Electronically Filed
2/13/2023 9:26 AM
Seventh Judicial District, Fremont County
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**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

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| STATE OF IDAHO,<br><br>Plaintiff,<br><br>v.<br><br>CHAD DAYBELL,<br><br>Defendant. | Case No.: CR22-21-1623<br><br>SECOND RENEWED MOTION TO SEVER FROM FROM DEATH-NOTICED CO-DEFENDANT IN ORDER TO ENFORCE MR. DAYBELL'S CONSTITUTIONAL RIGHTS |

COMES NOW the Defendant, Chad Daybell, and by and through undersigned counsel moves to sever case pursuant to Sections One, Two, Six, Seven, and Thirteen of Article I of the Idaho Constitution; the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Idaho Criminal Rule 14; and other authorities cited herein.

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## INTRODUCTION AND RELEVANT PRODECURAL HISTORY

To date, the myriad constitutional violations which will result from a joint capital trial, detailed in this Motion, have never been addressed. On September 9, 2021, Mr. Daybell moved to sever his trial from that of his co-defendant, Ms. Lori Vallow, who at the time had been found incompetent, was hospitalized and receiving treatment, and whose case had not yet been death noticed. On February 9, 2022, Mr. Daybell filed a memorandum in support of his severance motion, which further discussed the uncertainties created by Ms. Vallow's incompetency.

On March 21, 2022, the Court ruled against the Mr. Daybell's motion to sever. *See* Memorandum Decision Denying Defendant's Motion for Severance at 6-7. In arriving at this ruling, the Court considered only "three potential sources of prejudice," namely the possibility of prejudice resulting from "(1) a jury's confusion of evidence, (2) a defendant's inability to meaningfully present defenses, and (3) a jury basing a guilty determination on criminal disposition." *See id.* at 4-5. However, this was not the correct legal standard; Idaho courts only limit their analysis to these three potential forms of prejudice when examining motions to sever joined *offenses*, not motions to sever joined *defendants*.[1] *See State v. Abel*, 104 Idaho 865, 867-68

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[1] This error was also made by the parties. Mr. Daybell's Memorandum in Support of Motion for Severance ICR 14, filed on February 9, 2022, cited this standard. However, if the Court's prior Order is later reviewed for an abuse of discretion, the appellate court will examine whether this Court "acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it, and reached its decision by an exercise of reason." *See State v. Blake*, 161 Idaho 33, 35 (2016). As such, applying erroneous legal standards is an abuse of discretion, even if supplied by the parties.

(1983) (adopting the Fourth Circuit's standard regarding the "three sources of prejudice [that] are possible" when "two or more offenses are joined for trial"); *see also, e.g.*, *State v. Nava*, 166 Idaho 884, 890 (2020) (analyzing a motion to sever offenses for the three forms of potential prejudice); *State v. Williams*, 163 Idaho 285, 293 (Ct. App. 2018) (same).

Based on this erroneous application of the law, the Court concluded that Mr. Daybell had not met his "burden to persuade the Court that a jury is likely to confuse evidence in this case, that the Defense will be unable to meaningfully present defenses, or that a jury is likely to base a guilty determination in this case due to evidence of criminal disposition, [and therefore] the Court must conclude that the case will not be severed." *See* Memorandum Decision Denying Defendant's Motion for Severance at 6. Therefore, severance in this case has only been analyzed based on an improper legal standard and in relation to the circumstances that existed in February and March, 2022.

Because "the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear," *Cochran*, 97 Idaho at 74, Mr. Daybell moves to sever his trial from that of his co-defendant based on the change in circumstances over the ten months since he last moved to sever and due to the previous application of an improper legal standard. Most pertinent, in the intervening time period, the prosecution has filed a notice of intent to seek the death penalty against co-defendant Lori Vallow. Particularly in light of this occurrence, a joint trial would violate Mr. Daybell's rights to present a complete defense, to a fair and reliable merits phase determination, to an individualized sentencing determination, to confrontation of witnesses, and to due process pursuant to the state and federal constitutions.

## ARGUMENT

## I. This Motion Must be Evaluated in Light of the Heightened Reliability Required in Capital Cases as well as the Unique Eighth Amendment Protections Afforded to Capital Defendants.

When evaluating the issues that are raised in this Motion, this Court must be mindful of the heightened standard of reliability that applies to all cases in which the prosecution is seeking the death penalty. Both the Due Process and Cruel and Unusual Punishment Clauses of the U.S. constitution guarantee a capital defendant a "greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see also Mills v. Maryland*, 486 U.S. 367, 376 (1988) ("[I]n reviewing death sentences, the Court has demanded even greater certainty [than in other criminal cases] that the jury's conclusion rested on proper grounds."); U.S. Const. amends. VIII, XIV. Article I, Sections 6 and 13 of the Idaho Constitution provide similar protections for capital defendants. *See State v. Creech*, 105 Idaho 362, 383 (1983).

"[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Because "death is different," the U.S. Constitution requires that "extraordinary measures [be taken] to ensure that" Mr. Daybell "is afforded process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake." *Caldwell v. Mississippi*, 472 U.S. 320, 329 n.2 (1985) (*quoting Eddings v. Oklahoma*, 455 U.S. 104, 118 (1981) (O'Connor, J., concurring)). "[T]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Caspari v. Bolden*, 510 U.S. 383, 393 (1994) (*quoting Strickland v. Washington*, 466 U.S. 668, 704-05 (1984) (Brennan, J., concurring in part and dissenting in part)).

This elevated level of due process applies not only during the penalty phase of a capital

trial, but to any stage of the proceedings, including the merits phase. As the United States Supreme Court has explained, "[t]o 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." *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *see also Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (noting that the Court's "duty to search for constitutional error with painstaking care is never more exacting than in a capital case.").

Additionally, when the government seeks to have a convicted offender condemned to death, the Eighth Amendment imposes a special requirement nowhere else required in criminal law: an individualized sentencing determination. This "**precise and individualized sentencing**," *Stringer v. Black*, 503 U.S. 222, 232 (1992) (emphasis added), ensures that "each defendant in a capital case [is treated] with that degree of respect due the uniqueness of the individual," *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). The Eighth Amendment requires that "[a] sentencer [must] be allowed to give full consideration and full effect to mitigating circumstances." *Penry v. Johnson*, 532 U.S. at 782, 797 ("Penry II"). The *Penry II* Court clarified that:

> *Penry I* did not hold that the mere mention of 'mitigating circumstances' to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it may 'consider' mitigating circumstances in deciding the appropriate sentence. Rather, the key under *Penry I* is that the jury be able to consider and *give effect to* [a defendant's mitigating] evidence in imposing sentence. [A] sentencer [must] be allowed to give full consideration and full effect to mitigating circumstances.

532 U.S. at 797 (internal quotes and citations omitted) (emphasis in original).

The constitutional necessity of individualized treatment has led the Supreme Court to strike down death sentences imposed when sentencers did not fully consider "any relevant circumstance

that could cause [the sentencer] to decline to impose the [death] penalty." *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987); *see also, e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Mills v. Maryland*, 486 U.S. 367 (1988). Likewise, the Supreme Court has struck down death sentences whenever the procedures employed created an unnecessary risk of factual error in the decision to inflict death as punishment. *See, e.g., Lankford v. Idaho*, 500 U.S. 110 (1991); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Beck v. Alabama*, 447 U.S. 625 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977).

