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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** **MOTION TO CORRECT CASE HEADING AND TO CLARIFY THE COURT ORDER DATED AUGUST 6, 2021**

The State of Idaho motions this Court to Correct the Case Heading to reflect the Grand Jury's Single Indictment of Defendants Chad Daybell and Lori Norene Vallow AKA Lori Norene Daybell under one case number and also files a Request to Clarify the Court's Order dated August 6, 2021, based on thefollowing:

FACTUAL AND PROCEDURAL BACKGROUND

On May 24, 2021, a grand jury returned a single indictment against the Defendants, Chad Daybell and Lori Vallow Daybell, containing a total of nine criminal charges relating to the murders of Tylee Ryan, JJ Vallow and Tamara Daybell. Specifically, the Indictment charges both Defendants with: One Count of Conspiracy to Commit First-Degree Murder and Grand Theft by Deception wherein Tylee Ryan is the victim; One Count of First-Degree Murder

wherein Tylee Ryan is the victim; One Count of Conspiracy to Commit First-Degree Murder and Grand Theft by Deception wherein JJ Vallow is the victim; One Count of First-Degree Murder wherein JJ Vallow is the victim; and One Count of Conspiracy to Commit First-Degree Murder wherein Tammy Daybell is the victim. In addition, Defendant Lori Vallow Daybell is charged with One Count of Grand Theft wherein the United States Government is the victim. Defendant Chad Daybell has additional charges of One Count of First-Degree Murder wherein Tamara Daybell was the victim; and Two Counts of Insurance Fraud.

Subsequent to the Grand Jury returning one indictment, the charges against each Defendant were entered into the electronic filing system, Odyssey, with separate case numbers being assigned to each Defendant but with the original indictment remaining the charging document. This was done by the Court without any cited authority, despite the State having chosen to pursue one indictment against both Defendants, and the Grand Jury returning a single indictment naming both Defendants.

On June 9, 2021, Chad Daybell appeared with his counsel for an arraignment on his charges. Counsel for Mr. Daybell and counsel for the State met off the record with the Court. The Seventh District Trial Court Administrator was present as well. During the discussion held off the record, the State brought up its concern with the Defendants each appearing in separate case numbers. At that time the Trial Court Administrator informed the Parties it was done in large part due to the electronic filing system, Odyssey, not allowing for two defendants to be placed on the same filing under the same case number and referring vaguely to some other rules and statutes without providing any specifics. The State was instructed by the Court, it should not be the State's burden to file any motion to address this concern, and the Court would look into the matter.

On August 6, 2021, the Court issued an order indicating that while the cases would be joined in a single trial, the other proceedings leading up to trial would be conducted separately in each case and each Defendant would retain their individual case number. The Order was later clarified by the Court as instructing the Parties to only file respective pleadings in the individual cases.

On August 9, 2021, counsel for the State, Ms. Vallow Daybell and Mr. Daybell met off the record with the Court. The State again renewed the concerns that the case appeared to have been partially severed by the Court without any authority or motion from defense. The State at that time was informed if the State had concerns about the Order, a motion would need to be filed to address the State's concerns.

LAW AND ARGUMENT

I. The Defendants Cases Were Properly Joined in One Indictment and No Grounds for Severance Have Been Provided.

Idaho Criminal Rule 8 provides as follows:

> (a) Joinder of Offenses. Two or more offenses may be charged on the same complaint, indictment or information if the offenses charged, whether felonies or misdemeanors or both, are based on the same act or transaction or two or more acts or transactions connected together or constituting parts of a common scheme or plan. The complaint, indictment or information must state a separate count for each offense.
>
> (b) Joinder of Defendants. Two or more defendants may be charged on the same complaint, indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constitution an offense or offenses. The defendants may be charges in one or more counts together or separately and all of the defendants need not be charged in each count.

The Idaho Supreme Court reiterates that "[j]oinder of two or more defendants is proper if they are alleged to have participated in the same act or transaction or in the same series of acts or

transactions constituting an offense or offenses." *Thumm v. State*, 165 Idaho 405, 413, 447 P.3d 853, 861 (2019). "Joinder under a common scheme or plan theory requires 'two or more crimes *so related to each other* that proof of one tends to establish the other.'" (Emphasis in original) *State v. Anderson*, 487 P.3d 350, 359 (2021), citing to *State v. Nava*, 166 Idaho 884, 891, 465 P.3d 1123, 1130; *State v. Johnson*, 148 Idaho 664, 668, 227 P.3d 918, 922 (2010).

