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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 TO STRIKE HAC AGGRAVATOR**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, hereby moves this honorable Court for an Order striking from the state's Notice Pursuant to Idaho Code § 18-4004A the allegation that the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. This Motion is made on the grounds that this aggravator is unconstitutionally vague and fails to narrow the class of eligible candidates for death partly

because the Idaho Supreme Court cannot constitutionally place a limiting construction on the statute and partly because it has not in practice done so by omitting its construction from the ICJI.

EIGHTH AMENDMENT

The United States Supreme Court has stated that the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the states through the Fourteenth Amendment, prohibits a state from imposing the death penalty in an arbitrary and capricious manner. Instead, the sentencing body must be provided with standards which will genuinely narrow the class of crimes and the persons against whom the death penalty is imposed. *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742 (1983). *See also Gregg v. Georgia*, 428 U.S. 153, 206–07, 96 S.Ct. 2909, 2940–41, 49 L.Ed.2d 859, reh. denied 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976); *Furman v. Georgia*, 408 U.S. 238, 294, 92 S.Ct. 2726, 2754–55, 33 L.Ed.2d 346 (Brennan, J., concurring), reh. denied 409 U.S. 902, 93 S.Ct. 89, 34 L.Ed.2d 164 (1972).

"To pass constitutional muster, a capital-sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244, 108 S.Ct. 546, 554 (1988) *citing Zant*, 462 U.S. at 877, 103 S.Ct. at 2742; *Gregg,* 428 U.S. 153, 96 S.Ct. 2909. The Court stated:"[T]he narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase." *Id*. The clear provisions of the Idaho statute provide that the narrowing occur in the sentencing phase of the trial, particularly here, where the allegation is simply premediated murder. *See*, *State v. Hall*, 163 Idaho 744, 788 (2018) (finding aggravating circumstances in Idaho are in both the definition of the crime and in the statutory aggravating circumstances).

That said, aggravating circumstances must meet two requirements: the circumstance may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder (genuine narrowing), and the circumstance must not be unconstitutionally vague. *Tuilaepa v. California,* 512 U.S. 967, 972, 114 S.Ct. 2630, 2635 (1994).

"Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform jurors what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion held invalid in *Furman v. Georgia." Maynard,* 486 U.S. at 361–62, 108 S.Ct. at 1858. A statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. *See*, *e.g., Maynard v. Cartwright,* 486 U.S. 356, 361-364, 108 S.Ct. 1853, 1857-59, 100 L.Ed.2d 372 (1988); *Godfrey v. Georgia,* 446 U.S. 420, 427-433, 100 S.Ct. 1759, 1764-1767, 64 L.Ed.2d 398 (1980).

LEGISLATIVE HISTORY

Idaho's legislature has made it an aggravating circumstance where "the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity." I.C. § 19-2515(9)(e). This aggravator first appeared in the Model Penal Code in 1962. *See* Model Penal Code §210.6(3)(h) (1962). The state of Idaho shares this *exact* statutory language with one other state, California. Cal. Penal Code § 190.2, subd. (a)(14). The Supreme Court of California has ruled that this language is unconstitutionally vague. *People v. Carrasco*, 59 Cal.4th 924, 970, 330 P.3d 859, 896, 175 Cal.Rptr.3d 538 (Cal. 2014) *citing People v. Superior Court (Engert),* 31 Cal.3d 797, 801–803, 183 Cal.Rptr. 800, 647 P.2d 76 (1982).

JUDICIAL GLOSS

Idaho's highest court has placed a judicial gloss on this statute such that the state must show:

> "(W)e feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies the conscienceless or pitiless crime which is unnecessarily torturous to the victim."…
>
> "In interpreting this portion of the statute, the key word is 'exceptional.' It might be argued that every murder involves depravity. The use of the word 'exceptional,' however, confines it only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence."…
>
> With these constructions, i. e., that the murder must be accompanied by acts setting it apart from the norm of murders and that its commission manifests such depravity as to offend all standards of morality and intelligence, the aggravating circumstance contained in I.C. s 19-2515(f)(5) is sufficiently definite and limited to guide the sentencing court's discretion in imposing the death penalty.

State v. Osborn, 102 Idaho 405, 418 (1981) (*quoting State v. Dixon,* 283 So.2d 1 (Fla.1973) *and State v. Simants*, 197 Neb. 549, 250 N.W.2d 881, 891 (1977)).

Despite this ruling, the ICJI for the HAC states:

> The terms especially "heinous," "atrocious, " or "cruel," are considered separately; but in combination with "manifesting exceptional depravity." The terms heinous, atrocious or cruel are intended to refer to those first-degree murders where the actual commission of the first-degree murder was accompanied by such additional acts as to set the crime apart from the norm of first-degree murders.
>
> A murder is especially heinous if it is extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.
>
> The statutory aggravating factor does not exist unless the murder was especially heinous, especially atrocious, or especially cruel, and such heinousness, atrociousness or cruelty manifested exceptional depravity. It might be thought that every murder involves depravity. However, exceptional depravity exists only where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. The terms "especially heinous manifesting exceptional depravity," "especially atrocious manifesting exceptional depravity," or "especially cruel manifesting exceptional depravity" focus upon a defendant's state of mind at the time of the offense, as reflected by his words and acts.

ICJI 1713.

