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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 NUMBER CR29-22-0002805** **OBJECTION TO MOTION TO APPEAL, AMEND AND/OR CLARIFY NONDISSEMINATION ORDER**

COMES NOW, Bryan C. Kohberger, by and through their attorney, Jay Weston Logsdon, Chief Deputy Litigation, and hereby objects to the Motion to Appeal, Amend and/or Clarify Nondissemination Order filed by Shannon Gray as counsel for the Goncalves family. This objection is made on the grounds that the Nondissemination Order properly requires Mr. Gray to abide by the clear requirement of the ethical rules of this state.

ARGUMENT

I. The Court's Order is Not Violative of Mr. Gray's First Amendment Rights

In his Memorandum in Support of Motion for Appeal and/or Clarification of Amended Nondissemination Order (hereafter "Memorandum"), Mr. Gray contends that because his

clients—the Goncalves family—are classified as "non-party citizens," application of the Court's Nondissemination Order to him constitutes a prior restraint on his right to free speech under the First Amendment. In support of his position, Mr. Gray cites the "Fair Trial and Public Disclosure" provision of the ABA Standard for Criminal Justice, IRPC 3.6, as well as the precedent established under *Shepard v. Maxwell*, 384 U.S. 333 (1966); *Nebraska Press. Association v. Stuart*, 427 U.S. 539 (1976); and *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). The issue at hand may be summarized as follows: whether application of a nondissemination order to an attorney representing the family of an alleged murder victim constitutes an intolerable prior restraint on speech.

The First Amendment prohibits laws "abridging the freedom of speech," while the Sixth guarantees to the criminal defendant "the right to a speedy and public trial, by an impartial jury." U.S. Const. Amend. I; IV. Occasionally in conflict where protected pre-trial expression threatens the impartiality of the jury, the United States Supreme Court has determined certain parties' First Amendment rights may be limited when exercise of those rights would result in prejudice to the defendant, noting, "[w]ith his life at stake, it is not requiring too much that [the defendant] be tried in an atmosphere undisturbed by so huge a wave of public passion." *Sheppard*, 384 U.S. at 351 (quoting *Irvin v. Dowd*, 266 U.S. 717, 728 (1961)). As a means of reducing "the appearance of prejudicial material and to protect the jury from outside influence," a trial court may "[proscribe] extrajudicial statements by any lawyer, party, witness or court official," and may also "promulgate a regulation with respect to dissemination of information of information about the case." *Sheppard*, 384 U.S. at 358-62. In either case, "the cure lies in those remedial measures that will prevent the prejudice at its inception." *Id.*, 384 U.S. at 363.

One such measure is at issue here. As in *Stuart*, this Court is presented "with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak…shall not be abridged." *Stuart,* 427 U.S. at 570. Unlike in *Stuart*, however, the regulation at issue is as to an attorney, who may be subjected to greater limitations than could be imposed on the press. As the Supreme Court noted in *Sheppard*:

> 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. [emphasis added]

Sheppard, 384 U.S. 363. This holding was expressly upheld in *Gentile,* wherein the Supreme Court found:

> [T]he 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 [*Stuart*], and the cases which proceeded 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.

Gentile, 501 U.S. at 1074. In an attempt to exclude himself from these holdings, Mr. Gray argues that because his clients "are not parties to the case and therefore are not subject to the Order," (*See* Memorandum, pg. 3, *6-8) he too is due an equal measure of deference and exclusion. The weight of authority is contrary to this position.

In *Idaho State Bar v. Tapp,* 129 Idaho 414, 925 P.2d 1113 (1996), the Idaho Supreme Court made clear that courts must "[strike] a reasonable balance between the right of free speech and the State's legitimate interests in preserving the integrity of its judicial system." *Tapp,* 129 Idaho at 417, 925 P.2d at 1116. In reaching this conclusion, the *Tapp* Court relied upon the

Gentile decision which, in the Court's words, "[balanced] the State's interests in assuring fair trials against the free speech interests of attorneys." *Id.* Thus, a case-associated speaker's status as a lawyer alters the degree to which their speech is protected.

