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IN THE DISTRICT COURT OF THE FOURTH 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 MOTION FOR EXAMINATION OF DEFENDANT PURSUANT TO IDAHO CODE §18-207 AND FOR AN EXTENSION OF TIME TO COMPLETE REBUTTAL PENALTY PHASE EXPERT DISCLOSURES ***Filed Under Seal***

TO: THE DEFENDANT, BRYAN CHRISTOPHER KOHBERGER, AND COUNSEL

PLEASE TAKE NOTICE that the undersigned, pursuant to Idaho Code 18-207, moves the Court for an order granting the State's expert access to defendant to conduct examinations necessary to evaluate, respond to, and/or rebut defendant's proffered expert testimony concerning

his mental condition. The State also seeks an extension of time to complete its rebuttal penalty phase expert disclosures so that its expert can complete the requested examination pursuant to § 18-207.

INTRODUCTION

Defendant has put his mental condition at issue by proffering the expert testimony of several mental health professionals who intend to testify about his alleged mental and behavioral health disorders, including autism, attention-deficit/hyperactivity disorder (ADHD), obsessive-compulsive disorder (OCD), and avoidant/restrictive food intake disorder. Defendant's disclosures trigger the State's right under Idaho Code § 18-207(4)(c) to have its own experts examine defendant to evaluate and potentially rebut his experts' analysis and conclusions. Accordingly, the State respectfully asks the Court to grant this Motion and to order the State's experts access to defendant for purposes of appropriate mental examinations. Currently, the State has retained a single psychologist to serve as its expert.

The State has conferred with defendant's counsel, who does not object, in principle, to a mental condition examination pursuant to § 18-207(4)(c). Two disputes remain, however. First, defendant seeks to improperly limit the scope of the State's expert's examination. To assess and supplement the evaluation of defendant's autism and OCD, the State's expert contemplates conducting a limited set of personality tests. But because defendant's experts' chose not to address this area, defendant claims personality testing is off-limits for the State. The Court should reject defendant's position and should permit the State's psychologist to conduct the testing he deems appropriate in his professional judgment.

Second, defendant has taken the position that he is entitled to have his counsel in the room

during the State's expert's examination. This request is not necessary and runs contrary to professional psychological practices, as is evident by the fact that that defendant's counsel was not present when his own expert examined him. The Court should not permit defendant's attorney to attend the State's expert's examination.

In addition, to permit the Court to resolve the foregoing disputes and to grant the State's psychology expert adequate time to complete his examination and prepare a written report, the State requests an extension of time from the current April 28, 2024, deadline for rebuttal penalty phase expert disclosures. Specifically, the State asks the Court to move the deadline to 21 days after the State's expert has completed his examination of defendant.

PROCEDURAL BACKGROUND

On March 31, 2025, defendant made his penalty phase expert disclosures, which included reports from five mental health professionals, two of whom had been disclosed as guilt phase experts.[1]

[1] These experts are:

- Rachel Lawson Orr, PsyD, ABPP-CN, who conducted a neuropsychological evaluation of defendant (providing supplemental report to guilt phase report);
- Eileen P. Ryan, D.O., who provided forensic psychological analysis (providing supplemental report to guilt phase report);
- Jeffrey D. Lewine, Ph.D., a neuroscientist who reviewed and interpreted defendant's brain MRI;
- John F. Edens, Ph.D., who provided a report about the appropriateness of psychological testing and the use of terms like "sociopath" or "psychopath"; and
- Jolie S. Brams, Ph.D., who provided additional forensic psychological analysis.

The State had been working towards making its rebuttal penalty phase expert disclosures since even before defendant's penalty phase expert disclosures. The State had provisionally retained a psychologist to respond to defendant's experts and to conduct a mental health examination under § 18-207(4)(c). On April 2, 2025, the State began to meet and confer with defendant's counsel regarding the requested examination, including by disclosing the name of the State's expert, by sharing details about the scope of the intended examination (including personality testing), and by seeking a compromise regarding defendant's request to have counsel in the room. (Declaration of Joshua D. Hurwit in Support of State's Motion for an Examination of Defendant Pursuant to Idaho Code § 18-207 and for an Extension of Time to Complete Rebuttal Penalty Phase Expert Disclosures (Hurwit Decl.) at ¶ 1, Ex. S-1.)

On April 11, 2025, the State's expert informed the State that he was no longer able to work on this case. The State so informed defendant on April 14, 2025. (Hurwit Decl. at ¶ 2, Ex. S-2.) On April 17, 2025, the State disclosed to defendant that it had retained a new expert (providing his curriculum vitae to defendant on April 21). *Id.* On April 22, 2025, the State informed defendant that its new expert also intended to conduct personality testing—consistent with what the State's initial expert had proposed—and objected to having counsel present in the room with defendant during the examination. *Id.* On April 22, 2025, defendant's counsel responded that he continued to object to personality testing and maintained his position that he was entitled to have counsel present in the room during the examination. *Id.* He also objected to the State's request for an extension of time to make its rebuttal penalty phase expert disclosures. *Id.* This Motion followed.

