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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 CR29-22-2805

**MOTION TO STRIKE THE DEATH
PENALTY ON GROUNDS OF STATE
SPEEDY TRIAL PREVENTING
EFFECTIVE ASSISTANCE OF
COUNSEL**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and hereby moves this honorable Court for an Order striking the State's Notice Pursuant to Idaho Code § 19-4004A on the grounds that Idaho's statutory and constitutional guarantee to a speedy trial prevents effective assistance of counsel in death penalty cases.

**MOTION TO STRIKE THE DEATH PENALTY ON GROUNDS OF STATE
SPEEDY TRIAL PREVENTING EFFECTIVE ASSISTANCE OF COUNSEL**

ISSUES

- I. Idaho requires all criminal defendants to be brought to trial in six months from the arraignment on an Indictment pursuant to statute and its constitution.
 - a. In Idaho the right to a speedy trial is defined by I.C. § 19-3501 as it was at the time of the adoption of the Constitution.
 - i. The Idaho Constitution guarantees a speedy trial except where there is good cause for a delay or the request for postponement came from the defendant.
 - ii. The Idaho Constitution requires a fixed amount of time constitute undue delay. This Court should adopt the six-month line adopted by our legislature.
 - b. A defendant in Idaho can never request additional time without losing his right to a speedy trial.
- II. A capital case cannot be prepared in ten months.
- III. Idaho cannot force a defendant to choose between his rights.

PROCEDURAL HISTORY

On November 13, 2022, law enforcement found the bodies of Madison Mogen, Kaylee Gocalves, Xana Kernodle, and Ethan Chapin. On December 30, 2022, law enforcement arrested Mr. Kohberger at his parents' home in Pennsylvania. Mr. Kohberger's current counsel filed for a limited appearance the same day. His first appearance in court in Idaho was January 5, 2023. On January 12, 2023, Mr. Kohberger filed a Notice of Appearance, Request for Timely Preliminary Hearing, Motion for Bail Reduction and Notice of Hearing, which contained a demand for speedy trial pursuant to Sixth and Fourteenth Amendments to the United States Constitution, Art. I Sections 7, 13 and 18 of the Idaho Constitution, and I.C. § 19-3501.

While Mr. Kohberger prepared for a preliminary hearing, the State convened a grand jury on May 12, and by May 16, 2023, it had an Indictment for Mr. Kohberger on four charges of murder in the first degree and a count of burglary. This Court arraigned Mr. Kohberger on May 22, 2023. On May 23, 2023, pursuant to Mr. Kohberger's right to a speedy trial, this Court set Mr. Kohberger's jury trial for October 2, 2023, a mere ten months from his arrest. On August 23, 2023, Mr. Kohberger waived his right to a speedy trial in order to secure his right to effective assistance of counsel.

ARGUMENT

I. Idaho requires all criminal defendants to be brought to trial in six months from the arraignment on an Indictment pursuant to statute and its constitution.

Pursuant to Idaho Code § 19-3501(2)&(5), a court must order the prosecution or indictment to be dismissed, *unless good cause to the contrary is shown*, if a defendant, whose trial has not been postponed upon his application, is not brought to trial within six months from the date that information is filed with the court.

When a defendant who invokes their statutory speedy trial right is not brought to trial within six months and shows that the trial was not postponed at his request, the burden then shifts to the state to demonstrate good cause for the delay. *State v. Rodriguez-Perez*, 129 Idaho 29, 38, 921 P.2d 206, 215 (Ct.App.1996). Good cause means that there was a substantial reason for the delay that rises to the level of a legal excuse. *State v. Clark*, 135 Idaho 255, 260 (2000). Previously, there was not a fixed rule for determining good cause for the delay of a trial and the matter was left to the discretion of the trial court. *State v. Johnson*, 119 Idaho 56, 58 (Ct. App. 1990). The Idaho Supreme Court has held that “a thorough analysis of the reasons for the delay represents the soundest method for determining what constitutes good cause” and that a Court may rely in part on the *Barker* factors. *Clark*, 135 Idaho at 260 (*citing Barker v. Wingo*, 407 U.S. 514 (1972)).

Article I Section 13 also protects a defendant's right to a speedy trial. As will be shown, the Idaho Supreme Court has wrongfully deviated from the right as it was defined by the framers. Additionally, one of the underpinnings of the right, what constitutes undue delay, has ceased to exist and must be reinterpreted in the context of the modern court system.

a. In Idaho the right to a speedy trial is defined by I.C. 19-3501 as it was at the time of the adoption of the Constitution.

“When construing the Idaho Constitution, ‘the primary object is to determine the intent of the framers.’” *State v. Clarke*, 165 Idaho 393, 397, 446 P.3d 451, 455 (2019). “Provisions of the Idaho Constitution must be construed in light of the law prior to their adoption.” *State v. Green*, 158 Idaho 884, 887, 354 P.3d 446, 449 (2015). Even Idaho's Constitution reflects this view. Idaho Const. art. XXI, § 2 (“All laws now in force in the territory of Idaho which are not repugnant to this Constitution shall remain in force...”)

In *Clarke*, our Supreme Court found a statute in force at the time our Constitution was ratified to be controlling in its interpretation of Article I, § 17. *Clarke*, 165 Idaho 393.

In *State v. Matthews*, 129 Idaho 865, 934 P.2d 931 (1997), our Court considered the issue of whether search warrants needed to be signed in order to be valid. The Court found that warrants do need to be signed, or else a search pursuant to such a warrant will violate Art. I § 17 of our Constitution. The Court arrived at this conclusion despite the fact that Art. I § 17 is completely silent regarding whether a warrant needs a signature. The reason the Court was able to find a constitutional violation in this case was by acknowledging that the statutes which require a signature (I.C. §§ 19-4401, 4406, 4407), “predate the Constitution of the State of Idaho.” *Id.*, at 869, 934 P.2d at 935. Because these statutes, which require a signature on warrants, predated the Idaho Constitution, they “create a substantive right” which “existed prior to the adoption of this State's Constitution.” *Id.*

In *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978), our Supreme Court found a defendant was entitled to constitutional relief for a violation of I.C. § 19-611 (knock and announce) after finding the rights contained in that statute were long standing at common law and “deeply rooted in our heritage.” *Rauch*, at 593, 586 P.2d at 678. The *Rauch* Court was able to trace this deeply rooted heritage all the way back to 1603.

In this case, I.C. § 19-3501 must color this Court’s interpretation of Art. I, § 13, because this statutory provision was in effect at the time of ratification. At the time of the adoption of our Constitution, the 1887 Territorial Criminal Practice Act provided:

The Court, unless good cause to the contrary is shown, must order the prosecution of indictment to be dismissed, in the following cases:

...

2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial at the next term of the Court in which the indictment is triable, after it is found.

R.S. 1887, § 8212. *See* Exhibit A. The right to a speedy trial was certainly well known to the framers of our Constitution. Section 8212 had been in place for nearly three years prior to the our Constitution’s adoption. While the framers felt it unnecessary to lay out the amount of time for a speedy trial, the reliance on “terms” of the Court refers to R. S. 1887 § 3831 (Exhibit B), which reads as follows:

Each term must be held until the business is disposed of, or until a day fixed for the commencement of some other term in the district court.

This Court may require some explanation for what may seem a vague directive that terms, now only used by our Supreme Court, were to be held until there was nothing left to do or the judge needed to be elsewhere. In the days of the territories of our country, it was unnecessary to employ vast numbers of District Judges, as the cases appropriate for them (as defined in Idaho in 1887 by R.S. 1887, § 3830) were typically few. In the Idaho Territory:

three judges handled all the work of the district courts and supreme court. Each of the three sat as a district judge, and they sat together as the supreme court. They exercised the jurisdiction of local or territorial courts and of federal courts.

Dennis C. Colson, Idaho's Constitution: The Tie that Binds, 205 (2003 Ed.). So, as a judge put in in Michigan in 1828:

"Heretofore, & until recently, the Judges of this Territory were required to hold but one Term of the Court annually & that in Detroit. . . . But as the country became more settled, new counties were organized;- and it has been deemed expedient to increase the number of terms, & places too, of holding Courts.-The Legislative Council of the Territory, under the sanction of an Act of Congress of the 29th Jan^y 1827, have, at its late session, directed court to be holden in each of the organized counties of the Peninsula-& giving very ample jurisdiction to them, have required that *all or a majority* of the Judges attend each term.-The consequence of this new organization is, that the Judges, collectively, have now to hold *fifteen* Courts annually, instead of one, & to traverse, mostly on horseback, an immense country, over roads not yet half formed &, some of which are exceedingly dangerous.- The principle of this system, is progressive; the number of courts to be holden, will continue to increase with the advancing settlement of the Country."

William Wirt Blume & Elizabeth Gaspar Brown, *Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions: Part I. Establishment of a Standardized Judicial System* 61 Mich. L. Rev. 1, 96 (Nov., 1962) (*quoting* Letter, Woodbridge to Strong, dated Nov. 28, 1828, Woodbridge Papers, Burton Historical Collection, Public Library, Detroit, Michigan.). Idaho judges were granted the right to set their own terms in 1873. *Id.* at 99; *U.S. v. Kuntze*, 2 Idaho 446, 21 P. 407, 408 (1889). In 1871, the Idaho Territorial Supreme Court found that it determined when these terms were to occur:

The act of March 2, 1867, amendatory of the fifteenth section of the organic act of Idaho, provides, "that the judges of the supreme court of said territory, or a majority of them, shall, when assembled at the seat of government of said territory, define the judicial districts of said territory, and assign the judges who may be appointed for said territory to the several districts, and shall also fix the times and places for holding court in the several counties or subdivisions in each of said judicial districts, and alter the times and places of holding the courts, as to them shall seem proper and convenient."

People v. Heed, 1 Idaho 402, 406-07 (1871). District Court terms could be extremely infrequent. *See, Greathouse v. Heed*, 1 Idaho 494, 498 (1873) (noting in some counties there may only be one term a year). It is also worth noting that the legislature set the terms for the probate courts,

which functioned much like the magistrate courts we have now. *See, generally, id.* The importance of terms was more than simply the timing of trials- until a term was adjourned, judgments were not considered final and could be revised. *See, Moore v. Taylor*, 1 Idaho 630, 635 (1876).

When the Constitution was adopted, there was a lot of debate over whether to add additional judges. Colson, at 205-210. A vocal part of the delegation, led by William McConnell of Latah, argued that adding five additional judges to act solely as District Judges was too much expense. *Id.* at 206. When Weldon Heyburn of Shoshone and the judges argued that all courts were month and months behind, McConnell's faction argued it was the lawyers who were to blame. *Id.* at 207. In the end, it was the geography of our state that was to decide the issue. *Id.* at 209. The delegation overwhelmingly supported five new districts and judges. *Id.* They rejected thereby a compromise of four districts, placing two judges in north Idaho and two in the south as clearly unfair to the south, where some would have to travel 1200 miles to get to court. *Id.* The delegation clearly agreed with Judge Morgan, who said:

“It is ruinous, absolutely ruinous to men to have cases for trial in these courts” because the subject of litigation becomes worthless after such a long time or because they have great amounts of money invested.

Id. at 207.

The upshot was Art. V Section 11, which states:

The state shall be divided into five judicial districts, for each of which a judge shall be chosen by the qualified electors thereof, whose term of office shall be four years. And there shall be held a district court in each county, at least twice in each year, to continue for such time in each county as may be prescribed by law. But the legislature may reduce or increase the number of districts, district judges and district attorneys. This section shall not be construed to prevent the holding of special terms under such regulations as may be provided by law.

This Court should note that in the Constitution, though the District Judges were provided some leeway over when Court would be held in the various counties, it had to occur at least twice each year and each term would only conclude when the business was done, or the next term was to

begin. Additionally, the legislature had and has the power to require special terms, so whether or not court is held is not up to the judiciary. The right of Idaho citizens to speedy justice guaranteed by Art. I Section 18 of our Constitution is therefore not solely for the judiciary to define, any more than the right to a speedy trial for criminal defendants.

i. The Idaho Constitution guarantees a speedy trial except where there is good cause for a delay or the request for postponement came from the defendant.

Our state's speedy trial right must be as they were when the constitution was adopted. Not only is it clear from *Clarke* and other authorities that courts should first look to the understanding of the framers when considering the meaning of our constitutional rights, but even the Idaho Supreme Court had held that our constitutional right to a speedy trial was defined by I.C. § 19-3501 before the *Barker* test was adopted. *Ellenwood v. Cramer*, 75 Idaho 338, 343 (1954). It was not until *State v. Lindsay*, 96 Idaho 474, 475 (1975), that our Supreme Court held that *Barker* was an appropriate test for speedy trial under the Idaho Constitution. However- the Court held in *Clark* that the good cause test of I.C. §19-3501 was not an exact equivalent to the *Barker* test. 135 Idaho at 260. Therefore, this Court should hold that *Lindsay* and its progeny were wrongly decided, in that they did not properly consider Art. I Sec. 13 by starting from the understanding of our framers.

ii. The Idaho Constitution requires a fixed amount of time constitute undue delay. This Court should adopt the six-month line adopted by our legislature.

All that is left for discussion is what has become of the Idaho constitutional right and the statutory right pursuant to I.C. § 19-106 to a speedy trial after the legislature repealed terms of district courts in 1975. *See, State v. Carter*, 103 Idaho 917, 920 (1981). The *Carter* Court thought the question easily resolved by its earlier ruling to rely on the *Barker* test. *See id.* As argued in the preceding paragraph, however, the federal right to a speedy trial and the Idaho right

are not equivalent. Just as the *Barker* test does cannot replace the test for good cause, the *Barker* unreasonable delay test does not replace the next term of court test. This Court must decide what would be equivalent to the next term of court now that they no longer exist.

In *State v. Bennion*, 112 Idaho 32 (1986), the Idaho Supreme Court took up a similar challenge when a defendant demanded a jury trial for an infraction under Art. I Sec. 7. As the Idaho Supreme Court found:

This Court long and often has stated that [Article 1, § 7](#) preserves the right to jury trial as it existed at the common law and under the territorial statutes when the Idaho Constitution was adopted. *E.g.*, *Burnham, supra*, [35 Idaho at 526, 207 P. at 590](#); *Christensen v. Hollingsworth*, [6 Idaho 87, 93, 53 P. 211, 212 \(1898\)](#). This standard of construction holds sway in the criminal as well as civil context. *Dutton v. District Court*, [95 Idaho 720, 723, 518 P.2d 1182, 1185 \(1974\)](#) (involved criminal contempt); *State v. Jutila*, [34 Idaho 595, 597, 202 P. 566 \(1921\)](#) (involved robbery). Most jurisdictions interpret their analogous constitutional provisions in an analogous way. *E.g.*, *People v. Collins*, [17 Cal.3d 687, 131 Cal.Rptr. 782, 552 P.2d 742, 745 \(1976\)](#); *Rothweiler v. Superior Court*, [100 Ariz. 37, 410 P.2d 479, 485 \(1966\)](#); *see generally*, [47 Am.Jur.2d Jury, §§ 7, 17](#). The standard embodies the common sense notion that, by employing the phrase “shall remain inviolate,” the Framers must have intended to perpetuate the right as it existed in 1890. *Burnham, supra*, [35 Idaho at 525–26, 207 P. at 590](#); *Christensen, supra*, [6 Idaho at 94, 53 P. at 212](#); *accord*, *State v. Cousins*, [97 Ariz. 105, 397 P.2d 217, 218 \(1964\)](#); *Town of Montclair v. Stanoyevich*, [6 N.J. 479, 79 A.2d 288, 293 \(1951\)](#).

The standard should not be taken to extreme. The Framers did not intend to *literally* freeze the law precisely as it existed in 1890. To do so would yield the absurd result of affording no right to jury trial to those accused of crimes that happened not to be in statutory or common law existence at that arbitrary point in history.

Bennion, 112 Idaho at 37. The Court then reviewed the history of the right to a jury trial in the common law of England, other jurisdictions, and in Idaho at the time of statehood. *Id.* at 38-41. The Court found: “At the time of statehood, the territory of Idaho made two specific exceptions to an otherwise all-encompassing grant of the right to jury trial in criminal actions.” *Id.* at 41. The Court then looked to the framers and the Constitution itself for meaning. *Id.* at 42. The Court found that the Framers had imprisonment and punitive measures in mind. *Id.* The Court

determined that this history permitted “summary proceedings if the sanction is decriminalized.” *Id.* at 45.

Here, as argued above, the history of terms of court at the time of the adoption of our Constitution would permit this Court to find that the framers did not wish for people to languish in jail awaiting trial. The courts were not to have fewer than two terms- meaning that stretching those terms to their limits, a person could not have sat for more than a year. Additionally, this requirement did not permit the judge to close court and leave the district without having tried the defendant’s case. One can imagine the psychological effect that would have on a defendant- to wait in jail and have the only person with the power to release them pack up and leave the area.

The framers also would have been aware of the history of the right to a speedy trial. As found by the United States Supreme Court:

We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, ‘We will sell to no man, we will not deny or defer to any man either justice or right’;⁸ but evidence of recognition of the right to speedy justice in even earlier times is found in the Assize of Clarendon (1166). By the late thirteenth century, justices, armed with commissions of gaol delivery and/or oyer and terminer were visiting the countryside three times a year. These justices, Sir Edward Coke wrote in Part II of his Institutes, ‘have not suffered the prisoner to be long detained, but at their next coming have given the prisoner full and speedy justice, * * * without detaining him long in prison.’ To Coke, prolonged detention without trial would have been contrary to the law and custom of England; but he also believed that the delay in trial, by itself, would be an improper denial of justice. In his explication of Chapter 29 of the Magna Carta, he wrote that the words ‘We will sell to no man, we will not deny or defer to any man either justice or right’ had the following effect:

‘And therefore, every subject of this realme, for injury done to him in bonis terris, vel persona, by any other subject, be he ecclesiasticall, or temporall, free, or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.’

Coke's Institutes were read in the American Colonies by virtually every student of the law. Indeed, Thomas Jefferson wrote that at the time he studied law (1762—1767), 'Coke Lyttleton was the universal elementary book of law students.' And to John Rutledge of South Carolina, the Institutes seemed 'to be almost the foundation of our law.' To Coke, in turn, Magna Carta was one of the fundamental bases of English liberty. Thus, it is not surprising that when George Mason drafted the first of the colonial bills of rights, he set forth a principle of Magna Carta, using phraseology similar to that of Coke's explication: '(I)n all capital or criminal prosecutions,' the Virginia Declaration of Rights of 1776 provided, 'a man hath a right * * * to a speedy trial * * *.' That this right was considered fundamental at this early period in our history is evidenced by its guarantee in the constitutions of several of the States of the new nation, as well as by its prominent position in the Sixth Amendment. Today, each of the 50 States guarantees the right to a speedy trial to its citizens.

The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution.

Klopper, 386 U.S. at 223-26 (footnotes omitted).

Since 1975, no defendant needs to worry that a judge will become unavailable, leaving them detained essentially incommunicado. All the same, the weight of imprisonment and awaiting trial cannot be made much easier by having a judge available who does not hear your case though you ask him or her to. To some extent, the feeling of begging for one's freedom and having it fall on deaf ears as time drags on might be worse. In 1980, the Idaho legislature amended I.C. § 19-3501 to not permit a trial to be prolonged beyond six months. *Carter*, 103 Idaho at 920, n. 2; *see also*, S1369 Statement of Purpose (1980) (explaining adoption of six month bright line was to provide citizens with the speediest trial that was possible under previous statute) (Exhibit C). This Court may consider the opinion of the legislature, which is also reflected in other states. *See*, Francis C. Amendola, *et al.*, *State Provisions Regarding Speedy Trials, Generally*, 23 C.J.S. CRIMINAL PROCEDURE AND THE RIGHTS OF THE ACCUSED § 820 (2020).

This Court should draw a firm line at six months in conformity with the legislature and those of other states. In *Roper v. Simmons*, 543 U.S. 551, 574 (2005), the Court held:

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in *Thompson* drew the line at 16. In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Similarly, here, where Idaho's framers intended a fixed line for when a defendant had waited too long for trial, but the foundation for that line has been erased, it is for the courts to do their duty and ensure that the intentions of the Constitution and its protections remain.

- b. A defendant in Idaho can never request additional time without losing his right to a speedy trial.

As noted, I.C. § 19-3501 and its territorial predecessor that fixed the right to a speedy trial for the Idaho Constitution R.S. 1887, § 8212 do not permit a speedy trial claim when the trial was "postponed upon [the defendant's] application." This language could have been interpreted any number of different ways, but in *State v. Kysar*, 116 Idaho 992, 999 (1989), the Idaho Supreme Court, with no analysis, declared that any request for delay from a defendant waived the statutory right entirely. As the territorial statute defining the constitutional right has the same language, this Court can safely presume that the Idaho Supreme Court, if it ever revisits the issue of what the constitutional right consists of, will hold the same as to it. Thus, no defendant may ever request a delay in Idaho if they want to preserve their right to a speedy trial.

II. A capital case cannot be prepared in ten months.

With this six months to trial as a backdrop, modern death penalty work becomes impossible. Undersigned counsel is unable to fulfill the requirements of the ABA Guidelines For

the Appointment and Performance of Defense Counsel in Death Penalty Proceedings¹ (hereinafter “Performance Guidelines”) and the Supplementary Guidelines for Mitigation Function of Defense Teams in Death Penalty Cases² which have been adopted by Idaho and accepted by the U.S. Supreme Court as the defining standard for effective representation in capital cases. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003); IDAPA 61.01.02.070.02; Public Defense Commission, Capital Defending Attorney Qualifications and Roster, <https://pdc.idaho.gov/capital-counsel-qualifications-and-roster/> (last visited August 22, 2023).

Death penalty cases must be considered differently compared to non-death penalty cases. They must be subjected to heightened constitutional scrutiny. Put simply, so long as Mr. Kohberger’s execution is a possible result in this case, the State of Idaho must take basic, if not “extraordinary measures” to protect his constitutional rights. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). This is abundantly clear from the 6th and 14th Amendments and is enunciated precisely in the case of *Ake v. Oklahoma*:

This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment’s due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

Ake v. Oklahoma, 470 U.S. 68, 76 (1985).

Unquestionably, the prosecution’s intent to seek the death penalty ratchets up the demands on defense counsel. *See, e.g., Sawyer v. Whitley*, 505 U.S. 333, 343 (1992); *see also State v. Young*, 172 P.3d 138, 141 (N.M. 2007). Nowhere are these demands more clearly

¹ American Bar Association, ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), *available at*

https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003guidelines.pdf.

² American Bar Association, ABA Supplementary Guidelines for Mitigation Function of Defense Teams in Death Penalty Cases (2008) *available at* <https://pdc.idaho.gov/wp-content/uploads/2016/06/ABASupp.MitigationGuidelines2008.pdf>.

enunciated than in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Proceedings. Defense counsel incurs the immediate obligation to conduct a thorough investigation at every stage of the case, and this “duty is intensified (as are many duties) by the unique nature of the death penalty, [as] has been emphasized by recent statutory changes, and is broadened by the bifurcation of capital trials.” *Id.* at 1016 (footnotes omitted). The breadth and scope of this duty is such that it routinely results in findings of ineffective assistance after the fact (and after all sides have sunk enormous costs). *See id.* at 1016 n.197 (collecting inadequate investigation cases).

The duty to investigate of course includes all the numerous issues related to the guilt phase of homicide charges carrying the possibility of capital punishment: witness interviews, forensic analysis, crime scene investigation, charging documents, police conduct, codefendants, alibi, etc. *See id.* at 1016-21. However, the penalty phase alone can necessitate an even wider investigation. With virtually limitless avenues for mitigating evidence, all of which must be pursued, *see* I.C. § 19-2515(6); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978), the penalty phase investigation “requires [an] extensive and generally unparalleled” look into the defendant’s “personal and family history begin[ning] with the moment of conception.” Performance Guidelines, at 1022. Just the starting point for defense counsel includes:

- (1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);
- (2) Family and social history (including physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment, and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e. g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);
- (3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;
- (4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);
- (5)

Employment and training history (including skills and performance, and barriers to employability); (6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services)[.]

Id. at 1022-23. None of this material is necessarily easy to procure: His most personal experiences “may be extremely difficult for the client to discuss.” *Id.* at 1024. Indeed, defense counsel must build a special rapport with his client for all proceedings; he is asking the client to trust counsel *with his life*. And even the information defense counsel *can* collect then requires “[t]he collection of corroborating information from multiple sources—a time-consuming task . . . to ensure the reliability and . . . persuasiveness of the evidence.” *Id.* at 1024.

That is not the type of investigation that can wait until the week, or even month, before trial. To the contrary, the very possibility of the *penalty* phase proceedings weighs heavily on defense counsel’s preparations from the moment they begin to work on the case. *See id.* at 1023 (“The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses . . . decisions about the need for expert evaluations . . . motion practice, and plea negotiations.”). The “penalty phase” is in that sense a misnomer; for the defendant, the penalty phase begins as soon as the possibility of a death sentence arises, whether or not he has yet been found guilty. The mitigation investigation, furthermore, runs in parallel with the many tasks of defense counsel to prevent or prepare for trial on the original charges. *See id.* at 1028-1054 (Guidelines 10.8-10.10.2 discussing motion practice, negotiations with the prosecution, pleading, trial preparation, and jury selection).

It is no surprise, then, that one study estimates that the average capital trial consumes nearly 1,900 hours of defense counsel’s time—over *sixteen times* the average hours spent on non-capital *homicide* cases.³ That estimate itself is not an indictment of the capital punishment

³ Hon. James R. Spencer, et al., Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* 11 tbl. (1998), available at

system; it reflects in part the “extraordinary measures” required to ensure a fair hearing for a defendant accused of a capital crime. *Caldwell*, 472 U.S. at 329. However, the demands on capital counsel become a constitutional problem when, as in Idaho, the State’s speedy trial requirement hamstrings defense counsel’s ability to commit the requisite time.

The state, with its one hand, can dramatically escalate the demands on Mr. Kohberger and defense counsel by noticing intent to seek death. Yet with its other hand, it rigs the system so that it can be assured that defense counsel cannot meet those demands or must counsel a client to give up his right to a speedy trial.

III. Idaho cannot force a defendant to choose between his rights.

As “the first line of defense for individual liberties,” this Court’s foremost duty is to safeguard the rights of Idaho citizens and “deliver remedies for wrongs and justice freely and without purchase; completely and without denial; promptly and without delay[.]” *State v. Randolph*, 800 N.W.2d 150, 159 (Minn. 2011) (internal quotation marks omitted). Any number of remedies is available to the Court through the use of its inherent powers to supervise cases. *See, e.g., State v. Blank*, 33 Idaho 730, 822 (1921). Among these powers is the ability to preclude prosecution and imposition of the death penalty. *See Furman v Georgia*, 408 U.S. 238, 239 (1972) (per curiam). The Court also has authority to stay proceedings in the interests of justice. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

“There are.. circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” *United States v. Cronin*, 466 U.S. 648, 658 (1984). The hallmark of such situations is that, “although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into

http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/federal_judicial_conference_recommendations.authcheckdam.pdf.

the actual conduct of the trial.” *Cronic*, 466 U.S. at 659-60 (citing *Powell v. Alabama*, 287 U.S. 45 (1932)). In such cases the defendant has been constructively denied his right to counsel and need not wait to assert his claim in post-conviction proceedings. *See, e.g., Hurrell-Harring v. State*, 930 N.E.2d 217, 224-26 (N.Y. 2010); *State v. Peart*, 621 So. 2d 780, 787 (La. 1993) (“For example, ineffective assistance of counsel claims based on allegations that the attorney is faced with a conflict of interest are routinely brought . . . before trial.”).

The United States Supreme Court has had few opportunities to opine on the full array of circumstances that give rise to a presumption of prejudice, but it has applied that presumption when counsel has a definite conflict of interest with the defendant. *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978). The *Holloway* Court explained that a presumption is necessary in such cases because the prejudice inquiry “would not be susceptible of intelligent, evenhanded application.” 435 U.S. at 490. Courts would face the intractable problem of identifying, after the fact, what counsel “*refrain[ed]* from doing” both before and during trial. *Id.* at 490-91. Because the record on appeal rarely illuminates the reason for inaction, “*assess[ing]* the impact of a conflict of interests on the attorney’s options, tactics, and decisions . . . would be virtually impossible.” *Id.* at 491.

State courts have applied this wisdom to conflicts created by resource shortages. When States have failed to provide adequate funding to public defenders courts have recognized this results in “a conflict of interest is inevitably created” when a public defender’s “excessive caseload forces [him] to choose between the rights of the various indigent criminals he represents[.]” *In re Order on Prosecution of Crim. Apps. by the Tenth Jud. Cir. Public Defender*, 561 So. 2d 1130, 1135 (Fla. 199); *accord In re Edward S.*, 92 Cal. Rptr. 3d 725, 746-47 (Cal. Ct. App. 2009).

Here, the choice of the prosecution to seek the death penalty, in conjunction with the requirements for a defense in a capital case as required by Idaho, essentially forced Mr.

Kohberger to abandon his right to a speedy trial. Courts in Idaho have long recognized that forcing citizens to choose between their rights is the same as depriving them of those rights. *See, e.g., Bartosz v. Jones*, 146 Idaho 449, 462 (2008); *Osteraas v. Osteraas*, 124 Idaho 350, 355 (1992). The United States Supreme Court has held the same. *See, e.g., Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977); *Simmons v. U.S.*, 390 U.S. 377, 393-394 (1968) (“When [the choice between testifying and giving up a benefit] is applied to a situation in which the ‘benefit’ to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created.”). The State of Idaho may not force this “Hobson’s Choice” on Mr. Kohberger. However, it did, and now the Court has a “waiver” of a right based upon it. A waiver, however, must be voluntary, “and courts should indulge ever reasonable presumption against waiver.” *State v. Lopez*, 144 Idaho 349, 352 (Ct.App.2007) (*citing Barker*, 407 U.S. at 525). Thus, this situation has created an “undeniable tension” within this case.

Without question, the surest way to safeguard Mr. Kohberger’s rights is to strike the death penalty and restore his right to a speedy trial. Striking the death penalty will balance Mr. Kohberger’s right to effective assistance of counsel with his right to a speedy trial. *Cf. Young*, 172 P.3d at 143-44 (discussing the balance). Furthermore, a death penalty structure that violates the constitution is, by its nature, unconstitutional. Idaho’s system of obtaining death convictions is unconstitutional at this time. This was recently recognized in *State v. Vallow*, Fremont County Case No. CR22-21-1624 (2023) (Order Granting Defendant’s Motion to Dismiss the Death Penalty and Order Striking the Notice of Intent to Seek Death Penalty). In that matter, it was recognized that within the time limits required for a speedy trial, neither the State nor the Defense could appropriately function and a just outcome be reached. *See, Rett Nelson, Judge Removes Death Penalty, Addresses Evidence Motions in Lori Daybell Murder Case*, EASTIDAHONEWS.COM (Mar. 21, 2023) (available at <https://www.eastidahonews.com/2023/03/judge-removes-death-penalty-addresses-evidence->

[motions-in-lori-daybell-murder-case/](#)). The same result should be obtained here.

CONCLUSION

Based upon the foregoing and argument to be presented at the hearing hereon, this Court is respectfully requested to grant this Motion that:

- (a) the State's Notice of Intent to Seek Death Penalty be struck;
- (b) the Court seat a jury which is not "death-qualified";
- (c) the Court preclude the admission of any evidence of aggravating circumstances during the trial of this case; and,
- (d) the Court not instruct the jury on any aggravated punishment.

DATED this 4 day of September, 2024.

BY: 

JAY WESTON LOGSDON
INTERIM CHIEF PUBLIC DEFENDER

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the 5 day of September, 2024 addressed to:

Latah County Prosecuting Attorney –via Email: paservice@latahcountyid.gov
Elisa Massoth – via Email: legalassistant@kmrs.net



A

FILE I. CH. VII. CERTAIN PUBLIC OFFENSES.

to a return of any money he may have deposited in bail.

When defendant is released on bail, he must be detained there until he becomes sane, or becomes sane, the superintendent must give notice to the sheriff and District Attorney of the order of the sheriff must thereupon, without delay, take the defendant from the asylum, and place him in proper custody, to be brought to trial or judgment, as the case may be, legally discharged.

Sec. 8200. The expenses of sending the defendant to the asylum, or keeping him there, and of bringing him back, are in the first instance chargeable to the county in which the indictment was found; but the court may order them from the estate of the defendant, if it is or from a relative, town, city, or county bound to provide for and maintain him elsewhere.

CHAPTER VII. COMPROMISING CERTAIN PUBLIC OFFENSES BY LEAVE OF COURT.

Sec. 8201. Compromise may be made by the parties to any criminal action, and the court may, in its discretion, allow the same.

Compromise of criminal offenses may be made by the parties to any criminal action, and the court may, in its discretion, allow the same.

Section 8205. When a defendant is held to answer the charge of misdemeanor, for which the period of the act constituting the offense has a remedy by civil action, the offense may be compromised as follows:

1. By or upon an officer of justice, while the action of the district of his office;

2. By or upon an officer of justice, while the action of the district of his office;

3. With an intent to commit a felony.

Sec. 8206. If the party injured appears before the court, the depositions are required to be taken before trial, and acknowledgment that the satisfaction for the injury, the court may, in its discretion, order payment of the costs incurred, order that the defendant be stayed upon the prosecution, and the defendant charged therewith, but in such case the order must be set forth therein, and entered on the order is a bar to another prosecution for the same offense. No public offense can be continued upon a compromise or prosecution for the purpose of Chapter.

§ 8212-8215 DISMISSAL OF ACTION.—CORPORATIONS. FILE I. CH. VII-II.

CHAPTER VIII.

DISMISSAL OF THE ACTION FOR WANT OF PROSECUTION OR OTHERWISE.

Section 8212. The Court, unless good cause to the contrary is shown, must order the prosecution or indictment to be dismissed, in the following cases:

1. When a person has been held to answer for a public offense, if an indictment is not found against him at the next term of the Court at which he is held to answer;

2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial at the next term of the Court in which the indictment is triable, after it is found.

Sec. 8213. If the defendant is not indicted or tried, as provided in the last section, and sufficient reason therefor is shown, the Court may order the action to be continued from term to term, and in the meantime may discharge the defendant from custody on his own undertaking of bail for his appearance to answer the charge at the time to which the action is continued.

Sec. 8214. If the Court directs the action to be dismissed, the defendant must, if in custody, be discharged therefrom; or if admitted to bail, his bail is exonerated, or money deposited instead of bail must be refunded to him.

Sec. 8215. The Court may, either of its own motion or upon the application of the District Attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes.

Sec. 8216. The entry of a nolle prosequi is abolished, and neither the Attorney General nor the District Attorney can discontinue or abandon a prosecution for a public offense, except as provided in the last section.

Sec. 8217. An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor; but it is not a bar if the offense is a felony.

CHAPTER IX.

PROCEEDINGS AGAINST CORPORATIONS.

Section 8222. Upon an information or presentment against a corporation, the magistrate must issue a summons signed by him, with his name of office, requiring the corporation to appear and answer to the same.

B

possession of real estate; or the legality of any tax, unjust assessment, toll, or municipal fine, or in which the demand or the value of the property in controversy exceeds one hundred dollars;

4. To all special proceedings;

5. To the issuance of writs of mandate, review, prohibition, habeas corpus, and all writs necessary to the exercise of its powers;

6. To the trial of all indictments;

7. Its appellate jurisdiction extends to all cases arising in Probate or Justices' Courts; and to all other matters and cases wherein an appeal is allowed by law.

SEC. 3831. Each term must be held until the business is disposed of, or until a day fixed for the commencement of some other term in the district. Duration of term.

SEC. 3832. The court may adjourn from time to time during the term, and may, when the public convenience requires, adjourn the term over the time fixed by law for the commencement of another term in the same district. Adjournments.

SEC. 3833. Judgments and orders of this court may be entered either in term or vacation. Judgments and orders entered in vacation.

CHAPTER IV.

OF THE PROBATE COURT.

SECTION	SECTION
3840. Court in each county.	3843. Terms of the court in the respective counties.
3841. Jurisdiction of.	3844. Terms, where held. Shall have a Clerk.
3842. Presumptions in favor of its judgments.	

SECTION 3840. There must be a Probate Court held in each of the counties. Court in each county.

SEC. 3841. The Probate Court has jurisdiction:

1. To open and receive proof of last wills and testaments and to admit them to proof;
2. To grant letters testamentary of administration and of guardianship, and to revoke the same;
3. To appoint appraisers of estates of deceased persons;
4. To compel executors, administrators and guardians to render accounts;
5. To order the sale of property of estates, or belonging to minors;
6. To order the payment of debts due from estates;
7. To order and regulate all distributions of property or estates of deceased persons;
8. To compel the attendance of witnesses and the production of title deeds, papers and other property of an estate or of a minor;
9. To make such orders as may be necessary to the exercise of the powers conferred upon it.

In addition to their probate jurisdiction to hear and determine all civil causes wherein the damage or debt claimed does not exceed the sum of five hundred dollars, exclusive of interest, and concurrent jurisdiction with Justices of the Peace in criminal cases.

SEC. 3842. The proceedings of this court are construed in the same manner and with like intendments as the proceedings of courts of general jurisdiction, and to its records, orders, judgments and decrees there is accorded like force, Presumptions as to probate proceedings.

C

IN THE SENATE

SENATE BILL NO. 1369

BY JUDICIARY AND RULES COMMITTEE

AN ACT

RELATING TO DISMISSALS OF ACTIONS; AMENDING SECTION 19-3501, IDAHO CODE, TO
PROVIDE FOR THE DISMISSAL OF A CRIMINAL CHARGE AGAINST A PERSON IF
CHARGES HAVE NOT BEEN FILED WITHIN SIX MONTHS OF THE DATE OF HIS ARREST
AND TO PROVIDE THAT A CRIMINAL CHARGE, AGAINST A DEFENDANT WHOSE TRIAL
HAS NOT BEEN POSTPONED UPON HIS OWN APPLICATION, MUST BE BROUGHT WITHIN
SIX MONTHS FROM THE DATE THE INDICTMENT OR INFORMATION IS FILED WITH
THE COURT.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 19-3501, Idaho Code, be, and the same is
hereby amended to read as follows:

19-3501. WHEN ACTION MAY BE DISMISSED. The court, unless good cause to
the contrary is shown, must order the prosecution or indictment to be
dismissed, in the following cases:

1. When a person has been held to answer for a public offense, if an
indictment or information is not found against him at-the-next-term-of--the
court-at-which-he-is-held-to-answer and filed with the court within six (6)
months from the date of his arrest.

2. If a defendant, whose trial has not been postponed upon his
application, is not brought to trial at-the-next-term-of-the-court-in-which
the-indictment-is-triable;-after-it-is-found within six (6) months from the
date that the indictment or information is filed with the court.

51369
STATEMENT OF PURPOSE

1980

This bill would amend section 19-3501, Idaho Code, which presently provides the time limit within which a defendant must be charged and brought to trial. Idaho Code §19-3501 supplements the constitutional provision for a speedy trial contained in Art. 1, Section 13, Idaho Constitution. (State v. Hobson, 99 Idaho 200 (1978)).

Because the present statute requires that the criminal action be filed against the defendant in the next "term of court" and thereafter his trial must be had in the "next term of court," his speedy trial requirement can vary tremendously depending upon when he is arrested during a "term of court." For example, if he is arrested at the beginning of one term of court, the formal charges do not have to be formalized in an indictment or information until the end of the next term which could be one day less than twelve months later. However, in the event formal charges in the form of an indictment or information is filed on the last day of one term of court, his trial must be held by the end of the next term of court which is only six (6) months away.

This bill would enact a uniform time limit of six (6) months, which was the shortest time within which a defendant must have a trial under the present statute, and eliminate the reference to "terms of court" which have become outdated and archaic in the modern practice of the courts. In fact, the courts are in continuous session in all locations, and terms of court are no longer needed.

The primary benefit which would be derived by this amendment to section 19-3501, Idaho Code, would be that criminal defendants would have a uniform fixed period of six (6) months within which they must have a speedy trial rather than a variable period depending upon when charges were filed against them during a term of court of the district court.

FISCAL NOTE

This bill has no fiscal impact on the state general fund.

1980 Final Daily Data

2/8 Senate intro - 1st rdg - to printing
 2/11 Rpt prt - to HEW
 3/14 Rpt out - to 14th Ord
 3/17 Rpt out amen - to engros
 3/19 Rpt engros - to 1st rdg as amen
 3/19 1st rdg - to 2nd rdg as amen
 3/20 Amens rpt prt
 3/20 2nd rdg - to 3rd rdg as amen
 3/21 3rd rdg as amen - PASSED - 33-0-2
 NAYS -- none.
 Absent and excused -- Swenson, Van Engelen.
 Title apvd - to House
 3/22 House intro - 1st rdg as amen - to Health/Hel
 3/24 Rpt out - rec d/p - to 2nd rdg as amen
 3/24 2nd rdg - to 3rd rdg as amen
 3/26 3rd rdg as amen - PASSED - 59-10-1
 NAYS -- Barlow, Brackett, Brooks, Harlow, Hollifield,
 Infanger, Jones, Stivers, Ungricht, Winchester.
 Absent and excused -- Kenneville.
 Title apvd - to Senate
 3/26 To enrol
 3/27 Rpt enrol - Pres signed
 3/27 Sp signed
 3/31 To Governor
 4/2 Governor signed
 Session Law Chapter 325
 Effective: 4-2-80

S1365aa SHELTER HOMES - Amends existing law to clarify the authority of the Boards of County Commissioners to provide shelter homes and shelter care facilities for the care of sick or indigent persons.
 By.....Health, Education & Welfare

2/8 Senate intro - 1st rdg - to printing
 2/11 Rpt prt - to HEW
 2/18 Rpt out - to 14th Ord
 2/19 Rpt out amen - to engros
 2/20 Amens rpt prt
 2/21 Rpt engros - to 1st rdg as amen
 2/21 1st rdg - to 2nd rdg as amen
 2/22 2nd rdg - to 3rd rdg as amen
 2/26 3rd rdg as amen - PASSED - 34-0-1
 NAYS -- none.
 Absent and excused -- Bilyeu.
 Title apvd - to House
 2/27 House intro - 1st rdg as amen - to Rev/Tax
 3/13 Rpt out - rec d/p - to 2nd rdg as amen
 3/14 2nd rdg - to 3rd rdg as amen
 3/17 3rd rdg as amen - PASSED - 67-2-1
 NAYS -- Reardon, Stephenson.
 Absent and excused -- Tibbitts.
 Title apvd - to Senate
 3/18 To enrol
 3/19 Rpt enrol - Pres signed
 3/20 Sp signed
 3/21 To Governor
 3/26 Governor signed
 Session Law Chapter 185
 Effective: 7-1-80

S1366 SALES TAX - Amends existing law to increase the amount of sales tax revenue distributed to counties and cities on the basis of a population factor and tax charges factor.
 By.....Local Government & Taxation

2/11 Senate intro - 1st rdg - to printing
 2/12 Rpt prt - to Loc Gov

S1367 TAX AND TAXATION - Amends existing law to increase the schedule of income limits for the circuit breaker and property tax relief.
 By.....Local Government & Taxation

--CONTINUED--

2/11 Senate intro - 1st rdg - to printing
 2/12 Rpt prt - to Loc Gov

S1368 EQUIPMENT SUPPLIERS - Amends existing law to provide equipment suppliers the same protection afforded suppliers of labor and material under performance bonds of public work contractors.
 By.....Judiciary & Rules

2/11 Senate intro - 1st rdg - to printing
 2/12 Rpt prt - to Jud
 2/28 Rpt out - rec d/p - to 2nd rdg
 2/29 2nd rdg - to 3rd rdg
 3/3 3rd rdg - PASSED - 34-0-1
 NAYS -- none.
 Absent and excused -- Little.
 Title apvd - to House
 3/4 House intro - 1st rdg - to Jud
 3/14 Rpt out - rec d/p - to 2nd rdg
 3/17 2nd rdg - to 3rd rdg
 3/18 3rd rdg - PASSED - 65-2-3
 NAYS -- Hale, Stoicheff.
 Absent and excused -- Davidson, Horsch, Reardon.
 Title apvd - to Senate
 3/19 To enrol
 3/20 Rpt enrol - Pres signed
 3/21 Sp signed
 3/22 To Governor
 3/28 Governor signed
 Session Law Chapter 199
 Effective: 7-1-80

S1369 CRIMINAL OFFENSES AND PROCEDURES - Amends existing law to provide that criminal charges must be filed within six months from a defendant's arrest or when the indictment or information is filed with the court.
 By.....Judiciary & Rules

2/11 Senate intro - 1st rdg - to printing
 2/12 Rpt prt - to Jud
 2/19 Rpt out - rec d/p - to 2nd rdg
 2/20 2nd rdg - to 3rd rdg
 2/21 3rd rdg - PASSED - 35-0-0
 NAYS -- none.
 Absent and excused -- none.
 Title apvd - to House
 2/22 House intro - 1st rdg - to Jud
 3/6 Rpt out - rec d/p - to 2nd rdg
 3/7 2nd rdg - to 3rd rdg
 3/10 3rd rdg - PASSED - 64-4-2
 NAYS -- Fitz, Ingram, Reardon, Stoicheff.
 Absent and excused -- Tibbitts, Winchester.
 Title apvd - to Senate
 3/11 To enrol
 3/12 Rpt enrol - Pres signed
 3/13 Sp signed
 3/14 To Governor
 3/19 Governor signed
 Session Law Chapter 102
 Effective: 7-1-80

S1370 LIENS - Amends existing law to provide suppliers, renters, and lessors of equipment the same lien rights as materialmen.
 By.....Judiciary & Rules

2/11 Senate intro - 1st rdg - to printing
 2/12 Rpt prt - to Jud
 2/28 Rpt out - rec d/p - to 2nd rdg
 2/29 2nd rdg - to 3rd rdg
 3/3 3rd rdg - PASSED - 34-0-1
 NAYS -- none.
 Absent and excused -- Little.
 Title apvd - to House
 --CONTINUED--

Senate
MINUTES

JUDICIARY AND RULES COMMITTEE

February 8, 1980

Chairman High called the meeting to order at 2:25 p.m. in Room 430, Statehouse, on Friday, February 8.

ROLL CALL All members present with the exception of Senator Dobler, absent and excused.

VISITORS Carl Bianchi, Idaho Supreme Court
Scott Campbell, Ada County Prosecutor's Office
Pam Bengson, Attorney General's Office
Sheila Riley, Dept. of Insurance
Senator Watkins
Ray Burns, Pocatello

MINUTES Upon a motion by Senator Klein, seconded by Senator Leese, the minutes of February 6 were approved as printed, by voice vote.

CLARIFI- The Chairman brought before the committee a request from
CATION the Senate for clarification of the paired voting pro-
REQUEST cedure. Provided were sample forms of how the procedure
 might be improved. It was pointed out that the form
 should include signatures of both Senators involved in
 the paired vote.

ACTION Chairman High asked unanimous consent that a form be
 drafted and presented to the President of the Senate for
 approval. There being no objection, it was so ordered.
 A letter to that effect will be provided to the Secretary
 of the Senate.

RS. 5589 RELATING TO SERVICE OF SUBPOENAS IN LEGISLATIVE MATTERS
 Senator Risch explained that this is a redraft of RS 5247
 previously before the committee with the language change
 as discussed.

MOTION Moved by Senator Klein, seconded by Senator Leese, to
 introduce RS 5589. By voice vote, the motion carried.

RS 5320 PROVIDING FOR REPEAL OF SENATE RULE 11 (B) Senator Risch
 stated that the redraft of this RS has not yet been
 received from the data center but would be brought before
 the committee hopefully by the next meeting.

RS 5470 RELATING TO EXEMPTION FROM JURY SERVICE FOR DENTISTS
 Carl Bianchi explained that when the state enacted the
 "Uniform Jury Selection and Service Act" in 1971 this
 section of the Idaho Code was apparently overlooked and
 should be repealed to avoid misunderstanding.

MOTION Moved by Senator Klein, seconded by Senator Verner, to
 introduce RS 5470. By voice vote, the motion carried.

RS 5471

RELATING TO GROUNDS FOR REMOVAL, SUSPENSION, OR REPRIMAND OF ATTORNEYS Carl Bianchi explained that since Idaho Code 3-301 no longer describes the method by which practicing attorneys are disciplined, this section of the Code should be repealed in its entirety to conform to present day law and practices.

MOTION

Moved by Senator Klein, seconded by Senator Hartvigsen, to introduce RS 5471. By voice vote, the motion carried.

RS 5421

RELATING TO DISMISSALS OF ACTIONS Mr. Bianchi explained that this proposed bill would amend section 19-3501 of the Idaho Code which presently provides the time limit within which a defendant must be charged and brought to trial. Further, that the primary benefit which would be derived by this amendment would be that criminal defendants would have a uniform fixed period of six months within which they must have a speedy trial rather than a variable period depending upon when charges were filed against them during a term of court of the district court. Two possible language changes were discussed; adding "or filed" on line 16 and adding "or trial commenced" on line 20.

MOTION

Moved by Senator Mitchell, seconded by Senator Verner, to introduce RS 5421. By voice vote, the motion carried.

RS 5426C1

RELATING TO LIEN LAWS Senator Watkins introduced Mr. Ray Burns of Pocatello who spoke to the committee about the purpose of the proposed legislation. Mr. Burns said the intent is to provide that renters, leasers, and suppliers of equipment, which perform labor in connection with any land or building development or improvement, or to establish boundaries, shall be entitled to the same lien rights on such property as the materialmen.

MOTION

Moved by Senator Mitchell, seconded by Senator Verner, to introduce RS 5426C1. By voice vote, the motion carried.

RS 5427C1

RELATING TO PERFORMANCE BONDS OF PUBLIC WORKS CONTRACTORS Mr. Burns stated that the purpose of this proposed legislation is to provide that suppliers of equipment shall be protected and have the same claim rights with respect to performance and payment bonds as suppliers of labor and materials.

MOTION

Moved by Senator Risch, seconded by Senator Mitchell, to introduce RS 5427C1. By voice vote, the motion carried.

Senate
MINUTES

JUDICIARY & RULES COMMITTEE

February 18, 1980

Chairman High called the meeting to order at 1:45 p.m. on Monday, February 18, Room 430, Statehouse.

ROLL CALL All members present.

VISITORS Carl Bianchi, Supreme Court
Bill Crowl, Dept. of Correction
Darrol Gardner, Dept. of Correction
Senator Bradshaw
Robert Koontz, Boise Attorney
Hal Ryan, Boise Attorney
Jay Webb, Boise Attorney

MINUTES Upon a motion by Senator Leese, seconded by Senator Verner, the minutes of February 15 were approved as printed, by voice vote.

S 1324 RELATING TO THE SALARIES OF JUDGES
Available to answer questions on this bill were Hal Ryan and Robert Koontz. Provided to the committee were charts showing the ranking of judicial salaries in all states, as well as information on salaries to paid to other state employees in Idaho.

MOTION Moved by Senator Klein, seconded by Senator Verner, to send S 1324 out of committee with a do pass recommendation. By voice vote, the motion carried. Senator Verner was asked to be the floor sponsor for S 1324.

S 1325 RELATING TO THE SALARY OF COURT REPORTERS
Jay Webb spoke to the committee in favor of the bill. Also present to respond to questions were court reporters Mr. Bumpus and Mr. Gambee.

MOTION Moved by Senator Mitchell, seconded by Senator Klein, to send S 1325 out of committee with a do pass recommendation. By voice vote, the motion carried. Senator Mitchell was asked to be the floor sponsor for S 1325.

S 1372 RELATING TO EXEMPTION FROM JURY SERVICE FOR DENTISTS (Repealer)
Carl Bianchi was present to respond to questions.

MOTION Moved by Senator Mitchell, seconded by Senator Barker, to send S 1372 out of committee with a do pass recommendation. By voice vote, the motion carried. Senator Barker was asked to be the floor sponsor for S 1372.

S 1371 RELATING TO GROUNDS FOR REMOVAL, SUSPENSION OR REPRIMAND OF ATTORNEYS (Repealer)
Carl Bianchi was present to respond to questions.

MOTION Moved by Senator Mitchell, seconded by Senator Verner, to send S 1371 out of committee with a do pass recommendation. By voice vote, the motion carried. Senator Dobler was asked to be floor sponsor for S 1371.

→ S 1369 RELATING TO DISMISSALS OF ACTIONS
Present to respond to questions was Carl Bianchi.

MOTION Moved by Senator Verner, seconded by Senator Klein, to send S 1369 out of committee with a do pass recommendation. By voice vote, the motion carried. Senator Risch was asked to be floor sponsor for S 1369.

S 1398 RELATING TO RESIDENT CHAMBERS OF THE FIFTH JUDICIAL DISTRICT Senator Bradshaw was present to explain the purpose of S 1398.

MOTION Moved by Senator Klein, seconded by Senator Mitchell, to send S 1398 out of committee with a do pass recommendation. By voice vote, the motion carried. Senator Bradshaw was asked to be floor sponsor for S 1398.

S 1340 RELATING TO THE PEACE OFFICER STATUS OF EMPLOYEES OF THE BOARD OF CORRECTION Darrol Gardner was present to respond to questions regarding S 1340.

MOTION Moved by Senator Mitchell, seconded by Senator Verner, to send S 1340 out of committee with a do pass recommendation. By voice vote, the motion carried.

S 1341 RELATING TO THE PEACE OFFICER STATUS OF EMPLOYEES OF THE BOARD OF CORRECTION It was pointed out the S 1340 and S 1341 are companion bills.

MOTION Moved by Senator Mitchell, seconded by Senator Barker, to send S 1341 out of committee with a do pass recommendation. By voice vote, the motion carried. Senator Verner was asked to be floor sponsor for both S 1340 and S 1341.

S 1342 RELATING TO CORRECTIONAL INDUSTRIES Present to respond to questions were Darrol Gardner and Bill Crowl.

MOTION Moved by Senator Hartvigsen, seconded by Senator Mitchell, to send S 1342 out of committee with a do pass recommendation. By voice vote, the motion carried. Senator Hartvigsen was asked to be floor sponsor for S 1342.

House

MINUTES OF THE

JUDICIARY, RULES & ADMINISTRATION COMMITTEE

MARCH 5, 1980

The meeting was called to order by Chairman Stivers on March 5, 1980 at 4:05 p.m. in Room 406.

PRESENT Stivers, Chairman McDermott
Wesche Horvath
Smith Marley
Paxman
Ungricht
Harris.

EXCUSED Boyd

GUESTS Carl Bianchi, Hal Ryan, Roy Vance, Robert Horton,
Rep. Dan D. Emery, Scott Campbell, Darrol Gardner.

INTERNS Kris Gauss

MOTION Rep. Paxman moved that the minutes of the meeting held March 3, 1980 be approved as written. Rep. Ungricht seconded the motion. By voice vote, the motion carried.

RS 5769 Rep. Emery briefed the committee on this RS which relates to mandatory minimum prison sentences and the Uniform Controlled Substances Act; amending section 37-2732, Idaho Code, to provide mandatory minimum prison sentences for felony violations of the Uniform Controlled Substances Act regarding controlled and counterfeit substances and a certain amount of marijuana.

MOTION Committee discussion followed. Rep. Ungricht moved that RS 5769 be approved by the committee and sent to the Ways and Means Committee with a request that it be introduced for printing. Rep. Harris seconded the motion. By roll call vote, the motion carried. AYES: Stivers, Wesche, Smith, Harris, Paxman, Ungricht, Marley. NAYS: McDermott, Horvath. EXCUSED: Boyd.

RS 5722 Rep. Paxman introduced Mr. Robert Horton who briefed the committee on this RS which relates to embezzlement; amending section 18-2403A, Idaho Code, to add that failure to return a motor vehicle to its owner according to the terms of a rental agreement within forty-eight hours of the time specified shall constitute prima facie evidence of intent to commit embezzlement.

MOTION Committee discussion followed. Rep. Paxman moved that RS 5722 be approved by the committee and sent to the Ways and Means Committee with a request that it be introduced for printing. Rep. Smith seconded the motion. By roll call vote, the motion carried. AYES: Stivers, Wesche, Smith, Harris, Paxman, McDermott, Horvath, Marley. NAYS: None. EXCUSED: Boyd. ABSENT: Ungricht.

RS 5607 Rep. McDermott briefed the committee on this RS relating to the legal rate of interest; amending section 28-22-104, Idaho Code, to increase the statutory rate of interest, and to provide a time for interest to start to accrue on judgments.

MOTION Committee discussion followed. Chairman Stivers recommended removal of some of the archaic language in the RS. Rep. McDermott moved that RS 5607 be approved by the committee and introduced through Ways and Means for printing after changing some of the language to update it. Rep. Horvath seconded the motion. By voice vote, the motion carried.

RS 5608 Withdrawn by sponsor.

H 633

Mr. Scott Campbell, Ada County Prosecutor's Office, briefed the committee on this Bill relating to jurisdiction for criminal prosecutions for offenses committed while in transit; amending section 19-306, Idaho Code, to provide that offenses committed while in transit in a boat, motor vehicle or aircraft be under the jurisdiction of certain counties.

MOTION

Committee discussion followed. Rep. Horvath moved that H 633 be sent to the floor with a "do pass" recommendation. Rep. McDermott seconded the motion. By voice vote, the motion carried. Rep. Horvath will carry on the floor.

S 1324

Mr. Hal Ryan, attorney, briefed the committee on S 1324 relating to the salaries of judges; amending section 59-502, Idaho Code, to provide for the salaries of justices and judges. (See attached materials).

MOTION

Committee discussion followed. Rep. McDermott moved that S 1324 be sent to the floor with a "do pass" recommendation. Rep. Smith seconded the motion. By voice vote, the motion carried. The Chairman will appoint someone to carry this bill on the floor. Rep. Stivers requested that a "no" vote be recorded for him on S 1324.

S 1340
& S 1341

Mr. Darrol Gardner, Department of Corrections, briefed the committee on S 1340 and S 1341 which revise certain portions of the Idaho Code to grant peace officer status of employees of the Board of Corrections.

MOTION

Committee discussion followed on both bills. Rep. Wesche moved that S 1340 be sent to the floor with a "do pass" recommendation. Rep. Horvath seconded the motion. By voice vote, the motion carried. Rep. Paxman to carry on the floor.

MOTION

Rep. Harris moved that S 1341 be sent to the floor with a "do pass" recommendation. Rep. Marley seconded the motion. By voice vote, the motion carried. Rep. Marley will carry on the floor.

S 1342

Mr. Darrol Gardner, Department of Corrections briefed the committee on S 1342 which amends sections 20-403 through 20-418, Idaho Code, to eliminate the Correctional Industries Commission and create the governing body which shall consist of members of the Board of Corrections.

MOTION

Committee discussion followed. Rep. McDermott moved that S 1342 be sent to the floor with a "do pass" recommendation. Rep. Harris seconded the motion. By voice vote, the motion carried. Rep. Harris will carry on the floor.

→ S 1369

Mr. Carl Bianchi, Administrator for the Courts, briefed the committee on S 1369 which relates to dismissals of actions; amending section 19-3501, Idaho Code, to provide for the dismissal of a criminal charge against a person if charges have not been filed within six months of the date of his arrest and to provide that a criminal charge, against a defendant whose trial has not been postponed upon his own application, must be brought within six months from the date the indictment or information is filed with the court.

MOTION

Committee discussion followed. Rep. Horvath moved that S 1369 be sent to the floor with a "do pass" recommendation. Rep. Marley seconded the motion. By voice vote, the motion carried. Rep. Horvath will carry on the floor.

LATAH COUNTY PROSECUTOR'S OFFICE
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

V.

BRYAN C. KOHBERGER

Defendant.

Case No. CR01-24-31665

STATE'S OBJECTION TO DEFENDANT'S
MOTION TO STRIKE NOTICE OF INTENT
TO SEEK THE DEATH PENALTY ON
GROUNDS OF FAILURE TO PRESENT
AGGRAVATORS TO A NEUTRAL FACT
FINDER

COMES NOW the State of Idaho, by and through the Latah County Prosecuting Attorney,
and hereby objects to Defendant's Motion to Strike Notice of Intent to Seek the Death Penalty on
Grounds of Failure to Present Aggravators to a Neutral Fact Finder. The thrust of Defendant's
argument is that the applicable aggravating factors in a capital case must be presented to a grand

jury. His argument is squarely foreclosed by binding Idaho Supreme Court precedent. *See State v. Abdullah*, 158 Idaho 386, 456-61, 348 P.3d 1, 71-76 (2015); *see also* Order on Defendant’s Pretrial Motions, pp.12-18, *State v. Ross*, Case No. CR35-21-6092 (Oct. 10, 2023) (Monson, J.) (rejecting this same argument because *Abdullah*’s “controlling precedent is clear”).

Both Article I, Section 8 of the Idaho Constitution and the Sixth Amendment of the United States Constitution require the State to provide notice to the accused of the crime charged by indictment or information. Pursuant to Idaho law, the State must include in the information or indictment “a plain, concise and definite written statement of the essential facts constituting the offense charged.” I.C.R. 7(b).

In a capital case, the State must also provide notice to the accused of the intent to seek the death penalty within 60 days of the entry of a plea. I.C. § 18-4004A. The notice must include “a listing of the statutory aggravating circumstances that the state will rely on in seeking the death penalty.” *Id.* “[T]he statutory aggravating circumstances are not elements of a crime,” which means “there is no constitutional requirement that the State present evidence demonstrating probable cause for each aggravating circumstance.” *Abdullah*, 158 Idaho at 458-60, 348 P.3d at 73-75.

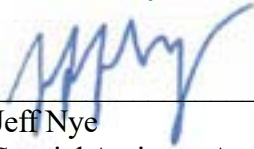
Defendant concedes that *Abdullah* is fatal to his argument because “the Idaho Supreme Court held that aggravators do not have to be presented to the grand jury.” (Mot. at 8.) He insists, however, that “[t]he decision in *Abdullah* is wrong and should be overruled.” *Id.* The length of Defendant’s brief suggests he believes this Court has that power. He is, of course, wrong. *See State v. Guzman*, 122 Idaho 981, 986-87, 842 P.2d 660, 665-66 (1991) (“[The Idaho Supreme Court] has been and remains the final arbiter of Idaho rules of law, both those promulgated and those evolving decisionally.”).

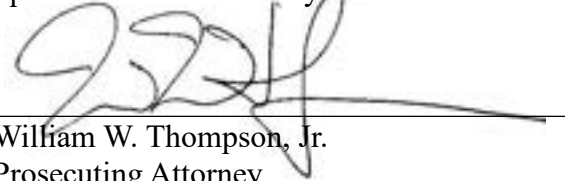
Even setting aside the authoritative weight of *Abdullah*, Defendant's critique of the decision is unpersuasive. Defendant posits that *Abdullah* should have analyzed the issue through the lens of the Eighth Amendment because, in Defendant's view, letting the prosecutor alone decide who faces the death penalty without the check of a neutral fact finder violates the prohibition on cruel and unusual punishment. But the U.S. Supreme Court has already rejected the argument that a state violates the Eighth Amendment simply because "the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for capital offenses." *Gregg v. Georgia*, 428 U.S. 153, 199 (1976). In fact, the Court found the unchecked discretion of the prosecutor was not an Eighth Amendment issue at all. *Id.* ("The existence of these discretionary stages is not determinative of the issues before us.").

In the face of contrary, controlling U.S. Supreme Court precedent, the best Defendant can come up with is a case suggesting the Eighth Amendment may prohibit rules that "diminish the reliability" of the guilt or sentencing determination in a capital case. *Beck v. Alabama*, 447 U.S. 625, 638 (1980). Even accepting Defendant's broad interpretation of the Eighth Amendment, he has failed to explain how Idaho's well-settled process of omitting the aggravating circumstances from the *grand jury's* probable cause determination has any effect whatever on the reliability of the *trial jury's* guilt or sentencing determination. *See State v. Edmonson*, 113 Idaho 230, 234-35, 743 P.2d 459, 463-64 (1987) ("The purpose of a grand jury proceeding is to determine whether sufficient probable cause exists to bind the defendant over for trial. The determination of guilt or innocence is saved for a later day."); *State v. Huckabay*, 168 Idaho 117, 122-23, 480 P.3d 771, 776-77 (2021) (explaining that any error in the probable cause determination is remedied by a finding of guilt by a trial jury).

In sum, this Court should deny Defendant's motion because "there is no constitutional requirement that the State present evidence demonstrating probable cause for each aggravating circumstance" and "the notice requirements in Idaho Code section 18-4004A is sufficient to satisfy due process and the Sixth Amendment." *Abdullah*, 158 Idaho at 458-60, 348 P.3d at 73-75.

RESPECTFULLY SUBMITTED this 9th day of October 2024.



Jeff Nye
Special Assistant Attorney General

William W. Thompson, Jr.
Prosecuting Attorney

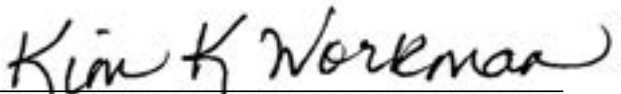
CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the STATE'S OBJECTION TO DEFENDANT'S MOTION TO STRIKE NOTICE OF INTENT TO SEEK THE DEATH PENALTY ON GROUNDS OF FAILURE TO PRESENT AGGRAVATORS TO A NEUTRAL FACT FINDER was served on the following in the manner indicated below:

Anne Taylor
Attorney at Law
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Coeur D Alene, ID 83816-9000

- ☐ Mailed
- ☒ E-filed & Served / E-mailed
- ☐ Faxed
- ☐ Hand Delivered

Dated this 9th day of October 2024.



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Assigned Attorney:

Anne C. Taylor, Attorney at Law, Bar Number: 5836
Jay W. Logsdon, First District Public Defender, Bar Number: 8759
Elisa G. Massoth, Attorney at Law, Bar Number: 5647

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO

Plaintiff,

V.

BRYAN C. KOHBERGER,

Defendant.

CASE NUMBER CR01-24-31665

**AMENDED MOTION TO STRIKE
STATE'S NOTICE OF INTENT TO
SEEK DEATH ON GROUNDS OF
MEANS OF EXECUTION**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, hereby moves this Court, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article I, Sections 1, 6, 7, 8 and 13 of the Idaho Constitution; I.C.R., Rs. 3, 5.1 and 7; and, I.C., §§ 18-4004, 19-1301-1308 and 1409, 1411 and 1418, and 19-2515 to Strike the State's

Notice of Intent to Seek Death Penalty. This Motion is made on the grounds that upon a conviction and sentence of death, the process by which Mr. Kohberger would be put to death in Idaho violates the Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 6 and 13 of the Idaho Constitution.

Issues

- I. Constitutional limits on manner of execution
- II. The history of executions in Idaho
- III. Lethal Injection in Idaho is not viable
- IV. The Firing Squad is not and was never constitutional

I.

Proceeding with capital murder charges in this case is unconstitutional because executing Mr. Kohberger by means of lethal injection or a gunshot as conceived of by the Idaho Department of Corrections (IDOC) would violate his right to be free from cruel and unusual punishment under the Eighth Amendment and his right to due process under the Fourteenth Amendment of the United States Constitution. *See Trop v. Dulles*, 356 U.S. 86, 100 (1958); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). It would also violate his rights under Article I, Sections 6 and 13 of the Idaho Constitution.

An execution procedure that involves “the unnecessary and wanton infliction of pain” violates the Eighth Amendment. *Gregg*, 428 U.S. at 173. The Eighth Amendment’s prohibition is not static, but is responsive to “evolving standards of decency” and “contemporary values concerning the infliction of a challenged sanction.” *Id.* Execution by lethal injection constitutes cruel and unusual punishment.

Furthermore, the Fourteenth Amendment guarantees that no person may be deprived of life, liberty, or property without due process of law. A violation of procedural due process requires

a showing of: 1) a constitutionally protected interest in life, liberty, or property; 2) governmental deprivation of that right; and 3) constitutional inadequacy of challenged procedures effecting the deprivation. *See Bank of Jackson Cty. v. Cherry*, 980 F.2d 1362, 1366 (11th Cir. 1993). A prisoner sentenced to death has a constitutionally protected interest in life that is not extinguished by the conviction and death sentence. *See Ohio Adult Parole Authority v. Woodward*, 523 U.S. 272 (1998).

The manner of execution is set by the legislature in Idaho. I.C. § 19-2716 was amended just last year. The new version of the statute is:

(1) The punishment of death shall be inflicted by continuous the following methods:

(a) Continuous, intravenous administration of a lethal quantity of a substance or substances approved by the director of the Idaho department of correction until death is pronounced by a coroner or a deputy coroner.; or

(b) Firing squad.

(2) Not later than five (5) days after the issuance of a death warrant, the director of the Idaho department of correction must determine, and certify by affidavit to the court that issued the death warrant, whether execution by lethal injection, as described in subsection (1)(a) of this section, is available.

(3) If the director certifies that lethal injection is available, the method of execution shall be lethal injection.

(4) If the director does not certify that lethal injection is available, fails to file a certification as required pursuant to subsection (2) of this section, or otherwise determines that lethal injection is unavailable, the method of execution shall be firing squad.

(5) If a court holds that lethal injection is unconstitutional, on its face or as applied, or otherwise determines that firing squad is a constitutionally required method of execution, the method of execution shall be firing squad.

(6) The director of the Idaho department of correction shall determine the procedures to be used in any execution.

(7) The provisions of this section shall apply to all executions carried out on and after the effective date of this enactment, irrespective of the date sentence was imposed.

SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after July 1, 2023.

The Idaho Supreme Court has ruled that the word “any” in what is now subsection (6) refers to each and every person to be executed as an individual, rather than a broad policy for all defendants. *See, Pizzuto v. IDOC*, 170 Idaho 94, 97 (2022). The Court held that because of the legal issues with the manner of execution, the director of the IDOC must provide each individual to be executed with the procedures that will be used in their case in advance of the execution so they may be reviewed and challenged. *Id.* at 98.

Thus, one condemned to die in Idaho has no real way to know how they will be killed at least until the death warrant is issued. Still, as things stand, Idaho has no viable method for killing Mr. Kohberger.

II.

Up until 1978 in Idaho death was imposed by hanging. Kathy Hill, *HANGED: A HISTORY OF IDAHO’S EXECUTIONS*, 4 (2010). The actual structure of hanging was changed more than once because of the difficulty of getting necks to snap as desired leading to a lack of immediacy in the execution.

The last man hanged by the people of Idaho was Raymond Snowden, on October 18, 1957. Hill, at 225. As Kathy Hill tells it:

For the first time, prison officials would use their new execution chamber. Located on the second floor of Cell Block Five, next to death row, the room replaced the outside scaffold used for earlier prison hangings. Throughout the day, guards repeatedly tested the trap door to ensure all would be ready for Snowden. The sound of the door dropping reverberated through the cell block; guards would recall the prisoners were eerily quiet that evening.

Around 11:45 p.m., prison guards arrived at Snowden’s cell. They carried a backboard complete with arm, leg, and foot straps. Snowden balked at first, but with [the prison chaplain’s] assurances, he allowed himself to be strapped in. They delivered him to the execution room and placed him in an upright position. The hangman’s noose dangled directly above his head.

Approximately ten people gathered in the observation room, among them Boise Police Chief Frank Demarest and Ada County Sheriff Pat McCarty, who had so deftly build the case against Snowden. Several newspaper reporters were also at the execution, but all declined to enter the observation room.

With Snowden in place on the trap door, Prison Warden Lou Clapp asked if he had any final words. Snowden, calm and clear, replied, "I do, but I don't know how to say it." Clapp gave him a few more minutes, then placed a black hood over his head. He stepped back and the executioner, who received \$600 for his trouble, stepped forward. He placed the noose around Snowden's neck, pushed the knot close to his spine, and pulled the trap door. The backboard veered a bit, scraping the side of the trap, but the deed was done. Snowden was pronounced dead at 12:20 a.m., October 18, 1957.

Hill, at 235.

Precisely why Idaho gave up on hanging has no simple explanation. Perhaps the guards telling stories of the sounds of the trap door being tested repeatedly in the presence of the doomed man-made people feel uncomfortable with the whole ordeal. Maybe it was the idea of strapping a man onto a board and wheeling him off to kill him with a bag over his face. Whatever it was- the how is relatively simple.

In 1978, as Idaho's legislature tried to devise ways to kill people that would satisfy the demands of the United States Supreme Court, Senators Jim Risch and Mike Black joined forces to amend the law to require lethal injection. Hill, at 4. The senators both claimed lethal injection would be more "humane." Senate Judiciary and Rules Committee, Minutes February 16, 1978 (Exhibit A). When the bill was proposed to the House Judiciary, Rules and Administration Committee:

Warden Anderson appeared in support of the bill, by indicating that it was the desire of the Board of Corrections to take the circus atmosphere out of executions. He said there are weird people who show up at executions and contribute to the circus atmosphere.

Minutes, February 27, 1978. (Exhibit B). It is unclear where Warden Anderson was encountering these circus-like executions, given that the last one in 1957 as describe above was far from it.

However, the new "humane" method of killing people immediately ran into problems.

Bona Miller of the Department of Corrections explained to the House Judiciary, Rules and Administration Committee just four years later, “a medical prescription is required to obtain the lethal injection, then a medical doctor or a medically trained person must administer the injection. The prison officials have been unable to find a medically trained person who would carry out such injections.” Minutes, February 19, 1982. (Exhibit C). During that legislative session, the Department of Corrections and the Idaho Medical Association tried to reach a compromise so that killing could happen. Judiciary, Rules & Administration Committee, Minutes, March 11, 1982. (Exhibit D). The firing squad was included essentially as a backup, and one the drafter of the bill thought was likely unlawful. *Id.*

This was the original birth of the firing squad. In 1982, I.C. § 19-2716 permitted the director to use the firing squad whenever lethal injection was “impractical.” The only directive provided for the firing squad was that the director would decides its members.

The original firing squad, however, never got off a shot. In 2009, the firing squad was repealed, with a Statement of Purpose that read:

...This proposed legislation will further amend Idaho Code Section 19-2716 to eliminate death by firing squad as an alternative method of execution. The elimination of the alternative method of death by firing squad is deemed appropriate in light of the United States Supreme Courts [sic] opinion in *Baze v. Rees*, 128 S.Ct. 1520 (2008), in which the Court concluded that a humane lethal injection protocol does not constitute cruel and unusual punishment. There is no similar Supreme Court authority addressing where the firing squad, as a method of execution, would constitute cruel and unusual punishment in violation of the Eighth Amendment. In addition, Idaho is one of only two states that have the firing squad as a method of execution; the rarity of this method of execution could form the basis of an Eighth Amendment claim. Elimination of the firing squad option will allow the state to avoid such challenge.

Statement of Purpose, RS18536 (2009) (Exhibit E). This reasoning was taken from the statements of then deputy attorney general Bill von Tegen and senior deputy attorney general LaMont Anderson. House Judiciary, Rules and Administration, Minutes Feb. 11, 2009 (Exhibit F); House Judiciary, Rules and Administration, Minutes Mar. 3, 2009 (Exhibit G).

This brings us up to this year, when LaMont Anderson, now Lead Deputy Attorney General for the Capital Litigation Unit, returned to the legislature to ask for the firing squad back. Senate Judiciary & Rules Committee, Minutes, Mar. 13, 2023. (available at https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2023/standingcommittees/230313_sj&r_0100PM-Minutes.pdf). Mr. Anderson told the Senate Judiciary and Rule Committee that the majority opinion in *Glossip v. Gross*, 576 U.S. 863 (2015), found that shooting people was “relatively quick and painless” and that there was an expert opinion in 1983 that said the same thing. *Id.*

The majority in *Glossip* never referred to the firing squad as “quick and painless” except when it quoted Justice Sotomayor’s dissent. *Id.* at 880 (*quoting* SOTOMAYOR, J. dissenting, at 977). It seems clear from the opinion in *Glossip* that the majority was simply pointing out that the dissent’s view that all methods for execution prior to lethal injection had become unconstitutional was a distinction without a difference from the view that it was time to simply stop killing people. *Id.*

And no amount of Google can uncover any experts from 1983 that thought shooting people was humane. In fact, Colman McCarthy wrote an article called “Killing with Kindness” in 1983 that would seem to dispel the idea that that was the heyday of firing squads. THE WASHINGTON POST (June 11, 1983) (available at <https://www.washingtonpost.com/archive/politics/1983/06/11/killing-with-kindness/b96cde68-e284-42b9-9e4d-1a3d6e94a0b5/>).

III.

Idaho does not have the ability to kill a man with an injection at this point in time and likely will not in the future. This is because of three things: 1. A lack of trained medical personnel willing to take life, 2. The difficulty in finding drugs that kill without creating unnecessary pain and 3.

The difficulty of purchasing those drugs that have been held to be appropriate for killing a person by the courts.

