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

STATE OF IDAHO, **Plaintiff,** **V.** **BRYAN C. KOHBERGER,** **Defendant.**	**CASE NUMBER CR01-24-31665** **MOTION IN LIMINE #13** **RE: CONDITIONS AS AGGRAVATOR**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and hereby moves this court for an order preventing the State from using Mr. Kohberger's mental health diagnosis of Autism and the characteristics of his autism as evidence in its case. This motion is meant to protect Mr. Kohberger's Fifth, Sixth and Fourteenth Amendment rights under the United States Constitution, and Article I Sections 6 and 13 of the Idaho Constitution.

Mr. Kohberger has a diagnosis of Autism, and he displays characteristics consistent with Autism. A comprehensive neuropsychological evaluation of Mr. Kohberger conducted by Dr. Rachel Orr, PsyD, ABPP-CN, found that Mr. Kohberger "continues to exhibit *all the core diagnostic features of ASD* currently, with significant impact on his daily life."[1] (See Exhibit 1 Orr Report page 17) (emphasis added).

Mr. Kohberger shares characteristics such as social challenges, perseveration and lack of reciprocity. These characteristics are noted, by those unfamiliar with autism, as not picking up on social cues. In evaluating Mr. Kohberger, Dr. Orr found that he has displayed lifelong deficits in social-emotional reciprocity, including "limited perspective-taking" and "limited sharing of affect/emotions of others." Ex. A at 16. Because of his autism others may see Bryan as not recognizing social cues, continuing to talk to others when the conversation would naturally end, over-focusing on a topic or hobby of interest or talking about the same topic repeatedly, using a complicated vocabulary, or seeming self-absorbed. Bryan's autism is also accompanied by obsessive-compulsiveness, and an eating disorder. Since childhood, Mr. Kohberger has exhibited compulsions around getting things in his eyes, hand-washing and other germ avoidant behaviors. (Exhibit 1 page 18.) These characteristics must not be used by the prosecution as factors for the Jury to consider as aggravators.

Evidence of mental illness, in capital case litigation, is mitigation evidence. The United States Supreme Court and the Idaho Supreme Court Recognize Evidence of a Defendant's Mental Illness as Mitigating. *State v. Payne*, 146 Idaho 548, 569–70, 199 P.3d 123, 144–45 (2008) (holding that mental health evidence is relevant to mitigation, even where there is no nexus between the defendant's mental health and the crimes); *State v. Card*, 121 Idaho 425, 439, 825 P.2d 1081, 1095 (1991) ("It is clear that a mental defect may diminish an individual's culpability for a criminal act."); and *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (acknowledging "the belief,

[1] Motion in Limine #13 Exhibit 1 Dr. Rachel Orr - Expert report

long held by this society, that defendants who commit criminal acts that are attributable to disadvantaged background, or to **emotional and mental problems**, may be less culpable that defendants who have no such excuse") (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) O'Connor, J., concurring) (emphasis added). Mr. Kohberger's Autism is mitigation evidence.[2]

It is inappropriate for the prosecution to wrap mitigating evidence into an Aggravator. In *Roper v. Simmons*, the Supreme Court noted with disapproval that the prosecutor had argued that mitigating evidence of the defendant's youth should actually be considered as an aggravator. The Court suggested that a rule prohibiting such conduct would have been warranted if not for the Court's larger concerns requiring that death be excluded altogether:

> "In some cases a defendant's youth may even be counted against him. In this very case, as we noted above, the prosecutor argued Simmons' youth was aggravating rather than mitigating. While this sort of overreaching could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked, that would not address our larger concerns." *Roper v. Simmons*, 543 U.S. 551, 573 (2005)

Allowing the State to argue that Mr. Kohberger's mental illness is an aggravating factor that violates the Eighth and Fourteenth Amendments by precluding the Jury from giving meaningful consideration and effect to that mitigating evidence. Mr. Kohberger points the court to *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007) for an overview of the Court's jurisprudence on this issue, including *Lockett*, *Eddings*, and *Penry* (starting on page 246).

Individualized sentencing in capital cases, reflects the concern of the Court for fairness in proceedings. As such Idaho is required to provide for unhindered consideration of mitigating evidence. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 608 (1978); *see also Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987) (holding that an instruction precluding consideration of nonstatutory

[2] In expert disclosures Mr. Kohberger indicated that he expects to call two expert witnesses in his case in chief to combat any attempt by the State to use his ASD characteristics as evidence of intent or proof of other elements of the crimes for which he is accused. This motion is not meant to conflict with that method of confronting evidence the State may use against him in its case in chief.

mitigating circumstances is unconstitutional); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (maintaining that one constitutional shortcoming of the North Carolina statute was its failure to allow consideration of relevant aspects of defendant's character).

