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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** **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, hereby moves to strike the State's Notice Pursuant to Idaho Code § 19-4004A on the grounds that there was no check on the decision of the prosecutor to pursue the death penalty. This Motion is based on the

Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I Sections 6 and 13 of the Idaho Constitution.

ISSUE

I. The Constitution requires a neutral fact finder to determine where the death penalty may be pursued.

The process provided to Mr. Kohberger up to this point has failed to adequately protect him from being arbitrarily selected for the death penalty in violation of the Eighth and Fourteenth Amendments in that no check was placed on the discretion of the prosecutor. The prosecutor has previously told this Court:

> What the State is trying to do is to enforce the law that our Legislature has put in place that says, in cases such as this, in facts like this, a jury is in entitled to decide not only guilt but potential penalty. We are simply trying to fulfill our responsibilities under the law. To characterize it as the State is trying, is wanting, is trying to kill someone, is just simply appealing to raw emotion and it has no place in this courtroom.[1]

However, as the prosecutor knows from his own experience in refusing to pursue the death penalty in *State v. Lee*, the decision to pursue the death penalty falls entirely and unreservedly to his own personal decision. *See*, Marty Trillhaase, *Idaho's Death Penalty Faces its own Mortality*, available at THE SPOKESMAN-REVIEW (Mar. 17, 2016) (https://www.spokesman.com/blogs/hbo/2016/mar/17/idaho-death-penalty-life-support/).

1 William Thompson, Argument, Jan. 26, 2024.

A. Selecting Candidates for Death

In Idaho, the decision to pursue the death penalty is the prosecutor's. I.C. § 18-4004 provides the penalty for first-degree murder is death or life imprisonment, but it may only be death where the prosecutor files notice of their intent to pursue death. I.C. § 18-4004A provides the prosecutor may drop their pursuit of the death penalty at any time, and if they do so death cannot be the outcome of a case.

The only limitation on the prosecutor's ability to seek the death penalty then is that it be a first degree murder case and that the prosecutor can find one circumstance of the case called an "statutory aggravator" listed in I.C. § 19-2515(9). As explained in detail in Professor Cover's *Narrowing Death Eligibility in Idaho: An Empirical and Constitutional Analysis*, 57 IDAHO L. REV. 559 (2022), due to the broad and vague nature of both what constitutes murder and what constitutes an aggravator, almost every murder is eligible for the death penalty at law. Professor Cover and her team analyzed first and second degree murder cases in Idaho file between June 2002 and the end of 2019. *Id.* at 561. They found that 86-90% of all murder convictions were factually first-degree murder cases and that 93-98% of those factually first degree murder cases were eligible for the death penalty under Idaho's scheme. *Id.* In fact, the scope of Idaho's death penalty is constitutionally defective in its own right, as will be argued in a separate motion.

Thus, there is no jury "entitlement" to the death penalty. There is only the decision of the prosecutor that sets the defendant upon this path. The consequence of placing no check on the prosecutor's discretion to seek the death penalty is a system in which geography plays the largest role in determining whether the accused will possibly be executed. As Justice Breyer found:

> Geography also plays an important role in determining who is sentenced to death. *See* Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics:* Furman, McCleskey*, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1253-56 (2013). And that is not simply because some States permit the death penalty while others do not. Rather *within* a death penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried. Robert J. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B.

> U. L. REV. 227, 231–232 (2012); *see also* JJ Donohue III*, An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUDIES 637 (2014) ("[T]he single most important influence from 1973–2007 explaining whether a death-eligible defendant [in Connecticut] would be sentenced to death was whether the crime occurred in Waterbury [County]"). Between 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide. Smith 233. And in 2012, just 59 counties (fewer than 2% of counties in the country) accounted for *all* death sentences imposed nationwide. Richard C. Dieter, *The 2% Death Penalty: How A Minority of Counties Produce Most Death Cases At Enormous Costs to All*, DEATH PENALTY INFORMATION CENTER, 9 (Oct. 2013).

