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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

**REPLY TO STATE'S OBJECTION TO
DEFENDANT'S MOTION TO STRIKE
FUTURE DANGEROUSNESS
AGGRAVATOR**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and hereby submits the following Reply to the State's Objection to his Motion to Strike Future Dangerousness Aggravator.

First, Mr. Kohberger would note that it appears the parties agree to call this the Future Dangerousness Aggravator instead of the propensity aggravator.

The first argument Mr. Kohberger made was that Idaho's Future Dangerousness Aggravator fails to narrow the class of individuals facing the death penalty. The State does not attempt to grapple with the myriad problems exposed by Mr. Kohberger's argument that *Creech* provides a meaningless gloss that merely describes murderers as opposed to those who commit manslaughter. Instead, it oddly enough simply quotes the passage from *Creech* that undeniably describes manslaughter:

Here . . . it cannot be asserted that the "propensity" circumstance could conceivably be applied to every murderer coming before a court in this state. We would construe "propensity" to exclude, for example, a person who has no inclination to kill but in an episode of rage, such as during an emotional family or lover's quarrel, commits the offense of murder. We would doubt that most of those convicted of murder would again commit murder, and rather we construe the "propensity" language to specify that person who is a willing, predisposed killer, a killer who tends toward destroying the life of another, one who kills with less than the normal amount of provocation. We would hold that propensity assumes a proclivity, a susceptibility, and even an affinity toward committing the act of murder.

State v. Creech, 105 Idaho 362, 370-71 (1983). What the Idaho Supreme Court of 1983 did not grasp is that it was describing first degree murder as opposed to voluntary manslaughter. Compare I.C. § 18-4001, 4002 with I.C. § 18-4006. The State repeats this mistake rather than grappling with it- understandably, because to do otherwise would be to admit that Idaho's scheme fails utterly to define those who should be death eligible.

The State's real argument is that this Court cannot overrule the mistakes of the Idaho Supreme Court. This Court cannot, but it can refuse to perpetuate them.

Next, Mr. Kohberger argues that this aggravator provides the jury with no guidance. The State now makes a meandering response that seems to attempt to refute the holding of *Ford v. Wainwright* but then just restates it. The State does not try to provide a clear way of deciding

when evidence of mental illness should be aggravating and when it should be mitigating. Simply telling a jury to find it aggravating if you think someone who has committed First Degree Murder will kill again based on something beyond the fact that they were able to do it in the first place is not providing the kind of narrowing required by *Furman*.

Mr. Kohberger provides this Court with a solution to this issue. Mr. Kohberger argues that Future Dangerousness *cannot* be a statutory aggravator. Aggravators are intended for deciding which First Degree Murderers merit the death penalty. Future Dangerousness does not do that- it focuses on the person, not the act. As Mr. Kohberger notes- a jury can consider possible dangerousness. But only *after* Mr. Kohberger has been selected for the possibility of death.

The State's response is that this Court should not worry, after all, judges consider future dangerousness all the time. That is true- it is a typical consideration at sentencing. But the aggravators are not just factors for sentencing. These are intended to narrow those eligible for the death penalty based on the *crime they have committed*. And that is something this aggravator does not do.

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 as indicated below on the 24 day of October, 2024 addressed to:

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