TABLE OF CONTENTS

Page

SOME RECENT CASES: PRESS ACCESS TO JURORS AND THE JURY SELECTION PROCESS IN THE SOCIAL MEDIA AGE

By Amelia Lucas, Summer Associate, Greenberg Traurig, LLP's Washington, D.C. Office

Anonymous Jurors

- *State v. Lafoga*, 152 Haw. 529 (Haw. Apr. 6, 2023)
    - Facts
        - Defendants were tried for several crimes (attempted murder in the second degree, kidnapping, conspiracy to commit murder, among others)
        - The trial court decided to seat an "innominate" jury – initially, the court told the parties it would conceal jurors' identifying information (only the court would have that information)
        - Both the prosecution and defendants' counsel questioned the court's decision to depart from standard jury selection procedure – the court subsequently clarified that the defense and prosecution would know the names of the jurors, but not their addresses or phone numbers (defendants and the public would not know any of this information)
        - Defendants argued that the court empaneled an anonymous jury, which violated their constitutional rights to a presumption of innocence and an impartial jury
    - Holding: There was no constitutional violation because the jury was not anonymous or partially anonymous and defendants were not prejudiced
        - The jury here was confidential (not anonymous or partially anonymous) – the defense and prosecution had the jurors' names and were able to learn about them before and during jury selection
        - There was no reason to empanel a confidential jury — the trial court's "hunch" that some jurors might say they are "afraid to serve" does not support a confidential jury
        - There was no constitutional violation because the lawyers were able to gather necessary information about the jurors before and during selection and defendants were present during jury selection (even though they did not know juror names)
- *South Carolina v. Murdaugh* Order of Non-Disclosure of Juror Information (12/28/2022)
    - "Considering the nature of the case and in the interest of justice, the Court finds that an Order should be issued prohibiting the disclosure of the identity of, and certain identifying information pertaining to jurors summoned to appear."
    - Order: "[A]ll parties, counsel, court personnel, agents, employees, law enforcement, and media shall be, and are hereby barred and restrained from disclosing the name, address, employment, and any other personal identifying information of any juror summoned in the [trial]. This Order does not prohibit the internal use of juror

information by the Court and counsel for case preparation. All jurors shall only be identified by juror number."

- *Morgan v. Dickerson*, 511 P.3d 202 (Ariz. 2022)
    - Facts
        - The superior court in Cochise County uses "innominate juries" for all criminal jury trials
            - Under that procedure, prospective and impaneled jurors are referred to by number rather than by name throughout open-court proceedings, although the court and the parties know their identities
            - Consequently, although voir dire examinations and trials are open for public viewing, observers are not provided jurors' names absent order of the court
    - Holding: The First Amendment does not prohibit the court's routine use of innominate juries
        - Two-part test
            - Experience
                - The experience inquiry focuses on whether the "place or process" has been open historically throughout the country, rather than in particular states or localities
                - Whether access to jurors' names was discretionary with courts, and thus considered nonessential to public observation of voir dire, bears on whether access "play[ed] a significant positive role in the functioning of [voir dire]," which is the subject of the logic inquiry. *See Press-Enterprise II*, 478 U.S. at 8.
                - We answer the experience inquiry by concluding that courts have historically revealed jurors' names during voir dire proceedings
            - Logic
                - By asking whether access to jurors' names "plays a significant positive role in the functioning of the particular process in question," the logic inquiry sets an exacting standard
                    - Morgan argues the standard is met here because public access to jurors' names carries the same benefits as accessing voir dire proceedings and trials; the State counters that accessing jurors' names would not significantly add to the proper functioning of voir dire, and disclosure would expose jurors to the risk of danger and embarrassment
                - Public right to attend voir dire promotes fairness and the appearance of fairness, critical to public confidence in the criminal justice system

        - Morgan failed to show that public access to jurors' names likewise plays a significant positive role in voir dire; with or without such access, the press and the public can attend voir dire proceedings and were able to do so in these cases
        - The public's role in voir dire is as an observer, not as a participant charged with selecting a fair jury; providing open access to jurors' names would not inherently cause prospective jurors to be more forthcoming during voir dire
    - In the internet age, where jurors' names can trigger access to a wealth of biographical information, including addresses, any slightly positive role in divulging jurors' names to the public is outweighed by the risk to jury integrity
    - Public access to jurors' names promotes neither fairness in voir dire proceedings nor the perception of fairness; thus, it does not play a significant positive role in the functioning of voir dire, and logic inquiry is answered in the negative

- The First Amendment does not provide the press or public with a qualified right to access jurors' names, and § 21-312(A) is facially valid

    - The Cochise County Superior Court therefore did not err by presumptively using innominate juries

- *State v. Chauvin*, 955 N.W.2d 684 (Minn. Ct. App. 2021)

    - Order for Juror Anonymity and Sequestration (11/4/2020)

        - Facts
            - Protest on September 11, 2020, outside of County Justice Center where motion hearing was held - while the majority of the protest was peaceful, after the hearing and upon leaving the Center, Defendants, attorneys, and County Sheriff's Office Captain were physically and verbally harassed
            - There was also picketing at defendants' homes, voicemails, emails, and other messages from the public, demanding a certain outcome of the case
            - Defense attorneys expressed concern for their personal safety and that of their clients
            - Given the high level of attempts at *ex parte* communication with the Court and counsel, it was likely people may attempt the same with jurors to influence a desired result
        - Order: Juror names and other identifying information shall not be divulged except to attorneys involved in the instant litigation; attorneys may only share the information with their clients and others working on the case. Public juror questionnaires shall be redacted. Jurors shall be partially sequestered. All

qualifying juror information shall be kept confidential until a date designated by the Court in a subsequent Order.

- Order Sealing Juror Information (4/23/2021)
  - Facts
    - After the conclusion of the trial, attorneys and the Court have continued to receive unprecedented levels of emails and other *ex parte* communications regarding the case
    - The Court informed jurors that they could choose to identify themselves publicly and speak with whomever they want about the case
  - Order: Continuing restrictions on public disclosure of jurors' identities remains necessary to protect those desiring to remain anonymous from unwanted publicity and harassment (Minn. R. Crim. P. 26.02 subd. 2(2) authorizes the Court to restrict access to juror identifying information as long as necessary to protect the jurors)
- Order and Memorandum Opinion on Media Coalition Motion to Unseal Juror Names and Associated Juror Information (10/25/2021)
  - Facts
    - The Media Coalition filed a motion to unseal juror identities, the prospective juror list, the completed juror questionnaires, and the original verdict forms
    - The state filed a memorandum opposing the Media Coalition's motion to unseal
  - Order: Jurors remain free to voluntarily identify themselves. On November 1, 2021, the Court will file a public document with the names and other identifying information of the jurors, including questionnaires and verdict forms

- *United States v. Harris*, 763 F.3d 881 (7th Cir. 2014)
  - Facts
    - At trial for conspiracy to commit mail fraud and aggravated identity theft, the District Court judge stated:
      - "One more thing I almost forgot. This is hard for me. To protect people's privacy, we try to refer to jurors by numbers now. Now, there is nothing more difficult than an Irishman that grew up in coal mining country to refer to people by numbers, and I'm going to try. So I'll talk to Juror Number 1, Juror Number 2, and the like. And I'm going to try not to forget and talk to you like you were otherwise a human being. But we do this just to protect your privacy, which is a very important consideration in the modern world."
      - There was no objection to this statement and Harris was convicted on both counts

- On appeal, Harris argued that the District Court committed plain error by empaneling an anonymous jury when none of the factors the court previously set forth as "bearing on the propriety of an anonymous jury" were present. *See United States v. Mansoori*, 304 F.3d 635, 650-51 (7th Cir. 2002).
    - Factors: (1) the defendant's involvement in organized crime; (2) her involvement in a group with the capacity to harm jurors; (3) whether she previously has attempted to interfere with the judicial process; (4) the severity of the punishment she would face if convicted; and (5) whether publicity regarding the case presents the prospect that the jurors' names could become public and expose them to intimidation or harassment

- Harris contended these factors were not present in her case and empaneling an anonymous jury deprived her of a fair trial because the jurors would have been predisposed to believe she was dangerous and/or guilty if there was a need for them to be anonymous; she also argued the jurors' anonymity deprived her attorney of the ability to effectively use his peremptory challenges since he was working with incomplete information about the jurors

- Holding: Harris failed to meet her burden under the plain error standard because (1) the judge's statements did not demonstrate that the juror's names were unknown to the parties, (2) the judge explicitly named one of the jurors at sidebar, and (3) the judge's questions and the jurors' responses during voir dire did not align with those expected of an anonymous jury (i.e., judge asked open-ended questions and allowed jurors to give responses that contained private, identifying information)
    - For Harris's argument that the district court committed plain error by empaneling an anonymous jury to succeed, she must first demonstrate that the district court actually did empanel an anonymous jury
        - An "anonymous jury" is selected from a venire whose members' identifying information—such as names, occupations, addresses, exact places of employment, and other such facts—has been withheld from the parties in order to protect potential jurors and their families
    - An "anonymous jury" is distinct from a "confidential" jury - anonymous juries are for the jurors' protection while a confidential jury is intended, for example, to limit the jurors' exposure to the media

Press Access to Voir Dire

- *United States v. Sittenfeld*, 2022 U.S. Dist. LEXIS 138586 (S.D. Ohio Aug. 3, 2022)
    - Facts
        - Sittenfeld was indicted for honest services wire fraud, bribery, and attempted extortion under color of official right
        - *Cincinnati Enquirer* filed a motion for disclosure of jury questionnaires and a motion to unseal the transcript of voir dire
    - Holding: Court granted *Enquirer*'s motion to unseal the transcript of voir dire and denied *Enquirer*'s motion for disclosure of jury questionnaires
        - Continuing to maintain the confidentiality of the juror questionnaires is appropriate because (1) the court has already provided aggregate information about the jurors taken from the juror questionnaires and the voir dire itself was conducted in open court (i.e., the public had substantial information about the jurors and the requested information would not materially add to the public's understanding); (2) the case involved substantial public scrutiny and thus releasing such information could lead jurors to being subject to unwanted, intrusive communications from media or other interested parties; and (3) while the trial has concluded, there remain issues relating to the jury that the parties are litigating (i.e., jurors could be contacted while post-trial litigation continues)
        - The concerns relevant to disclosure of jury questionnaires are not applicable to maintaining the voir dire transcript under seal – the transcript merely presents in documentary form what has already occurred at a public proceeding and access to a written form would enhance the public's understanding
            - The voir dire transcript will be redacted to protect any information that a juror shared at sidebar that the Court determines implicates a legitimate juror privacy concern that outweighs the public's interest in disclosure

- *United States v. Avenatti*, 2021 U.S. Dist. LEXIS 125442 (S.D.N.Y. Jul. 6, 2021)
    - Facts
        - Avenatti was charged with transmitting interstate communications with intent to extort, Hobbs Act extortion, and honest services wire fraud
        - In a letter, Avenatti raised concerns regarding press access to voir dire
            - The designated pool reporter attended voir dire sidebars, as approved by the judge; she also received a set of redacted juror questionnaires
            - Avenatti claimed that the court's disclosure of jury questionnaires and the presence of the pool reporter at sidebar implicated his right (1) to attend all stages of the trial, (2) to have counsel present at all stages of trial and be able to object to important pretrial and trial procedures as required by the 6th Amendment, (3) to be tried and sentenced without

any appearances of partiality, and (4) to have proceedings consistent with due process

- Holding: Avenatti's belated complaints about press access to voir dire provide no basis for the Court to disturb the jury's verdict
  - Avenatti failed to articulate how he was prejudiced by the distribution of redacted jury questionnaires or by a reporter's presence at sidebar
  - If Avenatti believed, prior to trial, that press access to voir dire presented a risk to his right to receive a fair trial, it was necessary for him to make an application to restrict press access to voir dire so the Court could perform the analysis set forth in *ABC, Inc. v. Stewart*, 360 F.3d 90, *United States v. King*, 140 F.3d 76, 80-81 (2d Cir. 1998), and *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14 (1986)

- *United States v. Shkreli*, 260 F. Supp. 3d 257 (E.D.N.Y. 2017)

  - Facts
    - EDNY press pool requested that the court allow one pool reporter to attend individual voir dire of potential jurors at sidebar to listen and take notes
    - Neither the government nor the defendant had previously requested closed sidebar; however, the defense subsequently "vigorously opposed" the presence of a reporter at sidebar, arguing that defendant's right to fair trial would be denied if potential jurors could not speak freely at sidebar to disclose possible bias without fear that their comments would be reported publicly

  - Holding: EDNY press pool request granted in part: (1) The parties shall not use juror names during voir dire or during trial; (2) a single pool reporter may attend voir dire sidebars to observe and take notes, but may not speak or ask questions and must leave the sidebar area if the court so orders; (3) the press may request transcripts of the voir dire sidebars and the only information that will be redacted will be that which is highly personal and appears in a context in which it would be possible to identify the venireperson; and (4) within the courthouse, the press, including representatives of the print and broadcast media, sketch artists, photographers, free-lance journalists, authors, and writers, shall not sketch or photograph any juror or prospective juror
    - In most cases, a juror's disclosures are entered into the court transcript and unnoticed by the public, at most only aired on appeal; however, in a high-profile case in which there has been ongoing pre-trial media coverage, prospective jurors may be subject to having their answers reported and disseminated that same day
    - Four factors counsel in favor of the limited restrictions ordered by the court (i.e., that the sidebar reporter step away from sidebar if requested and the names of the venire panel will not be used or released by the court until the conclusion of trial):
      - (1) Defendant has attracted a tremendous amount of negative publicity and notoriety

- (2) Negative media coverage in this case is related to issues that are wholly irrelevant to the charges (meaning the defense will not have the opportunity to confront preconceived notions prospective jurors may have about defendant on unrelated controversial issues, except through vigorous voir dire demanding utmost juror candor)
- (3) Some of the issues to be probed at voir dire relate to beliefs and actions publicly attributed to defendant concerning polarizing topics, such as race, gender, politics, and class
- (4) Because the voir dire transcript will be released to the press, disclosure of juror names would increase risk that jurors would not be candid, whether or not a reporter is present during voir dire questioning of that prospective juror

