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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO, Plaintiff, V. BRYAN C. KOHBERGER Defendant.	Case No. CR29-22-2805 STATE'S OBJECTION TO DEFENDANT'S MOTION TO CHANGE VENUE

COMES NOW the State of Idaho, by and through the Latah County Prosecuting Attorney, and objects to Defendant's Motion to Change Venue.

INTRODUCTION

Defendant has filed a motion to change venue, requesting that the trial in this matter be moved from Latah County—where the offenses took place—to Ada County, some 300 miles away. To support his motion, he conducted a survey of prospective jurors in Latah County, Ada County, Canyon County, and Bannock County. But far from demonstrating that a Latah County jury pool has been uniquely subjected to an "utterly corrupted" environment, as Defendant argues in his

brief, the data show that pervasive and wide-ranging coverage of this case throughout the entire State of Idaho has led to high case recognition among survey respondents across all four surveyed counties. The Court should decline Defendant's invitation to parse and split hairs over an incomplete dataset to reverse-engineer a transfer to Ada County, which according to Defendant's own experts, has received the second-highest amount of media coverage in the state and where a statistically greater number (albeit slight) of the survey respondents familiar with the case believe Defendant is guilty. *See* Def. Ex. B, p. 4-5; Def. Ex. C.[1] The Court should deny Defendant's motion and instead, focus on crafting remedial measures to ensure that a fair and impartial jury can be seated in Latah County.

ARGUMENT

Although the government generally must prosecute an offense in the county where it occurred, a court may change venue in two limited circumstances. I.C.R. 19; I.C.R.. 21; I.C. § 19-1801. First, a Court must change venue to another county "if the court is satisfied that a fair and impartial trial cannot be had in the county where the case is pending." I.C.R. 21(a); *see also* the similar language in I.C. 19-1801.

Second, a Court may—but is not required to—change venue for the convenience of the parties and in the interest of justice. I.C.R. 21(b). In this case, Defendant has asked the Court to

[1] The Truescope Media report does not show the entire picture, however. Def. Ex. C. In the "Definitions" section of the Truescope report, it is explained that the report does not take into account data from YouTube, private Facebook groups, podcasts, streaming services (such as Netflix, HBO, Paramount +, or Hulu). *Id.* In fact, the report does not take into account "data that is not location-specific" at all. *Id.* Given the ubiquity of blogs, podcasts, documentaries, and other internet or streaming media, it is difficult to gauge how including that data may have changed the Truescope report. Additionally, as the Court is aware, this type of media (i.e., video bloggers on YouTube, true crime podcasts, true crime "documentaries," and Tik Tok videos) is often the most inflammatory and prejudicial because it lacks the professional standards and safeguards of traditional media outlets (newspapers and television news).

change venue on both bases. For the following reasons, the Defendant has failed to show that either of these circumstances applies.

I. Defendant has failed to establish that a fair and impartial trial cannot be held in Latah County.

Defendant has argued that due to pervasive publicity in this case, a change of venue is appropriate. Defendant further claims that the atmosphere in Latah County has been "utterly corrupted" by media coverage. *Def.'s Mem. in Support of Motion to Change Venue*, p. 5.

It is undisputed that Defendant has a constitutional right to a fair trial with a fair jury—a panel of "impartial, indifferent jurors." *State v. Abdullah*, 158 Idaho 386, 421, 348 P.3d 1, 36 (2014). On a change of venue motion, it is Defendant's burden to show a reasonable likelihood that pretrial publicity will deprive him of a fair trial. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507 (1966); *State v. Hall*, 111 Idaho 827 (1986). However, where pretrial publicity is at issue, a "presumption of prejudice" necessitating a change of venue applies only in the most "extreme" of cases. *State v. Hadden,* 152 Idaho 371, 379 (Ct. App. 2012) (citing *Skilling v. United States*, 561 U.S. 358, 379, 130 S.Ct. 2896, 2915 (2010)). "The mere fact that the crimes reported by the media are gruesome or memorable does not render the publicity inflammatory to the extent of requiring a change of venue." *Hadden* at 385. The United States Supreme Court has also explained that "juror impartiality does not require ignorance." *Skilling* at 381, 130 S.Ct. at 2915.

In determining whether pretrial publicity has risen to a level that justifies a change of venue, Idaho's appellate courts look to a series of factors:

> the accuracy of the pretrial publicity; the extent to which the articles are inflammatory, inaccurate or beyond the scope of admissible evidence; the number of articles; whether the jurors were so incessantly exposed to such articles that they had subtly become conditioned to accept a particular version of the facts at trial; and the amount of time that passed between the coverage and the trial.

