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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

**Reply 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.

The Amended Nondissemination Order dated January 18, 2023 (“Gag Order”) prohibits any extrajudicial statement, written or oral, concerning this case. That prohibition is not justified by a concern for prejudicial statements, as a prohibition on any statement includes those statements that are exculpatory, neutral, or irrelevant to Mr. Kohberger. That prohibition also makes no attempt at any tailoring, let alone narrow tailoring. The State and Mr. Kohberger appear to be concerned with the *amount* of publicity around this case. But publicity alone is not prejudicial. And the Gag Order does nothing to limit publicity. The Gag Order has been around in its current and prior form for nearly five months. Mr. Kohberger was arrested on December 30, 2022, the initial gag order was entered January 3, 2023, and Mr. Kohberger’s initial appearance in Idaho was January 5, 2023. Given that timeline, the evidence that Mr. Kohberger now tries to submit shows, if anything, that the Gag Order has done nothing to curb the public’s legitimate interest in this case. But the Gag Order has prevented responsible individuals from sharing quality information, creating a vacuum filled by rampant speculation that can only hurt Mr. Kohberger or stoke conspiracies about the criminal justice system. The Gag Order does not survive a proper balancing of the Sixth Amendment and the First Amendment, thus the Court should vacate the Gag Order.

A. The Court should not consider the new evidence submitted by Mr. Kohberger.

In their opposition briefs, the State and Mr. Kohberger acknowledge that they submitted

no evidence to the Court when they requested a gag order. Mr. Kohberger tries to remedy that shortcoming by submitting a highly selective sampling of news coverage that is not representative of Intervenor's coverage and two expert reports with strong indications of unreliability. Intervenor's Motion to Vacate addresses the Court's decision to enter the Gag Order based on the record before it when the order was issued. This is not Mr. Kohberger's motion, and he should not be allowed to upend the record nearly five months after the Gag Order was entered, over a month after Intervenor filed their motion, and a mere three days before the hearing. He had plenty of time to submit evidence previously, as he has clearly been working with his putative experts for some time. He chose not to do so.

Mr. Kohberger's last-minute submission of putative expert analysis is particularly inappropriate, as there are disclosure rules for such evidence designed to provide the parties and the Court with the opportunity to vet whether the analysis is sufficiently reliable to consider. Idaho R. Civ. P. 26(b)(4)(A); Idaho R. Crim. P. 16(b)(7) & (c)(4). Given the unique posture of this case—by direction of the Idaho Supreme Court, Intervenor seeks to intervene for the limited purpose of challenging the Gag Order—Intervenor is not truly a party to this case and thus lacks discovery tools needed to fully invoke Civil Rule 26's and Criminal Rule 16's protections. But nonetheless, those rules exist so that there is sufficient time and data available to evaluate a putative expert's experience and methodology—perhaps with the assistance of a rebuttal expert if the subject matter is sufficiently complicated or technical—with the ultimate goal of making sure that only reliable expert testimony makes its way into the record and is properly relied on or rejected by the Court in reaching a decision.

Mr. Kohberger should not be allowed to sidestep those safeguards, particularly when even with short notice his experts' analyses have strong indicators of unreliability. Respectfully,

Ms. Saucier does not appear qualified. She works in what appears to be largely a business development or sales position. Nor does her analysis appear reliable, as she does not provide the raw underlying data or methodology for her many graphics and analysis.

For her part, Dr. El-Alayli, while seemingly well educated in psychology, appears to be opining well outside her area of expertise. Her report cites some articles that based on their titles appear to relate to potential jury bias (indicating experts exist on that topic), but a preliminary review of Dr. El-Alayli's publications suggest she does not work on or study that topic. None of her articles appear to relate to criminal trials or jury bias, and her five most recent articles are titled:

- “Dancing Backwards in High Heels: Female Professors Experience More Work Demands and Special Favor Requests, Particularly from Academically Entitled Students”;
- “Impressions of Businesses with Language Errors in Print Advertising: Do Spelling and Grammar Influence the Inclination to use a Business?”;
- “Grandiose Narcissists’ Public versus Private Attributions for a Collaborative Success”;
- “Who has the better personality, me or my partner? Self-Enhancement Bias in Relationships and its Potential Consequences”; and
- “Getting Aesthetic Chills from Music: The Connection between Openness to Experience and Frisson.”