Press Access to Jurors Post-Verdict

- *United States v. Chin*, 913 F.3d 251 (1st Cir. 2019)
    - Facts
        - Criminal case involving mail fraud and violation of RICO
        - District Court granted motion to intervene by the Trustees of Boston University as owners of WBUR (public radio station) but denied in substantial part their motion to unseal the names and addresses of jurors and to provide that information to WBUR "as soon as possible" after the jury's verdict
        - The District Court stated in the order that it would release juror names and hometowns, but not addresses, and only after Chin's sentencing, which was scheduled for January 30, 2018 (jury verdict was returned on October 25, 2017); it also noted that it would consider earlier release of the juror list upon submission by WBUR of an appropriate protective order crafted to insure against any unnecessary dissemination of the jurors' personal identification in the news media or over the internet (without the juror's express assent)
        - WBUR appealed the order, leading the District Court to issue an amended order, which eliminated the protective order requirement but reaffirmed that it would only release the jurors' names and hometowns (not addresses) and only after sentencing

    - Holding: District Court's decision regarding the motion to unseal vacated
        - *In re Globe Newspaper Co.*, 920 F.2d 88 (1st Cir. 1990) provided that a district court is required to disclose juror names and addresses post-trial but pre-sentencing; however, there is an exception if the court makes "particularized findings reasonably justifying non-disclosure"
            - Such findings must be peculiar to the case
            - Examples include credible threat of jury tampering, risk of personal harm to individual jurors, and other evils affecting administration of justice
            - Here, the District Court made no such particularized findings

        - *In re Globe* was decided with reference to the Jury Selection and Service Act of 1968, not the 1st Amendment; in reaching its decision, the court interpreted the Act's reference to publicizing juror names to also incorporate juror addresses
            - As a result, *In re Globe* provides that juror names and addresses alike may be withheld by court order where the interests of justice so require (e.g., security), but only upon a finding of exceptional circumstances peculiar to the case; thus, any delay in post-verdict disclosure must be justified
        - While *In re Globe* was decided well before modern social media, technological changes that create the potential for public release of jurors' names and addresses do not diminish the need for judicial accountability and transparency
        - Because *In re Globe*'s holding is directly applicable, the law of the circuit doctrine provides that the operative language construed in that case ought to be construed the same in this case
            - The District Court's legal conclusion that concerns for juror privacy and a lack of precedent requiring disclosure of home addresses justifies a generalized rule that only names and hometowns may be released after sentencing does not hold

- *United States v. Wright*, 2017 U.S. Dist. LEXIS 222476 (D. Mass. October 20, 2017)

    - Facts: Case involving defendants with ties to ISIS

    - Order: "[E]ven though there is no credible threat against anyone involved in this prosecution (I've checked), I will not follow my usual practice and reveal the names and home addresses of the jurors now that the case is over since this data may then be plastered permanently on the internet."
        - No sooner than 7 days after the jury verdict, interested news organizations may propose a protective order that will secure the jurors' personal identifiers from unnecessary dissemination on the internet
        - The Court recognizes that not providing actual home address occasions some additional burden on the press; however, it is entirely appropriate and constitutional to impose this burden as a cost of access

STATE OF SOUTH CAROLINA COUNTY OF COLLETON	)	COURT OF GENERAL SESSIONS FOURTEENTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA v. RICHARD ALEXANDER MURDAUGH, DEFENDANT.	)	Case Nos: 2022-GS-15-00592 2022-GS-15-00593 2022-GS-15-00594 2022-GS-15-00595 ORDER OF NON-DISCLOSURE OF JUROR INFORMATION

Considering the nature of the case and in the interest of justice, the Court finds that an Order should be issued prohibiting the disclosure of the identity of, and certain identifying information pertaining to jurors summoned to appear.

It is therefore Ordered that all parties, counsel, court personnel, agents, employees, law enforcement, and media shall be, and are hereby barred and restrained from disclosing the name, address, employment, and any other personal identifying information of any juror summoned in the above trial. This Order does not prohibit the internal use of juror information by the Court and counsel for case preparation. All jurors shall only be identified by juror number.

This Order shall remain in effect unless and until modified by further Order. Any violation is punishable by contempt of court.

AND IT IS SO ORDERED.

DEC 29 2022 AM11:08
COLLETON CO GS, REBECCA H.HILL

Clifton Newman
Presiding Judge

Columbia, South Carolina
December 28, 2022

JOURNALISTIC BEST PRACTICES: SAFETY GUIDELINES FOR AREAS OF CIVIL UNREST

By: Blake Altman, Litigation Associate, Greenberg Traurig, LLP's Chicago Office

With large-scale political movements taking place over the past few years, including the Black Lives Matter Protests, the January 6 attack on the Capitol, and the protest zone in Portland, Oregon, journalists are being tasked with entering high-risk areas in furtherance of their First Amendment newsgathering and reporting responsibilities. Whether it's the risks associated with the protesters themselves, or the risk of potential encounters with law enforcement, journalists need to know how to protect themselves. In 2022, sixty-seven members of the press were killed worldwide, the highest number since 2018, according to the annual report from the Committee to Protect Journalists.[1] Below is a compilation of best practices for journalists to maintain their physical safety while also effectively being able to cover highly relevant news events and protecting their First Amendment rights.

GENERAL RIGHTS OF JOURNALISTS

Generally, journalists are constitutionally protected by both the First and Fourth Amendments. Based on the First Amendment, "courts have recognized that a protected interest is perhaps especially likely to attach to a press credential." *Nicholas v. City of N.Y.*, No. 15-CV-9592 (JPO), 2017 U.S. Dist. LEXIS 26995, at *20 (S.D.N.Y. Feb. 27, 2017) (citing *Sherrill v. Knight*, 186 U.S. App. D.C. 293 n.22, 569 F.2d 124, 131 (1977) ("when the substance of the property interest involves first amendment values to the degree of this entitlement to a White House press pass, it would be difficult not to infer constitutional recognition of this interest.")).

Additionally, beyond the constitutional protections, the Privacy Protection Act of 1980[2] also provides protections against searches and seizures of materials intended for publication. Specifically, the law prevents government agents (i.e., the police) from seizing any work product materials or documentary materials from someone who was "reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast or other similar form of public communication." When attending protests, it is important for journalists to know that they and their equipment are protected from law enforcement. However, it is equally as important for journalists to identify themselves as such (for instance, by wearing ID badges or vests) in order to protect themselves and prevent being confused with protesters themselves.

Each state has different rules and regulations regarding the ability of journalists to record the police during protests. For a comprehensive resource of the recording guidelines per state, the Reporter's Committee for Freedom of the Press has published a compilation at https://www.rcfp.org/reporters-recording-guide/.

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1 https://cpj.org/data/killed/?status=Killed&motiveConfirmed%5B%5D=Confirmed&motiveUnconfirmed%5B%5D=Unconfirmed&type%5B%5D=Journalist&type%5B%5D=Media%20Worker&start_year=1992&end_year=2023&group_by=year

2 42 U.S.C. § 2000aa.

BEFORE YOU GO

Prior to attending any high-risk event, it's important for reporters to prepare by taking necessary safety precautions. Below is a list of best safety practices for journalists prior to attending any potentially dangerous newsgathering environment:

Per the Reporter's Committee for Freedom of the Press[3] ("RCFP") a journalist should:

1. Prepare a list of potential threats that could arise, whether it would be from protest participants or potential confrontations with law enforcement. Additionally, you should identify who may be adversarial to the press and stay away from those groups.

2. Find a lawyer who will be available while you are reporting. Specifically, it's important to either prepare an index card or write on your arm the numbers of both an attorney and a bondsman in the event that your cell phone become unavailable. Notice should be given to the attorney and bondsman prior to attending the event.

3. Research the location and nearby police precincts that you may be taken to in case you become unresponsive to calls. Tell your attorney and others these details.

4. Learn basic self-defense and first-aid tactics and bring personal protection equipment as appropriate for the protest. This can include trauma kits, gas masks (if tear gas can be expected), or body armor (if rubber bullets are expected). A vest and badges clearly identifying you as press should also be included.

5. Never go alone!

Additionally, the Radio Television Digital News Association[4] ("RTDNA") suggests:

1. Practice putting on your protective gear quickly and in a dark room to simulate the conditions that may occur.

2. Get any masks properly fitted and make sure to have the necessary filtration cartridges.

3. Make sure to dress distinctly from how the protesters at the event are going to dress so as to not be confused by law enforcement. Again, the key here is ensuring you look like you are from the Press and not participating in any potential lawlessness.

[3] https://www.rcfp.org/tips-for-covering-protests/.

[4] RTDNA Journalist SAFE Training, Situational Awareness, https://assets-002.noviams.com/novi-file-uploads/rtdna/Safety/RTDNA_Journalist_SAFE_Training_Part_1_-_Situational_Awareness.pdf.

AT THE PROTEST

While at the protest, anything can occur and it's important for journalists to stay vigilant. In order to assist with threat assessment, the RTDNA suggests using Cooper's Color Codes as a useful reminder to categorize risk assessments. These colors are:

1. **White:** You are unaware and unprepared, and likely would be caught off guard if a situation escalates quickly.

2. **Yellow:** You are relaxed alert. This is the ideal situation you should be in, where no specific threat exists but you continue to casually look around and observe the surroundings for any potential conflicts.

3. **Orange:** You are specifically alert and see something that is a cause for concern. Whether it's someone acting strangely or some environmental concern, being in Orange means a response may be needed to get to safety.

4. **Red:** When classifying a situation as red, the conflict is full-blown and it is imperative to get to safety.

Further, the RCFP states that journalists, while covering a protest, should:

1. Bring an ID and cash to speed up processing in the event of an arrest, and to help pay any potential bail.

2. Avoid breaking the law. Be mindful of what areas are public versus private land so as to not get cited for trespassing on private property.

3. Comply with any police dispersal order or directives.

4. If stopped by the police, it is important to calmly explain what you are doing at the protest and show your credentials. Recording the police in these situations may be important to document any mistreatment, but be careful to verify with local state laws on whether this is allowed. If an arrest occurs, immediately contact your attorney whose number should be readily available.

5. You are allowed to deny consent if a police officer asks to seize or view your equipment. State clearly that you are a journalist and that your equipment and its contents belong to your company and any attempt to view the material must go through your attorney first.

SUMMARY OF ISSUES AND EVENTS INVOLVING THE GAG ORDER ISSUED IN *STATE OF IDAHO V. BRYAN C. KOHBERGER* - CASE NO. CR29-22-2805

By Sara Shayanian, Litigation Associate, Greenberg Traurig, LLP's Fort Lauderdale Office

Bryan C. Kohberger is accused of fatally stabbing four University of Idaho students in their off-campus home in the fall of 2022. A not guilty plea has been entered on his behalf, and the trial is set for October 2023.

On January 3, 2023, the court issued a Nondissemination Order stating that "investigators, law enforcement personnel, attorneys, and agents of the prosecuting attorney or defense attorney, are prohibited from making extrajudicial statements, written or oral, concerning this case, other than quotation from or reference to, without comment, the public records of the case." The Nondissemination Order specifically forbid commentary on evidence of occurrences or transactions, the character or criminal record of a party, opinions about the merits of the case, and the existence of any confession, admission, or statement given by the defendant.

On January 18, 2023, the court issued an Amended Nondissemination Order. The court expanded the gag order, indicating that in order to "preserve the right to a fair trial, some curtailment of the dissemination of information . . . is necessary and authorized under the law." In the amended order, the court specifically prohibited any statement relating to the following: (1) evidence regarding occurrences or transactions in the case; (2) credibility and reputation of the parties, victims, and witnesses; (3) the performance or results of examinations or tests; (4) opinions relating to the merits of the case, claims, or defenses, (5) information the lawyers know or should know will be inadmissible at trial, and (6) any information reasonably likely to interfere with a fair trial.

On May 1, 2023, a coalition of media organizations filed a Motion to Vacate the Amended Nondissemination Order as well as a Memorandum in Support of Motion to Vacate the Amended Nondissemination Order. In their brief, the media organizations argued the Amended Nondissemination Order restrained their "constitutional right [to gather news] before it can be exercised" in violation of the First Amendment and claimed the order was "vague, overbroad, unduly restrictive, and not narrowly drawn." The media organizations argued that the gag order should be treated as a prior restraint and was therefore subject to strict scrutiny, with no evidence the speech at issue poses a clear and present danger, that the order is narrowly drawn, or that less restrictive alternatives were not available.

On June 23, 2023, the court issued a Revised Amended Nondissemination Order ("Media Order") and denied the Motion to Vacate filed by the media organizations. The Media Order noted that the Amended Nondissemination Order was "not a gag order on the media" and "is not directed toward the press at all." The court indicated it had the authority to regulate the speech of attorneys in cases before it and clarified that the limited incidental effects on the media's First Amendment rights were overridden by the compelling interest in ensuring that Kohberger's right to fair trial under the Sixth Amendment is not jeopardized.

Further, the court ruled that strict scrutiny did not apply to the gag order. Quoting *Radio Television News Ass'n of S. California v. U.S. Dist. Ct. for Cent. Dist. Of California*, 781 F.2d 1443, 1444 (9th Cir. 1986), the court found "[w]hen the media challenges an order restraining the speech of lawyers participating in a pending case, the court need only examine whether the

restrictions imposed are reasonable and whether the interests [of the government] override the very limited incidental effects of the [order] on First Amendment rights. The restrictions imposed also must not serve an illegitimate purpose." (Internal quotations omitted) The impact on the media, the court noted, is significantly different from when the media is denied access to a criminal trial or is restricted in disseminating any information it obtains. The media's right of access is to "sit, listen, watch, and report," and "their desire to access certain sources of information that otherwise might be available" is not sufficient to establish an infringement of freedom of the press.

The court analyzed *Sheppard*, *Nebraska Press*, and *Gentile*, finding that "*Sheppard* and *Nebraska Press* leave no doubt that, in appropriate cases, the Court has the authority to regulate the speech of attorneys involved in a case as well as their agents, such as law enforcement, to prevent prejudicial pretrial statements to preserve the right to fair trial by an impartial jury." The court, quoting *Sheppard*, stated that through the proscription of extrajudicial statements by lawyers or other parties, "Sheppard's right to a trial free from outside influence would have been given added protection without corresponding curtailment of the news media." With respect to *Nebraska Press*, the court noted that even in 1976 the Supreme Court had acknowledged the speed and pervasiveness of the media as well as the tension between the First and Sixth Amendments. The Media Order recognized that a prior restraint on speech is the "most serious and the least tolerable infringement on First Amendment rights," but also acknowledged that when the death penalty is on the table, "it is not requiring too much that [a defendant] be tried in an atmosphere undisturbed by so huge a wave of public passion."

