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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, v. LORI NORENE VALLOW AKA LORI NORENE DAYBELL, Defendant.	Case No.: CR22-21-1624 **RESPONSE TO DECLARED MOTION(S) RE: (1) MOTION FOR STATE TO DISCLOSE BRADY VIOLATIONS DISCLOSURES (2) MOTION FOR CRIMINAL DEPOSITIONS (4) MOTION FOR OUT OF STATE SUBPOENA(S) (4) MOTION TO DISQUALIFY IDAHO DEPARTMENT OF HEALTH AND WELFARE**

The State of Idaho hereby responds and objects to Defense Counsel Mark Means'[1] Declared Motion(s) Re: (1) Motion for State to Disclose Brady Violations Disclosures (2) Motion for Criminal Deposition(s) (3) Motion for Out of State Subpoena(s) (4) Motion to disqualify Idaho Department of Health and Welfare, hereinafter "Declared Motion." The State's response is based on following grounds and argument:

[1] While it is customary to refer to the defendant and their attorney as "the Defense", it would be inappropriate in this response to do so. The Defendant Lori Vallow/Daybell is currently deemed incompetent, and a stay exists in her case. She is also co-represented by death penalty qualified counsel, Jim Archibald. It is of note that Mr. Archibald did not sign this filing and it appears that Mr. Means acted unilaterally in preparing and filing this motion. There is no affidavit from Lori Vallow Daybell supporting such allegations. Where the Defendant is deemed incompetent and cannot consent to such a filing, where the Defendant has made no verified assertions to support such motion, and where Mr. Archibald did not sign said motion, it is appropriate to consider this Mr. Means' filing for clarity rather than as an actual filing of the entire Defense team.

1. **The Declared Motion for the State to Disclose "Brady Violation Disclosures" Mischaracterizes the Law, Misstates Facts and Other Communications, and Fundamentally is Not Supported by Law or Fact.**

Brady material is material or evidence in the possession of the State that is potentially exculpatory or tends to negate the guilt of a person charged with a crime. The concept of Brady material drives from the United States Supreme Court case *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215 (1963). In *Brady v. Maryland*, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215 (1963). Brady holds that prosecutors must disclose Brady material.

The Declared Motion requests that the State be required to turn over "Brady Violation Disclosures" regarding the comments made by Lori Vallow/Daybell to Daniel McConkie, an attorney at Kirton McKonkie. This request is misplaced. The Declared Motion appears to create the label "Brady Violation Disclosure" or so named item. Yet, the Motion fails to define the item and to supply a legal basis for such a legal categorization. The State is left to surmise or speculate that the Declared Motion's intent was to argue statements made by the Defendant Lori Vallow/Daybell to an attorney - not associated with this case or the prosecution - are somehow "Brady Violation Disclosures." There is no authority for such an argument or legal conclusion. Statements of Lori Vallow Daybell to a third party are not associated with the State, are not in the possession of the State, and are in no way Brady material as defined by the United States Supreme Court. Further, while the prosecution does have a duty to turn over any statements of the defendant in its possession, such statements cannot be Brady material if they are already known to the Defendant. Incriminating statements made by the Defendant to third parties are not per se "Brady material" The State is not in possession of those statements, other than what the State disclosed to defense counsel and the Court. Further, those statements were not made to a state actor such as the police or the prosecution.

This request for "Brady Violation Disclosures" shows a misinterpretation of the legal definition and concepts underpinning Brady material. Based on the rest of the motion, the most charitable interpretation of what the Declared Motion requests is for the State to produce any statements made by Lori Vallow/Daybell to Daniel McConkie which are self-incriminating (See Mean's Motion page 7). The State does not have in its possession or control any such statements.

