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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 SHANON GRAY'S REQUEST TO BE EXEMPT FROM THE AMENDED NONDISSEMINATION ORDER AND GRANTING REQUEST THAT THE ORDER BE CLARIFIED**

I. INTRODUCTION

This Order addresses the Motion to Appeal, Amend and/or Clarify Amended Nondissemination Order filed by Shanon Gray ("Gray"), attorney for the Goncalves family. At the outset, the Court would like to make clear that the Amended Nondissemination Order does not restrict the Goncalves family from speaking about the case to the media or anyone else. Instead, the Order restricts attorneys for the parties, attorneys representing victims' families, and attorneys representing witnesses from speaking about the case. Gray's motion asks this Court to exempt him from any regulation on his ability to speak to the media and the public, or at least to clarify the Amended Nondissemination Order.

In deciding the motion, the Court must balance Gray's First Amendment rights against 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." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075, 111 S. Ct. 2720, 2745, 115 L. Ed. 2d 888 (1991). Because "[m]embership in the bar is a privilege burdened with conditions," *id.* at 1066, 111 S. Ct. at 2740, 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.

Gray's request to be exempted from the Amended Nondissemination Order is denied. However, this Court will issue a Revised Amended Nondissemination Order that clarifies what cannot be discussed and what may be discussed. The Revised Amended Nondissemination Order is (1) limited to apply only to speech that is substantially likely to have a materially prejudicial effect on the right to a fair trial; (2) it applies equally to all attorneys participating in the case; (3) it is neutral as to points of view; and (4) it limits Gray's restricted comments only until after the trial and any sentencing proceedings that may take place. The regulation on Gray's speech is narrowly tailored to balance the competing interests of the First Amendment and the Sixth Amendment.

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.

As represented by Gray during the hearing held on June 9, 2023, the Goncalves family retained him to represent them around December 5, 2022. During the hearing, Gray did not dispute representations made that he himself, as well as members of the Goncalves family, had participated in several interviews with the media which, as Gray described, were "critical" of the homicide 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 Gray. 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 *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, including the Goncalves family, 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 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*[1], entered the Amended Nondissemination Order to balance Kohberger'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.

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[1] There is no dispute that the Goncalves family is not a party to this case. Nor is the family's attorney. 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.

On February 3, 2023, Gray filed a Notice of Appearance stating that he "represent[s] the Goncalves Family and [himself] in all pleadings, motions, notices[.]" That same day, Gray filed a Motion to Appeal, Amend and/or Clarify Amended Nondissemination Order along with a Memorandum in Support of Motion.

On February 6, 2023, the Associated Press, *et al.* ("Associated Press" is used to refer to the roughly 27 media entities that were involved in litigation before the Idaho Supreme Court involving the Amended Nondissemination Order in this case, as well as the 20 media entities that are now involved in litigation before this Court to vacate the Amended Nondissemination Order) filed a Petition for Writ of Mandamus or a Writ of Prohibition with the Idaho Supreme Court related to the Amended Nondissemination Order.

On February 8, 2023, the State filed a Memorandum of Points and Authorities Relating to Nondissemination Order and the Affidavit of Latah County Prosecutor William W. Thompson, Jr., stating that "members of the Goncalves family, who are represented by Mr. Shanon Gray, are potential witnesses in this case, including at trial and/or sentencing." On February 9, 2023, Kohberger filed an Objection to Motion to Appeal, Amend and/or Clarify Nondissemination Order.

On February 26, 2023, the magistrate issued a Notice Regarding Hearing Date on Motion to Appeal, Amend, and/or Clarify Amended Nondissemination Order informing the Goncalveses that their motion would be set for hearing after the Idaho Supreme Court issued a decision on the Associated Press's Petition.

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. The magistrate then

set a hearing on the Goncalves' motion for May 25, 2023. Thereafter, on May 2, 2023, the Associated Press filed a Motion to Intervene and a Motion to Vacate the Amended Nondissemination Order. Because of the Associated Press's filings, the magistrate vacated the hearing on the Goncalves' motion set for May 25, 2023, and 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. Gray did not file any additional briefing in support of the Motion to Appeal, Amend and/or Clarify Amended Nondissemination Order. On June 6, 2023, the State filed a concurrence with Kohberger's February 9, 2023, filing.

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 Goncalves family was represented by Gray.

