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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 TO CONTINUE**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and hereby respectfully submits the following Motion to Continue due to the substantial amount of trial investigation and preparation still outstanding, as well as recent and forthcoming publicity that is highly prejudicial to the defense. Any conviction and sentence resulting from a capital trial

beginning in August 2025 will be unconstitutionally imposed and, therefore, vulnerable to reversal on direct or collateral review. In making this Motion, Mr. Kohberger relies on his right to be free from cruel and unusual punishment, his right to due process, his right to a fair trial, his right to counsel, his right to present a defense, his right to confront witnesses, his right to a fair and reliable sentencing determination, and other rights safeguarded by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 6, 7, 8, and 13 of the Idaho State Constitution.

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ARGUMENT

I. This Court Has an Obligation to Uphold Mr. Kohberger's Constitutional Rights by Vacating the Trial Date because Defense Counsel Needs Additional Time to Review Discovery and Prepare for the Complex Merits and Sentencing Phases Unique to Death Penalty Cases.

This Court has an "obligation to 'enforce the constitutional rights of all 'persons,' including prisoners." *Brown v. Plata*, 563 U.S. 491, 511 (2011)*; see also Robb v. Connolly*, 111 U.S. 624, 637 (1884) ("Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof. . . .").

As detailed in this Motion, moving forward with a capital trial in August will infringe upon Mr. Kohberger's constitutional rights, as counsel requires more time to review discovery, complete investigations, and prepare for trial. When considering this request for a continuance, the Court must weigh the issues against the heightened need for reliability in death penalty cases. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). This elevated standard is essential because

execution is the most irreversible and profound penalty; indeed, "**death is different**." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (emphasis added).

When the State seeks the death penalty, it imposes an extraordinary burden upon the Court, itself, and defense counsel to ensure the fairness, accuracy, and reliability of the trial and any subsequent sentencing proceeding. With a defendant's life stake, the trial court must be "particularly sensitive to insure that every safeguard is observed," *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), and must take "extraordinary measures" to ensure that a death sentence is reliably imposed, rather than "imposed out of whim, passion, prejudice, or mistake," *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring).

Justice O'Connor's concurrence in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), reinforces the idea that trial courts must apply heightened scrutiny to decisions potentially leading to a death sentence. 487 U.S. 815, 856 (1988) ("Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of [the death penalty]"). The Idaho Supreme Court, too, has emphasized the special safeguards and stringent due process protections that must be afforded in capital cases. *See, e.g.*, *State v. Creech*, 105 Idaho 362, 383 (1983) ("The 'qualitative difference between death and other penalties calls for a greater degree of *reliability* when the death sentence is imposed.'") (emphasis in original) (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

Because proceeding to a capital trial prematurely is a decision that may lead to the erroneous imposition of the ultimate sanction, this Court must consider and assess this Motion under a heightened standard of due process.

II. Mr. Kohberger Has Myriad Constitutional Rights during These Proceedings, All of Which Are Dependent on Counsel Having the Time and Resources to Prepare for a Capital Trial in Accordance with Established Professional Norms.

A. In Capital Cases, the Rights to Effective Assistance of Counsel and a Complete Defense Are Amplified.

The Sixth Amendment entitles Mr. Kohberger to the effective assistance of counsel at both the merits and penalty phases of this capital case. *See, e.g., Andrus v. Texas*, 590 U.S. ___ (June 15, 2020) (per curiam); *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Additionally, and concomitantly, as part of this Sixth Amendment guarantee, as well as his right to Due Process as protected by the Fourteenth Amendment, Mr. Kohberger is entitled to a sufficient amount of time to allow counsel to adequately prepare for trial and sentencing. *See Powell v. Alabama,* 287 U.S. 45, 59 (1932) ("[A] defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense"); *United States v. Ash*, 413 U.S. 300, 340-41 (1973) ("*Powell* made clear that, in order to preserve the accused's right to a fair trial and to 'effective and substantial' assistance of counsel at the trial, the Sixth Amendment guarantee necessarily encompasses a reasonable period of time before trial during which counsel might prepare the defense."). The Supreme Court has recognized that "depriv[ing] a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Maine v. Moulton*, 474 U.S. 159, 170 (1985).

In a capital case, counsel must meet specific professional obligations to be constitutionally effective. The ABA Guidelines outline the professional expectations and obligations for counsel in death penalty cases. These Guidelines are not merely aspirational; they represent the current consensus on what is necessary for effective representation in capital cases. The Supreme Court has consistently referred to the ABA Guidelines to determine the prevailing professional norms for counsel's performance. For example, in *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), the Court explained that the ABA Guidelines for capital defense serve as "guides to determining what is reasonable" and represent "well-defined norms." Similarly, in *Rompilla v. Beard*, 545 U.S. 374, 387 (2005), the Court emphasized that it is the lawyer's duty to conduct a thorough investigation of the case's circumstances and explore all avenues leading to facts relevant to the case's merits and the penalty if convicted, citing the ABA Standards for Criminal Justice 4-4.1 (2nd ed. 1982).

The Ninth Circuit, which would review any death sentence arising out of Idaho state courts, has also repeatedly relied on the ABA Guidelines and expressly recognized the Guidelines as a "proper measure of the adequacy of an attorney's investigation." *Andrews v. Davis*, 944 F.3d 1092, 1109 (9th Cir. 2019) ("American Bar Association (ABA) standards and the like are evidence of those norms and guides to determining what is reasonable") (internal quotations omitted). The Ninth Circuit is not an anomaly; more than 700 capital case opinions cite the ABA Guidelines. *See* American Bar Association, Death Penalty Representation Project, *List of Opinions Citing the ABA Guidelines for Capital Defense*.[1]

In addition to the effective assistance of counsel, Mr. Kohberger has the right to a "meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *see also Crane v. Kentucky*, 476 U.S. 683, 687 (1986) (noting the existence of a "fundamental constitutional right to a fair opportunity to present a defense"); *California v. Trombetta*, 467 U.S. 479, 485 (1984) ("Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense."). This right has a number of sources, including the Due Process Clause of the Fourteenth Amendment, as well as the Compulsory Process and Confrontation Clauses of the Sixth Amendment. *Holmes*, 547 U.S. at 324.

This right takes on special significance in capital cases; the right to present a meaningful defense must take precedent over any countervailing state evidentiary rules or other procedures that might be acceptable in the context of non-capital criminal cases. *See, e.g., Holmes,* 547 U.S. at 330 (finding that South Carolina state rule, which had been in place for more than 60 years, unconstitutionally infringed upon capital defendant's right to present a complete defense); *Caspari*

[1] Available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/allcites.pdf (last visited April 22, 2025).

v. Bolden, 510 U.S. 383, 393 (1994) ("[T]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case.").

B. Mr. Kohberger Is also Entitled to an Individualized Sentencing Determination, a Constitutional Right that Is Uniquely Reserved for Defendants Facing the Death Penalty.

Because the prosecution is seeking to execute him, Mr. Kohberger also has additional constitutional rights in this proceeding. The Eighth Amendment requires that a capital sentencing proceeding permit individualized consideration of the defendant and the circumstances of the offense. *Woodson*, 428 U.S. at 304 (holding that consideration of the character of the defendant is "a constitutionally indispensable part of the process of inflicting the penalty of death"); *Roberts v. Louisiana,* 428 U.S. 325, 332-36 (1976) (holding that the state's mandatory death sentencing statute was unconstitutional because it did not permit the sentencer to make individualized determinations or assess degrees of culpability); *Parker v. Dugger*, 498 U.S. 308, 321-23 (1991) (holding that petitioner was deprived of his Due Process and Eighth Amendment rights to individualized sentencing where the appellate court failed to consider all mitigating evidence). As the Supreme Court noted in *Enmund v. Florida*, 458 U.S. 782 (1982), "we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' which means that we must focus on 'relevant facets of the character and record of the individual offender.'" *Id.* at 798 (citations omitted).

