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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 CR29-22-2805** **MOTION FOR COURT ORDER REQUIRING THE STATE: (1) TO PROVIDE NOTICE OF EVERY ALLEGED NONSTATUTORY AGGRAVATING FACT/CIRCUMSTANCE IT MAY RELY ON AT ANY SENTENCING TRIAL; AND (2) TO PROVE BEYOND A REASONABLE DOUBT EVERY ALLEGED NONSTATUTORY AGGRAVATING FACT/CIRCUMSTANCE**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and hereby moves this Court for an order requiring: (1) that the prosecution provide the defense with notice

of any nonstatutory aggravating fact/circumstance it intends to prove at the sentencing phase, if any sentencing phase is conducted; and (2) that the prosecution be required to prove any such nonstatutory aggravating fact/circumstance beyond a reasonable doubt to the unanimous satisfaction of the jury before any juror may consider an alleged aggravating fact/circumstance as a reason to support a death sentence.

I. Notice of NonStatutory Aggravating Facts/Circumstances

In *State v. Hall*, 163 Idaho 744, 797 (2018), the Idaho Supreme Court held for the first time that evidence of nonstatutory aggravating circumstances is admissible in the capital sentencing process and that it may be considered by the jury in determining whether to sentence an individual to death or life imprisonment.

Mr. Kohberger has argued elsewhere that Idaho's capital sentencing scheme as articulated in *Hall* is unconstitutional due to its arbitrary nature. Mr. Kohberger maintains those arguments here. However, if the Court disagrees and holds that nonstatutory aggravating circumstance evidence will be admissible at any potential sentencing phase in Mr. Kohberger's case, then the Court must enter an order requiring the prosecution to provide him with sufficient notice of any nonstatutory aggravating fact or circumstance it intends to introduce and/or rely upon during the sentencing phase, should one be held.

Such notice is required by the due process and the cruel and unusual punishment clauses of the United States and Idaho Constitutions. U.S. CONST. amend XIV; IDAHO CONST. ART. I SEC. 6, 13.

In *Lankford v. Idaho*, 500 U.S. 110 (1991), the United States Supreme Court held that a trial court's decision to sentence the defendant to death violated the Due Process Clause of the Fourteenth Amendment because at the time of the sentencing hearing, Lankford and his counsel did not have adequate notice that the judge might sentence him to death.

Lankford was charged with two counts of first-degree murder and had been advised at arraignment that the maximum punishment he could receive if convicted was either life in prison or death. However, after a jury found him guilty on both counts, and prior to his sentencing hearing, the State indicated in a response to a presentencing order that it was *not* recommending the death penalty as to either count. A sentencing hearing was held, and both parties made arguments about the relative merits of concurrent or consecutive, and fixed or indeterminate sentence terms. Despite the fact that the death penalty was not discussed by either party, at the conclusion of the sentencing hearing, the trial judge sentenced Lankford to death based, *inter alia*, on five specific aggravating circumstances. 500 U.S. at 110.

The Supreme Court reversed, holding that the trial court's silence following the State's response to the presentencing order "had the practical effect of concealing from the parties the principal issue to be decided at the hearing." *Id.* at 126. The Court continued, "Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure. Without such notice, the Court is denied the benefit of the adversary process." *Id.* at 126-27.

The Court further noted:

> If defense counsel had been notified that the trial judge was contemplating a death sentence based on five specific aggravating circumstances, presumably she would have advanced arguments that addressed these circumstances; however, she did not make these arguments because they were entirely inappropriate in a discussion about the length of petitioner's possible incarceration.

Id. at 122.

The Court in *Lankford* also cited to its prior decision in *Gardner v. Florida*, 430 U.S. 349 (1977), in which it relied upon the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment's prohibition against cruel and unusual punishment to hold that "a procedure for selecting people for the death penalty that permits consideration of secret information about the defendant is unacceptable." 500 U.S. at 125.

Failure to require the prosecution to provide the defense with sufficient notice of any evidence of nonstatutory aggravating facts/circumstances it intends to introduce at the sentencing phase would be a blatant violation of Mr. Kohberger's Eighth and Fourteenth Amendment rights under *Lankford* and *Gardner*, as well as his rights under article I, sections 6 and 13 of the Idaho Constitution.