The Media Order noted that in *Gentile* the Supreme Court expressly recognized that "the speech of those participating before the courts [can] be limited." The court emphasized that the "key takeaway" from *Gentile* is that a judge can protect a criminal defendant's right to a fair trial, and can prohibit lawyers involved in a case from making extrajudicial statements to the press so long as the regulation is not overbroad and provides notice of what is prohibited. The court clarified that attorneys representing a victim's family or a witness are likewise privy to confidential information — just as the prosecution and defense are. Quoting *Gentile*, the court noted that because "membership in the bar is a privilege burdened with conditions," requiring attorneys involved in the case to comply with the Media Order is not unreasonable and does not run afoul of the First Amendment.

Applying Supreme Court precedent, the court found that its prior Amended Nondissemination Order would help to ensure a trial free from outside influence and that "such restraining orders raise a freedom of the press issue that is analytically distinct" from prior restraints on the media. The court stressed its "obligation to help protect Kohberger's constitutional right to fair trial, and this is just one measure that the U.S. Supreme Court has endorsed, in appropriate cases, to help ensure the Sixth Amendment is not violated."

Finally, the court emphasized the "legitimate purpose" served by the Amended Nondissemination Order — to ensure a fair and impartial trial. Clarifying the purpose of the Amended Nondissemination Order, the Media Order noted it was not to "conceal the workings of the criminal justice system from the public" and that the media is "not restrained in any way and is free to attend hearings and report on what they observe and hear." The court narrowed the previous order to further clarify what speech by lawyers participating in the case and their agents is allowed, and indicated that the restrictions were reasonable given the pervasiveness of the media coverage and the impact of such prejudicial news on potential jurors. The court concluded that the

"very limited incidental effects of the Revised Amended Nondissemination Order on the media's First Amendment rights are overridden by the compelling interest in ensuring that Kohberger's right to fair trial under the Sixth Amendment is not jeopardized."

Classified Information Procedures Act (CIPA)

The Classified Information Procedures Act ("CIPA") (Title 18, U.S.C. App III) is a statute designed to address the discoverability and use of classified information in criminal trials, and is expected to play a central role in the prosecution of former President Trump for allegedly mishandling classified government documents. CIPA is a procedural statute; it neither adds to nor subtracts from the substantive rights of the defendant or the discovery obligations of the government. Rather, the procedure for making these determinations requires balancing the right of a criminal defendant with the right of the sovereign to know in advance of a potential threat from a criminal prosecution to its national security interest. Each of CIPA's provisions is designed to achieve those dual goals: preventing unnecessary or inadvertent disclosures of classified information and advising the government of the national security "cost" of going forward.

In re Washington Post Co., 807 F.2d 383 (4th Cir. 1986)

- Facts: *Washington Post* requested the unsealing of portions of the record of a criminal proceeding involving a Ghanian national relating to a joint motion to have a plea taken in camera. Both the motion and an affidavit were filed under seal. The hearing and plea were not reflected on the docket. At the hearing, the district court orally granted the government's motion, stating that its decision was based on the Classified Information Procedures Act. A *Washington Post* reporter was prevented from entering the courtroom. The *Washington Post* later filed a motion seeking release of the transcript.

- Rationale:

    - The court indicated that the "mere existence" of a First Amendment right of access does not entitle the press and public to access in every case. Access may be denied if "closure is essential to preserve higher values and is narrowly tailored to serve that interest." 807 F.2d at 390.

    - However, the court must follow procedures "as prerequisites to a closure order in a criminal proceeding," including giving advance notice and ensuring closure motions are docketed in advance. *Id*.

    - The court indicated that although it was "troubled . . . by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants" it was "equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present." *Id*. at 391.

- Holding: The Court vacated the district court's order to close hearings in the Ghanian national's case and also its denial of the *Washington Post*'s motion to unseal the sealed documents. The district court, in closing the hearings, failed to comply with the procedural requirement of giving notice to the public, and further failed to make specific findings concerning the interests at stake or to consider possible alternatives to closure. *Id*. at 392.

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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 **Memorandum in Support of Motion to Vacate the Amended Nondissemination Order**
THE ASSOCIATED PRESS; RADIO TELEVISION DIGITAL NEWS ASSOCIATION; SINCLAIR MEDIA OF BOISE, LLC/KBOI-TV (BOISE); STATES NEWSROOM DBA IDAHO CAPITAL SUN; TEGNA INC./KREM (SPOKANE), KTVB (BOISE) AND KING (SEATTLE); EASTIDAHONEWS.COM; THE LEWISTON TRIBUNE; WASHINGTON STATE ASSOCIATION OF BROADCASTERS; IDAHO PRESS CLUB; IDAHO EDUCATION NEWS; KXLY-TV/4 NEWS NOW AND KAPP/KVEW-TV—MORGAN MURPHY MEDIA KXLY-TV/4 NEWS NOW; SCRIPPS MEDIA, INC., DBA KIVI-TV, A DELAWARE	

CORPORATION; THE SPOKESMAN-REVIEW/COWLES COMPANY; THE NEW YORK TIMES COMPANY; LAWNEWZ, INC.; ABC, INC.; WP COMPANY LLC, DBA THE WASHINGTON POST; SOCIETY OF PROFESSIONAL JOURNALISTS; THE MCCLATCHY COMPANY, LLC; and THE SEATTLE TIMES,

Intervenors.

TABLE OF CONTENTS

Page

I. INTRODUCTION

Last week, the Idaho Supreme Court confirmed that a "vague, overbroad, unduly restrictive, or not narrowly drawn" gag order is "an unconstitutional obstacle to [Intervenors] gathering" information about this case. *In re Petition for Writ of Mandamus or Writ of Prohibition*, No. 50482, 2023 WL 3050829, at *5 (Idaho Apr. 24, 2023). But on procedural grounds, the Idaho Supreme Court decided that this Court should have a chance, in the first instance, to vacate the amended nondissemination order entered January 18, 2023 (the "Gag Order"). Following the Idaho Supreme Court's guidance, Intervenors now ask this Court to vacate the Gag Order because it is vague, overbroad, unduly restrictive, and not narrowly drawn. The Gag Order expands far beyond Idaho Rule of Professional Conduct 3.6, applying to individuals not governed by those ethical rules and prohibiting any statements about this case, not just those that present a substantial likelihood of materially prejudicing a future trial. What's more, the State and Mr. Kohberger (the "Parties") have submitted no evidence that media coverage presents a sufficient risk of prejudice to Mr. Kohberger's right to a fair trial or that other remedies are insufficient to prevent or remedy any prejudice. The Gag Order, which is based on the Parties' stipulation, rests merely on an assumption that press coverage is bad. The U.S. Constitution and the Idaho Constitution demand more. The Gag Order should thus be vacated.

II. BACKGROUND

In December 2022, Bryan C. Kohberger was arrested and charged for allegedly murdering four students at the University of Idaho. Despite great public interest in the investigation of the murders and now the prosecution of Mr. Kohberger, there have not been any notable leaks or dissemination of extrajudicial information that would prejudice Mr. Kohberger's right to a fair trial. Yet the Parties stipulated to a gag order "prohibiting attorneys, investigators, and law

enforcement personnel from making any extrajudicial statement, written or oral, concerning this case, other than a quotation from or reference to, without comment, the public records of the Court in this case." Declaration of Wendy J. Olson ("Olson Decl."), Ex. A.[1] The Parties offered no evidence in support of their stipulation, simply asserting: "As this Court is aware, this case involves matters that have received a great deal of publicity." *Id.* Their assertion, while not wrong, does not say the publicity has been prejudicial to Mr. Kohberger.

The Court issued the requested gag order just over an hour after the Parties submitted their stipulation. *Id.*, Ex. B. Intervenors do not doubt that the Court had good intentions, but an hour was not enough time to meaningfully consider the constitutional interests at stake. There was no time for the Court to hold a hearing, take any objections, make factual findings, or perform any legal analysis.

Ten days later, the Court held a private meeting with the Parties and an attorney for a victim's family. *Id.*, Ex. C. The Parties drafted a memorandum after the meeting. *Id.* The memorandum is not a court order; it is the Parties' memorialization of what they remember from the meeting. Even though minor redactions would satisfy any privacy concerns, the Parties opted to file the entire memorandum under seal. To the public, it appeared that the meeting never occurred (the Parties later agreed to unseal to memorandum to use it to oppose the Intervenors' petition in the Idaho Supreme Court).

Five days after the private meeting, the Court issued the Gag Order that is at issue in this motion. *Id.*, Ex. D. Because the preceding meeting was held privately, to the public it appeared that the Court issued the Gag Order *sua sponte*. The Court noted in the Gag Order that: "To

[1] The docket cannot be accessed on iCourts, so Intervenors' knowledge of the proceedings is limited to what the Idaho Judicial Branch has posted at https://coi.isc.idaho.gov/.

preserve the right to fair trial some curtailment of the dissemination of information in this case is necessary and authorized under the law." *Id.* The Court made no factual findings in support of that conclusion—which of course it could not as, again, the Parties presented no evidence (if evidence was presented during the private meeting, it was not offered on the record and cannot be relied upon as Intervenors have no means to evaluate, let alone challenge the veracity of, the evidence). *Id.* Nor did the Court hold a hearing or offer any legal analysis, aside from a footnote citing several authorities and offering no explanation of how or why those authorities apply. *Id.*

The Gag Order extends beyond what the Parties requested in their stipulation. The Gag Order applies to: "The attorneys for any interested party in this case, including the prosecuting attorney, defense attorney, and any attorney representing a witness, victim, or victim's family, as well as the Parties to the above-entitled action, including but not limited to investigators, law enforcement personal, and agents for the prosecuting attorney or defense attorney[.]" *Id.*

Intervenors are a coalition of media companies that but for the Gag Order would publish more information about the murders at the University of Idaho and Mr. Kohberger's prosecution. Members of the media coalition have been affected by the Gag Order as follows:

- A victim's family wants to speak with the press about Mr. Kohberger's prosecution, but they feel bound by the Gag Order. *Id.*, Ex. E.
- A Washington agency has requested declaratory relief to determine whether, consistent with the Gag Order, it can produce 9-1-1 tapes in response to public records requests. *Id.*, Ex. F.

- Major Christopher Paris of the Pennsylvania State Police told reporter Chris Ingalls that he could not answer whether police had launched any review of unsolved cases that could be linked to Mr. Kohberger because of the Gag Order.[2] Olson Decl., ¶ 9.
- Moscow Mayor Art Bettge told reporter Erica Zucco that the city attorney advised he could not answer questions about the overall community healing in Moscow because of the Gag Order. *Id.*
- Journalist Taylor Mirfendereski's public records requests were denied by the Latah County's Sheriff's Office, Moscow Police Department, Pullman Police Department, and Washington State Police Department because of the Gag Order. *Id.*
- The Moscow Police Department issued a press release that: "Due to this court order, the Moscow Police Department will no longer be communicating with the public or the media regarding this case." *Id.*, Ex. G.
- Gary Jenkins, Chief of Police at Washington State University, and Matt Young, Communication Coordinator for the City of Pullman, told reporter Morgan Romero that they could not answer whether Mr. Kohberger applied for a graduate assistant research position with the Pullman Police Department because of the Gag Order. Olson Decl., ¶ 9.
- The Moscow Police Department refused to advise a reporter from the Idaho Statesman how many cellphone towers are in the area near where the murders

[2] For the following citations in this paragraph, the source was referring either to the original or amended gag order.

occurred, the size of Mr. Kohberger's cell, the size of the Moscow jail, and the nature of Mr. Kohberger's meals because of the Gag Order. *Id.*

- Law&Crime reporter Angenette Levy was denied access to Kohberger's booking video from the Latah County Sheriff's Office because of the "court's non-dissemination order." *Id.*

Within weeks of the Court issuing the Gag Order, Intervenors petitioned the Idaho Supreme Court to vacate or nullify the Gag Order. The Idaho Supreme Court held that Intervenors have "sufficient standing to challenge the" Gag Order. *In re Petition for Writ of Mandamus or Writ of Prohibition*, 2023 WL 3050829, at *6. In support of that holding, the Idaho Supreme Court "agree[d] that the injury claimed"—a claim that the Gag Order infringes "freedom of the press by restricting [Intervenors'] ability to gather information for publication"—"is recognized under the First Amendment." *Id.* at *5. The Idaho Supreme Court further noted that if the Gag Order "is vague, overbroad, unduly restrictive, or not narrowly drawn, it would be an unconstitutional obstacle to their gathering of such information." *Id.*

But the Idaho Supreme Court declined to vacate the Gag Order, opining that "the proper course is to first seek redress from the magistrate court[.]" *Id.* at *10. Following that instruction, Intervenors now ask this Court to vacate the Gag Order because it vague, overbroad, unduly restrictive, and not narrowly drawn.

III. ARGUMENT

"[J]ustice cannot survive behind walls of silence[.]" *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966). For that reason, "[a] responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field." *Id.* at 350. "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Id.* The

First Amendment was thus "intended to give to liberty of the press the broadest scope that could be countenanced in an orderly society." *Id.* (cleaned up).

To be sure, an orderly society must also consider a criminal defendant's right to a fair trial. But when balancing that interest, First Amendment protections do not yield until they infringe the Sixth Amendment. There is no presumption that speech is prejudicial to a criminal defendant or that more speech necessarily means a less fair trial. To the contrary, the U.S. Supreme Court's precedent "demonstrate[s] that pretrial publicity[,] even pervasive, adverse publicity[,] does not inevitably lead to an unfair trial." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). And even when speech is prejudicial to a criminal defendant, only in "relatively rare" cases does pretrial publicity present "unmanageable threats." *Id.* at 551, 554. Many mitigating measures exist, "includ[ing] change of venue, trial postponement, a searching voir dire, emphatic jury instructions, and sequestration of jurors." *Application of Dow Jones & Co.*, 842 F.2d 603, 611 (2nd Cir. 1988) (citing *Sheppard*, 384 U.S. 333, and *Neb. Press*, 427 U.S. 539).

