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Idaho Supreme Court
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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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| STATE OF IDAHO,<br><br>Plaintiff-Respondent,<br><br>v.<br><br>LORI NORENE VALLOW a/k/a LORI NORENE DAYBELL,<br><br>Appellant. | Case No. 51091-2023<br><br>Fremont County Case No. CR 22-21-1624 |

# BRIEF OF APPELLANT LORI NORENE DAYBELL

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF FREMONT

HONORABLE STEVEN W. BOYCE, PRESIDING

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## STATMENT OF THE CASE

### Nature of the Case

This is Lori Norene Daybell's direct appeal from the district court's judgment imposing a controlling term of life in prison without the possibility of parole for her convictions on two counts of first-degree murder, three counts of conspiracy to commit first-degree murder and grand theft, and one count of grand theft.

Ms. Daybell respectfully contends several prejudicial errors tainted the fairness of the proceedings in the district court.

Three appellate issues surround the district court's mishandling, early in the case, of the State's quest to remove Ms. Daybell's retained attorney. First, on the merits, the district court's ruling disqualifying Ms. Daybell's attorney violated her fundamental Sixth Amendment right to counsel of her choice. Second, the court deprived Ms. Daybell of her Sixth Amendment right to the assistance of counsel at a critical stage when it erroneously routed the disqualification issue into the companion case of *State v. Chad Guy Daybell* and did not allow her counsel to intervene in her behalf in that case. Third, the court violated Ms. Daybell's Fourteenth Amendment right to due process of law when it heard and decided this issue while Ms. Daybell was incompetent, her case was stayed, and she was not present.

The district court also erred in permitting the State to present wide-ranging uncharged "bad acts" evidence at trial under Rule 404(b) of the Idaho Rules of Evidence, which injected prejudicial character and propensity evidence into the case.

And, finally, the trial never should have happened because Ms. Daybell's right to a speedy trial was violated.

This Court should reverse the district court's judgment on any of these grounds.

## Statement of the Facts[1]

### A. Background: From Arizona to Idaho

In 2018, Lori Vallow lived in Arizona and was married to Charles Vallow. Lori and Charles had adopted Charles's grandnephew, Joshua Jaxon ("JJ"). JJ was born prematurely and was autistic. (Tr., p. 1772, ln. 6-8.) He was smart and loving, but he was also a "typical seven-year-old autistic kid," meaning that he followed a strict routine, had some trouble in social situations, and could get upset at small things. (Tr., p. 1912, ln. 18-21, p. 1913, ln. 11-13.) He was not yet fully potty trained at night, and he attended a private school that had services for autistic kids. (Tr., p. 3800, ln. 9-15, p. 1961, ln. 18-22.)

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[1] Appellant summarizes the basic historical facts in Section A. This summary is not intended as an exhaustive sweep of every detail in the case.

This case has a voluminous record on appeal. For ease of reference, Appellant cites the record as follows:

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| Clerk's Record on Appeal: | "CR, p. _." |
| Confidential Exhibit Record: | "Conf. Rec., p. _." |
| Augmented Record: | "Aug. Rec., p._." |
| Augmented Confidential Exhibit Record: | "Aug. Conf. Rec., p._." |
| Transcripts: | "Tr., p. _." |
| Confidential Transcripts: | "Conf. Tr., p. _" |

When Appellant cites a record in Chad Daybell's companion case in the district court, parts of which have been augmented to this record on appeal, Appellant will include the case number.

Because Chad and Lori Daybell share the same last name, Appellant will refer to them by their first names when necessary to avoid confusion.

Lori's daughter from her previous marriage, 16-year-old Tylee, also lived in the home. Tylee was a smart and vivacious kid, but she could be a moody teenager. (Tr., p. 1866, ln. 16-18, p. 4828, ln. 15.) Tylee struggled with depression, anxiety, and panic attacks, and she had frequent and painful bouts of pancreatitis throughout her childhood. (Tr., p. 2155, ln. 14-15; p. 2993, ln. 23-25, p. 2994, ln. 1-15.) Tylee got her G.E.D. so that she could graduate from high school early. (Tr., p. 4828, ln. 12-13.)

Lori's faith was a central component of her life, and she was a devout member of the Church of Jesus Christ of Latter-day Saints. In October of 2018, Lori met Melanie Gibb at a church event, and they became friends. (Tr., p. 1864, ln. 17-18.) They talked on the phone and texted each other often. (Tr., p. 1869, ln. 3-12.) Another member of their circle was Zulema Pastenes. (Tr, p. 753, ln. 6-9.) Melanie and Zulema had been routinely attending "Preparing a People" conferences. (Tr., p. 1865, ln. 4-5.) Preparing a People was a group or association that sponsored periodic conferences and events with speakers who would teach attendees "how to be better prepared for anything that might happen, like a disaster, but as well as preparing [them] for the second coming of Jesus Christ." (Tr., p. 756, ln. 19-25.) Melanie and Zulema shared these interests in common with Lori, along with other individuals in their circle of friends. (Tr., p. 1883, ln. 13-15.)

In late October of 2018, Melanie, Zulema, Lori, and two other women drove to St. George, Utah, to attend a conference. (Tr., p. 756, ln. 19-20.) Chad Daybell, from

Rexburg, Idaho, was a frequent speaker at these conferences, where he would also sell his novels about end-times preparation, near death experiences, and other spiritual matters. (Tr., p. 768, ln. 17-24.) Chad attended the October 2018 conference in St. George. (Tr., p. 757, ln. 10.)

Lori had not met Chad before, but she had read a few of his books. (Tr., p. 757, ln. 22-23, 1873, ln. 20-25.) Lori spent much of the weekend at Chad's table. (Tr., p. 758, ln. 23-25.) Melanie claimed that Chad told Lori that they had been married in an earlier time period. (Tr., p. 1875, ln. 24-25.)

As part of their religious beliefs, Chad, Lori, and others believed that people had lived multiple prior lives, or "probations." (*Id*.) Chad had also had a near death experience from which he gained spiritual insight, as had Lori, and he claimed to be able to see "beyond the veil." (Tr., p. 2106, ln. 1-5.) There was an immediate connection between Chad and Lori. (Tr., p. 2417, ln. 5-9.) After they met, Chad and Lori continued to contact and see each other. (Tr., p. 1877, ln. 4-8.)

This was a difficult time in Lori's own marriage, which had started to deteriorate. (Tr., p. 1161, ln. 15-18.) By early 2019, Charles and Lori had separated. (Tr., p. 787, ln. 12-15.) Lori and Charles tried a brief reconciliation in Houston before Lori moved back to Arizona, with Tylee and JJ. (Tr., p. 4651, ln. 4-16.)

Chad taught the circle of friends that he could see the light and dark in people, and he had developed a rating scale of lightness and darkness. (Tr., p. 3719, ln. 2-6.)

After that – as Melanie and Zulema would testify at trial – Lori began to tell them that Charles was possessed by a dark spirit, or a demon. (Tr., p. 779, ln. 20-22.) They engaged in "castings" with her, or something akin to a prayer circle, where they would attempt to cast out Charles's dark spirits. (Tr., p. 1969, ln. 5-9.)

On July 11, 2019, Charles came to Arizona to spend time with JJ. (Tr., p. 4652, ln. 1-6.) He arrived at his estranged wife's home a little after 7:30 a.m. to take JJ to school. (*Id*.) Charles got JJ into his car when he realized that he had left his phone inside. (Tr., p. 4653, ln. 13-22.) Tylee was sleeping in her bedroom, and Alex Cox, Lori's brother, was sleeping in another bedroom. (Tr., p. 4655, ln. 21-25.) Charles came back inside to get his phone, but Lori had it. (*Id*. at 4654, ln. 23-24.) Charles got extremely upset that she had his phone. (Tr., p. 4655, ln. 4-8.) They argued, and Charles started chasing Lori around the room to get his phone. (*Id*. at ln. 9-11.)

Hearing the commotion, Tylee came out of her bedroom with a bat, which she poked at Charles to protect her mom. (Tr., p. 4656, ln. 6-12.) He took the bat from her. (*Id*.) By this time, Alex had stirred and emerged from his bedroom to subdue the Charles. (Tr., p. 4656, ln. 17-22.) Lori got Tylee out of the house and into the car with JJ. [2] (Tr., p. 4657, ln. 11-19.)

[2] This description comes primarily from Lori Daybell's statement to the police. The State would contend at trial that the actual shooting of Charles Vallow was intentional and not self-defense, but the initial events in the home were not really disputed. The way in which Charles was shot was disputed, however.

Alex claimed that Charles hit him in the head with the bat, so he went to get his gun. (Tr., p. 2282, ln. 13-15.) He came out of his room with the gun, Charles approached him with the bat, and Alex shot him twice. (*Id*. at ln. 16-21.) Police officers would later testify that some of the physical evidence did not match Alex's version. (Tr., p. 2028, ln. 12-14.) Charles died from his wounds.

Because of Charles's death, JJ began to receive social security benefits as Charles's surviving minor child. (Tr., p. 2182, ln. 1-3.) Lori checked into Charles's one-million-dollar life insurance policy and discovered that he had changed the beneficiary recently to his sister. (Tr., p. 2293, ln. 4-8.)

On September 1, Lori moved from Arizona to Rexburg with Tylee and JJ. (Tr., p. 2212, ln. 21-25.) Alex also moved to Rexburg. (Tr., p. 5255, ln. 4-6.) Lori lived in a apartment, and Alex lived in another unit in the same complex. (*Id*.) Lori's niece Melani Pawlowski, whom she considered to be a daughter, came to Rexburg and lived in the same apartment complex. (Tr., p. 2480, ln. 12-16.) Melani, who was divorcing her husband, Brandon Boudreaux, was part of the same group of friends as Lori. (Tr., p. 3880, ln. 9-12.)

Lori enrolled JJ in a local elementary school. (Tr., p. 2307, ln. 24-25.) Tylee had finished high school and was living at home for the time being.

