Lindsey A. Blake, ISB #7920
Rob Wood, ISB #8229
OFFICE OF THE FREMONT COUNTY
PROSECUTING ATTORNEY
22 W. 1st N.
St. Anthony, ID 83445
Tel: 208-624-4418
Email: prosecutor@co.fremont.id.us

Attorneys for the State

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, vs. CHAD GUY DAYBELL, Defendant.	**CASE NO. CR22-21-1623** **STATE'S OBJECTION AND MEMORANDUM IN RESPONSE TO DEFENDANT'S SECOND MOTION TO SEVER**

Pursuant to Idaho Criminal Rules 8 and 14, the State of Idaho Objects to the Defendant's Motion to Sever based on the following:

FACTUAL AND PROCEDURAL BACKGROUND

On May 24, 2021, a Grand Jury returned a single indictment against the Defendants, Chad Daybell and Lori Vallow Daybell, containing a total of nine criminal charges relating to the murders of Tylee Ryan, JJ Vallow and Tamara Daybell. Specifically, the Indictment charges both Defendants with: One Count of Conspiracy to Commit First-Degree Murder and Grand Theft by Deception wherein Tylee Ryan is the victim; One Count of First-Degree Murder wherein Tylee Ryan is the victim; One Count of Conspiracy to Commit First-Degree Murder and Grand Theft by Deception wherein JJ Vallow is the victim; One Count of First-Degree Murder

wherein JJ Vallow is the victim; and One Count of Conspiracy to Commit First-Degree Murder wherein Tamara Daybell is the victim. In addition, Defendant Lori Vallow Daybell is charged with One Count of Grand Theft wherein the United States Government is the victim due to Vallow Daybell receiving social security funds intended for the care of Tylee Ryan and J.J. Vallow. Defendant Chad Daybell has additional charges of One Count of First-Degree Murder wherein Tamara Daybell is the victim; and Two Counts of Insurance Fraud for the receipt of life insurance proceeds for Tamara Daybell's death.

On June 9, 2021, Defendant Chad Daybell was arraigned in the presence of his counsel on all his charges in the Indictment. Defendant Lori Vallow Daybell was arraigned on April 19, 2022. On August 5, 2021, the State filed its Notice of Intent to Seek the Death Penalty against Defendant Daybell. On May 2, 2022, the State filed its Notice of Intent to Seek the Death Penalty against Defendant Vallow Daybell.

On August 6, 2021, this Court issued an order indicating the cases would be tried in a single trial and recognized that joinder was proper under Idaho Criminal Rule 8. Defendant Chad Daybell filed his initial Motion to Sever on September 7, 2021. That Motion was denied on March 21, 2022. Defendant Daybell filed his Second Motion to Sever on September 27, 2022.

This Court set an initial trial date to begin on November 8, 2021; however, this Court later vacated the original trial dates after receiving Defendant Chad Daybell's signed written waiver of his right to speedy trial on August 20, 2021. This Court also addressed Defendant's Motion for Change of Venue filed on July 21, 2021. The change of venue motion was argued by Counsel for Defendant Chad Daybell and the State on October 5, 2021. In a written order dated October 8, 2021, this Court granted the request and ordered a change of venue of the joint trial to

Ada County; subsequently an order changing venue was entered in CR22-21-1624. On December 2, 2021, a scheduling conference was held, and this matter, along with case CR22-21-1624, was set for a ten (10) week trial beginning on January 9, 2023.[1] Co-Defendant Vallow Daybell initially asserted her right to a speedy trial, and a trial date was set in October of 2022; however, subsequently this Court found good cause to continue her trial date to January 9, 2023 to begin with her Co-Defendant Daybell. Co-Defendant Vallow Daybell's trial is currently stayed, and the January 2023 trial date has been vacated in her respective case number CR22-21-1624. Defendant Daybell has a pending Motion to Continue, wherein he is requesting a new trial date be selected with the trial beginning no sooner than October of 2023. *See Defendant's Motion to Continue, Pg. 4.*

LAW AND ARGUMENT

The State previously filed an Objection and Memorandum in Support of Objection in response to Defendant Daybell's First Motion to Sever. The Defendant makes some of the same arguments in his second motion – simply with more specificity, as well as, adding some additional arguments. The standard and burden under Rule 14 require the same application regarding the determination of prejudice irrespective of the specific argument presented by the Defendant. The Defendant previously did not meet the high burden of establishing prejudice to such a degree that severance of the Defendants is the only option, and he again fails to meet that burden with his Second Motion to Sever. The State incorporates the previous arguments, and provides the following additional argument:[2]

[1] This Court has continually held that while Defendant Chad Daybell and Defendant Lori Vallow Daybell have separate case numbers, this is one case for the purposes of trial.
[2] Some of the same arguments and content from the previous Objection and Memorandum are provided herein as applicable to the specific arguments being made by Defendant Daybell.

I. The Defendants Were Properly Joined in One Indictment Under Idaho Criminal Rule 8.

While the Defendant has not challenged that he and his Co-Defendant Vallow Daybell being properly joined for trial, the State would reiterate under Idaho Criminal Rule 8(b), the Defendants were properly joined for trial and remain properly joined for trial. The Idaho Supreme Court provides, "[j]oinder of two or more defendants is proper if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." *Thumm v. State*, 165 Idaho 405, 413, 447 P.3d 853, 861 (2019). "Joinder under a common scheme or plan theory requires 'two or more crimes *so related to each other* that proof of one tends to establish the other.'" (Emphasis in original) *State v. Anderson*, 487 P.3d 350, 359 (2021), citing to *State v. Nava*, 166 Idaho 884, 891, 465 P.3d 1123, 1130; *State v. Johnson*, 148 Idaho 664, 668, 227 P.3d 918, 922 (2010).

This Court in its August 6, 2021, Order, and at subsequent hearings, has determined that joinder in this case is permissible under I.C.R. 8(b). Furthermore, the Defendant has made no argument or allegation that either the charges or the Defendants were improperly or impermissibly joined. Indeed, there is no evidence to suggest the charges or the Defendants were improperly joined in the single indictment. Instead, the Defendant argues the case(s)[3] should be severed under Idaho Criminal Rule 14 due to prejudice.

II. Severance Under Idaho Criminal Rule 14 is Not Appropriate, or Required, Where Defendant Has Failed to Establish Prejudice.

Idaho Criminal Rule 14 provides as follows:

> "If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in a complaint, indictment or information, the court may order the state to elect between counts, grant separate

[3] This matter has been determined by this Court to be one case for trial with separate case numbers being assigned to each Defendant and separate proceedings being conducted prior to trial.

> trials of counts, grant a severance of defendants, or provide whatever other relief justice requires."

"Actions properly joined under I.C.R. 8(b) may be severed under I.C.R. 14 if it appears that a joint trial would be prejudicial. (Internal Citations Omitted.). *The Defendant has the burden of showing such prejudice*." (Emphasis added). *State v. Gamble,* 146 Idaho 331, 337, 193 P.3d 878, 884 (Ct.App. 2008), citing to *Caudill*, 109 Idaho at 226, 706 P.2d at 460; *Cochran*, 97 Idaho at 74, 539 P.2d at 1002.

