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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.	**CR22-21-1623** **MOTION FOR DISCOVERY CONCERNING EVENTS THAT WERE REVEALED IN LORI VALLOW'S MOTION DATED OCTOBER 27, 2021**

CHAD DAYBELL, through undersigned counsel, files this Motion requesting discovery concerning events that were revealed in co-defendant Lori Vallow' s Motion dated October 27, 2021. This Motion is made pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Idaho Const. Art. I, secs. 6, 7, 8 and 13, and the other authorities cited below.

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INTRODUCTION AND RELEVANT FACUAL BACKGROUND

On October 27, 2021, Counsel for Ms. Lori Vallow filed a Motion titled "Declared Motion(s) Re: (1) Motion for State to Disclose Brady Violations Disclosures; (2) Motion for Criminal Deposition(s); (3) Motion for out-of-state subpoena(s); and (4) Motion to Disqualify Idaho Department of Health and Welfare." In that Motion, Ms. Vallow' s counsel alleges that the State of Idaho committed serious misconduct; namely, that a state actor encouraged and/or coerced Mr. Daybell's incompetent co-defendant to speak about this case to an attorney who is neither affiliated with the case nor licensed in the State of Idaho, without notification to counsel of record. Even more concerning, this third-party attorney is alleged to have thereafter communicated with prosecutor Rob Wood about the case and the content of his conversation with Ms. Vallow. At no point thereafter did Prosecutor Wood alert the Court or undersigned counsel to the fact that an employee of the State had encouraged, coerced, and facilitated communication between an incompetent defendant in the State's custody and a private attorney, who then relayed that conversation back to the prosecution.

If these allegations are true, the prosecution's failure to immediately disclose to the Court the State's deliberate intrusion into the attorney-client relationship—and the fact that resulting information was then fed back to the State—represents a troubling departure from the

professional and ethical obligations of the prosecution, particularly in a capital case. *Cf. United States v. Levy*, 577 F.2d 200, 208 (3d Cir. 1978) ("In this [non-capital] case a government attorney, sensitive to her obligation to prevent sixth amendment violations by agents of the United States, called the matter to the district court's attention… [but] we know from the Rispo case that not all government attorneys can be counted on to act with the same punctilio as did Attorney Fields.").

Because Ms. Vallow and Mr. Daybell have been charged together as co-defendants, the State's exploitation of Ms. Vallow while incompetent and in state custody also implicates Mr. Daybell's rights to due process, a fair trial, and effective assistance of counsel. For all the reasons discussed below, this Court must permit broad discovery about this incident. Among the things Mr. Daybell must be permitted to investigate include how this situation came to pass; how a state hospital employee knew that an attorney in private practice in Utah served as legal counsel for the LDS church; why a state hospital employee believed that an attorney who represents the LDS Church would have any interest in this case; what conversations occurred between whom and the substance of those conversations; how and when the prosecution determined it did not have an obligation to inform this court or undersigned counsel of this extraordinary event; how a seemingly unaffiliated attorney in Utah was able to contact and get an audience with Mr. Wood following his conversation with Ms. Vallow; what other communications have occurred between the prosecuting attorneys and members or leaders of the LDS church regarding this case; what other communications have occurred between the prosecuting attorneys and state hospital employees relating to this case; and what actions have been taken by the prosecution or any of its agents as a result of this occurrence.

Discovery is indispensable to the effectuation of the right to a fair trial, due process, effective assistance of counsel, and the right to be free from cruel and unusual punishment, pursuant to the 5th, 6th, 8th, and 14th Amendments to the United States Constitution and Article 1, Sections 6, 7, 8, and 13 of the Idaho State Constitution. Mr. Daybell must be permitted to fully investigate this incident in order to assess the situation and make specific arguments for appropriate remedies necessary to protect his constitutional rights.

