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**THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT**  
**STATE OF IDAHO, COUNTY OF FREMONT**

STATE OF IDAHO,	)	Case No.: CR22-21-1623
	)	
Plaintiff,	)	
	)	REPLY TO STATE'S REQUEST TO
v.	)	IMPANEL JURORS FROM ANOTHER
	)	COUNTY AND TO SEQUESTER THE
CHAD DAYBELL,	)	JURY
Defendant.	)	
	)	
	)	

CHAD DAYBELL, through undersigned counsel, submits this reply to the prosecution's motions to impanel jurors from another county and to sequester the jury. Pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Idaho Const. art. I, secs. 6, 7, 8 and 13, as well as the other authorities cited below, Mr. Daybell respectfully requests that this Court grant the parties' joint request for change of venue, determine the jurisdiction to which the case should be transferred, and reset the hearing on the prosecution's request for impaneling and sequestering the jury until the prosecution has sufficiently briefed the issue and defense counsel has been permitted the time necessary to respond. If the Court does not continue the prosecution's motions to a later date, Mr. Daybell requests that the Court deny the motion to impanel a jury from another county, since doing so would prejudice Mr. Daybell and the prosecution has not met their burden regarding the costs of taking this course of action.

As grounds for his motion, Mr. Daybell asserts the following:

## **I. Introduction**

1. Mr. Daybell previously moved for a change of venue in order to ensure fair trial proceedings, and a hearing was set for October 5, 2021. On September 29, 2021, the prosecution submitted a response to Mr. Daybell's motion, in which they agreed with the request for a venue change. However, the prosecution also moved to sequester the jury and to impanel a jury from another county, instead of transferring the trial itself.

2. Idaho permits state courts discretionarily to "enter an order directing that jurors be impaneled from the county to which venue would otherwise have been transferred." Idaho Code § 19-1816. In order to do so, the court must first find, in part: "[t]hat it would be more economical to transport the jury than to transfer the pending action; and [t]hat justice will be served thereby." *Id.* If, after making these findings, a court decides to impanel a jury from another county, then "[t]he jury shall be summoned and impaneled as if the trial were to take place in the county where the jury was summoned. Thereafter, the jury shall be transported for purpose of the trial to the county in which the complaint, information or indictment is filed." *Id.*

## **II. Request to Continue the Prosecution's Motions**

3. In order to meaningfully respond to the prosecution's motions, Mr. Daybell is entitled to sufficient notice of the prosecution's arguments and the evidence that they intend to submit in support thereof. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("It is ... fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.").

4. Mr. Daybell provided this Court and the prosecution with sufficient notice regarding his motion for a change of venue. By submitting its own motions less than a week before the previously scheduled hearing date, the prosecution has deprived the defense of the time needed

to consult relevant law. Moreover, at the time of filing this reply, the prosecution has not provided evidence regarding the costs of impaneling a jury from another district. Therefore, beyond depriving Mr. Daybell of the time necessary to research relevant state and federal law, Mr. Daybell cannot respond to the prosecution's arguments about costs, because they have not yet been submitted. Before Mr. Daybell can respond sufficiently to the prosecution's motions, the prosecution must submit *some* evidence regarding the costs of impaneling a jury from another county, as compared to transferring the trial.

5. Mr. Daybell respectfully requests that the Court continue the prosecution's motions to a later date, in order to allow sufficient time to consult relevant law and to review any evidence submitted by the prosecution.

6. Furthermore, since the relevant costs are those of impaneling a jury "from the county to which venue would otherwise have been transferred," Idaho Code § 19-1816, the Court must first rule on the motion for a change of venue before turning to the issues raised by the prosecution's motions.

7. Mr. Daybell submits the below arguments without forfeiting his request continue the prosecution's motions until a later date.

