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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 NUMBER CR01-24-31665** **AMENDED MOTION TO STRIKE STATE'S NOTICE OF INTENT TO SEEK DEATH ON GROUNDS OF MEANS OF EXECUTION**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, hereby moves this Court, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article I, Sections 1, 6, 7, 8 and 13 of the Idaho Constitution; I.C.R., Rs. 3, 5.1 and 7; and, I.C., §§ 18-4004, 19-1301-1308 and 1409, 1411 and 1418, and 19-2515 to Strike the State's

Notice of Intent to Seek Death Penalty. This Motion is made on the grounds that upon a conviction and sentence of death, the process by which Mr. Kohberger would be put to death in Idaho violates the Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 6 and 13 of the Idaho Constitution.

Issues

I. Constitutional limits on manner of execution

II. The history of executions in Idaho

III. Lethal Injection in Idaho is not viable

IV. The Firing Squad is not and was never constitutional

I.

Proceeding with capital murder charges in this case is unconstitutional because executing Mr. Kohberger by means of lethal injection or a gunshot as conceived of by the Idaho Department of Corrections (IDOC) would violate his right to be free from cruel and unusual punishment under the Eighth Amendment and his right to due process under the Fourteenth Amendment of the United States Constitution. *See Trop v. Dulles*, 356 U.S. 86, 100 (1958); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). It would also violate his rights under Article I, Sections 6 and 13 of the Idaho Constitution.

An execution procedure that involves "the unnecessary and wanton infliction of pain" violates the Eighth Amendment. *Gregg*, 428 U.S. at 173. The Eighth Amendment's prohibition is not static, but is responsive to "evolving standards of decency" and "contemporary values concerning the infliction of a challenged sanction." *Id.* Execution by lethal injection constitutes cruel and unusual punishment.

Furthermore, the Fourteenth Amendment guarantees that no person may be deprived of life, liberty, or property without due process of law. A violation of procedural due process requires

a showing of: 1) a constitutionally protected interest in life, liberty, or property; 2) governmental deprivation of that right; and 3) constitutional inadequacy of challenged procedures effecting the deprivation. *See Bank of Jackson Cty. v. Cherry*, 980 F.2d 1362, 1366 (11th Cir. 1993). A prisoner sentenced to death has a constitutionally protected interest in life that is not extinguished by the conviction and death sentence. *See Ohio Adult Parole Authority v. Woodward*, 523 U.S. 272 (1998).

The manner of execution is set by the legislature in Idaho. I.C. § 19-2716 was amended just last year. The new version of the statute is:

> (1) The punishment of death shall be inflicted by continuous the following methods:
>
> (a) Continuous, intravenous administration of a lethal quantity of a substance or substances approved by the director of the Idaho department of correction until death is pronounced by a coroner or a deputy coroner.; or
>
> (b) Firing squad.
>
> (2) Not later than five (5) days after the issuance of a death warrant, the director of the Idaho department of correction must determine, and certify by affidavit to the court that issued the death warrant, whether execution by lethal injection, as described in subsection (1)(a) of this section, is available.
>
> (3) If the director certifies that lethal injection is available, the method of execution shall be lethal injection.
>
> (4) If the director does not certify that lethal injection is available, fails to file a certification as required pursuant to subsection (2) of this section, or otherwise determines that lethal injection is unavailable, the method of execution shall be firing squad.
>
> (5) If a court holds that lethal injection is unconstitutional, on its face or as applied, or otherwise determines that firing squad is a constitutionally required method of execution, the method of execution shall be firing squad.
>
> (6) The director of the Idaho department of correction shall determine the procedures to be used in any execution.
>
> (7) The provisions of this section shall apply to all executions carried out on and after the effective date of this enactment, irrespective of the date sentence was imposed.

> SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after July 1, 2023.

