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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

STATE OF IDAHO, Plaintiff, v. CHAD DAYBELL, Defendant.	Case No.: CR22-21-1623 MOTION TO CONTINUE THE TRIAL DATE TO ENFORCE MR. DAYBELL'S CONSTITUTIONAL RIGHTS

Mr. Chad Daybell, by and through his undersigned attorney, respectfully submits the following motion to vacate the current trial date due to the substantial amount of trial investigation and preparation and significant amount of discovery not provided to defense still outstanding. Any conviction and sentence resulting from a trial beginning in January 2023 will be unconstitutionally imposed and, therefore, vulnerable to reversal on direct or collateral review. In making this motion, Mr. Daybell relies on his right to be free from cruel and unusual punishment, his right to due process, his right to a fair trial, his right to counsel, his right to present a defense, his right to confront witnesses, his right to a fair and reliable sentencing determination, and other rights safeguarded by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution, Article I, Sections 6, 7, 8, and 13 of the Idaho State Constitution, and the corresponding Idaho statutes.

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SUMMARY OF REQUEST

On May 25, 2021, Mr. Daybell was indicted and charged with capital murder. As discussed further in this motion, despite counsel's efforts, there is no possible way to complete the investigation and be prepared for a death penalty trial by January 2023. Death penalty cases are unique in the criminal legal system and require counsel to undertake an extensive, time-consuming investigation for essentially two trials: the merits phase and the sentencing phase in the event there is a conviction. The merits phase is subject to heightened standards of reliability in capital cases, and the sentencing phase investigation is unique to death penalty cases and unparalleled in scope, as more thoroughly discussed in this motion. Due to the complexity of the merits case, which has dominated undersigned counsel's time, the sentencing phase investigation is in its initial stages. Moreover, there are substantial outstanding issues which must be litigated prior to trial. Undersigned counsel therefore respectfully moves the Court to vacate the current trial date to allow counsel the necessary additional time to complete the investigation and ensure the trial in this case accords with Mr. Daybell's constitutional rights.

Mr. Daybell submits this motion now, approximately four months prior to the scheduled trial date, in order to abate any possible prejudice to the State. The State previously asked this Court for a trial date several months later than January 2023,[1] and therefore a delay will only accommodate the State's prior request.

[1] Prosecutors requested a later trial date at the scheduling hearing held on December 2, 2021. *See* Video of Hearing, available at https://www.youtube.com/watch?v=CokRDNRRbWY.

Pushing this case to trial prematurely will heighten the already very significant risk of reversal that is characteristic of death penalty cases. Indeed, studies demonstrate that reversible error occurs in more than two-thirds of cases resulting in the death penalty.[2] Reversal often occurs years or even decades after the original conviction, given the unique and lengthy appellate and post-conviction process in death penalty cases, costing taxpayers millions of dollars in the interim. Future reversal of any conviction and sentence obtained at trial in this case would suspend closure for all parties and significantly tax the time and resources of the judicial system. Thus, in order to conserve resources, as well as preserve Mr. Daybell's constitutional rights and the integrity of these capital proceedings, Mr. Daybell respectfully requests this court vacate the current trial date.

Mr. Daybell further requests the Court hold a status hearing in January 2023 to set a new trial date. In the event the Court sets a new trial date at this time, Mr. Daybell respectfully requests a date no earlier than October 2023

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[2] In the largest study of its kind, researchers looked death sentences obtained nationally over a 23-year period. They only included cases that had completed the lengthy appellate and post-conviction review process in order to obtain an accurate reversal rate. Reversible error was found in 68 percent of the cases. *See* Columbia University News, *Landmark Study Finds Capital Punishment System Fraught with Error: Serious, Reversible Error Found in Nearly 7 out of 10 Capital Cases in 23 Year Period* (June 12, 2000).

Reversal of death sentences in Idaho, specifically, is also more likely than not. In a 2021 study, researchers found that of 42 defendants sentenced to death in Idaho in the modern era of the death penalty, 23 later had their cases or sentences reversed and received sentences of less-than-death, and two were exonerated and released. Of the remaining 17 individuals, only three had been executed, and six died in prison of natural causes. The eight people remaining on death row continue to challenge their sentences in the appellate or post-conviction review process, meaning their convictions and/or sentences could be overturned at any time and remanded for new proceedings. Thus, the absolute rate of reversal or exoneration in Idaho is likely to be even higher than the 60 percent captured at the time of review. Jacqueline Lee and Stephen Hackler, *The Declining Death Penalty in Idaho*, Boise State University (June 30, 2021), available at https://www.boisestate.edu/bluereview/the-declining-death-penalty-in-idaho/; *see also,* Office of Performance Evaluations, Idaho Legislature, *Financial Costs of the Death Penalty* (March 2014) at p. 12, available at: https://legislature.idaho.gov/wp-content/uploads/OPE/Reports/r1402.pdf.

