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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

STATE OF IDAHO, Plaintiff, v. CHAD DAYBELL, Defendant.	Case No.: CR22-21-1623 OBJECTION TO THE COURT'S SCHEDULING ORDER ISSUED ON DECEMBER 16, 2022

COMES NOW the Defendant, Chad Daybell, and through undersigned counsel, submits this Objection to the Court's Scheduling Order that was issued on December 16, 2022. Mr. Daybell objects to the dates set by the Scheduling Order, and this written Objection specifically addresses the quickly approaching January 9 deadline for the submission of jury questionnaires.[1] Mr. Daybell also anticipates moving for a continuance of the trial date, and all other associated deadlines in the scheduling order as required by the Court's order. However, because the January 9 jury questionnaire deadline precedes the Court's deadline for filing a continuance motion, Mr. Daybell requests a timely order vacating the January 9 deadline until such a time that the continuance motion can be filed, heard, and ruled upon.

[1] In filing this Objection, Mr. Daybell does not waive his right to object to the other deadlines contained in the scheduling order.

As explained below, jury questionnaires in capital cases are unique because of the constitutionally required individualized sentencing process. To comply with this constitutional requirement, questionnaires must be case-specific. Therefore, the investigations that must be completed prior to trial must also be completed prior to the formation of jury questionnaires. It would be impossible for Mr. Daybell to propose a constitutionally adequate jury questionnaire prior to completing a mitigation investigation and prior to receiving and reviewing all material evidence. To safeguard Mr. Daybell's right to the effective assistance of counsel, his due process rights, his right to a fair and impartial jury drawn from a fair cross-section of the community, and his right to individualized sentencing, Mr. Daybell objects to the current Scheduling Order and will promptly file a Second Motion to Continue.[2] *See* U.S. Const. amend. VI, VIII, XIV; ID Const. art. I, §§ 6, 7, 8, 13.

BACKGROUND

On September 27, 2022, Mr. Daybell submitted a Motion to Continue the trial date, which had then been set for January 2023.[3] In response, the State filed a motion that supported continuing the trial date, arguing that there is "good cause to continue the trial date for both Defendants given the complicated statutory issues with Defendant Vallow Daybell." *See* State's Response to Defendant's Motion to Continue at 3 (filed Oct. 6, 2022). The State has requested a trial date of fall 2023, at the earliest.[4]

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[2] Mr. Daybell has waived his right to speedy trial. See Defendant's Waiver of Statutory Right to Speedy Trial (filed Aug. 20, 2021).

[3] Mr. Daybell fully incorporates the substance of his Motion to Continue the Trial Date to Enforce Mr. Daybell's Constitutional Rights (filed Sep. 27, 2022).

[4] While the Court has previously noted defense counsel's objection to setting the case into 2023, those objections have been waived, since the ongoing investigations into this case have

In granting Mr. Daybell's Motion to Continue, the Court noted the many reasons that additional time is needed to prepare for a capital trial—including "constitutional rights to effective assistance of counsel, the required individualized sentencing proceeding associated with a capital case, the need for experts and development of mitigation evidence"—and concluded that "the Defense has indeed demonstrated that it is not, and cannot, be ready for trial in January, 2023." *See* Memorandum Decision and Order at 3 (filed Oct. 28, 2022).[5]

On December 16, 2022, the Court issued a Notice of Trial Setting, Pre-Trial Conference, and Scheduling Order Governing further Proceedings, setting trial for April 3, 2023. Additionally, the Order mandates that parties submit proposed jury questionnaires by January 9, 2023.

ARGUMENT

In the rare cases when an Idaho jury wields the power of life and death, the U.S. and Idaho Constitutions require that the process of selecting that jury be case-specific, detailed, and deeply probative of potential jurors' beliefs. If a trial court fails to identify and remove even a single potential juror whose views render him unqualified to serve as a juror in that particular case, the error is not subject to harmless error analysis—reversal is required. *See Morgan v. Illinois*, 504 U.S. 719, 735-36 (1992). Given the individualized sentencing decision that capital jurors may eventually make, qualified jurors must be willing and able to meaningfully consider and give weight to mitigating evidence. *See, e.g., McKoy v. North Carolina*, 494 U.S. 433, 443 (1990); *Woodson v. North Carolina*, 428 U.S. 280, 304 ("[I]n capital cases the fundamental respect for

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established that more time is necessary to effectuate Mr. Daybell's fundamental constitutional rights.