OTHER JURISDICTIONS

In Alabama, the aggravator reads "[t]he capital offense was especially heinous, atrocious, or cruel compared to other capital offenses". AL ST § 13A-5-49(8). Courts in Alabama define this aggravator as:

> This Court has stated the following concerning the application of this aggravating circumstance:
>
> " 'The especially heinous, atrocious, or cruel aggravating circumstance "appl [ies] to only those conscienceless or pitiless homicides which are unnecessarily torturous to the victim." *Ex parte Kyzer,* 399 So.2d 330, 334 (Ala.1981), citing *State v. Dixon,* 283 So.2d 1 (Fla.1973).
>
> " ' " 'There are three factors generally recognized as indicating that a capital offense is especially heinous, atrocious, or cruel: (1) the infliction on the victim of physical violence beyond that necessary or sufficient to cause death; (2) appreciable suffering by the victim after the assault that ultimately resulted in death; and (3) the infliction of psychological torture on the victim.' "
> " '*Saunders [v. State*], 10 So.3d [53] at 108 [(Ala.Crim.App.2007)] (quoting *Brooks [v. State*], 973 So.2d [380] at 417–18 [(Ala.Crim.App.2007)], citing in turn *Norris v. State,* 793 So.2d 847 (Ala.Crim.App.1999)).'
> "*Stanley v. State,* 143 So.3d 230, 312 (Ala.Crim.App.2011)."

Boyle v. State, 154 So.3d 171, 242–43 (Ala.Crim.App.2013). The courts further define psychological torture as:

> [o]ne factor this Court has considered particularly indicative that a murder is "especially heinous, atrocious or cruel" is the infliction of psychological torture. Psychological torture can be inflicted where the victim *is in intense fear and is aware of, but helpless to prevent, impending death.* Such torture "must have been present for an appreciable lapse of time, sufficient enough to cause prolonged or appreciable suffering.

Norris v. State, 793 So.2d 847, 861 (Ala.Crim.App.1999).

The state of Arizona's version reads: "The defendant committed the offense in an especially heinous, cruel or depraved manner." The courts have defined this to mean:

> [a] murder is especially cruel under A.R.S. § 13–751(F)(6) when the victim consciously 'suffered physical pain or mental anguish during at least some portion of the crime and [ ] the defendant knew or should have known that the victim would suffer.'

State v. Dixon, 226 Ariz. 545, 556 ¶ 61, 250 P.3d 1174, 1185 (2011) (*quoting State v. Morris,* 215 Ariz. 324, 338 ¶ 61, 160 P.3d 203, 217 (2007)).

> Cruelty goes to mental and physical anguish suffered by the victim. Mental anguish occurs when the victim experiences significant uncertainty about her fate. In order to constitute cruelty, conduct must occur before death and while a victim is conscious. Conduct occurring after death or while a victim is unconscious does not constitute cruelty. Before conduct can be found to be cruel, the State must prove that the defendant knew or should have known that the conduct would cause suffering to the victim.

State v. Cañez, 202 Ariz. 133, 160, ¶ 100, 42 P.3d 564, 591 (2002).

The state of Arkansas makes it an aggravator to commit murder where it was "committed in an especially cruel or depraved manner". Ark.Code Ann. § 5–4–604(8)(A). Arizona further defines this aggravator by statute to mean:

> (B)(i) For purposes of subdivision (8)(A) of this section, a capital murder is committed in an especially cruel manner when, as part of a course of conduct intended to inflict mental anguish, serious physical abuse, or torture upon the victim prior to the victim's death, mental anguish, serious physical abuse, or torture is inflicted.
> (ii)(a) "Mental anguish" means the victim's uncertainty as to his or her ultimate fate.
> (b) "Serious physical abuse" means physical abuse that creates a substantial risk of death or that causes protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.
> (c) "Torture" means the infliction of extreme physical pain for a prolonged period of time prior to the victim's death.
> (C) For purposes of subdivision (8)(A) of this section, a capital murder is committed in an especially depraved manner when the person relishes the murder, evidencing debasement or perversion, or shows an indifference to the suffering of the victim and evidences a sense of pleasure in committing the murder;

Ark.Code Ann. § 5–4–604(8)(B).

The state of California has the aggravator written as "[t]he murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. As used in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime that is unnecessarily torturous to the victim." Cal. Penal Code § 190.2, subd. (a)(14). The Supreme Court of California has ruled that this language is

unconstitutionally vague. *People v. Carrasco*, 59 Cal.4th 924, 970, 330 P.3d 859, 896, 175 Cal.Rptr.3d 538 (Cal. 2014) *citing People v. Superior Court (Engert),* 31 Cal.3d 797, 801–803, 183 Cal.Rptr. 800, 647 P.2d 76 (1982). However, in keeping with the gloss in other states, California continues to permit torture as an aggravator. Cal. Penal Code § 190.2, subd. (a)(18). The Court has held that to prove torture murder, the prosecution must establish a willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose. *People v. Hajek*, 171 Cal.Rptr.3d 234, 58 Cal.4th 1144, 1187, 324 P.3d 88, 131 (Cal. 2014) abrogated on other grounds by 200 Cal.Rptr.3d 265, 62 Cal.4th 1192, 367 P.3d 649.