Mr. Kohberger's Objection to Media's Motion to Vacate the Amended Nondissemination Order (“Mr. Kohberger's Objection”), Ex. E.

At bottom, Mr. Kohberger should not be allowed to submit untimely evidence, particularly expert evidence without all the typical disclosures and with strong indications of unreliability.

B. Mr. Kohberger's evidence, if anything, favors vacating the Gag Order.

Even if the Court is inclined to consider Mr. Kohberger's evidence, it favors vacating the Gag Order. As they have said before, Intervenor's do not dispute that there has been, and will continue to be, large amounts of public interest and publicity surrounding Mr. Kohberger's case. Nor do Intervenor's dispute that as a general proposition, certain speech, at times, can risk prejudicing a jury such that Sixth Amendment interests outweigh First Amendment interests.

But Mr. Kohberger's evidence largely details coverage dated *after* the Gag Order, which makes sense given that a gag order has been in place since virtually the inception of this case. The evidence thus shows not what the Gag Order has accomplished, but what the Gag Order has *failed* to do. The Gag Order, which in its current and prior form have been in place since three days after Mr. Kohberger was arrested, has not reduced the amount of public interest in this case. For that reason it also has not reduced the amount of publicity surrounding the case.

What the Gag Order has done is reduce the amount of quality information provided by responsible individuals in a reasonable and dispassionate manner. The absence of that information does not curb the public's interest; it creates a vacuum for bloggers, social media users, internet sleuths, and less ethical media outlets to publish rampant speculation that the public will consume when there is no better information available. That speculation, which at times can be inflammatory, can potentially saturate the internet, which may make it *more* difficult to empanel an unbiased jury. That is, the Gag Order—which prohibits any comments concerning the case, including those comments that could help Mr. Kohberger—actually works against Mr. Kohberger's Sixth Amendment interests. And in the process, the Gag Order reduces the public's ability to evaluate how the criminal justice system functions in the areas surrounding Moscow, and how public institutions like local police departments, prosecutors' offices, and public defenders' offices are performing—all information of great interest to the public when deciding

issues like whether their communities are safe, which personnel should fill elected roles, and whether budgets should be increased or decreased.

C. The Gag Order is vague, overbroad, unduly restrictive, and not narrowly drawn.

The Idaho Supreme Court just recently reminded the litigants in this matter that it “has long respected the media’s role in our constitutional republic” and that “[t]he underlying rationale of the First Amendment protection of freedom of the press is clear . . . the public must know the truth in order to make value judgments [and] [t]he only reliable source of that truth is a ‘press’ . . . which is free to publish that truth without government censorship. We cannot accept the premise that the public’s right to know the truth is somehow enhanced by prohibiting the disclosure of truth in the courts of the public.” *In re Petition for Writ of Mandamus or Writ of Prohibition*, No. 50482, 2023 WL 3050829, at *10 (Idaho Apr. 24, 2023) (citation omitted). The rhetoric in Mr. Kohberger’s objection—which ignores the distinction between media outlets at large and responsible national and local members of Intervenor’s coalition like the Idaho Press Club, the Washington State Association of Broadcasters, the Idaho Statesman, the Associated Press, and the New York Times—unfortunately does not share the level of respect, let alone civility, expressed by the Idaho Supreme Court.

But behind Mr. Kohberger’s bluster lie some striking admissions. First, he says “the Idaho Supreme Court has held that courts have the inherent power to sanction attorney misconduct. No initial order reminding parties of what the rules are is necessary for this Court to punish misconduct Even without the Order, the magistrate would have been able to sanction parties for violating those rules.” Mr. Kohberger’s Objection at pp. 7–8. That is precisely Intervenor’s point. The Idaho Rules of Professional Conduct already regulate the topics of speech that “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” I.R.P.C. 3.6(a). And as Mr. Kohberger says, either this Court, the Idaho State Bar, or both can discipline violations of

that rule. Vacating the Gag Order will not change that fact. So there must be a factual and legal justification for a gag order that prohibits speech from more people and on more topics, including those topics that do *not* pose a substantial likelihood of materially prejudicing these proceedings.