Some studies indicate that the disparity in charging reflects the decision-making authority, the legal discretion, and ultimately the power of the local prosecutor. *See, e.g.,* Greg Goelzhauser, *Prosecutorial Discretion Under Resource Constraints: Budget Allocations and Local Death–Charging Decisions*, 96 JUDICATURE 161, 162–163 (2013); Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision–Making in Death–Eligible Cases*, 51 ARIZ. L. REV. 305 (2009) (analyzing Missouri); Donohue, at 681 (Connecticut); Justin Marceau et al., *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069 (2013) (Colorado); Shatz & Dalton, at 1260–1261 (Alameda County).

As will be shown, the lack of a check on this discretion violates the Constitution.

B. Grand Jury Requirement of the Fifth Amendment

The Fifth Amendment requires that a grand jury pass upon any case involving the death penalty. That right, as Mr. Kohberger has argued previously, was intended as a "shield against government run amok". *Motion to Dismiss Indictment on Grounds of Error in Grand Jury Instructions or in the Alternative to Remand for Preliminary Hearing* at p. 7 (*citing* Brent Tomer, *Ring Around the Grand Jury: Informing Jurors of the Capital Consequences of Aggravating Factors*, 17 CAP. DEF. J. 61, 65 (2004); *see also* John Langbein, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL, 45 (2003)). It was so revered by the colonists that Madison enshrined it in the Fifth Amendment, even as Hamilton argued against it. *Id.* at 9 (*citing* Akhil Amar, *The Bill of*

Rights as a Constitution, 100 YALE L. J. 1131, 1184-85 (1991); Tomer, 17 CAP. DEF. J. at 67; THE FEDERALIST NO. 83 (Alexander Hamilton)).

Despite this, the Supreme Court in *Hurtado v. California*, 110 U.S. 516 (1884), determined that the amendment should not apply to the states through the Fourteenth Amendment. The Supreme Court in *Hurtado* held that the Grand Jury requirement was simply a choice made by the writers of the federal Constitution, and certainly not one required by Due Process, if only because the words "due process" appear in a separate clause. *Hurtado*, 110 U.S. at 528-29, 534-35. The Court held that the words "due process" that appear in the Fifth Amendment did not enshrine a particular form of procedure and allowed for the growth of the law. *Id*. The Court compared due process, upon the insistence of the defendant, to the words "law of the land" in the Magna Carta. *See id*., at 521-32. The defendant's choice was a poor one, as the Court was easily able to show the many ways in which criminal procedures in England had changed since 1215. *See, id*. The Court went on to hold that an adversarial preliminary hearing before a Magistrate afforded the liberties of the defendant enough protection to qualify as Due Process. *Id*. at 538.

Strikingly, the Court in *Hurtado* does not discuss the function and purpose of the Grand Jury or the circumstances behind the amendment. In a sense, *Hurtado* was an affirmation of the sentiment against the jury system that was common in the late 19th Century. *See*, Dennis Colson, Idaho's Constitution, 45-62 (Special Legis. Ed. 2003); Jeremy Bentham, 1 Rationale of Judicial Evidence 524 (1827); Jeremy Bentham, 2 The Works of Jeremy Bentham 139-40 (John Bowring ed., 1843). For example, the Court also stated in dicta that jury trials were not required in criminal cases by the Due Process clause. *See id.* at 121. The jury trial was already guaranteed in Article III of the Constitution and the guarantee appears again in the Sixth Amendment. As the Supreme Court would eventually hold in *Duncan v. Louisiana*, 391 U.S. 145 (1968), it is clear that Due Process as it was understood by those who wrote the Constitution required a jury trial in criminal cases.

More recently, the Supreme Court has found that all elements, sentencing factors, and any other fact that a jury would need to find at trial must be found by the Grand Jury in federal cases under the Fifth Amendment. *See U.S. v. Cotton*, 535 U.S. 625, 627 (2002) (*citing Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (*quoting Jones v. U.S.,* 526 U.S. 227, 243 n. 6 (1999)). This holding was in view of the Court's recent jurisprudence on the importance of the jury as a fundamental right of every citizen to protect them against governmental abuses of power. *See, Blakely v. Washington*, 542 U.S. 296, 306 (2004); *Ring v. Arizona*, 536 U.S. 584, 607 (2002); *Apprendi*, 530 U.S. 466 at 479-80. *See also*, *Ramos v. Louisiana*, 590 U.S. ---, 140 S.Ct. 1390 (2020) (holding unanimous jury requirement of the Sixth Amendment for serious offenses applies to the states).