Hadden at 377 (citing *State v. Sheahan,* 139 Idaho 267, 278 (2003); *Hall,* 111 Idaho 827, 829–30 (1986)).

The United States Supreme Court has held that only in the most extreme cases is a defendant afforded a presumption of prejudice based on pretrial publicity. *See, e.g., Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417 (1963) (in a bank robbery homicide, defendant afforded a presumption of prejudice where his videotaped confession during a police interrogation was aired on local news three times and seen by thousands); and *State v. Estes,* 381 U.S. 532, 551, 85 S.Ct. 1628, 1637 (1965) (during court hearing proceedings, judge allowed unmitigated camera access to the courtroom, including the filming of juror's faces). Neither *Rideau* nor *Estes* apply here. Defendant in this case did not confess to the murders, let alone on video broadcast to thousands; and it is the State's understanding that the Court will not allow the filming of jurors' faces at trial in this case.

Defendant urges this Court to find that *Sheppard v. Maxwell*, another U.S. Supreme Court case, applies here. *Def.'s Mem. in Support of Motion to Change Venue*, p. 8 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507 (1966)). But *Sheppard* is wholly inapplicable to this case. In *Sheppard*, "bedlam reigned at the Courthouse *during the trial* and newsmen took over practically the entire courtroom, hounding most of the participants at trial. . . .within a few feet from the jury box and counsel table sat some 20 reporters staring at Sheppard and taking notes." *Id.* at 335, 86 S.Ct. 1507. The *Sheppard* Court went on to explain the extreme nature of the media participation at trial:

> The erection of a press table for reporters inside the bar is unprecedented. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits and to confer privately with client and co-counsel. It is designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the

> public and the jury. Having assigned almost all of the available seats in the courtroom to the news media, the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. And the record reveals constant commotion within the bar. Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free reign. Participants in the trial, including the jury, were forced to run a gantlet of reporters and photographers each time they entered or left the courthouse. The total lack of consideration for the privacy of the jury was demonstrated by the assignment to a broadcasting station of space next to the jury room on the floor above the courtroom, as well as the fact that jurors were allowed to make telephone calls during their five-day deliberation.

Id. This case has nowhere near the chaos present in *Sheppard*. As the *Sheppard* Court explained, "the carnival atmosphere at trial could easily have been avoided, since the courtroom and courthouse premises are subject to the control of the court." *Id.* at 358, 384 U.S. at 1520. Here, the Court has scrupulously avoided such an environment. The Court entered a non-dissemination order early in the case. When the small press pool that was allowed in the courtroom failed to follow the Court's instructions as to filming or photographing the Defendant, the Court disallowed any media filming, photographing, or audio recording of court proceedings. This Court has repeatedly taken precautions to avoid the circus-like environment described in *Sheppard* and thus, *Sheppard* is easily distinguishable and a poor comparison to this matter.

As the caselaw makes clear, the test is not *knowledge* of the case, but rather, *partiality. See, e.g.*, *Hadden, and see State v. Hairston*, 133 Idaho 496, 506, 988 P.3d 1170, 1180 (Idaho 1999). Thus, the fact that Latah County survey respondents had the highest percentage of knowledge about the case compared to other counties is far less significant than the fact that Latah County survey respondents had the *least* amount of overall prejudgment among the counties. Def. Ex. B., App. B.

A. The survey data provided by Dr. Edelman is inadequate to justify a change of venue

i. It is not reported how many individuals declined to take the survey, raising serious concerns about non-response bias.

A glaring omission in the data provided by Dr. Edelman is the lack of any information about the number of individuals who were contacted but chose not to respond to the survey. This is important because non-participation bias can change the outcome of such a survey. *See, e.g.,* Scott Keeter et al., "What Low Response Rates Mean for Telephone Surveys," Pew Research Center, *available at* https://www.pewresearch.org/methods/2017/05/15/what-low-response-rates-mean-for-telephone-surveys/.[2]

As of the authoring of the 2017 article promulgated by the Pew Research Center, telephone poll response rates stabilized at approximately nine percent after years of decline. *Id.* While the Pew Research Center article concludes that low response rate does not necessarily lead to a conclusion of bias across all subject matters, low response rate can skew results in specific areas. *Id.* For example, individuals with high civic involvement are overrepresented in surveys. *Id.* As the Pew article explains, "[t]elephone polls greatly overstate civic engagement, probably because of non-response bias. As has been established in previous work, the people who answer surveys are likely to be the same people that are involved in their community's public life – they are joiners." *Id*. Such a phenomenon could easily play a role here, where at the very outset of the survey, respondents were told that they were being asked for "opinions about an upcoming jury trial." Def. Ex. B, App. B.