> The jury may infer the intent to inflict extreme pain from the circumstances of the crime, the nature of the killing, and the condition of the victim's body. [Citation.]" (*People v. Streeter* (2012) 54 Cal.4th 205, 237, 142 Cal.Rptr.3d 481, 278 P.3d 754 (*Streeter*).)[16] " 'There is no requirement that***285 the victim be aware of the pain.' " (*People v. Elliot* (2005) 37 Cal.4th 453, 466–467, 35 Cal.Rptr.3d 759, 122 P.3d 968.) Thus, as to both torture murder and torture-murder special circumstances, the sufficiency inquiry is directed at evidence of the defendant's torturous intent. (*People v. Mincey* (1992) 2 Cal.4th 408, 433, 6 Cal.Rptr.2d 822, 827 P.2d 388 (*Mincey*).)
>
> It bears emphasis that "the trier of fact may find intent to torture based on *all* the circumstances surrounding the charged crime, including the nature and severity of the victim's wounds and any statements by the defendant revealing his state of mind during the crime." (*People v. Bemore* (2000) 22 Cal.4th 809, 841, 94 Cal.Rptr.2d 840, 996 P.2d 1152 (*Bemore*).) For example, evidence that the defendant intentionally inflicted nonlethal wounds on the victim may demonstrate the requisite " 'sadistic intent to cause the victim to suffer pain in addition to the pain of death.' " (*Ibid*.; see id. at p. 844, 94 Cal.Rptr.2d 840, 996 P.2d 1152 ["Certain nonlethal knife wounds ... seem plainly calculated to cause extreme pain and to induce [the victim's] cooperation."]; see also *Mungia*, *supra*, 44 Cal.4th at p. 1137, 81 Cal.Rptr.3d 614, 189 P.3d 880 ["When we have upheld [torture-murder special-circumstance findings], the evidence has shown that the defendant deliberately inflicted nonfatal wounds or deliberately exposed the victim to prolonged suffering."]; *People v. Crittenden*(1994) 9 Cal.4th 83, 141, 36 Cal.Rptr.2d 474, 885 P.2d 887 (*Crittenden*) [intentional nonfatal injuries "are consistent only with an intent to inflict extreme pain"].) Although evidence of binding, by itself, is insufficient to establish an intent to torture (*Mungia*, at p. 1138, 81 Cal.Rptr.3d 614, 189 P.3d 880), it is appropriate to consider whether the victim was bound and gagged, or was isolated from others, thus rendering the victim unable to resist a defendant's acts of violence. (*Crittenden*, at p. 141, 36 Cal.Rptr.2d 474, 885 P.2d 887 [victims bound and gagged]; *People v. Proctor* (1992) 4 Cal.4th 499, 532, 15

> Cal.Rptr.2d 340, 842 P.2d 1100 ["victim was isolated and prevented from resisting or escaping..."]; cf. *People v. Chatman* (2006) 38 Cal.4th 344, 391, 42 Cal.Rptr.3d 621, 133 P.3d 534 [binding not required to prove torture].) Finally, the manner of the victim's death may also evidence the defendant's intent to torture. (*Proctor*, at pp. 531–532, 15 Cal.Rptr.2d 340, 842 P.2d 1100.)

Id.

In Florida the aggravator reads: "[t]he capital felony was especially heinous, atrocious, or cruel." F.S.A. § 921.141(6)(h). The Florida Supreme Court has held:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> *State v. Dixon,* 283 So.2d 1, 9 (Fla.1973). We have also stated that "[u]nlike the cold, calculated and premeditated aggravator, which pertains specifically to the state of mind, intent and motivation of the defendant, the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." *Brown v. State,* 721 So.2d 274, 277 (Fla.1998) (citing *Stano v. State,* 460 So.2d 890, 893 (Fla.1984)).
>
> Furthermore, we have held that "[i]n determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator." *Lynch v. State,* 841 So.2d 362, 369 (Fla.2003). The victim's mental state may be evaluated in accordance with common-sense inferences from the circumstances. *Swafford,* 533 So.2d at 277 (citing *Preston v. State,* 444 So.2d 939, 946 (Fla.1984)). We have also held that to support this aggravator, the evidence must demonstrate that the victim was conscious and aware of impending death. *Douglas,* 878 So.2d at 1261. However, we have explained that the actual length of the victim's consciousness is not the only factor relevant to this aggravating circumstance. *Beasley v. State,* 774 So.2d 649, 669 (Fla.2000). "[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." *James v. State,* 695 So.2d 1229, 1235 (Fla.1997). We have further held that the actions of the defendant preceding the actual killing are also relevant. *Gore v. State,* 706 So.2d 1328, 1335 (Fla.1997) (citing *Swafford,* 533 So.2d at 277, and *Smith v. State,* 424 So.2d 726, 733 (Fla.1982)).

Hernandez v. State, 4 So.3d 642, 699 (Fla.2009).

In Georgia, it is an aggravator if the murder was "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the

victim" Ga. Code Ann. § 17-10-30(b)(7). The Supreme Court of Georgia has interpreted this law and produced the following jury instruction:

> The state contends that the offense of murder in this case was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim. The state has the burden of proving this statutory aggravating circumstance beyond a reasonable doubt. In this regard, the state must prove to your satisfaction and beyond a reasonable doubt, first, that the offense of murder was outrageously or wantonly vile, horrible or inhuman; and, second, that it involved at least one of the following: torture or depravity of mind or an aggravated battery to the victim.
>
> I charge you that an aggravated battery occurs when a person maliciously causes bodily harm to another by depriving him of a member of his body, by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof. In order to find that the offense of murder involved an aggravated battery, you must find that the bodily harm to the victim occurred before death.
>
> I charge you that torture occurs when a living person is subjected to the unnecessary and wanton infliction of severe physical or mental pain, agony or anguish. Besides serious physical abuse, torture includes serious sexual abuse or the serious psychological abuse of a victim resulting in severe mental anguish to the victim in anticipation of serious physical harm. I charge you, however, that you would not be authorized to find that the offense of murder involved torture simply because the victim suffered pain or briefly anticipated the prospect of death. Nor would acts committed upon the body of a deceased victim support a finding of torture. In order to find that the offense of murder involved torture, you must find that the defendant intentionally, unnecessarily and wantonly inflicted severe physical or mental pain, agony or anguish upon a living victim.
>
> I charge you that depravity of mind is a reflection of an utterly corrupt, perverted or immoral state of mind. In determining whether or not the offense of murder in this case involved depravity of mind on the part of the defendant, you may consider the age and physical characteristics of the victim and you may consider the actions of the defendant prior to and after the commission of the murder. In order to find that the offense of murder involved depravity of mind, you must find that the defendant, as the result of his utter corruption, perversion or immorality, committed aggravated battery or torture upon a living person, or subjected the body of a deceased victim to mutilation, or serious disfigurement or sexual abuse.
>
> I charge you that you would not be authorized to return a finding of this statutory aggravating circumstance unless you are convinced beyond a reasonable doubt, not only that the murder involved torture, or depravity of mind, or an aggravated battery to the victim, but that the murder was also outrageously or wantonly vile, horrible or inhuman. Should you be convinced beyond a reasonable doubt of the existence of this statutory aggravating circumstance, then your verdict should reflect your finding, if you so find, that the murder was outrageously or wantonly vile, horrible or inhuman; your verdict should also reflect your finding, if you so find, that the

> murder involved at least one of the following: torture, depravity of mind, or an aggravated battery to the victim; and your verdict should specify which—torture, depravity of mind, or an aggravated battery to the victim—was involved in the murder.

West v. State, 252 Ga. 156, 161-62, 313 S.E.2d 67, 71 (Ga. 1984).

The state of Indiana takes a more direct route to make the same conduct an aggravator. Under its laws, it is aggravating when the murder involves "dismember[ing] the victim", "burn[ing], mutilate[ing], or tortur[ing] the victim", or "decapitate[ing] or attempt[ing] to decapitate the victim". IC 35-50-2-9(b)(10),(11). The Supreme Court of Indiana has further defined torture and mutilation:

> Torture is an appreciable period of pain or punishment intentionally inflicted and designed either to coerce the victim or for the torturer's sadistic indulgence. Put another way, torture is the gratuitous infliction of substantial pain or suffering in excess of that associated with the commission of the charged crime.
>
> Mutilation means to cut off or permanently destroy an essential part of a body or to cut up or alter radically so as to make imperfect. In order for mutilation to be found as an aggravating circumstance, there must be mutilation of the victim that goes beyond the act of killing.

Ward v. State, 903 N.E.2d 946, 961 (Ind. 2009).

> The state of Kansas makes it an aggravator to commit murder:
>
> in an especially heinous, atrocious, or cruel manner. A finding that the victim was aware of such victim's fate or had conscious pain and suffering as a result of the physical trauma that resulted in the victim's death is not necessary to find that the manner in which the defendant killed the victim was especially heinous, atrocious or cruel. Conduct which is heinous, atrocious or cruel may include, but is not limited to:
>
> (1) Prior stalking of or criminal threats to the victim;
>
> (2) preparation or planning, indicating an intention that the killing was meant to be especially heinous, atrocious or cruel;
>
> (3) infliction of mental anguish or physical abuse before the victim's death;
>
> (4) torture of the victim;
>
> (5) continuous acts of violence begun before or continuing after the killing;

> (6) desecration of the victim's body in a manner indicating a particular depravity of mind, either during or following the killing; or
>
> (7) any other conduct the trier of fact expressly finds is especially heinous.

K.S.A. 21-6624(f). The Supreme Court of Kansas has promulgated the following jury instruction interpreting the aggravator:

> "That the defendant committed the crime of capital murder in an especially heinous, atrocious or cruel manner. As used in this instruction, the following definitions apply:
>
> • 'heinous' means extremely wicked or shockingly evil;
>
> • 'atrocious' means outrageously wicked and vile; and
>
> • 'cruel' means pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of the sufferings of others.
>
> "In order to find that the crime of capital murder is committed in an especially heinous, atrocious, or cruel manner, the jury must find that the perpetrator inflicted serious mental anguish or serious physical abuse before the victim['s] death. Mental anguish includes a victim's uncertainty as to her ultimate fate."

State v. Kahler, 307 Kan. 374, 411, 410 P.3d 105 (Kan. 2018).

In Louisiana, the aggravator states: "The offense was committed in an especially heinous, atrocious or cruel manner." LSA-C.Cr.P. Art. 905.4(7).