Moreover, the Court must consider the issues raised in this pleading in light of the fact that this is a capital case, which makes it fundamentally different than any other type of criminal proceeding and guarantees capital defendants such as Mr. Daybell rights that the Constitution nowhere else requires.

ARGUMENT

I. Because The State Has Elected to Seek the Death Penalty, Heightened Standards of Due Process and Reliability Apply to Every Stage of These Proceedings.

When the prosecution elects to seek the death penalty, the nature of the case fundamentally changes. Capital cases are unique in the legal system in many aspects, including in the type and scope of pre-trial investigation, the number and required experience of core defense team members, the number and type of necessary experts, jury selection, the trial process, standard of review, and the appellate and post-conviction process. The United States Supreme Court, alone, has issued more than 100 substantive decisions about capital punishment in the modern era of the death penalty, a number that is dwarfed by decisions from state and federal courts that regularly review—and reverse—death sentences.

One of the most enduring themes of capital jurisprudence is that "death is different" and defendants are afforded significantly more protections than would be granted in the same case if the prosecution did not seek the death penalty. The United States Supreme Court has long held that a proceeding at which the decision-maker is called upon to determine whether a defendant should live or die is fundamentally different, and requires a corresponding level of increased reliability and scrutiny throughout the proceedings:

> 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.**

Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

Both the Due Process and Cruel and Unusual Punishment Clauses of the federal 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) (emphasis added); *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."); *California v. Ramos*, 463 U.S. 993, 998-99 (1983) (qualitative difference of death from all other punishments "requires a correspondingly greater degree of scrutiny of the capital sentencing determination"); *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (the "duty to search for constitutional error with painstaking care is never more exacting than in a capital case.") (Quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). Article I, §§ 6 & 13 of the Idaho Constitution offer similar protections.

This heightened standard of reliability is "a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; **that death is different**." *Ford*

v. Wainwright, 477 U.S. 399, 411 (1986); *see also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases."). Because "death is different," the United States Constitution requires that "extraordinary measures [be taken] to insure 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)) (emphasis added). "[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)); *see also Ring v. Arizona*, 536 U.S. 584, 605–06 (2002) ("As [the government's] counsel maintained at oral argument, there is no doubt that "[d]eath is different."); *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (holding it cruel and unusual to punish intellectually disabled persons with death is the "pinnacle of . . . death-is-different jurisprudence").

The United States Supreme Court has also made clear that a trial court must apply this heightened standard of reliability to all aspects of a capital case, including decisions impacting the merits phase, in order to satisfy the demands of the Eighth Amendment. In *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980), the United States Supreme Court held that the concerns for heightened reliability which applied during the sentencing proceedings in a capital case were equally applicable to the merits phase decision in a capital case:

> To ensure 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. (holding that the Constitution required the giving of a lesser-included offense instruction at the trial on the merits, if requested in a capital case, even if there was no due process requirement to give a lesser-included offense instruction in a non-capital case). The Court noted that failing to give such an instruction might "enhance the risk of an unwarranted conviction" and that "[s]uch a risk cannot be tolerated in a case in which the defendant's life is at stake." *Id.*: *see also Herrera v. Collins*, 506 U.S. 390, 406 n.5 (1993) (*Beck* "emphasizes the importance of ensuring the reliability of the guilt determination in capital cases in the first instance.").

Justice O'Connor's concurrence in *Thompson v. Oklahoma* further underscores why a trial court must apply heightened scrutiny to all decisions that may lead to the imposition of a death sentence:

> Under the Eighth Amendment, the death penalty has been treated differently from all other punishments. . . Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.

