

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

| | | |
|---------------------|---|----------------------------------|
| STATE OF IDAHO, |) | |
| |) | |
| Plaintiffs, |) | Case No. CR29-22-2805 |
| |) | |
| v. |) | MEMORANDUM IN SUPPORT OF |
| |) | MOTION FOR APPEAL AND/ OR |
| |) | CLARIFICATION OF AMENDED |
| BRYAN C. KOHBERGER, |) | NONDISSEMINATION ORDER |
| |) | |
| Defendant. |) | |

I Shanon L. Gray am an attorney licensed in the State of Idaho.
I represent Victim Kaylee Goncalves’s family in the above referenced matter.
I make this Memorandum in Support of the Motion to Appeal, Amend and/or Clarify
the Amended Non-dissemination Order on this case.

The Courts current Amended Non-dissemination Order is based on the following
referenced case law and legal guidelines:

1. ABA Standards for Criminal Justice: Fair Trial and Public Disclosure (4th Ed. 2016)
2. IRPC Rule 3.6
3. Sheppard v. Maxwell, 384 U.S. 333 (1966)
4. Nebraska Press Ass’n v. Stuart, 427 U.S. 539 (1976)
5. Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)

1
2 The Order states as follows:

3 “Therefore, based upon the stipulation of the parties and with good cause,

4 IT IS HEREBY ORDERED:

- 5 1. The attorneys for any interested party in this case, including the prosecuting
6 attorney, defense attorney and any attorney representing a witness, victim or
7 victim’s family, as well as the parties to the above entitled action, including but not
8 limited to investigators, law enforcement personnel, and agents for the prosecuting
9 attorney or defense attorney are prohibited from making extrajudicial statements
10 (written or oral) concerning the case, except, without additional comment, a
11 quotation from or reference to the official public record of the case.
- 12 2. This order specifically prohibits any statement, which a reasonable person would
13 expect to be disseminated by means of public communication that relates to the
14 following:
- 15 a. Evidence regarding the occurrences of transactions involved in the case;
 - 16 b. The character, credibility, reputation, or criminal record of a party, victim,
17 or witness, or the identity of a witness, or the expected testimony of a party,
18 victim, or witness.
 - 19 c. The performance or results of any examination or test or the refusal or
20 failure of a person to submit to an examination or test;
 - 21 d. Any opinion as to the merits of the case or the claims or defense of a party;
 - 22 e. Any information a lawyer knows or reasonably should know is likely to be
23 inadmissible as evidence in a trial and that would, if disclosed, create a
24 substantial risk of prejudicing an impartial trial;
 - 25 f. Any information reasonably likely to interfere with a fair trial in this case
26 afforded under the United States and 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.

IT IS FURTHER ORDERED, that no individual covered by this order shall avoid its proscriptions by actions directly or indirectly, but deliberately, that result in violating this order.

IT IS FURTHER ORDERED, that this order, in all provisions herein, shall remain in full force and effect throughout the entirety of this case unless otherwise ordered by this court.”

1 RELEVANT FACTS

2 1. On January 12, 2023 I participated in a zoom call with Magistrate Judge Megan
3 Marshall in which several of the victims and witnesses’ attorneys were present as well
4 as Latah County Prosecutor’s Office and counsel for the Defendant.

5 2. In that zoom call I informed Judge Marshal that my clients, the surviving family of
6 the family of the late Kaylee Goncalves **are not parties to the case** and therefore are
7 not subject to the Order. The Judge stated that she mistakenly believed that they were
8 “parties” and were therefore subject to the Order and she instructed me to advise them
9

10 3. I also informed Judge Marshall that I did not believe that I was covered under the
11 initial dissemination order as well and informed her that after the original dissemination
12 order came out that I emailed the Latah County Prosecutors Office for clarification and
13 for the Judge’s email. They offered no clarification and refused to provide Judge
14 Marshall’s email address.
15

16 4. During the zoom call I informed Judge Marshall that I would be contacting the
17 Idaho State Bar for clarification of her order as well.