On September 8, Alex, Lori, and the kids went to Yellowstone National Park. Lori took a picture of with a smiling Tylee hugging JJ, with Alex to the side, near some of Yellowstone's famous geysers. (Tr., p. 4154, ln. 4-10.)

On September 20, Melanie Gibb and her fiancé David Warwick came to Idaho for the weekend to visit Lori. (Tr., p. 2345, ln. 24-25, p. 2346, ln. 1-2.) Melanie and Lori were also intending to record a podcast. (*Id*.) Melanie and David did not see Tylee while they were there. They did see and interact with JJ, however. (Tr., p. 2346, ln. 19-22.) They would later testify that on the evening of September 22, Alex came inside holding a sleeping JJ, taking him upstairs. (Tr., p. 2358, ln. 8-12.)

Late into the evening, Melanie and Lori recorded their podcast, with David also participating. (Tr., p. 2357, ln. 3-8.) The next morning, David and Melanie left to continue their trip. They did not see JJ. (Tr., p. 2361, ln. 4-5.) JJ also did not return to school. (Tr., p. 2308, ln. 23-25.)

In early October, Chad's wife, Tammy, was in her driveway, having just gotten out of her car, when a masked person approached and fired what appeared to be a paint gun at her. (Tr., p. 3744, ln. 12-25.) She asked him what he thought he was doing, and the person ran away. (Tr., p. 3745, ln. 5-21.)

Within a few days of that event, someone fired a gun from the back of a Jeep at Melani Pawlowski's sone-to-be ex-husband, Brandon Boudreaux, in Arizona. (Tr., p.

1801, ln. 20-21.) The shooter missed him and Brandon stepped on the gas. (Tr., p. 1811, ln. 15-17.) . This incident also became part of the State's case at trial under I.R.E. 404(b).

On October 19, Tammy Daybell died suddenly, ostensibly in her sleep. (Tr., p. 3733, ln. 20-25, p. 3734, ln. 1-3.) The coroner initially ruled the death to be natural. (Tr., p. 5092, ln. 16-18.) Chad chose not to have an autopsy completed, and Tammy was buried in Utah within a few days. (Tr., p. 912, ln. 21-22.) He collected life insurance for her death. (Tr., p. 1593, ln. 19-21.)

On November 5, Chad and Lori were married in Hawaii. (Tr., p. 1594, ln. 1-2.)

In November, JJ's grandmother contacted the police, seeking a welfare check because she had not heard from her grandson in quite some time. (Tr., p. 1765, ln. 1-4.) The Rexburg police contacted Lori at her townhome. (Tr., p. 2435, ln. 18-22.) She told them that JJ was with her friend Melanie Gibb in Arizona. (Tr., p. 2444, ln. 20-25.) The police contacted Melanie Gibb, who "shared that she had him but then she didn't have him anyone, that Lori had him." (Tr, p. 1924, ln. 6-8.) She then called them back and told them that JJ had never been with her. (Tr., p. 1925, ln. 2.)

After this encounter, Lori and Chad left Rexburg and went to Hawaii.

In the meantime, Alex Cox had married Zulema Pastenes. (Tr., p. 2098, ln. 19-25.) He moved back to Arizona to live with her. On December 12, Alex died. (Tr., p. 5279, ln. 4-6.) There is no evidence that foul play was involved in his death.

Tammy's body was exhumed and examined. (Tr., p. 1593, ln. 2-3.) The coroner revised the cause of death to asphyxiation. (Id. at ln. 7-8.)

The children's whereabouts continued to be unknown, and law enforcement intensified their investigation. On February 20, 2020, police officers arrested Lori Daybell in Hawaii on two felony charges alleging desertion of her children, along with associated misdemeanor charges. (CR, p. 458.) She was extradited to Idaho to face those charges. (CR, p. 460.)

## Course of Proceedings

### A. The events leading to the district court's disqualification of Lori Daybell's retained counsel of choice.

Immediately upon her return, Lori retained attorney Mark Means as her counsel, with Chad supplying the funds to hire Means. (CR, p. 460.) Means entered his appearance as Lori's co-counsel in the desertion case. (*Id*.) Means would eventually be her sole attorney in that case. (*Id*.)

Around that same time, Chad retained John Prior to defend him against any forthcoming criminal charges. (*Id*. at 459.) Prior took the place of a previous attorney that Chad had retained but who did not intend to represent Chad if a criminal case came to fruition. (*Id*.)

Several weeks after Means entered his appearance – on April 28, 2020 – he issued a press release that he represented Chad and requested the media to "please direct all requests for communications/statements of the like to this office." (CR, p. 459.) He

posted a similar message on his Twitter account. (*Id*.) That same day, Lori called Chad from a jail phone. (*Id*.) In that call, Chad indicated that Mark Means currently represented both Lori and him to some extent, though Chad told her he was eventually "going to go with the other guy," meaning John Prior. (CR, pp. 460-61.) At Lori's bail reduction hearing, Means informed the judge that he represented both Lori and Chad. (*Id*.)

Within six weeks, on June 9, 2020, police searched Chad's property and discovered the bodies of the missing children buried near a pet cemetery in his yard. (CR, p. 461.) While the search was ongoing, Chad attempted to drive away from the scene but was arrested. (*Id*.)

Based on the evidence found during the search of the Daybell property, the State charged both Chad and Lori with conspiracy to alter or destroy evidence. (CR, p. 459.) These were the first criminal charges against Chad. Mark Means again appeared as Lori's attorney in her case. (CR, p. 461.) John Prior now appeared in Chad's case as his counsel.

*1. The State's first attempt to remove attorney Mark Means.*

At Lori's initial appearance on the destruction of evidence charges in June, the judge asked Means whether he represented any co-conspirator listed in the complaint. (CR, p. 461.) Means responded that he did not. (*Id*.)

The State moved the Court to deny Means's entry into the case and to appoint new counsel for Lori, arguing that Means had a potential conflict of interest after previously holding himself out as counsel for both Chad and Lori. (Conf. Rec., p. 39.) In support, the State relied on the public statements that Means had made in April and May of that year indicating that he represented both Lori and Chad. (*Id*.) It also pointed to the April 28 recorded jail call between Lori and Chad in which Chad suggested that Means represented both of them at the time. (Conf. Rec., pp. 39-42.)

Means countered that he had, at most, represented Chad in a limited capacity for a brief period before he had been charged. (Aug. Conf. Rec., pp. 8-33.) He reasserted that Chad had separate counsel in criminal matters, John Prior, who also had informed the judge on more than one occasion that there was no conflict of interest and, even there were, it had been waived through a written waiver signed by both Chad and Lori Daybell. (*Id*.) Means provided that written waiver the judge. (*Id*.) Means further claimed that he has consulted with Idaho State Bar Counsel, who described the relationship as "limited representation – or "having a cup of coffee" with Chad Daybell – and that the representation, if any, "ceased the moment Mr. Daybell retained Mr. John Prior." (*Id*. at 24.)

The judge held a hearing on the issue and inquired of Lori whether she had reviewed and signed the written waiver, and she waived any conflict again on the record. (Aug. Conf. Tr. 7/27/2020 Hrg. in *State v. Lori Norene Vallow*, Case No. CR 22-20-

838, p. 35, ln. 7-22.) She indicated that she had, *see id*, as did Chad at a later hearing. The judge concluded that while Means had represented both Chad and Lori before Chad was charged, creating a conflict of interest, both Lori and Chad had knowingly and voluntarily waived the conflict. (Conf. Rec., pp. 78-79.)

*2. The State charges Chad and Lori Daybell in a single indictment but the court separates the cases for pretrial purposes.*

Some ten months later, on May 25, 2021, the State charged Lori and Chad with murder, conspiracy to commit murder, and theft. (CR, pp. 52-59.) Although the State charged both defendants in a single indictment, the district court assigned two case numbers: CR 22-21-1623 for Chad Daybell and CR 22-21-1624 for Lori Daybell. This decision would have lasting implications moving forward.

*3. Ms. Daybell is found incompetent to proceed*

Before Lori was arraigned on the new charges, the district court found her mentally unfit to proceed, and it suspended her case. (CR, p. 73.) It remanded Lori to the custody of the Department of Health and Welfare for competency restoration, where she would remain undergoing treatment for the next ten months. (CR, p. 88.) The court ordered that all proceedings in her case were to cease in her case except matters related to the competency issue. (*Id*.)

Roughly contemporaneously, Mark Means filed a notice of appearance as Lori's counsel in the murder prosecution. (CR, p. 75.) He now represented her in all three

cases against her. Given that the death penalty was an option, the court appointed a second counsel for Lori, Public Defender Jim Archibald. (CR, p. 149.)

*4. The State's second, successful attempt to remove attorney Mark Means.*

While Lori's case was stayed, the State revived its attempt to disqualify Means based on his alleged brief simultaneous representation of Lori and Chad before Chad had been charged over a year earlier. (Conf. Rec., pp. 39, 48-50.) The State filed this motion under both Chad and Lori's case numbers. (*Id*.)

Perhaps in response to the State's filing of the motion in both cases, the district court entered an order reiterating that each defendant had "a unique case and a unique case number." (CR, p. 142.) The court "confirmed" that the cases "are two separate cases ... regardless of the single indictment," and that they will later only be joined for a single trial. (*Id*.) The court ordered the parties to "file all subsequent pleadings in each case, captioning only that individual Defendant's respective case number and name." (*Id*.)

In the wake of that order, the court set a hearing on the State's motion to disqualify Means, but because it had stayed Lori's case, it set that hearing only in *Chad Daybell's case*. (Aug. Rec., *State v. Chad Guy Daybell*, Case No. 1623, p. 168.) Mark Means filed a "Motion for Intervention" so that he could be heard on the issue of his own disqualification. (Aug. Conf. Rec., *State v. Chad Guy Daybell*, Case No. 1634, pp. 34-36.) In his motion, he argued that he needed to present the "facts and events" necessary to resolve the disqualification issue, which squarely impacted his client's interests. (*Id*. at

34.) He also noted that Lori "has a right to her chosen Counsel of Record," and that the prosecution "has taken a personal interest" in obstructing her constitutional right. (*Id*.)