To ensure a proper balance between the First and Sixth Amendments a party requesting a gag order must present evidence that the prohibited speech presents a sufficient risk of prejudice to a fair trial and that none of the other alternative remedies, which do not prohibit speech, are sufficient to prevent or remedy any prejudice. Here, the Parties have fallen well short, as they have submitted no evidence on the record to support the sweeping Gag Order that is in place.

A. The Gag Order violates the First Amendment because it is vague, overbroad, unduly restrictive, and not narrowly drawn.

The Gag Order broadly prohibits any statements "concerning this case." That prohibition is much broader than Idaho Rule of Professional Conduct 3.6, and it is broader than the regulations of speech described by the U.S. Supreme Court in *Sheppard*, *Nebraska Press*, and *Gentile.* There is no evidence that every statement concerning Mr. Kohberger's prosecution poses a substantial

risk to his right to a fair trial, nor is there any evidence that other, less restrictive measures could not prevent or remedy any prejudice. As a result, the Gag Order violates the U.S. Constitution and the Idaho Constitution.

1. The Gag Order far exceeds Idaho Rule of Professional Conduct 3.6.

Footnote 1 of the Gag Order cites Idaho Rule of Professional Conduct 3.6. It is unclear whether that citation is intended to suggest that the Gag Order mirrors Rule 3.6. Even if that were the case, the Parties need to explain why the Idaho State Bar's enforcement of Rule 3.6 is insufficient, such that a court order and the penalty of contempt are necessary. Those more severe penalties present a unique chilling effect that will reduce speech that does not violate Rule 3.6.

In any event, the Gag Order does not mirror Rule 3.6. The Gag Order is far broader: It prohibits more topics of speech and governs a wider range of individuals.

a. The Gag Order broadly prohibits any statements about Mr. Kohberger's prosecution.

Rule 3.6 is carefully crafted to regulate a narrow set of topics that are most likely to be prejudicial. It regulates speech that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." I.R.P.C. 3.6(a). The rule's comment explains that there are "certain subjects that are more likely than not to have a material prejudicial effect on a proceeding," such as the "character, credibility, reputation or criminal record of a party," "the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant," "[t]he performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test," and "[a]ny opinion as to the guilt or innocence of a defendant[.]" *Id.* 3.6 cmt. 5.

By contrast, the Gag Order is not tailored at all. Section 1 of the Gag Order prohibits any "extrajudicial statements (written or oral) concerning this case." Olson Decl., Ex. D. Section 2

offers examples of prohibited speech, but it does not say those examples are exhaustive or limit the general prohibition of any statements "concerning this case." As a result, the Gag Order prohibits all statements about Mr. Kohberger's prosecution—even statements that could *help* him secure a fair trial.

Unsurprisingly then, individuals have said the Gag Order prohibits them from making comments on innocuous topics like how the Moscow community is healing, how many cellphone towers are around where the murder occurred, the size of Mr. Kohberger's cell, the meals Mr. Kohberger receives, and Mr. Kohberger's job applications to the Pullman Police Department. Olson Decl., ¶ 9.

Even without the sweeping prohibition in Section 1, Section 2 of the Gag Order does not precisely mirror Rule 3.6's commentary. For example, Section 2(a) prohibits speech on "[e]vidence regarding the occurrences or transactions involved in the case," which is broader than the commentary's concerns about speech related to "the identity or nature of physical evidence expected to be presented," I.R.P.C. 3.6 cmt. 5. And Section 2(d) prohibits speech about "[a]ny opinions as the merits of the case or the claims or defense of a party," which is broader than the commentary's concerns related to speech about "[a]ny opinion as to the guilt or innocence of a defendant," I.R.P.C. 3.6 cmt. 5 (which is also covered in Section 2(f), suggesting Section 2(d) is intended to regulate something different and broader).

b. The Gag Order prohibits speech from a broad and vague group of individuals.

The Gag Order targets "[t]he attorneys for any interested party in this case, including the prosecuting attorney, defense attorney, and any attorney representing a witness, victim, or victim's family, as well as the Parties to the above-entitled action, including but not limited to investigators, law enforcement personnel, and agents for the prosecuting attorney or defense attorney." Olson

Decl., Ex. D.

To start, that group of individuals is vague. Although the Gag Order expressly identifies certain types of individuals, that list is not exhaustive because of the phrase "including but not limited to." *Id.* As a result, others—like the victims' families and law enforcement outside the State of Idaho—must guess whether they too are subject to the Gag Order. That guessing game renders the Gag Order unconstitutionally vague, and it also exceeds the Court's jurisdiction, as the Court cannot bind individuals who are not before it and who reside outside Idaho.

That group of individuals is also overbroad. In contrast to the Gag Order, Rule 3.6 governs attorneys only, and specifically those attorneys admitted to practice in Idaho. *E.g.*, I.R.P.C. pmbl.; *id.* 8.5. Rule 3.8 demonstrates that limitation. It requires a prosecutor to "exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case" from making statements that the prosecutor could not make under Rule 3.6. *Id.* 3.8(f). That is, Rule 3.8 operates indirectly through the prosecutor; it does not apply directly to an investigator or law enforcement (because they are not lawyers admitted in Idaho). Nor does Rule 3.8 address the defense attorneys, the defense's investigators or agents, or the attorneys or agents for the victims' families. The Gag Order by contrast applies to both the prosecution and the defense, and it directly regulates those who are not subject to the Idaho Rules of Professional Conduct.

2. U.S. Supreme Court precedent counsels in favor of vacating the Gag Order.

The Court cited three U.S. Supreme Court decisions in footnote 1 of the Gag Order: *Sheppard, Nebraska Press,* and *Gentile*. While those cases acknowledge the propriety of regulating some speech from lawyers and trial participants, they also explain the findings of prejudice and the narrow tailoring that are required before prohibiting speech. The Parties' stipulation and the Gag Order ignore those principles.

Taking the cases in order, the U.S. Supreme Court first decided *Sheppard v. Maxwell*, 384 U.S. 333 (1966). There, a prisoner challenged his conviction, arguing that he did not receive a fair trial because of publicity before and during his trial. For example:

- "Sheppard jurors were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings." *Id.* at 353.
- "[T]hree months before trial, Sheppard was examined for more than five hours without counsel," which "was televised live from a high school gymnasium seating hundreds of people." *Id.* at 354.
- During trial, the lower court erected "a press table for reporters inside the bar," where "some 20 reporters" sat "within a few feet of the jury box." The lower court also "assigned almost all of the available seats in the courtroom to the news media." Together, those decisions interfered with the privacy and tranquility of the defendant, the witnesses, and the jury during the trial. *Id*. at 355.

As a result of those and other facts, the Court held that "Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment." *Id*. at 335.

In support of that holding, the Court noted the trial judge's failures to prevent or remedy any prejudice to Sheppard, using remedies such as continuance of trial, sequestration of the jury, and control of the courtroom. Intervenors acknowledge that one potential measure the Court mentioned was: "the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case." *Id.* at 361.

But that observation does not compel maintaining the Gag Order. To start, *Sheppard* is a Due Process case—not a First Amendment case. Nobody appeared to argue that the proscription suggested by the Court would violate the First Amendment, so the Court did not decide that issue. *Sheppard* also largely addressed conduct during trial, which for now is not at issue as Mr. Kohberger's trial has not even been set and is likely many months or years away. And to be clear, Intervenors do not seek to conduct an out-of-court examination of Mr. Kohberger or to sit within the bar at Mr. Kohberger's trial.

While those stark legal and factual differences mean *Sheppard* is not controlling, more importantly the Gag Order here is not the hypothetical order that *Sheppard* described. There, the Court contemplated an order limiting speech on "prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case." *Id.* As described above, the Gag Order is much broader. It prohibits any statements "concerning this case," regardless of how likely or unlikely the statement is to be prejudicial (or helpful) to Mr. Kohberger.

The Court next decided *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). The gag order there prohibited statements about "(a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts strongly implicative of the accused." *Id*. at 545 (internal quotation marks omitted). Even with that narrower scope of prohibitions, the Court held that the gag order was unconstitutional. While drawing that conclusion, the Court explained three principles relevant here.

First, the First Amendment and the Sixth Amendment are entitled to equal protection. As

the Court explained: "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other." *Id.* at 561. It is thus not for courts "to rewrite the Constitution by undertaking what [the founders] declined to do." *Id.* Instead, First Amendment rights should yield only when necessary to protect Sixth Amendment rights. There is a "need to protect the accused as fully as possible" and a "need to restrict publication as little as possible." *Id.* at 566.

The second, and related, principle is that courts should consider "other measures" before issuing a gag order. *Id.* The Court endorsed many alternatives, such as "(a) change of trial venue to a place less exposed to the intense publicity that seemed imminent in Lincoln County; (b) postponement of the trial to allow public attention to subside; (c) searching questioning of prospective jurors, as Mr. Chief Justice Marshall used in the Burr Case, to screen out those with fixed opinions as to guilt or innocence; (d) the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court;" and (e) "[s]equestration of jurors[.]" *Id.* at 563–64 (footnoted omitted). By considering these alternatives—in other words, by narrowly tailoring the remedy—courts ensure they are issuing gag orders only when necessary. As a result, the First Amendment is infringed only when necessary to protect a Sixth Amendment interest. That approach preserves an equal balance between the two rights, as intended by the founders.

The third principle is that when reviewing the above analysis, a reviewing court must "examine the evidence before the trial judge" and the "precise terms of the restraining order[.]" *Id.* at 562.

Based on these and other principles, *Nebraska Press* held that the gag order there was unconstitutional. The Court observed that "pretrial publicity, even if pervasive and concentrated,

cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." *Id.* at 565. Given that assumptions are inappropriate in this context, the probability of prejudice was "not demonstrated with the degree of certainty" required. *Id.* at 569. The gag order was also not properly tailored. The trial court there failed to consider alternatives short of a gag order, and the prohibition on "implicative information" was "too vague and too broad to survive the scrutiny" required. *Id.* at 568.

In many ways, *Nebraska Press* counsels in favor of vacating the Gag Order here. The Parties offered no facts for the Court to determine that any statement concerning his case would prejudice Mr. Kohberger. The Parties also offered no explanation of why alternative measures would not suffice. But even if they had, the precise terms of the Gag Order (which prohibits statements "concerning this case") are broader than the *Nebraska Press* gag order (which prohibited statements about "implicative information") that the U.S. Supreme Court held was too broad.

Last, the Court decided *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). There, an attorney challenged disciplinary action taken against him for allegedly violating Nevada's equivalent of Idaho Rule of Professional Conduct 3.6. Like the Idaho rule, the Nevada rule prohibited an attorney from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id*. at 1033 (citation omitted). The Court held that the rule was unconstitutional as interpreted and applied in Nevada.

The Court's decision was fractured, but Part II of Chief Justice Rehnquist's opinion garnered a majority and is relevant here. Chief Justice Rehnquist first observed that, by default,

the First Amendment requires a "showing of clear and present danger that a malfunction in the criminal justice system will be caused before a State may prohibit media speech or publication about a particular pending trial." *Id.* at 1070–71 (internal quotation marks omitted). That said, the law imposes a less demanding standard for regulating "speech of lawyers representing clients in pending cases" because those lawyers are "participants in the criminal justice system" and thus "the State may demand some adherence to the precepts of that system[.]" *Id.* at 1074. A "substantial likelihood" of material prejudice test satisfies that less demanding standard, as it imposes "only narrow and necessary limitations" on speech. *Id.* at 1075. Put differently, "[t]he restraint on speech is narrowly tailored[.]" *Id.* at 1076.

Under Chief Justice Rehnquist's reasoning, the Gag Order is unconstitutional. The Parties have submitted no evidence of a "clear and present danger" of prejudice for statements made by non-lawyers nor a "substantial likelihood" of material prejudice for statements made by lawyers. And, again, the Gag Order is not at all tailored; it prohibits all statements "concerning this case"—not just those that would cause material prejudice.

In sum, *Sheppard*, *Nebraska Press*, and *Gentile* all counsel in favor of vacating the Gag Order. Those cases only permit prohibitions on speech that are (1) justified by a risk of material prejudice, and (2) narrowly tailored to limit only the speech that is actually prejudicial and cannot be prevented or remedied through other means. The Parties have submitted no evidence of prejudice sufficient to justify a Gag Order (clear and present danger for non-lawyers and substantial risk of material prejudice for lawyers), and even if they had, the Gag Order is not narrowly tailored to surgically proscribe only the speech that is prejudicial and cannot be prevented or remedied through other means.

3. The Court should treat the Gag Order as a prior restraint and apply strict scrutiny.

Consistent with the principles articulated in *Sheppard*, *Nebraska Press*, and *Gentile*, the Court should treat the Gag Order as a prior restraint and vacate it because the Parties' request does not survive strict scrutiny.

The Gag Order is a prior restraint. Speech presupposes a speaker and a recipient. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc*., 425 U.S. 748, 756 (1976). Without the one there cannot be the other. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) ("[W]e have recognized that without some protection for seeking out the news, freedom of the press could be eviscerated."). So the right to speech "necessarily protects the right to receive" information and ideas. *Va. Citizens*, 425 U.S. at 757 (citation omitted). There is thus a "constitutionally guaranteed right as a member of the press to gather news." *CBS Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975).

The Gag Order restrains that constitutional right before it can be exercised. Intervenors do not make the news; they report the news. They cannot report what they cannot gather. Here, there are many sources of newsworthy information that but for the amended Gag Order would provide information to Intervenors that Intervenors would then make editorial decisions about whether and when to publish. Intervenors' speech is thus being restrained before they can even speak. That is the definition of prior restraint. *Prior Restraint*, Black's Law Dictionary (11th ed. 2019) ("A governmental restriction on speech or publication before its actual expression.").

If the amended Gag Order is a prior restraint, then it is "subject to strict scrutiny[.]" *Levine v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 764 F.2d 590, 595 (9th Cir. 1985).

4. The Court should reject the fiction that gag orders directed at trial participants do not restrain the press.

To avoid the outcome dictated by prior restraint jurisprudence and cases like *Sheppard*, *Nebraska Press*, and *Gentile*, Intervenors anticipate that the Parties will ask the Court to follow the Second and Ninth Circuits in applying the First Amendment differently when the media challenges gag orders directed at sources of information. The Court should reject those decisions because they are not well reasoned and place form over function.