"In addressing motions to sever based upon I.C.R. 14, Idaho courts have generally considered three potential sources of prejudice which were identified in *State v. Abel,* 104 Idaho 865, 664 P.2d 772 (1983) as follows: (1) the jury may confuse and cumulate the evidence, and convict the defendant of one or both crimes when it would not convict him of either if it could keep the evidence properly segregated; (2) the defendant may be confounded in presenting defenses, as where he desires to assert his privilege against self-incrimination with respect to one crime but not the other; or (3) the jury may conclude that the defendant is guilty of one crime and then find him guilty of the other because of his criminal disposition. (Internal Citations Omitted). *State v. Wilske,* 158 Idaho 643, 350 P.3d 344, 346 (Ct.App. 2015). Although the analysis set forth by the court was in reference to joinder of multiple counts, the analysis appears applicable to joinder of co-defendants as well.[4]

"'The [United State] Supreme Court has instructed that a district court should grant a Rule 14 severance motion only when there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgement

[4] The Defendant asserts that this Court, by applying this standard, applied the wrong legal standard in denying his First Motion to Sever; however, he fails to provide any support for his assertion or set forth what he perceives to be the correct legal standard.

about guilt or innocence.' *United States v. Feyrer*, 333 F.3d 110, 114 (2d Cir. 2003) (quoting *Zafiro*, 506 U.S. at 539)." *United States Contreras*, 216 F.Supp. 3d 299, 304, 2016 U.S. Dist. LEXIS 151327, 2016 WL 6436664 (2nd Cir. 2016).

The Federal Rules of Criminal Procedure, Rule 14(a) provides the same requirements and relief as Idaho Criminal Rule 14. Federal Rule of Criminal Procedure 14(a) states: "If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires."

"In the federal system, there is a preference for joint trials of co-defendants that have been charged in the same indictment. *Zafiro v. United States*, 506 US. 534, 537, 113 S. Ct. 993, 122 L. Ed. 2d 317 (1993)." *United States v. Moreno*, 618 Fed. Appx. 308, 310, 2015 U.S. App. LEXIS 11773, 2 (9th Cir. 2015).

In *United States v. Contreras,* the Court stated, citing to *Richardson v. Marsh,* 481 U.S. 200 (1987):

> Joint trials "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." Joint trials also "enabl[e] more accurate assessment of relative culpability - advantages which sometimes operate to the defendant's benefit." In addition, joint trials promote an efficient use of the Court's resources, as well as the time and resources of the Government and witnesses. *Cf.id.* (noting "that separate trials require that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying"). And, finally, joint trials prevent gamesmanship, because severing defendants has the effect of "randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand." *Id."* While there is a more bright-line rule provided in the federal system, the same rationale is appropriately applicable to the state system. 216 F. Supp. 3d 299, 303-304.

In a recent decision, the United States District Court for the Central District of California in *United States v. Doran*, reiterated judicial economy and efficiency are paramount

considerations in favoring joinder, and this is so "despite some degree of bias inherent in joint trials." (Internal citations omitted). 2021 U.S. Dist. LEXIS 20854, *8 (C.D. Cal., 2021).

"Case law of the Ninth Circuit Court of Appeals provides that to warrant severance a defendant bears the heavy burden of demonstrating that 'the joint trial was so manifestly prejudicial as to require the trial judge to exercise his discretion [on the motion to sever] in just one way, by ordering a separate trial.'" *United States v. Guirguis*, 2018 U.S. Dist. LEXIS 165661, *4 (D. Haw. 2018), citing to *United States v. Johnson*, 297 F.3d 845, 855 (2002).

Further, "[t]he Ninth Circuit Court of Appeals has provided a four-part test to aid a district court's determination of whether severance is appropriate. The relevant considerations are: (1) whether the jury may reasonably be expected to collate and appraise the individual evidence against each defendant; (2) the judge's diligence in instructing the jury on the limited purposes for which certain evidence may be used; (3) whether the nature of the evidence and legal concepts involved are within the competence of the ordinary juror; and (4) whether [the defendants] could show, with some particularity, a risk that the joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgement about guilt or innocence." *Id.* at *4-5, citing to *United States v. Heine*, 2016 U.S. Dist. LEXIS 32132, 2016 WL 1048895, *2 (D.Or. March 14, 2016); *United States Hernandez-Orellana*, 539 F.3d 994, 1001 (9th Cir. 2008).

"On a Rule 14 motion, '[t]he burden of demonstrating prejudice rests on the [defendant], and is a heavy one.' *Adams*, 581 F.2d at 198. The defendant "must show that 'joinder was so manifestly prejudicial that it outweigh[s] the dominant concern with judicial economy.'" *United States v. Garcia*, 506 F. App. 593, 595 (9th Cir. 2013) (unpublished) (quoting *United States v. Douglass*, 780 F.2d 1472, 1478 (9th Cir.1986)). This burden is especially heavy when a

conspiracy is charged. See *United States v. Cruz*, 127 F.3d 791, 799 (9th Cir. 1997), abrogated on other grounds by *United States v. Jimenez Recio*, 537 U.S. 270, 123 S. Ct. 819, 154 L. Ed. 2d 744 (2003) ("A joint trial was particularly appropriate here because the defendants were charged with conspiracy."). This is so because where a conspiracy is charged, much of the evidence admitted against one defendant would be admissible against the other—even in a separate trial—as proof of the conspiracy." See *Id.* at 8. "Severance is 'necessary where the proof is such that a jury could not be expected to compartmentalize the evidence as it relates to separate defendants.' *Id.* at 468 (quoting *United States v. Jackson*, 549 F.2d 517, 525 (8th Cir.), *cert. denied, 430 U.S 985 (1977))." United States v. Rodgers*, 18 F.3d 1425, 1431-32 (8th Cir. 1994).

The court in *Doran,* determined that even if some evidence would not be admissible against Doran which was admissible against his co-defendants, "'[t]he prejudicial effect of evidence relating to the guilt of co-defendants is generally held to be neutralized by careful instruction by the trial judge.' *United States v. Escalante*, 637 F.2d 1197, 1201 (9th Cir. 1980); see also *United States v. Stinson*, 647 F.3d 1196, 1205 (9th Cir. 2011) (finding that where a "district court uses great diligence in instructing the jury to separate the evidence, severance is unnecessary because the prejudicial effects of the evidence of codefendants are neutralized"); *Fernandez*, 388 F.3d at 1243 ("We have repeatedly held that a district court's careful and frequent limiting instructions to the jury, explaining how and against whom certain evidence may be considered, can reduce or eliminate any possibility of prejudice arising from a joint trial")." *Doran* at 11-12.

The District Court for the District of Hawaii in *United States v. Guirguis* reiterated: "Various remedies short of severance are available to the district court to minimize prejudice to a defendant. If the district court determines that the risk of prejudice cannot be remedied, a

separate trial is required pursuant to Fed. R. Crim. P. 14(a)." 2018 U.S. Dist. LEXIS 165661, *4 (D. Haw. 2018).

"It is well settled that the essential elements of conspiracy are: (1) the existence of an agreement to accomplish an illegal objective, (2) coupled with one or more overt acts in furtherance of the illegal purpose and (3) the requisite intent necessary to commit the underlying substantive offense. *State v. Munhall*, 118 Idaho 602, 606, 798 P.2d 61, 65 (Ct.App. 1990). *State v. Gamble,* 146 Idaho 331, 337, 193 P.3d 878, 884 (Ct.App. 2008).

