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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

STATE OF IDAHO, Plaintiff, V. BRYAN C. KOHBERGER Defendant.	Case No. CR01-24-31665 STATE'S OBJECTION TO DEFENDANT'S MOTION TO STRIKE STATE'S NOTICE OF INTENT TO SEEK DEATH PENALTY ON GROUNDS OF VAGUENESS IN BALANCING AGGRAVATORS AND MITIGATORS

COMES NOW the State of Idaho, by and through the Latah County Prosecuting Attorney, and hereby objects to Defendant's Motion to Strike State's Notice of Intent to Seek Death Penalty on Grounds of Vagueness in Balancing Aggravators and Mitigators ("Motion"). Despite its name, Defendant's Motion does not address his alleged vagueness in balancing aggravators and mitigators. Instead, he asserts a facial challenge to the methods of execution used in Idaho. This Court should deny his motion because it is (1) not ripe for adjudication, (2) foreclosed by U.S. Supreme Court precedent, and (3) insufficient on its face for a method of execution claim.

A. Defendant's Method of Execution Claim Is Not Ripe for Judicial Review.

This Court should refuse to consider Defendant's claim at this stage of his proceedings because it is not ripe for adjudication. The doctrine of ripeness acts as a practical limitation on the jurisdiction of Idaho's courts to resolve disputes. *See Davidson v. Wright*, 143 Idaho 616, 620, 151 P.3d 812, 816 (2006). Ripeness "asks whether there is any need for court action at the present time." *A.C. & C.E. Investments, Inc. v. Eagle Creek Irrigation Company*, 173 Idaho 178, ___, 540 P.3d 349, 358 (2023). "Under the ripeness test in Idaho, a party must show (1) the case presents definite and concrete issues; (2) a real and substantial controversy exists (as opposed to hypothetical facts); and (3) there is a present need for adjudication." *State v. Manley*, 142 Idaho 338, 342, 127 P.3d 954, 958 (2005).

Courts agree that method of execution claims do not become ripe *at least* until after the direct appeal. *See Pizzuto v. Tewalt*, 997 F.3d 893, 902 (9th Cir. 2021) ("When a prisoner claims that a particular method of execution constitutes cruel and unusual punishment in violation of the Eighth Amendment, that claim becomes ripe when the method is chosen."); *West v. Schofield*, 468 S.W.3d 482, 492 (Tenn. 2015) (rejecting method of execution claims as "not ripe for judicial decision because they involve a method of execution that does not now presently apply to the Inmates and will never apply to them unless one of two statutory contingencies occurs in the future"); *State v. Washington*, 330 P.3d 596, 662 (Or. 2014) ("We agree with the state that the specific method of defendant's execution—as opposed to the death sentence itself—is not ripe for consideration by this court, nor will it be until all direct and collateral review proceedings have concluded and a death warrant has issued[.]"); *Rigterink v. State*, 66 So.3d 866, 897-98 (Fla. 2011) (rejecting method of execution claim as "not ripe for review on direct appeal" because "the Governor has not yet signed his death warrant"); *State v. Johnson*, 244 S.W.3d 144, 165 (Mo. 2008)

("[T]his court has found that when an execution date has not been set, it is premature to consider a claim involving the method of execution, as the type of lethal injection that the State may use in the future is unknown.").

Defendant's method of execution claim perfectly illustrates why such claims are not ripe at this early stage of a capital case. Idaho law prefers lethal injection as the method of execution and resorts to the firing squad only if lethal injection is unavailable. *See* I.C. § 19-2716. Defendant speculates that, *if* he is convicted and sentenced to death and *if* the law in Idaho is still the same when it comes time for his execution *then* he will be executed by the firing squad because lethal injection will not be available. He supports his conditional and speculative assertion by citing the Idaho Department of Correction's attempted execution of Thomas Creech on February 28, 2024, which was halted because the medical team could not establish an IV line. (Mot. at 10.) Put differently, Defendant asserts lethal injection will not be available for him decades from now because earlier this year the medical team could not insert an IV in a different individual. That is not even reasonable speculation, and this Court should refuse to rely on it.