18 5. Since the amended Order was issued on January 18, 2023, my clients and I have not
19 made any statements to the media, out of fear of being held in contempt of court.

20 6. Neither I nor my clients, the Goncalves have stipulated to the Order and upon
21 receiving it I (emailed) informed the Court and requested that the Order be changed as
22 it did not accurately reflect an agreement by the parties. The Court did not honor my
23 request.
24
25
26

1 ARGUMENT

2 Properly construed, the Order does not apply to the Victims’ families in this matter.

3 The only “parties” to the case are the People and the Defendant. Accordingly, as a non-party
4 citizens, the Victims surviving family members are free to speak to the public and the media
5 under the First Amendment to the Constitution. Simply put, their rights to freedom of speech
6 cannot be restricted through a judicial prior restraint. *Gentile* makes clear that only the rights
7 of attorneys who are actively engaged in litigating a pending matter can be restricted without
8 satisfying the rigorous prior restraints standard set forth in *Nebraska Press Association v.*
9 *Stuart*. See *Gentile v State Bar of Nevada*, 501 U.S. 1030, 1072-1074 (1991). (“The speech of
10 lawyers representing clients in pending cases may be regulated under a less demanding
11 standard than that established for regulation of the press in *Nebraska Press Assn. v. Stuart*,
12 427 U.S. 539, 49 L. Ed. 2d 683, 96 S. Ct. 2781 (1976) ...”) (emphasis added.)
13
14

15 As attorney for one of the Victim’s families, I am allowed to relay to the media any of
16 the opinions, views, or statements of those family members regarding any part of the case (as
17 they are allowed to speak about the case under the First Amendment).

18 This is different from offering up my own opinion regarding the facts and issues
19 surrounding the case. It would place an undue burden on the Victims’ families if the attorney
20 whom they have retained to represent their interests was prohibited from serving as their
21 spokesperson (conduit) to the media and other parties in transmitting the Victims’ families
22 thoughts and opinions.
23

24 As attorney for the Victim’s family members, who are not parties to this action, I too
25 am allowed to comment on the case and other issues surrounding the investigation pursuant to
26 IRPC Rule 3.6.

1 I am not an attorney of record involved in this case. I have played no part in the
2 investigation, prosecution or defense of the case. Neither the State nor the Defense has shared
3 any information regarding the case and therefore the only governing rule for public comment
4 regarding this case would be IRPC Rule 3.6.
5

6 Additionally, in the Gentile case the Court upheld ABA Rules 3.6 and 3.8 as they
7 applied to attorneys who are representing a party to the case but held that the wording of those
8 rules was unconstitutionally vague.

9 IRPC Rule 3.6 is similar in wording to ABA Rules 3.6 and 3.8 and therefore is vague
10 in its application to attorneys who are representing a party to the case and even more vague to
11 attorneys like I, who are **not representing any party to the case.**
12

13 The Order is facially overbroad and vague. On its face it precludes all comments or
14 opinions (other than reciting matters of public record), even if there is no possibility, much less
15 “substantial probability” of prejudicing the tribunal, and it also extends (remains in effect) even
16 after a jury has been seated and admonished to avoid all press coverage regarding the case. As
17 such, the Order is unconstitutionally overbroad.

18 The point of a non-dissemination order is to protect the rights of the parties in the case
19 and especially in criminal cases it is an attempt to preserve a fair and impartial jury pool. Once
20 the jury has been selected the non-dissemination order becomes moot and therefore would not
21 be allowed to be in full force for the “entirety of the case.”
22

23
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

AUTHORITIES

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)
First Amendment to the United States Constitution.
IRPC Rule 3.6

THEREFORE, I request that the Court forthwith amend and/or clarify the Amended Non-dissemination order regarding the issues addressed above and I request a hearing on the matter.

DATED THIS 2nd DAY OF February, 2023

By: elect. Sign. Shanon L. Gray
Shanon L.Gray, IDB#12061
Attorney for Goncalves Family