Filed: 04/24/2025 15:17:51
Fourth Judicial District, Ada County
**Trent Tripple, Clerk of the Court**
By: Deputy Clerk - Waters, Renee

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | |
|---|---|
| STATE OF IDAHO,<br><br>Plaintiff,<br><br>v.<br><br>BRYAN C. KOHBERGER,<br><br>Defendant. | Ada County Case No. CR01-24-31665<br><br>**ORDER ON DEFENDANT'S MOTION TO STRIKE DEATH PENALTY RE: AUTISM SPECTRUM DISORDER** |

## I. INTRODUCTION

Having been recently diagnosed with Autism Spectrum Disorder ("ASD") by a clinical neuropsychologist retained by his defense team, Defendant seeks to strike the death penalty as a sentencing option, arguing it violates his constitutional rights. He contends ASD is the functional equivalent of an intellectual disability, which is categorically recognized as a disqualifying exemption to the death penalty. Even if the Court rejects a categorical approach, he argues the death penalty option should nevertheless be stricken in his case given the intense media attention on Defendant's disability.

In response, the State disputes that ASD is equivalent to an intellectual disability for purposes of a categorical exemption to the death penalty and further notes that Defendant has not shown a national consensus supporting such an exemption. As for Defendant's individualized argument, the State contends that none of Defendant's concerns warrant striking the death penalty.

Oral argument on the motion was held on April 9, 2025, after which the Court took the matter under advisement. The Court finds striking the death penalty is not warranted.

## II. STANDARD

Constitutional issues, including the constitutionality of Idaho's capital sentencing scheme, are questions of law. *Rhoades v. State,* 149 Idaho 130, 132, 233 P.3d 61, 63 (2010).

## III. FACTS

During the course of this case, the defense team retained Dr. Rachel Orr, a clinical neuropsychologist, to conduct a comprehensive neuropsychological evaluation of Defendant and issue a report. Def.'s Exh. 2 (Orr Report). As part of this evaluation, Dr. Orr interviewed Defendant, Defendant's immediate family members and other relevant adults from Defendant's childhood, including former teachers. She gathered information on Defendant's history, made behavioral observations and administered cognitive tests. Based on her evaluation, Dr. Orr diagnosed Defendant with "Autism Spectrum Disorder, level 1, without accompanying intellectual or language impairment." ("ASD"). *Id.*, p. 16.

According to Dr. Orr, ASD is a "complex, heterogenous, neurodevelopmental disorder rooted in brain differences and characterized by social and behavioral features." *Id.*, p. 16. It causes "deficits in which affected individuals perceive and react to others and their environment, causing problems in social communication and interactions, repetitive behaviors, and narrow range of interests." Def's Exp. Discl., Exh. D13-B, p. 31 ("Ryan Report").[1] There is a wide range of autism symptoms and severity. *Id.* Deficits can include a restricted range of affect, atypical eye contact, displaying facial expressions or movements that do not match what is being said, failure to consider social cues, having trouble with speech reciprocity and repetitive behaviors.[2]

Pursuant to the American Psychiatric Association's Diagnostic and Statistical Manual, Fifth Edition (2013) ("DSM-5"), there are two primary diagnostic criteria for ASD. U.S. Center for Disease Control & Prevention ("CDC"), *Clinical Testing and Diagnosis for Autism Spectrum Disorder*, https://www.cdc.gov/autism/hcp/diagnosis/index.html (last visited Apr. 22, 2025) (citing DSM-5). The first criterium is persistent deficits in each of the following areas of social communication and interactions: 1) social-emotional reciprocity; 2) nonverbal communicative behaviors used for social interactions, and; 3) developing, maintaining and understanding relationships. The second criterium is the display of restrictive, repetitive patterns of behavior, interests or activities, as manifested by at least two of the following: 1) stereotyped or repetitive movements, use of objects, or speech; 2) insistence on sameness, inflexible adherence to

---

[1] Dr. Eileen Ryan conducted a psychiatric evaluation of Defendant and agreed with Dr. Orr's diagnoses. Her expert report is attached to her disclosure, filed by Defendant as Exhibit D-13 on January 23, 2025.