I. "Death Is Different": The Court and All Parties Must Adhere to the Unique and Rigorous Standards Applicable in Capital Cases.

The State fundamentally changed the nature of this case when it filed a notice of intent to seek Mr. Daybell's execution. Capital cases are unique in the legal system in many aspects, including in the type and scope of investigation, the number and required experience of core defense team members, pre-trial motions practice, the number and type of necessary experts, jury selection, the trial process, standard of review, and the appellate and post-conviction process. All the unique aspects of capital cases give rise to a significant body of "capital-specific" caselaw, which applies solely to cases in which the death penalty is sought by the government as a potential penalty. The United States Supreme Court, alone, has issued more than 100 substantive decisions about capital punishment in the modern era of the death penalty, a number that is dwarfed by decisions from state and federal courts that regularly review, and reverse, death sentences.

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

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

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

Thus, both the Due Process and Cruel and Unusual Punishment Clauses of the federal Constitution guarantee a capital defendant a "greater degree of reliability when the death sentence

is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see also Mills v. Maryland*, 486 U.S. 367, 376 (1988) ("[I]n reviewing death sentences, the Court has demanded even greater certainty [than in other criminal cases] that the jury's conclusion rested on proper grounds."); *California v. Ramos*, 463 U.S. 992, 998-99 (1983) (qualitative difference of death from all other punishments "requires a correspondingly greater degree of scrutiny of the capital sentencing determination").

This heightened standard of reliability is "a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *see also Lockett*, 438 U.S. at 605 ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.").

Because "death is different," the United States Constitution requires that "extraordinary measures [be taken] to ensure that" Mr. Daybell "is afforded process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake." *Caldwell v. Mississippi*, 472 U.S. 320, 329 n.2 (1985) (*quoting Eddings v. Oklahoma*, 455 U.S. 104, 118 (1981) (O'Connor, J., concurring)). As a result, "time and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Caspari v. Bolden*, 510 U.S. 383, 393 (1994) (*quoting Strickland v. Washington*, 466 U.S. 668, 704-05 (1984) (Brennan, J., concurring in part and dissenting in part)); *see also Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) ("As [the government's] counsel maintained at oral argument, there is no doubt that "[d]eath is different.").

The United States Supreme Court has also made clear that a trial court must apply this heightened standard of reliability to all aspects of a capital case, including the merits phase of a capital trial, in order to satisfy the demands of the Eighth Amendment. In *Beck v. Alabama*, 447

U.S. 625 (1980), the United States Supreme Court held that the concerns for heightened reliability which applied during the sentencing proceedings in a capital case were equally applicable to the trial on the merits in a capital case:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

Id. at 638 (holding that the Constitution required the giving of a lesser-included offense instruction at the trial on the merits, if requested in a capital case, even if there was no due process requirement to give a lesser-included offense instruction in a non-capital case). The Court noted that failing to give such an instruction might "enhance the risk of an unwarranted conviction" and that "[s]uch a risk cannot be tolerated in a case in which the defendant's life is at stake." *Id.* In so holding, the Court relied upon its previous statement in *Gardner v. Florida*, recognizing the different nature of death penalty cases:

> [D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

430 U.S. 349, 357-58 (1977); *see also Herrera v. Collins*, 506 U.S. 390, 406 n.5 (1993) (*Beck* "emphasizes the importance of ensuring the reliability of the guilt determination in capital cases in the first instance.").

Justice O'Connor's concurrence in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), further underscores the reason a trial court must apply heightened scrutiny to all decisions that may lead to the imposition of a death sentence:

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

Id. at 856. Because proceeding to a capital trial prematurely, prior to when counsel could provide effective assistance, is a decision that would lead to the erroneous imposition of the ultimate sanction, this Court must consider and assess this motion under a heightened standard of due process.

II. Mr. Daybell Has Myriad Constitutional Rights During These Proceedings, All of Which are Dependent on Counsel Having an Adequate Amount of Time to Prepare for a Capital Trial.

