NO. 818
A.M. FILED P.M.
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).

[2] 1. 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. ANALYSIS[3]

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)).

---

[3] In 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.

[4] Aliza 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.")

[8]The 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 the 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 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), (e), (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)(e). 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 reach[21] 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

---

[21]Defendant 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. § 18-4002[23] 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 Boyde 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 Boyde,* 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.

1. 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 ay 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 not[29]—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 sentencing[33]— 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 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)(e). 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]

---

[40]Effective 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, 2992) ("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 entitled 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).

---

[44] 158 Idaho at 455-56, 348 P.3d at 70-71.

[45] 167 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,

---

[46]Death 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 injection[50] 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 "uph[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 county [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:

William W. Thompson, Jr.
Ashley Jennings
LATAH COUNTY PROSECUTING ATTORNEY
paservice@latah.id.us

Jeffery Nye
Ingrid Batey
DEPUTY ATTORNEY GENERAL
Jeff.nye@ag.idaho.gov
Ingrid.batey@ag.idaho.gov

Anne Taylor
ATTORNEY FOR DEFENDANT
info@annetaylorlaw.com

Elisa C. Massoth
ATTORNEY FOR DEFENDANT
emassoth@kmrs.net

Jay Logsdon
KOOTENAI COUNTY PUBLIC DEFENDER
jay.logsdon@spd.idaho.gov

TRENT TRIPPLE
Clerk of the District Court

By _____
Deputy Court Clerk