During the hearing, representations were made to the Court that are important to note. First, Gray represented, both in briefing and during the hearing, that "the State . . . has [not] shared any information regarding the case" with himself or his clients, and that the State has not made any attempt to interview his clients. The State denied these allegations, calling them "misrepresentations at best." The State represented that it has shared information with the Goncalves family but must limit the information they share to protect the integrity of the investigation and the State's case. The State also represented that its investigators have attempted to interview members of the Goncalves

family, but that Gray has not allowed the interviews to occur. Both the State and the defense concurred in their positions that Gray has repeatedly issued statements and participated in television interviews that the parties view as a violation of the Amended Nondissemination Order. Gray did not dispute that, despite the Amended Nondissemination Order, he has continued to speak to the media by way of statements and interviews because it is his belief that the Court does not have the authority to impose any regulations on his speech and that Rule 3.6 of the Idaho Rules of Professional Conduct does not apply to him in this case.

III. ISSUES PRESENTED

The Goncalves family's motion raises two distinct issues. First, does the Amended Nondissemination Order prohibit the Goncalves family from speaking to the media or the public about the case? The Amended Nondissemination Order does not apply to the Goncalves family. Also, the Court's Revised Amended Nondissemination Order will not restrict the Goncalves family's speech. However, while the speech of the victims' families is not and will not be restrained by court order, this case is indisputably high-profile and the law requires the case to be tried in a court of law and not in the press or the public. As the U.S. Supreme Court has stated, "[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." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560, 96 S. Ct. 2791, 2803, 49 L. Ed. 2d 683 (1976). The same is true for those participating in a case and privy to confidential information.

The second issue raised in the Goncalves family's motion is whether the Court has the authority to restrict the speech of Gray, an attorney involved in, but not a party to, the case. Further,

this motion argues that the Amended Nondissemination Order violates Gray's First Amendment right to free speech. In fact, the Amended Nondissemination Order does prohibit Gray, an attorney representing a victim's family members who are also potential witnesses, from speaking to the public and the media about the case. Gray argues that "[a]s attorney for one of the Victim's families, [he is] allowed to relay to the media any of the opinions, views, or statements of those family members regarding any part of the case." Mem. in Supp. of Mot. for Appeal and/or Clarification of Amended Nondissemination Order at 4. Gray also argues that he himself is "allowed to comment on the case and other issues surrounding the investigation pursuant to IRPC Rule 3.6." *Id.* In Gray's view, the Court does not have the authority to restrict his First Amendment rights at all because he and his clients are not "parties" to the case.

This decision addresses (1) the obligation of the Court to ensure that Kohberger's right to a fair trial is not jeopardized by prejudicial extrajudicial statements; (2) the Court's authority to impose restrictions on the speech of attorneys and their agents involved in this case; and (3) the standard applied to reviewing a constitutional challenge by a lawyer whose speech has been restrained by a nondissemination order. Finally, this decision will apply the law and rules applicable to attorneys to the facts of this case in addressing Gray's argument that the Amended Nondissemination Order violates his First Amendment right to free speech.

IV. LAW

To begin, this Court must first address the status of the Goncalves family in this case. This Court agrees with Gray that the Goncalves family members are not parties to this case. However, as victims and potential witnesses their status separates them from the general citizenry.

A crime "victim" "is an individual who suffers direct . . . emotional harm as the result of the commission of a crime." I.C. § 19-5306. Crime victims, and specifically immediate families of homicide victims, are afforded both statutory and constitutional rights. I.C. § 19-5306; Article 1, § 22 of the Idaho Constitution. The Goncalves family, as well as the families of the other three victims, are undoubtedly victims in this case. As such, they are afforded rights that the public is not, including the rights to "communicate with the prosecution," to "prior notification of trial court . . . proceedings," to "read presentence reports relating to the crime," as well as other rights. *Id.* These rights put the victims' families, and Gray as the attorney representing the Goncalves family, in a position to know details about the crime and the prosecution's case that the public has no right to know at this stage in the proceedings.

Additionally, while the Goncalves family members are victims, they are also potential witnesses in the case for both trial and sentencing. Again, this puts them in a unique position and sets them apart from the public.

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). 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. The trial court did not enter a nondissemination order restricting the speech of trial participants or any "gag order" on the media. 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 (emphasis added).

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 (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).

In 1976, the U.S. Supreme Court again addressed the tensions between the First Amendment and the Sixth Amendment in *Nebraska Press*. 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 Ass'n*, 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. The same is true for trial participants, including lawyers who are privy to confidential information.

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, n. 27, 96 S. Ct. at 2823, n. 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 to prevent prejudicial pretrial publicity to preserve the right to fair trial by an impartial jury. Gray's argument that the Court only has the authority to regulate the speech of "parties" to a case is unpersuasive and not supported by case law.

In 1985, the 9th Circuit Court of Appeals addressed a challenge to a nondissemination order brought by two defense attorneys whose speech was restricted under the order. *Levine v. U.S. Dist.*

Ct. for Cent. Dist. of California, 764 F.2d 590 (9th Cir. 1985). 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*, 764 F.2d at 593. Miller's attorneys challenged the constitutionality of the order.