A. The Constitutional Rights to Effective Assistance of Counsel and to Present a Complete Defense

The Sixth Amendment entitles Mr. Daybell to the effective assistance of counsel at both the merits and penalty phases of this capital case. *See, e.g.*, *Andrus v. Texas*, 140 S.Ct. 1875 (2020) (per curiam); *Strickland*, 466 U.S. at 686. As detailed in Section III, below, this right also imposes significant obligations upon defense counsel to ensure that this right is properly effectuated. Additionally and concomitantly, as part of this Sixth Amendment guarantee, as well as his right to Due Process as protected by the Fourteenth Amendment, Mr. Daybell is entitled to a sufficient time for counsel to adequately prepare for trial and sentencing. *See Powell v. Alabama*, 287 U.S. 45, 59 (1932) ("[A] defendant, charged with a serious crime, must not be stripped of his right to

have sufficient time to advise with counsel and prepare his defense."); *United States v. Ash*, 413 U.S. 300, 340-41 (1973) ("*Powell* made clear that, in order to preserve the accused's right to a fair trial and to 'effective and substantial' assistance of counsel at the trial, the Sixth Amendment guarantee necessarily encompasses a reasonable period of time before trial during which counsel might prepare the defense."). The state constitution independently provides Mr. Daybell with similar rights. *See* Idaho Constitution, Article 1, §13.

In addition to the right to the effective assistance of counsel, Mr. Daybell has the right to a "meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *see also Crane v. Kentucky*, 476 U.S. 683, 687 (1986) (noting the existence of a "fundamental constitutional right to a fair opportunity to present a defense"); *California v. Trombetta*, 467 U.S. 479, 485 (1984) ("Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense."). This right has a number of sources, including the Due Process Clause of the Fourteenth Amendment, as well as the Compulsory Process and Confrontation Clauses of the Sixth Amendment. *Holmes*, 547 U.S. at 324; *see also,* Idaho Constitution, Article 1, §13.

B. The Right to an Individualized Sentencing Proceeding

Because the prosecution is seeking to execute him, Mr. Daybell has additional and unique constitutional rights in this proceeding. In addition to the heightened standard of due process discussed in Section I, *supra*, the Eighth Amendment requires that a capital sentencing proceeding permit individualized consideration of the defendant and the circumstances of the offense. *Woodson*, 428 U.S. at 304 (holding that consideration of the defendant's character is "a

constitutionally indispensable part of the process of inflicting the penalty of death"); *Roberts v. Louisiana,* 428 U.S. 325, 332-36 (1976) (holding that a mandatory death sentencing statute is unconstitutional because it does not permit sentencer to make individualized determination or assess degree of culpability); *Parker v. Dugger*, 498 U.S. 308, 322-23 (1991) (holding that petitioner was deprived of his Due Process and Eighth Amendment rights to individualized sentencing where appellate court failed to consider all mitigating evidence). As the Supreme Court noted in *Enmund v. Florida*, "we insist on individualized consideration as a constitutional requirement in imposing the death sentence, which means that we must focus on relevant facets of the character and record of the individual offender." 458 U.S. 782, 798 (1982) (citations omitted).

Individualized sentencing requires the presentation of mitigation evidence that is properly investigated, documented, and presented. "[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Payne v. Tennessee*, 501 U.S. 808, 822 (1991). "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot challenge the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." *Id.* at 824 (internal citations omitted). "[T]he mere declaration that evidence is 'legally irrelevant' to mitigation cannot bar the consideration of that evidence if the sentencer could reasonably find that it warrants a sentence less than death." *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990). In *Tennard v. Dretke*, 542 U.S. 274 (2004), the Court again emphasized that there is a "low threshold for relevance" with respect to mitigating evidence, reiterating that the "Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence . . . . the question is simply whether the evidence is of such a character that it might serve as a basis for a sentence less than death." *Id.* at 285-87 (internal

citations omitted). As discussed in more detail in Section III, this constitutional right also imposes additional, significant obligations on defense counsel. Without a comprehensive and thorough mitigation investigation and presentation to the sentencer, it is impossible for Mr. Daybell, or any capital defendant, to receive an individualized sentencing determination as required by the Eighth Amendment.

C. The Right to Expert Assistance During All Phases of this Capital Trial

An important corollary to the preceding rights is the right to access competent expert assistance in preparing a defense, regardless of a defendant's ability to pay for that assistance. As the Supreme Court stated:

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

Ake v. Oklahoma, 470 U.S. 68, 77 (1985). For several reasons, access to experts is particularly important in a case where the prosecution elects to seek the death penalty. First, "investigating a homicide is uniquely complex and often involves evidence of many different types. Analyzing and interpreting such evidence is impossible without consulting experts—whether pathologists, serologists, microanalysts, DNA analysts, ballistics specialists, translators, or others." American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA L. REV. 913, 955 (Rev. ed. 2003) [hereinafter "ABA Guidelines"]. Moreover, both "the prosecution and the defense rely more extensively on experts in death penalty cases than in [other types of] criminal cases." Subcom. On Federal Death Penalty Cases, Comm. On Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases:*

Recommendations Concerning the Cost and Quality of Defense Representation (1998), pp. 21-22, available at: https://www.uscourts.gov/sites/default/files/original_spencer_report.pdf.