Moreover, given the decades of time that would pass between the imposition of a death sentence and any execution, there would come a time before any execution when this Court or another court "will be in [a] better position than we are now to decide this question." *Manley*, 142 Idaho at 342, 127 P.3d at 958. For example, neither this Court, Defendant, nor the State can accurately predict whether and to what extent there will be changes over the next several decades to the Idaho Department of Correction's execution protocol, the Idaho statute that governs methods of execution, or the available methods of execution. Thus, this issue is not ripe, and this Court should refuse to decide it.

B. Defendant's Method of Execution Claim is Foreclosed by U.S. Supreme Court Precedent.

To the extent this Court finds Defendant's claim ripe for review, this Court should reject Defendant's facial challenges to lethal injection and the firing squad because the U.S. Supreme Court has already found those methods of execution constitutional.[1] Capital punishment is constitutional. *See Gregg v. Georgia*, 428 U.S. 153, 207 (1976). "It necessarily follows that there must be a means of carrying it out." *Baze v. Rees*, 553 U.S. 35, 47 (2008). While the U.S. Supreme Court has "never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment," *id.*, the High Court has affirmatively approved certain methods of execution, including lethal injection and the firing squad.

The Court first approved lethal injection in *Baze* and "cleared any legal obstacle to use of the most common three-drug protocol that had enabled States to carry out the death penalty in a quick and painless fashion." *Glossip v. Gross*, 576 U.S. 863, 869-70 (2015). The Court has also observed, and cited approvingly, a list of "courts across the country [that] have held that the use of pentobarbital in executions does not violate the Eighth Amendment." *Id.* at 871. Finally, the Court approved the use of midazolam in lethal injection executions. *See id.* at 881. Defendant

[1] Defendant cites both the Eighth Amendment and the Idaho Constitution in his brief. "Idaho courts have traditionally tracked the U.S. Supreme Court's Eighth Amendment jurisprudence." *Hairston v. State*, 167 Idaho 462, 468, 472 P.3d 44, 49-50 (2020). Moreover, both the Idaho Constitution and the Eighth Amendment use the exact same words for the ban on cruel and unusual punishment, *compare* U.S. Const. amend. VIII, *with* Idaho Const. art. I, § 6, and we thus presume they have the same meaning, *see Planned Parenthood Great Northwest v. State*, 171 Idaho 374, 408-409, 522 P.3d 1132, 1166-67 (2023) (holding "the Reserved Rights Clause is properly viewed as nothing more than Idaho's version of the Ninth Amendment" because they have "strikingly similar language"); *CDA Dairy Queen, Inc. v. State Ins. Fund*, 154 Idaho 379, 384, 299 P.3d 186, 191 (2013) ("[W]hen interpreting the Idaho Constitution, this Court will use federal rules and methodology unless clear precedent or circumstances unique to the state of Idaho or its constitution indicates that Idaho's constitution provides greater protection than the analogous federal provision."). Defendant provided no explanation as to why the Idaho Constitution should be interpreted differently than the Eighth Amendment in this context, and the authority he cited to support his argument relates to the Eighth Amendment, not the Idaho Constitution.

acknowledges that Idaho's execution protocol would not allow for the use of any other chemicals for lethal injection (Mot. 10), and he fails to argue that any specific aspect of Idaho's protocol would take it outside of these determinative decisions. *Baze* and *Glossip* thus foreclose Defendant's argument as to lethal injection.

Similarly, the Court has approved the use of the firing squad to conduct executions: "Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the Eighth Amendment." *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1879).