The United States Constitution prohibits deliberate indifference to the known risks associated with a particular method of execution. *Cf. Estelle v. Gamble*, 429 U.S. 97, 106 (1976). There are a number of known risks associated with the lethal injection method of execution, and the State of Idaho has typically failed to take adequate measures to ensure against those risks. The Eighth Amendment safeguards nothing less than a human being's dignity and prohibits methods of execution that involve the unnecessary and wanton infliction of pain. Under *Trop v. Dulles*, 356 U.S. 86, 100 (1958), to comply with constitutional requirements, the State must minimize the risk of unnecessary pain and suffering by taking all feasible measures to reduce the risk of error associated with the administration of capital punishment. *Glass v. Louisiana*, 471 U.S. 1080, 1086 (1985); *Campbell v. Wood*, 18 F.3d 662, 709-11 (9th Cir. 1994) (Reinhardt, J., dissenting); *see also Zant v. Stephens*, 462 U.S. 862, 884-85 (1985) (state must minimize risks of mistakes in administering capital punishment); *Eddings v. Oklahoma*, 455 U.S. 104, 118 (O'Connor, J., concurring).

The most recent document detailing how the director would kill a man is Idaho Department of Correction, Execution Chemicals Preparation and Administration (last updated March 30, 2021). This particular set up was intended for Mr. Pizzuto. *See*, Ruth Brown, *Idaho Inmate Pizzuto's Execution Canceled, State Doesn't Have Lethal Injection Chemicals*, IDAHO REPORTS (Nov. 30, 2022) (available at <https://idahocapitalsun.com/2022/11/30/idaho-inmate-pizzutos-execution-canceled-state-doesnt-have-lethal-injection-chemicals/>).

This Court should review the procedures adopted in 2021 that IDOC could not implement. *See* Idaho Dept. of Correction, Standard Operating Procedure: Execution Procedures (approved Mar. 30, 2021) (Exhibit H); *and* Idaho Dept. of Correction, Execution Chemicals Preparation and

Administration (last updated Mar. 30, 2021) (Exhibit I). It consisted of four different possible methods of death.

1. Method 1 uses Sodium Pentothal to put the man to sleep, and then paralyzes him using Pancuronium Bromide, and finally burns him alive from within via Potassium Chloride. Method 2 uses pentobarbital to put the man to sleep and then also murders them with pancuronium bromide and potassium chloride.

- a. There is no dispute in the scientific and legal community that potassium chloride and pancuronium bromide are extremely painful if a person receives them while conscious. In *Baze v. Rees*, the State conceded that, “failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.” 553 U.S. 35, 53, 128 S.Ct. 1520, 1533 (2004). Pancuronium bromide paralyzes the chest wall muscles and diaphragm so that the person can no longer breathe. *Id.* at 44, 527. Potassium chloride causes a cardiac arrhythmia which results in ineffective pumping of blood by the heart and, ultimately, cardiac arrest. *Id.* In *Baze*, the Court found that “proper administration of the first drug ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs.” *Id.* The potential pain from the second and third drugs was also acknowledged in the Court’s opinion in *Glossip v. Gross*. 135 S.Ct. 2726, 2740, 192 L.Ed.2d 761 (2015). Additionally, during oral arguments in *Glossip*, Justice Kagan likened the pain from potassium chloride to being burned alive from the inside. R. Barnes and M. Berman, *Supreme Court Justices Hotly Debate the Use of a Lethal Injection Drug*, The Washington Post, April 29, 2015. Scientific

evidence as well as eyewitness accounts from executions establish that that death by lethal injection can be an extraordinarily painful death. *See Id.*

2. Method 3 simply relies on injecting a lot of Sodium Pentothal.
3. Method 4 is the same idea but relies on injecting Pentoarbital instead.
4. Problematically for all these methods: Sodium pentothal is no longer available for killing people. Pam Belluck, *What's in a Lethal Injection Cocktail?*, THE NEW YORK TIMES (2011) available at <https://www.nytimes.com/2011/04/10/weekinreview/10injection.html>. The same became true of pentobarbital shortly thereafter. Lincoln Caplan, *The End of the Open Market for Lethal Injection Drugs*, THE NEW YORKER (2016) available at <https://www.newyorker.com/news/news-desk/the-end-of-the-open-market-for-lethal-injection-drugs>.

The upshot is that lethal injection does not exist in Idaho at this point in time. The director acknowledged as much in his letter to the Board of Correction in November 2022. (Exhibit J). Indeed, he was correct. The botched legal injection of Thomas Creech on February 28, 2024 demonstrates that, even when lethal injection drugs are obtained, lethal injection is not available in Idaho. <https://deathpenaltyinfo.org/executions/botched-executions> (After 58 minute and 8 attempts, the warden finally halted the execution.)

Due to this history, the legislature readopted the firing squad as a possibility in the last legislative session.

IV. Firing Squad

When considering whether the firing squad in its rebirthed iteration is Cruel and Unusual punishment in violation of the Constitution of both the United States and Idaho, it helps to have an idea of what that will look like. In 2010, Ronnie Lee Gardner volunteered for the firing squad in Utah.

June 18, 2010-- When a prison official opened a curtain to reveal the death chamber to witnesses early Friday, convicted killer Ronnie Lee Gardner was already strapped to the execution chair.

His eyes darted around the room at a prison in Draper, Utah, but he appeared calm, even at peace, witnesses said. This was a stark contrast from a troubled life marred by drugs, sexual abuse and indiscriminate violence. Asked by a prison official if he wanted to say anything, Gardner responded simply: "I do not, no."

A black hood was slipped over his bald head; a small circular taget attached over his heart. A barely audible countdown was interrupted by two loud bangs in quick succession. It was 12:15 a.m.

After a quarter of a century on death row, Gardner, 49, became the first man to die by firing squad in Utah in 14 years.

"He clenched his fist and then let go," radio talk show host Doug Fabrizio, one of a small group of witnesses, said. "And then he clenched it again."

A medical examiner checked Gardner's pulse on both sides of his neck. When the black hood was lifted to check Gardner's pupils with a flashlight, his ashen face was briefly revealed.

He was pronounced dead at 12:17 a.m.

...

At exactly midnight Friday, the inmate who spent more than half his life behind bars was awakened from a nap for his execution. He was escorted to the nearby execution chamber, where he was strapped to a metallic, winged chair. He wore a dark prison jumpsuit and no shoes. The chair was raised on a small black platform, like a stage. Relatives of his victims and members of the media witnessed the execution in separate rooms nearby.

A team of five anonymous marksmen armed with .30-caliber Winchester rifles, standing just 25 feet away behind a brick wall cut with a gun port, aimed their weapons at Gardner's chest. The Utah law enforcement officers volunteered for the assignment. One rifle was loaded with a blank so no one knew who fired the fatal shot.

Gardner repeatedly rubbed his left thumb and forefinger moments before the shooting. The rifles exploded and four bullets perforated his heart and lungs. The straps held his head up. A metal tray beneath the chair collected his blood.

Sandra Yi, a reporter with KSLTV in Utah, said Gardner fidgeted even after the barrage of gunfire.

"When he was shot, some of us weren't sure if he had passed away because we could see movement," she said. "He had his fist clenched and we could see his elbow move up and down."

Sheryl Worsley, a reporter with KSL News Radio in Utah, described the moments after the execution as disturbing.

"He moved a little bit and, to some degree, that bothers me," she said. "To some degree that mirrors the last few weeks of his life because he was fighting to stay alive the last few weeks and that seemed to continue on."

Prison officials said Gardner spent his final hours sleeping, reading the spy thriller "Divine Justice," and watching the "Lord of the Rings" film trilogy. He also met with his attorneys and a Mormon bishop. He appeared relaxed. He had fasted after eating his last requested meal -- steak, lobster tail, apple pie, vanilla ice cream and 7-Up -- two days earlier.

"He was at peace," his attorney, Tyler Ayres, told The Salt Lake Tribune. "He even laughed a few times ... and that helped put me at ease."

Outside the prison, members of his family -- some wearing T-shirts displaying his prisoner number, 14873 -- gathered to pay their respects. They were joined by dozens of death penalty protesters. Around the time of the execution, family members cranked up a car stereo playing Lynyrd Skynyrd's "Free Bird."

"He didn't want nobody to see him get shot," said Gardner's brother, Randy Gardner. "I would have liked to be there for him. I love him to death. He's my little brother."

Ray Sanchez, "Ronnie Lee Gardner Executed by Firing Squad in Utah", GMA (June 18, 2010) (available at <https://abcnews.go.com/GMA/Broadcast/convicted-killer-ronnie-lee-gardner-executed-utah/story?id=10949786>). Additionally, Utah's Department of Corrections made a commemorative coin to give all the staff that helped kill Ronnie that day. Geoff Liesik, "Corrections Crating Commemorative Coin for Ronnie Lee Gardner Execution", DESERETNEWS (Apr. 26, 2010) (available at <https://www.deseret.com/2010/4/27/20111327/corrections-creating-commemorative-coin-for-ronnie-lee-gardner-execution>).

There is an eerie similarity between the killing of Snowden by hanging in 1957 and the killing of Gardner in 2010. Men forced to spend years on death row finally taken to be murdered by other men. Men strapped to boards; faces covered by bags. The circus going on outside and the coins being minted to remember state sanctioned killing. This Court should wonder at why

Idaho is choosing to go backward.

The answer to that is the claims of LaMont Anderson and those in his office, suddenly seeing the light at the end of the gun barrel after getting rid of the practice almost fifteen years ago. Their claims rest on a misreading of *Glossip*. The majority in *Glossip* was not considering firing squads as a method for execution- only the dissent did that and did so on a bare record. 576 U.S. at 880-81. Both majority and dissent were of the opinion that *Wilkinson v. State of Utah*, 99 U.S. 130 (1878) held that the firing squad was constitutional. That simply is not true.

Wilkinson did not test the constitutionality of shooting people as a means of execution. It tested whether a judge in a territory had the authority to order a shooting after the territory removed from its statute the method of execution. 99 U.S. at 132-33. The Court did mention in dicta that it did not think firing squads were cruel and unusual- but that had nothing to do with the holding, as the Court acknowledged no one was arguing in 1878 that it was cruel or unusual. *Id.* at 137. (“Had the statute prescribed the mode of executing the sentence, it would have been the duty of the court to follow it, unless the punishment to be inflicted was cruel and unusual, within the meaning of the eighth amendment to the Constitution, which is not pretended by the counsel of the prisoner.”)

Since there therefore is no Supreme Court case that has ever actually considered whether it is cruel and unusual to use a firing squad, this Court should look at the ruling of the Court of Common Pleas for the Fifth Judicial Circuit of South Carolina in *Owen v. Stirling*. (Exhibit K). Although ultimately reversed by the Supreme Court of South Carolina in *Owens v. Stirling*, -- S.E.2d --, 2024 WL 3590797 (2024), the court’s analysis was sound.

The Court of Common Pleas found that South Carolina recently brought back the option of the firing squad. The statute has been challenged by people set to be executed. In the Order Granting Injunctive Relief to a challenge of method of execution the court noted that the firing squad had been around for years and was largely unused, thus the firing squad is not a new method

of execution, and it is an unusual form of punishment. *Id.* at 21. “This is so even though firing squads have existed for many years, meaning that it is not a newly created or recently discovered means of execution. Rather, it is a reversion to a historic method of execution that has never before been used by our State and is not used in the overwhelming majority of other states. Thus, execution by firing squad is unusual punishment both nationally and in South Carolina.” *Id.* at 22.

The Court of Common Pleas also found the firing squad to be cruel:

Here, it is clear that the firing squad causes death by damaging the inmate’s chest, including the heart and surrounding bone and tissue. This is extremely painful unless the inmate is unconscious which, according to Drs. Arden and Alvarez, is unlikely. Rather, the inmate is likely to be conscious for a minimum of ten seconds after impact. Moreover, the length of the inmates’ consciousness – and, therefore, his ability to sense pain – could even be extended if the ammunition does not fully incapacitate the heart. During this time, he will feel excruciating pain resulting from the gunshot wounds and broken bones. This pain will be exacerbated by any movement he makes, such as flinching or breathing.

This constitutes torture, a possibly lingering death, and pain beyond that necessary for the mere extinguishment of death, making the punishment cruel.² *Id.* at 22.

Id. at 22-23.

The Supreme Court of South Carolina has now found that the firing squad is neither cruel nor unusual. 2024 WL at *15-18. It does so by separating the horrors of what it is contemplating from what it calls the “critical question”, or, as they put it:

Our definition of cruel does not call upon us to analyze what the death chamber looks like after the execution has been carried out. There is no consideration in our analysis of whether a method of execution is “cruel” of the dramatic imagery set forth in the Chief Justice's dissent, the circuit court's order, or the inmates’ brief, such as blood soaked in the inmate's clothing, spattered on the walls, and pooling on the floor, or other physical violence to the body that occurs simultaneous with or subsequent to the cessation of pain. While each of these might have been political concerns addressed by our General Assembly, they are not constitutional concerns. Our definition of cruel defines the critical question and requires us to focus us on the risk of unnecessary and excessive conscious pain.

Having thus turned death into a sort of parlor game, guess at how much pain one might experience

after being shot in the heart, the court finds it is not convinced it sounds all that bad and thus cannot qualify as cruel. The only authority it relies upon are the various statements of liberal justices and judges dissenting in various cases. Given that any person chosen at random from the street can probably name a few pleasanter ways to die than being tied up, bagged and shot, it is hard to see this opinion as anything more than a political stunt.

In any case, the Court's eventual decision to decide it is not unusual, despite the fact that almost no one uses the firing squad except when chosen by the condemned, to uphold its use in South Carolina where the law *only permits its use if chosen by the condemned*, makes this opinion of no use to the state of Idaho. *See id.* at 18.

Idaho's statute authorizing the firing squad as punishment is excessive because death by firing squad subjects the human being killed to unnecessary physical pain. Even in the best circumstances, meaning accurate shots fired and hitting the intended target area death is not immediate. Awareness continues and pain exists. Counsel for Mr. Kohberger has attached the article "The Possible Pain Experienced During Execution by Different Methods, by Harold Hillman. PERCEPTION 22, 745-53 (1993) (Exhibit L). It quotes the Royal Commission on Capital Punishment rejecting shooting as "it does not possess even the first requisite of an efficient method, the certainty of causing immediate death." Dr. Barbara Wolf's affidavit also shows that shooting is cruel (Exhibit M).

Idaho's death penalty statute only permits unconstitutional or unavailable methods of death under the United States and Idaho Constitutions, and this Court should declare §§ 18-4004A and 19-2515 unconstitutional and strike the State's Notice of Intent to Seek Death Penalty. There is no humane reason to place Mr. Kohberger into solitary, as described in his Motion to Strike State's Notice of Intent to Seek Death Penalty on Grounds of International Law, with a promise to kill him just as soon as the people of Idaho can figure out a way that is available, humane, and does

not cause a circus outside the prison.

CONCLUSION

Based upon the foregoing and argument to be presented at the hearing hereon, this Court is respectfully requested to grant this Motion that:

- (a) the State's Notice of Intent to Seek Death Penalty be struck;
- (b) the Court seat a jury which is not "death-qualified";
- (c) the Court preclude the admission of any evidence of aggravating circumstances during the trial of this case; and,
- (d) the Court not instruct the jury on any aggravated punishment.

DATED this 24 day of October, 2024.

BY: 

JAY W. LOGSDON
FIRST DISTRICT PUBLIC DEFENDER

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same as indicated below on the 24 day of October, 2024, addressed to:

Latah County Prosecuting Attorney –via Email: paservice@latahcountyid.gov
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Assigned Attorney:

Anne C. Taylor, Attorney at Law, Bar Number: 5836
Jay W. Logsdon, First District Public Defender, Bar Number: 8759
Elisa G. Massoth, Attorney at Law, Bar Number: 5647

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO,

Plaintiff,

V.

BRYAN C. KOHBERGER,

Defendant.

CASE NUMBER CR01-24-31665

**DEFENDANT'S EXHIBIT LIST FOR
DEATH PENALTY MOTION RE:
GROUNDS OF ARBITRARINESS**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and hereby files with the court his redacted Exhibit A. At the hearing held on November 2, 2024 Judge Hippler granted the defense permission to file a redacted copy of the below exhibit.

Exhibit Disclosures:

- **Exhibit A:** PowerPoint by Professor Cover and data in support of study. (redacting child and sexual assault victim names).

PDF documents attached; USB electronic of same will be filed no later than 11/18/24 due to small print created by PDF conversion of Professor Cover's study. The USB electronic file is more readable.

DATED this 13 day of November, 2024.



ANNE C. TAYLOR
ANNE TAYLOR LAW, PLLC

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the 13 day of November, 2024 addressed to:

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NARROWING DEATH-ELIGIBILITY IN IDAHO: AN EMPIRICAL AND CONSTITUTIONAL ANALYSIS

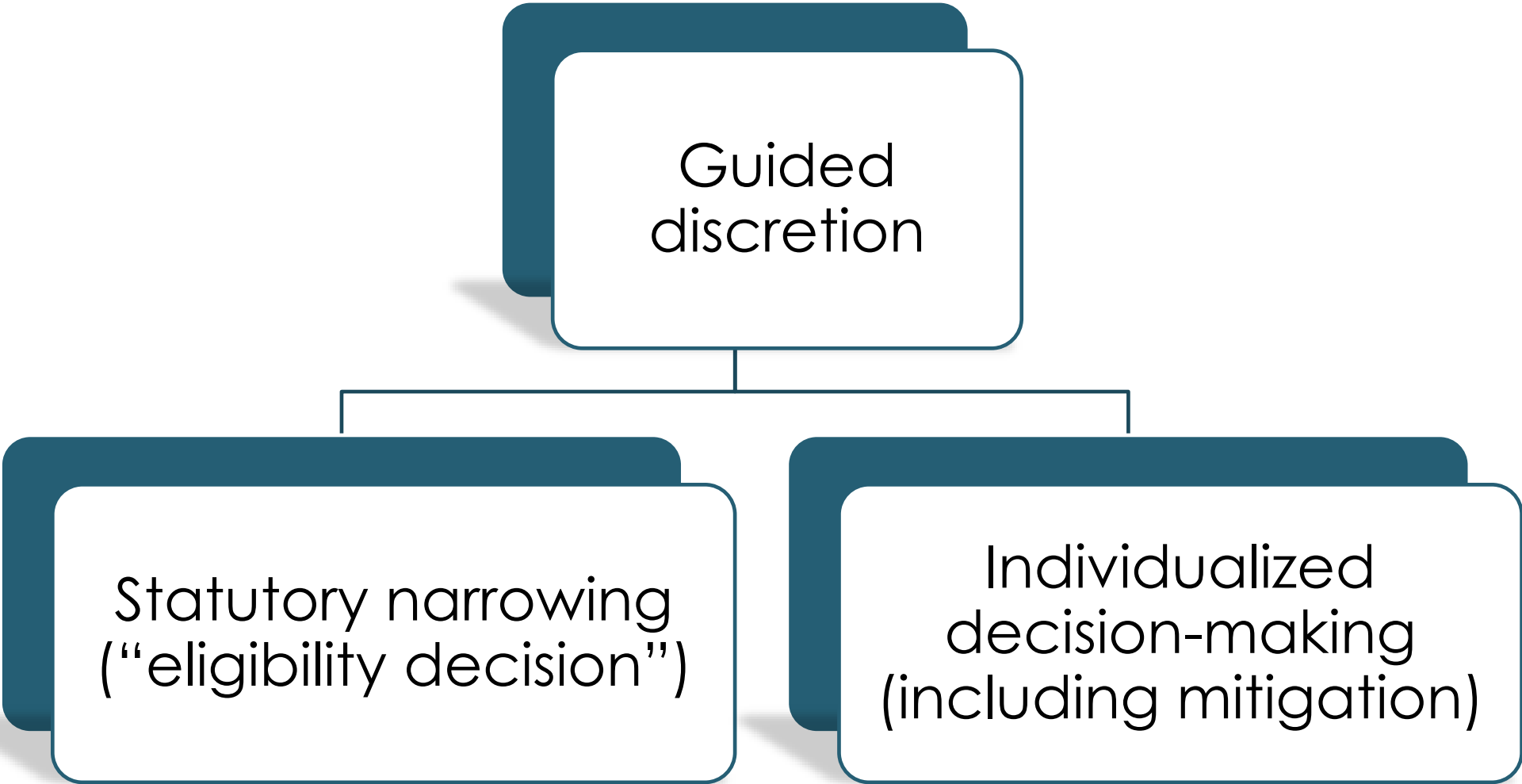
PROFESSOR
ALIZA PLENER COVER

DEFENDANT'S
EXHIBIT NO. A
IDENTIFICATION / EVIDENCE
CASE NO. CR01-24-31665
DATE: 11/13/24



Why this study?

Why Idaho?

