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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 UTTER DISREGARD  
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 Utter Disregard Aggravator in this case. This Court should decline to entertain the Defendant's request to hold unconstitutional that which has been held constitutional by well-settled Idaho Supreme Court precedent and the United States Supreme Court. Defendant's motion should be denied.

**ARGUMENT**

In this case, the State is pursuing the utter disregard aggravator. That aggravator applies when "[b]y the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life." Idaho Code § 19-2515(9)(f).

It is well-established that 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.” *Lowenfeld v. Phelps*, 484 U.S. 231, 244, 108 S.Ct. 546 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733 (1983)). Defendant correctly acknowledges that the Idaho Supreme Court has held that Idaho’s capital sentencing scheme meets that standard. *Defendant’s Motion to Strike Utter Disregard Aggravator*, p. 2 (citing *State v. Wood*, 132 Idaho 88, 103, 967 P.2d 702 (1998)). As the Idaho Supreme Court explained in *Wood*, “this Court has upheld the constitutionality of its death penalty statutes on numerous occasions.” *Id.* at 102, 967 P.2s at 716.

Nevertheless, Defendant argues that the Court should strike the utter disregard aggravator, asserting that this Court should hold that the judicial “gloss” placed on this aggravator in *State v. Osborn* was unconstitutional.<sup>1</sup> Defendant also argues that the Court should strike the utter disregard aggravator because the *Osborn* construction does not appear in the standard criminal jury instruction (ICJI) for this case. The Court should deny his motion.

#### **A. This Court Cannot Overrule the Idaho Supreme Court.**

Defendant makes an extraordinary request of this Court: “to find that the gloss placed on the aggravator by the Idaho Supreme Court was in violation of . . . the Idaho Constitution.” 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,

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<sup>1</sup> Defendant specifically requests that “this Court should find that the gloss placed on the aggravator by the Idaho Supreme Court was in violation of Art II Sec. 2 of the Idaho Constitution.” *Def. Motion to Strike Utter Disregard Aggravator*. But Article II of Idaho’s Constitution does not have a section 2. Thus, the State presumes from context that the Defendant intended to cite to Art. II Sec. 1 of the Idaho Constitution to advance a separation of powers argument.

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). Because Defendant’s argument that the Court should hold unconstitutional the Idaho Supreme Court’s construction set forth in *Osborn* requires this Court to effectively overrule a higher court, the Court should disregard it outright.

**B. The Constitutionality of the Utter Disregard Aggravator has Repeatedly Been Upheld.**

The Idaho Supreme Court has held that the utter disregard aggravator is not unconstitutionally vague with the limiting construction placed on it in *Osborn*. *State v. Abdullah*, 158 Idaho 386, 463, 348 P.3d, 1, 78 (citing *State v. Osborn*, 102 Idaho 405, 417-419, 631 P.2d 187, 199-201 (1981)). In *State v. Abdullah*, that Court explained that “[t]he *Osborn* construction satisfies the Eighth Amendment by genuinely narrowing the class of persons eligible for the death penalty,” pointing to the United State Supreme Court decision in *Arave v. Creech* also holding the aggravator constitutional. *Id.* (citing *Arave v. Creech*, 507 U.S. 463, 474-75, 113 S.Ct. 1534, 1540-42 (1993)). In *Creech*, the United States Supreme Court found that it was not necessary to determine whether the phrase “utter disregard for human life” itself was sufficient to pass constitutional muster because, the Court explained, “[t]he Idaho Supreme Court has adopted a limiting construction, and we believe that construction meets constitutional requirements.” *Creech* at 471, 113 S.Ct. 1541. As recently as 2018, in *State v. Hall*, the Idaho Supreme Court reiterated that Idaho’s Utter Disregard Aggravator “has also been repeatedly determined constitutional—most notably by the United States Supreme Court[.]” *State v. Hall*, 163 Idaho 744, 786-87, 419 P.3d 1042, 1085 (2018).

