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CASE NO. CR29-22-2805
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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,)
)
 vs.)
)
 BRYAN C. KOHBERGER,)
)
 Defendant.)
 _____)

Case No. CR29-22-2805

**ORDER ALLOWING DEFENSE
SURVEYS TO CONTINUE**

On March 22, 2024, the State filed a sealed Motion for Order Prohibiting Further Contact with Prospective Jurors Absent Leave of Court. The same day Defendant Bryan Kohberger filed an Objection to the State’s Motion with the promise of a forthcoming affidavit and memorandum in support of the Objection. The Court then entered a temporary order prohibiting both parties “from contacting potential jurors about this case, including via third parties, until further order of this Court.” A hearing on the issue was set for April 4, 2024.

In the interim, the defense filed a Memorandum in Support of Objection to the State’s Motion for Order Prohibiting Contact with Prospective Jurors Absent Leave of Court with the Declaration of Bryan Edelman, Ph.D., attached and a Motion to Rescind Order for Failure to Provide Due Process. On March 29, 2024, the State filed a Declaration in Response to Defendant’s “Motion to Rescind Order for Failure to Provide Due Process,” a Reply in Support of Motion for Order Prohibiting Contact with Prospective Jurors Absent Leave of Court, and an Objection to Defendant’s Motion to Rescind Order for Failure to Provide Due Process. On

March 29, 2024, the defense filed a Reply in Support of Motion to Rescind Order for Failure to Provide Due Process.

The April 4, 2024, hearing was open to the public because neither party requested that the hearing be sealed. At that time, the Court heard arguments from both parties regarding a survey the defense had conducted in Latah County and wished to conduct in two additional counties. The State took issue with nine of the questions in the survey, which were read into the record in open court, and argued that asking those specific survey questions to potential jurors violated the Court's Revised Amended Nondissemination Order entered June 23, 2023. Specifically, the Nondissemination Order prevents the attorneys in this case or their agents from making out-of-court statements which a reasonable person would expect to be disseminated by means of public communication and that relate to the following: 1) The identity or nature of evidence expected to be presented at trial or any sentencing phase of the proceedings, and 2) Any information a lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial, and that would, if disclosed, create a substantial risk of prejudicing an impartial trial. The State asserted the questions violated these provisions because the surveyors are agents of the defense and the defense bears the responsibility to honor the Nondissemination Order.

The defense argued that the questions in the survey were based on information obtained by defense expert, Bryan Edelman, from reading and watching various news articles and broadcasts from both mainstream media and social media. The defense further argued that the questions did not violate the Nondissemination Order because they constituted "information contained in the public record." The defense argued that the "public record" encompasses all information in the media for the public's consumption. The Nondissemination Order expressly

allows “[a]ttorneys involved in the case and their agents . . . [to] may make extrajudicial statements (written or oral) concerning” “[i]nformation contained in the public record.”

At the conclusion of the hearing, the Court ruled that Defendant’s due process rights had not been violated because 1) the order to pause the surveys was entered after Defendant filed an objection to such order, and 2) the order was temporary, and Defendant was given notice and the opportunity to be heard at the hearing set shortly after the temporary order was filed.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property without due process of law.” The right to procedural due process guaranteed under both the Idaho and United States Constitutions requires that a person involved in the judicial process be given meaningful notice and a meaningful opportunity to be heard. Due process requires that judicial proceedings be fundamentally fair. Procedural due process is not a rigid concept but, rather, it is flexible and calls for such procedural protections as the particular situation demands.

State v. Blair, 149 Idaho 720, 722, 239 P.3d 825, 827 (Ct. App. 2010) (internal quotation marks and citations omitted).

The Court also kept the temporary order prohibiting contact with potential jurors in place, and instructed defense counsel to consult with Bryan Edelman to determine if there was a way the survey could continue while eliminating the concerning questions the State raised. The hearing was scheduled to continue April 10, 2024.

