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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 No. CR29-22-2805

OBJECTION TO DEFENDANT'S
MOTION TO RESCIND ORDER
FOR FAILURE TO PROVIDE DUE
PROCESS

The State objects to Defendant's motion challenging this Court's order prohibiting further contact with prospective jurors, which was entered after the State filed a motion and the Defendant filed an objection. Defendant's claim that this Court failed to provide due process is belied by both the applicable law and the facts surrounding this Court's order.

Defendant's factual recitation in support of his motion leaves much to be desired, leaving out critical facts that are fatal to his argument. Most glaringly, Defendant fails even to mention this Court's Revised Amended Nondissemination Order ("Nondissemination Order"), which this Court entered more than six months ago after briefing by the parties and oral

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argument. As relevant here, the Nondissemination Order prohibits certain out-of-court statements, including out-of-court statements that relate to “[t]he identity or nature of evidence expected to be presented at trial or any sentencing phase of the proceedings.”

On March 8, 2024, more than six months after this Court entered the Nondissemination Order, the State received information from a Latah County resident who received an unsolicited telephone survey regarding this case. (Decl. in Resp. to Def.’s Mot. to Rescind Order for Failure to Provide Due Process (“Decl.”), p.1.) The State had little information about the call at that point and did not yet have reason to believe the defense had violated the Nondissemination Order. (See Decl. pp.1-2.) By March 19, however, the State had learned that multiple other Latah County residents had been called and learned the callers were disclosing information about evidence that would be presented at trial. (Decl., p.2.)

Equipped with this new information, the State had serious concerns that the defense was violating the Nondissemination Order and, giving the defense the benefit of the doubt, decided to contact defense counsel prior to raising the issue with the Court. (Decl., p.2.) The defense confirmed that the calls were being made on their behalf, and the State expressed its concerns regarding the calls and informed the defense that the issue needed to be raised with the Court. (Decl., pp.2-3.) The State filed a motion seeking an order prohibiting further contact with the prospective jurors and asserted as the sole legal basis for its motion that the contact violated the Nondissemination Order. (State’s Mot. for Order Prohibiting Contact with Prospective Jurors Absent Leave of Court, filed March 22, 2024.) Defendant filed an objection the same day that conceded the defense had conducted such a survey and indicated that a

memorandum in support and affidavit were forthcoming. (Objection to the State’s Mot. for Order Prohibiting Contact with Prospective Jurors Absent Leave of Court, filed March 22, 2024.) The Court then entered an order prohibiting either party from contacting prospective jurors. (Order Prohibiting Contact with Prospective Jurors Until Further Order of Court (“Order Prohibiting Contact”), filed March 22, 2024.) The order states the Court had “reviewed the materials submitted” by both parties and that “[a] hearing on the issue will be held as soon as practicable.” (Order Prohibiting Contact, p.1.) The Court has now scheduled a hearing for April 4, 2024—less than two weeks after entering the Order Prohibiting Contact.

This fuller explanation of the facts demonstrates that this Court has provided Defendant due process. Due process is satisfied “when the defendant is provided with notice and an opportunity to be heard.” *State v. Head*, 172 Idaho 564, ___, 535 P.3d 188, 196 (2023). Yet it “is not a concept to be applied rigidly in every matter.” *Bradbury v. Idaho Jud. Council*, 136 Idaho 63, 72, 28 P.3d 1006, 1015 (2001). Due process “is a flexible concept calling for such procedural protections as are warranted by the particular situation.” *Id.*

This Court has complied with due process on this issue by providing Defendant notice and an opportunity to be heard at every stage related to attorney contact with the public. Early in the case, Defendant stipulated “that a nondissemination order be issued to protect against adversely affecting the integrity of the case to be presented at trial,” (Stipulation for Nondissemination Order, p.2, filed Jan. 3, 2023), and then Defendant briefed and argued in favor of the nondissemination order (*e.g.*, Objection to Mot. to Appeal, Amend and/or Clarify Nondissemination Order, filed Feb. 9, 2023). The State’s recent motion asserted as its sole legal

basis that the defense may have violated the Nondissemination Order by including certain questions in the jury survey that disclosed information about the case, and the defense's objection filed prior to the Court entering its order conceded that the defense conducted the survey. In light of that information, this Court's subsequent decision to prohibit any additional contact with prospective jurors—at least “until further order of court”; allow for Defendant to provide an “affidavit and memorandum in support of the Objection”; and quickly schedule a hearing at which Defendant can be heard, plainly protected Defendant's right to due process “as warranted by the particular situation,” *Bradbury*, 136 Idaho at 72, 28 P.3d at 1015.

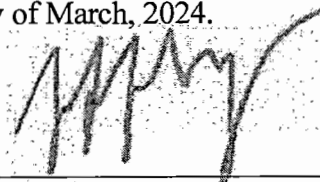
CONCLUSION

This Court should deny Defendant's motion for the reasons stated above.

RESPECTFULLY SUBMITTED this 29th day of March, 2024.



William W. Thompson, Jr.
Prosecuting Attorney



Jeff Nye
Special Assistant Attorney General

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the OBJECTION TO DEFENDANT'S MOTION TO RESCIND ORDER FOR FAILURE TO PROVIDE DUE PROCESS were served on the following in the manner indicated below:

Anne Taylor
Attorney at Law
PO Box 9000
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- Mailed
- E-filed & Served / E-mailed
- Faxed
- Hand Delivered

Dated this 29th day of March, 2024.