Mark Means and Jim Archibald were present at the hearing, as well as the prosecutors and John Prior for Chad Daybell. (Conf. Tr., 8/30/2021 Hrg. in *State v. Chad Guy Daybell*, Case No. 1623.) Chad did not initially attend the hearing, because, as Prior indicated, "I see no basis for the court to go forward on this conflict in this case." (*Id*. at, p. 7, ln. 6-8.) According to Prior, "this motion is more properly brought in the Vallow case." (*Id*. at ln. 18-19.) Prior repeated this sentiment multiple times throughout the hearing. (*See, e.g., id*., at 8, ln. 1-2 ("[i]f the State wants to pursue this motion, they can pursue it in the Vallow case"), p. 30, ln. 8-9 ("I'm going to renew my objection"), p. 31, ln. 10-12, p. 37, ln. 20-21([t]his is not part of this case, and it doesn't belong as part of this case.")

Acknowledging Prior's concern, the district court noted that "it's probably worth sorting out the issue at this point, of which case we are hearing this motion in," *see id*. at 9, ln. 7-10, but it then quickly moved on to Means's motion to "intervene" in Chad's case, *id*. at 12, ln. 1-5. Means argued that the State was circumventing the stay in *Lori*'s case by arguing the motion to disqualify him in *Chad*'s case. (*Id*. at 12, ln. 18-19.) He claimed that he "shouldn't have to file a motion for intervention because the motion is pending before both of [the cases]" but that he needed "to be able to express our objection to going forward based on the stay that is happening as well as the other

things that have filtered through in the discovery that the court should consider [in] a motion such as this." (*Id*. at 14, ln. 24-25, 15, ln. 1-8.) While the State agreed with Means that this was really a single case against both defendants, and it disagreed with the court's order splitting them, it still objected to Means's request to be heard on the disqualification issue in Chad's case. (*Id*. at 17, ln. 10-12.)

Construing Means's motion strictly as one seeking formal "intervention" as a party, the district court denied the motion. (Conf. Tr., 8/30/2021 Hrg. in *State v. Chad Guy Daybell*, Case No. 1623, p. 18, ln. 5-14.) It found that there was no authority allowing one defendant to enter as a party in another defendant's case (overlooking, perhaps, that it had artificially split the cases to begin with). (*Id*.) While the court allowed Means and Archibald to observe the hearing on the State's motion for disqualification, they were not permitted to participate.

The State steered the direction of the hearing – which occurred on August 30 and was continued to September 8, 2021 – to focus on *Chad*'s rights to conflict-free counsel rather than *Lori*'s right to counsel of her choice. (*Id*. at 19-28.) At the hearing, the court admitted, as State's Exhibit 4, a partial audio recording of the April 28, 2020 jail call between Lori and Chad, in which Chad indicated, to some degree, that Mark Means

was also his counsel at that time but that he was eventually going to go with the "other guy." (Aug. Conf. Tr. 9/8/2021, Hrg. in *State v. Chad Guy Daybell*, Case No. 1623, p. 34.) [3] Eventually, the court came around to the State's view, noting that it needed to explore the nature of any potential conflict with Chad personally. (*Id*. at 31, ln. 17-19.) Prior again suggested that "if the Court wants go on way of an inquiry, that inquiry should probably take place in the Vallow case and not the Daybell case." (Id. at 32, ln. 4-6.) The court took the matter under advisement.

* * *

Within a few weeks, the court held an ex parte hearing where only Chad and John Prior were present. (Aug. Conf. Tr. 10/8/2021 Hrg. in *State v. Chad Guy Daybell*, Case No. 1623.) There, Chad clearly expressed the view that he did not consider Mark Means to have been his counsel at any point. (*See*, *e.g.*, *id*. at 10, ln. 19-25, p. 11, ln. 1-11.) At the time that Means had made his public statements about representing both Chad and Lori, Chad had hired Prior, but he did not necessarily want it to be known publicly that he had hired a criminal attorney. (*Id*. at 13, ln. 3-11.) In any event, Chad informed

[3] This Court has granted appellate counsel's motion to order the district court clerk to augment State's Exhibit 4 to the record on appeal. The clerk has since augmented what she has labeled as "State's Exhibit 4," but it is not the call from April 28, 2020.

The undersigned has requested the district court clerk to correct the exhibit, but as of the filing of this brief, that has not been done. Ms. Daybell will therefore assume, for present purposes, that the district court's description of the call in its December 28, 2021 Memorandum Decision and Order is correct but reserves the right to amend her argument when the accurate exhibit is found and provided.

the court that he did not provide Means with any confidential information that he was worried about being exposed. (*Id*. at 10, ln. 19-25, p. 11, ln. 1-11.) To the extent that there was any potential for a conflict, he consented to Means continuing to represent Lori. (*Id*. at 18, ln. 12-15.) The court again took the matter under advisement.

While the motion for Means's disqualification was pending, an issue bubbled up regarding Lori's communication with an attorney for the Church of Jesus Christ of Latter-day Saints. (CR, pp. 269-78.) Means learned that a clinician at the state hospital had allegedly urged Lori to call the Church to inquire about the possibility of obtaining legal counsel paid by the Church to take the place of her appointed public defender co-counsel, Jim Archibald. (CR, p. 270.)

Based on that, Means filed a motion alleging certain violations by the State, contending that Lori had spoken freely with an attorney for the Church, who had indicated he might help her find additional counsel only to turn around and give the information to the prosecuting attorney. (CR, p. 272.) Means issued subpoenas to various entities to get to the bottom of the contact between the Church and the prosecutor. (*See*, *e.g*., CR, pp. 329-33.) The State responded by denying any impropriety and claiming that the prosecutor had a very short conversation – about "one minute" – with an attorney at the law firm representing the Church before notifying co-counsel Archibald of the contact. (CR, p. 344.)

Means's allegations and legal machinations clearly touched a nerve with the State, which again urged the court in its responsive filing that Means had "un-waivable and unethical conflict of interest due to his past dual representation." (CR, p. 345.) The State further argued that "Mr. Means continued involvement in this case is inappropriate and creates issues for appeal." (*Id*.)

Within a month of that dust-up, the court granted the State's motion and disqualified Mark Means as Lori Daybell's counsel. (CR, pp. 459-72.) It concluded that Means had represented Chad at least for some period of time, that the representation created a conflict of interest, and that the court would not honor a waiver because of the severity of the case. (*Id*.) Lori Daybell was still in the state hospital. She was not permitted to choose her own attorney.

**B. Ms. Daybell regains competency and demands a speedy trial**

Ms. Daybell's competency was restored by April 11, 2022, and the district court lifted the stay in her case. (Conf. Rec., p. 268.) She was arraigned on the charges, and the State filed a notice that it intended to seek the death penalty. (CR, p. 588.) The district court appointed attorney John Thomas as co-counsel to Jim Archibald. (CR, p. 553.)

At her arraignment, Ms. Daybell demanded her right to a speedy trial, a position that she reiterated repeatedly throughout the case. The case was set for trial the following October. (Cr, p. 1343.) Almost immediately, the State filed a motion to

continue the trial. (CR, p. 591.) Over Ms. Daybell's objection, the district court granted the State's request and reset the jury trial to begin in January of 2023. (CR, pp. 608, 625.)

In September, Ms. Daybell's counsel received information from a mental health professional that they believed required a reinvestigation of her competency. (Conf. Rec., pp. 287-88.) They filed motion to continue the trial and toll the deadlines for pretrial filings. (*Id*.) At the hearing on the motion, Ms. Daybell expressly disagreed with the findings of the mental health evaluator and objected to a continuance. (Conf. Tr., p. 587, ln. 9-12.) She told the court that she believed that the assessment was an attempt to prolong the case and that "I am unwilling to give up my rights to waive my right to a speedy trial." (*Id*.) Nonetheless, the court granted a continuance and held a competency hearing in November, after which it again found Ms. Daybell competent to proceed. (Conf. Rec., p. 428.) It reset the trial April 3, 2023, about 90 days later than the January setting. (CR, p. 1148.)

Ms. Daybell moved to dismiss the case, claiming that her speedy trial rights were violated. (CR, p. 1226.) The court denied the motion. (CR, p. 1342.)

### C. The district court grants the State permission to introduce widespread, uncharged "bad acts" evidence from Arizona in the Idaho trial

Some eight weeks before trial, the State filed a motion to introduce evidence under Rule 404(b) of the Idaho Rules of Evidence. (Conf. Rec., p. 491.) In that motion, it listed the "general nature of the evidence" that it sought to introduce, which included

some 27 categories of evidence related to Charles Vallow's death, Lori's previous husband's death, and "other evidence." (Conf. Rec., pp. 498-500.)

Ms. Daybell's counsel objected that the State's motion failed to give them reasonable notice. (Conf. Rec., p. 507.) They argued that the State intended to introduce an enormous amount of evidence from Arizona at the last minute – essentially another entire case or cases: "the State has been hiding the ball on this issue for at least 1 year, 8 months and 16 days (the time between the grand jury indictment and the proposed date of the hearing)." (Conf. Rec., p. 511.)

The court expressed some agreement that the State's motion was overbroad and vague, which prompted the State to file an amended motion to introduce the 404(b) evidence. (Conf. Rec., p. 518.) In the amended motion, it indicated that it intended to introduce evidence primarily related to the circumstances surrounding the death of Charles Vallow and the attempted shooting of Brandon Boudreaux, Melani Pawlowski's ex-husband. (CR, pp. 527-30.) The defense again objected, noting the enormity of the evidence and the burden it would put on the defense to investigate all those matters before a trial that was set to begin in few short weeks. (Conf. Tr., p. 804-09.)

The court granted the State's amended motion, with a few minor exceptions. It concluded that the evidence related to the shooting of Charles Vallow, the investigation into the shooting, and related matters was permissible to show the defendants' "plan,

preparation, knowledge, or identity." (Conf. Tr., pp. 878 – 88.) It likewise allowed evidence of the attempted shooting of Brandon Boudreaux, also to show "preparation, plan, knowledge, and/or identity." (Conf. Tr., pp. 889-90.) It concluded that the probative value of the evidence was not outweighed by the danger of unfair prejudice. (*Id*.)

