

CASE NO. CR29-22-2805  
BY *JP* DEPUTY

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 MOTION TO  
RECONSIDER ORDER DATED  
MAY 4, 2023

This matter is before the Court on the Associated Press, *et al.*'s Motion to Reconsider May 4, 2023 Order. After due consideration and for the reasons set forth herein, the Motion to Reconsider is denied.

I. FACTUAL AND PROCEDURAL HISTORY

On November 13, 2022, four University of Idaho students were found deceased in their home in Moscow, Idaho. The tragedy garnered widespread publicity and worldwide attention. While authorities were investigating the incident, media outlets transcended upon the Vandal community, and the internet and television were abuzz with stories and immense speculation.

Approximately forty-five days later, on December 30, 2022, the landscape of the matter changed. Bryan Kohberger was arrested and charged by criminal complaint with four counts of Murder in the First Degree and one count of Burglary. The community, internet, and television were still abuzz with stories and speculation, but the spotlight shifted to a single person, the accused. Upon Mr. Kohberger's arrest, the fundamental constitutional rights of the accused, the State of Idaho, and the victims were invoked, and the judicial process was set in motion. On January 3, 2023, the parties to this criminal action, the State of Idaho and Mr. Kohberger, filed a Stipulation for Nondissemination Order recognizing the court's constitutional duty

and authority to safeguard these fundamental rights, and ensure the efficacious administration of justice, and a fair trial under the Idaho and United States Constitution. After considering the parties' stipulation, and weighing the right to a fair trial for all parties involved and the right to free expression as afforded under both the United States and Idaho Constitution, the Court entered a Nondissemination Order on January 3, 2023 to curtail the dissemination of pre-trial publicity in the case as necessary and authorized under law. On January 18, 2023, an Amended Nondissemination Order was entered.

On February 6, 2023, a coalition of media companies, Associated Press, *et al.* ("Associated Press"), filed a Petition for Writ of Mandamus or a Writ of Prohibition in the Idaho Supreme Court challenging the constitutionality of the Nondissemination Order and seeking an extraordinary writ to protect the media's ability to cover the case. Both the State of Idaho and Mr. Kohberger intervened in the case to oppose the petition, and argued in support of maintaining the nondissemination order to which they stipulated. After reviewing the record, the Idaho Supreme Court issued an opinion dismissing the Associated Press's Petition for Writ of Mandamus or a Writ of Prohibition on April 24, 2023.

Then, on May 1, 2023, the Associated Press filed a Motion to Intervene and a Motion to Vacate the Amended Nondissemination Order in this case seeking to "intervene for the limited purpose of vindicating *their* First Amendment rights by filing a contemporaneous Motion to Vacate the Amended Nondissemination Order." Motion to Intervene, p. 3 (emphasis added).

On May 4, 2023, the Court issued an order setting a scheduling conference for May 22, 2023, to address a briefing schedule and schedule oral argument on the Associated Press's motions as well as on a companion motion, Motion to Appeal, Amend and/or Clarify Amended Nondissemination Order, filed by counsel for the Goncalves family.

On May 9, 2023, the Associated Press filed a Motion to Reconsider Order Dated May 4, 2023, and a Memorandum in Support of Motion to Reconsider Order Dated May 4, 2023. The Associated Press alleges that "[w]ith each passing day, the Amended Nondissemination [sic] Order dated January 18, 2023 ("Gag Order") causes irreparable harm." The Motion urges this Court to stay enforcement of the Nondissemination Order pending a decision on the Motion to Vacate the Amended Nondissemination Order or set a hearing on the

Motion to Vacate the Nondissemination Order on the next available date on the Court's calendar.

On May 11, 2023, Mr. Kohberger filed an Objection to Motion to Reconsider Order Dated May 4, 2023. Mr. Kohberger argues that the Associated Press's Motion to Vacate the Amended Nondissemination Order raises issues of both law and fact, and additional time is needed to gather evidence, including expert testimony, to oppose the Associated Press's motion. The same day, May 11, 2023, the Associated Press filed a Reply to Mr. Kohberger's Objection Dated May 11, 2023, the crux of its argument being that Mr. Kohberger should not need additional time to gather evidence for which he should have presented initially in support of the nondissemination order.

## II. DISCUSSION

The issue before the Court at this time is the Associated Press's motion to reconsider this Court's order setting a scheduling conference where all necessary parties would have input as to what briefing schedule and hearing date is preferred instead of setting a hearing and briefing schedule without such input.

