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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, vs. LORI NORENE VALLOW AKA LORI NORENE DAYBELL, Defendant.	**CASE NO. CR22-21-1624** **STATE'S OBJECTION AND RESPONSE TO DEFENDANT'S MOTION TO DISMISS DEATH PENALTY**

The State of Idaho, by and through the Fremont County Prosecuting Attorney's Office, objects to the Defendant's Motion to Dismiss the Death Penalty based on the fact the motion is premature. A motion to challenge the constitutionality of the imposition of the death penalty isn't ripe until the sentence of death is actually imposed. Notwithstanding, said objection, the State provides the following response:

ARGUMENT

I. The Defendant's Arguments are Not Ripe.

"A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. U.S.*, 523 U.S. 296, 300, 118 S.Ct. 1257, 1259, 140 L.Ed.2d 406 (1998) (internal citations omitted.) "Eighth Amendment

claims of 'cruel and unusual punishment' are not ripe when raised prior to the actual, or immediately pending, imposition of the challenged form of punishment." C*heffer v. Reno*, 55 F.3d 1517, 1523 (11th Cir. 1995). Because the Defendant has not yet been convicted, any challenge to a potential sentence is premature. The Court should accordingly deny the Motion.

II. Media Saturation is Not a Valid Ground to Dismiss the Death Penalty.

The Defendant argues that because of the media coverage in this case, potential jurors may continue to be exposed to prejudice and be biased against her. The Defendant fails to provide any legal support which would require the dismissal of the death penalty based on an unsupported assertion of a possibility. This Court has taken several measures already to limit prejudicial pretrial publicity in this matter.[1] The Defense is not without the ability to address their concerns. The Parties will engage in voir dire examination of the potential jurors which will allow the Defense to flush out their concerns regarding prejudice and bias. If any issues remain during or after the voir dire process, the Defense can address those concerns when they are ripe. To make an overbroad assertion of any prejudice or bias at this juncture is simply premature and not an issue ripe for consideration by this Court.[2]

III. Alleged Discovery Violations by the Government is Not a Valid Reason to Dismiss the Death Penalty.

The Defendant acknowledges the discovery in this case is voluminous; however, the State's reference to the "bulk of the discovery" having been turned over continues to be intentionally misrepresented. Clearly, the State represented the Defendant has had in her

[1] The Defendant filed a motion requesting this Court restrict the media coverage of the trial and pretrial proceedings in this matter. This Court has restricted the media from televising the proceedings, recording the proceedings and/or taking photographs in the courtroom.

[2] Additionally, as will be addressed below, the Defendant should be precluded from attempting to invite error by seeking to create additional media publicity and then argue that the publicity has created bias and/or prejudice against the Defendant.

possession the bulk of the discovery even before the Indictment in this pending matter was handed down.[3] The State has repeatedly represented that due to the significant amount of discovery in this case, the State has gone back through the evidence, and has continued to provide any discovery which has either has been determined to have not been turned over, or where a concern exists it may not have been turned over.[4] The State has always represented the Defendant is entitled to all discovery, and that this is not limited to capital cases. Even if there were a discovery violation, the Defense has provided no authority or legal support that the appropriate remedy would be to dismiss the death penalty.

The Defendant specifically references Idaho Criminal Rule 16(b)(2) regarding written or recorded statements of codefendants. In the State's first discovery response, the State indicated that there may be additional video, jail calls and/or jail visits which would be provided by July 15, 2021. Due to an oversight within the offices, the actual recordings of the Codefendant's jail calls were not provided; however, the Defense was put on notice of their potential existence. While it is unfortunate the jail calls and visits were not specifically identified, the State has provided the details of any calls and/or in-person visits which were reviewed and determined to contain any inculpatory or exculpatory information. The disclosure of the jail calls and in-person visits is an on-going request and will continue to be supplemented.[5] The Defense has been provided copies of all the current jail calls relating the Codefendant, as well as, the in-person

[3] The bulk of the discovery in the pending matter was previously provided in Fremont County Case CR22-20-838.
[4] Some of the more recently produced discovery has been determined to be duplicative, but in an attempt to avoid failure to disclose discovery, the State turned it over.
[5] This includes several in-person visits which were not obtained by the Prosecutor's office until after the discovery deadline of February 27, 2023. However, as the State is reviewing those, any statements which could potentially contain any exculpatory information are still being turned over and the contents relayed to the Defense. In addition, copies of those those additional calls and in-person visit will provided to the Defense.

visits within the State's possession and control. This request will be considered ongoing, so the recordings will continue to be provided to the Defense.