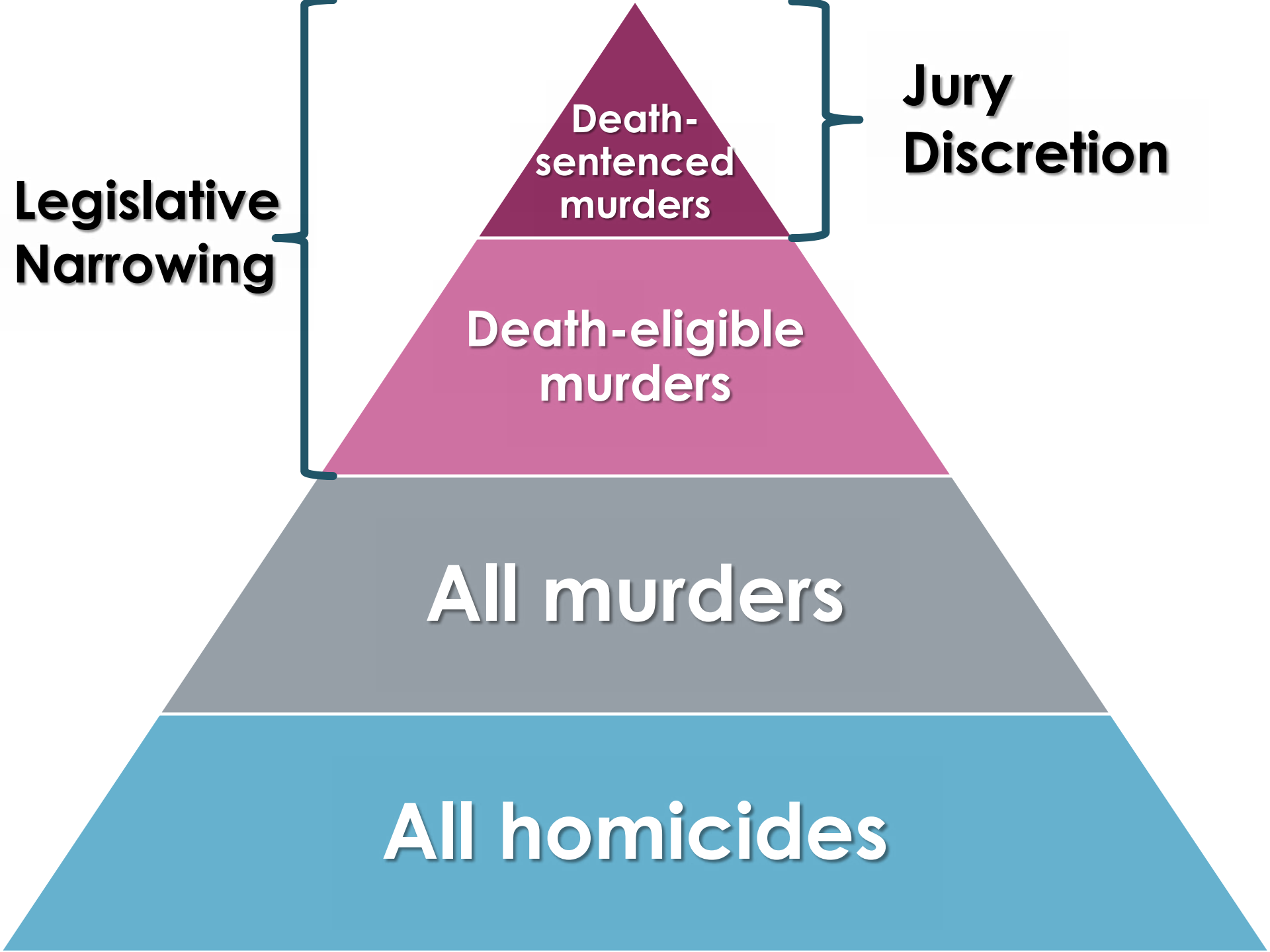


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graph TD; A[Guided discretion] --> B[Statutory narrowing  
("eligibility decision")]; A --> C[Individualized decision-making  
(including mitigation)]
```

Guided
discretion

Statutory narrowing
("eligibility decision")

Individualized
decision-making
(including mitigation)



**Jury
Discretion**

**Death-
sentenced
murders**

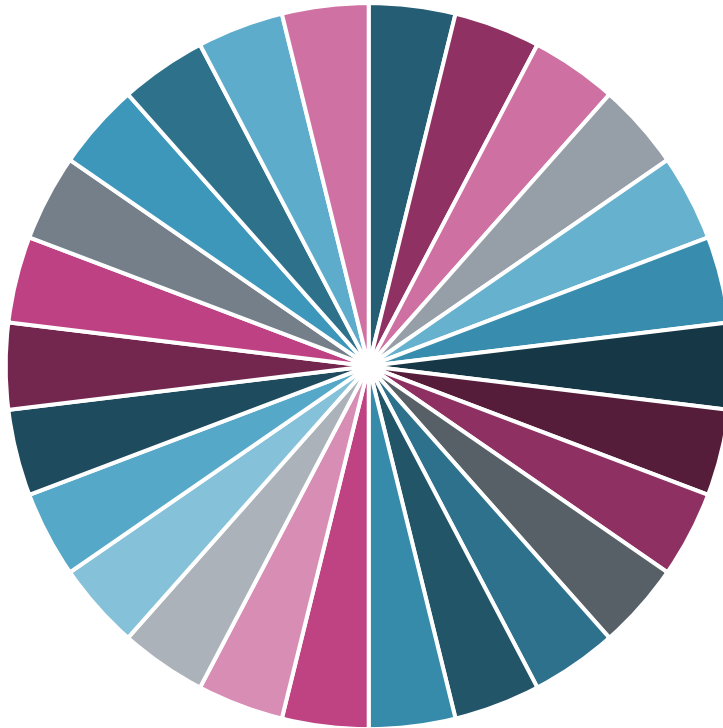
**Death-eligible
murders**

All murders

All homicides

**Legislative
Narrowing**

Last names



■ A ■ B ■ C ■ D ■ E ■ F ■ G ■ H ■ I ■ J ■ K ■ L ■ M
■ N ■ O ■ P ■ Q ■ R ■ S ■ T ■ U ■ V ■ W ■ X ■ Y ■ Z

THE
CUMULATIVE
EFFECT OF
MULTIPLE
CATEGORIES
ON THE
NARROWING
FUNCTION

STEP 1

- Analysis of Statutes & Caselaw

FIRST
DEGREE
MURDER
(PRE-
MEDITATED)

Idaho Code § 18-4003.

(a) All murder . . . which is perpetrated by any kind of willful, deliberate and **premeditated** killing is murder of the first degree.

FIRST DEGREE MURDER (FELONY MURDER)

Idaho Code § 18-4003.

* * *

(d) Any murder committed in the perpetration of, or attempt to perpetrate, aggravated battery on a child under twelve (12) years of age, arson, rape, robbery, burglary, kidnapping or mayhem, or an act of terrorism . . . or the use of a weapon of mass destruction, biological weapon or chemical weapon, is murder of the first degree.

CONTRAST WITH OTHER STATES

Examples:

- Louisiana First Degree Murder
- Texas Capital Murder
- Kansas Capital Murder

AGGRAVATING CIRCUMSTANCES

IDAHO CODE § 19-2515(9)

(9) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:

(a) The defendant was previously convicted of another murder.

(b) At the time the murder was committed the defendant also committed another murder.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration.

(e) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(f) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

(g) The murder was committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem and the defendant killed, intended a killing, or acted with reckless indifference to human life.

(h) The murder was committed in the perpetration of, or attempt to perpetrate, an infamous crime against nature, lewd and lascivious conduct with a minor, sexual abuse of a child under sixteen (16) years of age, ritualized abuse of a child, sexual exploitation of a child, sexual battery of a minor child sixteen (16) or seventeen (17) years of age, or forcible sexual penetration by use of a foreign object, and the defendant killed, intended a killing, or acted with reckless indifference to human life.

(i) The defendant, by his conduct, whether such conduct was before, during or after the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

(j) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise of official duty or because of the victim's former or present official status.

(k) The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding.

“FUZZY” AGGRAVATORS

(e) The murder was especially **heinous, atrocious or cruel**, manifesting exceptional depravity.

(f) By the murder, or circumstances surrounding its commission, the defendant exhibited **utter disregard for human life**.

* * *

(i) The defendant, by his conduct, whether such conduct was before, during or after the commission of the murder at hand, has exhibited **a propensity to commit murder** which will probably constitute a continuing threat to society.

STEP 2

- Study: Gathering Data

METHODOLOGY

- Universe of Cases
 - Date range: June 2002 – 2019
 - Source: List of cases charged 1D or 2D from Idaho Supreme Court
 - Excluded cases

METHODOLOGY

- **Case file review (with research assistants)**
 - Court filings/transcripts from attorneys
 - Court records in courthouses
 - Online sources
 - Westlaw
 - U of I Digital Commons case file repository
 - iCourt
 - Idaho Department of Correction offender search

METHODOLOGY

Information collected:

- Offense charged?
- Notice of intent to seek the death penalty?
- Death penalty sought at trial?
- Offense of conviction?
- Did the facts support a first-degree murder conviction?
- Was a conviction obtained by plea or verdict after trial?
- Was the sentence death or less than death?
- If the case was procedurally or factually first-degree murder, did any of the “clear” aggravators apply?
- If no “clear” aggravators applied, did any of the “fuzzy” aggravators apply?
- Explanation

METHODOLOGY

- 194 cases: sufficient information
- 26 cases: insufficient information

CATEGORIZING CASES

Categorization	Definition
1DCap	High level of confidence the case was both first-degree and death-eligible
1DMaybeCap	High level of confidence the case was first-degree; significant possibility that it was death-eligible
1DNon	High level of confidence the case was first-degree; low possibility that it was death-eligible
2Dv1D	Unable to categorize as first-degree with confidence
2D	High level of confidence the case was not first-degree

METHODOLOGY

- “Controlling fact-finding” rule
- Deference to prosecutorial allegations of facts, unless rebutted by judge/jury
- “Legal sufficiency” rule, assuming as true the prosecutorial allegations



STEP 3

- Analysis & Findings

FIRST-DEGREE ELIGIBILITY

Factual or procedural 1D		Charged 1D		Convicted 1D	
#	%	#	%	#	%
167 – 175	86 – 90%	173	89%	108	56%

DEATH-ELIGIBILITY

CASE CATEGORY	TOTAL #	1DCAP	1DMAYBECAP	DEATH ELIGIBILITY RATE (%)
Factual / procedural 1D	167	155	9	93 – 98%
1D conviction (procedural 1D)	108	105	2	97 – 99%
1D charge	173	146	9	84 – 89%
All cases in study (1D and 2D)	194	155	9	79 – 85%

% of death-eligible convictions

Notice of intent to seek death filed	Death sought at trial	Death sentence imposed
21%	5%	3%

Furman: approximately 15-20% of convicted, death-eligible murderers sentenced to death

CHARGING DECISIONS

INTERSTATE COMPARISON

State (date range)	Death eligibility (%)		
	% of procedural 1D murders	% of factual & procedural 1D murders	% of all murders (1D and 2D)
Idaho (2002 – 2019)	97 - 99%	93 - 98%	79 - 85%
Arizona (2002 – 2012)	98%	-	-
California (1978 – 2002)	95%	86%	68%
Colorado (1999 – 2010)	-	90.4%	-
Georgia (1974 – 1979)	-	-	86%
Georgia (1995 – 2004)	-	-	56%
Maryland (1978 – 1999)	-	-	~ 21%
Nebraska (1973 – 1999)	-	-	25%

County	Death-eligible cases	Death-eligible cases w/ notice of intent to seek death		Death-eligible cases where death sought at trial		Death-eligible cases w/ death sentence	
		#	%	#	%	#	%
Total	155	32	21%	7	5%	4	3%
3 biggest by population - Ada, Canyon, Kootenai	76	20	26%	7	9%	4	5%
All but 3 biggest counties	79	12	15%	0	0%	0	0%

GEOGRAPHY

OTHER FACTORS / OBSERVATIONS

- **Egregiousness** (many highly aggravated cases – multiple homicides, torture, etc. – did not result in capital trials)

CONCLUSIONS

■ **Key findings**

- Minimal statutory narrowing: statutes are doing little to winnow down the class of murderers eligible for the death penalty
- Low rate of filing notice of intent to seek the death penalty, pursuing death at capital trial, securing death sentences

■ **Prosecutorial discretion**

- Unconstrained discretion for prosecutors, with minimal legislative narrowing, is inconsistent with constitutional mandate
- Death penalty as bargaining chip?
- Weakens penological justifications of the death penalty: lessens deterrent effect; undermines arguments that it's necessary for purposes of retribution or deterrence
- Evolving standards of decency

OREGON, 2019 – EXAMPLE OF A NARROWED STATUTE

Aggravated Murder:

- [1] Murder of 2 or more people – terrorism;
- [2] While in custody and after a previous homicide conviction;
- [3] Premeditated and against a child under 14 years of age; or
- [4] Premeditated and against a police officer or other officer

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X		
1	Defendant	Researcher	County	Category/Case # (10/10/10)	Case vs. Name	File source	Charge code (10/10/10)	Death sentence	DO sought at trial?	Offense attempted	Conviction code (10/10/10)	Pris	Facts support 10/10/10	Sentence received?	Clear aggressor(s)?	HAC/Utter damaged/propensity?	Explanation	Media additions	Race of Def.	Race(s) of victim(s)	Gender of Def.	Gender(s) of victim(s)	Additional sources consulted	date of incident		
2	Douglas, John C.	AC	Ada	10Cap	Clear	OC/Court	10	no	no	10 murder 10 attempted 10 murder	10	pry	Yes (convicted, premeditated)	WOP	9(b) (more than one murder)		"Douglas, an African American, was charged with two counts of murder in the first degree... and one count of attempted murder in the first degree... after he shot three individuals, one of whom survived." State v. Douglas, No. 4638, 2018 WL 325142, at *1 (Idaho Ct. App. Jan. 9, 2018). "The jury returned a verdict of guilty on all three counts." State v. Douglas, No. 4638, 2018 WL 325142, at *1 (Idaho Ct. App. Jan. 9, 2018)		Black	multi	male	Multi (male, male)				
3	Sanchez, miss	AC	Ada	10Cap	Pris	SAPD hard copy	10	no	no	10 murder (premeditated) + grand theft	10	pry	yes (convicted by jury, premeditated)	less than death	POSSIBLE 9(g) (robbery) - but also possibly remuneration (see explanation)	HAC, utter divergated, propensity	HAC Judge at sentencing: "The intentional took the life of another. That was obvious from the facts of the case. It appeared that Leon was strangled first and strangled to the bedroom and deliberately stabbed while he lay on the floor.... And the person who killed him, Mr. Sanchez, wanted to make very sure that he was dead. And if you can graduate homicide into categories, I think this falls at least somewhere in the middle." (1717)		Hispanic	multi	male	male		4/18/2007		
4	Lopez, Chasman, Jorge	AC	Blaine	10Cap	Clear	OC/Court	10	no	no	10 murder	10	pry	yes (convicted)	less than death	9(b) (more than one murder)		On August 15, 2002, a burner was found in a remote desert area outside of Mountain Home, Idaho. Inside the car were the charred remains and bone fragments of Rebecca Ramsey Almaraz ("Almaraz") and her two sons, four-year-old R.B. and two-year-old M.M. Almaraz and M.M. had suffered fatal gunshot wounds to the head, but R.B.'s cause of death was undetermined. The white bullet lodged in Defendant, who previously dated Almaraz. On August 18, 2002, the State filed a complaint charging Defendant with three counts of first-degree murder for the deaths of Almaraz and her two sons.... A jury convicted Defendant on all three counts, and the court imposed three concurrent fixed life sentences. "State v. Lopez-Orozco, 159 Idaho 375, 376 P.3d 1056, 1057 (2016).		Hispanic	multi	male	Multi (female, 2 male (children)				
5	Sanchez, @jessica1	AC	Ada	10Cap	Pris	OC/Court	10	yes	yes	10 murder	10	pry	yes (torture, age battery, use verdict form p. 434)	WOP		HAC, utter divergated	A jury found Sanchez guilty of first degree murder and, after the penalty phase of the trial, additionally found the existence of two statutory aggravators. However, the jury could not reach a unanimous decision as to the imposition of the death penalty. Therefore, because the jury found some statutory aggravators, the district court sentenced Sanchez to a determinate term of life imprisonment.		Hispanic	multi	male	child		12/7/2003		
6	Herrera, Paul Edgar	AC	Canyon	10Cap	Clear	SAPD affix	10	no	no	10 murder, robbery, kidnapping second degree, and aggravated battery	10	pry	yes (convicted)	less than death	9(g) murder committed in perpetration of kidnapping, robbery, burglary		Verdict form: jury finds him guilty of 1D murder w/ malice afloatthought as well as 1D murder in course of kidnapping, robbery, burglary. Ruling on Rule 55 motion - p. 41.		Hispanic	male	male					
7	Brink, Daniel Edward, Jr.	AC	Pain Felt	10Cap	Clear	OC/Court	10	no	no	10 murder	10	pry	yes (premeditated)	less than death	possible 9(c) (great risk of death to many persons) - holding four people at gunpoint	utter divergated / Propensity	Soon thereafter, his van was also impounded. He inquired of the occupants of the home, and they indicated that Brent Lilwell had taken his van. In the ensuing days, Brent and several family friends traveled throughout Idaho in several counties. Brink was seen wearing off the back of a shotgun and working with the stock and trigger assembly. He later had a sawed-off shotgun behind the washing machine at the home where his van was stolen. Brink became obsessed with getting his van back and stated to several people his intention to exact revenge on Lilwell. On May 29, 2005, Brink drove to the acquaintance's home where his van was stolen. He heard the voices of Lilwell's girlfriend and another acquaintance in a room and reasoned that Lilwell was also present. He retrieved the shotgun from behind the washer and entered the room. Brink threatened Lilwell and demanded that Lilwell retrieve his van. When Brink later demanded to be taken to his van, an argument ensued between Brink, Lilwell, and Lilwell's girlfriend regarding gas money. Lilwell's girlfriend rummaged through her purse and appeared to try to give the purse to Lilwell. Brink fired the shotgun and the round struck Lilwell in the chest, killing him almost instantly. Brink was charged with first degree murder with an enhancement for using a deadly weapon, 1.C. § 18-602A, 1.C. § 18-602A, and being a persistent violator, 1.C. § 18-254A.	https://magawcslaw.com/news/local/brink-gets-life-in-prison/article_133b0dc4-675e-5ee7-8d3f-ad6d7626d03d.html								
8	Chivick, Daniel Edward, Jr.	AC	Ada	10Cap	Pris	SAPD affix	10	no	no	10 murder	10	pry	Yes (convicted)	less than death	9(c) (great risk of death to many persons)	HAC, Utter divergated	Armed indictment alleges: "That the Defendant, DANIEL EDWARD CHIVICK JR., ... did unlawfully and with the intentional application of torture, life and murder (indicted), a human being, by intentionally inflicting upon (indicted) extreme and prolonged pain with the intent to cause suffering, and/or by inflicting upon (indicted) extreme and prolonged acts of cruelty with the intent to cause suffering, to receive vengeance, or to satisfy some sadistic inclination, by inflicting repeated acts of blunt force trauma to the abdomen and/or head of (indicted), an eight (8) year old child... with his hands, knees, fists, and/or feet, and/or by other means of physical force, physical abuse, and/or emotional abuse, which caused bruising, pain, abdominal bleeding and injury, and/or head injuries including bleeding and/or brain swelling, from which injuries, force, and/or abuse (indicted) died or or around the 24th day of July 2000. (p. 455)		Native American	White	male	male	State v. Chivick, 158 Idaho 358, 413, 548 P.3d 1, 28 (2005)	State v. Chivick, 158 Idaho 358, 413, 548 P.3d 1, 28 (2005)		
9	Abdulrah, Kadir	AC	Ada	10Cap	Clear	OC/Court	10	yes	yes	10 murder + others	10	pry	yes (premeditated)	less than death	9(c) (great risk of death to many persons)	after divergated	State v. Abdulrah, 158 Idaho 386, 413, 548 P.3d 1, 28 (2005)		Other	male	female	Multi (Male and female)				
10	William P. Mosier	AC	Canyon	10Cap	Clear	SAPD affix	10	no	no	10 murder	10	pry	Yes (convicted)	less than death	9(b) (more than 1 murder)		"Master testified that he was paid \$1,000 by the victim's boyfriend to kill the victim. Mosier was charged with first degree murder and conspiracy to commit murder." Mosier v. State, No. 4432, 2018 WL 6735140, at *1 (Idaho Ct. App. Dec. 24, 2018). Convicted on both charges then overturned on appeal, new trial -> convicted of both charges again.		White	Multi-White	male	male				
11	David, Joseph	AC	Idaho	10Cap	Clear	OC/Court	10	no	no	10 murder + conspiracy	10	pry	Yes (convicted, premeditated)	WOP	9(c) remuneration		P 32 sentenced to feed life. The OSC upheld the sentence. Cites here to the PDF of that case.		White	Unknown	male	female		2003		
12	Carver, David	AC	Idaho	10Cap	Pris	SAPD hard copy	10	no	no	10 murder (battery on child under 12)	10	pry	Yes (convicted)	WOP		HAC, utter divergated, propensity	P 11: "Considering the brutal and unprovoked injuries that Defendant inflicted upon a helpless and innocent child, Defendant has not shown that the district court abused its discretion in imposing a fixed life sentence." P 10: "The pathologist testified that a fall from the bed would have led to a single impact, but in this case there were "at least six different impact sites or subglottal areas of hemorrhage, major trauma, depending on what you count and how you count them as that's the law and possible." He explained that it was difficult to count the number of impacts to the child's head because some of the areas of hemorrhage merged together and multiple impacts in the same area would have caused only one hemorrhage." P 8: "In reliance upon the previous instances of abuse of the child P 9: unrelenting response to the incident. The responding police officer "described Defendant's demeanor as "bipolar, manic, agitated, I mean, just without knowing a car." He testified that Defendant's voice was monotone and that he was not crying, nor did he appear to be upset or excited. The emergency medical technician who arrived at the house also described Defendant as "detached, uninvolved." After the ambulance had transported the boy to the hospital and he was in the emergency room, Defendant and the boy's mother went outside and stood near the back door. The ambulance driver testified that he returned to the ambulance to clean 1 and get 1 ready in case they were called on another run. While doing so, he observed Defendant and the mother for twenty minutes. He stated that Defendant was smoking and laughing and that he and the boy's mother were "talking part of the time, kind of laughing and carrying on." P 10: "When imposing the fixed life sentence, the district court focused upon Defendant's lack of rehabilitative potential. The court stated that as looking against rehabilitation your record as both a juvenile and as an adult, not only the crimes that you've been convicted of and have admitted, but your behavior while in probation, while incarcerated and in the state's care, and don't follow the rules, whether you're incarcerated or whether you're outside of incarceration. You had a number of write-ups when you were incarcerated. You couldn't finish a rider program. You've had write-ups while you were in jail 11 have. You were on probation when you committed other offenses. All of this tends to point to the fact that maybe you can't be rehabilitated... it appears to me that as pointed out since 16 you've been incarcerated most of the time. You haven't complied with the rules while incarcerated. You haven't complied with the rules outside of incarceration... I just don't believe based upon what I've seen that you can change. I wish I was wrong, but I don't find that there's any reasonable likelihood that you will, in fact, change your behavior and be a law-abiding citizen in the future."		White	Unknown	male	child				
13	Wayne Lee	CC	Canyon	10Cap	Clear	SAPD affix	10	No	No	10 murder (robbery by charge submitted by murder charge) lesser	10	pry	Yes (convicted)	Not death	9(g) murder committed in the perpetration of a robbery & Defendant acted with reckless indifference of human life.	utter divergated	Victim died of a heart attack having been left naked in the cold after Defendant's accomplices kicked him with steel-capped boots because the group wanted the victim's money and car. Defendant convicted of felony murder. He set up a prostitution outfit with the purpose of robbing the clients. Woods was the leader of the group but did not deliver the blows that led to the victim's heart attack. Defendant hired cabdriver knowing he was violent and homophobic. Relevant because victim was a gay man. Compare with State v. Lanford (1989) where the utter divergated aggravator was found because the death was caused over something as trivial as a car. Here, Defendant Woods planned with 2 others to rob the victim by turning him in through a four prostitution service. They robbed the victim of only \$200. They also stole the victim's car. While the planned robbery and attack was carried out by his accomplices, Defendant went out for coffee. Judge determined that Woods was only concerned with using people for his gain without concern for how they act.		White	White	male	male				

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q		R	S	T	U	V	W	X
14	Grove, Stacy Lane	AC	Naz Persa	10Cap	Henry	SAPD affle	10	no	no	10 murder	10	jury	yes (convicted) 10/9y murder, 488 battery of child	less than death	none	HAC	Prosecutor @ sentencing: "One is that of the medical experts who actually physically examined the body of [defendant] after he was killed all said the same thing. This is one of the worst cases they've ever seen. The number and severity of the injuries were, in their words, virtually unbelievable. I think that Dr. Harper said that it was the first time he'd been to a car, catapulted through the air and he against a curb." Vol. 8:448, p. 1514. Judge recasting facts at sentencing: "Dr. Choi reviewed the autopsy reports, . . . and he indicated that the autopsy showed the most brutal case he had ever seen. Dr. Hunter . . . said this was not just shunt-bell, this child was beaten very severely. . . . He further indicated that the beating was similar to being thrown from a car. "You've talked about Dr. Rusc, the pathologist. . . . A bear in the corpal colosseum connecting the bear to the central hemisphere, consistent with very significant force, like a motor vehicle accident or a fall from a couple of stories high or a blunt force trauma. "Talked about the hemorrhaging around the paranasal and that having to have been caused by severe force because of the protection that the body has around the paranasal. And then Dr. Harper, who specializes in child abuse cases, and we remember her testimony, and her opinion was that . . . [defendant] died from two fatal injuries. . . . I would have taken enormous force, she described them as uncommonly severe injuries consistent with being drug by a horse. "You couldn't inflict the injuries with your upper extremities alone. . . . Ms. Grove, I'm finding that for two reasons. One is because of the gravity of what was done here, and, two, because the jury had this in front of them to consider." p. 1126-29 Facts here seem similar to State v. Aragon: "The trial court found the existence of the circumstance in C. § 19-215(1)(3), that the murder was especially heinous, atrocious and cruel. The existence of this circumstance is supported by evidence that the victim was severely injured through the use of tremendous force, even though the victim was an eight month old child who could not possibly pose a threat to appellant, or procure him intentionally." State v. Aragon, 107 Idaho 558, 387, 690 P.2d 293, 321 (1984) "Medical testimony at trial indicated [defendant] beat [victim] to the head, a minimum of two and probably three blows. Testimony indicated that the blows which were inflicted were of a force equal to dropping [victim] off a three- or four-story building two or three times." State v. Aragon, 107 Idaho 558, 385, 690 P.2d 293, 298 (1984)	White	White	Male	child	Widow; clerk's record online			
15	Starfield, Katherine Lee	AC	Ada	10Cap	Henry	SAPD affle	10	no	no	10 murder	10	jury	19y Agg battery (12th order 11)	less than death	none	HAC	Supplemental police report: "Explained a Kathy that based on my training and experience, I had never seen an injury [to the victim] sustained from merely falling in the manner she explained. I believed her that [victim]'s injuries would be equivalent to a child falling from a two-story building head first onto concrete." p. 200 State at sentencing: "[T]his was a very, very violent crime. You heard a number of people testify that a significant amount of force was needed to cause these injuries. This wasn't a fall. This wasn't a fall. This was a significant amount of force." (4602) "[T]he degree of force and the degree of violence that the case used was enough to cause injuries that immediately caused [victim] to become conscious and unresponsive. . . . They were able to see handprints on his shoulders, handprints in the front, thumb in the back. And then it's significant that the case enough force when she was putting her hands on the child that she left those handprints there. . . . 4605-55. "[Victim] suffered from spinal cord and brain stem contusions and lacerations. And . . . that was a whiplash type injury, and to cause that injury would require expertise force." 4605-60. He hemorrhaged. "It's hard to get much more bleeding than we have here." A significant amount of blood. A significant amount of damage and injury to those eyes (4661). Patterns injury back of [victim]'s hip: "consistent with and only with a significant amount of force, being slammed into child's head back that his teeth impairs showed up on his lips." 1465-62. "Dr. Garrison testified that in no way that the single impact could have caused these injuries but that they were caused by three separate impacts, three separate impacts to this child's head inflicted by this defendant in a violent rage." (4662-63). HE: UTTER DISGUST! "Judge, I would also ask the court to take into account the defendant's actions after the crime was committed. There are really two types, two areas of her actions. One, I think a lack of remorse or concern for [victim]. . . . In terms of remorse, at the court heard during trial, and this was on audio, when officers arrived, she asks, "Is this going to be a big thing?" Her focus at this point is not on the little boy who is comatose, who is not breathing, who is not responding to pain, and who is being taken to the hospital in an ambulance. That's not her concern. Her concern is her ability to stay here. "Is this going to be a big thing?" Is this going to affect my ability to be a daycare provider?" (4666). Also points to efforts to manipulate the evidence, to get other jury Chad to change his mind. Judge's takeaways of what happened: "The ripper his coat off, and the took off too hard, and she got mad at him and she straitened him around, and although she didn't mean to kill him, that was the result." 4606. Judge sentences to minimum of 10 years, lesser OSC granted evidentiary hearing in PC petition on [sic: Starfield v. State, 165 Idaho 889, 454 P.3d 531, 134 (2023)]	White	White	Female	child	State v. Starfield, 158 Idaho 121, 328, 347 P.3d 175, 177 (2015)			
16	Thomas, Joseph Anthony, Jr.	AC	Naz Persa	10Cap	Henry	SAPD affle	10	no	no	10 murder	10	jury	yes (convicted)	less than death	none	HAC, Utter disgarded	Closing Arguments, Ct. of Appeals: Death by strangulation by force. Defense claimed it was accidental asphyxiation but state argues he strangled her given the amount of pressure required. (p. 1270-71, closing arguments) (Would have taken 3-5 minutes to die (p. 1294, closing arguments) "[The district court] weighed those factors against various aggravating factors including Thomas's prior unhealthily relationships with women and the extreme brutality of the crime. The district court explained that, the Court's view from the evidence that was submitted at trial and the matters presented in the PSJ and other attached documents, I just suggest a finding that the murder of [victim]] in this case was accomplished through an especially violent, calculated, and callous act [Thomas] in strangling the life from the woman that [he] had once loved and was the mother of [his children]." State v. Thomas, No. 45318, 2019 Wt 145823, at *1 (Idaho Ct. App. Apr. 2, 2019) First conviction overturned by OSC on appeal. Retrial and reconvicted of 10 murder. See State v. Thomas, No. 45318, 2019 Wt 146162, at *1 (Idaho Ct. App. Apr. 2, 2019)	White	White	Female	child	Starfield v. State, 165 Idaho 889, 454 P.3d 531, 134 (2023)			
17	Heggin, Gregory	AC	Canyon	10Cap	Henry	SAPD hard copy	10	no	no	10 murder	10	jury	yes (convicted, premeditated)	less than death	WOP	HAC, utter disgarded, propensity	Prosecutor @ sentencing hearing recommended, feed [T]his was simply an execution. The D backed his shovel into the V's which before he and Duran went and picked Mr. Grant up, he forced Mr. Grant to start digging his own grave, and then he sat him five times. Once in the front and four in the back. [That wasn't] enough, once Mr. Grant was on the ground he had been shot three times, the D kicked him multiple times and screamed and yowled yep. (1311) "[T]his is just a selfish crime in its nature. . . . It's not enough that he shot him, but now he has to kick him when he's dead on the ground and scream, and you dead yep! And make sure that Duran and those know that he's the big nut out there. He's in charge. . . . And to be the same in the victim's own car. But if that's not bad enough, within moments of killing someone execution style, kicking his body while he's on the ground, they're going to kick in the bus and ordering [T]his. How many people have the stomach to sit fast food after they've just killed someone. "Your honor, this defendant is a professional criminal and a multiple felony offender." (1316-17) "He can't say committing a crime, when he's in our most active facilities. And the first degree murder charge and the weapon enhancements at his 16th and seventh felony conviction, he has 16 misdemeanor convictions." (1318). Talks about history of violence. "And yet, we are convinced that this individual has a switch that he took him out and executed him." 1318 (Does this suggest 99) "[The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such provocation]" Judge at sentencing: " facts . . . are egregious. It is one thing . . . and certainly don't mean to diminish the death of any human being. It is one thing to kill somebody. In this Court's view, it is a completely different circumstance and is unnecessarily cruel to have that individual dig a hole, intending that he is digging his own grave, before executing him, that he's cruelly and callously had to come forward to take some to go to the individuals that were there. . . . That's not to risk, to the extent there is any ordinary murder, an ordinary murder." 1355. 3 possible reasons for the crime: believed he was a [victim] thought that was denied, maybe could 5400 if yes. "The Court finds that to be an aggravating factor, and extraordinarily egregious", and perhaps "There was no provocation at all. . . . I actually find that to be the worst of the three scenarios because it had another person with little to no provocation, let me tell you that you are extraordinarily dangerous individual." 1355-56 Bahr had a history of controlled substance use and juvenile crime record to include carrying concealed weapon. Also violated no contact order. State argues Bahr lacks accountability and remorse for his own actions. Allegedly made threats to and was physically abusive to an girlfriend. Sentencing in 1402-22. Prosecutor argument, showing possible utter disgarded in terms of advanced planning: "on terms of the facts of this case, I know Your Honor is very well-versed. You sit through the trial just like the rest of us. And I believe Your Honor is aware that it's the State's position that on September 23rd, 2015 the defendant, in a state of hatred and anger and rage, came up with a plan, in his words, to make his plan go away. And then the followed through and took the steps necessary to carry out his plan and to carry out and make good on the threats that he made, to make Ryan breathe single and to put Zachariah Peterson in a body bag. Your Honor is aware that the defendant, after agreeing to meet with Zachariah and Ryan, traveled to steal a firearm and did so; then traveled to the Walmart to steal a handgun, and then traveled and parked away from the meeting location, and, in the State's view, thereafter, the defendant ambushed Zachariah Peterson. Zach did not have a chance. He thought he was going there for a confrontation, a fight right or else. And the defendant, in the State's view, had no intention of fighting or confronting verbally Zachariah Peterson. We want them to let him live and die." Prosecutor at Sentencing TA 1837-29: "The defendant poses a continuing danger to the community from the State's perspective. He makes exceptionally poor impulsive and dangerous decisions. . . . The PSJ includes police reports, as I mentioned, that relate to that 2013 carrying a concealed weapon conviction in which, according to the police reports, the defendant and a female friend of Ryan's didn't each other, and they were in some sort of disagreement. Similarly, even reading the reports, there was a disagreement over the phone in which it is reported that the defendant threatened to cut the girl's tongue out. In the defendant's version of events it that report he claims that he's the one who was threatened and he felt threatened. So his solution to being afraid and feeling threatened was, according to the reports and the evidence, to secure a number of weapons, a 3 inch knife and conceal it in his person as well as a switch, which I think is important in light of the threat to cut out the girl's tongue. Both of those weapons were concealed on his person. And then he goes to this girl's home, and the defendant results in the killing being awful. . . . In terms of prior abuses, Ryan Harsh did not feel uncomfortable that the defendant was physically abusive to her during their relationship. Certainly we have no way to confirm that. And the defendant certainly doesn't disclose any such thing. The only thing he discloses in his interview the night of the murder is that he treated Ryan this bad and so he left. However, this Court is very familiar with the vulgarities with which the defendant addresses Ryan in the threatening texts that he sent to her as well as text messages that the jury didn't see. Your Honor ruled that the prior threats to send her to the hospital were not appropriate for the jury to consider. But they're certainly appropriate for the Court to consider when considering this defendant's character. His impatience, his penchant for violence and his risk to others. In those prior texts that the Court ruled were inadmissible for the jury to hear, you also saw that the defendant had previously threatened to make Zach's boy fatherless, some sort of threat against Ryan as well as threats to take anything in the State's perspective. As we mentioned, the murder of Zachariah Peterson was not as Dr. Beaver asserts, an isolated incident. . . . Not only is the Court familiar with the vulgarities and the								

[illegible]

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X
29	McDermott, Aaron Ryan	AC	Ada	10Cap	Henry	DC/Ct/Court	10	yes	yes	10	murder + conspiracy	10	yes	(yes convicted, premeditated)		WFOF	HAC, utter disregard, propensity	State v. McDermott, No. 32071, 2009 WL 955885, at *2 (Idaho Ct. App. July 2, 2009)						
30	Walt, Robert Jr.	AC	Ada	10Cap	Henry	DC/Ct/Court	10	yes	no	10	murder	10	yes	(yes convicted, premeditated)		less than death	HAC, utter disregard, propensity (see p. 231 of Clerk's Record)	State v. McDermott, No. 32071, 2009 WL 955885, at *2 (Idaho Ct. App. July 2, 2009)						
31	Hughes, Ravyn Dawn	AC	Brigham	10Cap	Henry	SAPD hard copy	10	no	no	10	murder	10	yes	(yes convicted, premeditated)		less than death	HAC, possible	State v. McDermott, No. 32071, 2009 WL 955885, at *2 (Idaho Ct. App. July 2, 2009)						
32	Schmechel, Kelly Bryan	AC	Canyon	10Cap	Clear	SAPD file	10	no	no	10	murder	10	yes	(yes not sure if premeditated or felony)		less than death	HAC/utter disregard/propensity	State v. McDermott, No. 32071, 2009 WL 955885, at *2 (Idaho Ct. App. July 2, 2009)						
33	Hurtman, Ronald John	AC	Ada	10Cap	Clear	DC/Ct/Court, Ada file	10	no	no	10	murder, kidnapping	10	yes	(yes convicted, premeditation and/or felony murder)		less than death	HAC/utter disregard/propensity	State v. McDermott, No. 32071, 2009 WL 955885, at *2 (Idaho Ct. App. July 2, 2009)						
34	Thornberry, Donna Kay	AC	Ada	10Cap	Clear	DC/Ct/Court, Ada file	10	no	no	10	murder	10	yes	(yes convicted by jury)		less than death	HAC/utter disregard/propensity	State v. McDermott, No. 32071, 2009 WL 955885, at *2 (Idaho Ct. App. July 2, 2009)						
35	Ciocchi, Albert	AC	Elmore	10Cap	Clear	DC/Ct/Court	10	no	no	10	murder + 20	murder	10	yes	(yes convicted, premeditation)		less than death	HAC/utter disregard/propensity	State v. McDermott, No. 32071, 2009 WL 955885, at *2 (Idaho Ct. App. July 2, 2009)					
36	Parkinson, Brian	AC	Jefferson	10Cap	Clear	DC/Ct/Court	10	no	no	10	murder	10	yes	(yes convicted, premeditation)		less than death	HAC/utter disregard/propensity	State v. McDermott, No. 32071, 2009 WL 955885, at *2 (Idaho Ct. App. July 2, 2009)						
37	Thornberry, Donna Kay	AC	Ada	10Cap	Clear	DC/Ct/Court, Ada file	10	no	no	10	murder	10	yes	(yes convicted, premeditation)		less than death	HAC/utter disregard/propensity	State v. McDermott, No. 32071, 2009 WL 955885, at *2 (Idaho Ct. App. July 2, 2009)						
38	Ciocchi, Albert	AC	Elmore	10Cap	Clear	DC/Ct/Court	10	no	no	10	murder	10	yes	(yes convicted, premeditation)		less than death	HAC/utter disregard/propensity	State v. McDermott, No. 32071, 2009 WL 955885, at *2 (Idaho Ct. App. July 2, 2009)						
39	Parkinson, Brian	AC	Jefferson	10Cap	Clear	DC/Ct/Court	10	no	no	10	murder	10	yes	(yes convicted, premeditation)		less than death	HAC/utter disregard/propensity	State v. McDermott, No. 32071, 2009 WL 955885, at *2 (Idaho Ct. App. July 2, 2009)						
40	Thornberry, Donna Kay	AC	Ada	10Cap	Clear	DC/Ct/Court, Ada file	10	no	no	10	murder	10	yes	(yes convicted, premeditation)		less than death	HAC/utter disregard/propensity	State v. McDermott, No. 32071, 2009 WL 955885, at *2 (Idaho Ct. App. July 2, 2009)						
41	Ciocchi, Albert	AC	Elmore	10Cap	Clear	DC/Ct/Court	10	no	no	10	murder	10	yes	(yes convicted, premeditation)		less than death	HAC/utter disregard/propensity	State v. McDermott, No. 32071, 2009 WL 955885, at *2 (Idaho Ct. App. July 2, 2009)						
42	Parkinson, Brian	AC	Jefferson	10Cap	Clear	DC/Ct/Court	10	no	no	10	murder	10	yes	(yes convicted, premeditation)		less than death	HAC/utter disregard/propensity	State v. McDermott, No. 32071, 2009 WL 955885, at *2 (Idaho Ct. App. July 2, 2009)						
43	Thornberry, Donna Kay	AC	Ada	10Cap	Clear	DC/Ct/Court, Ada file	10	no	no	10	murder	10	yes	(yes convicted, premeditation)		less than death	HAC/utter disregard/propensity	State v. McDermott, No. 32071, 2009 WL 955885, at *2 (Idaho Ct. App. July 2, 2009)						
44	Ciocchi, Albert	AC	Elmore	10Cap	Clear	DC/Ct/Court	10	no	no	10	murder	10	yes	(yes convicted, premeditation)		less than death	HAC/utter disregard/propensity	State v. McDermott, No. 32071, 2009 WL 955885, at *2 (Idaho Ct. App. July 2, 2009)						
45	Parkinson, Brian	AC	Jefferson	10Cap	Clear	DC/Ct/Court	10	no	no	10	murder	10	yes	(yes convicted, premeditation)		less than death	HAC/utter disregard/propensity	State v. McDermott, No. 32071, 2009 WL 955885, at *2 (Idaho Ct. App. July 2, 2009)						

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X															
																	the murder of Samantha Figueira, a human being, without justification or excuse, and with malice aforethought; to-wit: that ISSICA L. COLPITTS did knock on the front door of the residence of Samantha Figueira, and did let her wait thereby for Samantha Figueira to open the door, and then did immediately shoot Samantha Figueira with a .450 shotgun in the abdomen from which she died. Further that [she] did perpetrate such act by ambush (lying in wait), and/or to execute vengeance upon the person of Samantha Figueira, and/or did perpetrate such act by means of a willful, deliberate, and premeditated intent to kill, and/or did so with reckless indifference to human life."																						
																During argument at trial "[he] believe this case to be about anger, jealousy, and revenge." [S]he saw the impending demise of her family unit when Jo Walker told her he was going to have a relationship with Samantha Figueira... She had a problem, and she took care of her problem. She planned, prepared, and shot, and killed Samantha Figueira... and she felt no remorse about what she had done. Of course not, Samantha deserved it. Samantha, as we put it, had messed with the wrong people." (12/29/20). At approximately 5:54 p.m., she learned for the first time that Jo Walker and Samantha Figueira were in a relationship, and she exploded.... During this one hour and 24 minutes she decided to shoot Figueira. She created a plan. She obtained a firearm, and she put her plan into action." (2/4/21) "The shot and killed a woman whom she showed no remorse for it. She did it deliberately. She used that information in at least one phone call against Jo Walker that Samantha had died. When listen to that phone call you can hear her tone of voice. It is almost glowing." (2/6/21)																							
																Sentencing hearing re Prosecutor: "The Defendant did it viciously. She did it with a shotgun blast to the stomach causing massive internal injuries. Samantha did not pass from this life easily. She passed from this life writhing in pain. That is unforgivable. The Defendant placed her own misguided hope for a continued relationship with Jo to trample over Samantha Figueira's life.... That is the height of selfishness killing Samantha was a means to an end for her. She has shown no remorse, indeed, she even refuses to take responsibility, in light of the significant evidence introduced against her. The Court heard at trial an audio recording of...the day after Samantha was killed in which this Defendant was speaking with Jo Walker on the telephone, and she stated that conversation with the statement: Samantha is dead. The name of her victim was glowing. She had no concern or care about Samantha. And, in the course of that conversation she showed no concern or care about Samantha." 7/20-26 This was a deliberate act. After this Defendant shot Ms. Figueira in the stomach with a shotgun, she walked away from that event laughing." (7/28)																							
37	Gallits, Jessica	AC	Chamorro	1DCap	Grey	Adm look	1D	No	No	1D murder (premediated kill)	1D	very	yes (convicted premeditated murder)	less than death		after diagnosed	Judge at sentencing: this meets premeditation but "do not find that this was a calculated, well thought-out planned decision by you to take the life of Ms. Figueira...When you found that the ultimate betrayal took place, I believe the evidence shows that you made a fatal mistake. That was not induced nor foisted, calculating blood, but by emotion, by desire. I do not find that you are a monster...I do not find that you are a monster....I find you are a person that made a fatal mistake for a reason that is not justifiable." (7/28) "We do know that your demeanor throughout and your statements thereafter that day in the record, indicate a person that was not overwhelmed with emotion concerning a mistake. Not overwhelmed with, what hurt I don't? What accident has		White		female	female		5/22/2021															
38	Hill, Erick Tyrrell	AC	Ada	1DCap	Clear	OC/Court	1D	Yes	yes	rape, kidnapping	1D	very	yes before murder and premeditated	death	991 (the defendant was previously convicted of another murder)	HAC, utter disregard, propensity	Jury found all four aggravators and sentenced to death. See State v. Hill, 163 Idaho 744, 783, 418 P.3d 1042, 1083 (2018), reh'g denied (June 28, 2018), cert. denied, 139 S.Ct. 5616, 203 L. Ed. 2d 897 (2020).		White		male	female		8/24/2020															
39	Hill, Erick Tyrrell (same ID)	AC	Ada	1DCap	Clear	Self digital camera	1D	yes	yes	1D murder, rape	1D	very	yes (convicted)	death	991 (the defendant was previously convicted of another murder)	Jury found this aggravator. Previously convicted and sentenced to death in Hall l.		White		male	female																		
																In August 4, 2008, Reid, Jon Kambols, Steven Wilson, Neil Howard, and Cynthia Bawks were at a campground at Dobson Pass outside of Wallace, Idaho. Kambols shot and killed Howard and Bawks. Reid was charged with aiding and abetting in both murders....According to Kambols's testimony,...As the three drove away from the campsite, Reid became angry that Howard retrieved his knife and told Kambols "We have to kill them..."..Reid told Wilson that they were going to kill Howard and Bawks. The three then returned to Dobson Pass and parked on the main road. Wilson retrieved the pistol and Reid retrieved the 22 shells to give to Kambols. The three then walked to the campground and talked about how they would commit the murders. With the pistol hidden below Kambols's shirt, the three walked into the campground. Kambols talked to Howard while glancing at Reid. Reid was silently mouthing the words to Kambols "Come on, do it." Kambols shot Howard in the head, and then shot Bawks. Kambols and Wilson then dumped the bodies down a hill. As the three headed back to the car, Reid removed a number of 22 shells from his pocket and discarded them. The three then picked up Purfill and drove to Boise.																							
40	Hill, Corey K	AC	Shoshone	1DCap	Clear	OC/Court	1D	No	no	2x 1D murder (aiding and abetting); 2x aid abet aggravated assault; 2x unlawful discharge of firearm at a dwelling	1D	very	Yes (convicted, premeditated)	less than death	991 (more than one murder) (note it is clear that there was intent to kill though Reid was not directly involved)	State v. Reid, 151 Idaho 80, 82–83, 253 P.3d 754, 756–57 (Ct. App. 2011)					multi	male	Multi (male and female)																
																This was a multiple-execution for hire (137); so some evidence Defendant was nervous during the murder @ 1147 WNW 4436/E Trial court specifically says that D was not merely victims. The Defendant was convicted of two counts of aiding and abetting in first degree murder; and one count of aiding and abetting of attempted first degree murder.																							
41	Win, Samari	CC	Ada	1DCap	Clear	SAPD affix	1D	No	No	2x 1st degree murder in the first degree Attempting aiding and abetting murder in the first degree	1D	very	991 multiple murders	other diagnosed	#4345+ p1340; 1337					multi/black	male	multi (male)																	
																This is a drive-by shooting case in which Affaro was the driver. "In the summer of 2004, Caldwell experienced a spate of drive by shootings between rival gangs. One shooting occurred at approximately 3:30 a.m. on August 24, 2004, where actor "Harvey Rodriguez," San Carlos, Isaac Aranao and Carlos Chavez, all associated with the "Westside Latino" (Westside) gang, were at Rod-quest's house. A vehicle drove by, and two of its passengers began shouting at the resulting in Chavez being killed. It was the third shooting investigated by Calcedo police that night alone." State v. Affaro, No. 38500, 2013 WL 5366341, *1 (Idaho Ct. App. Sept. 25, 2013)(Multiple people in the house –v risk to many people) Specifically, the court noted the protection of society was an overarching concern requiring a larger sentence because a "message" needed to be sent to individuals in the community that such actions could not be tolerated, and it was a "warning" Court that deemed significant rebuttal." State v. Affaro, No. 38500, 2013 WL 5366341, at **7 (Idaho Ct. App. Sept. 25, 2013) Gang-involved drive by, suggests possible motive.																							
																Sufficient intent to kill through aiding and abetting due diligence. Trial court Memorandum Decision and Order Upon Defendant's Motion to Dismiss: "Regarding premeditation ... Specifically, that the defendant was placed in the car with Armando Macias, Richard Adams, and Evan Musuya by three witnesses-- more evidence that the defendant turned off the headlights and slowed down as the car passed by the home of Javier Rodriguez; and that Armando Macias and Richard Adams shot at the home knowing that there were at least two people inside. In light of the above-laid evidence presented to the jury, the Court finds that there was substantial evidence upon which the jury could have found the essential elements of the crime beyond a reasonable doubt." 139 Idaho Off. Rec. (2018)																							
42	Affaro, Michael	AC	Canyon	1DCap	Clear	OC/court,	1D	No	no	1D murder (aiding and abetting); 2x aid abet aggravated assault; 2x unlawful discharge of firearm at a dwelling	1D	very	Yes (convicted, premeditated)	less than death	991 (more than one murder)	other diagnosed (propensity)					multi	male	Multi (2 female, 1 male)																
43	Lee, John (a/k/a name ID)	AC	Latah	1DCap	Grey	SAPD affix	1D	No	No	3 counts 1D murder	1D	very	yes (convicted)	WOP	991 (more than 1 murder)	shooting spree; 3 murders. No death notice in exchange for guilty plea. See Idaho Court of Appeals Opinion. State v. Lee, 165 Idaho 254, 256 (Ct. App. 2018), petn for review denied (July 5, 2019)					multi	white	male																
																1x witness and victim (2) shot said the heard 3 shots in gringings with very short breaks between them but he had been shot and had gone from the bedroom to the hallway. Under O's broad premeditation standard, 1 shot would qualify as premeditation. There were many people present when they were fired, including a small child in the next bedroom. Preliminary hearing transcript suggests that victim two was inadvertently shot in the abdomen. Psychologist over ordered (PSO) Aggravated battery & use of deadly weapon charges dismissed by prosecutor as a result of the plea deal (Court summary & judgment) (Complaint case that Defendant did "kill and murder A.1."... by pointing a firearm at A.1. and shooting him multiple times in the abdomen or other part of the body from which he died." Court was for causing bodily harm against second victim T.H. by means of a deadly weapon... a firearm by pointing a firearm at T.H. or another and shooting her causing injury to abdomen." Preliminary hearing transcript of victim Th described a tension between victim 1 and Defendant. They were roommates in a trailer home but Defendant had sent a text that had upset victim 1. Victim came home and went in to Defendant's bedroom, where he was talking to a friend and where there were guns on the shelf. An argument began about a girl who Defendant liked and that victim had made remarks about. Victim 2 followed and got shot. 8 successive shots were fired after victim 2 was shot. (p. 20-25. Victim 1 & 2 both died. The father & his son (victim 1) were shot and Defendant to defendant, having denied his mother while she was alive). (p. 29-30). Source: (PSO, Judge of Conviction & Commencement Complaint, Preliminary Hearing Transcript, Plea Agreement																							
44	Sandow, Carlos Alberto	AC	Ada	1DCap	maylie clear/very	Ada County Clinic	1D	No	no	2D 1D murder	1D	very	yes (convicted)	less than death	possible 961 (great risk of death to many persons)	after diagnosed, propensity, possible HAC (multiple shots)	Humpo police received a tip that someone had been shot in the head. Victim's girlfriend in the car during shooting informed officer's that they were on the way to purchase drugs after their car was intercepted. They were approached by a man who demanded money from them, they begged to be let go, but he shot him right in the head. Video surveillance corroborated girlfriend's story. Phone left in the road where the suspect had been. Police reviewed text phone to Ada. Ada also cannot be the described by girlfriend. Call contained picture of the victim Defendant. A suspected gang member with a history of evading court hearings (Defendant paid guilty to having killed Ricardo Keith in the perpetration of it in the attempt to perpetrate a robbery (351 Plea Agreement 2-3).																						
																Arms alleged at start: 1D murder by robbery (C 18-4002) held without bail. Plea agreement entered into. Defendant agreed to plead guilty to Murder 1st Degree. Amador Latah/Latah Plea of guilty to 1D murder; all other charges under CRO26-7062-1 (Court Minute, Oct. 7, 2018 2-3)																							
45	Alisa, Neila (in court ID)	CC (JC in court ID)	Canyon	1DCap	Clear	Canyon County Clinic	1D	No	No	1D Murder	1D	very	Yes (18-4001; 18-60010)	less than death (5 years indeterminate life imprisonment)	961 murder in the perpetration of robbery	None					Hispanic	Hispanic	male	male		31st June 2016 (complaint 2-3)													

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X															
																	Original charges in complaint: 11 murder + 1 enhancement; agg battery; grand theft; attempted murder; battery w/ intent to commit serious injury; conspiracy to control drug trafficking; robbery. (see PH hearing 14) From Previctim of agg battery (M. Castro) testified. During drug transaction with D in back seat, he shoots and kills Lapidillo and seriously injures her. Meth. From Detective Heward: the meth was found at the scene. The bullet wound was consistent with someone shooting it from backseat. The grand theft charge is about taking the car after the murder. (134 of PH) Attempted murder: "We would submit that there's two possibilities for this charge. One is that the defendant pulled the trigger, killed the deceased, then attempted to shoot the victim in the car, Ms. Castro. The gun had misfired because of the problem with the gun and having it held up to the headrest and misfired. When he couldn't shoot her, 10 ft bar with the gun, he lost her severely, drug her out of the car, left her out in the middle of nowhere to die. Under other scenarios, we believe the elements of attempted 10 murder have been met." (134) "The next charge is that of battery with intent to commit a serious felony. We would submit that there was battery with intent to commit murder and robbery" (134-135). "The first charge is that of robbery. . . . The value of the deceased was found in the pickup with blood on it, the pickup of the defendant. . . . SO that while it was taken - had to have been taken from the person of the deceased and it is the defendant's pickup by the fact of it. . . . Along with . . . under the robbery count, we also charged the taking of the Chevy Malibu and would submit that that would be under the robbery statute also." (135-136) Defenses argues no intent to take the vehicle. . . . by means of fear or any use of force" as decided already and that Ms. Castro and unconvicted. Reminds court that 18.75 grams of meth left typy on the ground. (137-138). Judge finds PC for all charges. Regarding robbery "The statute . . . does reflect that either force or force, and, therefore, the circumstantial evidence, as testified to, does show that deprivation of property by way of both the wallet and the vehicle accomplished by way of force adequate to fulfill the elements of robbery for purposes of a postnuptial hearing." (131) Arvelino was charged with the first degree murder of his wife, an enhanced penalty for use of a deadly weapon, aggravated assault, and attempted murder. The charges arose out of an incident in southern Idaho in which Arvelino shot and killed his wife, the deadly bullet then struck another person, and Arvelino allegedly threatened a kill and attempted to shoot a person of the bar who tried to intervene. In part, the evidence relied upon by the State for the first degree murder charge was the early admission by Arvelino to police that he had intended to kill his wife when he went to the bar that night. The State also relied on the message sent a few hours earlier by Arvelino to a friend which says, "You similar esa prieta." Arvelino paid "4259" 454 guilty for first degree murder and the enhanced penalty for use of a deadly weapon, entering an Afford plea regarding the elements of male aforesaid; Judge finds 1-18-002, and premeditation, P.C. 18-4003(a). Arvelino's State, 154 Idaho 463, 453-54, 431 P.3d 838, 438-39 (2d Cir. App. 2023), reviewed denied (Jan. 2023)																						
46	Siguelis, Gerry	AC	Castro	10DCap	clear	ADA book copy	10	no	no	10	murder (premeditated) + 1st degree battery	10	pink	yes (convicted, sentenced)	less than death	993 (robbery)	other dangerous		Hipanic	Hipanic	male	female																	
47	Arvelino, Juan Manuel	AC	Castro	10DCap	clear	SAPD hard copy	10	no	no	10	murder plus other offense	10	pink	Yes (18-4003(a) premeditated)	less than death	993 (great risk of death to many persons)	prejudicial (prior DV)		Hipanic	Hipanic	Male	Female																	
48	Morales, Juanangel	AC	Koonelan	10DCap	clear	DCU/court	10	yes	no	10	2nd murder	10	pink	yes (convicted)	WOP	993 (more than 1 murder)			Hipanic	multi Hipanic	male	Multi (2 female)																	
49	Castillo, Jesus Adrian	AC	Bligham	10DCap	hazy	SAPD file	10	no	no	10	Battery on child under 12	10	pink	yes (convicted)	less than death	HAC/Other charged/prejudicial			Hipanic	Native American	male	child																	
50	Calveras, Phyllis E	CC (AC reviewed)	Canyon	10DCap	clear	Canyon County Kiosk	10	Yes	No	10	Murder 1st Aggravated Assault upon a Law Enforcement Officer (18-4012), 18-4013(a), 18-4014(a), 18-4015(a)	10	pink	yes (convicted, 18-4003(a), 18-4001, 18-4001(a))	less than death	993 (Defendant knowingly created a great risk of death to many persons.) (4) HAC; (5) Other; and (6) The murder was committed in the perpetration of robbery/ burglary (Penalty of intent to seek the Death Penalty p.1-2)	unfair		Hipanic	White	Male	male																	
51	Arroyo, Adan Adonis	AC	Bonerville	10DCap	hazy	DCU/court, SAPD hard copy	10	yes	No	10	murder (premeditated) and	10	pink	yes (convicted premeditated murder)	less than death	after dangerous, possible propensity			Hipanic	White	male	female		1/25/2023															
52	Carmona, Cesar (AC reviewed)	Canyon	10DCap	clear		Canyon County Kiosk	10	No	No	10	10-Murder (felony murder) & kidnapping (18-4012), 18-4003(a)	10	pink	yes (convicted 18-4003(a), 18-201)	less than death	993 murder committed in perpetration of a kidnapping	Other dangerous?		Hipanic	White	male	male																	
53	Jaramillo, Guadalupe J	AC	Canyon	10DCap	clear	SAPD hard copy	10	yes	no	10	murder (premeditated) + 1st degree battery	10	pink	yes (convicted premeditated murder)	less than death	993 The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding.	other dangerous, propensity		Hipanic	male	male																		
54	León, Abel	AC	Canyon	10DCap	clear	SAPD hard copy	10	yes	no	10	murder	10	pink	Yes (premeditated and/or kidnapping)	WOP	993 murder committed in perpetration of a kidnapping, 993	HAC, other dangerous, propensity		Hipanic	Male	Female			5/23/2020															

[illegible]

A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X											
																This is a federal capital case arising from the events occurring in the spring of 2003 when the Pellotinos, Joseph Edward Duncan II, traveled from North Dakota to Idaho on an unorchestrated crime seeking for children to molest, abuse, and kill. On May 16, 2005, Duncan lawfully chose his victims whom he broke into their home near Coeur d'Alene, Idaho and savagely killed three individuals living at the home and kidnapped two of the minor children - S.G. and D.G., who were eight and nine years old at the time. Duncan took the children to a secluded campsite in the Lake National Forest in Montana that had been chosen for his privacy where, for the next several weeks, he inhumanly tortured, raped, and sexually assaulted both children. Duncan eventually killed D.G. at the campsite. On June 22, 2005, Duncan returned to Coeur d'Alene, Idaho with S.G. and he was apprehended when an employee of the restaurant where he and S.G. were eating identified the law and called law enforcement.																		
47	Duncan, Joseph Edward II	AC	Notional	10cap	clear	DOJ/federal	1D	yes	No	Is 1D murder; 1x kidnapping	1D	no	yes (convicted)	yes less than death - but then referred to as federal count	98B (more than 1 murder)	HAC, utter disregard, propensity	Duncan v. United States, No. 2-07-CR-00023-E.L., 2019 WL 1320099, at *3 (D. Idaho Mar. 22, 2019)	White	Multi White	male	Multi (Female, 2 male)		5/16/2005											
48	Daniels, Adam Michael	AC	Ada	10cap	clear	Court	1D	no	no	Is 1D murder; robbery	1D	no	yes (convicted)	MRCP	98B (more than 1 murder)		To 1D murder conviction from Charge	White	Multi White	male	Multi (2 male, one female)													
49	Carlin, Richard	NS	New Pence	10cap	clear	SAPD effia	1D	no	No	2 counts of 1D murder, 1 attempted murder	1D	no	Yes (convicted)	yes less than death	98B (more than 1 murder)		That defendant pled guilty to the charge of COUNT 1: MURDER THE FIRST DEGREE / a felony which carries a maximum of: LIFE IMPRISONMENT OR DEATH. COUNT 2: MURDER IN THE FIRST DEGREE / a felony carries a maximum penalty of LIFE IMPRISONMENT OR DEATH; and COUNT 3: ATTEMPTED MURDER IN THE FIRST DEGREE / a felony which carries a maximum penalty of LIFE IMPRISONMENT OR DEATH. Rule 11 Plea Agreement, CR-2017-7591. Rule 11 plea agreement stipulated that John Doe # 2 had been followed and struck throughout the home (affidavit of PCI This is more than necessary to kill a human being. Use of an axe as a particularly brutal way to die.	White	Multi White	Male	Multi (2 female)													
50	High, Brent	CC IAC (renewed)	Canyon	10cap	clear	Canyon Kiosk	1D	No	No	2x murder 1st 18-4001(a); 1st 4001(b)(4); 1st 4001(c)(4)	1D	no	Yes, Defendant stabbed victims while in pursuit of killing them.	yes then death: 2D yes AND 99 yes	98B (2 murders)	HAC	Defendant was seen naked in the street after the attack. Inside the house there was a bloody scene with blood splatters in multiple rooms on the floors, walls and ceilings. There were bloody footprints down the hallway. An axe was found in the toilet. The axe had blood and hair on it. Defendant told detectives that he was carrying out God's work (Affidavit of PCI Both victims had been repeatedly struck in the head with a heavy, sharp object.) Complainant (Defendant) was committed for a pretrial bond and treatment Order for Continued Detention (Defendant entered a plea deal where he pled to 2 counts of murder 1D for 2D yes Conditional Plea of Guilty & 911 Agreement.)	Originaline.com states that the victims were Defendant's step brother and friend. https://www.originaline.com/breakingnews/2019/06/Idaho_victim_guiltily_pled_to_2nd_order_Defendant_had_been_tying_with_the_victims prior to their deaths. https://www.idahopress.com/news/after-sentence-sparks-anger/article_idaf2c0ab-af11-54d8-B0d1-2cc1cf0f05?view=fullpage	White	Multi White	male	Multi (male x2)	24th Jan 2007											
51	Colman Jacobs McGrath, William	KS	Bonner	10cap	Putny	SAPD effia	1D	yes	No	1D murder (unremanded ad)	1D	no	Yes (permanently convicted)	yes then death	HAC/Swingout/propagand	Source: Indigent & commitment; Affidavit of PC, CR-2007-2463. "This what he told me, that he attacked him like a lion animal [...] near as the autopsy could guess, it was 26 or 27 pound words." "But in this case, I mean, because I can't see any reason I could see this happening again if you were released."	White	Native American	Male	Male														
52	Doran AC	Twin Falls	10cap	clear	Ada kiosk	1D	no	no	no	1D murder	1D	no	yes (convicted)	yes then death	99g (robbery)	Plead guilty to 1D murder in exchange for state withdrawing notice to seek death penalty. Psychologist examining defendant found present depressive disorder and schizoid personality disorder.	Plead guilty to 1D murder based on premeditation and/or while attempting to perpetrate a robbery. (Plea change hearing p. 4). See also amended complaint. No notice of intent to seek death per plea	White	Unknown	male	male													
53	Shaw, Brandon James	CC IAC (renewed)	Canyon	10cap	clear	Canyon County Kiosk	1D	yes	No	1D murder party nightstand aggr	1D	no	yes (convicted 18-4001; 18-4002; 18-4003)	yes then death	98g (murder committed in perpetration of burglary (offered in plea deal 2 p plus hearing transcript))	Burglary count was dismissed as a result of the plea deal. [98] met/ Defendant entered his girlfriend's house (suggested he might live there too but had moved not during that week as they had not been getting on) and began threatening her; operator on 911 call heard her yelling about a gun. Victim found in the street with multiple stab wounds. Defendant told his mother he had stabbed his girlfriend. Defendant apparently informed detective that he had returned to collect his belongings and left his girlfriend. His girlfriend was not home when he first showed up so he collected his things and returned later. Defendant gained access to the house through using a credit card. He had a rifle. The rifle did not discharge so while Defendant tried to get the gun to work, his girlfriend ran out of the house. Defendant grabbed 3 knives from his mother and used them on Detective. Defendant informed detective "The wife has to something harmful to her and he was going to do her". Case strongly suggests premeditation although this account is from detective. [if Defendant felt he was going to harm his girlfriend, presumably aggravator could be found.] "[Defendant] ... did with knife, knife, knife, dagger, with premeditation and malice aforethought, and I think Chelsey Williams ... with a hole in her neck, causing injuries from which she died." Defendant's plea (Plea Hearing Transcript p. 59) & 56 Defendant admits to stabbing Chelsey multiple times with 3 knives. D agrees he was the aggressor. D admits he wanted to shoot Chelsey in the face and then turn the gun on himself, but the rifle jammed so he picked up the knives on the counter.	The Notice of intent to seek DP says aggravators were 98g HAC & (T) other Swagout.	White	White	male	female	"in or about 1880 day of Nov 2015" is 1876 Plea Hearing Transcript												
54	Ohman, Erik	AC	Teton	10cap	clear	SAPD effia	1D	yes	No	1D murder conspiracy (to commit) 1D murder	1D	no	yes (convicted premeditated)	yes then death	98B (more than 1 murder)	Notice of intent to seek DP, HAC, utter disregard, propensity. Supposedly Indigent; Murder 1 Firearm enhancement, Failure to report death, conspiracy to commit Murder 1. See MONTANA NEED FOR OVERT ACTS. Rule 11 plea agreement.	This case was related to death case. [See Ohman v. CHENON, 2020 WL 4929592, at *2] A woman and victim fetus were both killed; prosecution argued that this was two murders. Death of fetus resulted to manslaughter in plea agreement.	White	White	Male	Female	STATE OF IDAHO v. ERIK M. OHNSEN, 2020 WL 4929597												
55	Henderson Nicholas B	AC	Cheyenne	10cap	Putny	Ada kiosk	1D	yes	No	1D murder conspiracy (to commit) 1D murder	1D	no	yes (convicted premeditated)	yes then death		Michael James Lee pled guilty to murder in the first degree, Idaho Code §§ 18-4001, 18-4002, 18-4003(a), kidnapping in the second degree, Idaho Code §§ 18-4001, 18-4002, 18-4003, and battery with the intent to commit a serious felony, Idaho Code §§ 18-901, 18-911. State vs. Lee, No. 19045, 2013 WL 4957052, at *1 (Idaho Ct. App. Sept. 18, 2013). These were different victims but all happened the same day. Does this count for [98] "In the perpetration of?" (Note initial complaint alleges in the course of robbery of homicide victim Havel). [9.8] My reading of the case law on felony 1D murder is that "in the perpetration of" means the "death was part of a stream of events," see State v. Pratt, 125 Idaho 146, 158, 875 P.2d 800, 812 (1993) - and here clearly qualifies.	In any event, HAC is clear: From guilty plea: convicted of kidnapping his wife (binding her in trunk of car); 1D-murder of mother (premeditated stabbing, stabbed her multiple times); and battery with intent to commit mayhem on mother's partner (grabbing her eyes). (Charge of plea hearing, p. 20-24). Seems HAC.	White	White	male	male													
56	Jae, Michael James	AC	Ada	10cap	clear	SAPD effia	1D	No	No	1D murder with enhancements re Robbery, battery (intent to commit serious felony	1D	no	yes (convicted)	yes then death	98g (murder committed in perpetration of kidnapping (see explanation))	Sentencing prosecutor: Stupidest murder and stabbed her 22 times. Took a long time to die. (Sentencing 199) He raped his wife and tied her up in chains and threatened that if she didn't keep quiet, he would kill everyone but their daughter. (200-200). Mom stabbed 22 times and was also stomped on her face. She lived through all that 20 minutes. [211] Stabbed "about her abdomen, her breast, her sides, her throat. She was stabbed on all sides... This stab wound here is through and through, all the way through. The front to the back of my arm, with this blade that you can see, that line, she was split when she was hit with the knife that you can see. And again, I cannot describe how horrific and how shocking and how fearful your mother must have felt when she died, in the course of all this, you did, of course, threaten her. Close to kill her with the knife that you did and the knife that you were using to brutally murder your mother. You attacked Ms. Cindy, you battered her; and you attempted to gouge out her eyes." (236-17)	Source: ID: CT of appeal complaint.	White	White	Male	Female													
57	Marshall, Jackson Jay	AC	Twin Falls	10cap	clear	Ada kiosk	1D	no	no	1D murder with enhancements re Robbery, battery (intent to commit serious felony	1D	no	yes (convicted felony murder, premeditated)	yes then death	99g (robbery)	Indictment: "on or about the 25th day of July, 2015, ... Did wilfully, unlawfully, deliberately, with premeditation, and with malice aforethought, and/or in the perpetration of a robbery, kill and murder Kant Storer, a human being, by shooting Kant Storer with a gun from which he died" WITH DP FINDINGS: "Further, I am committing the above crime of Murder in the First Degree, the D. ... Intentionally created a great risk of death to many persons, and/or 1. That the murder committed by [98] was especially [HAC], and/or 3. utter disregard, and/or 4. in the perpetration of robbery, and 5. propensity. COUNT 3: conspiracy to commit 1D murder (with Barry Burton Kemball, Court 1st robbery, Court 4th Conspiracy to commit robbery.	Indictment specifies this charge. Pursuant to plea does not file this notice to intent to seek death	White	White	male	male													
58	Clawson, Clark Jackson	KS IAC (rev)	Twin Falls	10cap	clear	Twin Falls County Courthouse	1D	no	no	1D murder + kidnapping	1D	no	yes (convicted)	He imprisoned, he fast	98g (kidnapping), 98g/murder (risk of death to many)	From Opinion and Order Denying Defendant's Motion to Withdraw Plea of Guilty: Sufficient evidence in the record of knowledge or recklessness w/lt causing death. "[T]here is sufficient evidence in the record that Baker ... Inmate Coates would be killed. She was specifically told on the record that the indictment charged her with either participating in the killing 'or that you acted as an aider and abettor by assisting and/or encouraging the shooting of Mr. Coates.' "[29]. Court at plea hearing said "This state certainly has presented evidence that would support a factual finding of guilty beyond a reasonable doubt for both the first degree murder charge and the conspiracy charge." (29)	White	White	male	male														
59	Baker, Michael	AC / CC	Twin Falls	10cap	Putny	SAPD effia, Canyon County kiosk	1D	no	no	1D murder (aiding & abetting) + conspiracy	1D	no	yes (premeditation)	yes less than death		Question of law: does this count as murder of witness/official or murder of witness in course of kidnapping? See question in law Heredia	utter disregard	White	White	female	male													
60	Sligh, Kelly	CC IAC (renewed)	Canyon	10cap	Putny	Canyon Kiosk	1D	No	No	murder 1D 18-4001; 18-4002; 18-4003(a)	1D	no	yes (convicted)	Long period of time between victim and defendant, and the murder. Defendant showed he reached into closet to get tools.	yes then death: 3D yes then death: 3D	HAC	Official of PC, judgement, plea deal, Information, CR-2002-5720	White	White	female	female	28 Feb 2002												

A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X
																John and two co-conspirators robbed a number of convenience stores and a bank. John and another co-conspirator killed the third co-conspirator because they were concerned he would not keep the robbery a secret. John pled guilty to burglary in first degree murder. John filed an untimely appeal which was dismissed and a remittitur was issued on March 6, 2008. John v. State, No. 37329, 2011 WL 11037832, at *1 (Idaho Ct. App. May 24, 2011) Also see Charge of plea hearing, judgement of conviction - CR-2007-000515 Victim was left "at a remote location in the middle of the night in winter conditions" after being shot. (Charge of plea hearing, judgement of conviction)							
John, James Ray, Beynon, Neumann	AC/WIS	Twin Falls	1DCap	murder clear; authority heavy	IDC/Court, Twin Falls Courtthouse	1D	no	no	no	robbery	1D	yes	(not convicted, premeditated)	yes then death	see Nevada lawsuit for possible (S) or (M)	NAC, letter disregard	pled guilty to 1D murder and 1 count of robbery in exchange for state dropping weapons enhancement and conspiracy to commit murder and two counts of robbery	White		male	male		
Leaven	AC	Bonanza	1DCap	clear	SAPD hard copy	1D	no	No	No	1D murder	1D	yes	(not convicted, felony murder)	yes then death	pled guilty to amended charge of murder in first degree "pursuant to the Felony Murder Statute." (T: 25, sentencing hearing). See also p. 652 of Clerk's Record, Second Amended Prosecuting Attorney's Information. Count I is killing victim by shooting with gun in the perpetration of an attempt to perpetrate a burglary.		White		female	male	State v. McElhinney, No. 36356, 2011 WL 11037812, at *1 (Idaho Ct. App. June 17, 2011)		
McElhinney John Henry	AC	Twin Falls	1DCap	clear	SAPD affix	1D	no	no	no	1D murder	1D	yes	(not convicted, felony murder)	yes then death	Neg/ Felony murder during kidnapping Sentencing hearing transcript: Directly caused death through giving victim and leaving him in trunk of a car for hours, where victim died of suffocation [a: 17]. "David Earl Hutto entered an Alford's plea in first degree murder. ... and robbery. ... Hutto and an associate devised a plan to commit kidnapping and home invasion robberies. While on the way to commit a home invasion robbery, Hutto and his confederate followed the victim to his home where Hutto confronted the victim and forced him into his own vehicle by pointing a gun at him. Hutto drove the victim's vehicle followed by his confederate to a construction site. The victim's hands were bound behind his back, and Hutto and his confederate stole the victim's wallet and cell phone. The victim was driven to a remote location, where he was shot eight times and his body thrown down an embankment. Hutto and the confederate then drove to general debris and removed money from the victim's automobile. They also obtained a gun, ransacked the victim's vehicle, and cut it off fire. Hutto was absconding from probation from two different cases when he committed those offenses." State v. Hutto, No. 45127, 2018 WL 4440727, at *3 (Idaho Ct. App. Aug. 30, 2018)	White		male	male				
Hutts, David Rati	AC	Northeast	1DCap	clear	SAPD affix Court, Ada	1D	no	no	no	robbery, kidnapping 1D murder,	1D	yes	(not convicted, premeditated and felony)	yes then death	2x 1DCOP Tig/ (robbery and kidnapping)	Convicted rape + murder indictment charged premeditated murder of Kay Johnson, or in the alternative during the perpetration of a felony, "the rape of Kay Johnson, by robbing her with a knife causing her death," no notice to seek death per Rule 11.1 plea agreement REMAND FOR THE STATE OF CT.: Murder in the 1st degree, C.T. 54-2a; Enhanced Penalties, C.T. 54-2b; Rape, C.T. 54-2c; Evenually pled to 1D and prosecutor dropped other charges.	White		male	male	10/22/2016		
Patrick van Alonso, Tony David	AC	Ada	1DCap	clear	Yes	1D	no	no	no	rape 1D murder,	1D	yes	(not convicted)	WDOP Tig/ (rape)	Convicted rape + murder indictment charged premeditated murder of Kay Johnson, or in the alternative during the perpetration of a felony, "the rape of Kay Johnson, by robbing her with a knife causing her death," no notice to seek death per Rule 11.1 plea agreement REMAND FOR THE STATE OF CT.: Murder in the 1st degree, C.T. 54-2a; Enhanced Penalties, C.T. 54-2b; Rape, C.T. 54-2c; Evenually pled to 1D and prosecutor dropped other charges.	White		male	female				
		Cassia	1DCap	clear	Court	1D	no	no	no	1D murder	1D	yes	(not convicted)	yes then death	Tig/ (kidnapping, rape)	See Court of Appeals Decision Watts was charged by indictment with felony murder in Twin Falls County. Watts was accused of participating with John McElhinney in the kidnapping of Dale Miller. The State alleged that Miller died in the course of that kidnapping. Watts pled not guilty to the charge. ... Both agreements provided that Watts would enter a guilty plea to first degree felony murder and that the parties would stipulate to a unified term of life, with twenty years determinate. Watts v. State, No. 37748, 2011 WL 1048323, at *1 (Idaho Ct. App. Nov. 22, 2011)	White		male	female			
Watts, Kameron D	AC + ES	Twin Falls	1DCap	clear	IDC/Court, Twin Falls County Courthouse	1D	no	no	no	1D murder	1D	yes	(not convicted, felony murder)	yes then death	Tig/ (kidnaping)	Change of plea hearing: "This document alleges that on or about the 7th of September in Twin Falls County, you held or assisted Dale -- assisted John McElhinney in beating Dale Miller against his will. It is a correct statement? D: Yes. C: Is it a correct statement that Dale Miller owed John McElhinney money? D: yes. C: And that John McElhinney was trying to get Dale to pay him the money? D: yes. C: Is it a correct statement that you and John McElhinney tied Dale up and put him in the trunk of Dale's car? D: yes. C: And did you thereafter go to Dale's apartment and take his property? D: yes. C: The next morning then did you return to Twin Falls and see Dale Miller in the trunk of the car? D: Yes, I did. Did he appear to be not breathing at that time? D: Yes. C: Did you thereafter drive John McElhinney to OHS and purchase a 15 gallon drum? D: Yes. C: And you got there with John McElhinney and Mr. Miller's body in the drum in the vicinity of 871 S. 1st?	White		male	male			
Kamran, Jon Allen Beckman, Bradley Marion	AC	Shoshone	1DCap	clear	IDC/Court, Kootenai records	1D	no	no	no	2x 1D murder	1D	yes	(not convicted, premeditated)	yes then death	Yes (The defendant was previously convicted of another murder.) See (The defendant was previously convicted of another murder.) State v. Kamran, No. 38707, 2010 WL 5367638, at *1 (Idaho Ct. App. Nov. 25, 2010) Note this is a co-b of head	White		male	Multi (male and female)				
		Northeast	1DCap	clear		1D	no	no	no	1D murder	1D	yes	(not convicted)	yes then death		2 count second instance Washington sentence, and 6 sentences to serve concurrently. That prior conviction/sentence was for murder. (From Washington Delivers found case no. 05-1-00013-1. From https://www.cltax.gov/publications/testing/subchapter/c/tax/subchapter/c/tax/cv2001.pdf, produced by the prosecuting commission, Vol. 61-2-00023-3 as PLEA MURDER 2. POST 7/24/09) Change of Plea Hearing: D admits, willingly with premeditation, on or over 7/24/09, in a remote location in early morning, in winter, and she died. (T: 14) Prosecutor: "Essentially the idea of what she did was she went out there in the middle of the winter. She died of exposure, not injured." (T: 15) Sentencing hearing, forensic pathologist: "The two injuries that were fatal. ... [She] was in a field in a fairly remote location. There was no heating temperatures during that night... and with a blow to the head which probably knocked her unconscious, and then the extensive injuries to her chest which would have preceded her any movement, she is going to work out of it. Forensically blood had been taken for the hospital, she would have survived. But she died from the cold, the combination of the cold and the injuries." (T: 15) "She could have been alive for hours you said?" A: Yes." (T: 15) Sentencing judge: diagnosis of antisocial personality disorder and borderline personality disorder (148). "This placed the record in case establishes beyond any reasonable doubt that there is an undue risk that there is a shorter period of imprisonment Mr. Carr would potentially be inclined to commit additional criminal offenses."	White		male	female			
Carr, Jody Hendall Chew	AC	Twin Falls	1DCap	felony	SAPD hard copy	1D	no	no	no	1D murder	1D	yes	(re-14-003(a)) premeditated	yes then death	letter disregard, mitigate property	Bar bar cover 2x then left the scene, leaving her unattended in the snow, then returned to run her over again the day to put her out of her misery. 1-153 General Comments: "... on or about the 21st day of Jan., 2002... Did actually, unlawfully, deliberately, with malice aforethought, kill and murder Daniel Micah Kearns, a fellow inmate in the Ada County Jail, a human being, by putting on the end of a sheet which had been secured around the neck of Daniel Micah Kearns, strangling him, from which he died." Minutes: "admitted to taking victim into counseling suite and helped by pulling on the sheet and tying to stool. Unlabeled the sheet after jurors heard him found inmate Beane" (a: 4-6 minute entries). Waived proplem, held w/o bail no commitment. Information came. State attorney says "not intending at time to die death penalty" State's sentencing memorandum: "The Defendant was being held in the jail on a federal prison bond. He was also facing charges in the State of Oregon. In fact, the Defendant had been in a variety of prisons for a number of years. The Defendant talked to Mr. Kearns about what Mr. Kearns could expect in prison. He told Mr. Kearns what a child abuse/neglect officer could expect in prison. ... After several hours, the Defendant convinced Mr. Kearns that Kearns should let the Defendant kill him. According to the Defendant, he convinced Mr. Kearns to loop up and strangle him in the room so that the D could get the loop right and strangle Mr. Kearns. D made a signal from two pieces of sheets. He stated that what he wanted was that Kearns would take the end of the sheet that had the loop in it and pull it around his neck. Kearns would then wrap the other end around the base of the stool in kitchen aid. The D stated that Kearns wanted to so that the D could not put his arms to well after a few days was dead and unconcerned and he pulled the sheet over his head. The D stated that he made him reach over into a shelf to hold his face. C could hear C. C stated that he then sat with the other end and he assumed that C kept the loop around her neck. C stated that he pulled on the knot, he could feel resistance and struggling from B. C stated that he pulled on the end of the sheet until he felt a strong struggle. He then pulled the sheet over the base of his stool and tied the end of the sheet to the base of his stool. C stated that after he tied the sheet off to his stool, he put his leg on the sheet and pulled it even tighter. C stated that he then put a blanket on his side to block the view in case an officer looked in as they would not be able to see the sheet tied to his stool. C stated that after the officers discovered K, he untied the sheet and stepped out of his cell. C stated that he was almost ready to leave when he had started talking to K. C stated that K had only one night in the jail. The next day he started talking to a bookkeeping inmate and by that night it happened. C stated that K changed his mind shortly before he went into his cell on the night of his death. ... Subsequent to K's murder, the D filed his version of the facts in not only his sentencing memorandum but also in letters and to the Idaho State's reporter Derrick R. Her letter to Mr. Orr and the letter to K generated both contain this statement "You let us walk, I did it murder..by my hand another human being was destroyed." He continued "Mr. Kearns was faced with the imminent threat of sexual causing him pain and a potential death if he didn't allow me to kill him." He later stated "And for this I am proud." (UTTER DISREGARD) The Defendant is a career criminal who has a multiplicity of felony convictions. He is currently serving sentences on charges from Oregon and a federal sentence that will run for another 27 years approximately from the date of this sentencing memorandum." (PROBENITY) "On or about the 20th day of August, 2016... Did actually, unlawfully, deliberately, with premeditation, and with malice aforethought, kill and murder Anessa Weintraub, a human being, by strangling her from which she died." (Informational) Affidavit in support of complaint and warrant on arrest: "Charles Joseph Turne came to the Twin Falls Police Department on his own account and confessed to me that on August 20th he had the victim to the basement of 488 Fair Avenue and killed her. He said he decided to strangle her once they were in the basement. He described placing his hands around her throat and squeezing until she stopped resisting and stopped breathing. He said he wiped his face with a towel and left it in the basement, and then took a knife from his pocket and left it laying on the chair in the basement near her body. Mr. Turne also told me he left his gloves and his toilet knife on the floor of the basement." Kriminal offer: "That in exchange for the State's agreement to not pursue the death penalty in this matter," agrees to plead.							
Germkamp Earl Joseph	AC	Ada	1DCap	felony	Ada file	1D	no	no	no	1D murder premeditated	1D	yes	(not convicted, premeditated)	yes then death	letter disregard, property	letter disregard, property Bar bar cover 2x then left the scene, leaving her unattended in the snow, then returned to run her over again the day to put her out of her misery. 1-153 General Comments: "... on or about the 21st day of Jan., 2002... Did actually, unlawfully, deliberately, with malice aforethought, kill and murder Daniel Micah Kearns, a fellow inmate in the Ada County Jail, a human being, by putting on the end of a sheet which had been secured around the neck of Daniel Micah Kearns, strangling him, from which he died." Minutes: "admitted to taking victim into counseling suite and helped by pulling on the sheet and tying to stool. Unlabeled the sheet after jurors heard him found inmate Beane" (a: 4-6 minute entries). Waived proplem, held w/o bail no commitment. Information came. State attorney says "not intending at time to die death penalty" State's sentencing memorandum: "The Defendant was being held in the jail on a federal prison bond. He was also facing charges in the State of Oregon. In fact, the Defendant had been in a variety of prisons for a number of years. The Defendant talked to Mr. Kearns about what Mr. Kearns could expect in prison. He told Mr. Kearns what a child abuse/neglect officer could expect in prison. ... After several hours, the Defendant convinced Mr. Kearns that Kearns should let the Defendant kill him. According to the Defendant, he convinced Mr. Kearns to loop up and strangle him in the room so that the D could get the loop right and strangle Mr. Kearns. D made a signal from two pieces of sheets. He stated that what he wanted was that Kearns would take the end of the sheet that had the loop in it and pull it around his neck. Kearns would then wrap the other end around the base of the stool in kitchen aid. The D stated that Kearns wanted to so that the D could not put his arms to well after a few days was dead and unconcerned and he pulled the sheet over his head. The D stated that he made him reach over into a shelf to hold his face. C could hear C. C stated that he then sat with the other end and he assumed that C kept the loop around her neck. C stated that he pulled on the knot, he could feel resistance and struggling from B. C stated that he pulled on the end of the sheet until he felt a strong struggle. He then pulled the sheet over the base of his stool and tied the end of the sheet to the base of his stool. C stated that after he tied the sheet off to his stool, he put his leg on the sheet and pulled it even tighter. C stated that he then put a blanket on his side to block the view in case an officer looked in as they would not be able to see the sheet tied to his stool. C stated that after the officers discovered K, he untied the sheet and stepped out of his cell. C stated that he was almost ready to leave when he had started talking to K. C stated that K had only one night in the jail. The next day he started talking to a bookkeeping inmate and by that night it happened. C stated that K changed his mind shortly before he went into his cell on the night of his death. ... Subsequent to K's murder, the D filed his version of the facts in not only his sentencing memorandum but also in letters and to the Idaho State's reporter Derrick R. Her letter to Mr. Orr and the letter to K generated both contain this statement "You let us walk, I did it murder..by my hand another human being was destroyed." He continued "Mr. Kearns was faced with the imminent threat of sexual causing him pain and a potential death if he didn't allow me to kill him." He later stated "And for this I am proud." (UTTER DISREGARD) The Defendant is a career criminal who has a multiplicity of felony convictions. He is currently serving sentences on charges from Oregon and a federal sentence that will run for another 27 years approximately from the date of this sentencing memorandum." (PROBENITY) "On or about the 20th day of August, 2016... Did actually, unlawfully, deliberately, with premeditation, and with malice aforethought, kill and murder Anessa Weintraub, a human being, by strangling her from which she died." (Informational) Affidavit in support of complaint and warrant on arrest: "Charles Joseph Turne came to the Twin Falls Police Department on his own account and confessed to me that on August 20th he had the victim to the basement of 488 Fair Avenue and killed her. He said he decided to strangle her once they were in the basement. He described placing his hands around her throat and squeezing until she stopped resisting and stopped breathing. He said he wiped his face with a towel and left it in the basement, and then took a knife from his pocket and left it laying on the chair in the basement near her body. Mr. Turne also told me he left his gloves and his toilet knife on the floor of the basement." Kriminal offer: "That in exchange for the State's agreement to not pursue the death penalty in this matter," agrees to plead.	White		male	male	22-Jun-01		
Turine, Glenn Joseph	AC	Twin Falls	1DCap	felony	Ada book	1D	no	no	no	1D murder	1D	yes	(not convicted, premeditated)	yes then death	NAC, letter disregard	pled guilty to 1D murder and 1 count of robbery in exchange for state dropping weapons enhancement and conspiracy to commit murder and two counts of robbery	White		male	female			
Savage, Bryant	AC	Custer	1DCap	felony	media/ court	1D	no	no	no	1D murder premeditated	1D	yes	(not convicted)	yes then death	letter disregard	pled guilty to 1D murder and 1 count of robbery in exchange for state dropping weapons enhancement and conspiracy to commit murder and two counts of robbery	White		male	female			
																pled guilty to 1D murder and 1 count of robbery in exchange for state dropping weapons enhancement and conspiracy to commit murder and two counts of robbery	White		male	female			
Turmer, Crystal Loren	AC	Twin Falls	1DCap	clear	SAPD affix	1D	no	no	no	1D murder premeditated	1D	yes	(not convicted)	yes then death	Tig/ (robbery)	Media report of PC suggests she was actively participating in securing a gun for the robbery. "Turmer sent two acquaintances text messages asking about "throw away" gun in the day leading up to the shooting." (http://magicalcity.com/news/local/crime-and-court-two-acquaintances-in-motel-murder-should-go-to-jail-2017-08-22/2017-08							

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X
	Tuttle, Wesley Allen	AC	Ada	10Cap	4star	Ada file	10	no	no	20 murder (premeditated)	10	no	yes (convicted premeditated)	no death	9(a) (The defendant was previously convicted of another murder)	information "on or about the 20th day of November 1982... One witness, unknown, allegedly, with premeditation, and with malice aforethought, kill and murder, Lisa Chambers, a human being, by choking her with his hands from which she died." Pleads guilty. Sentenced to life in life, which "shall run concurrent with the sentence imposed on State of Utah, Summit County Case No. 1900." (Judgment & Commitment) (Utah 2nd degree murder conviction: "On remand the trial court sentenced Tuttle to five years to life for second degree murder." Tuttle v. State of Utah, 577 P.3d 879, 1209 Cr. 0993, as modified June 23, 2005 (affirming denial of habeas relief) Judge at sentencing: "And the jury did not find that the defendant was acting in self-defense. I suspect from the evidence the jury says that you had plenty of time to be able to retreat, to leave. And the Court cannot disregard your actions after you shot Mr. Haggath--Wohol... A person who has acted in self-defense in a tragedy does not let a person bleed to death and not make any attempt to call for help. Does not... treat Mr. Haggath--Wohol's body with such disregard, lead it into a truck and drag it out in the woods and dump it. And like the statement was, kind of like a deer carcass, and that's what it looks like. Those are not actions of a person who's acting in self-defense. And I think that's what the jury saw in this case. And so, I don't know what you're doing during this period of using methamphetamine."								
	McChernick, Michael Ryan	AC	Bonner	10Cap	4star	DAPO file	10	no	no	20 murder	20	no	yes (premeditation)	less than death		after disregard	p. 683, prosecutor's closing argument: "And what is that consistent with? That's consistent with his anger. He takes a couple of steps forward after he slams the door on Alicia, turns around, pulls the gun out of his pocket--or maybe he did have it in his holster, hard to tell -- he gives two shots on it. And he's aiming, he turned around and he's aiming, waiting for Robert to come out of that trailer."	White	Black	male	male			
	Gallatin, Jason Andrew	AC	Idaho	10Cap	4star	DCU/Court	20	no	no	20 murder	20	no	yes (premeditated)	less than death	9(a) (holberry)	after disregard; possible propensity	State brief on appeal: "On the evening of June 4, 2014, Goshen, in company with Enrie Ruiz, Beau Lutz, and a lady friend named Carla, drove up to Kyle Anderson's trailer with the intention of robbing him of illegal drugs and/or stolen goods. (See Int. Tr. 1: 29-31; 2: 20-22, 25-28, 32-33; 3: 1-27; 4: 22-23, 31-32, 33-34; 5: 14-15; 6: 1-10; 7: 1-10; 8: 1-10; 9: 1-10; 10: 1-10; 11: 1-10; 12: 1-10; 13: 1-10; 14: 1-10; 15: 1-10; 16: 1-10; 17: 1-10; 18: 1-10; 19: 1-10; 20: 1-10; 21: 1-10; 22: 1-10; 23: 1-10; 24: 1-10; 25: 1-10; 26: 1-10; 27: 1-10; 28: 1-10; 29: 1-10; 30: 1-10; 31: 1-10; 32: 1-10; 33: 1-10; 34: 1-10; 35: 1-10; 36: 1-10; 37: 1-10; 38: 1-10; 39: 1-10; 40: 1-10; 41: 1-10; 42: 1-10; 43: 1-10; 44: 1-10; 45: 1-10; 46: 1-10; 47: 1-10; 48: 1-10; 49: 1-10; 50: 1-10; 51: 1-10; 52: 1-10; 53: 1-10; 54: 1-10; 55: 1-10; 56: 1-10; 57: 1-10; 58: 1-10; 59: 1-10; 60: 1-10; 61: 1-10; 62: 1-10; 63: 1-10; 64: 1-10; 65: 1-10; 66: 1-10; 67: 1-10; 68: 1-10; 69: 1-10; 70: 1-10; 71: 1-10; 72: 1-10; 73: 1-10; 74: 1-10; 75: 1-10; 76: 1-10; 77: 1-10; 78: 1-10; 79: 1-10; 80: 1-10; 81: 1-10; 82: 1-10; 83: 1-10; 84: 1-10; 85: 1-10; 86: 1-10; 87: 1-10; 88: 1-10; 89: 1-10; 90: 1-10; 91: 1-10; 92: 1-10; 93: 1-10; 94: 1-10; 95: 1-10; 96: 1-10; 97: 1-10; 98: 1-10; 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14	Autia, Manuel Oscar	AC	Canyon	10Cap	shar	SAPD hard copy	10	no	no	20 murder (by shoot)	20	shar		less than death	9(1) [great risk of death to many persons]	propensity?		State at sentencing: "Mano and Manny were friends. They had an altercation, got out of hand, and the defendant went out of hand, all right? He pulled a gun, he fired at least seven times. Now, why do I say at least? I say at least because Mano, the victim, had seven entry and exit wounds in his body. Additionally, just other people were hit in the same fusillade of gunfire. He fired at least seven times during that. Now, that's a minimum. He may have fired more. . . ." (S1 S2) [This suggests great risk of death to many people] Defense at sentencing: "It was a heat of passion type of thing. There was an argument involved. There certainly wasn't premeditation because that just doesn't happen, especially knowing the relationship between the two." (S6) Judge at sentencing: "You intentionally killed Mario Gonzalez without justification or excuse and with malice aforethought. (S8) - so this is not a depraved heart case and as we know in felony almost always premeditation if there is intent to kill. Judge at sentencing: "Clearly, the weight of your criminal behavior prior to this crime and then this crime suggests that there is an undue risk that you would engage in continued criminal behavior." (S3) "Typically appear to have been the only one in the area who was armed. And . . . it was clearly not a case of self-defense. Why would an intelligent person get out a firearm . . . and you didn't shoot just one shot. As the state said, at least seven shots were fired. And you did it as a group of cornered people, and we are [fortunate that there weren't more than - that there's only one death that we're in court on today. . . . Yes, there was verbal intimidation, but you were the one who was armed and you pulled out the gun and started shooting." (S5) Michigan	Hispanic	Hispanic	male	male		
15	Upper Merion, Dennis D	AC	Winifrede	10Cap	heavy	SAPD affa	10	no	no	20 murder, kidnapping, assault	20	shar	yes (premeditation)	20CP		utter disregard, propensity		Michigan has laws in place to protect children or children of a defendant from a child under 12 years of age, to wit: E.O., who was approximately 47 days old at the time of his death, by the willful and unlawful use of force or violence upon such child, causing great bodily injury, to-wit: abusive head injury, from which the child died on July 12, 2007." State's notice of intent to present evidence pursuant to I.R.E. 404(b): "That [victim], at approximately one month of age, or on or about June 18, 2007, sustained a broken arm while in the care of his parents, and Raymond Ortiz admitted that he caused the injury claiming that it happened during the course of changing the infant's clothing. That as a part of an investigation regarding the broken arm, both defendant Ortiz and defendant Arnold were put on notice . . . that if potentially had a genetic defect which would have led to the more violent to injury and broken bones. . . . and should exercise extreme caution in regard to his handling and care. . . . On or about July 7, 2007, defendant Arnold contacted Basile City Police alleging an instance of domestic violence . . . and during the course of conversation . . . told responding officers that he was afraid that when it was angry he would physically harm her children. . . . Further, just prior to police arriving in response to her call on July 7, 2007, D. Arnold told a witness that she was afraid for her children but of D. Ortiz and that Ortiz had shaken their child/children prior to that time. . . . Further, during the course of E.O.'s 47 days of life, the infant spent approximately half of his time hospitalized and that neither D. regularly looked or cared for the child while he was in the hospital. . . . The State believes that the above listed evidence is relevant to defendant Ortiz to demonstrate that at the time he violently compressed both sides of [victim]'s head until he heard the bones "pop" that he had actual knowledge that not only were his actions potentially lethal to any infant, but that [victim] in particular was likely to be especially vulnerable and likely to be harmed by acts of physical violence to his body." State's second notice of intent to present 404(b) evidence includes acts of violence and/or abuse that D. committed upon [victim] and/or [victim] including "yelling and screaming at the babies, forcefully covering a child's mouth with a hand and/or a blanket to stop the child from crying, shaking one or both of the children, and any other acts of violence referenced in the discovery provided. . . . and Family Arnold witnessed bruises and physical injuries, and prior to his death, six week old E.O. suffered multiple injuries including broken arm, broken collarbone, and abrasions and bruising on other parts of his body, demonstrating that he suffered a systematic pattern of abuse." (000000) Ready to 20 per amended information: "60 willfully, unlawfully, deliberately, and with malice aforethought, but without premeditation, kill and murder E.O. His was a human being, who was approximately 47 days old at the time of his death, by the willful, intentional, and unlawful use of force and violence upon such child, to-wit: by squeezing the infant's head and skull until E.O. suffered massive bi-lateral skull fractures and other non-accidental head trauma, from which the child died on July 12, 2007." State's sentencing memorandum: admitted intent to kill. "So too has an extensive history of violent acts defendant Ortiz, who, as his criminal history and the police reports and other documents attached to this file . . . indicate, has an extensive history of violent criminal behavior, including an adult felony conviction for a crime of violence out of the State of Washington" (p. 4). "In the present case, 60 Ortiz killed six-week old [victim] Furthermore, 60 is a defendant with a history of Michigan	Hispanic	Hispanic	male	male		
