R. James Archibald
Attorney at Law
Idaho State Bar No 4445
1493 North 1070 East
Shelley, Idaho 83274
Telephone (208) 317-2908
Email: jimarchibald21@gmail.com

John Thomas
Attorney at Law
Idaho State Bar No. 6727
605 N. Capital Avenue
Idaho Falls, ID 83402
(208) 529-1350 ext. 1105
Email: jthomas@co.bonneville.id.us

Attorneys for Defendant

THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF FREMONT

STATE OF IDAHO, Plaintiff, v. LORI VALLOW DAYBELL, Defendant.	Case No.: CR22-21-1624 MOTION TO REMAND TO GRAND JURY FOR PROBABLE CAUSE DETERMINATION AS TO ALLEGED AGGRAVATING FACTORS

Comes now the Defendant, Lori Vallow Daybell, by and through counsel, and moves this Court to remand the case to the grand jury to hold a hearing on the statutory aggravating factors alleged by the prosecution in this case, as follows:

1. Mrs. Daybell is charged by a grand jury with conspiracy or aiding and abetting in three separate murders.

2. A grand jury received evidence and returned an indictment on May 24, 2021.

3. In the Notice of Intent to Seek Death Penalty, filed on May 2, 2022, the prosecution alleged the following aggravating circumstances:

A. 19-2515(9)(d): Murders were committed for remuneration.

B. 19-2515(9)(e): Murders were especially heinous, atrocious or cruel, manifesting exceptional depravity.

C. 19-2515(9)(f): By the murders, or circumstances surrounding their commission, the defendant exhibited utter disregard for human life.

D. 19-2515(9)(i): The defendant, by her conduct, whether such conduct was before, during or after the commission of the murders at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

4. A criminal defendant in Idaho is entitled to a probable cause determination prior to trial. *See* Idaho Const. § 8; I.C. § 19-804; I.C.R. Rule 5.1. *See also State v. Edmonson*, 113 Idaho 230, 232 (1987) ("the prosecutor can use either a grand jury proceeding or a preliminary hearing before an impartial magistrate to initiate criminal proceedings").

5. When a prosecutor charges a crime via information rather than a grand jury, an accused is entitled to a preliminary hearing under both Idaho law and the federal constitution. *State v. Edmonson*, 113 Idaho 230, 232 (1987); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (defendants charged by information are constitutionally entitled to a timely judicial determination of probable cause).

6. Just as Mrs. Daybell is entitled to a grand jury finding of probable cause on what charges are brought against her, she is likewise entitled to a grand jury finding of probable cause on each alleged statutory aggravating factor. Pursuant to well-established legal principles, as explained below, a statutory aggravating factor is the functional equivalent of an element of the offense that the prosecution must prove to the jury beyond a reasonable doubt.

7. Pursuant to the federal constitution, "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by

proof beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (quoting *United States v. Jones*, 526 U.S. 227, 252-53 (Stevens, J., concurring)). *See also Alleyne v. United States*, 570 U.S. 99, 102 (2013) ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt.").

8. In *Ring v. Arizona*, 536 U.S. 584 (2002), the United States Supreme Court held that "because Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury." *Id.* at 609 (internal quotations and citations omitted).

9. Under *Ring*, the death-eligibility determination is thus the equivalent of an element of the offense. As the Supreme Court later explained in *Schriro v. Summerlin*, 542 U.S. 348 (2004):

> *Ring* held that, *because* Arizona's statutory aggravators restricted (as a matter of state law) the class of death-eligible defendants, those aggravators *effectively were* elements for federal constitutional purposes, and so were subject to the procedural requirements the Constitution attaches to trial of elements.

Id. at 354 (emphasis in original).

10. The Idaho Supreme Court has similarly held that "the effect of *Ring* was to convert statutory aggravating circumstances relevant to sentencing into 'the functional equivalent of an element of a greater offense,' which was to be proved to a jury beyond a reasonable doubt." *State v. Shackelford*, 150 Idaho 355, 387 (2010). Thus, post-*Ring*, Idaho's statute mandating judge-sentencing in death penalty cases was rendered unconstitutional. *Id.*

11. In other words, because the components of the death-eligibility determination operate as the functional equivalent of elements of a greater offense, the constitutional requirements applicable to elements of an offense apply, such as the requirement that the government prove each element beyond a reasonable doubt. *See, e.g., Mullaney v. Wilbur*, 421

U.S. 684 (1975); *In re Winship*, 397 U.S. 358, 364 (1970) ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). It is also required by statute in Idaho that the prosecution prove any aggravating circumstances beyond a reasonable doubt. *See* I.C. § 18-4004.