The U.S. Supreme Court has repeatedly emphasized that, in a capital case, a jury must be given the opportunity to consider all evidence that may weigh against a death sentence for any particular offender. This evidence includes anything at all from the defendant's life history and cannot be limited. *See, e.g.*, *Lockett*, 438 U.S. at 604-09 (explaining that a sentencer may not be precluded from considering, as a mitigating factor, any aspect of the 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); *Bell v. Ohio*, 438 U.S. 637 (1978) (reversing death sentence because

statute precluded consideration of facts and circumstances proffered as mitigating circumstances); *Green v. Georgia*, 442 U.S. 95 (1979) (finding unconstitutional the exclusion of evidence at sentencing phase based upon Georgia's hearsay rule); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (finding that it was constitutional error for sentencing court to conclude that it could not consider the defendant's turbulent family history as a mitigating factor in deciding punishment); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (holding that it was unconstitutional violation of *Lockett* for trial court to exclude evidence that defendant had adjusted well to incarceration between arrest and trial); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (vacating death sentence because trial court's instructions to the jury did not allow jury to consider as a mitigating factor evidence of the defendant's mental retardation and childhood abuse); *Penry v. Johnson*, 532 U.S. 782 (2001) (finding that Texas' three-question sentencing format, in light of jury instructions and all circumstances of case, did not adequately allow the jury to consider mitigating evidence of mental retardation); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) ("Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. Thus, a State cannot bar the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death.") (internal citations and quotations omitted).

When a jury is denied relevant mitigating evidence, either because counsel independently fails to conduct a complete investigation or because the court denies defense counsel adequate time or resources to conduct such an investigation, the defendant's rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, as well as the corollary guarantees in the Idaho Constitution, are violated, and any resulting death sentence cannot stand. Thus, individualized sentencing requires the presentation of mitigation evidence that is properly investigated, documented, and presented with the help of appropriate experts. As detailed further below, this

process is a comprehensive, time-consuming, and expensive undertaking, but it is also what our Constitution demands when the government seeks to extinguish human life.

C. The Right to Qualified Expert Assistance as Part of the Guarantees to Effective Assistance of Counsel and an Individualized Sentencing Proceeding.

In line with the heightened protections afforded to capital defendants, and stemming from both the rights to "a meaningful opportunity to present a complete defense," *Holmes*, 547 U.S. at 324, and to due process, *Ake v. Oklahoma,* 470 U.S. 68, 70 (1985), capital defendants are entitled to necessary expert assistance. Indeed, expert assistance is needed in all homicide cases, given that "investigating a homicide is uniquely complex and often involves evidence of many different types. Analyzing and interpreting such evidence is impossible without consulting experts—whether pathologists, serologists, microanalysts, DNA analysts, ballistics specialists, translators, or others." ABA Guidelines, 31 HOFSTRA L. REV. at 955. However, in a case where the prosecution elects to seek the death penalty, the right to access competent expert assistance is particularly important, given that "the prosecution and the defense rely more extensively on experts in death penalty cases than in [other types of] criminal cases." Subcom. On Federal Death Penalty Cases, Comm. On Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (1998), pp. 21-22.[2] Because prosecutors rely extensively on experts in death penalty cases, capital defendants cannot "present their claims fairly within the adversary system" if they have not also obtained competent expert assistance. *See Woodson*, 428 U.S. at 77 (quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974)).

Beyond the frequently complex merits-phase issues, conducting an adequate investigation into sentencing-phase issues in a capital case almost always requires the assistance of multiple experts. *See McWilliams v. Dunn*, 137 S.Ct. 1790, 1793-94 (2017) (explaining that, when a capital

[2] Available at: https://www.uscourts.gov/sites/default/files/original_spencer_report.pdf

defendant's "mental condition" is "seriously in question" and is relevant to "the punishment he might suffer[,]" a state must provide a mental health professional capable of conducting an appropriate examination and assisting in evaluation, preparation, and presentation of the defense); ABA Guidelines, 31 HOFSTRA L. REV. at 1004 (noting that "because mental health issues pervade capital cases, a psychologist or other mental health expert may well be a needed member of the defense team[, and] additional expert assistance specific to the case will almost always be necessary for an effective defense").

As discussed further below in Section III.E., defense counsel cannot know the full range of experts that may be necessary until *after* the extensive social history investigation has been completed. Both the identification of a mental health professional's necessary area of expertise, and the accuracy of the expert's diagnosis, is dependent on having accurate and comprehensive social history information.

III. Counsel's Professional and Ethical Obligations in a Capital Case.

A. Counsel's Duty to Provide Effective Assistance of Counsel in Accordance with the Prevailing Professional Norms.

In order to effectuate Mr. Kohberger's constitutional rights as described above, counsel must at least meet the minimum professional obligations for counsel on a capital case as outlined in the ABA Guidelines. The ABA Guidelines require "high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction." 31 HOFSTRA L. REV. at 919. Among many other things, the ABA Guidelines recognize that **"[e]very task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution** . . . Due to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make extraordinary efforts on behalf of the accused." *Id.* at 923 (emphasis added); *see also id.* at 988 (recognizing the "extraordinary responsibilities and commitment required of counsel in death penalty cases").

B. The Minimum Requirements Counsel Must Meet in Investigating for the Merits Phase of a Capital Case.

With respect to investigation for the merits phase, the ABA Guidelines are clear that **counsel must thoroughly investigate and challenge every minute piece of the evidence the state purports to have.** "To assume the accuracy of whatever information the client may initially offer or the prosecutor may choose or be compelled to disclose is to render ineffective assistance of counsel . . . **the defense lawyer's obligation includes not only finding, interviewing, and scrutinizing the backgrounds of potential prosecution witnesses, but also searching for any other potential witnesses who might challenge the prosecution's version of events, and subjecting all forensic evidence to rigorous independent scrutiny**." *Id.* at 926.

In addition to a complete investigation of every piece of the State's case, counsel is then responsible for identifying and considering all legal claims potentially available, even if those claims have consistently lost in that jurisdiction. *See id.* at 1032 ("Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted practices."). This is necessary because counsel in a capital case has a duty to preserve "any and all conceivable errors for each stage of appellate and post-conviction review." *Id*. at 1030. Non-preservation of an issue at the trial level may result in waiver, and ultimately in a defendant's execution, even if reversible error occurred. *See id.* at 1030 (describing a case in which, from a joint capital trial, one co-defendant was eventually executed because his counsel failed to object to women being excluded from the jury, while the other co-defendant's case was reversed and he is now serving life in prison because his attorneys preserved the issue).

This obligation places a significantly higher burden on defense counsel than in a non-capital case. In an ordinary criminal case, counsel could strategically forgo some aspects of the exhaustive investigation outlined step-by-step in the ABA Guidelines and would not be required to preserve every possible legal error for potential review. Furthermore, there would be

significantly fewer legal issues to address because the unique issues related to capital sentencing would be irrelevant.

C. Counsel Must Conduct an Exhaustive, Unparalleled Life History Investigation, Analyze Hundreds of Documents and Interviews, and Compile All of this Information into a Cohesive Narrative for the Sentencing Phase.

1. What a Constitutionally Adequate Investigation Entails

A constitutionally adequate investigation for the sentencing phase of a capital case requires a comprehensive investigation into the client's entire life history in order to present a complete picture of the client's mitigating life circumstances to the jury. "Because the sentencer in a capital case must consider in mitigation anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history." *Id.* at 1022 (internal citations omitted).

The life history investigation is so central to death penalty cases that there is a supplementary set of Guidelines specifically outlining counsel's responsibility in this piece of case preparation. *See* Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV 677 (2008) [hereinafter "Supplementary Guidelines"].

The defense "must conduct an ongoing, exhaustive and independent investigation of every aspect of the client's character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death" in order to meet their constitutional obligations. *Supplementary Guidelines*, 36 HOFSTRA L. REV. at 689. Dozens of cases confirm this as a fundamental obligation of defense counsel in a capital case:

> Without conducting a reasonable investigation, counsel's choice of strategy will be arbitrary, as the strength of each potential strategic choice is contingent on the outcome of the initial investigation. *Hooper*, 314 F.3d at 1170-71; *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990). *Wiggins* makes clear that to be reasonably diligent, counsel must "'conduct a *thorough* investigation of the defendant's background'" for "*all reasonably available* mitigating evidence." *Id.* at 522, 524, 123 S.Ct. 2527 (quoting *Williams*, 529

> U.S. at 396, 120 S.Ct. 1495, and ABA Guideline 11.4. 1) (first emphasis added).

