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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO **Plaintiff,** **V.** **BRYAN C. KOHBERGER,** **Defendant.**	**CASE NUMBER CR29-22-2805** **REPLY TO STATE'S OBJECTION TO DEFENDANT'S MOTION TO DISMISS GRAND JURY ON GROUNDS OF ERROR IN GRAND JURY INSTRUCTIONS**

COMES NOW, Bryan C. Kohberger, by and through their attorney, Jay Weston Logsdon, Chief Deputy Litigation, and hereby submits the following Reply to the State's objection to his previously filed Motion to dismiss the Indictment for error in the instruction as to the standard of proof, or to remand for a preliminary hearing.

I. There is no Idaho Supreme Court authority binding on this Court as to the standard of proof for a grand jury.

The State begins by arguing that *Edmonson* contains a holding binding upon this Court that the standard of proof for a grand jury is probable cause. State's Brief at 2. The State insists this was a holding because the Supreme Court relied upon it to come to two conclusions: the use of a grand jury as opposed to a preliminary hearing did not violate equal protection, and that a court may set aside an indictment lacking probable cause. *Id.* at 2-3. The issue then is: did it matter to the Court that the standard it proclaimed for a grand jury was probable cause?

Starting with the equal protection claim, the answer is clearly no. The Court's holding as to Mr. Edmonson's equal protection challenge was it was a "cloak" for a request to "place a limit on prosecutorial discretion." *Edmonson*, 113 Idaho at 234. The Court refused. *Id.* The State insists that the next lines claiming that a grand jury has the same purpose as a preliminary hearing are what cinched it for prosecutorial discretion. *Id.* However, the issue of the standard of proof was not before the Court. Mr. Edmonson wanted the ability to call witnesses and challenge his case in a preliminary hearing; he took no issue with the standard. *Id.* The Court determined he could be denied those rights because a prosecutor's reasons for choosing a grand jury instead were valid. *Id.* at 235. That was the holding, not that somehow the lower standard of probable cause saved the day for grand juries as opposed to the balanced approach of a preliminary hearing.

Next, the State's claim that there is a holding dealing with sufficient evidence required is not quite accurate. The actual issue was whether admission of hearsay required the indictment to be thrown out. *Edmonson*, 113 Idaho at 236. The Defendant did not even challenge whether there was sufficient evidence after the hearsay was excised from the proceedings. *Id.* Thus, the State's claims that this is a holding are simply erroneous.

The State goes on to say that the unexamined issue of the standard of proof for a grand jury is set in "black letter law" because courts have been using probable cause. State's Brief at 4-5. An issue of first impression is not somehow set in stone by cases that relied on unchallenged court rules. The Idaho Supreme Court has never considered the constitutionality of I.C.R. 6.5 Thus, this Court is free to do so.

II. Section 19-1107 sets the stand of proof for grand juries at beyond a reasonable doubt.

The State's next argument is that despite its plain language, I.C. § 19-1107 actually has to be transposed into probable cause, because:

- The Idaho Supreme Court adopted a rule on the same issue, which, according to the State, forces this Court to abandon the usual rules of statutory interpretation. State's Brief at 5-6.
- The Idaho Supreme Court remarked once in dicta that it did not think the statute set the standard at beyond a reasonable doubt in *Gasper v. Seventh Jud. Dist.*, 74 Idaho 388, 395 (1953). State's Brief at 6.
- The phrase "in their judgment" means no one should question what a grand jury does. State's Brief at 6-7.
- The word "warrant" in 1862 meant ""[t]o authorize; to give authority or power to do or forbear anything, by which the person authorized is secured or saved harmless from any loss or damage by the act." State's Brief at 7 (quoting Goodrich, Chauncey A., "An American Dictionary of the English Language," G. and C. Merriam, Springfield Mass., (1862), p. 1249).
- The California Supreme Court's decision in *Cummiskey v. Sup. Ct.*, 839 P.2d 1059, 1066 (Cal. 1992) is persuasive authority. State's Brief at 8.

- The debate at the Idaho Constitutional Convention demonstrates a knowledgeable group clearly aware of the laws in effect in the territory. State's Brief at 8-9.