[5] The Court also noted "the purely speculative argument that some other attorney may at some point join the defense team, and the new attorney would need time to prepare." *See* Memorandum Decision and Order at 3. At the time of filing the prior Motion to Continue, Mr. Daybell had not yet requested the appointment of an additional, capital-qualified attorney to the defense team. He has now done so and the reason is no longer speculative.

humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender . . . as a constitutionally indispensable part of the process of inflicting the penalty of death."). As such, capital voir dire requires questions about the specific types of mitigating evidence that a juror on the case must be able to consider.

Juror questionnaires play an essential role in the deeply probing, case-specific voir dire required in capital cases. *See State v. Abdullah*, 158 Idaho 386, 423-24 (2015) (discussing prospective juror responses on the written questionnaires); *State v. Dunlap*, 155 Idaho 345, 364 (2012) (discussing court's use of written juror questionnaires). Comprehensive jury questionnaires are also essential to judicial economy, particularly in capital cases and in with significant pretrial publicity, both of which require large numbers of potential jurors must be screened. *See, e.g.*, *United States v. Quinones*, 511 F.3d 289, 299 (2d Cir. 2007) (explaining that lengthy jury questionnaires are "routinely employed" in cases involving high publicity and in capital cases); *United States v. Rahman*, 189 F.3d 88, 121-22 (2d Cir. 1999) (explaining that the trial court's detailed questionnaires "skillfully balanced the difficult task of questioning such a large jury pool with the defendants' right to inquire into the sensitive issues that might arise in the case"). Because questionnaires play a vital role in ensuring fair and impartial juries in high-profile capital cases, they must be designed in such a way that will eliminate potential jurors who will not meaningfully consider or give full effect to the specific types of mitigating evidence and themes that are anticipated. *See Morgan*, 504 U.S. at 729-30; *McKoy*, 494 U.S. at 443.

If a capital defendant is unable to sufficiently probe potential jurors about their views on relevant forms of mitigation, then "the trial judge's responsibility to remove prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence cannot be fulfilled." *See Morgan*, 504 U.S. at 729-30. For example, a potential juror may express

agreement with broad principles regarding mitigation and state that they would be willing to consider such evidence when presented. However, when specifically probed about types of mitigating evidence that are commonly maligned, such as addiction or mental health, that same potential juror may express an unwillingness to consider this type of evidence as mitigating. In that instance, because the person could not give meaningful consideration and effect to mitigating evidence that is relevant to the case, they would not be suitable to serve on the jury.

Counsel cannot possibly guess which categories or types of mitigation evidence may be relevant until the life history investigation is complete. And it is not possible to compose an adequate jury questionnaire without that knowledge. For example, in one case, mitigation may focus on the defendant's stable upbringing in a middle-class family, lack of criminal history, and drug addiction; in another case, the mitigation may focus on a defendant's chaotic and unstable childhood, extreme poverty, and frequent interactions with the criminal legal system. Jurors, based on their own life experiences and viewpoints, may be able to consider and give mitigating effect to evidence in one of those cases but be categorically unable to consider mitigating evidence in the other. Thus, without knowledge of the mitigating evidence that is anticipated, counsel could not fashion a probative questionnaire.

Asking counsel to propose a jury questionnaire prior to completion of the sentencing investigation in a capital case would be analogous to asking counsel to propose a jury questionnaire in a serious criminal case without having received, reviewed, and investigated the factual allegations. Before having developed an understanding of the facts of the case, counsel could propose a questionnaire focusing on whether a juror understands and can hold the prosecution to a standard of proof beyond a reasonable doubt. But, upon entering trial one year later—with the benefit of discovery and completing an investigation—counsel may concede his client's guilt but

assert a mental incapacity defense. The jury questionnaire proposed prior to counsel's development of the case theory would be useless for determining whether or not prospective jurors could fairly assess the case. Moreover, it would be an enormous waste of resources: both because hundreds of jurors spent time answering irrelevant questions, and because *voir dire* would necessarily take much longer to allow counsel to probe the necessary and relevant topics.