### D. The district court strikes the State's notice of intent to seek the death penalty based on its repeated discovery violations

Less than a month before trial, the State dumped additional discovery on the defense, well past the discovery deadline. (CR, p. 1422.) This was a pattern throughout the case. (*Id*.) The defense filed a motion to strike the death penalty as a sanction for the State's discovery violations. (CR, p. 1406.) The court granted that motion:

> [T]he Court concludes here that as an appropriate discovery sanction, the State will be precluded from seeking the death penalty at trial and the State's May 2nd, 2022, Notice of Intent to Seek the Death Penalty will be stricken.

(Tr., p. 660, ln. 13-20, p. 670, ln. 19-23.)

Because Chad had waived his right to a speedy trial, the court severed the cases and kept Lori's case on track for trial to begin April 3. (Tr., p. 671, ln. 19-25.) The death penalty remained an option in Chad's case.

### E. The trial, summarized

The trial proceeded as scheduled, lasting about six weeks with 60 witnesses.[4]

In addition to the basic historical facts recited in this brief, the State's case at trial relied on other circumstantial evidence, including cell phone geolocation data placing Alex Cox at the burial sites, evidence of text messages and emails exchanged among the alleged co-conspirators, and witness testimony about Lori and Chad's religious beliefs and statements. The defense countered that there was no physical evidence tying Lori to any of the deaths, that the alleged conspiracy to murder anyone was entirely circumstantial and speculative, and that the State was using prior bad acts to shore up its case and imply guilt.

The jury ultimately found Lori guilty on all counts. (CR, pp. 1895-96.) The district court sentenced her to three consecutive terms of life in prison with no possibility of parole for first degree murder, two concurrent sentences of life without parole for conspiracy to commit murder, and concurrent sentences of five to ten years in prison for grand theft. (CR, pp. 2117-18.)

She now appeals.

[4] Of those 60 witnesses, the undersigned calculates that at least 19 testified, in whole or in part, about 404(b) evidence from Arizona.

## ISSUES PRESENTED ON APPEAL

**I.**

**Lori Daybell was deprived of her Sixth Amendment right to counsel of her choice when the district court disqualified her retained attorney.**

**II.**

**Ms. Daybell was deprived of her Sixth Amendment right to the assistance of counsel during pretrial hearings on the State's motion to disqualify her counsel after the district court denied her attorney's request to participate in those hearings.**

**III.**

**Ms. Daybell was deprived of her right to due process under the Fourteenth Amendment when the district court held pretrial hearings that affected her substantial rights in her absence and while she was incompetent.**

**IV.**

**The district court erred in allowing the State to introduce evidence of uncharged bad acts from Arizona into the Idaho criminal trial under Rule 404(b) of the Idaho Rules of Evidence.**

**V.**

**The district court erred in denying Ms. Daybell's motion to dismiss based on a violation of her statutory and constitutional rights to a speedy trial.**

## ARGUMENT

### I.

**Lori Daybell was deprived of her Sixth Amendment right to counsel of her choice when the district court disqualified her retained attorney.**

#### A. Introduction

A criminal defendant has a fundamental right under the Sixth Amendment to hire counsel of her own choosing, free from interference from either the State or the trial court. Ms. Daybell retained attorney Mark Means to represent her against these charges. The State moved to dismiss Means based on a purported conflict of interest. The district court channeled the motion into Chad Daybell's case, did not allow Means to participate in the hearings on this issue, conducted an ex parte meeting with Chad before granting the State's motion. This all happened in Lori Daybell's absence and while she remained incompetent.

Ultimately, there was no actual conflict of interest, any *potential* conflict had been waived by both parties, and the district court erroneously focused on *Chad's* rights to the exclusion of *Lori*'s right to counsel of her own choice. The district court abused its discretion in granting the State's motion, and this Court should reverse.

### B. Standard of Review

A district court retains the discretion to grant or deny the prosecution's motion to disqualify the defendant's retrained counsel based on an alleged conflict of interest. *E.g.*, *Wheat v. United States*, 486 U.S. 153, 164 (1988). Under an abuse of discretion standard, this Court must determine whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of such discretion; (3) acted consistently with any legal standards applicable to the specific choices before it; and (4) reached its decision by an exercise of reason. *E.g.*, *State v. Herrera*, 164 Idaho 261, 270, 429 P.3d 149, 158 (2018).

### C. Standard of Law

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S.CONST.AMEND. VI. The United States Supreme Court has long held that the Sixth Amendment guarantees a defendant the right to hire her own attorney if she can afford to do so. *Cf. Powell v. Alabama*, 287 U.S. 45, 53 (1932)("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice").

The Supreme Court has found the right to counsel of choice to be grounded in "the close working relationship between lawyer and client, the need for confidence, and the critical importance of trust." *Luis v. United States*, 578 U.S. 5, 11 (2016). "The right to

select counsel of one's choice" is thus "the root meaning" of the Sixth Amendment. *United States v. Gonzalez–Lopez*, 548 U.S. 140, 147–148 (2006). The right also extends to representation by an attorney who, as here, is "willing to represent the defendant even though [she] is without funds." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624–625 (1989). There is a strong "presumption in favor of counsel of choice." *Wheat*, 486 U.S. at 161.

As with all constitutional rights, however, this right is not absolute. An advocate who is not a member of the bar may not represent clients in court. *Wheat*, 486 U.S. at 161. Nor is an indigent defendant entitled to choose his or her *appointed* counsel or to insist on a private attorney who does not wish to represent the defendant. *Id*. And, finally, courts have "an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id*. at 160. In *Wheat*, that meant that the district court had acted within its discretion in refusing the defendant's waiver of conflict-free counsel when the attorney he wanted to hire also represented other defendants concurrently in the same drug conspiracy case. 486 U.S. at 160. There, the Supreme Court held that the presumption in favor of a defendant's counsel of choice can be overcome "by a showing of serious potential for conflict." *Id*. at 164.

Yet thirty years after *Wheat* the Supreme Court has recently reaffirmed the centrality of the right to choose one's own attorney under the Sixth Amendment: "[w]e

nonetheless emphasize that the constitutional right at issue here is fundamental." *Luis*, 578 U.S. at 12 (noting the limited exceptions in *Wheat*). So, while a trial court retains the power to disqualify the defendant's counsel of choice, "disqualification of ... counsel should be a measure of last resort." *In re Grand Jury Proceedings*, 859 F.2d 1021, 1026 (1st Cir. 1988).

Where the right to choice of counsel is wrongly denied by a court, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. *Gonzalez–Lopez*, 548 U.S. at 148. Instead, "[d]eprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." *Id*.

**C. Discussion**

The district court's handling of this issue was seriously flawed from the beginning. Due to its desire to split the cases in two for all pretrial purposes, it routed hearings on the State's motion to disqualify *Lori* Daybell's retained counsel to *Chad* Daybell's case number. As Chad's trial counsel, John Prior, noted at repeatedly, this was a matter that was best addressed in Lori's case after she regained competency. While Chad had an interest in the matter, the State and the district court breezed by *Lori*'s fundamental right to choose her attorney. Worse, the district court refused to allow Means to participate in these hearings even though the precise issue was whether he had a conflict of interest and even though his client's rights were at stake. Meanwhile,

Lori sat at the state hospital, incompetent to proceed and absent. These procedural errors are, by themselves, sufficient to warrant reversal, as Ms. Daybell argues in Issues II and III.

Here, though, she challenges the district court's ruling squarely on its merits. The right to counsel of choice is fundamental. *Luis*, 578 U.S. at 12. Deprivation of that right is a structural error not subject to harmless error analysis. *Gonzalez–Lopez*, 548 U.S. at 148. A court that is assessing whether to disqualify a defendant's chosen counsel must take considerable care in balancing the rights and interests at stake. *In re Grand Jury Proceedings*, 859 F.2d 1021, 1026 (1st Cir. 1988) ("disqualification of ... counsel should be a measure of last resort."). The district court abused its discretion because it focused on Chad Daybell's right to conflict-free counsel to the exclusion of Lori Daybell's fundamental right to counsel of choice. It did not act consistently with the legal standards applicable to the specific choices before it.

The district court's myopic approach is readily apparent in how it conducted hearings on this issue. Initially, the court appears to have been sensitive to the need to halt all proceedings in Ms. Daybell's case while she was incompetent. Its orders indicated that all matters would cease except those related to competency. (CR, p. 88.) The court's unusual choice to split the cases also suggests that it was concerned about the need to cease litigation in Lori's case while litigation would move forward in Chad's case.

At the beginning of the hearing on the motion to disqualify, moreover, it hinted at an awareness of the problems inherent in litigating a matter in a Co-defendant A's case that affected Co-defendant B's substantial rights while Co-defendant B's case was stayed for incompetency. Preliminarily, it noted that "it's probably worth sorting out the issue at this point, of which case we are hearing this motion in, noting that the - 1624 case, which I'll refer to as the Vallow case, is currently stayed." (Conf. Rec., 8/30/2021 Tr. Hrg. in *State v. Chad Daybell*, No. 1623, p. 7, ln. 7-10.) It later queried, "[a]nd so the issue now is, are we properly to hear a motion objecting to Mark Means representing Lori Vallow Daybell in Case -1624, and does the court have the ability to consider that in a separate defendant's case in -1623?" (*Id*. at 19, ln. 3-7.) Despite those early glimmers of recognition that it had a problem on its hands, it eventually decided the State's motion without input from Lori or her counsel.

Ultimately, the court was persuaded by the State that it must conduct an inquiry into the "conflict" with Chad. It continued down that primrose path by holding an ex parte meeting with Chad to inquire about the alleged "conflict."