Organizing the State's arguments, we have two relating to the plain meaning of the statute, two relating to judicial interpretations, an argument about the separation of powers (presumably), and an argument from history.

a. The plain language of the statute does not help the State's case, especially if we are speaking in 1862.

The State's argument as to the plain language of the statute is confusing at best. While "warrant" today might give the State some wiggle room to advance a "reasonable foundation" argument, its own quote from 1862 permits no such reading of the statute. Why then does the State claim that "to authorize, to give authority or power to do…" somehow shows that a grand jury was permitted to act at a lower standard of proof? The State's argument as to what "in their judgment" means is even more confusing- the cases cited seem to merely indicate the grand juries ability to nullify. Certainly in Idaho, and other states that have adopted the FIELD CODES, the ability to challenge their judgment was adopted by statute. Even if it were not so- the State has already noted that *Edmonson* permits such challenges.

b. History does not help the State's case.

The State offers that which the Defense has already acknowledged, William Claggett claimed grand juries decide things on the basis of probable cause. And the Defense already explained why he was mistaken. In the words of our Supreme Court, our founders took a "belt-and-suspenders approach … to anticipating and assuaging congressional concerns about admitting Idaho to the Union." *State v. Heath*, 168 Idaho 678, 684 (2021). At issue in that particular debate was whether to permit preliminary hearings because (perhaps ironically) some of the framers did not care for them. But the Constitution, it must be recalled, was not adopted by the convention, but by the voters that

ratified it. *State v. Clarke*, 165 Idaho 393, 397 (2019). Just because the delegate from Shoshone was unaware of the FIELD CODE and its import, hardly means the voters were not. The fact that literally every grand jury case the Supreme Court considered until *Edmonson* involved the Court noting that the prosecutors, for some reason that they could not fathom, were using a beyond a reasonable doubt standard, would tend to show that the *people* of this state believed in that standard.

- Neither *Cummiskey* nor *Gasper* are convincing authorities.

The State claims the Idaho Supreme Court in *Gasper* rejects the plain language of the statute. Perhaps, but it gave no grounds as to why it did so, and as it was dicta, it is of no help to the State's argument. *Gasper v. District Court*, 74 Idaho 388, 390-92 (1953).

Cummiskey is a more complicated matter. Similar to the State's hodgepodge argument here, the California Supreme Court makes various claims to try to overcome the plain language of the statute. 839 P.2d at 1064. It begins with the plain language- but uses the definition of "warrant" from 1980. *Id.* It cites to Cal. Penal Code § 995, which at that time (and still today) specifically states an indictment can be dismissed if it lacks probable cause. Idaho has no such statutory language. In point of fact- that language was adopted in 1949. *See*, Stats.1949, c. 1311, p. 2298, § 1. Thus, it is no surprise that the court goes on to cite to a number of cases- all post 1949. The court then calls the holding in *Tinder* went to the "quality of evidence" instead of the standard- which makes little sense, particularly in view of the history of the FIELD CODES and their champion in the state of California, who, as previously noted in the Defense's brief, wrote *Tinder*. *Cummiskey*, 839 P.2d at 1066 (*citing People v. Tinder*, 19 Cal. 539 (1862)).

It would be a rather large mistake for the state of Idaho to consider *Cummiskey* a persuasive authority as to its own statutes, unmodified since territorial times, and now able to be viewed in terms of their origin.

c. The Idaho Supreme Court cannot overrule statutes by adopting rules on the same subject.

The State's final argument is that:

> Idaho Code § 19-1107 and Idaho Criminal Rule 6.5(a) share the same title and address the same issue: "Sufficiency of Evidence to Warrant Indictment." The rule explicitly sets the standard of proof at probable cause. *See* I.C.R. 6.5(a). The statute can—and therefore must—be read to do the same. *See State v. Garner*, 161 Idaho 708, 711, 390 P.3d 434, 437 (2017) ("Statutes and rules that can be read together without conflicts must be read in that way.").