Failure to require the State to provide such notice to Mr. Kohberger and his defense counsel would also violate the Sixth Amendment and article II, section 13 of the Idaho Constitution, because counsel cannot effectively engage in the adversarial process without pre-trial access to such information. *See, e.g., Gardner*, 430 U.S. at 360 ("Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.").

Not only must Mr. Kohberger be able to adequately defend his life at sentencing, but this Court must carefully screen such evidence in advance for admissibility. The Court can only do so if it requires the prosecution to provide the defense with advance notice of nonstatutory aggravating fact/circumstance evidence, which will enable the parties to engage in important pretrial litigation concerning the admissibility and reliability of any such evidence.

Even in jurisdictions where introduction of nonstatutory aggravating circumstances is explicitly provided for by law, the discretion of the prosecution to introduce its evidence is not unbridled. *See, e.g.,* 18 U.S.C. §3593 (permitting the government to present information about any aggravating factor for which it has given sufficient notice, provided that the government bears the burden of proving the factor beyond a reasonable doubt). Principles underpinning both the Eighth Amendment and the Due Process Clause "mandate that judicial discretion be exercised and the nonstatutory factors be carefully screened." *United States v. Davis*, 912 F.

Supp. 938, 944 (E.D. La. 1996). *See also United States v. Bin Laden*, 126 F.Supp.2d 290, 302 (S.D.N.Y. 2001) (holding that nonstatutory aggravating factors must meet a "strikingly high level of relevance and reliability"). *See also United States v. Solomon*, 513 F.Supp.2d 520, 526 (W.D.Pa.2007) ("If the [nonstatutory] aggravator has only a tangential relationship to a determination of who is more worthy of receiving a sentence of death, it should be excluded from the sentencer's review.").

Among other considerations, judicial screening evaluates the evidence and factor itself to determine admissibility under general principles that are now well-established: (1) the factor or circumstance cannot be unconstitutionally overbroad or vague. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994); *Arave v. Creech*, 507 U.S. 463, 473–74 (1993); (2) it must be "sufficiently relevant to the question of who should live and who should die;" (3) even if the factor or circumstance is relevant, evidence in support of it may be excluded "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593(c); *United States v. Grande*, 353 F.Supp.2d 623, 634 (E.D.Va.2005); *see also Solomon*, 513 F.Supp.2d at 526; and (4) in some jurisdictions, including the Ninth Circuit, a nonstatutory aggravating factor cannot duplicate another aggravating factor or an element of the offense. *See Allen v. Woodford,* 395 F.3d 979, 1012-13 (9th Cir. 2005) (*quoting United States v. McCullah*, 76 F.3d 1087, 1111–12 (10th Cir.1996)).

In jurisdictions that have statutes that permit introduction of nonstatutory aggravating "factors" or "circumstances," trial courts conduct a "searching review of the evidence…[at]…an evidentiary hearing at which the court, in its role as gatekeeper, [admits] only that evidence which carrie[s] with it sufficient indicia of reliability." *See, e.g. Davis,* 912 F. Supp. at 949 ("In an effort to assure those safeguards, this court will hold a pretrial hearing on the admissibility of the information the government intends to introduce in support of the nonstatutory aggravating

factors"); *United States v. Beckford,* 964 F.Supp. 993, 1000 (E.D.Va.1997) ("[B]efore the penalty hearing (should there be one), the Government must present to the Court and to the specific defendants the information which it intends to introduce as unadjudicated conduct. The Court will then determine whether the information is reliable. Only if the Government satisfies that threshold determination will the evidence be presented to the jury.").

Idaho's capital sentencing statute gives this Court the power and obligation to limit the prosecution's evidence. I.C.. § 19-2515(6) states:

> (6) At the special sentencing proceeding, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Disclosure of evidence to be relied on in the sentencing proceeding shall be made in accordance with Idaho criminal rule 16. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing.

This Court has an obligation to screen carefully and limit the prosecution's so-called nonstatutory aggravating fact/circumstance evidence in order to prevent arbitrary and capricious imposition of the death penalty. A U.S. District Court Judge in Pennsylvania explained:

> The Court's screening of aggravating factors is essential to channeling, directing and limiting the sentencer's discretion in order to prevent arbitrary and capricious imposition of the death penalty and to satisfy the 'heightened reliability' requirements of capital sentencing required under the Eighth Amendment.