This flawed process led to a flawed decision. In its Memorandum Decision and Order, the court acknowledged that a defendant has a Sixth Amendment right to counsel of her choosing. (CR, p. 465.) But it concluded that there was an "actual conflict of interest" that could not be waived due to the severity of the charges in this case. (*Id*.

at 469-70.) It referred primarily to the magistrate judge's previous ruling finding an actual conflict, of which it took judicial notice. (*Id*.)

The precise nature of this supposed conflict was never explained, however, presumably because one did not exist. Mark Means did not currently represent Chad Daybell, so any duty of loyalty would arise only in the context of a duty owed to a former client. It is true that over a year and a half before the court's ruling disqualifying him in this case, Means portrayed himself as representing Chad, before Chad had been charged, and at a time that he also represented Lori. But to the extent that he truly represented Chad in some capacity as his attorney, it was for a matter of a weeks. As Bar Counsel apparently told Means, this was a "cup of coffee" that ended the moment that John Prior was hired.

Even assuming that Means represented Chad at one time, the heart of any conflict of interest is whether the attorney's representation would be materially limited by conflicting duties of loyalty to a current client and a former client. *See* I.R.P.C 1.7(a). As applied here, an attorney in Means's position could have divided loyalties if he had learned something from Chad that would help his client Lori at trial, but he also still owed a duty of loyalty to his former client, Chad. What is woefully absent in this record, though, are any facts on which the court could rely to find that Means had such information or had some other material limitations moving forward.

The best evidence on that issue came directly from Chad Daybell himself and is squarely contrary to the district court's ruling. During the court's ex parte colloquy with him, Chad unequivocally asserted that he did not consider Means to be his attorne: Q. "did you ever understand that he was representing you?" A. "Never." (Aug. Conf. Tr. 10/8/2021 Hrg. in State v. Chad Daybell, No. 1623, p. 17, ln. 4-6.) More to the point, Means and Chad never discussed any confidential information:

> THE COURT: Without giving me any facts, just yes or no, at any point, did you discuss with Mr. Means any of the factual details of Lori's case or the circumstances surrounding her case?
>
> THE DEFENDANT: No.
>
> THE COURT: Did you ever discuss with Mr. Means any facts from your own personal knowledge about anything you've been charged with or that Lori's been charged with in any of the cases?
>
> THE DEFENDANT: I would only say it was more court appearances, is all he ever discussed with me regarding Lori.
>
> THE COURT: Okay Could – I –
>
> THE DEFENDANT: Such as the dates that the – that she would appear in court.
>
> THE COURT: Okay. So he mentioned to you when her court would be?
>
> THE DEFENDANT: Yes.

(Aug. Conf. Tr. 10/8/2021 Hrg. in *State v. Chad Daybell*, No. 1623, p. 10, ln. 19-25, p. 11, ln. 1-11.) Prior reiterated to the court, as he had repeatedly, that "I don't see a conflict here.

I don't see a problem. I don't perceive any issue with this. And – and, frankly, Ms. Vallow has no information about Mr. Daybell that could cause him any concern anyway." (*Id*. at 20, ln. 12-18.) Chad also unequivocally told the court that he had no problem with Means continuing to represent Lori. (*Id*. at 18, ln. 8-15.)

While the district court noted in its Memorandum Decision and Order disqualifying Means that he conducted this ex parte inquiry with Chad, *see* CR, pp. 457-58, the facts that the court learned from that inquiry did not make it into its ruling. Whatever else might be said about whether Means represented Chad in some capacity, what Chad told the district court undermines the court's conclusion of an *actual* conflict of interest. There is simply no substantial and competent evidence supporting an actual conflict of interest in this case.

Still, it is true that the Supreme Court noted in *Wheat* that a "*serious* potential for conflict" might be sufficient to warrant overcoming a defendant's choice of counsel and waive of any conflicts. 486 U.S. at 164. This Court should now view *Wheat* through the prism of the more recent cases on a defendant's right to counsel of choice, such as *Gonzalez–Lopez* and *Lopez*, which reaffirm the centrality of the right to the Sixth Amendment. Regardless, there was no *serious* potential for conflict here, either.

In *Wheat*, the defendant was affirmatively seeking the substitution of an attorney the day before the jury trial, while that attorney was actively and contemporaneously representing two other co-defendants in a complex drug trafficking conspiracy. 486 U.S.

at 163. The attorney's involvement with the other clients was deep, long-lasting, and ongoing. The Government intended to call one of them who had pled guilty at trial, creating a serious risk that the chosen counsel would need to cross-examine his own client. *Id*. at 164. On those facts, the Supreme Court held that the trial court was within its discretion to find that a "serious potential for conflict" would arise during the criminal trial. *Id*.

Here, in contrast, if Means represented Chad Daybell – a disputed fact – it was superficial and brief. Unlike *Wheat*, this limited representation occurred before Chad was charged criminally, ending well over a year before the issue was raised in the present case and long before trial was even on the horizon. And the only evidence that the court had before it about whether Chad had imparted any confidential information to Means was that he had not provided any such information. Chad had also retained his own criminal defense attorney, Prior, who had represented him for a year and a half. And the entire factfinding endeavor was tainted from its inception because of the serious procedural flaws in the inquiry. Lori was incompetent and unrepresented on the issue, so her wishes were not considered. None of that was true in *Wheat*.

Any risk was mitigated even more because both Chad and Lori clearly and expressly waived any potential conflict in writing. They reaffirmed their waivers at the hearing in the destruction of evidence case in front of the magistrate judge. Chad reaffirmed it yet again to the district court in the present case at the ex parte hearing.

In short, the potential for a conflict of interest in this case was speculative, attenuated, and nearly non-existent, while the potential for a conflict in *Wheat* was immediate, probable, and serious. When competing constitutional rights are at stake, a court has a duty to accurately weigh the risks and balance the importance of the rights. Here, the district court abused its discretion by using a miscalibrated scale, with a thumb on one side because it did not receive any input from Lori or her counsel. But more than that, the evidence of a potential conflict fell far short of what is required to overcome a defendant's constitutional right to counsel of choice.[5]

This case instead has hallmarks of what the Court in *Wheat* acknowledged was a possibility: the prosecution may seek to "manufacture" a conflict to prevent the defendant from the services of an attorney that the prosecution dislikes. 486 U.S. at 163. It is true that Means engaged in unorthodox practices, perhaps even practices that were not necessarily helpful to his client. But some of those practices – including accusing the State of impropriety through contact with the Church of Jesus Christ of Latter-day Saints – clearly ruffled the State. The State repeatedly and vigorously tried to get Means

[5] For yet another layer of protection that was missing in *Wheat*, Lori Daybell was represented by two attorneys. If there came a time at which Chad were to testify, an unlikely and speculative event, Lori's co-counsel Archibald could conduct the cross-examination.

dumped from the case. In an adversarial system, the court should look upon such efforts with a jaundiced eye.[6]

* * *

At the core of the Sixth Amendment is the right for *the defendant*, if she can afford private counsel or counsel is willing to represent her, to decide who she trusts and who she believes will best represent her interests in court, regardless of whether that attorney is viewed by others as the best one for the job. As the Supreme Court has recognized, this right is grounded in the "the close working relationship between lawyer and client, the need for confidence, and the critical importance of trust." *Luis*, 578 U.S. at 11.

The right protects the defendant's individual liberty and reflects dignitary interests. It is not a right that is intended to ensure the best representation possible. In that way, it is similar to the right of *self*-representation, which almost never enhances the quality of representation at trial. *Cf. Faretta v. California*, 422 U.S. 806, 820 (1975) (noting that "[t]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally"). Regardless of what Mark

[6] Means was not on the roster of death-qualified criminal defense attorneys, but he didn't need to be. Neither was John Prior, who represented Chad Daybell from beginning to end. Jim Archibald, who was on the roster, was Ms. Daybell's co-counsel.

Means's idiosyncrasies were, they were the idiosyncrasies that Ms. Daybell *chose*. He was *her* counsel of choice, and the State had a burden to present extremely persuasive information in a reliable and adversarial proceeding of a serious potential conflict of interest before that choice should have been removed from her. It did not, and the district court abused its discretion in granting State's motion.

For all these reasons, this Court should conclude that the district court violated Ms. Daybell's Sixth Amendment right to counsel of her choice when it granted the State's motion for disqualification.

## II.

## Ms. Daybell was deprived of her Sixth Amendment right to the assistance of counsel during pretrial hearings on the State's motion to disqualify her counsel after the district court denied her attorney's request to participate in those hearings.

### A. Introduction

If this Court disagrees with Ms. Daybell on the merits of the district court's disqualification ruling for any reason, it should still conclude that the *procedure* by which the district court heard and decided the motion violated Ms. Daybell's constitutional rights. Here, she asserts that the district court's ruling prohibiting her counsel from representing her interests at the hearings on the State's motion violated her Sixth Amendment right to the assistance of counsel at all critical stages of this prosecution. As with the first issue, this is a structural error that requires reversal.

### B. Standard of Review

Ms. Daybell acknowledges that her counsel did not argue, specifically, that if the district court denied his motion to intervene, then his client would be deprived of her Sixth Amendment right to the assistance of counsel at a critical stage in her prosecution. "Alleged constitutional errors during trial that are not followed by a contemporaneous objection must be reviewed under the fundamental error doctrine." *State v. Medina*, 165 Idaho 501, 505, 447 P.3d 949, 953 (2019) (cleaned up). The fundamental error doctrine involves a three-prong inquiry to determine whether the alleged error: "(1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists ...; and (3) was not harmless." *State v. Perry*, 150 Idaho 209, 225, 245 P.3d 961, 977 (2010). The defendant bears the burden of persuasion on each of these prongs. *Id*.

The second prong requires the "error to be clear and obvious" from the record "including information as to whether the failure to object was a tactical decision." *State v. Miller*, 165 Idaho 115, 119, 443 P.3d 129, 133 (2019). "If the record does not contain evidence regarding whether trial counsel's decision was strategic, the claim is factual in nature and thus more appropriately addressed via a petition for post-conviction relief." *Miller*, 165 Idaho at 119, 443 P.3d at 133.