In view of the renewed interest in the intention behind the jury requirements contained in the Constitution, this Court should do what the Court in *Hurtado* chose not to do- consider the function of the Grand jury, how it came to be specifically required in the Fifth Amendment, or whether it was considered a part of Due Process when the Fourteenth Amendment was adopted. *See,* 110 U.S. at 546-47, 557-58 (HARLAN, J., dissenting) This Court will find that the Grand Jury could not have been replaced by the preliminary hearing or the probable cause findings of Magistrates because the Grand Jury's main function was not the determination of probable cause but rather its ability to exercise *discretion* as to which cases were worth pursuing, as outlined above.

Thus, by doing away with the Grand Jury, those states that have done so have simply left their citizens at the mercy of the government. George Edwards wrote:

> There are many cases of a trifling nature which are returned by the committing magistrates and when brought before the grand jury the indictments are ignored. In counties where the volume of business is small, it would be of little consequence if the grand jury found true bills in even these cases, but in counties where the volume of business is large, and this is particularly true of the great cities which frequently are coextensive with the boundaries of the county, if then becomes of vital

> importance that there should be a tribunal to sift from the great mass of cases those which are too trifling in their nature to require further prosecution. And this is a duty which could not well devolve upon a single officer, for unless testimony was heard by him there would be no feasible way to determine which cases should be prosecuted and which should be ignored. *If evidence is therefore to be heard, it is wiser that it be heard and considered by a body impartially selected from the people than by a single officer whose training would incline him to find those grounds upon which the prosecution might be sustained.* [emphasis added]
> …
> It is absurd to contend that in a government such as ours, composed of a system of checks and balances, a committing magistrate is an individual whose discretion does not require review. They are chosen as a rule from men who have but little knowledge of the law and whose principal qualification is the political service rendered to their party and not the personal fitness of the individual for office. In a large number of cases the warrant will be issued by a magistrate, known either to the prosecutor or his counsel, who invariably is selected because of the acquaintanceship. That a defendant who is committed or held in bail under such circumstances should be entitled to have the judgment of the magistrate reviewed by a tribunal sufficiently large and without personal interest in the case, is but a reasonable requirement. Not that the magistrate may have acted improperly or violated the terms of his oath, but that prosecutions which are or may have been begun under such conditions, shall be declared by an impartial body to be well founded in fact before a defendant shall be obliged to answer.
> …
> If it be said the cases are not analogous in that the grand jurors are laymen who review the decision of a magistrate learned in the law, it may be answered that the laymen review not the law, but the facts of the case, and as to those facts all the legal learning which the magistrate may possess will not make him a better judge of the truth of the facts for the credibility of witnesses.

Edwards, at 35-39. These truths now appear stronger than ever as the result of allowing career prosecutors to determine who shall be accused. The people and the courts grow cognizant of the fact that prosecutors with unhampered discretion tend to overcharge cases to coerce pleas, and that the concept of prosecutorial discretion has become substantially eroded by the self-selecting pool of modern prosecutors who file the most serious charge that they can in every case presented to them. *See, e.g.*, Transcript of Oral Argument at p. 42, L. 6-25, *U.S. v. Johnson*, -- U.S. --, 135 S.Ct. 2551 (2015) (No. 13-7120) (Roberts, C.J. commenting on prosecutors' use of a vague statute to coerce pleas); Transcript of Oral Argument at p. 27, L. 10-25, p. 28, L. 1-25, p. 29, L. 1-25, p. 30, L. 1-25, p. 31, L. 1-5, *U.S. v. Yates*, -- U.S. --, 135 S.Ct. 1074 (2015) (No. 13-7451) (Scalia, J., Ginsburg, J., and Roberts, C.J. questioning the practices of the Attorney General to charge the

most serious charge in every case, the lack of common sense shown by the prosecutors bringing the charges, and the use of serious charges to coerce pleas).

