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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 UTTER DISREGARD 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 itself or by its circumstances showed an utter disregard for

human life. This Motion is made on the grounds that this aggravator is unconstitutionally vague and fails to narrow the class of eligible candidates for death.

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 Supreme Court of Idaho has found that our statutory scheme does both. *State v. Wood*, 132 Idaho 88, 103 (1998). However, in Mr. Kohberger's case, the charges are premeditated murder, not a murder with any sort of special circumstances. Thus, in this matter, the aggravating

circumstances preform the narrowing function.

Although the Supreme Court held in *State v. Hall,* 163 Idaho 744, 799 (2018), that *Wood* held the "narrowing function is provided in the definition of first-degree murder in Idaho, not necessarily in capital sentencing procedures", that holding does not change this case. The Court in *Hall* was merely recognizing that in some cases the narrowing function is performed by the charge. Again, the charges in this particular case do not perform that function.

That all having been said, the aggravating circumstances in this case must meet two requirements: the circumstance may not apply to every defendant convicted of murder; and it must apply only to a subclass of defendants convicted of murder (genuine narrowing), and the circumstance must not be unconstitutionally vague. *Id.,* 114 S.Ct. at 2635.

"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

The Utter Disregard for Human Life as an *aggravator* appears to be an Idaho invention, though the phrase first appeared in 1888 in Missouri in a manslaughter case. *State v. Davidson*, 95 Mo. 155, 8 S.W. 413 (Mo.1888). It appears thereafter in various states as a formulation of gross negligence amounting to wantonness, the *mens rea* for murder as opposed to manslaughter, and

the *mens rea* for Second Degree Murder where the intent to kill is lacking.[1] *See e.g. Cook v. State*, 46 Fla. 20, 37 35 So. 665, 670 (Fl. 1903); *Muscoe v. Commonwealth,* 87 Va. 460, 12 S.E. 790, 792 (Va. 1891); *Atchinson, T. & S.F.R. Co. v. Lindley*, 42 Kan. 714, 22 P. 703 (Kan.1889). In Idaho, the language "utter disregard for the safety of others" began being used regularly in tort cases involving car accidents. *See In re Burns*, 55 Idaho 190, 40 P.2d 105 (1935); *McClain v. Lewiston Interstate Fair & Racing Assoc*., 17 Idaho 63, 104 P. 1015 (1909). It then appeared as a description of the *mens rea* for manslaughter, quoting a decision from the Illinois Supreme Court. *See State v. McMahon*, 57 Idaho 240, 65 P.2d 156, 162 (1937). After that, the phrase "utter disregard for the safety of others" became a formulation of criminal negligence used in jury instructions. *State v. Patterson*, 60 Idaho 67, 88 P.2d 493, 495-96 (1939). However, the phrase still appeared infrequently at best.

JUDICIAL GLOSS

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

> acts or circumstances surrounding the crime that exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer. "Cold-blooded" means marked by absence of warm feeling: without consideration,

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1 A very similar formulation, "reckless disregard for human life" appears to have been slightly more popular. *See, e.g. McDonald v. Interational & G.N.R. Co.*, 21 S.W. 774 (Tx.Ct.Civ.App. 1893). The first time this language appears in a criminal case are in *Hamilton v. State*, 129 Ga. 747, 59 S.E. 803 (1907). There, the language was used in a jury instruction, explaining to the jury the concept of the abandoned or malignant heart. *Id.*, *cf.* I.C. § 18-4002. The language appeared again in 1915 in Oklahoma describing the intent necessary for a manslaughter conviction. *Daggs v. State*, 12 Okla.Crim. 289, 155 P. 489, 491 (Okla.Crim.Ct.App.1915). In 1919, like utter disregard, it is used to describe the *mens rea* for vehicular manslaughter. *Williams v. State*, 17 Ala. App. 285, 84 So. 424 (Ala.Ct.App. 1919). From there, the language seems to spread across the nation, variously used for manslaughter, murder in the second degree, and civil matters. *See, e.g.*, *Warden v. Hines*, 87 W.Va. 756, 106 S.E. 130 (W.V. 1921); *State v. Green*, 118 S.C. 279, 110 S.E. 145 (S.C. 1921); *McCree v. Davis*, 280 F. 959 (6th Cir. 1922); *People v. Klein*, 305 Ill. 141, 137 N.E. 145 (Ill.1922). It was eventually to be adopted by the United States Supreme Court as the *mens rea* required for the death penalty in felony murder cases. *See Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). Prior to that ruling, the language never appeared in Idaho.