The Idaho Court of Appeals addressed a request to sever where there was a conspiracy charged in *State v. Blake*, and found:

> "Here, during a hearing for Blake's motion for relief from prejudicial joinder, the district court denied the motion and noted that 'an appropriate and fair trial can be accomplished in a joint trial,' and the 'the benefits of a joint trial in light of the allegations of conspiracy, as well as the need for the same witnesses and evidence, outweighs any concerns raised.' The district court further indicated that any prejudice could, if necessary, be eliminated or limited through a limiting instruction or other remedy."

161 Idaho 33, 35-36, 383 P.3d 712, 714-15 (Ct.App. 2016).

Further, "[d]efendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials. See, *e. g., United States v. Martinez*, 922 F.2d 914, 922 (CA1 1991); *United States v. Manner*, 281 U.S. App. D.C. 89, 98, 887 F.2d 317, 324 (1989), cert. denied, 493 U.S. 1062, 107 L. Ed. 2d 962, 110 S. Ct. 879 (1990). Rules 8(b) and 14 are designed 'to promote economy and efficiency and to avoid a multiplicity of trials, [so long as] these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial.' *Bruton*, 391 U.S. at 131, n. 6 (internal quotation marks omitted). While 'an important element of a fair trial is that a jury consider *only* relevant and competent evidence bearing on the issue of guilt or innocence,' *ibid.* (emphasis added), a fair trial does not include

the right to exclude relevant and competent evidence. A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant." *United States v. Zafiro*, 506 U.S. 534, 540,113 S.Ct. 933, 938 (1993).

"The District Court properly instructed the jury that the Government had 'the burden of proving beyond a reasonable doubt' that each defendant committed the crimes with which he or she was charged. The court then instructed the jury that it must 'give separate consideration to each individual defendant and to each separate charge against him. Each defendant is entitled to have his or her case determined from his or her own conduct and from the evidence [that] may be applicable to him or to her.' In addition, the District Court admonished the jury that opening and closing arguments are not evidence and that it should draw no inferences from a defendant's exercise of the right to silence. These instructions sufficed to cure any possibility of prejudice." *Id.* at 541, citing to *Richardson v. Marsh*, 481 U.S. 200; *Schaffer v. United States*, 362 U.S. 511.

"The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 1709 (1987).

The Supreme Court further lays out that a severance under Rule 14 for co-defendants should be granted by the district court "only if there is serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro* at 539.

The United States Supreme Court in *Zafiro v. United States* provides:

> Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. See *Kotteakos v. United States*, 328 U.S. 750, 774-775, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946). Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice. See *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968). Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. See, *e. g., Tifford v. Wainwright*, 588 F.2d 954 (CA5 1979) *(per curiam)*. The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here. When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but, as we indicated in *Richardson v. Marsh*, less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice. See 481 U.S. at 211. *Zafiro at* 539.

The Defendant fails to state, or provide any support, that a manifest prejudice will result to him if his trial is not severed from his Co-Defendant. In addition, he specifically has not provided any support that any *claimed* prejudice is of such a nature or concern as to outweigh the paramount interests of judicial economy and efficiency especially with his heightened burden in light of the several counts of conspiracy. He further has not provided any support for an argument that severance is the only, or appropriate, remedy over any other potential remedy which this Court may apply.

A. There is No Heightened Standard Applied when Determining Severance in Capital Cases.

The State agrees *Lockett v. Ohio* sets out the standard that, "[t]he concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country." 438 U.S. 586, 602, 98 S.Ct. 2954, 2963 (1978). (Internal Citations Omitted.) However, the Defendant fails to provide any support or authority for his

assertion that a heightened standard is applied to a determination regarding a severance in a capital case.

A Federal Court, citing to United States Supreme Court cases, recently stated: "…[T]he Court will take prophylactic measures to guard against prejudice to individual defendants from the evidence introduced against their codefendants. In particular instructions to the jury that they must consider the evidence against each defendant separately and individually will alleviate the risk of prejudice. *Even in sensitive life-and-death matters, it is presumed that juries will follow the court's instructions and serve as impartial factfinders*. *CSX Transp. V. Hensley*, 556 U.S. 838, 841, 129 S.Ct. 2139, 173 L. Ed. 2n 1184 (2009); *Richardson*, 481 U.S. at 211. In conspiracy cases involving multiple defendants, the preference for joint trials still applies because courts presume that juries are capable of 'compartmentaliz[ing] the evidence against each defendant.' *Ledezma-Cepeda*, 894 F.3d at 690." *United States v. George*, 2019 U.S. Dist. LEXIS 150367, *21-22, 2019 WL 4194526 (E.D. La. 2019). (Emphasis added).

In *United States v. George*, capital co-defendants were attempting to sever their trials from both the other capital defendants and noncapital defendants for both the guilt and penalty phase. *Id.* at *2. There were no heightened standards applied by the Courts in *George* in determining whether or not a severance was required.

In *United States v. Edelin,* a case dealing with capital defendants, a Federal Court found: "[t]he test for severance is whether 'the defendants present conflicting and irreconcilable defenses and there is a danger that the jury will unjustifiably infer that the conflict alone demonstrates that both are guilty. In fact, the doctrine of irreconcilable defenses (mutually antagonistic defenses) is inapplicable where there is 'independent evidence of each defendant's guilt.' Moreover, it is not enough to show the 'presence of some hostility among co-defendants,'

or that the co-defendant strategies are generally antagonistic." *United States v. Edelin,* 118 F.Supp.2d 36, 49-50, 2000 U.S. Dist. LEXIS 14973, *39 (D.D.C., 2000).

"While a court must carefully evaluate the risk of prejudice in joint trials, there is no constitutional requirement that there be a guilt phase severance of properly joined defendants and offenses. *Zafiro*, 506 U.S. at 537; *United States v. Salameh*, 152 F.3d 88 (2nd Cir. 1998). Trial courts must always be mindful of the competing interests at stake. *See United States v. Aiken*, 76 F. Supp. 2d 1346 (S.D. Fla. 1999) (recognizing the courts' duty to balance judicial economy and efficiency with the potential prejudice a defendant faces in a joint trial)." *Id.* at 41.

"In *Zafiro*, the Supreme Court recognized not only that "Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." *Zafiro*, 506 U.S. at 538-39." *Id.*

United States v. Edelin did not apply a heightened test or standard in conducting an analysis as to whether or not severance is required when capital defendants are involved.

B. There Has Been No Evidence to Support a Severance Based on a Claim that the Defendants' Defenses are Mutually Antagonistic.

The United States Supreme Court has provided, "[i]n interpreting Rule 14, the Courts of Appeals frequently have expressed the view that 'mutually antagonistic' or 'irreconcilable' defenses may be so prejudicial in some circumstances as to mandate severance. Notwithstanding such assertions, the courts have reversed relatively few convictions for failure to grant a severance on grounds of mutually antagonistic or irreconcilable defenses. The low rate of reversal may reflect the inability of defendants to prove a risk of prejudice in most cases involving conflicting defenses." *Zafiro* at 538. (Internal Citations Omitted).

Furthermore, "[m]utually antagonistic defenses are not prejudicial *per se.* Moreover, Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion. See, *e. g., United States v. Lane*, 474 U.S. 438, 449, n. 12, 88 L. Ed. 2d 814, 106 S. Ct. 725 (1986); *Opper, supra*, at 95. *Id.* at 538-539.