16	Ortiz, Raymond D	AC	Ada	10Cap	heavy	Ada file	10	no	no	20 murder (intentional)	20	shar	yes (egg battery child under 12)		HAC, utter disregard, propensity		Michigan	Hispanic	Hispanic	male	child			
17	Talavera, Miguel Angel	CC (AC)	Canyon	10Cap	heavy	Ada knock (Canyon case)	20	no	no	murder 20 (use of deadly weapon and criminal gang with felony conviction charges dismissed)	20	shar	yes (premeditation followed the victim and stabbed repeatedly, though not charged w/ premed)		HAC, possible utter disregard, [propensity based on media]		Michigan	Hispanic	Hispanic	male	male			
18	Zepeda, Bobby	AC	Canyon	10Cap	heavy	Ada knock (Canyon case)	20	no	no	murder 20 (use of deadly weapon and criminal gang with felony conviction charges dismissed)	20	shar	yes (premeditation followed the victim and multiple stab wounds)		HAC, utter disregard; propensity based on media		Michigan	Hispanic	Hispanic	male	male			
19	Garcia, Joseph Allen	AC	Ada	10Cap	shar	Ada file	10	no	no	20 murder	20	shar	yes (felony murder)		9(1) [robbery]		Michigan	Hispanic	Hispanic	male	male			
20	Cruz, Christopher	AC	Winifrede	10Cap	heavy	SOCA/Adair; SAPD affa	10	no	no	20 murder	20	shar	yes (use explanation; premeditation)		after disregard given that he also (unsuccessfully) shot at the 2nd person		Michigan	White	White	male	male			

[illegible]

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X															
																	Judge's defense affidavit at charge of plea: "Based on your review of the State's case, as well as your own case, it is more reasonable evidence that the State might be able to prove a murder in the first degree if this went to trial?" Yes, indeed. [p. 7]. State's case as described at charge of plea: "Buck had it in his head that the victim was perhaps . . . molesting the great granddaughter . . . got it in his head, kept telling himself, 'I have to take care of this,' actually displayed a knife and said, 'I have to take care of this. Don't you see what's going on?' We believe he stayed up most of the night, until about midnight, waiting for the victim's father . . . and with the knife, he killed him, stabbed him about the chest and the neck, multiple injuries, and it was the stabbing, the slashing of the neck, that ultimately killed Arthur Clarkson." [p. 16 of charge of plea], [other evidence in the case, murder weapon found, he was trying to burn his clothes, and he told his brother "I missed up. I think I killed Grandpa."] [18] State's argument at sentencing: "[D]efendants are as left with a young man who can barely keep a 77-year-old man who uses a walker. The autopsy report indicates that Art Clarkson had 25 stab wounds. . . This is someone who has a stroke on the foot. 'Please come in' because I've hurt him so far because he uses a walker. And then Mr. Pickens . . . he flees, he discards the murder weapon, and so forth. Ultimately, when he caught by police, his body responds to the detectives, they asked if he was sane, he says no, unless you don't really want a Spanish name, but try to be smart. And it seems there is indication - he gets us to think lots of makes him cool. A few weeks later on a recorded phone call he is laughing on the phone and saying, 'in my picture still on the news?' That's not someone . . . And know Mr. Mayfield will dispute some of the reports from the calls, but from the calls, say that when Buck learned that the gentleman who called E13 was a registered sex offender, Buck said 'I've had known that, it would have been a double homicide. This isn't someone who is sorry for what they did.' This is premeditated. He had been talking about it the night before. It was cold. It was calculating." [29-30] And it's brutal - there is something visceral, it seems to me, about the mode of killing someone with a knife, that in your face - 25 stab wounds to the neck . . . There is something about that so visceral that almost strikes worse than being shot in the head by a gun. Buck Pickens was within inches of Art as he killed him, saw he watched him die. And . . . in some ways simply the brutality of this crime, it tells, demands that sentence." [13] [This supports both HAC and other damage!] Judge at sentencing: "Well, this case comes before the court with about as serious a second-degree murder as you could have. The defendant went into the home of a person who had befriended him in a multi-crime scenario, stabbed to death a 77-year-old man who got around with using a walker. He stabbed him 25 different times, and I think that that does need to be the key focus of this sentencing." [45] And think counter for the State makes an additional point that is valid and worth considering, which is that the victim in this case was killed by this close-range eruption of either destructive violence, and that means, even though up close, he is there, he's aware of the person he's dealing with, the person is a disabled person who uses a walker, he can see the effects of his actions on that person he leaves stabbing and stabbing and stabbing him to death. And that certainly seems to be no indication of any compassion, of any humanity or mercy in the defendant when he was in the state that his own drug use got him into this case." [56-57] See Idaho Supreme Court opinion. Continuity: USDO charged life sentence resting in part on future dangerousness: "After a careful analysis of all the information available to it, the district court stated that it did not believe that there 'was a realistic prospect that Mr. Fisher could safely be returned to the future--to the public at large future point without a meaningful risk, that he would engage in some kind of violent contact like this again in the future.'" The court concluded that the appropriate sentence was life without parole. . . ."To impose a fixed term sentence requires a high degree of certainty that the perpetrator could never be safely released back into society or that the nature of the offense requires that the individual spend the rest of his/her lifetime here." [7] The statement refers to these two factors standing alone, so in this case, the district court found both of those to be the predominant ones. The court concluded that there was not a "reasonable prospect" that defendant would be safely released back into society, and that the punishment must fit the crime. "[The consideration of social contribution and general deterrence are not decided on the basis of the unique characteristics of the offender; rather these considerations are decided upon the characteristics of the offense.]" Defendant has not shown that the court committed a clear abuse of discretion in imposing the fixed life sentence." State v. Fisher, 162 Idaho 465, 468, 398 P.3d 839, 843 (2017) Other damage: 2 separate victims (one survived), selected at random: "There is no indication that Defendant previously had any contact with either victim. He apparently selected them at random. After her arrest, it was determined that Defendant was also under the influence of both salts." State v. Fisher, 162 Idaho 465, 466, 398 P.3d 839, 840 (2017) "When Defendant pled guilty, he admitted that he willfully shot at the victim that he aimed his revolver at the victim and meant to pull the trigger; that he did not intend to kill the victim, but intended to shoot him, and that he knew of the danger and had a conscious disregard for the victim's life." State v. Fisher, 162 Idaho 465, 468, 398 P.3d 839, 842 (2017) Defendant is schizophrenic. Sentencing Judge: "It's clear there is a profound danger that Mr. Fisher presents, at least in an unmitigated state." 131. "I suspect that one of the most troubling and difficult aspects of these events is dealt with for Mr. Fisher, the victim's family, and his endgame. Mr. Fisher may have had his own reasons that he had because he was in a state of psychotic delusion, but as mentioned, these folks were just in the wrong place at the wrong time. . . The understanding I think speaks to the level of danger that the defendant presents to the public. I'm searching, for a reason to be confident that Mr. Fisher was at large again at some point in the future, that he would pose a significant risk to the community." [131] Arrested indictment [p. 34 of vol 1]: "On or about July 8, 2013, . . . did . . . With premeditation, and with malice aforethought, kill and murder Darlene Carpenter, a human being, by repeatedly striking Darlene Carpenter in the head with a blunt object and stabbing him in the abdomen, inflicting wounds from which he died." Indictment contains additional counts re grand theft by false promise against the victim, Darlene Carpenter. [Counts IV and V, p. 22-23 of Vol. 2] State's motion in limine regarding admissibility of casual statements: "On July 8, 2013, Darlene Carpenter was found dead in his garage with multiple different injuries. Evidence pointed to Douglas Anderson having intimate and large financial dealings with Carpenter. Anderson denied these dealings, and investigation found that the collateral Anderson was supposed to have to uphold his ends of the bargain did not exist. Video evidence showed Anderson at Carpenter's home for over an hour on the morning of Carpenter's death, which Anderson denied. Evidence also indicated that immediately after leaving Carpenter's residence, Anderson called a real estate company to list his home for sale to allow him to stay to deliver to the buyer to buy a full new set of clothes. Pursuant to a valid search warrant, Carpenter's blood was found in Anderson's truck on a day planner on the week of Carpenter's death. This wife told CP he confessed to her with details. He admitted killing him in call with friend T." Prosecutor at sentencing (immutates only, not TG): "This murder was calculated and methodical. This is the first murder in a decade we have had here in our community and it is so violent it is difficult to discuss. DL was an innocent victim to the defendants' fraudulent schemes. The defendant had led the victim to lower his guard." [p. 13 of Vol. 2] See Idaho Court of Appeals Decision: At the time of her death, the victim was living in a house with her cousin (Cully's mother), Cully, and the victim's boyfriend. One night in November 2012, Cully's mother discovered the body of the victim on the floor of a room with a knife sticking out of her head. An autopsy later revealed that the victim had twenty-one stab wounds, including eleven wounds in her head. Two days after the homicide, police arrested Cully, and Cully implicated himself and a co-defendant in the death of the victim. According to Cully's statements to the police, Cully and his co-defendant entered the house to steal money or financial transaction cards from the victim in order to acquire methamphetamine. Cully was charged by indictment with first degree murder, but that by receiving or possessing stolen property and burglary. As part of a plea agreement, the State later filed an amended indictment charging Cully with second degree murder, grand theft, and burglary. At the charge of plea hearing, the State acknowledged that it had agreed to dismiss the grand theft and burglary counts, and Cully pled guilty to second degree murder. At that hearing, Cully provided a factual basis for the plea. He explained that he and his co-defendant went over to the house where the victim was staying to do the victim. According to Cully, as he and the co-defendant were breaking into the house, the victim woke up and yelled at the co-defendant. The co-defendant yelled back and stabbed the victim. The co-defendant then handed Cully the knife and said, "You're either with me or you're with her." Cully then stabbed the victim, realizing that he stabbed her in the back and chest. But according to a letter Cully later wrote to his grandfather, he also "knew the knife wasn't his brain so he wouldn't suffer." State v. Cully, No. 42209, 2015 WJ 4657118, at 11 [Idaho Ct. App. Aug. 6, 2015] Information charges Murder (premeditation and/or felony murder), Burglary, Attempted Robbery: "That the D. . . On or about the 21st day of May, 2007, . . . Did . . . With premeditation and malice aforethought, kill and murder Andrew Dalley, a human being, by striking him in the head with a rock and stabbing him multiple times from which he died. CH IN THE ALTERNATIVE did willfully, unlawfully, and with malice aforethought kill and murder Andrew Dalley by striking him in the head with a rock and stabbing him multiple times which caused his death. The said murder being committed during the perpetration of a felony, to-wit, Burglary and/or Attempted Robbery. COUNT 2 That the D. . . did enter into a certain rental, to-wit, a mobile home, the property of Andrew Dalley, . . . with the intent to commit the crime of Theft and/or Robbery. COUNT 3 That the D. . . did intentionally and by means of force and/or fear attempt to take from the possession or from the person or from the immediate presence of Andrew Dalley certain personal property, to-wit, drugs, the property of Andrew Dalley, which was accomplished against the will of Andrew Dalley, in that the D took from him his hand with a rock and stabbed him multiple times while commanding him to give him drugs." PC found. State 1 Plus Agreement: Agrees to plead guilty to reduced charge of 2nd murder; prosecutor moves to dismiss burglary and attempted robbery charge. Note: ID had different theory of the case based on heart of assault but State continued to assert the robbery/burglary theory as well until the amendment, and PC found on those charges. Aggravated battery on a child, to-wit, C.A., a human being, who was under the age of sixteen years, to-wit, twenty-four (24) days old, DOB April 17, 2016, did strike her about her person, including her abdomen and/or buttocks which perforated her ovum from which she died." See judge hearing and sentencing hearing: Original trial for 10 murder ended in mistrial, judge hearing at 17). Prosecutor at charge of plea hearing: much would testify that "when she hit her daughter, [victim], with Daniel Abidin that she was healthy, . . . when she arrived back home after being driven from 2:20 pm to 3:20 pm that night, the victim was blue. She was shaking. That her ear was red and had an injury, and that she was having difficulties breathing. She would also testify that she immediately wanted to take [victim] to the ER soon, but that Daniel argued with her, and she had to get the baby with some clothes on so she could put her in the car along with her son, and that she took them to the ER. . . To respond testified that in his opinion that [victim] died of bacterial pneumonia, which was due to the perforation of her ovum, and that that perforation was caused by blunt abdominal trauma." [20-21] Mann would testify again, that the task at the time that she was angry with her for leaving him with his children. That he had to leave them while she was gone and she had been gone for too long. [24] would also testify regarding a Google search that she found on the cellphone that was being used by Daniel Abidin . . . that it had been searched, rather, how to hide bruises quickly online." [28] Judge: "That there is a factual basis that would support the plea in this matter . . . that would raise a substantial likelihood that you would probably be convicted of the offense of First Degree Murder in this matter. You're only charged with Second Degree Murder, but there is a substantial likelihood based upon the evidence." [39] "Daniel . . . was diagnosed with Antisocial Personality Disorder. Antisocial Personality Disorder is a mental condition which has long-term patterns of manipulating, exploiting, or violating the rights of others without any remorse. This diagnosis marks Daniel's behavior from the onset of this case ultimately clear. He left the hospital, left severely alone at the hospital. He tried to leave the hospital on May 15th to go get drugs as evidenced by text messages. I explain why Daniel did that. Different time expecting (sic) responsibility for his own actions and behavior. He blamed others, he blamed Blake, he blamed the speaker. At trial, the treatment and an Ah Right, it's best summed up by his own statement that he made in the [PSI]. I believe that that bad behavior choices in the past came back to affect law enforcement's reactions to our daughter's death. He fails to acknowledge that his actions at this time were what led to that investigation. . . What led to this prosecution were his actions. [Victim] . . . not faulted . . . gave birth, gave, gestating to breathe with a red ear. That's her mother mother. Found her mother. David Abidin's testimony to that a speaker had spoken for her. She was taken to the hospital. But there were multiple injuries. The ear, the buttocks, the perforated ovum, the																						
Fisher, Shawn Michael	AC	Ada	10Cpu	Reve	SAPD file	10	No	no	20 murder	20	plea	yes (premeditation)	less than death	none		HAC, other damaged			White	White	male	male		around Thanksgiving															
Anderson, Douglas Bennett	AC	Idem	10Cpu	maybe clear; Reve	Ada knock	10	No	no	20 murder	20	plea	yes (charged, premeditated)	less than death	covering up for swindling victim out of money, is this 99.7 "50/50" remuneration?	other damaged; HAC			White	White	male	male		Wednesday - 10C opinion																
Cully, Michael J	AC	Payette	10Cpu	Clear	OCJ/court	10	No	no	20 murder	20	plea	yes (felony murder)	less than death	8g (robbery or burglary)	HAC			White	White	male	female																		
LaBling, Todd	AC	Ada	10Cpu	clear	Ada file	10	No	no	20 murder	20	plea	yes (felony murder)	less than death	8g (burglary and/or attempted robbery)				White	White	male	male																		
Abidin, Daniel	AC	Channahon	10Cpu	Reve	Ada knock	10	No	no	20 murder	20	plea	yes (agg battery child under 12)	less than death																										
Robert	AC	Channahon	10Cpu	Reve	Ada knock	10	No	no	20 murder	20	plea	yes	less than death										5/11/2026																

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X
	Bates, Melissa Renee	AC	Renewal	10Cap	Heavy	DCL/court	10	no	no	20	murder	20	pink	yes (initially charged, only reduced for plea deal)	yes (initially charged, only reduced for plea deal)	yes (initially charged, only reduced for plea deal)	yes (initially charged, only reduced for plea deal)	yes (initially charged, only reduced for plea deal)	White	White	female	male		
137																			White	White	female	male		
	Hart, Denver	AC	Boundary	10Cap	Heavy	Shvey	20	no	no	20	murder	20	pink	yes (reloaded muzzle loader -> premeditation, although he claimed to not intend to kill)	yes (reloaded muzzle loader -> premeditation, although he claimed to not intend to kill)	yes (reloaded muzzle loader -> premeditation, although he claimed to not intend to kill)	yes (reloaded muzzle loader -> premeditation, although he claimed to not intend to kill)	yes (reloaded muzzle loader -> premeditation, although he claimed to not intend to kill)	White	White	male	male		11/9/2011
	Jenkins, Melissa	AC	Ada	10Cap	Heavy	Ada file	10	no	no	20	murder	20	pink	yes (aid & abet age battery child under 12)	yes (aid & abet age battery child under 12)	yes (aid & abet age battery child under 12)	yes (aid & abet age battery child under 12)	yes (aid & abet age battery child under 12)	White	White	female	child		
138																			White	White	male	male		
	McQueen, Martin	AC	Franklin	10Cap	Heavy	SAPD affs	10	no	no	20	murder	20	pink	yes (premeditation)	yes (premeditation)	yes (premeditation)	yes (premeditation)	yes (premeditation)	White	White	male	male		
140																			White	White	male	male		
	Piggs, Scott E	AC	Stmore	10Cap	Heavy	SAPD affs, Ada file	10	no	no	20	murder	20	pink	yes (premeditation - PC third or 4th, again enough found to sustain MFO)	yes (premeditation - PC third or 4th, again enough found to sustain MFO)	yes (premeditation - PC third or 4th, again enough found to sustain MFO)	yes (premeditation - PC third or 4th, again enough found to sustain MFO)	yes (premeditation - PC third or 4th, again enough found to sustain MFO)	White	White	Male	Female		
141																			White	White	Male	Female		
	Shaw, Anthony	AC	Ada	10Cap	Heavy	Ada file	10	no	no	20	murder	20	pink	yes (aggravated battery child under 12)	yes (aggravated battery child under 12)	yes (aggravated battery child under 12)	yes (aggravated battery child under 12)	yes (aggravated battery child under 12)	White	White	male	child		
142																			White	White	male	child		
	Thompson, Christopher	AC	Scottsdale	10Cap	Heavy	SAPD affs	10	no	no	20	murder	20	pink	yes (premeditation)	yes (premeditation)	yes (premeditation)	yes (premeditation)	yes (premeditation)	White	White	male	Female		
143																			White	White	male	Female		

[illegible]

[illegible]

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X

[illegible]

[illegible]

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X
155	Crosson, Tyke	JAC	Ada	2Dv1D		Ada knock	2D	no	no	Murder 2D (aiding & abetting)	2D	pink	Probably yes (see MYKLE Blumenshine)	less than death	possible 9(c) (great risk of death to many persons) - shooting at a group of people in the dark	possible letter disregard / propensity (due to the approached nature, shooting at a group of people, gang involvement)				Black	male	male		

NOV 20 2024

TRENT TRIPPLE, Clerk
By ANNA MEYER
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

v.

BRYAN C. KOHBERGER,

Defendant.

Ada County Case No. CR01-24-31665

**MEMORANDUM DECISION AND
ORDER ON DEATH PENALTY
MOTIONS**

I. INTRODUCTION

Defendant is charged with one count of Burglary and four counts of Murder in the First Degree in connection with the deaths of four University of Idaho students. The State has filed a notice of intent to seek the death penalty pursuant to Idaho Code § 18-4004A. (“Notice”)¹

Before the Court are twelve motions filed by Defendant challenging various aspects of Idaho’s capital punishment scheme.² (collectively, “Death Penalty Motions”). A hearing on the

¹ Amended Notice Pursuant to Idaho Code § 18-4004A (Oct. 9, 2024).

²1. Motion to Strike State’s Notice Pursuant to Idaho Code §18-4004A on Grounds of Arbitrariness (Sept. 5, 2024)

2. Motion to Strike Utter Disregard Aggravator (Sept. 5, 2024)

3. Motion to Strike HAC Aggravator (Sept. 5, 2024)

4. Motion to Strike Multiple Victims Aggravator (Sept. 5, 2024)

5. Motion to Strike Future Dangerousness Aggravator (Sept. 5, 2024)

6. Motion to Strike State’s Notice of Intent to Seek Death Penalty on Grounds of Failure to Present Aggravators to Neutral Fact Finder (Sept. 5, 2024)

7. Motion to Strike State’s Notice of Intent to Seek Death Penalty on Grounds of International Law (Sept. 5, 2024)

8. Motion to Strike State’s Notice of Intent to Seek Death Penalty on Grounds of Contemporary Standards of Decency (Sept. 5, 2024)

9. Motion to Strike the Death Penalty on Grounds of State Speedy Trial Preventing Effective Assistance of Counsel (Sept. 5, 2024)

10. Motion to Strike State’s Notice of Intent to Seek Death Penalty on Grounds of Means of Execution (Sept. 5, 2024)

11. Motion for Court Order Requiring the State: (1) to Provide Notice of Every Alleged Nonstatutory Aggravating Fact/Circumstance it May Rely On At Any Sentencing Trial; and (2) to Prove Beyond a Reasonable Doubt Every Alleged Nonstatutory Aggravating Fact/Circumstance (Sept. 5, 2024)

12. Motion to Trifurcate the Proceedings and Apply Rules of Evidence During Eligibility Phase (Sept. 5, 2024).

motions was held on November 7, 2024, following which the Court took the matters under advisement. The Court concludes relief in Defendant's favor is not warranted on any of the motions.

II. STANDARDS

The constitutionality of Idaho's capital punishment scheme is a question of law. *State v. Abdullah*, 158 Idaho 386, 450, 348 P.3d 1, 65 (2015). When a party challenges a statute on constitutional grounds, it "bears the burden of establishing that the statute is unconstitutional and must overcome a strong presumption of validity." *State v. Manzanares*, 152 Idaho 410, 418, 272 P.3d 382, 390 (2012) Further, when considering these challenges, courts are "obligated to seek an interpretation of a statute that upholds its constitutionality." *Id.*

The interpretation of a treaty is a question of law, as are matters of statutory interpretation. *Pocatello v. State*, 145 Idaho 497, 505, 180 P.3d 1048, 1056 (2008); *State v. Hall*, 163 Idaho 744, 796, 419 P.3d 1042, 1094 (2018).

Whether there is an infringement of a defendant's right to speedy trial presents a mixed question of law and fact. *State v. Clark*, 135 Idaho 255, 257, 16 P.3d 931, 933 (2000). A reviewing court will defer to the trial court's findings of fact if supported by substantial and competent evidence and will exercise free review of the trial court's conclusions of law. *Id.*

A motion to trifurcate capital proceedings is a matter of discretion. *United States v. Bolden*, 545 F.3d 609, 618–19 (8th Cir. 2008); *see also, Armand v. Opportunity Mgmt. Co.*, 155 Idaho 592, 602, 315 P.3d 245, 255 (2013) (whether to order separate trials for any claims or issues is discretionary). Consequently, a trial court must: 1) correctly perceive the issue as one of discretion; 2) act within the outer boundaries of its discretion; 3) act consistently with the legal standards applicable to the specific choices available to it, and; 4) reach its decision by the exercise of reason. *State v. Guerra*, 169 Idaho 486, 493, 497 P.3d 1106, 1113 (2021).

*Defendant also filed a Motion to Strike the Felony Murder Aggravator (Sept. 5, 2024), but that motion was rendered moot when the State amended the Notice to withdraw that particular aggravator.

III. ANALYSIS³

A. Motion to Strike State's Notice On Grounds of Arbitrariness

Defendant moves to strike the State's Notice on grounds that Idaho's capital sentencing scheme fails to narrow the class of first-degree murderers who are death-eligible defendants, thus permitting an arbitrary and capricious selection of defendants for death. He further argues Idaho's scheme is unconstitutional due to geographic disparities as to who is selected for the death penalty. These infirmities, according to Defendant, violate his Eighth Amendment protection against cruel and unusual punishment, his Fourteenth Amendment rights to due process and equal protection, the Idaho Constitution's corollary provisions, as well as the right to uniformity of justice provided by Article V, Sections 2 and 26 of the Idaho Constitution. In support of his argument, Defendant relies in large part on a study conducted and published in a law review article by Professor Aliza Cover of the University of Idaho College of Law.⁴

In response, the State contends that both arguments are foreclosed by binding precedent. It further argues that Professor Cover's article should be afforded little, if any, weight given foundational issues and lack of relevance.

1. Constitutional Requirements of a Capital Punishment Scheme

In imposing capital punishment, Idaho has a constitutional responsibility under the Eighth and Fourteenth Amendments to the U.S. Constitution to tailor and apply its laws in a manner that avoids the arbitrary and capricious infliction of the death penalty. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). To accomplish this, Idaho's capital sentencing scheme must "provide 'a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153 (1976)).

³In his motions, Defendant raises challenges under the U.S. Constitution and corollary provisions in the Idaho Constitution. However, he did not provide any argument or authority as to why this Court should interpret the protection afforded under Idaho's Constitution as more expansive than that provided by the U.S. Constitution. See e.g., *State v. Donato*, 135 Idaho 469, 472, 20 P.3d 5, 8 (2001) (explaining that this Court may declare the Idaho Constitution to provide greater protection than the federal constitution in some instances). Thus, unless otherwise noted, the Court will confine its analysis to U.S. Constitutional law.

⁴Aliza Plener Cover, *Narrowing Death Eligibility in Idaho: An Empirical and Constitutional Analysis*, 57 Idaho L. Rev. 559 (2022). The State objected to live testimony by Prof. Cover regarding her law review article on grounds that her opinions constituted legal opinions, lacked legal relevance and lacked foundation. The Court orally granted the objection, concluding her analysis was not relevant to the pertinent legal issues and finding her law review article to be a sufficient proffer for purposes of the motion.

Constitutional review of a state's capital punishment scheme addresses two separate aspects of the decision-making process: the eligibility decision and the selection decision. *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). States must comply with the requirements of both for their respective schemes to be constitutional. *Kansas v. Marsh*, 548 U.S. 163, 174, (2006).

a. Eligibility Standards

The eligibility decision imposes a narrowing requirement on a state capital scheme. "To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). State legislatures can satisfy the narrowing function in one of two ways: 1) by narrowing the definition of capital offenses, or; 2) by "more broadly defin[ing] capital offenses and provid[ing] for narrowing by jury findings of aggravating circumstances at the penalty phase." *Id.* at 246; *see also*, *Zant*, 462 U.S. at 878 ("statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty."). For states that have attempted to satisfy the narrowing requirement through the enactment of statutory aggravators, the United States Supreme Court requires:

[T]he trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase.... [T]he aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. Second, the aggravating circumstance may not be unconstitutionally vague.

Tuilaepa, 512 U.S. at 972 (internal quotes and cites omitted).

That said, if a particular statutory aggravator is vague, state courts are permitted to further define the aggravator through a limiting construction so as to allow the state to meet its constitutional obligation to "provide *some* guidance to the sentencer" and avoid the arbitrary and capricious infliction of death. *Arave v. Creech*, 507 U.S. 463, 471 (1993) (quoting *Walton v. Arizona*, 497 U.S. 639, 654 (1990)) (emphasis in original).⁵

⁵ Consequently, an Eighth Amendment vagueness challenge to a specific aggravating factor must consider both the statutory aggravator as well as any limiting construction placed upon the aggravator to determine whether it "adequately channels the discretion of the sentencing body in order to prevent the imposition of an arbitrary and capricious sentence." *Dunlap v. State*, 159 Idaho 280, 298–99, 360 P.3d 289, 307–08 (2015) (citations omitted).

b. Selection Standards

The selection decision aspect of capital sentencing determines whether a death-eligible defendant should actually receive the death penalty. *Tuilaepa*, 512 U.S. at 972. This phase “requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant’s culpability.” *Id.*

What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime. That requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime.

Id. (internal quotes and cites omitted, emphasis in original).

2. The Idaho Supreme Court has found Idaho’s capital scheme to be constitutionally narrow.

Idaho has opted to satisfy the constitutionally imposed eligibility requirements through the adoption of statutory aggravators in addition to statutorily carving out a class of murders, i.e., first-degree, to which the death penalty may apply.⁶ Under Idaho law, first-degree murder is a potentially capital crime “if such person killed, intended a killing, or acted with reckless indifference to human life, irrespective of whether such person directly committed the acts that caused death.” I.C. § 19-2515(1). If an individual falls into this category, at least one of the eleven statutorily enumerated aggravating circumstances—several of which are subject to limiting constructions—must be found beyond a reasonable doubt for the individual to be death-eligible. *Id.* at § 19-2515(9).

Defendant contends Idaho’s scheme has “so many aggravating circumstances, so broadly construed, that the aggravators accomplish no narrowing” and create a greater risk of arbitrary death sentences. However, the Idaho Supreme Court has determined that Idaho’s approach accomplishes the “narrowing function” in the eligibility phase as required by the U.S. Constitution. *Hall*, 163 Idaho at 788, 419 P.3d at 1086 (citing *State v. Wood*, 132 Idaho 88, 102, 967 P.2d 702, 716 (1996)).⁷ Noting that while a particular aggravator may apply to many

⁶ I.C. § 18-4003; 18-4004.

⁷ See also, *State v. Creech*, 105 Idaho 362, 369, 670 P.2d 463, 470 (1983) (“In Idaho, the aggravating circumstances which a sentencing judge may consider in pronouncing sentence in a capital case are clearly laid out in I.C. § 19–

murders, the Court concluded no one aggravator “appl[ies] to every first-degree murder—which is all the narrowing required by *Tuilaepa*.” *Id.* (emphasis in original). Consequently, Defendant’s argument is foreclosed by *Hall*.⁸

Moreover, in challenging Idaho’s scheme, Defendant improperly focuses on the statutory aggravating factors in the aggregate rather than individually.⁹ This approach was rejected by the Idaho Supreme Court in *State v. Hairston*, 133 Idaho 496, 988 P.2d 1170 (1999). There, the defendant argued that the combination of all statutory aggravators applied equally to all first-degree murder defendants and, therefore, did not provide a meaningful distinction between those deserving of the death penalty and those who were not. *Id.* at 508, 988 P.2d at 1182. The Court found “no legal basis” for considering the aggregate effect of Idaho’s aggravators, noting that each aggravator must be considered individually. *Id.* (citing *Arave*, 507 U.S. at 470 (narrowing in the eligibility phase of capital proceedings focuses on whether the sentencer is required to find at least one aggravating fact beyond the murder itself)).¹⁰ Because the defendant failed to challenge any one particular aggravating circumstance, the Court refused to find Idaho’s capital scheme “arbitrary and capricious.” *Id.*

Defendant contends, however, that *Hairston* did not reach the question of whether Idaho’s statutory scheme as a whole failed the narrowing function; rather he contends the Court’s ruling was “on whether a Court could still determine who deserved death, not on whether the statutory structure had failed the narrowing function.” Reply, p. 3. Defendant points out that, at the time of *Hairston*, judges—not juries—could still determine whether to impose the death

2515, and thus, to the extent possible, arbitrariness or the influence of prejudice is avoided, but the necessary individual consideration is nonetheless preserved.”)

⁸The Idaho Supreme Court is “the ultimate authority in fashioning, declaring, amending, and discarding rules, principles, and doctrines of precedential law by application of which the lower courts will fashion their decisions. This Court has been and remains the final arbiter of Idaho rules of law, both those promulgated and those evolving decisionally.” *State v. Guzman*, 122 Idaho 981, 987, 842 P.2d 660, 666 (1992).

⁹ Defendant has also filed separate motions challenging the individual aggravators which, as discussed herein, are not meritorious.

¹⁰ Similar “aggregating” arguments have been rejected around the country. See, e.g., *State v. Hidalgo*, 390 P.3d 783, 791 (Ariz. 2017) (“Observing that at least one of several aggravating circumstances could apply to nearly every murder is not the same as saying that a particular aggravating circumstance is present in every murder.”) *cert denied*, 138 S.Ct. 1054 (2018); *Steckel v. State*, 711 A.2d 5, 12–13 (Del. 1998) (“[W]e find the relevant inquiry to be whether “the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death sentence,” not ... whether, taken in combination, Delaware’s statutory aggravating circumstances apply to virtually all defendants convicted of first degree murder.”)

penalty.¹¹ Thus, Defendant posits that whether Idaho's statutory scheme as a whole has provided sufficient narrowing to prevent juries from arbitrarily imposing death is a matter of first impression.

Defendant's attempt to distinguish *Hairston* is misplaced. The Court squarely held that there was no basis to consider whether the aggravators collectively performed the narrowing; rather, the relevant question was whether the applicable aggravator individually performed the narrowing. *Id.* at 508, 988 P.2d at 1182. Defendant has provided no basis for why the analysis should be different when a jury rather than a judge makes the determination.¹² Indeed, in *Tuilaepa*—which was decided post *Ring*—the United States Supreme Court reiterated that the narrowing analysis focuses on the individual aggravator. *Tuilaepa*, 512 U.S. at 972 (noting the trier of fact must “find one ‘aggravating circumstance’” and “the aggravating circumstance” must apply only to a subclass of defendants and may not be unconstitutionally vague). Consequently, Defendant's narrowing argument is further foreclosed by *Hairston*, which is binding on this Court.¹³

Additionally, while the Eighth Amendment's narrowing analysis is typically confined to the eligibility phase, the narrowing effect of the selection phase and mandatory appellate review that focuses on who ultimately receives the death penalty cannot be ignored. *See, Hidalgo*, 390 P.3d at 792 (noting that a narrowing challenge to Arizona's capital scheme cannot focus solely

¹¹ In *Ring v. Arizona*, the U.S. Supreme Court held that an Arizona statute allowing a judge rather than a jury to find an aggravating circumstance violated the Sixth Amendment. 536 U.S. 584 (2002). Following *Ring*, Idaho amended its capital scheme to require that a jury find the aggravating circumstance unless a jury is waived. *See*, S.L. 2003, ch. 19, § 4.

¹² In *Hall*, the defendant made a similar argument, asserting that the HAC aggravator may have been constitutional when determined by a judge, but not by a jury because juries are less sophisticated and experienced than judges. 163 Idaho at 786, 419 P.3d at 1084. The Court found “no basis, principled or otherwise” for the argument. *Id.*

¹³ Professor Cover's law review article likewise did not consider the effect of individual statutory factors on narrowing. She grouped the statutory aggravators into those which were “fuzzy” and those which are “clear” and then determined whether each death-eligible case was supported by either a “fuzzy” or “clear” aggravator. Cover, 57 Idaho L. Rev. at 588. This grouping does not provide sufficient guidance as to whether any one aggravator is the problem, the remedy for which would be to strike the aggravator as opposed to find the entire scheme unconstitutional. *Zant*, 462 U.S. at 884. A similar deficiency was raised by four members of the U.S. Supreme Court in denying certiorari in *Hidalgo v. Arizona*, 138 S.Ct. 1054 (2018). They acknowledged there was empirical evidence that 98% of Arizona's first-degree murder defendants were death-eligible, but the petitioner failed to provide information as to what specific aggravators were implicated in these cases. *Id.* at 1058. Consequently, the Court does not find Professor Cover's article to be relevant to the issue of whether Idaho's scheme is constitutionally narrow.

on the statutory aggravating circumstances because the selection phase and mandatory appellate review provide further narrowing.). For a death penalty scheme to be constitutional, both the eligibility phase and selection phase must contain safeguards to “ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision.”

Tuilaepa, 512 U.S. at 973.

Idaho’s selection phase requires that the jury weigh all the mitigating circumstances against each applicable aggravating circumstance and determine whether the imposition of the death penalty would be unjust. I.C. § 19-2515(8)(a). The jury must unanimously agree that the death penalty is warranted. *Id.* at § 19-2515(3)(b). If the death penalty is imposed, the sentence is then reviewed by the Idaho Supreme Court to determine: 1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and; 2) whether the evidence supports the jury’s or judge’s finding of a statutory aggravating circumstance. I.C. § 19-2827(c). Thus, importantly, eligible defendants are further narrowed through these phases, which Defendant’s argument does not consider.

3. Defendant has not demonstrated Idaho’s capital scheme is geographically arbitrary.

Defendant additionally argues that Idaho’s capital scheme produces unequal application of the death penalty based on geography. Specifically, he maintains that all first-degree murders in Idaho fall within one of the aggravating circumstances listed in I.C. § 19-2515, thus giving prosecutors complete discretion to determine whether they seek the death penalty. This, he argues, gives rise to county-by-county arbitrariness. That is, “whether you are chosen for the death penalty depends more on where you committed the crime than how you committed the crime.” Mtn., p. 8. To this end, he cites to Professor Cover’s study noting that between 2002 and 2019, there were roughly the same number of death-eligible cases in three largest counties—Ada, Canyon and Kootenai—as in the remaining counties put together. Cover, 57 Idaho L. Rev. at 593-95. This arbitrariness, according to Defendant, deprives him of equal protection under the law, constitutes cruel and unusual punishment and violates uniformity of justice afforded by the Idaho Constitution, art. V, §§ 2, 26.

Defendant’s argument fails for three reasons. First, as discussed, the premise underlying Defendant’s argument is misplaced. Although at least one of Idaho’s enumerated statutory aggravators could apply to nearly every first-degree murder, that is not the proper analysis in

determining narrowness. The question is whether individual aggravators narrow the class of death-eligible murderers. *Hall*, 163 Idaho at 788, 419 P.3d at 1086.

Second, Defendant's geography-based challenge was considered and rejected by the Idaho Supreme Court in *Hairston*. 133 Idaho at 517-18, 988 P.2d at 1191-92. There, the defendant presented a study showing that the imposition of the death penalty was higher in urban counties than in rural counties and that financial resources potentially played a role in a prosecutor's decision to seek the death penalty. *Id.* The defendant argued this rendered Idaho's death penalty scheme arbitrary and capricious, but the Idaho Supreme Court disagreed. *Id.* Namely, the Court noted that the study did not collect or analyze the underlying data giving rise to the cause of the discrepancy. While there were indications the discrepancy was economically driven, this was insufficient to implicate a constitutional concern. *Id.* In so holding, the Court noted that variance in the implementation of a state's capital scheme is constitutionally permissible so long as it is based on legitimate, objective factors such as the strength of evidence, the capability of law enforcement agencies, and the judgment of the sentencing authority. *Id.* (citing *McCleskey v. Kemp*, 481 U.S. 279, 308 (1987)).¹⁴ Without empirical evidence connecting the discrepancy to an impermissible factor, the Court noted it would not trigger constitutional concern. *Id.*

Defendant has not offered the empirical evidence required by *Hairston*. Professor Cover admittedly did not collect or analyze the data that would provide the reason for the county-by-county discrepancy in Idaho. She notes:

I did not systematically collect data on offense egregiousness, nor did I catalog all possible aggravating and mitigating circumstances in each case. As a result, I cannot report findings ... about whether Idaho's system is 'arbitrary and capricious' in the sense that the distribution of death sentences across the universe of death-eligible cases can be explained not by the merits or the case (i.e., the weight of the aggravating and mitigation circumstances), but rather by an arbitrary factor such as race, gender or geography.

¹⁴ In *McCleskey*, the United States Supreme Court held that a statistical study showing that race likely influenced the imposition of the death penalty in Georgia was insufficient to establish arbitrariness in Georgia's death penalty scheme. In doing so, it observed that the study merely showed a "discrepancy that appears to correlate with race" rather than solid evidence that Georgia enacted its death penalty statute with a racially discriminatory purpose. 481 U.S. at 312. The Court further recognized that implementation of the death penalty is a discretionary judgment, that prosecutorial discretion is "essential to the criminal justice process," and the Court would not infer that discretion was abused absent "exceptionally clear proof." *Id.* at 297.

Cover, 57 Idaho L. Rev. at 593.

Thus, her study fails to support Defendant's argument for the same reasons the study in *Hairston* failed. There is simply no basis to conclude that the discrepancy she observed is caused by unbridled prosecutorial charging discretion or any other constitutionally impermissible factor.¹⁵

Third, to establish an equal protection violation, Defendant must establish not only the existence of purposeful discrimination, but that the decision makers in his case, i.e., the Latah County Prosecutor, acted with a discriminatory purpose. *McCleskey*, 481 U.S. at 292. The fact that the death penalty was sought against Defendant in Latah County as opposed to Ada, Canyon or Kootenai undermines any suggestion that Defendant was discriminated against on the basis of geography. Indeed, according to Professor Cover's study, not a single notice of intent to seek the death penalty was filed in Latah County during the time period she studied.

Defendant, however, contends that *McCleskey* and, by extension, *Hairston*, have been limited by the subsequent case of *Bush v. Gore*, a voting rights case in which the United States Supreme Court held that a state's counties cannot subject fundamental rights to differing, arbitrary standards and that a "formulation of uniform rules to determine intent based on these recurring circumstances is practicable and ... necessary." 531 U.S. 98, 106 (2000). Defendant argues that under *Bush*, "there is an equal protection issue with disparities in rights for citizens based on geography." Mtn., p. 10.

This argument, however, has been rejected by other courts that have considered challenges to prosecutorial discretion over the death penalty. See, Michael T. Morley, *Bush v. Gore's Uniformity Principle and the Equal Protection Right to Vote*, 28 Geo. Mason L. Rev. 229, 238 n. 62 (2020) (collecting cases). Primarily, these courts find that the principles of *Bush* do not apply in the criminal context given its expressly limited holding. *Id.*¹⁶ Other court have found that because their state capital schemes do not give prosecutors unbridled discretion in pursuing the death penalty, there is not the same risk of unequal treatment present in *Bush*. See, *Crowe v.*

¹⁵ Further, Professor Cover's study excludes death penalty notices filed in Idaho after 2019, many of which originated in smaller counties.

¹⁶ In *Bush*, the Supreme Court specifically stated that "our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." 531 U.S. at 109 (emphasis added).

Terry, 426 F. Supp. 2d 1310, 1354–55 (N.D. Ga. 2005), *aff'd sub nom. Crowe v. Hall*, 490 F.3d 840 (11th Cir. 2007). For both of these reasons, this Court likewise rejects the argument.

In sum, the Court finds that both arguments advanced by Defendant in aid of his arbitrariness motion are foreclosed by binding precedent and his efforts to distinguish such precedent fail. The motion is denied.

B. Motion to Strike Individual Aggravators

The State has identified four statutory aggravators in its Notice that it intends to rely upon in requesting the imposition of death in this case:

1. At the time the murder was committed the defendant also committed another murder;
2. The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity;
3. By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life, and;
4. The defendant, by his conduct, whether such conduct was before, during or after the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.¹⁷

Through four separate motions, Defendant seeks to strike each of the foregoing aggravators for various reasons. The Court finds none of Defendant's arguments to be prevailing.

1. Utter Disregard Aggravator

The utter disregard aggravator applies when “[b]y the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.” I.C. § 19-2515(9)(f). In *State v. Osborn*, the Idaho Supreme Court applied a limiting construction to the aggravator, to wit: “the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer.” 102 Idaho 405, 419, 631 P.2d 187, 201 (1981).

¹⁷ These aggravators are set forth in I.C. § 19-2515(9)(b), (c), (f) and (i), respectively.

In moving to strike the aggravator, Defendant argues that *Osborn*'s limiting construction—or “judicial gloss” as he characterizes it—is unconstitutional as it violates the separation of powers in Art. II, § 1 of the Idaho Constitution. He additionally argues that Idaho Criminal Jury Instruction (“ICJI”) 1714 defining the utter disregard aggravator overlaps with ICJI 1713 defining the “heinous, atrocious and cruel” aggravator described in I.C. § 19-2515(9)(e) (“HAC”) and ignores the alleged legislature’s intent that the killing be done recklessly. Neither argument has merit.

a. Neither Verska nor the separation of powers doctrine precludes the limiting construction.

There is no dispute that Idaho’s utter disregard aggravator, as narrowed by *Osborn*, has consistently been upheld as constitutional, including by the United States Supreme Court where, in *Arave v. Creech*, it rejected a constitutional vagueness challenge. 507 U.S. 463 (1993). Specifically, the Court found it unnecessary to decide whether the statutory language itself passed the constitutional muster, concluding instead that *Osborn*’s limiting construction “adequately channels sentencing discretion as required by the Eighth and Fourteenth Amendments.” *Id.* at 465, 471. Analyzing the language of the limiting construction, the Court noted that “[i]n ordinary usage, then, the phrase ‘cold-blooded, pitiless slayer’ refers to a killer who kills without feeling or sympathy.” *Id.* at 472. These terms, the Court observed, “describe the defendant’s state of mind: not his *mens rea*, but his attitude toward his conduct and his victim.” This is not a subjective matter, reasoned the Court, but “a *fact* to be inferred from the surrounding circumstances.” *Id.* (emphasis in original).

Likewise, the Idaho Supreme Court has repeatedly reaffirmed the constitutionality of the utter disregard aggravator with the *Osborn* limiting construction.¹⁸ It most recently did so in 2018 where, in *Hall*, it declined to revisit whether the aggravator was unconstitutionally vague, noting the issue had previously been “properly resolved.” 163 Idaho at 786–87, 419 P.3d at 1084–85.

Defendant, however, argues that *Osborn*’s limiting construction violates the separation of powers in Art. II, § 1 of the Idaho Constitution. Specifically, relying on *Verska v. St. Alphonsus Regional Medical Center*, Defendant argues that the courts have no power to revise an unambiguous

¹⁸*State v. Dunlap*, 155 Idaho 345, 377, 313 P.3d 1, 33 (2013); *Abdullah*, 158 Idaho at 463, 348 P.3d at 78; *State v. Pizzuto*, 119 Idaho 742, 772, 810 P.2d 680, 710 (1991), overruled on other grounds by *State v. Card*, 116 Idaho 129, 774, P.2d 299 (1989); *State v. Card*, 121 Idaho 425, 434, 825 P.2d 1081, 1090 (1991); *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299 (1989), overruled on other grounds by *Card*, 121 Idaho at 432, 825 P.2d at 1088; *State v. Aragon*, 107 Idaho 358, 367, 690 P.2d 293, 302 (1984); *Gibson v. State*, 110 Idaho 631, 638, 718 P.2d 283, 290 (1986).

statute in order to avoid absurdity because “the wisdom, justice, policy, or expediency of a statute are questions for the legislature alone.” 151 Idaho 889, 896, 265 P.3d 502, 509 (2011).

However, as the State points out, *Verska* merely held that the Court does not have the authority to modify an unambiguous statute if applying it as written results in a palpable absurdity. *Id.* at 896, 265 P.3d at 509 (“we have never revised or voided an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written, and we do not have the authority to do so.”). *Verska* did not limit a court’s ability to interpret ambiguous statutes or inhibit a court from applying clarifying standards to constitutionally vague statutes, particularly in the face of a constitutional obligation to tailor a statutory aggravator to “avoid[] the arbitrary and capricious infliction of the death penalty.” *Godfrey*, 446 U.S. at 428.

In fact, in *Abdullah*—decided after *Verska*—the Idaho Supreme Court rejected a similar separation of powers argument with regard to the limiting construction for both the utter disregard and HAC aggravators, holding the Court was “within its constitutional authority to narrowly construe an aggravating circumstance to avoid an unconstitutionally vague statute” and its ability to do so is not “constrained by the separation of powers doctrine.” 158 Idaho at 464, 348 P.3d at 79. Indeed, despite *Verska*, the Court has continued to uphold *Osborn*’s limiting construction for the utter disregard aggravator. *See, Dunlap*, 155 Idaho at 377, 313 P.3d at 33; *Abdullah*, 158 Idaho at 463, 348 P.3d at 78. This binding precedent forecloses Defendant’s argument.

b. ICJI 1714 is consistent with case law.

The “utter disregard” standard is set forth in ICJI 1714. It states:

‘Exhibited utter disregard for human life,’ with regard to the murder or the circumstances surrounding its commission, refers to acts or circumstances surrounding the crime that exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer. ‘Cold-blooded’ means marked by absence of warm feeling: without consideration, compunction, or clemency, matter of fact, or emotionless. ‘Pitiless’ means devoid of or unmoved by mercy or compassion. A ‘cold-blooded, pitiless slayer’ refers to a slayer who kills without feeling or sympathy. The utter disregard factor refers to the defendant’s lack of conscience regarding killing of another human being.

ICJI 1714.

This language was taken directly from the jury instruction provided in *Abullah*, which the Idaho Supreme Court affirmed as both “accurate” and constitutional. 158 Idaho at 463, 348 P.3d at 78. Nevertheless, Defendant challenges ICJI 1714 on grounds that it tracks too closely with ICJI 1713 for the HAC aggravator by focusing on the defendant’s state of mind and, additionally, ignores the legislature’s intent that the killing be done recklessly. Both arguments fail.

The Court approaches these arguments with the presumption that the ICJIs are “presumptively correct.” *State v. Mann*, 162 Idaho 36, 43, 394 P.3d 79, 86 (2017) (quotes, citations, brackets omitted). While ICJI 1713 also focuses on a defendant’s state of mind in instructing on the HAC aggravator,¹⁹ it is through a distinctly different lens and, in fact, the Idaho Supreme Court has found the two aggravators are not duplicative. *See, Wood*, 132 Idaho at 104, 967 P.2d at 718 (noting it was “clear” from prior cases that the two aggravating factors were distinct). Further, in *Osborn*, the Court acknowledged the HAC and utter disregard aggravators could overlap and, therefore, held that the phrase “utter disregard [] be viewed in reference to acts other than those set forth in [other statutory aggravators].” 102 Idaho at 418-19, 631 P.2d at 200-01. Hence, the jury will also be instructed that “[t]he same facts, without more, cannot be relied on to find more than one statutory aggravating circumstance beyond a reasonable doubt.” ICJI 1723. Together, these instructions ensure that, to the extent there is potential for overlapping evidence between the utter disregard and HAC aggravators, the jury is to consider it only once.

As for Defendant’s recklessness argument, had the legislature intended to import this standard into the utter disregard aggravator, it could have done so as it did with two other statutory aggravators. *See*, I.C. §§ 19-2515(9)(g), (h). The fact it did not indicates the legislature intended a different standard to apply than recklessness. *State v. Staples*, 548 P.3d 375, 378 (Idaho Ct. App. 2023), *reh’g denied* (Nov. 13, 2023), *review denied* (Jan. 19, 2024) (“When the legislature uses different language, a different meaning applies.”)

In sum, the Court finds the limiting construction applied by the Idaho Supreme Court to the utter disregard statutory aggravator does not contravene the separation of powers doctrine or

¹⁹ Specifically, ICJI 1713 instructs, in part: “The terms ‘especially heinous manifesting exceptional depravity,’ ‘especially atrocious manifesting exceptional depravity,’ or ‘especially cruel manifesting exceptional depravity’ focus upon a defendant’s state of mind at the time of the offense, as reflected by [his] [her] words and acts.”

Verska, nor does ICJI 1714 misconstrue the statute or duplicate the HAC limiting construction. Consequently, Defendant's motion is denied.

2. HAC Aggravator

The HAC aggravator applies when "the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity." I.C. § 19-2515(9)(c). In *Osborn*, the Idaho Supreme Court applied a limiting construction to this aggravator using language adopted from other states. 102 Idaho at 418, 631 P.2d at 200. Regarding the "especially heinous, atrocious or cruel" portion of the aggravator, the Court adopted the following language from the Florida Supreme Court:

[H]einous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Osborn, 102 Idaho at 418, 631 P.2d at 200 (quoting *State v. Dixon*, 283 So.2d 1 (Fla. 1973)).²⁰

With regard to the "manifesting exceptional depravity" portion of the aggravator, the Court adopted the following from the Nebraska Supreme Court:

In interpreting this portion of the statute, the key word is 'exceptional.' It might be argued that every murder involves depravity. The use of the word 'exceptional,' however, confines it only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence.

Id. at 418, 631 P.2d at 200 (quoting *State v. Simants*, 250 N.W.2d 881 (Neb. 1976), *cert. denied*, 434 U.S. 878 *reh. denied*, 434 U.S. 961 (1977)).

The Court found this limiting construction removed any vagueness from the HAC aggravator, rendering it "sufficiently definite and limited to guide the sentencing court's discretion in imposing the death penalty." *Id.* Subsequently, the Court upheld this language as constitutional. *Pizzuto*, 119 Idaho at 773, 810 P.2d at 711; *Charboneau*, 116 Idaho 129, 774 P.2d 299. The Ninth Circuit likewise found the construction constitutionally sufficient. *Leavitt v.*

²⁰ This limiting instruction had been previously approved by the United States Supreme Court in *Proffitt v. Florida*, 428 U.S. 242 (1976).

Arave, 383 F.3d 809, 836 (2004); *see also*, *Hall*, 163 Idaho at 786, 419 P.3d at 1084 (observing that the HAC aggravator with the limiting construction “has been determined constitutional time and time again.”).

a. Neither Verska nor the separation of powers doctrine precludes the limiting construction.

As with the utter disregard aggravator, Defendant contends the HAC aggravator must be stricken because the limiting construction violates the separation of powers and *Verska*. For the same reasons that argument failed for the utter disregard aggravator, it fails here.

b. ICJI 1713 is consistent with case law.

Additionally, Defendant argues ICJI 1713 fails to track with *Osborn*’s limiting construction. Specifically, Defendant contends ICJI 1713 “does away with” the limiting instruction on “manifesting exceptional depravity,” which *Osborn* defined as confined to situations where “depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence.” 102 Idaho at 418, 631 P.2d at 200. However, ICJI 1713 is nearly identical to *Osborn*. The minimal differences between the two are legally inconsequential.

In sum, for the reasons set forth with regard to the utter disregard aggravator, the Court finds the limiting construction applied by the Idaho Supreme Court to the HAC statutory aggravator does not contravene the separation of powers doctrine or *Verska*. Additionally, the Court finds ICJI 1713 appropriately embodies that limiting construction. Consequently, Defendant’s motion is denied.

3. Future Dangerousness (“Propensity”) Aggravator

The “propensity” aggravator applies when “the defendant, by his conduct, whether such conduct was before, during or after the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.” I.C. § 19-2515(9)(i). In *Creech*, the Idaho Supreme Court upheld the propensity aggravator as constitutional and, in doing so, provided a narrowing interpretation:

[I]t cannot be asserted that the ‘propensity’ circumstance could conceivably be applied to every murderer coming before a court in this state. We would construe ‘propensity’ to exclude, for example, a person who has no inclination to kill but in an episode of rage, such as during an emotional family or lover’s quarrel, commits the offense of murder. We would doubt that most of those convicted of murder would again commit murder, and rather we construe the ‘propensity’ language to specify that person who is a willing, predisposed killer, a killer who tends toward

destroying the life of another, one who kills with less than the normal amount of provocation. We would hold that propensity assumes a proclivity, a susceptibility, and even an affinity toward committing the act of murder.

105 Idaho at 370–71, 670 P.2d at 471–72.

Since *Creech*, the Idaho Supreme Court and Idaho’s federal district court have, on multiple occasions, upheld the constitutionality of the propensity aggravator when combined with this limiting construction against challenges that it is vague or that it unconstitutionally lowers the burden of proof. *Dunlap*, 159 Idaho at 299, 360 P.3d at 308 (citing cases).

Nevertheless, Defendant seeks to strike the aggravator on three grounds: 1) its limiting construction fails to narrow the class of death-eligible defendants; 2) it is impermissibly vague, and; 3) it is irrelevant to culpability and, therefore, cannot be an aggravator. As noted by the State, this Court does not have the ability to overrule *Creech* and its progeny affirming the aggravator’s constitutionality and application. *Guzman*, *supra*. However, even if the Court had such ability, Defendant’s arguments are not persuasive.

a. Creech’s limiting construction narrows the class of death-eligible defendants.

Defendant contends that the limiting construction applied in *Creech* excludes only those found guilty of voluntary manslaughter from its reach²¹ and effectively makes anyone who is found guilty of murder a candidate for death.²² He notes that “murder” is defined in Idaho, in relevant part, as:

the unlawful killing of a human being ... with malice aforethought or the intentional application of torture to a human being, which results in the death of a human being. Torture is the intentional infliction of extreme and prolonged pain with the intent to cause suffering. It shall also be torture to inflict on a human

²¹Defendant points out that the *Creech* limiting construction expressly excludes “a person who has no inclination to kill but in an episode of rage, such as during an emotional family or lover’s quarrel, commits the offense of murder” which, as Defendant notes, describes voluntary manslaughter. I.C. § 18-4006 (defining voluntary manslaughter as the unlawful killing of a human being without malice “upon a sudden quarrel or heat of passion.”).

²² This same general argument was advanced in *Dunlap*, where the defendant argued a jury instruction based on the *Creech* limiting instruction that the Court had previously approved was unconstitutional because it encompassed “anyone who commits first degree murder.” 159 Idaho at 298-300, 360 P.3d at 307-09. The Court rejected the argument, noting that the jury instruction: 1) provided that the jury could not base a propensity finding solely on the fact that it found the defendant guilty of murder, and; 2) instructed that propensity “requires a proclivity, a susceptibility, and even an affinity toward committing the act of murder.” *Id.*

being extreme and prolonged acts of brutality irrespective of proof of intent to cause suffering.

I.C. § 18-4001.

He perfunctorily contends that *Creech*'s limiting construction captures all torturers within its ambit. Defendant additionally argues that the definition of malice aforethought set forth in I.C. § 18-4002²³ corresponds exactly with that of the limiting construction because both definitions rely on a lack of provocation and a propensity or inclination toward murder. Therefore, he contends the limiting construction provides no meaningful narrowing of murderers who may qualify under the propensity aggravator.

Defendant is incorrect that the aggravator and its limiting construction applies to every murder. *Creech* specifically states that the propensity aggravator does not apply to "every murderer coming before the court in this state." 105 Idaho at 370–71, 670 P.2d at 471–72. Hence, ICJI 1717 instructs that "a finding that the defendant has a propensity to commit murder which will probably constitute a continuing threat to society cannot be based solely upon the fact that you found the defendant guilty of murder."

Additionally, Defendant is incorrect that both rely on a lack of provocation. While one way to show malice is to demonstrate a lack of "considerable provocation," it is not the only way. Moreover, the limiting construction requires that the murderer have an innate desire for the act of murder, i.e., "a proclivity, a susceptibility, and even an affinity toward committing the act of murder." *Creech, supra*. This far exceeds the malice definition. Finally, the aggravator itself requires a finding that a person "probably constitute[s] a continuing threat to society." I.C. § 19-2515(9)(i). This is not a requirement for a finding of malice aforethought.

b. The aggravator is not impermissibly vague or confusing.

Defendant next argues that the propensity aggravator is impermissibly vague and confusing to the jury as it applies to evidence of mental illness.²⁴ Defendant posits that a person's

²³ Section 18-4002, I.C., states: "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

²⁴ Defendant does not argue the aggravator is vague in a constitutional sense; indeed, void for vagueness challenges have been rejected time and again, including by the United States Supreme Court in *Jurek v. Texas*, 428 U.S. 262 (1976). His argument is that the jury may be confused in applying the aggravator as it relates to mental illness.

future dangerousness is invariably linked to that person's mental disturbances. Mental illness, however, is supposed to be viewed as a mitigating factor for death penalty purposes. Thus, juries are essentially asked to consider mental illness as both a mitigating and aggravating factor, rendering the evidence a double-edged sword. Citing to studies conducted by an American Bar Association task force created to study the subject of mental disability and the death penalty,²⁵ Defendant points out that juries are confused by the "double intention" behind evidence of mental illness and typically apply it as an aggravator rather than a mitigator. Thus, he argues it should be stricken.

The United States Supreme Court recognized the dilemma described by Defendant in *Penry v. Lynaugh*, when it noted that the defendant's "mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." 492 U.S. 302, 324 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002), and *holding modified by Boyd v. California*, 494 U.S. 370, 379-80 (1990). With such double-edged evidence, an instruction must be given to the jury to "consider and give effect to" mitigating evidence as it bears on the extent to which a defendant is undeserving of a death sentence. *Id.* at 319.

As illustrated in *Penry*, double-edged evidence is dealt with through instructions on the mitigation side, not through striking an aggravator. Defendant has cited not one case in which the propensity aggravator was stricken as a result of potential jury confusion in weighing double-edged evidence. Additionally, as the State points out, Defendant has not filed notice under I.C. § 18-207 that he will be relying on a mental condition and there is no indication by either party that evidence of mental illness will be presented at sentencing. Consequently, the motion is not ripe and, even if it were, striking the aggravator is not the solution.

c. The aggravator is relevant.

Defendant finally argues that future dangerousness is not relevant to culpability and should be stricken. To this end, he observes that the Eighth Amendment requires that defendants only be condemned to die if they are deserving based on their culpability, not their

²⁵ Ronald J. Tabak, Overview of Task Force Proposal on Mental Disability and the Death Penalty, 54 Cath. U. L. Rev. 1123, 1128-29 (2005) (observing that most jurors do not understand what "mitigating" means or how to apply mitigating factors such as severe mental illness, which jurors often equate with future dangerousness, an aggravator.)

dangerousness. Because a person's propensity to commit murder in the future has no bearing on culpability, Defendant contends future dangerousness can only be considered, if at all, after the jury has already found a different statutory aggravator applies.

Defendant's argument, however, fails to recognize that a defendant's future dangerousness has long been a sentencing consideration, which places an emphasis on culpability. *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J. concurring) (noting an "emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence."), *holding modified by Boyd*, 494 U.S. at 378-80. In *Simmons v. South Carolina*, the United States Supreme Court observed:

This Court has approved the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system. See *Jurek v. Texas*, 428 U.S. 262, 275, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (noting that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose"); *California v. Ramos*, 463 U.S. 992, 1003, n. 17, 103 S.Ct. 3446, 3454, n. 17, 77 L.Ed.2d 1171 (1983) (explaining that it is proper for a sentencing jury in a capital case to consider "the defendant's potential for reform and whether his probable future behavior counsels against the desirability of his release into society").

512 U.S. 154, 162 (1994).

As the State points out, the "protection of society" is the "primary consideration" in fashioning a sentence for a criminal defendant. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). A capital defendant's future dangerousness, therefore, is directly relevant to whether he or she is "culpable" for sentencing purposes.

In sum, the Court finds the propensity aggravator is sufficiently narrow to encompass only a select set of murderers, the jury will not be misled or confused as to its application as it relates to evidence of mental illness, and it is relevant to culpability. Consequently, Defendant's motion is denied.

4. Multiple Victims Aggravator

The "multiple victims" aggravator applies when, "[a]t the time the murder was committed the defendant also committed another murder." I.C. § 19-2515(9)(b). In seeking to

strike this aggravator, Defendant contends it fails to speak to the severity of the crime, it violates the prohibition on double counting aggravator evidence and it impermissibly “scores” victims. The Court is not persuaded by these arguments.

a. The aggravator is relevant to culpability.

With regard to the first argument, Defendant contends “murders cannot be aggregated in a manner that makes the act of a malice aforethought murder aggravated.” To this end, while he acknowledges this aggravator is intuitive and widely adopted, he contends that—standing alone—it fails to focus on the degree of the crime and allows for the imposition of the death penalty simply because there were two victims, without any additional evidence that gives insight into the culpability of the defendant. Thus, to render the act of two murders aggravated, the jury must necessarily resort to one of the other aggravators.

However, as the State points out, Defendant’s argument is essentially a public policy argument lacking any legal authority at all. Indeed, in asserting that there is “no way in which two murders can be aggregated in a way that makes the act of murder aggravated except to resort to one of the other aggravators,” Defendant refers to a law review article which states no such thing. In fact, it identifies “multiple victims” as a “legally relevant” factor influencing the punishment decision in capital cases. *See, Jonathan R. Sorensen & James W. Marquart, Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. Rev. L. & Soc. Change 743, 751 (1991).

b. The aggravator does not permit double counting.

Additionally, the multiple victim aggravator does not violate the prohibition on double counting aggravator evidence. This prohibition—typically given as a jury instruction (ICJI 1723)—allows a jury, in considering a particular aggravator, to consider the same evidence it previously considered for a different aggravator so long as it finds additional aggravating evidence to support a finding of the particular aggravator beyond a reasonable doubt. *Abdullah*, 158 Idaho at 470, 348 P.3d at 85. This rule is based on the presumption that the “legislature did not intend to duplicate aggravating circumstances.” *Id.* (quoting *Dunlap*, 155 Idaho at 365, 313 P.3d at 21).

Defendant notes, however, that the multiple victim aggravator has no additional aggravating evidence and, therefore, it is not possible for the jury to properly consider it. This argument assumes the jury will rely solely on the fact of multiple victims for the other statutory

aggravators. The State represents it intends to prevent sufficient evidence on all the applicable statutory aggravators to prevent the jury from double counting. In other words, the jury can find the multiple victim aggravator met and still use the evidence of multiple murders in finding the other statutory aggravators met because there will be other evidence. If they are not persuaded by the other evidence, ICJI 1723 instructs them they are not to make a finding that the aggravator is met.

c. The aggravator does not constitute victim-scoring.

Finally, Defendant argues the multiple murders aggravators effectively “scores” murder victims by saying a single dead person is not as valuable as two. He notes that the United States Supreme Court rejected scoring murder victims on a value scale in *Booth v. Maryland*, 482 U.S. 496, 505-07 (1987). *Booth*, however, addressed this issue with regard to victim impact evidence, which the Court was concerned would permit a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. The multiple victims aggravator relies solely on the numbers of victims; not on victim impact evidence. Thus, the concern of comparative judgment articulated in *Booth* is simply not possible.²⁶

In sum, the Court find that the multiple victims aggravator is relevant to culpability, does not result in double-counting aggravating evidence when provided with ICJI 1723, and does not result in a comparison of victim worth. Consequently, Defendant’s motion is denied.

C. Motion to Strike State’s Notice on Grounds of Failure to Present Aggravators to Neutral Factfinder

Defendant seeks to strike the death penalty on grounds that Idaho’s capital scheme vests far too much discretion in the prosecutor in determining whether to pursue the death penalty, thus rendering it an arbitrary and unconstitutional process. He argues that the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 6 and 13 to the

²⁶ Further, *Booth* was overturned in *Payne v. Tennessee*, where the Court observed that victim impact evidence is “not offered to encourage comparative judgments of this kind ... it is designed to show instead each victim’s uniqueness as an individual human being.” 501 U.S. 808, 823 (1991). It held: “We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant’s moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.” *Id.* at 825.

Idaho Constitution require that the eligibility and selection decisions (i.e., whether a statutory aggravator is present and whether it is outweighed by mitigating circumstances) first be presented to a Grand Jury before the prosecutor can formally pursue the death penalty. While he acknowledges the weight of case law from both the United States Supreme Court and the Idaho Supreme Court is against him,²⁷ he argues these cases must be overruled. The State responds that Defendant's argument is squarely foreclosed by binding precedent. The Court agrees.

I. Well-settled law mandates that the Fifth Amendment's Indictment Clause does not apply to the States.

Defendant's argument begins with the premise that the Indictment Clause of the Fifth Amendment of the United States Constitution should be afforded to the States. That clause provides: "[n]o person ... be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand Jury." U.S. Const. amend. V. It was adopted by the framers, in part, in recognition of the importance the Grand Jury played in protecting the citizens from "unfounded accusation" by the government. *Ex parte Bain*, 121 U.S. 1, 11 (1887), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625 (2002).

The Indictment Clause binds only the federal government. In *Hurtado v. California*, the United States Supreme Court considered whether the clause applied to the States through the Fourteenth Amendment for a capital offense. 110 U.S. 516 (1884). The Court held it did not, noting that grand jury screening was not "essential" to preserving that "spirit of personal liberty and individual right" which shaped the common law and was the ultimate concern of due process. *Id.* at 523. In so holding the Court relied heavily on historical evidence suggesting that prosecution by indictment or presentment had never been viewed as the only means for initiating prosecutions that accorded with the core values of the common law. *Id.* at 538. The Court observed that as long as a state provides—in advance of instituting a felony prosecution—some threshold procedure that comports with "fundamental principles of liberty and justice" and "secure[s] the individual from the arbitrary exercise of the powers of government[.]" the Fourteenth Amendment's due process

²⁷ The United States Supreme Court has long held that the Fifth Amendment requiring that a grand jury pass on any federal case involving the death penalty does not apply to the States. *Hurtado v. California*, 110 U.S. 516 (1884). In *Abdullah*, the Idaho Supreme Court held that statutory aggravators are not elements of a crime and, therefore, are not constitutionally required to be included in the indictment (and, by extension, determined by the Grand Jury). 158 Idaho at, 459, 348 P.3d at 74.

guarantee is satisfied. *Id.* at 527, 535. According to the Court, an adversarial preliminary hearing before a magistrate meets this standard. *Id.* at 538.

Defendant contends that *Hurtado* failed to consider important underpinnings of the Fifth and Fourteenth Amendments, including the importance of the Grand Jury, how it came to be required by the Fifth Amendment and whether it was considered a part of Due Process when the Fourteenth Amendment was adopted. An examination of these factors will, according to Defendant, reveal that the Grand Jury's primary function was not to establish probable cause, but to exercise discretion as to what cases were worth pursuing in the first place. In so arguing, Defendant cites to more recent United States Supreme Court case law recognizing the importance of the Grand Jury act as a check on prosecutorial power. *See, Cotton*, 535 U.S. at 634. Defendant contends this vital role is not fulfilled a preliminary hearing before a magistrate and is an increasing important role to fill given the fact that prosecutors with unhampered discretion tend to overcharge cases to coerce pleas.

It is not, however, for this Court to second-guess *Hurtado*, which has remained unquestioned precedent for nearly 150 years. *See, McDonald v. City of Chicago*, 561 U.S. 742 (2010) (describing *Hurtado* as a "governing decision" that "long predate[s] the era of selective incorporation").²⁸ Further, Defendant ignores the fact that *Hurtado* was based, in part, on the Court's view that an adversarial preliminary hearing before a magistrate was sufficient to protect citizens from the arbitrary exercise of governmental power, which would include misplaced prosecutorial charging discretion. 110 U.S. at 527, 538. In other words, the Court's concern was not solely with ensuring the existence of probable cause, but to protect more globally against an abuse of power by a prosecutor—something, according to *Hurtado*, proceedings before a magistrate could accomplish just as well as a Grand Jury. Therefore, there is nothing to be gained by applying the Fifth Amendment to the States.

2. Vesting charging discretion in the prosecutor does not violate the Eighth Amendment.

Defendant's corollary argument is that the unbridled discretion vested in prosecutors to seek the death penalty renders it an arbitrary and capricious process in violation of the

²⁸ Following this precedent, the Idaho Court of Appeals has held that the Fifth Amendment's Indictment Clause is inapplicable to Idaho prosecutions. *State v. Simmons*, 115 Idaho 877, 878, 771 P.2d 541, 542 (Ct.App. 1989) (quoting *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972)); *Warren v. Craven*, 152 Idaho 327, 330-31, 271 P.3d 725, 728-29 (Ct. App. 2012) (noting that, under *Hurtado*, a state felony prosecution need not be brought before a grand jury; an adversarial proceeding before a magistrate afforded under Idaho law does not violate due process).

prohibition against cruel and unusual punishment afforded by the Eighth Amendment. Defendant contends that, to comport with constitutional mandates, a prosecutor's decision to seek the death penalty must be supported by a Grand Jury finding of probable cause as to applicable statutory aggravators and, further, that the mitigating factors do not outweigh a particular statutory aggravator.

In advancing this argument, Defendant recognizes that the Idaho Supreme Court held relatively recently that statutory aggravators are not considered elements of the crime and, therefore, need not be included in the indictment. *Abdullah*, 158 Idaho at 459, 348 P.3d at 74. However, he argues *Abdullah* "is wrong and should be overruled." Mtn., p. 8. Specifically, he asserts the Idaho Supreme Court failed to consider the issue through the Eighth Amendment, i.e., the importance of the Grand Jury in protecting citizens against arbitrary acts by the government, including the arbitrary application of the death penalty by prosecutors.

In *Abdullah*, the defendant argued that the State was required by the Sixth Amendment and Article I, § 8 of the Idaho Constitution to allege the aggravating circumstances in the indictment. *Id.* at 457-58, 348 P.3d at 72-73. His argument was premised on *Ring v. Arizona*, where the U.S. Supreme Court held that Arizona's statutory aggravating factors were the "functional equivalent" of an element of a greater offense and, therefore, the Sixth Amendment's right to a jury trial requires that a jury, not the judge, find they exist. *Id.* 536 U.S. at 609. The Idaho Supreme Court rejected his argument. Pointing to its own prior case law and that issued by the "overwhelming majority of states," the Court held that *Ring* did not—and could not²⁹—elevate statutory aggravating circumstances into an element of a crime and, therefore, they need not be alleged in the indictment and subjected to a probable cause determination. *Abdullah*, 158 Idaho at 458-69, 348 P.3d at 73-74.

Defendant believes that *Abdullah* does not comport with Eighth Amendment jurisprudence because it permits unbridled prosecutorial discretion on the charging end. However, United States Supreme Court jurisprudence is not on his side. In *Gregg*, the Court rejected the argument that such prosecutorial discretion presents a constitutional violation. 428 U.S. at 199 (Petitioner's argument "that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense" does not indicate that system is

²⁹ The Court noted that only the state legislature has the power to designate elements of a crime. *Abdullah*, 158 Idaho at 458, 348 P.3d at 73 (citing *Porter v. State*, 140 Idaho 780, 784, 102 P.3d 1099, 1103 (2004)).

unconstitutional). As Justice White stated in his concurring opinion in *Gregg*, “[a]bsent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.” *Id.* at 225 (White, J., concurring); see also, *Proffitt v. Florida*, 428 U.S. 242 (1976) (same). In *McCleskey*, the Court again recognized the propriety of allowing prosecutors to exercise discretion in capital cases, noting:

[T]he policy considerations behind a prosecutor’s traditionally ‘wide discretion’ suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties[.]

...

Discretion in the criminal justice system offers substantial benefits to the criminal defendant.... [T]he capacity of prosecutorial discretion to provide individualized justice is ‘firmly entrenched in American law.’ As we have noted, a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case. Of course, ‘the power to be lenient [also] is the power to discriminate,’ but a capital punishment system that did not allow for discretionary acts of leniency ‘would be totally alien to our notions of criminal justice.’

481 U.S. at 296, 311–12 (internal cites omitted).

Moreover, the Eighth Amendment is concerned with the arbitrary and capricious infliction of *punishment*. Defendant’s myopic focus on prosecutorial discretion in deciding whether to pursue capital charges at the outset ignores all the other safeguards built into Idaho’s capital scheme that serve to focus that discretion as the matter progresses toward the imposition (or not) of punishment. These include the requirement that the prosecutor allege facts sufficient to allow a jury to find a capital crime was committed and one requisite aggravator is present. *See, e.g., U.S. v. Taylor*, 648 S.Supp.2d 1237, 1241 (D. N.M. 2008) (rejecting same argument with regard to the Federal Death Penalty Act, which “limit[s] and guide[s]” prosecutor’s discretion.); *People v. Stewart*, 520 N.E.2d 348, 357 (Ill. 1988) (prosecutor’s discretion is not unconstitutionally unfettered since he may only pursue the death penalty if one or more statutory aggravators exist). Other circumstances that rein in a prosecutor’s discretion include “factual nuances, strength of evidence, and, in particular, the broad discretion to show leniency.” *People v. Landry*, 385 P.3d 327, 375 (Cal. 2016).

These factors all ensure that prosecutorial discretion is kept in check so that the ultimate decision by the jury to impose death—if the case reaches that point—is not arbitrary and

capricious. In fact, Defendant has not cited to a single case striking down a capital scheme as unconstitutional due to wide prosecutorial discretion in selecting whether to pursue the death penalty. Consequently, there is no basis to question the constitutionality of *Abdullah*, which is not only binding on this Court, but dispositive of Defendant's argument. Consequently, the motion is denied.

D. Motion for Order Requiring State to Provide Notice of Non-Statutory Aggravators and Prove Beyond a Reasonable Doubt.

In this Motion, Defendant moves for an order requiring the State to: 1) provide notice of any non-statutory aggravating facts or circumstances it intends to prove at the sentencing phase, and; 2) provide any such non-statutory aggravating fact or circumstance beyond a reasonable doubt to the unanimous satisfaction of the jury before any juror may consider any aggravating fact or circumstance as a reason to support the death penalty.

The State concedes that, by statute, it must disclose to Defendant "all relevant evidence in aggravation and mitigation" that it intends to present at the special sentencing proceeding. I.C. § 19-2515(6). The term "all relevant evidence" includes non-statutory aggravating evidence. *Hall*, 163 Idaho at 795-99, 419 P.3d at 1093-97. However, the State argues that it need not prove the non-statutory aggravating evidence beyond a reasonable doubt. The State is correct.

The sole issue to be determined is whether Idaho's death penalty statute requires that the State prove all non-statutory aggravating evidence beyond a reasonable doubt. When an issue calls for statutory interpretation, the following principles apply:

The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

State v. Schulz, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011).

1. I.C. § 19-2515 does not impose a reasonable doubt standard on non-statutory aggravating evidence.

Applying the foregoing principles, the Court finds that I.C. § 19-2515 does not require the State to prove its non-statutory aggravating circumstances beyond a reasonable doubt. The relevant provisions of I.C. § 19-2515 are as follows:

(3) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless:

(a) A notice of intent to seek the death penalty was filed and served as provided in section 18-4004A, Idaho Code; and

(b) The jury, or the court if a jury is waived, finds beyond a reasonable doubt at least one (1) statutory aggravating circumstance. Where a statutory aggravating circumstance is found, the defendant shall be sentenced to death unless mitigating circumstances which may be presented are found to be sufficiently compelling that the death penalty would be unjust. The jury shall not direct imposition of a sentence of death unless it unanimously finds at least one (1) statutory aggravating circumstance and unanimously determines that the penalty of death should be imposed.

(4) Notwithstanding any court rule to the contrary, when a defendant is adjudicated guilty of murder in the first degree, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, no presentence investigation shall be conducted; provided however, that if a special sentencing proceeding is not held or if a special sentencing proceeding is held but no statutory aggravating circumstance has been proven beyond a reasonable doubt, the court may order that a presentence investigation be conducted.

(5)(a) If a person is adjudicated guilty of murder in the first degree, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, and a notice of intent to seek the death penalty was filed and served as provided in section 18-4004A, Idaho Code, a special sentencing proceeding shall be held promptly for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense.

...

(6) At the special sentencing proceeding, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Disclosure of evidence to be relied on in the sentencing proceeding shall be made in

accordance with Idaho criminal rule 16. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing.

...

(8) Upon the conclusion of the evidence and arguments in mitigation and aggravation:

(a) With regard to each statutory aggravating circumstance alleged by the state, the jury shall return a special verdict stating:

(i) Whether the statutory aggravating circumstance has been proven beyond a reasonable doubt; and

(ii) If the statutory aggravating circumstance has been proven beyond a reasonable doubt, whether all mitigating circumstances, when weighed against the aggravating circumstance, are sufficiently compelling that the death penalty would be unjust.

...

(9) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed....

I.C. § 19-2515 (emphasis added).

As the Idaho Supreme Court determined in *Hall*, the plain language of the statute clearly distinguishes the “statutory aggravating circumstances” enumerated in subsection (9) and from “all relevant evidence in aggravation and mitigation” in subsection (6), both of which may be considered by the jury when determining an individualized sentence. 163 Idaho at 798, 419 P.3d at 1096 (“[I]f it wanted to restrict the evidence presented to that which is relevant only to the statutory aggravators, the Legislature could have said something like ‘all relevant evidence in support of the statutory aggravators and mitigation,’ but it did not.”)

Moreover, it is *only* with respect to the statutory aggravating circumstances that the statute imposes the condition of proof beyond a reasonable doubt. The statute is silent as to the burden of proof required for the non-statutory evidence in aggravation. Had the Legislature wished to impose such a burden on the non-statutory evidence, it certainly could have done so. The fact it did not indicates that it did not intend for the same level of proof to apply.

In fact, as the State points out, the Idaho Supreme Court has suggested that non-statutory aggravating circumstances presented under I.C. § 19-2515 need not be found beyond a

reasonable doubt. In analyzing the statute in *Hall*, the Idaho Supreme Court cited approvingly to a passage in its opinion in *Creech*, where it first recognized the admissibility of non-statutory aggravating circumstances under I.C. § 19-2515. *Hall*, 163 Idaho at 797, 419 P.3d at 1095. That passage provides:

This court is not limited as to the circumstances it may find in aggravation to those listed [as statutory aggravators]. Thus, that section of the court's findings denominated '5. Facts and Arguments Found in Aggravation,' although including circumstances not statutorily listed and not expressly found beyond a reasonable doubt, is not in error. I.C. § 19-2515(a) permits the court, upon the suggestion of either party that there are circumstances which might properly be considered in aggravation or mitigation, to hear those circumstances. That language strongly suggests that a judge should hear all relevant evidence which either party desires to set forth. Such an interpretation is not contradicted by I.C. § 19-2515(f), which merely lists the statutory aggravating circumstances, at least one of which must exist beyond a reasonable doubt if the ultimate sanction of death is to be imposed.

Id. (quoting *Creech*, 105 Idaho 362, 369, 670 P.2d 463, 470 (1983)) (emphasis added).³⁰

Defendant, however, contends that the State overstates the import of *Creech* given that it was decided under a pre-*Ring* version of I.C. 19-2515 when judges—rather than the jury—had to provide written findings as to the statutory aggravators. *See*, I.C. § 19-2515 (1977). The Court's reference to the word “expressly,” according to Defendant, was solely in reference to what the judge had to put in the written findings; it did not hold that non-statutory aggravators could be found without proof beyond a reasonable doubt.

While Defendant is correct that *Creech*'s holding did not go this far, his attempt to parse the meaning of “expressly” in *Creech* is unavailing. The version of statute at issue in *Creech* is not fundamentally different than its current form, with the exception that the jury now makes the written findings rather than the judge. Importantly, both versions differentiate between “statutory aggravating circumstances” and “all relevant evidence in ... aggravation” and only require that the former be established beyond a reasonable doubt. *Compare*, I.C. §§ 19-2515(c), (f) (1977) with I.C. §§ 19-2515(5)(a), (8)(a)(i) (2022). To interpret *Creech*'s use of the word “expressly” as

³⁰ *See also*, *State v. Creech*, 132 Idaho 1, 14, 966 P.2d 1, 14 (1998) (“As long as the court finds at least one statutory aggravating factor beyond a reasonable doubt, it is free to consider and weigh other aggravating factors individually as well.”)

suggesting that non-statutory aggravators must also be found beyond a reasonable doubt but need not be set forth in writing reads into the statute language that does not exist.

Moreover, the case law cited by Defendant in support of his suggested interpretation of I.C. § 19-2515 provides no such support. In *People v. Tennyson*, the Supreme Court of Colorado considered whether Colorado's former death penalty statute required a jury to find beyond a reasonable doubt that the mitigating factors presented did not outweigh the proven statutory aggravating factors before death could be imposed. 788 P.2d 786, 790 (Colo. 1990) (interpreting C.R.S. § 16-11-103, repealed in 2002). The court concluded it did, citing the "strong concern for reliability of any sentence of death." *Id.* at 792.

Tennyson, however, speaks only to the proof required in the weighing process of mitigating evidence against statutory aggravators; it did not address whether non-statutory aggravating evidence had to be proven beyond a reasonable doubt. Moreover, Idaho's statute already prescribes a standard of proof for this weighing—the mitigating evidence must be "sufficiently compelling" when weighed against the statutory aggravating circumstance. I.C. § 19-2515(8)(a)(ii). Further, the Idaho Supreme Court has rejected the "beyond a reasonable doubt" standard in this weighing process, noting:

The weighing process, in our opinion does not involve shifting the burden of persuasion but is concerned instead with the presentation of relevant information to the sentencer in order that a reasoned and considered decision can be reached. The defendant's burden is merely to raise, in the aggravation-mitigation hearing, any factors which might possibly tend to mitigate his culpability for the offense. He has full opportunity to present and argue those factors. The court below then evaluates those factors under the guidelines set forth in the statute. His decision, including his reasoning, is then set forth in detail and this court reviews the entire process. While it is possible to speak of a 'burden' of persuasion on the defendant to establish why he should receive leniency, we feel that, under our sentencing process, the facts speak for themselves once presented. The completeness of the evaluative process below and the mandatory review by this court, we feel, withstands constitutional scrutiny.

