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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

BRYAN KOHBERGER,

Petitioner

v.

STATE OF IDAHO,

Respondent

Case No. CV01-26-15094

**PETITIONER'S RESPONSE TO
SEPTEMBER 3, 2026, ORDER RE:
SEALED SUPPLEMENTAL
MEMORANDUM AND LIMITED
REQUEST FOR CLARIFICATION
(PUBLIC FILING)**

COMES NOW Petitioner Bryan C. Kohberger ("Kohberger"), by and through undersigned counsel, and submits this Response to the Court's September 3, 2026, Order Re: Sealed Supplemental Memorandum. Petitioner further advises the Court that Petitioner has complied with the Court's direction to serve the Sealed Supplemental Memorandum upon Respondent. Petitioner respectfully requests that the Supplemental Memorandum remain sealed from public access pursuant to I.C.A.R. 32(i)(3)(A)(1).

To address directly the Court's order to provide a detailed explanation of why I.C.A.R. 32(i)(3)(A) justifies sealing the Supplement, the Supplement (1) contains highly intimate facts or statements, the publication of which would be highly objectionable to a reasonable person. Admittedly, Petitioner did not include (1) in his Motion, and perhaps that caused the Court some confusion. Nevertheless, based on the Court's prior orders to seal, which only cited I.C.A.R. 32(i), it is Petitioner's belief and intention to respect the Court's prior orders regarding the same material already under seal. To have done otherwise likely risks offending the Court.

Further, Petitioner requests a limited clarification that footnote 1 of the September 3 Order resolves only the privilege issue necessary to the Court's service ruling and does not prospectively adjudicate the scope of any future discovery waiver.

Petitioner does not ask the Court to revisit the general proposition that assertion of a particular ineffective-assistance claim may waive attorney-client privilege as to communications

relevant to the particular breach of duty placed at issue. The concern is timing and scope. No discovery request seeking former counsel's privileged communications or file is presently before the Court; no particular communication has been identified; and no motion to compel or other discovery dispute concerning privileged material is pending.

I. PETITIONER SEEKS TO PRESERVE THE STATUS QUO AND RESPECT THE COURT'S PRIOR SEALING OF THE UNDERLYING MATERIAL.

Petitioner did not file the Supplemental Memorandum under seal to obtain a tactical advantage over Respondent or to create a new category of secrecy. The purpose was narrower. The Supplemental Memorandum necessarily discusses and derives from material that had previously been filed and maintained under seal in the underlying criminal case. Petitioner sought to avoid publicly disclosing information that the Court had already treated as confidential while the Court determined the proper treatment of the new filing. To that point, the Supplement directly cites the sealed portion of a transcript and the May 20, Ex Parte Supplement to Motion to Continue that this Court had already placed under seal. Petitioner only sought to respect and maintain the dignity of this Court's prior order. To have filed the Supplement otherwise would be a direct violation of the Court's prior order to seal.

The September 3 Order has now resolved the separate question of adversarial access by directing service upon Respondent, and Petitioner has complied. Petitioner therefore does not seek to disturb that ruling. The remaining request is simply to preserve the prior public-access status quo: Respondent may receive and litigate the Supplemental Memorandum, while the highly intimate underlying material remains protected from unrestricted public dissemination unless and until the Court orders otherwise.

That approach respects the Court's current service directive without treating it as a direction to disclose the protected material to the public. It also avoids unilateral public disclosure of information previously maintained under seal. I.C.A.R. 32(i)(3)(D) separately addresses party access to sealed records and their permitted use in the case; access by Respondent does not itself resolve the public-access question.

II. THE SUPPLEMENTAL MEMORANDUM SHOULD REMAIN SEALED FROM PUBLIC ACCESS UNDER I.C.A.R. 32(i)(3)(A)(1).

A. *Turpen* requires a record-specific balance and a narrowly tailored remedy.

Idaho Court Administrative Rule 32 presumes public access. *State v. Turpen*, 147 Idaho 869, 871-72, 216 P.3d 627, 629-30 (2009), requires a case-specific determination whether privacy or public disclosure predominates and, when protection is justified, relief no broader than necessary. *Turpen* did not order automatic sealing; it remanded for the required findings. Petitioner bears the burden of establishing that the asserted privacy interest predominates. *State v. Collins*, 157 Idaho 857, 860, 340 P.3d 1173, 1176 (Ct. App. 2014).