### **III. The Prosecution's Burden to Submit Tailored Cost Estimates**

8. On September 22, 2021, the Idaho Supreme Court issued new COVID-19 protocols governing court operations. These protocols—issued in response to rising COVID-19 positivity rates throughout Idaho and the corresponding stresses on the state's healthcare system—require that courthouses accommodate physical distancing, mandated face masks for those present in the courthouse, provide easy access to sanitation stations, and restrict the amount of persons



congregating together. The order does not include an expiration date, but rather continues in effect until further orders from the Idaho Supreme Court.

9. Given the uncertainties surrounding the ongoing pandemic, it is impossible to determine when courts will return to a semblance of normalcy. *See, e.g., United States v. Smith*, No. 2:19-cr-00213, 2020 U.S. Dist. LEXIS 88158, at \*15 (E.D. Cal. May 19, 2020) (“... predicting the trajectory of this virus and its impact on the Court comes with a fair measure of speculation”); *Arizonans for Fair Elections v. Hobbs*, No. CV-20-00658-PHX-DWL, 2020 U.S. Dist. LEXIS 62501, at \*10 (D. Ariz. Apr. 9, 2020) (“It is folly for anyone to predict exactly how long the pandemic will last and how long the state and local responses to the pandemic will remain in effect.”).

10. In order to meet its burden, the prosecution must submit data regarding costs of impaneling a jury from another county that accounts for the ongoing pandemic and the uncertainties regarding future protocols. Evidence regarding the cost of past trials would thus be insufficient if not tailored to current circumstances and future uncertainties.<sup>1</sup>

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<sup>1</sup> Pursuant to Rule 201 of the Idaho Rules of Evidence, Mr. Daybell requests that the Court take judicial notice of the ongoing health risks presented by COVID-19 at the time of filing this motion, as well as the need to account for these risks when determining proper courtroom protocols and calculating associated costs. These ongoing risks COVID-19 are facts which satisfy all prongs of Rule 201, and must be judicially noticed upon a party’s request. While it does not appear that Idaho courts have yet taken such notice, federal courts have repeatedly taken notice of the pandemic’s health risks when applying the federal analogue to Rule 201. *See, e.g., United States v. Kerr*, No. 3:19-cr-296-L, 2020 U.S. Dist. LEXIS 55566, at \*8 n.4 (N.D. Tex. Mar. 31, 2020) (“As the information regarding which age group of persons is at greater risk for contracting COVID-19 cannot be reasonably disputed, the court takes judicial notice of this fact pursuant to Federal Rule of Evidence 201.”); *Joffe v. King & Spalding LLP*, No. 17-CV-3392 (VEC), 2020 U.S. Dist. LEXIS 111188, at \*18 (S.D.N.Y. June 24, 2020) (“Since the onset of the pandemic, courts in this circuit have routinely taken judicial notice of the likely risks and severity of COVID-19 and the potential efficacy of mitigation measures.”); *United States v. Gamboa*, No. 09-1741 JAP, 2020 U.S. Dist. LEXIS 102156, at \*11 (D.N.M. June 11, 2020) (“Even if the Defendant had not introduced this evidence into this proceeding, the Court certainly could and does take judicial notice of the pandemic and the effect it has had not only on the prison population, but on the community at large.”); *Hines v. N.Y. State DOL Staff*, No. 1:20-CV-517 (DNH/ATB), 2020 U.S. Dist. LEXIS 88932, at \*8 n.7 (N.D.N.Y. May 18, 2020) (“The court may take judicial notice of facts regarding the COVID-19 pandemic that are generally known within the court’s jurisdiction”);

11. In addition to accounting for necessary safety protocols, the prosecution's cost estimates must also account for the potential liability arising from transporting jurors to and from another county. Once appearing for jury duty, prospective jurors will be totally within the Court's custody and control, and will not be free to take whatever personal precautions they may wish regarding the pandemic. Rather, they will be compelled to comply with the Court's (and county's) determinations of what constitutes appropriate "safety measures." This scenario establishes a "special relationship" which gives rise to a duty of care owed to the jurors. *See Beers v. Corporation of President of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 686 (2013) (noting that "a special relationship requires some level of custody ... equated with control or supervision"); *Turpen v. Granieri*, 133 Idaho 244, 248 (1999) (noting that a "special relationship" arises when there "is knowledge of an unreasonable risk of harm and the right and ability to control the third party's conduct"). Such a duty of care gives rise to the possibility of liability.<sup>2</sup>