Osborn, 102 Idaho at 417, 631 P.2d at 199; *see also*, ICJI 1722 ("The existence of mitigating factors need not be proven beyond a reasonable doubt.").

In sum, in interpreting I.C. § 19-2515, the Court "cannot insert into statutes terms or provisions which are obviously not there." *Datum Constr., LLC v. RE Inv. Co., LLC*, 173 Idaho

159, 540 P.3d 330, 335 (2023). To adopt Defendant's position would require the Court to do just that. Consequently, his motion is denied.

E. Motion to Trifurcate Proceedings and Apply Rules of Evidence At Eligibility Phase.

While Defendant acknowledges that Idaho's death penalty scheme provides for two phases—a guilt phase and a penalty phase—he contends it must be trifurcated to ensure his constitutional rights are maintained. To this end, he argues the penalty phase should be divided into two parts: one addressing whether he is eligible for the death penalty (i.e., whether there is proof of a statutory aggravator beyond a reasonable doubt) and one determining the appropriate punishment (weighing all relevant evidence). If the State is permitted to present all evidence relevant to both statutory and non-statutory aggravating circumstances at one time, Defendant contends a jury may be confused as to what evidence applies to what statutory aggravator and misapply the evidence. Trifurcating would ensure that the jurors consider the appropriate aggravator at the appropriate time. He also contends that, once trifurcated, the Idaho Rules of Evidence should apply to the eligibility phase, given that it is akin to a guilt phase.

The State responds that Defendant's position is simply one of public policy and ignores the plain language of I.C. § 19-2515 and binding appellate decisions. It points out that I.C. § 19-2515 calls for a single sentencing proceeding, which has been the general practice of capital cases in Idaho and contemplated by Idaho's Death Penalty Sentencing Instructions. The State further points out that Defendant's proposition of leaving the presentation of mitigating evidence to the last phase would have the unintended consequent of highlighting aggravating evidence.

This issue is a matter of first impression in Idaho. Balancing the benefits and detriments that may be posed by trifurcation, and considering trifurcation is an exception to the rule, the Court will proceed in accordance with I.C. § 19-2515 rather than depart on an extra-statutory quixotic journey through trifurcation.

1. The birth of bifurcated death penalty proceedings in Idaho.

In the 1972 case of *Furman v. Georgia*, the United States Supreme Court determined that the death penalty constituted cruel and unusual punishment in violation of the Eighth Amendment if "it [was] administered arbitrarily or discriminately." 408 U.S. 238, 249 (1972) (Douglas, J., concurring). The decision served to invalidate most every capital punishment

scheme adopted by the states for giving too much discretion to the sentencer. In response, state legislatures, including Idaho's, revamped their death penalty statutes.

One of the statutory structures that emerged allowed the sentencer to weigh aggravating and mitigating circumstances in a separate sentencing phase conducted after the guilt phase. In *Gregg*, the United States Supreme Court considered and approved one such scheme adopted by Georgia. 428 U.S. at 162. Georgia's scheme specified statutory aggravating circumstances, one of which must be found by the sentencer beyond a reasonable doubt before a defendant was eligible for the death penalty. *Id.* at 196-97. The sentencer was also permitted to consider any other appropriate aggravating or mitigating circumstances prior to recommending a sentence of death. *Id.* To accomplish this, Georgia adopted a bifurcated system that segregated the guilt phase from the penalty phase. *Id.* at 190-91. In finding the bifurcated system best addressed the constitutional deficiencies identified in *Furman*, the *Gregg* Court quoted approvingly from the drafters of the Model Penal Code, to wit:

'(If a unitary proceeding is used) the determination of the punishment must be based on less than all the evidence that has a bearing on that issue, such for example as a previous criminal record of the accused, or evidence must be admitted on the ground that it is relevant to sentence, though it would be excluded as irrelevant or prejudicial with respect to guilt or innocence alone. Trial lawyers understandably have little confidence in a solution that admits the evidence and trusts to an instruction to the jury that it should be considered only in determining the penalty and disregarded in assessing guilt.

... The obvious solution ... is to bifurcate the proceeding, abiding strictly by the rules of evidence until and unless there is a conviction, but once guilt has been determined opening the record to the further information that is relevant to sentence. This is the analogue of the procedure in the ordinary case when capital punishment is not in issue; the court conducts a separate inquiry before imposing sentence.'

Id. (quoting ALI, Model Penal Code s 201.6, Comment 5, pp. 74-75 (Tent. Draft No. 9, 1959)).

While the Court was clear that Georgia's scheme was not the only way a death penalty statute could pass the constitutional muster, it indicated it was "the best." *Id.* at 195.

Like Georgia, Idaho revamped its death penalty scheme in response to *Furman* by, *inter alia*, providing for a separate sentencing phase during which the court would weigh circumstances in aggravation or mitigation. I.C. § 19-2515 (1977). This bifurcated process

continues to this day. During the guilt phase, the jury decides whether a defendant is guilty of first-degree murder. I.C. § 19-2515(5)(a). During the penalty phase—or “special sentencing proceeding”—the state and the defendant may present “all relevant evidence in aggravation and mitigation” including victim impact evidence (which is a form of non-statutory aggravating evidence). *Id.* at §§ 19-2515(5)(a), (6).

The jury must then decide: 1) whether the State has proven at least one aggravating circumstance beyond a reasonable doubt (eligibility decision) and, if so; 2) whether all the mitigating circumstances, when weighed against the statutory aggravating circumstance, is sufficiently compelling that the death penalty would be unjust (selection decision). *Id.* at § 19-2515 (3)(b), (8). Because the penalty phase is a sentencing hearing, the rules of evidence do not apply, nor is it subject to the Confrontation Clause. *State v. Dunlap*, 155 Idaho 345, 375, 378, 313 P.3d 1, 31, 34 (2013).

2. Pros and cons of the trifurcated approach

As in other capital schemes, the bifurcated approach is the default rule in Idaho and, as discussed, the one envisioned by statute. It necessarily results in a wide spectrum of evidence—subject to different evidentiary standards—being presented to the jury all at once, thus blurring the line between the eligibility decision and the selection decision. As outlined by one legal commentator analyzing the Federal Death Penalty Act:³¹

[T]he jury hears all of the evidence of ... statutory aggravating factors, nonstatutory aggravating factors, and mitigating factors in a single proceeding before making these two determinations. Receiving all of this information in a unitary proceeding creates a problem because the jury's determination of whether the defendant is eligible for the death penalty may be influenced by irrelevant evidence. The jury may find the defendant eligible for the death penalty based on evidence that, even if established beyond a reasonable doubt, fails to satisfy the statutory requirements of death eligibility.

Donald M. Houser, *Reconciling Ring v. Arizona with the Current Structure of the Federal Capital Murder Trial: The Case for Trifurcation*, 64 Wash. & Lee L. Rev. 349, 356–57 (2007).

This “influence” noted by the commentator is particularly acute with regard to victim impact evidence, which may present the danger of coloring the jury’s determination in the

³¹ The Federal Death Penalty Act is a bifurcated scheme similar to Idaho’s, but it additionally requires during the eligibility phase that the jury find the defendant had the requisite intent. 18 U.S.C. § 3591.

eligibility phase, despite the fact such evidence is not relevant to any of the statutory aggravators. As noted by one federal court:

To pretend that such [victim impact] evidence is not potentially unfairly prejudicial on issues to which it has little or no probative value is simply not realistic, even if the court were to give a careful limiting instruction. Rather, such potent, emotional evidence is a quintessential example of information likely to cause a jury to make a determination on an unrelated issue on the improper basis of inflamed emotion and bias—sympathetic or antipathetic, depending on whether one is considering the defendant or the victims' families.

United States v. Johnson, 362 F. Supp. 2d 1043, 1107 (N.D. Iowa 2005), *aff'd in part*, 495 F.3d 951 (8th Cir. 2007).³²

In addition, courts and commentators contend bifurcation can lead to juror confusion over what evidence is relevant to what decision (eligibility or selection) and what burden of proof applies. Margo A. Rocklin, *Place the Death Penalty on a Tripod, or Make it Stand on its Own Two Feet?* 4 Rutgers J. L. & Pub. Pol'y 788, 796 (Fall, 2007) (citing cases). Further, courts have noted that bifurcation results in the presentation of lengthy, often emotionally charged non-statutory aggravating and mitigating evidence that may not be necessary should the state fail to establish a statutory aggravator beyond a reasonable doubt in the first place. *Bowers*, 2023 WL 1108392 at * 6.

Yet another problem cited with the bifurcated system is the difficulty in applying it post-*Ring*, which many state and federal courts and legal commentators interpret as rendering the statutory aggravators *elements* of the offense of capital murder as opposed to sentencing factors. Rocklin, *supra* at p. 794 (discussing *Ring*, 536 U.S. at 585-87). As a result, it has been held that the evidentiary rules and confrontation rights—which courts have long held do not apply the sentencing³³—now apply to the presentation of evidence of statutory aggravators, i.e., the eligibility decision, but not the selection decision. *Id.* at 806-07 (collecting cases).³⁴ It has been

³² It should be noted that the scope of victim impact testimony in Idaho is limited. See discussion *infra* at p. 39.

³³ See, e.g., *Williams v. New York*, 337 U.S. 241, 246-51 (1949) (noting that, to effectively make individualized punishments, a sentencing judge should be able to consider “the fullest information possible,” unimpeded by evidentiary procedural limitations)

³⁴ See also, *United States v. Lujan*, 2011 WL 13210246, at *8 (D.N.M. 2011) (“If the penalty phase is reached, the Confrontation Clause would apply in the eligibility stage due to *Ring*’s requirement that facts necessary to expose [the defendant] to a death sentence must be found by a jury”; however, “[i]f [the defendant] is found eligible for

observed that a bifurcated approach where rules of evidence and confrontation rights apply to some evidence (statutory aggravating circumstances) and not other (non-statutory aggravating and mitigation circumstances) would lead to jury confusion and not ensure the protection of a defendant's constitutional rights. *Id.*, p. 807.

In light of these issues, some courts have opted for trifurcation between the guilt phase, the eligibility decision and the selection decision. *See*, David McCord, Hon. Mark W. Bennett, *The Proposed Capital Penalty Phase Rules of Evidence*, 36 Cardozo L. Rev. 417, 433 (2014) (citing cases); *United States v. Bowers*, 2023 WL 1108392 (W.D. Pa. 2023) (granting motion to trifurcate based on potential prejudicial introduction of extensive victim impact testimony irrelevant to an eligibility determination and summarizing federal cases granting trifurcation). In fact, in *Bowers*, the court noted that “where a request for trifurcation has been made, the majority of courts grant such relief.” *Id.* at *5.

There are, however, downsides to trifurcation that have been recognized by courts and commentators. It could significantly prolong proceedings, result in repetition in the presentation of evidence and witness testimony to the extent proof of the non-statutory and statutory aggravators overlap, and delay relief for the victims. *Bowers*, 2023 WL 1108392 at * 5; *see also*, *United States v. Bolden*, 545 F.3d 609, 619 (8th Cir. 2008) (finding motions to trifurcate should not be “routinely granted” because trifurcation “further extends and complicates what is already a long and complicated proceeding” and concerns over jury confusion can be remedied by clear instructions.)

In addition, trifurcation creates a process where the mitigating evidence is left to the end, after the jury has heard prolonged inculpatory evidence and may have already made up its mind. In other words, a jury may be less receptive to mitigating factors if it is left to the end. *See*, Adam Trahan and Daniel Stewart, *Examining the Utility of Frontloading Mitigation in Capital Cases When Faced with Overwhelming Evidence of Guilt*, 51 No. 2 Crim. Law Bulletin ART 4

death, the trial would proceed to the selection stage and the general rule allowing hearsay at sentencing would apply.”); *United States v. Umana*, 750 F.3d 320 (4th Cir. 2014) (“[T]he Confrontation Clause does not preclude the introduction of hearsay statements during the sentence selection phase of capital sentencing.”); *United States v. Fell*, 531 F.3d 197, 239 (2d Cir. 2008) (trifurcated capital trials allow the district court “to delineate clearly between the applications of the Confrontation Clause in the eligibility and selection phases”); *State v. Carr*, 502 P.3d 546, 594–95 (Kan. 2022), *cert. denied*, 143 S. Ct. 581, 214 L. Ed. 2d 344 (2023) (holding Confrontation Clause applies to eligibility evidence during penalty phase, but not to selection evidence.)

(Spring 2015).³⁵

3. Trifurcation is not warranted.

Defendant's arguments in favor of trifurcation into a guilt phase, eligibility phase and selection phase largely echo those noted above. Defendant contends that operating under a bifurcated model in his case would cause substantial prejudice, confuse the jury and violate his constitutional rights, including his right to confrontation, his right to due process, his right to a fair trial and his protection against cruel and unusual punishment. He anticipates there will be substantial evidence of non-statutory aggravation—including emotionally-charged victim impact evidence and evidence of his own past and character—none of which is relevant to the four statutory aggravators charged by the State. He argues he will be unfairly prejudiced by the free-for-all presentation of statutory and non-statutory aggravating evidence at once and there is good chance the jury will be unable to segregate the evidence properly, despite careful instructions. Moreover, he contends that because the eligibility decision is, under *Ring*, akin to the guilt phase, it should be subjected to the Rules of Evidence just like any other enhancement evidence permitted under Idaho law.³⁶

The Court, however, does not believe trifurcation will be as beneficial as Defendant hopes. Since it was enacted, I.C. § 19-2515 has contemplated a bifurcated process in capital cases. Thus, trifurcation—even if permissible under Idaho statutory law—is an exception, not the rule. The Court does not find the exception is warranted here.

First, as Defendant acknowledges, the Idaho Supreme Court has long held that the Rules of Evidence do not apply at capital sentencing proceedings. *Dunlap*, 155 Idaho at 375, 378, 313 P.3d at 31, 34. “Instead, the admission of evidence in capital sentencing proceedings is governed by Idaho Code § 19-2515(6), which provides that ‘the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation.’” *Id.*

The Court has also long held that the Confrontation Clause is inapplicable to such proceedings. In *Sivak v. State*, the Court held that the United States Constitution “does not

³⁵ In fact, in a capital post-conviction case pending in Kootenai County, the defendant is asserting a claim for ineffective assistance of trial counsel based on counsel's request for a trifurcated proceeding, which the trial court adopted. *Renfro v. State*, Kootenai Co. Case No. CV-17-9393 (Amended Petition For Post-Conviction Relief (Feb. 19, 2019)). Post-conviction counsel asserts that trifurcation did more harm than good because it permitted the front-loading of negative aggravating evidence without a corresponding emphasis on mitigating evidence. *Id.*

³⁶ See, e.g., I.C. § 19-2514 (persistent violator enhancement); I.C. § 19-2520 (firearm enhancement).

require that a capital defendant be afforded the opportunity to confront and cross-examine live witnesses in his sentencing proceedings.” 112 Idaho 197, 216, 731 P.2d 192, 211 (1986). This holding was “based, in part, on the belief that modern penological policies, which favor sentencing based on the maximum amount of information about the defendant, would be thwarted by restrictive procedural and evidentiary rules.” *Id.* at 215, 731 P.2d at 210 (citing *Williams v. New York*, 337 U.S. 241, 246–50 (1949)).

This Court is bound by these holdings. Moreover, *Ring* does not warrant revisiting the law in this regard. As the Idaho Supreme Court observed in *Abdullah*, *Ring* did not elevate statutory aggravating circumstances into “elements” of the underlying murder; only the legislature has the power to so act. 158 Idaho at 458, 348 P.3d at 73 (declining to require the State, based on *Ring*, to allege the aggravating circumstances as elements in the indictment). Consequently, even if this Court were to trifurcate the proceedings, it could not apply the Rules of Evidence to the eligibility phase or subject it to the Confrontation Clause.

Without these evidentiary limits, there could undoubtedly be a significant amount of evidence presented in aggravation and mitigation. However, the Court is not concerned over the potential for juror confusion. Juries are presumed to follow their instructions, and the ICJIs governing death penalty proceedings are clear as to how the jury is to apply the evidence. Thus, the risk that the jury will consider improper evidence or apply the wrong standard in determining whether a statutory aggravator applies is negligible.

Moreover, any risk of jury confusion is outweighed by the very real concern that Defendant will be prejudiced by trifurcation because mitigating evidence will be left for the final phase. By way of example, one of the statutory aggravators asserted by the State is future dangerousness under I.C. § 19-2515(9)(i). The jury will be asked whether Defendant “by his conduct, whether such conduct was before, during or after the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.” *Id.* Under Defendant’s trifurcated suggestion, the State will be able to introduce evidence relevant to this aggravator at the eligibility phase, but Defendant will not be able to present mitigating evidence. Thus, the jury will be asked to determine whether Defendant poses a risk of future danger based entirely on one-sided evidence.

Similarly, the Court finds persuasive the legal commentators who have advocated for more front-loaded mitigating evidence in capital proceedings rather than leaving it until the end,

after the jurors have been exposed to nothing but inculpatory evidence. This could potentially dilute the impact mitigating evidence may have, thus leading to a post-conviction claim similar to that pending in *Renfro*.

The most compelling reason to trifurcate the proceedings is to avoid the risk that the victim impact evidence may color the jury's perception of the mitigating evidence. There is no question that the victim impact evidence will be heart-wrenching and difficult to hear. However, victims have rights as well, including the right to be heard at sentencing. I.C. § 19-5306(1)(c). Further, there are several precautions to guard against undue prejudice. First, in homicides, only immediate family members may offer victim impact statements. *State v. Payne*, 146 Idaho 548, 575, 199 P.3d 123, 150 (2008). Further, the family members are statutorily limited in what they can say. I.C. § 19-2515(5)(a). They are not permitted to offer characterizations or opinions about the crime, about the defendant or about the appropriate sentence. *Id.*; *Payne*, 146 Idaho at 573 199 P.3d at 148. They are merely permitted to present "a quick glimpse of the life [the defendant] chose to extinguish." *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 830 (1991) (O'Connor, J., concurring)).

Additionally, references to or arguments using religious authority as the basis for punishment are improper and have been condemned by virtually every court to consider their use. *Id.* (citing *Sandoval v. Calderon*, 241 F.3d 765, 776-77 (9th Cir.2000)). The Idaho Supreme Court opined that "[t]his is so because the death penalty may only be imposed when the fact finder carefully focuses on the specific statutory factors and because reference to religious authority undermines the fact finder's role and sense of responsibility in sentencing a defendant to death." *Id.*

Finally, this Court can further impose restrictions on victim impact evidence to ensure it is not unduly prejudicial. The Court may require that victim impact statements be presented in writing prior to the sentencing hearing so they can be reviewed to ensure they stay within the permitted parameters. The Court may also instruct the victims to read from their statements and avoid emotional outbursts when speaking. Together, these precautions will help avoid the potential that victim impact evidence will taint a jury's eligibility decision in a way that leads to undue prejudice. Consequently, the Court does not find that trifurcation is necessary to protect Defendant's rights.

F. Motion to Strike Death Penalty on Grounds of State Speedy Trial Preventing Effective Assistance of Counsel.

In seeking to strike the death penalty, Defendant's multi-faceted argument begins with the premise that this Court should overrule decades of Idaho appellate precedent and conclude that the right to a speedy trial guaranteed by Article I, Section 13 of the Idaho Constitution should no longer be governed by the *Barker* factors but should be subject to a six-month speedy trial clock. He then asserts that, as a capital defendant, he cannot obtain effective assistance of counsel within a six-month period. Thus, at the time he waived his statutory and constitutional speedy trial rights, he was presented with an unconstitutional Hobson's choice between his constitutional right to a speedy trial and his constitutional right to effective assistance of counsel. He argues this choice rendered his waiver involuntary and deprived him of his constitutional speedy trial rights. The only remedy, he contends, is striking the death penalty.

The State points out that well-settled case law—which is binding on this Court—provides otherwise. Further, the State notes that Defendant waived his speedy trial rights, which is dispositive of any contention that such rights have been infringed. The State is correct.

1. Speedy Trial Rights

A criminal defendant in Idaho enjoys a constitutional right to a speedy trial under both the U.S. Constitution and the Idaho Constitution. U.S. Const. Amend. 6 (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]”); Idaho Const. art. 1, § 13 (“In all criminal prosecutions, the party accused shall have the right to a speedy and public trial[.]”). While the text is similar, these rights are not identical, with the “key difference” being when the speedy trial clock begins.³⁷ However, for the past fifty years, the Idaho Supreme Court has analyzed a defendant's rights under both constitutional provisions using the four-factor balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). *State v. Lindsay*, 96 Idaho 474, 531 P.2d 236 (1975) (adopting *Barker*); *State v. Lankford*, 172 Idaho 548, 535 P.3d 172, 184 (2023) (reaffirming *Barker*). Those factors are: “(1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted the right to a speedy trial; and (4) the prejudice to the defendant.” *Id.* (citing *Clark*, 135 Idaho at 258, 16 P.3d at 934).

³⁷ The clock begins for the federal right at the time of arrest and for the state right at the earlier of the time of arrest or the time charges are filed. *Lankford*, 172 Idaho at 560, 535 P.3d at 184 (citing *State v. Young*, 136 Idaho 113, 117, 29 P.3d 949, 953 (2001)).

In addition, I.C. § 19-3501 affords criminal defendants a statutory speedy trial right that provides “additional protection” beyond what it required by the U.S. and Idaho Constitutions. *Clark*, 135 Idaho at 258, 16 P.3d at 934.³⁸ That statute mandates, in relevant part, that unless “good cause” is shown, an indictment or prosecution must be dismissed “if a defendant, whose trial has not been postponed upon his application, is not brought to trial within six (6) months from the date that the defendant was arraigned before the court in which the indictment is found.” I.C. § 19-3501(3).

2. This Court is bound by *Lindsay* to apply the *Barker* factors, which avoid a “Hobson’s choice.”

Defendant contends that in adopting *Barker* to analyze speedy trial violations under the Idaho Constitution, the Idaho Supreme Court in *Lindsay* misconstrued the framers’ intent to define the speedy trial guaranty by reference to the corollary statutory right provided by what is now I.C. § 19-3501. This Court, however, is bound by *Lindsay*. *Guzman*, 122 Idaho at 987, 842 P.2d at 666. Consequently, Defendant’s state constitutional speedy trial right is governed by the *Barker* factors.

Moreover, the application of the *Barker* factors obviates any argument that Defendant was faced with a Hobson’s choice between his constitutional right to a speedy trial and constitutional right to effective assistance of counsel, thus rendering his waiver of speedy trial rights involuntary. The Idaho Supreme Court has found that a constitutionally permissible reason to delay trial is to allow defense counsel an adequate time to prepare. *Lankford*, 172 Idaho at 563, 535 P.3d at 187 (holding delay to allow prosecutors and defense counsel to prepare for trial was reasonably necessary and, therefore, not a violation of defendant’s constitutional speedy trial rights). *See also, United States v. Ashimi*, 932 F.2d 643, 648 (7th Cir. 1991) (rejecting the argument that the constitutional rights to a speedy trial and effective assistance of counsel are mutually exclusive; a delay in trial to permit adequate pretrial investigation merely results in a

³⁸ In *Clark*, the Idaho Supreme Court considered whether the *Barker* test applied to analyze “good cause” required by I.C. § 19-3501. 135 Idaho at 258-60; 16 P.3d at 934-36. After reviewing other jurisdictions’ various approaches, it held that “good cause” means “a substantial reason that rises to the level of a legal excuse for the delay.” *Id.* In determining whether the reason for delay constitutes good cause, the Court held that the *Barker* factors may be considered “only insofar as they bear on the sufficiency of the reason itself.” *Id.* (quoting *State v. Petersen* 288 N.W.2d 332, 335 (Iowa 1980)).

less speedy trial, not necessarily a constitutional violation); *Stuard v. Stewart*, 401 F.3d 1064, 1068-69 (9th Cir. 2005) (same).

Further, while Defendant's election to waive speedy trial rights resulted in him missing out on the statutory benefit of a six-month deadline under I.C. 19-3501, there is nothing impermissible when a defendant is forced to choose between a statutory right and a constitutional right. *Stuard*, 401 F.3d at 1069 ("Simmons is not violated when a defendant is forced to choose between a statutory right and a constitutional right."); *Ashimi*, 932 F.2d at 648 (same). Consequently, Defendant's assertion that his waiver was not voluntary because he was forced to choose between two constitutional rights falls flat. As it stands, Defendant has validly waived all speedy trial rights, which is dispositive of any claim that he has been deprived thereof. *State v. Youngblood*, 117 Idaho 160, 162, 786 P.2d 551, 553 (1990).

3. Defendant has not presented a valid basis for second-guessing *Lindsay*.

Even if this Court were not bound by *Lindsay*, Defendant's argument that it was wrongly decided is unavailing. Defendant's argument begins with the premise that "constitutional provisions must be construed in light of the law prior to their adoption." *State v. Green*, 158 Idaho 884, 887-88, 354 P.3d 446, 449-50 (2015). Defendant points out that at the time of ratification of Idaho's Constitution in 1889, Idaho's speedy trial statute provided that, absent good cause showing, an indictment must be dismissed if a defendant, "whose trial has not been postponed upon his application, is not brought to trial at the next term of the Court in which the indictment is triable, after it is found." R.S. 1887, § 8212 (1864).³⁹

At that time, the power to fix the time and place, i.e., term, for holding court was vested in the "judges of the supreme court." *United States v. Kuntze*, 2 Idaho 446, 21 P. 407, 408 (1889); *People v. Heed*, 1 Idaho 402, 406-06 (1871). However, Article V, Section 11 of the Idaho Constitution reined in this discretion to set terms somewhat by prescribing that district court be held "at least twice in each year[.]" It further provided: "This section shall not be construed to prevent the holding of special terms under such regulations as may be provided by law." Idaho Const. art. V, § 11. *See also*, I.C.A. § 1-706 (1932) (requiring at least two terms each year for the district court in each county to be fixed by court order). Thus, the setting of court

³⁹ With regard to the word "term," the Act provided: "Each term must be held until the business is disposed of, or until a day fixed for the commencement of some other term in the district court." R.S. 1887, § 3831.

terms—by which statutory speedy trial deadlines were measured—became a shared responsibility between the judiciary and the legislature.

Up until *Lindsay* was decided in 1975, the Idaho Supreme Court construed the speedy trial right guaranteed by Article I, Section 13 with reference to I.C. § 19-3501. In *Schrom v. Cramer*, the Court noted:

Under constitutional provisions providing for a speedy trial, the authorities consistently hold that the term 'speedy trial', being of indeterminate meaning, is subject to some construction by the legislature, and that statutes similar to our Section 19-3501, I.C., are to be read in connection with the constitutional provision and are to be given effect as a legislative definition of what constitutes a speedy trial under the constitution.

...

Our statute was a part of the Criminal Practice Act of 1864. It was in force and effect at the time of the adoption of our constitution and has been in force at all times since. The statute and the constitutional provision as read and construed together delimit the rights of an accused to a dismissal of an information for undue delay of trial.

76 Idaho 1, 4-5, 275 P.2d 979, 981 (1954).

However, in *Lindsay*, Defendant contends the Idaho Supreme Court erroneously veered away from this approach by adopting the federal *Barker* test rather than continuing to rely on I.C. § 19-3501 in analyzing whether a defendant's state constitutional speedy trial right was violated. As previously discussed, a defendant's speedy trial right under I.C. § 19-3501 was dependent on "terms" set through a joint effort between the legislature and the judiciary. By adopting *Barker* rather than abide by I.C. § 19-3501, Defendant contends the Idaho Supreme Court effectively made the judiciary the sole voice in determining whether a defendant's state constitutional speedy trial rights were violated. Had the Court not made this error, the state constitutional speedy trial right would continue to be defined by I.C. § 19-3501, which was amended by the legislature in 1980 to require a defendant to be brought to trial within six months.⁴⁰

⁴⁰Effective March 31, 1975, the Idaho legislature repealed I.C. § 1-706 which required at least two court terms per year in each county. This repeal was in response to this Court's promulgation of I.R.C.P. 77(a), effective January 1, 1975, which abolished terms of court. This effectively precluded determining the statutory right to a speedy trial by reference to "terms of court." *State v. Carter*, 103 Idaho 917, 920, 655 P.2d 434, 437 (1981). Thus, the Idaho legislature amended I.C. § 19-3501 to provide a fixed period of six months within which they be brought to trial. 1980 Idaho Sess.Laws, ch. 102, § 1.

While creative, there are two flaws in Defendant's argument. First, insofar as he relies on *Green* for the proposition that "constitutional provisions must be construed in light of the law prior to their adoption[.]" *Green* has been abrogated on this point. *State v. Clarke*, 165 Idaho 393, 397, 446 P.3d 451, 455 (2019). In *Clarke*, the Idaho Supreme Court observed the problem created by this approach, noting:

Green should stand for the principle that preexisting statutes and the common law may be used to help inform our interpretation of the Idaho Constitution, but they are not the embodiment of, nor are they incorporated within, the Constitution. To hold otherwise would elevate statutes and the common law that predate the Constitution's adoption to constitutional status.

Id.

Thus, while the version of I.C. § 19-3501 in existence at the time Art. 1, § 13 of the Idaho Constitution was ratified certainly colors the framers' intent, it cannot control the analysis.

The second flaw is that the six-month speedy deadline now imposed by I.C. § 19-3501 was not in effect when Art. 1, § 13 was ratified. Rather, the statute measured the speedy deadline by court terms, which the legislature abolished long ago. Therefore, even if Defendant were correct that the speedy trial right guaranteed by the Idaho Constitution is to be strictly interpreted by reference to I.C. § 19-3501 as it existed in 1889, it could not be interpreted as imposing a six-month time limit.

Moreover, even though the Idaho Supreme Court pre-*Lindsay* acknowledged the importance of I.C. § 19-3501 in defining what was meant by Idaho's constitutional guarantee to a speedy trial, it also recognized that whether a defendant was deprived of his or her constitutional speedy trial rights cannot simply be measured by time. In *Ellenwood v. Cramer*, the Idaho Supreme Court observed:

The right of a defendant to a speedy trial was recognized at common law and this right has been embodied in our Constitution. Idaho Statutes, Sec. 19-3501, I.C., has defined in substance what is meant by a speedy trial, that is, one accused of crime should be tried not later than the next term of court subsequent to being held to answer, unless the trial is postponed upon defendant's application, or with his consent, or other lawful, valid reason.

This Court, in *In re Rash*, 64 Idaho 521, 134 P.2d 420, 422, defined 'speedy trial' as 'as soon as reasonably possible'.

One accused of crime is entitled to be tried under fixed standards and rules, free from capricious and oppressive unnecessary delays and with reasonable diligence. The term speedy trial is relative, and must be considered and construed and applied depending upon all surrounding facts and circumstances. No arbitrary, fixed standard applicable to all situations can be defined. Time must, in many cases, be allowed for preparation, assembling of witnesses, or other reasons, and all circumstances and conditions must be considered in determining whether or not one accused of crime was accorded a speedy trial within the meaning of the constitutional provision.

Ellenwood v. Cramer, 75 Idaho 338, 343, 272 P.2d 702, 705 (1954).

Indeed, in *Lindsay*, the Court recognized that the adoption of the *Barker* factors comported with its own historic approach of “refer[ing] to considerations in addition to the mere passage of time” in determining whether a defendant has been deprived of speedy trial rights. *Lindsay*, 96 Idaho at 475, 531 P.2d at 237. This approach is consistent with how I.C. § 19-3501 has—since its territorial days—been defined, i.e., by allowing trial to be prolonged beyond the next court term upon a showing of “good cause.”⁴¹ Consequently, the Court does not find Defendant’s argument for calling *Lindsay* into question supportable.

G. Motion to Strike State’s Notice on Grounds of International Law

Defendant next contends that Idaho’s death penalty scheme violates the International Covenant on Civil and Political Rights (“ICCPR”), ratified by the United States in 1992.⁴² The ICCPR prohibits, *inter alia*, “cruel, inhuman or degrading treatment or punishment” and the arbitrary deprivation of life. ICCPR, Pt. III, arts. 6, 7. He asserts Idaho’s failure to comply with the ICCPR violates his state and federal constitutional due process rights. The State responds that Idaho’s death penalty does not run afoul of the treaty. The Court agrees.

1. The ICCPR provides no additional protection than the U.S. Constitution.

It is well-recognized that “[a]n international agreement creates obligations binding between the parties under international law.” Restatement (Third) of Foreign Relations Law §

⁴¹ Rule 28, I.C.R., sets forth six factors that a court may consider in determining whether there is good cause for failure to bring a defendant to trial within the statutory time frame. These factors are very similar to those set forth in *Barker*.

⁴² At Defendant’s request, the Court takes judicial notice under IRE 201(c)(2) of the following documents appended to Defendant’s motion: 1) the United Nations General Assembly Resolution 217 A (111), 10 December 1948 (Exh. A); 2) the ICCPR (Exh. B); 3) the International Covenant on Economic, Social and Cultural Rights (Exh. C), and; 4) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Exh. D).

102, cmt. f. At issue here is the ICCPR, which prohibits “cruel, inhuman or degrading treatment or punishment” and the arbitrary deprivation of life. ICCPR, Pt. III, arts. 6, 7. Defendant contends that the breadth of Idaho’s capital selection process, the excessive delays between sentencing and execution, the conditions of confinement and the implementation of the death penalty violate these provisions.

However, these provisions provide no greater protection than what is already provided under the United States Constitution. While the United States ratified the ICCPR, it agreed to abide by the foregoing prohibitions only to the extent that the Fifth, Eighth and Fourteenth Amendments of the United States Constitution ban cruel and unusual punishment. *See* 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992) (“That the United States considers itself bound by article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”). The ICCPR does not prohibit the death penalty and, in fact, sanctions its imposition for “the most serious crimes” in countries that allow for it, to wit:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

ICCPR, art. 6, ¶ 2.

Further, when the United States ratified the ICCPR in 1992, it specifically reserved the right “subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.” *See* 138 Cong. Rec. S4781-01 (*supra*).

Thus, the ICCPR, as adopted by the United States, does not impose any additional limits on the application of the death penalty in the United States than what it already constrained by the United States Constitution. *See, White v. Johnson*, 79 F.3d 432, 440 & n. 2 (5th Cir.) (noting that even if it were to consider the merits of the defendant’s ICCPR claim, it would do so under

the Senate's reservation that it only prohibits cruel and unusual conduct under the Eighth Amendment.).

2. The ICCPR does not create enforceable rights, nor can it be used to "interpret" constitutional protections.

Even assuming the ICCPR afforded broader rights than what is constitutionally guaranteed, it could not serve as an independent basis for Defendant's claim. Treaties only affect United States law if they are self-executing or otherwise given effect by congressional legislation. *Whitney v. Robertson*, 124 U.S. 190, 194] (1888). Congress specifically declared that Articles 1 through 24 of the ICCRP "are not self-executing." See 138 Cong. Rec. S4781-01 (*supra*). Further, it has been held by virtually every court that has addressed the issue that the ICCPR is not self-executing, has not been given effect by congressional legislation and creates no enforceable individual rights. *State v. Odom*, 137 S.W.3d 572, 599 (Tenn. 2004) (collecting cases).⁴³ Defendant has not cited to a single case to the contrary.

Recognizing this hurdle, Defendant urges this Court to overlook the ICCPR's non-self-executability and instead construe the Eighth Amendment in accordance with the ICCPR pursuant to the "Charming Betsy" canon of interpretation. This canon encourages judges to select an interpretation of an ambiguous statute that accords with U.S. international obligations, including those expressed in non-self-executing treaties. Rebecca Crootof, *Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 Yale L.J. 1784 (2011). As Defendant notes, this canon has not been used to interpret constitutional provisions, but he argues it should be done here lest the Court place "our country in breach of a treaty." Mtn., p. 7.

This argument defies logic. Defendant is essentially asking the Court to construe the Eighth Amendment as incorporating the ICCPR as a minimum standard based on an obscure canon of statutory interpretation. To the extent the Charming Betsy canon even applies to

⁴³ See also, *Booker v. McNeil*, , 2010 WL 3942866, at *40 (N.D. Fla. Oct. 5, 2010), *aff'd sub nom. Booker v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1121 (11th Cir. 2012) (ICCPR does not create judicially-enforceable individual rights and does not entitle defendant from relief from death penalty); *Halvorsen v. Com.*, 258 S.W.3d 1, 12 (Ky. 2007) (rejecting ICCPR claim in context of challenge to execution delay); *State v. Davis*, 9 N.E.3d 1031, 1051 (Ohio 2014) ("[T]he ICCPR provides no basis, independent of the Eighth Amendment, for holding that delay between execution and sentence deprives the state of the right to execute the death sentence[.]"); *Jenkins v. Broomfield*, 2023 WL 8441491, at *40 (C.D. Cal. Oct. 17, 2023) (concluding ICCPR claim "lacks support in clearly established federal law."); *State v. Horton*, 2016 WL 1742989, at *6 (Ariz. Ct. App. May 3, 2016) (finding ICCPR is not binding on any court in the United States); *Rouse v. Walden*, 420 P.3d 992 (Haw. App. 2018) (same).

constitutional provisions, a necessary prerequisite to its application is a finding of ambiguity. Crootof, at 1799 (“Once a court has determined that a non-self-executing treaty codifies customary international law, it may use the treaty, in conjunction with the Charming Betsy canon, when interpreting an ambiguous statute.”). Defendant has advanced no argument that the Eighth Amendment’s “cruel and unusual punishment” language is ambiguous.

In sum, the ICCRP provides no basis for relief. In accordance with the weight of authority, the Court finds it is not self-executing, has not been given effect by Congress and provides Defendant with no enforceable right. Moreover, Defendant has provided no basis by which the ICCRP should be used as a tool to interpret the meaning of the Eighth Amendment. Consequently, the motion is denied.

H. Motion to Strike State’s Notice on Grounds of Contemporary Standards of Decency

Relying on various data points and information from several fronts, Defendant contends that the imposition of the death penalty no longer comports with the evolving standards of society and, therefore, the State’s effort to impose the death penalty against him violates his constitutional right to be free from cruel and unusual punishment under both the state and federal constitutions. U.S. Const. amend. VIII; Idaho Const. art. I, §§ 6, 13.

In response, the State points out that only nine years ago, the Idaho Supreme Court rejected this argument in *Abdullah*,⁴⁴ which it reaffirmed four years ago in the case of *Hairston v. State*⁴⁵ with regard to defendants under the age of twenty-one. The State contends Defendant has not established any significant change since those cases were decided that would warrant a finding that the death penalty is no longer constitutional. The Court agrees.

1. Evolving Standards of Decency – Legal Standards

The Eighth Amendment, applied to the States through the Due Process Clause of the Fourteenth Amendment, forbids the infliction of cruel and unusual punishment. U.S. Const. amend. VIII. Long ago, the U.S. Supreme Court recognized that the phrase “cruel and unusual” is to be defined by “the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality).

⁴⁴158 Idaho at 455-56, 348 P.3d at 70-71.

⁴⁵167 Idaho 462, 468, 472 P.3d 44, 50 (2020) (*Hairston II*).

Ascertaining the standards of decency require consideration of “objective indicia of society’s standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against the sentencing practice at issue.” *Graham v. Florida*, 560 U.S. 48, 61 (2010) (quotes and citation omitted). Then, guided by “the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history meaning, and purpose, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.” *Id.* (quotes and citations omitted).

2. The Death Penalty Remains Consistent with Contemporary Standards of Decency.

The Idaho Supreme Court has held time and again that Idaho’s death penalty statute does not violate the Eighth Amendment. *Abdullah*, 158 Idaho at 455-56, 348 P.3d at 70-71. In fact, in *Abdullah*, the Court considered and rejected the argument that the death penalty is inconsistent with society’s evolving standards of decency. The Court observed that, at the time of the 2015 decision, thirty-two states continued to allow for the death penalty as an option and, therefore, it was difficult to view the practice as objectively intolerable. *Id.* It held that, “absent some legislative or executive action,” it could not conclude Idaho’s death penalty statute was unconstitutional based on evolving standards of decency and public opinion. *Id.*

The Court revisited the issue five years later in *Hairston II*, when the petitioner argued the death penalty for offenders under the age of twenty-one at the time of the offense was inconsistent with “emerging national, international, and state trends” against such punishment. 167 Idaho at 467, 472 P.3d at 49. In support, the petitioner presented, *inter alia*, national statistics regarding the abolition of and moratoria against the death penalty across the nation, evidence of international developments against execution, and evidence of emerging medical and scientific consensus that defendants under twenty-one are just as deserving as constitutional protection against the death penalty than those under eighteen. *Id.*

While the Court acknowledged the trends, it reaffirmed that it “subscribes to the views of legislative bodies as the basis for determining a national consensus[.]” *Id.* Absent evidence of legislative or executive action or of consensus among those states that continue to exercise the death penalty that it is unconstitutional for offenders under twenty-one years old, the Court was unwilling to depart from United States Supreme Court precedent setting eighteen years old as the

line at which death penalty eligibility rests. *Id.* at 468, 472 P.3d at 50 (citing *Roper v. Simmons*, 543 U.S. 551, 574 (2005)).

In arguing the death penalty no longer comports with the contemporary standards of decency, Defendant follows the same tact as the petitioner in *Hairston II*, citing to: 1) the decline of executions carried out nationwide over the past ten years; 2) the increasing number of state abolishing the death penalty or attempting to do so; 3) the decline in public support for the death penalty, and; 4) anti-death penalty sentiment expressed in the international community, by religious organizations and by the medical and pharmaceutical field.

However, the Idaho Supreme Court has been clear—to determine whether the death penalty remains consistent with the evolving standards of decency, the focus must be on legislative and executive action. Of this, Defendant has presented very little. It is true that since *Abdullah* was issued in 2015, five additional states no longer have a viable death penalty statute - Delaware (2016), New Hampshire (2019), Colorado (2020), Virginia (2021), and Washington (2023).⁴⁶ This still leaves twenty-seven states that still currently have the death penalty.⁴⁷ As observed in *Abdullah*, it is difficult to conclude the death penalty contravenes evolving standards of decency when a majority of the states of this nation continues to provide for it as a punishment.⁴⁸

Moreover, while Defendant points to ten states that currently have pending legislation to abolish the death penalty, legislation that is merely pending reveals very little about evolving standards of decency. “[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” *Atkins v. Virginia*, 536 U.S. 304,

⁴⁶Death Penalty Information Center, <https://deathpenaltyinfo.org/curriculum/high-school/state-by-state-data/state-summaries> (last visited Nov. 13, 2024).

⁴⁷ Although three of those twenty-seven states—California, Oregon and Pennsylvania—have gubernatorial moratoria in place on executions, it still leaves approximately half of the states with enforceable death penalty regimes.

⁴⁸ Moreover, even though there is a nationwide decrease in the number of executions performed each year, this does not necessarily corollate with evolving standards of decency. There can be many reasons executions are delayed, including changes in the law or unavailability of drugs, both of which delayed executions in Idaho. See, e.g., *Hairston v. Ramirez*, 746 F. App’x 633, 634 (9th Cir. 2018) (remanding to district court to consider whether counsel was ineffective in presenting mitigation evidence in light of U.S. Supreme Court case decided while Hairston’s appeal was pending); *Pizzuto v. Tewalt*, 2023 WL 4901992, at *2 (D. Idaho Aug. 1, 2023) (discussing how the unavailability of chemicals to perform lethal injection caused the repeated rescheduling of Pizzuto’s execution date.).

312 (2002) (emphasis added). More illuminating is that fact that voters in both California (the most populous state) and Nebraska have stated by way of referendum that the death penalty remains appropriate.⁴⁹

In sum, Defendant has demonstrated no significant legislative or executive action taken since *Abdullah* and *Hairston II* with respect to the death penalty that would signify a consequential change to societal standards of decency. Nor has Defendant cited to any court case in the past few years that the death penalty should be abolished due to evolving standards of decency. Consequently, there is no basis to depart from settled law upholding Idaho's death penalty statute as constitutional.

I. Motion to Strike State's Notice on Grounds of Means of Execution.

Defendant seeks to strike the State's Notice on grounds that Idaho's statutory methods of execution violate the Eighth and Fourteenth Amendments to the U.S. Constitution and its Idaho corollaries. Currently, there are two methods of execution are prescribed by Idaho statute: lethal injection and firing squad. I.C. § 19-2716. Defendant asserts that Idaho currently does not have the ability to kill a person by lethal injection⁵⁰ and the firing squad is not only currently unavailable,⁵¹ it is cruel and unusual. To this end, he provides the affidavit of Barbara Wolf, M.D. opining as to the conscious pain and suffering an individual executed by firing squad will suffer.⁵² Defendant further argues that it is unconstitutional to allow him to sit on death row without knowing how he will be executed.

⁴⁹ *Id.* at <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nebraska>; <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/california> (last visiting Nov. 13, 2024).

⁵⁰ Defendant provides no basis for his assertion that death by lethal injection is not available in Idaho. In February of 2024, Idaho attempted to execute Thomas Creech by lethal injection, yet was unable to do so due to the inability to establish reliable intravenous access, not because the drugs were unavailable. *Creech v. State*, 2024 WL 4678228, at *7 (Idaho Nov. 5, 2024). In fact, Creech was scheduled for a second attempt of execution by lethal injection on November 13, 2024, but it was suspended due to a stay imposed by Idaho's federal district court. Therefore, at the current time, it appears that death by lethal injection is an available means of execution in Idaho. Moreover, even if it were not, any anxiety Defendant may experience from not knowing how he is going to be executed does not implicate the Eighth Amendment. *Id.* at *7 (the psychological strain, the subsequent nightmares and trauma Creech experienced preparing for the failed execution and in anticipation of a second execution attempt is not an Eighth Amendment violation).

⁵¹ The facility for the firing squad has not yet been built.

⁵² The State objected to live testimony by Dr. Wolf on grounds that, because the issue is not ripe, her opinions would not aid the trier of fact in determining a fact of consequence, IRE 702. The Court orally granted the objection, finding Dr. Wolf's affidavit to be a sufficient proffer for purposes of the motion.

The State responds that Defendant's motion must be denied as it is not ripe, it is foreclosed by United States Supreme Court jurisprudence, and it is facially insufficient because he has failed to identify an alternative method of execution. The Court agrees.

1. Defendant's motion is not ripe.

To be justiciable, an issue must be ripe. "Ripeness is that part of justiciability that 'asks whether there is any need for court action at the present time.'" *A.C. & C.E. Invs., Inc. v. Eagle Creek Irrigation Co.*, 173 Idaho 178, 540 P.3d 349, 358 (2023) (quoting *Davidson v. Wright*, 143 Idaho 616, 620, 151 P.3d 812, 816 (2006) (internal citations omitted)). "[A] litigant ... must demonstrate that an actual controversy exists and that the requested relief will provide actual relief, *not merely potential relief*." *Id.* (internal quotes omitted; emphasis in original).

There is no hard and fast rule as to when a method of execution claim becomes ripe. The Ninth Circuit holds that a challenge to the method of execution becomes ripe "when the method is chosen." *Pizzuto v. Tewalt*, 997 F.3d 893, 902 (9th Cir. 2021). Other courts have set other thresholds. *See, Gallo v. State*, 239 S.W.3d 757, 780 (Tex. Crim.App. 2007) (challenge to lethal injection not ripe on direct appeal since there was no execution date and current method of execution may not exist in the future); *Rigterink v. State*, 66 So.3d 866, 897-98 (Fla. 2011) (method of execution claim becomes ripe when the death warrant is signed); *State v. Washington*, 330 P.3d 596, 662 (Or. 2014) (when all direct and collateral review proceedings have concluded and death warrant has issued); *State v. Johnson*, 244 S.W.3d 144, 165 (Mo. 2008) (after the setting of an execution date); *Harris v. Johnson*, 376 F.3d 414, 418 (5th Cir. 2004) (when execution by lethal injection was an event "reasonably likely to occur in the future").

Notably, in all of these cases, the defendants were already on death row. Defendant has presented no case where a capital defendant who has not yet even been found guilty of murder can challenge the method of execution. Instead, he claims it should be decided now to avoid his own "fate of ever-increasing fear and distress." However, this runs counter to the ripeness doctrine, which requires that an actual, not potential, controversy. The method of execution that is currently statutorily authorized in Idaho—lethal injection and, if unavailable, firing squad—may change in the future. Assuming Defendant is convicted, and the death penalty is imposed, it would likely be at least a decade before he is executed. To decide now as to the constitutionality

of any given method would amount to an advisory opinion. Avoidance of Defendant's distress is not a basis to contravene well-settled rules of justiciability. Consequently, the motion fails.

2. Lethal injection and firing squad have been found constitutional by the U.S. Supreme Court.

Even if Defendant's motion were ripe, it has been foreclosed by prior United States Supreme Court precedent finding both lethal injection and the firing squad to be constitutional methods of execution. In *Wilkerson v. Utah*, the Court upheld a sentence of death by firing squad, finding it did not contravene the Eighth Amendment. 99 U.S. 130, 134–135 (1879). While Defendant disputes that *Wilkerson* actually found death by firing squad passed the constitutional muster, that is precisely what *Wilkerson* held, i.e., “Cruel and unusual punishments are forbidden by the Constitution, but ... the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment.” Moreover, the United States Supreme Court consistently cites to *Wilkerson* as “up[h]olding] a sentence to death by firing squad imposed by a territorial court, rejecting the argument that such a sentence constituted cruel and unusual punishment.” *Baze v. Rees*, 553 U.S. 35, 48 (2008).

Additionally, in *Baze*, the Court found the three-drug protocol states commonly used for lethal injection did not violate the Eighth Amendment. 553 U.S. 35, 207. Subsequently, in *Glossip v. Gross*, the Court approved of the use of midazolam in lethal injection executions and cited approvingly to a list of “courts across the country [that] have held that the use of pentobarbital in executions does not violate the Eighth Amendment. 576 U.S. 863, 871, 881 (2015).⁵³ Defendant has not advanced any basis to question these holdings.

3. Defendant has failed to identify an alternate method of execution.

Finally, a prerequisite to an Eighth Amendment challenge to a method of execution is demonstrating an available alternate method, which Defendant has not done. “The Eighth Amendment does not guarantee a prisoner a painless death[.]” *Bucklew v. Precythe*, 587 U.S.

⁵³ In fact, the U.S. Supreme Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment. *Baze*, 553 U.S. at 48. To prevail on such a claim, a person must show a ‘substantial risk of serious harm,’ an ‘objectively intolerable risk of harm’ that prevents prison officials from pleading that they were ‘subjectively blameless for purposes of the Eighth Amendment.’” *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n. 9 (1994)). “Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual. *Id.*”

119, 132-33 (2019). Rather, it forbids “long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) ‘superadd[ition]’ of ‘terror, pain, or disgrace.’” *Id.* (quoting *Baze*, 553 U.S. at 48 (THOMAS, J., concurring in judgment)). Moreover, a requirement of all Eighth Amendment method-of-execution claims is “identifying an available alternative.” *Id.* at 136. As the Court pointed out in *Bucklew*:

Distinguishing between constitutionally permissible and impermissible degrees of pain ... is a *necessarily* comparative exercise. To decide whether the State has cruelly ‘superadded’ pain to the punishment of death isn’t something that can be accomplished by examining the State’s proposed method in a vacuum, but only by ‘compar[ing]’ that method with a viable alternative. *Glossip*, 576 U.S., at —, 135 S.Ct., at 2737–2738; see *Baze*, 553 U.S. at 61, 128 S.Ct. 1520.

Id.

Defendant acknowledges he has not identified an alternative method, but contends his claim is distinct from the method-of-execution claims in *Bucklew*, *Baze* and *Glossip*. He argues Idaho’s chosen methods are unconstitutional because they threaten Idaho’s citizens with a means of execution that “cannot be carried out without causing undue pain.” Reply, p. 4. However, this is not a distinction that can be drawn. Undue pain is precisely the question that the foregoing method-of-execution cases address. To strike a method of execution as unduly painful under the Eighth Amendment, Defendant must come forward with an alternative method. He has not done so, thus foreclosing his claim.

IV. ORDER

Based on the foregoing analysis, Defendant’s Death Penalty Motions are hereby DENIED.

IT IS SO ORDERED.

DATED this 19th day of November, 2024.


Steven Hippler
Administrative District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of November, 2024, I caused a true and correct copy of the above and foregoing instrument to be mailed, postage prepaid, or hand-delivered, to:

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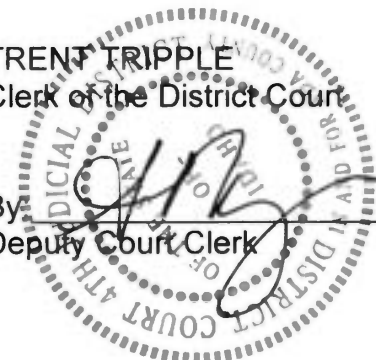
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By 
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ORDER

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO,

Plaintiff,

V.

BRYAN C. KOHBERGER,

Defendant.

CASE NUMBER CR01-24-31665

**DEFENDANT'S MOTION TO
PRECLUDE THE DEATH PENALTY
AND ADOPT OTHER NECESSARY
PROCEDURES DUE TO THE STATE'S
NUMEROUS DISCLOSURE
VIOLATIONS**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and respectfully requests that this Court remedy the State's failure to comply with its obligations under the state and federal constitutions, state law, the rules of the Supreme Court of Idaho, and the

**DEFENDANT'S MOTION TO PRECLUDE THE DEATH PENALTY
AND ADOPT OTHER NECESSARY PROCEDURES DUE TO THE
STATE'S NUMEROUS DISCLOSURE VIOLATIONS**

scheduling order of this Court. The State has failed to provide expert disclosures that are specific enough to understand what testimony and discovery it intends to rely on, depriving Mr. Kohberger of the ability to conduct independent review and investigation of the evidence it will rely on. Additionally, as counsel has previously stated, the discovery in this case has been provided in a manner that is as though the State took tens of thousands of documents, photos, and video clips and shook them up in a snow globe. While defense counsel has made herculean efforts to review the discovery provided, there is no possible way that all of the discovery—which is equivalent to 68,000 copies of the Encyclopedia Britannica¹—can be reviewed prior to the trial date. Indeed, a defense expert informed counsel it would require 3 additional years to review all of the discovery from the 67 electronic devices and digital data *alone*. By providing discovery in this manner, the State is failing to comply with their obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *Kyles v. Whitley*, 514 U.S. 419 (1995); *State v. Lankford*, No. 35617, 2016 Ida. LEXIS 212 (July 25, 2016), and *Grube v. State*, 134 Idaho 24 (2000). These cases require the prosecution to provide exculpatory and impeaching information to the defense, including any information that would tend to mitigate the punishment, even if it is not constitutionally material, in a manner and timeframe that it could be reasonably relied upon in preparing for trial. As discussed in this Motion, in cases with enormous amounts of electronic data, the prosecution does not meet that standard by providing discovery in a manner that effectively buries exculpatory, impeachment, and mitigation information.

Timely and meaningful disclosure is indispensable to the effectuation of the right to a fair trial, due process, effective assistance of counsel, and the right to be free from cruel and unusual punishment, pursuant to the 6th, 8th, and 14th Amendments to the United States Constitution and Sections 6 and 13 of Article I of the Constitution of the State of Idaho.

¹ A single Encyclopedia Britannica contains more than 30 volumes.

Mr. Kohberger requests that the Court exclude evidence and testimony that the State has not yet provided in adequate expert disclosures. An accompanying Motion in Limine has been filed regarding the specifics of this evidence; the details are not repeated herein but incorporated by reference. Exclusion of that evidence, however, is insufficient to cure the whole of the prejudice to Mr. Kohberger. Like other trial courts around the country, this Court must also (1) order the prosecution to provide a detailed index of documents it intends to rely on as well as an index of Brady information and (2) preclude the death penalty at the upcoming trial in order to meet the constitutional standards of due process and a fair trial. Mr. Kohberger acknowledges this motion requests preclusion of the death penalty as one of the remedies after this court’s ordered deadline. However, good cause exists for this filing. The State has produced an enormous amount of disorganized data, continues to provide discovery past their deadline, refuses to provide requested supplemental discovery² and has failed to abide by expert disclosure rule and order.

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² Mr. Kohberger has litigated the state’s identification of him through its IGG investigation. Multiple discovery requests, motions to compel have been heard. During his Motion to Suppress Mr. Kohberger learned new information relating to procedures and protocol, laboratory information about its work, and additional investigation that took place. He promptly requested the same through discovery. His request resulted in the State acknowledging it withheld information sought, and a refusal to provide it. The state further promised some discovery which has not yet arrived but overall said Mr. Kohberger was too late to get the information. Mr. Kohberger has filed a motion in limine to exclude IGG. Those arguments are incorporated but not repeated herein.

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RELEVANT FACTUAL BACKGROUND

Mr. Kohberger has consistently demanded that the prosecution comply with its obligations under the state and federal constitutions to provide exculpatory and impeaching information to the defense, as well as any information that would tend to mitigate the punishment. The defense has filed more than 20 supplemental requests for discovery, specifying evidence the State has failed to turn over.

The State has turned over more than 68 terabytes of data. That much data is the equivalent of 68,000 copies of the Encyclopedia Britannica. *See* Elizabeth Stafford, *Pretrial Discovery of*

Electronically Stored Information in Federal Criminal Cases, MICH. BAR J. 20, 22 (Mar. 2013) (explaining that 1-2 terabytes equal 1,000-2,000 copies of Encyclopedia Britannica); *see also United States v. Cotterman*, 709 F.3d 952, 964 (9th Cir. 2013) (“The average 400–gigabyte laptop hard drive can store over 200 million pages—the equivalent of five floors of a typical academic library.”). Put another way, “one gigabyte of text files will average over 677,000 text file pages and over 100,000 pages of email files.” *United States v. Salyer*, CR. S-10-0061 LKK (GGH), 5 n.3 (E.D. Cal. Aug. 2, 2010). One terabyte contains 1000 gigabytes. Thus, 68 terabytes of text files will average more than 46,000,000,000 text pages or nearly 7,000,000,000 pages of email files.

The discovery that has been provided includes more than 13,000 photographs, more than 15,000 video clips from businesses and more than 8,000 video clips from residences. It also includes more than 60+ digital devices and digital data and search warrant data, including cell phones and laptops from Mr. Kohberger, the victims, alternate suspects, and various other individuals who knew the victims. While the State has had access to many dozens or even hundreds of detectives and investigators from multiple law enforcement agencies including the FBI, in addition to the use of expensive AI and technological programs, to facilitate production and review of this massive amount of discovery, the defense team consists of three attorneys, a mitigation specialist, and three investigators. There is no way, even through the greatest of due diligence, that the defense can independently review all of this discovery.

In providing discovery, the State has not provided it in a searchable format, has not provided detailed logs and indexes that would facilitate the defense’s review of the evidence, and has not provided an index of *Brady* evidence or evidence that may be relevant to the defense.

Additionally, the Court set an expert disclosure deadline that passed more than one month ago. While the defense complied, the State provided vague disclosures that failed to identify opinions that experts would provide or detail the facts and evidence they would rely on for those

opinions. For example, the State's expert disclosure listed three alleged experts who would testify relating to the 67 electronic devices, digital data, and search warrant return data as provided in discovery; the scope of that evidence is so broad that a defense expert estimated it would take more than 3 years to review. The State did not identify any actual opinions it intends to elicit about these devices and failed to identify any portions of the data that would be presented or relied upon. Well after the disclosure deadline, the State turned over a report stating that examinations of the devices are ongoing, which only heightens the prejudice to Mr. Kohberger and further depletes his time to conduct any independent review or evaluation of the State's evidence. This is only one of many disclosures in which the State failed to identify what opinion the expert would testify to *and* failed to point to specific evidence or discovery that would be relied upon. Moreover, even after this Court told the State that its "job was not done" with its expert disclosures, the State produced a circular argument blaming the defense in its rebuttal disclosures about the electronics, digital data and third party warrants. No additional opinions, clarifications, or specifics were provided. And finally, Mr. Kohberger requested additional discovery, related to IGG, after he learned of its existence for the first time in his Motion to Suppress. The State acknowledge it had undisclosed information but refused, in part, to provide it, and promised, in part, to provide some information. No discovery has not been disclosed. (See also, Mr. Kohberger's Motion in Limine to Exclude IGG,) As discussed below, the State has gained a tactical advantage that cannot be remedied now, and therefore this Court must take affirmative steps to put Mr. Kohberger back on equal ground.

ARGUMENT

I. The Prosecution's Discovery Obligations under the Federal and Idaho Constitutions and Idaho Law.

Both the Federal and Idaho Constitutions, as well as Idaho law, require that the prosecution turn over any materials to the defense which may help the accused, either by negating the guilt,

mitigating punishment, or impeaching the State's witnesses. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995); *State v. Lankford*, No. 35617, 2016 Ida. LEXIS 212 (July 25, 2016); *Grube v. State*, 134 Idaho 24 (2000); I.C.R. 16(a).

A. The Prosecution Has a Constitutional Duty to Identify, Preserve, and Disclose Exculpatory Information.

Under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and Article I, § 13 of the Idaho Constitution, criminal defendants are entitled to proceedings that “comport with prevailing notions of fundamental fairness.” *California v. Trombetta*, 467 U.S. 479, 485 (1984). These notions of fundamental fairness require that a defendant be provided with evidence favorable to the defense. *See, e.g., Brady*, 373 U.S. at 87. Accordingly, the State violates a defendant's due process rights whenever the State suppresses evidence that “is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Grube*, 134 Idaho at 27.

The prosecutor's duty to produce this material is self-executing: she must turn over *Brady* material regardless of whether the defense has made a specific request. *United States v. Bagley*, 473 U.S. 667, 682 (1985). The good faith or bad faith of the prosecutor is not relevant to the *Brady* inquiry. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) (“Whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government”). The duty exists even if the defense conceivably might have access to the information independently. *See, e.g., United States v. Shaffer*, 789 F.2d 682, 690 (9th Cir. 1986) (non-disclosure of government witness' paid informant status not absolved even if defendant might have uncovered it through independent sources; tapes disclosed to co-defendant not effectively disclosed to defendant because “trial strategies of co-defendants often conflict”).

B. The State Suppresses Exculpatory Evidence when It Does Not Timely Disclose this Evidence.

To comply with their constitutional obligations, the State must disclose exculpatory evidence in time for its effective use at trial. *See, e.g., Bagley*, 473 U.S. at 676 (assessing materiality based on the impact of “effective” use of the exculpatory evidence); *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001) (“With respect to *when* the prosecution must make a disclosure required by *Brady*, the law also appears to be settled. *Brady* material must be disclosed in time for its effective use at trial or at a plea proceeding.”) (emphasis in original) (internal citations omitted). When the State fails to produce exculpatory evidence in time for its use at trial, the State has suppressed the evidence in violation of a defendant’s due process rights. *See, e.g., United States v. Beasley*, 576 F.2d 626 (5th Cir. 1978) (finding that the government suppressed exculpatory evidence by failing to timely produce statement of prosecution witness that differed from trial testimony).

Additionally, when exculpatory materials have been disclosed too late for their effective use at trial, the untimely disclosure implicates a defendant’s constitutional right to the effective assistance of counsel under the Sixth Amendment to the U.S. Constitution and Article 1, § 13 of the Idaho Constitution. The right to the timely disclosure of favorable evidence “guarantees an accused sufficient time to investigate and evaluate the evidence in preparation for trial.” *Moreno v. Commonwealth*, 392 S.E.2d 836, 417 (Va. App. 1990). In addition to allowing for full investigation which could lead to more favorable or exonerating evidence, the timely disclosure of *Brady* material can alert defendants to viable pre-trial challenges, such as suppression of evidence. *United States v. Gamez-Orduno*, 235 F.3d 453, 455 (9th Cir. 2000) (holding that *Brady* was violated in the pretrial context by suppression of a report that would have demonstrated Fourth Amendment standing to challenge a search).

Idaho Criminal Rule 16(a), the Idaho Rules of Professional Conduct, the ABA Rules of Professional Conduct, and *Brady* progeny all require *timely* disclosure of discovery materials, meaning prosecutors must turn over information at the earliest feasible opportunity. *See* I.C.R. 16(a) (“As soon as practicable following the filing of charges against the accused”); Idaho Rules of Professional Conduct R. 3.8(d) (mandating “timely disclosure to the defense”); ABA Rules of Professional Conduct R. 3.8(d) (mandating “timely disclosure to the defense”).

C. Mitigating Evidence Is Material when It “May Well” Have Been Consequential to a Jury’s Deliberations on Punishment.

In death penalty cases, *Brady* includes information that may not exculpate but that nonetheless mitigates punishment. *See, e.g., Cone v. Bell*, 556 U.S. 449, 475 (2009) (remanding for resentencing so jury could consider suppressed evidence relating to defendant's drug addiction incurred as a result of honorable military service). As such, even when evidence is not probative at all regarding a defendant’s guilt or innocence—or even when the evidence is more likely to support a finding of guilt during the first phase of a capital trial—the evidence may still be *Brady* material if it could lead to lesser punishment. As the Supreme Court has emphasized, while “[e]vidence that is material to guilt will often be material for sentencing purposes as well, the converse is not always true.” *Id.* at 474.

As such, when the State has elected to seek the death penalty, the Supreme Court has required a lesser showing of materiality to establish a *Brady* violation; a sentence will be reversed when the cumulative impact of the evidence “may well” have been material to the jury’s sentencing decision. *See id.* at 475 (vacating *Cone*’s sentence because the cumulative impact of the missing witness statements, police teletypes and interview notes regarding *Cone*’s drug use “may well” have been material to the jury’s sentencing deliberations, even though they were not material to the insanity defense in the guilt-innocence phase).

D. The Obligation to Disclose Exculpatory Evidence Extends beyond what the Prosecutors Are Personally Aware Of and Beyond Four Walls of a Prosecutor's Office; It Applies to Federal Law Enforcement Officers, State Lab Technicians, and other State Actors.

The prosecution's obligation to preserve and disclose exculpatory evidence does not turn on whether the prosecutor knows of the evidence. *See State v. Avelar*, 132 Idaho 775, 781 (1999) ("The duty of disclosure enunciated in *Brady* is an obligation of not just the individual prosecutor assigned to the case, but of all the government agents having a significant role in investigating and prosecuting the offense."). Thus, the prosecutor is constitutionally obligated to actively investigate and preserve potentially exculpatory evidence. *See, e.g., Commonwealth of North Mariana Islands v. Bowie*, 243 F.3d 1109, 1117 (9th Cir. 2001) ("[A] bad faith failure to collect potentially exculpatory evidence would violate the due process clause...due process requires law enforcement...to gather and to collect evidence in those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant."). The prosecution "may not be excused from disclosing what it does not know *but could have learned.*" *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997) (*en banc*) (internal citation omitted) (emphasis added). Additionally, the prosecution may not delegate the job of determining what evidence must be turned over to the defense, but instead must affirmatively seek out all relevant information from everyone involved in an investigation. *Kyles*, 514 U.S. at 438 (explaining that it is the prosecutor's duty to discharge the government's *Brady* responsibility and therefore a prosecutor will not be excused for failing to turn over information that was known to the police).

Given this obligation, it is obvious that *Brady* extends well beyond the four walls of a prosecutor's office. Because *Brady* does not require bad faith on the part of the prosecution, the State's obligation is an *affirmative* duty to learn of, and then to disclose, exculpatory evidence in

the custody of other members of the prosecution team, as well as any other state actors involved in the case.

Therefore, a prosecutor's *Brady* obligation extends to exculpatory information obtained or possessed by any federal or investigative agency with involvement in a case, including: the Federal Bureau of Investigation, *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995) (explaining that a federal prosecutor is "deemed to have knowledge of and access to anything in the custody or control of any federal agency participating in the same investigation of the defendant."); state lab technicians, *see In re Brown*, 17 Cal. 4th 873, *cert. denied*, 525 U.S. 978 (1998) (reversing death penalty conviction for prosecution's failure to disclose forensic crime lab worksheet showing possible drugs which could have affected defendant's mental state, even though prosecutor had no actual knowledge of the worksheet); the Department of Corrections, *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997) (*en banc*); the Bureau of Alcohol, Tobacco & Firearms, *Bagley v. Lumpkin*, 798 F.2d 1297 (9th Cir. 1986); the Drug Enforcement Agency, *United States v. Butler*, 567 F.2d 885, 891 (9th Cir. 1978); *see also United States v. Brumel-Alvarez*, 991 F.2d 1452, 1461-63 (9th Cir. 1993); the U.S. Food and Drug Administration, *United States v. Wood*, 57 F.3d 733 (9th Cir. 1995); the Internal Revenue Service, *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir.) ("[P]rosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant"); probation departments, *United States v. Alvarez*, 358 F.3d 1194 (9th Cir. 2004); and crime labs, *In re Brown*, 17 Cal. 4th 873, *cert. denied*, 525 U.S. 978 (1998) (reversing death penalty conviction for prosecution's failure to disclose forensic crime lab worksheet showing possible drugs which could have affected defendant's mental state, even though prosecutor had no actual knowledge of the worksheet).

E. Idaho Criminal Rule 16(a) Requires the Timely Disclosure of Exculpatory Evidence.

In addition to a prosecutor's *Brady* obligations, Idaho Criminal Rule 16(a) requires the prosecution to disclose, *as soon as practicable*, any material or information "which tends to negate the guilt of the accused as to the offense charged or reduce the punishment therefor." These obligations extend to any information and material in the possession or control of members of the prosecuting attorney's staff and of any others who have participated in the investigation or evaluation of the case. I.C.R. 16(a). Additionally, I.C.R. 16's disclosure requirements apply even if prosecutors do not personally know of exculpatory and mitigating information. *See State v. Gardner*, 126 Idaho 428, 433 (Ct. App. 1994) (holding that a prosecutor violated *Brady* and I.C.R. 16(a) even though he was personally unaware of an exculpatory witness' statement made to police). Therefore, I.C.R. 16 charges Idaho prosecutors with an affirmative duty to seek out and obtain all exculpatory and mitigating evidence and disclose it to the Defendant in a timely manner.

F. The Idaho Rules of Professional Conduct Require the Timely Disclosure of Exculpatory Evidence.

The Idaho Rules of Professional Conduct and the ABA Model Rules of Professional Conduct further recognize the prosecutor's ethical duty to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." Idaho Rules of Prof'l Conduct, R. 3.8(d); Model Rules of Prof'l Conduct R. 3.8(d).

The ABA Criminal Discovery Standards further reflect a prosecutor's well-settled discovery obligations and admonish the prosecution to turn over any and all information within their control that would (1) tend to negate the guilt of the defendant; (2) tend to reduce the punishment of the defendant; or (3) any material which may be used for impeachment. Std. 11-

2.1. Furthermore, the prosecution must disclose to the defense when they are aware of information, but do not have evidence verifying the information, when it would be discoverable if it were in their possession or control. Std. 11-4.3.

II. The Prosecution Has Turned Over Mountains of Unorganized Electronically Stored Data That Defense Counsel Cannot Possibly Review Prior to Trial.

When exculpatory material is contained in voluminous amounts of electronically stored records, the State violates its *Brady* obligations by doing nothing more than turning it over, unorganized, on a drive. In *United States v. Sayler*, 2010 U.S. Dist. LEXIS 77617, at * 19-23 (E.D. Cal. Aug. 2, 2010), the court ordered the prosecution to identify Rule 16, *Brady*, and *Giglio* documents contained in a voluminous discovery production “as a matter of case management (and fairness).” The court noted:

In light of the above, and to return to the real problem here, it bears repetition to emphasize that the ultimate issue is whether there is ‘disclosure’ in the letter and spirit of *Brady/Giglio* simply by turning over a mountain of ‘everything’ acquired over half a decade, and telling defense counsel nothing about where exculpatory/impeaching information can be found. Again, ‘the government cannot meet its *Brady* obligations by providing [the defendant] with access to 600,000 documents and then claiming that she should have been able to find the exculpatory information in the haystack.’ *United States v. Hsia*, 24 F.Supp. 2d 14, 29-30 (D.D.C. 1998). Or, as the undersigned put it in the initial order: ‘[A]t some point (long since passed in this case) a duty to disclose may be unfulfilled by disclosing too much; at some point, ‘disclosure,’ in order to be meaningful, requires ‘identification’ as well.

Id. at *19-20; *see also id.* at *5 (concluding that the government must identify *Brady* materials in voluminous electronic records, that “[t]here is no authority” for a conclusion to the contrary, and that it would be an “evisceration of constitutional rights” to shift the burden to the defense to review the records and identify *Brady* materials); *United States v. Cutting*, 2017 WL 1324023, at *10 (N.D. Cal. Jan. 12, 2017) (ordering that the government identify all exculpatory and impeachment materials in already-produced copies of electronic records because of the

“voluminous nature” of the records and the government’s production in formats “that seriously impede defendants’ ability to search the ESI”); *United States v. Blankenship*, 2015 WL 3687864, at *6 (S.D. W.Va. June 12, 2015) (“[W]ithout more, the United States does not comply with the requirement of *Brady* by merely including all known Brady material within the four million plus pages of discovery.”); *United States v. Adan*, 10–CR–260, No. 607–1 at 21 (M.D. Tenn. May 10, 2011) (“The Court concludes that the Government’s blanket provision here of 142 disks including disks unrelated to this action does not discharge its *Brady* and *Giglio* obligations.”).

In the context of vast electronic records, even the circuit courts that have adopted the most narrow approach to a prosecutor’s *Brady* obligations have held that the government must do more than simply produce the contents of these devices. In *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009), *aff’d in part, vacated on other grounds*, 561 U.S. 358 (2010), the defendant challenged the government’s open-file disclosure of several hundred million pages of discovery in an electronic file. However, the Fifth Circuit held that this voluminous discovery did not violate Brady obligations because: (1) the government provided copies of the electronic files to the defense; (2) the electronic file was searchable; (3) the government produced an index of “hot documents” indicating the documents that were important to its case as well as to documents that included potentially exculpatory evidence; and (4) the government had created a number of other databases to assist the defense’s review of the evidence. *Id.* at 577. As such, in the context of voluminous electronic data, this standard requires that the government go “beyond merely providing [a defendant] with the open file.” *See id.*

The State has taken none of the steps beyond mere production in this case. The electronic file is not searchable; defense counsel must locate and click into each and every separate document—of which there are many thousands—to find its contents. The State has not produced an index of documents that it will rely on in its case; to the contrary, the expert disclosure deadline

has come and gone without the State identifying its experts' conclusions and which documents it will use to support those conclusions. The State has not provided an index of *Brady* material, including exculpatory and impeachment information, nor an index of documents that are potentially relevant to the defense case. Indeed, the State has not provided anything to assist in the defense's review, despite the knowledge that it would be impossible even through the exercise of due diligence to identify exculpatory or impeachment evidence within the hundreds of millions of pages, tens of thousands of photos, and thousands of hours of video tape and audio recordings.

Under the more exacting standards adopted by other courts, it is even more plainly apparent that the State's approach to its *Brady* obligations runs afoul of Mr. Kohberger's due process rights. For example, the District of Columbia has rejected the Fifth Circuit's standard as too lenient, thereby "directing the government to identify exculpatory information within its voluminous production." *United States v. Saffarinia*, 424 F.Supp.3d 46, 90 (D.D.C. 2020); *see also, e.g., United States v. Saylor, supra* (directing the government to create an index of exculpatory and impeachment information for the 600,000 pages of discovery that had been disclosed to the defense); *United States v. Hsia*, 24 F. Supp. 2d 14, 29 (D.D.C. 1998) ("[O]pen-file discovery does not relieve the government of its Brady obligations. The government cannot meet its Brady obligations by providing Ms. Hsia with access to 600,000 documents and then claiming that she should have been able to find the exculpatory information in the haystack.").

III. Example: the State Has Not Timely Produced Indexed or Identifiable Portions of Contents Relating to the 67 Electronic Devices and Warrant Returns it Intends to Rely On.

The above problem is exemplified by, though certainly not limited to, the 67 electronic devices and other digital data and search warrant returns that the State has turned over. Since the State has not provided specific reports or indexes of materials it intends to use from the devices, digital data and search warrant returns, the defense must guess which form electronic reading

software is utilized. For most devices no specific report has been produced, for some devices Axiom is used and for some Cellebrite; the software produces different results for the same device. Each device results in an enormous volume of information to sift through; a single cellphone often produces more than 10,000 pages of material. This is because, modern electronic devices, including cell phones, have the capacity to store vast amounts of highly personal information. *See Riley v. California*, 124 S. Ct. 2473, 2490 (2014) (“Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception.”). Not only can these devices *store* immense amounts of information, but they also *generate* records that would otherwise never exist. *See id.* at 2491 (“A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.”).

Given the capacity for a person’s electronic device to effortlessly generate and compile vast amounts of information, searches of these devices “typically expose . . . far more than the most exhaustive search of a house,” and may enable the reconstruction of the “sum of an individual’s private life.” *See id.* at 2489-91; *see also, e.g., United States v. Andrus*, 483 F.3d 711, 718 (10th Cir. 2007) (“[F]or most people, their computers are their most private spaces. People commonly talk about the bedroom as a very private space, yet when they have parties, all the guests—including perfect strangers—are invited to toss their coats on the bed. But if one of those guests is caught exploring the host’s computer, that will be his last invitation.”). As such, the contents of all the 67 electronic devices, digital data and search warrant returns seized in this case contain enough information to paint a portrait of the daily lives of Mr. Kohberger, the victims, witnesses, alternate suspects, and people close to the victims. Given that the State’s case is almost

entirely circumstantial, patterns of evidence that emerge out of these devices may be key to the jury's consideration of guilt or innocence.

Courts often describe evidence regarding potential alternative perpetrators as “classic *Brady* material.” See, e.g., *Williams v. Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010) (“[N]ew evidence suggesting an alternate perpetrator is ‘classic *Brady* material.’”) (internal citations omitted); *United States v. Jernigan*, 492 F.3d 1050, 1056-57 (9th Cir. 2007) (en banc) (“Withholding knowledge of a second suspect conflicts with the Supreme Court’s directive that the criminal trial, as distinct from the prosecutor’s private deliberations, be preserved as the chosen forum for ascertaining the truth about criminal accusations.”); *Boyette v. Lefevre*, 246 F.3d 76, 91 (2d Cir. 2001) (describing such evidence as “classic *Brady* material”). Regardless of the State’s ultimate conclusions about whom to prosecute, “[w]ithholding knowledge of a second suspect conflicts with the Supreme Court’s directive that ‘the criminal trial, as distinct from the prosecutor’s private deliberations, [be preserved] as the chosen forum for ascertaining the truth about criminal accusations.’” *Jernigan*, 492 F.3d at 1056-57 (quoting *Kyles*, 514 U.S. at 440).

Countless cases have been overturned due to prosecutors’ failure to timely produce evidence that could have helped the defense identify a potential alternate perpetrator. See, e.g., *Comstock v. Humphries*, 786 F.3d 701 (9th Cir. 2015) (finding that prosecutors violated due process rights under *Brady* by failing to disclose the complainant’s statement that it was possible he had misplaced a stolen ring); *Jernigan*, 492 F.3d at 1057 (finding that prosecutors violated *Brady* obligations by failing to disclose to bank robbery defendant fact that other nearby banks had been robbed after her arrest and that a woman had been detained with uncannily similar physical description); *Trammell v. McKune*, 485 F.3d 546 (10th Cir. 2007) (holding that, despite eyewitness identification of defendant, prosecutors violated *Brady* by failing to disclose to the defense evidence of a potential alternate perpetrator with a similar appearance); *Robinson v. Cain*, 510 F. Supp. 2d 399 (E.D. La. 2007)

(finding a *Brady* violation in a second-degree murder case due to the State's withholding a police report that corroborated the defendant's version of events and supplied a motive for a different person to commit the offense); *Harrington v. State*, 659 N.W.2d 509 (Iowa 2003) (finding that the prosecution violated *Brady* by failing to disclose police reports identifying an alternative suspect).

Because many of these devices belong to the witnesses, the victims and to people who knew the victims, including potential alternate perpetrators, defense counsel is plainly obligated to review them. *See, e.g., United States v. Cronin*, 466 U.S. 648, 659 (1984) (explaining that, where defense counsel never subjected "the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreasonable"); *Soffar v. Dretke*, 368 F.3d 441, amended, 391 F.3d 703 (5th Cir. 2004) ("[A]n actual failure to investigate cannot be excused by a hypothetical decision not to use its unknown results."). Additionally, many of the devices and warrant returns belong to Mr. Kohberger. These devices and warrant returns will paint a comprehensive picture of his life, and therefore are likely to be key to the mitigation presentation at the sentencing phase.

But the defense cannot reasonably make effective use of voluminous electronic records because the State has not provided them in a detailed or indexed manner. Reviewing and understanding all of the records from these devices, digital data and search warrant returns alone would require three years, even if defense counsel did not look at any of the other discovery.³

³ Of course, there is significant additional discovery which is likely to contain exculpatory evidence relating to alternative perpetrators. For example, the defense had to fight for the several thousand tips collected by law enforcement tip lines. Though there were in the State's possession the entire time, the State did not turn them over until more than a year after the case began. The defense has no way of knowing whether the State intends to rely on or introduce any evidence from those tip lines, and has never received a log of *Brady/Giglio* evidence that the State has identified in the records. Because there is no log, an exact number is unknown, but the number of tips is more than 45,000. Tips continue to be reported.

Worse yet, the State apparently intends to rely on this evidence to establish guilt through three different experts, but has not identified what opinions these experts have drawn from the evidence nor which parts of the voluminous data they are relying on. The State has created a situation where the defense is completely in the dark and cannot mount even a limited investigation into rebutting their expert's testimony, including by identifying impeachment evidence or evidence that contradicts their expert's opinions. Rather than cure this defect when Court told the State that its "job was not done" with its expert disclosures, the State submitted expert rebuttal disclosures that blamed the defense for its inability to properly disclose expert opinions related to electronics, digital data and search warrant returns.

The State's failure to timely disclose this evidence in a meaningful way has prevented Mr. Kohberger from developing a full defense to the allegations in this case. As a result, the defense will not have the ability to identify the critical pieces of evidence or conduct necessary follow-up investigation on those pieces the State intends to rely on in the merits phase. The failure of the State to identify important documents in the massive electronic data dump, including exculpatory documents, will hamper Mr. Kohberger's ability to meaningfully contest the State's theory. Moreover, the State's failure to identify exculpatory documents relating to the sentencing phase will prevent a capital jury from receiving a complete picture of the life of Mr. Kohberger, supported by electronically generated records. *See Riley*, 124 at 2490 (describing the distinct characteristics of modern cell phones that make them indispensable in an investigation). Therefore, by dumping the contents of 67 electronic devices, digital data and search warrant returns on defense counsel without identifying the pertinent information within them, the State has violated Mr. Kohberger's due process rights and his right to the effective assistance of counsel at both the merits phase and at a capital sentencing proceeding, as well as his statutory rights under I.C.R. 16.

IV. Reviewing the Discovery is Only the Beginning of Defense Counsel’s Obligations; the Defense Must Have Time and Opportunity to Conduct Independent Investigation of the State’s Evidence.

When the prosecution seeks the death penalty, defense counsel “**must independently investigate [] all evidence—whether testimonial, forensic, or otherwise—purporting to inculcate the client.**” *See* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA L. REV. 913, 926 (Rev. ed. 2003) (setting forth the expectations and obligations of defense counsel in capital cases over 178 pages of guidelines and commentary) (emphasis added). In recognizing the large number of individuals sentenced to death who were later exonerated because they were innocent (110 when the ABA Guidelines were written, *id.* at 1017, though the number now stands at more than 195⁴), the Guidelines “underscor[e] the importance of defense counsel’s duty to take seriously the possibility of the client’s innocence, to scrutinize carefully the quality of the state’s case, and to investigate and re-investigate all possible defenses,” *id.* at 1018. Thus, a meaningful ability to review discovery and the State’s case is essential to the right to a fair trial and effective assistance of counsel in a capital case. This is a case where the facts are in great dispute. Mr. Kohberger asserts his innocence. There is no confession. There is no video or audio of the crime. There is no weapon. There is ONLY trace evidence on a moveable object, a knife sheath. Having full knowledge of the State’s expert opinions and the documents they will rely on will provide leads for further investigation to uncover exculpatory evidence or to impeach prosecution witnesses.