[2] Defendant's expert, Dr. Veronica Dahir, also writes that high non-response rates can affect the representativeness of a given survey. *Def. Ex. F.,* p. 5. Dr. Dahir writes that non-response rates are becoming less important due to various mitigation strategies such as opportunities to follow up, incentives, and interview trainings. *Id.* However, while these mitigation strategies might apply to individuals who would not participate in any survey at all, they do not account for those individuals who may have declined to participate in the survey in this case due to the specific subject matter of the survey.

This Court must ask itself: would an individual who was asked for their opinion about an upcoming jury trial continue a survey if they had no opinions about any upcoming jury trials? And once the survey started, would a prudent, thoughtful, and conscientious person who is reluctant to pass judgment with limited information opine to a stranger whether they believe a criminally accused is guilty of murder?

The Court should also consider the fact that, while the survey respondents were told that the poll was not political or sales-related, these survey respondents were never told why they were being asked questions. Def. Ex. B., App. B. They had no way of knowing whether the poll was being done on behalf of the news media, or a true crime blogger, or for some other purpose. *Id.* While they were told their responses would not be made public, they were never told whether they were being recorded. *Id.* One only has to exercise common sense to see that there are innumerable reasons why prudent, thoughtful, deliberative, and conscientious individuals might hesitate to complete such a survey.

Defendant's flawed hypothesis is that if 98% of a self-selecting group who voluntarily chose to share opinions about an upcoming jury trial have heard about this particular upcoming jury trial, then 98% of all citizens who are summoned for jury duty will have also heard about it. The Court should reject this illogical leap of faith and embrace a more practical inference: it is more likely that a voluntary survey that begins by asking individuals to opine about an upcoming jury trial will overrepresent individuals with knowledge about an upcoming jury trial.

ii. <u>This Court does not have complete survey data and therefore cannot adequately compare data among the four surveyed counties.</u>

As Defendant acknowledges, this high-profile quadruple homicide case has "captured the attention of the community, the State, the Country and even beyond the United States." *See* Def.

Motion to Change Venue, p. 5. Given the amount of attention that this case has received across the entire state, there are two critical questions on Defendant's motion to change venue. The first question is whether a fair and impartial jury can be convened in Latah County. And if not, the second question is whether an alternative county would better safeguard Defendant's right to a fair and impartial jury. After all, why would the Court change venue to another county that has nearly the same media saturation as Latah County? Yet the State and the Court were not provided a comprehensive list of survey responses across all four of the counties surveyed. In fact, Dr. Edelman's report focused primarily on Ada County as an alternative venue despite the fact that Canyon County and Bannock County, the other two counties surveyed, both received astronomically less media coverage than Latah County or Ada County. *See generally* Def. Ex. C; *and see* Def. Ex. B, p. 5-6, p. 50-51**.**

An example of the incomplete data provided from Canyon and Bannock counties is found on pages 50-51 of Dr. Edelman's declaration, where he reports that in Canyon County, "[a]pproximately 90% of the jury eligible population there had read, seen or heard about the case and 51% followed the case 'somewhat' or 'very' closely," and that in Bannock County, "[a]pproximately 84% of . . . survey respondents recognized the case, some 14 percentage points lower than in Latah County . . . [j]ust 45% of survey respondents followed the case 'somewhat' or 'very' closely." Def. Ex. B., p. 50. However, when Edelman discusses the Ada County survey respondents, he reports that while Ada County had a "93% recognition rate . . . there were important differences between the Latah and Ada County jury pools. Ada County residents are far less invested in the case. Only 15% reported that they followed the case "very" closely, compared

to 29% percent of Latah County residents." *Id.* at 50-51.[3] It is unclear why the Court was provided the statistical number of survey respondents who followed the case "very closely" in Ada County, yet in Canyon and Bannock County, the "somewhat" and "very" categories were collapsed, creating a larger percentage. This piece of context is especially concerning given that Defendant is advocating specifically for a venue change to Ada County, despite the fact that Ada County has a slightly higher prejudgment rate than Latah County, and a higher percentage of case recognition (93%) than either of the two alternative counties (Canyon at 90% and Bannock at 84%). Def. Ex. B., p. 4-5.