487 U.S. 815, 856 (1988).

Thus, when the State announces its intention to the seek the death penalty in a case, it imposes an extraordinary burden upon the Court, itself, and defense counsel to ensure the

fairness, accuracy, and reliability of the trial and any subsequent sentencing proceeding. The guarantee of "heightened reliability" to capital defendants is nowhere else required by the constitution and entitles capital defendants to more process and a more exacting standard of fairness than in an ordinary criminal case. The situation as alleged by Ms. Vallow's counsel would be alarming in any case but is particularly deserving of scrutiny in light of the State's affirmative decision to seek Mr. Daybell's execution. The integrity of these proceedings has been called into question, which necessarily implicates the reliability of both the merits phase decision and the sentencing decision. The Court must therefore permit Mr. Daybell to fully investigate this incident through discovery and evidentiary hearings.

II. This Court Must Permit Mr. Daybell to Fully Investigate this Serious Matter by Ordering Broad Discovery.

In order to assess the prejudice to Mr. Daybell's rights to a fair and impartial trial, due process, the effective assistance of counsel, and other rights safeguarded by the State and Federal Constitutions, he must be permitted to fully investigate this incident. Distinct from more traditional discovery issues in criminal cases, when the requested evidence concerns the prosecution team's own alleged wrongdoing, the prosecution cannot be tasked with the gatekeeping role of determining what information is relevant. Under these circumstances, broad discovery is required so that Mr. Daybell can pursue this inquiry without further limitations imposed by the State. As the Ninth Circuit has observed, in situations such as these, "the government and the defendant will have unequal access to knowledge. The prosecution team knows what it did and why. The defendant can only guess." *United States v. Danielson*, 325 F.3d 1054, 1070 (9th Cir. 2003), as amended (May 19, 2003).

Broad discovery is also appropriate due to the magnitude of the allegations. It is unquestionable that a state hospital employee entrusted with caring for an incompetent defendant is a government actor. *See, e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 335–37 (1985) ("Because MUSC is a state hospital, the members of its staff are government actors, subject to the strictures of the Fourth Amendment."). It is also beyond question that purposeful government intrusion into the attorney-client relationship is likely to result in significant prejudice. *See, e.g.*, *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995) ("[W]hen the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed."); *United States v. Levy*, 577 F.2d 200, 208 (3d Cir. 1978) ("Where there is a knowing invasion of the attorney-client relationship and where confidential information is disclosed to the government, we think that there are overwhelming considerations militating against a standard which tests the sixth amendment violation by weighing how prejudicial to the defense the disclosure is."); *United States v. Danielson*, 325 F.3d 1054, 1072 (9th Cir. 2003), as amended (May 19, 2003) ("It is true that once the government has improperly interfered with the attorney-client relationship and thereby obtained privileged trial strategy information, the prosecutor has the 'heavy burden' of showing non-use."); *see also Weatherford v. Bursey*, 429 U.S. 545, 549 (1977) ("[W]henever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered."). While the intrusion occurred with Mr. Daybell's co-defendant, it is highly possible under the circumstances that Mr. Daybell himself has also been prejudiced by these events.

Thus, Mr. Daybell requests that the Court issue a Discovery Order mandating the State's

disclosure of all information and materials about this matter within a timeframe set by the Court, followed by an evidentiary hearing in which Mr. Daybell can examine witnesses. Mr. Daybell joins Ms. Vallow' s requests for discovery as listed in the October 27 Motion in full. Moreover, Mr. Daybell requests the following materials:

1) Notes, in their original form, taken by Rob Wood during or after his conversation with Mr. Daniel McConkie.

2) Any recordings made of any phone calls or conversations relating to this matter.

3) A list containing the date, time, and subject matter of any and all phone calls, video calls, or in-person conversations which included any member of the prosecution team[1] and any person employed or contracting with the Idaho Department of Health and Welfare, including but not limited to N.S., a list of all parties to each, and the length of each call or conversation.

4) A list containing the date, time, and subject matter of any and all phone calls, video calls, or in-person conversations which included any member of the prosecution and Mr. McConkie, a list of all parties to each, and the length of each call or conversation. A copy of each phone record of the prosecution showing the time and date of each call.