This lawyer versus non-lawyer distinction is recognized broadly elsewhere, even in cases where the speaker-attorney claims not to be involved with the case in question. In *In re Goode,* 821 F.3d 553 (5th Cir. 2016), the Fifth Circuit Court of Appeals considered whether an attorney who routinely communicated with and occasionally passed notes to the defense could be sanctioned for violation of a nondissemination order and the Louisiana criminal trial publicity rule[1] because he was not "a lawyer associated with the defense" or "trial participant," application to whom, Goode argued, the local rule was limited. *Goode,* 821 F.3d at 557. Rejecting Goode's argument, the Court relied upon *Gentile*'s own language that because associated "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.,* 821 F.3d at 560 (quoting *Gentile,* 501 U.S. at 1074). Similar holdings have been reached across the Circuit Courts. *See, e.g., Mezibov v. Allen,* 411 F.3d 712 (6th Cir. 2005); *In re Morrissey,* 168 F.3d 134 (4th Cir. 1999); *Berner v. Delhanty,* 129 F.3d 20 (1st Cir.); *U.S. v. Cutler,* 58 F.3d 825 (2nd Cir. 1995); *Zal v. Steppe,* 968 F.3d 924 (9th Cir. 1992). Further, the 11th and 2nd Circuits have interpreted the 'heavy presumption against constitutionality' described in *Stuart* as being unique to "prior restraints *directed to the press*" and suggested the Supreme Court's *Sheppard* holding as suggesting "a restrictive order limiting extrajudicial commentary of trial participants as an alternative to a prior

[1] L. Crim. R. 53.5, providing: "During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case."

restraint on the media." *The News-Journal Corp. v. Foxman*, 939 F.2f 1499, 1512-13 (11th Cir. 1991) (emphasis in the original); *see also Zal*, 968 F.2d at 928 ("[L]awyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press.") (quoting *Gentile*, 501 U.S. at 1074).

As in *Goode*, Mr. Gray has special access to information via his clients. Dissemination of information forbidden by the Court's order would be deemed authoritative as a result of this access and Mr. Gray's status as an attorney, and therefore would endanger the jury's impartiality. The Court's exemption of Mr. Gray's clients from its Order effectively answers Mr. Gray's First Amendment concerns, while its continued application to him accounts for his apparent authority and special access to facts.

II. IRPC 3.6 is Not Facially Vague, nor Vague As Applied to Mr. Gray's Circumstances

Mr. Gray then argues that even if the Court may order him not to disseminate information to the press, because the Court's order mirrors the language of IRPC 3.6, it is vague on its face and as applied to his circumstances.

First- IRPC 3.6 is in no way vague on its face. Mr. Gray's argument on this point is premised on a faulty understanding and misreading of the *Gentile* holding. In *Gentile*, the Supreme Court expressly stated: "We are not called upon to determine the constitutionality of ABA Model Rule 3.6 (1981), but only Rule 117 as it has been interpreted and applied by the State of Nevada." *Gentile*, 501 U.S. at 1036 (emphasis added). Moreover, the Supreme Court held, "nothing inherent in Nevada's formulation of [of the trial publicity rule] fails First Amendment review; but as this case demonstrates, Rule 117 has not been interpreted in conformance with those principles by the Nevada Supreme Court…" *Id.*, 501 U.S. at 1037. Mr.

Gray's assertion that the *Gentile* Court "held that the wording of [Rules 3.6 and 3.8] was unconstitutionally vague" is simply wrong. Because *Gentile* only found that Nevada's rule was unconstitutional as applied, that decision does not mandate a similar finding when evaluating IRPC 3.6. To the contrary, the Supreme Court's express finding that "nothing inherent" in Nevada's rule failed First Amendment review indicates that the same conclusion is appropriate with regard to IRPC 3.6, which—as Mr. Gray himself states—is "similar in wording" to ABA Rule 3.6.