[2] U.S. National Institute of Mental Health website, available at: https://www.nimh.nih.gov/health/publications/autism-spectrum-disorder (last visited April 16, 2025).

routines, or ritualized patters of verbal or nonverbal behavior; 3) highly restricted, fixated interests that are abnormal in intensity or focus, and; 4) hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment. *Id.*

The severity of ASD is based on these two criteria. *Id.* There are three levels of severity, which corollate to how much support is needed. Level 3, which is the most severe, requires "very substantial support." Level 1, the least severe, requires merely "support." *Id.*

As to the first criterium, Dr. Orr noted in her report that Defendant's family and peers reported that Defendant displayed atypicalities and difficulties in social settings dating back to early childhood,[3] including: 1) inability to adjust his behavior to suit the social context; 2) poor social reciprocity in conversation; 3) issues with nonverbal behavior like personal space, and; 4) limited ability to take perspectives of others. She notes that these difficulties played a role in the eventual termination of his funding for his graduate program. At the time of his arrest, he was pursuing a PhD in criminal justice and criminology at Washington State University.[4]

In her personal evaluation of Defendant, Dr. Orr observed that Defendant demonstrated some typical social behaviors, such as "fairly consistent (though intense) eye contact, polite demeanor, and social conventions (e.g. shaking hands upon greeting)." He engaged in conversation and was never "overtly inappropriate." However, Dr. Orr also noted social behavior consistent with that reported by others, such as a "lack of fluidity" in his verbal interactions, awkward comments[5] or abrupt responses, "inconsistent understanding/acknowledgement of humor" and "occasional intense gaze." *Id.* at p. 9. She noted he had "poor reciprocity of interaction, including very frequent re-focus of conversation back on his own experiences or unusual responses to my sharing." *Id.* She also noted his lack of close friends and his "poor insight into his role in relationships." *Id.*

Dr. Orr further observed deficits in Defendant's nonverbal communication, noting "poor integration of verbalizations and eye contact; limited use of descriptive gestures; restricted range

---

[3]At an early age, Defendant's school psychologist recommended that he be evaluated for ADHD and Asperger's disorder (now ASD). He was clinically diagnosed with ADHD only.

[4] Defendant previously received an associate's degree in liberal arts, with a concentration in psychology (2018), a bachelor's degree in forensic track, psychology (2020) and a master's degree in criminal justice (2022). Defendant achieved a 4.0 GPA in his master's program.

[5] By way of example, Dr. Orr noted that Defendant commented that he "had a lot of fun" completing a cognitive test.

of affect;[6] atypical tone." *Id.*, p. 16. As to his speech, Dr. Orr observed that Defendant was generally clearly articulated and his speech was appropriate in rate and volume, but overall monotone. His language was "generally appropriate" in content and form with an "extensive vocabulary," but "overly formal", "often over-inclusive and disorganized" and "highly repetitive, with frequent scripted phrases." *Id.*, p. 9. By way of example, Dr. Orr noted that Defendant often used the phrases "Objectively speaking…"; "Mind you…"; "To be fair…" and "Moral of the story…" *Id.*

As to the second criterium, Dr. Orr found Defendant exhibited all four of the behaviors. He engaged in "occasional, subtle rocking of his upper torso while seated" and "scripted" and "repetitive" language. *Id.*, pp. 7, 9. He appeared "fixated" on the routine or timing of breaks and procedures during the examination. *Id.*, p. 10. He also demonstrated "rigidity" in his thinking and behavior, perseverative ideation (wanting to know the results of his testing) and was highly interested in "circumscribed" topics, such as forensic psychology, intellectual topics and Murakami. *Id.*, pp. 10, 17. She also noted he was "highly distracted" by sounds or activity occurring around him and frequently looked from side-to-side to monitor his periphery. *Id.*, p. 9. As a result of being easily distracted, he needed instructions repeated to him.

Defendant's neuropsychological profile revealed a "high average intellect at baseline" and his Full Scale IQ score was 119, which is in the 90$^{th}$ percentile for his age. *Id.*, p. 10. Cognitively, Defendant showed strong verbal abilities, abstract reasoning, memory, concept formation and reading skills. However, he displayed weakness in executive functioning, such as planning, cognitive flexibility, impulse control and organizational approach. He tended to perceive information in a piece-meal manner rather than look at the whole picture. *Id.*, p. 11. Ultimately, Dr. Orr found Defendant was "clearly a neurodivergent individual, manifesting all the social and behavioral features of [ASD]." *Id.*, p. 17. As noted, Defendant was assigned a Level 1 diagnosis without intellectual impairment, which is the least severe level.