5) Any and all text messages, phone records relating to any aspect of this matter, including internal text messages, phone calls and records between the prosecution team, text messages to or from agents of the Idaho Department of Health and Welfare, text messages to or from Mr. McConkie, and text messages to or from any member of the prosecution team and any member of Ms. Vallow's legal team.

6) Any and all emails relating to any aspect of this matter, including internal emails between the prosecution team, emails to or from agents of the Idaho Department of Health and Welfare, emails to or from Mr. McConkie, and emails to or from the prosecution and any member of Ms. Vallow's legal team.

7) Any and all voicemails relating to this situation, including between the prosecution team, to or from agents of the Idaho Department of Health, to or from Mr. McConkie, and to or from the prosecution and any member of Ms. Vallow' s legal team.

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[1] Member of the prosecution team is intended to include Rob Wood, Lindsey Blake, and Rachel Smith, as well as anyone in the Fremont or Madison prosecutor's offices and *any other person* affiliated with the prosecution in this case, including but not limited to individuals working with the Vera Causa Group.

8) Information about, and any notes generated during, any meetings within or between the Fremont County prosecutor's office, the Madison County prosecutor's office, or any other prosecutor affiliated with the case, that involved any discussion regarding this matter.

9) Any phone records, reports, incident logs, disciplinary paperwork, or other written or electronic materials—in its original form—from Idaho Department of Health and Welfare regarding this matter.

10) Any text messages, emails, or other written materials between N.S. and any other person at the Idaho Department of Health discussing this matter or discussing Chad Daybell and/or Lori Vallow generally.

11) Any text messages, emails, or other written materials between N.S. and any person in the Fremont County prosecutor's office, the Madison County prosecutor's office, or any other prosecutor affiliated with the case, discussing, generally, Chad Daybell and/or Lori Vallow.

12) A list of the trainings attended by all members of the prosecution team on this case within the past 5 years.

13) State or district-level policies regarding the prosecution's communications with Idaho Department of Health and Welfare employees.

14) Idaho Department of Health and Welfare policies and procedures regarding the assignment of "homework" or tasks to incompetent defendants.

15) Idaho Department of Health and Welfare policies and procedures regarding connecting patients to outside parties.

16) A log of all phone calls in which Ms. Vallow was a party, including incoming and outgoing calls, while under the care and supervision of Idaho Department of Health and Welfare.

17) A log of all disclosures regarding this matter made by any prosecutor, or any other person involved in a law enforcement agency, to any media outlet or journalist, including specific details about who made the disclosure, what was disclosed, and the substance of the disclosure.

All of these requests include discussions not only about the substance of the communications with N.S. and/or Mr. McConkie, but also discussions about what to do afterwards and/or what to disclose and to whom. Information about the surrounding

circumstances of these events is essential to the investigation and assessment of appropriate remedies. In the event the prosecution does not immediately disclose an item, Mr. Daybell further requests this Court require a written, particularized reason as to why the prosecution cannot comply, including an affirmative statement about (1) whether the item requested currently exists and (2) whether it ever existed but was deleted or destroyed.

Only after receiving this discovery and examining witnesses can Mr. Daybell make an accurate assessment of the appropriate relief. The Court must act to ensure equal access to information about what happened, so that Mr. Daybell can request any necessary remedial measures.

III. Additionally, the Prosecution Has a Clear, Self-Executing Legal Mandate to Turn Over *Brady* Material at the Earliest Feasible Opportunity.

Of course, the prosecution also has the legal obligation to turn over immediately any statements or information that may be favorable to Mr. Daybell's defense. Mr. Daybell hereby requests all discovery mandated under *Brady v. Maryland*, 373 U.S. 83 (1963), and the authorities discussed below.