Wilson v. Sirmons, 536 F.3d 1064, 1089 (10th Cir. 2008), opinion reinstated sub nom. *Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009).

Compiling a comprehensive life history for a capital sentencing phase requires two primary responsibilities, which are dependent upon each other, as further explained below. These responsibilities are: (1) collecting and analyzing records from the client and the client's family's life history, and (2) interviewing individuals who have touched the client's life or who may be able to shed light on circumstances shaping the client's life.

It is well-established that life history records that must be collected "include[], but [are] not limited to" all records that may be in existence and which bear on any of the following subjects:

- medical history;
- complete prenatal, pediatric and adult health information;
- exposure to harmful substances in utero and in the environment;
- substance abuse history;
- mental health history;
- history of maltreatment and neglect;
- trauma history;
- educational history;
- employment and training history;
- military experience;
- multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior;
- prior adult and juvenile correctional experience;
- religious, gender, sexual orientation, ethnic, racial, cultural and community influences;
- socio-economic, historical, and political factors

Supplementary Guidelines, 36 HOFSTRA L. REV. at 682. Contemporaneous records are intrinsically credible and may document events which the client and other family members were too young to remember, too impaired to understand and record in memory, too traumatized, ashamed, or biased

to articulate, or events which the client knows nothing about, but which may document significant events or conditions in the client's life.[3] *See* ABA Guidelines, 31 HOFSTRA L. REV. at 1025-26.

In addition to collecting and analyzing those life history records, the defense team must identify, locate, and interview life history witnesses in a culturally competent manner in order to produce confidential, relevant, and reliable information. *Id.* Lay witnesses that must be interviewed include people such as:

(a) The client's family, extending three generations back, and those familiar with the client,

(b) The client's friends, teachers, classmates, co-workers, employers, and those who served in the military with the client, as well as others who are familiar with the client's early and current development and functioning, medical history, environmental history, mental health history, educational history, employment and training history, military experience and religious, racial, and cultural experiences and influences upon the client or the client's family;

(c) Social service and treatment providers to the client and the client's family members, including doctors, nurses, other medical staff, social workers, and housing or welfare officials;

(d) Witnesses familiar with the client's prior juvenile and criminal justice and correctional experiences;

(e) Former and current neighbors of the client and the client's family, community members, and others familiar with the neighborhoods in which the client lived, including the type of housing, the economic status of the community, the availability of employment and the prevalence of violence;

(f) Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;

(g) Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.

[3] Most individuals who are the subject of a forensic evaluation are not able to remember their life histories completely, will remember events inaccurately, and will omit critical facts such as occurrences of head trauma. Certain important areas of information, such as prenatal history, whether their mother drank or took drugs during the pregnancy, early developmental issues, injuries, illness, exposure to environmental toxins, and genetic predispositions to illnesses, are not likely known by the defendant. Only through thorough gathering of records, repeated interviews with people who had contact with the client throughout his life, and the analysis of all this information can a complete life history be developed.

Supplementary Guidelines, 36 HOFSTRA L. REV. at 691-92. It is vital that the interviewer conduct these interviews in person, face-to-face, and one-on-one, and that multiple interviews be conducted to establish trust and rapport in order to elicit sensitive information. *Id*. at 689.

As the mitigation investigation develops, "red flags" will become apparent; *i.e*., indications that a particular mitigating circumstance or theme may be present in the defendant's life history. When counsel discovers a red flag, it cannot be ignored, as to do so would be to "abandon the [] investigation at an unreasonable juncture." *Wiggins*, 539 U.S. at 527-28 (2003).

The development of the mitigation investigation, including the identification of and subsequent follow-up on "red flags", is dependent on both the life history records and interviews of witnesses. These two parts function together in order to produce a reliable life history narrative. For example, records from a client's visit to the emergency room might be evidence of physical maltreatment by a parent or care taker, and may establish relevant dates and identify potential witnesses. The authors of reports and documents are themselves potential mitigation witnesses unknown to the client and the family. Alternatively, a family member recalling that the client or his family received services from a community organization when the client was young may aid counsel in finding records that would have otherwise not been known to exist, and which will offer third-party and contemporaneously recorded insight into what life was like for the client at a very young age. In this way, the investigation necessarily expands as new information is learned, because "[e]ach record obtained will refer to other records and reports which must be obtained, and individuals who must be located and interviewed. . ." Lee Norton, *Capital Cases: Mitigation Investigations*, The Champion (May 1992) at 45. This cyclical investigation is also important because it leads to confirmation from multiple sources—both objective records and corroborating witnesses who can testify—producing a persuasive mitigation case that can withstand adversarial testing. Thus, mitigation investigations develop in stages, as explained in this example:

> [R]ecords indicating that the client's mother drank alcohol during her early teenage years would lead the mitigation specialist to

> question the mother, her family, and friends regarding her history of alcohol use, particularly whether she drank during pregnancy. To test and corroborate the responses, the mitigation specialist would gather the mother's school records, medical records, especially pre-natal and post-natal health care records, all mental health and substance abuse treatment records, the client's birth records, pediatric records (which may reflect slow growth and development of the client during childhood), school records (which may indicate social and academic problems as well as psychological evaluations), and social service or child protection agency records (which may contain references to the mother's drinking). Additional interviews would follow, focusing on family members, neighbors, coworkers, caregivers of the mother and the client who might have information about the mother's use of alcohol during pregnancy and the effects this had on the client. All of this information might give rise to a theory that the client suffers from Fetal Alcohol Syndrome, which, in turn, would lead to further evaluation by an appropriate mental health expert. All these steps are absolutely necessary for an accurate and reliable diagnosis by the expert evaluator.

Richard Dudley, Jr. and Pamela Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 973 (2008) [hereinafter "Getting it Right"].

Unsurprisingly, this process takes time, especially because many witnesses must be interviewed multiple times even after rapport has been established:

> It is insufficient to talk to witnesses only once because each new individual recalls different facts and anecdotes; if an aunt provides an account of a head injury which the mother forgot to mention, it is necessary to go back to the mother and ask about it. Similarly, an interview may reveal records that must be obtained which in turn raise new questions, questions which necessitate interviewing several witnesses again.

Id.

Adding to the complexity, it has long been recognized that a competent mitigation investigation must include the family history **going back at least three generations,** and must document genetic history, patterns, and effects of familial medical conditions. *See Supplementary Guidelines*, 36 HOFSTRA L. REV. at 691; *see also* ABA Guidelines, 31 HOFSTRA L. REV. at 1025 n.216. Because it is well-established that many major psychotic illnesses have strong genetic components, the existence of mental illnesses or related conditions in the family tree is vital

information for mental health experts evaluating the client, and the absence of such can lead to incorrect diagnoses. *See* ABA Guidelines, 31 HOFSTRA L. REV. at 1025; *see also* Daniel J. Wattendorf & Donald W. Hadley, *Family History: The Three-Generation Pedigree*, 72 AM. FAM. PHYSICIAN 441, 447 (2005); *Rompilla*, 545 U.S. at 392-93 (finding constitutional error after three mental health experts erroneously concluded there was nothing helpful to the defendant's case, but a background social history would have alerted them to organic brain damage, extreme mental disturbance, and fetal alcohol syndrome). The ABA Guidelines are clear that this exhaustive investigation is constitutionally required, despite the fact that it is a time-consuming and expensive undertaking:

> A multi-generational investigation extending as far as possible vertically and horizontally frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment. The collection of corroborating information from multiple sources—**a time-consuming task**—is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence.

ABA Guidelines, 31 HOFSTRA L. REV. at 1025 (emphasis added).

2. A Full Investigation Is Likely to Lead to Discovery of Numerous Mitigating Factors that Would Not Be Readily Apparent from a Cursory Investigation.