> compunction, or clemency, matter of fact, or emotionless. "Pitiless" means devoid of or unmoved by mercy or compassion. A "cold-blooded, pitiless slayer" refers to a slayer who kills without feeling or sympathy. The utter disregard factor refers to the defendant's lack of conscience regarding killing another human being.

ICJI 1714.

OTHER JURISDICTIONS

The Utter Disregard aggravator exists in no other state. However, the basic concept can be found elsewhere. Problematically for this Court, it turns up largely as a way of defining the almost ubiquitous "heinous, atrocious or cruel" aggravator (hereinafter, the HAC). Missouri, for example, defines its HAC aggravator as a killing that shows "callous disregard for human life." *Harris*, 184 F.3d, 749 *quoting Ramsey v. Bowersox*, 139 F.3d 749, 454 (8th Cir.1998). Similarly, Oklahoma has used the language when discussing whether a defendant will be a future danger. *See Jones v. State*, 2006 OK CR 5, 128 P.3d 521 (Okla.Ct.Crim.App.2006).

ARGUMENT

This Court should strike the Utter Disregard 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 deemed unconstitutional by the Idaho and United States Supreme Courts. *See State v. Osborn*, 102 Idaho 405, 417-19 (1981). 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.[2] 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). 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.

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2 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).

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, 418-19, 631 P.2d 187, 200-01 (1981), providing a rewording of the Utter Disregard aggravator 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:

> We conclude instead that the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i. e., the cold-blooded, pitiless slayer.

Osborn, 102 Idaho at 419, 631 P.2d at 201, the instruction should read:

> Utter means complete, absolute. Disregard means the action or state of ignoring something.

THE NEW OXFORD AMERICAN DICTIONARY, (Third Ed. 2010). The Court added language stating that in addition to murder, the state had to prove the murder was "callous" and that the killer was "cold-blooded" and "pitiless." *Osborn*, 102 Idaho at 418, 631 P.2d at 2000. But the state of ignoring human life would be more akin to a self-driving car killing a pedestrian. It would be a person who did an action with no thought to the lives it would affect but knowing it would affect lives. The Supreme Court's interpretation is someone else entirely. Disregarding human life and being without pity are two separate concepts. Callous means "showing or having an insensitive and cruel disregard for others." THE NEW OXFORD AMERICAN DICTIONARY, (Third Ed. 2010). Cruel means "willfully causing pain or suffering to others, or feeling no concern about it." *Id*.

Cold-blooded means "without emotion or pity; deliberately cruel or callous." *Id*. Pity means "the feeling of sorrow and compassion caused by the suffering and misfortunes of others." *Id*. In essence, the *Osborn* gloss is a soup of synonyms masquerading as a definition. But more importantly, it interjects concepts like cruelty, i.e. the enjoyment of pain, and the lack of pity into a statute that does not have anything to do with either. The killer the legislature describes is ignoring human life completely, they take no joy from its extinguishment. And to say they lack pity is to miss the point. The killer is devoid of interest in the life he takes.

The ICJI only makes matters worse, stating that the aggravator has to do with the conscience. First of all, the Supreme Court in *Osborn* was trying to avoid having it mean something already covered by another aggravator. *See* 102 Idaho at 418-19, 631 P.2d 200-01. The HAC is the aggravator dealing with the conscience, as detailed in the other motions. Utter Disregard cannot be about the same thing that the HAC is about. *See, 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)). Second, the ICJI completely ignores the legislature's intent and rewrites the statute. The legislature describes a person taking a killing action recklessly. The ICJI describes an assassin intentionally killing people without pity.

Because the Idaho Supreme Court cannot change the meaning of the aggravator, and because the aggravator as written is unconstitutional, this Court must strike Utter Disregard 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 Utter Disregard aggravator in the State's Notice Pursuant to Idaho Code § 18-4004A be struck;

(b) the Court not instruct the jury on Utter Disregard.

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

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