"Criminal Rule 8 permits two or more offenses to be charged in the same complaint, indictment, or information if they are 'based on the same act or transaction or on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan." I.C.R. 8(a). The initial decision to join two or more offenses in the same charging document is usually made by the prosecuting attorney in preparing the complaint to initiate criminal proceedings or in making a presentation to a grand jury." *State v. Orellana-Castro*, 158 Idaho 757, 760, 351 P.3d 1215, 1218 (2015). Similarly, the decision whether to join co-defendants pursuant to I.C.R. 8(b) would generally be a decision left to the prosecuting attorney.

Furthermore, "the propriety of joinder is determined by what is alleged, not what the proof eventually shows. As set forth in *United States v. Roselli*, 432 F.2d 879. 'It is implicit in the language of Rule 8(b) that so long as all defendants participate in a series of acts constituting an offense or offenses, the offenses and defendants may be joined even though not all defendants participated in every act constituting each joined offense. Rule 8(b)'s 'goal of maximum trial convenience consistent with minimum prejudice' is best served by permitting initial joinder of charges against multiple defendants whenever the common activity constitutes a substantial portion of the proof of the joined charges.'" *State v. Cochran*, 97 Idaho 71, 539 P.2d 999, 1001 (1975), citing to *United States v. Roselli,*432 F.2d at 889.

In addition, "[t]he general rule is that persons charged in a conspiracy should be tried

together, particularly where proof of the charges against the defendants is based upon the same evidence and acts..." *United States v. Rodgers*, 18 F.3d 1425, 1431 (8th Cir. 1994), citing to *United States v. Miller*, 725 F.2d 462, 467 (8th Cir. 1984). "Severance is 'necessary where the proof is such that a jury could not be expected to compartmentalize the evidence as it relates to separate defendants.' *Id.* at 468 (quoting *United States v. Jackson*, 549 F.2d 517, 525 (8th Cir.), *cert. denied*, 430 U.S 985 (1977))*."* Id. at 1431-1432.

"…Because the general rule is that those indicted together are tried together to prevent inconsistent verdicts and to conserve judicial and prosecutorial resources, severance is particularly difficult to obtain where, as here, multiple defendants share a single indictment." *United States v. Casas*, 425 F.3d 23, 26-27 (5th Cir. 2005). "Regardless of whether Nicolai's trial might have been speedier had it been severed, the delays did not cause significant prejudice, nor did they result in the denial of a fair trial or a miscarriage of justice. *See United States v. LiCausi*, 167 F.3d 36, 48-49 (1st Cir. 1999). (determining that appellant must show 'prejudice greater than that which necessarily inheres whenever multiple defendants…are joint tried')." Id. at 27.

The evidence in the indictment before this Court demonstrates that Defendants acted in concert in a common scheme or plan, as well as a conspiracy, the State opted to request one indictment for both Defendants, and the Grand Jury returned one indictment for both Defendants. The Defendants have been properly joined in a single indictment under I.C.R. 8(b) based upon their participation in the same series of acts, and the initial decision to present one indictment is in the discretion of the prosecution.

Idaho law does allow for a severance of charges and/or defendants under either I.C.R. 8 or I.C.R. 14, neither of which have been addressed by the Court, at this time. The standard of

review for improper joinder under I.C.R. 8 requires the Court to determine if the allegations are related beyond merely showing a criminal propensity and instead provide evidence that the same persons were involved in committing the acts in a joint transaction. *State v. Anderson*, 478 P.3d at 359.

"When an objection to joinder of offenses or defendants is made, the first issue for the trial court is whether joinder is permissible under Criminal Rule 8…. [J]oinder of offenses is permissible 'if the offenses charged, whether felonies or misdemeanors or both, are based on the same act or transaction or on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.' I.C.R. 8(a). Joinder of defendants is permissible 'if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.' I.C.R. 8(b)." *Orellana-Castro* at 1218.

Idaho Criminal Rule 14 provides as follows:

> "If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in a complaint, indictment or information, the court may order the state to elect between counts, grant separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the state to deliver to the court for inspection in camera any statements or confessions made by the defendants that the state intends to introduce in evidence at trial."

"Actions properly joined under I.C.R. 8(b) may be severed under I.C.R. 14 if it appears that a joint trial would be prejudicial. (Internal Citations Omitted.). The Defendant has the burden of showing such prejudice." *State v. Gamble,* 146 Idaho 331, 337, 193 P.3d 878, 884 (Ct.App. 2008), citing to *Caudill*, 109 Idaho at 226, 706 P.2d at 460; *Cochran*, 97 Idaho at 74, 539 P.2d at 1002.