Records, interviews, and other psychosocial research collected during the mitigation investigation process may reveal the following types of information, all of which has been considered mitigating in the modern era of capital punishment:

a. Fetal and birth trauma, including prenatal malnutrition, prenatal exposure to alcohol, drugs and toxins, maternal medical conditions, such as diabetes, liver and thyroid problems and toxemia, and complications of delivery, such as anoxia;

b. Problems in early physical, emotional, mental and social development;

c. Physical illnesses and impairments, such as chronic infections, high fevers that compromise organic function, traumatic injuries,

infectious diseases, nutritional deficiencies and/or imbalances, inadequate medical attention;

d. Evidence of early or adolescent signs of mental illness or deficiencies, including mental retardation, pervasive developmental disorders and major mental illnesses, such as major depression, schizophrenia and bipolar disorder; evidence of the onset and course of childhood, adolescent or adult mental illnesses; interventions prescribed and/or obtained; and subtle signs of disturbance, including self-medication;

e. Educational history, including when and where the client attended school; how many times the client changed schools; patterns of tardiness and absences; indications of learning disorders, such as low performance, low intelligence and/or performance testing; special education referrals and/or programs; individualized educational plans; referrals for psychological and/or psychiatric evaluations;

f. Patterns of social behavior, including acting out in anxiety and/or tendencies toward isolation; changes in mood and behavior; problems with hygiene and incontinence; self-destructive behaviors; impulse control problems; low self-esteem; poor verbal skills; unusual fears and phobias;

g. The history, nature and extent of psychological, physical, and sexual abuse, including molestation and rape, premature exposure to sexual behaviors, isolation, degradation, rejection, abandonment, shunning, terrorization, and exposure to criminal activities; failure to help the child develop age-appropriate skills and competencies; failure to provide appropriate evaluations and treatment; destruction of treasured objects or ideals; prevention and/or destruction of important nurturing relationships; emotional and financial exploitation; exposure to consistently high levels of stimuli and anxiety; failure to soothe the child and teach the child to self soothe;

h. A history and course of self-medicating behaviors and subsequent drug and alcohol dependence, including the presence of traumatic experiences, exposure to older individuals who introduced and/or encouraged the child to use drugs and alcohol; patterns of self-medication to regulate undiagnosed mental illnesses, such as paranoia and hallucinations; information regarding all treatment facilities, diagnoses offered, interventions prescribed, the degree of support of family members and others; a history of overdoses and suicide attempts;

i. The nature of relationships with parents, nuclear family and extended family, including whether or not a client knew both parents, whether she later learned someone that she thought was a biological parent was in fact not, or whether the client's true heritage

was learned in the course of the investigation; the degree of consistency and support provided by caring adults in the home; whether parents or caretakers were physically or mentally impaired and the effects of these conditions on the child's development; traumatic losses through death, divorce, incarcerations or other disruptions involving important caretakers;

j. Residential history, including housing projects, foster homes, juvenile settings, patterns of evictions, institutional settings and community violence;

k. Presence or absence of social and community support systems, including social groups such as Boy/Girl Scouts, little league, summer camp and/or vacations, religious and/or spiritual activities, extended family relationships, neighborhood associations, and access to medical, psychological, legal and law enforcement assistance;

l. Nature and extent of poverty, including substandard living conditions, presence and quantity of environmental toxins, lack of proper nutrition, medical and dental care, inadequate heat and air conditioning, overcrowding, inadequate clothing and other basic needs, and infestations of rodents and insects;

m. The number and nature of traumatic events, including the death, illness or injury of loved ones or important caretakers, being a victim or witness of violence, loss of home and/or possessions, acute or prolonged illnesses and/or hospitalizations, experience of accidents or natural disasters;

n. Employment history, including childhood jobs and/or quitting school to help support the family, patterns of job skills and/or lack of skills, job-related injuries and/or illnesses, traumatic loss of employment, and exposure to toxins;

o. Juvenile and adult criminal history, including the influence of co-defendants, experiences with law enforcement, juvenile detention centers, courts, parole and probation offices, prisons and work release programs, rapes and assaults during incarceration; adequacy of care while institutionalized, including violence, gang tensions, overcrowding, lack of appropriate educational, vocational and recreational activities, diagnoses and medications provided while incarcerated, and/or failure by institutions to provide adequate mental and physical care and/or medication;

p. Military history, including the location and nature of combat experiences, illnesses and accidents, evaluations, interventions and medications prescribed, nature of job assignments, special commendations, promotions and training, Article 15s and other disciplinary actions, patterns of alcohol and drug abuse, any

indications of untreated mental illness including traumatic stress reactions;

q. Patterns of all significant relationships and any indications of attachment disorders, continuity and quality of relationships with family, friends, spouses, co-workers, military cohort, effects of loss or perceived loss of these relationships on the client's mood and judgment; and

r. Physical and mental health, substance abuse, social, education and employment histories of parents, caretakers, siblings, and other significant individuals.

Declaration of Elizabeth Vartkessian, Ph.D., *United States v. Chukwudi Ofomata*, Case 2:17-cr-00201 (filed 11/09/2018).[4]

3. Mere Identification of Mitigating Information Is Not the Conclusion of the Investigation.

Though it requires many hundreds or thousands of hours to complete the interviews and records collection in a constitutionally adequate manner, the mere identification of mitigation themes, such as those listed above, is not the conclusion of the investigation. Counsel must then analyze each theme in accordance with available empirical and social science, usually with the help of experts, and must decipher how each mitigating theme played a role in the client's life.

For example, childhood poverty is a common mitigating theme in capital cases. Simply knowing that a client's family was very poor is insufficient. Social science has extensively documented how poverty can snowball into other major problems, such as increased likelihood of physical and psychological abuse; antisocial behaviors; long-lasting psychological effects such as depression, poor impulse control, and high levels of dependency; increased likelihood of diagnosable psychiatric conditions; increased likelihood of trauma, which can result in serious long-term consequences both physically and psychologically; parental abandonment or neglect; increased exposure to environmental toxins and pollutants; dangerous living conditions; poor

[4] Dr. Vartkessian is the founder and director of Advancing Real Change, Inc., a non-profit organization that conducts capital mitigation investigations nationally.

quality schools, and so on. *See* Craig Haney, *Supplementary Guidelines For The Mitigation Function Of Defense Teams In Death Penalty Cases, Imagining Mitigation: Evolving Standards Of Decency,* 36 HOFSTRA L. REV. 835, 864-875 (2008); *see also* Scharlette Holdman, *The Nature and Role of Mitigation Evidence in Capital Cases*, Report for the Center for Capital Assistance (2002) at 5 (explaining many negative outcomes of extreme poverty, including that it has medical consequences, such as brain damage, and psychiatric implications).

It is incumbent on the defense team, therefore, to investigate beyond the mere surface-level identification of mitigation factors. The contextualization and integration of mitigating life history information is an essential part of the capital sentencing decision, because jurors ultimately are looking for an answer to the question "why?".[5] For example,

> The long-term consequences of poverty can be empirically documented . . . That documentation can serve as the solid, factual, scientific basis for the penalty-phase contention that childhood poverty—**over which virtually no capital defendant has had any control—helped to shape his life course, drastically limited his available choices, and contributed directly to the criminal behavior and lifestyle in which he engaged**. And it also is usually possible to identify with some precision the various factors that help to explain why some people's lives are more profoundly affected by poverty than others.

See Haney, 36 HOFSTRA L. REV. at 865.

In sum, compiling a life history is not merely a checklist of tasks. It is a complex and rich endeavor that focuses on a person's identity, and goes to the heart of the human experience:

> Compiling a life history includes understanding the broader environment that affects the client and this requires gathering records and asking questions regarding **culture, class, race and ethnicity, national origin, gender identity, sexuality, spirituality, and other factors that affect the client's individual identity and group allegiances**. This is not a tangential inquiry. Rather, **how a person perceives himself and his place in the world affects his motivation and understanding of his own conduct, status, interpersonal relationships, safety, honor, and obligations.**

[5] Of course, a sentencing phase only occurs if the jury has already found the defendant guilty of capital murder beyond a reasonable doubt in the merits phase. Counsel does not suggest that conviction is a foregone conclusion of this trial.

> **Identity profoundly affects how medical and mental illnesses are described and experienced by an individual and his community**. It is necessary to understand what the client, his family, and his community considers behavioral norms in order to accurately interpret data that is gathered through observation, records, and interviews**. How others perceive an individual and his place in the world adds an additional layer of complexity to understanding the nature and magnitude of psychosocial stressors he encounters.** The failure of mental health systems to accommodate cultural needs and responses helps explain why many capital clients have medical and mental conditions that were not identified prior to their arrest.