On April 10, 2024, the parties again reconvened in open court. Again, neither party requested that the hearing be sealed. The questions at issue were again discussed, including the fact that some of the questions on the survey are not rooted in fact or supported by admissible evidence but are simply rumors in the media and on social media while other questions were formulated based on information from the public Probable Cause Affidavit filed by the State.

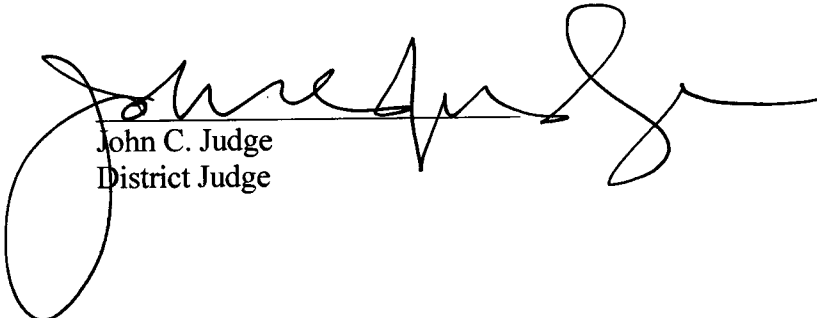
After a lengthy hearing, the parties remained at odds over whether the nine questions at issue should be allowed to be asked in surveys conducted by the defense in other counties.

The Court now ORDERS the following:

1. The “public record” as that term is used in the Nondissemination Order means the public court record (i.e., information from public hearings and from documents filed in the case that are not sealed).
2. Information that formed the basis for six of the nine questions at issue came from the Probable Cause Affidavit, a document filed in this case that is not sealed. The Nondissemination Order expressly allows “[a]ttorneys involved in the case and their agents . . . [to] make extrajudicial statements (written or oral) concerning” “[i]nformation contained in the public record.” Additionally, one of the questions was not based on admissible or inadmissible “evidence” but instead asked about the feelings of members of the Moscow community. Therefore, the defense did not violate the Nondissemination Order by asking seven of the nine questions.
3. As to the remaining two questions, prior to the hearings, there was not “information contained in the public record” about these “media items.” However, these questions have now been read into the public record and discussed at length during the hearings, including the fact that these “media items” may not be true. Because the information is now in the public record, the Court does not see any benefit in preventing the defense from continuing its surveys or requiring that the two questions at issue be eliminated. Again, these questions and “media items” are now part of the public record and the Nondissemination Order does not prohibit the attorneys involved in the case or their agents from making extrajudicial statements about information contained in the public record.

4. The Nondissemination Order also allows extrajudicial statements “that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client. Any such statement shall be limited to such information as is necessary to mitigate the recent adverse publicity.” Defense counsel argued at length that the two “media items” not contained in the public record were the subject of extensive media coverage that was prejudicial to Defendant and that the survey questions asking potential jurors if they had read, seen, or heard these “media items” was necessary to support Defendant’s Motion for Change of Venue, which is aimed at mitigating the effects of prejudicial pretrial publicity on Defendant’s right to a fair trial.
5. The goal of the Nondissemination Order is to ensure a fair and impartial jury can be impaneled so that Defendant receives a fair trial. If defense counsel believes asking these survey questions, which arguably contain prejudicial information or misinformation about Defendant, is more beneficial than harmful, as Defendant’s expert testified, this Court does not, at this juncture, have sufficient information or evidence to second guess that strategic decision by trial counsel.
6. The Court’s Order Prohibiting Contact with Prospective Jurors Until Further Order of Court is lifted and the defense may continue its surveys without modification to the survey questions. Any extrajudicial statements by any attorneys involved in this case or their agents must continue to comply with the Nondissemination Order.

DATED this 19th day of April 2024.


John C. Judge
District Judge

CERTIFICATE OF SERVICE

I certify that copies of the ORDER ALLOWING DEFENSE SURVEYS TO CONTINUE were delivered by email to:

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on this 22nd day of April 2024.

County Clerk of the Court

By: 
Deputy Clerk