12. A defendant who is convicted of first-degree murder in Idaho is not eligible for a death sentence after a conviction; [*Booth v. State*, 151 Idaho 612, 620 (2011) (explaining Idaho statutory scheme)] rather, the statutory scheme mandates that a defendant is only eligible for the death penalty if the state seeks the death penalty pre-trial, the defendant is convicted of first-degree murder, and a special sentencing proceeding is held during which the jury determines that at least one statutory aggravating circumstance has been proven by the state beyond a reasonable doubt. *See* I.C. § 19–2515(9) ("the following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed . . ."); *see also Booth*, *supra*, at 620. Only after a statutory aggravating circumstance is found by the jury to exist beyond a reasonable doubt can the jury consider whether or not a sentence of death is appropriate by weighing the aggravating and mitigating circumstances. *See Id.* If no aggravating circumstances are proven beyond a reasonable doubt, the defendant is not subject to the death penalty. *Id.* at 620. In fact, if no aggravating circumstances exist beyond a reasonable doubt, the defendant is not only *not* subject to the death penalty, but is also not subject to a mandatory fixed life sentence. *Id.* ("Under the statutory scheme, the court is only required to impose a fixed life sentence when (1) the State has filed a notice of intent to seek the death penalty; (2) the State seeks the death penalty; (3) the defendant is convicted of, or pleads guilty to, first-degree murder; (4) a special sentencing proceeding is held during which the jury, or the court if a jury is waived, determines that at least one statutory

aggravating circumstance has been proven beyond a reasonable doubt; and (5) after weighing any mitigating evidence against the statutory aggravating circumstances, the jury, or the court if a jury is waived, finds that imposition of the death penalty is unjust. . . if Defendant went to trial and was convicted of first-degree murder, he would have been subject to an indeterminate life sentence with at least ten years fixed, but not a mandatory fixed life sentence").

13. Therefore, because a defendant would not otherwise be subject to the death penalty or even to a mandatory fixed life sentence without the existence of an aggravating factor, the aggravating factors in Idaho's statute serve as the functional equivalent of elements of a greater offense.

14. Because the statutory aggravating factors alleged by the prosecution are the functional equivalent of elements of the offense, and because they alone subject Mrs. Daybell to the potential punishment of death, she is entitled to a probable cause determination on each of them by the grand jury.

15. A determination by the grand jury is necessary to ensure that the prosecution is not attempting to overcharge aggravators in this case.

16. There are also legitimate questions about whether the aggravating factors presently alleged by the prosecution apply to Mrs. Daybell under the facts of this case, especially where the prosecution is aware of her vast mental health issues.

17. It is highly questionable whether the "utter disregard for human life" aggravator applies to Mrs Daybell giving her mental health issues. In *Arave v. Creech*, 507 U.S. 463 (1993), the United States Supreme Court upheld the constitutionality of this aggravator based on the Idaho Supreme Court's limiting construction in *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981), which provided that "the utter disregard for human life phrase is meant to be reflective of

acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." 102 Idaho at 418-19. In concluding that this limiting construction satisfied the Eighth Amendment's narrowing requirement, the United States Supreme Court specifically noted:

> We acknowledge that, even within these broad categories, the word "pitiless," standing alone, might not narrow the class of defendants eligible for the death penalty. A sentencing judge might conclude that every first-degree murderer is "pitiless," because it is difficult to imagine how a person with any mercy or compassion could kill another human being without justification. Given the statutory scheme, however, we believe that a sentencing judge reasonably could find that not all Idaho capital defendants are "cold-blooded." That is because some within the broad class of first-degree murderers *do* exhibit feeling. Some, for example, kill with anger, jealousy, revenge, or a variety of other emotions**.** In *Walton* we held that Arizona could treat capital defendants who take pleasure in killing as more deserving of the death penalty than those who do not. Idaho similarly has identified the subclass of defendants who kill without feeling or sympathy as more deserving of death**.** By doing so, it has narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed.

Id. at 475–76.

18. For similar reasons, it is questionable at best whether the "propensity" aggravator applies to Mrs. Daybell. In *State v. Hall*, 419 P.3d 1042 (Idaho 2018), the Supreme Court of Idaho recently reaffirmed:

> [I]t cannot be asserted that the "propensity" circumstance could conceivably be applied to every murderer coming before a court in this state. We would construe "propensity" to exclude, for example, a person who has no inclination to kill but in an episode of rage, such as during an emotional family or lover's quarrel, commits the offense of murder**.** We would doubt that most of those convicted of murder would again commit murder, and rather we construe the "propensity" language to specify that person who is a willing, predisposed killer, a killer who tends toward destroying the life of another, one who kills with less than the normal amount of provocation. We would hold that propensity assumes a proclivity, a

> susceptibility, and even an affinity toward committing the act of murder.