Getting It Right, 36 Hofstra L. Rev. at 967. Without this information, properly investigated and contextualized, it is impossible that a jury will be able to conduct an "individualized sentencing" of the defendant and his circumstances that the Eighth Amendment requires.

D. The Alleged Aggravating Circumstances of this Crime Heighten Counsel's Obligation to Conduct a Full and Complete Investigation and Prepare a Presentation that can Withstand Adversarial Testing.

It should be noted that an integrated, comprehensive life history is not a luxury to be afforded to only some capital defendants, nor is it offered as an "excuse" that stands no chance in the face of an aggravated crime. Rather, it is a vehicle that confronts and challenges the stereotypes of the "natural born killer," offering instead "an examination of the structure of the lives of those who commit [capital violence]." Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 559 (1995). The U.S. Supreme Court has recognized this as a fundamental and mandatory part of the capital punishment system:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty.

Woodson, 42 U.S. at 303.

Moreover, there are many examples of capital cases in which the presentation of a comprehensive life history and mitigating circumstances overcame aggravated crimes, including cases with multiple victims. Indeed, **juries have rejected the death penalty in at least 400 cases involving multiple victims**, demonstrating that the outcome of this case, even in the event of conviction, is anything but a foregone conclusion. *See* Russell Stetler, Maria McLaughlin, & Dana Cook, *Mitigation Works: Empirical Evidence of Highly Aggravated Cases Where the Death Penalty Was Rejected at Sentencing*, 51 HOFSTRA L. REV. 89, 149-206 (2021) (listing more than 400 cases in which juries rejected the death penalty in highly aggravated cases with multiple victims).

For example, Ricky Abeyta killed a state police officer, a sheriff's deputy, his ex-girlfriend along with her 18-year-old daughter and adult sister, another teenager, and a 6-month-old baby in a small New Mexico town of 2,500 residents; a jury sentenced him to life after deliberating for 11 days. *Id.* at 150; Lou Mattei, "Looking Back at the Chimayó Massacre," SUN News (Jan. 27, 2011).[6] Jason Burkett and a co-defendant killed three people, including a 16- and 18-year old, in two separate episodes; a Texas jury sentenced him to life. *Id.* at 155. Andre Cooper was a gang leader convicted of killing four people, including eliminating a witness against him; a Pennsylvania jury rejected the death penalty. *Id.* at 159. The list goes on.

A death sentence is not a guaranteed outcome upon conviction of an aggravated capital murder case. And in a case where the allegations are sensational in nature and have been the subject of intense media and public scrutiny, *see* Part V, *infra*, a comprehensive and accurate life history presentation is even more crucial to the constitutional imperative of an individualized sentencing

[6] Available at https://www.riograndesun.com/news/looking-back-at-the-chimay-massacre/article_87123eb5-c507-5273-9a76-6d99893d0ba4.html.

determination, to ensure the aggravated nature of the crime and the public outcry does not overcome the jury's ability to weigh both options.

Thus, capital defense teams have a complex and time-consuming job in identifying and interviewing life history witnesses, collecting numerous life history records from the client and his family, and then analyzing and contextualizing all of the information into a cohesive narrative for the jury, should the case proceed to a sentencing phase. And as discussed in the following section, it is only *after* the mitigation investigation nears completion that counsel can identify all of the behavioral, cultural, scientific, and mental health experts that may be necessary to develop the mitigation presentation and allow for individualized sentencing as required by the U.S. Constitution.

E. Counsel Cannot Identify All Necessary Experts Without Completing the Comprehensive Life History Investigation.

In addition to frequently complex merits-phase issues that are likely to require expert assistance, adequate investigation into sentencing-phase issues almost always requires the assistance of multiple experts. In particular, the defendant's mental health and cognitive functioning throughout life—as well as that of his family and caretakers—is essential information during the sentencing phase and also often pertains to merits phase issues. ABA Guidelines, 31 HOFSTRA L. REV. at 956 (emphasis added) (explaining that neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common amongst persons on death row, and how this can impact several aspects of the case other than sentencing).

Like other mitigating circumstances, merely identifying mental health diagnoses is insufficient to tell the client's story. "[U]nderstanding *how* mental disorders, impairments, and trauma affect a client's *childhood, adolescent, and adult functioning* are core responsibilities of the capital defense function." Russell Stetler, *Mental Health Evidence and the Capital Defense Function: Prevailing Norms*, 82 UMKC L. REV. 407, 407 (2014) (emphasis added).

Reliable mental health assessments depend on extensive life history information, including information about family and genetic histories:

> Because psychiatrically disordered or cognitively impaired individuals are by definition likely to be poor historians, a reliable evaluation requires historical data from sources independent of the client (for clinical reasons, although the point has additional significance in forensic applications). Additional components of a reliable evaluation include a thorough physical examination (including neurological examination) and appropriate diagnostic testing. The standard mental status examination cannot be relied upon in isolation for reliable clinical assessments any more than an expert can be relied upon in isolation in the courtroom context.

Id. at 417 (noting further that a complete retrospective social history has been recognized as a vital tool for accurate diagnosis since at least the 1980s); *see also Getting It Right*, 36 HOFSTRA L. REV. at 974-75 ("As a general rule, it is never appropriate to expect a mental health expert to deliver a comprehensive mental health assessment of the client until the life history investigation is complete.").

Moreover, in addition to basing evaluations on reliable and complete life history information, experts must be selected on the basis of specific red flags in the client's history and each expert's speciality—they cannot be generalized forensic practitioners brought in to look for any variety of potential diagnoses. *See* ABA Guidelines, 31 HOFSTRA L. REV. at 1008 ("[C]ounsel should choose experts who are tailored specifically to the needs of the case, rather than relying on an 'all-purpose' expert who may have insufficient knowledge or experience to testify persuasively.").

Experts that may be necessary in a capital case come from a variety of specialities and may include medical doctors, psychologists, psychiatrists, neuropsychologists, neuropsychiatrists, endocrinologists, toxicologists, pharmacologists, and various Ph.Ds, such as Ph.Ds in childhood development or early childhood education. Within each of those professions there are a host of specialties that must be tailored to the case, such as childhood abandonment and neglect, complex trauma, intellectual disability, traumatic brain injuries, fetal alcohol syndrome, in-utero exposure

to substances, effects of specific drugs or substances in combination with existing disorders or mental illness, and so on. *See, e.g.,* Supplementary Guidelines, 36 HOFSTRA L. REV. at 690 (describing types of expert witnesses that may be necessary); *Getting it Right*, 36 HOFSTRA L. REV. at 979 (explaining that multi-disciplinary expert teams are often necessary and listing examples).

In light of the fact that experts with different specialities will be necessary for each case, decades of caselaw confirms that "[i]t is simply ineffective assistance for counsel to permit a mental health assessment of the client to occur before having made a reasoned decision about the purpose of the examination and having provided the examiner with the data necessary to reach a professionally competent conclusion respecting the question presented." Stetler, 82 UMKC L. REV. at 420.

Experts are often essential to telling the client's story in a way that answers the all-important "why" question, *see* Section III.D., *supra*, and connecting the client's life circumstances to the commission of the crime:

> A deeper understanding of the subject is rendered through a psychodynamic formulation, which takes into account influences in a subject's life that contributed to his mental state, considers how environmental and personality factors are relevant to analyzing the subject's symptoms, and considers how all these influences interacted with the person's genetic, temperamental, and biological makeup. For example, using attachment theory, a commonly accepted theory of human behavior, a mental health expert might describe the long-term consequences of being raised by a parent who was psychologically and emotionally unavailable to the defendant as a result of the parent's severe depression or drug addiction. A mental health expert might also employ research on the impact of various factors on human growth and development to explain how certain traumatic injuries to the defendant's brain, or exposure to certain chemical toxins, or certain chronic medical conditions resulted in cognitive deficits or behavioral difficulties. In another case, a mental health expert might use research that has clearly demonstrated the effects of a particular drug of abuse on human behavior to explain the behavior of a defendant who was addicted to the drug, or had ingested large quantities of the drug, or both. Conversely, a mental health expert might explain how a defendant's inability to comply with a prescribed medication regimen resulted in a recurrence of the hallucinations, delusions and/or other thought process difficulties that led to his criminal behavior.