Additionally, Dr. Edelman discusses the phenomenon of "minimization effect," which is when a prospective juror attempts "to minimize the full extent of their exposure to pretrial publicity." Def. Ex. B, p. 54. However, his discussion about the impact of this phenomenon on the actual survey respondents in this case was limited solely to Latah County. *Id.* at p. 54-60. Similarly, as discussed in more detail below, nowhere in the survey report is there mention of answers provided by Canyon County or Bannock County survey respondents about the two most potentially prejudicial and inflammatory pieces of media information addressed by the survey: rumors that Defendant had stalked one of the victims or followed them on social media. Def. Ex. B.

In an environment where the Court has limited data and where Defendant is asking the Court to move venue to a county with a slightly *higher* prejudgment rate among survey respondents with knowledge of the case, these types of omissions make it impossible for the Court to make an informed determination whether to move venue at all, much less to move it specifically to Ada County.

[3] Put another way, less than a third of Latah County survey respondents reported following the case "very closely."

iii. The majority of the survey focused on prospective jurors' knowledge of information already within the court record and admissible at trial

Defendant argues in his brief that this matter is an extreme case justifying a change of venue due to "[t]he continuous nature of media coverage, often inaccurate and misleading, the impact of the media coverage, and the small size of the community," *Def.'s Mem. in Support of Motion to Change Venue*, p. 5. But as Idaho's appellate courts have repeatedly held, facts are prejudicial when they are beyond the scope of admissible evidence or inaccurate. *See Hadden*, 152 Idaho at 377; *see also Sheahan,* 139 Idaho at 278 ("when reviewing the nature and content of the pretrial publicity, this Court is concerned with the accuracy of the pretrial publicity, the number of articles, and whether the articles will condition the jurors to accept a particular version of the facts at trial"); *and see Hall*, 139 Idaho at 829 ("[q]ualitatively, the courts must be concerned with news stories and editorials that are inflammatory, inaccurate or beyond the scope of admissible evidence.").[4]

During the course of Dr. Edelman's survey, respondents were asked whether they had read, seen, or heard about a series of factual information items related to the case. Def. Ex. B, App. B. The majority of these items—that cell tower data showed that the Defendant was "near" the victims' home several times in the months before the murder;[5] that a knife sheath was found at the

[4] The *Sheahan* Court also went on to note that "the quantitative impact must also be recognized. When jurors are incessantly exposed to news stories selectively packaged for mass consumption, they may become subtly conditioned to accept a certain version of facts at trial." *Sheahan* at 829-830. Unfortunately, as Defendant acknowledges in his brief, the entire state has been subjected to media coverage about this case. The State would also point out that while Ada County had slightly less survey respondents who reported having heard about the case, slightly more of those who had heard about the case appeared to be "conditioned to accept" the Defendant's guilt. Def. Ex. B, p. 4-5 (explaining that 98% of Latah County respondents and 93% of Ada County respondents have heard of this case, but of those, 67% of Latah County respondents and 68% of Ada County respondents are inclined to believe that the Defendant is guilty).

[5] The probable cause affidavit did not explicitly state that Defendant was "near" the actual home of the victims, but stated that Defendant was in the vicinity of a cell tower servicing the area of the victim's residence twelve times in the months before the homicides.

murder scene; that DNA found on that knife sheath came back a match to Defendant; that Defendant drove the same type of vehicle seen in the neighborhood of the murders; that Defendant was arrested at his parents' home in Pennsylvania; and that Defendant has stated he was out driving alone on the murders[6]—are part of the Court record and admissible at trial. *Id.* Only three of the questions asked were not part of the Court record. These questions were:

> Have you read, seen, or heard if university students in Mocow and their parents lived in fear until Bryan Kohberger was arrested for the murders?
>
> Have you read, seen, or heard if Bryan Kohberger stalked one of the victims?
>
> Have you read, seen, or heard if Bryan Kohberger had followed one of the victims on social media?

Def. Ex. B, App. B.

