

Anne Taylor Law, PLLC
Anne C. Taylor, Attorney at Law
Bar Number: 5836
PO Box 2347
Coeur d'Alene, Idaho 83816
Phone: (208) 512-9611
iCourt Email: info@annetaylorlaw.com

Jay W. Logsdon, Interim Public Defender
Kootenai County Public Defender's Office
PO Box 9000
Coeur d'Alene, Idaho 83816
Phone: (208)446-1700

Elisa G. Massoth, PLLC
Attorney at Law
P.O. Box 1003
Payette, Idaho 83661
Phone: (208)642-3797; Fax: (208)642-3799

Assigned Attorney:

Anne C. Taylor, Public Defender, Bar Number: 5836
Jay W. Logsdon, Chief Deputy Public Defender, Bar Number: 8759
Elisa G. Massoth, Attorney at Law, Bar Number: 5647

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH**

STATE OF IDAHO

Plaintiff,

V.

BRYAN C. KOHBERGER,

Defendant.

CASE NUMBER CR29-22-0002805

**MOTION AND MEMORANDUM IN
SUPPORT OF MOTION TO
TRIFURCATE THE PROCEEDINGS
AND APPLY RULES OF EVIDENCE
DURING THE ELIGIBILITY PHASE**

COMES NOW, Bryan C. Kohberger, through his attorneys of record, and hereby submits the following Motion and Memorandum in Support of Motion to Trifurcate the Proceedings and to Apply the Rules of Evidence During Eligibility Phase. Proceeding with a bifurcated trial in

which non-statutory aggravation is presented without the Rules of Evidence being applied will result in a violation of Mr. Kohberger's State and federal Constitutional rights including the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 6 and 13 of the Idaho Constitution.

ARGUMENT

Idaho's death penalty scheme provides for two phases, one where the culpability of the accused is determined, and then, if they are found guilty, a sentencing phase, commonly called the penalty phase. Problematically, at the penalty phase, the jury must actually make two determinations. These two determinations are: 1) whether the defendant is eligible for the death penalty and, 2) what is the appropriate punishment. Under Idaho Code Section 19-2515(3)(b), a person is only eligible for the death penalty the jury "finds beyond a reasonable doubt at least one (1) statutory aggravating circumstance." If the jury determines that the defendant is eligible for the death penalty, then it must decide if it is the appropriate sentence. Where a statutory aggravator is found, "the defendant shall be sentenced to death unless mitigating circumstances which may be presented are found to be sufficiently compelling that the death penalty would be unjust." I.C. § 19-2515(3)(b). In order to sentence a defendant to death, both findings (eligibility and appropriateness) are required. "The jury shall not direct imposition of a sentence of death unless it unanimously finds at least one (1) statutory aggravating circumstance and unanimously determines that the penalty of death should be imposed." *Id.* Combining these two distinct determinations into one 'sentencing' proceeding violates a defendant's State and federal constitutional rights. This has become increasingly clearer in recent years given the Supreme Court's holdings in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which made clear that any

factor that increases the permissible punishment must be found by the jury beyond a reasonable doubt.

Under Idaho's death penalty scheme, there are very specific statutory aggravating factors that make a defendant eligible for the death penalty. I.C. § 19-2515(9). When determining eligibility, the jury must consider each statutory aggravator alleged and "return a special verdict stating: (i) Whether the statutory aggravating circumstance has been proven beyond a reasonable doubt[.]" I.C. § 19-2515(8)(a). It is the State's burden to present evidence supporting each alleged aggravator. The Idaho Supreme Court has consistently held that the same facts cannot support more than one aggravator because it presumes that the legislature did not intend to duplicate aggravating circumstances. *State v. Dunlap*, 155 Idaho 345, 365, 313 P.3d 1, 21 (Idaho 2013) (citing *State v. Fain*, 116 Idaho 82, 99, 774 P.2d 252, 269 (1989), overruled on other grounds by *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991); *State v. Osborn*, 102 Idaho 405, 418–19, 631 P.2d 187, 200–01 (1981). Therefore, trial courts must instruct jurors that they are required to find independent evidence to support each statutory aggravator alleged. *Id.*

Even though the State must present very specific independent evidence supporting each aggravator, Idaho's death penalty scheme allows the State to present general non-statutory aggravation evidence. *State v. Hall*, 163 Idaho 744, 797 (2018). Non-statutory aggravation evidence is aggravation that does not support any statutory aggravator. This evidence can only be considered by jury when determining whether the death penalty is the appropriate punishment, not when determining whether a statutory aggravator exists. "If the statutory aggravating circumstance has been proven beyond a reasonable doubt, [the jury then determines] whether all mitigating circumstances, when weighed against the aggravating circumstance, are sufficiently compelling that the death penalty would be unjust." I.C. § 19-2515(8)(a)(ii).

