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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 No. CR01-24-31665 STATE'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE DEATH PENALTY RE: AUTISM SPECTRUM DISORDER

COMES NOW the State of Idaho, by and through the Latah County Prosecuting Attorney, and responds to Defendant's Motion to strike the death penalty on account of his alleged diagnosis of autism spectrum disorder ("ASD"). Defendant argues that it would violate the Eighth Amendment's prohibition on cruel and unusual punishment to impose a sentence of death because he has ASD. His argument fails for multiple independent reasons.

For starters, Defendant's argument contradicts both U.S. Supreme Court and Idaho Supreme Court precedent. The *only* mental disability that precludes imposition of the death penalty is intellectual disability as defined in *Atkins v. Virginia*, 536 U.S. 304 (2002) and Idaho Code § 19-2515A. No other mental illness qualifies unless and until the U.S. Supreme Court or the Idaho Supreme Court holds differently. *See State v. Dunlap*, 155 Idaho 345, 380, 313 P.3d 1, 36 (2013).

Even setting that fatal flaw aside, Defendant has failed to prove the requisite national consensus to support his claim. A critical part of that consensus is the actions of state legislatures in addressing the punishment Defendant now claims is prohibited under the Eighth Amendment. Defendant cites the actions of only two states: Ohio and Kentucky. His citations are both insufficient and inaccurate. *See Atkins*, 536 U.S. at 314 (observing "two state enactments . . . do not provide sufficient evidence at present of a national consensus"); Ohio Rev. Code Ann. § 2929.025(A)(1)(a) (prohibiting the execution of people with some mental illnesses but not including ASD); Ky. Rev. Stat. Ann. § 532.130(3) (same).

Finally, if two reasons to deny Defendant's motion were not enough, Defendant has not shown that the rationale underpinning *Atkins* applies to people with ASD. All the concerns in *Atkins* trace back to intellectual disability, and a person with ASD does not necessarily have intellectual disabilities. Take, for example, Defendant, who was diagnosed with the least severe form of ASD "*without* accompanying intellectual . . . impairment." (Mot., Ex. 2, p.16.)

This Court should deny Defendant's motion.

A. Idaho law only prohibits the death penalty for a mentally disabled person only when the elements of Idaho Code § 19-2515A are proven, and Defendant has failed to do so.

Consistent with the Eighth Amendment, Idaho law only prohibits the death penalty for a mental disability when the person qualifies as "mentally retarded." I.C. § 19-2515A; *see Atkins*, 536 U.S. at 306-21. In *Atkins*, the U.S. Supreme Court put in place a constitutional prohibition on

the death penalty for "mentally retarded offender[s]." 536 U.S. at 321. But the Court left to the states "the task of developing appropriate ways to enforce the constitutional restriction." *Id.* at 317. Idaho chose to enforce this constitutional restriction by enacting Idaho Code § 19-2515A, which defines "mentally retarded" in Idaho for purposes of the constitutional restriction on the death penalty for those with mental disabilities. The Idaho Supreme Court has read the statutory definition of "mentally retarded" to require proof of three elements: "(1) an intelligence quotient (IQ) of 70 or below; (2) significant limitations in adaptive functioning in at least two of the ten areas listed; and (3) the onset of the offender's IQ of 70 or below and the onset of his or her significant limitations in adaptive functioning both must have occurred before the offender turned age eighteen." *Pizzuto v. State*, 146 Idaho 720, 728-29, 202 P.3d 642, 650-51 (2008).

The Idaho Supreme Court has flatly rejected Defendant's argument. *See State v. Dunlap*, 155 Idaho 345, 380, 313 P.3d 1, 36 (2013). In *Dunlap*, the defendant argued, like Defendant here, that "the rationale underlying *Atkins* . . . compels the same conclusion for mentally ill defendants." *Id.* The Idaho Supreme Court disagreed. *See id.* The court did not evaluate how those with mental illnesses compare to the intellectually disabled discussed in *Atkins* because it saw no need to do so. *See id.* The court simply noted that neither the U.S. Supreme Court nor any other court had expanded *Atkins* since it was decided. *See id.* ("We join these courts in holding that a defendant's mental illness does not prevent imposition of a capital sentence."). *Dunlap* is fatal to Defendant's argument.