In addition to a complete investigation of every piece of the State’s case, counsel is responsible for identifying and considering all legal claims potentially available, even if those claims have consistently lost in that jurisdiction. *See id.* at 1032 (“Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted practices.”).

⁴ <https://deathpenaltyinfo.org/innocence-list-those-freed-death-row>

This is necessary because counsel in a capital case has a duty to preserve “any and all conceivable errors for each stage of appellate and post-conviction review,” as the non-preservation of an issue at the trial stage may result in a defendant’s execution even if reversible error occurred. *Id.* at 1030 (explaining a case in which, from a joint capital trial, one co-defendant was eventually executed because his counsel failed to object to women being excluded from the jury, while the other co-defendant’s case was reversed and he is now serving life in prison because his attorneys preserved the issue).

In a case as complex as this one, the State’s failure to direct the defense to evidence it will rely on in accordance with the Court’s schedule is highly prejudicial. It will undoubtedly impact the defense’s ability to meet the evidence at trial, develop a comprehensive defense strategy, adequately respond to each aspect the State’s case, and complete all pre-trial litigation about admissibility of the evidence. Even assuming the State discloses detailed expert disclosures and an index of “hot documents” tomorrow, counsel will need the remaining months before trial to conduct independent investigation into the evidence and witnesses, identify evidence that contradicts the State’s theories, and incorporate all of the new information into the defense’s case. *See, e.g., Leka v. Portuondo*, 257 F.3d 89, 101 (2d Cir. 2001) (finding that the State suppressed exculpatory evidence by identifying an eyewitness days before trial, such that the attorney could not reasonably be expected to suspend other trial preparation to interview the witness, and thereby constituting a failure “to make sufficient disclosure in sufficient time to afford the defense an opportunity for use”). It will not be possible to do this to the extent required in a death penalty case in addition to identifying and preserving all of the related legal claims that could stem from the evidence. Thus, as discussed below, because heightened reliability standards cannot possibly be met on this timeframe, the Court must preclude the death penalty.

V. This Is a Capital Case and Heightened Due Process Applies.

The Supreme Court has been clear that the death penalty must be reserved for only those few offenders deemed extraordinarily culpable, and therefore uniquely deserving of death. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). “[T]he average murderer” is insufficiently culpable to “justify the most extreme sanction available to the State.” *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). While every murder is appalling, only the *most* extreme qualify for the death penalty. A case is not capital just because it is the worst murder a community has ever seen, nor is it capital because it technically checks the boxes of the necessary aggravating factors under a capital sentencing statute. A case may *only* appropriately be capital—in the words of the U.S. Supreme Court—when it falls into a very “narrow category of the most serious crimes” and involves a defendant “whose extreme culpability makes them the most deserving of execution” in the entire country. *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *see also Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (explaining that the death penalty “must be limited to those offenders . . . whose extreme culpability makes them the most deserving of execution”).

Heightened constitutional obligations apply in death penalty cases because a life-or-death sentencing decision is “qualitatively different” from sentencing decisions involved in any other kind of case. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The nature, quality, and gravity of death cases makes the defense of capital cases fundamentally unlike any other type of legal endeavor. *See, e.g., Sawyer v. Whitley*, 505 U.S. 333, 343 (1992). As a result, death penalty trials require especially stringent due process from both the judge and attorneys, and may not be treated as standard criminal cases. *See, e.g., Gardner v. Florida*, 430 U.S. 349 (1977); *see also Simmons v. South Carolina*, 512 U.S. 154 (1994); *Lankford v. Idaho*, 500 U.S. 110 (1991). Courts must go to “extraordinary measures” to ensure that a death penalty trial is fair. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). So long as Mr. Kohberger’s death is a possible result of

this case, the State of Idaho and this Court must go to “extraordinary measures” to protect his constitutional rights. *Caldwell*, 472 U.S. at 329.

VI. Mr. Kohberger Has Been Prejudiced by the State’s Failure to Fulfill Its Disclosure Obligations and Judicial Remedy Is Required.

Because the State has failed to satisfy its disclosure obligations in manner that would enable Mr. Kohberger to further investigate and incorporate exculpatory evidence into his defense for an August 2025 trial, Mr. Kohberger will be deprived of a fair trial and the right to effective assistance of counsel if the Court does not remedy this situation. This Court has wide discretion to remedy discovery violations as appropriate under the circumstances. I.C.R. 16(k); *see also* ABA Standards of Criminal Discovery, std. 11-7.1(a)(iv). Generally, when the State has failed to timely produce evidence “in violation of the Constitution, the [trial] court must choose between barring furthering prosecution or suppressing . . . the State’s most probative evidence.” *Trombetta*, 467 U.S. at 487.

In past cases, courts have entirely dismissed indictments based on discovery violations to protect the defendant’s constitutional rights, to sanction the government for misconduct, and to deter future *Brady* abuses. *See, e.g., United States v. Diabate*, 90 F.Supp.2d 140 (D. Mass. 2000) (dismissing indictment because prosecution failed to follow two local rules of discovery requiring them to (1) inform all law enforcement agencies of their discovery obligations and (2) require all agents involved in the case to maintain contemporaneous notes); *United States v. Dollar*, F. Supp. 2d 1320 (N.D. Ala. 1998) (dismissing case with prejudice after government “flagrantly breached” its obligation under *Brady* to produce exculpatory and impeachment materials in a timely manner); *State v. Martinez*, 86 P.3d 1210 (Wash. App. 2004) (affirming trial court’s finding that the defendant was prejudiced because “late discovery compromised defense counsel’s ability to adequately prepare for trial”); *State v. Harris*, 713 N.E.2d 528 (Ohio App. 1998) (affirming trial judge’s dismissal of case when exculpatory material was withheld).

Mr. Kohberger is not requesting dismissal of the indictment for these violations, at least at

this point.⁵ Because five months remain before trial, the defense believes there are remedies that this Court can order short of dismissing the case that will likely remedy a significant amount of the prejudice.

1. Preclude Experts and Testimony Not Properly and Timely Disclosed by the State.

Mr. Kohberger requests that the State be prohibited from introducing experts, testimony, and underlying evidence that has not been properly detailed in an expert disclosure for which the deadline was January 9, 2025. Those specifics are detailed in the accompanying Motion in Limine.

2. Require the State to Provide a “Hot Documents” Index of Information it Intends to Rely on, As Well As *Brady/Giglio* Evidence, in Accordance with The Minimum Standards for Voluminous Electronic Discovery.

Given the compounding prejudice of late disclosure with the extreme amount of discovery has been provided in a format that does not meet the minimum standards that courts have considered, *see* Section II *supra*, Mr. Kohberger respectfully requests that this Court order the State to provide, within two weeks or the soonest this Court deems reasonable: (1) a detailed index⁶ of the discovery and evidence they intend to rely on at either the merits phase or in sentencing and (2) a detailed index of *Brady/Giglio* documents and evidence, including potentially exculpatory or impeachment information. Given the amount of data, “[t]he government cannot meet its *Brady* obligations by providing [Mr. Kohberger] with access to [more than 68terabytes of data] and then claiming that [he] should have been able to find the exculpatory information in the haystack.” *See United States v. Hsia*, 24 F. Supp. 2d 14, 29 (D.D.C. 1998). Both of these indexes should include

⁵ Mr. Kohberger reserves the right to request dismissal if and when the circumstances warrant it.

⁶ The State’s current method of noting the date that is has produced a batch of discovery and the number associated with the disclosure pleading is not a detailed index.

location of the document in a way that makes it easily identifiable by the defense. *See U.S. v. Saylor, supra* (ordering government to identify *Brady* information within electronic discovery already produced).

As discussed above, evidence pointing to a possible alternate perpetrator or anything refuting the State's theory is bedrock *Brady* evidence and should be included. Moreover, if this proceeds as a death penalty case, *Brady* material includes any evidence that would tend to mitigate punishment. *Brady*, 373 U.S. at 87. Examples of this evidence in a capital case include: evidence that a capital defendant was a devoted and loving family member; that he experienced trauma, neglect, isolation, or ostracization as a child, young adult, or adult; that he excelled in his education; that he experienced blows to the head or other potential brain injuries; that he experienced depression, anxiety, or other symptoms of mental illness; that his symptoms began before he was charged with capital murder; and/or that he is susceptible to pressure, manipulation, or exploitation.

3. Preclude the Death Penalty as a Potential Sentencing Option.

Courts have also precluded the prosecution from seeking the death penalty in would-be capital cases when the prosecution fails to satisfy their pretrial discovery obligations. As the First Circuit has noted, “[d]ismissal of the Notice [to seek death] is not as extreme as dismissal of an indictment. The government may still seek a conviction and the serious penalty of life imprisonment.” *United States v. Lopez-Matias*, 522 F.3d 150, 154 n.9 (1st Cir. 2008). This less-extreme remedy is appropriate even in situations when the violations would not amount to a sanction in a non-capital felony case:

We do believe that [in a capital case] when the stakes are so high, a smaller quantum of prejudice may justify a sanction [than in a regular murder case]. And, as discussed above, striking the Notice is not quite as serious as dismissing the indictment altogether, and so perhaps still less prejudice is required.

Lopez-Matias, 522 F.3d at 158.

Another Idaho trial court recently concluded that precluding the death penalty was the only way to cure the prejudice of disclosure violations by the State. In *Idaho v. Lori Vallow Daybell*, the State had bates stamped and previously provided more than 80,000 documents in discovery; however, the prosecution failed to turn over approximately 5,000 pages of discovery and 30 hours of audio files until a month before trial. The court ruled from the bench and signed an order. This is notably many, many multitudes less than the 68 terabytes of discovery turned over in this case. Though the prosecution filed the discovery only one day after the deadline set by the court, the defense argued that there was insufficient time for counsel to review the significant discovery in a meaningful manner and complete any necessary follow up prior to the trial date one month later. The Court agreed and found that dismissal of the death penalty was appropriate in order to mitigate the prejudice. *See, e.g.*, Audio File: Judge Grants Lori Vallow’s Motion to Dismiss Death Penalty (YouTube) (March 21, 2023), beginning at 21:16.⁷ The Court specifically found that the State had acted in good faith and attempted to disclose all discovery, and that the remedy was not in any way intended to be a sanction for bad faith or misconduct by prosecutors *Id.* However, the Court specifically noted that “death is different,” that heightened standards of reliability and unique safeguards must apply in a death penalty case, and therefore striking the death penalty was the only appropriate remedy. This Court has commented in other proceedings related to Mr.

⁷Available at

https://www.google.com/search?q=lori+daybell+motion+to+dismiss+the+death+penalty+%2B+discovery&sca_esv=0baf5c9e671f57b4&rlz=1C1UEAD_enUS928US929&biw=1280&bih=585&sxsrf=ADLYWIJ7z5CnAaYgsYK8_0g8oLjnqNAGiQ%3A1733775426181&ei=QIBXZ8HbCrO0wN4P95WomAE&ved=0ahUKEwjBhJfjwJuKAXUzGtAFHfcKChMQ4dUDCA8&uact=5&oq=lori+daybell+motion+to+dismiss+the+death+penalty+%2B+discovery&gs_lp=Egxnd3Mtd2l6LXNlcniAiPGxvcmkgZGF5YmVsbCBtb3Rpb24gdG8gZGlzbWlzcYB0aGUgZGVhdGggcGVuYWx0eSArIGRpe2NvdmVyeTIFeCEYoAEyBRAhGKABMgUQIRigATIFeCEYoAEyBRAhGKABSOMPUNsCWLQOcAF4AJABAZgBqAKgAb8IqgEFMC42LjG4AQPIAQD4AQGYAgagAtAGwgIFeCEYnwXCAgUQIRirApgDAIgGAZIHAzAuNqAHxC0&scient=gws-wiz-serp#fpstate=ive&vld=cid:4e068cd9,vid:eu17oCSd4PU,st:0.

Kohberger’s trial setting and motions about discovery and expert opinions, that Lori Vallow’s case is distinguishable because she had not waived her speedy trial rights. However, in this case, it is the Court that is repeatedly telling all counsel and Mr. Kohberger that the trial date is set in stone and everyone must be ready to proceed by July 30, 2025.

In another case, a federal district court precluded the government from seeking the death penalty for two defendants after the prosecution failed to turn over some of the statements made by a witness for approximately one year after the defendants had been arrested. *United States v. Joel Manuel Rivera-Clemente and Josean Clemente*, No. 3:11-cr-00499-JAF (D.P.R. Sep. 19, 2012). The judge found that the defendant had been prejudiced because the prosecutor’s “repeated delays and failures...to provide timely and full disclosure” hindered the defense’s ability to investigate the crime. *Id.* at 2. Due to the fact that discovery was not disclosed in a timely manner, the prosecutor’s conduct “easily pass[ed] the threshold to bar the government from seeking the death penalty,” *id.* at 3, and preclusion of the death penalty was the “only viable remedy that protects the dignity of the process and the rights of a death penalty eligible defendant,” *id.* at 2.

In yet another case, the court declared a mistrial and precluded the death penalty after discovering that the State did not turn over all the notes from one of the investigating officers. *State v. Bellamy*, No. 05-CRS-4713-17 (N.C. 2011). The judge specifically noted that the prosecution was not aware of the notes and had not acted willfully or in bad faith, but that their “regrettable and unintentional failure” to fully comply with their discovery obligations had deprived the defendant of his rights to due process, a fair trial, and effective assistance of counsel. *Id.* at 6. While a mistrial alone may have cured the violation, the court ordered preclusion of the death penalty in the re-trial as an additional sanction. *Id.* at 6-7. In a case like this one, where more than 68 terabytes of discovery has been produced, the failure to direct the defense to evidence and

discovery it will use in support of expert conclusions as required by the disclosure rules will result in the same prejudice as if it was not turned over at all.

Several other judges have struck the death penalty as a sentencing option in response to disclosure violations as well. *See, e.g., State v. Montgomery*, 220 N.C. App. 525 (2012) (“[T]he trial court declared the case non-capital as a sanction for discovery violations by the State.”); *United States v. Rosado-Rosario*, 1998 U.S. Dist. LEXIS 673 (ordering the case to proceed as a regular felony proceeding after the prosecutors failed to timely turn over unredacted discovery to the Defense); *United States v. Gomez-Olmeda*, 296 F. Supp. 2d 71, 89 (D.P.R. 2003) (precluding the death penalty where the prosecution failed to clarify the nature of a meeting with the Department of Justice regarding the case, “coupled with the prosecution’s flagrant, and admitted, disregard of this court’s discovery deadlines”).

Mr. Kohberger has repeatedly brought forth facts that demonstrate serious prejudice to his due process rights. He has repeatedly raised the issue of the chaotic and disorganized production of discovery. He has repeatedly compelled discovery. Regardless of whether it was purposeful or inadvertent, the prosecution has shirked its responsibility to fulfill its constitutional obligations to provide timely disclosure to the defense. As a result, the defense’s ability to investigate has been seriously impeded.

Regardless of whether the failure to organize the voluminous discovery into a searchable and useable form, identify potential exculpatory evidence, and provide minimally adequate expert disclosures on the timeline set by this Court is intentional or merely the result of inattention, the prejudice is the same. Indeed, other courts have precluded the death penalty on far less, and bad faith is not the standard for applicability of sanctions. *See, e.g., State v. Martinez*, 86 P.3d 1210 (Wash. App. 2004) (affirming dismissal of indictment, and noting that “governmental misconduct need not be evil or dishonest in nature; simple mismanagement is sufficient”); *State v. Bellamy*,

No. 05-CRS-4713-17 (N.C. 2011) (precluding the death penalty despite the clear absence of willful conduct or bad faith); *State v. Montgomery*, No. 07-CRS-215044 (N.C. 2010) (precluding death penalty based on considerations of due process for the capital defendant, without addressing good faith or bad faith on part of the prosecution, noting that “everyone involved in this case wishes [the violation] had never happened”).

Striking the death penalty is the only remedy that begins to adequately address the prejudice to Mr. Kohberger. Even with a “hot documents” list and detailed expert disclosures—the minimum necessary for this case to proceed to trial—counsel is at a massive disadvantage given the limited resources as compared to the State and the fact that only five months remain before trial. And the tactical advantage that the State has gained because the Defense complied with the Court’s disclosure deadline cannot be remedied after-the-fact. *See* discussion in accompanying Motion in Limine to Exclude.

Though counsel could proceed to a non-capital trial by making strategic decisions about what to follow up on in the limited time frame, counsel will not have time to complete the type of investigation that would be necessary to meet the required heightened reliability standard in death penalty cases in light of the late disclosures and mountains of discovery. Precluding the death penalty is therefore necessary to enforce Mr. Kohberger’s constitutional rights. This remedy will also reduce the significant risk of seating a conviction-prone jury that does not hold the prosecution to their burden of proof,⁸ a fact that would exacerbate the State’s already-gained strategic and resource advantages. Though a risk will remain that the extensive and prejudicial pretrial publicity will negatively impact the fairness and accuracy of the jury’s factfinding, this risk will be mitigated when it is not compounded by the process of death

⁸ Mr. Kohberger hereby incorporates all arguments and authorities contained in his Motion to Prevent Death-Qualification of the Jury.

qualification, a process that skews the jury towards conviction and death during *voir dire* before a single piece of evidence has been presented.

DATED this 24 day of February, 2025.



ANNE C. TAYLOR
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CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the 24 day of February, 2025 addressed to:

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO

Plaintiff,

V.

BRYAN C. KOHBERGER,

Defendant.

CASE NUMBER CR01-24-31665

**MOTION TO STRIKE DEATH
PENALTY**

RE: AUTISM SPECTRUM DISORDER

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and hereby moves this Court to strike the death penalty as a sentencing option in his case because Mr. Kohberger's autism spectrum disorder (ASD) reduces his culpability, negates the retributive and deterrent purposes of capital punishment, and exposes him to the unacceptable risk that he will be wrongfully convicted and sentenced to death. In making this motion, Mr. Kohberger relies on his

right to be free from cruel and unusual punishment, his right to due process, his right to a fair trial, his right to counsel, his right to present a defense, his right to a reliable sentencing determination, and other rights safeguarded by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 2, 6, 7, and 13 of the Idaho State Constitution.

Mr. Kohberger is aware of the deadline previously imposed by the court’s scheduling order but has good cause for filing this motion at this time. Good cause is laid out in an Affidavit, attached but filed under seal. (See Exhibit 1, Affidavit of Dr. Cecil Reynolds – A notarized signed copy will be provided once received from Dr. Reynolds)

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INTRODUCTION

The United States Supreme Court has repeatedly emphasized the exceptional and irrevocable nature of the death penalty:

Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976). This heightened standard of reliability is “a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.” *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *see also*, *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (“Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases”).

Because “death is different,” when the State announces its intention to seek the death penalty in a case, it imposes an extraordinary burden upon the Court, the State, and defense counsel to ensure the fairness, accuracy, and reliability of the trial and any subsequent sentencing proceeding.

When a defendant’s life is at stake, a court must be “particularly sensitive to ensure that every safeguard is observed,” *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), and must take “extraordinary measures” to guarantee that a death sentence is not “imposed out of whim, passion, prejudice, or mistake.” *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O’Connor, J., concurring) (emphasis added). These “extraordinary measures” must apply at both the merits phase and the sentencing phase of a capital trial. *Beck v. Alabama*, 447 U.S. 625, 638 (1980); *see also*,

Lockett v. Ohio, 438 U.S. 586, 604 (1978); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

In addition to imposing a heightened standard of reliability in cases where the State is seeking death, the United States Supreme Court has firmly held that capital punishment is only constitutional under the Eighth Amendment if it is reserved for those few offenders deemed extraordinarily culpable, and therefore uniquely deserving of execution. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). While every murder is appalling, only the *most* extreme qualify for the death penalty. See *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (“[T]he average murderer” is insufficiently culpable to “justify the most extreme sanction available to the State.”); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (a case may only be appropriately capital when it falls into a very “narrow category of the most serious crimes,” and *also* involves a defendant “whose extreme culpability makes them the most deserving of execution”). In laymen’s terms, amongst the entire class of murderers, the death penalty must be reserved for “the worst of the worst.” *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) (*citing Roper*, 543 U.S. at 568).

Holding true to these constitutional principles of reliability and proportionality, the Court has categorically prohibited the imposition of the death penalty where a particular characteristic of the defendant renders him less culpable, negates the retributive and deterrent aims of capital punishment, or creates a risk of an erroneous death sentence. See *Atkins*, 536 U.S. at 320-21 (prohibiting the execution of the intellectually disabled); *Roper*, 543 U.S. at 572 (prohibiting the execution of juvenile offenders). This reasoning applies with equal force to defendants who, like Mr. Kohberger, have autism spectrum disorder (“ASD”). ASD is “a neurological and developmental disorder that affects how people interact with others, communicate, learn, and behave.” Nat’l Inst. Mental Health, *Autism Spectrum Disorder*, <https://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd> (last visited Feb. 10, 2025). People with ASD, including Mr. Kohberger, exhibit deficits in nearly all the same areas cited by the Court in concluding that it is unconstitutional for people with intellectual disabilities to be sentenced to death because such sentences are not proportional and cannot be reliably

imposed. Indeed, the pervasive media coverage emphasizing symptoms of Mr. Kohberger's disability demonstrates that the very risks recognized by the Court are already being realized to his prejudice. Accordingly, this Court must strike death as a sentencing option in this case.

ARGUMENT

I. Due to Impairments in Communication, Reasoning, Social Skills, and Impulse Control, People with ASD Are Insufficiently Culpable to Be Executed.

The death penalty is only appropriately sought in a case when it falls into a very “narrow category of the most serious crimes” *and* involves a defendant “whose extreme culpability makes them the most deserving of execution.” *Roper*, 543 U.S. at 568; *see also Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (the Eighth Amendment limits the death penalty to those offenders with “a consciousness materially more depraved” than that of the typical murderer); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (the death penalty “must be limited to those offenders . . . whose extreme culpability makes them the most deserving of execution”).

In prohibiting execution of people with intellectual disabilities, the U.S. Supreme Court identified several characteristics that make such defendants “categorically less culpable than the average criminal.” *Atkins*, 543 U.S. at 316.

Because of their impairments, however, by definition they have diminished capacities **to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.**

Id. at 318 (emphasis added).

People with ASD exhibit impairments in nearly all of these areas. There are two primary diagnostic criteria for ASD. First, a person must display persistent deficits in social communication and interaction across multiple contexts, as manifested by deficits in all three of the following areas: (1) social-emotional reciprocity, (2) nonverbal communicative behaviors used for social interaction, and (3) developing, maintaining, and understanding relationships. U.S. Ctr. Disease Control & Prevention, *Clinical Testing and Diagnosis for Autism Spectrum Disorder*,

<https://www.cdc.gov/autism/hcp/diagnosis/index.html> (last visited Feb. 10, 2025) (citing Am. Psych. Ass’n, *Diagnostic and Statistical Manual* (5th ed. 2013)) [hereinafter CDC]. Second, a person must display restrictive, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following: (1) stereotyped or repetitive motor movements, use of objects, or speech, (2) insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior, (3) highly restricted, fixated interests that are abnormal in intensity or focus, and (4) hyper- or hyporeactivity to sensory input or unusual interests in sensory aspects of the environment. *Id.* As a result of these deficits, “Offenders with autism spectrum disorder tend to lack theory of mind (especially empathy and the ability to see from other perspectives), the ability to appreciate the whole context, executive functioning required for planning and organization, appreciation for the consequences of one’s actions, and the ability to generalize learning from one situation to another.” Astrid Birgden, *Enabling the Disabled: A Proposed Framework to Reduce Discrimination Against Forensic Disability Clients Requiring Access to Programs in Prison*, 42 MITCHELL HAMLINE L. REV. 637, 655 (2016). A comprehensive neuropsychological evaluation of Mr. Kohberger conducted by Dr. Rachel Orr, PsyD, ABPP-CN, found that Mr. Kohberger “continues to exhibit *all the core diagnostic features of ASD* currently, with significant impact on his daily life.” *See* Exhibit 2 (Report by Dr. Orr) at 17 (emphasis added).

Social deficits (including a diminished ability “**to understand the reactions of others,**” *Atkins*, 543 U.S. at 318) are perhaps the most widely recognized characteristics of ASD. People with ASD often have “difficulty identifying the emotional or mental states (e.g., fear, anxiety) of others, and how to respond appropriately[.]” Colleen M. Berryessa, *Defendants with Autism Spectrum Disorder in Criminal Court: A Judge’s Toolkit*, 13 DREXEL L. REV. 841, 847 (2021) [hereinafter Berryessa 2021]; *see also* Jerrod Brown et al., *Autism Spectrum Disorder (ASD) in the Criminal Justice System in FORENSIC MENTAL HEALTH: A SOURCE GUIDE FOR PROFESSIONALS*, 21, 24, 27 (Jerrod Brown & Erv Weinkauff ed., 2018). Accordingly, it is difficult for people with ASD to interpret and respond to social cues, particularly when those cues are nonverbal. Berryessa

2021, *supra*, at 847; Brown, *supra*, at 24. As it relates to this case, Dr. Orr confirmed that Mr. Kohberger has displayed lifelong deficits in social-emotional reciprocity, including “limited perspective-taking” and “limited sharing of affect/emotions of others.” Ex. A at 16.

Along with difficulty recognizing the emotions of others, people with ASD often struggle to recognize and regulate their own emotions. This can manifest as diminished capacity “**to control impulses**,” *Atkins*, 543 U.S. at 318. *See* Brown, *supra*, at 27. Dr. Orr observed Mr. Kohberger’s impulsive tendencies throughout her evaluation, which were also reported by his family. Ex. A at 9, 13, 14, 17. Additionally, a need to engage in repetitive behaviors or interests is one of the of diagnostic domains of ASD. CDC, *supra*. For many people with ASD, this manifests in compulsive behavior that cannot easily be controlled by rational thinking. *See* Berryessa 2021, *supra*, at 849. Since childhood, Mr. Kohberger has exhibited compulsions around hand-washing and other cleaning behaviors. Ex. A at 18.

Diminished ability “**to communicate**,” *Atkins*, 543 U.S. at 318, is another a hallmark of ASD. Language deficits are common among people with ASD, ranging from complete lack of verbal language skills to difficulty recognizing and understanding abstract language, sarcasm, and irony. Brown, *supra*, at 24. People with ASD “universally struggle with pragmatics, or the appropriate use of language for the situation at hand.” *Id.* These language deficits can become even more pronounced in stressful and anxiety-inducing situations. *Id.* Although Mr. Kohberger has strong verbal abilities, he failed to recognize multiple idioms during Dr. Orr’s evaluation, Ex. A at 11, and Dr. Orr noted that his language was often overinclusive, disorganized, highly repetitive, and overly formal, *id.* at 9.

Like people with intellectual disabilities, people with autism also have diminished capacities “**to understand and process information**” and “**to abstract from mistakes and learn from experience**,” *Atkins*, 543 U.S. at 318. Studies show that ASD is characterized by deficits in complex cognitive processing. Diane L. Williams et al., *Associations Between Conceptual Reasoning, Problem Solving, and Adaptive Ability in High-functioning Autism*, 44 J. AUTISM & MOTION TO STRIKE DEATH PENALTY RE: AUTISM SPECTRUM DISORDER Page 7

DEVELOPMENTAL DISORDERS 2908 (2014), <https://pmc.ncbi.nlm.nih.gov/articles/PMC6067678/>.

In particular, people with ASD are generally able to identify concepts and learn established rules, but struggle “with concept formation or the ability to develop new concepts based upon experience.” *Id.* In other words, people with ASD may be able to comprehend information, but, like people with intellectual disabilities, they have difficulty extrapolating that information and applying it to a new domain. These deficits in conceptual reasoning and problem solving are apparent even among people with ASD who have average or above-average general intelligence. *Id.* Indeed, despite his high baseline intelligence, Mr. Kohberger exhibits slow verbal processing and weaknesses in certain areas of executive functioning, including cognitive flexibility and organizational approach. Ex. A at 11. Dr. Orr observed that Mr. Kohberger “tended to perceive information in a more piece-meal manner,” *id.*, and was highly distractable, *id.* at 9.

As a result of these impairments, people with ASD show diminished adaptive functioning—much like people with intellectual disabilities. “Adaptive functioning encompasses those skills essential for real-world, everyday functioning that generally fall within the broad areas of daily living skills (e.g., self-care), socialization (e.g., interpersonal skills), and communication (e.g., the ability to convey your wants and needs).” Goldie A. McQuaid et al., *The Gap between IQ and Adaptive Functioning in Autism Spectrum Disorder: Disentangling Diagnostic and Sex Differences*, 25 AUTISM 1565 (2021), <https://pmc.ncbi.nlm.nih.gov/articles/PMC8324508/>. Notably, people with ASD exhibit adaptive functioning that falls far below what would be expected given their cognitive ability. *Id.*; see also Williams et al., *supra*. In its post-*Atkins* jurisprudence, the Court has repeatedly emphasized that adaptive functioning is a key consideration in determining whether a person is intellectually disabled, and thus excluded from execution. *Hall v. Florida*, 572 U.S. 701, 723 (2014) (courts must permit defendants to present evidence of adaptive functioning to demonstrate intellectual disability where IQ score falls within margin of error); *Moore v. Texas*, 581 U.S. 1, 15-16 (2017) (same, and directing courts to focus adaptive-functioning inquiry on adaptive deficits rather than strengths). It follows that people with

ASD, who are similarly impaired in this area, should not be sentenced to death.

II. The Deterrent and Retributive Aims of the Death Penalty Are Not Met by Executing People with ASD.

In order for a death sentence to meet the Eighth Amendment's proportionality requirement, it must satisfy the two penological goals of capital punishment.

[In] *Gregg v. Georgia*, [this Court] identified "retribution and deterrence of capital crimes by prospective offenders" as the social purposes served by the death penalty. Unless the imposition of the death penalty on a [] person "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment."

Atkins, 536 U.S. at 319 (citing *Gregg*, 428 U.S. at 183; *see also Kennedy*, 554 U.S. at 441 (The death penalty "is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes."); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) ("A punishment might fail the test on either ground.")).

The *Atkins* Court concluded that neither aim was met by executing intellectually disabled defendants. Discussing retribution, the Court reasoned,

If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.

Atkins, 536 U.S. at 319. As discussed in Part I, *supra*, the Court's conclusions regarding the diminished culpability of people with intellectual disabilities are equally applicable to people with ASD. Accordingly, if the retributive aim of the death penalty is not satisfied by executing people with intellectual disabilities, it is not met by executing people with ASD.

Turning to deterrence, the *Atkins* Court again relied on deficits that are shared by people with intellectual disabilities and people with ASD.

notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, **the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses**—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

Atkins, 536 U.S. at 320 (emphasis added).

The characteristics of ASD make deterrence even less salient as an aim of punishment. The repetitive behaviors and fixations that are key diagnostic criteria of ASD mean that, for many defendants with ASD, their offending behavior is compulsive and cannot be curbed by a rational cost-benefit analysis. *See Berryessa 2021, supra*, at 849. Additionally, because people with ASD have difficulty with abstract thinking and extrapolating from one scenario to another, they may not easily connect their present actions to a potential future outcome.

Executing people with ASD does not meaningfully satisfy the penological aims of retribution or deterrence. Accordingly, sentencing people with ASD to death violates the Eighth Amendment.

III. As Awareness of ASD Becomes More Widespread, Evolving Standards of Decency Condemn Execution of People with ASD.

The Eighth Amendment prohibits excessive punishments. Whether a punishment is excessive must be judged by current prevailing standards of decency. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (“The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”); *see also Kennedy*, 554 U.S. at 419 (“[the Eighth Amendment’s] applicability must change as the basic mores of society change”) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972)). In affirming its holding that people with intellectual disabilities cannot be sentenced to death, the Court observed,

The Eighth Amendment is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice. To enforce the Constitution’s protection of human dignity, this Court looks to the evolving standards of decency that mark the progress of a maturing society. The Eighth Amendment’s

protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force.

Hall, 572 U.S. at 708 (internal citations and quotations omitted).

The past four decades have seen a significant evolution in the understanding of ASD. Although infantile autism was first described by psychiatrist Leo Kanner in 1943, it was not included in the Diagnostic and Statistical Manual ("DSM") as one of several Pervasive Developmental Disorders until 1980. Nicole E. Rosen et al., *The Diagnosis of Autism: From Kanner to DSM-III to DSM-5 and Beyond*, 51 J. AUTISM & DEVELOPMENTAL DISORDERS 4253, 4253, 4255. When the DSM was revised seven years later, published as "DSM-III-R," the condition was renamed from "infantile autism" to "autism disorder" to encompass all ages and developmental levels. *Id.* at 4255. The DSM-III-R established new diagnostic criteria for autism disorder, based on three domains of impairment: (1) qualitative impairment in reciprocal social interaction, (2) qualitative impairment in communication, and (3) restricted interests and activities and repetitive movements. *Id.* The fourth edition of the DSM ("DSM-IV"), published in 1994, recognized Asperger's Syndrome and autistic disorder as separate diagnoses within the broad category of Pervasive Developmental Disorders. *Id.* at 4256.

The current version of the DSM, published in 2013 as DSM-5, reflects a major shift in the understanding of autism. DSM-5 established a comprehensive diagnosis of autism spectrum disorder ("ASD"), which replaces Asperger's Syndrome and autistic disorder. *Id.* at 4256-57. The current ASD diagnosis recognizes autism as a spectrum of conditions. *See CDC, supra*. DSM-5 also consolidated the diagnostic criteria of impairments in social interaction and communication into a single domain, removed language impairment as a specific diagnostic criterion, and added unusual sensory sensitivity as a manifestation of the restrictive/repetitive behavior domain. Rosen et al., *supra*, at 4259, 4260.

As the psychological community's understanding of ASD has evolved, so has awareness

of the condition. ASD is now the fastest-growing developmental disability in the United States. Brown, *supra*, at 22. From 2011 to 2022, ASD diagnosis increased by 175%. Luke P. Grosvenor et al., *Autism Diagnosis Among US Children and Adults, 2011-2022*, JAMA NETWORK OPEN (Oct. 30, 2024), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2825472>.

The increase in awareness of ASD has coincided with greater efforts by the criminal legal system to account for the role that intellectual disabilities, developmental disorders, and mental health conditions play in offending behavior. For example, as of December 31, 2023, there were 655 mental health courts in the United States, across 42 states and the District of Columbia. Nat'l Treatment Court Resource Ctr., *Treatment Courts Across US States/Territories (2023)*, https://ntcrc.org/wp-content/uploads/2024/06/2023_NTCRC_TreatmentCourt_Count_Table.pdf (last visited Feb. 10, 2025). Two states have enacted legislation barring people with serious mental illness from being sentenced to death. *See* Ohio Rev. Code Ann. § 2929.025 (West); Ky. Rev. Stat. Ann. § 532.140 (West).

ASD specifically has been deemed relevant to defendants' interactions with law enforcement and ability to formulate criminal intent. *See, e.g., U.S. v. Cottrell*, 333 F. App'x 213, 216 (9th Cir. 2009) (evidence of defendant's ASD relevant to jury's determination of whether he possessed specific intent required for aiding and abetting); *State v. Suber*, No. A06-2438, 2008 WL 942622, 10 (Minn. Ct. App. Apr. 8, 2008) (unpublished opinion) (reversing defendant's conviction for driving under the influence where physical impairment interpreted by law enforcement as intoxication could also have been explained by defendant's Asperger's Syndrome). In *State v. Burr*, 921 A.2d 1135 (N.J. Super. Ct. App. Div. 2007), an appellate court reversed a defendant's convictions of sexual assault and endangering the welfare of a child because the trial court erred in excluding evidence of the defendant's Asperger's Syndrome. The defendant proffered the evidence "to assist the jury in understanding why he might act in a way that appears socially unacceptable to others." *Id.* at 1149. In holding that the trial court abused its discretion by disallowing the evidence, the appellate court noted, "[t]he trial would have been a more fair and

complete adversarial process if, in evaluating the evidence and the inferences urged by the State, jurors were aware that defendant's mental disability prevents him from viewing the world as others do in terms of acceptable social interactions." *Id.* at 115.

The intersection between ASD and the death penalty has gained recent attention with the case of Robert Roberson, an autistic man sentenced to death in Texas for the alleged murder of his daughter. In addition to challenging the scientific flaws underpinning his daughter's diagnosis of shaken baby syndrome, Mr. Roberson argues that his ASD contributed to his wrongful conviction because law enforcement misinterpreted his flat affect during the tragedy as evidence of guilt. *See* Petition for Commutation of Death Sentence to a Lesser Penalty, or, in the Alternative, a 180-Day Reprieve, and Request for an Interview and Hearing on the Matter, at 39-49, *In re Robert Leslie Roberson III*, https://drive.google.com/file/d/10tRZmfosl__j47r1Xn9QJuUvDeZ_LrYs/view (last visited Feb. 10, 2024) [hereinafter Petition for Commutation of Death Sentence]. Mr. Roberson's plight—including his argument about ASD—has attracted widespread media attention. *See, e.g.*, J. David Goodman, *In Texas, Execution Looms Despite Questions in Shaken Baby Case*, N.Y. Times (Oct. 14, 2024), <https://www.nytimes.com/2024/10/14/us/texas-execution-robert-roberston-shaken-baby.html>; John Grisham, *Texas May Execute a Man Based on a Scrapped Medical Theory*, Wall St. J. (Sept. 7, 2023), <https://www.wsj.com/articles/texas-may-execute-a-man-based-on-a-scrapped-medical-theory-death-row-autism-prison-b3c44493>; Maurice Chammah, *Robert Roberson's Death Penalty Case Shows How Justice System Fails People with Autism*, The Marshall Project (Sept. 18, 2024), <https://www.themarshallproject.org/2024/09/18/texas-autism-death-penalty-roberston>. Mr. Roberson has also garnered support from a broad coalition, ranging from the lead detective who investigated his case to judges, psychologists, and advocates. Petition for Commutation of Death Sentence, *supra*, at 10-16. Even the Texas legislature has rallied behind Mr. Roberson; a bipartisan group of 84 state lawmakers wrote in support of his clemency petition. *Id.* at 12-13.

standards of decency mandate a categorical bar on the execution of people with intellectual disabilities. As detailed in Part I, *supra*, people with ASD exhibit many of the very same impairments as people with intellectual disabilities. The overlap is apparent in Idaho’s own intellectual disability statute, which, in addition to a showing of significantly subaverage intellectual functioning, requires a showing of “significant limitations in adaptive functioning in at least two (2) of the following skill areas: **communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.**” I.C. § 19-2515A (emphasis added). If evolving standards of decency twenty years ago condemned the execution of people with intellectual disabilities due to the impairments associated with their condition, it follows that execution of people with ASD, who share nearly identical deficits, is equally deplorable.

IV. Death Sentences for People with ASD are Inherently Unreliable Because Defendants with ASD Cannot Present Mitigation Evidence that Will Be Meaningfully Considered by the Jury.

The United States Supreme Court has long held that the “qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). In *Lockett*, the Court held that this heightened need for reliability required the consideration of mitigation evidence because the sentencer’s “possession of the fullest information possible concerning the defendant’s life and characteristics” is “[h]ighly relevant—if not essential—[to the] selection of an appropriate sentence.” *Id.* at 603, quoting *Williams v. New York*, 337 U.S. 241, 247 (1949) (emphasis in original). Therefore,

a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant’s character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Id. at 605.

Critically, the heightened need for reliability is not satisfied by the mere presentation of

mitigating evidence. *Lockett* and its progeny not only established a defendant's right to present mitigating evidence to the sentencing judge or jury, but it also required that the sentencer give that mitigating evidence effect. See, e.g., *id.*; *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Penry v. Lynaugh*, 492 U.S. 302 (1989). In *Eddings*, the defendant presented mitigating evidence regarding his troubled childhood at trial, but the judge disregarded it, commenting that he did not believe that the law permitted him to consider it in mitigation. *Id.* at 109. The Court reversed *Eddings*' death sentence, holding that the judge committed constitutional error by refusing to consider the mitigating evidence. The Court held, "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Id.* at 113-14 (emphasis in original). While the sentencer and reviewing courts may determine what relative weight to assign to the mitigation, "they may not give it no weight by excluding such evidence from their consideration." *Id.* at 115. In her concurring opinion, Justice O'Connor reiterated that the concern for reliability embodied in *Lockett* motivated the Court's holding:

Because sentences of death are "qualitatively different" from prison sentences, this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.

Id. at 117-18 (O'Connor, J., concurring) (internal citations omitted). The trial judge's belief that he was not permitted to consider *Eddings*' troubled youth undermined the reliability of the sentencing determination and revealed an impermissible risk that the death penalty was erroneously imposed on an insufficiently culpable defendant. *Id.* at 119.

In *Penry v. Lynaugh*, *supra*, the Court again examined the crucial role of mitigating evidence in reliable determinations about culpability. *Penry* challenged the constitutionality of the Texas sentencing statute because it did not permit the jury to fully consider and give effect to the mitigating evidence of his intellectual disability and childhood abuse in its capital sentencing determination. *Id.* at 315. In evaluating *Penry*'s claim, the Court reviewed the link between the

sentencer's consideration of mitigating evidence and reliable capital sentencing:

Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]," and has made a reliable determination that death is the appropriate sentence.

Id. at 319 (internal citations omitted). The Court agreed that, because the Texas sentencing scheme did not permit the jury to give evidence of Penry's intellectual disability and background mitigating effect such that a reliable determination about his moral culpability could be made, it violated the Eighth and Fourteenth Amendments. *Id.* at 322-28.

In line with its commitment to ensuring the reliability of capital proceedings, the *Atkins* and *Roper* Courts articulated a rationale for excluding juveniles and intellectually disabled defendants from the death penalty that is independent from the proportionality analysis discussed in Parts I-III, *supra*: the characteristics of youth and intellectual disability create an unacceptable risk of wrongful execution because they hamper the defendant's ability to present mitigation evidence. The Court acknowledged that defendants with intellectual disabilities are unable to "make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors" where: (1) they are "**less able to give meaningful assistance to their counsel,**" *Atkins*, 536 U.S. at 320, (2) "**their demeanor may create an unwarranted impression of lack of remorse for their crimes,**" *id.* at 321, (3) they are "**typically poor witnesses,**" *id.*, and (4) the mitigation presented "**can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury,**" *id.* (emphasis added); *see also Roper*, 543 U.S. at 573 ("a defendant's youth may even be counted against him").

Because these concerns apply with at least equal force to someone with ASD, the Eighth and Fourteenth Amendments also prohibit the imposition of the death penalty in this case.

a. Defendants with ASD Are Less Able to Meaningfully Assist their Counsel.

The key diagnostic criteria for ASD (social deficits and repetitive behaviors and interests) significantly hamper an autistic defendant's ability to meaningfully assist counsel, particularly in the unique context of capital defense. The first and most critical step in adequate capital representation is establishing rapport with the client. "Establishing a relationship of trust with the client is essential both to overcome the client's natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, and to ensure that the client will listen to counsel's advice on important matters such as whether to testify and the advisability of a plea." The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA L. REV. 913, 1008 (Rev. ed. 2003). The social and communication deficits associated with ASD, discussed in Part I, *supra*, pose a major barrier to developing the necessary rapport between counsel and client for effective capital representation. For example, people often convey warmth through nonverbal cues, such as posture, facial expression, and tone, which clients with ASD will not be able to recognize or interpret.

The second diagnostic criterion—repetitive behaviors and interests—often manifests as hyper-focus on a particular topic at the exclusion of all others. Brown, *supra*, at 24. Capital cases involve an enormous volume of information across different subjects. In this case, the State has provided 68 terabytes of discovery. To make informed decisions, a capital client must be able to comprehend the full landscape of his case. For defendants with ASD, their fixation on a single theory or piece of evidence will impair their ability to see the case in its entirety and make reasoned decisions about its direction.

Relatedly, people with ASD tend to be rigid in their thinking and struggle with decision-making. Brown, *supra*, at 25; CDC, *supra* (listing "extreme distress at small changes, difficulties

with transitions, rigid thinking patterns” as examples of behavior that meet diagnostic criteria for ASD). A complex capital case will rarely follow a linear trajectory. As the investigation and evidence evolve, so will the defense’s strategy, and the client must be able to adapt. For capital defendants, the ability to pivot from a defense focused on innocence to one that is devoted to mitigation, or the ability to decide whether to accept a plea or risk a trial, or whether to suspend the short-term goal of proceeding to trial in order to achieve the long-term goal of fair and reliable adversarial proceedings, is literally a matter of life or death. Particularly under the enormous and unparalleled pressure of a capital prosecution, a defendant with ASD is likely to exhibit extreme inflexibility even in the face of necessity or become overwhelmed to the point of decision paralysis.

These impairments cannot simply be overcome by a client who wants to be cooperative. Mr. Kohberger displays extremely rigid thinking, perseverates on specific topics, processes information on a piece-meal basis, struggles to plan ahead, and demonstrates little insight into his own behaviors and emotions. Ex. A at 10, 11, 12, 14, 17. Even assuming Mr. Kohberger aims to be as helpful as possible in preparing the case, these mental deficiencies will invade every detail of that aid, from client relationship to fact investigation to mitigation investigation to pretrial motions to trial strategy. No matter how helpful Mr. Kohberger may wish to be, it is simply not possible for him to aid counsel in a way that someone without the deficits accompanying ASD would be able to. This lack of ability is the precise concern articulated in *Atkins*.

b. The Demeanor of a Defendant with ASD Will Likely Create an Unwarranted Impression of Lack of Remorse.

“At all stages of the proceedings, the defendant’s behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial.” *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring). Concerns about jurors’ impressions of a defendant’s remorse—or lack thereof—apply with equal force to persons afflicted with ASD as they do to those with intellectual disability. *See Atkins*, 536 U.S. at 321.

Demeanor is particularly important in capital trials when the defendant's life is at stake. "Serious prejudice could result" if the "defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion" is inhibited:

The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.

Riggins, 504 U.S. at 143-144 (Kennedy, J., concurring). Indeed, substantial social science research bears Justice Kennedy's observations out. Many scholars have determined that, alongside the possibility of a defendant's future dangerousness, a defendant's perceived remorselessness is perhaps the best predictor of whether a jury will sentence a person to death. *See, e.g.*, Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1560 (1998) (finding that 69% of jurors within the study who voted for death cited remorselessness as a reason, and that many indicated it was the "most compelling reason" for their vote); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 COLUM. L. REV. 1538, 1560-61 (1998) (almost 40% of jurors surveyed cited lack of remorse as the reason they voted for death). Therefore, as with the intellectually disabled, there is a substantial risk that the demeanor of a defendant with ASD "may create an unwarranted impression of lack of remorse for their crimes." *Atkins*, 536 U.S. at 321.

Due to the physical manifestations of their disability, people with ASD are particularly vulnerable to bias on account of their courtroom demeanor. The diagnostic criteria for ASD list repetitive motor movements, echolalia, and excessive smelling or touching of objects as symptoms of ASD. CDC, *supra*. People with ASD often engage in repetitive self-stimulating behavior, which can include hand-flapping, finger-snapping, and body rocking. *See Brown, supra*, at 28. A juror seeing the defendant engage in any one of these behaviors, while sitting at counsel table during a murder trial, would perceive the defendant as strange, out-of-control, and even disrespectful of

such a solemn proceeding.

Subtler indicators of ASD can be just as damning for capital defendants, if not more so. Inability to make and maintain eye contact is a common symptom of ASD, which can be mistakenly interpreted as guilt or shame. Berryessa 2021, *supra*, at 850-51. Due to their difficulty recognizing the emotions of others, people with ASD may make facial expressions that are awkward and incongruent with the tone of the proceedings. *Id.* at 850; Christine N. Cea, *Autism and the Criminal Defendant*, 88 ST. JOHN'S L. REV. 495, 519 (2014). Most concerning for capital defendants, people with ASD often display a flat affect even in the face of highly emotional evidence, which can be interpreted as coldness or a lack of remorse. Berryessa 2021, *supra*, at 852.

Mr. Kohberger's ASD manifests in many of these highly prejudicial, but completely involuntary, mannerisms. Dr. Orr observed that he subtly rocks his upper torso, especially while engaged in a cognitive task or listening to someone else—both of which are almost certain to occur during his trial. Ex. A at 7. His range of facial expression is limited, his baseline affect is stoic, and his expressions are sometimes incongruent with what is happening around him. *Id.* Mr. Kohberger also exhibits atypical eye contact, including an intense gaze. *Id.* at 9, 16. As discussed below in Part V, *infra*, Mr. Kohberger's facial expressions—including his lack of affect and concentrated stare—are already being assigned sinister meaning by observers.

Jurors begin assessing a case from the moment they step into the courtroom. In this case, where jurors will be forced to determine whether Mr. Kohberger will live or die, Mr. Kohberger himself is essentially a piece of evidence to be examined and evaluated; every movement and expression is subject to analysis. Due to his ASD, Mr. Kohberger simply cannot comport himself in a manner that aligns with societal expectations of normalcy. This creates an unconscionable risk that he will be executed because of his disability rather than his culpability.

c. People with ASD Make Poor Witnesses.

Concerns about the demeanor of a defendant with ASD apply with greater force when he chooses to take the stand in his own defense. Both verbal and nonverbal communication with the

jury is impeded by the deficits experienced by someone with ASD, perhaps to an even greater degree than someone with intellectual disability, who may not experience the same level of social impairment. A person with ASD will struggle on the witness stand in myriad ways:

Aside from atypical social behaviors, individuals with ASD may exhibit uncommon verbal or speaking patterns. Sometimes their phrasing is unusual, nonsensical, and exceedingly formal. They may take a long time to answer questions, which may appear evasive. They may also let out “sudden and unexpected verbal utterances,” which might come across as rude. They may also misinterpret or nit-pick questions asked of them during questioning or cross-examination. For instance, defendants may fail to pick up on cues which signal the end of a line of questioning, or attempt to shift the conversation to a topic of their interest. Such behavior may be misunderstood as the defendant being “cagey,” or unwilling to discuss a particular area or answer questions. As another example, when questioned in his jury trial, a defendant with ASD instigated “arguments with the prosecutor over comparatively trivial detail, while failing, unless re-directed, to confront the underlying and critical question.”

Berryessa 2021, *supra*, at 851 (internal citations omitted).

Due to the deficits associated with ASD, a defendant like Mr. Kohberger is just as likely as someone with intellectual disability to make a poor witness. Mr. Kohberger’s speech is awkward, both in its content and delivery. As Dr. Orr observed, his tone and cadence are abnormal, his interactions lack fluidity, and his language is often overinclusive, disorganized, highly repetitive, and oddly formal. *Id.* at 8-9, 16, 17. He is highly distracted by sounds or activity occurring around him, and he frequently looks from side-to-side to monitor his periphery. *Id.* at 9. As a result of his high distractibility, he often needs questions or instructions repeated. *Id.* He frequently shifts the topic back to himself even when it is inappropriate. *Id.* He uses abrupt, matter-of-fact phrases that would be considered rude. *Id.* He carries on about topics in a circular manner and perseverates about specific, non-essential details. *Id.* These symptoms of Mr. Kohberger’s ASD will alienate him from the jury and significantly hamper his ability to make a persuasive showing of innocence or of mitigation. *Atkins*, 536 U.S. at 320-21.

d. Evidence of a Defendant's ASD Will Likely Be Perceived by the Jury as Aggravating Instead of Mitigating.

It is well-recognized by courts and scholars alike that evidence of ASD, like intellectual disability and youth, is a “two-edged sword,” *id.*; *see also Roper*, 543 U.S. at 573, that increases the likelihood that a defendant will be seen as dangerous and, as a result, sentenced to death. *See, e.g., Neuhard v. United States*, 119 F.4th 1064, 1070 (6th Cir. 2024) (trial counsel not ineffective for failing to present evidence of defendant's ASD due to “the risk that the jury would perceive him as a mentally ill ‘monster’ who could not control his impulses to sexually abuse children”); *United States v. Morais*, 670 F.3d 889, 897 (8th Cir. 2012) (testimony at sentencing about defendant's autism and compulsive nature gave court reason “to be concerned about incorrigibility”); *Mammone v. Jenkins*, No. 5:16CV900, 2019 WL 5067866, at *49 (N.D. Ohio Oct. 9, 2019), *aff'd*, 49 F.4th 1026 (6th Cir. 2022) (capital defendant's insistence that he did the “right thing” by killing his children—a belief which post-conviction counsel attributed to his ASD— “perhaps ma[de] the case for death even stronger”). In one study, several trial judges who were interviewed regarding the impact of ASD on sentencing believed ASD would be an aggravating factor, “as an individual's inability to control his behavior may be an inherent danger and threat to himself, others, and public safety.” Colleen M. Berryessa, *Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism*, 46 J. AUTISM & DEVELOPMENTAL DISORDERS 2770 (2016), <https://pmc.ncbi.nlm.nih.gov/articles/PMC4939110/>.

The risk that the jury's fear about the defendant's future dangerousness will overshadow the mitigating force of defense evidence is especially pronounced in cases of ASD. ASD is beyond the comprehension of most jurors, and it is chronic, permanent, and untreatable. Research has found that neurotypical adults demonstrate negative implicit bias against adults with ASD. *See Cheryl L. Dickter et al., Implicit and Explicit Attitudes Toward Autistic Adults*, 2 AUTISM IN ADULTHOOD 144, 145, 148 (2020). Moreover, and particularly relevant to Mr. Kohberger's case and the media frenzy surrounding it, “[h]eightedened media attention on ASD-associated crimes has

raised public alarm over the possible link between an autism diagnosis and violent behavior.” Brown, *supra*, at 26.

Although there is little research on juror receptivity to ASD as mitigation evidence, studies have repeatedly found that jurors view evidence of serious mental illness as aggravating rather than mitigating. Several analyses demonstrate that, although jurors believe in the abstract that mental health evidence will make them less likely impose death, in reality that evidence is often “presented and discounted, presented and ignored, or presented, rejected and treated as an aggravator.” Marla Sandys et al., *Capital Jurors, Mental Illness, and the Unreliability Principle: Can Capital Jurors Comprehend and Account for Evidence of Mental Illness*, 36 J. BEHAV. SCI. & L. 470, 477 (2018) (citing studies). One study of capital jurors who voted for death in cases where mental illness was a factor found that nearly half of jurors either treated it as an aggravating factor or reported that it had no impact on their decision at all. *Id.* at 479. The same study also revealed that evidence of mental illness became irrelevant to some jurors if the facts of the crime were particularly brutal; that jurors often expressed concern about mentally-ill defendants’ future dangerousness, especially where there appeared to be less potential for rehabilitation; that jurors often perceived a defendant’s lack of emotion at trial as a lack of remorse, rather than a symptom of mental illness; and that jurors were highly skeptical of defendants’ claims of mental illness, often believing the defendant was malingering to manipulate the system and escape punishment. *Id.* at 479-83.

That real capital juries are routinely transmogrifying mitigating evidence into evidence warranting execution demonstrates the inability to address this problem through jury selection or instructions. A capital sentencer “must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future.” *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007); *see also Penry*,

that evidence of intellectual disability should be considered aggravating in sentencing). However, experience shows that reality is different: despite their impairments, these defendants are *more likely* to be sentenced to death. *Cf.*, *Atkins*, 536 U.S. at 320 (holding that defendants with cognitive and behavioral impairments of intellectual disability are less morally culpable); *Penry*, 490 U.S. at 321 (“defendants who commit criminal acts that are attributable to . . . emotional and mental problems may be less culpable than defendants who have no such excuse”).

This Court addressed the reality that evidence of mental illness is often a “double-edged sword” in its November 20, 2024, Memorandum Decision and Order on Death Penalty Motions [hereinafter Order on Death Penalty Motions]. Citing *Penry*, 492 U.S. at 319, the Court denied Mr. Kohberger’s motion to strike the propensity aggravator on the grounds that “double-edged evidence is dealt with through instructions on the mitigation side, not through striking an aggravator.” Order on Death Penalty Motions at 19. However, the United States Supreme Court overruled *Penry* in *Atkins* and explicitly held that the double-edged nature of intellectual disability evidence is one reason why defendants with intellectual disabilities cannot be sentenced to death in accordance with the Eighth and Fourteenth Amendments’ reliability requirement. *Atkins*, 536 U.S. at 320-21. The Supreme Court reiterated this principle when it categorically barred execution of juvenile offenders in *Roper*, 543 U.S. at 573. Noting that the prosecution had argued that the defendant’s youth was aggravating rather than mitigating, the Court specifically rejected anything less than a categorical exclusion to address the problem: “While this sort of overreaching could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked, that would not address our larger concerns.” *Id.* Thus, the Supreme Court has clearly established that where mitigating disability evidence may be mutated into an aggravator, the remedy is not a mere jury instruction, but exclusion of death as a sentencing outcome.

V. Even if this Court Rejects a Categorical Approach, it Should Remove the Death Penalty Because Case-Specific Factors Create an Unacceptable Risk that a Death Sentence Will Be Imposed In Spite of Factors Requiring a Lesser Sentence, Including a Pervasive Media Narrative that Assigns Sinister Meaning to Symptoms of Mr. Kohberger’s Disability.

Even if the Court does not find that a categorical exclusion is warranted, the lack of reliability inherent to any death sentence imposed upon on Mr. Kohberger provides independent grounds to strike death in this case. There is no need to speculate about what impact Mr. Kohberger's ASD might have on his ability to present a meaningful defense; the prejudice is already clear. In its decision transferring venue of Mr. Kohberger's case, the Latah County Court acknowledged the extraordinary media attention received by this case. Much of that attention focuses on Mr. Kohberger himself—in particular, on his disability.

Outlets ranging from *The New York Times* to true crime video bloggers have assigned nefarious meaning to symptoms of Mr. Kohberger's ASD. Multiple news sources have, for example, focused on Mr. Kohberger's social deficits, particularly as they relate to his interactions with women. NBC News accused Mr. Kohberger of making “creepy” comments to female staff at a brewery. Minyvonne Burke & Deon J. Hampton, *Suspect in Idaho Killings Had Made ‘Creepy’ Comments to Brewery Staff, Customers, Owner Says*, NBC News, Dec. 31, 2022, <https://www.nbcnews.com/news/us-news/suspect-idaho-killings-made-creepy-comments-brewery-staff-customers-ow-rcna63847>. *The New York Times* ran an article alleging that Mr. Kohberger made female students at Washington State University feel “uncomfortable” (though an investigation by the university cleared Mr. Kohberger of any wrongdoing), and described how he lost his job as a teaching assistant due to his “failure to meet the ‘norms of professional behavior’ in his interactions with the faculty.” Mike Baker & Nicholas Bogel-Burroughs, *University Investigated Idaho Murder Suspect’s Behavior Around Time of Killings*, N.Y. Times, Feb. 10, 2023, <https://www.nytimes.com/2023/02/10/us/idaho-murders-kohberger-fired-wsu.html>. If true, these allegations can easily be explained by Mr. Kohberger's ASD: given their difficulty interpreting social cues, people with ASD may misconstrue social niceties as romantic interest. Berryessa 2021, *supra*, at 848-49. It is also no surprise that Mr. Kohberger came across as socially awkward or that he struggled to adapt to professional norms; these impairments are hallmarks of his disability.

Lack of facial expressions and abnormalities in eye contact and body language are so emblematic of ASD that they are explicitly listed in the diagnostic criteria for the disorder. CDC, *supra*. But to the online commentators who have developed a cottage industry devoted to parsing Mr. Kohberger's every movement, these symptoms of his disability are sure signs of his guilt. One video "analyzing" Mr. Kohberger's body language—which has received **over one million views**—infers guilt from his "deadpan look" and "robot-like walk," positing that his facial expressions and body language prove he is a murderous "incel." LiveNOW from FOX, *Idaho Murders: What Suspect Bryan Kohberger's Body Language Tells Us*, YOUTUBE (Jan. 4, 2023), <https://www.youtube.com/watch?v=Uk5j1nmk6lo&t=13s>. A similar video, viewed over 350 thousand times, lambasts Mr. Kohberger for his "glare" and "blank empty stare," his "cold iciness," his "intense expression," and his lack of facial affect. Law&Crime Network, *'Cold Iciness': Bryan Kohberger's Body Language Before and After Arrest for Idaho Murders Analyzed*, YOUTUBE (May 23, 2023), <https://www.youtube.com/watch?v=J3QRDUPA58w&t=6s>. Noting the rigidity of his posture and his apparent lack of emotion, *The New York Post* described Mr. Kohberger as showing "a level of calm most comparable to infamous assassin Lee Harvey Oswald." Stephanie Pagones, *Accused Idaho Killer Bryan Kohberger's Body Language Compared to Lee Harvey Oswald*, N.Y. Post, May 23, 2023, <https://nypost.com/2023/05/23/accused-idaho-killer-bryan-kohbergers-body-language-akin-to-oswald-s/>. A headline from The U.S. Sun says it all: "LOOK OF A 'KILLER' Idaho suspect Bryan Kohberger's 'psychopathic stare' entering court hides chilling emotions, says body language expert." G.P. Rodriguez, The U.S. Sun, Jan. 3, 2023, <https://www.the-sun.com/news/7045055/idaho-suspect-bryan-kohbergers-psychopathic-stare/>.

These widely viewed and highly prejudicial media reports, draped in the language of "expertise" and "analysis," demonize Mr. Kohberger for his disability. In an environment so tainted by rampant and vitriolic conjecture, it is impossible for Mr. Kohberger to receive the individualized sentencing determination—including full and careful consideration of mitigation evidence—that the constitution demands whenever the State seeks to extinguish a human life.

The sustained national media attention on this case also repeatedly emphasizes that the alleged crime is brutal and shocking in nature. These types of cases were of particular concern to the U.S. Supreme Court and underpinned the categorical approach in *Atkins* and *Roper*: “An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.” *Roper*, 543 U.S. at 573; *see also Atkins*, 536 U.S. at 320-21. Likewise, a jury in this case will be emotionally overwhelmed by the factual allegations, and simultaneously looking at a defendant who appears to be emotionally uninvested and unmoved and who cannot persuasively testify in his own defense. There is little doubt that this reality will overpower any mitigating arguments based on ASD as a matter of course, amounting to an unconstitutional risk that Mr. Kohberger—on account of his disability—will be unreliably convicted and sentenced to death.

CONCLUSION

For all of the reasons set forth above, Mr. Kohberger’s ASD prevents him from being sentenced to death in a manner that accords with the constitutional requirements of proportionality and reliability. Like juveniles and people with disabilities, he is insufficiently culpable to be sentenced to death, the aims of deterrence and retribution will not be satisfied by his execution, and he faces an unacceptable risk “that the death penalty will be imposed in spite of factors which may call for a less severe penalty.” *Lockett*, 438 U.S. at 605. As such, the death penalty must be struck as a possible penalty in this case.

DATED this 24 day of February, 2025.



ANNE C. TAYLOR
ANNE TAYLOR LAW, PLLC

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the 24 day of February, 2025 addressed to:

Latah County Prosecuting Attorney –via Email: paservice@latahcountyid.gov

Elisa Massoth – via Email: legalassistant@kmrs.net

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO,

Plaintiff,

V.

BRYAN C. KOHBGERGER,

Defendant.

CASE NUMBER CR01-24-31665

**ORDER SEALING DEFENDANT'S
EXHIBITS IN SUPPORT OF THEIR
MOTION TO STRIKE DEATH
PENALTY RE: AUTISM SPECTRUM
DISORDER**

The Court having before it the *Stipulated Motion to File Defendant's Exhibits in Support of their Motion to Strike Death Penalty RE: Autism Spectrum Disorder Under Seal*, and good cause appearing, now, therefore;

IT IS HEREBY ORDERED the Defendant's exhibits in support of their Motion to Strike Death Penalty RE: Autism Spectrum Disorder shall be filed under seal pursuant to I.C.A.R. 32(i) and I.C. § 74-124(1)(b) and (c).

SO ORDERED 2-27-25


STEVEN J. HIPPLER
DISTRICT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on March 03, 2025 addressed to:

Latah County Prosecuting Attorney –via Email: paservice@latahcountyid.gov
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Deputy Clerk 3/3/2025 4:23:34 PM

**ORDER SEALING DEFENDANT'S EXHIBITS IN SUPPORT OF THEIR MOTION
TO STRIKE DEATH PENALTY RE: AUTISM SPECTRUM DISORDER**

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO,

Plaintiff,

V.

BRYAN C. KOHBERGER,

Defendant.

CASE NUMBER CR01-24-31665

**DEFENDANT'S RESPONSE TO
STATE'S MOTION IN LIMINE**

**RE: IMPROPER DEATH PENALTY
COMMENTS**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and hereby responds to the State's Motion in Limine RE: Improper Death Penalty Comments.

Mr. Kohberger faces four counts of first-degree murder. The charges began with an arrest warrant and Complaint. The State chose the Grand Jury process rather than preliminary hearing,

and the Grand Jury returned the Indictment. Thereafter the State chose to file its Notice of Intent to Seek Death.

The jury selected to try Mr. Kohberger's case will be aware the State is seeking the death penalty. They will be informed at the outset for a variety of reasons. Mr. Kohberger must have a way of conducting Voir Dire with prospective jurors; he must be able to examine witnesses and present arguments in his trial. Mr. Kohberger suggests he use phrases that comport with existing language in statute and jury instruction.¹

DATED this 17 day of March, 2025.



BY:

ANNE C. TAYLOR
ANNE TAYLOR LAW, PLLC

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the 17 day of March, 2025 addressed to:

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¹ The State pointed the court to ICJI 700C as how the jury would be instructed; but the jurors will also hear ICJI 700B when jury instruction are read.

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,
Plaintiff,

V.

BRYAN C. KOHBERGER
Defendant.

Case No. CR01-24-31665

STATE'S RESPONSE TO DEFENDANT'S
MOTION TO PRECLUDE THE DEATH
PENALTY AND ADOPT OTHER NECESSARY
PROCEDURES

RE: DISCLOSURE VIOLATIONS

COMES NOW the State of Idaho, by and through the Latah County Prosecuting Attorney, and hereby responds to "Defendant's Motion to Preclude the Death Penalty and Adopt Other Necessary Procedures due to the State's Numerous Disclosure Violations." The State incorporates "State's Response to Defendant's Motion in Limine #2 Re: Vague and Undisclosed Expert Testimony" in this response.

STATE'S RESPONSE TO DEFENDANT'S MOTION TO PRECLUDE THE DEATH PENALTY AND ADOPT
OTHER NECESSARY PROCEDURES RE: DISCLOSURE VIOLATIONS

ARGUMENT

I. The State has Complied with Idaho Criminal Rule 16

The controlling authority for discovery is Idaho Criminal Rule 16. I.C.R. 16(a) which states:

As soon as practicable after the filing of charges against the accused, the prosecuting attorney must disclose to defendant or defendant's counsel any material or information in the prosecuting attorney's possession or control, or that later comes into the prosecuting attorney's possession or control, that tends to negate the guilt of the accused as to the offense charged or that would tend to reduce the punishment for the offense.

I.C.R. 16(a). The rule goes on to discuss that this obligation extends to information in the possession or control of others who have participated in the investigation and the prosecutor must disclose 404(b) information.

Under I.C.R. 16(b), upon written request from the Defendant, the Prosecutor must disclose (1) statements of defendant; (2) statements of co-defendants; (3) defendant's prior record; (4) documents and tangible objects; (5) reports of examinations or tests; (6) witnesses; (7) expert witnesses; (8) police reports; (9) digital media recordings; (10) other additional materials ordered by the Court. I.C.R. 16(b).

Under Rule 16 there is a continuing duty to disclose which continues even through trial: "If...a party discovers additional evidence or evidence of an additional witness or witnesses, or decides to use additional evidence, witness or witnesses, the evidence is automatically subject to discovery and inspection." I.C.R. 16(j). In such a case, the party must "immediately notify" the other party to allow that party to make the appropriate request for additional discovery or inspection. *Id.*

Upon written request from the defendant, the State must respond within fourteen days of service with one of the following: (1) the response has been complied with; (2) there is no objection and the defense will be permitted discovery at a “time and place certain”; or (3) the State objects to all or part of the information with grounds for the objection. I.C.R. Rule 16(f)(1). Failure to respond within fourteen days constitutes a waiver of any objections and is ground for sanctions by the Court unless there is a showing of “good cause or excusable neglect.” I.C.R. 16(f)(2).

Lastly, Rule 16 provides that if a party fails to comply with a request for discovery, the Court may: (1) order the party to permit discovery or inspection; (2) prohibit discovery; or (3) enter such other order as it deems just in the circumstances. I.C.R. 16(k). The choice of an appropriate sanction for failure to comply with a discovery request is within the discretion of the trial court. *State v. Mathews*, 124 Idaho 806, 864 P.2d 644 (Ct. App. 1993).

In the case at hand, the State has complied with Idaho Criminal Rule 16. Defense counsel entered a notice of appearance on January 11, 2023. Starting on January 18, 2022, the State began providing discovery pursuant to Rule 16(a). Discovery was provided generally as follows: documents including reports were bates stamped and sent as PDFs (Bates Pages 1-15914); photographs were bates stamped and sent as PDFs (originals of the photographs were sent on a hard drive pursuant to a later discovery request) (Photo Bates 1-13832); and audio and/or video files were assigned an “AV” file number and placed onto hard drives (AV00001-AV0000989). PDFs were sent automatically. Larger files including audio/video files (which could not be emailed) were put on hard drives. The hard drives were routinely picked up by defense counsel or her staff.

Early on the parties had to determine how to discover a massive amount (over 50 terabytes (TB) of data) which was stored at the MPD Forensics Lab. This included data such as surveillance videos, phone extractions, third party data, call details records, and computer extractions. The amount of data recovered required the MPD, the State, and Defendant to acquire large servers capable of storing this data. The Defendant acquired and provided a server to the MPD and the information was copied, verified, and placed onto the Defendant's server. This process (acquiring, copying, verifying, etc.) took several weeks. This was turned over to the Defendant around April 4, 2023 (almost two years ago).

Discovery was provided continuously as the State received it from various agencies and it was promptly turned over to Defendant in the same fashion it was received. The State and Defendant are on the same playing field in this regard. Turning information over in the same way it was received allowed: (1) the discovery to be sent promptly; and (2) the State to track what was turned over (the State learned early on if we moved or changed files then it was much more difficult to determine what had been discovered or to answer any questions from defense).

On January 10, 2023, the State received a written request for discovery pursuant to Rule 16(b). This was followed by 22 supplemental requests throughout the course of the case (in addition to six motions to compel). The State replied to each request in accordance with Rule 16(4)(1) within the requisite fourteen days. Further the State not only met the demands of 16(4)(1) but supplemented those requirements by providing the Defendant with the location of the requested discovery and the date discovered within each of those initial responses.

On September 4, 2024, the State filed "State's Response and Supplemental Responses to Defendant's Requests for Discovery." This was accompanied by fifteen attachments (approximately 320 pages) which detailed the location, the description, and the date the

discovery was provided to the Defendant. In essence, Defendant was provided 319 pages of “index[es]” for each of their discovery requests. See State’s Response and Supplemental Responses to Defendant’s Requests for Discovery (because of its volume the State is not attaching this filing to this response). The State’s initial discovery deadline was September 6, 2024 (approximately eleven months before trial is scheduled to start). As noted above, the State also has a continuing duty to disclose information until the completion of trial. As such, the State has continued to disclose information, which came to light after September 6, 2024.

The State has complied with Idaho Criminal Rule 16. The Defendant has not provided any basis for I.C.R. Rule 16 violations, much less sanctions.

II. The State has Complied with *Brady v. Maryland* and its Progeny

Defendant’s argument rests on a misunderstanding of the State’s *Brady* obligations. Under *Brady*, the prosecution has a duty to disclose evidence that is both favorable to the defense and material to either guilt or punishment. 373 U.S. at 87. “There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it’s exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” *State v. Hall*, 163 Idaho 744, 830, 419 P.3d 1042, 1128 (2018).

“‘Prejudice’ and ‘materiality’ are used interchangeably in the context of *Brady*.” *State v. Campbell*, 170 Idaho 232, 247 n.5, 509 P.3d 1161, 1176 n.5 (2022). “When assessing materiality, the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the [outcome].” *Id.* at 247, 509 P.3d at 1176 (quoting *Thumm v. State*, 165 Idaho 405, 423-24, 447 P.3d 853, 871-72 (2019) (brackets in original)). “Such evidence is material ‘if there is a reasonable probability that, had the evidence

been disclosed to the defense, the result of the proceeding would have been different.” *Id.* (quoting *Strickler v. Greene*, 527 U.S. 263 (1999)). When the *Brady* issue is one of delayed disclosure, the question is whether ““earlier disclosure would have created a reasonable doubt of guilt.”” *Thumm*, 165 Idaho at 423, 447 P.3d at 871 (quoting *United States v. Burke*, 571 F.3d 1048, 1054 (10th Cir. 2009)).

“Brady is an obligation of not just the individual prosecutor assigned to the case, but of all the government agents having a significant role in investigating and prosecuting the offense.” *State v. Gardner*, 126 Idaho 428, 433 (Ct. App. 1994); *see also Kyles*, 514 U.S. 419 at (“the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case, including the police”). However, “a prosecutor is not required to disclose ‘evidence the prosecutor does not possess or evidence of which the prosecutor could not reasonably be imputed to have knowledge or control.’” *State v. Avelar*, 132 Idaho 775, 781 (1999) (quoting *United States v. MacFarlane*, 759 F.Supp.1163, 1168 (W.D. Pa. 1991)). Even “information held in the minds of government witnesses is generally not imputed to the prosecution unless that information was discovered by police or prosecutors.” *Avelar*, 132 Idaho at 781.

In this case, the State has provided all material information in its possession to the Defendant, and will continue to provide any additional material information that may come to light.¹ As noted above, almost all discovery was provided within a timespan of three and a half

¹ The Defendant states “Mr. Kohberger requested additional discovery, related to IGG.” The Defendant claims the State has refused to provide this information. However, this information is controlled by Judge Judge’s “Sealed Order for Disclosure of IGG Information and Protection Order”. Further this specific information is not material - it has no bearing on the Defendant’s guilt or innocence. Any issues related to IGG are now moot in light of the Defendant’s Motion in Limine Regarding IGG Evidence and the State’s concurrence that no IGG evidence will be offered at trial.

years prior to trial (first discovery sent January 18, 2023) up until 11 months prior to trial (discovery deadline of September 6, 2024). The State has requested information regarding the Defendant's possible defense so the State could make specific inquiry for information that could be material to the Defendant (i.e. exculpatory). To date, the State has not received any information which would aid in the process of identifying possible exculpatory information.

Defendant claims the State has violated *Brady* by failing to provide an index of all discovery materials. But *Brady* does *not* require “the prosecutor to make a complete and detailed accounting to the defense of all police investigatory work on a case.” *State v. Horn*, 101 Idaho 192, 195 (1980) (quoting *Moore v. Illinois*, 408 U.S. 786, 795 (1972)). Moreover, the State *has* provided approximately 320 pages of “indexes” in response to the Defendant's 411 discovery requests. In addition, the Defendant has been provided a searchable index for all FBI materials.² The State has continuously facilitated the Defendant's review of discovery materials. The State also affirmatively sought exculpatory information, tasking investigators to pursue avenues of potential *Brady* material and documented such as supplemental reports that are readily reviewable. The Defendant, at best, is making a bald-faced assertion of improper conduct by the State without pointing to any factual basis. In the end, the State is in no better position to identify potentially exculpatory evidence than the Defendant.

The State has and will continue to abide by the requirements of I.C.R. 16 and *Brady*. Mr. Kohberger's due process rights have not been violated.³

² On August 8, 2024, the Defendant was provided a copy of the FBI's One Drive database related to this case. This included a master list of items in an excel format which was searchable.

³ The Defendant argues that the State not provided contents of various items it intends to rely upon at trial. The State notes the deadline for exhibit lists and witness lists are due April 21, 2025. In addition, the State has completed initial and supplemental expert disclosures pursuant to the Court's scheduling order and January 23, 2025, instructions.

III. There Are No Grounds to Preclude the Death Penalty

This Court should reject the Defendant's request to strike the death penalty as a sanction for a discovery violation that does not exist. *See supra* Part II. Even those courts that have utilized that sanction recognized that it was extreme and only utilized because no other remedy was sufficient. For example, in *Idaho v. Lori Vallow Daybell*, the State failed to timely disclose conversations between the Defendant and Co-Defendant. See "YouTube: Judge grants Lori Vallow's motion to dismiss death penalty in her case," March 21, 2023, 4:45 mark.⁴ The State's discovery deadline was "prior to February 27, 2023." The State disclosed discovery on February 27, 2023 (which the Court noted was late). On this date, the State discovered jail house recordings (phone calls and video visits). In addition, on March 13, 2023, the State discovered several more hours of jail house recordings (statements of defendant and co-defendant). *Id.* at 13:00. Over 100 hours of audio and video was disclosed after the discovery deadline. *Id.* The Defendant submitted an affidavit from her mitigation expert detailing the prejudice due to the late disclosures. *Id.* at 7:58. These disclosures were two weeks before jury selection was set to begin on March 27, 2023. *Id.* The Court noted the "problem here is a timing problem" *Id.* at 15:50. The Defendant's trial was set to begin April 3, 2023, and Defendant had not waived her right to speedy trial. The Court noted that if the disclosures had been made prior to the discovery deadline (February 27, 2023, or one day late) "it would be difficult for the Court to determine that prejudice would arise." *Id.* at 16:33.

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<https://www.bing.com/videos/riverview/relatedvideo?q=Lori+Vallow+Boyce+Motion+to+Preclude+Death+Penalty+hearing&&view=riverview&mmscn=mtsc&mid=991D7E49A555DB0FEED991D7E49A555DB0FEED&&aps=285&mcid=D5B6718C2E674A81B8F41B948F41683C&FORM=VMSOVR>

Presiding Judge, District Court Judge Steven W. Boyce stated:

the Court must determine here that the Defense has in fact demonstrated material prejudice resulting from late disclosures. The prejudice has occurred because of the proximity of the trial, the volume of the discovery, and the inability of the defense to adequately review that discovery before trial begins.

Id. at 19:45. Further, “having determined that prejudice has resulted due to the late disclosed discovery the Court must next consider what course of action, if any, is necessary.” *Id.* at 20:34.

Judge Boyce held:

because the Court has not found any willful conduct on the part of the State, the Court is not primarily concerned with any sort of sanction or punishment, but what the Court must address is an appropriate remedy to try to mitigate the prejudice that has been caused by the late disclosures. Ordinarily, a logical remedy would exist here and that would be a continuance of this trial. This has been proposed by the State as one solution, and the State has proposed to mirror a continuance in the companion case of the Chad Daybell’s case - 1623 case. However, here that’s an option I can’t consider, because in this case the defendant has unequivocally asserted her right to a speedy trial. In determining whether speedy trial is violated, one of the major factors is the reason for the delay. The reason for the delay here rests on the State and can’t be counted against the defendant to justify a delay of her trial in this case. If I were to delay this case based on an issue caused by the State, I believe that would violate her fundamental and constitutional right to a speedy trial.

Id. at 21:05.

The Judge noted that jury selection was set to begin the following week. *Id.* at 23:09. The Court found that excluding witnesses or evidence was not reasonable or fair to the State. *Id.* at 23:58. That left the Court with two options (1) striking the death penalty; or (2) dismissing the case. *Id.* at 24:08. The Court determined that dismissing the case would be “too severe of a sanction here.” *Id.* at 24:16. Judge Boyce determined this was a ripe issue and noted that all other options were considered before coming to his decision.

Judge Boyce held (noting a heightened scrutiny) “as an appropriate discovery sanction the State will be precluded from seeking the death penalty at trial and the State’s May 2, 2022 Notice of Intent to Seek the Death Penalty will be stricken.” *Id.* at 33:19. The Court reiterated this was not imposed to penalize the State but rather to ensure the constitutional right of the defendant was protected. *Id.* at 33:35.

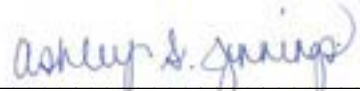
The facts before the Court in Kohberger’s case are nothing like the facts before the Court in the *Vallow* case. Unlike in *Vallow*, where the defendant pointed to over 100 hours of late disclosed jail calls and visits (that may or may not contain *Brady* material), the Defendant has not pointed to any particular evidence he believes the State has failed to disclose. Moreover, as the court in *Vallow* explained, the sanction in *Vallow* resulted from the Court not having any other choice because the defendant had not waived her right to a speedy trial. Here, Defendant has waived his right to a speedy trial. Even if this Court finds the State violated its *Brady* obligation for failing to provide unspecified evidence, the Court can fashion more appropriate remedies in this case.

In essence the Defendant is arguing that in cases that involve a large amount of discovery such as this one, the death penalty cannot be pursued because there is so much information for defense counsel to review prior to trial. That is absurd and such application would lead to absurd results. Despite his repeated assertions, Defendant has not demonstrated any actual prejudice – because there is none. Defendant’s request is without merit and should be denied.

CONCLUSION

The State requests that the Court find that (1) the State has abided by the requirements of ICR 16; (2) the State has not violated *Brady v. Maryland*, its progeny, or Mr. Kohberger's due process rights; therefore, (3) there is no basis to preclude the death penalty.

RESPECTFULLY SUBMITTED this 17th day of March 2025.



ASHLEY S. JENNINGS
SENIOR DEPUTY PROSECUTOR

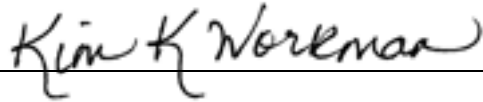
CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the STATE'S REPONSE TO DEFENDANT'S MOTION TO PRECLUDE THE DEATH PENALTY AND ADOPT OTHER NECESSARY PROCEDURES RE: DISCLOSURE VIOLATIONS were served on the following in the manner indicated below:

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- ☒ Mailed
- ☒ E-filed & Served / E-mailed
- ☐ Faxed
- ☐ Hand Delivered

Dated this 17th day of March 2025.



LATAH COUNTY PROSECUTOR'S OFFICE
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,
Plaintiff,

V.

BRYAN C. KOHBERGER,
Defendant.

Case No. CR01-24-31665

STATE'S REPLY TO
DEFENDANT'S RESPONSE TO
MOTION IN LIMINE

RE: IMPROPER DEATH
PENALTY COMMENTS

COMES NOW the State of Idaho, by and through the Latah County Prosecuting Attorney, and respectfully replies to the "Defendant's Response to the State's Motion in Limine Re: Improper Death Penalty Comments" filed on March 17, 2025.

The State brought this motion based on defense counsels' repeated references to the "State attempting to kill" their client which only serve to improperly incite the emotions of the jury. The State has a statutory right (I.C. 18-4004A), which it has chosen to invoke, to seek the death penalty

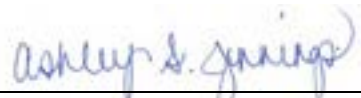
STATE'S REPLY TO DEFENDANT'S RESPONSE TO MOTION IN LIMINE
RE: IMPROPER DEATH PENALTY COMMENTS

in this case. Invoking this right does not open the door to the use of inflammatory language in front of a jury. The State seeks an Order prohibiting defense counsel from stating “The State has decided to attempt to kill [client/Mr. Kohberger]” or “[The State is] trying to kill one of us” (phrases that have been used in previous hearings as cited in the State’s Motion), or similar phrases.

The State relied on Idaho Criminal Jury Instruction (I.C.J.I.) 700C in its motion to illustrate that such language is inappropriate during the guilt phase when a juror is instructed not to “concern yourself with the subject of penalty or punishment.” I.C.J.I. 700C. I.C.J.I. 700B instructs the jurors that this is a capital case and describes the process for sentencing if the Defendant is convicted of murder. The State understands the jurors will be advised this is a capital case (and it is in no way suggesting that this fact be withheld from the jurors); but this fact should not permit defense counsel to characterize this statutory right in any manner they want (i.e. using inflammatory language with the purpose of inciting an emotional reaction from the jurors).

For the above reasons, the State request the Court prohibit defense counsel from making any reference to the State “attempting to kill” the Defendant (or similar phrases).

RESPECTFULLY SUBMITTED this 21st day of March 2025.



Ashley S. Jennings
Senior Deputy Prosecuting Attorney