According to Dr. Edelman's report, 45% (less than half) of Latah County residents surveyed responded "yes" when asked if they had read, seen, or heard that Defendant stalked one of the victims. Def. Ex. B p. 57. The report did not indicate the response rate for the other counties surveyed. Similarly, 45% of Latah County residents responded "yes" when asked if they had read, seen, or heard that Defendant followed one of the victims on social media. Def. Ex. B. p. 51.[7] Dr. Edelman reported that only 35% of Ada County respondents reported having heard this information, but did not report on the responses from the other two counties. *Id.* As to the question

[6] As the Court is aware, this particular piece of information was placed into the public record by the Defendant himself in his response to the State's alibi demand. *See Notice of Defendant's Supplemental Response to State's Alibi Demand*.

[7] In his report, Dr. Edelman writes that "only after the [rumors of stalking] had proliferated through the media and on social media for 16 months did the prosecutor clarify in the April 2024 hearing that it was untrue." Def. Ex. B, p. 36. It is unclear why Dr. Edelman seems to believe the prosecutor is under an affirmative duty to make public comment about the veracity of social media rumors, and it is a strange observation indeed given that approximately 220 Latah county residents (55% of 400) who responded to the telephone survey apparently heard this rumor for the first time directly from the survey company retained by the defense.

whether individuals had read, seen, or heard that university students and their parents lived in fear until Defendant's arrest, overall response rates were not provided for any county.

In any event, the substantial majority of the factual information asked of the survey respondents was not beyond the scope of what will be admitted at trial. Most of the items were contained within the court record. As to the prejudicial items related to rumors that Defendant had stalked one of the victims or followed any of them on social media, less than half of Latah County survey respondents reported even having heard of it. The data provided to the Court demonstrates, if anything, the majority of Latah County survey respondents had not heard the most prejudicial and inflammatory information pieces outside of the court record and that Latah County residents who have heard about the case were, overall, statistically less likely to prejudge the Defendant.

B. The Court should decline Defendant's invitation to disregard long-settled precedent establishing voir dire as the proper procedure for addressing bias.

The survey relied upon by the Defendant did not even ask respondents the most crucial question of all: whether they could set aside their biases and base their decision only on the evidence at trial. Def. Ex. B., App. B. Instead, Defendant and his experts ask this Court to simply assume that the survey respondents—and by extension, all potential jurors in Latah County who have been exposed to media information about this case—are incapable of setting their biases aside and serving on a jury.[8]

In Dr. Edelman's declaration, he argues that a juror's professed ability to be fair and impartial "should not be taken at face value in cases where there is substantial prejudicial pretrial

[8] Defendant also points to community members' close emotional connection this case, citing candlelight vigils held for the victims, the fear experienced by many University of Idaho students, and other ways that the community was affected. The State does not dispute that individual jurors should be subject to extensive voir dire on these topics to determine whether and to what extent they may have been impacted after the homicides.

publicity." Def. Ex. B., p. 62. Similarly, Professor Scott Sundby argues generally that small town residents where a crime is committed cannot be impartial jurors and will go into the proceedings with "a thumb on death's side of the scale." Def. Ex. D, p. 4-5 (*citing Socher v. Florida*, 504 U.S. 527, 532 (1992)). Sunby asserts that there are two distinct dangers to holding the trial in Moscow. First, Sundby argues, jurors will be aware of community outrage and, as a result, might fear being outcast if they fail to return a death sentence. Def. Ex. D, p. 3. In support of this assertion, Sundby provides a single example – the Arkansas case of Bobby Ray Fretwell, whose execution was commuted after a juror came forward and admitted that he had voted for the death penalty for the sole reason that he feared being ostracized in the hometown he shared with Fretwell's victim. "Death-Row Inmate Spared After Juror Makes Plea," Steve Barns, New York Times, Feb. 6, 1999, *available at* https://www.nytimes.com/1999/02/06/us/death-row-inmate-spared-after-juror-makes-plea.html. Setting aside the obvious issue with asking this Court to base a legal decision on a single news story in involving a nearly forty-year-old case that is not binding on this Court, there is a glaring distinction between the Fretwell case and this case: the advent of social media and the internet. Assuming the 1984 homicide went to trial in the middle of the 1980s, it is virtually certain that media coverage was more localized to the community rather than spread out across the State of Arkansas or the Country. Thus, had a judge even been asked to change venue in that case, it is entirely likely that, in the absence of pervasive media coverage, a different county may well have had a population that had largely not heard of the case. That simply isn't the case in this matter, where a significant number of individuals in every county surveyed were familiar with the case. Thus, it is a poor analogy that has no legal or factual relevance to this Court.