Many of these issues are also discussed by Justice Harlan in his dissent in *Hurtado*. But in addition to these points, he also found that when the Fourteenth Amendment was adopted:

> all the states of the Union-some in terms, all substantially-declared, in their constitution, that no person shall be deprived of life, liberty, or property otherwise than 'by the judgment of his peers or the law of the land,' or 'without due process of law.' When that amendment was adopted the constitution of each state, with few exceptions, contained, and still contains, a bill of rights, enumerating the rights of life, liberty, and property, which cannot be impaired or destroyed by the legislative department. In some of them, as in those of Pennsylvania, Kentucky, Ohio, Alabama, Illinois, Arkansas, Florida, Mississippi, Missouri, and North Carolina, the rights so enumerated were declared to be embraced by 'the general, great, and essential principles of liberty and free government;' in others, as in those of Connecticut, in 1818, and Kansas, in 1857, to be embraced by 'the great and esssential principles of free government.' Now, it is a fact of momentous interest in this discussion, that, when the fourteenth amendment was submitted and adopted, the bill of rights and the constitutions of 27 states expressly forbade criminal prosecutions, by information, for capital cases; while in the remaining 10 states such prosecutions were impliedly forbidden by a general clause declaring that no person should be deprived of life otherwise than by 'the judgment of his peers or the law of the land,' or 'without due process of law.' It may be safely affirmed that, *when that amendment was adopted*, a criminal prosecution, by information, for a crime involving life, was not permitted in any one of the states composing the Union.

110 U.S. at 557 (footnotes omitted).

Considering the intentions of those that wrote the Constitution and the importance they placed on the grand jury, *Hurtado* must be overruled, and the right to a grand jury in infamous and capital cases guaranteed by the Fifth Amendment to the United States Constitution should be applied to the states.

C. Grand Jury Requirement of the Eighth Amendment

This Court is likely to note that this case did go before a grand jury, and that in *State v. Abdullah*, 158 Idaho 386, 458-59 (2015), the Idaho Supreme Court held that aggravators do not have to be presented to the grand jury. The decision in *Abdullah* is wrong and should be overruled. In brief, the Court in *Abdullah* held that aggravators are not elements and do not need to be

presented to a grand jury. *Id.* That ruling only makes sense if one ignores the purpose of the grand jury as standing between citizens and their government. At the time the constitution was adopted, most felonies were death penalty cases, in which the only possible outcome was death, and a grand jury would have known it. *See*, *Range v. Attorney General United States of America*, 69 F.4th 96, 105 (3rd Cir.2023) (citations omitted). Grand jurors routinely saved defendants from death. *See*, Langbein, at 45 ("For the years 1660-1800 Beattie found that the Surrey grand juries dismissed 11.5 percent of the bills of indictments for property offenses punishable by death and 17.3 percent of those brought for noncapital property offenses, 14.9 percent for murder, 27.4 percent for infanticide, 25.8 percent for wounding, 44.4 percent for rape." [footnote omitted]).

Thus, the question in *Abdullah* should not a technical question of what counts as an element at law- the question was and is whether a grand jury believes the prosecution should pursued – including the possible punishment. That is why the issue must be seen through the lens of the Eighth Amendment.

1. "Arbitrary and Capricious"

The Eighth Amendment to the Constitution of the United States prohibits the imposition of Cruel and Unusual Punishment. In 1972, the United States Supreme Court determined that the death penalty had become Cruel and Unusual through its disuse. *Furman v. Georgia*, 408 U.S. 238, 299, 92 S.Ct. 2726 (1972) (BRENNAN, J., concurring). On the one hand, the Court was deeply disturbed by the prospect that the death penalty's apparent arbitrary application may be in actuality discriminatory application. Justice Douglas wrote:

> In a Nation committed to equal protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. In ancient Hindu law a Brahman was exempt from capital punishment, and under that law, '(g)enerally, in the law books, punishment increased in severity as social status diminished.' We have, I fear, taken in practice the same position, partially as a result of making the

> death penalty discretionary and partially as a result of the ability of the rich to purchase the services of the most respected and most resourceful legal talent in the Nation.