The Louisiana Supreme Court has held:

> [T]his court "has given the statutory aggravating circumstance of heinousness a narrow construction, requiring 'that to be valid there must exist elements of torture, pitiless infliction of unnecessary pain or serious bodily abuse prior to death.' " *State v. Manning,* 2003–1982 p. 67–68 (La.10/19/04), 885 So.2d 1044, 1103, *cert. denied,* 544 U.S. 967, 125 S.Ct. 1745, 161 L.Ed.2d 612 (2005); *see also State v. Brogdon,* 457 So.2d 616, 630 (La.1984), *cert. denied,* 471 U.S. 1111, 105 S.Ct. 2345, 85 L.Ed.2d 862 (1985). "Torture requires evidence of serious physical abuse of the victim before death." *Manning,* 2003–1982 p. 69, 885 So.2d at 1104; *State v. Sonnier,* 402 So.2d 650, 659 (La.1981), *cert. denied,* 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983). In addition, "[t]his Court has also held that the murder must be one in which the death was particularly painful and one carried out in an inhumane manner." *Manning,* 2003–1982 p. 68, 885 So.2d at 1103. A victim's "awareness of impending doom" is relevant to a finding of heinousness. *Manning,* 2003–1982 p. 70, 885 So.2d at 1104.

State v. Reeves, 11 So.3d 1031, 1085-86 (La. 2009).

In Mississippi, it is aggravating if the murder was "especially heinous, atrocious or cruel." Miss. Code Ann. § 99-19-101. The Supreme Court of Mississippi has interpreted this law in the following manner for juries:

> The Court instructs the jury that in considering whether the capital offense was especially heinous, atrocious or cruel; heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.
>
> An especially heinous, atrocious or cruel capital offense is one accompanied by such additional acts as to set the crime apart from the norm of capital murders—the conscienceless or pitiless crime which is unnecessarily tortuous to the victim. If you find from the evidence beyond a reasonable doubt that the defendant utilized a method of killing which caused serious mutilation, that there was dismemberment of the body prior to death, that the defendant inflicted physical or mental pain before death, or that a lingering or tortuous death was suffered by the victim, then you may find this aggravating circumstance.

Gillett v. State, 56 So.3d 469, 509 (Miss. 2010).

In Missouri, the legislature has made it an aggravator to commit a murder that "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind." V.A.M.S. 565.032.2(7). Missouri's Supreme Court requires that the state specify in the instruction what act the jury is to find vile, and further defines this vileness by requiring that the act have exhibited "a callous disregard for the sanctity of all human life." *Harris v. Bowersox*, 184 F.3d 744, 749 (1999) *citing State v. Ramsey*, 864 S.W.2d 320 (Mo.1993).

Nevada makes it an aggravator that "[t]he murder involved torture or the mutilation of the victim." N.R.S. 200.033(8). The Nevada Supreme Court provides the following additional definitions:

> Torture "requires that the murderer must have intended to inflict pain beyond the killing itself." "Torture involves a calculated intent to inflict pain for revenge, extortion, persuasion or for any sadistic purpose."

Weber v. State, 121 Nev.554, 587, 119 P.3d 107, 129 (Nev. 2009) *overruled on other grounds* 405

P.3d 114 (*quoting Domingues v. State,* 112 Nev. 683, 702, 917 P.2d 1364, 1377 (1996).) (footnotes omitted).

In North Carolina, the aggravator reads: "The capitol [sic] felony was especially heinous, atrocious, or cruel." N.C.G.S. § 15A–2000(e)(9). The Supreme Court of North Carolina has adopted the following jury instruction to provide more guidance to the jury:

> Under the evidence in this case, one possible aggravating circumstance may be considered: Was this murder especially heinous, atrocious or cruel?
>
> In this context, heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.
> However, it is not enough that this murder be heinous, atrocious or cruel as those terms have just been defined. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so.
>
> For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing, or this murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

State v. Syriani, 333 N.C. 350, 391, 428 S.E.2d 118, 140-41 (N.C.1993).

The Oklahoma legislature adopted the following language: "The murder was especially heinous, atrocious, or cruel." 21 Okl.St.Ann. § 701.12(4). The Oklahoma Court of Criminal Appeals has held:

> A particular murder is especially heinous, atrocious or cruel where the evidence shows: (1) that the murder was preceded by either torture of the victim or serious physical abuse; and (2) that the facts and circumstances of the case establish that the murder was heinous, atrocious or cruel. *Postelle v State*, 2011 OK CR 30, ¶ 79, 267 P.3d 114, 143. (Okla.Crim.App. 2011). The "term 'torture' means the infliction of either great physical anguish or extreme mental cruelty." *Id.* A finding of "serious physical abuse" or "great physical anguish" requires that the victim have experienced conscious physical suffering prior to death. *Id.* "[T]he term 'heinous' means extremely wicked or shockingly evil; the term 'atrocious' means outrageously wicked and vile; and the term 'cruel' means pitiless, designed to inflict a high degree of pain, or utter indifference to or enjoyment of the suffering of others." *Id.*

Frederick v. State, 2017 OK CR 12, 400 P.3d 786, 817 (Okla.Crim.App. 2017) *overruled on other*

grounds by Williamson v. State, 422 P.3d 752, 2018 OK CR 15 (2018).

