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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 STATE'S NOTICE OF DEATH PENALTY ON GROUNDS OF ARBITRARINESS**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and hereby submits the following Reply to the State's Objection in response to his Motion to Strike the Death Penalty on Grounds of Arbitrariness.

Mr. Kohberger had argued that the death penalty in Idaho is as arbitrary as it was when the United States Supreme Court struck it down in *Furman* because its aggravators are so broad and numerous that all forms of murder can be noticed for death. The State responded that this is not true, relying on the ruling in *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). Unfortunately for the State, *Tuilaepa* does not stand for the proposition that a single aggravator narrows who is eligible for the death penalty, nor was it an issue that a state's aggravators taken as a whole make every murder death penalty eligible. *See id.* at 975-77. The only case ever to reach the United States Supreme Court on this issue is *Hidalgo v. Arizona*, 583 U.S. 1196 (2018), which disappointingly did not result in an authoritative opinion. However, the case did provide a concurring opinion by Justice Breyer joined by Justice Ginsburg, explaining that if it could be shown that a state has adopted a scheme that would capture all first-degree murder, it fails to satisfy the narrowing requirement. *Id*., at 1198.

The State, however, doubles down on its improper reading of *Tuilaepa* by claiming that *State v. Hall*, 163 Idaho 744, 788 (2018), supports its interpretation of the law. That case focuses on a single aggravator, not all of them, just as *Tuilaepa* did, and is of no assistance to the State's point.

The State then attempts to weave Mr. Kohberger's arguments into one by claiming that *State v. Hairston*, 133 Idaho 496 (1999), supports its argument. Mr. Kohberger had, of course, noted that the Court in *Hairston* ruled, incorrectly in his view, that the geographical issues in Idaho as to the seeking of the death penalty created a constitutional issue. The State now relies on the case to argue that the Idaho Supreme Court has already ruled on the narrowing function in Idaho. However, the Court's ruling in *Hairston* was:

> While we doubt Hairston's underlying assumption [that Idaho provides no meaningful narrowing], we find no legal basis for the review of all Idaho first degree murder cases that he suggests. Each aggravating circumstance must provide a principled basis for distinguishing between those who deserve the death

> penalty and those who do not. *Arave v. Creech,* 507 U.S. 463, 123 L. Ed. 2d 188, 113 S. Ct. 1534 (1993). However, the Eighth and Fourteenth Amendments do not call for the elimination of all discretion in a judge's capital sentencing decisions. The court's discretion must be directed by "'clear and objective standards'" to minimize the risk of wholly arbitrary and capricious action. *Lewis v. Jeffers,* 497 U.S. 764, 111 L. Ed. 2d 606, 110 S. Ct. 3092 (1990). *See, e.g., Creech v. Arave,* 507 U.S. 463, 473-74, 123 L. Ed. 2d 188, 113 S. Ct. 1534 (1993). Hairston has not challenged a particular aggravating circumstance, and we do not find Idaho's death penalty scheme as a whole to be arbitrary and capricious.

Id. at 508. The Court's ruling was on whether a Court could still determine who deserved death, not on whether the statutory structure had failed the narrowing function. The case predates the requirement that juries determine punishment, and predates *Hidalgo*, so the Court could hardly be blamed for not recognizing what Hairston's attorneys were arguing. The issue, an issue thus far undecided in this state, is whether Idaho has failed to provide sufficient narrowing to prevent allowing juries to arbitrarily sentence people to death. Neither *Hairston* nor the State's brief provide any holding or argument regarding how Idaho's scheme accomplishes this task.

The State then focuses on the states that have considered the argument and come up with a rather odd grouping of supporters- *Hidalgo* itself, followed by Delaware, which no longer has the death penalty, Virginia, which no longer has the death penalty, and Colorado, which no longer has the death penalty. In essence, the State argues "look at these states that realized the death penalty is a gross injustice- just before they did, they rejected this argument." The State's ostrich argument should be as unconvincing in Idaho as it now is in these states.

The State's final and weakest argument is that the narrowing function in Idaho is fulfilled by letting a jury decide who lives and its rejection of the death penalty for the severely mentally ill. Assuming the State intended this as a serious argument, this Court need merely consider the cases previously cited to see that a blanket "no severely mentally ill defendants" rule does not provide proper narrowing any more than "kill whomever you wish"- which was literally the problem articulated in *Furman*.

Mr. Kohberger also argued that geography plays the greatest role in Idaho as to who gets the death penalty, based on the work of Professor Cover. The State responded that Professor Cover did not make any such claim. The State relies on Professor Cover acknowledging she cannot draw conclusions as to why the death penalty is sought in any particular place. (Mot., Ex. A, p.593). Mr. Kohberger argues that what matters at a constitutional level is that the cases that receive a filing seeking death and the cases that receive the death penalty have no discernible qualitative difference from each other- but they can easily point to where they were filed. A system that claims to be based on "justice" should and must be better.

Finally, the State attempts to assault Professor Cover's article. It attacks its foundations, claiming this Court cannot know whether Professor Cover reviewed the right materials to reach a conclusion. It does so in what it claims are three different ways but all boil down to the same complaint. The State's nitpicking is telling. Any rational being could foresee upon reviewing Idaho's statutory scheme that it would be far too broad to not apply to every first-degree murder. It is, frankly, disappointing that our judiciary requires a study to make plain what everyone already knows. *See*, *Hidalgo v. Arizona*, 583 U.S. 1196 (2018). The State's argument is that of Sgt. Schulz in Hogan's Heroes, screaming "I see nothing!" in the face of the obvious.

Mr. Kohberger hopes this Court recognize the validity of his challenge and strike down this unconstitutional scheme.

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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