In addition to the frequently complex merits phase issues, conducting an adequate investigation into sentencing phase issues in a capital case almost always requires the assistance of multiple experts. *See, e.g.*, *McWilliams v. Dunn*, 137 S.Ct. 1790, 1798-1800 (2017) (holding that, when defendant's "mental condition" is "seriously in question" and is relevant to "the punishment he might suffer[,]" a state must provide a mental health professional capable of conducting an appropriate examination and assisting in evaluation, preparation, and presentation of the defense); ABA Guidelines, 31 HOFSTRA L. REV. at 1004 (noting that "because mental health issues pervade capital cases, a psychologist or other mental health expert may well be a needed member of the defense team [and] additional expert assistance specific to the case will almost always be necessary for an effective defense.").

III. Because this is a Capital Case, Defense Counsel Has Significant Additional Professional and Ethical Obligations in Preparing for Trial.

A. Counsel's Duty to Provide Effective Assistance of Counsel in Accordance with the Prevailing Professional Norms

Because "death is different[,] [s]o too are the lengths to which defense counsel must go in investigating a capital case." *Doe v. Ayers*, 782 F.3d 425, 435 (9th Cir. 2015) (citations omitted). These lengths are largely set out in the ABA Guidelines which "continue to stand as the single most authoritative summary of the prevailing professional norms in the realm of capital defense practice." Russell Stetler, W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 635 (2013). These Guidelines, , "are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases." ABA Guidelines, 31 HOFSTRA L. REV. at 920.

The U.S. Supreme Court has repeatedly looked to the ABA Guidelines in determining the minimum prevailing professional norms for counsel's performance in death penalty cases. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (ABA Guidelines for capital defense are "guides to determining what is reasonable" and "well-defined norms"); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) ("It is the duty of the lawyer to conduct a thorough investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and penalty in the event of a conviction.") (citing ABA Standards for Criminal Justice 4-4.1 (2nd ed. 1982)). The Ninth Circuit, which would review any death sentence obtained in this case, has also repeatedly relied on the ABA Guidelines to judge state trial counsel's performance, and expressly recognized the Guidelines as a "proper measure of the adequacy of an attorney's investigation." *Andrews v. Davis*, 944 F.3d 1092, 1109 (9th Cir. 2019) ("American Bar Association (ABA) standards and the like are evidence of those norms and guides to determining what is reasonable.") (internal quotations omitted).

B. Investigating for the Merits Phase of a Capital Case

The ABA Guidelines outline the extraordinary amount of time and care that counsel must expend when a client's life is in their hands. With respect to investigation for the merits phase, the ABA Guidelines are clear that counsel must thoroughly investigate and challenge every minute piece of the evidence that the State purports to have:

> [D]efense counsel must independently investigate the circumstances of the crime and all evidence—whether testimonial, forensic, or otherwise—purporting to inculpate the client. To assume the accuracy of whatever information the client may initially offer or the prosecutor may choose or be compelled to disclose is to render ineffective assistance of counsel . . . the defense lawyer's obligation includes not only finding, interviewing, and scrutinizing the backgrounds of potential prosecution witnesses, but also searching for any other potential witnesses who might challenge the prosecution's version of events, and subjecting all forensic evidence

> to rigorous independent scrutiny. . . In addition to investigating the alleged offense, counsel must also thoroughly investigate all events surrounding the arrest, particularly if the prosecution intends to introduce evidence obtained pursuant to alleged waivers by the defendant (e.g., inculpatory statements or items recovered in searches of the accused's home).

ABA Guidelines, 31 HOFSTRA L. REV. at 926. In recognizing the large number of individuals sentenced to death and later exonerated because they were innocent—110 when the revised ABA Guidelines were published in 2003, *id.* at 1017, though the number currently stands at 190[3]—the Guidelines "underscor[e] the importance of defense counsel's duty to take seriously the possibility of the client's innocence, to scrutinize carefully the quality of the state's case, and to investigate and re-investigate all possible defenses." Accordingly, the baseline investigation for the guilt/innocence phase must include the following:

1. Charging Documents:
   Copies of all charging documents in the case should be obtained and examined in the context of the applicable law to identify:
   a. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;
   b. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;
   c. any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) that can be raised to attack the charging documents; and
   d. defense counsel's right to obtain information in the possession of the state and the applicability, extent, and validity of any obligation that might arise to provide reciprocal discovery.