Dr. Eileen Ryan, a board-certified psychiatrist retained by the defense team, agreed with Dr. Orr's ASD diagnosis after conducting a comprehensive forensic psychiatric examination of Defendant. Of note, she observed that Defendant "is highly intelligent and has a factual understanding of the proceedings against him, the penalty he is possibly facing, pleas, and the

---

[6] Dr. Orr noted Defendant's social smiling was "inconsistent" and occurred in "unusual and incongruent contexts." She also noted he did not display tearfulness, anxiety or anger.

roles of courtroom personnel, etc." Ryan Report, p. 33. She further noted there was "no evidence of a formal thought disorder or thought disorganization." *Id.*, p. 18.

## IV. ANALYSIS

Relying on the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 1, 2, 6, 7 and 13 of the Idaho Constitution,[7] Defendant seeks to have individuals diagnosed with ASD categorically exempt from the death penalty. He contends a categorical exemption is warranted for individuals with ASD because: 1) they are insufficiently culpable and execution would not satisfy the retributive and deterrent purposes of capital punishment; 2) execution of individuals with ASD is contrary to the evolving standards of decency, and; 3) death sentences for individuals with ASD are inherently unreliable due to their inability to present meaningful mitigation evidence. Alternatively, he argues removal of the death penalty as a sentencing option in his case is warranted due to the impact his ASD will have on his ability to present a meaningful defense, particularly given the intense media attention on his disability.

### A. A Categorical Exemption from Capital Punishment For Individuals with ASD is Not Warranted.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The United States Supreme Court has interpreted the Eighth Amendment to categorically prohibit the execution of three classes of individuals: 1) the intellectually disabled under *Atkins v. Virginia*, 536 U.S. 304, 311 (2002); 2) individuals who commit murder while before the age of 18 under *Roper v. Simmons*, 543 U.S. 551, 574 (2005), and; 3) individuals incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399, 418 (1986).

At issue here is the first category. In *Atkins*, the Court held the "mentally retarded" (now, "intellectually disabled") must be categorically exempt from execution after finding that the cognitive and behavior deficiencies that drive an intellectual disability diagnosis negate the penological purposes served by the death penalty and give rise to a "special risk" that the death penalty will be wrongfully imposed. 536 U.S. at 318-21. In addition, the Court found that a

[7] While Defendant cites to the Idaho Constitution as a basis for his motion, he has not provided any argument or authority as to why the Idaho Constitution should apply any broader than similar provisions in the United States Constitution. *See, e.g. State v. Donato*, 135 Idaho 469, 472, 20 P.3d 5, 8 (2001).

categorical exemption was consistent with society's contemporary standards of decency. *Id.* at 315-16.

No court has ever found ASD to be a categorically death-disqualifying diagnosis. However, Defendant argues ASD is the functional equivalent of an intellectual disability and, therefore, the rationale underpinning *Atkins* applies with equal force to individuals with ASD. He further argues that categorically excluding individuals with ASD from capital punishment is consistent with society's prevailing standards of decency. The State responds that a categorical exemption from the death penalty is only available under the law to those with intellectual disabilities, the definition of which ASD fails to satisfy. It further disputes that there is any national consensus supporting Defendant's claim.

The State is correct. First, intellectual impairment—a hallmark of an intellectual disability—is not present in the diagnostic criteria of ASD and no court has ever found the two to be equivalent. Second, Defendant has not presented any evidence of a national consensus as to whether the death penalty is a disproportionate punishment for individuals with ASD.

1. ASD is not equivalent to an intellectual disability for purposes of death penalty exemption.

Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Atkins,* 536 U.S. at 319. In considering whether intellectually disabled persons are "categorically less culpable than the average criminal," the *Atkins* court relied on clinical definitions of an intellectual disability offered by the American Association on Mental Retardation and the American Psychiatric Association. *Id.* at 308, n. 3, 318.[8] Both defined the condition based on the presence of two criteria: 1) subaverage intellectual function, and; 2) significant limitations in adaptive skills manifesting prior age 18. Based on this criteria, the Court found the intellectually disabled were categorically less culpable for their crimes, noting:

> [C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.