The requirement of individualized treatment in capital sentencing means, among other things, that the legally relevant facts to be litigated and decided in a capital sentencing hearing are potentially countless. As summarized by Justice Powell, writing for the Court in *McCleskey v. Kemp*, 481 U.S. 279, 294 (1987), "the Constitution requires that [the jury's capital sentencing] decision rest on innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense." *Accord California v. Ramos*, 463 U.S. 992, 1008 (1983) (referring to the "myriad of factors" which determine sentencer's choice between life and death); *Zant v. Stephens*, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring) (citing "the countless considerations" weighed by capital sentencing authorities). For this reason, the issues confronting a capital sentencer are exponentially more complex than those confronted in ordinary criminal trials.

Any process that dilutes Mr. Daybell's mitigating evidence hampers the jury's ability to "give full consideration and full effect" to mitigating circumstances and thus violates his Eighth Amendment right to an individualized sentencing determination. *See Penry II*, 532 U.S. at 797. As detailed further below, there are several reasons why a joint sentencing proceeding will

undoubtedly hamper the jury's ability to give full effect to Mr. Daybell's individual mitigating circumstances and therefore these capital cases must be severed.

## II. A Joint Capital Trial Would Materially Prejudice Mr. Daybell.

Idaho Criminal Rule 14 provides, in part:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in a complaint, indictment or information, the court may order the state to elect between counts, grant separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires.

In considering whether the joinder of defendants prejudices any party, Idaho courts must consider *all* potential forms of prejudice. *See, e.g.*, *State v. Gamble*, 146 Idaho 331, 336-40 (2008) (assessing joinder of defendants for prejudice arising out of antagonistic defenses, confrontation clause issues, and minimally overlapping charges); *State v. Caudill*, 109 Idaho 222, 225-26 (1985) (assessing joinder of defendants for prejudice arising out of antagonistic defenses, confrontation clause issues, and a spillover of evidence admissible against only one defendant); *State v. Cochran*, 97 Idaho 71, 74 (1975) (assessing joinder of defendants for prejudice based on the risk of the jury being unable to provide fair, individualized assessments of each defendant's guilt). The Court "has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Cochran*, 97 Idaho at 74.

### A. A Joint Trial Would Deprive Mr. Daybell of His Constitutional Right to Present a Complete Defense.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Notably, state evidentiary rules must yield to the defendant's federal and state constitutional rights when they are conflict. *See id.*

In *Holmes*, the defendant was convicted of murder and sentenced to death. During his trial, the court denied Holmes the opportunity to present evidence that an alternate perpetrator had committed the crime under a state evidence rule barring 'alt perp' evidence if it would "merely cast a bare suspicion or raise a conjectural inference as to another's guilt" rather than "raise a reasonable inference as to the defendant's own innocence." *See id.* at 323. The State Supreme Court affirmed the conviction, holding that because the prosecution had forensic evidence which 'strongly support[ed] a guilty verdict,' proffered evidence about someone else's alleged guilt could not raise a reasonable inference about the defendant's own innocence. *See id.* at 321. The U.S. Supreme Court reversed, holding that a defendant's constitutional rights are violated when the right to present a complete defense are abridged by evidence rules that "infringe upon a weighty interest of the accused." *See id.* at 324 (internal citations omitted). In holding the rule unconstitutional, the Court further noted that it is "widely accepted" that "the accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged" and that "[e]vidence tending to show the commission by another person of the crime charged may be introduced by accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt." *Id.* at 327.

The *Holmes* Court also detailed the Court's long history of overturning convictions due to the arbitrary curtailing the defendant's right to present a complete defense. *See, e.g.*, *Washington v. Texas*, 388 U.S. 14, 22-23 (1967) (holding that the state evidence rule violated defendant's right to present a defense); *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973) (same); *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986) (same); *Rock v. Arkansas*, 483 U.S. 44, 58 (1987) (same).

Based on the allegations in this case, one of the plainly available defenses would be to demonstrate that Ms. Vallow and her brother, Alex Cox, were responsible for the crimes alleged

and that they acted as part of their own conspiracy that did not involve Mr. Daybell. As part of that defense, Mr. Daybell would seek to introduce the prior bad acts of both Ms. Vallow and Mr. Cox, as well as evidence regarding their relationship and the death of Mr. Cox, and the past statements of Mr. Cox. Ms. Vallow's prior bad acts would bear upon motive, intent, and plan. In particular, Ms. Vallow's alleged involvement in the murder of her ex-husband—who Mr. Cox told police that he had shot—plainly bears upon the issue of whether Ms. Vallow and Mr. Cox had an ongoing conspiracy that preceded the core acts alleged in this case. As such, Lori Vallow's previous conduct easily meets the relevance standard for Reverse-404(B); in fact, this information goes straight to the heart of Mr. Daybell's potential defenses, including any defenses that he did not commit the crimes alleged, that he was not engaged in a conspiracy, and that he had no knowledge of what occurred. This alternative perpetrator evidence "is inconsistent with, and raises a reasonable doubt of, [Mr. Daybell's] own guilt," such that Mr. Daybell has the constitutional right to introduce the evidence, regardless of state evidentiary rules. *See Holmes,* 547 U.S. at 327.

Moreover, because Mr. Cox is now deceased and cannot be called as a witness, Mr. Daybell will likely need to introduce statements that Mr. Cox has previously made to the police, as well as others, pursuant to hearsay exceptions. *See* IRE 801(d)(2)(E) (excluding from the definition of hearsay any statement that "was made by the party's coconspirator during and in furtherance of the conspiracy"); IRE 804 (permitting the introduction of a deceased declarant's past statements under specific circumstances, including a statement against interest). However, while many of Mr. Cox's statements fall within a hearsay exception, any such statements that are "testimonial" would still violate Ms. Vallow's Sixth Amendment confrontation rights. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004) (holding that the introduction of testimonial statements, even when not hearsay, violates a defendant's confrontation rights under the Sixth Amendment and explaining

that "[w]hatever else the term [testimonial] covers, it applies at a minimum . . . to police interrogations"). But if Mr. Daybell cannot introduce evidence tending to exonerate him, it would constitute a denial of due process and an arbitrary limitation on his right to present a complete defense, particularly in light of the heightened reliability that is required at each stage of a capital trial. *See Holmes*, 547 U.S. at 319-20 (explaining that the right to present a complete defense cannot be curtailed by evidence rules that "infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.") (internal citations omitted).

Therefore, a joint trial would create a conflict in the fundamental trial rights of Mr. Daybell and Ms. Vallow—if Mr. Daybell presents a complete defense, Ms. Vallow will be denied her confrontation rights; but if Ms. Vallow's confrontation rights are respected, then Mr. Daybell will be unable to present the testimonial statements of Mr. Cox, which bear upon the critical issue of his involvement and whether he had any conspiracy with Ms. Vallow.