Both the Federal and Idaho Constitution, as well as Idaho law, require that the prosecution turn over any materials that may help the accused, either by negating guilt or punishment or by impeaching witnesses. *See id.*; *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); I.C.R. 16(a). This duty to disclose arises out of the prosecutor's role to seek justice rather than to secure convictions at any cost: "...the prosecutor's role transcends that of a pure adversary: he 'is the representative not of an ordinary party to a controversy, but of a sovereignty... whose interest...in a criminal prosecution *is not that it shall win a case, but that*

justice shall be done.'" *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) (citations omitted) (emphasis added). In seeking justice, prosecutors must be mindful that their duty is to seek justice not just for the victim, but also for the defendant, who must always be guaranteed a fair trial. *Berger v. United States*, 295 U.S. 78, 88 (1935). Indeed, as a minister of justice, the prosecutor has an "obligation [to] guard the rights of the accused as well as to enforce the rights of public…a prosecutor does not 'represent' the victim." *In re Russell*, 2011 S.D. 17, ¶ 41 (citing *State v. Penkaty*, 708 N.W.2d 185, 196-97 (Minn. 2006)).

Idaho Criminal Rule 16(a) likewise requires the prosecution to disclose, as soon as practicable, any material or information "which tends to negate the guilt of the accused as to the offense charged or reduce the punishment therefor." These obligations extend to any information and material in the possession or control of members of the prosecuting attorney's staff and of any others who have participated in the investigation or evaluation of the case. I.C.R. 16(a). Prosecutors are required under I.C.R. 16 to disclose any exculpatory or impeachment evidence in the possession of any agent of the state, even if they do not personally know of that information. *See State v. Gardner,* 126 Idaho 428, 433 (Ct. App. 1994) (prosecutor violated *Brady* and I.C.R. 16(a) even though he was personally unaware of an exculpatory witness statement made to police). They are thereby charged with an affirmative duty to seek out and obtain all such evidence and disclose it to the Defendant.

The Idaho Rules of Professional Conduct and the ABA Model Rules of Professional Conduct further recognize the prosecutor's ethical duty to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the

prosecutor is relieved of this responsibility by a protective order of the tribunal." Idaho Rules of Prof'l Conduct, R. 3.8(d); Model Rules of Prof'l Conduct R. 3.8(d).

The ABA Criminal Discovery Standards also admonish the prosecution to turn over all information within their control that would (1) tend to negate the guilt of the defendant; (2) tend to reduce the punishment of the defendant; or (3) any material which may be used for impeachment. Std. 11-2.1. Furthermore, the prosecution must disclose to the defense when they are aware of information that exists that would be discoverable if it was in fact in their possession or control. Std. 11-4.3. These Standards explicitly recognize that the seriousness of the case must be taken into account when considering the strictness by which discovery obligations will be enforced. Std. 11-1.2. As a capital case is the most serious in our criminal justice system, these standards demand rigorous adherence.

The prosecutor's duty to produce this material is self-executing: she/he must turn over *Brady* material and disclose exculpatory information regardless of whether the defense has made a specific request. *Bagley*, 473 U.S. at 682. While there may occasionally be some excuses to a prosecution's failure to produce *Brady* material and disclose all exculpatory information when no specific request has been made, the failure to fully respond "is seldom, if ever, excusable" when the defense has made such a request.[2] *State v. Brown*, 98 Idaho 209, 213 (1977) (quoting *United States v. Agurs*, 427 U.S. 97, 106 (1976)). Moreover, even a good faith failure to disclose *Brady* material can result in a Due Process violation, since it can result in an unfair trial. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) ("Whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as

[2] This Motion provides the State with notice of the specific exculpatory materials and information requested.

such it is the spokesman for the Government"). Given the State's power to investigate and prosecute criminal actions, an unfair trial would result if the State were to cherry-pick the information that it provides a defendant or disclose only incriminating information. To preserve fair trials, the State must preserve all potentially exculpatory information and ensure that a defendant knows of that information; the prosecution thus has the duty to disclose exculpatory information exists even if the defense conceivably might have access to the information independently. *See,* e.g., *United States v. Shaffer*, 789 F.2d 682, 690 (9th Cir. 1986) (non-disclosure of government witness' paid informant status not absolved even if defendant might have uncovered it through independent sources; tapes disclosed to co-defendant not effectively disclosed to defendant because "trial strategies of co-defendants often conflict").