### C. Standard of Law

Once the State has initiated adversary judicial process against a defendant, the Sixth Amendment guarantees a defendant the right to have counsel present at all

critical stages of the subsequent criminal prosecution. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). The adversary process begins with an indictment or other formal charge. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972); *State v. Tapp*, 136 Idaho 354, 363, 33 P.3d 828, 837 (Ct. App. 2001) (holding that a defendant's Sixth Amendment right to counsel is triggered by the filing of a criminal complaint or an indictment).

Critical stages of a criminal prosecution are broader than just the trial itself, as "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U.S. 218, 225 (1967). A critical stage is therefore any "stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *see also Bell v. Cone*, 535 U.S. 685, 695–96 (2002) (noting that a critical stage is "a step of a criminal proceeding ... that held significant consequences for the accused."). Critical stages include, for example, post-indictment police lineups, arraignments, preliminary hearings, and sentencing. *United States v. Leonti*, 326 F.3d 1111, 1117 (9th Cir. 2003) (citations omitted); *see also Coleman v. Alabama*, 399 U.S. 1, 8 (1970)(holding that a preliminary hearing is a critical stage).

Prejudice is presumed when a criminal defendant has been completely denied the right to counsel for a critical stage because it is an error that contaminates the fairness of the entire proceeding and is not subject to harmless error analysis. *See United*

*States v. Cronic*, 466 U.S. 648, 659 (1984); *cf. United States v. Yamahiro*, 788 F.3d 1231, 1235–36 (9th Cir. 2015) (holding that absence of counsel at a victim allocution during the sentencing phase was structural error requiring per se reversal).

**D. Discussion**

The State initiated adversary judicial proceedings against Lori Daybell when it indicted her on May 25, 2021. Mark Means formally entered his appearance as her counsel soon thereafter. Her Sixth Amendment right to the assistance of counsel attached to all subsequent critical stages of the criminal prosecution.

The hearing on the State's motion to disqualify Ms. Daybell's counsel was a critical stage. It is irrelevant that those hearings were not held under her case number. The Supreme Court has held that a critical stage is any proceeding "formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *See Wade*, 388 U.S. at 225. In *Wade*, for instance, the Court held that the defendant was entitled to counsel's presence at a post-indictment police lineup. *See id*. What matters is whether the proceeding is one in which "where substantial rights of a criminal accused may be affected." *Mempa*, 389 U.S. at 134. A hearing at which the court is taking evidence, hearing argument, and weighing whether to dismiss a defendant's attorney is surely one in which the "substantial rights of a criminal accused may be affected." *Id*.; *see also Bell*, 535 U.S. at 695–96 (a critical stage is one that "held significant consequences for the accused.") Ms. Daybell had a Sixth Amendment right to counsel to

represent her interests at that hearing. She did not waive that right – and she could not, since she was incompetent – so she meets the first element of the fundamental error test. *See Perry*, 150 Idaho at 225, 245 P.3d at 977.

The second part of fundamental error review looks to whether the error is "clear and obvious," meaning that the record must contain evidence that trial counsel's failure to object was *not* a tactical or strategic decision. *Miller*, 165 Idaho at 119, 443 P.3d at 133.

Ms. Daybell also meets this element. In fact, her counsel *did* object below and asked to be heard on the matter at the hearing. He claimed that the State had taken a personal interest in his dismissal and was trying to circumvent his client's right to counsel of her choosing. He appeared at the hearing and argued that the court should not be proceeding with the issue in Chad's case. He perhaps mistakenly framed his request as one seeking to "intervene," which the court construed quite literally as seeking intervention as a party rather than simply a request to represent his client's interests. There can be no plausible tactical reason to argue vociferously to be present and heard on an issue and yet intentionally choose not to cite the client's Sixth Amendment right to counsel.

For support that Ms. Daybell can satisfy the second prong of the *Perry* fundamental error test, this Court can also look to *State v. Bodenbach*, 165 Idaho 577, 587, 448 P.3d 1005, 1015 (2019). There, Bodenbach argued that the trial court erred in giving the jury a particular "initial aggressor" instruction in a self-defense case. 165 Idaho 577

at 584, 448 P.3d at 1012. His attorney objected to the trial court giving any initial aggressor instruction, which the court overruled, but counsel did not object to the final instruction as worded. *Id*. On appeal, the Idaho Supreme Court held that the issue was not preserved but that Bodenbach "easily satisfied the second prong of *Perry*," as "[t]he error is clear from the record and was not a tactical decision because defense counsel attempted to prevent the jury from being instructed regarding an initial aggressor." 165 Idaho at 587, 448 P.3d at 1015.

Like in *Bodenbach*, where trial counsel tried to prevent the court from giving an initial aggressor instruction altogether, here Means objected to the court proceeding with the hearing on the motion to disqualify and tried to intervene to be heard. As in *Bodenbach*, there can be no tactical reason for counsel trying to prevent the hearing, and trying to be heard at the hearing, but then failing to cite the Sixth Amendment. The constitutional right was clear and obvious, it was not waived, and there is evidence in the record that counsel did not make a tactical decision to let the issue go.

As for the third element – normally, the appellant would bear the burden to show "that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings." *Miller*, 165 Idaho at 119, 443 P.3d at 133. This case, however, is one of the minority instances. That is so because the complete denial of counsel at a critical stage is not subject to harmless error analysis. *Cronic*, 466 U.S. at 659 & n. 25. The absence of counsel makes the

proceeding itself unreliable, *see id*., and there is no way for a defendant to prove how counsel's presence might have changed the outcome. Structural errors "defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself." *Gonzalez-Lopez*, 548 U.S. 148 (cleaned up).

Counsel was not absent for a mere blip in the proceedings or at some inconsequential point. This was a hearing that impacted Lori Daybell's fundamental right to choose who she wanted to represent her. The court held that hearing and took argument from the parties (excluding Ms. Daybell's counsel) on August 30, 2021, which it continued to September 8, 2021, so that Chad Daybell could be present (but not Lori Daybell). At the September 8 hearing, it admitted evidence. It then continued to hear the issue when it went factfinding at an ex parte meeting between the court, Chad Daybell, and John Prior. At all these junctures, Ms. Daybell's rights went unrepresented.

It is not possible to reconstruct what the outcome might have been had counsel been permitted to actively represent Ms. Daybell at this critical point in her case. To be sure, he could have offered his version of the facts regarding the alleged simultaneous representation. He could have also argued to the court that Chad's comments at the ex parte hearing should have been given great weight. He could have impressed upon the court the importance of Ms. Daybell's right to counsel of choice, which seemed to get overlooked in the process. The result of the motion for disqualification cannot be said to

be reliable one, as an important interest went unrepresented, and there is now no way to predict the outcome of the trial had Means remained in the case.

This Court should reverse Ms. Daybell's convictions and remand for a new trial due to the complete denial of her Sixth Amendment right to counsel at a critical stage in the criminal prosecution.

## III.

**Ms. Daybell was also deprived of her due process right under the Fourteenth Amendment not to be prosecuted while she was incompetent, and her related constitutional right to be physically present at all critical stages, when the district court held pretrial hearings in her absence on the State's motion to disqualify her counsel.**

### A. Introduction

This issue is similar, but independent of, the last. Here, Ms. Daybell contends that the district court's decision to route the State's motion for disqualification to Chad Daybell's case, where it was actively litigated while she was incompetent, and in her absence, violated her Fourteenth Amendment right to due process of law.

### B. Standard of Review

As with the last issue, Mr. Daybell's counsel below did not cite the Fourteenth Amendment as a basis for the court to withhold litigating the State's motion until his client was competent. This Court's standard of review is again one of looking for fundamental error. The Court must review the record to determine whether the alleged

error: "(1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists ...; and (3) was not harmless." *Perry*, 150 Idaho at 225, 245 P.3d at 977.

### C. Legal Standards

#### *1. Right Not to be Prosecuted While Incompetent*

The United States Supreme Court has "repeatedly and consistently recognized that the criminal trial of an incompetent defendant violates due process." *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996)(citations omitted). The Constitution requires that a defendant be able to make rational decisions that are "deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." *Drope v. Missouri*, 420 U.S. 162, 171–172 (1975). Once a trial court has a bona fide doubt about the defendant's competency to proceed, it must suspend the trial until it can resolve the competency issue. *See Drope*, 420 U.S. at 182.

#### *2. The Right to be Physically Present*

"[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987); *see also Hovey v. Ayers*, 458 F.3d 892, 901 (9th Cir. 2006) (defining a "critical stage" as "any stage of a criminal proceeding where substantial rights of a criminal accused may be affected'"). Although

"[t]he constitutional right to presence [during a critical stage of a criminal proceeding] is rooted to a large extent in the Confrontation Clause of the Sixth Amendment," the Supreme Court has recognized that in situations "where the defendant is not actually confronting witnesses or evidence against him," the right to presence "is protected by the Due Process Clause." *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam).

While the right to be present is "an essential condition of due process," *Snyder v. Massachusetts*, 291 U.S. 97, 119 (1934), it is not absolute. In *Snyder*, the Supreme Court explained that, although the defendant may have a right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge," *id*. at 105–06, the defendant has no right to be present "when presence would be useless, or the benefit but a shadow," *id*. at 106–07. Therefore, "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Id*. at 107–08.

**D. Discussion**

For the same reasons that Ms. Daybell gave in Issue II, the hearings on the State's motion for disqualification of her counsel amounted to a "critical stage" of the prosecution against her. The resolution of those hearings affected her substantial right to counsel of her choice.

Applying the first prong of the *Perry* fundamental error test, Ms. Daybell did not waive her constitutional rights to be present or agree that proceedings can occur during her incompetency. She had no choice in the matter. She was found to be incompetent by the court, and the court remanded her to the custody of the Department of Health and Welfare. She could not have knowingly and voluntarily waived these constitutional rights in any event.