Mr. Gray's argument that IRPC 3.6 is unconstitutionally vague as applied to his own circumstances is also faulty. In *Gentile* the Supreme Court found that , "one central point must dominate the [Court's as-applied vagueness] analysis: this case involves political speech…. At issue here is the constitutionality of a ban on political speech critical of the government and its officials." *Gentile*, 501 U.S. at 1034. While it is true that Mr. Gray and the Goncalves family have criticized the police in this matter in the past, since Mr. Kohberger's arrest their statements have been focused on him. *See, e.g.* King 5, "Father of Idaho Murder Victim Says Kohberger was "Overwhelmed" in Court" (Jan. 6, 2023) (available at https://www.king5.com/article/news/crime/idaho-murders/father-idaho-murder-victim-kohberger-court/281-79e6ad39-ca22-4bf0-837a-04844f96f37c).

Additionally, at issue in *Gentile* was the confusion created by the safe harbor exception for statements by the defense about their defense. *Id*. at 1048. Mr. Gray has essentially agreed his client is not a real party to this action and has nothing similar to a defendant's interest in sharing their defense with the press. Thus, the vagueness found in *Gentile* is inapposite to his concerns.

III. As an Attorney, Mr. Gray Cannot Claim Vicarious Exemption From the Rules of Professional Conduct, and is Therefore Bound by IRPC 3.6

Finally, Mr. Gray asserts that 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," regardless of the Rules of Professional Conduct, because it "would place an undue burden on the Victims' families if the attorney whom they have retained to represent their interests was prohibited from serving as their spokesperson…to the media and other parties in transmitting the Victim's families thoughts and opinions." This assertion of vicarious exemption from the Rules of Professional Conduct is plainly baseless.

Besides being entirely inconsistent with the above-provided precedent, Mr. Gray's position on this issue is contrary to to the long-held acknowledgement that " [e]ven outside the courtroom…, lawyers in pending cases [are] subject to ethical restrictions on speech which an ordinary citizen would not be." *Id.*, 501 U.S. at 1071 (citing *In re Sawyer*, 360 US. 622 (1959)). Such has always been the case, as "[m]embership in the bar is a privilege burdened with conditions." *Theard v. United States*, 354 U.S. 278, 281 (1957) (quoting *In re Rouss*, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917)). Mr. Gray's representation of the Gonalvez family does not entitle him to the same degree of freedom of speech they enjoy as ordinary citizens. Further, Mr. Gray makes clear that, if his Motion is granted, he will "comment on the case and other issues surrounding the investigation pursuant to Rule 3.6." What portion of Rule 3.6 Mr. Gray invokes here is an open question—insofar as the Rule addresses Mr. Gray's intended subject matter, it expressly identifies it as a subject "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." IRPC 3.6, Cmmt. 5. Indeed, the Rule notes that "[c]riminal jury trials will be most sensitive to extrajudicial speech." IRPC 3.6, Cmmt. 6.

Mr. Gray argues he will not be "offering up [his] own opinion regarding the facts surrounding the case," but rather only "serving as [his client's] spokesperson (conduit) to the media and other parties in transmitting the Victims' families thoughts and opinions." Far from mitigating the already tenuous nature of his argument, this signal of intent again places Mr. Gray at odds with Rule 3.6 and *Gentile.* The Court has already exempted Mr. Gray's clients from its Order, adequately preserving their First Amendment rights. To extend this exemption to Mr. Gray would function solely to grant potentially prejudicial statements the weight recognized as a danger by the *Gentile* Court, on a subject the Rule distinguishes as already extremely susceptible to prejudice. If Mr. Gray truly intends only to voice his clients' thoughts and opinions, then the Court's previous exemption has already cured the supposed First Amendment infirmity—Mr. Gray's clients may voice these thoughts and opinions themselves- as they have clearly been doing. The sole effect of maintaining the Court's Order in present form is the continued operation of a remedial measure that prevents prejudice at its inception. Mr. Gray is bound by the rules of professional conduct, and "[t]he First Amendment does not excuse him from that obligation." *Gentile*, 501 U.S. at 1081.

DATED this ___8____ day of February, 2023.

ANNE C. TAYLOR, PUBLIC DEFENDER
KOOTENAI COUNTY PUBLIC DEFENDER

BY: 

JAY WESTON LOGSDON
CHIEF DEPUTY LITIGATION
ASSIGNED ATTORNEY

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the ___9____ day of February, 2023 addressed to:

Latah County Prosecuting Attorney –via iCourt: paservice@latahcountyid.gov
Shannon Gray – via iCourt shanon@graylaw.org