Id. at 1085 (quoting *State v. Creech*, 105 Idaho 362, 370, 670 P.2d 463, 471 (1983)).

19. Clearly, the prosecution is not entitled to simply allege any statutory aggravating circumstance it desires and proceed to trial on such a theory regardless of the facts or evidence.

20. A determination by the grand jury as to whether the prosecution can establish that probable cause exists to support each of these aggravating factors is necessary to protect the constitutional right to due process and a fair trial. If none of the aggravating factors alleged can meet a probable cause threshold, Mrs. Daybell will be legally ineligible for the death penalty due to the fact that no aggravating factors can be proven beyond a reasonable doubt. There are myriad reasons why it is constitutionally impermissible to subject a defendant who is not eligible for the death penalty to a capital proceeding, including the fact that such a defendant should not be tried by a conviction-prone, death-qualified jury, which would violate her right to a fair trial by an impartial jury protected by the Fifth, Sixth, and Fourteenth Amendments and article I, sections 1, 7 and 13 of the Idaho Constitution, as well as her right to be free from cruel and unusual punishment protected by the Eighth Amendment and article I, section 6 of the Idaho Constitution and her right to equal protection under the law.

21. Moreover, conducting *voir dire* about statutory aggravating factors that lack probable cause (which counsel will have to do, unless the Court remands the case to the grand jury) would improperly expose the jury to information it should not consider when resolving Mrs. Daybell's guilt or nonguilt for the charged offenses and determining the appropriate sentence for her should this case reach a sentencing phase. Such improper exposure would bias the jury against her and violate her state and federal constitutional rights to a fair trial by an impartial jury, and to be free from cruel and unusual punishment. *See, e.g., State v. Gross*, 146 Idaho 15, 21 (Ct. App.

2008) (defendant's right to fair trial was violated by prosecutor's numerous improper comments, as such conduct was "calculated to inflame the minds of jurors and arouse prejudice or passion against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence"); U.S. Const. amends. V, VI, VIII, XIV; Id. Const. art. I, secs. 6, 7, and 13.

22. In addition to the constitutional reasons why Mrs. Daybell is entitled to a probable cause determination by the grand jury on each of the statutory aggravating factors alleged by the prosecution, a probable cause determination will also greatly serve the goal of judicial efficiency and economy. If it is determined that any of the aggravating factors are not supported by probable cause, it saves both the prosecution and the defense from preparing and presenting evidence of such at any potential sentencing hearing. If the grand jury determines that none of the statutory aggravating factors are supported by probable cause, Mrs. Daybell will no longer be subject to the death penalty and significant resources will be spared, both in investigation and preparation pre-trial and at trial itself, particularly because there will not be a specialized sentencing proceeding in front of a jury. *See* I.C. § 19–2515(5).

23. A probable cause determination by the grand jury is an efficient and simple means for this Court to ensure that there is adequate evidence to justify this case proceeding with a possible penalty trial in the future. It will also, like all grand jury proceedings, serve as a check on the State's otherwise unmitigated power to charge and, thus, overcharge individuals with offenses to which there is not enough evidence to support, and will provide the prosecution with a more realistic assessment of whether it is prudent to continue to seek the death penalty against Mrs. Daybell.

24. It is beyond dispute that the "heightened standard of reliability" applies to the capital sentencing proceedings in this case. *See, e.g.*, *Spaziano v. Florida*, 468 U.S. 447, 456 (1984), *overruled on other grounds by Hurst v. Florida*, 136 S.Ct. 616 (2016); *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (risk of unreliable conviction "cannot be tolerated" in case where defendant's life is at stake); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *People v. Young*, 814 P.2d 834, 846 (Colo. 1991); *People v. Rodriguez*, 786 P.2d 1079 (Colo. 1989).

25. Mrs. Daybell files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Idaho Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article I, sections 6, 7, 8, and 13 of the Idaho Constitution.

Dated: July 12, 2022

_/s/_____
R. James Archibald, Esq.

_/s/_____
John Thomas, Esq.

Certificate of Service

I certify that on this date I served a copy of the attached to:

Lindsey Blake, Esq.	Efile and serve
Robert Wood, Esq.	Efile and serve
Rachel Smith, Esq	Email
John Thomas, Esq.	Efile and serve
John Prior, Esq.	Email

Dated: July 12, 2022

_/s/_____
R. James Archibald, Esq.