The Idaho Supreme Court has ruled that the word "any" in what is now subsection (6) refers to each and every person to be executed as an individual, rather than a broad policy for all defendants. *See*, *Pizzuto v. IDOC*, 170 Idaho 94, 97 (2022). The Court held that because of the legal issues with the manner of execution, the director of the IDOC must provide each individual to be executed with the procedures that will be used in their case in advance of the execution so they may be reviewed and challenged. *Id.* at 98.

Thus, one condemned to die in Idaho has no real way to know how they will be killed at least until the death warrant is issued. Still, as things stand, Idaho has no viable method for killing Mr. Kohberger.

II.

Up until 1978 in Idaho death was imposed by hanging. Kathy Hill, HANGED: A HISTORY OF IDAHO'S EXECUTIONS, 4 (2010). The actual structure of hanging was changed more than once because of the difficulty of getting necks to snap as desired leading to a lack of immediacy in the execution.

The last man hanged by the people of Idaho was Raymond Snowden, on October 18, 1957. Hill, at 225. As Kathy Hill tells it:

> For the first time, prison officials would use their new execution chamber. Located on the second floor of Cell Block Five, next to death row, the room replaced the outside scaffold used for earlier prison hangings. Throughout the day, guards repeatedly tested the trap door to ensure all would be ready for Snowden. The sound of the door dropping reverberated through the cell block; guards would recall the prisoners were eerily quiet that evening.
>
> Around 11:45 p.m., prison guards arrived at Snowden's cell. They carried a backboard complete with arm, leg, and foot straps. Snowden balked at first, but with [the prison chaplain's] assurances, he allowed himself to be strapped in. They delivered him to the execution room and placed him in an upright position. The hangman's noose dangled directly above his head.

> Approximately ten people gathered in the observation room, among them Boise Police Chief Frank Demarest and Ada County Sheriff Pat McCarty, who had so deftly build the case against Snowden. Several newspaper reporters were also at the execution, but all declined to enter the observation room.
>
> With Snowden in place on the trap door, Prison Warden Lou Clapp asked if he had any final words. Snowden, calm and clear, replied, "I do, but I don't know how to say it." Clapp gave him a few more minutes, then placed a black hood over his head. He stepped back and the executioner, who received $600 for his trouble, stepped forward. He placed the noose around Snowden's neck, pushed the knot close to his spine, and pulled the trap door. The backboard veered a bit, scraping the side of the trap, but the deed was done. Snowden was pronounced dead at 12:20 a.m., October 18, 1957.

Hill, at 235.

Precisely why Idaho gave up on hanging has no simple explanation. Perhaps the guards telling stories of the sounds of the trap door being tested repeatedly in the presence of the doomed man-made people feel uncomfortable with the whole ordeal. Maybe it was the idea of strapping a man onto a board and wheeling him off to kill him with a bag over his face. Whatever it was- the how is relatively simple.

In 1978, as Idaho's legislature tried to devise ways to kill people that would satisfy the demands of the United States Supreme Court, Senators Jim Risch and Mike Black joined forces to amend the law to require lethal injection. Hill, at 4. The senators both claimed lethal injection would be more "humane." Senate Judiciary and Rules Committee, Minutes February 16, 1978 (Exhibit A). When the bill was proposed to the House Judiciary, Rules and Administration Committee:

> Warden Anderson appeared in support of the bill, by indicating that it was the desire of the Board of Corrections to take the circus atmosphere out of executions. He said there are weird people who show up at executions and contribute to the circus atmosphere.

Minutes, February 27, 1978. (Exhibit B). It is unclear where Warden Anderson was encountering these circus-like executions, given that the last one in 1957 as describe above was far from it.

However, the new "humane" method of killing people immediately ran into problems.