United States v. Hammer, 4:96-CR-239, 2011 WL 6020157 (M.D. Pa. Dec. 1, 2011) (*citing United States v. Solomon*, 513 F.Supp.2d 520, 525 (W.D.Pa. 2007)).

Aggravating circumstances introduced in a capital sentencing proceeding must be relevant to the question of life or death. As one federal judge stated:

> [A]re there then *no* limits on the "other" information that can be introduced at the penalty phase of a capital case? The answer is clearly no. The statute itself requires that any such information be "relevant." And by relevant, it must mean sufficiently relevant to the consideration of who should live and who should die.

Davis, 912 F. Supp. at 943. Thus, a nonstatutory aggravating circumstance must concern matters sufficiently severe to warrant consideration of the death penalty. "While unadjudicated conduct

may be admissible, it must be carefully monitored to avoid constitutional deficiencies." *United States v. Grande*, 353 F.Supp.2d 623, 634 (E.D.Va.2005). As observed by the court in *United States v. Friend,* 92 F.Supp.2d 534, 543 (E.D.Va.2000):

> [R]elevance and heightened reliability, in the context of assessing a nonstatutory aggravating factor in a death penalty scheme, are two sides of the same coin. Together, they assure the twin constitutional prerequisites of affording a rational basis for deciding that in a particular case death is the appropriate punishment and of providing measured guidance for making that determination. Those objectives can only be accomplished if the proposed aggravating factor raises an issue which (a) is of sufficient seriousness in the scale of societal values to be weighed in selecting who is to live or die; and (b) is imbued with a sufficient degree of logical and legal probity to permit the weighing process to produce a reliable outcome.

Thus, relevance in the context of nonstatutory aggravating circumstances is determined by reference to the statutory aggravating factors because those are the "death-worthy" factors as determined by the legislature. Such legislative guidance is particularly significant in this context because:

> [I]t should be presumed that Congress would not craft a statute which would defeat the fundamental objectives reflected in the Supreme Court's death penalty jurisprudence by relaxing the standards of reliability and relevance of nonstatutory aggravating factors when it so carefully defined the statutory aggravating factors and, in so doing, confined them to a strikingly high level of relevance and reliability. Indeed, to relax the standards for nonstatutory aggravating factors 'would defeat the goal of guided and measurable jury discretion, and return us to an unconstitutional system where the death penalty is 'wantonly' and 'freakishly' imposed.'

Friend, 92 F.Supp.2d at 544, quoting *Davis,* 912 F.Supp. at 943.

For all of the reasons set forth above, the prosecution must be required to give Mr. Kohberger notice of any and all nonstatutory aggravating facts/circumstances that it intends to introduce and/or rely on at a sentencing trial, should one be held.

II. Burden of Proof

In addition to requiring the prosecution to provide sufficient pre-trial notice of nonstatutory aggravating facts/circumstances, this Court must require the State to prove beyond a reasonable doubt any nonstatutory fact or circumstance it is permitted to introduce against Mr. Kohberger. Failure to do so would violate the due process and the cruel and unusual punishment clauses of the United States and Colorado Constitutions. U.S. CONST. amends. V, VIII, XIV; IDAHO CONST. ART. I, SECS. 6, 13.

Statutory aggravating factors are required to be proven beyond a reasonable doubt to the unanimous satisfaction of the jurors or they cannot be considered at any stage by the jurors. I.C. § 19-2515(7)(c) & (8)(a)(i). The State must be held to a similar burden with respect to the "other aggravating evidence" that was created by and embraced in *Hall*. The statute does not mention[1] the nonstatutory aggravating "circumstances" or "other aggravating evidence" created in *Hall*, but in light of the power granted them by *Hall*, and in light of precedent, the beyond a reasonable doubt standard should apply to them as well.

In *People v. Tenneson*, 788 P.2d 786, 792 (Colo. 1990), the Colorado Supreme Court held that the burden is beyond a reasonable doubt:

> An instruction to the jury that they must be convinced beyond a reasonable doubt that any mitigating factors do not outweigh the proven statutory aggravating factors before a sentence of death can be imposed adequately and appropriately communicates the degree of reliability that must inhere in the balancing process. *See Ford v. Strickland*, 696 F.2d 804, 879 (11th Cir. 1983) (Anderson, J., concurring in part and dissenting in part) (in the penalty phase of capital murder prosecution, the beyond a reasonable doubt standard prescribes the "level of confidence" that the jury should have in its decision), *cert. denied*, 464 U.S. 865 (1983); *State v. Wood*, 648 P.2d 71, 84 (Utah), *cert. denied*, 459 U.S. 988 (1982). We are persuaded that the legislature, though not explicitly addressing the issue, could have intended no lighter a burden.