Mr. Daybell will also be prejudiced in his ability to present a complete defense in a joint trial because he would be prevented from presenting exculpatory testimony from Ms. Vallow. In a joint trial, a co-defendant who has exculpatory information as to the other cannot testify without almost certainly providing inculpatory information as to themselves, or information that would be damaging to their case at the penalty phase. Under these circumstances, severance is the only way to hold fair and reliable trials for both co-defendants.

### B. A Joint Trial Would Create a Conflict between the Right against Self-Incrimination and the Right to an Individualized Sentencing Determination.

It is well-settled that a capital defendant must be permitted to offer, and the sentencer must consider, mitigating factors such as his post-crime cooperation with law enforcement, and his expressed remorse during the trial or sentencing proceedings. *See Gregg v. Georgia*, 428 U.S. 153,

197 (1976) (listing the extent of the defendant's cooperation with law enforcement as an example of a mitigating factor); *see also Minnick v. Mississippi*, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting) ("A confession is rightly regarded by the [federal] Sentencing Guidelines as warranting a reduction of sentence, because it 'demonstrates a recognition and affirmative acceptance of personal responsibility for . . . criminal conduct' . . . which is the beginning of reform.") (internal citation omitted)). This creates a substantial likelihood that, in assigning mitigating weight to one defendant's voluntary self-incrimination and expressions of remorse, the jury will at the same time treat as aggravating the failure of his co-defendant to produce similar evidence in mitigation.

The difficulty with this situation is that, under the Fifth Amendment to the U.S. Constitution and Article I, Section 13 of the Idaho Constitution, the right against compelled self-incrimination applies with undiminished force to the penalty phase of a capital case. *See, e.g.*, *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981) ("We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned."). Thus, any adverse consideration by a sentencing jury of a capital defendant's failure to incriminate himself—whether by cooperating with the police investigation, confessing to his role in the offenses charged, or expressing remorse either before or after conviction—would violate that defendant's Fifth Amendment rights, *Carter v. Kentucky*, 450 U.S. 288 (1981), *Griffin v. California*, 380 U.S. 609 (1965), and by extension his Eighth Amendment rights as well, *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (holding that the state's attachment of "aggravating" label to defendant's assertion of constitutional rights violated the Eighth Amendment) (dictum); *Dawson v. Delaware*, 112 S.Ct. 1093, 1097 (1992) (holding that a capital sentencer's consideration of irrelevant evidence concerning defendant's constitutionally protected association violated due process).

This conflict between the Fifth and Eighth Amendment rights of capital co-defendants is especially vexing because the precise points at which this constitutional conflict will arise generally cannot be foreseen prior to trial and cannot be resolved by instructions. The conflict is unforeseeable prior to trial because a defendant will not normally offer evidence of his cooperation or remorse until the sentencing phase. Indeed, the evidence may not exist until the sentencing stage—one of the reasons for a bifurcated sentencing proceeding is to permit a defendant to assert his constitutional right to remain silent with respect to his guilt or innocence, and yet to express remorse or contrition for his crime at the sentencing hearing after conviction. If and when remorse or contrition has been expressed at sentencing, a capital defendant enjoys an inviolable constitutional right to have the weight of the evidence considered by the sentencing jury, and the court may not circumscribe that right in any material way. *See Penry v. Lynaugh*, 492 U.S. 302 (1989); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

Just as the Court may not predict before trial how both the presence and the absence of co-defendants' remorse, cooperation, and voluntary self-incrimination may enter into a joint jury sentencing trial, neither will the familiar remedy of jury instructions be available to safeguard the Fifth Amendment rights of the silent co-defendants. For the Court cannot tell the jury to disregard the fact that one defendant exercised his Fifth Amendment right to remain silent throughout the pretrial, trial, and sentencing stages of the proceedings, as required by *Carter v. Kentucky, supra*, and *Bruno v. United States*, 308 U.S. 287 (1939), without trenching upon the co-defendant's Eighth Amendment right, *Lockett v. Ohio, supra*, to have his waiver of his Fifth Amendment rights considered in mitigation of his punishment. Simply put, if a defendant's willingness to waive his rights against self-incrimination is logically relevant to the sentence he should receive, so too must

a co-defendant's unwillingness to make a similar waiver. The Court cannot by instructions deny the probative significance of the latter without nullifying the significance of the former as well. Severance of the defendants' capital sentencing hearings is the only remedy available to resolve this conflict between constitutional rights.

### C. A Joint Trial Would Create a Conflict between Mr. Daybell's Confrontation Rights and Ms. Vallow's Constitutional Rights.

In *Bruton v. United States*, 391 U.S. 123 (1968), two defendants were tried jointly, one of whom had made an extrajudicial confession that incriminated both his codefendant and himself. *Id.* at 126. Neither defendant testified for the State or on his own behalf. *Id.* at 127-28 The trial court admitted the confession into evidence but gave a limiting instruction to the jury that it could only consider the confession as evidence against the declarant and not against the non-declarant defendant. *Id.* at 124-25. Nevertheless, the U.S. Supreme Court held that such a solution is unworkable, and emphasized that where the State wishes to rely on an inculpatory statement of one defendant to make its case against that defendant, then that defendant's trial must be severed from any of the named and blamed codefendants. *Id.* at 131-32.

The Supreme Court has further held that extrajudicial confessions from codefendants are inadmissible even in cases in which the defendant's own confession is admitted against him and "interlocks" with that of his co-defendant. *Cruz v. New York*, 481 U.S. 186, 193-94 (1987). The Court has provided further protections for Confrontation Clause rights in holding that the "non-self-inculpatory" portion of accomplice confessions that implicate a criminal defendant do not fall into any firmly rooted hearsay exception:

> It is clear that our cases have consistently viewed an accomplice's statements that shift or spread the blame to a criminal defendant as falling outside the realm of those "hearsay exception[s] [that are] so trustworthy that adversarial testing can be expected to add little to [the statements'] reliability." ... The decisive fact, which we make

> explicit today, is that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence.

*Lilly v. Virginia*, 527 U.S. 116, 133-34 (1999).

Another typically important judicial tool in multi-defendant criminal cases which can prove unusable in the sentencing phase of a capital case is the redaction of defendants' statements. In *Marsh v. Richardson*, 481 U.S. 208 (1987), the Supreme Court upheld the use of redaction as a means of protecting the confrontation rights of co-defendants when the prosecution seeks to introduce an out-of-court statement of one defendant into evidence at a joint trial. The utility of redaction is that by removing from the statement all incriminating references to the maker's co-defendants, a trial court can ensure that the jury will consider the statement only as evidence against its maker. But when the issues before the jury shift from relatively straightforward questions of guilt or innocence to the countless gradations of moral culpability that must be made at the sentencing phase of a capital case, a trial court will often be unable to redact a statement without materially distorting it.

