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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, Plaintiff, V. BRYAN C. KOHBERGER, Defendant.	Case No. CR01-24-31665 STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE #13 RE: CONDITIONS AS AGGRAVATORS

COMES NOW the State of Idaho, by and through the Latah County Prosecuting Attorney, and responds to Defendant's Motion in Limine regarding the State's use of Defendant's autism during the penalty phase of the trial. Defendant asks this Court to prohibit the State from asserting autism or any symptom of the autism as an aggravating factor that would support imposition of the death penalty. The State has no plans to rely on Defendant's autism as an aggravating factor at the penalty phase of the trial. However, the law is clear that the State can argue against and rebut Defendant's alleged autism diagnosis to the extent Defendant relies on his autism diagnosis as a

mitigating factor. Thus, the Court should deny his motion.

The U.S. Supreme Court has at least suggested that states are prohibited from "attach[ing] the 'aggravating' label to . . . conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness." *Zant v. Stephens*, 462 U.S. 862, 885 (1983). But *Zant*'s suggested prohibition does not require states to stand silent on the issue of mental health during the penalty phase of a capital case. Rather, consistent with the principles set out in *Zant*, a state can present evidence to the jury regarding a defendant's mental illness to argue the defendant's mental illness does not deserve mitigating weight. *See United States v. Coonce*, 932 F.3d 623, 639-40 (8th Cir. 2019).

In *Coonce*, the defendant presented during the penalty phase of a capital trial "evidence about whether the [Bureau of Prisons] could control him" and expert testimony as to "how [his] brain injuries might mitigate his role in the offense." *Id.* The government responded by presenting evidence that his "mental illness could make [the defendant] ineligible for certain programs and placements his experts said would control him in the BOP" and that his own mental health expert had "previously written articles admitting the same injuries could also make him 'increasingly aggressive, agitated, and dangerous.'" *Id.* On appeal, the defendant asserted the same argument Defendant makes here: the government was prohibited from using his mental illness against him during the sentencing phase of the trial. *See id.* The Eighth Circuit acknowledged *Zant*'s suggestion "that mental illness cannot be used against a defendant as an aggravating factor" but affirmed the district court's decision to admit the evidence. *Id.* (quoting *Zant*, 462 U.S. at 885). Even though "the government's use of mental health evidence could imply future dangerousness," the court explained, "the government . . . only used mental health in cross-examinations and rebuttals to counter [the defendant's] evidence." *Id.* There could be no error because "the government did not

advance mental health issues as an aggravating factor in its case in chief, and excluding such evidence here risked barring any fair rebuttal." *Id.*; *see also, e.g.*, *Perez v. State*, 919 So.2d 347, 375-76 (Fla. 2005) (recognizing the same principle sent out in *Zant* but finding no error in trial court's consideration that defendant's "antisocial personality features and borderline personality features which [had] coalesced over time into a conduct disorder that now makes [the defendant] a dangerous person" because "[t]he trial court's statement here was clearly made in its assessment of the *weight* to be accorded a nonstatutory mitigating circumstance"); *In re Smith*, 756 So.2d 957, 961-62 (Ala. 2000) (holding "the trial court did not violate the principles set out in *Zant*" because it "was not attaching the 'aggravating' label to any conduct that should be considered mitigating" and merely "concluded that the evidence offered was mitigating, but not as mitigating as [the defendant] would have the trial court believe").

Consistent with these decisions, the Idaho Supreme Court has been clear that mental illness—like all mitigating factors—warrants only the weight the jury sees fit to give it. *See Dunlap v. State*, 159 Idaho 280, 307-08, 360 P.3d 289, 316-17 (2015). In *Dunlap*, the court upheld the removal for cause of a juror who said he could not give the death penalty "if there is evidence of *any sort* of mental problems." *Id.* The court found the juror was properly excluded because that view "would substantially impair his ability to perform his duties as a juror" including to "decide whether the imposition of the death penalty would be unjust by *weighing* all mitigating circumstances against each statutory aggravating circumstance." *Id.* The juror's "statement that if there was *any* evidence regarding mental illness he 'could not' impose the death penalty suggests an inability to weigh mitigating circumstances against any aggravating circumstance." *Id.* Given *Dunlap*'s holding that a juror in a capital case has a duty to *weigh* mental illness as a mitigating circumstance against each statutory aggravating circumstance, it necessarily follows that the State

can present evidence to the jury and argue as to the amount of weight the jury should give the defendant's mental illness. *See id.*; *see also* I.C. § 19-2515(6), (8) (explaining both parties "shall be entitled to present all relevant evidence in aggravation and mitigation" and offer "arguments in mitigation and aggravation").

Idaho has not run afoul of *Zant* because it has not "attached the 'aggravating' label . . . to [a] defendant's mental illness." 462 U.S. at 885. The legislature has set out eleven aggravating circumstances that warrant the death penalty, and not one of them is the defendant's mental health. *See* I.C. § 19-2515(9). In the context of this case, the State has noticed the four statutory aggravating circumstances upon which it intends to rely in the event of a penalty phase. (*See* Amended Notice Pursuant to Idaho Code § 18-4004A, filed 10/9/24.) None of those four circumstances relate to Defendant's alleged autism. Indeed, the State filed the amended notice prior to having any knowledge of Defendant's alleged autism. But if Defendant relies on his alleged autism as a mitigating circumstance or presents other mitigating circumstances that could be rebutted by his alleged autism, the State can—consistent with *Zant*—use Defendant's autism to rebut Defendant's mitigating evidence and argue the weight the State believes the jury should give Defendant's alleged autism. *See Coonce*, 932 F.3d at 639-40.

For all these reasons and to the extent explained above, the Court should deny Defendant's request to prohibit the State from using Defendant's autism during the penalty phase of the trial.

RESPECTFULLY SUBMITTED this 17th day of March 2025.

William W. Thompson, Jr.
Prosecuting Attorney

Jeff Nye
Special Assistant Attorney General

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE #13 RE: CONDITIONS AS AGGRAVATORS were served on the following in the manner indicated below:

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

Dated this 17th day of March 2025.