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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 CR29-22-0002805

**DEFENDANT'S REPLY TO STATE'S
SUPPLEMENTAL RESPONSE TO
DEFENDANT'S MOTIONS REGARDING
GRAND JURY RECORD AND
TRANSCRIPT**

COMES NOW, Bryan C. Kohberger, by and through his attorney, Anne C. Taylor, Public Defender, and hereby replies to the State's Supplemental Response to Defendant's Motions Regarding Grand Jury Record and Transcript. The State argues that Mr. Kohberger is only entitled to an audio recording and/or transcript of the grand jury proceedings and the grand juror notes, but not the other enumerated items set forth in Idaho Criminal Rule 6 et seq. The

CASE NO. CR 29-22-2805
2023 June 13 4:11 P.M.
CLERK OF DISTRICT COURT
LATAH COUNTY
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State also objects to a qualified protective order, preferring instead to keep requested materials protected by adherence to the word “sealed”.

Release of the grand jury proceedings, governed by Rule and Statute, are materials necessary to Mr. Kohberger’s defense. Article I, Section 8 of the Idaho Constitution, Idaho Criminal Rules 6 et seq, and Idaho Codes §§ 19-1001, et seq. 19-2021 et seq., 19-1201 et seq, and 19-1401 et seq provide authority for release to Mr. Kohberger. Good cause is not required but exists to release all items in Mr. Kohberger’s motion as set forth below.

PROCEDURAL BACKGROUND

Mr. Kohberger was indicted by a grand jury on May 16, 2023. He filed a “Motion to Make Available the Record of all Proceedings of the Grand Jury Pursuant to I.C.R. 6.2” and a “Motion Requesting Release of Grand Jury Materials under Qualified Protective Order” on May 19, 2023. The State then filed their “State’s Response to Defendant’s Motions Regarding Grand Jury Record and Transcript” and a proposed order on May 30, 2023. The parties were not able to reach an agreement regarding the release of grand jury materials which resulted in the state filing their “State’s Supplemental Response to Defendant’s Motions Regarding Grand Jury Record and Transcript” on June 6, 2023. This defense’s reply follows.

ARGUMENT

- I. Mr. Kohberger has a legal right to challenge the grand jury indictment and the court should release all records requested in his motion.

Mr. Kohberger faces charges of four counts of first-degree murder and one count of burglary; because of the first-degree murder charges the State can file notice of intent to seek the death penalty. After Mr. Kohberger’s early January court appearance, counsel for Mr. Kohberger and the State planned for a preliminary hearing scheduled the week of June 26, 2023. A preliminary hearing would have allowed the Defense to challenge evidence the State claims to

have against Mr. Kohberger. The State, as is its option, chose to proceed with a secret grand jury.

A grand jury was empaneled at a time when the small community of Moscow, Idaho had been exposed to 6 months of intense local, national, and international media coverage. Because the State has provided extensive discovery, Mr. Kohberger knows that exculpatory evidence exists. Whether a fair and impartial panel of grand jurors was assembled amidst intense media coverage is a significant question the Defense must evaluate. *See* I.C.R.6.7 and I.C. § 19-1003 and *State v. Roberts*, 188 P. 895, 897 (1920.) Whether inadmissible or exculpatory evidence was presented to the grand jury is a significant question the defense must evaluate. *See* I.C.R. 6.2(a), 6.6 and I.C. §19-1107. And, while there are many other legal arguments Mr. Kohberger may pursue related to the grand jury proceedings, how the grand jury was selected and what evidence was presented, illustrate good cause for the Defense's need for all materials set forth in its motion.

Mr. Kohberger is entitled to pursue relief on a single error or cumulative errors. To determine if there are cumulative errors, good cause exists to review all items requested in his motion. Cumulative error exists when the "cumulative effect of the ...errors and indiscretions, none of which alone might have been enough to tip the scale, operate[]to the defendant['s] prejudice by producing a biased grand jury." *U.S. v. Samango*, 607 F.2d 877, 884 (9th Cir. 1979) and *State v. Ellington*, 151 Idaho 53,70 (2011) (noting "[u]nder the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial." (internal quotation and citation omitted)). Pursuant to Idaho Criminal Rule 48, Idaho Code §2-213(2), and Idaho Codes §§ 19-1001, et seq. 19-2021 et seq., 19-1201 et seq, and 19-1401 et seq., Mr. Kohberger is entitled to request the proceedings be stayed while he challenges the indictment.

The Rules Provide for the Release of all enumerated items in Mr. Kohberger's motion without good cause.