State's Brief at 5-6. This is an accurate quote, however, it is misleading without the context of the paragraph proceeding the analysis:

> "When a statute and a rule can be reasonably interpreted so that there is no conflict between them, they should be so interpreted rather than interpreted in a way that results in conflict." [*State v. Two Jinn, Inc.*, 148 Idaho 706,] 709 [(2010)]. "When there is a conflict between a statute and a criminal rule, this Court must determine whether the conflict is one of procedure or one of substance; if the conflict is procedural, the criminal rule will prevail." *State v. Johnson*, 145 Idaho 970, 974, 188 P.3d 912, 916 (2008). On the other hand, when the conflict is substantive, the statute will prevail. *Two Jinn*, 148 Idaho at 709, 228 P.3d at 390; *see also State v. Beam*, 121 Idaho 862, 828 P.2d 891 (1992).

State v. Garner, 161 Idaho 708, 711 (2017). The Court in *Garner* goes to some pains to show a lack of conflict in the statute and rule at issue in the case- a statute and rule nothing at all like what is at issue before this Court. *Id.* This Court, then, must consider whether this is a substantive or procedural issue.

III. I.C. § 19-1107 and Rule 6.5(a) conflict and the rule does not control, because it is a substantive right.

The State next argues that the standard of proof is a procedural matter rather than a substantive one. To get there, the State relies on:

- A concurrence by a former federal jurist;
- A United States Supreme Court case involving choice-of-law;

- An AEDPA decision by the United States Supreme Court;
- That burdens of proof differ from standards;
- That only Idaho can decide whether the standard for a grand jury is procedural or substantive.

It should be noted that if the State is correct as to the last point, the first three are irrelevant.

Starting then with the second to last point- it is true that the burden of proof differs from the standard of proof.

> **standard of proof** (1857) The degree or level of proof demanded in a specific case, such as "beyond a reasonable doubt" or "by a preponderance of the evidence"; a rule about the quality of the evidence that a party must bring forward to prevail.

BLACK'S LAW DICTIONARY (11th ed. 2019).

> **burden of proof** (18c) **1.** A party's duty to prove a disputed assertion or charge; a proposition regarding which of two contending litigants loses when there is no evidence on a question or when the answer is simply too difficult to find. • The burden of proof includes both the *burden of persuasion* and the *burden of production*. — Also termed *evidentiary burden*; *evidential burden*; *onus probandi*. See SHIFTING THE BURDEN OF PROOF. Cf. STANDARD OF PROOF. **2.** Loosely, BURDEN OF PERSUASION. — Abbr. BOP.
>
> "In the past the term 'burden of proof' has been used in two different senses. (1) The burden of going forward with the evidence. The party having this burden must introduce some evidence if he wishes to get a certain issue into the case. If he introduces enough evidence to require consideration of this issue, this burden has been met. (2) Burden of proof in the sense of carrying the risk of nonpersuasion. The one who has this burden stands to lose if his evidence fails to convince the jury — or the judge in a nonjury trial. The present trend is to use the term 'burden of proof' only with this second meaning …" Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 78 (3d ed. 1982).
>
> "The expression 'burden of proof' is tricky because it has been used by courts and writers to mean various things. Strictly speaking, burden of proof denotes the duty of establishing by a fair preponderance of the evidence the truth of the operative facts upon which the issue at hand is made to turn by substantive law. Burden of proof is sometimes used in a secondary sense to mean the burden of going forward with the evidence. In this sense it is sometimes said that a party has the burden of countering with evidence a prima facie case made against that party." William D. Hawkland, *Uniform Commercial Code Series* § 2A-516:08 (1984).

BLACK'S LAW DICTIONARY (11th ed. 2019). As noted by Black's Law Dictionary, simply going by the word "burden" or "standard" is unhelpful.