The commonwealth of Pennsylvania has had a moratorium on the death penalty since 2015. However, their statute continues to make it an aggravator when: "The offense was committed by means of torture." 42 Pa.C.S.A. § 9711(8). The courts there have interpreted this language as follows:

> In order to establish the aggravating circumstance of torture, "the Commonwealth must prove beyond a reasonable doubt that the defendant intentionally inflicted on the victim a considerable amount of pain and suffering that was unnecessarily heinous, atrocious, or cruel, manifesting exceptional depravity." *Commonwealth v. Karenbauer*, 552 Pa. 420, 447, 715 A.2d 1086, 1099 (1998) (citing *Commonwealth v. Whitney,* 550 Pa. 618, 637, 708 A.2d 471, 480 (1998)). "The linchpin of the torture analysis is the requirement of an intent to cause pain and suffering in addition to the intent to kill." *Commonwealth v. Ockenhouse,* 562 Pa. 481, 493, 756 A.2d 1130, 1136 (2000) (citing *Commonwealth v. Edmiston,* 535 Pa. 210, 236, 634 A.2d 1078, 1091 (1993)). In other words, the Commonwealth must prove the defendant was not satisfied with the killing alone. *Id.* (citing *Commonwealth v. Caldwell,* 516 Pa. 441, 448, 532 A.2d 813, 817 (1987)). It is not enough for the Commonwealth to prove, however, that the victim endured pain before dying. *Commonwealth v. Brode,* 523 Pa. 20, 28, 564 A.2d 1254, 1258 (1989).
>
> This Court has enumerated a number of factors to guide our determination as to whether a murder was committed by means of torture. These factors include, but are not limited to: "(1) the manner in which the murder is committed, including the number and types of wounds inflicted; (2) whether the wounds were inflicted in a vital or non-vital area of the body; (3) whether the victim was conscious during the episode and (4) the duration of the episode." *Ockenhouse,* 562 Pa. at 493–94, 756 A.2d at 1137.

Commonwealth v. Haney, 634 Pa. 690, 713, 131 A.3d 24 (Pa.2015).

The state of South Carolina makes an aggravator to inflict "physical torture" during the murder or to engage in "dismemberment." Code 1976 § 16-3-20(c)(a)(1)(i)&(j). The Supreme Court of South Carolina has further defined these aggravating circumstances:

> Physical torture is the intentional infliction of serious, vile, horrible, or inhuman abuse upon the body of another before death. The instantaneous death of the victim does not constitute torture. Physical torture may include the malicious infliction of bodily harm to another by depriving him or her of a member of his or her body or by rendering a member of his or her body useless, or by seriously disfiguring his or her body or a member of his or her body, or the intentional and unmerciful prolonging of severe pain and abuse to the body of another, or the intentional unmerciful infliction of serious and extensive physical pain and abuse to the body

of another.

State v. Smith, 298 S.C. 482, 486, 381 S.E.2d 724, 726 (S.C.1989).

South Dakota's aggravator reads: "The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age." SDCL § 23A-27A-1(6). The Supreme Court of South Dakota has adopted the following definitions:

> Our opinion in *Rhines I* observed that an acceptable interpretation of "torture" as used in SDCL 23A-27A-1(6) included two elements: "(1) the unnecessary and wanton infliction of severe pain, agony, or anguish; and (2) the intent to inflict such pain, agony, or anguish." 1996 SD 55, ¶ 161, 548 N.W.2d [415,] 452 [(1996)]. *See also Moeller II,* 2000 SD 122, ¶ 115, 616 N.W.2d [424,] 454 [(S.D. 2000)] (reaffirming this definition of "torture"). The purpose of this interpretation is to "eliminat[e] from the pool of death-eligible murderers those who intended to kill their victims painlessly or instantly or who only intended to cause pain that was incidental to death." *Moeller II,* 2000 SD 122, ¶ 115, 616 N.W.2d at 454 (citing *Rhines I,* 1996 SD 55, ¶ 161, 548 N.W.2d at 452). As noted above, we presume the circuit court was familiar with this interpretation. *See Sochor [v. Florida],* 504 U.S. [527], 536-37, 112 S.Ct. [2114,] 2121-22, 119 L.Ed.2d 326 [(1992)].
>
> …
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> In *Moeller II,* we upheld a trial court's narrowing instruction of "depravity of mind" requiring a finding that the defendant acted with "indifference to the life or suffering of the victim ... [with] a corrupt, perverted or immoral state of mind on the part of the [d]efendant in excess of what was required to accomplish the murder." 2000 SD 122, ¶¶ 103-11, 616 N.W.2d at 452-53. *See Moeller I,* 1996 SD 60, ¶ 118, 548 N.W.2d [465,] 492-93 [(S.D.1996)]. Similarly, we approved an instruction of "aggravated battery" that required findings of:
>
> (1) the infliction of serious physical abuse upon the victim, by depriving her of a member of her body, by rendering a member of her body useless, or by seriously disfiguring her body or a part of her body; and
>
> (2) the defendant ... had the specific intention, design, or purpose of maliciously inflicting unnecessary pain to the victim ... [which] implies suffering in excess of what was required to accomplish the murder.
>
> *Moeller II,* 2000 SD 122, ¶¶ 117-20, 616 N.W.2d at 454-55. *See Moeller I,* 1996 SD 60, ¶ 115, 548 N.W.2d at 492.

State v. Page, 2006 SD 2, 708 N.W.2d 739, 756 (S.D. 2006).