Second, Sundby argues that the homicide of University of Idaho students created a uniquely traumatizing effect on the city of Moscow, effectively rendering potential jurors "victims-once-

removed." *Id.* pp 11. In support of this assertion, Sundby offers another faulty analogy, claiming that trying this case in Moscow would be tantamount to "allow[ing] a guard who worked in the same prison to serve on a jury where a defendant was on trial for the murder of a prison guard." *Id.* pp 12. But that analogy is flawed because it does not take into account the Court's ability to convene a large enough jury pool to prevent anyone with such a close connection to the case to sit on the jury.[9]

Similarly, after arguing that exposure to media creates biases that are difficult to overcome, Dr. Amani El-Alayi concludes that venue should be moved outside of Latah County. Def. Ex. E. Dr. El-Alayi specifically argues that "even extended voir dire by seasoned attorneys does not specifically mitigate pretrial publicity effects, despite its other potential benefits." *Id.* p. 12.[10]

The problem with the Defendant's experts, however, is that their opinions are directly contrary to the law. The United States Supreme Court and Idaho's appellate courts have repeatedly held that a prospective juror may remain on a jury panel if a trial judge is persuaded that the juror can set aside their initial impression and render a verdict solely on the evidence presented at trial. *See, e.g., Murphy v. Florida,* 421 U.S. 794, 800, 95 S.Ct. 2031, 2036 (1975); *see also State v. Hoffman,* 109 Idaho 127, 130, 705 P.2d 1082, 1085 (Ct. App. 1985). As the Idaho Supreme Court held in *State v. Hairston*:

> The trial court does not need to find jurors that are entirely ignorant of the facts and issues involved in the case. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

[9] As discussed in more detail below, the Court can address concerns about bias arising from personal experiences during individual voir dire.

[10] The State would note that the research relied upon by Dr. El-Alayi consists largely of studies involving mock juries rather than the true jury trial process. *See, e.g., id.* at 4.

133 Idaho 496, 506, 988 P.2d 1170, 1180 (1999). And as the same Court explained in *Hadden,* "[i]t will *only be* at the commencement of voir dire that the court and the parties will be able to determine if any of the prospective jurors have formed an opinion based upon adverse pretrial publicity." *Hadden* at 371 (citing lower court's decision not to change venue) (emphasis added). Only then can a court determine whether the atmosphere of the court will be so "utterly corrupted by press coverage" that an unbiased jury cannot be found. *Id.* at 379. Thus, as the State has previously argued, even if the Court determined that a change of venue would be necessary, the only appropriate way for the Court to do so would be after commencement of voir dire.

C. The Court can fashion remedial measures for jury selection short of changing venue

Because the Court has not been presented with evidence that a jury pool in Ada County would be any less likely to prejudge the Defendant than one in Latah County, the best way to ensure that the Defendant gets a fair trial is to safeguard the jury selection process. First, the Court can convene a large jury pool. As noted elsewhere in this brief, if the Court were to summon 1800 jurors, only 1 in 100 would have to be chosen in order to select a jury of 12 plus six alternates. Next, the Court could send out questionnaires to each of the jurors to gauge knowledge of the case, media exposure, biases, and other views. The Court could then allow the parties ample time to review each questionnaire, and the parties could then confer to discuss whether they had reached any stipulations as to disqualifications for cause. After that, the Court could take up the issue of any disputed jurors and determine whether to dismiss those jurors for cause. Then, those jurors whose questionnaire passes initial review could be called back to the courthouse for actual voir dire.

The Court could also allow a detailed individual voir dire outside the presence of the other jurors, which would address concerns outlined by Dr. Edelman in his report. Def. Ex. B, p. 53

(explaining that research shows that prospective jurors are more likely to be forthcoming and candid outside the presence of other prospective jurors). If the Court were inclined to allow the trial to be livestreamed, the Court could make an exception for individual voir dire and disallow any recording of the individual voir dire to ensure that each juror being questioned would be maximally incentivized to freely and candidly any questions asked of him or her.

D. Even if the Court were to find that a fair and impartial jury cannot be empaneled in Latah County, the Court may empanel a jury from a neighboring county rather than moving the trial 300 miles south.

Even if the Court were to be persuaded that a fair and impartial jury could not be empaneled in Latah County, the Court could rely on Idaho Code §19-1816 and draw upon a jury pool from a neighboring county. To invoke Idaho Code §19-1816, the Court must find that:

> (1) a fair and impartial jury cannot be impaneled in the county where the criminal complaint, information, or indictment was filed;
> (2) that it would be more economical to transport the jury than to transfer the pending action; and
> (3) that justice would be served thereby.