Getting It Right, 36 HOFSTRA L. REV. at 983.

There are numerous examples of capital case reversals because counsel failed to complete the social history investigation, even when competent experts have been hired, because the evaluations resulted in inaccurate and/or incomplete information presented to the sentencer. *See, e.g., Caro v. Calderon*, 165 F.3d 1223, 1226-27 (9th Cir. 1999) (holding counsel ineffective where they "consulted four experts, including a medical doctor, a psychologist, and a psychiatrist, [but] failed to consult a neurologist or toxicologist who could have explained neurological effects of defendant's exposure to pesticides"); *Jacobs v. Horn*, 395 F.3d 92 (3d Cir. 2005) (overturning conviction and death sentence because counsel was ineffective for failing to provide the hired mental health expert with a social history, "necessary information to conduct a proper evaluation," and the expert erroneously concluded that defendant suffered no major mental illness, when in fact defendant suffered from "mild mental retardation, organic brain damage, and schizoid personality disorder;" conviction reversed because this information would have also been relevant to a diminished capacity defense); *Jells v. Mitchell*, 538 F.3d 478 (6th Cir. 2008) (finding counsel ineffective for failing to investigate the defendant's social history and to provide the mental health expert with "personal history records—records that would have been collected had they used a mitigation specialist—that were necessary for the evaluation"); *Haliym v. Mitchell*, 492 F.3d 680 (6th Cir. 2007) (finding counsel ineffective in 1987 trial for failing to investigate defendant's social history, and failing to provide expert psychiatrist with such information; expert erroneously concluded that defendant had a diagnosis of "adjustment disorder with depressed moods" and was malingering, when in fact he had a brain injury); *Commonwealth v. Collins*, 888 A.2d 564 (Pa. 2005) (finding counsel ineffective in several ways in sentencing phase of 1991 trial, including by failure to provide defense psychiatrist with relevant social history information; counsel should have found information indicating that client suffered a head injury, and the expert would have recommended neurological and neuropsychological testing).

Therefore, the investigation into the individual's life history must be completed before counsel can know the full spectrum of necessary experts for the penalty phase. This is essential because the accuracy of the evaluation relies on precise background information, and counsel must identify the appropriate type of expert to engage. *See Getting it Right*, 36 Hofstra L. Rev. at 980-87 (explaining the forensic mental health evaluation process). Forensic neuropsychologist George Woods emphasizes that the accuracy of a diagnosis is contingent on the social history, and cognitive deficits are likely to be overlooked if a comprehensive social history is not complete. This is because "**cognitive deficits often present as a series of defective links in an action, particularly in new, novel or stressful circumstances, rather than discrete symptoms, like hallucinations or delusions**." *See* George Woods*, Neurobehavioral Assessment In Forensic Practice*, Int'l J. L. & Psych. at 2 (2012) (explaining how a comprehensive social history connects a person's deficits to their behavior in ways that testing and a diagnosis alone cannot). This information cannot be obtained solely through a face-to-face evaluation in a jail setting.

The ABA Guidelines highlight the complexity of this process and acknowledge that "[c]reating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a **time-consuming and expensive process**." ABA Guidelines, 31 Hofstra L. Rev. at 956 (emphasis added).

IV. Counsel Requires Additional Time to Fulfill the Minimum Requirements Described Above.

A. Counsel Cannot Review All of the Relevant Discovery and Complete the Necessary Investigations Prior to Trial.

As counsel explained in recent filings and in oral argument—which are hereby incorporated in full for brevity's sake—it is impossible for the defense team to review the necessary and relevant discovery in a manner that allows the evidence to be integrated into the comprehensive defense case, to pursue all necessary investigations arising from review of the discovery, including into alternative perpetrators, and to address the myriad issues that continue to

arise from the State's failure to fully abide by this Court's discovery and expert disclosure deadlines. Counsel requested that this Court alleviate these problems by precluding the death penalty as a possibility, freeing up counsel's time to focus only on the merits phase preparation and removing the heightened standard of reliability that governs death penalty proceedings. Because the Court denied that motion,[7] counsel is obligated to seek a continuance to continue reviewing discovery, complete investigations relating to the merits phase—including into alternative perpetrators—and complete investigations into "red flags" that have arisen in the life history investigation.

Courts have recognized that the prosecution has an advantage in investigation and discovery issues because of the resources at their disposal, and this is particularly true here, where the prosecution has had the assistance of the federal government. As the Sixth Circuit has explained,

> The Supreme Court's rejection of the idea that the "prisoner still has the burden to discover the evidence" is based in part on the fact that the **prosecution has the advantage of a large staff of investigators, prosecutors and grand jurors, as well as new technology such as wiretaps of cell phones.** That is one of the reasons that these investigators must assist the defendant who normally lacks this assistance and may wrongfully lose his liberty for years if the information they uncover remains undisclosed. **The superior prosecutorial investigatory apparatus must turn over exculpatory information.** The *Brady* rule imposes an independent duty to act on the government, like the duty to notify the defendant of the charges against him.

United States v. Tavera, 719 F.3d 705, 712 (6th Cir. 2013). The prosecution has not provided defense counsel with a list of potentially exculpatory or impeaching evidence within the vast tranches of discovery in this case, and the Court declined to order them to do so. During oral argument on that motion, the Court identified a practical problem with relying on prosecutors to identify and list all exculpatory and impeaching information: prosecutors are advocates of their

[7] *See* Order on Defendant's Motion to Strike Death Penalty and Adopt Other Necessary Procedures (April 29, 2025).

side, and see the case through the lens of trying to secure a conviction. Thus, what may appear exculpatory to a defense attorney—or lead to the discovery of exculpatory evidence through additional investigation—may appear only tangentially relevant to a prosecutor. Given the heightened standards of due process afforded to a capitally accused defendant, it is imperative that counsel has time to review the relevant discovery and conduct any necessary follow-up investigations.

Cutting off this review before counsel can complete it would significantly prejudice Mr. Kohberger. The State's case is circumstantial. Mr. Kohberger was not identified as a person of interest until weeks after the crime, and after he was identified, law enforcement ceased investigating all other possibilities. While counsel can explain this in trial, every experienced trial lawyer knows that trials are essentially "story battles"—high-stakes duels where the prosecution and defense each tell competing narratives about the same set of events. Ultimately, the jury decides which story feels more true and more coherent. Even though the burden of proof rests with the prosecution, and the defense bears no burden at all, humans are driven by narratives; that reality forces the defense to counteract the State's narrative with another compelling story. *See, e.g.,* David Schwartz and Chelsey Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 Wis. L. Rev 337, 341-42 (summarizing other scholars). As scholars explain, "[w]here the central issue is the identify of the perpetrator, even a reasonable doubt case implies a story that someone else did it. But it is a story with a huge hole, and one likely to be ineffective. The jury might speculate that, if this defendant did not do it, there should be at least some evidence suggesting that someone else did." *Id*. at 342. And it is especially incumbent on counsel to become aware of all existing evidence, because alternate perpetrator evidence may be deemed inadmissible under Idaho law if it "merely tends to mislead the jury that another person committed the crime." *State v. Meister*, 148 Idaho 236, 241 (2009).

Thus, defense counsel's review of the discovery is not merely checking a box—it goes to the very heart of the ability to prepare and present a defense. Reviewing and integrating all of the evidence in order to tell the jury a coherent counternarrative is essential to defending Mr. Kohberger's life. The State and its "superior investigatory apparatus," *Tavera, supra*, has spent years honing in on one specific story—that of Mr. Kohberger's guilt—and ignoring all other possibilities. Defense counsel has a bigger job in not only reviewing their case for guilt, but figuring out what the State missed, and exploring other alternative possibilities. The inability to review the discovery and incorporate all of the information into a cohesive defense prior to trial would nearly guarantee that counsel cannot mount an effective defense on Mr. Kohberger's behalf. Because his life is on the line and due process must be given its highest regard, this Court should grant counsel the time necessary to ensure a fair trial.