As outlined in his recent Motion to Continue, Mr. Daybell's mitigation investigation is in its nascency. *See* Motion to Continue at 16-22. While Mr. Daybell will provide further information in his Second Motion to Continue in the coming weeks, the mitigation investigation is nowhere near complete enough to enable a strategic choice about mitigation themes. Without developed mitigation themes, it is impossible for counsel to propose adequate jury questionnaires. *See* American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA L. REV. 913, 1052 (2003) (emphasizing trial counsel's duty to "devote substantial time to determining the makeup of the venire, preparing a case-specific set of voir dire questions, planning a strategy for voir dire, and choosing a jury most **favorable to the theories of mitigation that will be presented**") (emphasis added); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 358 (1993) ("Counsel must develop a consistent theory before trial to facilitate consistent strategies relating to jury selection . . . **Counsel's choice of theory will have especially critical ramifications on jury selection strategy**.") (emphasis added). Therefore, by setting a deadline that requires a proposed jury questionnaire before the completion of a mitigation investigation, the current Scheduling Order prevents the development of a questionnaire in line with prevailing professional norms, resulting in reversible error. *See United States v. Baldwin*, 607 F.2d 1295, 1298 (9th Cir. 1979) (holding that a court "commits reversible error" when it "so limits the scope

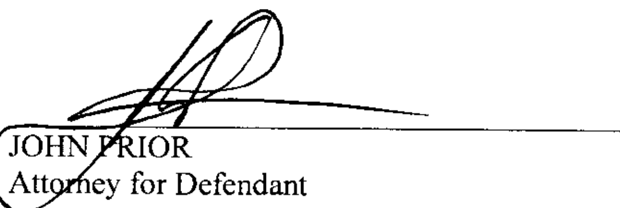
of voir dire that the procedure used for testing does not create any reasonable assurances that prejudice would be discovered if present").

In sum, the mitigation investigation in this case is in its beginning stages and has not developed sufficient evidence that could reasonably form the basis of a mitigation theme. Because mitigation themes must inform defense counsel's development of jury questionnaires, the January 9 deadline would violate Mr. Daybell's: (1) right to effective assistance of counsel, since counsel cannot propose a jury questionnaire without having completed a mitigation investigation, *see* U.S. Const. amend. VI; ID Const. art. I, § 13; 31 HOFSTRA L. REV. at 1052; (2) right to a fair and impartial jury, because an inadequately particularized jury questionnaire cannot assure that all potential jurors can meaningfully consider the types of mitigating evidence that are likely in this case, *see* U.S. Const. amend. VI; ID Const. art. I, § 7; *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) ("Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored."); (3) due process rights, since the failure to protect a fair and impartial process "violates even the minimal standards of due process," *State v. Abdullah*, 158 Idaho 386, 421 (2015) (quoting *State v. Moses*, 156 Idaho 855, 862 (2014)); and (4) right to individualized sentencing, since an imprecisely focused jury questionnaire cannot guarantee that jurors will meaningfully consider and give weight to all mitigating evidence, *see* U.S. Const. amend. VIII; ID Const. art. I, § 6.

CONCLUSION

For the reasons discussed above, Mr. Daybell objects to the Court's Scheduling Order issued on December 16, 2022. Mr. Daybell respectfully requests that the Court vacate the current deadline for submitting proposed jury questionnaires, and not set any additional deadlines until after the Court can consider Mr. Daybell's forthcoming continuance motion, to be filed in January 2023.

DATED this 23rd day of December 2022.

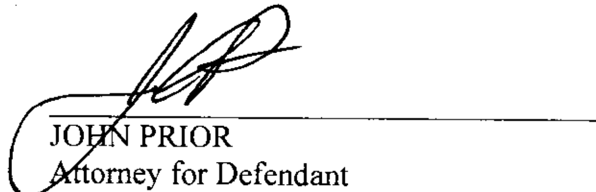


JOHN PRIOR
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to the Fremont County Prosecuting Attorney by efiling and service to prosecutor@co.fremont.id.us

DATED December 23, 2022



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