In *Radio and Television News Association of Southern California v. U.S. District Court for the Central District of California*, the Ninth Circuit recognized that the media has a "first amendment right of access or right to gather information[.]" 781 F.2d 1443, 1446 (9th Cir. 1986) (internal quotation marks and citation omitted). But in the Ninth Circuit's view, a court order prohibiting an individual from speaking with the media does not infringe that right to gather information because: "The media never has any guarantee of or 'right' to interview counsel in a criminal trial. Trial counsel are, of course, free to refuse interviews, whether or not restrained by court order. If such an individual refuses an interview, the media has no recourse to relief based upon the first amendment." *Id.* at 1447.

That reasoning is misguided as a court prohibiting a person from speaking to the media is different than an individual deciding not to speak to the media. To start, an interviewee's decision not to speak to the media is generally not a state action. As a result, the First Amendment typically does not govern the interviewee's decision to not answer questions. *E.g.*, *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) ("MNN is a private actor, not a state actor, and MNN therefore is not subject to First Amendment constraints on its editorial discretion."). By contrast, a gag order issued by a state court, even to enforce the request of a private party, is a state action and thus must comport with the First Amendment. *See Apao v. Bank of N.Y.*, 324 F.3d 1091,

1093 (9th Cir. 2003) ("[W]hat would otherwise be private conduct, i.e., placing a racially restrictive covenant in a deed, can violate the Fourteenth Amendment when state action in the form of a court order is sought to enforce its restrictive provisions.").

The Ninth Circuit's reasoning also ignores the reality of news coverage. There is no reporting without information. The media does not make the news; it reports the news. If a court orders an individual not to provide information to the media, then the media has nothing to report. The media may technically be allowed to ask questions to gather the news, but it has no real expectation of an answer. The law should recognize, or at least assume, that individuals will follow court orders. As a result, a court order regulating an individual's speech to the media also regulates the media. The media has no realistic opportunity to publish the information that the sources of the information are ordered not to provide. Intervenors are not, as *Radio and Television News* suggests, seeking an order compelling anybody to speak with them. Intervenors instead are challenging a state action prohibiting speech and asking for a realistic opportunity to gather and report information on a matter of public interest.

The Second Circuit's decision in *Application of Dow Jones & Co*. is also unpersuasive. The Court's analysis there begins by observing the distinction observed in *Radio and Television News*, which is a flawed for the reasons already described. 842 F.2d at 608. The Second Circuit additionally noted that the parties subject to the gag order there requested the order and urged its affirmance. A party's preference not to speak with the press does not mean a state action adopting that preference is lawful. A party's preference not to speak is typically not a state action, but it becomes a state action when a court issues an order. *See Apao*, 324 F.3d at 1093. And here, not everyone subject to the Gag Order requested it. In fact, one of the victims' families is actively challenging it.

Given the flawed reasoning in *Radio and Television News* and *Dow Jones*, this Court should reject those decisions and adopt the better reasoned decisions in *Young* and *People v. Sledge*, 879 N.W.2d 884 (Mich. Ct. App. 2015). In *Young*, the Sixth Circuit recognized that the media has no realistic opportunity to gather and publish the news when a court forbids sources of information from talking to the media. It wrote: "Although the news media are not directly enjoined from discussing the case, it is apparent that significant and meaningful sources of information concerning the case are effectively removed from them and their representatives. To that extent their protected right to obtain information concerning the trial is curtailed and impaired." 522 F.2d at 239. In *Sledge*, the Michigan Court of Appeals similarly explained: "Although the gag order does not directly prohibit the media from discussing the case, it prohibits the most meaningful sources of information from discussing the case with the media. Therefore, the right of the [media] to obtain information from all potential trial participants is impaired." 879 N.W.2d. at 893 (citation omitted).

Simply put, *Radio and Television News* and *Dow Jones* put form over function. They observe a technical distinction between a gag order naming the media and a gag order naming a third party, but they ignore that, in reality, both orders directly regulate the media. *Richmond Newspapers*, 448 U.S. at 576 ("[W]e have recognized that without some protection for seeking out the news, freedom of the press could be eviscerated."). *Young* and *Sledge* understand that reality. This Court should follow the better reasoning in *Young* and *Sledge* and hold that the Gag Order must be "narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms." *Young*, 522 F.2d at 238.

5. The Court should apply strict scrutiny even if it does not find that the Gag Order is a prior restraint.

Regardless of whether prior restraint jurisprudence applies, the Court's task here is to

balance Intervenors' First Amendment interests with Mr. Kohberger's Sixth Amendment interests. Neither right is superior. As a result, the Court should aim to give both rights the maximum effect possible. It "need[s] to protect the accused as fully as possible," and it "need[s] to restrict publication as little as possible." *Nebraska Press*, 427 U.S. at 566. The only way to satisfy those twin goals is to apply a standard that allows a gag order only when (1) the prohibited speech is almost certain to materially prejudice the criminal defendant, and (2) nothing else can prevent or cure the prejudice.

Anything less risks underenforcing the First Amendment. A less demanding test will be overinclusive, at times restricting protected speech that does not create prejudice or that creates prejudice that can be remedied in other ways. The First Amendment will then be underenforced, as protected speech will be suppressed even if the speech does not infringe the criminal defendant's right to a fair trial. That outcome is intolerable because "any First Amendment infringement that occurs with each passing day is irreparable." *Neb. Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, J., in chambers).

6. The Gag Order fails under strict scrutiny.

A gag order survives strict scrutiny only if: "(1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest, (2) the order is narrowly drawn, and (3) less restrictive alternatives are not available." *Levine*, 764 F.2d at 595 (citations omitted). The Gag Order fails under each prong.

First, there is no evidence that the speech at issue poses a clear and present danger or a serious and imminent threat to Mr. Kohberger's right to a fair trial. The Parties offered no evidence in support of their stipulation, and the Court has not collected any evidence, held any evidentiary hearings, or made any factual determinations.

There is also no indication that the individuals subject to the Gag Order will disseminate

information that will prejudice Mr. Kohberger. Law enforcement released limited information during its investigation and after Mr. Kohberger's arrest, including at the press conference announcing the arrest. As the prosecution moves forwards, the Parties' attorneys must comply with Idaho Rule of Professional Conduct 3.6 and the prosecution must comply with Rule 3.8, even without the Gag Order. The Parties' attorneys' willingness to enter the stipulation suggests they intend to strictly comply with those rules.

In any event, the Gag Order does not target prejudicial speech. It targets *any* speech concerning the case with no consideration of whether the speech would be prejudicial or helpful to Mr. Kohberger.

At bottom, there is not a clear and present danger or a serious and imminent threat that absent the Gag Order, publicity will prejudice Mr. Kohberger's right to a fair trial.

Second, as explained above, the Gag Order is not narrowly drawn. It is directed at a wide and vague group of people, and it governs any statement concerning the case, good or bad for Mr. Kohberger. The Gag Order does not narrowly target speech that could be most prejudicial, but rather wrongly assumes that all speech about the case is prejudicial. As a result, sources of newsworthy information have declined to provide information about topics like how the Moscow community is healing, how many cellphone towers are around where the murder occurred, the size of Mr. Kohberger's cell, the meals Mr. Kohberger receives, and Mr. Kohberger's job applications to the Pullman Police Department because of the Gag Order (or its predecessor). Those topics of speech, while arguably subject to the Gag Order, are unlikely to prejudice Mr. Kohberger. Yet they are suppressed.

Third, the Parties have not explained why other, less restrictive alternatives would not prevent or remedy any prejudice to Mr. Kohberger. For example, prejudicial publicity can be

mitigated by a change of venue, trial postponement, a searching voir dire, emphatic jury instructions, and sequestration of jurors. *Dow Jones*, 842 F.2d at 611 (citing *Sheppard*, 384 U.S. 333, and *Nebraska Press*, 427 U.S. 539). The need to consider less restrictive alternatives here, at this early stage of the case, is particularly acute. No trial has been scheduled (indeed the preliminary hearing is not until June 2023), and given the seriousness of the charges, trial is likely more than a year away. The Parties and the Court have ample time to assess whether unrestrained speech about Mr. Kohberger and the facts and circumstances of the crimes with which he is charged unfairly prejudice his right to a fair trial. And if a danger emergers, there will be plenty of time to remedy it.

7. The Gag Order fails under less exacting scrutiny.

Courts that do not apply strict scrutiny to gag orders like the one here still require some factual findings to support the gag order. In *Dow Jones*, for example, the Second Circuit considered "whether there is a 'reasonable likelihood' that pretrial publicity will prejudice a fair trial" and an exploration of "whether other available remedies would effectively mitigate the prejudicial publicity." 842 F.2d at 610–11. Other courts have required similar findings. *See News-J. Corp. v. Foxman*, 939 F.2d 1499, 1515–16 (11th Cir. 1991) (noting that after "a full hearing" where the press could be heard, the district court found evidence of "the potential inability of impaneling an impartial jury" and "concluded that there was no less restrictive means of safeguarding the defendants' Sixth Amendment rights"); *Radio & Television News Ass'n of S. Cal.*, 781 F.2d at 1447 (considering whether a gag order is reasonable and overrides First Amendment interests); 1 Kevin F. O'Malley et al., Fed. Jury Prac. & Instr. § 2:4, Westlaw (6th ed., updated Feb. 2023) ("A gag order must be no greater than that necessary to protect the interest involved. Hence a gag order may be entered where there is a reasonable or serious threat, less restrictive alternatives are not adequate, and the order would effectively prevent the threatened harm to the defendant's right to

a fair trial.") (footnotes omitted); 75 George L. Blum et al., Am. Jur. 2d Trial § 135, Westlaw (2d ed., updated Feb. 2023) ("[A] court may issue a participant gag order only where the press and general public are given an opportunity to be heard on the question of the issuance of the order, the court describes those reasonable alternatives that the court considered and rejected, the order is narrowly tailored to serve the interest of protecting the defendant's right to a fair trial, and the court has made a specific finding that there was a substantial probability that the defendant's right to a fair trial would be prejudiced by publicity that would occur in the absence of a gag order.").

Again, the Parties here have offered no evidence of any risk of prejudice to Mr. Kohberger or offered any explanation why alternatives to the Gag Order would not suffice. So far, there has been publicity surrounding Mr. Kohberger's prosecution, but no indication that the publicity has been prejudicial. Since the murders occurred, law enforcement and now the attorneys have judiciously shared information with the public. There is no suggestion that anybody now subject to the Gag Order had previously made extrajudicial statements that may have biased the jury pool. In fact, Mr. Kohberger may be less prejudiced if well-informed and responsible individuals share some information, rather than allowing the Gag Order to create a vacuum for mere speculation on the internet.

But even if there were some evidence of prejudicial publicity, there are other ways to ensure Mr. Kohberger has a fair trial. To start, his trial date is not even been set and will presumably occur well in the future. The passing of time reduces the risk of any jury taint. Additionally, when the time for trial arrives, a change in venue, probing voir dire, and clear jury instructions can all ensure Mr. Kohberger has a fair trial.

At bottom, the Gag Order suppresses speech without any justification. That violates the First Amendment no matter the test applied.

B. The Gag Orders violates the Idaho Constitution for the same reasons.

Courts have "addressed simultaneously" the First Amendment of the U.S. Constitution and Article I, Section 9 of the Idaho Constitution. *Bingham v. Jefferson Cnty.*, No. 4:15-CV-00245-DCN, 2017 WL 4341842, at *6 n.4 (D. Idaho Sept. 29, 2017). So the Court can find that the Gag Order violates the Idaho Constitution for the same reasons that it violates the U.S. Constitution.

But the Court need not treat Idaho's Constitution in lockstep with the U.S. Constitution. If, for example, the Court is persuaded that under federal law gag orders need not survive strict scrutiny, it should consider whether they must do so under Article I, Section 9 of the Idaho Constitution. Unlike the First Amendment, Article I, Section 9 provides that a person may "publish on all subjects[.]" For criminal trials, all subjects would include both information presented inside the courtroom and information presented outside the courtroom.

As explained above, when balancing the right to speech with the right to a fair trial, the Court's aim should be to recognize each right as much as possible. Only when speech necessarily infringes the right to a fair trial is there a justification for curtailing the speech. And again, strict scrutiny is an exacting standard that ensures speech is curtailed when, and only when, necessary. So even if some federal courts have interpreted the First Amendment to yield short of the outer boundaries of the right to a fair trial by adopting tests that are overinclusive when curtailing speech, this Court should interpret Article I, Section 9 as more broadly protecting all speech that falls short of infringing the right to a fair trial, either because there is not sufficient certainty that the speech will be prejudicial or because other remedies short of restricting speech can prevent or cure the prejudice.

IV. CONCLUSION

Intervenors request that the Court vacate the Gag Order because it violates the U.S. Constitution and the Idaho Constitution.

DATED: May 1, 2023.