The present request invokes I.C.A.R. 32(i)(3)(A)(1): the record contains "highly intimate facts or statements, the publication of which would be highly objectionable to a reasonable person." The current rule also requires identification of the protected record and written reasons for the restriction. I.C.A.R. 32(i)(3)(B). Prior sealing explains counsel's cautious treatment of the information; it does not substitute for applying those requirements to this Supplemental Memorandum.

B. The Supplement reveals individualized private information, not merely ordinary litigation facts.

The record at issue is the Sealed Supplemental Memorandum filed August 27, 2026, not the entire criminal or post-conviction file. Its protected content is identifiable: individualized health-related assessments, descriptions of confidential communications, and discussion of expert-assisted consultation. The relevant passages appear principally in the final two substantive paragraphs on page 1, the first three paragraphs on page 2, and the later passages on pages 2-3 that repeat or apply the same private information. The Court can evaluate those passages directly without their substance being repeated in this public Response.

These passages disclose substantially more than the dates of hearings, the terms of an order, or an attorney's general request for additional preparation time. They expose private information about an identified person's functioning and the individualized assistance being considered in confidential consultations. That subject matter is intimate even when it becomes relevant to litigation. Idaho's civil rules separately caution litigants concerning public filings containing medical records, treatment, and diagnosis. I.R.C.P. 2.6(f)(1). That caution is not an automatic sealing exemption, but it reinforces why the content requires particular scrutiny rather than treatment as ordinary procedural history.

The privacy harm is the involuntary disclosure of those personal assessments and consultation details, not simply unfavorable publicity about the conviction or criticism of counsel or the Court. The Supplement also distinguishes matters under investigation from conclusions actually established. Public dissemination of preliminary concerns presents a concrete risk that tentative observations will be detached from those qualifications and repeated as settled findings. Once the private details have been publicly distributed, a later ruling cannot restore their confidentiality. These consequences follow from the content of the specific passages; Petitioner does not rely on unsupported predictions of physical danger or financial loss.

The request does not depend on claiming that every sensitive fact in the longer source filing appears in the four-page Supplement. The narrower document must be evaluated on its own contents. Nor does the existence of a public reference to a general health-related subject necessarily disclose the particular assessments or consultation details at issue. Petitioner seeks protection only for information that remains private, not removal of facts already disclosed in open proceedings.

C. The public interest is substantial, but it can be served without unrestricted disclosure of every private detail.

Petitioner acknowledges the public's legitimate interest in the basis for a request to disqualify a judge and in the Court's treatment of that request. Because Petitioner relies on the Supplement, the public interest extends beyond the existence of the filing to understanding the argument and the resulting decision. The information's relevance therefore weighs in favor of access; it does not eliminate the competing privacy interest or answer whether every intimate detail must be published.

The balance favors protecting the individualized private details while preserving access to the legal theory, the chronology of the proceedings, the relief sought, and the Court's reasons. The public memorandum and this Response remain available. A properly redacted version of the Supplement can disclose additional nonprivate argument, including argument critical of the Court, without publishing the personal assessments themselves. The Court's written ruling likewise must remain public without revealing protected content. I.C.A.R. 32(i)(3)(B). Secrecy is not requested for judicial conduct, adverse legal reasoning, or the existence of the dispute.

The State's access and public access serve different purposes. Respondent has been served pursuant to the September 3 Order and can contest the Supplement. The present request does not deprive Respondent of that opportunity. Even assuming a claim-specific privilege waiver permits access for adjudication, the separate public-access balance remains. I.C.A.R. 32(i)(3)(D) permits party access and case-related use while restricting access by the public. The publicity surrounding

this case strengthens the need for transparent judicial reasoning; it is neither a reason to suppress criticism nor a reason to dispense with protection for intimate information.

D. The Court should preserve the unredacted record and use targeted redactions wherever they will suffice.

Petitioner requests continued sealing of the complete, unredacted Supplement. But the availability of the public memorandum and this Response does not, by itself, establish that withholding every sentence of the Supplement is the least restrictive remedy. Petitioner therefore expressly asks the Court to consider targeted redaction as an alternative to withholding the entire document from public view.