The state of Tennessee makes it an aggravator to: "The murder was especially heinous, atrocious, or cruel, in that it involved torture or serious physical abuse beyond that necessary to produce death." T. C. A. § 39-13-204(i)(5). The Tennessee Supreme Court held:

> The phrase "heinous, atrocious, or cruel" is a unitary concept that may be proven under either of two prongs: torture or serious physical abuse. *State v. Keen*, 31 S.W.3d 196, 209 (Tenn. 2000) (citing *State v. Van Tran*, 864 S.W.2d 465, 479 (Tenn. 1993)). "Torture" is the "infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." *State v. Pike*, 978 S.W.2d 904, 917 (Tenn. 1998) (citing *State v. Williams*, 690 S.W.2d 517, 529 (Tenn. 1985)). *220 "Serious" alludes to a matter of degree, and the physical, rather than mental, abuse must be beyond or more than what is necessary to produce death. *State v. Suttles*, 30 S.W.3d 252, 262 (Tenn. 2000); *see also* [*State v.*] *Odom*, 928 S.W.2d [18,] 26 [(Tenn. 1996)] (defining abuse as an act that is "excessive" among other things). Jurors do not have to agree on which prong makes the murder "especially heinous, atrocious, or cruel." *Keen*, 31 S.W.3d at 208–09. As long as the proof is sufficient under either prong for finding the aggravating circumstance beyond a reasonable doubt, and all jurors agree that the aggravating circumstance is present and applicable to the case at hand, different jurors may rely upon either theory to reach their conclusion. *Id.* at 209.

State v. Davidson, 509 S.W.3d 156, 219-20 (Tenn.2016).

Utah's version of the aggravator reads: "the homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death." U.C.A. 1953 § 76-5-202(1)(r). The Supreme Court of Utah has held:

> This court placed an additional gloss on the new version of subpart (q) in *State v. Tuttle,* 780 P.2d 1203 (Utah 1989). The court stated in *Tuttle* that "if subpart (q) is interpreted too literally, it would include all murders not resulting in instantaneous death" because all murders involve serious bodily injury. *Id.* at 1216. To avert this problem, the court further limited the range of murders that could qualify as especially heinous. An intentional homicide is committed in "an especially heinous, atrocious, cruel, or exceptionally depraved manner" only if the facts demonstrate (1) that the defendant inflicted "physical torture, serious physical abuse, or serious bodily injury [upon] the victim before death" which is "qualitatively and quantitatively different and more culpable than that necessary to accomplish the murder," and (2) that any of these forms of abuse were inflicted upon the victim while the defendant was in a "mental state materially more depraved or culpable than that of most other murderers." *Id.* at 1216–17. Unless there is a convergence of serious physical abuse and a depraved mental state (both of which must exceed that which is normally required to intentionally kill the victim), the "especially heinous" aggravating circumstance is not applicable to the case. *See id.* at 1218.

…

> We now hold that the "especially heinous" aggravating circumstance does not require that the victim have a conscious awareness of pain during the depraved attack. The only requirement that appears in the language of the statute is that the torture, physical abuse, or bodily injury occur prior to death. The statute says nothing of the victim's consciousness during the attack. We recognize that common definitions of physical torture involve "the infliction of intense pain ... to punish or coerce someone." Webster's Third New International Dictionary Of The English Language 2414 (1986)…
>
> We need not resolve whether the depraved infliction of physical injury on an unconscious person qualifies as "torture" under subpart (q), however. In addition to torture, that provision defines an "especially heinous" murder as one involving "serious physical abuse" and "serious bodily injury." Those terms do not suggest that conscious awareness of pain is a necessary prerequisite to a finding that physical abuse or bodily injury occurred. "Bodily injury," for example, is defined by statute as "physical pain, illness, *or any impairment of physical condition,*" Utah Code Ann. § 76–1–601(3) (2008) (emphasis added); and "serious bodily injury" is defined as "bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death," *id.* § 76–1–601(10)…

Archuleta v. Galetka, 696 Utah Adv. Rptr. 28, 2011 UT 73, 267 P.3d 232, 255-56 (Utah 2011).

In Wyoming, the aggravator reads: "The murder was especially atrocious or cruel, being unnecessarily torturous to the victim." W.S.1977 § 6-2-102(h)(vii). The Supreme Court of Wyoming held: "Strictly construed, the standard set by this aggravating fact will be met by those murders which are accompanied by intentionally inflicted torture, either physical or mental, distinguishable from the usual, the ordinary, the normal sort of homicide in the typical murder case." *Olsen v. State*, 2003 WY 46, 67 P.3d 536, 580-81 (Wyo. 2003).

ARGUMENT

This Court should strike the HAC aggravator in this matter. First, this Court should find that the gloss placed on the aggravator by the Idaho Supreme Court was in violation of Art II Sec. 2 of the Idaho Constitution. Without this gloss, the wording of the aggravator has already been struck down by the California Supreme Court, the Eighth Circuit, and in alternate forms by the United States Supreme Court. Additionally, the saving construction does not actually appear in

the ICJI for the aggravator.

SEPARATION OF POWERS

The Court in *State v. Osborn*, 102 Idaho 405, 418, 631 P.2d 187, 200 (1981) *citing Godfrey v. Georgia*, 446 Idaho 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *Gregg v. Georgia*, 428 U.S. 153, 201, 96 S.Ct. 2909, 2938, 49 L.Ed.2d 859 (1976), found that the United States Supreme Court had held that a statutory aggravator in a capital case can be given a limiting construction that gives sufficient guidance to the sentencing authority.[1] The Court has continued to rely on this precedent to uphold this aggravator. *See, e.g.*, *State v. Hall*, 163 Idaho 744, 419 P.3d 1042, 1084 (2018).