---

[8] In referencing the clinical definitions of an intellectual disability, the *Atkins* court did not adopt these definitions or otherwise offer any procedural or substantive guidelines for determining whether a person is intellectually disabled. *Shoop v. Hill*, 586 U.S. 45, 49 (2019) ("*Atkins* gave no comprehensive definition of 'mental retardation' for Eighth Amendment purposes."). Rather, it tasked the states with developing their own mechanism for enforcing the restriction. 536 U.S. at 318. Idaho did so through the passage of I.C. § 19-2515A, discussed *infra*.

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.

*Id.* at 318.

Based on these deficiencies, the Court found two independent reasons to categorically exclude the intellectually disabled from the death penalty—both of which the Court found were "consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution." *Id.* at 318. First, the reduced culpability of the intellectually disabled undermined the twin justifications underpinning the death penalty—retribution and deterrence of capital crimes. *Id.* at 318-19. As to retribution, the Court reasoned that if the culpability of the average murderer is insufficient to justify the imposition of death, "the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." *Id.* As to deterrence, the Court reasoned that the same cognitive and behavioral impairments that render mentally disabled offenders less culpable also render them less likely to appreciate the consequences of their conduct and control their behavior. *Id.* at 320.

Second, the Court found that the reduced capability of intellectually disabled offenders gave risk to an unacceptable risk that the death penalty could not be reliably imposed. *Id.* at 320-21. Namely, the Court found that, in the aggregate, intellectually disabled offenders faced a special risk of wrongful execution because they: 1) are more susceptible to false confessions; 2) less able to "make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors"; 3) "may be less able to give meaningful assistance to their counsel"; 4) "are typically poor witnesses," and; 5) "their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* Further, the Court found that "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Id.*

Relying on the diagnostic criteria set forth in the DSM-IV, various publications and Dr. Orr's evaluative report, Defendant argues that individuals with ASD, himself included, exhibit

similar adaptive impairments to those with an intellectual disability and, consequently, the same justifications underlying the *Atkins* exemption should apply to defendants with ASD. This is an apple-to-oranges comparison, however. While intellectually disabled and ASD individuals may share some of the same adaptive impairments, the intellectual deficit—an essential feature of an intellectual disability—is not a diagnostic element of ASD.

As noted in *Atkins*, an intellectual disability is based on deficits in both intellectual function and adaptive function. 536 U.S. at 308, n. 3, 318; *see also, Hall v. Florida*, 572 U.S. 701, 710 (2014) (noting that the "defining characteristic of intellectual disability" in the medical community is the "existence of *concurrent* deficits in intellectual and adaptive functioning.") (emphasis added). While *Atkins* did not set out a comprehensive definition of an intellectual deficit, it did provide guidance, noting that prevailing medical authorities required "significantly subaverage intellectual functioning." 536 U.S. at 308, n. 3. To this end, the Court noted that the medical community typically considered "the cutoff IQ score of the intellectual function prong of the mental retardation definition" to be between 70 and 75 and lower. *Id.* at 308, n. 5.

Under *Atkins* and its progeny, it is the intersection of intellectual and adaptive deficits that render an individual with an intellectual disability less morally culpable for purposes of death penalty disqualification. *Hall,* 572 U.S. at 710. As recognized by the Idaho Supreme Court, adaptive deficits alone will not render a defendant mentally incapacitated for purposes of the exemption. *Pizzuto v. State*, 146 Idaho 720, 729, 202 P.3d 642, 651 (2008) ("Significant limitations in adaptive functioning alone will not bring an offender within the protection of [I.C. § 18-2515A].")[9] Substantial intellectual deficits are required.