The State has already disclosed any statements made by Lori Vallow/Daybell within its possession or control. Mr. Means can obtain the statements he is referring to by simply asking his client what statements she made. Further, the Declared Motion makes clear that Mr. McConkie was willing to speak with Mr. Means' co-counsel Jim Archibald. The information and statements being sought by Mr. Means are simply not within the State's possession and control, and therefore not discoverable through the State. Mr. Means can contact the individuals he claims have the alleged information to gather that information. Nothing about the unvalidated, unsupported assertions have a true connection to the actual application of *Brady v. Maryland*. The apparent attempt to significantly extend the legal concept of Brady material to cover potentially incriminating statements made by Lori Vallow Daybell to an independent third party and not in the possession of the State is unsupported by the law.

The public manner in which Mr. Means requests this outlined material is concerning as it appears he intends to publicize statements he believes were made by his client. At this time the Defendant Lori Vallow/Daybell is deemed by the Court incompetent and cannot make an informed consent to her private statements being made public. If Vallow/Daybell did indeed make incriminating statements, it is alarming that Mr. Means is objecting to sealing this matter. The potential for harm to Vallow/Daybell from publicizing such statements is high and could also be extremely harmful to Mr. Means' former client, Chad Daybell, who is a co-defendant and alleged co-conspirator in this matter. It is noteworthy that Vallow/Daybell's court appointed, death sentence-qualified public defender has not joined in this motion.

2. The Declared Motion for Criminal Depositions and Out of State Subpoenas is Not Supported by Law or Fact.

Idaho Criminal Rule 15 is the sole authority for, and governs, the taking of depositions in a criminal case. It reads:

> At any time after the filing of the complaint, indictment or information, and on notice to all parties, a party may move that a prospective witness be deposed *in order to preserve testimony for trial.* (Italics added) The Court may grant the motion if the testimony of the witness is material, and it is necessary to take the deposition of the witness in order to prevent a failure of justice.

Rule 15 exists to preserve material testimony, not as a discovery tool. It has long been held in Idaho, and even a cursory review of case law establishes that rule 15 exists for situations where a witness will be unavailable for trial. (For example, a material witness who has a terminal illness.)

In *State v. Filson,* the Idaho Supreme Court denied the defendant's motion to depose the victim stating:

> From the record before this court, there is no showing whatsoever that the prosecutrix would be unable to attend the trial. Without such a showing there is no grounds upon which to grant the motion and the court did not err in refusing to allow it.
> 101 Idaho 381, 384, 613 P.2d 938, 941 (1980).[2]

The Declared Motion fails to provide any factual basis whatsoever to suggest that any of the individuals listed are witnesses in this case in any capacity. It fails to provide any factual basis as to why any of their testimony would be material and how their depositions would be necessary to prevent a failure of justice. Further, even if any of the individuals/organizations listed were witnesses, the Declared Motion makes no showing whatsoever of their unavailability for trial.

The request in the Declared Motion for "out of state subpoenas" is procedurally defective. A court in Idaho cannot simply grant an "out of state subpoena." If Mr. Means wants to serve a subpoena in another State, he must first acquire a subpoena signed by the Court or the Clerk of the Court pursuant to ICR 17, and then domesticate said subpoena in whichever state he wishes to have it served. The law and rules in Idaho are clear on the manner in which to obtain process enforceable in other states. The request in the Declared Motion fails to follow Idaho law and must be denied.

3. Mr. Means' Motion to Disqualify the Idaho Department of Health and Welfare is Not Supported by Law or Fact.

The Declared Motion to disqualify the Idaho Department of Health and Welfare (hereinafter IDHW) is baseless and unsupported by the law. The Defendant has been declared incompetent and committed to the custody of IDHW at the request of and on a prior motion of Mr. Means. Incompetency proceedings in a criminal case in Idaho are governed by statutes 18-210 through 18-217. I.C. 18-212(2) reads:

> If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in subsections (5) and (6) of this section, and the court shall commit him to the custody of the director of the department of health and welfare, for a period not exceeding ninety (90) days, *for*

[2] In Filson the victim/witness is referred to as the "prosecutrix."

care and treatment at an appropriate facility of the department of health and welfare…(emphasis added)

The statutes listed above only allow for restoration treatment of the incompetent to be performed by IDWH at IDHW facilities. While I.C. 18-211(10) allows the Court to appoint additional experts, that is only in relation to a finding of competence or incompetence. Nothing in the Idaho Code provides for a disqualification of the Department of Health and Welfare, nor does anything in the Idaho Code provide for an alternate method of restoring competence. By law the Court's sole authority to obtain treatment for restoration of the incompetent lies with its power to commit a defendant to the custody of the director of the department of health and welfare. There is no power of the Court to commit a person found unfit to proceed to any other facility.