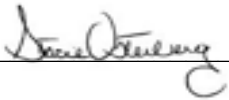
CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the STATE'S REPLY TO DEFENDANT'S RESPONSE TO MOTION IN LIMINE RE: IMPROPER DEATH PENALTY COMMENTS were served on the following in the manner indicated below:

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- ☐ Faxed
- ☐ Hand Delivered

Dated this 21st day of March 2025.



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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO

Plaintiff,

V.

BRYAN C. KOHBERGER,

Defendant.

CASE NUMBER CR01-24-31665

**REPLY TO STATE'S RESPONSE TO
DEFENDANT'S MOTION TO STRIKE
DEATH PENALTY**

RE: AUTISM SPECTRUM DISORDER

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and hereby
replies to the State's Response to Defendant's Motion to Strike Death Penalty Re: Autism
Spectrum Disorder, filed on March 17, 2025. Mr. Kohberger relies on his right to be free from

cruel and unusual punishment, his right to due process, his right to a fair trial, his right to counsel, his right to present a defense, his right to a reliable sentencing determination, and other rights safeguarded by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 2, 6, 7, and 13 of the Idaho State Constitution.

Mr. Kohberger incorporates herein Defendant's Response to State's Motion in Limine Re: Neuropsychological and Psychiatric Evidence, filed March 17, 2025. That Response provides neuroimaging showing that ASD has both physical and biological factors.

ARGUMENT

The *Atkins* standard for intellectual disability is much more than low IQ. *Atkins v. Virginia*, 536 U.S. 304 (2002). Mr. Kohberger fits the criteria set forth in *Atkins* in the following ways: impairment in communication, reasoning, social skills, and understanding the reactions of others. His deficits developed at an early age and continue to the present day; ASD is not something one outgrows. Very early in his education he was treated as a child with special needs, evaluated psychologically, and provided with instructional support. He was observed as "rocking" in the classroom, inattentive, and he had poor fine motor skills. He received reading support, speech therapy, reminders to stay on tasks, more time for homework, and organizational support. He lacked social-emotional reciprocity and had few friends, he did not understand nonverbal communicative behaviors used for social interaction, and had an inability to develop, maintain, and understand relationships. The State seeks death when Mr. Kohberger is a person with an intellectual and neurodivergent physical disability. Like people with intellectual disabilities, Mr. Kohberger's adaptive functioning is impaired. He lacks the skills to function in the real world of daily living, self-care, socialization, and communication. People with an IQ above 70, can still qualify as intellectually disabled due to diminished adaptive function. *Hall v.*

Florida, 572 U.S. 701 (2014). The DSM clearly states that intelligence is not a hedge against severe deficits in social functioning. “Even those with average or high intelligence have an uneven profile of abilities. The gap between intellectual and adaptive functional skills is often large.” DSM-5, p. 55.

The State is misguided in its argument that Mr. Kohberger has “the least severe form of ASD” in support of its position that his disability is not *Atkins* or *Roper* qualifying. In *United States v. Huseth*, 18-CR-20027, Doc. 67 (D. Kan. 2018) the court dispelled the misconception among lay people that “high functioning” or “mild” autism, terms used by researchers to denote individuals with average intelligence and communication skills, does not result in severe impairments. The court specifically rejected the contention that the defendant’s ASD is “mild” because he has a high IQ, had attended college, and could drive a car. Huseth had a Full-Scale IQ of 123, “[b]ut despite his high IQ,” the court stated, “Huseth is severely impaired and, in many areas, functions at the level of an 8-year-old.” The court considered evidence that demonstrated that the defendant struggled with daily living skills and socialization, despite his high intelligence.¹ “Intelligence is not a hedge against severe impairment of adaptive functional ability,” the court stated. Another example of the inappropriate reliance of a court on the term “mild” is from the Fourth Circuit. In *United States v. Zuk*, 874 F.3d 398 (4th Cir. 2017), the trial court’s sentence was overturned on appeal and remanded, largely because of Mr. Zuk’s autism being described in the record as “mild autism,” and the correlative failure to do adaptive testing which would have illustrated the true degree to which Mr. Zuk was impaired in relevant ways. The State relies on cases that do not address the facts in this case. It cites, *U.S. v. Roof*, 10 F.4th 314, 380 (4th 2021), which does not stand for the proposition that ASD is not included as falling under *Atkins*. In *Roof*, the court focused only on

¹ See also *Roper v. Simmons*, 543 U.S. 551 (2005) (drawing the line at age 18 is subject to objections), ASD impacts the functional age of adults who suffer from the disorder. Often times the functional age is that of a juvenile. When that is the case, the protections of *Roper* to be death ineligible arguably apply.

IQ as there was no full development of an intellectual disability. The State's reliance on *Dunlap* and *Pizzuto* are equally misplaced, as the issues related to mental disability were different. In *Pizzuto*, the court hinged its decision on a lack of data before age 18 and there was no claim of ASD. *Pizzuto v. State*, 146 Idaho 720,728-29 (2008). In *Dunlap*, the argument focused on mental illness and ASD was not a claim. *State v. Dunlap*, 155 Idaho 345,380 (2013).

Atkins stated three reasons why, in that case, Capital Punishment was inappropriate: lesser culpability does not merit death, the death penalty does not act as a deterrent for the intellectually disabled, and impairments of the intellectually disabled can jeopardize the fairness of their proceedings. These same factors apply in Mr. Kohberger's case.

Lesser culpability- Mr. Kohberger has all times asserted his innocence. Should he be convicted of this crime, his neurological, physical disorder may very well be the reason the jury misjudges him. The public sentiment of prejudice against him and pre-judgment of guilt resulted in a change of venue. Media coverage continues to be negative with an overall continued narrative claiming his guilt. The reality is that he is in fact, in a category of persons who are less culpable. It is widely recognized that autism does affect culpability, moral reasoning, and the ability to foresee consequences of social interaction and processes. People with ASD face a childhood of victimization by their typically developing peers because they are misunderstood. Inevitably, misunderstanding is going to reprise itself in the courtroom setting to the great disadvantage of the autistic accused facing typically developed jurors.

In *USA v. Shore*, 17-cr-502, Doc. 50 (E.D. Pa. July 7, 2020) District Court Judge Timothy J. Savage stated:

Autism is a (sic) neuro-developmental disability involving the brain. It is characterized by the presence of narrow, repetitive behavior and differences and difficulties in social interaction, communication, and adjusting to change. A person suffering from ASD is neurologically impaired in his ability to appreciate

the unacceptability of his conduct or to intuit why this conduct is unacceptable. Because of his difficulty observing social norms, an ASD individual may engage in socially disapproved or unacceptable behavior, with no consciousness of wrongdoing or a real sense of how his behavior is viewed by others . . . But, the same factors bearing on the juvenile’s mental development and appreciation of his wrongdoing are present in the case of a defendant with ASD. . . Shore, like others with ASD, shares the same characteristics with juveniles whom the Supreme Court has found are “constitutionally different from adults for purposes of sentencing.” *Miller v. Alabama*, 567 U.S. 460, 471 (2012). These include immaturity, impulsivity, and failure to appreciate the risks and consequences of their actions. The same analysis applies here.

USA v. Shore, Doc. 50, Memorandum Opinion, p. 7.

Death penalty as deterrent- it is well known that the death penalty is no deterrent at all. That is the reason that many states have eliminated it. It is not a deterrent for anyone.² Moreover, the State argues that “the death penalty does not act as a deterrent for the intellectually disabled because they cannot process the possibility of execution as a penalty,” and declares that this does not apply in the case of autism. To the contrary, autism is often conceptualized as an executive functioning disorder.³ Part of executive functioning is the ability to foresee consequences and adjusting behavior to optimize one’s course of action to obtain beneficial and avoid negative consequences. Mr. Kohberger suffers from executive function deficiencies such as disorganization and inability to plan ahead.

Impairment of intellectually disabled: Mr. Kohberger does have a “diminished ability to understand and process information, to learn from experience, to engage in logical reasoning or to control impulses.” As explained in the expert reports, he has poor working memory, engages

² See <https://deathpenaltyinfo.org/research-halting-the-use-of-the-death-penalty-did-not-result-in-an-increase-in-homicide-rates> (last visited March 24, 2025).

³ Volkmar, et al, *An Introduction to Autism and the Autism Spectrum*, Ch. 1 in: Volkmar, F.R., Loftin, R., Westphal, A., Woodbury-Smith, M. (eds) *Handbook of Autism Spectrum Disorder and the Law*. Springer, Cham. (2021).

in repetitive behaviors, and poor impulse control. His neurological divergence is supported in neuro imaging.

Persons with ASD make poor witnesses. Research shows that if the jury is not informed of the defendant diagnosis of ASD, the impact of a negative impressions of demeanor may have a detrimental implication for defendants with ASD. Perlin & Cucolo⁴ emphasize the need for protections in these areas because the operation of autistic traits

makes it much more difficult for individuals with ASD in the criminal justice system, especially when their fate is to be decided by jurors who may either have no familiarity with autism or whose "familiarity" is based on a television stereotype, and who regularly consider demeanor evidence (and their idiosyncratic perceptions of how "demeanor" can be translated into remorse, empathy, motive and more in evaluating a witness's credibility).

Mr. Kohberger's ASD makes a fair and just trial a challenge. The State argues news coverage is not informative on this topic. The State benefits from the biased news media. Public sentiment is that Mr. Kohberger's physical presentation makes him look guilty, through no fault of his own. His flat affect, intense gaze, awkward body posture, holding still in the court room, inability to react and process what is happening in the court room, and inability to show emotion could cause enough juror bias to convict him. Without a doubt, his ability to testify in trial and the decision to testify will be nearly impossible for Mr. Kohberger. He has no ability to perceive what it will feel like and whether he should in fact testify. His inability to read the room, understand the threat that cross examination will present, or explain himself in socially acceptable way without prosody of speech, presents insurmountable hurdles for him. The State

⁴ Perlin, Michael L. and Cucolo, Heather, 'Something's Happening Here/But You Don't Know What It Is': How Jurors (Mis)Construe Autism in the Criminal Trial Process, 82 UNIV PITTSBURGH LAW REVIEW 586 (2021), available at SSRN: <https://ssrn.com/abstract=3664705> or <http://dx.doi.org/10.2139/ssrn.3664705>.

picked fragments of sentences in the expert reports to support its position that Mr. Kohberger does not present with ASD challenges. In doing so, the State could not be more wrong in comparing Mr. Kohberger's ability to testify in a courtroom to the average person. He suffers from multiple vulnerabilities impacting, first, deciding whether or not to testify, and then competently testifying, with no ability to eliminate the physical conditions that exist within his body due to his neurodivergence. He fits exactly the *Atkins* "typical poor witness."

The failure of the police or a court to consider the extent to which the appearance of the accused is accounted for by his autism has resulted in reversals, on pure evidentiary sufficiency grounds. *See State v. Suber*, 2008 WL 942622 (Minn.2008) (failure to rule out ASD as the cause of indicia of impairment in operating motor vehicle, as opposed to marijuana); *United States v. Cottrell*, 333 F. App'x 213 (9th Cir. 2009) (reversal for failure to consider evidence of Asperger's condition in determining the specific intent required for conviction).

Finally, the State argues that Mr. Kohberger is competent and for that reason, *Atkins* does not apply. Competence is constantly being assessed and the reason Dr. Ryan's report refers to the issue is because his ASD impacts his ability to assist counsel and understand the proceedings he faces. He has an inability to assist with mitigation evidence and understand the magnitude of his case. By way of example, when he was arrested in his home, with a full swat team, doors broken, and parents zip tied, he made small talk with the detective in the back of the car during the ride to the police station. He asked the officer about his education and suggested that they get coffee at a later date. He did not perceive the profoundly serious nature of the moment and exhibited no perception of what was happening. While competency has not been raised in this case, at this time, Mr. Kohberger's team and assisting experts are constantly analyzing this issue.

CONCLUSION

For all the reasons addressed above and in Mr. Kohberger's initial brief, the death penalty must be struck as a possible penalty in this case. The Court has notified the parties that fifteen (15) minutes will be allowed on this motion. This is a matter that requires an evidentiary hearing with expert testimony. Mr. Kohberger will continue to pursue this legal issue throughout trial if this motion is denied. Given his disability, a jury should never be allowed to consider putting him to death.

DATED this 24th day of March, 2025.



ELISA G. MASSOTH

ELISA G. MASSOTH, PLLC ATTORNEY

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the 24 day of March, 2025, addressed to:

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERIK M. HUSETH,

Defendant.

Case No. 18-20027-JAR

MEMORANDUM AND ORDER ON SENTENCING

On August 27, 2018, Defendant Erik Huseth pled guilty to Count 3 of a three-count Information, charging him with possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). The charges stemmed from the FBI's search and seizure of Huseth's computer in 2014, which contained child pornography images and videos. This matter is now before the Court on Huseth's Sentencing Memorandum and Motion for Downward Departure or Variance (Doc. 31).

Neither party objects to the Sentencing Guidelines calculations in the Presentence Investigation Report. The calculations are: a base offense level of 18, a two-level enhancement for knowingly engaging in distribution via the use of peer-to-peer software, a two-level enhancement for use of a computer, a two-level enhancement for materials involving prepubescent minors, a four-level enhancement for materials depicting the sexual exploitation of infants or toddlers, a five-level enhancement for possessing more than 600 images, and a three-level reduction for acceptance of responsibility. The total offense level is 30, and Huseth's criminal history category is I, resulting in a correctly calculated Guidelines range of 97 to 120 months.

Huseth seeks a substantial departure downward under U.S.S.G. § 5H1.4 (Physical Condition) and a substantial variance downward on the basis of his lifelong condition of Autism Spectrum Disorder (“ASD”), his significant cognitive impairments, his particularized vulnerability, and his need for treatment. Huseth requests a sentence of probation, with any conditions the Court finds appropriate.

The government advocates for a two-level downward variance in recognition of this Court’s prior rulings that the two-level enhancement for use of a computer is no longer a distinguishing specific offense characteristic in an age when virtually all such crimes are committed through the use of a computer.¹ The government thus advocates for a sentence of 78 months, the bottom of the Guidelines range of 78 to 97 months for a total offense level of 28 and criminal history category of I.

In the three years since Huseth pled guilty, the parties have engaged in extensive discovery concerning Huseth’s ASD and whether he has Pedophilic Disorder. The parties have obtained evaluations, diagnoses, reports, and testimony from experts and have presented evidence at several sentencing hearings. The Court has the benefit of the opinions of five experts. Sarah Dettmer, a psychologist, has treated Huseth since 2013 for ASD. Defense expert Dr. Rachel Loftin, a psychologist who specializes in ASD, did extensive testing of Huseth and his parents and a comprehensive evaluation. Defense expert Dr. George Athey, a neuropsychologist who specializes in treatment of sex offenders, tested and evaluated Huseth and concluded that Huseth does not have Pedophilic Disorder. The government’s experts, Dr. Eric Imhof and Dr. Kimberly Spence, interviewed Huseth and reviewed the reports of Dr. Loftin

¹ See U.S. Sent’g Comm’n, Federal Sentencing of Child Pornography Non-Production Offenses 9 (2021).

and Dr. Athey. Dr. Spence opined that Huseth has ASD. Dr. Imhof opined that Huseth has Pedophilic Disorder.

There is no dispute that Huseth has ASD, but there is a dispute about the degree of his impairment and the degree to which it impaired his ability to fully appreciate the wrongfulness of possessing and viewing child pornography. There is also a dispute about whether Huseth has Pedophilic Disorder.

The Court has carefully reviewed the testimony and exhibits, the Presentence Investigation Report, as well as the many memoranda and pleadings filed by the parties.² Based on this extensive record, the Court concludes that Huseth's ASD and associated severe cognitive deficits significantly impaired his ability to fully appreciate the wrongfulness of possessing and viewing child pornography. Though Huseth understood enough to justify a plea to knowingly and intentionally possessing child pornography, he is not a neurotypical person and, without any explicit explanation, could not fully appreciate that the children involved were horrifically abused physically, mentally, and emotionally. Huseth's ASD further renders him particularly vulnerable to bullying and worse injury in a prison environment.

And, having carefully weighed the testimony and opinions of the experts, the Court finds that Huseth does not have Pedophilic Disorder. Nonetheless, the Court concludes that a probation sentence with treatment and therapeutic conditions tailored to his ASD as well as to sex offenders who are pedophilic constitutes a sentence that is sufficient but not greater than necessary to satisfy the statutory sentencing purposes set forth in 18 U.S.C. § 3553(a). For all

² The record includes: Huseth's Sealed Sentencing Memorandum and Motion for Downward Departure or Variance (Doc. 31); the government's Response to Defendant's Sentencing Memorandum. (Doc. 35); Huseth's Reply to the Government's Sentencing Memorandum (Doc. 63); Huseth's Supplemental Sentencing Information: Sentencing Data in Autism-Related Child Pornography Cases (Doc. 67); and the government's Sur-Reply to Defendant's Reply to Government's Sentencing Memorandum (Doc. 68).

these reasons, pursuant to § 3553(a), the Court finds that a substantial downward variance is warranted, as explained more fully below.

I. Legal Standard

After *United States v. Booker*,³ district courts are no longer required to impose a Guidelines sentence. The Guidelines should still be “the starting point and the initial benchmark,”⁴ but “district courts may impose sentences within statutory limits based on appropriate consideration of all the factors listed in [18 U.S.C.] § 3553(a).”⁵ That statute provides:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed--
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence[s] and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . ;
- (5) any pertinent policy statement . . . issued by the Sentencing Commission . . . ;
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

³ 543 U.S. 220 (2005).

⁴ *Pepper v. United States*, 562 U.S. 476, 490 (2011) (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)).

⁵ *Id.*

(7) the need to provide restitution to any victims of the offense.⁶

In determining whether a defendant is entitled to a variance, a district court “should engage in a holistic inquiry of the § 3553(a) factors.”⁷ The court “must consider the extent of the deviation [from the Guidelines] and ensure that the justification is sufficiently compelling to support the degree of the variance.”⁸ “A ‘major’ variance should have ‘a more significant justification than a minor one.’”⁹ That said, the Supreme Court has rejected “an appellate rule that requires ‘extraordinary’ circumstances to justify a sentence outside the Guidelines range” and “the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.”¹⁰

II. Analysis

A. Nature, Circumstances, and Seriousness of the Offense

In June 2014, an FBI task force officer used a computer to launch a law enforcement version of a peer-to-peer software to search for IP addresses offering to share files containing child pornography. On June 29, 2014, the officer downloaded a partial file from Huseth’s computer, but the file did not meet the definition of child pornography. From July 4 to August 10, 2014, the officer downloaded from Huseth’s computer numerous images and video files containing child pornography.

In November 2014, the FBI executed a search warrant at Huseth’s residence, seizing his computer and related equipment. Huseth had a collection of 271 child pornography videos and

⁶ 18 U.S.C. § 3553(a).

⁷ *United States v. Lente*, 759 F.3d 1149, 1174 (10th Cir. 2014) (quoting *United States v. Lopez-Macias*, 661 F.3d 485, 492 (10th Cir. 2011)).

⁸ *Id.* (alteration in original) (quoting *Gall v. United States*, 552 U.S. 38, 50 (2007)).

⁹ *Id.* (quoting *Gall*, 552 U.S. at 50).

¹⁰ *Id.* (quoting *Gall*, 552 U.S. at 47).

12,198 child pornography images. While these numbers may seem extreme, they are not. In June 2021, the U.S. Sentencing Commission issued a report titled, *Federal Sentencing of Child Pornography Non-Production Offenses*, which updates and expands upon its 2012 child pornography report.¹¹ Among its key findings was that in fiscal year 2019 (“FY 2019”), “non-production child pornography offenses involved a median number of 4,265 images, with some offenders possessing and distributing millions of images and videos.”¹² The Sentencing Commission also found that 95.4% of defendants convicted of non-production possession of child pornography received an enhancement for having 600 or more images.¹³ The Sentencing Commission explained that, “[f]acilitated by advancements in digital and mobile technology, non-production child pornography offenses increasingly involve voluminous quantities of videos and images that are graphic in nature, often involving the youngest victims.”¹⁴

Huseth’s child pornography collection included images and videos of infants, toddlers, prepubescent minors, and teenage girls, some of which depicted sadistic or masochistic conduct. Sadly, this material is typically found in the collections of those convicted of non-production child pornography offenses. In FY 2019, 52.2% of defendants convicted of non-production child pornography offenses had images or videos of infants or toddlers, and 99.4% had images of prepubescent victims.¹⁵ Further, 96.3% of defendants convicted of non-production possession of child pornography received an enhancement for images depicting victims under 12 years old, and

¹¹ See U.S. Sent’g Comm’n, *supra* note 1.

¹² *Id.* at 4. Huseth was convicted of the offense that the Sentencing Commission categorizes as non-production possession of child pornography. The Sentencing Commission’s report categorizes two other non-production offenses: receipt of child pornography and distribution of child pornography. See *id.* at 1.

¹³ *Id.* at 19.

¹⁴ *Id.* at 4.

¹⁵ *Id.*

78.6% of such defendants received an enhancement for images depicting sadistic or masochistic conduct or abuse of an infant or toddler.¹⁶ These enhancements, in the Sentencing Commission’s view, “cover conduct so ubiquitous that they now apply in the vast majority of cases sentenced under § 2G2.2.”¹⁷

The nature and circumstances of Huseth’s offense are quite typical when compared to other defendants convicted of non-production possession of child pornography. The majority of these cases involve voluminous quantities of images and videos, victims under the age of 12 or prepubescent minors, images depicting sadistic and masochistic conduct, and the use of a computer—all of which are specific offense enhancements under the Guidelines.¹⁸

At the same time, certain aggravating circumstances are not present in this case. The Sentencing Commission found that participation in an online community devoted to child pornography and engagement in sexual conduct with a child prior to or concurrently with the offense are aggravating factors that the Guidelines fail to adequately account for.¹⁹ In FY 2019, 43.7% of non-production child pornography offenders participated in an online child pornography community,²⁰ and 48% engaged in aggravating sexual conduct prior to or concurrently with the offense.²¹ There is no evidence that Huseth participated in any online child pornography community or engaged in sexual conduct with a child during or prior to the offense.

¹⁶ *Id.* at 19.

¹⁷ *Id.* at 4.

¹⁸ *See id.* at 19. Moreover, close to 40% of defendants convicted of non-production possession of child pornography received a two-level distribution enhancement. *See id.*

¹⁹ *Id.* at 6.

²⁰ *Id.* at 38.

²¹ *Id.* at 40–41.

Nor is there evidence that Huseth specifically sought out images depicting infants or toddlers, or images depicting sadistic or masochistic conduct. Huseth frequently used the search term “PTHC,” which is an acronym for “Preteen Hard Core.” But Huseth did not know what PTHC stood for. And he did not search for particular ages or age groups either; instead, he searched by series name, which sometimes included the age of the child (most commonly 12 years old).

The typicality of the circumstances of Huseth’s offense in no way diminishes the seriousness of this offense. The Court considers this offense extremely serious. The acquisition and possession of child pornography creates market demand for the horrific sexual assault and exploitation of children, and it causes these children continuing harm as these horrific images continue to be distributed, shared, and viewed.

B. History and Characteristics of the Defendant

The Court has an extensive record of Huseth’s history and characteristics, documented in educational and medical records relied upon by the experts who treated, evaluated, and/or assessed Huseth, and who produced comprehensive reports of their findings. Huseth retained Rachel Loftin, Ph.D., a psychologist who specializes in evaluating and treating individuals with ASD. Dr. Loftin is the Clinical Director of the Autism Assessment, Research and Treatment Center at Rush University Medical Center. Huseth also offered the reports of his treating psychologist, Sarah Dettmer, M.S.Ed., M.S., LPC, LCPC, who specializes in counseling people with ASD and has 22 years of experience in the field. Ms. Dettmer has treated Huseth for ASD in individual and group therapy since 2013, before he was apprehended by law enforcement in this case. The government offered the testimony of Kimberly Spence, Ph.D., an ASD specialist

who works with Dr. Eric Imhof at Specialized Treatment and Assessment Resources, P.A. in Florida.

1. Autism Spectrum Disorder

Dr. Loftin, Dr. Spence, and Ms. Dettmer all agree that Huseth has ASD, a lifelong neurodevelopmental disorder that presents in early childhood. According to the Diagnostic and Statistical Manual of Mental Disorders:

Autism spectrum disorder is characterized by persistent deficits in social communication and social interaction across multiple contexts, including deficits in social reciprocity, nonverbal communicative behaviors used for social interaction, and skills in developing, maintaining, and understanding relationships. In addition to the social communication deficits, the diagnosis of autism spectrum disorder requires the presence of restricted, repetitive patterns of behavior, interests, or activities. Because symptoms change with development and may be masked by compensatory mechanisms, the diagnostic criteria may be met based on historical information, although the current presentation must cause significant impairment.

Within the diagnosis of autism spectrum disorder, individual clinical characteristics are noted through the use of specifiers (with or without accompanying intellectual impairment; with or without accompanying structural language impairment; associated with a known medical or genetic condition or environmental factor; associated with another neurodevelopmental, mental, or behavioral disorder), as well as specifiers that describe the autistic symptoms (age at first concern; with or without loss of established skills; severity). These specifiers provide clinicians with an opportunity to individualize the diagnosis and communicate a richer clinical description of the affected individuals. For example, many individuals previously diagnosed with Asperger's disorder would now receive a diagnosis of autism spectrum disorder without language or intellectual impairment.²²

Ms. Dettmer has been treating Huseth for ASD since 2013. Dr. Spence relied on Dr. Loftin's thorough evaluation of Huseth and the raw data in concluding that Huseth has ASD. In

²² Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders: DSM-5 31–32 (5th ed. 2013).

her comprehensive evaluation, Dr. Loftin administered the Scales of Independent Behavior, Revised (“SIB-R”) to Huseh’s parents, which is “an individual assessment of adaptive behavior, which can be defined as day-to-day activities necessary to take care of oneself and get along with others.”²³ Dr. Loftin also administered multiple tests to Huseh: Autism Diagnostic Observation Schedule (“ADOS2”), Minnesota Multiphasic Personality Inventory (“MMPI-2”), Test of Problem Solving (“TOPS-3”), Wechsler Adult Intelligence Scale (“WAIS-IV”), and Millon Clinical Multiaxial Inventory (“MCMI-III”).

Based on her evaluation, Dr. Loftin offered an extensive opinion about the severity of Huseh’s ASD and how it affects his behavior. She found:

Mr. Huseh can appear as rather typical. He is bright, has a good vocabulary and has no visible disabilities. Despite outward appearances of normalcy, Mr. Huseh has very significant social and adaptive skills deficits. His ability to operate in social contexts and to care for himself are substantially delayed. In many key contexts (including making inferences in social situations, caring for a home, preparing his meals, and social interaction in community settings), he is functioning on the level of an 8-year[-]old child.

Mr. Huseh clearly meets the diagnostic criteria for Autism Spectrum Disorder (ASD). Deficits in social-communication and the presence of atypical behaviors associated with autism were evident from early childhood. Social-communication deficits, particularly making inferences about social behavior, are severe. There are limits in his ability to think about his social relationships. He can provide definitions of certain relationships but struggles when asked about others’ experiences. He presents as very socially naïve and lacks knowledge about how to behave in social interaction. Mr. Huseh has a long history of intense preoccupations with particular topics, and these preoccupations can interfere with social engagement. There is also a history of insistence on verbal rituals, repetitive behaviors, and unusual sensory seeking behaviors in early childhood (sniffing people, mouthing), and behavioral rigidity. *The diagnosis of Autism Spectrum Disorder without Intellectual Disability, Social-*

²³ Doc. 31-1 at 5.

*Communication Severity score of 1 (“requiring support”) is appropriate for Mr. Huseth.*²⁴

Huseth’s developmental delays were identified by the age of 2. He was non-verbal, made no eye contact, engaged in repetitive behaviors, displayed limited social engagement, and had significant language delays. Huseth was placed in a special education preschool class for children with developmental disorders. He received speech therapy because he did not speak, but by second grade it was determined that he could read.

When Huseth began seeing a psychologist, he was given other diagnoses. At the age of 19, he was diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) and Asperger’s Disorder (now ASD),²⁵ as well as Social Phobia and depression. Following these diagnoses, Huseth commenced mental health therapy. Huseth received such services from 2005 to 2013 but described the therapy as not productive, until he started group and individual therapy sessions with Ms. Dettmer in 2013.

The government points to Huseth’s high IQ, the fact that he attended college, and the fact that he can drive a car as evidence that his ASD is not severe. Dr. Loftin scored Huseth’s Full Scale IQ at 123 and noted that he has good vocabulary. But, despite his high IQ, Huseth is severely impaired and, in many areas, functions at the level of an 8-year-old. As Dr. Loftin notes, intelligence is no hedge against severe impairment of adaptive functional ability. Huseth drives a car, but his parents have to manage oil changes, repairs, and maintenance. Huseth excelled at math and majored in civil engineering, but he dropped out of college because he

²⁴ *Id.* at 14.

²⁵ The DSM-5 folded Asperger’s Disorder into the umbrella diagnosis of ASD. *See* Am. Psychiatric Ass’n, *supra* note 15, at 51 (“Individuals with a well-established DSM-IV diagnosis of autistic disorder, Asperger’s disorder or pervasive developmental disorder not otherwise specified should be given the diagnosis of autism spectrum disorder.”).

struggled with higher-level, collaborative projects that required him to interact with others, and he could not tolerate living with a roommate or on campus.

After Huseth dropped out of college, he trained to be an electrician, at his father's urging. But he has been unable to maintain employment. He is bullied by peers and struggles to interact with others. Ms. Dettmer attributed Huseth's difficulties at work to his "concrete way of thinking."²⁶ She described one example—the foreman at a previous job told Huseth to "holler at me when you are done."²⁷ Huseth interpreted that literally and hollered or yelled at the foreman across the job site to inform him the job was done. Ms. Dettmer explained that she has worked with Huseth "to help him understand and respond appropriately to peer and supervisor interactions."²⁸

Although Huseth lived in an apartment at the time of the search warrant, that was short-lived. For all but two of his adult years, he has resided with his parents. Huseth's parents, who by all accounts provide a loving and highly supportive environment for him, have described his challenges with certain activities of daily living. For example, they have to repeatedly show him how to address an envelope. And they recalled that after a recent dental appointment, Huseth told them he did not realize that he was supposed to brush all the surfaces of his teeth; he thought he only needed to brush the chewing surfaces.

Huseth has never been married, has no children, and has never been in a long-term romantic relationship. He has few or no friends; he describes his "best friend" as a woman from California he met online playing World of Warcraft, whom he has never seen in person. In

²⁶ Doc. 31-3 at 1.

²⁷ *Id.*

²⁸ *Id.*

social interactions, Huseth continues to be bullied by others and taken advantage of by those who detect his naïveté and vulnerability.

Dr. Loftin notes that “Huseth can appear very odd.”²⁹ He has a history of intense preoccupations that interfere with social engagement and a history of insistence on verbal rituals and repetitive behaviors. Dr. Loftin found that “his mindblindness further complicates the picture because he is not aware of how unusual his behavior can seem to others.”³⁰ This, she explained, is a cornerstone of ASD. According to Dr. Loftin, “[t]he Theory of the Mind,” a “dominant theor[y] in ASD,” “asserts that ‘mindblindness’ is at the root of social difficulties of this disorder, meaning that people with ASD have difficulty attributing mental states (beliefs, desires, and intentions) to others, and also have difficulty understanding that others have internal states that differ from one’s own.”³¹ As a consequence, people with ASD have delayed or no development of certain social capabilities, and more advanced capabilities fail to develop at all.

2. Huseth Did Not Fully Appreciate the Wrongfulness and Harm

Huseth’s motion for variance is based in part on his failure to fully appreciate the wrongfulness of possessing child pornography and the harm done to the children depicted in the pornography. To be sure, Huseth knowingly and intentionally possessed child pornography and had the *mens rea* rendering him guilty of the offense. And the Court recognizes that a *departure* based on diminished capacity is forbidden under U.S.S.G. § 5K2.13 for crimes involving child pornography. But in considering whether a variance is appropriate, the Court may consider Huseth’s cognitive impairments and deficits to the extent that he did not fully appreciate the wrongfulness of his actions.

²⁹ Doc. 31-1 at 15.

³⁰ *Id.*

³¹ *Id.*

There is substantial evidence that, while Huseh's ASD did not *cause* him to possess child pornography, his ASD impaired his ability to understand why it was wrongful and that children were gravely harmed in the production of the pornography. As Ms. Dettmer explained, Huseh is “extremely naïve and like other individuals with ASD he demonstrates difficulty with taking the perspective of others and lacks social awareness of routine social conventions.”³² Ms. Dettmer described Huseh's initial lack of understanding about what he had done wrong: “He became quite upset in the clinical office and stated ‘I just viewed it, I didn’t hurt them.’”³³ Similarly, when Dr. Spence and Dr. Imhof interviewed him, Huseh said, “I always thought it’s wrong like in the long run to do that to a kid in real life and I didn’t really think it was wrong to look at it. . . . I guess I compare it to a Peeping Tom or something.”³⁴ Ms. Dettmer noted that Huseh would not fully appreciate that “a child depicted in a sexual pose or having sexual contact with another child or an adult was the subject of abusive criminal conduct, or that the child did not want to be there. He would most likely also miss facial expressions that might make that unambiguous for typical viewers.”³⁵

Ms. Dettmer and Dr. Loftin both spoke to this concept of “mindblindness” in Huseh and his impaired ability to recognize or understand the internal mental states of others. It is this impairment that distinguishes neurotypical people, who from years of social interaction—and reading and intuiting the behavior of others—develop an awareness of community standards that child pornography is wrong because of the harm it causes children. Neurotypical people’s ability to interact, infer, and intuit allows them to understand that child pornography is harmful to

³² Doc. 31-3 at 3.

³³ *Id.*

³⁴ Huseh Ex. A at 41. All citations prefaced with “Ex.” refer to exhibits that were admitted at the June 8, 2021 evidentiary hearing.

³⁵ Doc. 31-3 at 3.

children and why it is an abomination under societal standards, without anyone expressly telling them so. But Huseh's ability to intuit unexpressed but implicit societal rules is impaired. In fact, Dr. Loftin found that Huseh scored at an age equivalent of 8 years and 8 months in "making inferences" on a social problem-solving evaluation.³⁶

Huseh generally understood that it was wrong to hurt children. He told Dr. Spence and Dr. Imhof that he would delete child pornography "where the girl[] [wa]s obviously getting hurt . . . or if the girl . . . seemed upset."³⁷ But Huseh then stated, "You know, actually, I don't think I came across that too often but sometimes."³⁸ This illustrates Huseh's impaired ability to read the facial expressions and emotional states of the children and to understand that *all* children depicted in child pornography are being hurt.

Ms. Dettmer further noted that a neurotypical person would also understand that people who view child pornography are encouraging its producers, but Huseh's "appreciation of that kind of connection is impaired, not for lack of values, but for lack of normal functioning of his brain."³⁹

The government argues that Huseh demonstrated he understood the gravity of his conduct when he asked Agent Craig Enloe what kind of prison sentence he was looking at. During the execution of the search warrant, Agent Enloe interviewed Huseh in a car parked outside Huseh's apartment. Agent Enloe recorded the interview, and the Court has listened to it. Huseh asked about a prison sentence only after agents identified themselves as law enforcement, produced a search warrant, swarmed his apartment, and began seizing his computer and related

³⁶ Doc. 31-1 at 13.

³⁷ Huseh Ex. A at 33.

³⁸ *Id.*

³⁹ Doc. 31-3 at 3.

items. And Huseh raised this question well into the interview, after Agent Enloe had asked him numerous questions about the type and quantity of child pornography he possessed, how he obtained it, whether he had distributed it, and whether he had sexual contact with children. Huseh's question in no way evidences that he fully appreciated the wrongfulness of his actions.

The government points to other evidence that, it argues, indicates Huseh appreciated the wrongfulness of his actions. For instance, Huseh told agents that he had not disclosed to his therapist that he viewed child pornography because he was too embarrassed to tell her. But Ms. Dettmer advised that "Huseh had not discussed the use of pornography in *any* format with [her] prior to his computer being taken by police. Since this has taken place, he has processed his experiences and use of both adult and child porn in therapy sessions."⁴⁰ The government misstates the record when it argues that Huseh had discussed adult pornography but not child pornography with his therapist.

The government also argues that, despite Huseh's parents' account that Huseh discussed his short-term sexual encounters with them in embarrassingly graphic detail, Huseh did not tell them about viewing child pornography. But the record does not indicate that Huseh's inappropriately graphic candor with his parents occurred before he was apprehended. Instead, the evidence is that Huseh's parents had not talked much to Huseh about any sexual matters as he was growing up. The Court simply will not assume from Huseh's silence that he fully appreciated the wrongfulness of viewing child pornography. Huseh's parents never expressly told him that viewing child pornography was wrong and why, and Huseh's ASD impaired his ability to intuit the unspoken prohibition of child pornography.

⁴⁰ *Id.* at 2 (emphasis added).

The government also suggests that Huseh told Agent Enloe that he had Asperger's Syndrome as an excuse for his behavior, which indicates he understood the wrongfulness of his conduct. But having reviewed Agent Enloe's recorded interview of Huseh, the Court is not convinced that Huseh was attempting to excuse or justify his conduct. Rather, Huseh mentioned that he had Asperger's Syndrome in the context of telling Agent Enloe that he had a therapist and that he had not told her that he possessed child pornography.

Further, the government suggests that Huseh minimized the frequency that he viewed child versus adult pornography, indicating he understood the wrongfulness of his conduct. When pressed by Dr. Imhof, Huseh stated that he spent half to two-thirds of the time he viewed pornography looking at adult pornography and that, of the time he spent viewing child pornography, the majority was spent viewing materials depicting teenagers, not prepubescent children. But there is no evidence that Huseh understated the relative time he spent viewing child pornography, and the Court declines to speculate that Huseh was minimizing.

It also bears noting that Agent Enloe could not have appreciated the extent of Huseh's cognitive deficits while interviewing him. Agent Enloe interpreted Huseh's answers to his questions through the filter of how a neurotypical person would respond. But, as Dr. Loftin and Ms. Dettmer repeatedly noted, Huseh has significant cognitive deficits that affect his ability to communicate effectively.

Dr. George Athey, Jr., Ph.D, ABPP, is a neuropsychologist retained by Huseh to evaluate his sexual behavior and sexual interest patterns. Dr. Athey treats sex offenders in a clinical practice, after 27 years of such practice at the famed Menniger Clinic. Dr. Athey was not retained to evaluate Huseh's ASD. Nonetheless, in the course of his evaluation, Dr. Athey observed that Huseh "evidences clear deficits in cognitive ability to express his emotional

experience and to maintain a consistent context for responding to questions about his sexual experience in particular that could allow him to appreciate what other people would think he is communicating regarding his sexual attraction and behavioral intent towards children.”⁴¹

Dr. Spence and Dr. Imhof submitted a joint report that focused solely on the question of Huseth’s sexual behavior and interests.⁴² Dr. Imhof is a clinical psychologist who specializes in treating sex offenders, including cases involving child pornography, now in private practice after many years of directing programs for state and federal sex offenders. Dr. Spence’s and Dr. Imhof’s joint report acknowledges that Huseth has ASD but evaluates his behavior and interests without regard to his ASD, and without any apparent appreciation that their interview (and Agent Enloe’s interview) should take account of Huseth’s cognitive deficits and ability to communicate effectively. To the contrary, and surprisingly given Dr. Spence’s expertise in ASD, their report characterizes Huseth as having “deficits in the general self-regulation domain including poor cognitive problem solving in that he describes he does not consider the consequences of his actions before making a decision.”⁴³ And while the report notes that “Huseth struggles to understand the impact of his viewing pornography depicting minors on the victims,”⁴⁴ it characterizes this as “[him] demonstrat[ing] [a] lack of concern for others.”⁴⁵

Given Dr. Spence’s and Dr. Imhof’s focus on the question of Huseth’s sexual behavior and sexual interests, and their disregard for Huseth’s ASD, the Court gives little weight to their

⁴¹ Doc. 31-2 at 9.

⁴² See Gov. Ex. 50.

⁴³ *Id.* at 8.

⁴⁴ *Id.*

⁴⁵ *Id.*

characterization of Huseh to the extent it relates to whether he fully appreciated the wrongfulness of viewing child pornography.

Huseh's ASD impaired his ability to see the harm in viewing child pornography. As Dr. Loftin explained:

[M]ost typical peers acquire information about sexual norms and expectations from peers and media. No one explicitly says that it is illegal to look at sexual images of children. Individuals with ASD do not acquire information from their peers and the media in the same way. Even the most basic information must be taught in an explicit and clear fashion for people with ASD. If someone with ASD is not told, for example, that looking at images of a person below the age of consent or onset of puberty is wrong and can indirectly cause harm to other children by creating a demand for the product, he or she may not know that it is not acceptable. Particularly for a person with ASD who, like Mr. Huseh, has significant deficits in inferencing, it would be nearly impossible to comprehend this information without being explicitly told. That is, he would not understand that a child is unhappy being photographed because he is not unhappy to see it.⁴⁶

In short, although Huseh's ASD did not cause his behavior, his ASD substantially contributed to the commission of the offense because it impaired his ability to fully understand that viewing child pornography is wrong and why it is wrong. This inability to intuit and infer, coupled with the fact he never received explicit instructions on the topic, contributed to his commission of this offense. Further, Huseh lacked the ability to exercise the power of reason to appreciate that every child depicted in child pornography has been raped, abused, and irreparably harmed.

C. Promote Respect for the Law

During the three years since Huseh was charged with this offense, he has been on pretrial release and has been compliant with the terms of his bond supervision. He has followed the rules

⁴⁶ Doc. 31-1 at 14–15.

and continued to see Ms. Dettmer for therapy. Ms. Dettmer stated, “He now understands the reasoning behind the prohibition and the victimization that is depicted. He feels terrible that he did what he did, now that he understands why it is wrong. He now understands the rules.”⁴⁷ She explained that people with ASD “follow the rules once they understand them,” and “this is very true in the case of [Huseth].”⁴⁸ “During my work with Mr. Huseth,” she added, “he has been observed during social skills training to follow rules to a fault.”⁴⁹

Dr. Loftin and Dr. Athey also noted that people with ASD are “rule followers,” once they know the rules. Dr. Imhof agreed, though he testified that he has had some sex offenders with ASD who recidivated.⁵⁰ Huseth’s parents provided an example of his firm allegiance to rules once he knows them. During driver’s education, Huseth was taught to stop the car well before the intersection. Huseth is so compliant with this rule that he typically stops an unusually long distance from the intersection, sometimes impeding his ability to see oncoming traffic before he slowly inches forward.

A prison sentence is often necessary to promote respect for the law. But Huseth has demonstrated his respect for the law through a prolonged, three-year period of abiding by his many conditions of pretrial release, most of which will continue during his future term of supervision.

D. Afford Adequate Deterrence to Criminal Conduct

Preventing the future abuse of children through the manufacture, distribution, and possession of child pornography by generally deterring such conduct is always an important

⁴⁷ Doc. 31-3 at 3.

⁴⁸ *Id.* at 4.

⁴⁹ *Id.*

⁵⁰ As discussed *infra*, considering the nature of the offense and Huseth’s history and characteristics, he presents a low risk of recidivism.

factor in sentencing. Congress, the Supreme Court, and the Sentencing Commission have long recognized the importance of general deterrence in considering an appropriate sentence.⁵¹

With respect to Huseth's specific deterrence, for the reasons addressed above, the Court concludes that a prison sentence is not necessary in this case to either promote respect for the law or to afford adequate deterrence to criminal conduct.

E. Protect the Public from Further Crimes of the Defendant

The parties offered conflicting opinions about whether Huseth has Pedophilic Disorder. Dr. Imhof and Dr. Spence opined that Huseth qualifies for a diagnosis of "Pedophilic Disorder, non-exclusive type, sexually attracted to females" based on their opinion that he is attracted to children and uses child pornography to cope with depression.⁵² They found that Huseth met the three criteria for this diagnosis:

[R]ecurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child (generally age 13 years or younger) for a duration of six months (Criterion A); the individual has acted on these sexual urges or the sexual urges or fantasies have caused marked distress or interpersonal difficulty (Criterion B); and the person is at least sixteen years of age and at least five years older than the child or children (Criterion C).⁵³

There is no dispute that Huseth meets Criterion A and Criterion C. But Criterion B requires that the person has acted on the sexual urges or that the sexual urges or fantasies have caused marked distress or interpersonal difficulty. Huseth has not acted on any sexual urges involving children, and there is no evidence that Huseth's urges or fantasies have caused him marked distress or

⁵¹ *Osbourne v. Ohio*, 495 U.S. 102, 109–10 (1990) ("It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.").

⁵² Gov. Ex. 50 at 9.

⁵³ *Id.*

interpersonal difficulty. He had not told his therapist, parents, or anyone about viewing child pornography until he was apprehended. There is no evidence that it has affected his functioning or his relationships, or otherwise caused him distress.

Notably, Dr. Imhof found that Huseh meets Criterion B because he suffered distress and interpersonal difficulty when he was apprehended and charged with possession of child pornography. Following this logic, had Huseh not been apprehended, he would not qualify for the diagnosis of Pedophilic Disorder. That Dr. Imhof's diagnosis hinges on the fact that Huseh's conduct was detected is nonsensical. Further, Dr. Spence's and Dr. Imhof's report and testimony indicates that their opinion that Huseh has Pedophilic Disorder also relies in part on certain statements Huseh "reportedly" made to the agents who interviewed him. But Dr. Spence's and Dr. Imhof's account of some of those statements is inaccurate or takes them out of context.

Dr. Loftin, Dr. Athey, and Ms. Dettmer all opine that Huseh is not sexually attracted to children and does not have Pedophilic Disorder. Dr. Athey evaluated Huseh with a focus on identification of Huseh's "patterns of sexual interest and understanding the basis for these interests from the perspective of the history of his development of sexual experience over time and the deficits in his functioning in development of relationships."⁵⁴ To that end, Dr. Athey reviewed Dr. Loftin's psychological evaluation report, interviewed Huseh, and administered the MMPI-2-RF test and the Abel Assessment for Sexual Interest ("AASI-3").⁵⁵ Dr. Athey noted that the AASI-3 is an empirically validated system for assessing sexual interest among

⁵⁴ Doc. 31-2 at 1.

⁵⁵ Part of the AASI-3 administered by Dr. Athey included data from another patient who was apparently assigned the same client ID as Huseh. But this did not invalidate Dr. Athey's evaluation, because he could ascertain which data applied to Huseh, and he did not consider the mistakenly included data from the other patient.

neurotypical persons. Dr. Athey evaluated the test results and observed that Huseth has significant communication deficits. He also noted significant cognitive problems in memory and concentration and “discontinuities in thinking.”⁵⁶ Dr. Athey also reviewed the MMPI-2 tests administered to Huseth in 2014 and 2015, including the checking of validity scales, which might bear on the weight to give to the AASI-3. Dr. Athey found the MMPI-2 test results to be valid.

Dr. Athey concluded that Huseth does not have Pedophilic Disorder and explained:

It is my opinion within a reasonable degree of psychological certainty that [Huseth] does not pose risk for progressing beyond his viewing of child images into approaching children for sexual gratification. He requires ongoing treatment for his autism spectrum disorder condition to understand the source of his abnormal viewing practices and how to interact with adult females in order to have more satisfying emotional relationships with them.⁵⁷

Dr. Imhof took issue with Dr. Athey’s report primarily because of the data on the Visual Reaction Time (“VRT”) part of the test, which showed Huseth’s viewing time of female adults, adolescents, 6–13-year-olds, and children 5-years-old and younger signified sexual interest in children.

Dr. Athey found that based on visual reaction time alone, the test suggested a problematic interest in the 6–13 age group, but not in any younger age group. But Dr. Athey did not place as much weight on the VRT data as Dr. Imhof. Dr. Athey explained that “the average ratings for age group fell within a region of disgust,”⁵⁸ and stressed that “[i]t is important to recall that the arousal ratings in this portion of the protocol refer to the degree of arousal experienced when

⁵⁶ *Id.* at 3.

⁵⁷ *Id.* at 10.

⁵⁸ Doc. 31-2 at 8–9.

attempting to fantasize about actual contact with the person in the slide.”⁵⁹ Dr. Athey found that Huseth’s “arousal by certain partial aspects of child pornographic images does not equate to his response to ‘real’ people”; rather, “it is an attraction to a visual depiction of his own experience of the onset of sexual arousal in childhood and the privacy of his early experience of it, not an attraction to or arousal by a female of that age.”⁶⁰ Dr. Athey also noted that Huseth’s romantic relationships have all been with adult women, and as Huseth has aged, so have the ages of the adult women he has pursued. This is consistent with Ms. Dettmer’s opinion that “Erik does not have any sexual interest in underage females.”⁶¹

When Dr. Spence and Dr. Imhof interviewed Huseth, he told them that when he viewed pornography and masturbated, he did not usually think about having sex with the person on the screen: “It’s kind of weird. Like when I -- my computer it’s really removed.”⁶² He described child pornography as “just kind of an extreme form of porn because I wouldn’t really do it in real life. . . . [O]n a computer screen it kind of seems good, but if I imagined myself doing that in real life, it’s pretty bizarre.”⁶³ Huseth described having fantasies sometimes about the “teenage girls” he viewed, but “it would be a little freaky with the like children because it’s just too much with the kids. Like it’s off-putting to think about in real life.”⁶⁴ Huseth said he never had sexual fantasies about children in real life. He also said that he had no sexual attraction to his former girlfriend’s six-year-old daughter, despite being around the child for several days at a time and sometimes babysitting while the mother was at work during the two to three months that he dated

⁵⁹ *Id.* at 9.

⁶⁰ *Id.*

⁶¹ Doc. 31-3 at 3.

⁶² Huseth Ex. A at 44.

⁶³ *Id.* at 45.

⁶⁴ *Id.* at 45-46.

the mother. Huseth also disclaimed feeling more comfortable around children or wanting friendships with children.

Dr. Spence and Dr. Imhof gave great weight to Huseth's description of his attraction to child pornography and concluded that he was sexually attracted to children. But Huseth actually said he would look at child pornography because he "just liked what it looked like physically."⁶⁵ It was Dr. Imhof who then suggested to Huseth that he downloaded the image "if [he] found that *individual* attractive."⁶⁶ But Huseth's words could just as easily be interpreted as liking the scene, rather than being attracted to the individual child in the scene.

As noted above, Dr. Athey concluded that whatever interest Huseth showed in child pornography was not by virtue of any sexual interest in children; rather, Huseth was attracted to images that resonated with his earliest experience of sexual arousal in childhood. Dr. Athey thus ruled out Pedophilic Disorder. The Court gives more weight to Dr. Athey's assessment because he actually administered the test to Huseth.

The Court heard a battle of the experts on another related issue. Dr. Loftin opined that Huseth's "mindblindness," which is a symptom of ASD, "can produce a phenomenon of *counterfeit deviance*, in which he may appear to fit a particular profile of deviant behavior (i.e., paraphilia) when, in fact, he is displaying symptoms of ASD."⁶⁷ Dr. Spence challenged Dr. Loftin's opinion, pointing to research that limits the differential diagnosis of counterfeit deviance

⁶⁵ *Id.* at 38.

⁶⁶ *Id.* at 39 (emphasis added).

⁶⁷ Doc. 31-1 at 15; *see also* Denise C. Kellaher, *Sexual Behavior and Autism Spectrum Disorders: an Update and Discussion*, 17 *Current Psychiatry Reps.* 25 (2015) ("Counterfeit deviance characterizes sexual behavior that may appear to arise from a paraphilia but instead it originates from a lack of sexual knowledge and experience and from poor social skills.").

to prisoners or mental patients who contrive sexually deviant behavior for attention-seeking purposes. The Court need not resolve this difference of opinion.

To be sure, the Court gives more credence to Dr. Athey's opinion that Huseth does not have Pedophilic Disorder. But for purposes of evaluating the important consideration of protecting the public from further crimes, the Court finds more persuasive that Dr. Loftin, Dr. Athey, Dr. Imhof, and Dr. Spence all agree that a diagnosis of Pedophilic Disorder is not predictive of the likelihood of recidivism. And there is no dispute that for Huseth—convicted of non-production possession of child pornography, with no evidence of sexual contact with children—the likelihood of recidivism is very low.

Indeed, the Sentencing Commission's latest child pornography report includes statistics on this very question.⁶⁸ The Sentencing Commission analyzed known recidivism rates of federal non-production child pornography offenders who had either distributed, received, or possessed child pornography. The study tracked for a three-year period all such offenders who were released from prison or placed on probation in 2015.⁶⁹ Known recidivism was defined as any of the following arrest events: an arrest that led to a felony or misdemeanor qualifying conviction; an arrest that led to no evidence of acquittal or dismissal; or a reported technical violation of conditions of probation or supervised release that led to an arrest or revocation.⁷⁰ The study analyzed "overall recidivism" and "sexual recidivism" rates (contact or no-contact sex offenses).⁷¹

⁶⁸ See U.S. Sent'g Comm'n, *supra* note 1.

⁶⁹ *Id.* at 62–63.

⁷⁰ *Id.* at 63.

⁷¹ *Id.*

The study found an overall recidivism rate of 27.6% among the non-production child pornography offenders tracked: 16% were arrested for a crime that was not a sex offense or related to their status as a sex offender; the sexual recidivism rate was 4.3%, with only 1.3% of offenders arrested for a contact sex offense; and 7.3% of offenders were arrested or had their term of supervised release revoked for failing to register as a sex offender.⁷² Importantly, this study did not distinguish between those convicted of distribution, receipt, or possession, the latter of which carries a lower base offense level. This low recidivism rate comports with the expert testimony in this case.

The Court thus concludes that Huseth does not have Pedophilic Disorder, but even if he does, the likelihood of recidivism is exceedingly low. Furthermore, as discussed below, the conditions the Court imposes for Huseth's term of supervision include a treatment plan recommended by Dr. Imhof and Dr. Spence, based on their opinion that Huseth has Pedophilic Disorder.

F. Avoid Unwarranted Sentencing Disparities

It is not unusual for courts to vary downward from the applicable Guidelines range in sentencing defendants like Huseth, who are convicted of non-production possession of child pornography. The Sentencing Commission reports that in FY 2019, less than one-third of offenders sentenced for non-production child pornography offenses received a sentence within the Guidelines range; the majority (59%) received a downward variance.⁷³

And for defendants like Huseth, who were convicted of non-production possession of child pornography, 81.5% received a downward variance in FY 2019.⁷⁴ The majority of

⁷² *Id.* at 65.

⁷³ *Id.* at 5.

⁷⁴ *Id.* at 55.

defendants convicted of non-production possession of child pornography had a Guidelines range of 78 to 97 months, and the average sentence imposed was 47 months, although there were considerable differences in how these similarly situated defendants were sentenced.⁷⁵ For non-production possession offenders who received a two-level enhancement for distribution, the majority had a Guidelines range of 97 to 121 months, and the average sentence imposed was 57 months, although there were again considerable differences in how these similarly situated possession offenders were sentenced.⁷⁶

To be sure, 99% of defendants convicted of non-production distribution, receipt, or possession of child pornography received a prison sentence in FY 2019.⁷⁷ But, noting that most of these defendants received a downward variance, the Sentencing Commission explained that “the long[-]term trend shows that most courts believe § 2G2.2 is generally too severe and does not appropriately measure offender culpability in the *typical* non-production child pornography case.”⁷⁸ And although 99% of offenders in all non-production categories receive a prison sentence, obviously 1% do not receive a custodial sentence. In this Court’s view, despite the temptation to vary downward but still impose a prison sentence given that statistic, an intellectually honest analysis compels a noncustodial sentence in this case. As it must, the Court has considered all the § 3553(a) factors, including the history and characteristics of Huseth, while not giving undue weight to that factor alone.

The parties have briefed these issues extensively, including citations to numerous child pornography cases to either justify a variance or a Guidelines sentence. But in *United States v.*

⁷⁵ *Id.* at 54.

⁷⁶ *Id.* at 57.

⁷⁷ *Id.* at 20.

⁷⁸ *Id.* at 22. (emphasis added).

Booker,⁷⁹ the Supreme Court counseled that under the advisory Guidelines system, courts should “continue to move sentencing in Congress’ preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.”⁸⁰ While statistics are informative and enlightening, in the final analysis, the Court is to fashion a sentence for the individual defendant that duly considers all the § 3553(a) factors, including those that are unique to the individual defendant.

The Court declines to consider the sentences in the many cases cited by the parties for any purpose other than a recognition that there are sentencing disparities for defendants convicted of non-production child pornography cases. In the legion of cases cited by the parties, there were differences in the nature and circumstances of the offense, such as sexual contact, non-sexual contact, possession, distribution, and/or receipt. There were differences in the history and characteristics of the defendant, and differences across other § 3553(a) factors, including whether any sentencing disparity was warranted. It is also clear that in many of those cases, the judge’s decision was not based on an extensive record of the defendant’s life-long cognitive impairments, or an extensive record of expert analysis and opinions that this Court enjoys.

G. Just Punishment and the Need to Provide Training, Care, or Treatment

Just punishment necessarily considers both the seriousness of the offense and what sentence would provide just punishment to this individual defendant. The experts all agree that Huseth is uniquely vulnerable in a prison population, given his deficits in social adaptive functioning and social immaturity. One researcher has noted that while estimates vary by study,

⁷⁹ 543 U.S. 220 (2005).

⁸⁰ *Id.* at 264–265.

reported instances of bullying among individuals with ASD in the general prison population range from 29% to 94%.⁸¹

As has been the case in his community and throughout his life, Huseth is vulnerable to being manipulated and used by others. He operates as an eight-year-old in many aspects of social adaptation and maturity. This, coupled with his sex offender conviction, makes him particularly vulnerable in a prison setting. This factor is not determinative, nor should it be. But it is a factor the Court necessarily considers.

With a sex offender conviction, Huseth is ineligible for sentencing to a minimum-security facility.⁸² While the Court can recommend that this sex offender provision be waived, the Bureau of Prisons (“BOP”) is under no obligation to waive it. The Court thus considers that if incarcerated, Huseth may be designated to a medium-security facility where the population may render him more vulnerable than in a minimum-security facility.

Ms. Dettmer and the other experts agree that Huseth needs treatment. Where they differ is whether he can receive adequate treatment through BOP programming. Dr. Imhof has vast experience with the BOP programming and opined that Huseth can receive adequate sex offender treatment there. Dr. Imhof and Dr. Spence pointed to the Skills Program offered by the BOP, which helps developmentally disabled persons survive in the difficult prison culture, including those with ASD. The Skills Program, however, has not been adapted to those with ASD and their unique needs. And there is no therapy specific to ASD available in the BOP.

⁸¹ Gary Mesibov & Melissa Sreckovic, *Child and Juvenile Pornography and Autism Spectrum Disorder, in Caught in the Web of the Criminal Justice System: Autism, Other Developmental Disabilities, and Non-Contact Sex Offenses* 64, 70–71 (Lawrence A. Dubin & Emily Horowitz eds., 2017).

⁸² See BOP Program Statement 5100.08.

Ms. Dettmer, with the benefit of having treated Huseth for his ASD since 2013, recommends that Huseth continue to work with a mental health professional who specializes in ASD, as his ASD causes him severe, debilitating anxiety, and his difficulty in interacting with others causes him to struggle with activities of daily living. Ms. Dettmer opines that Huseth needs “intervention unlike typical sex offender’s rehabilitation programs. He needs to be offered therapy consisting of psychosexual education that informs in a clear, concrete fashion what the ‘rules’ are for safe, and legal sexual interaction as well as what specific sexual interactions to avoid.”⁸³ This is borne out by his inappropriate romantic relationship in the early months of 2018 with a mother of a six-year-old daughter. Ms. Dettmer further opines that Huseth also needs “ongoing mental health counseling separate from the psychosexual education in order to maintain stability of his anxiety.”⁸⁴

Dr. Loftin agrees that Huseth would not benefit from the usual sexual offender rehabilitation program.⁸⁵ Instead, he needs “instruction in sexuality from someone specialized in teaching people with ASD, along with increased opportunities for social skill development and interaction.”⁸⁶ Dr. Loftin opines that a trained mental health professional can provide the concrete, explicit instruction Huseth needs on how to avoid illegal websites and images. Dr. Loftin further opines that Huseth needs continued individual therapy to address social-emotional deficits, with a focus on “development of perspective taking and theory of mind skills.”⁸⁷

⁸³ Doc. 31-3 at 4.

⁸⁴ *Id.*

⁸⁵ Doc. 31-1 at 16.

⁸⁶ *Id.*

⁸⁷ *Id.*

In fact, the universal view among the experts is that Huseth would benefit *most* from treatment, and that any risk of recidivism can be more appropriately addressed through treatment than incarceration. Indeed, the special conditions of supervision recommended in the Presentence Investigation Report address these needs in a manner the medical professionals find acceptable and appropriate. These conditions include a computer and internet monitoring program that will preclude Huseth's access to adult or child pornography or media that would allow interaction with those engaged in such activities. The conditions also include participation in mental health treatment, which may include psychological counseling and prescribed medication, and a condition allowing the U.S. Probation Office to search Huseth's person, house, residence, vehicles, place of employment or business, and any property under his control, when based upon reasonable suspicion.

And, consistent with the experts' recommendations, the Court will modify the special condition in paragraph 146 of the Presentence Investigation Report to read: "You must participate in therapy targeted at ASD, such as cognitive-behavioral, therapist-led therapy," as described in Dr. Loftin's report.

The conditions of supervision typically include obtaining "a current psychosexual and/or mental health evaluation" and, "if recommended by any such evaluation," participating "in a mental health treatment program and/or sex offender treatment program."⁸⁸ If referred to a sex offender treatment program, the offender is required to comply with any and all monitoring and evaluation modalities, including polygraph and visual reaction testing. But the Court will modify this condition.

⁸⁸ Doc. 20 ¶ 146.

At Huseth's request, Bruce Cappel, Ph.D., ABPP, a licensed psychologist with Clinical Associates, P.A. ("Clinical Associates") submitted a letter dated June 3, 2021, detailing his group's ability to provide treatment for Huseth in accordance with the treatment recommendations of Dr. Imhof and Dr. Spence.⁸⁹ Dr. Cappel stated that he had reviewed Dr. Imhof's and Dr. Spence's joint report, understood that they had diagnosed Huseth with Pedophilic Disorder, Non-Exclusive Type, Sexually Attracted to Females, as well as Unspecified Depressive Disorder, and that Huseth also had a historical diagnosis of ASD. Dr. Cappel's letter detailed each of their recommendations and concluded that Clinical Associates can provide such a treatment program. Notably, Clinical Associates has been offering sex offender treatment services for 29 years, and it has "a deep bench of providers who hold clinical status with the Association for the Treatment of Sexual Abusers (ATSA)."⁹⁰ Its providers have presented at ATSA international conferences and published in the ATSA journal. Clinical Associates has also held contracts with the U.S. Probation and Parole Offices as well as the BOP to provide sex offender evaluation and treatment for more than 20 years. Clinical Associates has treated more than 1,500 sex offenders since 2010, created a transitional treatment program for sexual predators in Kansas, and provided in-facility and outpatient evaluation and treatment services for the State of Kansas for 9 years.⁹¹

Dr. Imhof testified that Dr. Cappel's letter merely regurgitates his recommendations and provides no specific treatment plan or assurance to him that it can deliver treatment based on his recommendations. But the fact that Dr. Imhof, who does not practice in Kansas, is unfamiliar with Clinical Associates and its providers' long record of treating federal and Kansas sex

⁸⁹ Huseth Ex. B; Gov. Ex. 50 at 10–11.

⁹⁰ Huseth Ex. B.

⁹¹ *Id.*

offenders does not warrant this Court dismissing their expertise or stated ability to provide a treatment plan that comports with Huseth's needs and the experts' recommendations.

Further, the proposed treatment plan is based on Dr. Spence's and Dr. Imhof's opinion that Huseth has Pedophilic Disorder, despite the contrary opinions of the other experts. In that sense, the proposed treatment plan, which the Court will adopt and incorporate into the conditions of probation, is more than adequate to address the need for therapeutic treatment, the low risk of recidivism, and the need to protect the public from Huseth's further crimes.

H. Restitution

The parties have stipulated and agreed to the identity of the victims and the amount of restitution to be paid to each one of them. So, this is not an issue at sentencing.

III. Conclusion

The Supreme Court has firmly instructed that the Sentencing Guidelines are advisory and that the sentencing court "may not presume that the Guidelines range is reasonable" but "must make an individualized assessment based on the facts presented."⁹² The court must "frame[] its final determination in line with §3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necessary' to accomplish the sentencing goals advanced in § 3553(a)(2)."⁹³ This Court has considered all of the factors it must consider under section § 3553(a). While this Court has seriously considered the history and characteristics of this defendant, as it must, this Court has not focused on this factor exclusively nor failed to seriously consider all of the § 3553(a) factors. And the Court finds that a downward variance to a sentence

⁹² *Gall v. United States*, 552 U.S. 38, 50 (2007) (citing *Rita v. United States*, 551 U.S. 338, 351 (2007)).

⁹³ *Kimbrough v. United States*, 552 U.S. 85, 111 (2007).

of probation is warranted. The Court will entertain any final arguments of counsel, hear from Huseth, and impose a final sentence at the sentencing hearing.

IT IS THEREFORE ORDERED BY THE COURT that Defendant Erik. M. Huseth's Motion for Downard Variance (Doc. 31) is **granted**. The Court will be in contact with the parties forthwith to schedule a sentencing date.

IT IS SO ORDERED.

Dated: October 22, 2021

S/ Julie A. Robinson
JULIE A. ROBINSON
CHIEF UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
MICHAEL SHORE	:	NO. 17-502

MEMORANDUM OPINION

Savage, J.

July 7, 2020

The defendant Michael Shore, who has Autism Spectrum Disorder (“ASD”), has moved to bar application of the 15-year mandatory minimum sentence and for a variance from the sentencing guideline of life imprisonment on his conviction of three counts of manufacturing child pornography in violation of 18 U.S.C. §§ 2251(a). He argues that imposition of the mandatory 15-year sentence, as applied to him, violates the Eighth Amendment prohibition against cruel and unusual punishment.¹ He contends that taking into consideration his “unique psychological and emotional history,” the 15-year sentence is grossly disproportionate to the offenses.

The government opposes the motion, citing well established precedent that counsels against sustaining a challenge to a statutory mandatory minimum sentence. It argues that such a challenge is reserved only for the extraordinary case and this case is not one of them. The essence of the government’s position is that the 15-year sentence is not “grossly disproportionate” to the manufacturing offense.

¹ He does not challenge the mandatory minimum ten-year and five-year sentences on other counts.

The mandatory 15-year sentence in Shore's case is harsh and does not serve all penological goals. Taking into consideration his ASD and its role in the offense conduct, the sentence raises an inference of gross disproportionality between the gravity of the offense and the severity of the sentence. Nevertheless, when looking at sentences in this district and other districts for the same offenses by defendants with and without mental conditions, a 15-year sentence in this case is not unusual. Therefore, because it does not violate the Eighth Amendment, we must deny the motion to disregard the legislatively mandated 15-year sentence.

Although the mandatory sentence must be imposed, the life sentence under the Sentencing Guidelines need not. Consideration of the constellation of the factors set forth in 18 U.S.C. § 3553, without emphasis on any one factor to the exclusion of others, merits a variance. Thus, to the extent the defendant's motion seeks a variance, we shall grant it.

The Offense Conduct

Shore entered an open guilty plea to five counts of use of an interstate commerce facility to entice a minor to engage in sexual conduct in violation of 18 U.S.C. § 2422(b), three counts of manufacturing and attempting to manufacture child pornography in violation of 18 U.S.C. § 2251(a), one count of distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2), and one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). The charges arose out of his interactions with four minors.

For purposes of addressing the specific challenge to the 15-year mandatory minimum sentence, we recite only the facts relating to the manufacturing offenses. It is that conduct that must be examined to perform the proportionality analysis.

Shore, 33 years old at the time, communicated with a 12-year old minor via Facebook, cell phone and text messaging. The minor's mother, upon discovering the communications, directed him to stop. Despite the warning that her daughter was only 12, Shore continued to communicate with her by private, direct messaging. The sexually graphic messages requested nude photos and solicited sex. Shore sought photos of her in the shower masturbating.

Shore engaged in similar sexually graphic communications with two other young girls, 14 and 16 years old. In these instances, Shore expressed his desire to have sex with them. The 14-year old responded to his requests by sending him photos of her naked and topless. The 16-year old, who turned 17 during the time of the communications, sent five photos depicting her nude or in a sports bra and underwear. Shore transmitted those photos to a woman in Chicago.

Proportionality Analysis

The Eighth Amendment "does not require strict proportionality between crime and sentence." *Ewing v. California*, 538 U.S. 11, 23 (2003). "It forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.*

A severe sentence by itself is not unconstitutional. *Harmelin v Michigan*, 501 U.S. 957, 994 (1991) (Kennedy, J., concurring in part and concurring in judgment). In other words, the mere length of a sentence, no matter how long, does not justify invalidating a legislatively mandated sentence. Consequently, a successful proportionality challenge to a mandatory sentence is "exceedingly rare." *Hutts v. Davis*, 454 U.S. 370, 374 (1982) (per curiam).

Before conducting the analysis, we recognize that we must grant substantial deference to Congress in determining the types and limits of punishment. *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983). At the same time, when determining whether a sentence violates the Eighth Amendment, courts may consider “the particular defendant and particular crime at issue.” *Graham v. Florida*, 560 U.S. 48, 87 (2010) (Roberts, C.J., concurring in judgment).

The Supreme Court established the framework for analyzing an Eighth Amendment proportionality challenge in *Ewing v. California*, 538 U.S. 11, and *Solem v. Helm*, 463 U.S. 277. The Third Circuit explicated the analysis in *United States v. MacEwan*, 445 F.3d 237 (3d Cir. 2006), when it rejected a proportionality challenge to the same 15-year mandatory minimum sentence provision Shore attacks.

The proportionality analysis consists of three steps. First, the court determines whether a comparison between the gravity of the offense and the severity of the sentence gives rise to “an inference of gross disproportionality.” If it does not, the inquiry ends. If it does, the court proceeds to the second and third steps. At the second and third steps, the court compares the defendant’s sentence to sentences imposed on other offenders convicted of the same crime in the same jurisdiction (the intrajurisdictional inquiry) and those imposed for the same offenses in other jurisdictions (the interjurisdictional inquiry). *Solem*, 463 U.S. at 290-292; *MacEwan*, 445 F.3d at 247. Only if the intrajurisdictional and the interjurisdictional comparisons confirm the inference that the sentence is grossly disproportionate may a court find that it violates the Eighth Amendment.

Gravity of the Offense

In evaluating the gravity of the offense, we consider “the harm caused or threatened to the victim or society and the culpability of the [defendant].” *See Solem*, 463 U.S. at 292. In examining the defendant’s culpability, we consider his intent and motive. *Id.* at 293. We also consider his criminal history. *Rummell*, 445 U.S. at 276.

Shore’s conduct constituting manufacturing was abhorrent. He solicited young teenagers, 12 and 14 years old, to participate in sharing sexually charged photos he requested. He encouraged them to expose themselves and solicited sexual engagement. He requested a 12-year old sixth grader to send him photos of her nude and in her underwear. She responded, sending him a photo of herself in a sports bra and a towel around her waist. He later asked for photos of her masturbating in the shower. Another victim, a 14-year old, sent him photos of her topless and nude as requested.

These photos were for his own purpose. He was not creating the images for dissemination or profit. He was not in the business of child pornography.

No one questions that child pornography, especially its manufacture, is a serious crime that preys on the most vulnerable victims who bear the scars of exploitation for years and in many cases forever. Children are harmed physically, emotionally, and mentally, causing them difficulties in adjusting normally. The insult lives on in perpetual circulation through the Internet.

Congress determined that severe penalties were needed because it found that child pornography is a “multimillion dollar industry” run from a “nationwide network of individuals” who “openly advertise their desire to exploit children and to traffic in child pornography.” Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-

248, 120 Stat. 587, 623. The manufacturing penalty is aimed at those who prey upon children for their own greed. It is not to penalize the mentally challenged who have no real appreciation of their offense and who live in a fantasy world.

Shore does not fit the profile of the offender Congress targeted for such a severe sentence. He was not manufacturing child pornography for distribution or profit. To apply the mandatory minimum mechanically without distinguishing between the two types of offenders – the callous and manipulative profiteer on the one hand, and the unwitting impaired person on the other – would result in a disparity.

The gravity of the offense is not measured solely by the community's moral outrage or the impact on the victim. The defendant's culpability must be included. We cannot assess the gravity of the offense without looking at the offender's state of mind and his mental state. The criminal law has always considered the actors' *mens rea* when grading offenses for sentencing purposes. For example, murder, the most heinous and serious offense, is classified by degrees that reflect the offender's state of mind. Other crimes are likewise graded.

In his concurring opinion in *Graham*, Chief Justice Roberts identified the offender's state of mind as an essential component of the analysis. Explaining the process, he wrote, "[t]his ['narrow proportionality'] analysis can consider a particular offender's mental state and motive in committing the crime, the actual harm caused to his victim or to society by his conduct, and any prior criminal history." *Graham*, 560 U.S. at 88.

Indeed, considering the offender's state of mind as affecting his culpability is what led the Supreme Court to declare as a violation of the Eighth Amendment sentencing a juvenile to death for murder, *Roper v. Simmons*, 543 U.S. 551 (2005), a mentally disabled

defendant to death, *Atkins v. Virginia*, 536 U.S. 304 (2002), and a juvenile to life without parole for a non-capital crime. *Graham v. Florida*, 560 U.S. 48 (2010). Granted the mandatory 15-year sentence for manufacturing child pornography is not comparable to the ultimate penalty of death or a life sentence. But, the same factors bearing on the juvenile's mental development and appreciation of his wrongdoing are present in the case of a defendant with ASD.

Shore, like others with ASD, shares the same characteristics with juveniles whom the Supreme Court has found are "constitutionally different from adults for purposes of sentencing." *Miller v. Alabama*, 567 U.S. 460, 471 (2012). These include immaturity, impulsivity, and failure to appreciate the risks and consequences of their actions. The same analysis applies here.

Shore's ASD is a component of the culpability analysis. It bears on his perspective and appreciation of the wrongfulness of his offense conduct. It goes to his intent. Thus, we look at how ASD played a role in Shore's conduct.

Autism is a neuro-developmental disability involving the brain. It is characterized by the presence of narrow, repetitive behavior and differences and difficulties in social interaction, communication, and adjusting to change. A person suffering from ASD is neurologically impaired in his ability to appreciate the unacceptability of his conduct or to intuit why this conduct is unacceptable. Because of his difficulty observing social norms, an ASD individual may engage in socially disapproved or unacceptable behavior, with no consciousness of wrongdoing or a real sense of how his behavior is viewed by others.

ASD is defined in the DSM-V as typified by extreme social and emotional immaturity, the inability to read others or respond appropriately in social settings, lack of

intuitive awareness of social/moral/legal constraints, and intense and narrowly directed repetitive activities. AM. PSYCHIATRIC ASS'N DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-V) 50 (5th ed. 2013). These features combine to create a risk of offensive behavior towards others without any offensive purpose.

Because they are typically isolated from their peers of the same age, persons with ASD have limited socio-sexual understanding. They do not recognize sexual boundaries. They are naïve and socially awkward. They have a desire to “fit in”. Yet, when they do, they fail to perceive and appreciate the feelings of others, and they engage in inappropriate behavior. They are not antisocial, they are asocial.

“Much of the deviant or sexual offending behavior exhibited among those with ASD is often a manifestation of their ASD symptoms, and not malice.” M.C. Mogavero, *Autism, Sexual Offending, and the Criminal Justice System*, J. INTELLECTUAL DISABILITIES & OFFENDING BEHAV. 116-126 (2016). How the lack of sociosexual understanding leads to inappropriate sexual behavior has been described as follows:

We do recognize that problems with sexual expression and experiences can lead to a person with Asperger's syndrome being charged with a sexual offence. The charges tend to be for sexually inappropriate behaviour rather than sexually abusive or sexually violent behaviour (Ray, Marks and Bray-Garretson 2004). The person may have difficulty distinguishing between kindness and attraction, and assume a friendly act was an indication of romantic or sexual attraction. This can lead to a crush or infatuation with the person. Due to problems with Theory of Mind abilities and reading social cues, the person with Asperger's syndrome assumes that the degree of adulation is reciprocal, and signs of rejection or annoyance are not recognized. The person may be charged with offences related to stalking.

The focus or expression of sexual pleasure can also be of concern. For example, the person with Asperger's

syndrome may not have had the usual social, sensual and sexual experiences of typical adolescents, and may develop sexually arousing fantasies involving objects, clothing, children or animals. The technical term is paraphilia. Acting out some paraphilias is illegal. The person with Asperger's syndrome may have been sexually abused and subsequently repeat the offence with others, assuming such sexual behaviour is acceptable, or as an attempt to understand why someone would engage in, and appear to enjoy, such behaviour.

A curiosity and confusion regarding sexuality can lead to the desire for more information and the development of a solitary and clandestine special interest in pornography. There can then be the assumption that the sexual behaviour seen in films and described in magazines is a script for a first date. When certain suggestions are made, the person can be labeled a pervert or sexual deviant, and face the possibility of charges of sexual assault. There has been the suggestion that having Asperger's syndrome could be a factor in at least one case of sexual serial homicide (Silva, Ferrari and Leong 2002). Thus, I strongly advocate guidance in sexuality for adolescents and adults with Asperger's syndrome, using the programs designed by specialists in Asperger's syndrome (Henault 2005), and appropriate modifications for treatment programs for sexual offenders (Ray et al. 2004).

TONY ATWOOD, THE COMPLETE GUIDE TO ASPERGER'S SYNDROME 336 (Jessica Kingsley ed., 2007).

"Sexual curiosity and drive (along with a lack of appropriate channels for sexual expression and interaction) can lead individuals with AS to explore websites with child pornography without understanding the criminal and predatory context." Michael D. Powers & James M. Loomis, *Asperger Syndrome in Adolescence and Adulthood*, in ASPERGER SYNDROME: ASSESSING AND TREATING HIGH-FUNCTIONING AUTISM SPECTRUM DISORDERS 331, 339 (James C. McPartland et al eds., 2d ed. 2006). In other words, they have no appreciation of the seriousness or gravity of their transgressions.

Shore's ASD contributed to his offense conduct. Dr. Shawn Channel, a staff psychologist at Federal Medical Center, Devens, and Dr. Elliot Atkins, a clinical psychologist who tested and evaluated Shore, concluded that his ASD played a role in his behavior.² Noting that ASD's role was "very complicated", Dr. Channel testified, "I believe [his ASD] contributed to his offense conduct."³ He testified that Shore's ASD impaired his understanding of the wrongfulness of his behavior.⁴

Dr. Atkins opined that "Michael's Autism Spectrum Disorder has contributed to his commission of the instant offenses in a manner that clearly differentiates him from those individuals that both Congress and the Sentencing Commission had in mind when the Sentencing Guidelines were crafted."⁵ Dr. Atkins explained that Shore suffers from "severe deficits in social functioning and doesn't fully appreciate the impact of his behavior on others."⁶ He lacked the ability to understand that his actions were harmful to others. "He had very little or no appreciation of the harm he was doing."⁷

Shore, who is full of self-doubt and sees himself as socially alienated, has characteristic traits of ASD. He has poor judgment skills. He demonstrates a lack of remorse and empathy.⁸ He is socially immature. Testing revealed a "profound immaturity

² Transcript of Proceedings at 13, 68, *United States v. Shore*, No. 17-502 (E.D. Pa. July 31, 2018) ("Tr."); Letter from Elliot L. Atkins, Ed. D., P.A., to Burton A. Rose, Esquire 7 (Sept. 20, 2017) ("Atkins Rpt.") (on file with court).

³ Tr. at 97-98.

⁴ *Id.* at 99.

⁵ Tr. at 13; Atkins Rpt. 7.

⁶ *Id.*

⁷ Tr. at 11.

⁸ *Id.* at 52.

and dependency” that led him to create his own inner world.⁹ Deficits in socio-emotional reciprocity result in his over interpreting the degree of significance of a relationship.¹⁰ He functions socially and emotionally at the level of an adolescent.¹¹ “He is still functioning much like a teenager himself and interacting like a young teenager instead of someone his own age.”¹²

When the experts say an ASD individual lacks empathy, they do not mean he is callous, sadistic or sociopathic. It means he has extreme difficulty viewing the world through the eyes of others. He does not notice when others suffer or he misunderstands others’ feelings. GARY B. MESIBOV ET AL., UNDERSTANDING ASPERGER SYNDROME AND HIGH FUNCTIONING AUTISM (2001). Although an ASD individual may know it is wrong to induce children to engage in sexual behavior, he does not appreciate its impact or its consequences.

Having found that Shore’s culpability in light of his ASD mitigates the gravity of the offense, we turn to the severity of the sentence. Then, we must determine whether there is a “gross imbalance”.

Severity of the Sentence

The severity of a sentence is not based solely on the length of years. It must take into consideration the penological goals of sentencing – retribution, deterrence, incapacitation, and rehabilitation. *Graham*, 560 U.S. at 71. Of course, it balances these

⁹ Atkins Rpt. 6.

¹⁰ Tr. at 64.

¹¹ Atkins Rpt. at 8.

¹² Tr. at 27-28.

goals in light of the defendant's unique and individualized characteristics and circumstances which we have already discussed.

Retribution is a legitimate basis for punishment. But, the sentence must be "directly related to the personal culpability" of the defendant. *Id.* (quoting *Tison v. Arizona*, 381 U.S. 137 (1987)). We have already considered Shore's culpability as it was impacted by his ASD. He was not as culpable as one without ASD or a defendant who profits from the exploitation of children. Nonetheless, he deserves punishment for doing what he knew was wrong even though he did not appreciate the consequences of his actions, including the effects on the young children. But, a 15-year sentence is not necessary to satisfy the need for retribution, especially when considered with the other penological goals.

Deterrence demands a substantial sentence. It is necessary to deter others from manufacturing child pornography. The mandatory 10-year sentence, which Shore does not challenge, will serve as a sufficient deterrent. Can anyone predict that a person committing this type offense would consider not doing it because there was a potential sentence of five or ten years rather than 15 years? Where is the decisive point? Just what sentence is a sufficient deterrent is an open question. The sentence must be significant enough to act as a deterrent and not more than sufficient to accomplish this goal. The mandatory 10-year sentence Shore does not challenge is sufficient deterrence.

Incapacitation is aimed at preventing recidivism. As long as the offender is inclined to recommit the same offenses, he must be confined. This goal intersects with the goal of rehabilitation. If an offender cannot be rehabilitated, his incapacitation is necessary to prevent recidivism. On the other hand, if he is capable of rehabilitation, his sentence

should be limited to the time sufficient to accomplish that goal, taking into consideration the other penological goals.

Shore can be rehabilitated. There is no doubt that he would benefit from treatment that would reduce the risk of recidivism. There are two types of treatment that would be beneficial. First, there is specific sexual offender treatment that typically lasts between sixteen and eighteen months. The second is treatment addressing his ASD symptoms. It entails treatment for social and emotional manifestations of his ASD.¹³ The treatment to address his thinking and judgment problems, his impulsivity and social problems could last several years.

With successful treatment, Shore could be “reasonably expected to conform his behavior to the law so that he does not reoffend.”¹⁴ Treatment of ASD “specifically targets empathy training.”¹⁵ It is aimed at people “with the social deficits associated with autism.”

“Child pornography *only*” offenders are at extremely low risk of again committing the same type offense (1% over 6 years) and at very low risk of committing a hands on offense (3% over 6 years).¹⁶ Autistic persons have traits that militate against risks for

¹³ Tr. at 20.

¹⁴ *Id.* at 21.

¹⁵ *Id.* at 327.