STOEL RIVES LLP

/s/ Wendy J. Olson
Wendy J. Olson
Cory M. Carone

Attorneys for Intervenors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of May 2023, I served a true and correct copy of the within and foregoing **MEMORANDUM IN SUPPORT OF MOTION TO VACATE OR AMEND THE AMENDED NONDISSEMINATION ORDER** upon the following named parties by the method indicated below, and addressed to the following:

Latah County Prosecutor's Office William W. Thompson, Jr. Prosecuting Attorney Latah County Courthouse P.O. Box 8068 Moscow, ID 83843	___ Hand Delivered ___ Mailed Postage Prepaid ___ Via Facsimile ___ U.S. Mail ___ Via email _X_ Via iCourt efile & serve at: *paservice@latahcounty.id.gov*
Anne Taylor Attorney at Law P.O. Box 9000 Coeur d'Alene, ID 83816	___ Hand Delivered ___ Mailed Postage Prepaid ___ Via Facsimile ___ U.S. Mail _X_ Via email at *ataylor@kcgov.us* ___ Via iCourt efile & serve at: *pdfax@kcgov.us*
Jeff Nye Deputy Attorney General P.O. Box 83720 Boise, ID 83720	___ Hand Delivered ___ Mailed Postage Prepaid ___ Via Facsimile ___ U.S. Mail _X_ Via email at *jeff.nye@ag.idaho.gov* ___ Via iCourt efile & serve at:
Shanon Gray 2175 N. Mountain View Road Moscow, ID 83843	___ Hand Delivered ___ Mailed Postage Prepaid ___ Via Facsimile ___ U.S. Mail ___ Via email _X_ Via iCourt efile & serve at: *shanon@graylaw.org*

/s/ Wendy J. Olson
Wendy J. Olson

Filed: 06/23/2023 16:26:54
Second Judicial District, Latah County
Julie Fry, Clerk of the Court
By: Deputy Clerk - Mottern, Beth

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, vs. BRYAN C. KOHBERGER, Defendant.	Case No. CR29-22-2805 **ORDER DENYING THE ASSOCIATED PRESS'S MOTION TO VACATE THE AMENDED NONDISSEMINATION ORDER**

I. INTRODUCTION

This Order addresses the Motion to Vacate the Amended Nondissemination Order filed by Intervenors, a coalition of 20 media outlets[1] that will be collectively referred to as the "Associated Press." The Amended Nondissemination Order does not restrict, restrain, or in any way enjoin the press from reporting on or publishing information they obtain through their own investigations or interviews. The Amended Nondissemination Order is not a "gag order" on the media. Instead, the

[1] The Associated Press; Radio Television Digital News Association; Sinclair Media of Boise, LLC/KBOI-TV (Boise); States Newsroom dba Idaho Capital Sun; Tegna Inc./KREM (Spokane), KTVB (Boise), and King (Seattle); EastIdahoNews.com; The Lewiston Tribune; Washington State Association of Broadcasters; Idaho Press Club; Idaho Education News; KXLY-TV/4 News Now and KAPP/KVEW-TV-Morgan Murphy Media KXLY-TV/4 News Now; Scripps Media, Inc., dba KIVI-TV, a Delaware corporation; The Spokesman Review/Cowles Company; The New York Times Company; LawNewz, Inc.; ABC, Inc.; WP Company LLC, dba The Washington Post; Society of Professional Journalists; The McClatchy Company, LLC; and the Seattle Times.

Amended Nondissemination Order restricts attorneys directly involved in the case who are representing a party, a witness, or a victim's family, and the agents for those attorneys, including law enforcement, from making certain statements about the case to the media or the public. Because "[m]embership in the bar is a privilege burdened with conditions," *Gentile v. State Bare of Nevada*, 501 U.S. 1030, 1066, 111 S. Ct.2720, 2740, 115 L. Ed. 2d 888 (1991), the U.S. Supreme Court has recognized that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press." *Id.* at 1076, 111 S. Ct. at 2744. "As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Id.* at 1074, 111 S. Ct. at 2744.

The purpose of the Amended Nondissemination Order, which was stipulated to by the parties,[2] is to protect Defendant Bryan C. Kohberger's ("Kohberger") right to a fair trial by an impartial jury as guaranteed by the Sixth Amendment. "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Id.* at 1075, 111 S. Ct. at 2745.

The Associated Press's Motion to Vacate the Amended Nondissemination Order is denied. This Court has the authority to regulate the speech of attorneys participating in this case, and the agents for those attorneys, to ensure that Kohberger is not denied his right to a fair trial by an impartial jury because of extrajudicial prejudicial statements. However, this Court will issue a Revised Amended Nondissemination Order that clarifies what cannot be discussed and what can be

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[2] The term "parties" is a precise legal term used to describe the State and the Defendant, Bryan Kohberger. There are no other parties to this case.

discussed. The Revised Amended nondissemination Order (1) is limited to apply only to speech that is substantially likely to have a materially prejudicial effect on the right to a fair trial; (2) applies equally to all attorneys participating in the case; (3) is neutral as to points of view; and (4) restricts attorneys' comments only until after the trial and any sentencing proceedings that may take place.

The Revised Amended Nondissemination Order is reasonable considering the facts of this case: (1) the evidence presented by the defense showing the pervasiveness of media coverage, including coverage prejudicial to Kohberger and coverage that includes extrajudicial statements by an attorney participating in the case; and (2) the impact such prejudicial news coverage has on potential jurors and the fair administration of justice. The restriction imposed serves a legitimate purpose, and the very limited incidental effects of the Revised Amended Nondissemination Order on the media's First Amendment rights are overridden by the compelling interest in ensuring that Kohberger's right to a fair trial under the Sixth Amendment is not jeopardized.

II. BACKGROUND

On November 13, 2022, four University of Idaho students, Kaylee Goncalves, Madison Mogen, Xana Kernodle, and Ethan Chapin, were found deceased in Goncalves, Mogen, and Kernodle's off-campus home in Moscow, Idaho. The cause of death for each was ruled a homicide. As news of the tragedy broke, media outlets from around the country descended upon Moscow. As law enforcement investigated, news stations, newspapers, and social media were flooded with stories and speculation about the homicides and law enforcement's investigative efforts and abilities. Throughout the course of the investigation, the Moscow Police Department, in partnership with the University of Idaho, the Latah County Prosecutor's Office, and the Idaho State Police, held press briefings to answer questions and reassure the public. Appropriately, the information released was limited to protect the integrity of the ongoing investigation.

On December 30, 2022, Kohberger was arrested and charged with four counts of Murder in the First Degree and one count of Burglary. Again, media outlets descended upon Moscow and the news coverage quickly focused on Kohberger.

The same day that Kohberger was charged, his attorney filed a Motion for Nondissemination Order asking the magistrate judge to enter an order "barring parties, their attorneys, investigators, law enforcement personnel, and potential witnesses from discussing [the case] with any public communications media." Thereafter, on January 3, 2023, the defense and the State filed a Stipulation for Nondissemination Order "prohibiting attorneys, investigators, and law enforcement personnel from making any extrajudicial statement, written or oral, concerning this case, other than a quotation from or reference to, without comment, the public records of the Court in this case." The same day, the magistrate judge entered a Nondissemination Order prohibiting "the parties to the [case], including investigators, law enforcement personnel, attorneys, and agents of the prosecuting attorney or defense attorney, . . . from making extrajudicial statements, written or oral, concerning this case, other than a quotation from or reference to, without comment, the public records of the case."

On January 13, 2023, the magistrate judge held an in-chambers, off-the-record conference with Latah County Prosecuting Attorney William W. Thompson, Jr., Senior Deputy Prosecutor Ashley S. Jennings, defense counsel Anne C. Taylor, attorneys for two witnesses in the case, and Shanon Gray, attorney for the Goncalves family. A summary of the meeting, as prepared by the parties in the case, was filed with the Idaho Supreme Court on March 3, 2023, as part of the Declaration of Deborah A. Ferguson in the case of *In re Petition for Writ of Mandamus or Writ of Prohibition*, No. 50482, 2023 WL 3050829 (Idaho Apr. 24, 2023). The purpose of the conference was to address the applicability of the Nondissemination Order to the attorneys both present as

parties to the case and the attorneys participating in the case. The magistrate judge reminded the attorneys that this case is a high-profile case with both national and international media coverage, and that they each have a duty under the Idaho Rules of Professional Conduct to not interfere with the parties' right to a fair trial. The magistrate advised the attorneys that it was not their job to disseminate information to the media. The magistrate judge stated that the Nondissemination Order did not restrict the attorneys' nonparty clients from speaking to the media, but reiterated the importance of the case being tried in a court of law and not the media and encouraged each attorney to advise their clients accordingly in order to preserve the right to a fair trial by an impartial jury.

On January 18, 2023, the magistrate judge, based on the stipulation of the parties, entered the Amended Nondissemination Order to balance Kohberger's and the State's right to a fair trial and the "right to free expression as afforded under both the United States and Idaho Constitution." The magistrate noted that "[t]o preserve the right to a fair trial some curtailment of the dissemination of information in this case is necessary and authorized under the law." The Amended Nondissemination Order reads:

> IT IS HEREBY ORDERED:
>
> 1. The attorneys for any interested party in this case, including the prosecuting attorney, defense attorney, and any attorney representing a witness, victim, or victim's family, as well as the parties to the above entitled action, including but not limited to investigators, law enforcement personal, and agents for the prosecuting attorney or defense attorney, are prohibited from making extrajudicial statements (written or oral) concerning this case, except, without additional comment, a quotation from or reference to the official public record of the case.
>
> 2. This order specifically prohibits any statement, which a reasonable person would expect to be disseminated by means of public communication that relates to the following:
>   a. Evidence regarding the occurrences or transactions involved in this case;
>   b. The character, credibility, reputation, or criminal records of a party, victim, or witness, or the identity of a witness, or the expected testimony of a party, victim, or witness;

c. The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test;
d. Any opinion as to the merits of the case or the claims or defense of a party;
e. Any information a lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial;
f. Any information reasonably likely to interfere with a fair trial in this case afforded under the United States and the Idaho Constitution, such as the existence or contents of any confession, admission, or statement given by the Defendant, the possibility of a plea of guilt, or any opinion as to the Defendant's guilt or innocence.

On February 6, 2023, the Associated Press filed a Petition for Writ of Mandamus or a Writ of Prohibition with the Idaho Supreme Court related to the Amended Nondissemination Order. On April 24, 2023, the Idaho Supreme Court issued an opinion dismissing the Associated Press's Petition, finding that although the media did have standing to challenge the Amended Nondissemination Order, they must first present their petition to the trial court. Thereafter, on May 2, 2023, the Associated Press filed a Motion to Intervene and a Motion to Vacate the Amended Nondissemination Order. The magistrate set a scheduling conference for May 22, 2023.

On May 16, 2023, an Indictment was filed against Kohberger, and this Court began presiding over the case. On May 22, 2023, after Kohberger's arraignment, this Court conducted a scheduling conference and set a briefing schedule and hearing for oral argument. The Associated Press's Motion to Vacate the Amended Nondissemination Order was extensively briefed, and both the State and Kohberger submitted extensive briefing in opposition to the Motion.

Oral argument was heard on June 9, 2023. The State was represented by William W. Thompson, Jr., and Bradley J. Rudley, Latah County Prosecutor's Office. Kohberger was represented by Anne C. Taylor and Jay W. Logsdon, Kootenai County Public Defender's Office. The Associated Press was represented by Wendy Olson and Cory Carone.

During the hearing, the defense put on the testimony of two expert witnesses. First, Jean R. Saucier, Senior Vice President of Truescope North America, testified. In sum, Ms. Saucier testified to the quantity of media coverage in this case. It is undisputed that media coverage in this case is rampant and ongoing, including on television, the internet, social media, and the radio. News surrounding the case is being reported by reliable sources of news, unreliable news outlets, and individuals engaged in spreading or fueling rumors, theories, and unfounded speculation. It is also worth noting that Ms. Saucier's testimony and the exhibits she showed demonstrate that in the "Share of Voice – Media Coverage" category, "Shanon Gray's stories [in the media] had the highest potential reach at 561,112,573 impressions" with impressions being the "opportunities to see" a story. Ex. A to Defendant's Objection to Media's Mot. to Vacate the Amended Nondissemination Order. Shanon Gray is the attorney for the Goncalves family and is bound by the Amended Nondissemination Order.

The defense also submitted several news articles demonstrating that at least some portion of the news, if not most of it, is prejudicial to Kohberger. *See* Motion to Take Judicial Notice of Press Coverage.

Second, Dr. Amani El-Alayli, Social Psychologist and Social Cognition Researcher, testified to the impact such media can have on a potential juror. It was Dr. El-Alayli's opinion "that vacating the non-dissemination order would increase the potential for bias among prospective jurors, both initially and throughout the trial." Dr. El-Alayli further opined that "my review of research illustrat[es] that anti-defendant pretrial publicity increases the probability of guilty verdicts, and that this bias persists despite the receipt of trial arguments/evidence, admonitions to disregard the publicity information, and jury deliberation. . . . commentary by individuals with status/expertise

(e.g., police, attorneys, and judges) in media coverage create more potential for biased jurors." Ex. D to Defendant's Objection to Media's Mot. to Vacate the Amended Nondissemination Order.

III. ISSUES PRESENTED

The Associated Press argues that the Amended Nondissemination Order restrains their "constitutional right [to gather news] before it can be exercised" in violation of the First Amendment. Mem. in Supp. of Mot. to Vacate the Amended Nondissemination Order at 15. The Associated Press asserts that their First Amendment rights are being violated because "[t]he media does not make the news; it reports the news." *Id.* at 17. The argument continues that "[i]f a court orders an individual not to provide information to the media, then the media has nothing to report." *Id.* "Intervenors' speech is thus being restrained before they can even speak." *Id.* at 15. Thus, The Associated Press alleges that the Amended Nondissemination Order is a prior restraint on the media and does not survive the strict scrutiny test applied to prior restraints on the press.

This decision addresses the following: (1) the obligation of the Court to ensure that Kohberger's right to a fair trial is not being jeopardized by prejudicial extrajudicial statements; (2) the Court's authority to impose restrictions on the speech of those attorneys and their agents involved in this case; and (3) the standard applied to reviewing constitutional challenges by the media to nondissemination orders aimed at trial participants, especially lawyers. Finally, this decision applies the law to the facts of this case in addressing The Associated Press's argument that the Amended Nondissemination Order violates their First Amendment rights.

IV. LAW

In 1966, the U.S. Supreme Court recognized a defendant's right to "a trial by an impartial jury free from outside influences" in the face of "massive, pervasive and prejudicial publicity." *Sheppard v. Maxwell*, 384 U.S. 333, 335, 362, 86 S. Ct. 1507, 1508, 1522, 16 L. Ed. 2d 600 (1966).

While recognizing that "[a] responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field," *id.* at 350, 86 S. Ct. at 1515, the Court chastised the trial judge for not taking "strong measures" to ensure Sheppard's right to a fair trial. *Id.* at 362, 86 S. Ct. at 1522. In *Sheppard*, there was not a nondissemination order on trial participants or any "gag order" on the media. Notably, in overturning Sheppard's conviction, the Court listed several things that the trial court should have done: 1) "the judge should have adopted stricter rules governing the use of the courtroom by newsmen," and "should have more closely regulated the conduct of newsmen in the courtroom"; 2) "the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony"; 3) "the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion"; 4) "the judge should have at least warned the newspapers to check the accuracy of their accounts"; and 5) "it is obvious that the judge should have further sought to alleviate [inaccurate, prejudicial news] by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers." *Id.* at 358-360, 86 S. Ct. at 1520-1521.