In *State v. Pacheco*, the Idaho Court of Appeals found: "Where an issue of late disclosure of prosecution evidence is presented, the inquiry on appeal is whether the lateness of the disclosure so prejudiced the defendant's preparation or presentation of his defense that he was prevented from receiving a fair trial. The defendant bears the burden of establishing prejudice by showing that there is a reasonable probability that, but for the late disclosure of evidence, the result of the proceedings would have been different." 134 Idaho 367, 370, 2 P.3d 752, 755 (Ct.App. 2000).

Further, the Idaho Court of Appeals in *State v. Van Sickle* determined: "[T]he state is not required to initiate copying of the requested documents or to provide, without further request or court order, a copy of all materials sought. Van Sickle does not contend that the state created any obstacle to his ability to review or copy the requested items." *State v. Van Sickle*, 120 Idaho 99, 101, 813 P.2d 910, 912 (Ct.App. 1991). The State has not created any obstacles to the Defendant reviewing the recorded calls and/or visits or to obtaining a copy of them. Until recently, the specific request for copies of all jail calls and visits was not made – specifically such request was not made until March 3, 2023. Further, the State has accommodated arrangements for the Defense to review discovery materials any time it has been requested.

The Defense again throws out the term *Brady* with nothing to support that assertion. "'The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.' 427 U.S. at 109-110, 96 S.Ct. at 2400." *State v. Aragon*, 107 Idaho 358, 366, 690 P.2d 293, 301 (Ida. 1984). The Court in *Aragon* went on to find:

> The record reflects that Mrs. Brown's statement was hearsay, and she had no personal knowledge of her daughter Teresa hitting her child. Her statement that she would shake the child when it cries was at most cumulative and in no way exculpatory. Her statement that she had called the child abuse center on Teresa before appears to reflect only her own motive to obtain custody of the child. Accordingly, the statement does not establish the materiality necessary to constitute a violation of either the prosecution's constitutional duty to disclose exculpatory information under *United States v. Agurs, supra*, or a violation of I.C.R. 16. Accordingly, appellant was not deprived of a fair trial. *Id.*

In *State v. Cates*, the Idaho Court of Appeals reviewed an allegation of a lack of pretrial disclosure of a Codefendant's presentence report, and determined that any error in the late disclosure of the presentence report was not fundamental. 117 Idaho 90, 94, 785 P.2d 654, 658 (Ct.App. 1989). In *Cates*, the presentence report was not even mentioned in any pretrial discovery, but the codefendant was listed as a potential witness. Further, once the defense was put on notice that the State intended to ask the codefendant about the statements made in the presentence report (which were inculpatory for Cates), the defense did not request a continuance to look at the report or speak to the presentence investigator. *Id.*

Further, in *State v. Phillips*, the Idaho Court of appeals determined that: "[B]ecause the aggregate disclosure did include the witness in question, and because Phillips did not demonstrate any prejudice, we uphold the magistrate's decision that substantial compliance with the rule was sufficient. *See e.g. State v. Marek*, 112 Idaho 860, 736 P.2d 1314 (1987) (lack of showing prejudice from failure to comply with discovery request renders error, if any, harmless)." 117 Idaho 23, 27, 784 P.2d 353, 357 (Ct.App. 1989).

"Pursuant to I.C.R. 16(e)(2), the court is authorized to impose sanctions for discovery violations. See *State v. Marek*, 112 Idaho 860, 868, 736 P.2d 1314, 1322 (1987). The choice of an appropriate sanction for failure to comply with a discovery request is within the discretion of the trial court, and the trial court's exercise of that discretion is beyond the purview of a

reviewing court unless it has been clearly abused. *State v. Matthews,* 124 Idaho 806, 812, 864 P.2d 644, 650 (Ct. App. 1993). *State v.* Cochran, 129 Idaho 944, 949, 935 P.2d 207, 212 (Ct.App. 1997).

In applying this analysis to several discovery violations alleged in *Cochran*, the Court provided, the State should have turned over a written policy, but that the Defendant was not prejudiced by the nondisclosure. *Id.*

Regarding an audio recording that actually did not exist, the Court found "[i]f there was a discovery violation, because Cochran has failed to demonstrate that he was prejudiced by the violation, such error was harmless." *Id.*

"On review of the record, assuming without deciding that the state did commit a discovery violation, Cochran has failed to show how he was prejudiced by this violation because all the charges against B.B. were brought out on cross-examination in front of the jury. Thus, any error on the part of the district court was harmless." *Id.* at 950.