¹⁶ The most recent data analysis addressing *typically developed* individuals show that the risks of reoffending as to child pornography for one who has no history of contact offenses is very low, and for a contact offense almost negligible. Autism is a countervailing factor to risk. Persons with ASD are “rule bound”. Once taught that behavior is inappropriate and wrong, they rigidly conform to the rules.

Online offenders with no history of contact offenses almost never committed contact sexual offenses, despite a comparably higher interest in photographs of children compared to contact offenders. Kelly M. Babchishin, R. Karl Hanson & Heather VanZuylen, *Online Child Pornography Offenders are Different: A Meta-analysis of the Characteristics of Online and Offline Sex Offenders Against Children*, 49 ARCH SEX. BEHAV. 44-66 (2014).

There is only a one percent official recidivism rate for contact sexual offences and a three percent

reoffending. Those traits – rigid adherence to social rules once learned – make them highly unlikely to reoffend.

Incarceration in this case has a positive and a negative side. On the positive side, Shore can benefit from the Bureau of Prisons' psychological and psychiatric treatment specific to his offense conduct. These treatments are aimed at avoiding the consequences of future misbehavior. On the negative side, Shore, like other inmates with autism, will have difficulty in dealing with other inmates because he will be unable to understand his effect on them, setting him up for manipulation and victimization.¹⁷ "His condition puts him at risk of injury and victimization and psychological regression."¹⁸ An autistic inmate "could be readily exploited, abused or blackmailed by other inmates."¹⁹

After balancing Shore's diminished culpability against the gravity of the offense and considering the penological goals of sentencing, we conclude that application of the 15-year mandatory minimum sentence raises an inference of gross disproportionality. Thus, we proceed to compare the sentence to those imposed in this district and other district for the same offense.

Intrajurisdictional Inquiry

Fifteen of the 83 defendants convicted of violating § 2251(a) in this district received no greater than a 15-year mandatory minimum sentence. No defendant received a

recidivism rate for child pornography offences after a *follow-up of up to six years*. Michael C. Seto, R. Karl Hanson & Kelly M. Babchishin, *Contact Sexual Offending by Men With Online Sexual Offenses*, 23 SEX. ABUSE: J. RES. & TREATMENT 124-145 (2011).

¹⁷ Tr. at 17.

¹⁸ *Id.*

¹⁹ *Id.* at 95.

sentence less than 180 months – the mandatory minimum. The two defendants with Asperger's Syndrome were sentenced to 330 and 720 months' imprisonment, respectively.

Shore's conduct was significantly less egregious than the two defendants with Asperger's. In those cases, the defendants engaged in contact with the minors. The defendant sentenced to 720 months videotaped himself sexually abusing a two-year-old boy and a three-year-old girl. The other defendant with Asperger's molested and took photographs of children engaging in sexual acts he directed. Shore engaged in no physical contact with the young teenagers.

The sentences of the 83 defendants in this district demonstrate that a 15-year minimum sentence for a violation of § 2251(a) is not grossly disproportionate. Indeed, a longer sentence may be considered proportionate.

There were nine cases where the mandatory 15-year sentence was imposed and the bottom of the sentencing range was above 180 months. Although this does not confirm gross disproportionality, it does support a variance when viewed under 18 U.S.C. § 3553(a)(6).

Interjurisdictional Inquiry

The guideline for violation of § 2251 is United States Sentencing Guidelines (USSG) § 2G2.1. The base offense level is 32. An enhancement under USSG § 4B1.5 adds five points to the offense level.

At our request, the Sentencing Commission provided sentencing results in cases of defendants convicted of a § 2251 violation and sentenced under USSG § 2G2.1 and a § 4B1.5 enhancement. The Commission provided a statistical analysis of sentences for

three different scenarios which identify the type of sentence imposed, the sentence relative to the guideline range, average sentence length, average guideline range, supervised release imposed, and the average term of supervised release.

This statistical data shows that on a national basis a 15-year prison sentence is not unusual, let alone grossly disproportionate, for a defendant convicted of violating § 2251. Thus, we conclude that the intrajurisdictional and the interjurisdictional comparative analysis of sentences of those convicted of the similar offenses does not support a finding that a 15-year sentence in these circumstances is extreme and does not confirm the inference that a 15-year sentence is grossly disproportionate.

Conclusion

Given Shore's individual characteristics, his diminished culpability, and the specifics of his offense conduct, a 15-year minimum sentence is harsh. But, it is not cruel and unusual in violation of the Eighth Amendment. Therefore, we must deny his motion to bar application of the 15-year mandatory minimum sentence.

All the factors bearing on our finding of an inference of gross disproportionality and under 18 U.S.C. § 3553(a) support a variance from the guideline of life imprisonment.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

v.

BRYAN C. KOHBERGER,

Defendant.

Ada County Case No. CR01-24-31665

**ORDER ON DEFENDANT'S MOTION
TO STRIKE DEATH PENALTY RE:
AUTISM SPECTRUM DISORDER**

I. INTRODUCTION

Having been recently diagnosed with Autism Spectrum Disorder ("ASD") by a clinical neuropsychologist retained by his defense team, Defendant seeks to strike the death penalty as a sentencing option, arguing it violates his constitutional rights. He contends ASD is the functional equivalent of an intellectual disability, which is categorically recognized as a disqualifying exemption to the death penalty. Even if the Court rejects a categorical approach, he argues the death penalty option should nevertheless be stricken in his case given the intense media attention on Defendant's disability.

In response, the State disputes that ASD is equivalent to an intellectual disability for purposes of a categorical exemption to the death penalty and further notes that Defendant has not shown a national consensus supporting such an exemption. As for Defendant's individualized argument, the State contends that none of Defendant's concerns warrant striking the death penalty.

Oral argument on the motion was held on April 9, 2025, after which the Court took the matter under advisement. The Court finds striking the death penalty is not warranted.

II. STANDARD

Constitutional issues, including the constitutionality of Idaho's capital sentencing scheme, are questions of law. *Rhoades v. State*, 149 Idaho 130, 132, 233 P.3d 61, 63 (2010).

III. FACTS

During the course of this case, the defense team retained Dr. Rachel Orr, a clinical neuropsychologist, to conduct a comprehensive neuropsychological evaluation of Defendant and issue a report. Def.'s Exh. 2 (Orr Report). As part of this evaluation, Dr. Orr interviewed Defendant, Defendant's immediate family members and other relevant adults from Defendant's childhood, including former teachers. She gathered information on Defendant's history, made behavioral observations and administered cognitive tests. Based on her evaluation, Dr. Orr diagnosed Defendant with "Autism Spectrum Disorder, level 1, without accompanying intellectual or language impairment." ("ASD"). *Id.*, p. 16.

According to Dr. Orr, ASD is a "complex, heterogenous, neurodevelopmental disorder rooted in brain differences and characterized by social and behavioral features." *Id.*, p. 16. It causes "deficits in which affected individuals perceive and react to others and their environment, causing problems in social communication and interactions, repetitive behaviors, and narrow range of interests." Def's Exp. Discl., Exh. D13-B, p. 31 ("Ryan Report").¹ There is a wide range of autism symptoms and severity. *Id.* Deficits can include a restricted range of affect, atypical eye contact, displaying facial expressions or movements that do not match what is being said, failure to consider social cues, having trouble with speech reciprocity and repetitive behaviors.²

Pursuant to the American Psychiatric Association's Diagnostic and Statistical Manual, Fifth Edition (2013) ("DSM-5"), there are two primary diagnostic criteria for ASD. U.S. Center for Disease Control & Prevention ("CDC"), *Clinical Testing and Diagnosis for Autism Spectrum Disorder*, <https://www.cdc.gov/autism/hcp/diagnosis/index.html> (last visited Apr. 22, 2025) (citing DSM-5). The first criterium is persistent deficits in each of the following areas of social communication and interactions: 1) social-emotional reciprocity; 2) nonverbal communicative behaviors used for social interactions, and; 3) developing, maintaining and understanding relationships. The second criterium is the display of restrictive, repetitive patterns of behavior, interests or activities, as manifested by at least two of the following: 1) stereotyped or repetitive movements, use of objects, or speech; 2) insistence on sameness, inflexible adherence to

¹ Dr. Eileen Ryan conducted a psychiatric evaluation of Defendant and agreed with Dr. Orr's diagnoses. Her expert report is attached to her disclosure, filed by Defendant as Exhibit D-13 on January 23, 2025.

² U.S. National Institute of Mental Health website, available at: <https://www.nimh.nih.gov/health/publications/autism-spectrum-disorder> (last visited April 16, 2025).

routines, or ritualized patterns of verbal or nonverbal behavior; 3) highly restricted, fixated interests that are abnormal in intensity or focus, and; 4) hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment. *Id.*

The severity of ASD is based on these two criteria. *Id.* There are three levels of severity, which correlate to how much support is needed. Level 3, which is the most severe, requires “very substantial support.” Level 1, the least severe, requires merely “support.” *Id.*

As to the first criterion, Dr. Orr noted in her report that Defendant’s family and peers reported that Defendant displayed atypicalities and difficulties in social settings dating back to early childhood,³ including: 1) inability to adjust his behavior to suit the social context; 2) poor social reciprocity in conversation; 3) issues with nonverbal behavior like personal space, and; 4) limited ability to take perspectives of others. She notes that these difficulties played a role in the eventual termination of his funding for his graduate program. At the time of his arrest, he was pursuing a PhD in criminal justice and criminology at Washington State University.⁴

In her personal evaluation of Defendant, Dr. Orr observed that Defendant demonstrated some typical social behaviors, such as “fairly consistent (though intense) eye contact, polite demeanor, and social conventions (e.g. shaking hands upon greeting).” He engaged in conversation and was never “overtly inappropriate.” However, Dr. Orr also noted social behavior consistent with that reported by others, such as a “lack of fluidity” in his verbal interactions, awkward comments⁵ or abrupt responses, “inconsistent understanding/acknowledgement of humor” and “occasional intense gaze.” *Id.* at p. 9. She noted he had “poor reciprocity of interaction, including very frequent re-focus of conversation back on his own experiences or unusual responses to my sharing.” *Id.* She also noted his lack of close friends and his “poor insight into his role in relationships.” *Id.*

Dr. Orr further observed deficits in Defendant’s nonverbal communication, noting “poor integration of verbalizations and eye contact; limited use of descriptive gestures; restricted range

³At an early age, Defendant’s school psychologist recommended that he be evaluated for ADHD and Asperger’s disorder (now ASD). He was clinically diagnosed with ADHD only.

⁴ Defendant previously received an associate’s degree in liberal arts, with a concentration in psychology (2018), a bachelor’s degree in forensic track, psychology (2020) and a master’s degree in criminal justice (2022). Defendant achieved a 4.0 GPA in his master’s program.

⁵ By way of example, Dr. Orr noted that Defendant commented that he “had a lot of fun” completing a cognitive test.

of affect;⁶ atypical tone.” *Id.*, p. 16. As to his speech, Dr. Orr observed that Defendant was generally clearly articulated and his speech was appropriate in rate and volume, but overall monotone. His language was “generally appropriate” in content and form with an “extensive vocabulary,” but “overly formal”, “often over-inclusive and disorganized” and “highly repetitive, with frequent scripted phrases.” *Id.*, p. 9. By way of example, Dr. Orr noted that Defendant often used the phrases “Objectively speaking...”; “Mind you...”; “To be fair...” and “Moral of the story...” *Id.*

As to the second criterium, Dr. Orr found Defendant exhibited all four of the behaviors. He engaged in “occasional, subtle rocking of his upper torso while seated” and “scripted” and “repetitive” language. *Id.*, pp. 7, 9. He appeared “fixated” on the routine or timing of breaks and procedures during the examination. *Id.*, p. 10. He also demonstrated “rigidity” in his thinking and behavior, perseverative ideation (wanting to know the results of his testing) and was highly interested in “circumscribed” topics, such as forensic psychology, intellectual topics and Murakami. *Id.*, pp. 10, 17. She also noted he was “highly distracted” by sounds or activity occurring around him and frequently looked from side-to-side to monitor his periphery. *Id.*, p. 9. As a result of being easily distracted, he needed instructions repeated to him.

Defendant’s neuropsychological profile revealed a “high average intellect at baseline” and his Full Scale IQ score was 119, which is in the 90th percentile for his age. *Id.*, p. 10. Cognitively, Defendant showed strong verbal abilities, abstract reasoning, memory, concept formation and reading skills. However, he displayed weakness in executive functioning, such as planning, cognitive flexibility, impulse control and organizational approach. He tended to perceive information in a piece-meal manner rather than look at the whole picture. *Id.*, p. 11. Ultimately, Dr. Orr found Defendant was “clearly a neurodivergent individual, manifesting all the social and behavioral features of [ASD].” *Id.*, p. 17. As noted, Defendant was assigned a Level 1 diagnosis without intellectual impairment, which is the least severe level.

Dr. Eileen Ryan, a board-certified psychiatrist retained by the defense team, agreed with Dr. Orr’s ASD diagnosis after conducting a comprehensive forensic psychiatric examination of Defendant. Of note, she observed that Defendant “is highly intelligent and has a factual understanding of the proceedings against him, the penalty he is possibly facing, pleas, and the

⁶ Dr. Orr noted Defendant’s social smiling was “inconsistent” and occurred in “unusual and incongruent contexts.” She also noted he did not display tearfulness, anxiety or anger.

roles of courtroom personnel, etc.” Ryan Report, p. 33. She further noted there was “no evidence of a formal thought disorder or thought disorganization.” *Id.*, p. 18.

IV. ANALYSIS

Relying on the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 1, 2, 6, 7 and 13 of the Idaho Constitution,⁷ Defendant seeks to have individuals diagnosed with ASD categorically exempt from the death penalty. He contends a categorical exemption is warranted for individuals with ASD because: 1) they are insufficiently culpable and execution would not satisfy the retributive and deterrent purposes of capital punishment; 2) execution of individuals with ASD is contrary to the evolving standards of decency, and; 3) death sentences for individuals with ASD are inherently unreliable due to their inability to present meaningful mitigation evidence. Alternatively, he argues removal of the death penalty as a sentencing option in his case is warranted due to the impact his ASD will have on his ability to present a meaningful defense, particularly given the intense media attention on his disability.

A. A Categorical Exemption from Capital Punishment For Individuals with ASD is Not Warranted.

The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII. The United States Supreme Court has interpreted the Eighth Amendment to categorically prohibit the execution of three classes of individuals: 1) the intellectually disabled under *Atkins v. Virginia*, 536 U.S. 304, 311 (2002); 2) individuals who commit murder while before the age of 18 under *Roper v. Simmons*, 543 U.S. 551, 574 (2005), and; 3) individuals incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399, 418 (1986).

At issue here is the first category. In *Atkins*, the Court held the “mentally retarded” (now, “intellectually disabled”) must be categorically exempt from execution after finding that the cognitive and behavior deficiencies that drive an intellectual disability diagnosis negate the penological purposes served by the death penalty and give rise to a “special risk” that the death penalty will be wrongfully imposed. 536 U.S. at 318-21. In addition, the Court found that a

⁷ While Defendant cites to the Idaho Constitution as a basis for his motion, he has not provided any argument or authority as to why the Idaho Constitution should apply any broader than similar provisions in the United States Constitution. See, e.g. *State v. Donato*, 135 Idaho 469, 472, 20 P.3d 5, 8 (2001).

categorical exemption was consistent with society's contemporary standards of decency. *Id.* at 315-16.

No court has ever found ASD to be a categorically death-disqualifying diagnosis. However, Defendant argues ASD is the functional equivalent of an intellectual disability and, therefore, the rationale underpinning *Atkins* applies with equal force to individuals with ASD. He further argues that categorically excluding individuals with ASD from capital punishment is consistent with society's prevailing standards of decency. The State responds that a categorical exemption from the death penalty is only available under the law to those with intellectual disabilities, the definition of which ASD fails to satisfy. It further disputes that there is any national consensus supporting Defendant's claim.

The State is correct. First, intellectual impairment—a hallmark of an intellectual disability—is not present in the diagnostic criteria of ASD and no court has ever found the two to be equivalent. Second, Defendant has not presented any evidence of a national consensus as to whether the death penalty is a disproportionate punishment for individuals with ASD.

1. ASD is not equivalent to an intellectual disability for purposes of death penalty exemption.

Capital punishment must be limited to those offenders who commit “a narrow category of the most serious crimes” and whose extreme culpability makes them “the most deserving of execution.” *Atkins*, 536 U.S. at 319. In considering whether intellectually disabled persons are “categorically less culpable than the average criminal,” the *Atkins* court relied on clinical definitions of an intellectual disability offered by the American Association on Mental Retardation and the American Psychiatric Association. *Id.* at 308, n. 3, 318.⁸ Both defined the condition based on the presence of two criteria: 1) subaverage intellectual function, and; 2) significant limitations in adaptive skills manifesting prior age 18. Based on this criteria, the Court found the intellectually disabled were categorically less culpable for their crimes, noting:

[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.

⁸ In referencing the clinical definitions of an intellectual disability, the *Atkins* court did not adopt these definitions or otherwise offer any procedural or substantive guidelines for determining whether a person is intellectually disabled. *Shoop v. Hill*, 586 U.S. 45, 49 (2019) (“*Atkins* gave no comprehensive definition of ‘mental retardation’ for Eighth Amendment purposes.”). Rather, it tasked the states with developing their own mechanism for enforcing the restriction. 536 U.S. at 318. Idaho did so through the passage of I.C. § 19-2515A, discussed *infra*.

Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.

Id. at 318.

Based on these deficiencies, the Court found two independent reasons to categorically exclude the intellectually disabled from the death penalty—both of which the Court found were “consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution.” *Id.* at 318. First, the reduced culpability of the intellectually disabled undermined the twin justifications underpinning the death penalty—retribution and deterrence of capital crimes. *Id.* at 318-19. As to retribution, the Court reasoned that if the culpability of the average murderer is insufficient to justify the imposition of death, “the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.” *Id.* As to deterrence, the Court reasoned that the same cognitive and behavioral impairments that render mentally disabled offenders less culpable also render them less likely to appreciate the consequences of their conduct and control their behavior. *Id.* at 320.

Second, the Court found that the reduced capability of intellectually disabled offenders gave rise to an unacceptable risk that the death penalty could not be reliably imposed. *Id.* at 320-21. Namely, the Court found that, in the aggregate, intellectually disabled offenders faced a special risk of wrongful execution because they: 1) are more susceptible to false confessions; 2) less able to “make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors”; 3) “may be less able to give meaningful assistance to their counsel”; 4) “are typically poor witnesses,” and; 5) “their demeanor may create an unwarranted impression of lack of remorse for their crimes.” *Id.* Further, the Court found that “reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.” *Id.*

Relying on the diagnostic criteria set forth in the DSM-IV, various publications and Dr. Orr’s evaluative report, Defendant argues that individuals with ASD, himself included, exhibit

similar adaptive impairments to those with an intellectual disability and, consequently, the same justifications underlying the *Atkins* exemption should apply to defendants with ASD. This is an apple-to-oranges comparison, however. While intellectually disabled and ASD individuals may share some of the same adaptive impairments, the intellectual deficit—an essential feature of an intellectual disability—is not a diagnostic element of ASD.

As noted in *Atkins*, an intellectual disability is based on deficits in both intellectual function and adaptive function. 536 U.S. at 308, n. 3, 318; *see also*, *Hall v. Florida*, 572 U.S. 701, 710 (2014) (noting that the “defining characteristic of intellectual disability” in the medical community is the “existence of *concurrent* deficits in intellectual and adaptive functioning.”) (emphasis added). While *Atkins* did not set out a comprehensive definition of an intellectual deficit, it did provide guidance, noting that prevailing medical authorities required “significantly subaverage intellectual functioning.” 536 U.S. at 308, n. 3. To this end, the Court noted that the medical community typically considered “the cutoff IQ score of the intellectual function prong of the mental retardation definition” to be between 70 and 75 and lower. *Id.* at 308, n. 5.

Under *Atkins* and its progeny, it is the intersection of intellectual and adaptive deficits that render an individual with an intellectual disability less morally culpable for purposes of death penalty disqualification. *Hall*, 572 U.S. at 710. As recognized by the Idaho Supreme Court, adaptive deficits alone will not render a defendant mentally incapacitated for purposes of the exemption. *Pizzuto v. State*, 146 Idaho 720, 729, 202 P.3d 642, 651 (2008) (“Significant limitations in adaptive functioning alone will not bring an offender within the protection of [I.C. § 18-2515A].”)⁹ Substantial intellectual deficits are required.

Intellectual deficiency, however, is not among the diagnostic criteria for ASD. *See*, DSM-5. While individuals with ASD may share some of the same adaptive deficits as those with an *Atkins*-qualifying intellectual disability, the essential feature, i.e., intellectual disability, is lacking. That is not to say that individuals with ASD cannot also suffer from intellectual deficiencies. Indeed, Dr. Ryan noted in her report that it is estimated that 50% of individuals

⁹As authorized by *Atkins*, Idaho prohibits the execution of the mentally disabled through I.C. § 19-2515A. That statute defines “mentally retarded” as: “significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant subaverage general intelligence functioning and significant limitations in adaptive functioning must occur before age eighteen (18) years.” The statutes further defines “significantly subaverage general intellectual functioning” as “an intelligence quotient of seventy (70) or below.” I.C. § 19-2515A(1).

with ASD have “a degree of intellectual disability.” Ryan Report, p. 31. However, it is not necessary to a diagnosis of ASD and, therefore, cannot be equated to a mental disability for purposes of *Atkins*. In fact, in *United States v. Roof*, the Fourth Circuit declined to apply *Atkins* to a defendant with ASD who had an IQ of 125, noting that his limitations in adaptive skills alone are insufficient to render him intellectually disabled. *United States v. Roof*, 10 F.4th 314, 380 (4th Cir. 2021). With an IQ of 119, Defendant likewise fails to qualify.

Further, even if adaptive deficits alone could give rise to a categorical exemption, Defendant has presented no authority that the adaptive deficits of ASD have the equivalent effect on culpability or on the ability to make a persuasive showing of mitigation as does an intellectual disability. He dedicates a large portion of his briefing to describing how individuals with ASD, like those who are intellectually disabled, struggle to present meaningful mitigation evidence due to their adaptive deficits. He contends they are less able to meaningfully assist counsel due to social and communication deficits and their tendency to focus on specifics rather than the whole picture. He argues that the flat affect and other physical manifestations of ASD can create an unwarranted impression of lack of remorse and, further, awkward speech and distractability render individuals with ASD poor witnesses. He also contends that evidence of ASD is “double-edged” because it will likely be perceived by the jury as aggravating rather than mitigating.

However, to even be considered for categorical exemption from the death penalty based on these adaptive impairments alone, Defendant would—at a minimum—have to demonstrate that, considered as a whole, individuals with ASD suffer from these same or similar impairments that render them more susceptible to false confessions and diminish their ability to assist in their defense. *Atkins*, 536 U.S. at 320-21 (noting that intellectually disabled individuals “in the aggregate” face a special risk of wrongful execution due to their deficits). As Defendant’s authorities point out, however, “the presentation and symptomology of ASD vary widely.” Colleen M. Berryessa, *Defendants with Autism Spectrum Disorder in Criminal Court: A Judge’s Toolkit*, 13 Drexel L. Rev. 841, 842 (2021). Indeed, as its name implies, it is on a spectrum. Some may suffer from adaptive deficiencies to a degree where it interferes with the presentation of mitigation evidence and some may not. Ryan Report, p. 31 (noting the “wide range of autistic

symptoms and severity.”)¹⁰ The lack of any uniform presentation which can be measured on an objective scale (like IQ, youth and competency) renders ASD inapt for categorical exemption.

Further, courts that have considered whether to extend *Atkins* to mental health disorders similar to ASD have uniformly declined to do so. For example, Fetal Alcohol Spectrum Disorder, which is a group of conditions that can occur in a person exposed to alcohol before birth, is characterized by many of the same behavioral issues and learning challenges that mark an ASD diagnosis.¹¹ Reasoning that FASD cannot be medically equated to an intellectual disability, courts have found that the justifications for exempting individuals with intellectual disabilities from the death penalty do not apply to individuals with FASD. *See, In re Soliz*, 938 F.3d 200, 203 (5th Cir. 2019) (inmate failed to show that FASD the functional equivalent of an intellectual disability as defined in *Atkins*); *United States v. Fell*, 2016 WL 11550800, *7 (D. Vt. 2016) (“Fell has not shown that all persons with FASD ... have cognitive and behavioral impairments that result in the same (or ‘equivalent’) diminishment in moral culpability, ability to be deterred, and capacity to assist in their defense as individuals with [intellectual disability]”).¹²

¹⁰ Indeed, Defendant is an example of a highly functioning individual with ASD. His diagnosis is not accompanied by an intellectual or language impairment, he has an IQ of 119 and graduated from his master’s program with 4.0 GPA. At the time of the homicides, he was enrolled in a doctoral program. His experts describe him as “highly intelligent,” having “strong verbal abilities, abstract reasoning, memory, concept formation and reading skills.” They noted “no evidence of a formal thought disorder or thought disorganization.” He understands the proceedings against him and the penalty he is possibly facing. He is “generally clearly articulated” and “demonstrated some typical social behaviors, such as ‘fairly consistent (though intense) eye contact, polite demeanor, and social conventions.’” There is no indication he is susceptible to a false confession nor is there anything approaching a confession in this case, to the Court’s understanding. In fact, Dr. Ryan notes that Defendant “continues to adhere rigidly to a belief that he will be found Not Guilty[.]” Ryan Report, p. 33. While he is noted to have a “flat affect” and other physical mannerisms that can potentially be interpreted by the jury as lack of remorse, *Atkins* demands more of a reduced capacity than this. 536 U.S. at 320-21. Further, any danger that the jury will interpret his affect as a lack of remorse can be mitigated by addressing ASD in voir dire, and through expert testimony and evidence in the penalty phase.

¹¹ U.S. Center for Disease Control & Prevention, *About Fetal Alcohol Spectrum Disorders (FASDs)*, https://www.cdc.gov/fasd/about/index.html#cdc_disease_basics_testing_screening-diagnosis (last visited April 22, 2025). As an umbrella term for a broad range of symptoms cause by prenatal alcohol exposure, FASD is not a clinical diagnosis, like ASD. However, according to the CDC, FASD includes Neurobehavioral Disorder Associated With Prenatal Alcohol Exposure, which is a DSM-V diagnosis. It requires evidence of prenatal alcohol exposure and central nervous system involvement, as indicated by impairments in cognition, self-regulation and adaptive functioning. *Id.*

¹² *See also, Garza v. Shinn*, 2021 WL 5850883 at *105 (D. Ariz, 2021) (“There is no authority holding that individuals with FASD are exempt from capital punishment.”), *appeal filed*, No. 22-99001 (9th Cir. Jan. 7, 2022); *Garcia v. State*, 356 So. 3d 101, 113 (Miss. 2023) (while FASD may be a mitigating factor to be weighed against the aggravating factors, “it is not a death penalty disqualifier.”); *Ellison v. Thornell*, 721 F. Supp. 3d 820, 979 (D. Ariz. 2024) (*appeal filed*, No. 24-3527 (9th Cir. June 5, 2024) (finding “no authority” that individuals with FASD are exempt from capital punishment).

Likewise, courts—including the Idaho Supreme Court—have squarely refused to extend *Atkins* to severe mental illness, such as schizophrenia, bipolar disorder and anti-social personality disorder. *State v. Dunlap*, 155 Idaho 345, 380, 313 P.3d 1, 36 (2013) (declining to extend *Atkins* to categorically prohibit execution of the mentally ill, joining “every court” to have considered the issue and collecting cases); *State v. Hall*, 163 Idaho 744, 814, 419 P.3d 1042, 1112 (2018) (reaffirming *Dunlap* in finding defendant’s mental illness did not prevent imposition of capital sentence). If courts are uniformly unwilling to extend *Atkins* to severe mental illness, which can be at least equally as adaptively debilitating as ASD, an extension for ASD is unavailing.

In sum, Defendant has not demonstrated—nor has any court held—that persons with ASD have similar cognitive and behavioral deficiencies that result in an equivalent diminishment of culpability, ability to be deterred and capacity to assist in their defense as individuals with an intellectual disability. While they may share some similar adaptive deficiencies, Defendant has not demonstrated how this alone establishes equivalence for Eighth Amendment purposes.

2. Defendant has not established a national consensus against execution of individuals with ASD.

For Eighth Amendment purposes, cruel and unusual punishment is defined by “evolving standards of decency that mark the progress of a maturing society.” *Dunlap*, 155 Idaho at 379-80, 313 P.3d at 35-36 (quoting *Atkins*, 536 U.S. at 311-12). Ascertaining the standards of decency require consideration of “objective indicia of society’s standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against the sentencing practice at issue.” *Graham v. Florida*, 560 U.S. 48, 61 (2010) (quotes and citation omitted). In *Atkins*, for example, the Court found that the two independent reasons for categorically excluding the intellectually disabled from the death penalty were “consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution.” 536 U.S. at 318.¹³

¹³ At oral argument, Defendant suggested that if the Court found the individuals with ASD were categorically exempt from the death penalty based on the unreliability rationale of *Atkins*, it need not consider whether the national consensus supported exemption. This is an incorrect reading of *Atkins*, which in no uncertain terms found that the national consensus supported exemption for both rationales articulated by the Court. 536 U.S. at 318 (“In light of these deficiencies, our death penalty jurisprudence provides two reasons consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution.”). Therefore, Defendant must establish a national consensus against execution of ASD, regardless of whether exemption is warranted under the unreliability rationale or the retribution/deterrence rationale of *Atkins*.

Defendant argues categorically excluding individuals with ASD from capital punishment is consistent with society's prevailing standards of decency. He notes that the psychological community's understanding of the manifestations of ASD has significantly evolved over the past forty years, bringing with it a marked explosion in both ASD diagnoses and increased societal awareness.¹⁴ He points out that this growing awareness of ASD has coincided with efforts by the criminal legal system to address mental health disorders through the creation of mental health courts. He further notes that evidence of ASD has been held to be relevant in criminal cases to issues of intent. As for legislative enactments, he points to two states, Ohio and Kentucky, which recently enacted legislation barring people with serious mental illness from being sentenced to death.

At best, this evidence demonstrates a growing societal sensitivity to mental disorders generally. However, evidence of evolving standards of decency must come from legislative and executive actions. Two states protecting individuals with severe mental illness from execution is not a national consensus.¹⁵ Further, these two state statutes only apply to schizophrenia, schizoaffective disorder, bipolar disorder and delusional disorder, not ASD. *See*, Ohio Rev. Code Ann. § 2929.025(A)(1)(a); Ky. Rev Code Ann. § 532.130(3). Moreover, courts—including the Idaho Supreme Court—continue to reject the notion of a national consensus in the context of mental illness. *See, e.g., Hall v. State*, 172 Idaho 334, 361, 533 P.3d 243, 270 (2023), *reh'g denied* (Aug. 10, 2023) (noting that there has been no change in the national consensus refusing to extend *Atkins* to the mentally ill); *People v. Steskal*, 11 Cal. 5th 332, 374, 485 P.3d 1, 34 (2021) (observing there is “no evidence” that a national consensus has formed against the imposition of the death penalty for mentally ill).

Perhaps recognizing the lack of legislative acts in support of his argument, Defendant attempts to show a national consensus against executing individuals with ASD through a handful

¹⁴ He notes that ASD is now the fastest-growing developmental disability in the United States, with a significant increase in diagnoses in both adults and children between 2011 and 2022. Luke P. Governor, et al., Autism Diagnosis Among US Children and Adults, 2011-2022, JAMA Network Open (Oct. 30, 2024), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2825472> (last visited Apr. 22, 2025).

¹⁵ By contrast, *Atkins* concluded “a national consensus has developed against” using the death penalty on the intellectually disabled only after finding that eighteen states had adopted legislation to that effect, one state legislature had unanimously adopted a similar bill, and two other states passed similar bills in at least one house. 536 U.S. at 315-16.

of court decisions finding the diagnosis to be of evidentiary value.¹⁶ None of these, however, are capital cases. He also cites to recent media attention on a Texas capital case against Robert Roberson, an autistic man who was convicted of killing his baby on a theory of shaken baby syndrome. Mr. Roberson is seeking to commute his death sentence based, in part, on the argument that his ASD contributed to his conviction. *See, In re Robert Leslie Roberson III, Petition for Commutation of Death Sentence to a Lesser Penalty, Or, In the Alternative, a 180-Day Reprieve, and Request for an Interview and Hearing on the Matter.*¹⁷ Defendant notes that a group of 84 Texas legislators recommended clemency for Mr. Roberson. However, what Defendant fails to mention is these legislators did not recommend clemency due to his autism, but because of “significant scientific and medical evidence now shows that his daughter, Nikki, who was chronically ill, died of a combination of natural and accidental causes, not the debunked shaken baby syndrome hypothesis that State used to convict [him].” *Id.* at p. 13.

In sum, not only has Defendant failed to show that ASD is equivalent to an intellectual disability for death penalty exemption purposes, he has not shown there is a national consensus against subjecting individuals with ASD to capital punishment. ASD may be a mitigating factor to be weighed against the aggravating factors in determining if a defendant should receive the death penalty, but it is not a death-penalty disqualifier.

B. Case-Specific Factors Do Not Warrant Defendant’s Exemption from Capital Punishment.

Defendant alternatively argues he should be exempt from the death penalty because the intense media scrutiny on his ASD undermines his ability to present a meaningful defense and renders it “impossible” for him to receive a fair individualized sentencing determination. He points out that news sources have focused on his “social deficits,” including his past interactions with females, his “deadpan look,” “robot-like walk,” “cold iciness,” “rigid posture” and lack of facial affect. He argues the media is demonizing him for his disability while at the same time

¹⁶ *See, U.S. v. Cottrell*, 333 F.App’x 213, 216 (9th Cir. 2009) (finding evidence of defendant’s Asperger’s diagnosis was relevant to whether he had specific intent to aid and abet arson); *State v. Suber*, 2008 WL 942622, *10 (Minn. Ct. App. April 8, 2008) (reversing defendant’s DUI conviction where physical impairment the officer interpreted as intoxication could have been attributable to Asperger’s syndrome); *State v. Burr*, 948 A.2d 627 (N.J. 2008) (evidence of defendant’s Asperger’s syndrome relevant to rebut inference of grooming by having child sit on his lap where he did not realize it was inappropriate.).

¹⁷ Available at: <https://rl.texas.gov/scanned/archive/2024/54898.pdf> (last accessed April 22, 2025).

emphasizing the brutality of the crime. This, he warns, will overpower any mitigating arguments based on ASD and poses a risk that he will be sentenced based on his disability.

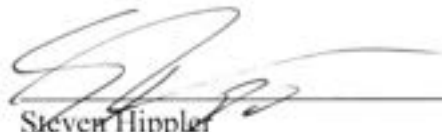
As the State points out, however, there is no precedent for striking the death penalty due to media coverage.¹⁸ Further, any concerns that arise from such media coverage can be mitigated through voir dire and from expert testimony and evidence during the penalty phase of the trial.

V. ORDER

Based on the foregoing, Defendant's Motion to Strike the Death Penalty re: Autism Spectrum Disorder is DENIED.

IT IS SO ORDERED.

DATED this 24th day of April, 2025.


Steven Hippler
Administrative District Judge

¹⁸ Indeed, jurors will not access media once selected to serve, and if exposed to pretrial media that has impaired their ability to be unbiased, they would be excluded from jury service on this case.

CERTIFICATE OF SERVICE

I hereby certify that on 4/24/2025, I served a true and correct copy of the **ORDER ON DEFENDANT'S MOTION TO STRIKE DEATH PENALTY RE: AUTISM SPECTRUM DISORDER**

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TRENT TRIPPLE

Clerk of the Court

By: 
Deputy Clerk 4/24/2025 3:18:14 PM

CERTIFICATE OF SERVICE

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

v.

BRYAN C. KOHBERGER,

Defendant.

Ada County Case No. CR01-24-31665

**ORDER ON DEFENDANT'S MOTION
TO STRIKE DEATH PENALTY AND
ADOPT OTHER NECESSARY
PROCEDURES**

I. INTRODUCTION

Defendant contends that the discovery produced by the State in this case has been voluminous and unorganized, thus rendering him unable to meaningfully review and investigate the State's evidence in time for trial. Asserting his due process rights have been violated, Defendant seeks sanctions in the form of striking the death penalty¹ and imposing certain organizational requirements upon the State to aid Defendant's review of discovery. The State responds that it has complied with all discovery obligations, including *Brady*,² and there is no basis for sanctions or other measures.

Oral argument on the motion was held on April 9, 2025, after which the Court took the matter under advisement. Because Defendant has failed to show a discovery violation or due process violation by the State, sanctions are not warranted. The Court further declines to require the State to provide further organizational assistance to Defendant.

II. STANDARD

A trial court's decision regarding discovery violations must be supported by substantial and competent evidence in the record. *State v. Koch*, 157 Idaho 89, 93, 334 P.3d 280, 284 (2014). Choice of sanctions for failure to comply with discovery obligations is discretionary. *State v. Cochran*, 129 Idaho 944, 949, 935 P.2d 207, 212 (Ct. App. 1997). On discretionary

¹ Defendant also moved to strike the State's experts, incorporating his Motion *in Limine* re: Vague and Undisclosed Expert Witnesses. The Court denied this motion in a separate order.

² *Brady v. Maryland*, 373 U.S. 83 (1963).

matters, the trial court must: 1) correctly perceive the issue as one of discretion; 2) act within the outer boundaries of its discretion; 3) act consistently with the legal standards applicable to the specific choices available to it, and; 4) reach its decision by the exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

III. ANALYSIS

Pursuant to *Brady v. Maryland*, a prosecutor has a constitutional duty to disclose favorable evidence to the accused where such evidence is “material” either to guilt or to punishment. 373 U.S. at 87.³ This duty covers not only exculpatory material, but also information that could be used to impeach a key government witness. *Giglio v. United States*, 405 U.S. 150, 154 (1972). *Brady* does not, however, grant broad discovery rights to a defendant. *State v. Campbell*, 170 Idaho 232, 248, 509 P.3d 1161, 1177 (2022) (quoting *United States v. Bagley*, 473 U.S. 667, 675 n.7 (1985) (“An interpretation of *Brady* to create a broad, constitutionally required right of discovery ‘would entirely alter the character and balance of our present systems of criminal justice.’”)). It simply imposes a due process standard upon prosecutors by requiring them to disclose favorable, material evidence. *Campbell*, 170 Idaho at 248, 509 P.3d at 1177 (citing *Bagley*, *supra*).

“In tandem” with *Brady*, the Idaho Criminal Rules require the prosecuting attorney to disclose “as soon as practicable following the filing of charges,” any evidence which “tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment.” *State v. Gardner*, 126 Idaho 428, 432, 885 P.2d 1144, 1148 (Ct. App. 1994) (quoting ICR 16(a)). The discovery obligations under both *Brady* and ICR 16 extend to all the government agents having a significant role in investigating and prosecuting the offense.” *Id.* at 433, 885 P.2d at 1149.

Defendant complains that the State has failed to satisfy its obligations under *Brady* and ICR 16 due to its method of discovery production.⁴ He contends that the State has turned over

³ In a capital case, this includes evidence that may mitigate punishment. *Cone v. Bell*, 556 U.S. 449, 475 (2009).

⁴ Despite presenting this motion in briefing as a *Brady* violation, at the hearing on the motion Defendant confusingly requested that the Court view the motion “not as a *Brady* violation but as a due process violation[.]” However, Defendant appears to misapprehend the scope of his due process rights regarding discovery. “There is no general constitutional right to discovery in a criminal case.” *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). In fact, “the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded....” *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). Rather, it is *Brady* and its progeny that serve to uphold a criminal defendant’s due process rights with regard to discovery. As the United States Supreme Court has explained, “[t]he *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the

more than 68 terabytes of data in discovery consisting of in excess of 13,000 photographs, 15,000 video clips from businesses and 8000 video clips from residences.⁵ It also includes more than sixty digital devices, digital data and search warrant return data. Defendant also contends the State has not provided the discovery in a searchable format, has not provided detailed logs and indexes that would facilitate defense's review of the material and has not specifically identified any *Brady* evidence. Defendant argues he has been prejudiced by the State's "data dump" method of discovery and contends that sanctions are warranted in the form of striking the death penalty and excluding witnesses. He also asks that the Court required the State to identify *Brady* material or "hot documents" within its discovery.

While the State acknowledges there is a "massive" amount of data in this case, it contends the majority is "completely irrelevant." Specifically, the State contends that most of the data is from cell phone extractions and weeks of surveillance video footage throughout the Moscow area obtained following the homicides. It affirmed on the record that it is unaware of any *Brady* material in those videos other than those specifically identified in motion practice and otherwise throughout the case. Further, the State's experts who reviewed the various devices (including cell phones) and other digital data have disclosed opinions that they found no connection between Defendant and the victims from the devices and data.

The State also notes that since this case began over two years ago, it has continuously turned over to Defendant all the information it received from the various investigating agencies in the same format as the information was received by the State.⁶ This was done at Defendant's request, who specifically asked that the State produce "everything [the State] had" from the get-go. Defendant also issued 400 itemized requests for discovery in this case. Thus, the State contends it is on the "same playing field" as Defendant regarding discovery.⁷ In addition, the

primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675. Thus, it is *Brady* that governs the Court's analysis of Defendant's alleged due process rights violation.

⁵ Other than those identified in warrant applications, expert disclosures, motion practice and in the exhibit lists, the numerous surveillance videos show nothing of consequence.

⁶ The State explained that all the evidence in this case was routed to it from the various investigating agencies. Once received, the State would copy it and then place it directly on Defendant's server in the same fashion and format it was received. The State has maintained its files in that same format.

⁷ In his reply, Defendant asserted that the State utilizes an "expensive, technologically powerful" case management software program called "Prosecutor by Karpel" which has a global search function to search all discovery and case documents at one time, generate reports from such searches and automatically transcribe audio and video files.

State points out that on September 4, 2024—at approximately the same time as its discovery deadline—it provided Defendant with a 320-page index identifying the location of requested discovery, a description of the evidence, and the date discovered. In addition, all of the evidence received from the FBI—which comprises the majority—was provided to Defendant with a searchable index.⁸ In sum, the State asserts it has provided everything required by ICR 16(a) and *Brady* and disputes that it has engaged in any discovery violations.

A. Defendant Has Not Established a Discovery Violation, Thus Sanctions Are Not Warranted.

“‘There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.’” *State v. Hall*, 163 Idaho 744, 830, 419 P.3d 1042, 1128 (2018) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). Defendant, as he appears to have acknowledged at the hearing, cannot establish these elements because he has not identified any withheld evidence that is exculpatory or impeaching. Further, he has not identified any obligation under ICR 16 that the State has violated. His quibble, rather, is with the method in which the State has produced discovery, arguing it is effectively a data dump that prevents him from meaningfully review the discovery for *Brady* material. There are, however, several problems with Defendant’s position.

First, while neither *Brady* nor ICR 16 prescribe the form discovery must take, it is well settled under federal law that there is no direct obligation for the government to identify or itemize *Brady* material for the defense. *Rhoades v. Henry*, 638 F.3d at 1039 (noting absence of authority for the proposition that the government’s *Brady* obligations require it to point the defense to specific documents within a larger mass of material that it has already turned over). “While the Supreme Court in *Brady* held that the Government may not properly conceal exculpatory evidence from a defendant, it does not place any burden upon the Government to

Because he does not have access to similar technology, Defendant disputes he is on the same playing field as the State. However, at the hearing, the State disputed its evidence software program has any of these features. Instead, the prosecutors rely on a self-created spreadsheet to identify and manage discovery.

⁸ When Defendant ran into a problem with some of the disclosed PDF documents with password protection, the State worked with Defendant to resolve the problem.

conduct a defendant's investigation or assist in the presentation of the defense's case." *United States v. Marrero*, 904 F.2d 251, 261 (5th Cir.1990).⁹

Further, voluminous discovery alone is not a basis for finding concealment under *Brady*. This occurs typically in "open file" discovery where the government effectively makes its entire file available to a criminal defendant. *United States v. Saffarinia*, 424 F.Supp.3d 46, 85 (D.D.C. 2020). This method of discovery—which Defendant requested of the State in this case—carries the recognized benefit of increasing "the efficiency and fairness of the criminal process." *Strickler v. Greene*, 527 U.S. 263, 283, n. 23 (1999). It is only when the government uses the open file policy to hide exculpatory material or otherwise prevent a defendant's access to such material that a *Brady* violation will be found. For example, in *United State v. Skilling*, the Fifth Circuit observed that while the use of voluminous open file does not alone violate *Brady*, its misuse by the government can give rise to a *Brady* violation, stating:

For instance, evidence that the government 'padded' an open file with pointless or superfluous information to frustrate a defendant's review of the file might raise serious *Brady* issues. Creating a voluminous file that is unduly onerous to access might raise similar concerns. And it should go without saying that the government may not hide *Brady* material of which it is actually aware in a huge open file in the hope that the defendant will never find it. These scenarios would indicate that the government was acting in bad faith in performing its obligations under *Brady*.

554 F.3d 529, 577 (5th Cir. 2009), *rev'd in part on other grounds by Skilling v. United States*, 561 U.S. 358 (2010).

However, where there is no proof that the government "larded its production with entirely irrelevant documents" or "made access to documents *unduly* onerous," a *Brady* violation will not be found. *U.S. v. Warshak*, 631 F.3d 266, 296–97 (6th Cir.2010) (emphasis in original).

Here, Defendant has not shown any bad faith by the State with regard to discovery production. While the discovery is indeed voluminous, the Court does not find that the manner in which the State produced it violates *Brady* or otherwise constitutes misconduct. The discovery was produced to Defendant as he specifically requested. The State received the information from its investigating agencies, labeled the materials and turned them over to Defendant through a shared access drive in the same format as received. This method not only puts the State and

⁹ See also, *United States v. Pelullo*, 399 F.3d 197, 212 (3d Cir. 2005) (*Brady* does not impose an obligation "on the prosecution team members to ferret out any potentially defense-favorable information from materials that are so disclosed.")

Defendant on equal footing regarding discovery review, it also serves the important purpose of protecting against claims of missing or manipulated documents if the State puts them in a different format or organization or otherwise conveys them to Defendant in a different manner than received. While the State acknowledges that much of the discovery is “completely irrelevant,” including surveillance videos and data from the numerous phones, computers and other devices, it did not produce it for purposes of padding the file or otherwise attempting, in bad faith, to hide *Brady* information in its haystack of information. Rather, Defendant asked for “everything” and “everything” is what he received. Defendant cannot demand everything under the sun and then complain about the weight of all the planets.

Moreover, Defendant has not produced any evidence showing the State has hidden *Brady* material or made his access to discovery unduly onerous. Although the State did not provide all of the discovery in a searchable format (as it was not received by the State in such a format), it provided a 320-page index identifying the specific location of evidence produced in response to Defendant’s 400 individual discovery requests, a description of the evidence, and the date discovered. In addition, the discovery received from the FBI—which comprised the majority—was provided to Defendant in a searchable format. Other than the cell phone/digital data and video surveillance footage, Defendant has not identified what information his counsel will be unable to review prior to trial and why that information is material. Further, the State has stipulated that it is unaware of any *Brady* material in the video surveillance footage (other than that specifically identified in motion practice) and its experts who have reviewed all the cell phone and other digital data in the case have opined they found no connection linking Defendant to the devices and data analyzed.

In addition, Defendant’s complaints of being unable to meaningfully review the discovery ring hollow. Defendant has been receiving discovery in the same manner for over two years. In that time, he has not once sought a remedy from this Court to regulate discovery, such as requiring the State to provide discovery in a different format. He has not sought additional resources under ICR 12.2 to hire additional staff to review discovery or obtain litigation document control software to help organize and sort the evidence. His lead counsel insisted that she be allowed to take on a second high-profile capital case despite the voluminous discovery in

this case.¹⁰ Further, at oral argument, lead counsel indicated that her practice is to personally review all the discovery herself, rather than rely on associates and staff to review materials to cut through the less relevant information and point to what materials need review by lead counsel. These actions are not indicative of an overburdened defense team. In fact, it is evident Defendant has been able to capably navigate the discovery given his more than robust motion practice, the scope and breadth of the experts retained and the disclosures filed. *See, Warshak*, 631 F.3d at 197-98 (no *Brady* violation where there was no proof the government hid exculpatory evidence and where the defendant's motion practice belied his claim that he was unable to navigate the discovery).

In the cases cited by Defendant where the courts have struck the death penalty as a sentencing option, the defendant had demonstrated that the prosecution either willfully¹¹ or inadvertently (but with extreme resulting prejudice)¹² violated discovery obligations. Here, however, Defendant has not established a discovery violation under *Brady* or ICR 16 in the first place. He has not shown the State has attempted to concealed specific materials within the discovery and he has not shown discovery to be unduly burdensome to the point where he is unable to examine the items that are material and of evidentiary value.¹³ Consequently, there is no basis for any sanction, let alone striking the death penalty.

¹⁰ *State v. Skylar Meade*, Nez Perce County Case No CR35-24-3750. *See, State v. Kohberger*, CR01-24-31665, October 8, 2024, *ex parte* Hearing Minutes (Sealed).

¹¹ *United States v. Rivera-Clemente*, 2012 WL 12911051, at *1 (D.P.R. Sept. 19, 2012) (where the government showed a "troubling reluctance" to disclose information that was relevant to the death penalty certification process, including *Brady* material, decertification was appropriate due to prejudice to defendant); *United States v. Rosado-Rosario*, 1998 WL 28273, at *3 (D.P.R. Jan. 15, 1998) (striking death penalty as sanction where the government refused to comply with discovery order and filed a notice of intent to seek the death penalty without first seeking certification); *Gardner v. Florida*, 430 U.S. 349 (1977) (vacating death sentence for violation of due process where death sentence was imposed based, in part, on a presentence investigation report that was not disclosed in full to defendant so as to allow him the opportunity to deny or explain).

¹² *State v. Lori Vallow Daybell*, Fremont County Case No. CR22-21-1624 (March 21, 2023 hearing) (striking death penalty as a sanction for the State's inadvertent failure to produce over 100 hours of phone calls and video visits containing statements of the defendant until two weeks prior to jury selection and the defendant had not waived speedy.) The transcript of the hearing was filed Nov. 24, 2023 in that case and, to the extent necessary, the Court takes judicial notice thereof under IRE 201(c).

¹³ Indeed, Defendant has struggled to identify materials that he has been unable to review at all, except to indicate that lead counsel has not been able to personally review all the surveillance videos and devise data produced (most of which the State has conceded are not of evidentiary value and are neither exculpatory nor inculpatory).

B. The Court Declines to Impose Organizational Requirements on the State.

Defendant additionally asks the Court to require the State to identify *Brady* material or “hot documents” within its discovery.¹⁴ The Court finds neither is warranted.

While the general rule is that the government need not specifically identify *Brady* material within a larger mass of disclosed evidence, courts will sometimes “order the government to organize voluminous discovery to comply with the spirit of its statutory and constitutional obligations.” *United States v. Salyer*, 2010 WL 3036444, at *2 (E.D. Cal. Aug. 2, 2010) (citing *U.S. v. W R Grace*, 526 F.3d 499, 509–510 (9th Cir. 2008)). Such organization measures include requiring that the government specifically designate any known *Brady* material within the discovery. Whether to order such identification is highly dependent on the facts and circumstances of the case. *Saffarina*, 424 F.Supp.3d at 85. Courts consider not only the volume of discovery and how it was produced, but the relative position of the defendant requesting identification, such as “(i) a defendant’s access to counsel, (ii) whether the defendant is incarcerated, (iii) a defendant’s access to resources, (iv) a defendant’s ability to participate in the preparation of his own defense, and (v) whether the interests of multiple defendants are aligned.” *United States v. Lacey*, 2018 WL 4963292, at *2 (D. Ariz. Oct. 15, 2018) (citations omitted).

In *Saffarina*, for example, the government produced approximately one million records and 3.5 million pages of documents in discovery. With this discovery, the government provided production logs, Bates-stamping, and metadata in an electronic and searchable format. *Id.* at 83–84. The court found that, under the circumstances, the government’s *Brady* obligations required it to identify “any known *Brady* material to the extent that the government knows of any such material in its production[.]” *Id.* at 85. In doing so, the court emphasized that the defendant was “an individual defendant who neither ha[d] the benefit of parallel civil litigation, nor access to voluntary corporate assistance to sift through the massive amounts of documents within the government’s voluminous production”; that the defendant’s counsel was handling the case *pro bono* with “time constraints” and “limited financial resources”; and “that the government—assisted by at least two federal prosecutors and several federal agents from at least two law

¹⁴ Nonetheless, this issue is largely moot given the representations by the State regarding its knowledge of *Brady* materials within the discovery and the exchange of the State’s expert disclosures and exhibit lists that, from the state’s perspective, call out the “hot” documents.

enforcement agencies—... had the luxury of reviewing this material on a rolling basis over the course of its three-year investigation.” *Id.* at 88.¹⁵

Likewise, in *Salyer*, the court directed the government to identify previously disclosed *Brady/Giglio* material to the defendant where the government collected documentary information during a five-year investigation, and the government’s massive production consisted of electronic information with multiple gigabytes and millions of pages. *Salyer*, 2010 WL 3036444, at *1, *3. The court reached that conclusion based on the circumstances of that case, which included: (1) there was a “singular, individual defendant, who [was] detained in jail pending trial, and who [was] represented by a relatively small defense team[;]” and; (2) “[t]here [was] no parallel civil litigation, and [the defendant] [did] not have access to voluntary corporate assistance in attempting to find the documents needed by the defense.” *Id.* at *7.

By contrast, in *United States v. Meek*, the court declined to compel the government to identify *Brady* material in its discovery, noting that: 1) the government produced the discovery in a user-friendly, searchable, and indexed format; 2) there was no indication that the government deliberately concealed or buried any exculpatory evidence in the information it turned over to the defense; 3) the defendants were sophisticated, formerly high-level executives represented by experienced and talented counsel from notable law firms, and; 4) the defendants had access to the discovery for over a year and had it in the same format as did the government. 2021 WL 1049773, at *5 (S.D. Ind. Mar. 19, 2021). The court further pointed out that ordering the government to “identify or label *already produced* material as covered by *Brady*—and by omission, identify non-*Brady* material—only invites future disputes as to whether the Government did an adequate job of identifying such material or characterized the material consistent with the Defendants’ view of it.” *Id.* (emphasis in original).¹⁶

¹⁵ See also, *United States v. Blankenship*, 2015 WL 3687864 (S.D.W.Va. June 12, 2015) (requiring government to specifically designate any known *Brady* materials within its four million pages of discovery that was “disorganized and unsearchable,” where the government had several years to review the material yet the defendant had only five months, and where the defendant claimed the government was burying exculpatory evidence); *U.S. v. Hsia*, 24 F.Supp.2d 14, 29 (D.D.C. 1998) (“The government cannot meet its *Brady* obligations by providing [the defendant] with access to 600,000 documents and then claiming that [the defendant] should have been able to find the exculpatory information in the haystack.”); *United States v. Cutting*, 2017 WL 132403, at *8–9 (N.D. Cal. Jan. 12, 2017) (requiring government to identify all known *Brady* material in discovery numbering in the millions of pages).

¹⁶ See also, *Skilling*, 554 F.3d at 576 (holding government was not required to identify *Brady* material where there was no indication that the government was hiding exculpatory evidence and where its discovery, consisting of several hundred million pages of documents, was electronic and searchable, accompanied by indices and identified “hot documents” that the prosecution viewed as particularly relevant).

While Defendant is currently incarcerated, he has a robust defense team¹⁷ and has not faced time constraints given his speedy trial waiver, with this case well over two years old. Further, unlike in *Saffarinia* and *Salyer*, Defendant has had nearly as much time as the State to review discovery. Defendant was arrested on December 30, 2022, approximately six weeks after the homicides. Defense counsel filed a notice of appearance on January 12, 2023, and the State first began providing discovery on January 18, 2023. Thus, this is not a situation where the State has had the benefit of a years-long investigation compared to a defendant who has mere months to review the investigative material.

Further, the Court shares the significant concern voiced in *Meek* that requiring the State to identify *Brady* material in already produced discovery, or to organize it in a way different from how the State received it, would simply invite future litigation as to whether the State did a sufficient job. *Meek*, 2021 WL 1049773, at *5. Not infrequently, what constitutes *Brady* material is fairly debatable. Where the circumstances do not, as here, cry out for a departure from the general rule, the Court will not invite such future disputes.

In addition, there is no need to require the State to disclose a list of “hot documents,” which is a tool imposed by some courts for particularly voluminous discovery to aid the defendant in identifying material that deserve closer attention. Chen, Brian, *Big Data and Brady Disclosures*, 99 N.Y.U.L.Rev. 1754, 1788 (Nov. 2024). The State has effectively already done so. Defendant was indicted by a grand jury. This process required the State to present evidence supporting the elements of the charges and identify any “substantial evidence which directly negates the guilty of the subject of the investigation.” ICR 6.1(b)(1). Defendant is privy to all the evidence produced by the State at the grand jury proceedings in this matter. Further, the State recently disclosed its exhibit and witness list identifying precisely what the State intends to use to support its case. Additionally, the State has taken reasonable steps to aid Defendant in navigating the discovery, including by: 1) providing a detailed index of all the discovery produced identifying the location, a description of the evidence, and the date discovered; 2) providing the FBI materials with a searchable index; 3) working with counsel to resolve access problems to documents, and; 4) representing that the surveillance videos other than those

¹⁷ For capital cases in Idaho, a defendant who has court appointed counsel must have a lead and a second chair attorney. Here, Defendant has always employed at least three attorneys, has employed investigators and mitigation specialists and has retained dozens of experts.

highlighted by the State do not contain any relevant footage and that the devices, phones and other digital data of the victims and others do not show any connection between the Defendant and the victims. Collectively, this provides Defendant reasonable means to meaningfully review the discovery he requested.¹⁸ Consequently, the Court declines to impose additional organizational requirements.

V. ORDER

Based on the foregoing, Defendant's Motion to Strike the Death Penalty and Adopt Other Necessary Procedures Due to State's Disclosure Violations is DENIED.

IT IS SO ORDERED.

DATED this 29th day of April, 2025.


Steven Hippler
District Judge

¹⁸ The Court continues to strongly urge defense counsel to request additional resources and personnel from the money judge if it is felt needed.

CERTIFICATE OF SERVICE

I hereby certify that on 4/29/2025, I served a true and correct copy of the **ORDER ON DEFENDANT'S MOTION TO STRIKE DEATH PENALTY AND ADOPT OTHER NECESSARY PROCEDURES**

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TRENT TRIPPLE

Clerk of the Court

By: 
Deputy Clerk 4/29/2025 2:04:26 PM

CERTIFICATE OF SERVICE

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

v.

BRYAN C. KOHBERGER,

Defendant.

Ada County Case No. CR01-24-31665

**ORDER ON DEFENDANT'S MOTION
TO STRIKE DEATH PENALTY AND
ADOPT OTHER NECESSARY
PROCEDURES**

I. INTRODUCTION

Defendant contends that the discovery produced by the State in this case has been voluminous and unorganized, thus rendering him unable to meaningfully review and investigate the State's evidence in time for trial. Asserting his due process rights have been violated, Defendant seeks sanctions in the form of striking the death penalty¹ and imposing certain organizational requirements upon the State to aid Defendant's review of discovery. The State responds that it has complied with all discovery obligations, including *Brady*,² and there is no basis for sanctions or other measures.

Oral argument on the motion was held on April 9, 2025, after which the Court took the matter under advisement. Because Defendant has failed to show a discovery violation or due process violation by the State, sanctions are not warranted. The Court further declines to require the State to provide further organizational assistance to Defendant.

II. STANDARD

A trial court's decision regarding discovery violations must be supported by substantial and competent evidence in the record. *State v. Koch*, 157 Idaho 89, 93, 334 P.3d 280, 284 (2014). Choice of sanctions for failure to comply with discovery obligations is discretionary. *State v. Cochran*, 129 Idaho 944, 949, 935 P.2d 207, 212 (Ct. App. 1997). On discretionary

¹ Defendant also moved to strike the State's experts, incorporating his Motion *in Limine* re: Vague and Undisclosed Expert Witnesses. The Court denied this motion in a separate order.

² *Brady v. Maryland*, 373 U.S. 83 (1963).

matters, the trial court must: 1) correctly perceive the issue as one of discretion; 2) act within the outer boundaries of its discretion; 3) act consistently with the legal standards applicable to the specific choices available to it, and; 4) reach its decision by the exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

III. ANALYSIS

Pursuant to *Brady v. Maryland*, a prosecutor has a constitutional duty to disclose favorable evidence to the accused where such evidence is “material” either to guilt or to punishment. 373 U.S. at 87.³ This duty covers not only exculpatory material, but also information that could be used to impeach a key government witness. *Giglio v. United States*, 405 U.S. 150, 154 (1972). *Brady* does not, however, grant broad discovery rights to a defendant. *State v. Campbell*, 170 Idaho 232, 248, 509 P.3d 1161, 1177 (2022) (quoting *United States v. Bagley*, 473 U.S. 667, 675 n.7 (1985) (“An interpretation of *Brady* to create a broad, constitutionally required right of discovery ‘would entirely alter the character and balance of our present systems of criminal justice.’”)). It simply imposes a due process standard upon prosecutors by requiring them to disclose favorable, material evidence. *Campbell*, 170 Idaho at 248, 509 P.3d at 1177 (citing *Bagley*, *supra*).

“In tandem” with *Brady*, the Idaho Criminal Rules require the prosecuting attorney to disclose “as soon as practicable following the filing of charges,” any evidence which “tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment.” *State v. Gardner*, 126 Idaho 428, 432, 885 P.2d 1144, 1148 (Ct. App. 1994) (quoting ICR 16(a)). The discovery obligations under both *Brady* and ICR 16 extend to all the government agents having a significant role in investigating and prosecuting the offense.” *Id.* at 433, 885 P.2d at 1149.

Defendant complains that the State has failed to satisfy its obligations under *Brady* and ICR 16 due to its method of discovery production.⁴ He contends that the State has turned over

³ In a capital case, this includes evidence that may mitigate punishment. *Cone v. Bell*, 556 U.S. 449, 475 (2009).

⁴ Despite presenting this motion in briefing as a *Brady* violation, at the hearing on the motion Defendant confusingly requested that the Court view the motion “not as a *Brady* violation but as a due process violation[.]” However, Defendant appears to misapprehend the scope of his due process rights regarding discovery. “There is no general constitutional right to discovery in a criminal case.” *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). In fact, “the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded....” *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). Rather, it is *Brady* and its progeny that serve to uphold a criminal defendant’s due process rights with regard to discovery. As the United States Supreme Court has explained, “[t]he *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the

more than 68 terabytes of data in discovery consisting of in excess of 13,000 photographs, 15,000 video clips from businesses and 8000 video clips from residences.⁵ It also includes more than sixty digital devices, digital data and search warrant return data. Defendant also contends the State has not provided the discovery in a searchable format, has not provided detailed logs and indexes that would facilitate defense's review of the material and has not specifically identified any *Brady* evidence. Defendant argues he has been prejudiced by the State's "data dump" method of discovery and contends that sanctions are warranted in the form of striking the death penalty and excluding witnesses. He also asks that the Court required the State to identify *Brady* material or "hot documents" within its discovery.

While the State acknowledges there is a "massive" amount of data in this case, it contends the majority is "completely irrelevant." Specifically, the State contends that most of the data is from cell phone extractions and weeks of surveillance video footage throughout the Moscow area obtained following the homicides. It affirmed on the record that it is unaware of any *Brady* material in those videos other than those specifically identified in motion practice and otherwise throughout the case. Further, the State's experts who reviewed the various devices (including cell phones) and other digital data have disclosed opinions that they found no connection between Defendant and the victims from the devices and data.

The State also notes that since this case began over two years ago, it has continuously turned over to Defendant all the information it received from the various investigating agencies in the same format as the information was received by the State.⁶ This was done at Defendant's request, who specifically asked that the State produce "everything [the State] had" from the get-go. Defendant also issued 400 itemized requests for discovery in this case. Thus, the State contends it is on the "same playing field" as Defendant regarding discovery.⁷ In addition, the

primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675. Thus, it is *Brady* that governs the Court's analysis of Defendant's alleged due process rights violation.

⁵ Other than those identified in warrant applications, expert disclosures, motion practice and in the exhibit lists, the numerous surveillance videos show nothing of consequence.

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State points out that on September 4, 2024—at approximately the same time as its discovery deadline—it provided Defendant with a 320-page index identifying the location of requested discovery, a description of the evidence, and the date discovered. In addition, all of the evidence received from the FBI—which comprises the majority—was provided to Defendant with a searchable index.⁸ In sum, the State asserts it has provided everything required by ICR 16(a) and *Brady* and disputes that it has engaged in any discovery violations.

A. Defendant Has Not Established a Discovery Violation, Thus Sanctions Are Not Warranted.

“‘There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.’” *State v. Hall*, 163 Idaho 744, 830, 419 P.3d 1042, 1128 (2018) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). Defendant, as he appears to have acknowledged at the hearing, cannot establish these elements because he has not identified any withheld evidence that is exculpatory or impeaching. Further, he has not identified any obligation under ICR 16 that the State has violated. His quibble, rather, is with the method in which the State has produced discovery, arguing it is effectively a data dump that prevents him from meaningfully review the discovery for *Brady* material. There are, however, several problems with Defendant’s position.

First, while neither *Brady* nor ICR 16 prescribe the form discovery must take, it is well settled under federal law that there is no direct obligation for the government to identify or itemize *Brady* material for the defense. *Rhoades v. Henry*, 638 F.3d at 1039 (noting absence of authority for the proposition that the government’s *Brady* obligations require it to point the defense to specific documents within a larger mass of material that it has already turned over). “While the Supreme Court in *Brady* held that the Government may not properly conceal exculpatory evidence from a defendant, it does not place any burden upon the Government to

Because he does not have access to similar technology, Defendant disputes he is on the same playing field as the State. However, at the hearing, the State disputed its evidence software program has any of these features. Instead, the prosecutors rely on a self-created spreadsheet to identify and manage discovery.

⁸ When Defendant ran into a problem with some of the disclosed PDF documents with password protection, the State worked with Defendant to resolve the problem.

conduct a defendant's investigation or assist in the presentation of the defense's case." *United States v. Marrero*, 904 F.2d 251, 261 (5th Cir.1990).⁹

Further, voluminous discovery alone is not a basis for finding concealment under *Brady*. This occurs typically in "open file" discovery where the government effectively makes its entire file available to a criminal defendant. *United States v. Saffarinia*, 424 F.Supp.3d 46, 85 (D.D.C. 2020). This method of discovery—which Defendant requested of the State in this case—carries the recognized benefit of increasing "the efficiency and fairness of the criminal process." *Strickler v. Greene*, 527 U.S. 263, 283, n. 23 (1999). It is only when the government uses the open file policy to hide exculpatory material or otherwise prevent a defendant's access to such material that a *Brady* violation will be found. For example, in *United State v. Skilling*, the Fifth Circuit observed that while the use of voluminous open file does not alone violate *Brady*, its misuse by the government can give rise to a *Brady* violation, stating:

For instance, evidence that the government 'padded' an open file with pointless or superfluous information to frustrate a defendant's review of the file might raise serious *Brady* issues. Creating a voluminous file that is unduly onerous to access might raise similar concerns. And it should go without saying that the government may not hide *Brady* material of which it is actually aware in a huge open file in the hope that the defendant will never find it. These scenarios would indicate that the government was acting in bad faith in performing its obligations under *Brady*.

554 F.3d 529, 577 (5th Cir. 2009), *rev'd in part on other grounds by Skilling v. United States*, 561 U.S. 358 (2010).

However, where there is no proof that the government "larded its production with entirely irrelevant documents" or "made access to documents *unduly* onerous," a *Brady* violation will not be found. *U.S. v. Warshak*, 631 F.3d 266, 296–97 (6th Cir.2010) (emphasis in original).

Here, Defendant has not shown any bad faith by the State with regard to discovery production. While the discovery is indeed voluminous, the Court does not find that the manner in which the State produced it violates *Brady* or otherwise constitutes misconduct. The discovery was produced to Defendant as he specifically requested. The State received the information from its investigating agencies, labeled the materials and turned them over to Defendant through a shared access drive in the same format as received. This method not only puts the State and

⁹ See also, *United States v. Pelullo*, 399 F.3d 197, 212 (3d Cir. 2005) (*Brady* does not impose an obligation "on the prosecution team members to ferret out any potentially defense-favorable information from materials that are so disclosed.")

Defendant on equal footing regarding discovery review, it also serves the important purpose of protecting against claims of missing or manipulated documents if the State puts them in a different format or organization or otherwise conveys them to Defendant in a different manner than received. While the State acknowledges that much of the discovery is “completely irrelevant,” including surveillance videos and data from the numerous phones, computers and other devices, it did not produce it for purposes of padding the file or otherwise attempting, in bad faith, to hide *Brady* information in its haystack of information. Rather, Defendant asked for “everything” and “everything” is what he received. Defendant cannot demand everything under the sun and then complain about the weight of all the planets.

Moreover, Defendant has not produced any evidence showing the State has hidden *Brady* material or made his access to discovery unduly onerous. Although the State did not provide all of the discovery in a searchable format (as it was not received by the State in such a format), it provided a 320-page index identifying the specific location of evidence produced in response to Defendant’s 400 individual discovery requests, a description of the evidence, and the date discovered. In addition, the discovery received from the FBI—which comprised the majority—was provided to Defendant in a searchable format. Other than the cell phone/digital data and video surveillance footage, Defendant has not identified what information his counsel will be unable to review prior to trial and why that information is material. Further, the State has stipulated that it is unaware of any *Brady* material in the video surveillance footage (other than that specifically identified in motion practice) and its experts who have reviewed all the cell phone and other digital data in the case have opined they found no connection linking Defendant to the devices and data analyzed.

In addition, Defendant’s complaints of being unable to meaningfully review the discovery ring hollow. Defendant has been receiving discovery in the same manner for over two years. In that time, he has not once sought a remedy from this Court to regulate discovery, such as requiring the State to provide discovery in a different format. He has not sought additional resources under ICR 12.2 to hire additional staff to review discovery or obtain litigation document control software to help organize and sort the evidence. His lead counsel insisted that she be allowed to take on a second high-profile capital case despite the voluminous discovery in

this case.¹⁰ Further, at oral argument, lead counsel indicated that her practice is to personally review all the discovery herself, rather than rely on associates and staff to review materials to cut through the less relevant information and point to what materials need review by lead counsel. These actions are not indicative of an overburdened defense team. In fact, it is evident Defendant has been able to capably navigate the discovery given his more than robust motion practice, the scope and breadth of the experts retained and the disclosures filed. *See, Warshak*, 631 F.3d at 197-98 (no *Brady* violation where there was no proof the government hid exculpatory evidence and where the defendant's motion practice belied his claim that he was unable to navigate the discovery).

In the cases cited by Defendant where the courts have struck the death penalty as a sentencing option, the defendant had demonstrated that the prosecution either willfully¹¹ or inadvertently (but with extreme resulting prejudice)¹² violated discovery obligations. Here, however, Defendant has not established a discovery violation under *Brady* or ICR 16 in the first place. He has not shown the State has attempted to concealed specific materials within the discovery and he has not shown discovery to be unduly burdensome to the point where he is unable to examine the items that are material and of evidentiary value.¹³ Consequently, there is no basis for any sanction, let alone striking the death penalty.

¹⁰ *State v. Skylar Meade*, Nez Perce County Case No CR35-24-3750. *See, State v. Kohberger*, CR01-24-31665, October 8, 2024, *ex parte* Hearing Minutes (Sealed).

¹¹ *United States v. Rivera-Clemente*, 2012 WL 12911051, at *1 (D.P.R. Sept. 19, 2012) (where the government showed a "troubling reluctance" to disclose information that was relevant to the death penalty certification process, including *Brady* material, decertification was appropriate due to prejudice to defendant); *United States v. Rosado-Rosario*, 1998 WL 28273, at *3 (D.P.R. Jan. 15, 1998) (striking death penalty as sanction where the government refused to comply with discovery order and filed a notice of intent to seek the death penalty without first seeking certification); *Gardner v. Florida*, 430 U.S. 349 (1977) (vacating death sentence for violation of due process where death sentence was imposed based, in part, on a presentence investigation report that was not disclosed in full to defendant so as to allow him the opportunity to deny or explain).

¹² *State v. Lori Vallow Daybell*, Fremont County Case No. CR22-21-1624 (March 21, 2023 hearing) (striking death penalty as a sanction for the State's inadvertent failure to produce over 100 hours of phone calls and video visits containing statements of the defendant until two weeks prior to jury selection and the defendant had not waived speedy.) The transcript of the hearing was filed Nov. 24, 2023 in that case and, to the extent necessary, the Court takes judicial notice thereof under IRE 201(c).

¹³ Indeed, Defendant has struggled to identify materials that he has been unable to review at all, except to indicate that lead counsel has not been able to personally review all the surveillance videos and devise data produced (most of which the State has conceded are not of evidentiary value and are neither exculpatory nor inculpatory).

B. The Court Declines to Impose Organizational Requirements on the State.

Defendant additionally asks the Court to require the State to identify *Brady* material or “hot documents” within its discovery.¹⁴ The Court finds neither is warranted.

While the general rule is that the government need not specifically identify *Brady* material within a larger mass of disclosed evidence, courts will sometimes “order the government to organize voluminous discovery to comply with the spirit of its statutory and constitutional obligations.” *United States v. Salyer*, 2010 WL 3036444, at *2 (E.D. Cal. Aug. 2, 2010) (citing *U.S. v. W R Grace*, 526 F.3d 499, 509–510 (9th Cir. 2008)). Such organization measures include requiring that the government specifically designate any known *Brady* material within the discovery. Whether to order such identification is highly dependent on the facts and circumstances of the case. *Saffarina*, 424 F.Supp.3d at 85. Courts consider not only the volume of discovery and how it was produced, but the relative position of the defendant requesting identification, such as “(i) a defendant’s access to counsel, (ii) whether the defendant is incarcerated, (iii) a defendant’s access to resources, (iv) a defendant’s ability to participate in the preparation of his own defense, and (v) whether the interests of multiple defendants are aligned.” *United States v. Lacey*, 2018 WL 4963292, at *2 (D. Ariz. Oct. 15, 2018) (citations omitted).

In *Saffarina*, for example, the government produced approximately one million records and 3.5 million pages of documents in discovery. With this discovery, the government provided production logs, Bates-stamping, and metadata in an electronic and searchable format. *Id.* at 83–84. The court found that, under the circumstances, the government’s *Brady* obligations required it to identify “any known *Brady* material to the extent that the government knows of any such material in its production[.]” *Id.* at 85. In doing so, the court emphasized that the defendant was “an individual defendant who neither ha[d] the benefit of parallel civil litigation, nor access to voluntary corporate assistance to sift through the massive amounts of documents within the government’s voluminous production”; that the defendant’s counsel was handling the case *pro bono* with “time constraints” and “limited financial resources”; and “that the government—assisted by at least two federal prosecutors and several federal agents from at least two law

¹⁴ Nonetheless, this issue is largely moot given the representations by the State regarding its knowledge of *Brady* materials within the discovery and the exchange of the State’s expert disclosures and exhibit lists that, from the state’s perspective, call out the “hot” documents.

enforcement agencies—... had the luxury of reviewing this material on a rolling basis over the course of its three-year investigation.” *Id.* at 88.¹⁵

Likewise, in *Salyer*, the court directed the government to identify previously disclosed *Brady/Giglio* material to the defendant where the government collected documentary information during a five-year investigation, and the government’s massive production consisted of electronic information with multiple gigabytes and millions of pages. *Salyer*, 2010 WL 3036444, at *1, *3. The court reached that conclusion based on the circumstances of that case, which included: (1) there was a “singular, individual defendant, who [was] detained in jail pending trial, and who [was] represented by a relatively small defense team[;]” and; (2) “[t]here [was] no parallel civil litigation, and [the defendant] [did] not have access to voluntary corporate assistance in attempting to find the documents needed by the defense.” *Id.* at *7.

By contrast, in *United States v. Meek*, the court declined to compel the government to identify *Brady* material in its discovery, noting that: 1) the government produced the discovery in a user-friendly, searchable, and indexed format; 2) there was no indication that the government deliberately concealed or buried any exculpatory evidence in the information it turned over to the defense; 3) the defendants were sophisticated, formerly high-level executives represented by experienced and talented counsel from notable law firms, and; 4) the defendants had access to the discovery for over a year and had it in the same format as did the government. 2021 WL 1049773, at *5 (S.D. Ind. Mar. 19, 2021). The court further pointed out that ordering the government to “identify or label *already produced* material as covered by *Brady*—and by omission, identify non-*Brady* material—only invites future disputes as to whether the Government did an adequate job of identifying such material or characterized the material consistent with the Defendants’ view of it.” *Id.* (emphasis in original).¹⁶

¹⁵ See also, *United States v. Blankenship*, 2015 WL 3687864 (S.D.W.Va. June 12, 2015) (requiring government to specifically designate any known *Brady* materials within its four million pages of discovery that was “disorganized and unsearchable,” where the government had several years to review the material yet the defendant had only five months, and where the defendant claimed the government was burying exculpatory evidence); *U.S. v. Hsia*, 24 F.Supp.2d 14, 29 (D.D.C. 1998) (“The government cannot meet its *Brady* obligations by providing [the defendant] with access to 600,000 documents and then claiming that [the defendant] should have been able to find the exculpatory information in the haystack.”); *United States v. Cutting*, 2017 WL 132403, at *8–9 (N.D. Cal. Jan. 12, 2017) (requiring government to identify all known *Brady* material in discovery numbering in the millions of pages).

¹⁶ See also, *Skilling*, 554 F.3d at 576 (holding government was not required to identify *Brady* material where there was no indication that the government was hiding exculpatory evidence and where its discovery, consisting of several hundred million pages of documents, was electronic and searchable, accompanied by indices and identified “hot documents” that the prosecution viewed as particularly relevant).

While Defendant is currently incarcerated, he has a robust defense team¹⁷ and has not faced time constraints given his speedy trial waiver, with this case well over two years old. Further, unlike in *Saffarinia* and *Salyer*, Defendant has had nearly as much time as the State to review discovery. Defendant was arrested on December 30, 2022, approximately six weeks after the homicides. Defense counsel filed a notice of appearance on January 12, 2023, and the State first began providing discovery on January 18, 2023. Thus, this is not a situation where the State has had the benefit of a years-long investigation compared to a defendant who has mere months to review the investigative material.

Further, the Court shares the significant concern voiced in *Meek* that requiring the State to identify *Brady* material in already produced discovery, or to organize it in a way different from how the State received it, would simply invite future litigation as to whether the State did a sufficient job. *Meek*, 2021 WL 1049773, at *5. Not infrequently, what constitutes *Brady* material is fairly debatable. Where the circumstances do not, as here, cry out for a departure from the general rule, the Court will not invite such future disputes.

In addition, there is no need to require the State to disclose a list of “hot documents,” which is a tool imposed by some courts for particularly voluminous discovery to aid the defendant in identifying material that deserve closer attention. Chen, Brian, *Big Data and Brady Disclosures*, 99 N.Y.U.L.Rev. 1754, 1788 (Nov. 2024). The State has effectively already done so. Defendant was indicted by a grand jury. This process required the State to present evidence supporting the elements of the charges and identify any “substantial evidence which directly negates the guilty of the subject of the investigation.” ICR 6.1(b)(1). Defendant is privy to all the evidence produced by the State at the grand jury proceedings in this matter. Further, the State recently disclosed its exhibit and witness list identifying precisely what the State intends to use to support its case. Additionally, the State has taken reasonable steps to aid Defendant in navigating the discovery, including by: 1) providing a detailed index of all the discovery produced identifying the location, a description of the evidence, and the date discovered; 2) providing the FBI materials with a searchable index; 3) working with counsel to resolve access problems to documents, and; 4) representing that the surveillance videos other than those

¹⁷ For capital cases in Idaho, a defendant who has court appointed counsel must have a lead and a second chair attorney. Here, Defendant has always employed at least three attorneys, has employed investigators and mitigation specialists and has retained dozens of experts.

highlighted by the State do not contain any relevant footage and that the devices, phones and other digital data of the victims and others do not show any connection between the Defendant and the victims. Collectively, this provides Defendant reasonable means to meaningfully review the discovery he requested.¹⁸ Consequently, the Court declines to impose additional organizational requirements.

V. ORDER

Based on the foregoing, Defendant's Motion to Strike the Death Penalty and Adopt Other Necessary Procedures Due to State's Disclosure Violations is DENIED.

IT IS SO ORDERED.

DATED this 29th day of April, 2025.


Steven Hippler
District Judge

¹⁸ The Court continues to strongly urge defense counsel to request additional resources and personnel from the money judge if it is felt needed.

CERTIFICATE OF SERVICE

I hereby certify that on 4/29/2025, I served a true and correct copy of the **ORDER ON DEFENDANT'S MOTION TO STRIKE DEATH PENALTY AND ADOPT OTHER NECESSARY PROCEDURES**

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Clerk of the Court

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CERTIFICATE OF SERVICE