Id., at 255-56, 92 S.Ct. at 2734-35 (footnotes omitted). On the other hand, members of the Court were concerned about ensuring that the death penalty be used in cases that merited its use. Thus, Justice Brennan wrote:

> 'The basic concept underlying the (Clause) is nothing less than the dignity of man. While the State has the power to punish, the (Clause) stands to assure that this power be exercised within the limits of civilized standards.' [*Top v. Dulles*, 356 U.S. 86,] 100, 78 S.Ct.[2064] 597 [(1958)].
> …
>
> In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause-that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments. See Granucci, 'Nor Cruel and Unusual Punishments inflicted:' The Original Meaning, 57 Calif.L.Rev. 839, 857-860 (1969).
>
> …
>
> As *Wilkerson v. Utah* suggests, when a severe punishment is inflicted 'in the great majority of cases' in which it is legally available, there is little likelihood that the State is inflicting it arbitrarily. If, however, the infliction of a severe punishment is 'something different from that which is generally done' in such cases, *Trop v. Dulles*, 356 U.S. [86,] 101 n. 32, 78 S.Ct. [590,] 598 [(1958)], there is a substantial likelihood that the State, contrary to the requirements of regularity and fairness embodied in the Clause, is inflicting the punishment arbitrarily. This principle is especially important today. There is scant danger, given the political processes 'in an enlightened democracy such as ours,' *id*., at 100, 78 S.Ct., at 598, that extremely severe punishments will be widely applied. The more significant function of the Clause, therefore, is to protect against the danger of their arbitrary infliction.

Id., at 270, 274-75, 92 S.Ct. at 2742, 2744-45 (footnotes omitted). In cases involving the death penalty, the law must be able to discern those who merit the ultimate punishment-

> Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose 'the right to have rights.' A prisoner retains, for

> example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a 'person' for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, see *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), yet the finality of death precludes relief. An executed person has indeed 'lost the right to have rights.' As one 19th century proponent of punishing criminals by death declared, 'When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere.'

Id., at 290, 92 S.Ct. at 2752-53 (BRENNAN, J. concurring).

Though a divided Court decided *Furman* the basic principle that the punishment must fit the crime remains a bedrock of Eighth Amendment jurisprudence. *See, Kennedy v. Louisiana*, 554 U.S. 407, 428, 128 S.Ct. 2641 (2008); *Solem v. Helm,* 463 U.S. 277, 285-290, 103 S.Ct. 3001 (1983); *Enmund v. Florida*, 458 U.S. 782, 797, 102 S.Ct. 3368 (1982); *Coker v. Georgia*, 433 U.S. 584, 598, 97 S.Ct. 2861 (1977). And it is for this reason that the aforementioned arbitrariness in its imposition goes beyond the issue of whether arbitrariness is but a mask for prejudice. Arbitrariness necessarily means that humans are being discarded at random. No death penalty scheme may permit people to be killed for the same reasons it would spare another.

2. The Prosecutor's Discretion in Selecting Candidates for Death

The prohibition on arbitrariness extends to the discretion of the prosecutor. Justice White wrote that the discretion of the prosecutor in deciding to pursue the death penalty is broad. *Gregg v. Georgia*, 428 U.S. 153, 225 (1976). However, he defined the permissible factors as:

> the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. [D]efendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong.

Id. In other words, a prosecutor must make the objective decision that the case merits the punishment, and for no other reason. However, then the Court held in *McClesky v. Kemp*, 481 U.S. 279, 306-07 (1987), that a prosecutor's decision not to seek the death penalty in like circumstances due to mercy could not be used to show a constitutional violation.

The Supreme Court in *McClesky* left the discretion of prosecutors to seek death undisturbed, though it provided no real assurance that prosecutors would not use this discretion in an arbitrary fashion. *Id.* at 311-12 ("Of course, "the power to be lenient [also] is the power to discriminate," K. Davis, Discretionary Justice 170 (1973), but a capital punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice." (*quoting*, *Gregg v. Georgia,* 428 U.S., at 200, n. 50, 96 S.Ct., at 2937, n. 50)).