"We have held that severance should be granted when the defendant 'shows that the core of the co-defendant's defense is so irreconcilable with the core of his own defense that the acceptance of the co-defendant's theory by the jury precludes acquittal of the defendant.'" *United States v. Mayfield*, 189 F.3d 899, 895 (9th Cir. 1999), citing to *United States v. Throckmorton*, 87 F.3d 1069, 1072 (9th Cir. 1996).

"'Mere inconsistency in defense positions is insufficient' to warrant severance. *Tootick*, 952 F.2d at 1081. However, the 'probability of reversible prejudice increases as the defenses move beyond the merely inconsistent to the antagonistic.' *Id.*; *Zafiro*, 506 U.S. at 542 (Stevens, J. concurring in the judgment.) When defendants present mutually exclusive defenses, the jury often cannot 'assess the guilt or innocence of the defendants on an individual or independent basis. *Tootick*, 952 F.2d at 1082. Defendants who accuse each other bring the effect of a second prosecutor into the case with respect to their codefendant…" *Mayfield* at 899-900.

The Court in *Mayfield* determined "Gilbert's defense and Mayfield's defense were mutually exclusive because "the core of the co-defendant's defense is so irreconcilable with the core of [Mayfield's] own defense that the acceptance of the co-defendant's theory by the jury precludes acquittal of the defendant." *Id*. at 900. (Internal Citations Omitted).

"Antagonism between defenses or the desire of one defendant to exculpate himself by inculpating a codefendant, however, is insufficient to require severance. *United States v.*

Sherlock, 962 F.2d 1349, 1363 (9th Cir. 1989), *cert. denied sub nom. Charley v. United States,* 506 U.S. 958, 121 L. Ed. 2d 342, 113 S. Ct. 419 (1992). To be entitled to severance on the basis of mutually antagonistic defenses, a defendant must show that the core of the codefendant's defense is so irreconcilable with the core of his own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant. *Id.*" *United States v. Throckmorton*, 87 F.3d 1069, 1071 (9th Cir. 1996).

In *Throckmorton*, even though one defendant defended on grounds of insufficient evidence and the other defendant defended on the theory that he was acting as a DEA informant, the defenses were not antagonistic. Further, even though the testimony from his codefendant was harmful to Throckmorton, it would have been admissible anyway. *Id.*

"In *United States v. Tootick*, 952 F.2d 1078, 1081 (1991), the Ninth Circuit Court of Appeals explained defenses are mutually exclusive when "'acquittal of one codefendant would necessarily call for the conviction of the other.'" *United States v. Guirguis*, 2018 U.S. Dist. LEXIS 165661, *6, 122 A.F.T.R.2d (RIA) 2018-6239 (D. Haw. 2018). The defendants in *Tootick* had both pointed the finger at the other defendant as having committed the crime. The defenses were found to be mutually antagonistic because in order for the jury to acquit one defendant, they must convict the other defendant. *Id.*

"In deciding whether reversal is required, the defendant must show that joinder 'was so manifestly prejudicial as to require the trial judge to exercise his discretion in but one way, by ordering a separate trial.' *United States v. Ramiriez*, 710 F.2d 535, 546 (9th Cir. 1983) (quoting *United States v. Abushi*, 682 F.2d 1289, 1296 (9th Cir. 1982))." *United States v. Tootick*, 952 F.2d 1078, 1080, 1080-81 (9th Cir. 1991).

"Mere inconsistency in defense positions is insufficient to find codefendants' defenses antagonistic. Inconsistency, alone, seldom produces the type of prejudice that warrants reversal. The probability of reversible prejudice increases as the defenses move beyond the merely inconsistent to the antagonistic." *Tootick* at 1081. (Internal Citations Omitted). "Mutually exclusive defenses are said to exist when acquittal of one codefendant would necessarily call for the conviction of the other. *Adler,* 879 F.2d at 497. 'The prototypical example is a trial in which each of two defendants claims innocence, seeking to prove instead that the other committed the crime.' *United States v. Holcomb,* 797 F.2d 1320, 1324 (5th Cir. 1986). In *United States v. Crawford,* 581 F.2d 489 (5th Cir. 1978) the court found mutually exclusive defenses where defendants, charged with possession of an unregistered firearm, each claimed that the other owned the weapon. *Id.* at 491-92." *Tootick* at 1081.

"Blaming a codefendant does not necessarily rise to the level of an antagonistic defense. In *Heine*, 2016 U.S. Dist. LEXIS 32132, *1." *Guirguis* at *7. "The district court [in *Heine*] found that even though [the defendants] intended to blame one another, their defenses were not mutually antagonistic so as to mandate severance. *Id.* The district court distinguished the facts of the case from the facts of *Tootick*. The Indictment in *Heine* alleged that defendants Heine and Yates acted in concert with other unnamed individuals. The district court stated that unlike the jury in *Tootick*, the jury in a joint trial of Heine and Yates would have flexibility. For example, the jury could find that Yates acted through mistake and negligence, but did not intend to deceive anyone. The defense allowed for a result that did not require either Heine or Yates to be solely responsible for the crimes alleged. Other unnamed individuals could have been responsible for misconduct." *Id*. at *7-8.

In *Guirguis*, the defendants were "charged as conspirators and as individuals in other counts." *Id*. at *8. "Even if Defendant Guirguis blames Defendant Higa, by claiming he lacked knowledge or was ignorant, such a defense does not rise to the level of a mutually antagonistic defense. Justice Stevens' concurrence in *Zafiro* explained that 'dual ignorance defenses do not necessarily translate into 'mutually antagonistic' defenses, as that term is used in reviewing severance motions, because acceptance of one defense does not necessarily preclude acceptance of the other and acquittal of the codefendant.' *Zafiro*, 506 U.S. at 542 (Stevens, J., concurring). Defendant Higa may raise the defense of ignorance or both defendants may blame one another for the alleged crimes, but such blaming does not rise to the level of a mutually antagonistic defense. *Heine*, 2016 U.S. Dist. LEXIS 32132, 2016 WL 1048895, *9. Defendant Higa has failed to meet the burden required to warrant severance based on mutually antagonistic defenses." *Id*. at *8-9.

"While a great disparity of evidence may be sufficient to permit severance in certain cases, the focus is on "whether the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants in light of its volume and limited admissibility." *U.S. v. Gaines*, 563 F.2d 1352, 1355 (9th Cir. 1977) (citation omitted). The risk of prejudice posed by joint trials may be cured by proper jury instruction. *Zafiro*, 506 U.S. at 540-41. Joint trials are particularly appropriate in conspiracy cases." *Guirguis* at *10, citing to *United States v. Ortiz*, 2013 U.S. Dist. LEXIS 147825, 2013 WL 5597145, *1 (N.D. Cal. Oct. 11, 2013); *United States v. Fernandez*, 388 F.3d 1199, 1242 (9th Cir. 2004).

The Idaho Supreme Court in *State v. Gamble* determined the defenses were not antagonistic simply because one defendant was going to take a position of having no knowledge

of the drugs and one defendant was going to take the position that the State couldn't prove its case. 146 Idaho 331, 340, 193 P.3d 878, 887 (Ct.App. 2008).