Mr. Daybell further specifically requests that this discovery be turned over immediately. Idaho Criminal Rule 16(a), the Idaho Rules of Professional Conduct, the ABA Rules of Professional Conduct, and *Brady* progeny all require *timely* disclosure of discovery materials, meaning prosecutors must turn over information at the earliest feasible opportunity. *See* I.C.R. 16(a) ("As soon as practicable following the filing of charges against the accused"); Idaho Rules of Prof'l Conduct R. 3.8(d) ("make timely disclosure to the defense"); ABA Rules of Prof'l Conduct R. 3.8(d) ("make timely disclosure to the defense").

Aside from a prosecutor's professional obligations, timely disclosure of *Brady* materials is necessary to ensure Mr. Daybell's constitutional rights to due process, a fair trial, and effective assistance of counsel. *See, e.g.*, *Thumm v. State*, 165 Idaho 405, 423 (2019) ("it would eviscerate the purpose of the *Brady* rule and encourage gamesmanship were we to allow the government to postpone disclosures to the last minute") (citations omitted); *United States v. Gamez-Orduno*, 235 F.3d 453, 455 (9th Cir. 2000) (*Brady* violated in pretrial context by suppression of report

that would have demonstrated that defendants had Fourth Amendment standing to challenge search); *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995) (guilty plea successfully challenged on *Brady* grounds). In order to fully litigate this matter and have the opportunity to request appropriate remedial measures, all discovery—including any *Brady* material—related to this matter must be immediately disclosed to Mr. Daybell.

IV. Mr. Daybell Requests an Evidentiary Hearing and the Appointment of a Special Prosecutor on this Matter.

In addition to specific discovery requests detailed above, Mr. Daybell requests an evidentiary hearing in which he may call witnesses. Witnesses will likely include, but may not be limited to, the Idaho Department of Health and Welfare staff member N.S., Mr. Daniel McConkie, and prosecutor Rob Wood. An evidentiary hearing is essential to identify the circumstances and extent of the State of Idaho's alleged misconduct and the resulting prejudice to Mr. Daybell.

An opportunity to examine witnesses under oath is imperative. There are serious questions as to how and why a state hospital employee knew that a lawyer in private practice in Utah represents the LDS church in legal matters and why she specifically directed Ms. Vallow to speak to him. Equally important are how and why a lawyer in private practice in another state was able to get a direct audience with Mr. Wood after speaking with Ms. Vallow, whether Mr. Wood has previously communicated with counsel for the LDS Church in relation to this matter, and why Mr. Wood did not alert the Court or undersigned counsel to this occurrence.

Beyond the important rights at issue, the personal interests of the relevant witnesses also require an adversarial hearing. Each witness is personally interested in clearing themselves from any allegations of impropriety, which could result in professional or financial consequences. If

left unchecked, this serious conflict of interest threatens Mr. Daybell's ability to discover the truth. Subjecting witnesses to cross-examination has long been a bedrock feature of our criminal legal system, as it is known to be the best tool to discover the truth. *See, e.g., Lilly v. Virginia*, 527 U.S. 116 (1999) (cross-examination is "the greatest legal engine ever invented for the discovery of truth"); *California v. Green*, 399 U.S. 149, 158 (1970) (forcing a witness to testify also "insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury"); *State v. Mantz*, 148 Idaho 303, 306 (Ct. App. 2009) ("As cross-examination leads to the discovery of truth, limitations on cross-examination may impede that discovery.").