In reviewing the order, the court addressed "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. The court 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 (9th Cir. 1985) (internal citations omitted) (emphasis added). The court nevertheless applied strict scrutiny in reviewing the order. "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. The court noted,

> 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)).

In 1991, the U.S. Supreme Court expressly recognized that "the speech of those participating before the courts [can] be limited." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1072, 111 S. Ct. 2720, 2743, 115 L. Ed. 2d 888 (1991). 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 of materially prejudicing a trial. However, Rule 117 expressly allowed a lawyer to "state without

elaboration . . . the general nature of the . . . defense." *Id.* at 1048, 111 S. Ct. at 2731. 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.

> '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 to protect the right to a fair trial a court can 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 explaining 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 acknowledges 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).

Notably, there is nothing in the language of Rule 3.6 or ABA Standard 8-2.1 that limits the application of those provisions to attorneys representing a "party" to a case. Instead, Rule 3.6 applies to lawyers "*participating*" "in the investigation or litigation or a matter." Similarly, ABA Standard 8-2.1 applies to "a lawyer *participating* in [a] criminal matter." Again, Rule 3.6 of the Idaho Rules of Professional Conduct and ABA Standard 8-2.1 is not limited to a lawyer representing a "party."

V. ANALYSIS

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 fundamental right to free speech under the First Amendment. 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 aimed at attorneys participating in the case and their agents. 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." *Id.* at 361, 86 S. Ct. at 1521; *see also Nebraska Press Ass'n*, 427 U.S. at 601, n. 27, 96 S. Ct. at 2823, n. 27. "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 363, 86 S. Ct. 1507 at 1522. By

regulating and restraining the speech of trial participants, the trial court can help to ensure a "trial free from outside influence . . . without corresponding curtailment of the news media." *Id.* at 362, 86 S. Ct. at 1522.

As was stated by the 9th Circuit in *Levine*, "[t]he case for restraints on trial participants is especially strong with respect to attorneys." *Levine*, 764 F.2d at 595 (internal citations omitted). This was echoed by the Supreme Court in *Gentile*. "[T]the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than" strict scrutiny because lawyers involved in a case "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." *Gentile,* 501 U.S. at 1074, 111 S. Ct. at 2744.

As was discussed in detail above, the rationale for allowing an attorney's speech to be more regulated than speech by a non-attorney is (1) a lawyer's status as "an officer of the legal system and a public citizen having special responsibility for the quality of justice," (2) lawyers participating in a case have special access to confidential information through discovery and client communications, and (3) lawyers' statements are likely to be received as especially authoritative. I.R.P.C., Preamble: A Lawyer's Responsibilities; *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).

Rule 3.6 of the Idaho Rules of Professional Conduct sets forth specific requirements and restrictions for lawyers "participating" in a case when it comes to "trial publicity." The purpose of the rule is to guard against materially prejudicial extrajudicial statements by attorneys participating in a case that might impair the right to a fair trial. Similarly, the ABA has promulgated a standard for lawyers participating in a criminal matter that restricts extrajudicial

statements that (1) have a substantial likelihood of influencing or prejudicing the outcome of a trial or a jury; (2) that heighten public condemnation of a defendant, a witness, or a victim; or (3) that undermine the public's respect for the judicial process. ABA Standard 8-2.1.

Taken together, the case law and the standards governing attorneys make clear that (1) the Court has an obligation to take measures to ensure that the balance between the First Amendment and the Sixth Amendment is not weighed against Kohberger, and (2) the Court has authority to impose restrictions on the speech of attorneys participating in the case when it comes to extrajudicial statements that "have a substantial likelihood of materially prejudicing" potential jurors and a fair trial.

2. Strict scrutiny and "a less demanding standard" have both been applied to restrictions on a lawyer's speech.

As detailed above, in 1985, the 9th Circuit in *Levine* applied strict scrutiny in reviewing a nondissemination order being challenged by two lawyers whose speech was restrained. The burden was on the government to establish that: (1) the restrained activity posed either a clear and present danger or a serious and imminent threat to a protected competing interest, (2) the order was narrowly drawn, and (3) less restrictive alternatives were not available. *Levine*, 764 F.2d at 596. However, in 1991, the U.S. Supreme Court held that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than" strict scrutiny. *Gentile*, 501 U.S. at 1074, 111 S. Ct. at 2744. The rationale for "a less demanding standard" has been detailed above.

Here, as will be discussed below, the restraints on Gray's speech (and the speech of all attorneys involved in the case) set forth in the Court's Revised Amended Nondissemination Order will meet the higher standard of strict scrutiny.

