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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 CHRISTOPHER KOHBERGER, Defendant.	Case No. CR29-22-2805 MEMORANDUM OF POINTS AND AUTHORITIES RELATING TO NONDISSEMINATION ORDER

To aid the Court in review of the Motion submitted by Mr. Gray to "Appeal, Amend and/or Clarify Amended Nondissemination Order," the State provides this Memorandum of Points and Authorities. The State's interest relating to this Order is to ensure that the Defendant, and the State, are provided a fair and impartial jury trial and that the integrity of any conviction is maintained, for it is the duty of the prosecutor as a public officer "to see that the accused has a fair and impartial trial." *State v. Spencer*, 74 Idaho 173, 183 (1953). Below are the points, cases, and statements made in cases that the State located to aid this Court. These points are largely presented in block quote and without commentary by the State.

I. TABLE OF CASES AND AUTHORITIES:

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Other Authorities

II. SUMMARY OF POINTS AND AUTHORITIES:

1. The U.S. Supreme Court and Ninth Circuit Court of Appeals require that the Court take affirmative steps to ensure that the Defendant "receives a trial by an impartial jury free from outside influences . . . [and to] protect their processes from prejudicial outside interferences."

In the case of *Sheppard v. Maxwell*, the U.S. Supreme Court was asked to review the habeas corpus application of a person convicted of first-degree murder in a case which received "intense" publicity and media attention. 384 U.S. 333 (1966). Prior to, and during the trial, the courtroom was packed with media and there were "five volumes filled with . . . clippings from each of the three Cleveland newspapers covering the period from the murder until Sheppard's conviction in December 1954." *Id.* at 342. In granting the habeas petition, the U.S. Supreme Court found that the trial court failed to act to preserve Sheppard's right to a fair trial. The Court stated:

> . . . (l)egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.' *Bridges v. State of California*, supra, 314 U.S. at 271, 62 S.Ct. at 197. Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), we set aside a federal conviction where the jurors were exposed 'through news accounts' to information that was not admitted at trial. We held that the prejudice from such material 'may indeed be greater' than when it is part of the prosecution's evidence 'for it is then not tempered by protective procedures.' At 313, 79 S.Ct. at 1173. At the same time, we did not consider dispositive the statement of each juror 'that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles.' At 312, 79 S.Ct. at 1173. Likewise, in *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, we set aside the conviction holding:
>
> > 'With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion.' At 728, 81 S.Ct., at 1645.
>
> *Id.* at 350-353.

Regarding the statements of witnesses and other possible participants to the press, the U.S. Supreme Court stated:

> Secondly, 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. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. Although the witnesses were barred from the courtroom during the trial the full verbatim testimony was available to them in the press. This completely nullified the judge's imposition of the rule. *See Estes v. State of Texas*, supra, 381 U.S., at 547, 85 S.Ct., at 1635. Thirdly, 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. That the judge was aware of his responsibility in this respect may be seen from his warning to Steve Sheppard, the accused's brother, who had apparently made public statements in an attempt to discredit testimony for the prosecution. The judge made this statement in the presence of the jury . . . it is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers.

Id. at 359 (emphasis added).

Finally, the Court ultimately held:

> 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 . . . 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. 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 363.

These notions are further reflected in Ninth Circuit Court of Appeals' precedent in the case of *Farr v. Pitchess*, where the Court considered a trial court order that "prohibit[ed] any attorney, court attache, or witness from releasing for public dissemination the contents or nature of proposed trial testimony or other evidence." 522 F.2d 464, 466 (9th Cir. 1975). In upholding the order, the Ninth Circuit Court of Appeals stated:

> In a criminal case the trial judge has a duty and obligation to attempt to protect the right of the defendants to a fair trial, free of adverse publicity. Where the case is a notorious one, that burden on the court is heavy. The most practical and recommended procedure to insure against dissemination of prejudicial information is the entry of an order directing that attorneys, court personnel, enforcement officers and witnesses refrain from releasing any information which might interfere with the right of the defendant to a fair trial. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). The language of the *Sheppard* Court is not equivocal. The duty of the court to enter such orders and the authority for enforcement are spelled out . . .

Id. at 468.

2. The Court has power to evaluate the types of speech which would impact the right to a fair trial, and to take measures where a case is highly publicized.

