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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 NOTICE OF INTENT TO SEEK THE DEATH PENALTY ON GROUNDS OF FAILURE TO PRESENT AGGRAVATORS TO NEUTRAL FACT FINDER**

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 the Notice of Intent to Seek the Death Penalty on Grounds of Failure to Present Aggravators to a Neutral Fact Finder.

The State argues, relying on *Abdullah*, that no neutral factfinder is needed for the aggravators that the State believes permit death. As Mr. Kohberger argued in his brief, *Abdullah* did not consider the 8th Amendment when it made its ruling. It also relied on *State v. Porter*, 140 Idaho 780 (2004), a case that also did not consider the 8th Amendment. The reasoning in *Abdullah* is a peculiar leap of logic. The Court found that because aggravators are not elements of a crime they need not appear in the indictment or information. *State v. Abdullah*, 158 Idaho 386, 457-61 (2015). The Court never explains why. It never discusses the function of a grand jury or preliminary hearing to test evidence. Instead, it relies on sleight of hand- the aggravators are not elements thus they do not go in the indictment.

Essentially- if the *Abdullah* Court has its way, the State can simply take elements of crimes, call them something else, and there will be no need to have a grand jury or neutral factfinder consider them. That is obviously wrong. First- the whole concept of "functional equivalence" in *Ring v. Arizona*, 536 U.S. 584 (2002) is recognizing the Constitution set the floor for state behavior- and simply renaming things does not avoid its requirements. Second – as the Court reaffirmed just recently – state law does not have the power to define away constitutional rights. *See Tyler v. Hennepin County, MN*, 598 U.S. 631, 638 (2023) (*citing Phillips v. Washington Legal Foundation,* 524 U.S. 156, 167, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998)).

The State also pushes back on Mr. Kohberger's argument that leaving it up to prosecutors to determine when to seek the death penalty violates the constitution. However, the State makes no attempt, as it has previously at hearings in this case, to claim the prosecutor's hands are tied or that death is somehow required by law. Now the State simply insists that the prosecutor's power to seek death is derived from Supreme Court decisions and is thus unquestionable. State's Brief at 3 (*citing Gregg v. Georgia*, 428 U.S. 153, 199 (1976)). Then the State claims Mr. Kohberger's

argument was that the failure to have a neutral factfinder between the accused and death at the beginning of the process would lead to less reliability at the eventual trial. *Id.*

First, Mr. Kohberger cited to the authorities arraigned against his argument, but they include *McClesky v. Kemp*, 481 U.S. 279, 306-07 (1987), not *Gregg*. The Court in *Gregg* was weighing the new procedures adopted in the aftermath of *Furman* and determined that the prosecutor's discretion was not a concern. *Gregg*, 428 U.S. at 199. Justice White's concurrence, quoted by Mr. Kohberger in his briefing, provides a better explanation as to why the Supreme Court was unconcerned by the prosecutor's discretion to seek death. Defendant's Brief at 12 (*citing Gregg*, 428 U.S. at 225 (WHITE, J. concurring). But Mr. Kohberger does not quibble with the prosecutor's ability to be lenient, his argument is with the prosecutor's ability to seek death. Mr. Kohberger is not requesting that there be a requirement that death be sought in every First Degree Murder case so as to give a neutral factfinder the ability to decide if death is sought- such a rule would come to nothing, since the charging decision itself would function to allow prosecutors to decide who would receive this treatment. Mr. Kohberger is arguing that if a prosecutor chooses to seek death, just as with the charging decision, that this be determined by a neutral factfinder at the start of the process.

As to the State's second argument, Mr. Kohberger's aim is not to make death determinations "more reliable" whatever that might mean. He seeks a process that will "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). He also seeks to prevent the usage of the death penalty in cases where it does not belong to force pleas from defendants. The State provides no response to

these concerns, likely because it recognizes the current system provides no assurances. Mr. Kohberger asks this Court to hold that until it does, the death penalty may not be sought.

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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