The error plainly exists on this record. There is no dispute that she was incompetent during this time frame, and she was not physically present during the hearings on the disqualification of her counsel. As with the last issue, Means attempted to be heard at the hearing. In fact, he expressly noted that "we need to express out objection to going forward based on the stay that is happening ..." (Conf. Tr., 8/30/2021 Hrg. in *State v. Chad Guy Daybell*, Case No. 1623, p. 15, ln. 5-6.) While he may not have cited constitutional grounds, he raised the issue of proceeding in the face of a stay for incompetency. As in *Bodenbach*, this is evidence in the record that counsel did not make a tactical choice to forego citing constitutional bases for his objection.

Ms. Daybell contends, as in Issue II, that placing a burden on her to prove that the error had "must have affected the outcome of the trial proceedings,"*see Miller*, 165 Idaho at 119, 443 P.3d at 133, is inappropriate given the right that was at stake. It is not possible to prove that had she been competent and physically present to be heard on this issue, the outcome of the *trial* would have been different. That is unknowable. But

had the district court delayed hearing this issue until she was competent and present, as it should, she would have been able to express why she wanted Means to continue as her counsel.

In assessing the harm from Issues II and III, the Court should keep in mind that Ms. Daybell's absence *and* the court's refusal to allow her counsel to participate in these hearings worked together to deprive her of having a voice on the critical issue of who would represent her at trial. Had one of those been different, then her interests might have been represented. They simply were not. She respectfully contends that this Court should reverse and remand for a new trial.

## IV.

## The district court erred in allowing the State to introduce evidence of uncharged bad acts from Arizona into the Idaho criminal trial under Rule 404(b) of the Idaho Rules of Evidence.

### A. Introduction

Ms. Daybell contends that she was tried as much for her character and conduct in Arizona as she was for the charged crimes. This Court should reverse on any one of several grounds related to the admission of wholesale I.R.E. 404(b) evidence. First, the State gave unreasonably late notice of its intent to introduce the evidence from Arizona in this case. Next, the evidence it introduced was not relevant to prove "plan, preparation, knowledge, or identity" and was instead largely propensity or bad

character evidence. Finally, even if there was some probative value from the Arizona evidence as to one or more of the I.R.E. 404(b) factors, the danger of unfair prejudice flowing from that evidence substantially outweighed its probative value, and the admission of the evidence led to confusion of the issues and was misleading to the jury.

**B. Standard of Review**

Questions of relevance are reviewed de novo. *State v. Raudebaugh*, 124 Idaho 758, 764, 864 P.2d 596, 602 (1993); *State v. Aguilar*, 154 Idaho 201, 203, 296 P.3d 407, 409 (Ct. App. 2012). Once relevance has been established, this Court reviews a trial court's decision to admit evidence for an abuse of discretion. *State v. Grist*, 147 Idaho 49, 51, 205 P.3d 1185, 1187 (2009). Under an abuse of discretion standard, the Court examines whether: "(1) the trial court correctly perceived the issue as discretionary; (2) the trial court acted within the outer bounds of its discretion and with applicable legal standards; and (3) the trial court reached its decision through an exercise of reason." *Id*.

**C. Standard of Law**

It is well established that evidence of other crimes, wrongs, or acts is not admissible to prove criminal propensity; that is, evidence of other crimes, wrongs, or acts cannot be introduced as evidence that a defendant who committed a prior bad act is more likely to have committed the currently charged bad act. *Grist*, 147 Idaho at 52, 205 P.3d at 1188. Such evidence may, however, be introduced if probative of another

relevant matter such as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." I.R.E. Rule 404(b)(2).

Rule 404(b)(2)(B) requires the prosecution "to serve reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial ... and do so reasonably in advance of trial – or during trial if the court, for good cause shown, excuses lack of pretrial notice." *Id*. The Idaho Supreme Court has held that compliance with the notice requirement of Rule 404(b) "is mandatory and a condition precedent to admission of other acts evidence." *State v. Sheldon*, 145 Idaho 225, 230, 178 P.3d 28, 33 (2008); *see also State v. Whitaker*, 152 Idaho 945, 950, 277 P.3d 392, 397 (Ct. App. 2012) ("This notice requirement is mandatory, and the failure to comply creates a bar to admissibility."). The rule is intended to encourage disclosure by the prosecution and discourage trial by ambush. *State v. Leavitt*, 171 Idaho 757, 765, 525 P.3d 1150, 1158 (2023).

If the prosecution has given reasonable notice in advance of trial – or the lack of pretrial notice is excused for good cause – Idaho courts follow a two-tier process to evaluate the admissibility of evidence offered under Rule 404(b)(2). The first tier has two steps: (1) "the trial court must determine whether there is sufficient evidence to establish the other crime or wrong as fact"; and (2) "[t]he trial court must determine whether the evidence of the other act would be relevant to a 'material and disputed issue concerning the crime charged, other than propensity'" *State v. Nava*, 166 Idaho

884, 893, 465 P.3d 1123, 1132 (2020) (quoting *Grist*, 147 Idaho at 52, 205 P.3d at 1188). "Such evidence is only relevant if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Grist*, 147 Idaho at 52, 205 P.3d at 1188 (citation omitted). Second, the court must conduct a balancing test under Rule 403 and "determine whether the danger of unfair prejudice substantially outweighs the probative value of the evidence." *Id*.

**D. Discussion**

*1. The prosecution failed to provide reasonable notice*

When the State initially moved to introduce evidence under 404(b), it offered vague generalities as to the nature of that evidence. It listed the "general nature" of the evidence that it intended to present, including 27 listed categories of evidence related to Charles Vallow's death, Lori's previous husband's death, and "other evidence." (Conf. Rec., pp. 498-500.) Ms. Daybell objected based on the extensive sweep of the motion, and the district court tended to agree.

The State followed up with an amended motion to introduce the evidence, this time trimming the evidence in some ways (tied primarily to matters regarding Ms. Daybell's marriage trouble with Charles Vallow, "castings," the events leading up to and after Vallow's shooting death, and the attempted shooting of Brandon Boudreaux), but it was still exceptionally broad. Ms. Daybell again objected the lack of reasonable notice, citing the broad scope of the evidence and the burden it would put on the

defense to investigate what amounted to a separate case – or cases – in a different state for a trial that was set to begin in few short weeks. (Conf. Tr., p. 804-09.) The district court overruled that objection, distinguishing cases where the Idaho Supreme Court had reversed for insufficient notice on the ground that notice in those cases came at trial, if at all. The district court further concluded that because the nature of the evidence had been disclosed to the defense over time in discovery, the defense could not claim surprise.

The district court abused its discretion in resolving the notice issue adversely to Ms. Daybell. It is true that the State gave notice in advance of trial, but the question is whether that notice was "reasonable." It was not. A requirement of reasonableness implies that notice is far enough in advance of trial that the defendant has a fair opportunity to prepare and to meet the evidence. As such, reasonableness must be assessed in light of the circumstances of the individual case before the district court.

This case is unlike any other run-of-the-mill case that contains 404(b) issues. spanned two states, was investigated by an alphabet of law enforcement agencies, featured intense media scrutiny, had two precursor felony cases, involved five prosecuting attorneys and two defense counsel with a death penalty team, and was tried three years after Ms. Daybell was arrested. The amount of information generated by so many individuals and entities was enormous. It is not reasonable to expect defense counsel in a case such as this to read the prosecution's mind about whether it

intended to introduce uncharged misconduct from another state. This nature of this case and the amount of 404(b) evidence demanded notice much earlier than a few weeks before the criminal trial.

As argued by defense counsel below, there is no reason why the State could not have decided much earlier whether it intended to introduce the Arizona evidence: "the State has been hiding the ball on this issue for at least 1 year, 8 months and 16 days (the time between the grand jury indictment and the proposed date of the hearing)." (Conf. Rec., p. 511.) A reasonable conclusion is that it wanted the element of surprise, which is precisely what the notice requirement in I.R.E. 404(b)(2)(B) is intended to avoid. This inference is bolstered by the State's repeated late discovery disclosures, which led to the district court striking the death penalty as a sanction.

The district court abused its discretion in not simply denying the State's amended motion for lack of reasonable notice.

*2. The evidence was not relevant to prove Ms. Daybell's "plan, preparation, knowledge, or identity."*

Evidence is relevant if it "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." I.R.E. 401. The court allowed the State to introduce the bulk of the proffered Arizona evidence under the theory that it was relevant to prove "plan, preparation, knowledge, or identity," which it claimed were disputed issues.

Starting with "identity" – the Idaho Supreme Court has held that"[e]vidence of prior misconduct is relevant on the issue of identity when the evidence demonstrates sufficiently similar, as well as distinctive, characteristics or patterns between the prior misconduct and the charged crime." *Leavitt*, 171 Idaho at 767, 525 P.3d at 1160. The quintessential example of when identity is a material factual issue, and a prior bad act or crime tends to prove that the defendant is the one who committed the crime, is when there is a "signature" or modus operandi apparent in the two crimes. On the other hand, when "the characteristics of both the prior offense and the charged offense are not in any way distinctive, but are similar to numerous other crimes committed by persons other than the defendant, no inference of identity can arise." *United States v. Powell*, 587 F.2d 443, 448 (9th Cir. 1978).

That is true here. For example, the State's theory that Charles Vallow was somehow lured into a trap, then shot under the guise of self-defense, is in no way similar to the manner in which JJ, Tylee, or Tammy Daybell died. That also applies to the attempted shooting of Brandon Boudreaux from the back of a vehicle. Nothing about the factual circumstances of these events gives rise to a signature that tends to make the killer's identity more likely than without that evidence. More removed is how the circumstances of what the State claimed were violent crimes in Arizona showed a "signature" that pointed to Lori Daybell.

"Knowledge" is also misapplied. For this factor to be relevant, the uncharged bad acts must logically tend to show an awareness, or knowledge, by the defendant of the charged crimes. The shooting of Charles Vallow in what the State contended was a set-up for self-defense, and the attempted shooting of Brandon Boudreaux, do not tend to make it more likely that Lori Daybell had knowledge of the murders of JJ, Tylee, or Tammy Daybell committed in entirely different ways.