Intellectual deficiency, however, is not among the diagnostic criteria for ASD. *See*, DSM-5. While individuals with ASD may share some of the same adaptive deficits as those with an *Atkins*-qualifying intellectual disability, the essential feature, i.e., intellectual disability, is lacking. That is not to say that individuals with ASD cannot also suffer from intellectual deficiencies. Indeed, Dr. Ryan noted in her report that it is estimated that 50% of individuals

---

[9]As authorized by *Atkins*, Idaho prohibits the execution of the mentally disabled through I.C. § 19-2515A. That statute defines "mentally retarded" as: "significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant subaverage general intelligence functioning and significant limitations in adaptive functioning must occur before age eighteen (18) years." The statutes further defines "significantly subaverage general intellectual functioning" as "an intelligence quotient of seventy (70) or below." I.C. § 19-2515A(1).

with ASD have "a degree of intellectual disability." Ryan Report, p. 31. However, it is not necessary to a diagnosis of ASD and, therefore, cannot be equated to a mental disability for purposes of *Atkins*. In fact, in *United States v. Roof*, the Fourth Circuit declined to apply *Atkins* to a defendant with ASD who had an IQ of 125, noting that his limitations in adaptive skills alone are insufficient to render him intellectually disabled. *United States v. Roof*, 10 F.4th 314, 380 (4th Cir. 2021). With an IQ of 119, Defendant likewise fails to qualify.

Further, even if adaptive deficits alone could give rise to a categorical exemption, Defendant has presented no authority that the adaptive deficits of ASD have the equivalent effect on culpability or on the ability to make a persuasive showing of mitigation as does an intellectual disability. He dedicates a large portion of his briefing to describing how individuals with ASD, like those who are intellectually disabled, struggle to present meaningful mitigation evidence due to their adaptive deficits. He contends they are less able to meaningfully assist counsel due to social and communication deficits and their tendency to focus on specifics rather than the whole picture. He argues that the flat affect and other physical manifestations of ASD can create an unwarranted impression of lack of remorse and, further, awkward speech and distractability render individuals with ASD poor witnesses. He also contends that evidence of ASD is "double-edged" because it will likely be perceived by the jury as aggravating rather than mitigating.

However, to even be considered for categorical exemption from the death penalty based on these adaptive impairments alone, Defendant would—at a minimum—have to demonstrate that, considered as a whole, individuals with ASD suffer from these same or similar impairments that render them more susceptible to false confessions and diminish their ability to assist in their defense. *Atkins*, 536 U.S. at 320-21 (noting that intellectually disabled individuals "in the aggregate" face a special risk of wrongful execution due to their deficits). As Defendant's authorities point out, however, "the presentation and symptomology of ASD vary widely." Colleen M. Berryessa, *Defendants with Autism Spectrum Disorder in Criminal Court: A Judge's Toolkit,* 13 Drexel L. Rev. 841, 842 (2021). Indeed, as its name implies, it is on a spectrum. Some may suffer from adaptive deficiencies to a degree where it interferes with the presentation of mitigation evidence and some may not. Ryan Report, p. 31 (noting the "wide range of autistic

symptoms and severity.")[10] The lack of any uniform presentation which can be measured on an objective scale (like IQ, youth and competency) renders ASD inapt for categorical exemption.

Further, courts that have considered whether to extend *Atkins* to mental health disorders similar to ASD have uniformly declined to do so. For example, Fetal Alcohol Spectrum Disorder, which is a group of conditions that can occur in a person exposed to alcohol before birth, is characterized by many of the same behavioral issues and learning challenges that mark an ASD diagnosis.[11] Reasoning that FASD cannot be medically equated to an intellectual disability, courts have found that the justifications for exempting individuals with intellectual disabilities from the death penalty do not apply to individuals with FASD. *See*, *In re Soliz*, 938 F.3d 200, 203 (5th Cir. 2019) (inmate failed to show that FASD the functional equivalent of an intellectual disability as defined in *Atkins*); *United States v. Fell*, 2016 WL 11550800, *7 (D. Vt. 2016) ("Fell has not shown that all persons with FASD ... have cognitive and behavioral impairments that result in the same (or 'equivalent') diminishment in moral culpability, ability to be deterred, and capacity to assist in their defense as individuals with [intellectual disability]").[12]