The Court went on to find, "[n]otably, Gamble's defense did not include the assertion that Runkle knew about the drugs, which would have made it antagonistic to Runkle's defense. *See Caudill*, 109 Idaho at 226, 706 P.2d at 460 (finding defenses were not antagonistic where Defendant A admitted to involvement in the crime but pointed the finger of guilt for the actual murder to Defendant B, who admitted to killing the victim, but denying that he had the requisite intent, or in the alternative, his acts were not premeditated). *Id.*

In *United States v. George*, the capital defendants attempted to sever their trial from the noncapital defendants and vice versa. The capital defendants were also trying to sever their cases from each other. The Court found "each capital defendant here may claim his innocence without mandating the conviction of a codefendant. The capital defendants cite *United States v. Green* to support their antagonistic defense argument, but the circumstances of that case are distinguishable." 2019 U.S. Dist. LEXIS 150367, *18, 2019 WL 4194526 (E.D. La. 2019). (Internal Citations Omitted).

"In *Green*, the district court severed the trials of two capital codefendants because ballistics evidence suggested that there was only *one* shooter who committed a murder in aid of racketeering, creating a 'zero sum game' among the codefendants' mutually exclusive defenses that the other man committed the crime. By contrast, here, the government alleges that all *three* capital defendants shot at Trochez and have equal degrees of culpability. Based on these circumstances, the jury in this case need not disbelieve the core of one defendant's defense in order to believe the core of a codefendant's defense." *Id.* at *18-19.

"Here, the capital defendants have only presented general allegations of conflicting defenses without specifying how the jury's acceptance of one defense precludes the possibility of acquittal of a codefendant. Therefore, at this stage of the proceedings, the Court finds that severance on this basis is not warranted." *Id.* at *19.

Similar to *United States v. George*, there are more than two named coconspirators – meaning if the Defendants blame each other – it doesn't result in a "zero sum game." The Defendant has failed to present adequate argument or case law to support a Court taking the drastic measure of completely severing properly joined defendants, to the contrary, case law clearly supports trying defendants together when their cases are part of a common scheme or plan and particularly where there is a conspiracy. The Defendant has only provided speculation as to what evidence he may present which he believes would be antagonistic to Defendant Vallow Daybell; however, what is purported to be argued and/or introduced does not rise to the level of a true mutually antagonistic defense where the only adequate remedy would be a severance of the Defendants.

C. The Defendant Has Failed to Meet His Burden to Show that Severance is Necessary Based on His Claim that He Cannot Present a Complete Defense.

The Defendant cites to *Holmes v. South Carolina* as support for severing the cases because he asserts he will not be able to present a complete defense if the cases are not severed. His reasoning is flawed.

"Based on the allegations in this case, one of the plainly available defenses would be to demonstrate that Ms. Vallow and her brother, Alex Cox, were responsible for the crimes alleged and that they acted as part of their own conspiracy that did not involve Mr. Daybell. As part of that defense, Mr. Daybell would seek to introduce the prior bad acts of both Ms. Vallow and Mr.

Cox, as well as evidence regarding their relationship and the death of Mr. Cox, and the past statements of Mr. Cox. Ms. Vallow's prior bad acts would bear upon motive, intent, and plan. In particular, Ms. Vallow's alleged involvement in the murder of her ex-husband – who Mr. Cox told police that he had shot – plainly bears upon the issue of whether Ms. Vallow and Mr. Cox had an ongoing conspiracy that preceded the core acts alleged in this case." *See Defendant's Second Motion to Sever, Pgs. 9-10.*

As cited above, "[a]ntagonism between defenses or the desire of one defendant to exculpate himself by inculpating a codefendant, however, is insufficient to require severance. *United States v. Sherlock,* 962 F.2d 1349, 1363 (9th Cir. 1989), *cert. denied sub nom. Charley v. United States,* 506 U.S. 958, 121 L. Ed. 2d 342, 113 S. Ct. 419 (1992). *United States v. Throckmorton*, 87 F.3d 1069, 1072.

"…[W]hile the district court must guard against undue prejudice; it need not protect conspirators from evidence of their confederates' acts in furtherance of their common illegal aim."' *United States v. George* at *22. (Internal Citations Omitted.)

This Court in its Memorandum Decision on Defendant's Motion to Sever stated: "In particular, the Court concludes that the concern of Vallow's charges in another jurisdiction creating prejudice at trial can be cured through motions in limine and appropriate instructions to the jury." *See Memorandum Decision on Defendant's Motion to Sever, dated March 21, 2022, Pg. 5.*

Idaho Rules of Evidence, Rule 801(d)(2)(E) states: (2) Statement by Party-Opponent. The statement is offered against an opposing party and: (E) was made by the party's coconspirator during the furtherance of the conspiracy.

Statements of co-conspirators, in furtherance of a conspiracy, are admissible against all conspirators. "Idaho Rule of Evidence 801(d)(2)(E) excludes from the definition of hearsay a statement by a co-conspirator made during the course and in furtherance of the conspiracy. The scope of the co-conspirator exception is narrow, and the requirements that the co-conspirator's statement be made during the course of and in furtherance of the conspiracy is a prerequisite to admissibility that must be scrupulously observed. *Krulewitch v. United States*, 336 U.S. 440, 443-44, 93 L.Ed. 790, 69 S.Ct. 716 (1949)." *State v. Harris*, 141 Idaho 721, 725, 117 P.3d 135, 139 (Ct. App. 2005).

"Although *Crawford* did not define 'testimonial,' the Court explicitly noted 'statements in furtherance of a conspiracy' as an example of 'statements that by their nature were *not* testimonial.' (Emphasis added). For statements that are *not* testimonial in nature, Confrontation Clause scrutiny need not apply, and the rule of *Ohio v. Roberts*, permits admission of an unavailable witness's statement against a criminal defendant so long as it 'bears adequate indicia of reliability.' This test if met where the declarant is unavailable and the evidence falls within a 'firmly rooted hearsay exception,' or bears 'particularized guarantees of trustworthiness.' The admissibility of co-conspirator statements as nonhearsay qualifies as a 'firmly rooted' hearsay exception under the *Roberts* test." *United States v. Wilson*, 148 Fed.Appx.602, 604-605, 2005 U.S. App. LEXIS 18941, *6-7 (9th Cir., 2005). (Internal Citations Omitted.)

"[A]n out-of-court statement is not hearsay if it is 'offered against an opposing party and … was made by the party's coconspirator during and in furtherance of the conspiracy.'…'[T]he statement of a coconspirator is admissible against the defendant if the government shows by a preponderance of the evidence that [1] a conspiracy existed at the time the statement was made; [2] the defendant had knowledge of, and participated in, the conspiracy; and [3] the statement

was made in furtherance of the conspiracy.'" *State v. Garica,* 2022 U.S. Dist. LEXIS 98958, *2-3 (N.D. Cal. 2022). (Internal Citations Omitted). "To be 'in furtherance of' a conspiracy, 'the statements must further the common objectives of the conspiracy or set in motion transactions that are an integral part of the conspiracy.' '[M]ere conversations between coconspirators' does not qualify as nonhearsay." *United States v. Wilson* at 604. (Internal Citations Omitted).

The introduction of a statement made by a co-conspirator is not an automatic hearsay exception for a co-conspirator because the State is the Party-Opponent – not the other co-conspirators – statements of co-conspirators are admissible as hearsay exceptions against other co-conspirators as introduced by the State. If statements are introduced by the State from a co-conspirator, it may open the door for the Defendant to introduce alleged statements from Alex Cox. However, the Defendant appears to assume that at least some statements – allegedly made by Alex Cox – may be testimonial in nature and would require his Co-Defendant Vallow Daybell to have the right to confront Alex Cox. This reasoning is flawed. The same co-conspirator statements would be admissible against both Defendant Daybell and Defendant Vallow Daybell since they are charged as co-conspirators with Alex Cox regardless of if they are tried together or separately. Further, there are limited testimonial statements made by Alex Cox, and both Defendants have been provided what the State has through discovery. The State is unaware of any testimonial statements made by Alex Cox which would require, or support, a severance of these case(s) for trial.[5]

[5] If the Defendant is aware of any additional testimonial, or other statements allegedly made by Alex Cox, other than those provided by the State, the State has not been provided with these statements. The statements would need to be provided in response to the State's discovery request if the Defendant intends to introduce them at trial.