"In addressing motions to sever based upon I.C.R. 14, Idaho courts have generally

considered three potential sources of prejudice that were identified in *State v. Abel,* 104 Idaho 865, 664 P.2d 772 (1983) in regard to consolidation of charges as follows: (1) the jury may confuse and cumulate the evidence, and convict the defendant of one or both crimes when it would not convict him of either if it could keep the evidence properly segregated; (2) the defendant may be confounded in presenting defenses, as where he desires to assert his privilege against self-incrimination with respect to one crime but not the other; or (3) the jury may conclude that the defendant is guilty of one crime and then find him guilty of the other because of his criminal disposition. (Internal Citations Omitted). *State v. Wilske,* 158 Idaho 643, 350 P.3d 344, 346 (Ct.App. 2015). Although the analysis set forth by the court was in reference to joinder of multiple counts, the analysis appears applicable to joinder of co-defendants as well.

"'The Supreme Court has instructed that a district court should grant a Rule 14 severance motion only when there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgement about guilt or innocence.'" *United States v. Feyrer*, 333 F.3d 110, 114 (2d Cir. 2003) (quoting *Zafiro*, 506 U.S. at 539). *United States Contreras*, 216 F.Supp 3d 299, 304 (2nd Cir. 2016).

The Speedy Trial Act in the federal system 'imposes a unitary time clock on all co-defendants joined for trial.' *United States v. Vasquez*, 918 F.2d 329, 337 (2d Cir. 1990). As a result, 'delay attributable to any one defendant is charged against the single clock, thus making the delay applicable to all defendants.' *United States v. Pena*, 793 F.2d 486, 489 (2d Cir. 1986)." *United States Contreras*, 216 F.Supp 3d 299, 304. If a defendant brings a motion to sever which is denied, then a reasonable delay analysis is applied in determining the reasonableness of any delay. Even under this standard, several federal courts have found delay alone isn't enough to establish prejudice.

"Joint trials 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.' *Richardson v. Marsh*, 481 U.S. 200, 210, 107 S. Ct. 1702, 97 L. Ed. 2d 176 (1987). Joint trials also 'enable more accurate assessment of relative culpability - advantages which sometimes operate to the defendant's benefit.' *Id.* In addition, joint trials promote an efficient use of the Court's resources, as well as the time and resources of the Government and witnesses. *Cf. id.* (noting that separate trials require 'that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying'). And, finally, joint trials prevent gamesmanship…Thus, '[j]oint trials are particularly appropriate in circumstances where the defendants are charged with participating in the same criminal conspiracy." *Id*. at 303-304. While there is a more bright-line rule provided in the federal system, the same rationale seems applicable to the state system.

"The Speedy Trial Act did not alter a trial court's function in ruling on a severance motion; the court must still balance the needs of each defendant against the needs of judicial economy. *United States v. Varella*, 692 F.2d 1352, 1359 (11th Cir. 1982)…" *United States v. Tedesco*, 726 F.2d 1216, 1220 (7th Cir. 1983). The court further determined "that the mere passage of time" while the codefendants' motions were litigated did not "improperly prejudice [the defendant's] case." "Balanced against this is the large amount of time that would have been wasted had the Government been forced to present essentially the same evidence in two trials." *Id.*

The New York Courts have addressed separating proceedings involving co-defendants and found "[i]n a criminal action involving multiple defendants, the 'action' travels through the system as a unit (unless, of course, severance has been requested and granted). It would be

anomalous in that situation to bifurcate the action among the different defendants during the course of the proceedings merely because one of the codefendants creates a delay." *People v. Barnett* (135 Misc. 2d 1127, 1129-1130, 517 N.Y.S.2d 849, 851 (Criminal Court of City of New York, Kings County 1987). "The number of defendants involved usually is not dispositive of the number of criminal actions that stem from a set of criminal charges." Id. at 1131. The State recognizes that the language provided in the New York statutes differs from the language provided in the Idaho statutes; however, the reasoning would seem to follow that bifurcating proceedings would be anomalous, and that a criminal action involving co-defendants should process through the courts as one criminal action.