Bona Miller of the Department of Corrections explained to the House Judiciary, Rules and Administration Committee just four years later, "a medical prescription is required to obtain the lethal injection, then a medical doctor or a medically trained person must administer the injection. The prison officials have been unable to find a medically trained person who would carry out such injections." Minutes, February 19, 1982. (Exhibit C). During that legislative session, the Department of Corrections and the Idaho Medical Association tried to reach a compromise so that killing could happen. Judiciary, Rules & Administration Committee, Minutes, March 11, 1982. (Exhibit D). The firing squad was included essentially as a backup, and one the drafter of the bill thought was likely unlawful. *Id.*

This was the original birth of the firing squad. In 1982, I.C. § 19-2716 permitted the director to use the firing squad whenever lethal injection was "impractical." The only directive provided for the firing squad was that the director would decides its members.

The original firing squad, however, never got off a shot. In 2009, the firing squad was repealed, with a Statement of Purpose that read:

> …This proposed legislation will further amend Idaho Code Section 19-2716 to eliminate death by firing squad as an alternative method of execution. The elimination of the alternative method of death by firing squad is deemed appropriate in light of the United States Supreme Courts [sic] opinion in Baze v. Rees, 128 S.Ct. 1520 (2008), in which the Court concluded that a humane lethal injection protocol does not constitute cruel and unusual punishment. There is no similar Supreme Court authority addressing where the firing squad, as a method of execution, would constitute cruel and unusual punishment in violation of the Eighth Amendment. In addition, Idaho is one of only two states that have the firing squad as a method of execution; the rarity of this method of execution could form the basis of an Eighth Amendment claim. Elimination of the firing squad option will allow the state to avoid such challenge.

Statement of Purpose, RS18536 (2009) (Exhibit E). This reasoning was taken from the statements of then deputy attorney general Bill von Tagen and senior deputy attorney general LaMont Anderson. House Judiciary, Rules and Administration, Minutes Feb. 11, 2009 (Exhibit F); House Judiciary, Rules and Administration, Minutes Mar. 3, 2009 (Exhibit G).

This brings us up to this year, when LaMont Anderson, now Lead Deputy Attorney General for the Capital Litigation Unit, returned to the legislature to ask for the firing squad back. Senate Judiciary & Rules Committee, Minutes, Mar. 13, 2023. (available at https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2023/standingcommittees/230313_sj&r_0100PM-Minutes.pdf). Mr. Anderson told the Senate Judiciary and Rule Committee that the majority opinion in *Glossip v. Gross*, 576 U.S. 863 (2015), found that shooting people was "relatively quick and painless" and that there was an expert opinion in 1983 that said the same thing. *Id.*

The majority in *Glossip* never referred to the firing squad as "quick and painless" except when it quoted Justice Sotomayor's dissent. *Id.* at 880 (*quoting* SOTOMAYOR, J. dissenting, at 977). It seems clear from the opinion in *Glossip* that the majority was simply pointing out that the dissent's view that all methods for execution prior to lethal injection had become unconstitutional was a distinction without a difference from the view that it was time to simply stop killing people. *Id.*

And no amount of Google can uncover any experts from 1983 that thought shooting people was humane. In fact, Colman McCarthy wrote an article called "Killing with Kindness" in 1983 that would seem to dispel the idea that that was the heyday of firing squads. THE WASHINGTON POST (June 11, 1983) (available at https://www.washingtonpost.com/archive/politics/1983/06/11/killing-with-kindness/b96cde68-e284-42b9-9e4d-1a3d6e94a0b5/).

III.

Idaho does not have the ability to kill a man with an injection at this point in time and likely will not in the future. This is because of three things: 1. A lack of trained medical personnel willing to take life, 2. The difficulty in finding drugs that kill without creating unnecessary pain and 3.

The difficulty of purchasing those drugs that have been held to be appropriate for killing a person by the courts.