The proposed method is content-specific: redact the individualized assessments and confidential consultation details identified above, including repetitions that would disclose the same information elsewhere in the Supplement. Preserve the caption, filing information, nonprivate chronology, legal argument, and requested relief. Merely replacing Petitioner's name would not protect him in this identified case; conversely, deleting entire paragraphs is unnecessary when a narrower deletion protects the information without distorting the remaining text.

If the Court determines that a meaningful public version can be prepared in that manner, Petitioner requests leave to submit a proposed redacted copy for approval within three days of the Court's direction, with the original preserved under seal under I.C.A.R. 32(i)(3)(C). Complete withholding is requested only to the extent the Court finds protected information cannot be separated without disclosing it or materially distorting the argument. Petitioner does not seek a permanent blanket seal on the case or on future rulings.

E. The ruling should identify the protected material and explain the balance before public access changes.

Petitioner requests written findings identifying the particular passages that satisfy I.C.A.R. 32(i)(3)(A)(1), the privacy injury associated with their disclosure, the public interest weighed against that injury, and why the chosen redaction or sealing is no broader than necessary. If the Court is not persuaded to protect the identified information, Petitioner requests a hearing under I.C.A.R. 32(i)(2) and continuation of the existing temporary seal pending that hearing and the Court's decision. Any additional particularized showing can be addressed through a protected submission as directed by the Court rather than by reproducing the private facts in this public brief.

This Response is submitted for public filing. The requested protection concerns only the separately filed Supplement and its protected content. The Court may revisit the restriction if circumstances change. I.C.A.R. 32(i)(7). This approach permits present judicial and public scrutiny

while avoiding an irreversible disclosure before the Court has completed the record-specific analysis *Turpen* requires.

III. FOOTNOTE 1 SHOULD NOT BE CONSTRUED AS A PROSPECTIVE DETERMINATION OF THE SCOPE OF DISCOVERY WAIVER.

Footnote 1 of the September 3 Order observes that by asserting ineffective assistance of counsel, Petitioner has waived privilege over communications with trial counsel relevant to the conduct placed at issue, citing I.R.E. 502(d)(3), *Skelton v. Spencer*, 98 Idaho 417, 419, 565 P.2d 1374, 1376 (1977), and *Tasby v. United States*, 504 F.2d 332 (8th Cir. 1974). Petitioner understands that observation as explaining why privilege did not justify withholding the filed Supplemental Memorandum from Respondent. So understood, the footnote resolves the issue actually before the Court.

The authorities cited in the footnote themselves reflect that limitation. *Skelton* concerned communications relevant to the specific settlement process and attorney conduct the client had affirmatively attacked. *Skelton*, 98 Idaho at 419, 565 P.2d at 1376. And the Court cites *Tasby* for waiver only "to the extent necessary to litigate" the ineffective-assistance claim. September 3 Order at 1 n.1. Those authorities support a claim-specific relevance inquiry; they do not require a prospective determination that unidentified portions of former counsel's file are discoverable before Respondent has requested them or before the operative amended petition defines the claims.

To the extent the footnote could instead be read as a prospective determination governing future discovery, however, that question is not presently ripe. Idaho Criminal Rule 39(b) provides that the civil discovery rules do not apply in post-conviction proceedings "except as and only to the extent ordered by the trial court." To the extent the Court's August 26, 2026, scheduling order may be construed as generally authorizing discovery by setting a May 7, 2027, completion date, that general authorization still does not identify any privileged material Respondent seeks or establish the scope of any implied waiver.

More importantly, the Court's current scheduling order expressly contemplates an amended petition and provides that any amended petition will supersede and replace the prior petition in full. Petitioner has moved to enlarge the amendment period because current counsel must investigate an extraordinary volume of discovery and determine which claims can responsibly be pleaded and supported. Until the operative amended petition is filed, Respondent cannot know with precision which ineffective-assistance theories will remain, which may be narrowed or omitted, or what claim-specific discovery it may contend is necessary. That sequencing matters.