The trial in *Hall* exemplifies the difficulties created by this scheme. On the one hand, the legislature has indicated all “relevant” evidence may come in at the penalty phase. I.C. § 19-2515(9). On the other, the legislature at that time had indicated that propensity to commit murder is to be shown by evidence of “prior conduct or conduct in the commission of the crime at hand.” I.C. § 19-2515(9)(h)(2003). By permitting evidence relevant to aggravation but not to a statutory aggravator, the legislature has created a scenario where a jury’s decision is necessarily confused.

Donald M. Houser outlined the potential problems in a law review article in which he analyzed the Federal Death Penalty Act which like Idaho’s is also a bifurcated system. He writes:

[T]he jury hears all of the evidence of intent factors, statutory aggravating factors, nonstatutory aggravating factors, and mitigating factors in a single proceeding before making these two determinations. Receiving all of this information in a unitary proceeding creates a problem because the jury’s determination of whether the defendant is eligible for the death penalty may be influenced by irrelevant evidence. They jury may find the defendant eligible for the death penalty based on evidence that, even if established beyond a reasonable doubt, fails to satisfy the statutory requirements of death eligibility. . . The end result is that the issue of eligibility and punishment melt into a singular assessment.

See Donald M. Houser, *Reconciling Ring v. Arizona with the Current Structure of the Federal Capital Murder Trial: The Case for Trifurcation*, 64 WASH. & LEE L. REV. 349, 354-55 (2007).

In this case, the State has alleged five different statutory aggravators. Mr. Kohberger anticipates that the State will attempt to introduce substantial evidence of aggravation which is not related to any statutory aggravator including evidence about Mr. Kohberger’s past and evidence of Mr. Kohberger’s character. The State will also seek to introduce non-statutory aggravation evidence in the form of victim impact evidence. This non-statutory aggravation should be presented during a separate sentencing proceeding after the jury has considered the issue of eligibility based on the statutory aggravators. Under this construction, there would be a

culpability phase, an eligibility phase and a sentencing phase rather than just two phases (culpability and penalty). The jury would only be presented with non-statutory evidence during the sentencing phase and would therefore only be able to use it in its determination of whether a sentence of death is appropriate. The consideration of non-statutory aggravation only for the purpose of determining whether the death penalty is an appropriate punishment is what is required by the statute. Trifurcating the proceedings is a way of ensuring that jurors are able to comply with the requirements of Idaho Code Section 19-2515 and consider the appropriate aggravator at the correct time.

Non-statutory aggravating evidence is any evidence that is not directly related to proving one of the alleged statutory aggravating circumstances beyond a reasonable doubt. There are many types of non-statutory aggravating evidence that the State may choose to present, including victim impact evidence. At sentencing, a “quick glimpse” of the victim’s life may be given in the form of testimony about the victim’s life. *See Payne v. Tennessee*, 501 U.S. 808, 830 (1991) (O’CONNOR, J., concurring). “However, this ‘quick glimpse’ has morphed into a full-length feature film in some cases.” *See Sharon Turlington, Completely Unguided Discretion: Admitting Non-Statutory Aggravating and Non-Statutory Mitigating Evidence in Capital Sentencing Trials*, 6 PIERCE L. REV. 469, 477-78 (2008) (characterizing penalty phase, from the perspective of a practicing death penalty defense lawyer, as “an evidentiary free-for-all”). The expansion of victim impact evidence in the form of expanded victim testimony and video presentations for the jury has furthered the need for trifurcation. When jurors are emotionally overwhelmed by extensive victim impact evidence, they are likely to use the evidence and their grief for the victims to the support statutory aggravators even though it is unrelated.

In addition to changes to the presentation victim impact evidence, changes in the law in recent years have made trifurcation necessary and rendered bifurcated death penalty schemes

unconstitutional. Constitutionally, the bifurcated model became especially problematic after the Supreme Court's holding in *Ring v. Arizona*, 536 U.S. 584, 609 (2002). In *Ring*, the Court held that statutory aggravators are elements of the offense of capital murder. *Id.* at 609 (“Because Arizona’s enumerated aggravating factors operate as the functional equivalent of an element of a greater offense ... the Sixth Amendment requires that they be found by a jury.”). Because statutory aggravators are elements of the crime of capital murder, they must be found by a jury. When statutory aggravators became elements, new constitutional problems arose. “[F]actors once considered simply sentencing factors are now elements of the crime, [and] the bifurcated trial structure . . . raises serious constitutional concerns.” *See Houser*, 64 WASH. & LEE L. REV. at 361. “Evidence that a court would never admit at trial, such as victim impact statements, hearsay and character evidence, is unquestionably permissible at the sentencing phase[.]” *Id.* at 361. However, during the jury’s determination of a statutory aggravator which is an element of the crime, the defendant “is given none of the protections afforded the other elements of the crime adjudicated in the guilt phase.” *Id.* at 361-62.