In summary, the Court stated that "the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case." *Id.* at 361, 86 S. Ct. at 1521. "*In this manner, Sheppard's right to a trial free from outside influence would have been given added protection*

without corresponding curtailment of the news media. Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom – not pieced together from extrajudicial statements." *Id.* at 362, 86 S. Ct. at 1522 (emphasis added).

In addressing the tension between the First Amendment and the Sixth Amendment, the Court stated:

> From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, *the trial courts must take strong measures to ensure that the balance is never weighed against the accused.* And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; *the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.*

Id. at 362–63, 86 S. Ct. 1507 at 1522 (emphasis added).

The Associated Press relies heavily on *CBS Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975) in support of their position that the Amended Nondissemination Order is unconstitutional and must be vacated. In that case, the appellate court issued a decision addressing a nondissemination order entered in a civil case. There, the nondissemination order prohibited "all counsel and Court

personnel, all parties concerned with this litigation, whether plaintiffs or defendants, their relatives, close friends, and associates" from "discussing in any manner whatsoever these cases with members of the news media or the public." *Id.* at 236. The press challenged the order as violating the press's rights under the First Amendment.

The court held as follows:

> before a trial [court] can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is 'a serious and imminent threat to the administration of justice.' *Craig v. Harney*, 331 U.S. 367, 373, 67 S.Ct. 1249, 1253, 91 L.Ed. 1546 (1947). Applying either the standard that the speech must create a "clear and present danger," *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962), of a serious and imminent threat to the administration of justice, or the lesser standard that there must be a "reasonable likelihood," *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969), of a serious and imminent threat to the administration of justice, we hold that the trial court's order is constitutionally impermissible.

Id. at 239.

The court reasoned that the order issued by the trial court constituted a prior direct restraint upon freedom of expression. "In sweeping terms it seals the lips of 'all parties concerned with this litigation, whether plaintiffs or defendants, their relatives, close friends and associates . . . from discussing in any manner whatsoever these cases with members of the news media or the public.' Although the news media are not directly enjoined from discussing the case, it is apparent that significant and meaningful sources of information concerning the case are effectively removed from them and their representatives. To that extent their protected right to obtain information concerning the trial is curtailed and impaired." *Id.* The court continued, "[w]e find the order to be an extreme example of a prior restraint upon freedom of speech and expression and one that cannot escape the proscriptions of the First Amendment, unless it is shown to have been required to obviate serious and imminent threats to the fairness and integrity of the trial." *Id.* at 240.

In this Court's view, the *Young* court's reliance on the high standard applied in *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947) and *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962) is misplaced. Both of those cases dealt with contempt proceedings and did not address nondissemination orders restricting extrajudicial statements by specific persons to preserve the right to a fair trial.

In *Harney*, three media personal were found guilty of criminal contempt and sentenced to three days in jail for publications during an ongoing civil case in which they criticized the presiding judge. The judge found the news reports were designed to falsely represent to the public the nature of the proceedings and to prejudice and influence the court to grant a new trial. In reversing the decision of the trial court, the Court held that "[g]iving the editorial all the vehemence which the court below found in it we fail to see how it could in any realistic sense create an imminent and serious threat to the ability of the court to give fair consideration to the motion for rehearing." *Harney*, 331 U.S. at 378, 67 S. Ct. at 1256. This Court agrees that any attempt by a court to hold the media in contempt, and even jail them, for publications critical of the court should be viewed under the strictest scrutiny. However, the facts in *Harney* have no similarity to the restriction on the speech of trial participants in this case or in the *Young* case.

In *Wood*, a grand jury was impaneled and instructed by the judge to investigate a voting issue within the county. While the grand jury was in session, the elected sheriff issued a public statement criticizing the judge for singling out the African American community and essentially attempting, through the judicial process, to intimidate and silence the African American vote. The sheriff also wrote a letter to the grand jury "implying that the court's charge was false" among other things. A month later the sheriff was cited for contempt. Following a trial, where the court failed to make any findings or articulate any reasoning for its decision, the sheriff was found guilty of

contempt and sentenced to 20 days in jail. In overturning the contempt conviction, the Supreme Court held that, as an elected official, the sheriff "had the right to enter the field of political controversy, particularly where his political life was at stake. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matter of current public importance. Our examination of the content of petitioner's statements and circumstances under which they were published leads us the [sic] conclude that they did not present a danger to the administration of justice that should vitiate his freedom to express his opinions in the manner chosen." *Wood*, 370 U.S. at 394–95, 82 S. Ct. at 1375. Again, the facts in *Wood* have no similarities to the Amended Nondissemination Order in this case or the facts in *Young*.

Additionally, the *Young* court's finding that "before a trial [court] can limit *defendants' and their attorneys'* exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is 'a serious and imminent threat to the administration of justice'" is at odds with the Supreme Court's later holding in *Gentile* that will be discussed below. *But see Levine v. U.S. Dist. Ct. for Cent. Dist. of California*, 764 F.2d 590, 595 (9th Cir. 1985) (The trial court imposed a restraining order prohibiting attorneys involved in the case from communicating with the media regarding the merits of the case. In reviewing the restraining order, the 9th Circuit applied strict scrutiny.). Regardless of the standard applied to a constitutional challenge by a lawyer restricted by a nondissemination order, a less demanding standard is applied when the media challenges such an order. *Radio & Television News Ass'n of S. California v. U.S. Dist. Ct. for Cent. Dist. of California*, 781 F.2d 1443, 1444 (9th Cir. 1986).

In 1976, the U.S. Supreme Court again addressed the tensions between the First Amendment and the Sixth Amendment in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S. Ct.

2791, 49 L. Ed. 2d 683 (1976). Even then, in 1976, the Court acknowledged that "[t]he speed of communication and the pervasiveness of the modern news media have exacerbated" the tension between the First Amendment and the Sixth Amendment. *Nebraska Press*, 427 U.S. at 548, 96 S. Ct. at 2798. Unlike in this case, *Nebraska Press* dealt with a restraint on the media's ability to publish or broadcast specific information (i.e., a restraint on freedom of the press) and not a restraint on freedom of speech. The Court recognized that "when the case is a 'sensational' one tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment." *Id.* at 551, 96 S. Ct. at 2799. The Court noted that a prior restraint on speech is "most serious and the least tolerable infringement on the First Amendment rights," while also acknowledging that when the death penalty is on the table, "it is not requiring too much that [a defendant] be tried in an atmosphere undisturbed by so huge a wave of public passion." *Id.* at 552, 96 S. Ct. at 2799 (quoting *Irvin v. Dowd*, 366 U.S. 717, 728, 81 S.Ct. 1639, 1645, 6 L.Ed.2d 751 (1961)). The Court stated that "*[i]t is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors.*" *Id.* at 560, 96 S. Ct. at 2803 (emphasis added).

In a footnote in the concurring opinion, authored by Justice Brennan, the following was noted:

> A significant component of prejudicial pretrial publicity may be traced to public commentary on pending cases by *court personnel, law enforcement officials, and the attorneys involved in the case*. In Sheppard v. Maxwell, supra, we observed that "the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters." 384 U.S., at 361, 86 S.Ct., at 1521. See also Id., at 360, 86 S.Ct., at 1521 ("(T)he judge should have further sought to alleviate this problem (of publicity that misrepresented the trial testimony) by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers"); Id., at 359, 363,

> 86 S.Ct., at 1521, 1522. *As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases*, see In re Sawyer, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959), and to impose suitable limitations whose transgression could result in disciplinary proceedings. Cf. New York Times Co. v. United States, 403 U.S., at 728-730, 91 S.Ct., at 2148-2149 (Stewart, J., joined by White J., concurring). *Similarly, in most cases courts would have ample power to control such actions by law enforcement personnel.*

Id. at 601, footnote 27, 96 S. Ct. at 2823, footnote 27 (emphases added).

Sheppard and *Nebraska Press* leave no doubt that, in appropriate cases, the Court has the authority to regulate the speech of attorneys involved in a case as well as their agents, such as law enforcement, to prevent prejudicial pretrial statements to preserve the right to fair trial by an impartial jury.

In 1985 and 1986, the 9th Circuit Court of Appeals addressed a situation strikingly similar to the one now before this Court in two separate opinions. As way of background, Defendant Richard Miller, a former FBI agent, was charged with espionage. The case received extensive local and national media coverage. After attorneys for both the prosecution and the defense engaged in extrajudicial statements to the media, the trial court entered an order prohibiting "all attorneys in [the] case, . . . [from] making any statements to members of the news media concerning any aspect of [the] case that bears upon the merits to be resolved by the jury." *Levine v. U.S. Dist. Ct. for Cent. Dist. of California*, 764 F.2d 590, 593 (9th Cir. 1985).

In *Levine* the court addressed a challenge to the nondissemination order brought by defense counsel. The court framed the issue as addressing "the clash between the basic and fundamental right to a fair criminal jury trial and the first amendment right of attorneys to engage in free speech." *Id.* at 591. In reviewing the restraining order, the 9th Circuit noted that "the district court's order

applies only to trial participants. The Supreme Court has suggested that *it is appropriate to impose greater restrictions on the free speech rights of trial participants than on the rights of nonparticipants. The case for restraints on trial participants is especially strong with respect to attorneys.*" *Id.* at 595 (internal citations omitted). The court nevertheless applied strict scrutiny. "Accordingly, the district court's order may be upheld only if the government establishes that: (1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest, (2) the order is narrowly drawn, and (3) less restrictive alternatives are not available." *Id.* at 596 (internal citations omitted). The court concluded that the speech of the lawyers did pose a serious and imminent threat to the administration of justice and that the trial court's choice of remedy was appropriate. However, the court found that the nondissemination order was overbroad and directed the district court as follows:

> It is apparent that many statements that bear "upon the merits to be resolved by the jury" present no danger to the administration of justice. After the filing of this opinion, the district court must determine which types of extrajudicial statements pose a serious and imminent threat to the administration of justice in this case. The district court then must fashion an order specifying the proscribed types of statements. With regard to statements by the prosecution, it would be appropriate for the district court to order the government to observe the self-imposed limitations set forth in 28 C.F.R. § 50.2(b) (1984). With regard to statements by the defense, it would be appropriate to proscribe statements relating to one or more of the following subjects:
>
> (1) The character, credibility, or reputation of a party;
> (2) The identity of a witness or the expected testimony of a party or a witness;
> (3) The contents of any pretrial confession, admission, or statement given by a defendant or that person's refusal or failure to make a statement;
> (4) The identity or nature of physical evidence expected to be presented or the absence of such physical evidence;
> (5) The strengths or weaknesses of the case of either party; and
> (6) Any other information the lawyer knows or reasonably should know is likely to be inadmissible as evidence and would create a substantial risk of prejudice if disclosed.

Id. at 599 (citing Model Rules of Professional Conduct, Rule 3.6 (1983); ABA Standards for Criminal Justice Standard 8-1.1 (1982); Model Code of Professional Responsibility DR 7-107 (1979)).

The case then went back to the trial court. The trial court amended its restraining order to adopt the six categories of speech by lawyers specified by the 9th Circuit as appropriate to proscribe. The Radio and Television News Association then filed for a writ of mandamus with the 9th Circuit arguing that the restraining order, even as amended, posed "an unconstitutional prior restraint infringing freedom of the press." *Radio*, 781 F.2d at 1444. The 9th Circuit addressed the media's challenge in *Radio*.

Like here, the media argued that "the order, by effectively denying media access to the trial participants, constitutes an unconstitutional restraint on the media's ability to gather news." *Id.* at 1445. Much of the court's opinion concluding that the trial court's amended restraining order was reasonable and served a legitimate purpose is worth repeating:

> [T]he impact on the media in this case is significantly different from situations where the media is denied access to a criminal trial or is restricted in disseminating any information it obtains. . . .
>
> In contrast, the district court's order in this case is not directed toward the press at all. On the contrary, the media is free to attend all of the trial proceedings before the district court and to report anything that happens. In fact, the press remains free to direct questions at trial counsel. Trial counsel simply may not be free to answer. In sum, the media's right to gather news and disseminate it to the public has not been restrained.
>
> As we noted in *Levine,* the district court's order 'raises a freedom of the press issue that is analytically distinct from the issues that were raised in *Associated Press* and *CBS.*' Rather, the RTNA asserts a first amendment right of full access to trial participants. This assertion is not supported by constitutional case law. *See Pell v. Procunier,* 417 U.S. 817, 829-35, 94 S.Ct. 2800, 2807-11, 41 L.Ed.2d 495 (1974) (in holding that freedom of the press was not infringed by government restrictions on interviews with prison inmates, Court rejected media assertion of 'right of access to the sources of what is regarded as newsworthy information').
>
> The press does enjoy a constitutional interest in access to our criminal courts and criminal justice process. In *Richmond Newspapers,* 448 U.S. 555, 576, 100 S.Ct.

2814, 2827, 65 L.Ed.2d 973 (1980) (plurality), the Supreme Court affirmed the first amendment 'right of access' or 'right to gather information' granted to the press with respect to criminal trials. *However, the Court described that right only as a right to sit, listen, watch, and report.*

In *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 609, 98 S.Ct. 1306, 1318, 55 L.Ed.2d 570 (1978), the Supreme Court held that '[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public.' *See also Branzburg v. Hayes,* 408 U.S. 665, 684, 92 S.Ct. 2646, 2658, 33 L.Ed.2d 626 (1972) (first amendment "does not grant the press a constitutional right of special access to information not available to the public generally."). As with the public, the press has no greater privilege than the right to attend the trial.

In short, the media's 'right to gather information' during a criminal trial is no more than a right to attend the trial and report on their observations. *KPNX Broadcasting Co.,* 678 P.2d at 439-42 (1984) (holding that limitations on the media's ability to interview trial participants do not violate the first amendment)[.]

The media is granted access to the same information, but nothing more, that is available to the public. The district court having determined that the free speech rights of the trial counsel must be restrained, the media has no greater right than the public to hear that speech.

The media never has any guarantee of or "right" to interview counsel in a criminal trial. Trial counsel are, of course, free to refuse interviews, whether or not restrained by court order. If such an individual refuses an interview, the media has no recourse to relief based upon the first amendment.

. . .

In sum, the media's collateral interest in interviewing trial participants is outside the scope of protection offered by the first amendment. The media's desire to obtain access to certain sources of information, that otherwise might be available, is not a sufficient interest to establish an infringement of freedom of the press in this case.