But to the State's more interesting argument, Defense Counsel was able to find the same argument in the case *G & M Farms v. Funk Irr. Co.*, 119 Idaho 514, 530-32 (1991) (BISTLINE, J., *concurring in part*). Justice Bistline in that matter argues essentially what the State argues here, the standard of evidence is procedural, and it is not bound by the holdings of the United States Supreme Court. *Id.* at 532. The trouble for the State, of course, is that Justice Bistline was arguing alone. Additionally, as the State noted, there is no doubt that the *burden* of proof is substantive. *See*, *e.g.*, *State v. Bassett*, 86 Idaho 277 (1963). However, even *Bassett* seems to imply that the presumption of innocence *includes* the evidentiary standard. *Id.*

From the perspective of the Defense, this understanding, implicit in *Bassett*, is correct. For example, in *State v. Jones*, 125 Idaho 477, 485-86 (1994) *overruled on other grounds by State v. Montgomery*, 163 Idaho 40 (2017), the Court considered the difference between the "substantive" law versus "evidentiary principle". *Id.* As the Court found, the burden of proof was a requirement that differed between these two. *Id.* Although the Court used the term "burden", it also quotes with approval the Ninth Circuit's understanding of "what must be proved", and since in either case the "burden" is clearly on the State, the Court undoubtedly was considering the "standard of proof." *Id.* (*quoting United States v. Peralta,* 941 F.2d 1003, 1006 (9th Cir.1991) (quoting *United States v. Gil,* 604 F.2d 546, 549 (7th Cir.1979))).

Another example is *State v. Shackelford,* 150 Idaho 355, 375 (2010) *abrogated on other grounds by State v. Garcia*, 166 Idaho 661 (2019), which dealt with *ex post facto* law. In that case, the Court gave a more robust definition of substantive as opposed to procedural:

> However, if the change is merely procedural, "and does 'not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt,' " there is no *ex post facto* violation. [*Weaver v. Graham*, 450 U.S. 24,] 29, n. 12,

> [(1981)] (quoting *Hopt v. Utah,* 110 U.S. 574, 590, 4 S.Ct. 202, 210, 28 L.Ed. 262, 269 (1884)). "[T]he constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Beazell v. Ohio,* 269 U.S. 167, 171, 46 S.Ct. 68, 69, 70 L.Ed. 216, 218 (1925). The Supreme Court in *Collins v. Youngblood* stated that "procedural" can be thought to refer to "changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." 497 U.S. 37, 45, 110 S.Ct. 2715, 2720, 111 L.Ed.2d 30, 40 (1990).

Id. The Court concluded that a change as to instructions to treat direct and circumstantial evidence the same way was merely procedural. *Id.* It did so because the change did not affect the "substantive" criminal law but merely "recognized that direct and circumstantial evidence possess the same probative value and thus the reasonable doubt standard is applicable to both." *Id.*

One can also come at this issue from the other direction. *In re Winship*, 397 U.S. 358 (1970), conclusively established that the standard of proof for criminal and juvenile cases is beyond a reasonable doubt because it was required for Due Process. However, who was the Court overruling in that case? It was the standard of proof set by the *legislature* of New York. *Id.* It may be that due process concerns lead courts to overrule statutory standards of proof- but in case after case, it was the legislature, not the courts, that set those standards. In Idaho, for example, the legislature has set the standard of proof for various hearings. *See*, *Ballard v. Kerr*, 160 Idaho 674, 710 (2016) (holding legislature sets the standard of proof in medical malpractice actions); *Akers v. D.L. White Const., Inc.*, 156 Idaho 37, 52 n. 10 (2013) (finding legislature set standard of proof for punitive damages); *Rhodes v. State*, *Dept. of Health and Welfare*, 107 Idaho 1120, (1985) (BISTLINE, J., *concurring*) (noting legislature set standard of proof in parental right termination cases); *State v. Osborn*, 102 Idaho 405, 428 (1981) (BISTLINE, J., *separately concurring in reversal for sentencing*) (arguing legislature set standard of proof for aggravators in death cases); *State v. McGough,* 129 Idaho 371, 374 (Ct.App. 1996) (finding legislature set standard of proof for forfeiture); *Interest of Doe I*, 2022 WL 16955164, at *3

(Ct.App.2022) (unpublished) (finding legislature set standard of proof for aggravating circumstances in Child Protection cases at preponderance of evidence).