For example, in *State v. Howard*, 295 S.C. 462 (1988), cert. denied, 490 U.S. 1113 (1989), the trial court was found to have violated the defendant's Eighth Amendment rights to present mitigating evidence when it redacted references in his confession to the allegedly dominant role of his co-defendant. Reversing the first defendant's death sentence, the South Carolina Supreme Court concluded that the exclusion of references to domination by the co-defendant had undermined his case in mitigation and concluded by "caution[ing] the trial bench when considering a capital defendant's motion to sever that the effect of a joint trial on each defendant at *both the guilt and sentencing phases* must be considered." 369 S.E.2d at 138 (emphasis added).

*Howard* illustrates the paradigmatic difficulty with cases involving two death-noticed co-defendants' out-of-court statements in a capital sentencing phase. While there is a general preference for joint criminal trials in non-capital cases, a capital sentencing phase produces significant complications, particularly due to the heightened need for reliability in conviction and sentence. Even in non-capital cases, the Supreme Court has recognized the risks of redaction undercutting a defendant's theory of defense. *See, e.g.*, *Tennessee v. Street*, 471 U.S. 409, 415-17 (1985) (finding that redacting a co-defendant's confession and reading it into evidence would have undercut the respondent's theory of defense).

In 1998, the Supreme Court held that *Bruton* violations cannot be cured by the redaction of confessions in which the name of the defendant is replaced by a blank space or a word like "deleted." *Gray v. Maryland*, 523 U.S. 185, 197 (1998). Under the *Bruton* line of cases, there is a Confrontation Clause violation when a non-testifying codefendant's confession is introduced that either names another codefendant or refers to the existence of them in an accusatory manner; there is no violation if the confession is redacted to the extent that it omits any reference at all to the codefendant. *Washington v. Secretary Pa. Dep't of Corrections*, 801 F.3d 160, 166 (3d Cir. 2015) (citing *Gray*, 523 U.S. at 193-94; *Richardson*, 481 U.S. at 208, 211; *Bruton*, 391 U.S. at 126). It is against this backdrop that a potential violation of Mr. Daybell's confrontation rights must be analyzed.

In the instant case, Mr. Daybell's Confrontation Clause rights would not be protected by any remedy redacting a potential incriminating confession offered by his co-defendant. In a capital murder proceeding in which Mr. Daybell's life is at stake and heightened and meticulous protections apply, the risk of deprivation of his Sixth Amendment rights is too severe to proceed with a joint trial. *See State v. Paz*, 132 Idaho 758, 762 (1993) (Blistine, J., dissenting). Ultimately,

the preference for judicial efficiency in jointly charging two co-defendants in a case in which co-defendant confessions may be a factor must yield to the judicial duty to protect and preserve the basic rights accorded to each citizen under the Constitution. *State v. LePage*, 102 Idaho 387, 391 (1981).

### D. A Joint Trial Would Prevent a Full Consideration of Mitigating Factors in Violation of Mr. Daybell's Right to Be Free from Cruel and Unusual Punishment.

A jury required simultaneously to weigh inconsistent theories of mitigation offered on behalf of two co-defendants will likely be unable to accord both co-defendants the individualized consideration that the Eighth Amendment requires. For example, one defendant may offer evidence that prior to the present offense he worked at gainful employment, or that he has a stable and loving family whom he supports.. The same jury is then asked to consider, also in mitigation of punishment, evidence that a second defendant has suffered throughout his life from a brain impairment which has left him chronically paranoid, socially isolated, unemployable, and subject to intermittent explosive outbursts of rage and physical aggression. The first defendant presents evidence tending to show that he will likely prove a model inmate if sent to prison instead of executed; the second defendant's mental illness makes his likely future behavior somewhat more problematic. There can be no doubt that each defendant is constitutionally entitled to have each of these divergent aspects of his character and record considered in mitigation of his punishment. *See Lockett*, 438 U.S. at 586 (holding that the Eighth Amendment was violated by failure of state capital sentencing procedure to permit consideration of, inter alia, defendant's favorable prognosis for rehabilitation); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (same; good adjustment to pretrial incarceration); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (same; organic brain damage, etc.). But to the extent that the jury assigns substantial mitigating weight to the first defendant's evidence,

the second defendant's case in mitigation will be correspondingly weakened and may even be improperly considered as evidence justifying a sentence of death.

Under the Eighth Amendment, a defendant's psychiatric impairments are factors to be considered in mitigation, not in aggravation, and the fact that these disabilities may render the defendant more likely to pose a risk of violence in the future may not be used by a capital sentencing jury to place those impairments on death's side of the scale. *See Zant v. Stephens*, 462 U.S. 862, 885 (1983) (suggesting that Eighth Amendment would be violated by attachment of "'aggravating' label" to factors "that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness"). But when counsel for a capital defendant at a joint hearing stresses his own client's mental stability in order to reassure the jury concerning his future behavior if spared, there arises a constitutionally unacceptable risk that the jury will impose death on the co-defendant "despite the existence of factors which may call for a less severe penalty." *See Lockett*, 438 U.S. at 605. Likewise, the failure of a co-defendant to have several family members testify on his behalf may be perceived as aggravating, or even damning, if the co-defendant brings a parade of family members to testify—although the absence of the defendant's family may actually reflect facts about his emotionally impoverished background that should be given weight in mitigation, not aggravation. *Cf. Eddings v. Oklahoma*, 455 U.S. 104 (1982) (holding that the Eighth Amendment was violated by sentencer's refusal to consider defendant's violent childhood environment as mitigating factor). In each case, the problem is that evidence that the Constitution requires to be considered on the side of life is undermined or even transformed into evidence for death by an irrelevant and arbitrary comparison with the mitigating evidence offered on behalf of co-defendants.

In a joint sentencing hearing with conflicting mitigation, the jury will be invited to choose which mitigating factors are "really" mitigating, and which should be minimized—or even treated as aggravating. The invidiousness of this compare-and-contrast approach to mitigating factors at a joint sentencing hearing is increased by the "either/or" decision before the jury. The fact that the jury has before it a stark life-or-death choice for more than one defendant creates the risk that the jury will be tempted to turn the enormous moral task that requires consideration of the full range of mitigation into a simple either/or framework. The jury is likely to ask not whether defendant A deserves death or life, but whether he deserves greater, lesser, or equal punishment as defendant B. This can distort the jury's sentencing decisions in either one or both of two different ways.

First, it can skew the jury's determination of whether any of the defendants deserve death: the likelihood of an affirmative answer to that question will be capriciously increased by joinder whenever a single jury is required to fashion appropriate sentences for two defendants of varying culpability. Once the jury concludes that it would not be fair to sentence the more culpable defendant to the same punishment as the less culpable defendants, a powerful but legally extraneous reason to impose a death sentence on the more culpable defendant is introduced into the jury's deliberations. Each capital defendant is entitled to an unencumbered jury evaluation of the true gravity of his crime and the extent of his own moral culpability, and not merely to a serial ranking of co-defendants in which the loser gets death while the other is spared.