The United States Constitution prohibits deliberate indifference to the known risks associated with a particular method of execution. *Cf. Estelle v. Gamble*, 429 U.S. 97, 106 (1976). There are a number of known risks associated with the lethal injection method of execution, and the State of Idaho has typically failed to take adequate measures to ensure against those risks. The Eighth Amendment safeguards nothing less than a human being's dignity and prohibits methods of execution that involve the unnecessary and wanton infliction of pain. Under *Trop v. Dulles*, 356 U.S. 86, 100 (1958), to comply with constitutional requirements, the State must minimize the risk of unnecessary pain and suffering by taking all feasible measures to reduce the risk of error associated with the administration of capital punishment. *Glass v. Louisiana*, 471 U.S. 1080, 1086 (1985); *Campbell v. Wood*, 18 F.3d 662, 709-11 (9th Cir. 1994) (Reinhardt, J., dissenting); *see also Zant v. Stephens*, 462 U.S. 862, 884-85 (1985) (state must minimize risks of mistakes in administering capital punishment); *Eddings v. Oklahoma*, 455 U.S. 104, 118 (O'Connor, J., concurring).

The most recent document detailing how the director would kill a man is Idaho Department of Correction, Execution Chemicals Preparation and Administration (last updated March 30, 2021). This particular set up was intended for Mr. Pizzuto. *See*, Ruth Brown, *Idaho Inmate Pizzuto's Execution Canceled, State Doesn't Have Lethal Injection Chemicals*, IDAHO REPORTS (Nov. 30, 2022) (available at https://idahocapitalsun.com/2022/11/30/idaho-inmate-pizzutos-execution-canceled-state-doesnt-have-lethal-injection-chemicals/).

This Court should review the procedures adopted in 2021 that IDOC could not implement. *See* Idaho Dept. of Correction, Standard Operating Procedure: Execution Procedures (approved Mar. 30, 2021) (Exhibit H); *and* Idaho Dept. of Correction, Execution Chemicals Preparation and

Administration (last updated Mar. 30, 2021) (Exhibit I). It consisted of four different possible methods of death.

1. Method 1 uses Sodium Pentothal to put the man to sleep, and then paralyzes him using Pancuronium Bromide, and finally burns him alive from within via Potassium Chloride. Method 2 uses pentobarbital to put the man to sleep and then also murders them with pancuronium bromide and potassium chloride.

    a. There is no dispute in the scientific and legal community that potassium chloride and pancuronium bromide are extremely painful if a person receives them while conscious. In *Baze v. Rees*, the State conceded that, "failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." 553 U.S. 35, 53, 128 S.Ct. 1520, 1533 (2004). Pancuronium bromide paralyzes the chest wall muscles and diaphragm so that the person can no longer breathe. *Id.* at 44, 527. Potassium chloride causes a cardiac arrhythmia which results in ineffective pumping of blood by the heart and, ultimately, cardiac arrest. *Id.* In *Baze*, the Court found that "proper administration of the first drug ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs." *Id.* The potential pain from the second and third drugs was also acknowledged in the Court's opinion in *Glossip v. Gross*. 135 S.Ct. 2726, 2740, 192 L.Ed.2d 761 (2015). Additionally, during oral arguments in *Glossip*, Justice Kagan likened the pain from potassium chloride to being burned alive from the inside. R. Barnes and M. Berman, *Supreme Court Justices Hotly Debate the Use of a Lethal Injection Drug*, The Washington Post, April 29, 2015. Scientific

evidence as well as eyewitness accounts from executions establish that that death by lethal injection can be an extraordinarily painful death. *See Id.*

2. Method 3 simply relies on injecting a lot of Sodium Pentothal.
3. Method 4 is the same idea but relies on injecting Pentoarbital instead.
4. Problematically for all these methods: Sodium pentothal is no longer available for killing people. Pam Belluck, *What's in a Lethal Injection Cocktail?*, THE NEW YORK TIMES (2011) *available at* https://www.nytimes.com/2011/04/10/weekinreview/10injection.html. The same became true of pentobarbital shortly thereafter. Lincoln Caplan, *The End of the Open Market for Lethal Injection Drugs*, THE NEW YORKER (2016) available at https://www.newyorker.com/news/news-desk/the-end-of-the-open-market-for-lethal-injection-drugs.