Courts in other jurisdictions have similarly rejected efforts to expand *Atkins* to other mental disabilities, including ASD. *See, e.g., United States v. Roof,* 10 F.4th 314, 380 (4th 2021). In *Roof,* the defendant "suffer[ed] from 'autism spectrum disorder,' 'other specified schizophrenia spectrum disorder and other psychotic disorder,' and 'other specified anxiety disorder.'" *Id.* at 336.

He argued that he too should benefit from the rationale underlying *Atkins*, but the Fourth Circuit made short work of his argument. *Id.* at 380. The court found the defendant "has no plausible argument that he is protected by *Atkins*" because "[h]e has an IQ of 125." *Id.* The court explained that *Atkins*, and thus the Eighth Amendment, were limited to protecting the intellectually disabled, and *Atkins* "specifically defined such disability as involving 'subaverage intellectual functioning.'" *Id.* (quoting *Atkins*, 536 U.S. at 321). "Although 'significant limitations in adaptive skills such as communication' are part of the *Atkins* test, they are not sufficient by themselves to render a defendant mentally incapacitated" for purposes of the Eighth Amendment. *Id.* (quoting *Hall v. Florida*, 572 U.S. 701, 708 (2014)); *see also Petersen v. State*, 326 So.3d 535, 628 (Ala. Ct. App. 2019) (refusing to apply *Atkins* to defendant with "bipolar disorder with psychotic features, autism-spectrum disorder, a personality disorder, and schizophrenia"); *State v. Johnson*, 207 S.W.3d 24, 51 (Mo. 2006) ("Both federal and state courts have refused to extend *Atkins* to mental illness situations."); *State v. Hancock*, 840 N.E.2d 1032, 1059 (2006) (refusing to extend *Atkins* because "[m]ental illnesses come in many forms; different illnesses may affect a defendant's moral responsibility or deterrability in different ways and to different degrees").

Defendant "has no plausible argument" that the Eighth Amendment prohibits the imposition of the death penalty based on his ASD. His IQ of 119 is far above the required IQ of 70 or lower. His IQ testing prior to age 18, while lower, is still above 70 and, as admitted by his own expert, "[c]learly . . . an underestimate of his ability from what we now know." (*See* Ex. D13-B, p.7 & n.10.) He has failed to prove two of the required three statutory elements to enjoy the Eighth Amendment's protection against the death penalty on account of his alleged mental disability. Idaho Code § 19-2515A and the holdings in *Atkins*, *Pizzuto*, and *Dunlap* therefore require this Court to deny his motion.

B. Defendant's Eighth Amendment claim fails because he cannot show evolving standards of decency prohibit the death penalty for individuals with ASD.

Even if this Court could go beyond *Dunlap*, the conclusion remains the same: Defendant has no plausible argument under the Eighth Amendment. Defendant cannot show that evolving standards of decency prohibit use of the death penalty as to individuals with ASD, a requirement of his Eighth Amendment Claim. As the *Atkins* Court explained, "[p]roportionality review under those evolving standards should be informed by objective factors to the maximum possible extent." 536 U.S. at 312 (internal quotations omitted). The Court has "pinpointed that the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Id.* (internal quotations omitted). It is *only* in "cases involving a consensus" of state legislatures that the Court has "brought to bear" its own judgment on whether a penalty violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.*

Atkins concluded "a national consensus has developed against" using the death penalty on the intellectually disabled only after finding that eighteen states had adopted legislation to that effect, the Texas legislature had unanimously passed such a bill, and similar bills had passed in at least one house in two other states. *Id.* at 315-16. The Court found this number of states sufficient given "the consistency of the direction of change." *Id.* at 315.