"Joint trials 'play a vital role in the criminal justice system.' *Richardson v. Marsh*, 481 U.S. 200, 209, 107 S. Ct. 1702, 95 L. Ed. 176 (1987). They promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.' *Id.*, at 210. For these reasons, we repeatedly have approved of joint trials. See *ibid*.; *Opper v. United States*, 348 U.S. 84, 95, 99 L.Ed. 1010, 75 S. Ct. 158 (1954); *United States v. Marchant*, 25 U.S. 480, 12 Wheat. 480, 6 L. Ed. 700 (1827); cr. 1 C. Wright, Federal Practice and Procedure § 223 (2d ed. 1982) (citing lower court opinions to the same effect)." *Zafiro v. United States*, 506 U.S. 534, 537-538, 113 S.Ct. 933, 937 (1993).

It is the State's position that the Defendants were properly joined under I.C.R. 8(b) in one case which should have one case number and proceed together. However, in the Court's Order dated August 6, 2021, the Court has indicated that the Defendants are joined simply for jury trial purposes. This is improper under I.C.R. 8 and I.C.R. 13 in terms of judicial economy. The Court has not made a finding that joinder was improper, nor has either Defendant raised this issue. To the contrary, the Court has indicated that joinder is permissible under I.C.R. 8(b) but has limited

this joinder solely to trial.

The Court has not heard argument that the joinder was improper from either Defendant or any argument regarding any prejudice to either Defendant, but instead has sua sponte entered an order separating the Defendants into separate case numbers, requiring separate filings and separate proceedings with the exception of trial.

It is unclear from I.C.R. 14 whether or not a court can sua sponte sever a case. This appears to be a novel issue. In *State v. Anderson,* a trial court sua sponte joined several charges for trial under I.C.R. 13. While the Idaho Court of Appeals had some concerns with the joinder, it appears the trial court was allowed to sua sponte join the charges. 138 Idaho 359, 63 P.3d 485 (Ct.App. 2003)

I.C.R. 13 provides:

> "The court may order that two or more complaints, indictments or informations be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single complaint, indictment or information. The procedure is the same as if the prosecution were under a single complaint, indictment or information."

However, in *State v. Martinez,* the defense suggested that "upon purported authority of *Schaffer v. U.S.*, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed.2d 921 (1960), that the district court was required sua sponte to order severance or relief." 109 Idaho 61, 65, 705 P.2d 965, 969 (Ct. App. 1985). The Idaho Supreme Court disagreed, and determined that "*Schaffer* imposed no such rigid obligation upon a trial court[,] but "[r]ather, in *Schaffer,* the U.S. Supreme Court held that joinder of co-defendants is permissible if they allegedly have participated in the same act or transaction, or in the same series of acts or transactions, constituting the offenses charged." *Id.* at 65-66.

Further, the courts in Idaho consistently reference the burden being on the party, most

commonly the defense, bringing a motion under I.C.R. 14, to establish that the joinder is prejudicial. "The inquiry on appeal is whether the defendant has presented facts demonstrating that unfair prejudice resulted from a joint trial, which denied him a fair trial. (Internal Citations Omitted). *State v. Cirelli*, 115 Idaho 732, 734,769 P.2d 609, 611 (Ct.App. 1989). "Pursuant to I.C.R. 14, a defendant may move to sever charges, even if the requirements of I.C.R. 8 have been satisfied, if the joinder of those charges prejudiced the defendant." *State v. Nava*, 166 Idaho 884, 889, 465 P.3d 1123, 1128, (2020), citing to *State v. Caudill*, 109 Idaho 22, 226, 706 P.2d 456, 460 (1985). "The Defendant has the burden of showing such prejudice." *State v. Gamble*, 146 Idaho 331, 337, 193 P.3d 878, 884 (Ct.App. 2008), citing to *Caudill*, 109 Idaho at 226, 706 P.2d at 460; *Cochran*, 97 Idaho at 74, 539 P.2d at 1002.