An implied waiver under I.R.E. 502(d)(3) is tied to a communication "relevant to an issue of breach of duty." Determining whether a particular communication falls within that exception necessarily requires an identified claim, an identified communication or category of material, and an articulated basis for relevance. None of those concrete discovery questions are presently before the Court.

Respondent has not served a discovery request seeking former counsel's privileged communications or file. No particular communication has been identified. No privilege objection has been asserted. No privilege log has been prepared. No subpoena or motion to compel is pending. The Court therefore has not been presented with the developed record necessary to determine whether any future requested item falls within a claim-specific attorney-client waiver, is separately protected as attorney work product, is subject to expert or confidentiality protections, or should be disclosed only under specified conditions.

I.R.C.P. 26(b)(3) separately protects documents and tangible things prepared in anticipation of litigation and requires protection against disclosure of an attorney's or representative's mental impressions, conclusions, opinions, and legal theories even when trial-preparation material is otherwise discoverable. The existence of a claim-specific attorney-client waiver therefore does not, by itself, resolve every work-product, expert, relevance, confidentiality, or use restriction that may arise if Respondent later seeks portions of former counsel's file.

The Ninth Circuit's en banc decision in *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003), while not controlling this state proceeding, illustrates why courts ordinarily address IAC waiver in the context of concrete discovery. *Bittaker* recognized disclosure sufficient to fairly litigate an ineffective-assistance claim while cautioning against expanding implied waiver beyond what the claim actually requires and approved restrictions preventing compelled disclosure from becoming an unrestricted prosecution roadmap in a later retrial.

Lambright v. Ryan, 698 F.3d 808, 818-20 (9th Cir. 2012), makes the timing point even more directly. Applying *Bittaker*, the Ninth Circuit held that when discovery will require disclosure of attorney-client or work-product material in support of an ineffective-assistance claim, the court must enter appropriate orders clearly delineating the contours of the limited waiver before discovery begins and must strictly police those limits thereafter. *Id.* at 818-20. *Lambright* expressly clarified that a protective order need not issue the moment an ineffective-assistance claim is pleaded; rather, the protection must be in place before discovery on the claim requires disclosure of privileged material. *Id.* Although federal habeas procedure does not control this state proceeding, the fairness

principle is persuasive here, particularly because Idaho PCR discovery likewise exists only to the extent authorized by the trial court under I.C.R. 39(b).

There is also an Idaho-rule basis for controlled use of the material presently at issue. I.C.A.R. 32(i)(3)(D) provides that sealed records ordinarily remain accessible to the parties for purposes of the case and expressly authorizes the Court to impose additional restrictions on use and disclosure. Thus, continued sealing and appropriate use limitations are consistent with the structure of Rule 32 even apart from the persuasive federal waiver authorities.

Petitioner therefore respectfully requests clarification that footnote 1 does not prospectively determine the scope of waiver applicable to discovery that has not yet been requested. If and when Respondent seeks identified privileged or work-product material after the operative petition is established, the parties can litigate the necessity, relevance, scope, and conditions of disclosure on a developed record, including in camera review where appropriate. Alternatively, if the Court construes the August 26 scheduling order as already authorizing discovery broad enough to encompass privileged or work-product material, Petitioner respectfully requests that the Court first delineate the claim-specific scope of any waiver and appropriate use restrictions before any such production occurs.

IV. THE COURT'S SUA SPONTE WAIVER OBSERVATION ILLUSTRATES THE PRACTICAL IMPORTANCE OF RESOLVING THE PENDING DISQUALIFICATION ISSUE EARLY.

Petitioner does not suggest that the Court intended to advocate for Respondent, and Petitioner does not contend that the September 3 Order, standing alone, demonstrates bias. The Court may have included footnote 1 solely to explain why privilege did not justify withholding the Supplemental Memorandum from Respondent. If so, the requested clarification merely confirms that limited understanding.

If the footnote is read more broadly, however, it reaches a potential future discovery position before Respondent has asserted it, before an operative amended petition has defined the claims, and before any particular privileged material has been requested. That circumstance illustrates the institutional concern already presented in the pending Motion to Disqualify. Continued assignment will require the Court to make repeated discretionary rulings concerning the same former counsel, plea process, confidential communications, expert evidence, credibility, and constitutional validity that are intertwined with the Court's own prior involvement in the underlying criminal case. Idaho authority counsels the same procedural restraint when a court reaches an issue sua sponte.