Here, Defendant cites "[t]wo states" to support his claim. (Mot. at 12 (citing Ohio and Kentucky).) That is two too many. Ohio's statute applies only to schizophrenia, schizoaffective disorder, bipolar disorder, and delusional disorder. *See* Ohio Rev. Code Ann. § 2929.025(A)(1)(a). Kentucky's statute is the same. *See* Ky. Rev. Code Ann. § 532.130(3). All Defendant has succeeded in proving is that Ohio and Kentucky revised their death penalty prohibitions within the last five years and did *not* think it necessary to add ASD as a disqualifying condition. That is not the kind of "consistency" Defendant needs, and it is the wrong "direction of change" to support

his claim. *Atkins*, 536 U.S. at 315.

Defendant's evolving standards argument goes downhill from there. He cites as proof that society has evolved to prohibit the use of the death penalty on individuals with ASD three appellate court decisions—two unpublished, all decided more than 15 years ago, and none involving the death penalty. (Mot. at 12-13.) Defendant also cites media reports regarding another death penalty case where the defendant has ASD. (Mot. at 13.) None of those reports, however, call for or suggest anyone else has called for a categorical prohibition on the death penalty for individuals with ASD. *Cf. Atkins*, 536 U.S. at 313-14 & n.8 (noting "public protests" over the execution of an intellectually disabled person *because* he was intellectually disabled and explaining the execution, at least in part, caused "state legislatures across the country . . . to address the issue"). Even the defendant in that case, who is currently awaiting his execution, asserts his execution would violate the Eighth Amendment because he is innocent—*not* because he has ASD. *See* Petition[1] at 62 (arguing the defendant "is actually innocent of the offense for which he was convicted and sentenced to death" and "[h]is execution would therefore be cruel and unusual and violate his due process rights under the Eighth and Fourteenth Amendments").

Defendant has failed entirely to demonstrate any kind of consensus to support his claim that individuals with ASD should be categorically precluded from receiving a sentence of death. Thus, he cannot establish such a sentence violates the Eighth Amendment.

C. Autism spectrum disorder is not susceptible to Defendant's categorical approach.

This Court should reject Defendant's attempt to group together all individuals with any form of ASD for purposes of determining whether the Eighth Amendment prohibits imposition of

[1] Petition for Commutation of Death Sentence to a Lesser Penalty, or, in the Alternative, a 180-day Reprieve, and Request for an Interview and Hearing on the Matter, available at https://drive.google.com/file/d/10tRZmfosl__j47r1Xn9QJuUvDeZ_LrYs/view

the death penalty. The U.S. Supreme Court's categorical approach to the Eighth Amendment in the death penalty context has focused on groups who by-and-large share the same characteristics. *See Atkins*, 536 U.S. at 306 (concluding that all intellectually disabled people "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct" because "of their disabilities in areas of reasoning, judgment, and control of their impulses"); *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (expounding on "[t]he general differences between juveniles under 18 and adults" and stating its "reasoning applies to all juvenile offenders under 18").

Unlike the intellectually disabled and minors, everyone with autism spectrum disorder does not by-and-large share the same relevant characteristics for purposes of the Eighth Amendment. "The term 'spectrum' indicates that wide range of autistic symptoms and severity." (Supplemental Response to Request for Discovery Regarding Expert Witnesses, Ex. D13-B, p.31., filed 1/23/25 ("Ex. D13-B").) Defendant "would have met the DSM-IV criteria for Asperger's disorder." *Id.* "Asperger's disorder is a form of autistic spectrum disorder" and even within that one subset of ASD "all individuals with Asperger's are different." *Id.* One fluctuating co-occurring condition, for example, is accompanying intellectual disability. "It used to be estimated that 70 percent of those with autistic spectrum disorder have a degree of intellectual disability," but "that estimation has changed to about 50 percent." *Id.*

Even if a categorical approach to ASD were appropriate, the Eighth Amendment analysis would necessarily have to focus on those who have the least severe symptoms. This makes the specific facts of Defendant's case ideal because of his diagnosis. He was diagnosed with "Autism Spectrum Disorder, level 1, without accompanying intellectual or language impairment." (Ex. 2,

p.16.) Level 1 is the least severe of the 3 levels of ASD.[2]

D. Defendant's social impairment from ASD does not fall within the rationale articulated in *Atkins* for prohibiting the death penalty of the intellectually disabled.

