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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 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, and hereby submits this Reply to the State's Objection to his Motion to strike the death penalty in this matter on the Grounds of Vagueness in Balancing Aggravators and Mitigators, which should have been titled on grounds of means of execution.

The State makes three arguments, one, issues as to the manner of execution are not ripe, two that lethal injection is an approved method of killing in this country, and three, so is the firing squad.

As the State acknowledges, any possible execution in this case is decades and decades away. Therefore, it is pointless to argue now over the propriety of how it might take place. Mr. Kohberger counters that if the delay and uncertainties about any eventual execution was a reason not to litigate such issues then much of the case law requiring these issues to be raised in the trial court needs revisiting. Mr. Kohberger points out that millions of taxpayer dollars are being spent in this case *because* the State has decided to seek a penalty that will take so many decades to reach many of those involved in this matter will likely die of natural causes. The question for this Court is "is it constitutional to kill this person in the manner set out by law" and if it is not – that ought to be the end of things. The time and money being expended on the what the State implies is merely a hypothetical would itself be an injustice. Unfortunately, the death penalty remains too real a possibility to be ignored.

That being said, Mr. Kohberger also acknowledges that the general judicial approach to manner of execution claims is to consider them as an afterthought, as the State cited authorities hold. Mr. Kohberger's argument, however, is a challenge to the propriety of permitting a death verdict in this case when the State has no real plan to carry it out. It ought to be clear that if Idaho tomorrow adopted quartering as its method execution, no person should be forced to sit on death row awaiting a punishment that clearly would violate the Eighth Amendment.

Tragically, the rulings of our Supreme Court have made that entirely unclear. From *Baze v. Rees* 553 U.S. 35 (2008) to *Glossip v. Gross*, 574 U.S. 1133 (2015) and *Bucklew v. Precythe*, 587 U.S. 119 (2019), a majority of the Court has severed the sentence of death from the execution, and treated method of execution as a sterile subject fit for logomachy. Worse still, despite its promises that prisoners may challenge means of execution by presenting an

alternative, its recent decisions show those promises were quite empty. *See*, *Smith v. Hamm*, 144 S.Ct. 414 (2024).

In the face of these decisions, Mr. Kohberger argues that a death verdict under these circumstances violate the Eighth Amendment. The Supreme Court has never ruled on this issue- in point of fact, it has yet to rule on a single *Lackey* claim. *See, e.g., Allen v. Ornoski*, 435 F.3d 946 (9th Cir. 2006). Mr. Kohberger is not making a true *Lackey* claim as he has yet to spend decades on death row as the State foretells. His argument is that when it is so foreseeable that the death penalty in a case is almost purely symbolic, the Constitution refuses it- because what it amounts to is a state of dehumanization that cannot be justified. *See*, *Knight v. Florida*, 528 U.S. 990, 993 (1999) (BREYER, J., dissenting from denial of cert.); *Thompson v. McNeil*, 556 U.S. 1114, 1119 (2009) (STEVENS, J. & BREYER, J. dissenting from denial of cert.).

In *Trop v. Dulles*, 356 U.S. 86 (1958), the Court held that the Eighth Amendment did not permit the government to denaturalize its citizens, even for a crime for which death was a possible punishment. It held:

> We believe, as did Chief Judge Clark in the court below, that use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.
>
> This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all

> the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.
>
> The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance. Even statutes of this sort are generally applicable primarily to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion. In this country the Eighth Amendment forbids this to be done.

Trop, 356 U.S. at 101-103.

Mr. Kohberger argues that a death verdict in this case is analogous to the "fate of ever-increasing fear and distress" described in *Trop*. To permit the State to seek one where the actual means of execution are illegitimate is too great a farce for the Eighth Amendment. Thus, this Court should consider the issue now.

The State's argument in favor of its execution regime is to claim that *Wilkerson* upheld firing squads by pointing at other cases in which it was discussed. However it may have been construed, its text does not say what the State is arguing. Additionally, in *Baze, Glossip* and *Bucklew*, the Court eschewed the concept of punishments being "constitutional" or "unconstitutional" *except* when compared to some other punishment that does not "superadd" pain/disgrace/torture, etc. Thus, no means of execution is currently constitutional or unconstitutional until compared to another.

The State recognizes this in its next argument and rightly claims that Mr. Kohberger did not proffer a way in which he would like to be killed should it come to that. Mr. Kohberger did not because he is not making a means of execution claim like in those cases. He is arguing that the state of Idaho violates the Constitution when it threatens its citizens with its current death penalty regime that relies on means of execution that cannot be carried out without causing undue pain. Mr. Kohberger should not have to spend decades in courts trying to keep from being

killed in some horrible fashion. The Eighth Amendment does not allow it, and neither may this Court.

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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