---

[10] Indeed, Defendant is an example of a highly functioning individual with ASD. His diagnosis is not accompanied by an intellectual or language impairment, he has an IQ of 119 and graduated from his master's program with 4.0 GPA. At the time of the homicides, he was enrolled in a doctoral program. His experts describe him as "highly intelligent," having "strong verbal abilities, abstract reasoning, memory, concept formation and reading skills." They noted "no evidence of a formal thought disorder or thought disorganization." He understands the proceedings against him and the penalty he is possibly facing. He is "generally clearly articulated" and "demonstrated some typical social behaviors, such as "fairly consistent (though intense) eye contact, polite demeanor, and social conventions." There is no indication he is susceptible to a false confession nor is there anything approaching a confession in this case, to the Court's understanding. In fact, Dr. Ryan notes that Defendant "continues to adhere rigidly to a belief that he will be found Not Guilty[.]" Ryan Report, p. 33. While he is noted to have a "flat affect" and other physical mannerisms that can potentially be interpreted by the jury as lack of remorse, *Atkins* demands more of a reduced capacity than this. 536 U.S. at 320-21. Further, any danger that the jury will interpret his affect as a lack of remorse can be mitigated by addressing ASD in voir dire, and through expert testimony and evidence in the penalty phase.

[11] U.S. Center for Disease Control & Prevention, *About Fetal Alcohol Spectrum Disorders (FASDs),* https://www.cdc.gov/fasd/about/index.html#cdc_disease_basics_testing_screening-diagnosis (last visited April 22, 2025). As an umbrella term for a broad range of symptoms cause by prenatal alcohol exposure, FASD is not a clinical diagnosis, like ASD. However, according to the CDC, FASD includes Neurobehavioral Disorder Associated With Prenatal Alcohol Exposure, which is a DSM-V diagnosis. It requires evidence of prenatal alcohol exposure and central nervous system involvement, as indicated by impairments in cognition, self-regulation and adaptive functioning. *Id.*

[12] *See also, Garza v. Shinn*, 2021 WL 5850883 at *105 (D. Ariz, 2021) ("There is no authority holding that individuals with FASD are exempt from capital punishment."), *appeal filed*, No. 22-99001 (9th Cir. Jan. 7, 2022); *Garcia v. State*, 356 So. 3d 101, 113 (Miss. 2023) (while FASD may be a mitigating factor to be weighed against the aggravating factors, "it is not a death penalty disqualifier."); *Ellison v. Thornell*, 721 F. Supp. 3d 820, 979 (D. Ariz. 2024) (*appeal filed*, No. 24-3527 (9th Cir. June 5, 2024) (finding "no authority" that individuals with FASD are exempt from capital punishment).

Likewise, courts—including the Idaho Supreme Court—have squarely refused to extend *Atkins* to severe mental illness, such as schizophrenia, bipolar disorder and anti-social personality disorder. *State v. Dunlap*, 155 Idaho 345, 380, 313 P.3d 1, 36 (2013) (declining to extend *Atkins* to categorically prohibit execution of the mentally ill, joining "every court" to have considered the issue and collecting cases); *State v. Hall*, 163 Idaho 744, 814, 419 P.3d 1042, 1112 (2018) (reaffirming *Dunlap* in finding defendant's mental illness did not prevent imposition of capital sentence). If courts are uniformly unwilling to extend *Atkins* to severe mental illness, which can be at least equally as adaptively debilitating as ASD, an extension for ASD is unavailing.

In sum, Defendant has not demonstrated—nor has any court held—that persons with ASD have similar cognitive and behavioral deficiencies that result in an equivalent diminishment of culpability, ability to be deterred and capacity to assist in their defense as individuals with an intellectual disability. While they may share some similar adaptive deficiencies, Defendant has not demonstrated how this alone establishes equivalence for Eighth Amendment purposes.