Second, multiple-defendant jury sentencing risks another decisional process which might be called "bootstrapping for death." This occurs once the jury decides to sentence the first defendant to death: that defendant's case then becomes a sort of benchmark for death against which the co-defendant is measured. And if this happens, the second defendant can avert death for himself only by establishing that the difference between the death-sentenced defendant's culpability and

his own is a great as the (immeasurable) gulf between life and death. If he cannot establish so dramatic a difference between the death-sentenced defendant's case and his own, the jury can be expected "to feed him from the same spoon," and in the process to deny his Eighth Amendment right to individualized and untrammeled consideration of his own culpability. This is of even greater concern when the co-defendants are romantically involved or married, as here.

Prejudice will also arise if the defendants present much of the same mitigating evidence. If this case results in a joint penalty phase, the jury's focus on each individual will be diluted and prejudicially blur the two defendants' arguments with respect to mitigation. To the extent that both defendants argue the same or similar theories of mitigation, the reasonably anticipated effect could be to undermine the integrity of the individualized hearing and be less persuasive by virtue of the repetition.

Life experience is the heart of penalty phase presentations. Suppose in one scenario that both defendants present an "abused childhood" penalty defense. That might be a compelling argument for one defendant, but it will lose its impact if retold for each of the defendants. Or perhaps if the jury sees similar penalty defenses and strategies, it may believe them to be suspicious, contrived, or boilerplate. And while a particular mitigation narrative may be a compelling argument for one defendant, it will lose its impact if retold for each defendant.

Furthermore, the impact of the plea for mercy will tend to be discredited, depriving one or both of the defendants of individualized penalty consideration. When the jury hears multiple pleas for mercy based on the same mitigating factors, the jury's capacity for mercy may be strained. In effect they are saying, is no one to pay for this terrible crime? That does not happen in a severed trial, because a jury in a severed trial is able to assume that another jury will mete out appropriate punishment—such as death—for the other co-defendant if warranted.

Yet another problem is that of lingering doubt. In this case lingering doubt is likely to be a factor if there is a joint sentencing stage, particularly because the evidence is circumstantial and the State, despite charging the co-defendants with conspiracy, has little to no direct evidence that the two co-defendants have actually acted through agreement. Lingering doubt is a legitimate and important consideration in a penalty phase, and in a co-defendant case, defendants may not only assert the lingering doubt issue at penalty phase, but in doing so, point powerfully at another defendant as the major player. In a penalty phase of a capital case, the issue is normative and the decision must be *individualized,* not comparative. Therefore, in a joint penalty phase, this powerful mitigating circumstance is more likely to be lost, in violation of the constitutional mandate for an individualized sentencing decision.

### E. A Joint Trial Would Create a Conflict between the Due Process Right and Co-Defendant's Right to Withhold Penalty Phase Evidence until Trial.

One of the most consistent threads of the Supreme Court's constitutional jurisprudence of capital punishment is "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" *Skipper,* 476 U.S. at 5 n.1 (*quoting Gardner v. Florida*, 430 U.S. 349, 362 (1977)). This requirement has been applied to strike down death sentences imposed after the prisoner was denied fair notice of the facts used to sentence him to death, *Gardner, supra,* or of the issues which he would be expected to meet at the penalty hearing, *Lankford v. Idaho*, 111 S.Ct. 1723 (1991). However, no such notice provisions exist to ensure that a capital co-defendant will have a fair opportunity to investigate and rebut the harmful information placed before the sentencing jury by his co-defendant. And because such evidence will be propounded by defendants on trial for their own lives and unconstrained by the rules of prosecutorial ethics that are supposed to limit the adversarial zeal of the prosecutors, *see Berger v. United States*, 295 U.S. 78 (1935), there is an especially grave risk that harmful

evidence from co-defendants will be injected into the decision-making process without being subjected to "the adversarial testing process" upon which our system of justice relies "to produce a just result under the standards governing decision," *Strickland,* 466 U.S. at 687.

### F. A Joint Trial Would Create the Risk of Sentencing Based on Gender Stereotyping, in Violation of Mr. Daybell's Right to Individualized Sentencing.

The risk of group rather than individualized sentencing is all the more invidious here, because this case places before the jury one male and one female defendant. Social science research demonstrates that the deindividuation that constitutes the core of gender stereotypes will be exacerbated by the deindividuation inherent in a joint sentencing proceeding. Because the risk is substantial that such a joint sentencing proceeding will be needlessly affected by gender stereotyping and bias, holding such a joint hearing would violate Mr. Daybell's right to due process of law, *Turner v. Murray*, 476 U.S. 28 (1986), to equal protection, *see McCleskey v. Kemp*, 481 U.S. 279 (1987), and against cruel and unusual punishment, *see Furman v. Georgia*, 408 U.S. 238 (1972).

As evidence of this danger, the disparity in the number of death sentences imposed on men over women has long been recognized. As Justice Marshall noted in 1972:

> There is also overwhelming evidence that the death penalty is employed against men and not women. Only 33 women have been executed since 1930, while 3,827 men have met a similar fate. It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.

*Furman*, 408 U.S. at 365 (Marshall, J., concurring).

In the 50 years since Justice Marshall noted the gender-based disparities in sentencing practices, these gendered trends have continued. Between the *Furman* decision in 1972 and January 1, 2021, 8,581 men were sentenced to death, while only 175 women received similar

sentences. *See Death Penalty Census Database*, Death Pen. Info. Ctr., available at https://deathpenaltyinfo.org/database/sentences (last visited Sep. 12, 2022). Idaho currently has eight individuals on death row, seven of whom are men. *See Death Row*, Idaho Dept. of Corr., available at https://www.idoc.idaho.gov/content/prisons/death_row (last visited Sep. 12, 2022).

It is plain that a joint sentencing greatly exacerbates the risk that the Mr. Daybell's gender will have a substantial adverse effect on the jury's determination of his sentence. The Supreme Court has recognized that the sentencing phase of a capital case is especially vulnerable to the play of prejudice and that special safeguards against discrimination may be necessary in such proceedings that are not constitutionally compelled in the determination of guilt or innocence. *See Turner*, 476 U.S. at 35 (reversing death sentence due to denial of voir dire examination concerning jurors' racial biases).

Studies specifically examining the consequences of severance or nonseverance on capital cases and capital sentencing have found that deindividualization is a grave concern. The findings of these studies indicate that in cases where one co-defendant is more culpable than the other—i.e., where only one is the triggerman directly responsible for a death—both defendants are prejudiced by joinder. The "worst" defendant is prejudiced because he will be perceived of as the one most deserving of death, if one defendant must be chosen. Yet the other defendant is prejudiced because of his association with the codefendant, the "negative halo effect."

Because a joint sentencing determination in this case clearly works against individualized consideration for each defendant, as required by the Eighth Amendment, the constitutional directive to eliminate the risk of discrimination based on gender bias in capital sentencing dictates that no jury be required to choose between life and death for more than one of the two capital co-defendants in this case.

## III. Severance Is Routinely Granted in Capital Cases due to the Need for Heightened Reliability and Other Constitutional Protections Specific to Death Penalty Cases.

As discussed below, courts around the country routinely sever cases with multiple death-noticed co-defendants, particularly ones with antagonistic defenses, specifically citing to the need for heightened reliability under the federal constitution.

