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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR FREMONT COUNTY

STATE OF IDAHO, Plaintiff, vs. LORI VALLOW DAYBELL, Defendant.	**Case No. CR22-21-1624** **MOTION TO DECLARE IDAHO'S CAPITAL PUNISHMENT SCHEME UNCONSTITUTIONAL**

Come now the attorneys for the Defendant, and move the Court to Declare Idaho's Capital Punishment Scheme Unconstitutional, as follows:

1. The death penalty is a uniquely severe punishment – the ultimate, irreversible act of violence by state against citizen. Furman v. Georgia, 408 U.S. 238 (1972). Because "death is different" from all other punishments, the Eighth Amendment restricts its

use, mandating that it "be reserved for the worst of crimes and limited in its instances of application." Gregg v. Georgia, 428 U.S. 153 (1976); Kennedy v. Louisiana, 554 U.S. 407 (2008). In other words, the death penalty may be imposed only upon the "worst of the worst." Kansas v. Marsh, 548 U.S. 163 (2006).

2. In Narrowing Death Eligibility in Idaho: An Empirical and Constitutional Analysis, 57 Idaho Law Review 559 (2021), Professor Aliza Plener Cover studied and analyzed Idaho's death penalty cases and the capital statutory scheme. She concluded with these constitutional implications:

> Idaho's first-degree murder statute does not meaningfully narrow capital eligibility, because 86-90% of all murder convictions were factually or procedurally first-degree murder. Nor does Idaho's list of aggravating circumstances meaningfully narrow death eligibility, because 93-98% of factual or procedural first-degree murder cases were death-eligible, with at least one aggravating circumstance present. As argued by the petitioner in Hidalgo v. Arizona, such a high rate of death eligibility shows that the capital scheme is failing to genuinely narrow the class of persons eligible for the death penalty, and therefore violates the Eighth Amendment.
>
> Idaho's high rate of death eligibility does not translate into a high rate of capital charging or death sentencing. Indeed, prosecutors formally seek the death penalty only rarely, and a death sentence is even more infrequently imposed. The prosecution filed a notice of intent to seek the death penalty in 21% of factually death-eligible cases in the study, proceeded to a capital trial in 5% of death-eligible cases, and obtained a death verdict in only 3% of death-eligible cases.
>
> The small number of death sentences in Idaho, in isolation, may not present a constitutional problem, for if few people commit crimes that are serious enough to deserve the death penalty under the laws of the state, it is both logical and acceptable that commensurately few people receive it. But because most murderers are eligible for the death penalty, and death is imposed upon only a handful, there is a substantial constitutional argument 1) that the capital scheme fails to fulfill its narrowing function and 2) that the death penalty, when administered, is "cruel and unusual."
>
> It is precisely the combination of broad statutory death eligibility and infrequent death sentencing that the Supreme Court has prohibited since Furman. Justice Douglas called the "discretionary statutes" at issue in that case "pregnant with discrimination." Justice Stewart and White condemned a system where, among all who are death eligible, there is "a capriciously selected random handful upon who the sentence of death has in fact been imposed."
>
> The dramatic disparity between the high death eligibility rate and the low death charging and sentencing rates suggests that the primary reason for the small number of death sentences in Idaho is not legislative guidance about capital eligibility, but

rather prosecutorial discretion. It is entirely appropriate for prosecutors to exercise discretion not to charge death-eligible cases capitally, in light of mitigating circumstances, resource constraints, and the preferences of the victim's family. However, discretionary selectivity by prosecutors cannot satisfy the narrowing requirement. The Supreme Court has specifically required legislative narrowing of capital eligibility – rather than relying on discretionary prosecutorial selection of which death-eligible cases to pursue capitally. Legislative narrowing necessarily involves the identification of objective and generally-applicable constraints; it consists of value judgments about which substantive factors make cases "worse" and more deserving of the ultimate punishment. Legislatures may not constitutionally abdicate their narrowing responsibility to prosecutors. While prosecutorial discretion will always be a part of a capital system, over-reliance on prosecutorial discretion risks inserting arbitrary and capricious factors into the system – including geographic happenstance, resource disparities, and implicit and explicit biases on the lines of race, gender, and ethnicity. Moreover, the high level of death eligibility skews the adversarial system by giving prosecutors a significant tactical advantage, even when they have no intention of actually pursuing the death penalty to verdict. The death penalty becomes a bargaining chip that can pressure a defendant to waive his constitutional rights and plead guilty.

The high rate of death eligibility and low rate of death sentencing also weakens the penological justifications for the death penalty. The U.S. Supreme Court has identified two primary punitive purposes that could justify capital punishment: deterrence and retribution. Unless capital punishment measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment. The infrequency of the death penalty in Idaho diminishes its deterrent value, because potential murderers cannot reasonably expect that they will be put to death if they commit their crime. Moreover, repeated decisions by prosecutors and juries that deterrence and retribution are adequately served through a prison term rather than death suggests that society believes these penological purposes can be adequately achieved through a non-capital outcome. The low rate of usage of the death penalty, despite its wide availability, supports an argument that capital punishment is inconsistent with evolving standards of decency – at least for the vast majority of capital-eligible crimes.

Fifty years after Furman was decided, the death penalty's use in Idaho is being constrained not by reasoned and even-handed legislative judgment, but by prosecutorial discretion. The data gathered by this study – showing a high rate of statutory death eligibility and a low rate of death charging and sentencing – is strong evidence that Idaho's capital punishment scheme, on an aggregate level, does not meet the Eighth Amendment narrowing requirement.

57 Idaho Law Review at 605-607 (citations omitted).

3. The undersigned attorney's experience with homicide cases and death penalty litigation is similar to Professor Cover's study. Excluding this current case of Lori

Vallow Daybell, of the 26 defendants charged with murder that the undersigned has represented, the prosecutor wanted to pursue the death penalty in nine of them. From the nine in which the death penalty was pursued, in only one did the defendant receive the ultimate punishment. The only one was Tim Dunlap, to whom I was assigned for a resentencing some 14 years after his crime. Dunlap had already received the death penalty twice before, once by a judge in Idaho and another by a jury in Ohio. Again, in support of Professor Cover's analysis, I point out that Tim Dunlap is still on death row in Idaho, some 31 years after his crime.

4. The prosecutors in this instant case have not narrowed the death penalty eligibility. The aggravators against Lori Vallow Daybell include allegations of:
    - killing for money, or
    - killing in an especially heinous, atrocious, or cruel manner, manifesting exceptional depravity, or
    - killing in circumstances exhibiting utter disregard for human life, or
    - killing which exhibits a propensity to commit murder which will probably constitute a continuing threat to society.
5. These four alleged aggravators present a pretty broad package of options for a jury to consider the death penalty. The constitutional requirement for "narrowing" is nowhere to be found in this case. Therefore, this Court should declare the death penalty in this case to be unconstitutional, and the case can proceed without the option of the death penalty.

Dated: January 2, 2023

/s/ Jim Archibald
R. James Archibald, Esq.

Certificate of Service

I hereby certify that on this day I served a true and correct copy of this document on the following by the method of delivery indicated:

Lindsey A. Blake, Esq.	efile and serve
Robert H. Wood, Esq.	efile and serve
Dated: January 2, 2023	/s/ Jim Archibald R. James Archibald, Esq.