In addition, "the federal courts have addressed the similar question of separate trials of counts under Fed.R.Crim.P. 14 upon which former I.C.R.14 is based. *See, e.g., Bradley v. United States*, 433 F.2d 1113 (D.C.Cir.1969); *United States v. Foutz*, 540 F.2d 733 (4th Cir. 1976); *United States v. Rox*, 692 F.2d 453, 454 (6th Cir. 1982) ("A defendant is prejudiced if the jury would be unable to keep the evidence from each offense separate and unable to render a fair and impartial verdict on each offense"); *United States v. Neal*, 692 F.2d 1296, 1305 (10th Cir. 1982) ("For prejudice resulting from denial of a severance motion to justify reversal, the defendant must show more than just a better chance of acquittal at separate trials"); *United States v. Harper*, 680 F.2d 731, 733 (11th Cir.) (requires showing of compelling prejudice), *cert. denied*, U.S., 103 S.Ct. 229, 74 L.Ed.2d 182 (1982). In most federal cases motions for separate trials have been denied. *See, e.g., Bradley v. United States, supra; see also* 1 C. Wright, Federal Practice and Procedure: Criminal 2d § 222 (1982) (citing cases). *State v. Abel*, 104 Idaho 865, 867, 664 P.2d 772 (1983).

The Court Order further limits the Parties' ability to address issues of mutual interest to both Defendants. It is expected that motions regarding change of venue will need to be addressed in both cases since the Defendants are currently set to be tried in one trial; however, there is only a pending hearing on a motion to change venue in Defendant Chad Daybell's case. If the motion is decided, it will deprive Defendant Lori Vallow Daybell of the opportunity to be heard regarding the change of venue.

There is also a motion pending regarding severance of the Defendants only in Defendant Chad Daybell's case. If this motion is decided without allowing Defendant Lori Vallow Daybell to be heard, it will deprive her of the opportunity of being heard. Further, there is a hearing on the consumption of DNA only set in Defendant Chad Daybell's case. This is problematic because the evidence is applicable to both Defendants. The Court is putting the State in a position of potentially not being allowed to introduce all evidence against both Defendants. If the Court grants the motion to consume DNA, it will deprive Defendant Lori Vallow Daybell of the opportunity to be heard on this issue, or it may result in the State only being able to use the evidence against one of the Defendants which is prejudicial to the State. Furthermore, by limiting the Defendants' access to the filings in the other half of the case, it is limiting the Defendants' ability to have access to all information and pleadings which may have an impact on a trial in this matter.

In addition to the concerns regarding the Defendants' rights, the State is prejudiced by being required to duplicate evidence and hearings held in relation to venue, expert witnesses, discovery, evidence, etc. The State opted to pursue a single indictment which is the State's discretion. Joinder of the parties is not only proper, but it avoids duplication of evidence and hearings on matters such as those raised above. The State is unaware of any statutory authority

or rule that provides for severing a single indictment properly joined under I.C.R. 8(b) for all purposes and procedures leading up to jury trial. As far as any authority the State could locate, the Court is limited in its ability to sever a case to a finding that the joinder was improper or that there is prejudice to the State or the Defendant(s). Neither of these findings have been made by the Court.

In the Court's Order dated August 6, 2021, while recognizing that joinder is permissible and that a single indictment has been filed on the case, the Court did note concerns relating to protecting the defendants' "full panoply of rights, including due process protections, afforded by the United States Constitution and the Idaho State Constitution…" The Court did not provide any specific rights of the Defendants' that the Court was addressing, or any finding of prejudice to either Defendant or the State. The defense in Defendant Chad Daybell's case has recently filed a written waiver of speedy trial. "…An unequivocal written waiver of speedy trial signed by a defendant is dispositive of a later motion to dismiss on this basis, *State v. Youngblood*, 117 Idaho 160, 162, 786 P.2d 551, 553 (1990)…" *State v. Lopez*, 144 Idaho 349, 352, 160 P.3d 1284, 1287 (Ct. App. 2007).

The State is unaware of any further due process concerns requiring severance at this time. The Court has referenced the proceedings against Defendant Lori Vallow Daybell being stayed; however, this is early on in the proceedings, and it would be premature to sever the case at this time based on the pending competency. The State recognizes that Defendant Chad Daybell's case should not be held in perpetuity; however, federal case law supports that a delay in trial alone is not a reason for severance, nor has the Court actually made such finding.

The Court at a minimum has partially severed the Defendants' case, and at the most has de factor severed the case without providing any findings or authority to support this order and

not in compliance with the required findings pursuant to I.C.R. 14 and case law.

II. Prosecutors Have Discretion with Regard to Charging Decisions.

The courts have analyzed the discretion of the prosecution versus the discretion of the courts in several different situations, and it is well established that charging decisions are within the sole discretion of the prosecution.