Mr. Kohberger's next admission is that the required factual presentation did not occur, as he says "[t]his Court *now*"—five months later—"has the opportunity to make a factual record." Mr. Kohberger's Objection at p. 12 (emphasis added). Mr. Kohberger's proposed factual record is untimely, and it is inappropriate and unpersuasive for the reasons already provided.

And finally there is Mr. Kohberger's admission that the Idaho Supreme Court "found that a vague, overbroad, unduly restrictive or not narrowly drawn nondissemination order would be unconstitutional." Mr. Kohberger's Objection at p. 4. The State interprets the Idaho Supreme Court's decision the same way. The State's Response to Associated Press' Motion to Intervene and Motion to Vacate the Amended Nondissemination Order ("State's Opposition") at p. 1 ("[I]t is now this Court's prerogative to determine . . . whether the Order is vague, overbroad, unduly restrictive, or not narrowly drawn."). That, again, is precisely Intervenors' point. Mr. Kohberger's argument that a gag order that "possibly appl[ies] to a broad swath of the population," Mr. Kohberger's Objection at p. 4, and that prohibits any comments concerning this case, is not vague, overbroad, unduly restrictive or not narrowly drawn does not pass muster.

As Intervenors have said (and as Mr. Kohberger ignored): *Sheppard, Nebraska Press*, and *Gentile* "acknowledge the propriety of regulating some speech from lawyers and trials participants, [but] they also explain the findings of prejudice and the narrow tailoring that are required before prohibiting speech." Intervenors' Memorandum in Support of Motion to Vacate the Amended Nondissemination Order ("Opening Mem.") at p. 9. Honest legal analysis requires not cherry picking quotes but putting those quotes in the context of the issues presented to the Court, the

factual record before the Court, the Court’s legal reasoning, and ultimately the principles underlying that reasoning. Intervenor did just that with *Sheppard, Nebraska Press*, and *Gentile* in their opening brief. Opening Mem. at pp. 9–14. To be sure, those cases suggest carefully crafted gag orders can be permissible in certain situations. And those cases did not decide whether a gag order restricting speech only by sources of information is constitutional (which, if anything, means any supportive views of such gag orders are nonbinding dicta). But when applying the facts and the law to the issues that were presented in those cases, the Supreme Court announced constitutional principles that apply more broadly, just as Intervenor argued in their opening brief. Boiled down, the key principles are that a prohibition on speech must be (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. Those principles are consistent with prior restraint jurisprudence. They are also consistent with the broader notion that when balancing the First Amendment and the Sixth Amendment, the First Amendment yields if, and only if, the speech at issue would violate the criminal defendant’s Sixth Amendment rights.

Application of Dow Jones & Co., Inc., 842 F.2d 603 (2d Cir. 1988) and *Radio and Television News Association of Southern California v. U.S. District Court for the Central District of California*, 781 F.2d 1443 (9th Cir. 1986) are wrongly decided because they ignore those principles by watering down the competing First Amendment interests and sidestepping prior restraint jurisprudence on a technicality. In practice, a gag order that names only a third party that could provide information to the media is no different than a gag order that names the media because the media does not create news, it reports news provided by third parties. *CBS Inc. v. Young* may be a civil case, but that does not mean it inaccurately described how news coverage works when it recognized that “[a]lthough 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 234, 239 (6th Cir. 1975). Nor is *People v. Sledge*’s similar explanation any less convincing: “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.” 312 Mich. App. 516, 530, 879 N.W.2d 884, 893 (2015).

At bottom, a prohibition on any statement concerning a case is by definition overbroad, unduly restrictive, and not narrowly drawn—the prohibition cannot be any broader. Nor, as the evidence Mr. Kohberger seeks to introduce illustrates, does such a broad prohibition limit publicity generally. It simply ensures that the publicity comes from sources that are less reliable. The Gag Order here is also vague in who it covers, as described by the Idaho Supreme Court and explained in Intervenor’s opening brief.

CONCLUSION

For these reasons and the reasons provided in their opening memorandum and supplemental memorandum, Intervenor’s request that the Court vacate the Gag Order.

DATED: June 8, 2023.

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/s/ Wendy J. Olson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of June 2023, I served a true and correct copy of the within and foregoing upon the following named parties by the method indicated below, and addressed to the following:

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