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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 TRIFURCATE PROCEEDINGS AND APPLY RULES OF EVIDENCE DURING ELIGIBIITY PHASE

Comes now the State of Idaho, by and through the Latah County Prosecuting Attorney, and hereby objects to Defendant's Motion to Trifurcate Proceedings and Apply Rules of Evidence during the Eligibility Phase. For the following reasons, the Court should deny Defendant's motion.

ANALYSIS

In his motion, Defendant disregards applicable statutory authority and binding appellate decisions and instead, makes a public policy argument that this Court should do two things. First, he asks this Court to disregard the language of Idaho Code §19-2515, which sets forth a two-part

jury proceeding in capital cases. *Def. Mem. in Support of Mtn. to Trifurcate*. Under the Defendant's proposed scheme, the trial would not be composed of a culpability phase and a sentencing phase, as set forth by statute, but would instead be split into three proceedings for culpability, eligibility, and punishment. *Id.* Next, Defendant asks the Court to disregard long-settled precedent holding that the Idaho Rules of Evidence do not apply to sentencing proceedings and to apply them anyway. The Court should decline to do either.

A. Idaho Code §19-2515 provides for a single sentencing proceeding in capital cases.

Idaho Code §19-2515 sets forth the procedure for sentencing in capital cases and calls for a single sentencing proceeding. Throughout §19-2515, the Code refers to "'a' special sentencing proceeding" or "'the' special sentencing proceeding," clearly delineating a single hearing for the jury to determine whether capital punishment is appropriate. I.C. §19-2515.[1] It is therefore unsurprising that in Idaho, capital cases have generally followed the two-part procedure outlined by statute. *See, e.g., State v. Hall,* 163 Idaho 744, 419 P.3d 1042 (2018); *State v. Dunlap*, 155 Idaho 345, 313 P.3d 1 (2017); *Sivak v. State,* 112 Idaho 197, 731 P.2d 192 (1986); *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983).

In an attempt to bolster his request that this Court ignore Idaho's statutory procedure for capital sentencing, Defendant claims that the United States Supreme Court's decision in *Ring v.*

[1] Similarly, all of the criminal jury instructions set forth by the Idaho Supreme Court contemplate a single sentencing proceeding in capital cases. *See, e.g.,* ICJI 1700B ("[i]f the defendant is convicted of murder in the first degree, there will then be a separate sentencing phase of the trial"); ICJI 1701 ("the defendant in this case has been convicted of the crime of First-Degree Murder. We will now have a sentencing phase of the trial regarding that offense"); ICJI 1702 ("in determining the facts, you may consider only the evidence admitted during the trial and during the sentencing phase"); *and see* ICJI 1703 ("[t]he State has the burden of proving the existence of a statutory aggravating circumstance, and that burden remains on the State throughout the sentencing phase"). *See* Idaho Criminal Jury Instructions, 1700 Death Penalty Sentencing Instructions, *available at* https://isc.idaho.gov/main/criminal-jury-instructions.

Arizona renders a bifurcated model of sentencing "especially problematic," and further asserts the *Ring* Court found that "statutory aggravators are elements of the offense of capital murder." *Def. Mem. in Support of Mtn. to Trifurcate*, p. 6 (citing *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428 (2002)). That is not at all what the *Ring* Court held. The *Ring* Court's holding applied to a statutory scheme which allowed a jury to convict an individual of felony murder without determining whether the defendant was the actual killer, and then allowed *a judge* to make the factual finding that the defendant was the killer in order to determine whether to impose the death penalty. *See generally Ring v. Arizona*, 536 U.S. 584 (2002). Far from holding that "statutory aggravators are elements of the offense of capital murder," the *Ring* Court held that because "Arizona's enumerated aggravating factors operate[d] as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Id.* at 585, 122 S.Ct. 2430 (cleaned up). Two years later, in *Schiro v. Summerlin*, when analyzing a separate issue, the United States Supreme Court reiterated that *Ring's* holding was entirely based on the right to a jury trial:

> *Ring* held that a sentencing judge, sitting without a jury, may not find an aggravating circumstance necessary for imposition of the death penalty. Rather, the Sixth Amendment requires that those circumstances be found by a jury. This holding did not alter the range of conduct Arizona law subjected to the death penalty. It could not have; *it rested entirely on the Sixth Amendment's jury trial guarantee*, a provision that has nothing to do with the range of conduct a State may criminalize.