2. Potential Witnesses:
   a. Barring exceptional circumstances, counsel should seek out and interview potential witnesses, including, but not limited to:
   (1) eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself;
   (2) potential alibi witnesses;
   (3) witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), and the degree of culpability for the offense, including:

[3] Death Penalty Information Center, Description of Innocence Cases, available at: https://deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited Sept 23, 2022).

(a) members of the client's immediate and extended family
(b) neighbors, friends and acquaintances who knew the client or his family
(c) former teachers, clergy, employers, co-workers, social service providers, and doctors
(d) correctional, probation, or parole officers;
(4) members of the victim's family.

b. Counsel should conduct interviews of potential witnesses in the presence of a third person so that there is someone to call as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews. Counsel should investigate all sources of possible impeachment of defense and prosecution witnesses.

3. The Police and Prosecution:
Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports, autopsy reports, photos, video or audio tape recordings, and crime scene and crime lab reports together with the underlying data therefor. Where necessary, counsel should pursue such efforts through formal and informal discovery.

4. Physical Evidence:
Counsel should make a prompt request to the relevant government agencies for any physical evidence or expert reports relevant to the offense or sentencing, as well as the underlying materials. With the assistance of appropriate experts, counsel should then aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence.

5. The Scene:
Counsel should view the scene of the alleged offense as soon as possible. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).

31 HOFSTRA L. REV. at 1018-20.

Following a complete investigation of every piece of the State's case, counsel is then responsible for analyzing all of the information and identifying and considering all legal claims potentially available, even if those claims have consistently lost in that jurisdiction. *See id.* at 1032 ("Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted practices."). This is necessary because counsel in a capital case has a duty to preserve "any and all conceivable errors for each stage of appellate and post-conviction review." *Id.* at 1030. Non-preservation of an issue at the trial level may result in waiver, and ultimately in a

defendant's execution, even if reversible error occurred. *Id.* at 1030 (describing a case in which, from a joint capital trial, one co-defendant was eventually executed because his counsel failed to object to women being excluded from the jury, while the other co-defendant's case was reversed and he is now serving life in prison because his attorneys preserved the issue).

C. Counsel's Minimum Duties in Preparing for a Potential Sentencing Phase of a Capital Case

In capital cases, a full investigation is fundamental not only for the merits phase, but also the sentencing phase in which the jury determines whether to spare a convicted defendant's life. A constitutionally-adequate investigation for the sentencing phase of a capital case requires a comprehensive and exhaustive investigation into the client's entire life history in order to present a complete picture of the client's mitigating life circumstances to the jury. "Because the sentencer in a capital case must consider in mitigation anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history." *Id.* at 1022 (citations omitted). The mitigation investigation is so central to capital cases that there are Supplementary Guidelines directing this part of capital trial preparation specifically. *See* Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 677 (2008) (hereinafter "Supplementary Guidelines")

The defense "must conduct an ongoing, exhaustive and independent investigation of every aspect of the client's character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death" in order to meet their constitutional obligations. *Id.* at 689. Compiling a comprehensive life history for a capital sentencing phase requires two primary responsibilities, which are dependent upon each other, as further explained below. These responsibilities are: (1) collecting and analyzing records from the

client and the client's family's life history, and (2) interviewing all individuals who have touched the client's life in more than a cursory manner or who may be able to shed light on circumstances shaping the client's life.

Life history records that must be collected, not only about the client but also about client's family members, "include[], but [are] not limited to" all the following types of records:

- medical history;
- complete prenatal, pediatric and adult health information;
- exposure to harmful substances in utero and in the environment;
- substance abuse history;
- mental health history;
- history of maltreatment and neglect;
- trauma history;
- educational history;
- employment and training history;
- military experience;
- multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior;
- prior adult and juvenile correctional experience;
- religious, gender, sexual orientation, ethnic, racial, cultural and community influences;
- socio-economic, historical, and political factors

Id. at 682. In addition to collecting and analyzing life history records, the defense team must be able to identify, locate, and interview life history witnesses in a culturally competent manner that produces confidential, relevant, and reliable information. *Id.* Lay witnesses will include people such as:

(a) the client's family, extending at least three generations back, and those familiar with the client,

(b) The client's friends, teachers, classmates, co-workers, employers, and those who served in the military with the client, as well as others who are familiar with the client's early and current development and functioning, medical history, environmental history, mental health history, educational history, employment and training history, military experience and religious, racial, and cultural experiences and influences upon the client or the client's family;

(c) Social service and treatment providers to the client and the client's family members, including doctors, nurses, other medical staff, social workers, and housing or welfare officials;

(d) Witnesses familiar with the client's prior juvenile and criminal justice and correctional experiences;

(e) Former and current neighbors of the client and the client's family, community members, and others familiar with the neighborhoods in which the client lived, including the type of housing, the economic status of the community, the availability of employment and the prevalence of violence;

(f) Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;

(g) Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.