B. The Life History Investigation is Ongoing and Requires Additional Time and Expert Assistance.

As more fully discussed in the *ex parte* supplement to this Motion,[8] the life history investigation remains ongoing. Counsel is reviewing and digesting significant new records that have been received in the past couple of months; addressing ongoing barriers to receiving important life history records; and continuing to build rapport with several key life history witnesses. As explained in the accompanying *ex parte* filing, the investigation to date has revealed "red flags" for a number of mitigating themes and issues, and counsel must fully investigate these avenues before making strategic decisions related to sentencing.

As discussed in Section III.E., only after a more thorough life history investigation will counsel know the range of experts that will be necessary to contextualize Mr. Kohberger's life story.

[8] Mr. Kohberger is entitled to maintain the confidentiality of the defense team's ongoing investigation.

V. A Continuance is Also Necessary to Investigate and Remedy the Prejudice of Highly Inflammatory Publicity Released just Weeks Before the Current Trial Date, Including the Recent Dateline NBC Special and a Forthcoming Book.

This case has garnered substantial public interest, and the Court previously issued a non-dissemination order restricting the release of certain information to the public in order to preserve the integrity of the proceedings and safeguard Mr. Kohberger's right to a fair trial.

On May 9, 2025, just weeks before this capital trial is set to begin, Dateline NBC aired a two-hour episode about this case titled "The Terrible Night on King Road." The program includes details and materials, including video footage, cell phone records, and photographs of documents, that are not publicly available through official channels. The show repeatedly emphasizes the non-public nature of this information, stating it was obtained from unnamed sources who are close to the investigation, and that the materials were obtained exclusively by Dateline. Much of the "investigative" material presented by Dateline was taken out of context and will not be admissible at trial because it lacks reliability.

The leaked materials appear carefully curated to promote a narrative of guilt. As this Court acknowledged in its May 15, 2025, Document and Records Hold Order, the source of the leak is most likely someone currently or formerly associated with law enforcement or the prosecution team. If that is the case, it raises urgent and serious questions about the objectivity, judgment, and credibility of the individuals tasked with investigating and presenting the State's evidence—particularly those who may be called as witnesses. The identity of those involved, their motives, and any efforts to conceal their conduct go directly to the heart of witness credibility and the integrity of the State's case.

The apparent leak is not only an egregious violation of the Court's non-dissemination order; it enabled Dateline to gild rampant speculation with a veneer of credibility. When purportedly "exclusive" information surfaces through a media broadcast shortly before trial—particularly information attributed to unnamed sources with access to the investigation—it carries a heightened

aura of credibility and secrecy that can deeply influence public perception. Unlike official disclosures, which are typically accompanied by context and procedural safeguards, leaks framed as exclusives are perceived as uncensored truths that the public was not meant to see. This "insider" framing enhances the material's persuasive power, suggesting that it is both authentic and revealing of the case's hidden realities.

The episode includes things such as:

- Repeated speculative assertions regarding the assailant's motives, including unfounded allegations of sexual motivation.
- Dramatic reenactments and animations depicting the alleged crime, created by the show's producers without basis in the evidentiary record.
- Emotional interviews with individuals connected to the alleged victims, accompanied by evocative music, photos, and videos designed to elicit strong emotional responses.

The broadcast repeatedly bolstered its speculative claims through the use of so-called expert commentary, including individuals identified as law enforcement professionals and academics. These commentators were permitted to make sweeping assertions about the defendant's alleged motives, psychological state, and personal history—none of which are grounded in evidence before the Court—while the program repeatedly emphasized their "training," "research," and "years of experience" to lend undue credibility to their conjecture. This type of testimonial mimicry improperly mirrors expert witness testimony in a trial setting without the safeguard of cross-examination or evidentiary standards, effectively presenting the public with a one-sided, unvetted narrative that shapes juror perception before any admissible evidence has been presented.

While the program occasionally inserts disclaimers such as "we don't know what happened," these brief caveats do little to mitigate the cumulative impact of an extended narrative constructed through selective imagery, emotionally charged reenactments, and detailed speculative

descriptions of the crime. When viewers are presented with a cohesive, visually reinforced sequence of events—especially when paired with commentary from individuals styled as experts—the overall presentation fosters a sense of authenticity and truthfulness that is difficult for viewers to disregard. An occasional, passing verbal disclaimer functions more as a legal formality than a meaningful check on prejudicial perception, and most viewers will leave with the impression that they have seen a reliable reconstruction of events.

The Dateline special, which aired just weeks before the trial date, will not even be the last pretrial media "bombshell." Best-selling crime author James Patterson has written a book about the murders titled, "The Idaho Four: An American Tragedy," scheduled for release on July 14, 2025—just **sixteen days** before jury selection is slated to begin. AMAZON, https://www.amazon.com/Idaho-Four-American-Tragedy/dp/0316572853 (last visited March 16, 2025). The blurb for the book describes Mr. Kohberger as a "brilliant grad student, loner, apparent incel," and explicitly tells the reader: "Now you are the jury. The evidence is in." *Id.* The publisher boasts of "unmatched access" to the investigation, including interviews with "local law enforcement." *Id.* This suggests that the apparent Dateline leak was not the only violation of this Court's non-dissemination order.

The Sixth and Fourteenth Amendments guarantee the right to a fair trial by an impartial jury. A continuance is necessary to fully investigate the leaks and to mitigate the prejudicial effects of such inflammatory pretrial publicity occurring so close to the current trial date.

In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Supreme Court held that a defendant was denied a fair trial due to "massive, pervasive and prejudicial publicity" that the trial court failed to mitigate. The Court emphasized the trial judge's responsibility to ensure that the defendant receives a fair trial, free from the influence of prejudicial media coverage. The Court explicitly noted that a continuance may be required to protect the defendant's rights. *Id.* at 363 ("But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should

continue the case until the threat abates or transfer it to another county not so permeated with publicity.").

The Supreme Court has likewise recognized that the passage of time can significantly reduce the taint of media exposure, holding in *Patton v. Yount* that even in a case involving extensive coverage of a confession, the delay between media saturation and trial reduced its prejudicial impact. 467 U.S. 1025, 1033–35 (1984). *See also Beck v. Washington*, 369 U.S. 541, 556 (1962) (pretrial publicity did not impair juror impartiality where, by the time of trial, "[t]he news value of the original 'disclosures' was diminished, and the [newspaper] items were often relegated to the inner pages"). The Court has recognized that while "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial . . . [t]he trial judge has a major responsibility . . . [T]he measures a judge takes or fails to take to mitigate the effects of pretrial publicity [] may well determine whether the defendant receives a trial consistent with the requirements of due process." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554-55 (1976). The timing of the trial is a key factor in ensuring juror impartiality, as emotional intensity and memory of prejudicial material tend to fade over time.

Social science research supports this position. A comprehensive meta-analysis found that pretrial publicity significantly increases the likelihood of conviction, but that the effect is diminished when there is a temporal delay between media exposure and trial. Lori A. Hoetger et. al., *The Impact of Pretrial Publicity on Mock Juror and Jury Verdicts: A Meta-Analysis*, 46 Law & Hum. Behav. 121, 133 (2022).

In sum, the two-hour Dateline episode is uniquely prejudicial in both tone and content: it constructs a speculative narrative around motive and guilt, features emotionally manipulative production elements, and amplifies unsupported theories through self-styled "expert" commentary — all timed to air just weeks before trial, when juror impressions are most vulnerable and voir dire least equipped to neutralize such deep-seated bias. The forthcoming book by James Patterson,

which will arrive in the hands of potential jurors just two weeks before voir dire begins, promises to set off a new round of inflammatory, negative coverage and to deepen the pervasive bias against Mr. Kohberger on the eve of trial. The Court has already acknowledged that the Dateline special exposes a likely violation of the non-dissemination order, and Mr. Patterson's purported "unmatched access" to sources including "local law enforcement" suggests that multiple unauthorized disclosures have occurred. Depending on the results of the investigation into the leaks, a continuance may be inadequate. Once the source(s) of the leaks are identified and the full extent of misconduct revealed, the violations could warrant remedies more serious than delay. At the very least, however, a continuance is essential to allow the extremely prejudicial impact to partially subside, and to give the Court and the defense time to fully investigate and address the scope of the violations. Only then can the conditions necessary for selecting an impartial jury and ensuring a fair trial under the Sixth and Fourteenth Amendments be meaningfully restored.