The eligibility phase, is akin to a guilt phase in that the State bears the burden of presenting evidence supporting each statutory aggravator it seeks to prove. Statutory aggravation evidence should be treated the same way as other enhancement evidence permitted under other Idaho statutes. For example, when the State seeks to enhance a sentencing by alleging that a firearm was used in the commission of a crime, it presents evidence during the guilt phase in accordance with the Rules of Evidence. *See* I.C. § 19-2520, I.C.J.I. 1602. Similarly, when the State seeks to enhance a sentence by alleging that a defendant is a perpetual law violator, it must present evidence during the guilt phase in accordance with the Rules of Evidence. *See* I.C. § 19-2514, ICJI 1601.

When a defendant is charged as a persistent violator pursuant to Idaho Code Section 19-2514, the jury determines whether he is a persistent violator during a second proceeding. The persistent violator charge is stated in a two part information. *State v. Johnson*, 86 Idaho 51, 383 P2d 326 (1963). Initially, the jury is only informed of the offense with which they defendant is charged, part one of the information. Depending upon the verdict on part one, the second part is read, and the jury deliberates further.

When dealing with other enhancement statutes, judges have discretion to divide the proceedings into two phases. For example, Idaho law allows the judge to determine whether the firearm enhancement should be determined at one proceeding or two. The court decides whether to give the firearm enhancement instruction along with instructions on the case in chief, or to allow the jury to deliberate on the case in chief first, and on the firearm enhancement second, depending on the case. *See State v. Stedtfeld*, 108 Idaho 695, 698, 701 P.2d 315 (Ct.App. 1985). Idaho law contemplates judicial discretion and separation of the determinations when necessary. In this case, with the voluminous about of non-statutory aggravation that is expected to be presented, separating the two determinations into an eligibility and sentencing phase is necessary to ensure a legal and fair sentencing.

Under the trifurcated model, only after the jury decides eligibility does it move on to the sentencing phase. In contrast to the eligibility phase, the sentencing phase, in which the jury decides whether the death penalty is appropriate, is more like a non-capital sentencing determination. At this phase, it is the defendant's burden to present mitigating evidence and the sentencer's role to decide the appropriate punishment. Unlike evidence of statutory aggravation which must be proved beyond a reasonable double, mitigation does not need to meet this burden. *See I.C. § 19-2515*. The jury does not need to find that the mitigation outweighs the aggravation

beyond a reasonable doubt. *Id.* The jury considers both statutory and non-statutory aggravation when making this determination.

The Idaho Supreme Court has held that the Rules of Evidence do not apply at capital sentencing proceedings. *Dunlap*, 155 Idaho 345, 375. The Court has held that “the admission of evidence in capital sentencing proceedings is governed by Idaho Code § 19–2515(6), which provides that ‘the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation.’” *Id.* The Idaho Supreme Court has also held that the right to confrontation does not apply to sentencing procedures. The Court explained: “The justification for the refusal to completely extend the procedural protections of the sixth amendment to the sentencing phase is based, in part, on the belief that modern penological policies, which favor sentencing based on the maximum amount of information about the defendant, would be thwarted by restrictive procedural and evidentiary rules.” *Sivak v. State*, 112 Idaho 197, 210 (1986) (*citing Williams v. New York*, 337 U.S. 241, 246-50 (1949)).

Under a bifurcated system, the bulk of evidence in capital sentencing trials is admitted without rules of evidence. *See Turlington*, 6 PIERCE L. REV. at 479. Much of the non-statutory aggravating evidence the jury is allowed to hear would not normally be admitted as evidence in the guilt phase of the trial. In a death penalty case, “the rules of evidence, in what should be the most carefully scrutinized area of law, are entirely lax.” *Id.* As Sharon Turlington explains, this does not make sense.