I.C. §19-1816. As explained in more detail in Section II below, the transfer of trial to Ada County would come at an extraordinary cost. Transporting the jurors from a neighboring county, such as Nez Perce County, would be a far more economical option. Similar in population size to Latah County, Nez Perce County has a population of over 42,000. United States Census Bureau data, *available at* https://data.census.gov/profile/Nez_Perce_County,_Idaho?g=050XX00US16069. Lewiston, the largest city in Nez Perce County, is approximately 30 miles from the Latah County courthouse. Summoning a jury panel from across the county line would incur far fewer costs and logistical issues than moving the trial to Ada County.

II. Transferring venue would not be convenient for the parties and witnesses, nor would it be in the interests of justice.

Defendant next argues that the Court should change venue under Idaho Criminal 21(b), which provides that upon Defendant's motion, a court may change venue to another county "for the convenience of parties and witnesses, and in the interest of justice." I.C.R. 21(b). This Idaho Criminal Rule addressing venue is distinguishable from its civil counterpart, Idaho Rule of Civil Procedure 40.1, which also allows for a venue change for convenience, but is limited in scope to the convenience of the witnesses and the ends of justice. Idaho R. Civ. P. 40.1(a)(1)(B). Defendant does not even address the convenience of the parties and has failed to establish that a change of venue in this case is convenient for the witnesses or in the interest of justice.

First, Defendant argues that Ada County's large population size has more than ten times as many potential jurors than Latah County and thus, offers a larger jury pool to choose from. But the fact that Latah County is smaller than Ada County does not mean that it is too small to select a jury. As the 11th most populated county of Idaho's 44 counties, Latah County is larger than 75% of Idaho's counties. Latah County's jury-eligible population of over 32,500 could easily accommodate a panel of hundreds or even thousands of individuals being summoned for jury duty. *See* Edelman Decl. p. 3. As noted above, if the Court were to proceed with a twelve-person jury and six alternates, the Court could easily summon 1800 individuals (only 5% of Latah County's total jury-eligible population), meaning that out of every one hundred jurors called for duty, only one would need to qualify to be able to seat a jury.

Next, Defendant argues that the Ada County Courthouse can best accommodate this trial—specifically, Ada County's large courtrooms with adequate space for attorneys and room for spectators. But even Ada County cannot accommodate *every* interested spectator. One merely had to drive by the Ada County courthouse during certain days in the Lori Vallow trial of 2023 and the

Chad Daybell trial earlier this year to see a line out the door. The public interest in attending the Chad Daybell trial was so great that individuals who wished to attend had to apply online for a reservation the day before to get a ticket into the courtroom. "Chad Daybell's trial will be livestreamed. Here's what you need to know if you want to be in the courtroom," East Idaho News, March 17, 2024, *available at* https://www.eastidahonews.com/2024/03/chad-daybells-trial-will-be-livestreamed-heres-what-you-need-to-know-if-you-want-to-be-in-the-courtroom/. On cases of such tremendous public interest, there is unlikely to be any physical courtroom large enough to accommodate every member of the public who wishes to observe. Moreover, the Court can accommodate the large number of people who want to view the trial by providing live-streaming options.

As to the size of tables for the attorneys, the location of media, and the daily workings of security, these logistical considerations can be addressed by careful planning with the local Trial Court Administrator and the Administrative District Judge. There is no reason to think that the Latah County courthouse or its staff is incapable of addressing these administrative and procedural matters in the months leading up to the trial. Indeed, when Defendant filed a motion to remove cameras in the courtroom after media outlets repeatedly took close-up photographs of the Defendant in violation of a prior verbal admonition of the Court, the Court swiftly denied multiple subsequent media requests and eventually issued its Amended Order Governing Courthouse and Courtroom Conduct, which prohibited the media from video recording, still photography, or audio recording during court proceedings. *Def.'s Motion to Remove Cameras from Courtroom*, August 24, 2023; *Amended Order Governing Courthouse and Courtroom Conduct,* January 5, 2024. There is no reason to believe that any subsequent concerns about media or security would not be addressed with similar efficacy.

