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

STATE OF IDAHO,)
)
Plaintiff,)
)
vs.)
)
LORI VALLOW DAYBELL,)
)
)
Defendant.)
)
)
_____)

Case No. CR22-21-1624

**MOTION TO REMAND INDICTMENT
TO THE GRAND JURY FOR FURTHER
PROCEEDINGS**

COMES NOW the Defendant, Lori Vallow Daybell, by and through her attorneys of record, and hereby requests that the court remand the indictment to the grand jury for further proceedings. As it is currently worded, Counts 1 and 3 of the indictment will be confusing to the trial jury, and the crimes as currently stated do not meet the elements of a single crime, but in

fact lumps two crimes into one allegation making it a general felony for possible punishment purposes at sentencing.

Defendant has been charged with Conspiracy to Commit First Degree Murder and Grand Theft by Deception in Counts 1 and 3 of the indictment; Count 1 as to Tylee Ryan, and Count 3 as to JJ Vallow. The Defendant sees each of these as two separate allegations and two separate acts which, if proven, caused two separate crimes. The allegations allege the single crime of Conspiracy to Commit First Degree Murder and Grand Theft by Deception. It references five separate statutes, those being Idaho Code §§ 18-1701, 18-4003(a), 18-2403(1), 18-2403(4)(a), and 18-2407(1)(b)(3). These statutes do not overlap in their elements. To lump First Degree Murder and Grand Theft by Deception into one charge is contrary to statutory construction, contrary to Idaho Criminal Rule 8(a), as well as being confusing to the jury to try to navigate the elements.

It is unclear as to whether or not the grand jury properly found that each element of Count 1 and Count 3 of the indictment was valid, as the grand jury deliberation is secret, and no one but the grand jurors themselves know if the elements satisfied Idaho Criminal Rule 6.5(b), which states that there may be two or more separate charges in a grand jury indictment, but *each must be voted on separately by the grand jury*. (emphasis added).

Furthermore, there is no statutory punishment for this allegation. While there are statutory punishments for Conspiracy to Commit First Degree Murder and separate and distinct punishments for Grand Theft by Deception, there is no statutory punishment for the combination.

Idaho Code § 19-1409(2) states that an indictment must contain a statement of the acts of the offense . . . “in such a manner as to enable a person of common understanding to what is

intended.” Idaho Code § 19-411(2) and (3) states that the indictment must be direct and certain as it regards the offense charged and the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. The elements of Conspiracy to Commit First Degree Murder and Grand Theft by Deception combine two separate and distinct crimes into one; or in the alternative, the grand jury may be alleging a Conspiracy to Commit Grand Theft by Deception, and a separate crime of Conspiracy to Commit First Degree Murder. Idaho Code § 19-1432 states that while two or more offenses may be charged in the same indictment, they must be charged as separate counts. The Defense is unclear if the grand jury is alleging a Conspiracy to Commit Grand Theft by Deception while in the commission of the First-Degree Murder. If that is the case the Defendant would ask that the court strike the First-Degree Murder language as it is not an element of the crime of Grand Theft, and vice versa. If, in the alternative, the indictment contemplates a Conspiracy to Commit First Degree Murder and while doing so also committed Grand Theft, those crimes are separate and distinct, and would need to be separated into two separate and distinct charges pursuant to Idaho Criminal Rule 8(a). It is unclear to the defendant as to what the grand jury is alleging. If the Defense cannot figure out the charges, it is highly unlikely that a trial jury would be able to either.

While Idaho Code § 19-1420 and the Idaho Criminal Rule 7(e) allows for an amendment to an indictment, it is unclear how this will play out should the court not remand the indictment for further proceedings. It seems to conflict with the Fifth Amendment to the U.S. Constitution. The general rule is that indictments cannot be amended in substance. "An amendment to an indictment occurs when the charging terms of an indictment are altered." *United States v. Cancelliere*, 69 F.3d 1116, 1121 (11th Cir. 1995). This follows from the fundamental distinction between the information and the indictment which must be returned by a grand jury. If the

indictment could be changed by the court or by the prosecutor, then it would no longer be the indictment returned by the grand jury.

Indeed, in *Russell v. United States*, 369 U.S. 749, 769 (1962), the Court pointed out that a consequence of amending the indictment is that the defendant "could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." "Thus, the Fifth Amendment forbids amendment of an indictment by the Court, whether actual or constructive." *United States v. Wacker*, 72 F.3d 1453, 1474 (10th Cir. 1995), *petition for cert. filed*, (Jun. 10, 1996) (No. 95-9284).

The United States Supreme Court, reviewing the history of the grand jury, quotes Lord Mansfield on the subject:

[T]here is a great difference between amending indictments and amending informations.

Indictments are found upon the oaths of a jury, and ought only to be amended by themselves; but informations are as declarations in the king's suit. An officer of the Crown has the right of framing them originally; he may, with leave, amend in like manner, as any plaintiff may do.

Ex parte Bain, 121 U.S. 1, 6 (1887). *Cf. United States v. Miller*, 105 S.Ct. 1811 (1985) (it does not constitute an unconstitutional amendment to an indictment to drop those allegations which are unnecessary to an offense that is clearly contained within it).

In one case, *Stirone v. United States*, 361 U.S. 212 (1960), the defendant was convicted of unlawful interference with interstate commerce in violation of the Hobbs Act, 18 U.S.C. § 1951. The indictment charged that the victim's contract was to supply ready-mix concrete from his Pennsylvania plant to be used in the erection of a steel mill in Allenport, Pennsylvania.

Performance of the contract involved, according to the indictment, shipment of sand from

various points in the United States to the victim's ready-mix concrete plant. The trial court permitted the government to offer evidence of the effect upon interstate commerce not only of the sand thus brought into Pennsylvania but also the interstate shipment of steel from the steel mill to be constructed from the ready-mix concrete.

The United States Supreme Court reversed the defendant's conviction on the ground that he was convicted of a different crime from that charged, in violation of his Fifth Amendment right to be indicted by a grand jury:

The grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete. . . . Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. *Stirone*, at 217.

If the Court would rather strike the language of either the First-Degree Murder charge or the Grand Theft by Deception in each count, the defendant would not object. An amendment for the excising of surplusage that has the effect of narrowing a defendant's liability without changing the meaning of the charge as it was presented to the grand jury is permissible. In *United States v. Whitman*, 665 F.2d 313 (10th Cir. 1981), the court held it was proper for the government to strike the references to overvaluation of property in an 18 U.S.C. § 1014 count alleging false statements to a federally insured bank. A similar deletion was approved in *United States v. Ramirez*, 670 F.2d 27 (5th Cir. 1982), even though the defendant's theory of defense was thereby altered.

Lastly, should the court not choose to remand the indictment or to strike the language in the allegations in Counts 1 and Count 3, the Defense would ask that the court make a ruling which would be consistent with Idaho Code as to punishment, and that the charges in Count 1 and Count 3 be declared punishable pursuant to Idaho Code §18-112 as a felony not otherwise prescribed in the Idaho Code and that the punishment shall be a maximum possible punishment is imprisonment in the state prison for a term not to exceed five (5) years, or by a fine not to exceed fifty thousand dollars (\$50,000) or both such fine and imprisonment.

For these reasons, and in the interest of justice, the Defendant respectfully requests that the indictment be returned to the grand jury for further proceedings consistent with the severance of the charges in Counts 1 and 3 of the indictment, or in the alternative the court strike language as to either the Grand Theft or the First-Degree Murder in each count.

Dated: July 12, 2022.

_____/s/_____
R. James Archibald

_____/s/_____
John Thomas