Id. at 691-92.

As the mitigation investigation develops, "red flags" will become apparent; *i.e.*, indications that a particular mitigating circumstance or theme may be present in the defendant's life history. When counsel discovers a red flag, it cannot be ignored, as to do so would be to "abandon the[] investigation at an unreasonable juncture." *Wiggins v. Smith*, 539 U.S. 510, 527-28 (2003). The development of the mitigation investigation, including the identification of and subsequent follow-up on 'red flags,' is dependent on both the life history records and interviewing witnesses. The records component requires a thorough collection of all documentation about the client and his family. Such contemporaneous records are intrinsically credible and may document events which the client and other family members were too young to remember, too impaired to understand and record in memory, too traumatized, ashamed, or biased to articulate, or events which the client knows nothing about, but which may document significant events or conditions in the client's life.[4]

[4] Most individuals who are the subject of a forensic evaluation are not able to remember their life histories completely, will remember events inaccurately, and will omit critical facts such as occurrences of head trauma. Certain important areas of information, such as prenatal history,

See ABA Guidelines, 31 HOFSTRA L. REV. at 1025-26. The interview component involves identifying, locating, establishing rapport with, and interviewing persons who knew the client during the course of his life. It is vital that the interviewer conduct these interviews in person, face-to-face, and one-on-one, and that multiple interviews be conducted to establish trust and rapport in order to elicit sensitive information. *Supplementary Guidelines*, 36 HOFSTRA L. REV. at 689.

These two parts, collection of records and conducting interviews, function together in a cyclical nature. For example, records from a client's visit to the emergency room might be evidence of physical maltreatment by a parent or caretaker, and may establish relevant dates and identify potential witnesses. The authors of reports and documents are themselves potential mitigation witnesses unknown to the client and the family. Alternatively, a family member recalling that the client or his family received services from a community organization when the client was young may aid counsel in finding records that would have otherwise not been known to exist, and which will offer third-party and contemporaneously-recorded insight into what life was like for the client at a very young age. In this way, the investigation necessarily expands as new information is learned, because "[e]ach record obtained will refer to other records and reports which must be obtained, and individuals who must be located and interviewed. . ." Lee Norton, *Capital Cases: Mitigation Investigations*, The Champion (May 1992) at 45. This cyclical investigation is also important because it leads to confirmation from multiple sources—both objective records and corroborating witnesses who can testify—producing a persuasive mitigation

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whether their mother drank or took drugs during the pregnancy, early developmental issues, injuries, illness, exposure to environmental toxins, and genetic predispositions to illnesses, are not likely known by the defendant. Only through thorough gathering of records, repeated interviews with people who had contact with the client throughout his life, and the analysis of all this information can a complete life history be developed.

case that withstands adversarial testing. Unsurprisingly, this process takes time, and requires that many witnesses be interviewed multiple times even after rapport has been established:

> It is insufficient to talk to witnesses only once because each new individual recalls different facts and anecdotes; if an aunt provides an account of a head injury which the mother forgot to mention, it is necessary to go back to the mother and ask about it. Similarly, an interview may reveal records that must be obtained which in turn raise new questions, questions which necessitate interviewing several witnesses again.

Id.

Adding to the complexity, it has long been recognized that a competent mitigation investigation must include the family history **going back at least three generations,** and must document genetic history, patterns, and effects of familial medical conditions. *See Supplementary Guidelines*, 36 HOFSTRA L. REV. at 691; *see also* ABA Guidelines, 31 HOFSTRA L. REV. at 1025 n.216 (*citing* Norton, *Capital Cases: Mitigation Investigations*, at 3). Because it is well-established that many major psychotic illnesses have strong genetic components, the existence of mental illnesses or related conditions in the family tree is vital information for mental health experts evaluating the client, and the absence of such can lead to incorrect diagnoses. *See* ABA Guidelines, 31 HOFSTRA L. REV. at 1025 (*citing* Norton at 45, 48); *see also* Daniel J. Wattendorf & Donald W. Hadley, *Family History: The Three-Generation Pedigree*, 72 AM. FAM. PHYSICIAN 441, 447 (2005); *Rompilla v. Beard*, 545 U.S. 374 (2005) (three mental health experts erroneously concluded there was nothing helpful to the defendant's case but a background social history would have alerted them to organic brain damage, extreme mental disturbance, and fetal alcohol syndrome). This exhaustive investigation is constitutionally required, even though it is necessarily an extremely time-consuming and expensive undertaking:

> A multi-generational investigation extending as far as possible vertically and horizontally frequently discloses significant patterns

> of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment. The collection of corroborating information from multiple sources—**a time-consuming task**—is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence.