The Associated Press argues the media is suffering "irreparable harm" each day the Nondissemination Order is in place while citing to an inapplicable legal standard and disregarding the court rules that govern their motion. "Irreparable harm" is a legal concept routed in injunctive relief, for which the Associated Press has not formally plead, except to request the Court stay enforcement of the Amended Nondissemination Order pending a decision on the merits of their motion to vacate. Prior to a court issuing such preliminary injunction, albeit unconventional in a criminal proceeding, there must be an evidentiary showing that "it appears by the complaint that the plaintiff is entitled to the relief demanded, and that relief, or any part of it, consists of restraining the commission or continuance of the acts complained of, either for a limited period or perpetually" or "it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff." I.R.C.P. 65(e)(1) and (2). As the record reflects, the Associated Press elected to file a motion to vacate the nondissemination order, not a preliminary injunction in which irreparable harm would need to be established.

Even so, the Associated Press cites to a number of cases for the proposition that the loss of First Amendment freedoms constitutes irreparable injury, but fails to note the distinction between those cases and

the Associated Press's motion. The cases cited either included a formal pleading for a preliminary injunction or were a direct restraint or enjoinder on media. Rep. to Mr. Kohberger's Obj. Dated May 11, 2023, p. 2 citing *Am. C.L. Union of Idaho, Inc. v. City of Boise*, 998 F. Supp. 2d, 918 (D. Idaho 2014) (quoting *Associated Press v. Otter*, 682 F.3d 821, 826 (9<sup>th</sup> Cir. 2012)) (plaintiffs moved for a preliminary injunction); Memorandum in Support of Motion to Reconsider Order Dated May 4, 2023, p. 3 citing *Nebraska Press Ass'n v. Stuart* 423 U.S. 1327, 1329 (1975) (direct restraint on media and press prohibiting reporting); *Cap. Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1304 (1983) (press and media enjoined from publication of information).

In its opinion, the Idaho Supreme Court addressed the Associated Press's "injury" for purposes of standing to bring their original writ. It found that "If the Petitioners' allegations are true, they have alleged "an injury [not irreparable harm] that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *In re Petition for Writ of Mandamus or Writ of Prohibition*, 2023 WL 3050829 at 5 (Idaho Apr. 24, 2023) (emphasis added). Thus, the Associated Press must first demonstrate their allegations and reasons set forth in their motion to vacate are true before an injury is established, let alone irreparable harm as argued. To date, no preliminary injunction has been sought nor evidence presented at this juncture to support a finding of irreparable harm that would require staying the Amended Nondissemination Order pending the merits hearing.

Just as the Idaho Supreme Court opined, *this* Court recognizes the press's role in our democracy and the importance of balancing the Sixth Amendment rights of the parties in the criminal proceeding with the First Amendment rights of the press. Yet, "those seeking to enforce [these well-guarded rights] must still bow to the jurisdictional rules and procedural channels litigants are constrained to follow." *In re Petition for Writ of Mandamus or Writ of Prohibition*, 2023 WL 3050829 at 11 (Idaho Apr. 24, 2023). More simply, should the Court allow the Associated Press to intervene as a party in this capital murder case, then it must follow the rules and procedures just as the parties to the action, the State of Idaho and Mr. Kohberger, have done. Just as the Court carefully contemplated the parties' stipulation and the law governing nondissemination orders prior to issuing its order, it likewise must assure the Associated Press's motions are set in the regular course on a schedule as proscribed in the Idaho Criminal Rules so as to fully and adequately address their import.


III. ORDER

For the reasons set forth above,

IT IS HEREBY ORDERED that the Associated Press's Motion to Reconsider Order Dated May 4, 2023, is denied. The scheduling conference will remain set for May 22, 2023, at 10:00 a.m. PST via Zoom.

IT IS FURTHER ORDERED that the Associated Press's request to stay enforcement of the Amended Nondissemination Order pending a decision on the Motion to Vacate Amended Nondissemination Order is denied.

Dated: 5/16/2023

  
Megan E. Marshall  
Magistrate Judge

CERTIFICATE OF SERVICE

I certify that copies of the ORDER DENYING MOTION TO RECONSIDER ORDER DATED MAY 4, 2023, were delivered by email to the following:

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JULIE FRY  
CLERK OF THE COURT

By:   
Deputy Clerk