Schiro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519 (2004) (*citing Ring* at 609, 122 S.Ct. 2428) (cleaned up) (emphasis added).

In *State v. Abdullah* the Idaho Supreme Court rejected an argument similar to the one the Defendant makes in his motion. 158 Idaho 386, 348 P.3d 1 (2015). The *Abdullah* defendant argued that under *Ring,* death penalty aggravators should be filed with an indictment or information,

asserting that *Ring* transformed the aggravating circumstances into elements of the charged offenses. *Id.* at 457, 348 P.3d 72. The Idaho Supreme Court soundly rejected this contention, holding that "*Ring* did not transform the 'functional equivalent' elements of aggravating circumstances to the level of actual elements of an offense to require the State to allege the aggravating circumstances in the indictment or information." *Id.* at 457, 348 P.3d 73. The Court also explained that "[w]without the designation of aggravating circumstances as elements of a crime, the State's formal notification of the intent to seek the death penalty does not carry the constitutional requirements of an indictment or information." *Id.* Citing to its earlier holding in *State v. Porter*, the *Abduallah* Court reiterated it had "stated in clear terms that the statutory aggravating circumstances are not elements of a crime." *Id.* at 458, 348 P.3d 73 (citing *Porter v. State*, 140 Idaho 780, 784, 102 P.3d 1099, 1103 (2004). The Defendant's claim that *Ring* stands for the proposition that "statutory aggravators are elements of the offense of capital murder" is wholly unsupported by *Ring* itself, as well as Idaho Supreme Court cases that followed it.

Another problem with Defendant's proposal to trifurcate proceedings is his lack of clarity as to how, as a practical matter, the presentation of aggravating and mitigating evidence would play out. Defendant asserts "[t]he eligibility phase, is akin to a guilt phase in that the State bears the burden of presenting evidence supporting each statutory aggravator it seeks to prove." *Def. Mem. in Support of Motion to Trifurcate,* p. 6. Thus, under the Defendant's proposed model, statutory aggravating evidence would be introduced and admitted during the second of three phases. Later in his brief, Defendant asserts

> [t]he third phase, the sentencing phase, in which the jury determines whether death is the appropriate punishment would be conducted like a regular sentencing proceeding in which the Rules of Evidence are not applied and other rights including the right to confrontation are limited. All the evidence in aggravation that the State seeks to

> introduce is admitted in the final phase for the purpose of determining an appropriate sentence.

Id., p. 9 (emphasis added).

Defendant goes on to explain that mitigation evidence would not be heard until the final phase of the trifurcated proceedings, proposing

> [i]n contrast to the eligibility phase, the sentencing phase, in which the jury decides whether the death penalty is appropriate, is more like a non-capital sentencing determination. At this phase, it is the defendant's burden to present mitigating evidence and the sentencer's role to decide the appropriate punishment. Unlike evidence of statutory aggravation which must be provided beyond a reasonable doubt, mitigation does not need to meet this burden. The jury does not need to find that the mitigation outweighs the aggravation beyond a reasonable doubt. The jury considers both statutory and non-statutory aggravation when making this determination.

Id. p. 7. Thus, under the Defendant's proposed model, the jurors apparently would render a decision on whether or not the Defendant is death-eligible after hearing the State present statutory aggravators without hearing mitigation evidence from the Defendant.

In *Lockett v. Ohio,* the United States Supreme Court held that a capital defendant has the constitutional right to present mitigation evidence during sentencing proceedings. The Court held "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964 (1978).

It is difficult to see how the model proposed by Defendant would benefit him in this case, where one of the statutory aggravators arises from Idaho Code §19-2515(9)(i), which looks to whether "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). It defies common sense to believe that Defendant would benefit from a trifurcated proceeding where the jurors would consider whether he poses a risk of future dangerousness and is therefore eligible for the death penalty without hearing all mitigation evidence relevant to that aggravator.