STATUTORY AND LEGAL BACKGROUND

Idaho Code § 18-207 provides, in pertinent part:

> (4) No court shall, over the objection of any party, receive the evidence of any expert witness on any issue of mental condition, or permit such evidence to be placed before a jury, unless such evidence is fully subject to the adversarial process in at least the following particulars:
>
> > (c) Raising an issue of mental condition in a criminal proceeding shall constitute a waiver of any privilege that might otherwise be interposed to bar the production of evidence on the subject and, ***upon request, the court shall order that the state's experts shall have access to the defendant in such cases for the purpose of having its own experts conduct an examination in preparation for any legal proceeding at which the defendant's mental condition may be in issue.***

The Idaho Supreme Court has interpreted this provision broadly. In *State v. Samuel*, 452 P.3d 768 (Idaho 2019), the Court reviewed a district court's decision to grant a § 18-207(4)(c) motion by the State to examine the defendant who moved to suppress his statement on the grounds that he did not voluntarily, knowingly, and intelligently waive his *Miranda* rights. *Id.* at 777. The Court began by reaffirming the constitutionality of § 18-207(c)(4) and finding that it applied to pre-trial motions as well as to trial. *Id.* at 779-80; *see also State v Hall*, 419 P.3d 1042, 1100 (Idaho 2018) (finding that § 18-207(4)(c) was constitutional and applied at sentencing as well as trial); *State v Payne*, 199 P.3d 123 (Idaho 2008).

The Court then found (i) that the suppression issue raised in defendant's motion was one concerning the defendant's mental condition, *Samuel* at 780-81, and (ii) that, although the defendant's expert's testimony did not use the term "mental condition," it nonetheless triggered § 18-207(4)(c) because it referred to the defendant's "significant limitations" and "capacity," *id.* at 781 (noting also that the defense expert conducted a "neuropsychometric examination").

ANALYSIS

In this case, defendant has put his mental condition at issue through the multiple behavioral, mental health, and neuroscience professionals he intends to call at trial and/or at the penalty phase

of this case.[2] These experts' proffered testimony directly addresses the defendant's "mental illnesses" (or the viewpoint that some of his neuropsychological conditions are not "mental"). (Hurwit Decl. ¶¶ 3-4, Ex. S-3 (Phase Two Expert Report of Dr. Eileen Ryan) at 46, Ex. S-4 (Declaration of Jeffrey David Lewine) at 3.) Therefore, defendant has triggered § 18-207(c)(4) and provided a more-than-adequate basis for the State's request that its own expert conduct an examination of defendant necessary to evaluate and potentially rebut the opinions of his retained experts. *See Samuel* at 781 (noting also that the State had the right to have its expert conduct an examination where the defense expert conducted a "neuropsychometric examination"). Currently, the State has retained a psychologist to perform an examination and may retain other experts as necessary.

While he recognizes that he has triggered § 18-207(c)(4), defendant seeks to limit the scope of the State's psychologist's examination and maintains that one of his lawyers should be present in the room with him during the examination. Consistent with case law and standard psychology practices, the Court should reject defendant's positions.

I. The Court Should Not Confine the State's Psychology Expert's Examination to the Scope Chosen by Defendant.

The Court should not limit the scope of the State's expert's psychological examination to defendant's chosen areas of inquiry. Despite spending dozens of hours with defendant over the course of many days, defendant's experts did not conduct personality testing. That was their choice. But the State's retained psychology expert believes in his professional judgment that it is necessary to perform a limited set of personality tests on defendant to confirm, rebut, or otherwise

[2] The scope of what testimony is permissible is set forth in this Court's Order on State's Motion in Limine re: Neuropsychological and Psychiatric Evidence (filed April 18, 2025).

contextualize the neuropsychological conditions with which defendant has been diagnosed by his retained experts.[3] (Declaration of Dr. Jason Gage in Support of State's Motion for an Examination of Defendant Pursuant to Idaho Code § 18-207 and for an Extension of Time to Complete Rebuttal Penalty Phase Expert Disclosures (Gage Decl.) at ¶ 4.) This is entirely proper under § 18-207(c)(4).