"'Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.'" *United States v. Johnson*, 469 Fed.Appx 632, 639, 2012 U.S. App. LEXIS 4190, 2012 WL 66220 (9th Cir. 2012), citing to *United States v. Batchelder*, 442 U.S. 114, 124, 99 S.Ct. 2198, 60 L.Ed. 2d 755 (1979), *United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). "A prosecutor may, but is not required to, charge two or more defendants in a single indictment if 'they are alleged to have participated in the same act or transactions, or in the same series of acts or transactions, constituting an offense or offenses." *Id.*, citing to Fed. R. Crim. P. 8(b).

Further, in *United States v. Fernandez*, the Court provided, "[i]t was within the district court's discretion to reject the plea agreement's sentence, but its 'decision that the second-degree murder charge itself was too lenient…intruded into the charging decision, a function 'generally within the prosecutor's exclusive domain.'" 2009 U.S. Dist. LEXIS 122154, 2009 WL 4898258, 17 (9th Cir. 2009), citing *Miller, 722 F.2d at 565.*

"That acceptance of the guilty plea to the lesser charges would require too lenient a sentence is 'just happenstance,' and the judge's sentencing discretion 'will be cabined only by the prosecutor's decision regarding which charges to pursue,' which is a strictly executive function.' The court also cited *United States v. Robertson,* 45 F.3d 1423, (10th Cir. 1995), for the proposition that 'courts should be wary of interfering with prosecutorial discretion.' *Vasquez-*

Ramirez, 443 F.3d at 698 n.6. In *Robertson,* the Tenth Circuit stated that 'while district courts may reject charge bargains in the sound exercise of judicial discretion, concerns relating to the doctrine of separation of powers counsel hesitancy before second-guessing prosecutorial choices.'" *United States v. Fernandez*, 2009 U.S. Dist. LEXIS 122154, 2009 WL 4898258, 18 (United States District Court for the District of Arizona), 2009, citing to *Robertson,* 45 F.3d at 1438.

The Idaho Court of Appeals has determined, "where the facts legitimately invoke more than one statute, a prosecutor is vested with a wide range of discretion in deciding what crime to prosecute. *State v. Vetsch*, 101 Idaho 595, 618 P.2d 773 (1980). If the prosecutor has probable cause to believe that the suspect has committed the crime defined by the statute, the decision to prosecute and the decision of selecting which charge to file lies within the prosecutor's discretion. *State v. Gilbert*, 112 Idaho 805, 736 P.2d 857 (Ct. App 1987). This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 1530, 84 L.Ed.2d 547 (1985). See also *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 511 (1978). *LeBarge v. State*, 116 Idaho 936, 939-940782 P.2d 59, 62-63 (Ct. App. 1989).

While the State recognizes that federal cases deal with authority specifically granted the prosecutor and not the courts, it is the State's position that the State is granted the exclusive authority to determine whether or not to request a joint indictment from a grand jury. When the State exercises this authority, the State recognizes it is not without some limitations. The Idaho Rules of Criminal Procedure and case law clearly establish that a court can sever a case if it determines that joinder was improper or that there is prejudice to the state or the defendant(s). However, case law indicates the burden is on the party moving for severance under I.C.R. 14 to

establish prejudice, and it also lays out the standard to evaluate a motion for severance based on prejudice. Further, case law makes clear that joinder is favored for purposes of judicial economy and especially in cases involving charges of conspiracy.

The State further recognizes that under I.C.R. 14, a court can take whatever measures it deems necessary to avoid prejudice to the state or defendant; however, the rule, and case law requires a finding of prejudice prior to the court establishing such a remedy. There has been no finding in this case. Further, the State can find no authority to allow a court to separate all proceedings for co-defendants charged in one indictment with the exception of trial, or for a court to separate an indictment into two case numbers.

Wherefore, the State respectfully requests the heading in this case(s) be changed to reflect the original indictment with both Defendants being listed under the same case number and for the case(s) to proceed together for all future hearings and filings.

Respectfully submitted this 20th day of September, 2021.

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

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of September, 2021, that a copy of the foregoing MOTION TO CORRECT HEADNG AND TO CLARIFY THE COURT ORDER DATED AUGUST 6, 2021 was served as follows:

Mark L. Means
meanslawoffice@gmail.com

- ☐ U.S. Mail
- ☐ Hand Delivered
- ☐ Courthouse Box
- ☐ Facsimile:
- ☐ File & Serve
- ☐ Email

R. James Archibald
mlm@means-law.com

- ☐ U.S. Mail
- ☐ Hand Delivered
- ☐ Courthouse Box
- ☐ Facsimile:
- ☐ File & Serve
- ☐ Email

By: /s/Lindsey A. Blake