Defendant also argues that this case should be moved to Ada County based on cost. Defendant's argument is limited to asserting that out-of-state witnesses who fly into Boise would be closer to the physical location of the courthouse, while Latah County witnesses would potentially have to fly to the Spokane Airport and rent a car. The State does not dispute that the Spokane Airport is further from the Latah County Courthouse than the Boise Airport is from the Ada County Courthouse. However, the nearby city of Lewiston also has an airport serviced by Delta and United with nonstop flights to Denver, Seattle, and Salt Lake City. Lewiston Airport Website, *available at* https://www.golws.com/. But whether out-of-state witnesses fly into Lewiston, Spokane, or even Boise, the cost of rental vehicles for a handful of out-of-state witnesses is only a fraction of the total cost picture.

Most of the State's witnesses are local or will be traveling to Moscow by car. If venue is moved, those witnesses who are local would need to rent hotels in Boise, potentially for multiple nights, while they wait to testify. The State's law enforcement and emergency dispatch witnesses would have to potentially be away from work for days, rather than hours, creating a ripple effect of inconvenience. Similarly, the medical examiner, who is based out of Spokane, would also have to extend her time away from the office. Some witnesses who would otherwise drive to Moscow from Spokane or northern Idaho would have to obtain flights if the trial were moved to Boise, which would increase the costs.

While Defense counsel took this case on a contract basis and will have to travel whether the trial is had in Ada County or in Latah County, the same is not true for the Court, the court reporter, the court clerk, and the Court's staff attorney. All would have to travel to Boise either by air or in a State vehicle; would have to obtain lodging; and would have to arrange for per diem reimbursement for meals. The State, which has the burden of proof and must deal with the logistics

of juggling witnesses and trial exhibits would have to relocate both of its lead attorneys, as well as its support and victim services staff, for weeks and likely months. This would come at great expense for lodging, transportation, and per diem. Additionally, the elected Prosecutor and his Chief Deputy would be physically away from the daily operations of the Latah County Prosecutor's Office and from the law enforcement agencies they advise, creating a potentially detrimental ripple effect for Latah County's public safety operations.

Finally, the Defense also asks the Court to change venue on the basis that Moscow Police Chief Fry is currently running for Latah County Sheriff. First, this presupposes the outcome of the November election and is premature.

If elected as Sheriff, Chief Fry would have the statutory authority to summon a sufficient number of trial jurors in the event that there is an unanticipated shortage. Idaho Code §2-210. Defendant states that Chief Fry is a witness, and therefore this duty would create a conflict. At this time, the State does not anticipate calling Chief Fry as a witness. However, even if he were called as witness by the defense, and even if there were an unanticipated shortage of jurors, he could delegate his authority to a senior chief deputy to exercise that function if necessary**.** See Idaho Code §31-2006 (allowing a county officer to designate a senior deputy to perform the duties of the office during a vacancy, absence, or inability).

The Court should also consider, in the interest of justice, the physical location of the victims' families. I.C.R. 21(b) (interest of justice a consideration in a court's determination whether to change venue for convenience). It is the State's understanding that most of the victims' immediate family members who are constitutionally entitled to attend trial proceedings live closer to Latah County than to Boise. *See* Idaho Const. Art. I, § 22(4).

It is also strange to the State that the surveyor did not do polling in geographically closer counties, such as Nez Perce county. Given how close the overall prejudgment rates among the surveyed counties were, it is entirely possible that Nez Perce County could have had an even lower prejudgment rate than Latah County. If the Court were to change venue, it seems to the State that changing venue to a geographically closer county such as Nez Perce or Kootenai County (just across the state line from the Spokane International Airport) would be less inconvenient than moving the trial 300 miles south to Boise. In any event, the Defendant has come nowhere close to demonstrating that moving this trial to Boise would be convenient to the witnesses or the parties, nor has the Defendant demonstrated such a move would be in in the interests of justice.

CONCLUSION

Defendant has failed to meet his burden of showing that change of venue in this case is necessary or convenient. The Court should decline his invitation to ignore well-settled precedent establishing the voir dire process. The Court should also decline to relocate itself, the State, and scores of witnesses hundreds of miles, only to face another jury pool with similarly high media exposure. Defendant's motion should be denied.

RESPECTFULLY SUBMITTED this 12th day of August, 2024.

William W. Thompson, Jr
Prosecuting Attorney

Ingrid Batey
Special Assistant Attorney General

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the STATE'S OBJECTION TO DEFENDANT'S MOTION TO CHANGE VENUE was served on the following in the manner indicated below:

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☐ Mailed
☒ E-filed & Served / E-mailed
☐ Faxed
☐ Hand Delivered

Dated this 12th day of August, 2024.