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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 THE FUTURE DANGEROUSNESS AGGRAVATOR

COMES NOW the State of Idaho, by and through the Latah County Prosecuting Attorney, and hereby objects to the Defendant's Motion to Strike the Future Dangerousness Aggravator in this case. For the following reasons, Defendant's motion should be denied.

ARGUMENT

To Defendant's credit, he acknowledges from the outset that his Motion to Strike the Future Dangerous Aggravator (often referred to as the "propensity" aggravator) flies in the face of well-established precedent. *Defendant's Motion to Strike Future Dangerousness Aggravator,* pp. 3-4.

Specifically, Defendant acknowledges that the Idaho Supreme Court and the United States Supreme Court have upheld the constitutionality of considering propensity as an aggravator in a capital case. *Id.* (citing *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983) (citing *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950 (1976))). However, Defendant dismisses with a figurative handwave the Idaho Supreme Court's decision in *Creech* and the United States Supreme Court's holding in *Jurek v. Texas*—both of which are which are binding on this Court—as "problematic" and plows ahead with three arguments in support of his motion. First, he asserts that the propensity aggravator fails to narrow the class of death eligible defendants. Second, he contends that the propensity aggravator is impermissibly vague. Finally, he claims that the propensity aggravator is irrelevant to culpability and therefore cannot be an aggravator.

A. This Court Cannot Overrule the Idaho Supreme Court.

As elsewhere in his briefing on the death penalty, Defendant asks this Court to enter a ruling contrary to a specific holding of the Idaho Supreme Court. This, of course, the Court cannot do. The Idaho Supreme Court unambiguously set forth its authority in *State v. Guzman*:

> To this Court falls the obligation to be and remain 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). Having admitted that binding appellate caselaw forecloses his argument, Defendant's motion should be denied on this basis alone.

B. The Propensity Aggravator Appropriately Narrows the Class of Death-Eligible Defendants.

As noted above, Defendant acknowledges that the constitutionality of the propensity aggravator was upheld by the Idaho Supreme Court in *State v. Creech.* There, the Court held that the propensity aggravator narrows the class of death-eligible defendants, and even provided an example of the type of murder that would *not* fall within the scope of the propensity aggravator:

> Here . . . it 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.

Creech at 370-71, 105 Idaho 471-72. Ignoring the specific example provided by the *Creech* Court, Defendant complains that "the [Idaho] Supreme Court's gloss is a list of synonyms that define anyone who would commit murder as already defined by the legislature" and "does not accomplish the genuine narrowing required by the Eighth Amendment." Unfortunately for the Defendant, one's personal interpretation or belief about the Idaho Supreme Court's holding in *Creech* is irrelevant to this Court's determination. *See Guzman* at 987, 842 P.2d 666 (holding that the Idaho Supreme Court "remains the final arbiter of Idaho rules of law").

C. The Aggravator is not Impermissibly Vague.

Here again, Defendant acknowledges that the law is not on his side. Under his heading "I.C. § 19-2515(9)(i) is impermissibly vague," Defendant next writes that "the United States Supreme Court held that future dangerousness was not vague as it was something judges had to do all the time" in *Jurek v. Texas*. *Def. Motion to Strike Future Dangerousness Aggravator*, p. 6 (citing *Jurek v. Texas*, 428 US 262, 96 S.Ct. 2950 (1976)).

Defendant is correct—the United States Supreme Court upheld the constitutionality of a future dangerousness or "propensity" aggravator in *Jurek v. Texas. Id.* In *Jurek*, the Court addressed an argument similar to the one that Defendant poses to this Court. *Id.* In the Texas statutory scheme at issue in *Jurek*, jurors in a capital sentencing proceeding had to answer three questions related to aggravation in the affirmative. *Id.* One of those questions was "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* at 269. On appeal, the *Jurek* defendant argued that "it is impossible to predict future behavior and that the question is so vague as to be meaningless." *Id.* at 274. Rejecting that contention, the *Jurek* Court held that "prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system," and that "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Id.* at 275-76. Accordingly, the Court concluded, the Texas statutory scheme did not violate the Constitution. *Id.* at 276. The Court also explained that "[b]y authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." *Id.*

Defendant then argues that the propensity aggravator should be struck for the sake of clarity to the jury, arguing that there is potential for confusion where certain types of mental disorders could be taken as both aggravation and mitigation, arguing that "practically speaking, every case where a jury is asked to find a person is likely to pose a threat of future dangerousness will involve underlying significant disturbances in that person's mental functioning." *Def. Motion to Strike Future Dangerousness Aggravator*, p. 7. Defendant asserts that "[f]rom the Supreme Court's view, a mental illness of a type that renders a person unable to understand the meaning of or reason for it bars the application of the death penalty." *Id,* p. 8. In support of this argument, Defendant cites to *Ford v. Wainwright*. 477 U.S. 399, 106 S.Ct 2595 (1986). But that case is wholly irrelevant to the Defendant's argument. *Ford v. Wainright* dealt with a defendant who had appeared to be intellectually normal at the time of his conviction and sentencing to death. *Id.* Ford developed a severe mental illness in the years that followed, displaying symptoms of schizophrenia that included referring to himself as "Pope John Paul III" and claiming to have appointed nine new justices to the Florida Supreme Court. *Id.* at 402-03, 106 S.Ct. 2597-98 (1986). The Court ultimately remanded the case for a determination of the defendant's sanity, explaining that "it is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Id.* at 417, 106 S.Ct.2605. In any event, there is nothing in the record that suggests that the Defendant in this case has "a mental illness of a type that renders [him] unable to understand the meaning of or reason for" the application of the death penalty. Nor is there any indication as of this time that evidence of mental illness would be presented at sentencing by either the prosecution or the defense, as neither party has yet filed notice under Idaho Code § 18-207. Accordingly, this argument is wholly irrelevant or alternatively, not ripe.

D. Future Dangerousness is a Relevant Sentencing Consideration.

Defendant's assertion that future dangerousness is irrelevant to punishment is without merit. As the Defendant himself pointed out in discussing *Jurek*, the United States Supreme Court characterized prediction of future dangerousness as "an essential element in many of the decisions rendered throughout our criminal justice system." *Jurek v. Texas*, 428 US 262, 96 S.Ct. 2950 (1976)). Additionally, Idaho's appellate courts place protection of society against the future dangerousness of defendants at the forefront of all sentencing decisions. *State v. Toohill,* 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). As the Idaho Court of Appeals explained in *State v. Toohill,* "it is clear, as a matter of policy in Idaho, that the primary consideration is 'the good order and protection of society.' All other factors must be subservient to that end." *Id.* (citing *State v. Moore*, 78 Idaho 359, 363, 304 P.2d 1101, 1103 (1956)).

CONCLUSION

Defendant's motion is contrary to settled Idaho Supreme Court and United Supreme Court precedent. It should be denied.

RESPECTFULLY SUBMITTED this 9th day of October 2024.

Ingrid Batey
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 THE FUTURE DANGEROUSNESS AGGRAVATOR was served on the following in the manner indicated below:

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

Dated this 9th day of October 2024.

Kim K. Workman