VI. Reversal is More Likely Than Not in Any Case Resulting in a Death Sentence.

Statistically, almost two-thirds of death penalty cases are eventually overturned due to errors, often many years or even decades after the initial conviction.[9] A frequent cause is reversal on ineffectiveness grounds due to the lack of an exhaustive investigation and complete presentation to the sentencer.[10] Hundreds of cases could serve as examples, but for brevity, the following are

[9] In the only study of its kind, researchers conducted a comprehensive 23-year study, including 5,500 judicial decisions, reviewing outcomes of death sentences that had been fully reviewed through the appellate and post-conviction process and thus were final. Reversible error was found in 68 percent of the cases. *See* Columbia University News, *Landmark Study Finds Capital Punishment System Fraught with Error: Serious, Reversible Error Found in Nearly 7 out of 10 Capital Cases in 23 Year Period* (June 12, 2000), available at http://www.columbia.edu/cu/pr/00/06/lawStudy.html#footnote1.

[10] Federal habeas proceedings, which occur only after a conviction has been upheld in state appellate and post-conviction proceedings, account for at least 40 percent of reversals in death penalty cases. *See, e.g.*, Andrew Gelman, et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, J. of Empirical Legal Studies 209, 2013 (2005) (reviewing all state death sentences over more than a 20 year period and finding that 40 percent of reversals occurred in federal habeas proceedings, after multiple state courts had upheld the conviction and sentence); Howard Mintz, *Death Sentence Reversals Cast Doubt on System*,

examples from the United States Supreme Court and the Ninth Circuit—courts that will have jurisdiction over the review of this case in the event of a death sentence:[11]

- *Andrus v. Texas*, 590 U.S. ___ (June 15, 2020) (per curiam) (counsel provided deficient performance by "overlooking vast tranches of mitigating evidence" including the fact that his client suffered "very pronounced trauma" and suffered from "affective psychosis" by the time he was eleven years old and by failing to adequately investigate and rebut the State's case in aggravation; remanded to lower court to address prejudice prong of *Strickland*)
- *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam) (counsel provided ineffective assistance by failing to investigate mitigating evidence regarding defendant's mental capacity, family background, or military service)
- *Rompilla v. Beard*, 545 U.S. 374 (2005) (even when a capital defendant and his family members have said that no mitigating evidence is available, his lawyer is bound to conduct a social history investigation and adequately follow up on 'red flags'; hiring three well-reputed mental health experts without conducting the proper life history investigation still constituted ineffective assistance of counsel)
- *Wiggins v. Smith*, 539 U.S. 510 (2003) (counsel's failure to fully investigate Wiggins' background and present mitigating evidence of his "excruciating life history" violated his Sixth Amendment right to counsel)
- *Williams v. Taylor*, 529 U.S. 362 (2000) (counsel ineffective for failing to uncover and present evidence of defendant's "nightmarish childhood," borderline mental retardation, and good conduct in prison)
- *Bemore v. Chappell*, 788 F.3d 1151 (9th Cir. 2015) (defendant prejudiced by counsel's failure to further investigate mental health evidence after initial evaluation suggested further testing, choosing instead to go with "good guy with a drug problem" defense in sentencing, which was not only incomplete but opened the door to harmful rebuttal evidence)
- *Doe v. Ayers*, 782 F.3d 425 (9th Cir. 2015) (defendant prejudiced by counsel's failure to investigate and present mitigating evidence including child abuse and neglect, mental illness including PTSD and depression that he self-medicated for, and that defendant was sexually abused while previously incarcerated)
- *Stankewitz v. Wong*, 698 F.3d 1163 (9th Cir. 2012) (counsel failed to conduct adequate mitigation investigation that would have uncovered a traumatic childhood of abuse and

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Mercury News (April 13, 2002) (study on California death sentences found that the state Supreme Court overturns 10 percent of capital cases, but the 9th Circuit overturns 62 percent of cases affirmed by the state Supreme Court, for a total reversal rate matching the national average, two out of three), available at https://deathpenaltyinfo.org/stories/death-sentence-reversals-cast-doubt-on-system.

[11] Cases resulting in the death penalty undergo a unique, extensive appellate and post-conviction process through both the state and federal courts, and this process generally last decades. It is not uncommon that cases are reversed 5, 10, or even 20 years into the future, resulting in both new trial or sentencing proceedings in the district court, and then beginning anew the appellate process.

neglect, a history of mental illness, and substance abuse combined with lack of sleep prior to the murder)

- *Libberton v. Ryan*, 583 F.3d 1147 (9th Cir. 2009) (counsel failed to adequately investigate and present mitigating evidence, including that the co-defendant instigated the crimes and Libberton was "merely a follower," and that he was seriously physically abused by his father and step-father growing up)
- *Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008) (counsel failed to adequately investigate and present mitigating and mental health evidence, which would have shown that the defendant endured an abusive childhood and was neglected, family history of incest, a serious head injury, and self-medication with drugs and alcohol from childhood)
- *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007) (counsel failed to adequately investigate and present in sentencing the mitigating evidence of defendant's trauma from serving in Vietnam, his long history of mental illness including suicide attempts and psychiatric hospitalizations, and his upbringing in an abusive, unstable family living in extreme poverty)
- *Frierson v. Woodford*, 463 F.3d 982 (9th Cir. 2006) (counsel failed to uncover and present mitigating evidence including extensive history of drug use, organic brain dysfunction, significant head injuries, an IQ of 71, and a learning disability)
- *Hovey v. Ayers*, 458 F.3d 892 (9th Cir. 2006) (counsel ineffective for failing to adequately prepare and present mental health evidence; though the hired psychiatrist testified that defendant had schizophrenia, he had not been provided with relevant social history documents which would have significantly bolstered the diagnosis under scrutiny by prosecutors, who portrayed the doctor as uninformed and not credible)
- *Summerlin v. Schriro*, 427 F.3d 623 (9th Cir. 2005) (counsel failed to investigate and present mitigating evidence of a tortured childhood, a diagnosis of paranoid schizophrenia, organic brain damage, and a temporal lobe seizure disorder, and also failed to investigate and rebut the state's evidence underlying the aggravating factors)
- *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005) (finding counsel ineffective and reversing the sentence due to counsel's failure to pursue further mental health experts, instead relying on a psychologist "who was not qualified to testify in a capital case," which resulted in counsel not pursuing viable mental health defenses at trial due to the lack of qualified experts)

Mr. Kohberger deserves a fair trial from the outset to prevent an arbitrary or wrongful conviction and potential death sentence. These cases underscore the critical importance of thorough investigation before trial. This diligence is essential to avoid the costly and time-consuming process of reversing a conviction and death sentence years or even decades later.

VII. A Continuance is Reasonable and Necessary under the Circumstances.

While there is no mechanical test for determining whether a continuance should be granted, a trial court cannot deny a continuance based on "a myopic insistence upon expeditiousness in the face of a justifiable request for delay." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). In determining whether denial of a continuance request resulted in a violation of due process, the reviewing court looks to the circumstances of the case, "particularly [] the reasons presented to the trial judge at the time the request [was] denied." *Id.* at 590.

This request is not made lightly. Defense counsel has worked around the clock actively preparing for trial since appointment to this case, filed all motions in a timely manner, complied with expert disclosure deadlines, and had expected to proceed on schedule. However, it has become clear that without additional time, the defense cannot complete review of the necessary discovery, meaningfully respond to all of the State's amended expert disclosures and incorporate the information into an effective defense, and finish critical sentencing phase investigations. While prompt administration of justice is important—to both the State and Mr. Kohberger—the constitutional guarantee of a fair trial outweighs modest delay. And, because the majority of cases ending in the death penalty are later overturned for error, the public interest lies in ensuring a fair trial in the first instance. A continuance will ensure that Mr. Kohberger's fundamental constitutional rights are honored, and that any verdict rendered rests on a fair and complete presentation of the facts, not on forced haste.

DATED this ___20____ day of May, 2025.

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 ___20____ day of May, 2025 addressed to:

Latah County Prosecuting Attorney –via Email: paservice@latahcountyid.gov
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