The upshot is that lethal injection does not exist in Idaho at this point in time. The director acknowledged as much in his letter to the Board of Correction in November 2022. (Exhibit J). Indeed, he was correct. The botched legal injection of Thomas Creech on February 28, 2024 demonstrates that, even when lethal injection drugs are obtained, lethal injection is not available in Idaho. https://deathpenaltyinfo.org/executions/botched-executions (After 58 minute and 8 attempts, the warden finally halted the execution.)

Due to this history, the legislature readopted the firing squad as a possibility in the last legislative session.

IV. Firing Squad

When considering whether the firing squad in its rebirthed iteration is Cruel and Unusual punishment in violation of the Constitution of both the United States and Idaho, it helps to have an idea of what that will look like. In 2010, Ronnie Lee Gardner volunteered for the firing squad in Utah.

June 18, 2010-- When a prison official opened a curtain to reveal the death chamber to witnesses early Friday, convicted killer Ronnie Lee Gardner was already strapped to the execution chair.

His eyes darted around the room at a prison in Draper, Utah, but he appeared calm, even at peace, witnesses said. This was a stark contrast from a troubled life marred by drugs, sexual abuse and indiscriminate violence. Asked by a prison official if he wanted to say anything, Gardner responded simply: "I do not, no."

A black hood was slipped over his bald head; a small circular taget attached over his heart. A barely audible countdown was interrupted by two loud bangs in quick succession. It was 12:15 a.m.

After a quarter of a century on death row, Gardner, 49, became the first man to die by firing squad in Utah in 14 years.

"He clenched his fist and then let go," radio talk show host Doug Fabrizio, one of a small group of witnesses, said. "And then he clenched it again."

A medical examiner checked Gardner's pulse on both sides of his neck. When the black hood was lifted to check Gardner's pupils with a flashlight, his ashen face was briefly revealed.

He was pronounced dead at 12:17 a.m.

…

At exactly midnight Friday, the inmate who spent more than half his life behind bars was awakened from a nap for his execution. He was escorted to the nearby execution chamber, where he was strapped to a metallic, winged chair. He wore a dark prison jumpsuit and no shoes. The chair was raised on a small black platform, like a stage. Relatives of his victims and members of the media witnessed the execution in separate rooms nearby.

A team of five anonymous marksmen armed with .30-caliber Winchester rifles, standing just 25 feet away behind a brick wall cut with a gun port, aimed their weapons at Gardner's chest. The Utah law enforcement officers volunteered for the assignment. One rifle was loaded with a blank so no one knew who fired the fatal shot.

Gardner repeatedly rubbed his left thumb and forefinger moments before the shooting. The rifles exploded and four bullets perforated his heart and lungs. The straps held his head up. A metal tray beneath the chair collected his blood.

Sandra Yi, a reporter with KSLTV in Utah, said Gardner fidgeted even after the barrage of gunfire.

"When he was shot, some of us weren't sure if he had passed away because we could see movement," she said. "He had his fist clenched and we could see his elbow move up and down."

> Sheryl Worsley, a reporter with KSL News Radio in Utah, described the moments after the execution as disturbing.
>
> "He moved a little bit and, to some degree, that bothers me," she said. "To some degree that mirrors the last few weeks of his life because he was fighting to stay alive the last few weeks and that seemed to continue on."
>
> Prison officials said Gardner spent his final hours sleeping, reading the spy thriller "Divine Justice," and watching the "Lord of the Rings" film trilogy. He also met with his attorneys and a Mormon bishop. He appeared relaxed. He had fasted after eating his last requested meal -- steak, lobster tail, apple pie, vanilla ice cream and 7-Up -- two days earlier.
>
> "He was at peace," his attorney, Tyler Ayres, told The Salt Lake Tribune. "He even laughed a few times ... and that helped put me at ease."
>
> Outside the prison, members of his family -- some wearing T-shirts displaying his prisoner number, 14873 -- gathered to pay their respects. They were joined by dozens of death penalty protesters. Around the time of the execution, family members cranked up a car stereo playing Lynyrd Skynyrd's "Free Bird."
>
> "He didn't want nobody to see him get shot," said Gardner's brother, Randy Gardner. "I would have liked to be there for him. I love him to death. He's my little brother."