The Declared Motion's unverified, unsubstantiated assertations fail to state a cause that necessitates the Court's intervention in the daily psychiatric, medical and mental health treatment of a person in the Custody of IDHW. Even if true, none of the allegations rise to the level of mistreatment or inappropriate conduct on the part of IDHW. Bare assertions, conjecture and unsubstantiated claims do not support the Court taking the drastic and legally questionable, action of disqualifying the entire agency charged by Idaho law with Ms. Vallow Daybell's custody and care. The Court does not have the authority to micromanage the daily treatment of Ms. Vallow/Daybell. The Court's concern is with the legal status of a defendant, not on managing complaints about individual staff performance. Should Mr. Means or Ms. Vallow/Daybell have a grievance about an individual staff member, or members, the grievance process within the individual institution is available to them. The Court is not a part of a facility's grievance process. Further there is no evidence or even assertion in the Motion, that the facility itself has some how disqualified itself. The novel argument that the alleged actions of one staff member somehow are imputed to an entire facility, and to an entire multifacility State-wide Department, is without merit or legal authority.

Beyond the fact the Declared Motion's request to disqualify IDHW has no basis in law or fact, even if Mr. Means was able to prove the allegations made against N.C., disqualifying the entire IDHW would be a drastic and unreasonable remedy. Beyond not providing any actual evidence of his allegations against N.C., Mr. Means has not alleged any wrongdoing on the part of the entire IDHW which would require a disqualification of the entire department.

4. Mr. Means' Unverified, Unsupported Factual Allegations Consist of Hearsay, Highly Suspect Information and Pure Speculation and Cannot be Proven Without the Testimony and Cross-examination of Lori Vallow Daybell.

The Declared Motion contains several false statements. First, there is no evidence to support the Declared Motion's assertion that Mr. Wood has ever met, let alone spoken, with Daniel McConkie. Another attorney at Kirton McConkie informed Mr. Wood that the Defendant had contacted Daniel McConkie. The conversation regarding this issue lasted approximately one minute and Mr. Wood informed said attorney he would notify the Defendant's public defender. Mr. Wood immediately contacted the Defendant's court appointed counsel and informed him of the information provided. Mr. Wood also informed the Court, and defense counsel, at a hearing shortly thereafter. The State is unaware of any authority creating a duty for attorneys at Kirton McConkie to provide this information to anyone. Further, the State is unaware of any legal or ethical duty that the State had to provide that information to the defense; however, it was provided to both the Court and defense counsel as a professional courtesy and out of an abundance of caution.

The apparent lack of due diligence in filing this motion is egregious and possibly merits sanctions by the Court against Mark Means. Rather than exercise the due diligence required by the Rules of Professional Conduct (Rule 1.3) counsel simply makes speculative and extreme allegations in the Declared Motion. For example: Mr. Means in footnote 10 appears to claim that the Court itself is under the "complete control" of the LDS Church. Another example, is the harsh and unsubstantiated allegations of "unethical and possible illegal activities" by Mr. McConkie, even though Mr. McConkie was willing to, and did, speak with Jim Archibald. Mr. Means could have simply called Mr. McConkie himself before making such allegations. (See Means Motion at page 7) Mr. Means' extreme ethical accusations may have now created a situation where Mr. McConkie is not willing to speak with Mr. Means due to the defamatory statements. Mr. McConkie had been willing to speak with defense counsel but given the unsubstantiated accusations may not now be able to do so. The State has no knowledge as to Mr. McConkie's intention, but Mr. Means, by his own actions, may have now limited his ability to obtain the information he is allegedly seeking through the Declared Motion. As further example, to the State's knowledge and belief, Mr. Means did not speak with the maligned clinician or her supervisors at IDHW before filing his motion to disqualify. Mr. Means in the motion has