2. Defendant has not established a national consensus against execution of individuals with ASD.

For Eighth Amendment purposes, cruel and unusual punishment is defined by "evolving standards of decency that mark the progress of a maturing society." *Dunlap*, 155 Idaho at 379-80, 313 P.3d at 35-36 (quoting *Atkins,* 536 U.S. at 311–12). 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). In *Atkins*, for example, the Court found that the two independent reasons for categorically excluding the intellectually disabled from the death penalty were "consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution." 536 U.S. at 318.[13]

---

[13] At oral argument, Defendant suggested that if the Court found the individuals with ASD were categorically exempt from the death penalty based on the unreliability rationale of *Atkins*, it need not consider whether the national consensus supported exemption. This is an incorrect reading of *Atkins*, which in no uncertain terms found that the national consensus supported exemption for both rationales articulated by the Court. 536 U.S. at 318 ("In light of these deficiencies, our death penalty jurisprudence provides two reasons consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution."). Therefore, Defendant must establish a national consensus against execution of ASD, regardless of whether exemption is warranted under the unreliability rationale or the retribution/deterrence rationale of *Atkins*.

Defendant argues categorically excluding individuals with ASD from capital punishment is consistent with society's prevailing standards of decency. He notes that the psychological community's understanding of the manifestations of ASD has significantly evolved over the past forty years, bringing with it a marked explosion in both ASD diagnoses and increased societal awareness.[14] He points out that this growing awareness of ASD has coincided with efforts by the criminal legal system to address mental health disorders through the creation of mental health courts. He further notes that evidence of ASD has been held to be relevant in criminal cases to issues of intent. As for legislative enactments, he points to two states, Ohio and Kentucky, which recently enacted legislation barring people with serious mental illness from being sentenced to death.

At best, this evidence demonstrates a growing societal sensitivity to mental disorders generally. However, evidence of evolving standards of decency must come from legislative and executive actions. Two states protecting individuals with severe mental illness from execution is not a national consensus.[15] Further, these two state statutes only apply to schizophrenia, schizoaffective disorder, bipolar disorder and delusional disorder, not ASD. *See*, Ohio Rev. Code Ann. § 2929.025(A)(1)(a); Ky. Rev Code Ann. § 532.130(3). Moreover, courts—including the Idaho Supreme Court—continue to reject the notion of a national consensus in the context of mental illness. *See, e.g., Hall v. State*, 172 Idaho 334, 361, 533 P.3d 243, 270 (2023), *reh'g denied* (Aug. 10, 2023) (noting that there has been no change in the national consensus refusing to extend *Atkins* to the mentally ill); *People v. Steskal*, 11 Cal. 5th 332, 374, 485 P.3d 1, 34 (2021) (observing there is "no evidence" that a national consensus has formed against the imposition of the death penalty for mentally ill).

Perhaps recognizing the lack of legislative acts in support of his argument, Defendant attempts to show a national consensus against executing individuals with ASD through a handful

---

[14] He notes that ASD is now the fastest-growing developmental disability in the United States, with a significant increase in diagnoses in both adults and children between 2011 and 2022. Luke P. Governor, et al., Autism Diagnosis Among US Children and Adults, 2011-2022, JAMA Network Open (Oct. 30, 2024), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2825472 (last visited Apr. 22, 2025).

[15] By contrast, *Atkins* concluded "a national consensus has developed against" using the death penalty on the intellectually disabled only after finding that eighteen states had adopted legislation to that effect, one state legislature had unanimously adopted a similar bill, and two other states passed similar bills in at least one house. 536 U.S. at 315-16.

of court decisions finding the diagnosis to be of evidentiary value.[16] None of these, however, are capital cases. He also cites to recent media attention on a Texas capital case against Robert Roberson, an autistic man who was convicted of killing his baby on a theory of shaken baby syndrome. Mr. Roberson is seeking to commute his death sentence based, in part, on the argument that his ASD contributed to his conviction. *See*, *In re Robert Leslie Roberson III*, Petition for Commutation of Death Sentence to a Lesser Penalty, Or, In the Alternative, a 180-Day Reprieve, and Request for an Interview and Hearing on the Matter.[17] Defendant notes that a group of 84 Texas legislators recommended clemency for Mr. Roberson. However, what Defendant fails to mention is these legislators did not recommend clemency due to his autism, but because of "significant scientific and medical evidence now shows that his daughter, Nikki, who was chronically ill, died of a combination of natural and accidental causes, not the debunked shaken baby syndrome hypothesis that State used to convict [him]." *Id.* at p. 13.

In sum, not only has Defendant failed to show that ASD is equivalent to an intellectual disability for death penalty exemption purposes, he has not shown there is a national consensus against subjecting individuals with ASD to capital punishment. ASD may be a mitigating factor to be weighed against the aggravating factors in determining if a defendant should receive the death penalty, but it is not a death-penalty disqualifier.