Even if there were a consensus of state legislatures, Defendant has failed to show that his social impairment from ASD falls within the rationale underpinning the Court's "independent evaluation" in *Atkins*. 536 U.S. at 321. The *Atkins* Court gave three reasons why it agreed with "the legislatures that have recently addressed the matter": (1) the lesser culpability of the intellectually disabled does not merit the death penalty, (2) the death penalty does not act as a deterrent for the intellectually disabled because they cannot process the possibility of execution as a penalty, and (3) the impairments of the intellectually disabled can jeopardize the fairness of their proceedings. *See id.* at 306-07, 317-21. None of these reasons support striking the death penalty in this case.

First, Defendant has failed to show that his ASD would in any way make him less culpable for murder. The *Atkins* Court found the intellectually disabled less culpable because of the "powerful evidence" of the "large number of States prohibiting the execution of mentally retarded persons." 536 U.S. at 315-16. Defendant has no such evidence. *See supra* Part B. The evidence Defendant has offered on that front proves the opposite: Kentucky and Ohio found people with *specific* mental illnesses less morally culpable, but they did *not* include people with ASD. *See* Ohio Rev. Code Ann. § 2929.025(A)(1)(a); Ky. Rev. Stat. Ann. § 532.130(3).

Nor do the specific factors discussed in *Atkins* support Defendant's argument. *Atkins* explained the intellectually disabled were less morally culpable because of "cognitive and behavioral impairments" including "the diminished ability to understand and process information,

[2] *See* Autism Spectrum Disorder (ASD), Center for Disease Control, available at https://www.cdc.gov/autism/hcp/diagnosis/index.html.

to learn from experience, to engage in logical reasoning, or to control impulses." *Id.* at 320. Defendant's ASD does not result in cognitive impairments. He was diagnosed with "Autism Spectrum Disorder, level 1, without accompanying intellectual or language impairment." (Ex. 2, p.16.) His type of ASD is "characterized by severe and sustained impairments in social interaction, but not by cognitive ability." (Ex. D13-B, p.16 n.21.) His examination revealed "no evidence of a formal thought disorder or thought disorganization" (Ex. D13-B, p.18), and "no evidence of difficulty understanding" the examiner. (Ex. 2, p.9.) While Defendant's ASD may cause behavioral impairments such as "[i]mpulsive tendencies," nothing in his reports suggest such impulsive tendencies manifest through physical aggression or that his lack of impulse control had any connection to the crimes with which he is charged. (Ex. 2, p.9.)

Second, Defendant has failed to show that the imposition of the death penalty in his case would not act as a deterrent to similarly situated individuals with ASD. The Court expressed concern in *Atkins* that the intellectually disabled did not have the intellectual capacity to "process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." 536 U.S. at 320. Here, again, this does not apply to Defendant because his ASD diagnosis excludes any accompanying intellectual impairment. (Ex. 2, p.16.) In fact, one of Defendant's own experts found that he is "highly intelligent and has a factual understanding of the proceedings against him" including "the penalty he is possibly facing." (Ex. D13-B, p.33.) That is an unsurprising conclusion given that his ASD did not prevent him from graduating with "a master's degree" in "Criminal Justice in January 2023 with a GPA of 4.0." (Ex. D13-B, p.9.)

Third, Defendant has failed to show his ASD will jeopardize the fairness of the proceedings against him. *Atkins* emphasized that people with intellectual disabilities are more prone to false

confessions, are typically poor witnesses, may be less able to give meaningful assistance to their counsel, and may have demeanor that creates an unwarranted impression of lack of remorse for their crimes. *See* 536 U.S. at 320-21 & n.25. The Court also noted that "mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Id.* at 321.

None of the Court's concerns weigh in favor of striking the death penalty in this case. Neither the concern about false confessions nor the concern about a lack of remorse apply in this case because Defendant has not confessed and "maintains that he is innocent of the offenses with which he is charged." (Ex. D13-B, p.3.) Even as a categorical matter, Defendant has provided no evidence to suggest that people with ASD are more likely to falsely confess to a crime, which sufficiently distinguishes them from the intellectually disabled people in *Atkins*. To the extent that social impairments from ASD cause an unwarranted impression of a lack of remorse, that negative reaction is limited to those who "do not understand autistic spectrum disorder" (Ex. D13-B, p.32), and the defense can address ASD with the jury during the penalty phase—presumably the only time Defendant would be interested in showing remorse.