In *Papin v. Papin*, 166 Idaho 9, 19-20, 454 P.3d 1092, 1102-03 (2019), the Idaho Supreme Court recognized that a court may raise an issue on its own initiative when the affected party receives adequate advance notice and an opportunity to address it. The concern here is not that the Court was forbidden to observe that an ineffective-assistance claim can create a privilege waiver; it is that a prospective ruling fixing the scope of waiver before any identified discovery request would resolve an issue the parties have not yet had an opportunity to litigate on concrete facts.

Best v. State, Docket No. 53233, slip op. at 1, 8-9 (Idaho Mar. 26, 2026), is particularly instructive because it arises in post-conviction proceedings. Best reiterated that when a post-conviction court acts on a ground not advanced by the State, the petitioner must receive notice and a meaningful opportunity to respond to that court-generated ground. Best involved the statutory notice requirements for sua sponte summary dismissal, not privilege, so Petitioner does not contend it directly controls this issue. Its procedural principle is nevertheless relevant. Notably, the State in Best had expressly requested an order deeming attorney-client privilege waived before the district court entered such an order. *Id.* at 2. Here, Respondent has made no comparable request and has not identified any privileged material it seeks.

This case is subject to extraordinary national scrutiny. That publicity does not alter the governing legal standard and should not influence any judicial decision. But it does mean that close procedural and merits rulings will inevitably be examined through the existing appearance question, whether or not such scrutiny is fair to the Court. Petitioner raises that reality not as leverage and not as a threat of public criticism, but because public confidence in the neutrality of the adjudicative process itself is an institutional interest.

Reassignment would remove that collateral issue. A different judicial officer could decide future discovery, privilege, evidentiary, credibility, amendment, and merits questions without the recurring dispute over whether prior judicial involvement affected the ruling. If post-conviction relief is denied, the legitimacy of that result is strengthened by eliminating the collateral appearance question. If relief is granted, reassignment likewise avoids any suggestion that the result constitutes a repudiation of the Court's prior rulings. Petitioner offers this point only to preserve the institutional argument already presented in the pending disqualification motion.

Petitioner does not ask the Court to treat this Response as supplemental briefing enlarging the grounds asserted in the pending Motion to Disqualify, nor does Petitioner offer the September 3 Order as an independent ground for disqualification. The point is limited to explaining why a narrow clarification of the footnote now will reduce avoidable collateral disputes while the pending disqualification question remains unresolved.

V. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court: (1) maintain the Sealed Supplemental Memorandum under seal from public access pursuant to I.C.A.R.

32(i)(3)(A)(1), or alternatively permit a redacted public version while preserving the unredacted version under seal; (2) clarify that footnote 1 addresses the privilege issue necessary to the service ruling and does not prospectively adjudicate the scope of waiver applicable to future discovery; (3) if the August 26 scheduling order is construed as authorizing discovery that may reach privileged or work-product material, delineate the claim-specific contours and use restrictions of any waiver before disclosure is required; (4) preserve privilege, work-product, expert, confidentiality, relevance, and protective-order issues for determination on a developed record when Respondent seeks identified material after the operative amended petition is established; and (5) make the record-specific findings requested in Section II and, if the Court is not persuaded to protect the identified information, hold the requested hearing before changing public access, with the existing temporary seal maintained pending decision. This Response itself is submitted for public filing.

Dated this 10th Day of September 2026.

MAGYAR, RAUCH & ASSOCIATES P.L.L.C.,

/s/Gregory Rauch

Gregory Rauch, ISB #7389

Attorney for Bryan Kohberger

CERTIFICATE OF SERVICE

I hereby certify that on 10th Day of September 2026 I caused a true and correct copy of the foregoing documents to be served on the following in the manner indicated below:

Prosecutor:
Latah County Prosecutor's Office
paservice@latahcountyid.gov

☐ US Mail
☐ Facsimile
☐ Hand Delivery
☐ Email
☒ eService – iCourt

s/Matt Ruck
Matt Ruck
Paralegal to Mr. Rauch