### A. Reversals for Failure to Sever Capital Co-Defendants.

The Supreme Court has expressed reservations about co-defendants acting in the capacity of second prosecutors. Even in a non-capital case, the Supreme Court has noted that the constitutional difficulties in cases involving antagonistic defenses may operate to reduce the burden on the prosecution in two ways. *See Zafiro v. United States*, 506 U.S. 534, 543-44 (1993) (Stevens, J., concurring).

> First, joinder may introduce what is in effect a second prosecutor into a case, by turning each co-defendant into the other's most forceful adversary. Second, joinder may invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to convict the defendant who appears the more guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt as to that particular defendant.

*Id.* at 544.

In this case, it is apparent—even prior to the beginning of any proceedings—that the antagonistic and mutually exclusive defenses of Mr. Daybell and his co-defendant will ultimately result in a "second prosecutor" dilemma during both the merits phase and sentencing phase. A joint trial will transform each defendant into "the other's most forceful adversary." *See id.* Ultimately this situation is untenable and incompatible with the heightened reliability required in capital cases, and any convictions will be subject to reversal on appeal based on a violation of the due process rights of both defendants.

### B. Federal Courts Routinely Grant Severance in Capital Cases.

There is significant precedence in federal capital cases for severance. The constitutional justifications cited by federal courts as necessitating severance apply with equal weight to defendants like Mr. Daybell, who is subject to the protections of the both the U.S. Constitution and the Idaho Constitution. Additionally, federal cases serve as a particularly useful comparison because the Administrative Office of the Courts has a government-funded unit, the Federal Death Penalty Resource Counsel, which tracks all federal capital cases, including during the pre-trial period. Therefore, a data set exists for capital cases in the federal system, and it is possible to ascertain how routine severance is in capital co-defendant cases. The data demonstrates that trial courts grant severance in a "clear majority of cases."[2]

As the Fifth Circuit has observed, although "efficiency factors support joint trials even in capital cases," there is an "inherent tension between joinder and each defendant's constitutional entitlement to an individualized capital sentencing decision." *United States v. Bernard*, 299 F.3d 467, 475 (5th Cir. 2002). As a result, "[a] trial court must be especially sensitive to the existence of such tension in capital cases, which demand a heightened degree of reliability." *Id.; see also United States v. Tipton*, 90 F.3d 861, 892 (4th Cir. 1996) ("More important of course than any consideration of inconvenience or possible unfairness to the Government from sequential separate trials are the possibilities of unfairness to the accused persons from a joint penalty-phase trial—specifically the threat posed to individualized consideration of their situations, and in particular the quite different mitigating factors relevant to each."); *United States v. Perez*, 299 F. Supp. 2d 38, 44 (D. Conn. 2004) (ordering severance in light of "the heightened need for reliability in a death penalty trial"); *United States v. Roland*, No. 12-cr-298 (D.N.J. June 15, 2015) at 5 (finding

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[2] *See* Declaration of Kevin McNally Regarding Joint and Separate Trials and Outcomes in Multiple Capital Defendant Federal Death Penalty Trials (Sept 2018), filed in the case of Efrain Rodriguez-Mendoza, No. 4:10-CR-0459 (S.D. Tex.) [Exhibit A]; Severance of Defendants in Federal Death Penalty Trials Chart (8/2/18) [Exhibit B].

"that the threshold for showing prejudice is lower in a capital case than in a noncapital case"); *United States v. Green*, 324 F. Supp. 2d 311, 320 (D. Mass. 2004) ("[T]he standards for severance are necessarily leavened by the fact this is a death penalty case. The threshold for determining what constitutes prejudice and when the jury's ability to render a reliable verdict is compromised is necessarily lower than in the ordinary case."); Jon B. Gould & Lisa Greenman, Report to the Committee on Defender Services, *Judicial Conference of the United States: Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* (2010) at 81 ("In multi-defendant cases involving more than one [death-]authorized defendant, many judges have followed the practice of trying each capital defendant separately.").

Furthermore, federal trial courts facing mutually inconsistent defenses in a capital case, as here, have repeatedly granted severance when requested. In *United States v. Lecco*, 2:05-cr-107 (S.D.W.V. Sept. 3, 2009), a federal district court confronted a situation analogous to the one described in this Motion. Each co-defendant's defense was that the other one killed the victim without any participation and knowledge of the other. The trial judge granted severance, noting that:

> In this setting, each defense team will act as a second prosecutor against the opposing co-defendant. The choice required between the two theories presents so sharp a contrast that the jury, in crediting the core of one defense, must then necessarily disbelieve the core of the other odr, worse yet, cause the jury to unjustifiably infer that the conflict alone should result in both being found guilty.
>
> Additionally, the gravity of the sentence sought especially implicates the societal interest in convicting only the guilty. **The dual-prosecutor quandary is a particular concern in this regard.**

2:05-cr-107 at *6-7 (S.D.W.V. Sept. 3, 2009) (emphasis added) (internal citation omitted).

The Court further expounded on the prejudice such antagonistic defenses would have in a capital sentencing proceeding:

> In a joint trial, capital accuseds with diametrically opposed defenses, as here, may not only attempt to minimize their own role [] but also present their mitigation case implicitly, or by design, to redound to their co-defendant's detriment. In such a scenario, **a co-defendant, in effect, locks arms with the prosecutor**, stressing the aggravators applicable against the adversary co-defendant, and may even **advocate other aggravators unencumbered by the notice procedures** [] that are applicable to the prosecutor alone.

*Id.* at *9 (emphasis added).

Several other federal trial courts have severed co-defendants' trials due to similar concerns about antagonistic defenses and "choos[ing] between restricting [Co-Defendant A's] defense or permitting [Co-Defendant A's] attacks on [Co-Defendant B]; either option result[ing] in prejudice." *See, e.g.*, *United States v. Andrews*, 12-CR-100 (N.D.W.V. Nov. 26, 2013) at *14 (granting severance because the mutually antagonistic defenses in this case will thrust defense counsel into the role of prosecutor, thereby reducing the government's burden); *United States v. Basciano*, 05-CR-60 (E.D.N.Y. Oct. 23, 2007) (granting severance where the core of the defenses were in direct conflict); *United States v. Green*, 324 F. Supp. 2d 311, 325-26 (D. Mass. 2004) (granting severance because of mutually exclusive defenses in which each defendant planned to point the finger at the other when there was only evidence of one shooter). Indeed, severance can be warranted on the ground that virtually every argument for mitigation made by one defendant would, in effect, be viewed as an argument against mitigation as to the other defendant and each defendant would have the inherent focus of shifting the blame and claiming they are not as worthy of death as their co-defendant. *See Green*, 324 F. Supp. 2d at 326.

## IV. Judicial Economy Weighs in Favor of Severance.

A joint trial would quickly prove to be unmanageable, unnecessarily lengthy, confusing, and the result unreliable. Although concerns for judicial economy are one reason that joint trials

may be favored in the non-capital context, concerns for efficiency favor severance in capital cases, and especially here.