In the case of *Gentile v. State Bar of Nevada*, the U.S. Supreme Court considered whether a disciplinary action by the State Bar of Nevada against a defense attorney for holding a press conference and stating his client is innocent of the charges and that the police department was corrupt, violated the dictates of the First Amendment. 501 U.S. 1030, 1058 (1991). While the Court found that the defense attorney's statements were protected by the First Amendment, it noted that his conduct did not "demonstrate[] any real or specific threat to the legal process. . ." and that "[o]nly the occasional case presents a danger of prejudice from pretrial publicity." *Id.* at 1058, 1054.

The holding in *Gentile* that the bar on the attorney's one-time, political speech violated the First Amendment was well distinguished by the U.S. District Court in Louisiana when it

considered a gag order related to a highly publicized criminal case and stated:

> In *Gentile*, the defendant was indicted, and within a few hours of the indictment, his attorney held a press conference. The attorney denounced the government and charged certain officials with corruption. This occurred six months before trial and was a one time event. After trial, the attorney was brought before the state bar association for violating its general prohibition against lawyers making statements to the press that would have a substantial likelihood of materially prejudicing the proceedings. The bar association recommended a private reprimand which was affirmed by the state supreme court. The attorney appealed. In terms of distinguishing features . . . Secondly, the Supreme Court in *Gentile* emphasized that the attorney's comments were 'classic political speech.' It characterized the issue in the case as 'the constitutionality of a ban on political speech critical of the government and its officials' and stated that 'speech critical of the exercise of the State's power lies at the very center of the First Amendment.' *Id.*, 501 U.S. at 1034, 111 S.Ct. at 2724. No claim has been made in this case that the parties, with or without the partial gag order, have anything to say to the media, much less anything that would constitute political speech. Thirdly, the Supreme Court in *Gentile* was dealing with a generic bar association rule restricting extrajudicial comment in cases across the board, not one, as here, tailored to a specific case with its unique problems of publicity. Finally, the Supreme Court in *Gentile* noted that the attorney's speech was a one-time event, six months before trial, and could not have conceivably affected the fairness of the trial. The partial gag order here is an on-going prophylactic measure to assure a fair trial.

U.S. v. Davis, 904 F.Supp. 564, 567-68 (E.D.La. 1995). As noted in *Gentile*, there are the "occasional" cases where the Court must take extensive measures to protect the fundamental right to a fair and impartial trial.

3. The recent decision by the Connecticut Supreme Court in *Lafferty v. Jones* provides a comprehensive review of the cases addressing restraints on speech of litigants and the power of Courts to sanction such speech.

To aid the Court in considering its Order and any potential free speech interest, the State submits that the recent decision by the Connecticut Supreme Court in *Lafferty v. Jones* provides a comprehensive review of decisions by other courts and a test to employ. 336 Conn. 332, 246 A.3d 429 (Conn. 2020). At its highest level, the Connecticut Court reviewed and applied numerous U.S. Supreme Court decisions by stating:

> The leading case is *Bridges v. California*, 314 U.S. 252, 275–77, 62 S. Ct. 190, 86

> L. Ed. 192 (1941), in which the Supreme Court considered whether a union leader could be held in contempt when a newspaper published statements that he had made threatening a strike. The court considered whether the speech presented a 'clear and present danger' to the administration of justice. *Id.*, at 261–262, 273, 62 S. Ct. 190. Specifically, the court analyzed 'the particular utterances ... in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment.' *Id.*, at 271, 62 S. Ct. 190 . . . 'The [United States] Supreme Court has held that speech otherwise entitled to full constitutional protection may nonetheless be sanctioned if it obstructs or prejudices the administration of justice.' *Standing Committee on Discipline v. Yagman, supra*, 55 F.3d at 1442, citing *Gentile v. State Bar of Nevada, supra*, 501 U.S. at 1074–75, 111 S.Ct. 2720, and *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966) . . . 'Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression.' *Landmark Communications, Inc. v. Virginia, supra*, 435 U.S. at 842–43, 98 S.Ct. 1535; *see also Turney v. Pugh*, 400 F.3d 1197, 1202 (9th Cir. 2005).

Id. at 353-361.