Defendant claims *Wilkerson* did not hold the firing squad is constitutional. (Mot. at 13.) His unsupported assertion falls flat in light of *Wilkerson*'s express holding to the contrary and more recent decisions in which the Court confirmed it meant exactly what it said. *See Bucklew v. Precythe*, 587 U.S. 119, 131 (2019) ("Consistent with the Constitution's original understanding, this Court in *Wilkerson*[], permitted an execution by firing squad while observing that the Eighth Amendment forbade the gruesome methods of execution described by Blackstone 'and all others in the same line of unnecessary cruelty.'"); *Glossip*, 576 U.S. at 869 ("In *Wilkerson*[], the Court upheld a sentence of death by firing squad."). In fact, even those Justices often considered less friendly toward capital punishment acknowledge *Wilkerson*'s holding. *See Glossip*, 576 U.S. at 969-70 (Sotomayor, J., dissenting) (observing "[t]he Court first confronted an Eighth Amendment challenge to a method of execution in *Wilkerson*[]" and "approved the particular method at issue—the firing squad"). *Wilkerson* thus forecloses Defendant's argument that the firing squad constitutes cruel and unusual punishment.

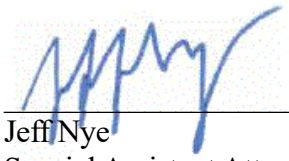
C. Defendant's Method of Execution Claim Is Insufficient on Its Face Because He Failed to Identify an Alternative Method of Execution.

Even setting aside Defendant's problems with justiciability and dispositive precedent, he has gone about his Eighth Amendment claim all wrong by failing to provide an alternative method of execution. "[T]he Eighth Amendment does not guarantee a prisoner a painless death—something that, of course, isn't guaranteed to many people, including most victims of capital crimes." *Bucklew*, 587 U.S. at 132-33. Instead, the Eighth Amendment forbids only methods of execution that seek to "superadd terror, pain, or disgrace" to the execution. *Id.* at 133. And, as the unique verb "superadd" suggests, this "is a *necessarily* comparative exercise." *Id.* (emphasis in original). "To decide whether the State has cruelly 'superadded' pain to the punishment of death isn't something that can be accomplished by examining the State's proposed method in a vacuum, but only by 'compar[ing]' that method with a viable alternative." *Id.* Thus, "identifying an available alternative is 'a requirement of *all* Eighth Amendment method-of-execution claims' alleging cruel pain." *Id.* at 136 (emphasis in original) (quoting *Glossip*, 576 U.S. at 867). Further, the identified alternative must be "readily implemented" and "significantly reduce a substantial risk of severe pain." *Bucklew*, 587 U.S. at 141-49.

Defendant's attack on lethal injection and the firing squad is insufficient on its face because he failed to take a single step down the High Court's well-lit path for method of execution claims. In 16 pages of briefing, Defendant failed even to mention an alternative method of execution—much less prove a readily available alternative that would significantly reduce a substantial risk of severe pain. That is a third independent reason why this Court should deny Defendant's method of execution claim. *See, e.g.*, *Bucklew*, 587 U.S. at 148-49 (rejecting method of execution claim because the condemned "failed to present any evidence suggesting [his identified alternative] would significantly reduce his risk of pain"); *Glossip*, 576 U.S. at 867 (holding method of

execution claim failed on the independent basis that "the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain").

RESPECTFULLY SUBMITTED this 9th day of October 2024.



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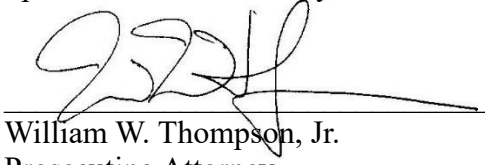

William W. Thompson, Jr.
Prosecuting Attorney

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the STATE'S OBJECTION TO DEFENDANT'S MOTION TO STRIKE STATE'S NOTICE OF INTENT TO SEEK DEATH PENALTY ON GROUNDS OF VAGUENESS IN BALANCING AGGRAVATORS AND MITIGATORS was served on the following in the manner indicated below:

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☐ Mailed
☒ E-filed & Served / E-mailed
☐ Faxed
☐ Hand Delivered

Dated this 9th day of October 2024.

Kim K. Workman

Kim K. Workman