12. The prosecution's cost estimates must further be tailored to the county to which the trial otherwise would have been transferred. Because the court has not yet ruled that change of venue is appropriate—let alone the county to which the case should be transferred—the prosecution's motion is premature. The prosecution cannot possibly submit evidence regarding the

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*Jones v. Wolf*, No. 20-CV-361, 2020 WL 1643857, at \*8 (W.D.N.Y. Apr. 2, 2020) (taking judicial notice that "for people of advanced age, with underlying health problems, or both, COVID-19 causes severe medical conditions and has increased lethality") (quoting *Basank v. Decker*, 20 Civ. 2518, 2020 WL 1481503, at \*3 (S.D.N.Y. Mar. 26, 2020)); *Valentine v. Collier*, No. 20-20207, 2020 U.S. App. LEXIS 17761, at \*3 n.1 (5th Cir. June 5, 2020) ("This court has taken judicial notice of statistics concerning COVID-19 already.").

<sup>2</sup> Notably, it is not clear that this county would risk liability if the trial were transferred to another county, which can set its own policies and procedures above and beyond those created by the Idaho Supreme Court. While the costs of a trial must be paid "by the county where the complaint, information or indictment is filed," this does not lead to the conclusion that the county would be liable for any gaps in protections offered to jurors according by another county's safety protocols. *See Idaho Code* § 19-1816 (West).



costs of impaneling a jury from a county that is yet unknown. Relatedly, Mr. Daybell cannot properly consider the impacts of jury sequestration when he does not know the county in which it may occur or if jurors would be sequestered after being transported from a different county.

**IV. Prejudice to Mr. Daybell Resulting from Impaneling a Jury from Another County**

***a. Death is Different***

13. The United States Supreme Court has long recognized that the qualitative difference in the severity of the punishment in a capital case creates a greater 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); *see also Gilmore v. Taylor*, 508 U.S. 333, 342 (1993) (“The Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case.”). The penalty of death is “unique in both its severity and finality.” *Gardner v. Florida*, 430 U.S. 349, 357 (1977).

14. The requirement of heightened reliability, in turn, dictates that courts provide capital defendants with special accommodations, considerations, and “protections that the Constitution nowhere else provides.” *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991). Accordingly, while many of the issues raised in this reply are, in varying degrees, applicable to non-capital cases as well, they must of necessity be analyzed here through a “death is different” lens. *See, e.g., Sampson v. United States*, 832 F.3d 37, 43 (1st Cir. 2016) (noting that “an already significant legal question is even more so in the context of a capital case, because ‘death is [] different.’”).

***b. Sixth Amendment Concerns***

15. The Sixth Amendment entitles a criminal defendant to more than mere legal representation; an accused has the right to the effective assistance of competent counsel. *Powell v. Alabama*, 287 U.S. 45, 58 (1932).

16. Defense counsel and their clients often must quietly consult each other at the defense table, which makes physical distancing impossible. Yet effective assistance of counsel requires conflict-free counsel, and “the fear of transmission on the part of the client or counsel fatally undermines the trust and communication necessary to establish and maintain an attorney-client relationship.” NACDL, *Criminal Court Reopening and Public Health in the COVID-19 Era: NACDL Statement of Principles and Report* (June 2020), p. 4, available at: <https://www.nacdl.org/getattachment/56802001-1bb9-4edd-814d-c8d5c41346f3/criminal-court-reopening-and-public-health-in-the-covid-19-era.pdf>.

17. Despite safety protocols that have been established to protect both defendants and their attorneys while permitting court operations to proceed, those protocols do not account for a situation where a defendant is moved to a different county for jury selection and then moved back to the original county for trial. It is not clear whether Mr. Daybell would be quarantined before and after each of these moves.