Ray Sanchez, "Ronnie Lee Gardner Executed by Firing Squad in Utah", GMA (June 18, 2010) (available at https://abcnews.go.com/GMA/Broadcast/convicted-killer-ronnie-lee-gardner-executed-utah/story?id=10949786). Additionally, Utah's Department of Corrections made a commemorative coin to give all the staff that helped kill Ronnie that day. Geoff Liesik, "Corrections Crating Commemorative Coin for Ronnie Lee Gardner Execution", DESERETNEWS (Apr. 26, 2010) (available at https://www.deseret.com/2010/4/27/20111327/corrections-creating-commemorative-coin-for-ronnie-lee-gardner-execution).

There is an eerie similarity between the killing of Snowden by hanging in 1957 and the killing of Gardner in 2010. Men forced to spend years on death row finally taken to be murdered by other men. Men strapped to boards; faces covered by bags. The circus going on outside and the coins being minted to remember state sanctioned killing. This Court should wonder at why

Idaho is choosing to go backward.

The answer to that is the claims of LaMont Anderson and those in his office, suddenly seeing the light at the end of the gun barrel after getting rid of the practice almost fifteen years ago. Their claims rest on a misreading of *Glossip*. The majority in *Glossip* was not considering firing squads as a method for execution- only the dissent did that and did so on a bare record. 576 U.S. at 880-81. Both majority and dissent were of the opinion that *Wilkerson v. State of Utah*, 99 U.S. 130 (1878) held that the firing squad was constitutional. That simply is not true.

Wilkerson did not test the constitutionality of shooting people as a means of execution. It tested whether a judge in a territory had the authority to order a shooting after the territory removed from its statute the method of execution. 99 U.S. at 132-33. The Court did mention in dicta that it did not think firing squads were cruel and unusual- but that had nothing to do with the holding, as the Court acknowledged no one was arguing in 1878 that it was cruel or unusual. *Id.* at 137. ("Had the statute prescribed the mode of executing the sentence, it would have been the duty of the court to follow it, unless the punishment to be inflicted was cruel and unusual, within the meaning of the eighth amendment to the Constitution, which is not pretended by the counsel of the prisoner.")

Since there therefore is no Supreme Court case that has ever actually considered whether it is cruel and unusual to use a firing squad, this Court should look at the ruling of the Court of Common Pleas for the Fifth Judicial Circuit of South Carolina in *Owen v. Stirling*. (Exhibit K). Although ultimately reversed by the Supreme Court of South Carolina in *Owens v. Stirling*, -- S.E.2d --, 2024 WL 3590797 (2024), the court's analysis was sound.

The Court of Common Pleas found that South Carolina recently brought back the option of the firing squad. The statute has been challenged by people set to be executed. In the Order Granting Injunctive Relief to a challenge of method of execution the court noted that the firing squad had been around for years and was largely unused, thus the firing squad is not a new method

of execution, and it is an unusual form of punishment. *Id*. at 21. "This is so even though firing squads have existed for many years, meaning that it is not a newly created or recently discovered means of execution. Rather, it is a reversion to a historic method of execution that has never before been used by our State and is not used in the overwhelming majority of other states. Thus, execution by firing squad is unusual punishment both nationally and in South Carolina." *Id.* at 22.