The rationale for this has been that while capital punishment demands increased reliability, the admission of more, rather than less, evidence during the penalty phase enhances reliability. . . . If juries are not allowed to hear certain types of evidence because it is too prejudicial, or not probative of an individual’s guilt, why does that same evidence somehow transform into being more reliable simply because it is being introduced in the penalty phase? It seems that the opposite is true—that the sentence of death would be based more on past conduct than on the strength of the facts in the current case. This should not be acceptable if our constitutional standards truly require that the death penalty be applied in a rational and non-arbitrary way.

Id. at 479.

The solution for allowing for the maximum amount of evidence to be presented to the jury while not violating Mr. Kohberger’s constitutional rights is to have a trifurcated proceeding. “While the Constitution prohibits the introduction of character evidence during the adjudication of guilt or innocence, it also requires the capital trial to include as much individualized information as possible about the defendant.” *See Houser*, 64 WASH. & LEE L. REV. 346 at 376. “Trifurcation respects both of these constitutional requirements.” *Id.* It allows the maximum amount of evidence about the defendant to be presented while still complying with the state and federal constitutions.

The third phase, the sentencing phase, in which the jury determines whether death is the appropriate punishment would be conducted like a regular sentencing proceeding in which the rules of evidence are not applied and other rights including the right to confrontation are limited. All the evidence in aggravation that the State seeks to introduce is admitted in the final phase for the purpose of determining an appropriate sentence.

Several jurisdictions have used the trifurcated system. *See, United States v. Bowers*, 2023 WL 1108392 (W.D. Pa. 2023) (unreported); *State v. Prince*, 250 P.3d 1145 (2011); *United State v. Fell*, 531 F.3d 197 (2d Cir. 2008); Millemann, *Limiting Death: Maryland's New Death Penalty Law*, 70 MD.L.REV. 272 (2010) (describing trifurcation of the capital proceedings in Maryland, finding the separate proceedings are more efficient, obviating proof on selection-only factors when eligibility not found, and also prevent jury confusion and thereby produce more reliable sentencing decisions).

A trifurcated system would also protect Mr. Kohberger’s right to confrontation. Unlike Idaho, a majority of courts who have addressed the issue have recognized that the Confrontation Clause applies to evidence “used to establish an aggravating factor” necessary to make the

defendant eligible for the death penalty. *State v. McGill*, 140 P.3d 930, 942 (Ariz. 2006) (emphasis omitted). Six state high courts have agreed. See *State v. Robinson*, 796 P.2d 853, 861-62 (Ariz. 1990), *Rodgers v. State*, 948 So. 2d 655, 663-65 (Fla. 2006), *Pitchford v. State*, 45 So. 3d 216, 251, 252, 252 & n.100 (Miss. 2010), *State v. Bell*, 603 S.E.2d 93, 115-16 (N.C. 2004), *Rousseau v. State*, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005) and *Grandison v. State*, 670 A.2d 398, 413 (Md. 1995).

The Fourth Circuit Court of Appeals has suggested that the right to confrontation applies during “the guilt and *eligibility* phases of a trial.” *United States v. Umana*, 750 F.3d 320, 347-48 (4th Cir. 2014) (emphasis original). The court explained:

During the sentence selection phase of a capital trial, the jury exercises discretion in selecting a life sentence or the death penalty, and any facts that the jury might find during that phase do not alter the range of sentences it can impose on the defendant. Under the Federal Death Penalty Act, the jury finds the facts necessary to support the imposition of the death penalty in the guilt and *eligibility* phases of trial. See 18 U.S.C. §§ 3591–3596. It is only during these phases that the jury makes “constitutionally significant” factual findings.

Id. Other federal district courts have agreed. See *United States v. Mills*, 446 F. Supp. 2d 1115, 1135 (C.D. Cal. 2006) (holding that *Crawford v. Washington*’s protections apply to any proof of any aggravating factor during the penalty phase of a capital proceeding under the Federal Death Penalty Act). Some federal district courts have trifurcated the proceeding in order to comply with Constitutional restrictions. In *United States v. Bodkins*, 2005 WL 1118158, at *4-5 (W.D. Va. May 11, 2005), the court chose to separate the penalty phase into an eligibility portion and a sentencing portion because “the court [] determined that, if the defendants [were] convicted of one or more death eligible offenses, the subsequent sentencing proceeding [would] be bifurcated into an eligibility phase followed by a selection phase.” The district court explained that “any testimonial hearsay evidence offered during the eligibility phase would have to meet the requirements of *Crawford* before it could be presented to the jury. Those same requirements

would not apply to hearsay evidence, testimonial or non-testimonial, offered during the selection phase.” *Id.*

The federal district court in the Northern District of Iowa chose trifurcation as well. *United States v. Johnson*, 378 F.Supp.2d 1051, 1056 (N.D. Iowa 2005) The court concluded that trifurcation is required for three reasons.