Counsel cannot find, in Idaho or anywhere else, a time when a court has held that the legislature set the standard of proof *too high*, and set it lower. As the Court held in *Ballard*:

> Where the legislature has intended that a heightened standard of proof or a specific method of proof apply, it has expressly provided for such a requirement. For example, the legislature has required that a claimant seeking punitive damages "prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted." I.C. § 6–1604. Likewise, the legislature expressly provided that the standard of care and breach of that standard be proven by direct expert testimony in a medical malpractice action. I.C. § 6–1012. Idaho Code section 6–1603 provides that the cap on awards of non-economic damages shall not apply to causes of action arising out of reckless misconduct, but is silent on the method of proof required to show recklessness. Likewise, section 6–1012 is silent on the issue of recklessness. Where the legislature has not expressly provided that direct expert testimony is required to prove recklessness in medical malpractice actions, we decline to apply such a requirement.

160 Idaho at 710. It would be exceedingly anomalous for the judiciary to sudden proclaim that the citizens of Idaho may not demand additional protections against the risk of false arrest. *See*, *Winship*, 397 U.S. at 363. ("[The reasonable-doubt standard] is a prime instrument for reducing the risk of convictions resting on factual error.") It should be beyond a reasonable doubt that the Idaho Supreme Court did not somehow supplant the law with a rule in the 1980s.

IV. Mr. Kohberger asserts a theory the law allows and seeks a remedy this Court can grant.

The State's final argument is that erroneous instructions to a grand jury do not permit either dismissal or to treat the Indictment as a Presentment. State's Brief at 11-13. Once again, a tortuous path to this conclusion must be tread. First, the State claims only statutory bases for dismissal can affect a grand jury, relying on a case from 1927. *Id.* at 11 (*quoting State v. Arregui*, 44 Idaho 43 (1927)). While the Defense is typically interested in the past, the State already noted that in *Edmonson* the

Court went beyond what the statute permits. The Defense already explained why- courts, like Idaho, have gone beyond the statutes to find due process concerns attach to grand juries. Defense's Brief at 18. The State, likely realizing that this argument has little likelihood of success, then shifts to arguing that prejudice must be shown.

First, Mr. Kohberger disagrees. Yes, the cases Counsel cited are for trial juries. However, there is simply no credible argument to be made that the State may mislead a grand jury as to the standard of proof and rely on the Indictment it procures. Additionally, it makes little sense that a defendant deprived of his right to counsel for a preliminary hearing will doom his eventual conviction, but a defendant given a grand jury told it may indict a "ham sandwich" has no recourse. *See*, *Coleman v. Alabama*, 399 U.S. 1 (1970). To deprive the accused of a fundamental right has natural consequences.

Second, Mr. Kohberger will demonstrate in a separate motion the prejudice that resulted from the erroneous instruction in this matter.

Finally, the State argues it can always seek another Indictment and there is no way for this Court to treat this Indictment as a presentment. The law is replete with courts treating legal documents masquerading as one thing as what they actually are. *See*, *e.g. State v. Doe*, --- P.3d ---, 2023 WL 4750727 (Ct.App. 2023) (pending publication). The State's argument that the language in I.C. §§ 19-1603, 1604 does not give courts the power to prevent resubmission of a case to a grand jury is simply inaccurate. The Idaho Supreme Court found that a court *can* refuse resubmission. *See, e.g. Martin v. Lyons*, 98 Idaho 102, 104 (1977).

V. The Opinions of Various District Courts are not persuasive authority.

The State also appends to its decision three district court opinions, claiming they are persuasive authority. Certainly all these respectable jurists may have attempted to tackle these issues, but they did not have the benefit of Mr. Kohberger's briefing and research elucidating where the

beyond a reasonable doubt standard for grand juries originated and how it has been treated by prosecutors and courts ever since its adoption. It appears that the State has culled from these decisions much of its argument, and there is nothing within them that has not been addressed above. Thus, the Defense respectfully asks that this Court approach this subject with an open mind.

DATED this ____22___ day of August, 2023.

ANNE C. TAYLOR, PUBLIC DEFENDER
KOOTENAI COUNTY PUBLIC DEFENDER

BY: _____
JAY WESTON LOGSDON
CHIEF DEPUTY LITIGATION
ASSIGNED ATTORNEY

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the ___22____ day of August, 2023 addressed to:

Latah County Prosecuting Attorney –via Email: paservice@latahcountyid.gov
Elisa Massoth – via Email: legalassistant@kmrs.net

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