"In light of the fact that there was no marked money to be discovered, and the state never represented in response to discovery that marked money was found on Cochran, we conclude the district court did not err in this regard." *Id.*

There are several factors to consider with the allegations being made by the Defense: First, the State would assert that this discovery has not been disclosed late because the discovery deadline in this case was February 27, 2023.[6] The State complied by including there were recordings of jail calls and in-person visits which had not specifically been requested by the Defense.[7] Furthermore, the Defense was put on notice of the potential existence of the jail

[6] The State incorporates the timeline and argument contained in the State's Objection to the Defendant's Motion in Limine.

[7] The State recognizes the Defense may assert that all written and recorded statements of a Codefendant qualified as a specific request for the jail calls. However, generally I.C.R. 16 qualifies statements as "relevant."

recordings, but has never sought to compel their disclosure until the Motion to Compel which was filed the day after this Motion to Dismiss. Finally, at the request of Defense, the State has turned over the existing jail phone call recordings and in-person visits related to the Codefendant.

If the Court finds the discovery disclosure was late or untimely, the Court can consider the appropriate remedy, but to dismiss the death penalty would be an extreme remedy for which the Defense has provided no support – especially where they have failed to establish any prejudice by receiving such evidence at this juncture.

IV. Capital Punishment is a Constitutionally Available Sentence.

The argument asserted by the Defense is not ripe for consideration, and furthermore, has already been reviewed extensively by the Idaho Supreme Court in *State v. Dunlap* where the Court provided:

> The Eighth Amendment prohibits the imposition of cruel and unusual punishment, which is defined by "evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 311-12, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). Applying the Eighth Amendment, the U.S. Supreme Court has determined that defendants who are mentally retarded or insane may not be sentenced to death. *Atkins*, 536 U.S. at 321; *Ford v. Wainwright*, 477 U.S. 399, 409-10, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986). Albeit in a much different context, the U.S. Supreme Court has recognized that the differences between the mentally retarded and the mentally ill permit states to treat them differently. *See Heller v. Doe*, 509 U.S. 312, 321-22, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). Dunlap candidly acknowledges that the Supreme Court has not addressed the constitutionality of death penalty schemes that permit the execution of mentally ill defendants. However, Dunlap contends that the rationale underlying *Atkins* and *Ford* compels the same conclusion for mentally ill defendants.
>
> It appears that every court that has considered this issue have refused to extend *Atkins* and hold that the Eighth Amendment categorically prohibits execution of the mentally ill. *Dunlap v. Commonwealth*, 2010-SC-000226-MR, 2013 Ky. LEXIS 292, 2013 WL 3121689, at *65 (Ky. June 20, 2013) ("We are not prepared to hold that mentally ill persons are categorically ineligible for the death penalty. . . . A categorical bar, applying equally to persons suffering from paranoid

> schizophrenia and bulimia, would be unwise."); *Malone v. State*, 2013 OK CR 1, 293 P.3d 198, 216 (Okla. Crim. App. 2013) ("Appellant cites no cases from any American jurisdiction that hold that the *Atkins* rule or rationale applies to the mentally ill. . . . We expressly reject that the *Atkins* rule or rationale applies to the mentally ill."); *Simmons v. State*, 105 So. 3d 475, 511 (Fla. 2012) (reiterating rejection of claim "that defendants with mental illness must be treated similarly to those with mental retardation because both conditions result in reduced culpability."); *People v. Castaneda*, 51 Cal. 4th 1292, 127 Cal. Rptr. 3d 200, 254 P.3d 249, 290 (Cal. 2011) (holding that antisocial personality disorder is not analogous to mental retardation or juvenile status for purposes of imposition of the death penalty); *Mays v. State*, 318 S.W.3d 368, 379 (Tex. Crim. App. 2010) (noting absence of authority to support claim that mental illness renders one exempt from execution under the Eighth Amendment); *Lewis v. State*, 279 Ga. 756, 620 S.E.2d 778, 786 (Ga. 2005) (noting defendant failed to "cite any authority that establishes a constitutional prohibition on convicting and sentencing to death a defendant who is competent but mentally ill " and declining to extend the holding of *Atkins*); *State v. Johnson*, 207 S.W.3d 24, 51 (Mo. 2006) (noting that "federal and state courts have refused to extend *Atkins* to mental illness situations"); *State v. Hancock*, 108 Ohio St. 3d 57, 2006 Ohio 160, 840 N.E.2d 1032, 1059-60 (Ohio 2006) (refusing appellant's request "to establish a new, ill-defined category of murderers who would receive a blanket exemption from capital punishment without regard to the individualized balance between aggravation and mitigation in a specific case"); *Franklin v. Bradshaw*, 695 F.3d 439, 455 (6th Cir. 2012) (noting absence of case law extending *Atkins* to prohibit the execution of those with mental illnesses); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006) (rejecting claim that *Atkins* and *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), created a new rule making the execution of mentally ill persons unconstitutional). We join these courts in holding that a defendant's mental illness does not prevent imposition of a capital sentence. 155 Idaho 345, 379-380, 313 P.3d 1, 36-37 (Ida. 2013).