Defendant’s argument that the Idaho Supreme Court’s decision in *Verska v. St. Alphonsus Regional Medical Center* reversed its ability to provide judicial interpretation to statutes is self-evidently wrong. See *Def. Motion to Strike HAC Aggravator*, p. 18. In *Verska*—and in a passage quoted by the Defendant himself—the Idaho Supreme Court merely explained that “we have *never revised or voided an unambiguous statute* on the ground that it was patently absurd or would produce absurd results when construed as written, and we do not have the authority to do so.” *Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 896, 265 P.3d 502, 509 (2011) (emphasis added). The *Verska* Court simply stated that the Court could not rewrite unambiguous statutes. *Id.* The *Verska* Court did not limit the Court’s ability to interpret statutes or add judicial “gloss” to statutes. In *State v. Abdullah*, decided after *Verska*, the Idaho Supreme Court again reiterated the propriety of using a limiting construction (or “judicial gloss,”) holding that “the utter disregard aggravator with a limiting construction is not void for vagueness under the Eighth Amendment.” 158 Idaho 386, 348 P.3d 1 (2015) (citing *State v. Dunlap*, 155 Idaho 345, 376, 313 P.3d 1, 34 (2013)).

### **C. The ICJI for the Utter Disregard Aggravator Appropriately Reflects the Law**

Defendant claims that the ICJI for the utter disregard aggravator “only makes matters worse” because it too closely tracks to the HAC aggravator. *Def. Memorandum in Support of Motion to Strike Utter Disregard Aggravator*, p. 8. One need only look to the respective jury instructions for utter disregard and HAC to see that they are distinct. Idaho Criminal Jury Instructions 1713 and 1714, available at <https://isc.idaho.gov/main/criminal-jury-instructions>. Defendant’s argument has also been foreclosed by the caselaw. The *Osborn* Court specifically held that because “we will not presume that the legislative intent was to duplicate any already enumerated circumstance . . . the phrase 'utter disregard' must be viewed in reference to acts other

than those set forth [in the other statutory aggravators].” *Osborn* at 419, 631 P.2d at 201. The *Osborn* court then crafted its limiting construction to reflect “the highest, the utmost, callous disregard for human life, i.e., the cold-blood, pitiless slayer.” *Id.* Even if the utter disregard aggravator has some similarities to the HAC aggravator, the State can still proceed on both. *See State v. Charboneau*, 116 Idaho 129, 774 P.2d 299 (1989), *overruled on other grounds by State v. Card*, 121 Idaho 425, 430 (1991).

Similarly, Defendant claims that the ICJI “completely ignores the legislature’s intent and rewrites the statute. The legislature describes a person taking a killing action recklessly.” *Def. Motion to Strike Utter Disregard Aggravator*, p. 8. Defendant is wrong. Nowhere in Idaho Code § 19-2515(9)(f) did the legislature use the word “reckless,” despite using it in two other subsections setting forth aggravating circumstances. *See* Idaho Code §§ 19-2515(9)(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”); *and see* Idaho Code §§ 19-2515(9)(h) (“the murder was committed in the perpetration of, or attempt to perpetrate, 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.”). If the legislature intended § 19-2515(9)(f) to encompass recklessness, it would have said so explicitly as it did elsewhere in Idaho’s capital sentencing scheme.

**CONCLUSION**

The Defendant's motion is directly contrary to well-established Idaho Supreme Court and United States 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

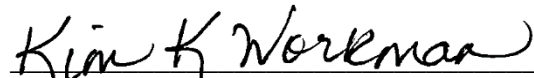
**CERTIFICATE OF DELIVERY**

I hereby certify that true and correct copies of the STATE'S OBJECTION TO DEFENDANT'S MOTION TO STRIKE UTTER DISREGARD AGGRAVATOR was served on the following in the manner indicated below:

Anne Taylor  
Attorney at Law  
PO Box 2347  
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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Kim K. Workman