Defendant Daybell also argues that his Co-Defendant Vallow Daybell has exculpatory testimony for him which she cannot present because it is a joint trial. This reasoning is also flawed.

The Court in *United States v. Edelin* dealt with a similar argument:

> Earl Edelin makes the argument under that he should be allowed to sever his trial from that of Tommy Edelin because he needs the testimony of co-defendant Tommy Edelin. Defendant Earl Edelin must first make the *prima facie* showing required under the factors of *United States v. Ford*, 276 U.S. App. D.C. 315, 870 F.2d 729, 731 (D.C. Cir. 1989). Under *Ford*, Earl Edelin must show that there is a bona fide need for the testimony, what the substance of the desired testimony will be, the exculpatory nature and effect of the testimony, and the likelihood that the co-defendant would in fact testify. *U.S. v. Ford*, 870 F.2d at 731. The Court must then determine the significance of the testimony in relation to the defendant's theory of the case, assess the extent of prejudice caused by the absence of the testimony, give weight to the timeliness of the motion, and consider the effects on judicial administration and economy. *Id.* Addressing each element of *U.S. v. Ford*, it appears that there is a bona fide need for the testimony, co-defendant Tommy Edelin has represented that he will testify, defendant Earl Edelin has disclosed that Tommy Edelin would deny that he solicited the murder of his father, and this testimony might be somewhat exculpatory for Earl Edelin. The prima facie burden of defendant Earl Edelin has been met aside from the burden of proving the likelihood that Tommy Edelin will testify.
>
> Delving beyond the representation that Tommy Edelin will testify, it must be recognized that although co-defendant Tommy Edelin has represented that he will testify that he did not seek to have his father murdered, the likelihood that he will actually testify must be weighed, not only upon the representation made by counsel for Earl Edelin that Tommy Edelin will testify, but also on the likelihood that Tommy Edelin would subject himself to cross-examination when he faces the death penalty, albeit in another trial. The Court cannot engage in flights of fancy where a defendant can force severance of his case by asserting that his co-defendant would testify on his behalf. The reality of the situation is very far from Earl Edelin's claims. In order for Tommy Edelin to testify at his father's trial, he would be subjecting himself to cross-examination. The likelihood that he would even consider doing so before his own case has come to a final judgment and all appeals have been exhausted is infinitesimally small. Even assuming that Tommy Edelin would testify, the Court rules that severance is not warranted when the proposed testimony of Tommy Edelin would be suspect, self-serving, and of potentially insignificant probative value. 118 F. Supp. 2d 36, 44-45.

The Court held "[t]rials cannot be severed solely on the grounds of proposed co-defendant testimony." In making this finding, the Court applied the standard set forth in the Supreme Court case *Richardson v. March*: "'Joint trials play a vital role in the criminal justice system…It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying and randomly favoring the last-tried defendants who have the advantage of knowing the prosecutor's case beforehand." *Id. at 45.*

The Defendant has not even started to meet the requirements set forth in *U.S. v. Ford* regarding any alleged testimony that he believes his Co-Defendant would offer. She is currently facing a potential capital punishment as well, so for the Defendant to assert, he would be able to call her as a witness in a separate proceeding is fraught with the same concerns addressed in *United States v. Edelin.*

The Defendant argues he will not be allowed to present a full defense if the trial is not severed. The courts have clearly established there are other remedies available short of a complete severance, including limiting and clarifying jury instructions. This includes instructions as to the application of specific evidence against the separate Defendants. Further, at this point there have been no evidentiary rulings with regard to the speculation being offered by the Defendant supporting his request for a severance. It is unknown whether the evidence mentioned by the Defendant would be admitted and/or whom the evidence would be admitted against. The Defendant references evidence regarding a statement made by a co-conspirator and presenting a theory or defense that it was his Co-Defendant Vallow Daybell and her brother,

Alex Cox. The Defendant puts forward he believes he would be successful with a 404B request to admit this evidence; however, we have not had a 404B hearing to determine the admission of the evidence and/or whom it would be admitted against. Without more information, this argument falls short of the high burden a defendant has with regard to requesting a complete severance under I.C.R. 14.

D. There is no *Bruton* Issue at this Time.

"*Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L. Ed. 2d 476 (1970), protects a defendant from incriminating out-of-court statements of a co-defendant being used against him in a joint trial where the co-defendant does not take the stand and thereby becomes subject to cross-examination. There, the Supreme Court held that in a joint trial of two defendants named Evans and Bruton, at which Evans did not testify, admission into evidence of Evans's pretrial confession which implicated Bruton constituted prejudicial error. *Bruton*, 391 U.S. at 126. The Court held that introduction of the confession added substantial weight to the prosecution's case in a form that was not subject to cross-examination, thereby violating Bruton's Sixth Amendment right to confrontation. *Id.*" *State v. Gamble*, 146 Idaho 331, 337-38, 193 P.3d 878, 884.

Even if there were a *Bruton* issue, this does not automatically require a complete severance of the trial. In *State v. Beam*, the Idaho Supreme Court upheld a District Court's decision to impanel two juries to hear codefendants' cases. The Idaho Supreme Court looked to the United States Supreme Court and Ninth Circuit for guidance quoting: "[t]he dual jury procedure was employed by the trial court here to avoid prejudice to the two defendants, for reasons of judicial economy, and to avoid the problem of the rule in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 475 (1968). The mere fact that a two-jury procedure was

adopted to avoid the impact of *Bruton* does not defeat its use. *United States v. Sidman*, 470 F.2d 1158 (9th Cir. 1972), *cert. denied, 409 U.S. 1127, 93 S. Ct. 948, 35 L.Ed.2d 260 (1973)."* 109 Idaho 616, 622, 710 P.2d 526, 532 (1985).

When applying *Bruton*, "the calculus changes when confessions that do not name the defendant are at issue. While we continue to apply *Bruton* where we have found that its rationale validly applies, see *Cruz* v. *New York, ante*, p. 186, we decline to extend it further. We hold that the Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 1709 (1987).

In *United States v. Lacey,* the United States District Court for the District of Arizona found that since the defendant failed to provide any statements made by her co-defendants, and there was no indication or evidence that any of her co-defendants had provided a confession implicating her, there was no reason to sever. Further, redaction of any confession or statement which removed "any reference to the Defendant (in addition to a limiting instruction)" could be enough to alleviate any potential prejudice without making a separate trial the only remedy. *United States v. Lacey*, 2020 U.S. Dist. LEXIS 22370, *12 (D. Ariz., 2020).

In addition, the Ninth Circuit in *United States v. Throckmorton* provides: "[a] fair trial does not include the right to exclude relevant and competent evidence. A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant." 87 F.3d 1069, 1072 (9th Cir. 1996).