### B. Case-Specific Factors Do Not Warrant Defendant's Exemption from Capital Punishment.

Defendant alternatively argues he should be exempt from the death penalty because the intense media scrutiny on his ASD undermines his ability to present a meaningful defense and renders it "impossible" for him to receive a fair individualized sentencing determination. He points out that news sources have focused on his "social deficits," including his past interactions with females, his "deadpan look," "robot-like walk," "cold iciness," "rigid posture" and lack of facial affect. He argues the media is demonizing him for his disability while at the same time

---

[16] *See, U.S. v. Cottrell*, 333 F.App'x 213, 216 (9th Cir. 2009) (finding evidence of defendant's Asperger's diagnosis was relevant to whether he had specific intent to aid and abet arson); *State v. Suber*, 2008 WL 942622, *10 (Minn. Ct. App. April 8, 2008) (reversing defendant's DUI conviction where physical impairment the officer interpreted as intoxication could have been attributable to Asperger's syndrome); *State v. Burr*, 948 A.2d 627 (N.J. 2008) (evidence of defendant's Asperger's syndrome relevant to rebut inference of grooming by having child sit on his lap where he did not realize it was inappropriate.).

[17] Available at: https://lrl.texas.gov/scanned/archive/2024/54898.pdf (last accessed April 22, 2025).

emphasizing the brutality of the crime. This, he warns, will overpower any mitigating arguments based on ASD and poses a risk that he will be sentenced based on his disability.

As the State points out, however, there is no precedent for striking the death penalty due to media coverage.[18] Further, any concerns that arise from such media coverage can be mitigated through voir dire and from expert testimony and evidence during the penalty phase of the trial.

## V. ORDER

Based on the foregoing, Defendant's Motion to Strike the Death Penalty re: Autism Spectrum Disorder is DENIED.

IT IS SO ORDERED.

DATED this 24th day of April, 2025.

Steven Hippler
Administrative District Judge

[18] Indeed, jurors will not access media once selected to serve, and if exposed to pretrial media that has impaired their ability to be unbiased, they would be excluded from jury service on this case.

## CERTIFICATE OF SERVICE

I hereby certify that on 4/24/2025, I served a true and correct copy of the **ORDER ON DEFENDANT'S MOTION TO STRIKE DEATH PENALTY RE: AUTISM SPECTRUM DISORDER**

**LATAH COUNTY PROSECUTING ATTORNEY'S OFFICE**
**WILLIAM W. THOMPSON, JR.**
PROSECUTING ATTORNEY
VIA EMAIL: paservice@latahcountyid.gov

**ASHLEY JENNINGS**
SENIOR DEPUTY PROSECUTING ATTORNEY
VIA EMAIL: paservice@latahcountyid.gov

**JOSHUA D. HURWIT**
SPECIAL DEPUTY PROSECUTING ATTORNEY
VIA EMAIL: paservice@latahcountyid.gov

**JEFFERY D. NYE**
SPECIAL ASSISTANT ATTORNEY GENERAL
VIA EMAIL: jeff.nye@ag.idaho.gov

**MADISON ALLEN**
SPECIAL ASSISTANT ATTORNEY GENERAL
VIA EMAIL: Madison.allen@ag.idaho.gov

**ANNE TAYLOR LAW, PLLC**
ANNE C. TAYLOR
VIA EMAIL: info@annetaylorlaw.com

**ELISA G. MASSOTH, PLLC**
ELISA G. MASSOTH
VIA EMAIL: emassoth@kmrs.net

**IDAHO STATE PUBLIC DEFENDER'S OFFICE**
FIRST DISTRICT PUBLIC DEFENDER
JAY W. LOGSDON
VIA EMAIL: jay.logsdon@spd.idaho.gov

**BICKA BARLOW**
Pro Hac Vice
VIA EMAIL: bickabarlow@sbcglobal.net

TRENT TRIPPLE
Clerk of the Court

By: Renee D Walker
Deputy Clerk 4/24/2025 3:18:14 PM

**CERTIFICATE OF SERVICE**