First, the court concluded that the danger of unfair prejudice arising from jurors hearing “victim impact” evidence or evidence on other “non-statutory” aggravating factors before the jurors make their determination on the defendant’s “eligibility” for the death penalty, on the basis of the “gateway” and “statutory” aggravating factors, substantially outweighs any probative value of such evidence to the determination of the defendant’s “eligibility” for a death sentence. Second, the court concluded that the information concerning “gateway” and “statutory” aggravating factors in this case is entirely severable from information concerning any other factor, where the government intends to rely only on evidence admitted in the “merits phase” to prove the “gateway” and “statutory” aggravating factors, and introduction of extraneous information into the jury’s determination of the “gateway” and “statutory” aggravating factors could only tend to confuse the issues. Third, the court concluded that, if the jury is permitted to hear information on all of the factors in one proceeding, the jury is reasonably likely to be misled into believing that all information is pertinent to the determination of all factors and the balance of factors.

Id.

The federal district court in *United States v. Jordan*, 357 F. Supp. 2d 889, 903-04 (E.D. Va. 2005) also chose to separate the sentencing phases into two parts to avoid a Confrontation Clause problem. In holding that the Confrontation Clause applied to the penalty stage, the court distinguished between the “two facets” of the deliberative process in the penalty stage: eligibility and selection. *Id.* at 902. The court held: “From a constitutional perspective, the eligibility phase is the most critical because it is a necessary prerequisite to the jury’s consideration of the death penalty.” *Id.* “It encompasses the finding of fact that increases the defendant’s authorized punishment from life in prison to death. *Id.* *Jordan* then held, “[c]onsistent with the constitutional safeguards identified by the United States Supreme Court ..., this Court is of the opinion that with respect to the eligibility phase of the penalty stage of a capital trial, the

Confrontation Clause is equally applicable.” *Id.* at 903. The district court found that “a close examination of the governing statute reveals that the statute does not necessarily mandate a single unitary proceeding.” *Id.* The court found that the testimonial statements could be used in the selection phase, stating “[u]nlike the eligibility phase, the selection phase is intended to be less structured and less encumbered by strict adherence to the Rules of Evidence.” *Id.* The court in *Jordan* concluded that “[u]nless its probative value is substantially outweighed by the danger of unfair prejudice, the jury should ‘have as much information before it as possible when it makes the sentencing decision.’ ” *Id.* (quotation omitted). The court in *Jordan* thus chose to separate the proceedings because “the Government intends to offer evidence which, in this Court’s view, is inadmissible on the issue of eligibility but permissible in the selection phase.” *Id.* at 903–04.

Just as the federal district court found that the Federal Death Penalty Act does not mandate a single proceeding, neither does Idaho’s death penalty scheme. *Compare* 18 U.S.C.A. 3593 with I.C. § 19-2515. Idaho Code Section 19-2515 refers to a “sentencing proceeding” but does expressly prohibit splitting the proceedings into two parts. Section 19-2515 contemplates a variety of situations and even allows for the proceeding to be held before a different jury when necessary.

In this case, given the extensive non-statutory aggravation that Mr. Kohberger anticipates the State will seek to introduce in this case, trifurcation of the proceedings is necessary to protect his state and federal constitutional rights. Failure to separate the penalty proceeding will lead to an arbitrary and capricious sentence in violation of the Eighth Amendment to the United States Constitution and Article I Section 6 and 13 the Idaho Constitution. It will also violate Mr. Kohberger’s Constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 6 and 13 of the Idaho Constitution including

his right to due process and a fair trial. Additionally, it would violate his right to confront witnesses under the Sixth Amendment to the United States Constitution and Article I Section 13 of the Idaho Constitution.

CONCLUSION

Trifurcation of the proceedings is necessary to protect Mr. Kohberger's state and federal constitutional rights. Mr. Kohberger respectfully requests that this Court grant the Motion to Trifurcate the Proceedings into a guilt, eligibility and sentencing phase. Mr. Kohberger also asks that this Court apply the rules of evidence to the guilt and eligibility phases.

DATED this 4 day of September, 2024.

BY:



JAY WESTON LOGSDON
INTERIM CHIEF PUBLIC DEFENDER

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the 5 day of September, 2024 addressed to:

Latah County Prosecuting Attorney –via Email: paservice@latahcountyid.gov
Elisa Massoth – via Email: legalassistant@kmrs.net