In *United States v. George*, that Court reiterated, "[s]ignificantly, *Bruton's* protective scope is limited to statements that are 'testimonial' in nature. In *Crawford v. Washington*, the Supreme Court concluded that the Confrontation Clause only applies to 'testimonial' statements; it does not bar the admission of out-of-court statements that are nontestimonial." 2019 U.S. Dist. LEXIS 150367, *10, 2019 WL 4194526. (Internal Citations Omitted). "Accordingly, every circuit court of appeals that has considered the issue has concluded that the *Bruton* doctrine is limited to testimonial statements." *Id.*, citing to *Lucero v. Holland*, 902 F.3d 979, 989 (9th Cir. 2018).

"While the Supreme Court left open the precise definition of a 'testimonial' statement, the Court delineated that it includes, at a minimum, police interrogations and prior testimony at a preliminary hearing, grand jury, or trial. Statements made to individuals who are not 'principally charged with uncovering and prosecuting criminal behavior' are not 'categorically outside the Sixth Amendment,' but they are 'significantly less likely to be testimonial than statements given to law enforcement officers.' In all cases, 'standard rules of hearsay, designed to identify some statements as reliable, will be relevant' to the testimonial inquiry." *Id.* at *10-11. (Internal Citations Omitted).

"Statements are testimonial and, therefore, barred by the Confrontation Clause when their 'primary purpose' is to 'establish or prove past events potentially relevant to later criminal prosecution.'" *Id.* at *11, citing to *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). "'Where no such primary purpose exits, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.'" *Id.* at *12. (Internal Citations Omitted.)

Clearly, Defendant Daybell has not provided any confession, let alone statement, by his Co-Defendant which he believes implicates him, or any concern that she may provide a statement which he will not be allowed to cross-examine her on. Further, even if there were such a statement, case law outlines that other remedies should be, and can be, considered short of a complete severance of the Co-Defendants' trials.

E. The Defendant Fails to Meet his Burden to Show a Severance is Necessary to Allow an Individualized Sentencing Determination or that Capital Cases are Routinely Severed.

The United States Supreme Court, in *Kansas v. Carr* provides:

> Joint proceedings are not only permissible but are often preferable when the joined defendants' criminal conduct arises out of a single chain of events. Joint trial may enable a jury 'to arrive more reliably at its conclusions regarding the guilt or innocence of a particular defendant and to assign fairly the respective responsibilities of each defendant in the sentencing.' That the codefendants might have 'antagonistic' theories of mitigation, does not suffice to overcome Kansas's 'interest in promoting the reliability and consistency of its judicial process.' Limiting instructions, like those used in the Carrs' sentencing proceedings, 'often will suffice to cure any risk of prejudice.' To forbid joinder in capital-sentencing proceedings, would perversely, *increase* the odds of 'wanto[n] and freakis[h]' imposition of death sentences. Better that two defendants who have together committed the same crimes be placed side-by-side to have their fates determined by a single jury." *Kansas v. Carr.* "We] have continued to apply the presumption to instructions regarding mitigating evidence in capital-sentencing proceedings, see, *e.g., Weeks*, 528 U. S., at 234, 120 S. Ct. 727, 145 L. Ed. 2d 727." 577 U.S. 108, 125, 136 S.Ct. 633, 645 (2016)

In *Kansas v. Carr,* the United States Supreme Court evaluated a claim that the co-defendants' rights under the Eighth Amendment to an individualized sentencing had been violated. 577 U.S. 108, 122, 136 S. Ct. 633, 644 (2016). The Kansas Supreme Court had determined that testimony from a sister that one brother was the shooter, and evidence from one co-defendant that he was under the thumb of his corrupt older brother was enough to have required separate sentencing proceedings. *Id.* at 122.

However, the United Supreme Court found, "[w]hatever the merits of the defendants' procedural objections, we will not shoehorn them into the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" "[T]he Eighth Amendment is inapposite when each defendant's claim is, at bottom, that the jury considered evidence that would not have been admitted in a severed proceeding, and that the joint trial clouded the jury's consideration of mitigating evidence like 'mercy.'" "[I]t is the Due Process Clause that wards off the introduction of 'unduly prejudicial' evidence that would 'rende[r] the trial fundamentally unfair.'" *Id.* at 123. (Internal Citations Omitted).

"The test prescribed by *Romano* for a constitution violation attributable to evidence improperly admitted at a capital-sentencing proceeding is whether the evidence 'so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process.' 512 U.S., at 12, 114 S. Ct. 2004, 129 L. Ed. 2d 1." *Id.* at 123-124.

In applying that test the Court found:

> In light of all the evidence presented at the guilt and penalty phases relevant to the jury's sentencing determination, the contention that the admission of mitigating evidence by one brother could have "so infected" the jury's consideration of the other's sentence as to amount to a denial of due process is beyond the pale. To begin with, the court instructed the jury that it "must give separate consideration to each defendant," that each was "entitled to have his sentence decided on the evidence and law which is applicable to him," and that any evidence in the penalty phase "limited to only one defendant should not be considered by you as to the other defendant." App. to Pet. for Cert. in No. 14-450, at 501 (Instr. 3). The court gave defendant-specific instructions for aggravating and mitigating circumstances. *Id.*, at 502-508 (Instrs. 5, 6, 7, and 8). And the court instructed the jury to consider the "individual" or "particular defendant" by using four separate verdict forms for each defendant, one for each murdered occupant of the Birchwood house. *Id.*, at 509 (Instr. 10); App. in No. 14-449 etc., at 461-492. We presume the jury followed these instructions and considered each defendant separately when deciding to impose a sentence of death for each of the brutal murders. *Romano*, *supra*, at 13, 114 S. Ct. 2004, 129 L. Ed. 2d 1. *Id.* at 124.

"While the court must carefully evaluate the risk of prejudice in joint trials, there is no constitutional requirement that there be a guilt phase severance of properly joined defendants and offenses. *Zafiro*, 506 U.S. at 537; *United States v. Salameh*, 152 F.ed 88 (2nd Cir. 1998)." *Edelin* at *9-10.

In *United States v. Catalan-Roman,* the Court stated:

> For a variety of reasons, the current weight of authority remains against severance of multiple defendants even in capital cases. In joint proceedings, a jury 'may be able to arrive more reliably at its conclusion regarding the guilt or innocence of a particular defendant and to assign fairly the respective responsibilities of each defendant in the sentencing. In addition, 'underlying the [government's] interest in a joint trial is a related interest in promoting the reliability and consistency of [the] judicial process, given that the jury obtains a more complete view of all the acts underlying the charges than would be possible in separate trials. *Buchancan v. Kentucky*, 483 U.S. 402, 418, 97 L. Ed. 2d 336, 107 S. Ct. 2906 (1987); *see also United States v. O'Bryant*, 998 F.2d 21, 25 (1st Cir. 1993)('As a rule, persons who are indicted together should be tried together'); *United States v. Villarreal*, 963 F2d 725 (5th Cir. 1992). This Court also finds that the same 'considerations of efficiency and fairness to the Government (and possibly the accused as well) that militate in favor of joint trials of jointly-charged defendants in the guilt phase,… must remain generally in play at the penalty phase.' *See Tipton*, 90 F.3d at 892. 376 F. Supp. 2d 96, 100-101, 2005 U.S. Dist. LEXIS 11494, *11-12 (D.P.R. 2005).