While the State has not found an Idaho case directly on point, it appears that Idaho courts have not limited mental health experts in exercising their professional judgment. In *Payne*— an Idaho Supreme Court case discussing § 18-207 for other reasons—the underlying trial court order provided that "[t]he mental health experts . . . are allowed to discuss any subject with the defendant that, in their professional opinion, is believed to be reasonably necessary to a thorough evaluation of the defendant's mental health status." 199 P.3d at 151. This is consistent with cases from across the country addressing provisions analogous to § 18-207. *See, e.g.*, *McCullough v. Anne Arundel County, Maryland*, Civ. Action No. CCB-19-926, 2020 WL 7319296, at *2 (D. Md. Dec. 11, 2020) ("Courts are empowered to limit the scope of an examination under [Federal Rule of Civil Procedure] 35, but the majority view is that unless good cause is shown to limit the manner or scope of the testing the medical expert deems necessary, the court should defer to the expert's choice of information sought and tests to be administered."); *Abernathy v. State*, 462 S.E.2d 615, 616 (Ga. 1995) (declining to limit the scope of an independent mental illness evaluation).

Here, there are good reasons not to limit the State's expert's examination. First, the State's proposed examination is only for rebuttal. In such situations, courts have found that "[a]n

[3] During the meet and confer process, the State provided to defendant's counsel examples of the contemplated personality testing. (Hurwit Decl. ¶ 1, Ex. S-1.)

examination by the State's mental health expert . . . is not limited by the type of expert that the State may use, the type of examination that the State's expert may employ, or the sequence of the examination performed by the State's expert." *Polvon v. State*, 682 S.W.3d 651, 661 (Tex. 2024). In *Hernandez v. Davis*, 750 Fed. Appx. 378 (5th Cir. 2018) (unpublished), the Fifth Circuit reviewed a death penalty conviction and held that because the state's mental health examination was limited to proper rebuttal purposes, the "trial court properly refused to limit the scope of [the state's expert's] examination in the manner [the defendant] wanted." *Id.* at 384.

Consistent with such cases, the State is simply exercising its right under § 18-207(c)(4) to test the mental condition evidence that defendant seeks to offer. As it made clear during motion *in limine* briefing and argument, the State does not intend to affirmatively introduce defendant's mental condition during the trial and maintains that defendant's mental condition is irrelevant at the guilt phase.[4] Even if personality testing reveals something, the State will not raise such evidence during its case-in-chief. Thus, the State is not seeking to use the proposed personality testing to stretch its examination beyond permissible rebuttal under § 18-207(c)(4).

Second, the Court should permit personality testing because defendant has opened the door by offering testimony about his lack of personality disorders. One of defendant's forensic psychiatrists concluded that defendant does not meet "criteria for antisocial personality disorder." (Hurwit Decl. ¶ 3, Ex. S-3 at 49.) Regardless of the criteria alluded to, the State's expert should be able to directly test the defense expert's hypothesis. While the State's expert's contemplated personality testing is intended to validate the primary diagnoses of autism, OCD, and ADHD, it is

[4] The only anticipated caveat would be if defendant is permitted to raise his autism and/or OCD diagnoses during the guilt phase. The State reserves the right to introduce testimony from its expert to rebut or contextualize these diagnoses, if appropriate.

only fair that the State's expert be able to evaluate all mental conditions that may appear during the examination. The limited testing is not a fishing expedition but, in the State's expert's "professional opinion, is believed to be reasonably necessary to a thorough evaluation of the defendant's mental health status." *See Payne*, 199 P.3d at 151; (Gage Decl. ¶ 4).

Finally, the Court should not limit the nature of the State's examination because defendant will suffer no prejudice from the proposed examination. The State will disclose all results from the examination (including personality testing), and defendant will be able to object to any proposed expert testimony—either in whole or in part—prior to it being offered at trial. For this reason, limiting the scope of the § 18-207(c)(4) examination is premature and unnecessary.

The Court should not place limits on the examination by the State's expert psychologist.

II. The Court Should Not Permit Defendant's Counsel to Be Present in the Examination Room.

The Court should allow the State's psychology expert to perform his examination of defendant without the presence of counsel in the room with defendant. This is consistent with standard psychology practices and the American Bar Association Standards on Mental Health, which provide:

> When the scope of the evaluation is not limited to defendant's competence to proceed, *the defense attorney should be present at the evaluation only at the request of the evaluator for reasons relating to the effectiveness of the evaluation*. If present the attorney may actively participate only if requested to do so by the evaluator.

ABA Standards on Mental Health 7-3.5(c)(ii) (*available at* https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf, last visited April 22, 2025) (emphasis added).

Here, the State's expert does not want defendant's counsel to be present because of the risk

that counsel's presence would interfere—even unintentionally—with the validity of the examination. (Gage Decl. ¶ 5.) The State's position is supported by standard psychological practices and by the fact that counsel was not present when defendant's expert performed her neuropsychological examination. (Gage Decl. ¶¶ 6, 8.) The Court should not impose a separate standard on the State's expert.