It is axiomatic that the Court and the people of our nation rely on "safeguards to make [our jury trial system] as fair as possible." *U.S. v. Singer*, 380 U.S. 24, 35 (1965). The safeguard intended to protect against the vast discretion of prosecutors is the grand jury. As the prosecution has admitted on several occasions in this case, the grand jury played no part in the decision for death in this matter.[2]

3. The Grand Jury as a Check on the Prosecutor's Death Decision

Since 1962, the Eighth Amendment to the United States Constitution has barred states from imposing "cruel and unusual punishment" where the state failed to follow procedure. *Robinson v. California*, 370 U.S. 660 (1962). This is because when the punishment of death has not truly been earned it is cruel. Thus, the United States Supreme Court held:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

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2 The Prosecution has also stated several times that the decision to pursue death had not been made at that time, but this is untrue. The Prosecution informed the Defense, after it learned of the Indictment, that it used a Grand Jury at least in part to prevent any claim that the death penalty could not be sought without an Indictment.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (footnotes omitted). Since 1972, states have been required to find ways to ensure that the death penalty is being imposed in a manner that is not freakish or wanton. *Furman v. Georgia*, 408 U.S. 238 (1972).

The vast majority of decisions followed that have been concerned with the process by which a defendant is chosen for death have focused on sentencing. *See, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976) (sentencing scheme involving bifurcated hearing, aggravating and mitigating factors to be found by jury, found constitutional); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (mandatory death penalty unconstitutional); *Proffitt v. Florida*, 428 U.S. 242 (1976) (aggravating circumstances provided adequate guidance as interpreted by the Florida Supreme Court); *Gardner v. Florida*, 430 U.S. 349 (1977) (defendant must be permitted to review presentence investigation report and respond to its contents); *Lockett v. Ohio*, 436 U.S. 586 (1978) (sentencing scheme failed to permit individualized consideration of mitigating factors); *Green v. Georgia*, 442 U.S. 95 (1979) (hearsay rule may not prevent introduction of mitigating evidence); *Godfrey v. Georgia*, 446 U.S. 420 (1980) (aggravator unconstitutionally broad); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (character evidence in mitigation must be admissible as matter of law); *Zant v. Stephens*, 462 U.S. 862 (1983) (sentence not invalid because one aggravator found by jury later held invalid); *Barefoot v. Estelle*, 463 U.S. 880 (1983) (psychiatric opinion on ultimate issue of dangerousness posed in form of hypothetical containing controverted facts admissible at sentencing phase); *California v. Ramos*, 463 U.S. 992 (1983) (instruction on Governor's power to commute a life sentence not prohibited even where it does not inform jury that a death sentence may also be commuted); *Spaziano v. Florida*, 468 U.S. 447 (1984) (judge may impose death even where jury recommends life); *Wainwright v. Witt*, 469 U.S. 412 (1985) (juror may be removed for cause if found to be unwilling to impose the death penalty); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (evidence of good behavior while in custody must be admissible); *California v. Brown*, 479 U.S. 538 (1987)