Perhaps the closest call would be the defendant's "plan" or "preparation," but the problem here is the State's shotgun approach to the 404(b) evidence. Some of the Arizona evidence, under the State's theory of the case, may tend to make the existence of a scheme or plan involving the acts in Idaho more likely than without that evidence. But the most prejudicial evidence – the circumstances surrounding the shooting of Charles Vallow and the attempted shooting of Brandon Boudreaux – do nothing to move the needle and, as explained below, carried a high danger of unfair prejudice to Ms. Daybell.

*3. Rule 403 balancing: the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading of the jury*

Even if there was some probative value from the Arizona evidence as to one or more of the 404(b) factors, the danger of unfair prejudice was extreme. Circling back to where Ms. Daybell began this issue, the State's laundry list of 404(b) evidence from Arizona, where about one-third of the witnesses testified partially or entirely to what

the State contended was criminal activity or bad acts in Arizona, meant that Ms. Daybell's trial was based to a large extent on 404(b) evidence. The State was not relying on some discrete judgment of conviction with a few supporting facts sprinkled in. It was essentially also trying her for a conspiracy to murder her ex-husband and a conspiracy to murder Brandon Boudreaux, crimes for which she had not been convicted. The facts had not been established on either of those events, and this created mini-trials within this trial.

The danger from prior bad acts evidence is that it allows a jury to convict the defendant because they are a bad person or have bad character, rather than basing a verdict on the facts supporting the crimes charged. It heightens the risk that so much mud will be flung that a jury could decide that the defendant must have done something. It risks confusing the issues (what is the purpose of *this* evidence as opposed to *that* evidence?) and can easily mislead a jury. A trial court should use the care of a surgeon with a scalpel when considering admitting this type of evidence in this type of case, not a meat cleaver. This case was rife with wholesale evidence of bad acts and bad character from Arizona. The probative value of the evidence, if any, was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading of the jury.

For any of these reasons, the district court abused its discretion in granting the State's motion and admitting the Arizona bad acts evidence in this trial.

## V.

## The district court erred in denying Ms. Daybell's motion to dismiss based on a violation of her statutory and constitutional rights to a speedy trial.

### A. Introduction

There are perhaps few other cases in which a defendant has so forcefully demanded her right to a speedy trial. Ms. Daybell repeated that refrain early and often. Her counsel noted it frequently in hearings and in filings. Ms. Daybell moved to dismiss, claiming that her speedy trial rights were violated due to the two-year delay between when the State filed the indictment and when she was ultimately tried. The delay was beyond the six months required by I.C. § 19-3501 and the time frame generally contemplated by the Idaho constitution and the Sixth Amendment. The district court erred in denying that motion, and this Court should reverse.

### B. Standard of Review

Whether there was an infringement of a defendant's right to speedy trial presents a mixed question of law and fact. *State v. Clark*, 135 Idaho 255, 257, 16 P.3d 931, 933 (2000). This Court defers to the trial court's findings of fact if supported by substantial and competent evidence, but it exercises free review of the trial court's conclusions of law. *Id*.

### C. Standard of Law

Criminal defendants are guaranteed the right to a speedy public trial under the Sixth Amendment and under Article I, section 13 of the Idaho Constitution.

In *Barker v. Wingo*, 407 U.S. 514 (1972), the United States Supreme Court set out a four-part balancing test, which Idaho courts apply to state constitutional claims. to assess whether the defendant's constitutional right to a speedy trial has been violated. The factors to be considered are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her right to a speedy trial; and (4) the prejudice occasioned by the delay. *Barker*, 407 U.S. at 530. None of the four *Barker* factors is, by itself, "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Moore v. Arizona*, 414 U.S. 25, 26 (1973).

Idaho has also chosen to supplement the constitutional rights with a statutory right to a speedy trial in I.C. § 19-3501. The statutory provisions give criminal defendants additional protection beyond what is required by the state and federal constitutions. *Clark*, 135 Idaho at 258, 16 P.3d at 934.

Under the statute, absent good cause, the trial court must dismiss a prosecution against a defendant if, among other things, if a trial is not postponed upon her application, she "is not brought to trial within six (6) months from the date that the defendant was arraigned before the court in which the indictment is found." I.C. § 19-3501(3).

The statute mandates that unless the State can demonstrate "good cause" for a delay greater than six months, the court must dismiss the case. *Clark*, 135 Idaho at 258, 16 P.3d at 934. In *Clark*, the Idaho Supreme Court concluded that "good cause means that there is a substantial reason that rises to the level of a legal excuse for the delay." 135 Idaho at 260, 16 P.3d at 936.

"The good cause determination may take into account the factors listed in *Barker*," but only as "surrounding circumstances." 135 Idaho at 260, 16 P.3d at 936. In other words, if the "delay [has] been a short one, or the defendant has not demanded a speedy trial, or is not prejudiced, a weaker reason will constitute good cause." *Id*. (citation omitted). But "if the delay has been a long one, or if the defendant has demanded a speedy trial, or is prejudiced, a stronger reason is necessary to constitute good cause." *Id*.

**D. Discussion**

The State filed its indictment on May 25, 2021. Ms. Daybell's trial started on April 3, 2023, nearly two years since the State indicted her. The Idaho Supreme Court had held that a 14-month delay since indictment is presumptively prejudicial. *E.g.*, *State v. Mansfield*, __ Idaho __, 559 P.3d 1177, 1192 (Idaho 2024) (noting that a 14-month delay "triggers further inquiry into the remaining three *Barker* factors.). The two-year delay in this case is presumptively prejudicial.

In addition, as the district court noted, "Lori has never waived her right to a speedy trial," and "it is clear that she never relinquished or abandoned this right." (CR, p. 1348.) Not only did she not relinquish the right, she loudly asserted it. She demanded a speedy trial at her arraignment, she objected to her counsel's request to reevaluate her competency in November of 2022, *see* Conf. Tr., p. 587, ln. 9-12, and she moved the court to dismiss the indictment after it had reset the trial for April of 2023. Her counsel also repeatedly indicated in statements to the court and in their papers that their client was asserting her speedy trial rights. This factor weighs strongly in her favor.

A portion of the delay is clearly attributable to the court's finding that Ms. Daybell was not competent to proceed and on subsequent restoration proceedings at the state hospital. The court found her incompetent on June 9, 2021, staying her case, and then lifted the stay when it found her competent on April 11 , 2022, a period of ten months. While Ms. Daybell concedes that the reason for this portion of the delay is not attributable to the State, it is not attributable to her voluntary choice to seek a delay, either. At most, it is neutral.

She was arraigned on April 22, 2022, and demanded a speedy trial, which was set for the following October. The State quickly filed a motion to continue the trial about 90 days to the next January to line it up with Chad Daybell's currently scheduled trial. (CR, p. 591.) The court found good cause supporting this motion, over Ms. Daybell's

objection, *see* CR, pp. 606-08, ostensibly to avoid an improper severance of the cases. (CR, p. 625.)

In October, Ms. Daybell's counsel filed a motion to stay the case and reevaluate her competency. (CR, p. 597.) They noted that she objected to the motion, and she also objected at the hearing. (Conf. Tr., p. 587, ln. 9-12.) The court granted that motion and reset the trial for April of 2023. In November, the court held an evidentiary hearing, found Ms. Daybell competent. It lifted the stay, and trial began on April 3, 2023.

The overall reasons for the delay – incompetency, placing the cases on the same track for trial, and reevaluating competency – do not necessarily weigh in favor of either party. Ms. Daybell, personally, did not request any of the delays, and she objected to them when she could.

The final component of the analysis is prejudice. As noted, a two-year delay that a defendant did not request or acquiesce in is presumptively prejudicial. But the court must also look at the particular facts in the case before it. *Mansfield*, __ Idaho at __, 559 P.3d at 1197. In *Barker*, the United States Supreme Court identified three interests that the right to a speedy trial is designed to protect: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532.

When it assessed the "preventing oppressive pretrial incarceration" *Barker* factor, the district court focused on the time between November of 2022 and April of 2023, *see*

CR, p. 1352, but that is too small a window of time. Ms. Daybell had been incarcerated since her arrest in February of 2020, and she never left custody. True, she was not technically incarcerated on *these* particular charges until May of 2021, but a shift in the paperwork as the basis for holding one in jail hardly matters to the detainee. And while some of that time was spent in the state mental hospital that, too, is but a different flavor of "jail." The "oppressive pretrial incarceration" factor runs in tandem with "anxiety and concern of the accused." The Court may recall that, until right before trial, the State was seeking a death sentence against Lori Daybell. The anxiety and concern of one awaiting trial for two years for a trial that could result in a sentence of death must understandably be immense.

As for limiting the possibility that the defense will be impaired, Ms. Daybell acknowledges that her counsel voiced concern about what they thought was the shortness of time to prepare. Still, the right is personal to her, not her counsel.

Overall, in light of Ms. Daybell's repeated and strong invocation of her right to a speedy trial – which reflects her strong desire to see the charges resolved and to avoid prolonged anxiety in oppressive pretrial incarceration conditions – the presumptively prejudicial length of the delay, balanced against the reasons given for extending the time, the district court erred in concluding that "good cause" had been shown to overcome this fundamental right. The court should have instead dismissed the indictment under I.C. § 19-3501, and it erred in further concluding that Ms. Daybell's

Sixth Amendment right to a speedy trial had not been violated. This Court should reverse with instructions to dismiss the indictment.

## CONCLUSION

Lori Daybell respectfully asks this Court to reverse her judgment of conviction and remand for an order dismissing all charges against her based on a violation of her statutory and constitutional right to a speedy trial.

Short of that, this Court should reverse the judgment of conviction and remand for a new trial based on the errors raised in Issues I through IV.

Respectfully submitted on this 30th day of May 2025.

*/s/Craig H. Durham*
Craig H. Durham
Attorney for Appellant

**CERTIFICATE OF SERVICE**

This Brief has been served on the following on this 30th day of May by filing through the Court's e-filing and serve system:

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/s/*Craig H. Durham*
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