"A 'spillover effect' – whereby the jury imputes the defendant's guilt based on evidence presented against his co-defendant – is an insufficient predicate for a motion to sever.'" A defendant is not entitled to severance just because it would increase his chance of acquittal or because evidence is introduced that is admissible against certain defendants. Broad complaints of the 'volume of evidence, the disparity of evidence between defendants, and a generalized spillover effect' do not warrant severance. Instead the defendant must identify 'specific and compelling' prejudice against him that would result from evidence introduced against his codefendants." *United States v. George*, 2019 U.S. Dist. LEXIS 150367, *20-21. (Internal Citations Omitted).

The Defendant merely asserts that if he chooses to invoke his Fifth Amendment right at a trial in this matter – that could be used against him in a sentencing phase if his Co-Defendant doesn't invoke. The Defendant argues a jury instruction could not correct this. However, the Defendant fails to adequately show there would be a realistic or significant difference between a Defendant invoking his Fifth Amendment right in a separate trial, and then deciding to show remorse or acceptance in a mitigation phase and having a jury instruction to address this versus if a jury instruction were given in a joint trial to the sentencing jury to apply the appropriate standard and evidence to both Defendants. A jury is always instructed during the guilt phase that a Defendant has the right not to testify, and if they choose not to testify it shouldn't be held against them. The Defendant fails to meet his burden in showing the only way to address the potential – not reality – of one Defendant accepting responsibility during the guilt phase, and it having such an impact on the penalty phase is a complete severance of the Codefendants for the guilt and penalty phases.

The Court in *United States v. George* addressed a similar argument and found, "[b]ecause the Court has yet to hear the evidence, and a penalty hearing may not be needed as to any or some of the capital defendants, the Court finds it prudent to rule on the request for individual penalty hearings after the jury reaches a verdict in the guilt phase of the capital defendants' trial." 2019 U.S. Dist. LEXIS 150367, *25.

"Other courts, however, have decided to hold sequential penalty hearings. *See United States v. Ortiz,* 315 F.3d 873 (8th Cir. 2003)(joint trials, sequential penalty hearings); *United States v. Peoples,* 250 F.3d 630 (8th Cir. 2001)(joint trial, sequential penalty hearings); *United States v. Lee,* 274 F.3d 485, 488 (8th Cir. 2001)(joint trials, sequential penalty hearings before the same jury); *United States v. McCullah,* 76 F.3d 1087, 1097 (10th Cir. 1996)(joint trails,

sequential penalty hearings before the same jury that determined guilt); *Taylor,* 293 F.Supp. 2d at 889-900(joint trial, sequential penalty hearings); *United States v. Bin Laden,* 156 F.Supp. 2d 359 (S.D.N.Y. 2001)(sequential sentencing hearings for defendants Al-Owhali and Mohamed); *United States v. Davis,* 904 F.Supp. 554 (E.D. La. 1995)(sequential sentencing hearings), on appeal, *United States v. Causey,* 185 F.3d 407 (5th Cir. 1999)." *United States v. Catalan-Roman*, 376 F. Supp. 2d 96, 104-105, 2005 U.S. Dist. LEXIS 11494, *23-24 (D.P.R., 2005).

The Court in *United States v. Catalan-Roman* stated:

> In *Taylor*, the Court held that although the same jury that determined defendant's guilt should also determine his sentence, the benefits of consecutive sentencing hearings before the same jury outweighed any other consideration including the costs of holding several hearings. Particularly, the Court understood that because co-defendant's counsel would not participate in sequential hearings, the chance that he would turn into co-defendant's prosecutor or that the co-defendant would be faced with evidence of which he did not know of would be minimized. Furthermore, the consecutive hearings would not be extremely repetitive of the aggravating factors alleged, thus the 'additional evidence required to prove these factors at the penalty phase [was] likely to be minimal. There, aside from the mitigating information, the only new information pertained to an aggravating factor applicable only to one of the defendants. The Court found that holding sequential hearings was a 'small price to pay in order to further ensure individualized consideration by the jury of each defendant's punishment." *Id.* at 105.

While various approaches have been adopted, and upheld, regarding the penalty phase in capital cases, it is clear, the burden is still on the Defendant to meet the standard required under I.C.R. 14 and applicable analysis, and that severance is still disfavored if there are other remedies available – including jury instructions or sequential sentencing hearings. The Defendant has not met his burden to establish that a joint sentencing in this matter would result in prejudice which is so severe it mandates a severance of the guilt and penalty phase of the Defendants.

F. The Defendant Has Failed to Meet His Burden to Establish the Fact His Co-Defendant Being a Woman Requires a Severance.

While the Defendant asserts that men are more frequently sentenced to death than women, he fails to establish how a separate trial would affect the outcome of a sentence for the Defendant. The citations provided by the Defendant are not examples of capital co-defendants who were sentenced separately based on their gender. If there is a disparity in the application of the death penalty – it exists separate from joint trials.

G. There is No Prejudice Based on a Delay, or Potential Delay, of Trial.

In the Defendant's First Motion to Sever, he argued he must be tried separate from his Co-Defendant because the proceedings against her were stayed, and he wanted his trial to move forward. The Defendant is now asserting the opposite argument. However, this particular issue has now been resolved since his Co-Defendant's case is currently stayed and the trial date in her case has been vacated. The Defendant currently has a Motion to Continue pending which the State is not opposing – so long as the case(s) remain one for trial.

CONCLUSION

It is clear the courts and case law support joinder of parties to provide for judicial economy and efficiency. Joinder further avoids duplication of evidence, witness testimony, inconsistent verdicts and unfair advantages for either Defendant. This is especially true in cases including charges of conspiracy. It is further clear the courts have established defendant(s), in this case Defendant Chad Daybell, bear a significant burden to establish that such manifest prejudice exists and cannot be overcome with other remedies which may be established by the trial court.

Defendant Daybell fails to provide any supported and/or ripe argument(s) that he will suffer prejudice if his trial is not severed from his Codefendant Vallow Daybell as is required under Rule 14 and case law. Mere conjecture or conclusory statements of perceived prejudice without actual proof or substantive evidence do not justify severance of properly joined defendants or charges.

Wherefore, the State respectfully requests this Court deny the Defendant's Motion to Sever.

Respectfully submitted this 12th day of October 2022.

/s/Lindsey A. Blake
Lindsey A. Blake
Fremont County Prosecuting Attorney

/s/Rob H. Wood
Rob H. Wood
Madison County Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of October, 2022, that a copy of the foregoing Response was hand delivered, emailed, faxed or mailed to the following party as indicated:

John Prior
Law Office of John Prior
429 SW 5th Street, Ste. 110
Meridian, Idaho 83462
john@jpriorlaw.com

- ☐ U.S. First Class Mail
- ☐ Hand Delivered
- ☐ Courthouse Box
- ☐ Facsimile:
- X File & serve
- ☐ Email

R. James Archibald
Attorney for Defendant
1493 North 1070 East
Shelly, Idaho 83274
jimarchibald21@gmail.com

- ☐ U.S. First Class Mail
- ☐ Hand Delivered
- ☐ Courthouse Box
- ☐ Facsimile:
- X File & serve
- ☐ Email

John Kenneth Thomas
Bonneville County Public Defender's Office
605 N. Capital Ave.
Idaho Falls, Idaho 83402
jthomasserve@co.bonneville.id.us

- ☐ U.S. First Class Mail
- ☐ Hand Delivered
- ☐ Courthouse Box
- ☐ Facsimile:
- X File & serve
- ☐ Email

By: Tiffany Mecham
Tiffany Mecham