The Court has defined mitigating factors to be any evidence that "might serve 'as a basis for a sentence less than death.' *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (quoting *Lockett,* 438 U.S. at 604)**.** Mitigating circumstances are not necessarily factors that lead sentencers to believe that a defendant is a "good" person despite having committed a horrible crime. As the Supreme Court has explained, "compassionate or mitigating factors [may stem] from the diverse frailties of humankind." *Woodson,* 428 U.S. at 304.

In a Constitutionally fair proceeding juries must be able to consider mitigation **as mitigation**.

> "[The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original).

Considering again, *Abdul-Kabir*, the Court summarized *Penry* as holding that, where mitigation evidence is double-edged, court must give "an appropriate instruction directing the jury 'to consider fully' mitigating evidence as it bears on the extent to which a defendant is undeserving of a death sentence[.]" 550 U.S. at 255 (quoting *Penry*, 492 U.S. at 323).

A Constitutionally fair proceeding requires juries must be able to **give effect to** mitigation evidence.

> It is "firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigation evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Abdul-Kabir*, 550 U.S. at 246.
> "[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

> When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett*, 438 U.S., at 605.
> "The sentencer… may determine the weight to be given relevant mitigating evidence [of unhappy upbringing and emotional disturbance]. But they may not give it no weight by excluding such evidence from their consideration." *Eddings v. Oklahoma*, 455 U.S. 104, 114–15, 102 S. Ct. 869, 877, 71 L. Ed. 2d 1 (1982).

Allowing the State to argue that Mr. Kohberger's mental health issues are actually aggravators unlawfully interferes with the jury's ability to give effect to that mitigation evidence. It is more prejudicial than if the sentencer were told to ignore it or give it no weight, which is prohibited by law.

The State also cannot argue that factors which are causally related to Mr. Kohberger's mental health issues should serve to aggravate the punishment (i.e., that they contribute to future dangerousness/propensity to kill or contribute to aggravators regarding heinousness of the crime). That is functionally the same thing as arguing that he should be sentenced to death *because of* his mental illness, which is constitutionally impermissible:

> "Georgia [has not] attached the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant, or *to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness.* If the aggravating circumstance at issue in this case had been invalid for reasons such as these, *due process of law would require that the jury's decision to impose death be set aside*." *Zant v. Stephens,* 462 U.S. 862, 885 (1983) (emphasis added) (citation omitted).

The Court in *Zant v. Stephens* Court cited *Miller v. State, 373 So. 2d 882 (Fla. 1979),* in support of the proposition that an aggravating label cannot be attached to evidence of mental illness. *Stephens,* 462 U.S. at 885. *Miller* was a Florida Supreme Court opinion that specifically dealt with the problem of utilizing factors that are the result of a defendant's mental illness in order to aggravate a sentence. In *Miller,* the defendant was convicted of murdering a cab driver and raping her when she was dead or dying. At the sentencing hearing, the judge aggravated the defendant's penalty because of a finding that Miller had a propensity to commit violent acts. The

court vacated the sentence in part because this propensity was causally related to the defendant's schizophrenia, which was characterized by hallucinations that other women were his hated mother. The court found it problematic to aggravate a defendant's penalty on the basis of the very same evidence that argued in favor of leniency. Consequently, that the Supreme Court in *Stephens* relied on *Miller* provides further indication that it is impermissible to treat factors causally related to mental illness as aggravating circumstances in capital punishment cases.

Allowing the State to argue that Mr. Kohberger's mental health and developmental disabilities are aggravators violates the Eighth and Fourteenth Amendments by criminalizing his status as a disabled person. Criminalization of a person's "mere status" violates the Eighth Amendment, as applied to the states through the Fourteenth Amendment. *City of Grants Pass, Oregon v. Johnson*, 603 U.S. 520, 546 (2024) (discussing *Robinson v. California*, 370 U.S. 660 (1962)).

In *Robinson v. California*, 370 U.S. 660 (1962), the U.S. Supreme Court struck down a California statute that criminalized narcotics addiction as violating the Eighth Amendment's cruel and unusual punishment clause. The Court reasoned:

> "It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. . . . [I]n the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Robinson*, 370 U.S. at 667.

Justice Douglas wrote in his concurrence in *Robinson*: "We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action." *Robinson*, 370 U.S. at 678 (Douglas, J., concurring).

The same reasoning applies here. Mr. Kohberger cannot be sentenced to death due to his "mere status" as a person with ASD—a disability which in fact renders him less culpable and which should be considered by the jury only as mitigation.

Mr. Kohberger respectfully requests the court prevent the state from using his diagnosis of Autism or any characteristic thereof as an aggravator if a sentencing proceeding is held.

DATED this ___24____ day of February, 2025.

BY: _____
ANNE C. TAYLOR
ANNE TAYLOR LAW, PLLC

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the ___24____ day of February, 2025 addressed to:

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