The Court of Common Pleas also found the firing squad to be cruel:

> Here, it is clear that the firing squad causes death by damaging the inmate's chest, including the heart and surrounding bone and tissue. This is extremely painful unless the inmate is unconscious which, according to Drs. Arden and Alvarez, is unlikely. Rather, the inmate is likely to be conscious for a minimum of ten seconds after impact. Moreover, the length of the inmates' consciousness – and, therefore, his ability to sense pain – could even be extended if the ammunition does not fully incapacitate the heart. During this time, he will feel excruciating pain resulting from the gunshot wounds and broken bones. This pain will be exacerbated by any movement he makes, such as flinching or breathing.
>
> This constitutes torture, a possibly lingering death, and pain beyond that necessary for the mere extinguishment of death, making the punishment cruel.2 *Id.* at 22.

Id. at 22-23.

The Supreme Court of South Carolina has now found that the firing squad is neither cruel nor unusual. 2024 WL at *15-18. It does so by separating the horrors of what it is contemplating from what it calls the "critical question", or, as they put it:

> Our definition of cruel does not call upon us to analyze what the death chamber looks like after the execution has been carried out. There is no consideration in our analysis of whether a method of execution is "cruel" of the dramatic imagery set forth in the Chief Justice's dissent, the circuit court's order, or the inmates' brief, such as blood soaked in the inmate's clothing, spattered on the walls, and pooling on the floor, or other physical violence to the body that occurs simultaneous with or subsequent to the cessation of pain. While each of these might have been political concerns addressed by our General Assembly, they are not constitutional concerns. Our definition of cruel defines the critical question and requires us to focus us on the risk of unnecessary and excessive conscious pain.

Having thus turned death into a sort of parlor game, guess at how much pain one might experience

after being shot in the heart, the court finds it is not convinced it sounds all that bad and thus cannot qualify as cruel. The only authority it relies upon are the various statements of liberal justices and judges dissenting in various cases. Given that any person chosen at random from the street can probably name a few pleasanter ways to die than being tied up, bagged and shot, it is hard to see this opinion as anything more than a political stunt.

In any case, the Court's eventual decision to decide it is not unusual, despite the fact that almost no one uses the firing squad except when chosen by the condemned, to uphold its use in South Carolina where the law *only permits its use if chosen by the condemned*, makes this opinion of no use to the state of Idaho. *See id.* at 18.

Idaho's statute authorizing the firing squad as punishment is excessive because death by firing squad subjects the human being killed to unnecessary physical pain. Even in the best circumstances, meaning accurate shots fired and hitting the intended target area death is not immediate. Awareness continues and pain exists. Counsel for Mr. Kohberger has attached the article "The Possible Pain Experienced During Execution by Different Methods, by Harold Hillman. PERCEPTION 22, 745-53 (1993) (Exhibit L). It quotes the Royal Commission on Capital Punishment rejecting shooting as "it does not possess even the first requisite of an efficient method, the certainty of causing immediate death." Dr. Barbara Wolf's affidavit also shows that shooting is cruel (Exhibit M).

Idaho's death penalty statute only permits unconstitutional or unavailable methods of death under the United States and Idaho Constitutions, and this Court should declare §§ 18-4004A and 19-2515 unconstitutional and strike the State's Notice of Intent to Seek Death Penalty. There is no humane reason to place Mr. Kohberger into solitary, as described in his Motion to Strike State's Notice of Intent to Seek Death Penalty on Grounds of International Law, with a promise to kill him just as soon as the people of Idaho can figure out a way that is available, humane, and does

not cause a circus outside the prison.

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 State's Notice of Intent to Seek Death Penalty be struck;

(b) the Court seat a jury which is not "death-qualified";

(c) the Court preclude the admission of any evidence of aggravating circumstances during the trial of this case; and,

(d) the Court not instruct the jury on any aggravated punishment.

DATED this ___24___ day of October, 2024.

BY: _____
JAY W. LOGSDON
FIRST DISTRICT 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 ___24____ day of October, 2024, addressed to:

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

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