Moreover, neither of Defendant's experts expressed concern about his current ability to assist his counsel. Instead, one expert at least implied she does not currently have that concern because she recommended only that "the attorneys monitor his competency throughout the proceedings regarding his ability to assist in the preparation and presentation of his defense." (Ex. D13-B, p.33.)

Similarly, Defendant's reports do not support the concern that he would be a poor witness in the same way an intellectually disabled person would be a poor witness. *Atkins*, 536 U.S. at 320-21. The *Atkins* Court did not explain what it meant when it said those with an intellectual disability

are "typically poor witnesses," but its overwhelming focus on lack of intelligence suggests it was "the diminished ability to understand and process information." *Id.* No evidence suggests Defendant would have that problem. He is "highly intelligent and has a factual understanding of the proceedings against him" (Ex. D13-B, p.33); his speech during his formal evaluation was "[f]luent, clearly articulated, and appropriate in rate and volume" (Ex. 2, p.9); his language was "[g]enerally appropriate in content and form, with no grammatical errors" (Ex. 2, p.9); with respect to his comprehension throughout the evaluation he "[a]ppeared intact" and there was "no evidence of difficulty understanding" the questioner (Ex. 2, p.9); and "[h]e was never overtly inappropriate" (Ex. 2, p.8). To the extent his reports suggest potential downsides as a witness, those downsides are not significantly different than many witnesses testifying in court for the first time. (*See, e.g.*, Ex. 2, pp.8-9 (lack of descriptive or emphatic gestures; atypical speech, tone, and cadence; awkward interaction and lack of fluidity; awkward comments; and occasional intense gaze).)

Furthermore, Defendant has not shown that his ASD will "enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Atkins*, 536 U.S. at 321. Nothing in Defendant's reports suggests that his ASD causes him to act violently or even more aggressively. Indeed, "[h]e does not have a history of violence" other than one incident, years ago, that neither expert attributes to his ASD. (Ex. D13-B, p.32.)

E. The media attention in this case does not warrant striking the death penalty under the Eighth Amendment.

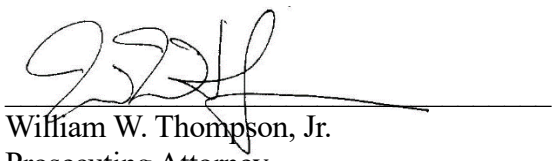
Defendant's argument related to the media finds no support in *Atkins* or any other Eighth Amendment case law. If the Eighth Amendment does not preclude a sentence of death for people with ASD—and it does not—that punishment does not suddenly become cruel and unusual in violation of the Eighth Amendment merely because potential symptoms of Defendant's ASD were reported in the media. The *Sixth Amendment* protects Defendant's right to a fair and impartial jury,

and the extensive jury selection process this Court has planned will sufficiently vindicate that right. Defendant cites no case in any jurisdiction that has held or even suggested that significant media coverage can give rise to an Eighth Amendment claim of cruel and unusual punishment.

CONCLUSION

For all the reasons stated above, this Court should deny Defendant's motion.

RESPECTFULLY SUBMITTED this 17th day of March 2025.



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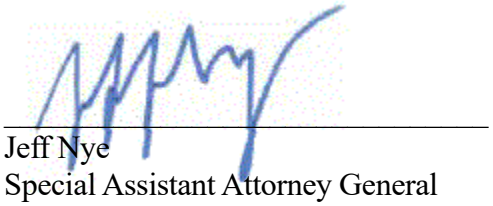

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CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the STATE'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE DEATH PENALTY RE: AUTISM SPECTRUM DISORDER were served on the following in the manner indicated below:

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☐ Mailed
☒ E-filed & Served / E-mailed
☐ Faxed
☐ Hand Delivered

Dated this 17th day of March 2025.

Kim K Workman