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

<p>STATE OF IDAHO,  Plaintiff,  vs.  LORI VALLOW DAYBELL,  Defendant.</p>	<p><b>Case No. CR22-21-1624</b></p> <p><b>MOTION IN LIMINE TO EXCLUDE LATE-DISCLOSED EVIDENCE</b></p>
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Comes now the Defendant, through her attorneys, and pursuant to Rule 16, Idaho Criminal Rules, Rule 702, Idaho Rules of Evidence, and the Amended Notice of Trial Setting, Pre-Trial Conference, and Scheduling Order Governing Further Proceedings filed December 27, 2022, moves to prevent the State from presenting all evidence listed in the Thirteenth Supplemental Discovery Disclosure, as follows:

## **LATE-DISCLOSED EVIDENCE**

1. Paragraph 2 of the Court's Scheduling Order states that all discovery must be completed prior to February 27, 2023. On February 27, 2023, at 4:07 pm, the State of Idaho filed a Thirteenth Supplemental Discovery Disclosure. The filing is late and violates the Court order as it wasn't filed prior to February 27, 2023. This is a capital murder case, and heightened scrutiny applies to the government's actions when it seeks to kill a defendant.
  
2. The Thirteenth Supplemental Discovery Disclosure contained a 10 page directory of contents:
  - 702 Disclosures (140 pages)
  - Arizona Certified Documents (25 pages)
  - Astrea – Dr. Green Report (38 pages)
  - Dr. Welner (36 pages)
  - FBI (9 audio files and 3,460 pages)
  - FBI Subfiles (3 audio files and 109 pages)
  - Fremont County (33 audio files and 441 pages)
  - Patctech Report (8 pages)
  - Psychic Essay (76 pages)
  - RPD (3 audio files and 348 pages)
  - Social Security (252 pages)

**The discovery provided late is 4,933 pages and 48 audio files containing over 30 hours of interviews.**

3. Defense counsel and the defendant will not and can not review all of this material prior to the jury trial selection starting in Boise on March 27, 2023. The only remedy available to the Court at this time, since the defendant has maintained her right to a speedy trial, is to prevent the admission of this evidence at trial.

### **FBI REPORTS**

4. Preventing the admission of this late-disclosed evidence at trial would include all of the witnesses identified in the FBI reports. These FBI reports begin with interviews in 2020, three years ago. For example, Audrey Barratario was a friend of the defendant. She pleaded the Fifth Amendment when summoned for the grand jury. The government still listed her as a witness and so the defense reached out to her to see what she was planning to say. She refused to provide any information to the defense. Then, less than 30 days before trial and after the court's discovery cutoff deadline, the defense received the FBI report containing the details of the interview with said witness. Her statements about the defendant are false.
5. If the defense would have received this information in a timely fashion, we could have investigated the matter further. Instead, the defense is hampered and doesn't have the requisite time to provide an effective defense. Most of the interviews from the FBI were over three years ago. Why it took three years to provide these FBI reports to defense counsel cannot be explained in good faith by the government.

**MICHAEL WELNER, M.D.**

6. Among the 4,933 pages of late-disclosed evidence is an opinion from the state's expert, Michael Welner, M.D. He calls it an affidavit although it's not dated and does not meet the definition of an affidavit under Idaho Code 9-1406.
7. The defendant is not presenting a mental health defense at the guilt phase portion of the trial. This has been the subject of multiple hearings and the Court has ruled upon the matter. Defense experts will not present a mental health defense under Idaho Code 18-207 during the guilt phase of the trial.
8. Since the defense will not make defendant's mental health an issue during the guilt phase of the trial, likewise the government can't make it an issue during the guilt phase. However, the government is now trying to say its mental health expert is not really a mental health expert, but is actually a "religious expert" and an "expert on evil-doers."
9. The government's current position regarding defendant's mental health is not well received. The government knows of, and conceded with, her commitment to a mental health facility in the State of Idaho. The government has received and read all of the reports from the treating mental health experts, both in and out of the mental hospital. The government has received and read the mental health reports from the Court's independent mental health expert. All experts who have met with the defendant agree that she suffers from a mental illness in varying degrees. Instead of accepting the mental health evidence for what it is, the government wishes to change the title of their expert from "mental health expert" to "religious expert" and "expert on evil-doers."

10. Rule 702 of the Idaho Rules of Evidence prohibits what the government is attempting to do in this case. The Court should review the CV of the government's expert and find that he has no such expertise in "religious studies" or the "concept of evil." He isn't published in those areas and has not been reviewed by peers in those areas. His testimony would violate the ABA Criminal Justice Standards on Mental Health, because he's opined a canned mental health diagnosis of her without even meeting her, and because she's not presenting a mental health defense during the guilt phase of the trial. In fact, the "concept of evil" doesn't even exist in a psychological setting, as the DSM doesn't recognize it. His testimony would be far more prejudicial than probative. He is not an expert in evil, as there is no such thing.
11. Dr. Welner has not evaluated the defendant and has not requested to evaluate the defendant. It violates a doctor's oath to diagnose someone as not having a mental illness when the doctor hasn't even evaluated the patient. He's not entitled to evaluate her for the guilt phase portion of the trial since the defense experts won't be presenting testimony during the guilt phase. As such, the government's expert cannot render an opinion one way or another that she does not suffer from a mental illness in the guilt phase portion of the upcoming trial.
12. The government wishes to call Welner in its case in chief, as he states in his affidavit. The Court should review his affidavit to confirm his position. The Court must prevent this manifest injustice in this capital murder case. The Court can do this by declaring it was disclosed late, which is true, and/or by stating that the expert is not permitted nor qualified to testify under Rule 702, I.R.E. Since the defense is not going to present expert testimony in the guilt phase of the trial that she is mentally ill, the

government cannot present expert testimony in the guilt phase of the trial that she is not mentally ill.

Dated: March 5, 2023

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

/s/ John Thomas  
John Thomas, Esq.

#### CERTIFICATE OF SERVICE

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

Lindsey Blake, Esq. Efile and serve

Rob Wood, Esq. Efile and serve

Dated: March 5, 2023

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