While the State understands that the presence of counsel has been permitted in some instances in Idaho,[5] courts have not recognized a right for a defendant to have counsel in the room. Indeed, the Idaho Supreme Court has stated that "a defendant has the right to the assistance of counsel, *as opposed to the presence of counsel*, during a compelled mental examination." *Payne*, 199 P.3d at 152 (emphasis added). The Ninth Circuit has also approved of another circuit's holding that a defendant "does not have the further right to have her counsel physically present in the room during the course of [an] examination." *Hess v. Macaskill*, 67 F.3d 307, *4 (1995) (unpublished) (citing *United States v. Bondurant*, 689 F.2d 1246, 1249 (5th Cir. 1982)).

Here, because defendant chose to place his mental condition at issue, the State should be permitted to have its chosen expert conduct the examination consistent with that expert's professional judgment. This means having no one else in the examination room aside from the expert and defendant.

If the Court rejects the State's position, then, as an alternative, the State seeks an order containing procedures to minimize the effect that counsel's presence will have on the examination.

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[5] Defendant's counsel has pointed to *State v. Santistevan*, 148 P.3d 1273 (Idaho Ct. App. 2006), in which an underlying trial court order permitted defense counsel to be present during a mental examination. It does not appear, however, that the presence of counsel was litigated in that case.

The State would request the following restrictions:

1. Counsel must not communicate with defendant in any way during the examination, including during any breaks;

2. Counsel must be seated behind defendant in a manner that prevents eye contact between defendant and counsel;

3. Counsel is prohibited from making noises during the examination; and

4. Counsel must not take any notes during the testing phases of the examination in order to preserve the integrity of the tests administered.

III. The Court Should Grant the State's Request for an Extension of Time to Complete its Rebuttal Penalty Phase Expert Disclosures.

The Court should grant the State an extension of time to make its rebuttal penalty phase expert disclosures. The Scheduling Order provided the State with 28 days to respond to defendant's penalty phase expert disclosures, meaning that the current deadline is April 28, 2025.

Defendant disclosed six penalty phase experts who prepared approximately 250 pages of reports. Five of the six experts are mental health or neuroscience professionals, and three of these five were not disclosed as guilt phase experts. In addition, defendant did not initially produce to the State the testing results from defendant's neuropsychological evaluation due to ethical standards in the psychology field (which require a psychologist to disclose such materials directly to another psychologist). These materials were produced to the State's psychology expert on April 19, 2025. (Gage Decl. ¶ 7.)

It is fair to provide the State with additional time to respond to defendant's disclosures. The State has acted diligently to retain a psychologist (finding a new psychologist within days after its initial psychologist withdrew from the case) and to meet and confer with defendant about the scope and manner of the mental condition examination under § 18-207(c)(4). The State also needs additional time to identify other neuroscience experts it may decide to retain to compliment

the findings of its psychology expert, just as defendant did.

It is unclear why defendant objects to the State's requested extension, but, having opposed the scope and manner of the State's requested mental condition examination, it is incongruous for him to oppose an extension that will allow the parties to bring their disputes to the Court for a resolution. Not granting the State's extension in this circumstance would effectively nullify § 18-207(c)(4) in this case because, without a mental condition examination, the State will have nothing to disclose by way of rebuttal.

Defendant will not be prejudiced by the requested extension. With than three months still to go before trial, there is ample time for the Court to resolve the parties' disputes, for the State's expert to conduct his examination, and for the State to finalize its disclosures. Defendant will have ample opportunity to review these disclosures before the penalty phase begins, which will be weeks, if not months, after jury selection begins in July.

Accordingly, the Court should grant the State an extension of time to make its rebuttal penalty phase expert disclosures. Specifically, the Court should allow the State to make its rebuttal penalty phase expert disclosures 21 days after the State's psychologist completes his mental condition examination of defendant.

CONCLUSION

For the foregoing reasons, the Court should grant this Motion in its entirety.

- First, the Court should order (i) that the State's expert have access to defendant to conduct an examination under § 18-207(c)(4) and (ii) that the State's expert be able to conduct the examination and testing he deems appropriate based on his professional judgment.

- Second, the Court should order that defendant's counsel may not be present in the room during the § 18-207(c)(4) examination.
- Third, the Court should grant the State until 21 days after the § 18-207(c)(4) examination is complete to make its rebuttal penalty phase expert disclosures.

DATED this 25th day of April 2025.

JOSHUA D. HURWIT
Special Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the STATE'S MOTION FOR AN EXAMINATION OF DEFENDANT PURSUANT TO IDAHO CODE §18-207 AND FOR AN EXTENSION OF TIME TO COMPLETE REBUTTAL PENALTY PHASE EXPERT DISCLOSURES were served on the following in the manner indicated below:

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Dated this 25th day of April 2025.