However, in *Verska v. St. Alphonsus Regional Medical Center*, 151 Idaho 889, 896, 265 P.3d 502, 509 (2011), the Idaho Supreme Court reversed course on its ability to put a judicial gloss on statutes. The Court held:

> If this Court were to conclude that an unambiguous statute was palpably absurd, how could we construe it to mean something that it did not say? Doing so would simply constitute revising the statute, but we do not have the authority to do that. The legislative power is vested in the senate and house of representatives, Idaho Const. art. III, § 1, not in this Court. As we said in *Berry v. Koehler*, 84 Idaho 170, 177, 369 P.2d 1010, 1013 (1962), "The wisdom, justice, policy, or expediency of a statute are questions for the legislature alone."
>
> …
>
> Thus, we have never revised or voided an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written, and we do not have the authority to do so. "The public policy of legislative enactments cannot be questioned by the courts and avoided simply because the courts might not agree with the public policy so announced." *State v. Village of Garden City,* 74 Idaho 513, 525, 265 P.2d 328, 334 (1953). Indeed, the contention that we could revise an unambiguous statute because we believed it was absurd or would produce absurd results is itself illogical. "A statute is ambiguous where the language is capable of more than one reasonable construction." *Porter v. Board of Trustees, Preston School Dist. No. 201,* 141 Idaho 11, 14, 105 P.3d 671, 674 (2004).

1 Note that the Supreme Court, like most jurisdictions, has held that a court can give a statute a limiting, or saving construction. *See, e.g., Aptheker, Secretary of State*, 378 U.S. 500, 515-16, 84 S.Ct. 1659, 1669 (1964). This doctrine has its roots in either making the assumption that Congress did not intend to write a statute at odds with the Constitution, or that courts should avoid interpreting statutes in a way that violates the Constitution. *See Antonin Scalia & Bryan Garner,* READING LAW, p. 240-51 (2012).

> An unambiguous statute would have only one reasonable interpretation. An alternative interpretation that is unreasonable would not make it ambiguous. *In re Application for Permit No. 36–7200,* 121 Idaho 819, 823–24, 828 P.2d 848, 852–53 (1992). If the only reasonable interpretation were determined to have an absurd result, what other interpretation would be adopted? It would have to be an unreasonable one. We therefore disavow the wording in the *Willys Jeep* case and similar wording in other cases and decline to address Plaintiffs' argument that Idaho Code section 39–1392b is patently absurd when construed as written.

Id. The Idaho Supreme Court has therefore found that it does not have, as the federal courts and other states have, the ability to change the wording of a statute so as to save it from absurdity. *See, e.g*., Scalia & Garner, at 234-39.

Given the Court's inability to revise statutes, the holding in *State v. Osborn*, 102 Idaho 405, 418, 631 P.2d 187, 200 (1981), providing a rewording of the HAC was unconstitutional. The Court has also held that "terms in a statute are given their commonly understood, everyday meanings, unless the legislature has provided a definition." *State v. Richards*, 127 Idaho 31, 38, 896 P.2d 357, 364 (Ct.App.1995), *citing Ada County Assessor v. Roman Catholic Diocese*, 123 Idaho 425, 849 P.2d 98 (1993). Thus, rather than the Court's *Osborn* revision, the statute must remain as it is, with definitions as provided in the dictionary. Instead of:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Osborn, 102 Idaho at 418, 631 P.2d at 2000 (*quoting Dixon*, 283 So.2d at 9), the instruction should read:

> Heinous means utterly odious or wicked; that atrocious means horrifyingly wicked; and, that cruel means willfully causing pain or suffering to others, or feeling no concern about it.

THE NEW OXFORD AMERICAN DICTIONARY, (Third Ed. 2010). But the Court's holding, taken from Florida, clearly went beyond simply going to the dictionary. The Court specifically added

language stating that in addition to murder, the state had to prove "additional acts" setting it apart from the typical conscienceless murder and involved torture. *Osborn*, 102 Idaho at 418, 631 P.2d at 2000. The aggravator says nothing of additional acts, and it says nothing of torture.

Interestingly, the actual instruction adopted by the court in ICJI 1713 does away with the additional proofs set out in *Osborn* and held to have saved the statute in *Hall*. The Supreme Court in *Hall* relies on "manifesting exceptional depravity" as its limiting construction. *Hall*, 163 Idaho at 786, 419 P.3d at 1084.[2] The Court then rejected the ruling of the Eighth Circuit in *Moore v. Clarke*, 904 F.2d 1226 (1990), that this language is unconstitutionally vague, relying on the ruling in *Leavitt v. Arave*, 383 F.3d 809, 836 (9th Cir.2004). But the court in *Leavitt* was considering the *Osborn* limiting construction, *not* the text of the statute. *Id*. It certainly was not considering the text of ICJI 1713, which does away with the gloss that the court found saved the aggravator, relying on the ruling in *Proffitt v. Florida*, 428 U.S. 242, 255-56, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (holding that "the conscienceless or pitiless crime which is unnecessarily torturous to the victim" provides adequate guidance to the sentencing authority).

Because the Idaho Supreme Court cannot change the wording of the aggravator, and because the saving construction adopted in *Osborn* is not even included in ICJI 1713, and finally because the statute itself is unconstitutionally vague, this Court must strike this aggravator from the Notice Pursuant to Idaho Code § 18-4004A.

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 HAC aggravator in the State's Notice Pursuant to Idaho Code § 18-4004A be struck;

(b) the Court not instruct the jury on the HAC aggravator.

2 Note these words actually appear within the statute and are not a "limiting construction" as that term is used by other courts, or even the Idaho Supreme Court in any other case.

Counsel requests that this motion be set for hearing in order to present oral argument, evidence and/or testimony in support thereof. Requested time is 25 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 by placing a copy of the same 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

_____