After reviewing standards applied by the U.S. Supreme Court and other courts, the Court in *Jones* chose to apply the "most rigorous and searching review of any infringement of . . . first amendment rights." *Id.* The Court reasoned:

> The [United States] Supreme Court has held that speech otherwise entitled to full constitutional protection may nonetheless be sanctioned if it obstructs or prejudices the administration of justice. *Standing Committee on Discipline v. Yagman, supra*, 55 F.3d at 1442, *citing Gentile v. State Bar of Nevada*, supra, 501 U.S. at 1074–75, 111 S.Ct. 2720, and *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). Importantly, "[a] rule governing speech, even speech entitled to full constitutional protection, need not use the words 'clear and present danger' in order to pass constitutional muster." *Gentile v. State Bar of Nevada, supra*, at 1036, 111 S.Ct. 2720 (Kennedy, J.). Because the Supreme Court has not yet clearly supplanted clear and present danger in the area of extrajudicial speech, we will use it as a guideline in our analysis. Even still, it is necessary to refine the standard to our present circumstances to incorporate the requirements of *Brandenburg* and the inquiries outlined in *Gentile*. 'Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression.' *Landmark Communications, Inc. v. Virginia, supra,*

435 U.S. at 842–43, 98 S.Ct. 1535; see also *Turney v. Pugh*, 400 F.3d 1197, 1202 (9th Cir. 2005) . . . Courts must have the ability to restrict the rights of participants to the extent necessary to protect the fairness of the litigation. 'Although litigants do not surrender their [f]irst [a]mendment rights at the courthouse door ... those rights may be subordinated to other interests that arise in this setting. For instance, on several occasions [the] [c]ourt has approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant. ... In the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors.' (Citations omitted; internal quotation marks omitted.) *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32–33 n.18, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). '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.' (Internal quotation marks omitted.) *Gentile v. State Bar of Nevada, supra*, 501 U.S. at 1072, 111 S.Ct. 2720. '[The United States Supreme Court] expressly contemplated that the speech of those participating before the courts could be limited. This distinction between participants in the litigation and strangers to it is brought into sharp relief by [the] holding in *Seattle Times Co. v. Rhinehart*, [*supra*, at 20, 104 S.Ct. 2199].' (Emphasis omitted; footnote omitted.) *Gentile v. State Bar of Nevada, supra*, at 1072–73, 111 S. Ct. 2720. 'The primary danger of extrajudicial speech to the administration of justice must be that the outcome of a judicial proceeding, or the ability of the court to do its work, might be improperly influenced by people who have no legitimate part in the courts' resolution of that matter. Of course, the person making an extrajudicial statement might actually be a party in an ongoing proceeding. Or, an out-of-court statement might not affect any pending matter, but might influence the course of some future proceeding. The point is that an attempt to interfere with the outcome of a case is properly punishable because justice is being affected through means other than those established for the proper disposition of a controversy.' L. Raveson, "Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power; Part One: The Conflict Between Advocacy and Contempt," 65 Wash. L. Rev. 477, 499–500 (1990).

A related, but necessary inquiry, considers the timing and the nature of the speech. Speech is more likely to interfere with the administration of justice if it is calculated to intimidate or threaten other participants in the litigation. . . Additionally, '[t]he possibility that other measures will serve the [s]tate's interests should also be weighed.' *Landmark Communications, Inc. v. Virginia, supra*, 435 U.S. at 843, 98 S.Ct. 1535. We also consider whether the sanction is narrowly tailored to achieve the government's substantial interest in ensuring the administration of justice. *Gentile v. State Bar of Nevada, supra*, 501 U.S. at 1075, 111 S.Ct. 2720 . . . see also *People v. Goss*, 10 Ill. 2d 533, 536–37, 141 N.E.2d 385 (1957) (upholding contempt order under clear and present danger test when nonparty appeared on television show and accused party to court proceeding of being from 'a family with [court admitted] hoodlum connections' and called

witness 'professional sneak and liar' (internal quotation marks omitted)).

Id. at 361-365.

Thus, the *Jones* court outlines a two-part inquiry, while incorporating standard First Amendment jurisprudence on tailoring, which largely requires the Court to identify the party seeking to speak, the timing and nature of the speech, and whether such speech would cause a "clear and present danger" to the defendant's right to a fair and impartial trial.

Finally, the State submits the attached *Affidavit of William Thompson, Jr.,* which notes that the members of the Goncalves family, represented by Mr. Shanon Gray, are potential witnesses at a trial and/or sentencing in this matter.

DATED this 7th day of February, 2023.

Bradley Rudley

Bradley J. Rudley
Chief Civil Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES was served on the following in the manner indicated below:

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DATED this 8th day of February, 2023.

Kirk Workman