18. If Mr. Daybell were not to be quarantined before and after his movements between county jails—hotspots for COVID-19 outbreaks among both detainees and staff—then defense counsel would be placed into a situation that substantially increases the risk of being exposed to COVID-19.

19. If Mr. Daybell were to be quarantined before and after his movements between county jails—often hotspots for COVID-19 outbreaks among both detainees and staff—then this

would disrupt his communications with defense counsel at critical times.<sup>3</sup> Cf. *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir. 1989) (“Pre-trial detainees have a substantial due process interest in effective communication with their counsel and in access to legal materials.”).

*c. Impact on Mr. Daybell’s Right to a Fair Cross-Section of the Community*

20. The Sixth Amendment guarantee the parties a trial before a fair cross-section of the community. See also Idaho Code § 2-202 (“It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity ...”). To establish a Sixth Amendment violation, a defendant must show that (1) “the group alleged to be excluded [from the jury system] is a ‘distinctive’ group in the community,” (2) “the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community,” and (3) “this underrepresentation is due to systematic exclusion of the group in the jury selection process.” *Duren v. Missouri*, 439 U.S. 357, 364 (1976).

21. In order to meet their burden of establishing “[t]hat justice will be served” by impaneling a jury from another county, as opposed to transferring the trial to that county, the prosecution must present evidence that the non-excused jury pool will include a fair cross-section of the community, particularly as relates to distinctive groups in that community.

22. Studies have repeatedly demonstrated that race, ethnicity, gender, and age impact an individual’s fear regarding COVID-19. See, e.g., Michael Nino, et al., *Race and ethnicity, gender, and age on perceived threats and fear of COVID-19: Evidence from two national data*

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<sup>3</sup> Furthermore, quarantine following jury selection would cause a delay between impaneling the jury and beginning the presentation of evidence. Such a delay would raise a substantial risk of the jury being swayed by news coverage, which is likely to increase in the buildup to trial.



*sources*, SSM - Pop. Health (Mar. 13, 2021) (finding that “race and ethnicity, gender, and age play a significant role in shaping threat and fear perceptions of COVID-19”). Of particular significance to the issue of impaneling a jury from another county, studies have found that distinctive racial groups hold a stronger belief in the importance of protecting others in their community, which would likely impact their willingness to be transported to and from another county during the pandemic. *See, e.g.,* Heather Orom, et al., *Racial/Ethnic Differences in Prosocial Beliefs and Prevention Behavior During the COVID-19 Pandemic*, J. Racial and Ethnic Health Disparities (Aug. 30, 2021) (finding that “Black and Latinx respondents thought it was more important to protect a variety of non-close others” in their communities).

23. Given this evidence regarding the likely impact on the willingness of racial minorities and older groups to travel to another county during the ongoing pandemic, impaneling a jury from another county may violate Mr. Daybell’s right to a trial before a fair cross-section of the community. Without substantial evidence to the contrary, the prosecution has not met its burden of establishing that justice would be better served by impaneling a jury from another county as opposed to transferring trial to another county.

***d. Impact on Jury Deliberations***

24. “[The Supreme] Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its truly awesome responsibility.” *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985). State action which “minimize[s] the jury’s sense of responsibility for determining the appropriateness of death” offends the Eighth Amendment. *Id.*

25. “The right of a defendant to have a jury deliberating his guilt or innocence free from any distractions, outside or improper influences is a paramount right which must be closely

guarded.” *Taylor v. State*, 498 So. 2d 943, 945 (Fla. 1986); *In re Pilot Project for Elec. News Coverage in Ind. Trial Courts*, 895 N.E.2d 1161, 1165 (Ind. 2006) (“We want participants who will give their full attention to the courtroom proceedings ... [including] jurors who can without preoccupation be completely attentive to testimony and evidence [and] people who will not seek to avoid service as jurors or witnesses ...”); *Interpool Ltd. v. Patterson*, 874 F. Supp. 616, 618 (S.D.N.Y. 1995) (affirming excusal of juror whose “preoccupation with his personal concerns was so great that he was unlikely to fulfill his responsibilities as a juror in an appropriate manner.”); *Saenz v. State*, No. 01-18-00896-CR, 2020 Tex. App. LEXIS 4820, at \*31 (Tex. App. June 30, 2020) (“A juror is disabled if she has a ... mental condition, or emotional state that hinders her ability to perform her duties as a juror. A disability includes any condition that inhibits a juror from fully and fairly performing the functions of a juror.”).