An adversarial hearing is also necessary because Mr. Daybell must be entitled to subpoena any notes, recordings, emails, phone records or other materials related to this matter and held by witnesses who are not employed by the State of Idaho, including Mr. McConkie. This is essential to Mr. Daybell's ability to cross-examine the witnesses about any inconsistencies between the materials and their testimony.

To protect the integrity of this process, Mr. Daybell further requests that the Court sequester witnesses who may be called to testify about this event. Specifically, Mr. Daybell requests:

(1) An order prohibiting Mr. Wood and any other member of the prosecution from communicating with Mr. McConkie or IDHW employee N.S.

(2) An order prohibiting Mr. Wood or any member of the prosecution from having any communications regarding this incident with any person working with the IDHW.

(3) An order preventing Rob Wood or any member of the prosecution team from making further public statements about this matter. Because at least one member of the prosecution team is a witness, further public statements will violate the spirit of sequestration and will impair Mr. Daybell's ability to fully investigate this matter.

Finally, Mr. Daybell requests the Court appoint a Special Prosecutor for this matter, who is not otherwise affiliated with the case or with the Fremont or Madison Prosecutor's Offices or a member of the LDS church. Mr. Rob Wood is undoubtedly a witness to this matter, but it may become clear that other members of the prosecution team are also witnesses, and thus this Court should ensure that a conflict does not arise in the middle of the evidentiary hearing. Moreover, a special prosecutor should not have any allegiance to any of the individual prosecutors or witnesses in this matter, as a member of the same prosecution team almost certainly would.

V. Mr. Daybell Objects to Sealing These Pleadings or Proceedings from the Public in The Absence of a Specific Request from Defense Counsel.

In response to Ms. Vallow' s Motion dated October 27, 2021, Prosecutors Wood and Blake released this public statement on October 28:

> "The State will continue to focus on pursuing justice on behalf of the victims. We will address the unfounded claims by one of Ms. Daybell's defense attorneys in a court of law—not in the media.
>
> Filings of this nature are traditionally sealed and handled in confidential proceedings. Litigating such matters publicly can compromise both parties' right to fair trial and compromise various individuals' rights to privacy. The mental health issues and investigations are not suited for the court of public opinion."

It is clear from this statement that the prosecution intends to keep the public in the dark; in fact, they went as far to make a public assertion that "filings of this nature are *traditionally* sealed and handled in confidential proceedings." Contrary to that characterization, neither the State of Idaho nor the Fremont or Madison County Prosecutor's Office have a right to confidentiality. But Mr. Daybell has a Sixth and Fourteenth Amendment right to public proceedings, and members of the public have a First Amendment right to access court proceedings.

A criminal defendant's right to a public trial is expressly guaranteed by both the U.S. and Idaho Constitutions. *See* U.S. Const. amend. XI; Idaho Const. Art. 1, § 13; *see also In re Oliver*, 333 U.S. 257, 271 (1948) (recognizing fundamental due process right to public court proceedings, in addition to express Sixth Amendment right to public trial); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (discussing history of public trials). The constitutional right to a public trial extends to pre-trial proceedings. *See, e.g., Waller v. Georgia*, 467 U.S. 39, 47 (1984) (right to public trial includes right to public suppression hearings); *Presley v. Georgia*, 558 U.S. 209, 213 (2010) ("Sixth Amendment right to a public trial extends to the *voir dire* of prospective jurors."). Prejudice is presumed whenever a violation of this right occurs. *Waller*, 467 U.S. at 49.

As the Supreme Court has explained, throughout the historical evolution of the criminal jury trial, the proceedings have been open "to all who care to observe." *Richmond Newspapers*, 448 U.S. at 564. This "has been long recognized as an indispensable attribute of an Anglo-American trial," *id.* at 569 and serves several purposes "for the benefit of the accused," *Waller v. Georgia,* 467 U.S. 39, 46 (1984). First, it gives assurance that the proceedings are conducted fairly. *Richmond Newspapers*, 448 U.S. at 564. Second, it discourages perjury, misconduct by any participants, and decisions based on bias or partiality. *Id.: see also Waller,* 467 U.S. at 46 (a public trial "ensure[s] that judge and prosecutor carry out their duties responsibly" and "discourages perjury."). The presence of spectators also keeps the "triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller,* 467 U.S. at 46.