crossed the line of zealous advocacy and entered into the arena of rank accusation: made accusations against private individuals; statements about a clinician which could threaten her job, and about an out of state attorney, who, based on the accusations in the Declared Motion, did nothing wrong and is now accused of taking actions to "manipulate the defendant to be forced and manipulated into making statements against her interest." (See Mean's Motion page 7).

Mr. Means' representations and allegations about N.C., the clinician and his client are suspect and should be treated as such. (Please see Mr. Means' motion at pages 2 and 3). At no point does Mr. Means provide a source for this information. As stated above, to the State's knowledge, Mr. Means never spoke with N.C. about this situation to get her side of the story, nor did he speak with her supervisors at the IDHW to ask them to investigate. Unless Mr. Means can produce a witness to verify his story, it is inadmissible hearsay. If the story was provided to Mr. Means by his client, it should be discounted due to the reasons for which she has been committed to IDHW. Further, if the facts alleged by Mr. Means came from his client, he has placed his client in a precarious situation by publishing her statements in violation of her constitutional rights and contrary to Rule 1.6 of the Idaho Rules of Professional Conduct.

The State specifically asks the Court to take notice that the Declared Motion was signed by Mr. Means under penalty of perjury. He signed pursuant to the words: "That I Certify (or Declare) under penalty of perjury pursuant to the Law of the State of Idaho that the foregoing is true and correct." There is no requirement he swear to the contents of the motion. He chose to verify the contents of the motion with his name and signature of his own accord. Without additional affidavit, witness statements or documentation, Mr. Means is the sole witness or affiant to the accusations therein.

5. Mr. Means' Continued Representation of the Defendant is Inappropriate and Unethical.

Mr. Means has an un-waivable and unethical conflict of interest due to his past dual representation of both Lori Vallow/Daybell and her co-conspirator/co-defendant, Chad Guy Daybell, in regards to the subject matter of this case. Mr. Means' continued involvement in this case is inappropriate and creates issues for appeal. An inquiry into this conflict must be held in this case and a knowing and intelligent waiver of conflict on the part of the defendant must be made in order for Mr. Means to ethically represent Vallow/Daybell. However, an inquiry and waiver cannot occur due to the Defendant's restoration commitment and related stay of the case.

Further, any waiver, even if knowing and intelligent should be rejected by the Court. An incompetent defendant should not be presumed to have waived the constitutional right to conflict-free counsel, especially when said counsel appears willing to publicize private statements of the Defendant. At a minimum Mr. Means should be precluded from filing any other documents in this case that are unsigned by his co-counsel until such time as the Court can engage in an inquiry with the Defendant regarding the conflict of interest.

Conclusion

The Declared Motion(s) should be denied without hearing as a matter of law. The law does not provide the Court the authority or jurisdiction to award any remedy requested in the Declared Motion. Even if the law did allow for such remedies, the Declared Motion provides no evidence or even allegations which support said remedies. Mr. Means has relied on spurious facts, hearsay, and possible violations of his own client's rights to make the allegations. The State requests that Counsel Means be sanctioned by the Court ordering all motions filed on behalf of Defendant Lori Vallow/Daybell be signed by both Counsel for the Defendant until such time as the Defendant is deemed competent, and by any other remedies and sanctions the Court deems appropriate.

DATED this 24th day of November, 2021.

/s/Lindsey A. Blake
Lindsey A. Blake
Prosecuting Attorney for Fremont County

/s/Rob H. Wood
Rob H. Wood
Prosecuting Attorney for Madison County

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of November, 2021, that a copy of the foregoing RESPONSE TO DECLARED MOTION was served as follows:

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By: /s/Lindsey A. Blake