Mr. Kohberger is requesting items listed in Idaho Criminal Rule 6 and Idaho Codes §§19-1001, et seq. 19-2021 et seq., 19-1201 et seq, and 19-1401 et seq. Mr. Kohberger is not seeking anything outside of rule or statute. Each portion of the grand jury proceedings is specified in his original motion and in the rule. *See* Motion to Make Available the Record of all Proceedings of the Grand Jury Pursuant to I.C.R. 6.2, May 19, 2023.

The State's suggestions that he should listen to the audio recording and/or review a transcript of incomplete proceedings merely adds delay to Mr. Kohberger's ability to challenge the grand jury indictment. Essentially, Mr. Kohberger is asked to "look at some but not all, and then ask for more at a later time". Mr. Kohberger's right of a speedy trial has not been waived. This sort of delay would require either a waiver of his important right to a speedy trial or for counsel to represent him less than fully prepared; as such Mr. Kohberger under separate but contemporaneous filing is requesting that his case be stayed during the now contested process of obtaining materials he must examine. Authority for a stay is contained in Idaho Code §2-213(2):

A party may move to stay the proceedings, and in a criminal case to quash the indictment or for other appropriate relief, on the ground of substantial failure to comply with this chapter in selecting the grand or trial jury.

Mr. Kohberger is acting with diligence to discover grounds upon which to challenge the indictment through a motion to dismiss. The State's obstruction of release of the full grand jury proceedings is creating unnecessary delay. This case should be stayed until Mr. Kohberger has complete access to all matters related to the grand jury proceedings and until such time as he can file an Idaho Rule 48 motion to dismiss the indictment. Or, as Mr. Kohberger is requesting, the Court should order all grand jury records released so that defense work can be done.

The State's reliance on *State v. Abdullah*, 158 Idaho 386, 449 (2015) for the standard that good cause is required is not accurate. Mr. Abdullah's grand jury proceedings were in 2014, before I.C.R. 6.2, which was adopted in 2017. The rule does not require good cause, and even if it did, good cause exists as explained earlier. In Mr. Abdullah's post-conviction case he was arguing that grand jury transcripts that had not been included in the appellate record needed to be added and briefed as a subsequent issue. Mr. Abdullah wanted to argue that the grand jury term had expired. In this case, Mr. Kohberger is asking for grand jury records immediately following his indictment and before jury trial, not years later in a post-conviction proceeding. It is worth noting that *Abdullah* illustrates how issues such as this have plagued cases in the appellate realm for decades. Release of the grand jury records now allows Mr. Kohberger's defense to provide effective representation.

II. Sealed versus Qualified Protective Order.

Mr. Kohberger seeks access to these records whether sealed or under a qualified protective order. Defense counsel needs to be able to disclose the grand jury records to the defense team, including relevant experts with the admonition that the records are not to be copied or disbursed. Defense counsel needs to be able to review the records with Mr. Kohberger, but does not seek an order to provide him with a copy. Additionally, the Defense needs to be able to refer to the records in legal challenges or witness examination. To protect the sensitive nature of the records and pleadings referencing grand jury proceedings, any such pleadings can be submitted to the court with a motion to seal.

CONCLUSION

Mr. Kohberger is entitled to review all grand jury proceedings as set forth in his original “Motion to Make Available the Record of All Proceedings of the Grand Jury Pursuant to I.C.R. 6.2” filed May 19, 2023. Although good cause is not required, it exists because a grand jury was empaneled after 6 months of intense media coverage in a small community, exculpatory evidence exists, and there may be a single error or cumulative errors which require the examination of the entire grand jury record. He does not object to the records being sealed as clarified earlier. He agrees with the State that grand juror notes should be included in the records provided. Should the Court release only partial records or transcripts, Mr. Kohberger requests a stay of all proceedings pursuant to Idaho Code §2-213 until such time as he is able to review, request additional records, provide a sworn statement of reasons, and file a I.C.R. 48 motion to dismiss.

DATED this 13 day of June, 2023.

ANNE C. TAYLOR, PUBLIC DEFENDER
KOOTENAI COUNTY PUBLIC DEFENDER



BY: _____

ANNE C. TAYLOR
PUBLIC DEFENDER
ASSIGNED ATTORNEY

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the 13 day of June, 2023 addressed to:

Latah County Prosecuting Attorney –via Email: paservice@latahcountyid.gov
Elisa Massoth – via Email: legalassistant@kmrs.net
Ingrid Batey – via Email: ingrid.batey@ag.idaho.gov
Jeff Nye – via Email: jeff.nye@ag.idaho.gov