ABA Guidelines, 31 HOFSTRA L. REV. at 1025 (emphasis added). As the mitigation investigation nears completion, only then will it become clear to counsel what types of additional behavioral, cultural, or mental health experts may be necessary to develop the mitigation presentation in order to allow for individualized sentencing as required by the U.S. Constitution.

Finally, counsel must complete the sentencing investigation prior to the start of trial in any case where the death penalty is a possibility. *See, e.g.,* ABA Guidelines, 31 HOFSTRA L. REV. at 1059 ("During an investigation of the case, counsel should begin to develop a theme that can be presented consistently through both the first and second phases of the trial."); *id.* at 1015 ("Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty."); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 358 (1993) ("Counsel must develop a consistent theory before trial to facilitate consistent strategies relating to jury selection, witness preparation, pretrial motions, and overall strategy. Counsel's choice of theory will have especially critical ramifications on jury selection strategy"); Counsel's ability to conduct necessary pre-trial litigation, negotiate and strategically advise the client about any potential plea deals, conduct voir dire at a capital trial, synthesize the trial theory in both the merits and sentencing phases of a capital trial, and hire appropriate experts all depends on the completion of the mitigation investigation prior to the beginning of a capital trial, even in cases where counsel believes a sentencing phase will never occur. *See* ABA Guidelines, 31 HOFSTRA L. REV. at 1059 ("During an investigation of the case, counsel should begin to develop a theme that can be

presented consistently through both the first and second phases of the trial."); ABA Guidelines, 31 HOFSTRA L. REV. at 1048 n.257 ("[F]or counsel to gamble that there never will be a mitigation phase because the client will not be convicted of the capital charge is to render ineffective assistance.").

IV. Capital Cases are Frequently Reversed for Failure to Conduct and Adequate Life History Investigation.

While there is no doubt that conducting a thorough mitigation investigation into a person's life history, background, and mental health requires unparalleled time and effort, the failure to complete an exhaustive investigation poses serious risk of reversal on ineffectiveness grounds. Even looking only to the United States Supreme Court and the Ninth Circuit—courts that will have jurisdiction over the review of this case in the event of a death sentence—there are numerous examples of death sentences that have been overturned due to incomplete or inadequate investigation for a capital sentencing phase:

- *Andrus v. Texas*, 140 S.Ct. 1875 (2020) (per curiam) (counsel provided deficient performance by "overlooking vast tranches of mitigating evidence" including the fact that his client suffered "very pronounced trauma" and suffered from "affective psychosis" by the time he was eleven years old and by failing to adequately investigate and rebut the State's case in aggravation; remanded to lower court to address prejudice prong of *Strickland*))
- *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam) (counsel provided ineffective assistance by failing to investigate mitigating evidence regarding defendant's mental capacity, family background, or military service)
- *Rompilla v. Beard*, 545 U.S. 374 (2005) (even when a capital defendant and his family members have said that no mitigating evidence is available, his lawyer is bound to conduct a social history investigation and adequately follow up on 'red flags'; hiring three well-reputed mental health experts without conducting the proper life history investigation still constituted ineffective assistance of counsel)
- *Wiggins v. Smith*, 539 U.S. 510 (2003) (counsel's failure to fully investigate Wiggins' background and present mitigating evidence of his "excruciating life history" violated his Sixth Amendment right to counsel)