Consequently, *we are not required to consider whether the district court's amended restraining order can withstand strict scrutiny as a prior restraint on constitutional freedom of the press.*

We need only 'examine whether the restrictions imposed are reasonable and whether the interests [of the government] override the very limited incidental effects of the [order] on First Amendment rights.' The restrictions imposed also must not serve an illegitimate purpose.

The district court found that restrictions on the extrajudicial statements of trial counsel to the press were necessary to reduce prejudicial publicity. We cannot say it was unreasonable for the district court to conclude that statements by trial counsel on matters bearing on the merits of the trial might impair the fairness of the trial or threaten the integrity of the judicial process. Nor is there any indication in the record that the district court's order was intended to conceal the workings of the criminal justice system. The press remains free to attend the trial and scrutinize the fairness of the proceedings. On the basis of this limited standard of review, the

district court's amended restraining order is "reasonable" and serves a legitimate purpose.

Id. at 1446-1448 (some internal citations omitted) (emphasis added).

Radio makes clear that strict scrutiny does not apply to challenges by the press of nondissemination orders that do not restrain the media, but instead restrain trial participants, as in this case. Instead, the standard to be applied is "whether the restrictions imposed are reasonable and whether the interests [of the government] override the very limited incidental effects of the [order] on First Amendment rights," and whether the restrictions imposed serve a legitimate purpose. *Id.* at 1447.

As expressly recognized by the Supreme Court in 1991, "the speech of those participating before the courts [can] be limited." *Gentile*, 501 U.S. at 1072, 111 S. Ct. at 2743. In *Gentile*, Gentile, a defense attorney, held a press conference after his client was indicted. Gentile proclaimed that the evidence at trial would prove his client was innocent and that "crooked cops" were the ones responsible for stealing the drugs and money at issue. Gentile also commented on other aspects of the defense's case. Six months later Gentile's client was acquitted. Thereafter, the Nevada State Bar filed a complaint against Gentile alleging that he violated Nevada Supreme Court Rule 117, which prohibited a lawyer from making extrajudicial statements to the press that had a substantial likelihood a materially prejudicing a trial. However, Rule 117 expressly allowed a lawyer to "state without elaboration . . . the general nature of the . . . defense." The State Bar's disciplinary board found Gentile in violation of Rule 117 and recommended that he be reprimanded. Ultimately, the Supreme Court held that Nevada Supreme Court Rules, Rule 117, as applied to the facts of Gentile's case, was unconstitutionally vague. The Court noted that the "safe harbor provision" misled Gentile into thinking that he could make the statements he made without discipline.

Despite the holding that Rule 117 was unconstitutionally void for vagueness as applied, the Court continued to recognize "*that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), and the cases which preceded it. Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct." *Id.* at 1074, 111 S. Ct. at 2744 (emphasis added).

> 'As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice.' Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative.

Id. at 1074, 111 S. Ct. at 2744–45 (quoting *Nebraska Press*, 427 U.S. at 601, n. 27, 96 S. Ct. at 2823, n. 27.).

The key takeaways from *Levine* and *Gentile* are that a court can, to protect the right to a fair trial, prohibit lawyers involved in a case from making extrajudicial statements to the press so long as the regulation is not overbroad, is clear, and provides notice of what is prohibited. While the *Levine* court applied strict scrutiny, *Gentile* suggests that "a less demanding standard" applies to restrictions on the speech of lawyers participating in pending cases.

The ability of a court to restrict the speech of a lawyer participating in a case is rooted in a lawyer's status as "an officer of the legal system and a public citizen having special responsibility for the quality of justice." I.R.P.C., Preamble: A Lawyer's Responsibilities. "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to

challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process." *Id.* As an "officer of the court," a lawyer has a duty "to preserve the integrity of the legal system's search for the truth while maintaining a professional, courteous and civil attitude toward all persons involved in the process." *Id.*

Lawyers licensed to practice law in Idaho are governed by the Idaho Rules of Professional Conduct. Rule 3.6(a) specifically states that "[a] lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Comment 5 to Rule 3.6 gives specific examples of subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a criminal matter or any other proceeding that could result in incarceration:

1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
2) In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
3) The performance or results of any examination or test or the refusal or failure of a person to submit to any examination or test, or the identity or nature of physical evidence expected to be presented;
4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
5) Information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
6) The fact that a defendant has been charged with a crime, unless there is included therein a statement explain that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Rule 3.6 also expressly allows lawyers participating in a matter to state the following:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
(2) information contained in a public record;
(3) that an investigation of a matter is in progress;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case, in addition to subparagraphs (1) through (6);
    (i) the identity, residence, occupation and family status of the accused;
    (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
    (iii) the fact, time and place of arrest; and
    (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Comment 1 to Rule 3.6 recognizes the difficulty in striking "a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved." Similarly, comment 6 to Rule 3.6 states that "[c]riminal jury trials will be most sensitive to extrajudicial speech."

The American Bar Association has also promulgated standards for conduct of attorneys. Standard 8-2.1 governs the conduct of lawyers participating in a criminal matter. Standard 8-2.1 reads:

(a) Subject to any additional limitations imposed by local or professional rules, during the pendency of a criminal matter, a lawyer participating in that criminal matter should not make, cause to be made, condone or authorize the making of a public extrajudicial statement if the lawyer knows or reasonably should know that it will have a substantial likelihood of:
    (i) influencing the outcome of that or any related criminal trial or prejudicing the jury venire, even if an untainted panel ultimately can be found;

(ii) unnecessarily heightening public condemnation of a defendant or a person or entity who has been publicly identified in the context of a criminal investigation, or of a witness or victim; or

(iii) undermining the public's respect for the judicial process.

ABA STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND PUBLIC DISCOURSE (4th ed. 2016).

V. ANALYSIS

While "[o]nly the occasional case presents a danger of prejudice from pretrial publicity," *Gentile*, 501 U.S. at 1054, 111 S. Ct. at 2734, this case, as recognized by the Idaho Supreme Court, "has drawn widespread publicity, garnering worldwide media attention and much speculation" and, therefore, pretrial publicity does present a real danger of prejudice. *In re Petition for Writ of Mandamus or Writ of Prohibition*, No. 50482, 2023 WL 3050829, at *1 (Idaho Apr. 24, 2023). "Recognizing the high-profile nature of the case and the extensive coverage it has received, along with the need to minimize possible pretrial prejudice," the parties stipulated to entry of the original Nondissemination Order and the Amended Nondissemination Order. *Id.* As was noted by District Judge Steven W. Boyce in his Memorandum Decision and Order Prohibiting Video and Photographic Coverage in the case of *State of Idaho v. Lori Norene Vallow aka Lori Norene Vallow Daybell*, CR22-21-1624, "[a]greement between the State and Defense on any issue in a capital case is rare, further confirming to the Court the legitimacy and level of concern counsel have raised." The same is true in this instance.

1. This Court has an obligation to take measures to ensure Kohberger's right to a fair trial including proscribing potentially prejudicial extrajudicial statements by any lawyer participating in the case.

"Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Gentile,* 501 U.S. at 1075, 111 S. Ct. at 2745. This Court also recognizes the

important role the press plays in the judicial system. "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field." *Sheppard, 384 U.S. at* 350, 86 S. Ct. at 1515. However, with "the advent of the internet and social media," *In re Petition for Writ of Mandamus or Writ of Prohibition*, No. 50482, 2023 WL 3050829, at *11 (Idaho Apr. 24, 2023), the tensions between the First Amendment and the Sixth Amendment continue to increase. As was outlined in *Sheppard*, trial courts "must take strong measures to ensure that the balance is never weighed against the accused." *Sheppard*, 384 U.S. at 362, 86 S. Ct. at 1522.

In this case, the Amended Nondissemination Order – in place by the parties' stipulation to protect Kohberger's right to a fair trial – is not directed toward the press at all. Like in *Radio & Television News*, the Amended Nondissemination Order is aimed at attorneys participating in the case and their agents such as law enforcement. The U.S. Supreme Court has made clear that a trial court can "proscribe extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters." *Sheppard*, 384 U.S. at 361, 86 S. Ct. at 1521; *see also Nebraska Press*, 427 U.S. at 601, n. 27, 96 S. Ct. at 2823, n. 27. By doing so, the trial court can help to ensure a "*trial free from outside influence . . . without corresponding curtailment of the news media.*" *Sheppard*, 384 U.S. at 362, 86 S. Ct. at 1522 (emphasis added). Such restraining orders raise "a freedom of the press issue that is analytically distinct" from prior restraints on the media. *Radio*, 781 F.2d at 1446.

Nondissemination orders that restrain "*the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976)." *Gentile*, 501 U.S. at 1074, 111 S. Ct. at 2744 (emphasis added). Lawyers

"have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Id.* In a case as high profile as this one, a nondissemination order echoing the responsibilities of a lawyer found in the Idaho Rules of Professional Conduct does not violate the attorney's First Amendment rights.

The parties have a legitimate concern about information being disseminated to the media by way of attorneys participating in the case. Obviously, the State and the defense are privy to confidential information, but so too are attorneys representing a victim's family or a witness. As noted by the Court in *Gentile*, "[b]ecause lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative." *Gentile*, 501 U.S. at 1074, 111 S. Ct. at 2744–45 (quoting *Nebraska Press*, 427 U.S. at 601, n. 27, 96 S. Ct. at 2823, n. 27.). This concern was echoed by defense expert Dr. El-Alayli who opined that "commentary by individuals with status/expertise (e.g., police, attorneys, and judges) in media coverage create more potential for biased jurors." Ex. D to Defendant's Objection to Media's Mot. to Vacate the Amended Nondissemination Order.

"Membership in the bar is a privilege burdened with conditions." *Gentile*, 501 U.S. at 1066, 111 S. Ct. at 2740. Requiring attorneys involved in the case to comply with I.R.P.C 3.6 as echoed in the Revised Amended Nondissemination Order is not unreasonable and does not unconstitutionally impinge upon the First Amendment. This Court has an obligation to help protect Kohberger's constitutional right to a fair trial, and this is just one measure that the U.S. Supreme Court has endorsed, in appropriate cases, to help ensure the Sixth Amendment is not violated. Thus, this Court has the authority to restrain prejudicial speech by attorneys participating in the case.

2. Strict scrutiny does not apply to the media's constitutional challenge of the Amended Nondissemination Order.

When the media challenges an order restraining the speech of lawyers participating in a pending case, the court "need only 'examine whether the restrictions imposed are reasonable and whether the interests [of the government] override the very limited incidental effects of the [order] on First Amendment rights.' The restrictions imposed also must not serve an illegitimate purpose." *Radio*, 781 F.2d at 1447. This is not strict scrutiny. The rationale for a lower standard of constitutional review is because "the impact on the media . . . is significantly different from situations where the media is denied access to a criminal trial or is restricted in disseminating any information it obtains." *Id.* at 1446. Strict scrutiny would apply in such a case.

While the press does have a "right of access" or "right to gather information" with respect to criminal trials, that right is described only as a right to sit, listen, watch, and report. *Id.* at 1446. "The media's desire to obtain access to certain sources of information, that otherwise might be available, is not a sufficient interest to establish an infringement of freedom of the press in this case." *Id.* at 1447. As such, strict scrutiny does not apply.

3. The restrictions on the extrajudicial statements of counsel and their agents to the press are necessary to reduce prejudicial publicity and protect Kohberger's right to a fair trial.

The evidence presented by the defense shows that 1) media coverage in this case is rampant and ongoing; 2) at least some, if not most, of the news coverage is prejudicial to Kohberger; 3) a portion of the statements being made to the media are coming from an attorney participating in the case; 4) "vacating the non-dissemination order would increase the potential for bias among prospective jurors, both initially and throughout the trial;" and 5) "anti-defendant pretrial publicity increases the probably of guilty verdicts, and that this bias persists despite the

receipt of trial arguments/evidence, admonitions to disregard the publicity information, and jury deliberation. . . . commentary by individuals with status/expertise (e.g., police, attorneys, and judges) in media coverage create more potential for biased jurors." Ex. D to Defendant's Objection to Media's Mot. to Vacate the Amended Nondissemination Order.

As currently drafted, the Amended Nondissemination Order is arguably overbroad and vague in some areas. However, it does serve a legitimate purpose, and restricting the speech of attorneys participating in the case is reasonable. The very limited incidental effects of the speech restrictions on the media's First Amendment rights are overridden by the compelling interest in ensuring a fair trial by an impartial jury. Statements by counsel participating in the case on matters bearing on the merits of the case might impair the fairness of the trial or threaten the integrity of the judicial process. The Amended Nondissemination Order is not intended to conceal the workings of the criminal justice system from the public. The media is not restrained in any way and is free to attend hearings and report on what they observe and hear. For these reasons, the media's request that the Amended Nondissemination Order be vacated is denied.

However, because the Amended Nondissemination Order is arguably overbroad and vague, the Court will issue a Revised Amended Nondissemination Order to further clarify and narrow what speech by lawyers participating in the case and their agents is allowed and prohibited by giving specific examples. The Revised Amended Nondissemination Order is narrowly drawn to prohibit only extrajudicial statements that have a "substantial likelihood of materially prejudicing" this case. The restriction on attorneys' speech applies equally to all attorneys participating in the pending case and will restrict the attorneys' comments only until after the trial and any sentencing proceedings. The regulation of attorneys' speech meets the

"less demanding standard" set forth in *Gentile* as well as strict scrutiny. The restrictions are necessary to protect Kohberger's right to a fair trial and the fair administration of justice.

As to the media's constitutional challenge, the restrictions imposed on attorneys participating in the case and their agents are not only reasonable and legitimate considering the high profile nature of this case, but also meet the strict scrutiny standard.

VI. CONCLUSION

The Associated Press's request that the Amended Nondissemination Order be vacated is denied. However, the Revised Amended Nondissemination Order will replace the Amended Nondissemination Order and will clarify and narrow the restrictions on speech and the individuals whose speech is restrained.

SO ORDERED this 23rd day of June 2023.

John C. Judge
District Judge

CERTIFICATE OF SERVICE

I certify that copies of the ORDER DENYING THE ASSOCIATED PRESS'S MOTION TO VACATE THE AMENDED NONDISSEMINATION ORDER were delivered by email to the following:

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CLERK OF THE COURT

By:_____
Deputy Clerk