3. **The case law and ethical rules support a finding that Gray's speech can be restrained without violating the First Amendment. This Court's Revised Amended Nondissemination Order will narrow and clarify what speech is restrained and what speech is not restrained to withstand strict scrutiny.**

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.

As was presented at the hearing on June 9th, the parties have a legitimate concern for information being disseminated to the media by attorneys involved in the case, including attorneys representing the families of the victims and attorneys representing witnesses. While these attorneys and their clients are not parties to the case, they are undoubtedly participating in the case. Because the victims' families are themselves victims in the case and are also potential witnesses, they are in a unique position and have a right to obtain information not available to the public. 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.). As defense counsel stated during oral argument, "when Mr. Gray speaks, people listen. It matters to have [counsel] abide by the ethical rules."

Additionally, because Gray has initiated a tort claim against the City of Moscow, law enforcement, and the University of Idaho on behalf of the Goncalves and Mogen families, he may also "have special access to information through discovery" that again is not open to the public. This access to confidential information coupled with "the advent of the internet and social media" over the past several decades makes this Court's task of balancing Gray's First Amendment rights with Kohberger's Sixth Amendment right an even more difficult task than it was for the courts in *Sheppard*, *Nebraska Press*, *Levine*, and *Gentile*. *In re Petition for Writ of Mandamus or Writ of Prohibition*, No. 50482, 2023 WL 3050829, at *11 (Idaho Apr. 24, 2023). But the facts of this case and the circumstances presented to the Court during argument make clear the obligation of the Court to ensure all attorneys participating in the case are, at the least, abiding by the ethical rules that restrain comments to the media and public about certain aspects of the case.

This is a high-profile case with substantial media attention. Any statements made to the media by those involved in the case spread like wildfire, and at times have been twisted and misconstrued. The stakes are high for both parties, but especially for Kohberger who is potentially facing the death penalty if found guilty. Given this backdrop, the Court must take measures to ensure Kohberger's right to a fair trial by an impartial jury.

Gray, through his clients, and the other attorneys participating in the case have special access to confidential information. As represented by the parties during the hearing, Gray has issued statements and participated in television interviews that the parties view as a violation of the current Amended Nondissemination Order. Gray did not dispute these representations. "[E]xtrajudicial statements [by lawyers involved in a case] 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. Based on the circumstances of the case and these facts, this Court finds that extrajudicial statements by lawyers participating in the case that have a "substantial likelihood of materially prejudicing" a fair trial or sentencing pose a "clear and present danger or a serious and imminent threat" to Kohberger's fundamental right to a fair trial by an impartial jury.

Further, this Court finds that there are not less restrictive alternatives available to prevent prejudicial information from being leaked to the media by lawyers. As noted in *Gentile*, while change of venue, delay of trial, or sequestering the jury may be tactics used to help filter out the effects of pretrial publicity, "[t]he State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants." *Gentile*, 501 U.S. at 1075, 111 S. Ct. at 2745. A nondissemination order aimed at attorneys and their agents privy to confidential information is the best prophylactic measure to ensure a fair trial. While other measures may be necessary down the road, requiring Gray, and any attorney involved in the case, to comply with I.R.P.C 3.6 as echoed in Court's Revised Amended Nondissemination Order, is a reasonable action at this time.

Finally, while the current Amended Nondissemination Order is arguably overbroad and vague in some areas, this Court's Revised Amended Nondissemination Order is narrowly drawn to prohibit only extrajudicial statements that have a "substantial likelihood of materially prejudicing" this case. The Revised Amended Nondissemination Order includes specific examples of what speech is prohibited and what speech is allowed. 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 Gray's speech, and the speech of all attorneys involved in this case, is again narrowly drawn and necessary to protect Kohberger's right to a fair trial.

VI. CONCLUSION

Gray's request to be exempted from the Amended Nondissemination Order is denied. However, Gray's request that the Amended Nondissemination Order be clarified is granted. Gray, as an attorney participating in this case by representing a victim's family who are also potential witnesses, must comply with the Rule 3.6 as echoed in the Revised Amended Nondissemination Order.

SO ORDERED this 23rd day of June 2023.

John C. Judge
District Judge

CERTIFICATE OF SERVICE

I certify that copies of the ORDER DENYING SHANON GRAY'S REQUEST TO BE EXEMPT FROM THE AMENDED NONDISSEMINATION ORDER AND GRANTING REQUEST THAT THE ORDER BE CLARIFIED were delivered by email to the following:

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on this 23rd day of June 2023.

CLERK OF THE COURT

By:_____
Deputy Clerk