Apart from the benefits to the accused, public proceedings also have "significant community therapeutic value," and serve to divert "community concern, hostility, and emotion" into legitimate court proceedings, as opposed to manifesting in vigilante justice. *Richmond*

Newspapers, 448 U.S. at 571. By the same token, without public access, a result that is unwelcome to some in the community may "cause a reaction that the system at best has failed and at worst has been corrupted." *Id.* The effectiveness of the justice system thus rests on public access. *Id.*

Members of the public and the media also have a First Amendment right to access court proceedings. *See, e.g., Richmond Newspapers*, 448 U.S. at 557 ("the First Amendment—of itself and as applied to the States through the Fourteenth Amendment—secures the public a right of access to trial proceedings"); *Press-Enter. Co. v. Superior Court of California, Riverside City,* 464 U.S. 501 (1984) (this First Amendment guarantee includes *voir dire*). Article 1, § 18 of the Idaho Constitution encompass the same protections. *See Cowles Pub. Co. v. Magistrate Court of the First Judicial Dist. of State, City of Kootenai,* 118 Idaho 753, 755 (1990) ("The right to an open public preliminary hearing and trial is a shared right of the accused and the public, with the common element and concern being the assurance of fairness.").

The public's right to access court proceedings can be qualified—but *only* if doing so is necessary to **effectuate the defendant's constitutional rights**. *See Richmond Newspapers*, 448 U.S. at 557 (closing proceedings to the public upon unopposed request by defendant was unconstitutional because the judge did not make any inquiry into whether alternative solutions existed to ensure fairness to the defendant while still permitting public access); *Cowles,* 118 Idaho at 760 ("The presumption remains that [criminal trials] in Idaho will remain open absent the defendant's request and an overriding interest in a fair trial.").

Thus, in order to preserve his constitutional rights, Mr. Daybell objects to any request by the prosecution to seal any pleadings or hearings related to this issue, unless such a request has also come from defense counsel and is necessary to effectuate Mr. Daybell or Ms. Vallow' s

right to a fair trial. Given that one of the primary purposes of public proceedings is to ensure that proceedings are conducted fairly, *Richmond Newspapers*, 448 U.S. at 564, and to ensure that the "prosecutor carr[ies] out their duties responsibly," *Waller,* 467 U.S. at 46, the Court must be particularly sensitive to such a request in this instance, where the integrity and fairness of the judicial process has been called into question.

VI. Conclusion

It is essential to create a full and complete record concerning this matter, both because creating a complete record is essential to preserve Mr. Daybell's due process rights and rights to appeal, and so that counsel can accurately assess the situation and request appropriate relief.

In summary, Mr. Daybell requests the following:

(1) Discovery of all written and recorded materials as referenced in Section II of this Motion, and written statements as to whether any of the requested materials were deleted or destroyed;

(2) An evidentiary hearing on this matter in front of an impartial tribunal, in which Mr. Daybell is permitted to call and cross-examine witnesses to this matter;

(3) The appointment of an unaffiliated, special prosecutor to litigate this matter;

(4) Sequestration of witnesses.

(5) An order preventing further public statements from the prosecution concerning this matter in light of their status as witnesses.

(6) That this Court deny any request by the State to seal documents or hearings related to this matter unless secrecy is specifically requested by defense counsel in order to preserve the defendants' Sixth Amendment and due process rights.

Mr. Daybell files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following

grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Idaho Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article I, sections 6, 7, 8, 13, 16, 17, and 18 of the Idaho Constitution.

DATED this 5th day of November 2021.

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 5th day of November 2021.

JOHN PRIOR
Attorney for Defendant