Though not binding on this Court, the potential unintended consequences of adopting Defendant's proposed model were recently highlighted by post-conviction counsel for the defendant in *State v. Renfro,* which to the State's knowledge, is the only capital case in Idaho where a court chose to adopt a trifurcated proceeding. *Renfro v. State, Case No: CV-2017-9393, Amended Petition for Post Conviction Relief* (filed 2/19/2019**).** In that case, defense counsel moved for a trifurcated proceeding based on nearly identical arguments. *Motion and Memorandum in Support of Motion to Trifurcate Proceedings and Apply Rules of Evidence During the Eligibility Phase, State v. Renfro,* CR-15-6589 (filed 2/19/17). However, in a subsequent petition for post-conviction relief, post-conviction counsel argued trial counsel's request for a trifurcated proceeding constituted ineffective assistance of counsel:

> While trifurcation can, in theory, benefit a capital defendant, it also carries substantial risks of over-emphasizing and front loading negative, aggravating evidence, without a concomitant emphasis on mitigating evidence, if not properly implemented. Simply put, trifurcation is a means to an end, not an end.

Renfro v. State, Amended Petition for Post-Conviction Relief, p. 244.

The Court should decline to deviate from the procedures described in Idaho Code §19-2515 based on a reading of *Ring* that is wholly inconsistent with the United States Supreme Court's own reading of that case.

B. It is well settled that the Rules of Evidence do not apply to sentencing proceedings.

As the Defendant straightforwardly acknowledges in his brief, "the Idaho Supreme Court has held that the Rules of Evidence do not apply at capital sentencing proceedings." *Def. Mem. in Support of Mtn. to Trifurcate,* p. 8 (citing *Dunlap*, 155 Idaho 375). Defendant also acknowledges that "the Idaho Supreme Court has also held that the right to confrontation does not apply to sentencing procedures." *Id.* (citing *Sivak v. State,* 112 Idaho 210 (1986) (internal quotations omitted)**.**

The Defendant is correct: Idaho appellate courts have repeatedly held that the Idaho Rules of Evidence do not apply to sentencing proceedings. *See, e.g., State v. Hall,* 163 Idaho 744, 791, 419 P.3d 1042, 1090 (2018); *State v. Dunlap*, 155 Idaho 345, 375, 313 P.3d 1, 31 (2017); *and State v. Creech*, 105 Idaho 362, 366, 670 P.2d 463, 467 (1983). Similarly, Idaho's courts of appeal have also held that the Confrontation Clause does not apply to sentencing proceedings. *See Dunlap* at 379, 313 P.3d at 35 ("[a]fter a lengthy and scholarly consideration of precedent from the U.S. Supreme Court. . . that court concluded that 'the Confrontation Clause is inapplicable to the presentation of testimony relevant only the sentencing authority's selection decision.' We agree and hold the admission of the reports did not violate Dunlap's Sixth Amendment rights."); *Sivak v. State,* 112 Idaho 197, 216, 731 P.2d 192 (1986) ("we continue to adhere to our ruling in Creech and the position of the United States Supreme Court that the Sixth Amendment to the United States Constitution does not require that a capital defendant be afforded the opportunity to confront and cross-examine live witnesses at his sentencing proceedings.")

Nevertheless, Defendant asks this Court to disregard the holdings of the Idaho Supreme Court and instead, be guided by the authors of various law review articles. *See id.* at p. 8-9. But this Court cannot do that. As the Idaho Supreme Court explained 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). The Court should reject the Defendant's request to override Idaho's courts of appeal and deny his motion.

CONCLUSION

The Defendant asks the Court to discard the plain language within Idaho Code §19-2515 and the unambiguous holdings of the United States Supreme Court and the Idaho Supreme Court. He urges the Court to ignore the procedures set forth and upheld by binding legal authority and instead, impose procedures based on public policy arguments. His motion should be denied.

RESPECTFULLY SUBMITED 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 TRIFURCATE PROCEEDINGS AND APPLY RULES OF EVIDENCE DURING ELIGIBIITY PHASE was served on the following in the manner indicated below:

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☐ Mailed
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☐ Faxed
☐ Hand Delivered

Dated this 9th day of October 2024.

Kim K Workman

Kim ~~K~~. Workman