- *Williams v. Taylor*, 529 U.S. 362 (2000) (counsel ineffective for failing to uncover and present evidence of defendant's "nightmarish childhood," borderline mental retardation, and good conduct in prison)
- *Bemore v. Chappell*, 788 F.3d 1151 (9th Cir. 2015) (defendant prejudiced by counsel's failure to further investigate mental health evidence after initial evaluation suggested further testing, choosing instead to go with "good guy with a drug problem" defense in sentencing, which was not only incomplete but opened the door to harmful rebuttal evidence)
- *Doe v. Ayers*, 782 F.3d 425 (9th Cir. 2015) (defendant prejudiced by counsel's failure to investigate and present mitigating evidence including child abuse and neglect, mental illness including PTSD and depression that he self-medicated for, and that defendant was sexually abused while previously incarcerated)
- *Stankewitz v. Wong*, 698 F.3d 1163 (9th Cir. 2012) (counsel failed to conduct adequate mitigation investigation that would have uncovered a traumatic childhood of abuse and neglect, a history of mental illness, and substance abuse combined with lack of sleep prior to the murder)
- *Libberton v. Ryan*, 583 F.3d 1147 (9th Cir. 2009) (counsel failed to adequately investigate and present mitigating evidence, including that the co-defendant instigated the crimes and Libberton was "merely a follower," and that he was seriously physically abused by his father and step-father growing up)
- *Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008) (counsel failed to adequately investigate and present mitigating and mental health evidence, which would have shown that the defendant endured an abusive childhood and was neglected, family history of incest, a serious head injury, and self-medication with drugs and alcohol from childhood)
- *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007) (counsel failed to adequately investigate and present in sentencing the mitigating evidence of defendant's trauma from serving in Vietnam, his long history of mental illness including suicide attempts and psychiatric hospitalizations, and his upbringing in an abusive, unstable family living in extreme poverty)
- *Frierson v. Woodford*, 463 F.3d 982 (9th Cir. 2006) (counsel failed to uncover and present mitigating evidence including extensive history of drug use, organic brain dysfunction, significant head injuries, an IQ of 71, and a learning disability)
- *Hovey v. Ayers*, 458 F.3d 892 (9th Cir. 2006) (counsel ineffective for failing to adequately prepare and present mental health evidence; though the hired psychiatrist testified that defendant had schizophrenia, he had been provided with relevant social history documents which would have significantly bolstered the diagnosis under scrutiny by prosecutors, who portrayed the doctor as uninformed and not credible)
- *Summerlin v. Schriro*, 427 F.3d 623 (9th Cir. 2005) (counsel failed to investigate and present mitigating evidence of a tortured childhood, a diagnosis of paranoid schizophrenia, organic brain damage, and a temporal love seizure disorder, and also failed to investigate and rebut the State's evidence underlying the aggravating factors)

As this partial but lengthy list demonstrates, prematurely having a capital trial under circumstances where the defense has not yet had sufficient time to adequately prepare the mitigation and mental health evidence is highly likely to result in a reversal of either the conviction, death sentence, or both.

V. Undersigned Counsel Requires Additional Time to Adequately Prepare for Mr. Daybell's Capital Trial.

Since the indictment on capital murder charges approximately 16 months ago, counsel's time has been dominated by litigating numerous issues with the indictment process, discovery, the legal authority of prosecutors in this case, and a host of other matters, as well as reviewing voluminous discovery in a case that the prosecution has repeatedly referred to as "particularly complex" due to conspiracy charges, the fact that there are two co-defendants and other alleged conspirators, and that investigation is occurring across jurisdictions for multiple alleged homicides which are alleged to have occurred months apart.

Undersigned counsel has been handling this extremely complex case alone until this point, and is currently seeking qualified co-counsel in accordance with the ABA Guidelines for capital defense as well as the practical necessity of having more than one lawyer in a case this complex. At the current time we have been unable to secure co counsel if and when co-counsel is hired, that attorney will require sufficient time to become well-acquainted with the entire case to ensure decisions are informed and made strategically in accordance with professional norms for capital cases. *See, e.g.*, *Strickland*, 466 U.S. at 690-91 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). Thus, co-counsel will require time to independently review all of the discovery and get up to date on the defense investigation and all of the litigation completed

to date. Counsel will thereafter need sufficient time to consider and analyze legal issues and strategies, and ultimately will require time to litigate issues that arise out of this process. A qualified attorney could not possible complete the required work in the only four remaining months before a January 2023 trial date.

Additionally, the investigation into the merits phase remains ongoing. The prosecution has recently made a request for additional DNA testing, and several discovery items still have not been turned over to the defense. Though the prosecution has no less than five attorneys working on this case—five times the manpower of undersigned counsel—they have not yet complied with their discovery obligations. Defense counsel is entitled to, and indeed required by, the ABA Guidelines to independently examine, with the assistance of qualified experts, every piece of evidence the State intends to use at trial. Thus, the State's delay hinders counsel's ability to complete the necessary investigation prior to the current trial date.

The pre-trial litigation necessary in this case is also far from complete. Death penalty cases typically require hundreds of pre-trial motions, and undersigned counsel has not yet had time to research and litigate issues that are unique to the death penalty due to the ongoing focus on evidentiary issues and other issues specific to the prosecution of this case. As discussed above, it is a fundamental duty of trial counsel to preserve all possible legal issues, particularly ones that bear on the legality or appropriateness of a sentence of death, necessitating the time and opportunity to do so.

Finally, a continuance is necessary because the mitigation investigation cannot possibly be completed in five months. As detailed above, the mitigation investigation includes gathering numerous records generated about the client during the course of his life in addition to records of family members. Capital mitigation investigations generally result in thousands of pages of