Given the mutually antagonistic nature of the defendants' positions, a joint trial would require that this Court repeatedly adjudicate multiple evidentiary and procedural disputes relating to inter alia, redaction, precluding portions of a witness's testimony, and constructing procedural workarounds designed to prevent prejudice against each defendant. It will also involve composing repeated, case-specific, and hard-to-obey limiting instructions, which may ultimately still be insufficient to avoid constitutional violations. *See, e.g.*, *Krulewitch v. United States*, 336, U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."). These issues will have to be repeatedly relitigated as the parties' trial presentations progress. As explained by Federal District Judge Matsch regarding the trial of Timothy McVeigh:

> There are efficiencies and advantages in single focused trials. The time needed for jury selection is significantly reduced: the number of defense peremptory challenges is halved and only one defense counsel conducts voir dire questioning. It is easier to apply the rules of evidence . . . Given these considerations, it is far from certain that the time required for two separate trials would, in total, be substantially greater than the time required for a joint trial.

*United States v. McVeigh*, 169 F.R.D. 362, 370 (D. CO 1996); *see also id.* (noting some of the inefficiencies associated with joint trials, including that co-defendants "will have different positions on evidentiary objections, and different approaches to the cross-examination of government witnesses and in the presentation of defense witnesses); *United States v. Richard Haworth*, 168 F.R.D. 658, 659 (D. N.M. 1996) (explaining that the court had "carefully considered all relevant factors and conclude[d] that severance will both reduce the risk of prejudice to defendants and facilitate judicial economy"); *United States v. Rodriguez-Mendoza*, No. 4:10-CR-

0459, 2019 WL 11853410, at *4 (S.D. Tex. Mar. 18, 2019) ("The objective in this capital case is first and foremost a fair trial for both sides. Secondary to that is an efficient trial. . . taken together, strong inferences and the reality of antagonistic defenses, spillover of evidentiary effects, due process and Eighth Amendment concerns, that instructions will not adequately steer a jury around the hazards of disobedience or lack of appreciation and confrontation clause infractions, lead the Court to conclude that severance will promote judicial economy and fair trials."). Furthermore, severance may also become warranted at any time during the course of the joint trial and at great expense to the Court's time and resources. Finally, while severance now would result in two trials instead of one joint trial, the fact is that this case is far more vulnerable to reversal if it proceeds as a joint trial. Reversal would result in a do-over with individual trials, making this first joint trial a complete waste of time and resources. It is respectfully submitted that the most efficient resolution would be to grant severance now due to myriad issues this joint capital case presents.

**V. Severance is Additionally Appropriate Because Mr. Daybell Requires a Continuance in Order to Adequately Prepare a Defense, and Ms. Vallow Has Asserted her Right to a Speedy Trial.**

That unavoidable conflicts will arise between Mr. Daybell's and Ms. Vallow's constitutional rights at a joint trial is made more apparent by the present situation. As discussed in greater detail in his contemporaneously filed Motion to Continue the Trial Date to Enforce Mr. Daybell's Constitutional Rights,[3] forcing Mr. Daybell to proceed with a January 2023 trial would violate his right to be free from cruel and unusual punishment, right to due process, right to a fair trial, right to counsel, right to present a defense, right to confront witnesses, right to a fair and reliable sentencing determination, and other rights safeguarded by the Fifth, Sixth, Eighth, and Fourteenth

[3] Mr. Daybell hereby incorporates the arguments and authorities contained in his Motion to Continue the Trial Date to Enforce Mr. Daybell's Constitutional Rights.

Amendments to the United States Constitution, and Article I, §§ 6, 7, 8, and 13 of the State Constitution. However, Ms. Vallow has asserted her right to a speedy trial pursuant to the Sixth and Fourteenth Amendments and Article 1, § 13. Thus, a conflict exists between Mr. Daybell's most fundamental trial rights and the right asserted by Ms. Vallow. Yet, this Court has a fundamental "obligation to 'enforce the constitutional rights of all 'persons.'" *Brown v. Plata*, 563 U.S. 491, 511 (2011); *see also Robb v. Connolly*, 111 U.S. 624, 637 (1884) ("Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof. . . ."). While the Court may continue Ms. Vallow's trial date despite her asserted speedy trial right,[4] severance is the most direct approach to enforce the constitutional rights of both Mr. Daybell and Ms. Vallow, and the most sensible approach due to the irreconcilable conflicts which will arise in a joint trial of both death-noticed co-defendants. *See* I.C.R. 14 (authorizing severance whenever "it appears that a defendant . . . is prejudiced by a joinder"). Mr Daybell has now been provided additional discovery that has been in the prosecutors possession for more than 3 years and was recently provided to the defense on February 2, 2023. Prior to that time there have been repeated references to the issue relative to the defenses's inability to test certain DNA evidence and have the results prior to trial. In addition, it was just discovered that the prosecuting attorney is in possession of over 12 TB of additional evidence that must be reviewed prior to trial and is essential and necessary for the trial and if necessary mitigation proceedings.

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[4] Based on the need for Mr. Daybell's continuance, the Court may also continue Ms. Vallow's trial date if the cases are not severed. *See United States v. Butz*, 982 F.2d 1378, 1381 (9th Cir. 1993) (holding that a continuance granted to a co-defendant in a joint trial pauses the speedy trial clock under federal speedy trial provisions); I.C. § 19-3501 (permitting tolling of the speedy trial clock for "good cause").

To incorporate the substance of separate filings regarding outstanding discovery, as well as to clarify a particular issue regarding the prosecution's obligations. As discussed below, the State fails to satisfy its *Brady* obligations through simply permitting defense access to the electronic devices so that their voluminous contents may be copied. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419 (1995); *State v. Lankford*, No. 35617, 2016 Ida. LEXIS 212 (July 25, 2016); *Grube v. State*, 134 Idaho 24 (2000).

**ARGUMENT**

The State has indicated that it has 12 terabytes of electronic discovery that have not been produced to the defense. That much data is the equivalent of 12,000 copies of the Encyclopedia Britannica. *See* Elizabeth Stafford, *Pretrial Discovery of Electronically Stored Information in Federal Criminal Cases*, MICH. BAR J. 20, 22 (Mar. 2013) (explaining that 1-2 terabytes equal 1,000-2,000 copies of Encyclopedia Britannica); *see also United States v. Cotterman*, 709 F.3d 952, 964 (9th Cir. 2013) ("The average 400–gigabyte laptop hard drive can store over 200 million pages—the equivalent of five floors of a typical academic library."). The State has further indicated that it has itself downloaded and reviewed the contents of these devices, but has not provided discovery about the search protocols used,[5] what additional software was utilized for downloading the contents or converting them, who conducted these steps, and what training that they had. But most critically, the State has not even provided copies of the contents, rather asserting that the defense must request access to the devices and copy the contents, which conflates the State's

[5] This information is critical to the development of any suppression arguments, since the State may only seize and search items for which there exists probable cause. Because the Ninth Circuit requires that appropriate search protocols be utilized, the State must provide this information in discovery, as has been requested by Mr. Daybell in his Rule 16 discovery requests.

independent constitutional obligations under *Brady* with its statutory obligations under Idaho Criminal Rule 16.[6]