26. Nowhere is a defendant’s right to conflict-free jury deliberations more important than when human life hangs in the balance. Indeed, capital punishment has been upheld on the ground that “[t]he States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision” *McGautha v. California*, 402 U.S. 183, 207-08 (1971).

27. It is common to instruct jurors on their “duty to deliberate”, and the instructions typically include an admonition that they “not give up your honest beliefs solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.” *See, e.g., State v. Andriano*, 215 Ariz. 497, 510 (2007). Although courts “generally presume that jurors follow their instructions,” *Penry v. Johnson*, 532 U.S. 782, 799 (2001), this presumption ceases to apply where the jurors’ health and safety are at risk or when they have been waiting for extended periods of time to return to their home county.

28. Capital trials often require that jurors focus attentively for weeks or months at a time. *See, e.g.,* Office of Performance Evaluations, Idaho Legislature, *Financial Costs of the Death Penalty* (March 17, 2014), p. 20, available at: <https://legislature.idaho.gov/wp-content/uploads/OPE/Reports/r1402.pdf> (finding that capital trials typically last substantially longer than noncapital trials).

29. Additionally, studies and narrative reports from hundreds of capital jurors have confirmed that jurors are often adversely affected by sitting on a capital trial and making a life-or-death decision about another human being. *See, e.g.,* Michael Antonio, *Stress and the Capital Jury: How Male and Female Jurors React to Serving on a Murder Trial*, 29 THE JUST. SYST. J. 396, 399-403 (2008) (most jurors found the experience of serving as a capital juror emotionally upsetting; many reported long-term effects such as chronic physical or emotional problems and difficulties relating to family, friends, or coworkers; some jurors reported nightmares; some found the stress so much to bear that they used prescription drugs, drinking, and smoking to cope; and some jurors developed eating disorders or became physically ill). The adverse effects of sitting on a months-long, emotionally exhausting capital trial will only be magnified if the jury is sequestered from their home and families during this time.

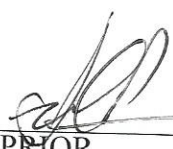
30. In a capital trial, where the defendant presents his evidence only after the government's presentation of their case, both at the merits and penalty phases, jurors would likely hold any perceived "delay" in the proceedings against the defendant—who, to them, is requiring the jurors to stay longer with each day that the defense is presenting its evidence. When jurors are resentful about having to sit through an emotionally-exhausting trial and make an extremely distressing decision about whether to sentence to someone to death, that resentment is almost always directed towards the defendant. This situation would impermissibly "plac[e] a thumb [on]



death's side of the scales." *Sochor v. Florida*, 504 U.S. 527, 532 (1992). Transporting jurors from another county and requiring them to remain away from familiar settings for weeks or months would only amplify these feelings of resentment.

MR. DAYBELL files this reply to the prosecution's motions to impanel a jury from another county and to sequester the jury on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Right to a Trial before a Fair Cross-Section of the Community, the Right to Effective Counsel, Equal Protection, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Idaho Constitutions generally, and specifically, the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitutions, and Article I, sections 6, 7, 8, and 13 of the Idaho Constitution.

DATED this 4<sup>th</sup> day of October 2021

  
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JOHN PRIOR  
Attorney for Defendant

**CERTIFICATE OF SERVICE:**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was delivered to the office of the FREMONT COUNTY PROSECUTING ATTORNEY, by odyssey court efile and serve prosecutor@co.fremont.id.us on this date.

Dated this 4<sup>th</sup> of October 2021.

  
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John Prior