(instruction to jurors not to be swayed by sympathy upheld); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (improper to instruct jury to ignore nonstatutory mitigating factors), *Booth v. Maryland*, 482 U.S. 496 (1987) (victim impact statement inadmissible); *Lowenfield v. Phelps*, 484 U.S. 231 (1988) (aggravator may also be element of crime); *Franklin v. Lynaugh*, 487 U.S. 164 (1988) (no right to instruct jury on residual doubts as to guilt as mitigation in sentencing phase); *South Carolina v. Gathers*, 490 U.S. 805 (1989) (characteristics of victim inadmissible); *Walton v. Arizona*, 497 U.S. 639 (1990) (judge may determine existence of aggravators, burden may be placed on defendant to prove existence of mitigators); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990) (upholding instruction stating a jury must impose death penalty if mitigators do not outweigh aggravators); *Boyde v. California*, 494 U.S. 370 (1990) (same); *Payne v. Tennessee*, 501 U.S. 808 (1991) (victim characteristics admissible overruling *Booth* and *Gathers*); *Morgan v. Illinois*, 504 U.S. 719 (1991) (juror may be removed for cause if unwilling to impose life); *Simmons v. South Carolina*, 512 U.S. 154 (1994) (error in not instructing jury that life sentence would be without parole); *Tuggle v. Netherland*, 516 U.S. 10 (1995) (valid aggravator does not excuse improper exclusion of evidence); *Harris v. Alabama*, 513 U.S. 504 (1995) (state need not define weight judge must give jury's recommendation for life or death); *Buchanan v. Angelone*, 522 U.S. 269 (1998) (jury need not be instructed on concept of mitigation or provide specific mitigating factors); *Jones v. U.S.*, 527 U.S. 373 (1999) (jury need not be instructed on consequence of failure to reach a verdict at sentencing phase); *Penry v. Johnson*, 532 U.S. 782 (2001) (instruction on mitigation unsatisfactory); *Ring v. Arizona*, 536 U.S. 584 (2002) (jury alone may find aggravators, overruling *Walton*); *Kansas v. Marsh*, 548 U.S. 163 (2006) (instruction that jury must find for death where aggravators and mitigators are equal upheld).

These opinions essentially hold that: "To pass constitutional muster, a capital sentencing scheme must '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.' " *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) *quoting Zant*, 462 U.S., at 877.

However, ensuring fairness and due process in death cases requires going beyond the sentencing to the "safeguards" of the proceedings. Prior to *Furman*, the Supreme Court had held that the Fourteenth Amendment required additional process in capital cases. In *Powell v. Alabama*, 287 U.S. 45 (1932), the Court held that the indigent must be provided counsel in capital cases. The Court held in that case:

> Let us suppose the extreme case of a prisoner charged with a capital offense, who is deaf and dumb, illiterate, and feeble-minded, unable to employ counsel, with the whole power of the state arrayed against him, prosecuted by counsel for the state without assignment of counsel for his defense, tried, convicted, and sentenced to death. Such a result, which, if carried into execution, would be little short of judicial murder, it cannot be doubted would be a gross violation of the guarantee of due process of law…

Id. at 65. The Court has also held that a defendant accused of a capital crime is constitutionally entitled to a lesser included instruction. *Beck v. Alabama*, 447 U.S. 625, 638 (1980). As the Court held in *Beck*:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

Id.

Accepting that the Eighth Amendment requires additional process for the selection defendants to be placed in the pool of possible candidates for death prior to sentencing, it is clear that the grand jury process as a check on prosecutorial discretion is required. As argued above, it is widely acknowledged that requiring that a prosecutor's charging decision be vetted by a neutral fact finder serves as protection against unfounded threats that may be used to coerce a plea to a lesser charge, inflict trauma upon the unjustly accused, the coercive quality of threatening

defendants with massive though unwarranted penalties, and the waste of community resources. Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955). Thus, it must be that in death penalty cases a neutral fact finder must find probable cause exists to believe that the aggravators alleged by the state exist and outweigh the mitigating factors in order to ensure that death may be sought in order to comply with the Eighth Amendment.

Without this check, we have the arbitrariness of the current system, where prosecutors are the driving force behind where death is sought. Without this check, the freakish and wanton nature of the death penalty cannot be resolved. Without this check, this nation continues to fail to live up to the promises explicitly listed in the Constitution to protect its citizens from the death penalty.

CONCLUSION

This Court must find that permitting the prosecutor to sit in the place of the judge or jury and decide that death should be a permissible penalty in this matter is unconstitutional. The decision as to whether a matter is in fact a capital be checked by a neutral decision maker. This Court should so find, and strike the Notice Pursuant to Idaho Code § 19-4004A in this matter.

Counsel requests this matter be set for a hearing estimated to last 30 minutes.

DATED this 4 day of September, 2024.

BY: _____
JAY LOGSDON
INTERIM CHIEF 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 5 day of September, 2024 addressed to:

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

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