When exculpatory material is contained in voluminous amounts of electronically stored records, the State violates its *Brady* obligations by doing nothing more than permitting the defendant access to it for copying. *See, e.g.*, *United States v. Salyer*, 2010 WL 3036444, at *5 (E.D. Cal. Aug. 2, 2010) (concluding that the government must identify *Brady* materials in voluminous electronic records, that "[t]here is no authority" for a conclusion to the contrary, and that it would be an "evisceration of constitutional rights" to shift the burden to the defense to review the records and identify *Brady* materials); *United States v. Cutting*, 2017 WL 1324023, at *10 (N.D. Cal. Jan. 12, 2017) (ordering the that the government identify all exculpatory and impeachment materials in already-produced copies of electronic records because of the "voluminous nature" of the records and the government's production in formats "that seriously impede defendants' ability to search the ESI"); *United States v. Blankenship*, 2015 WL 3687864, at *6 (S.D. W.Va. June 12, 2015) ("[W]ithout more, the United States does not comply with the requirement of *Brady* by merely including all known Brady material within the four million plus pages of discovery."); *United States v. Adan*, 10–CR–260, No. 607–1 at 21 (M.D. Tenn. May 10, 2011) ("The Court concludes that the Government's blanket provision here of 142 disks including disks unrelated to this action does not discharge its *Brady* and *Giglio* obligations.").

In the context of vast electronic records, even the circuit courts that have adopted the most narrow approach to a prosecutor's *Brady* obligations have held that the government must do more than simply produce the contents of these devices. In *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009), aff'd in part, vacated on other grounds, 561 U.S. 358 (2010), the defendant challenged

[6] The defense has not found a case where the government refused to even produce the voluminous contents of seized electronic devices, but rather insisted that the defense must do so.

the government's open-file disclosure of several hundred million pages of discovery in an electronic file. However, the Fifth Circuit held that this voluminous discovery did not violate Brady obligations because: (1) the government actually provided copies of the electronic files to the defense; (2) the electronic file was searchable; (3) the government had produced an index of "hot documents" that included potentially exculpatory evidence; and (4) the government had created a number of other databases to assist the defense's review of the evidence. *Id.* at 577. As such, in the context of voluminous electronic data, this standard requires that the government to go "beyond merely providing [a defendant] with the open file." *See id.* Of course, the State has taken none of these steps in this case; the State has not even produced copies of the contents of the devices. *Cf. United States v. Weaver*, 992 F. Supp. 2d 152, 156 (E.D.N.Y. 2014) (finding no *Brady* violation because "the government has provided detailed indices for all the materials it produced, the majority of which were provided in both PDF and 'load-ready' file format that could be easily searched"); *United States v. Lacey*, No. 2018 WL 4963292, at *2 (D. Ariz. Oct. 15, 2018) ("When deciding whether itemization of *Brady* material is required in circumstances of voluminous discovery, courts have held that the Government meets its *Brady* obligations when it provides discovery materials in a searchable electronic format with indices describing the documents contained therein."); Hon. Eric Holder, *In the Digital Age, Ensuring that the Department Does Justice*, 41 Geo. L. J. Rev. Crim. Proc. i, xi (2012) (citing the need for electronic evidence to be provided in a "usable format with a comprehensive table of contents").

Under the more exacting standards adopted by other courts, it is even more plainly apparent that the State's approach to its *Brady* obligations runs afoul of Mr. Daybell's due process rights. For example, the District of Columbia has rejected the Fifth Circuit's standard as too lenient, thereby "directing the government to identify exculpatory information within its voluminous

production." *United States v. Saffarinia*, 424 F.Supp.3d 46, 90 (D.D.C. 2020); *see also, e.g.*, *United States v. Hsia*, 24 F. Supp. 2d 14, 29 (D.D.C. 1998) ("[O]pen-file discovery does not relieve the government of its Brady obligations. The government cannot meet its Brady obligations by providing Ms. Hsia with access to 600,000 documents and then claiming that she should have been able to find the exculpatory information in the haystack.").

**CONCLUSION**

Because the State has not produced the roughly 12 terabytes of seized electronic information that has been its exclusive custody and control for the last 2.5 years, Mr. Daybell has been deprived an array of facially exculpatory and potentially exculpatory evidence. While the State has relied on Rule 16's mandate that a defendant be permitted to copy tangible objects in their control, that Rule does not undermine the stronger, constitutionally-compelled obligations for *Brady* materials. Because the State has refused to produce copies of the contents of the devices and has not identified the Brady material contained therein, the State has violated Mr. Daybell's rights to a fair trial, due process, effective assistance of counsel, and to be free from cruel and unusual punishment, pursuant to the 6th, 8th, and 14th Amendments to the United States Constitution and Sections 6 and 13 of Article I of the Constitution of the State of Idaho.

Even if the State were to produce the 12 terabytes of data today, in a manner that is at the *very least* consistent with that outlined by *Skilling, supra*, it would not be within a timeframe that makes it reasonably usable at an April 2023 trial date. Thus, the very least this Court must do in order to enforce Mr. Daybell's constitutional rights is continue the trial date—either by severing Mr. Daybell from his co-defendant or by determining that a continuance will not violate the co-defendant's asserted right to a speedy trial. It bears repeating that Mr. Daybell's most fundamental constitutional rights, including to a fair trial and effective assistance of counsel, especially in a

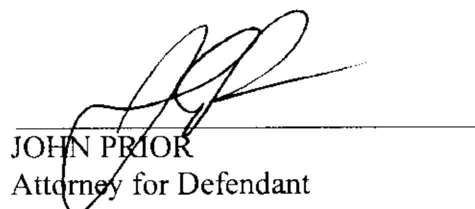
case for which his life is at stake, cannot be cast aside in order to accommodate a single constitutional right asserted by the co-defendant.

## CONCLUSION

For the reasons discussed in this Motion, Mr. Daybell moves to sever this case pursuant to Sections One, Two, Six, Seven, and Thirteen of Article I of the Idaho Constitution; the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Idaho Criminal Rule 14; and other authorities cited above.

**NOTICE IS HEREBY GIVEN** that on 23rd day of February 2023 at the hour of 9:00 am., or as soon thereafter as counsel may be heard, John Prior, attorney for Defendant above named will call up for hearing a hearing for Defendant's Motion to Sever before the Honorable Judge Steven W. Boyce District Judge at the Fremont County Courthouse in St Anthony, ID.

DATED this 13th day of February 2023.

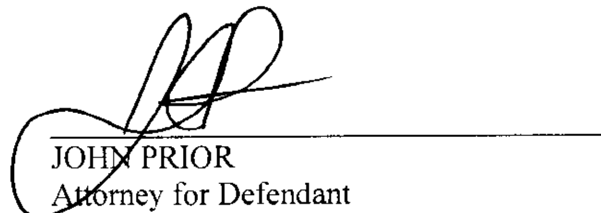


JOHN PRIOR
Attorney for Defendant

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to the FREMONT COUNTY PROSECUTING ATTORNEY'S OFFICE, by efiling and service to prosecutor@co.fremont.id.us on this date.

DATED this 10th day of February, 2023



JOHN PRIOR
Attorney for Defendant