The Defense makes broad assertions regarding the Defendant's mental status. The Defendant in a filing on January 3, 2023 made it unequivocally clear that she does not intend to raise mental health as a defense at trial.[8] Now, in contradiction, to that claim, the Defense is attempting to assert publicly the Defendant suffers from some form of mental illness which has some bearing as to her culpability in the charged offenses. It is interesting the Defense in the same motion claims to have concerns about the pretrial publicity, in this matter creating potential

[8] The State has a pending Motion in Limine requesting the Defense be held to this position during a trial in this matter.

issues regarding the Defendant's right to a fair trial, and yet, in the same filing includes an inflammatory reference that "we don't kill witches anymore in America."

The State has never – at any time – referred to the Defendant in this case as a witch. In addition, the State has serious concerns about the blatant misrepresentations made by the Defense in this motion. The State's proposed expert, Dr. Welner, is a respected forensic psychiatrist who has testified for both the state and defendants previously and whose work is conducted within the boundaries and ethics of the American Psychiatric Association. As such, the State has not provided any expert reports referring to the Defendant as a witch.[9] The Defense's complete mischaracterization of any such expert opinion is clearly an attempt by the Defense to try this case through the media.[10] The appropriate venue for the trials of individuals, including the Defendant, who has been charged with the most egregious offenses, is in a courtroom. The State intends to continue to pursue the litigation of this matter in a courtroom.

V. The Potential Method of Infliction of Death is Not Ripe for Consideration and the Defense Argument is Unsupported.

The Defendant's argument is premature and not supported by any legal authority. The Defendant's argument would not be ripe unless a sentence of death is actually pronounced. There is no evidence which has been presented to a jury to allow them to make an independent determination regarding, whether or not the Defendant has mental health issues, and whether or

[9] The State incorporates the references to Dr. Welner's Report made in the State's Objection to the Defendant's Motion in Limine filed on March 13, 2023.

[10] The Defendant appears to be attempting to invite error, or its equivalent, by creating an argument the jury pool has been contaminated. The Defendant claims to have concerns about the continued media coverage in this matter, and the potential impact it may have on selecting a jury that isn't biased or prejudiced against the Defendant. However, in the same filing they state: "This past week the government submitted an opinion that maybe the defendant wasn't mentally ill, but just evil. Even if the government's new opinion of the defendant has some believers that the defendant is just evil, we don't kill witches anymore in America." *See Defendant's Motion to Dismiss Death Penalty*, Pg. 3. The Defendant – while completely misstating – is referencing an opinion which has not been publicly disclosed, and also making very extreme statements about the Defendant. The Defendant cannot attempt to garner more media attention, and especially negative portrayals of herself – and then claim prejudice because of the media attention.

not the existence or lack thereof, will have any bearing on the potential punishment which may be imposed – assuming there is a finding of guilt and an aggravating factor. Again, the Defendant has indicated, and it has been reiterated multiple times, the Defense does not intend to introduce any evidence of, or argue anything regarding mental health, in the guilt phase of the trial.[11] Wherefore, the issue of mental health will not even be broached by Defense until this matter is presented to a jury for the penalty phase – assuming there is a finding of guilt and an aggravator.

Idaho Code 19-2716 provides*:* "The punishment of death shall be inflicted by continuous, intravenous administration of a lethal quantity of a substance or substances approved by the director of the Idaho department of correction until death is pronounced by a coroner or a deputy coroner. The director of the Idaho department of correction shall determine the procedures to be used in any execution. This act shall apply to all executions carried out on and after the effective date of this enactment, irrespective of the date sentence was imposed."

The Defense is merely attempting to make unsupported arguments regarding the potential method in which a capital sentence may – or would – be carried out regarding the Defendant – assuming she is given a capital sentence. The Defense makes a misplaced and premature conclusion regarding any potential change in the law. There is no way to foresee what any change in the statute would provide; however, the stronger presumption would be that similar language would be included which would render whatever the current controlling statute is based on the date the execution is carried out – not when any sentence is imposed. However, if the Defense is correct in their analysis, then their request to dismiss the death penalty is irrelevant – if the sentence would never be carried out. The Defendant's argument fails from all angles.

Wherefore, the State respectfully requests the Defendant's Motion to Dismiss the Death Penalty be denied.

Respectfully submitted this 13th day of March 2023.

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

/s/Rob H. Wood
Rob H. Wood
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of March, 2023, that a copy of the foregoing document was served as follows:

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By: /s/Lindsey A. Blake