788 P.2d at 792-793 (Colo. 1990) (footnotes omitted).

[1] The statute also has no logical place for such "aggravating circumstances" to enter the process. This is no surprise given that the legislature expressly removed the "any aggravating circumstances" language from the statute in 1995. 1995 Idaho Laws Ch. 140 (S.B. 1084).

The *Tenneson* Court went on to explain in detail the importance of the beyond a reasonable doubt standard in matters of fact-finding in criminal cases, relying in part on *In re Winship*, 397 U.S. 350, 363 (1969). The Court then stated:

> These considerations assume profoundly greater importance in the process of determining whether a person convicted of murder shall be sentenced to death. They further inform and undergird our analysis of the degree of certainty our statute requires each juror to possess in order to support a conclusion that the balance between aggravating and mitigating circumstances tips in favor of death.

Tenneson, 788 P.2d at 795.

The *Tenneson* Court then held that the Colorado capital sentencing statute required the "beyond a reasonable doubt" standard at the fourth step of their statutory process. It cited the same reasons as those that supported its decision concerning the third step involving weighing, stating as follows:

> We are reinforced in our conclusion by the fact that under Colorado's statutory scheme the jury would proceed to the fourth step in the unlikely event that the jury were convinced beyond a reasonable doubt that any mitigating factors and the proven statutory aggravating factors were exactly in balance. In those circumstances, it would be especially important that the jurors understand that the fourth step is separate and independent and requires that their ultimate conclusion that death is the appropriate penalty be reached only if they possess the degree of certainty that is communicated by the standard of beyond a reasonable doubt.

Id. at 796 [footnote omitted].

The nonstatutory aggravating facts/circumstances are facts easily capable of being judged under the standard of beyond a reasonable doubt. Such facts, if introduced, may play a crucial role at in the sentencing process, if the jury ultimately reaches this final step. Indeed, under *Hall* the importance of these nonstatutory facts/circumstances may supersede the importance of all other evidence offered by the parties at sentencing, because they will be the final aggravating facts to which jurors will be exposed prior to rendering their final sentencing verdict.

Unless the standard of beyond a reasonable doubt is applied to any nonstatutory aggravating circumstances, the resulting process and any decisions in favor of a death sentence will lack the fairness and reliability required by the due process and cruel and unusual punishment clauses of the United States Constitution. *See Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *Gardner*, 430 U.S. at 357-58; *Mills v. Maryland*, 486 U.S. 367, 376 (1988) ("[I]n reviewing death sentences, the Court has demanded even greater certainty [than in other criminal cases] that the jury's conclusion rested on proper grounds."); *California v. Ramos*, 463 U.S. 993, 998-99 (1983) (qualitative difference of death from all other punishments "requires a correspondingly greater degree of scrutiny of the capital sentencing determination"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (qualitative difference between death and other penalties "calls for a greater degree of reliability when the death sentence is imposed"); *Caldwell v. Mississippi*, 472 U.S. 320, 329-330 (1985); U.S. Const. amends. V, XIII, XIV.

Failure to apply such a standard would also specifically violate the due process and cruel and unusual punishment clauses of the Colorado Constitution. *See Tenneson*, 788 P.2d at 791-92 (Colo. 1990); *People v. Rodriguez*, 786 P.2d 1079, 1082 (Colo. 1989): *People v. Young*, 814 P.2d 834 (Colo. 1991): *People v. Rodriguez*, 794 P.2d 965, 972 (Colo. 1990): *People v. White*, 870 P.2d 424 (Colo. 1994) ("Colorado's death sentencing statute must be construed in light of the strong concern for reliability of any sentence of death."); Colo. Const. art. II, secs. 20 & 25.

CONCLUSION

Based upon the foregoing and argument to be presented at the hearing hereon, this Court is respectfully requested to grant this Motion that:

(a) the State's Notice of Intent to Seek Death Penalty be required to list any nonstatutory aggravators the state wishes to present;

(b) the State be required to prove any such aggravators beyond a reasonable doubt.

Counsel requests this issue be set for a hearing estimated to last thirty minutes.

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

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