

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 VALLOW DAYBELL

Defendant.

Case No. CR22-21-1624

**MEMORANDUM DECISION AND  
ORDER DISQUALIFYING COUNSEL**

Introduction:

On July 27, 2021, Plaintiff State of Idaho ("State") filed a motion objecting to the entry of Mr. Means as counsel for Defendant Lori Norene Vallow Daybell ("Vallow") and requested this Court to conduct an inquiry into whether Mr. Means had a non-waivable conflict, to deny the entry of Mr. Means as counsel in the case, and to appoint capital counsel for Vallow. To support its motion, the State filed a memorandum, including three exhibits and an excerpt of sealed findings of fact entered in Case CR22-20-838. Afterward, the Court heard the Parties in a closed hearing on September 8, 2021, where the State submitted "Exhibit 4," an audio file of an April 28, 2020 recorded jail call between Vallow and Daybell, for *in camera* review. Thereafter, the Court determined an inquiry was necessary to assist the Court in determining the merits of the State's contentions that Mr. Means' ability to adequately represent his client were compromised due to the alleged conflict.

As a result, on October 8, 2021 the Court conducted an *in camera* inquiry with Vallow's co-defendant, Chad Guy Daybell ("Daybell") to ascertain whether Mr. Means had ever represented



Daybell such that the purported representation rose to the level of an actual conflict, and whether the conflict was waivable or non-waivable. Daybell is currently represented by attorney John Prior, in case CR22-21-1623, who was present with Daybell during the inquiry.

Having considered all of the submitted briefing in both Fremont County case numbers CR22-21-1623 and CR22-21-1624, as well as the Findings of Fact and Conclusions of Law entered by the Magistrate in Case No. CR 22-20-838<sup>1</sup>, where this issue previously arose, and having heard the Parties in multiple hearings address the concerns raised by the State, the Court orders now as follows.

#### Factual and Procedural Background:

At the outset, this Court has considered and reviewed the Findings of Fact entered by the Magistrate on July 31, 2020 in Case CR22-20-838, and determined those findings to be accurate. As those findings were made in a sealed document, and the Court having found that good cause exists to disseminate portions of that document in consideration of this decision, the Magistrate's findings are included herein verbatim, as follows:

#### II. FINDINGS OF FACT

- a. Lori and Chad were married on November 5, 2019.
- b. At the time of their marriage, Lori Vallow had two minor children: Joshua "J.J." Vallow and Tylee Ryan.
- c. On February 20, 2020, Lori was arrested in Hawaii with two counts of felony desertion of a child, as well as misdemeanor charges of resisting and obstructing an officer, solicitation of a crime, and contempt of court under Madison County jurisdiction.
- d. Rexburg law enforcement took Lori into custody on March 4, 2020, and she was extradited from Hawaii to Idaho.
- e. Lori retained Mr. Means (exact date unknown).

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<sup>1</sup> The Magistrate's Findings of Fact and Conclusions of Law were entered in Case CR22-20-838 on July 31, 2020 and were sealed. The Court has considered I.C.A.R. 32 in determining that those findings of fact are to be unsealed at this time for purposes of inclusion in the analysis in this case, and has issued a contemporaneous order in conjunction with this decision, which disseminates a portion of that sealed document. In addition, this decision references the State's "July 27, 2021 Motion and Memorandum Objecting to Counsel's Entry of Appearance and for Finding of Conflict" filed under seal in this case, portions of which are also disseminated herein pursuant to the I.C.A.R. 32 Order.



f. On March 21, 2020, Chad retained Mr. Prior who works in the same building complex as Mr. Means.

g. On March 24, 2020 (according to Mr. Prior), or March 31, 2020 (according to document submitted), Lori and Chad signed a conflict of interest waiver.

h. On April 28, 2020, Mr. Means posted the following on Twitter: "Please not[e] (sp) that this office (notice being provided by other means as well) represents Mr. Chad Daybell. If any agency, investigative authority, etc., wishes to contact my client please contact my office directly."

i. On April 28, 2020, Mr. Means sent a press release stating the following: "Please take notice that this office represents Mr. Chad Daybell. Please direct all requests for communications/statements of the like to this office."

j. On April 28, 2020, Lori and Chad had a visit via telephone/tablet in the Madison County Jail. During this conversation, Chad stated, "Mark [Means] is my attorney." Chad alluded he had shared confidential information with Mr. Means that Chad believed would be covered by attorney/client privilege. The video recording also suggested that Chad believed he would not have to testify against Lori if Mr. Means represented them both.

k. On May 2, 2020, Mr. Means told the court during a bail reduction hearing in Madison County for Lori that he represented both Lori and Chad.

l. On June 9, 2020, a search warrant was executed on Chad's property.

m. During the search, Chad called Mr. Means before calling Mr. Prior.

n. Based on the findings from the search warrant, on June 10, 2020, Chad was charged with two counts of felony destruction, alteration, or concealment of evidence under Idaho Code 18-2603. These charges were amended on June 30, 2020, to include two felony counts of conspiracy to destroy, alter, or conceal evidence. Lori was listed in the criminal complaint as a co-conspirator.

o. Lori was charged with two felony counts of conspiracy to destroy, alter, or conceal evidence on June 29, 2020. Chad was listed in the criminal complaint as a co-conspirator.<sup>2</sup>

This Court has made additional inquiries and reviewed facts set forth in the record in this case since the time of the Magistrate's findings, and therefore, in addition to the Magistrate's findings, considers the following:

On February 20, 2020, Vallow was arrested and charged with two counts of Felony Desertion of a Child and several misdemeanors, in connection with the disappearance of Vallow's two minor children: Tyler Ryan and JJ Vallow. Initially, Vallow was represented by Sean Bartholick; however, Bartholick notified the State that in the event Vallow was charged with a

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<sup>2</sup> July 31, 2020 "Findings of Fact and Conclusions of Law" issued by Magistrate Judge Eddins, pp. 3-6  
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crime, he would not represent her. Sometime in late February or early March, Chad Daybell retained Mr. Means and paid a sum of money to him to represent his wife, Lori Vallow Daybell. Mr. Means entered his appearance as Lori's counsel on March 4, 2020, in case CR33-20-302, as co-counsel with two other attorneys, who no longer represent Vallow. Later that month, on March 21, 2020, attorney John Prior began representing Daybell. Mr. Prior previously confirmed that representation date to Magistrate Judge Eddins, although no written notice of appearance had been filed as of that date by Mr. Prior, because Daybell had no case pending against him at that time. Subsequent to Mr. Means entering his appearance establishing his representation of Vallow, and also after the date Mr. Prior indicated he represented Daybell, on April 28, 2020, Mr. Means communicated to the public through social media that he represented Chad Daybell.<sup>3</sup> The communication states: "Please not [*sic*] that this office (notice being provided by other means as well) represents Mr. Chad Daybell. If any agency, investigative authority etc., wishes to contact my client please contact my office directly." The message originated from "Mark Means Law" and neither the content nor the source of the communication has been disputed.

Further, Mr. Means emailed Prosecutor Rob Wood asking him to provide a press release stating that Mr. Means represented Chad Daybell, and to direct investigation efforts relating to Daybell or Vallow to him. Mr. Means also published a press release directly.<sup>4</sup> In its *in camera* inquiry, the Court also reviewed a phone call recorded from the Madison County Jail. The call demonstrates that on April 28, 2020, Daybell and Vallow spoke to one another while Vallow was in custody. During the phone call, Daybell indicated that Mr. Means was Daybell's attorney, and Daybell also knew that Mr. Means was concurrently Vallow's attorney. That Mr. Means

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<sup>3</sup> State's Exhibit "1," July 27, 2021 Motion and Memorandum Objecting to Counsel's Entry of Appearance and for Finding of Conflict.

<sup>4</sup> State's Exhibits "2-3," July 27, 2021 Motion and Memorandum Objecting to Counsel's Entry of Appearance and for Finding of Conflict.



represented Vallow at that time is also clear, as noted by the previously referenced notice of appearance filed in her case. Daybell also stated he was “eventually” going with “the other guy,” ostensibly referring to Mr. Prior. After that call, on or about May 1, 2020, a bail hearing was held in Vallow’s case. At that hearing, Mr. Means represented to the Magistrate Judge that he represented Daybell as well as Vallow.

Thereafter, on June 9, 2020, a search warrant was executed on Daybell’s property that led to the location and recovery of the bodies of Vallow’s two children. The State submits that upon law enforcement’s arrival at Daybell’s property, Daybell called Mr. Means and asked law enforcement officers to speak with Mr. Means about the warrant.<sup>5</sup> It is undisputed that Daybell called Mr. Means; however, after its *in camera* inquiry of Daybell, the Court determines that there is a dispute about the content of the call. Daybell was arrested that day in connection to the ongoing investigation into the death of Vallow’s children, and charged with felony counts in Case CR22-20-755.

On or about June 30, 2020, Fremont County Magistrate Judge Eddins inquired of Mr. Means whether he had ever represented any co-conspirator listed in the complaint attached to Fremont County case CR22-20-0838. Mr. Means denied that he had represented anyone other than Vallow. His position was unpersuasive and Judge Eddins found that Mr. Means had represented both Chad Daybell and Lori Vallow Daybell. Judge Eddins ruled that there was a conflict of interest stemming from Means’ concurrent representation; however, Judge Eddins concluded that given the nature and tenor of the specific charges in that case, the conflict was waivable provided the Defendants furnished valid waivers to the court. Judge Eddins expressly stated his order accepting the waivers was limited to the proceedings in CR22-20-0838. There is some question

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<sup>5</sup> July 27, 2021 Motion and Memorandum Objecting to Counsel’s Entry of Appearance and for Finding of Conflict, ¶ 10.



about the validity of the waiver Mr. Means furnished to the court; ultimately, it is not dispositive to the issue of conflict in the present case and need not be discussed further at this time.

On March 2, 2021, Mr. Means filed a request for Vallow to be evaluated pursuant to Idaho Code Section 18-211, and submitted the bill on the examination to Fremont County. The State challenged that action because Vallow had not been declared indigent. On May 21, 2021 this Court determined Vallow was unable to pay for the evaluation and Vallow was declared indigent. On May 24, 2021, a Fremont County Grand Jury returned an indictment charging Chad Daybell and Lori Vallow Daybell as co-conspirators in the deaths of Tylee Ryan, J.J. Vallow, and Tamra “Tammy” Daybell. The charges for murder in the first degree carry maximum penalties of death.

On May 26, 2021, the Defendants appeared in magistrate court in Fremont County for an initial appearance. Daybell appeared with his counsel, John Prior, and his case was set-out. Before Vallow was set to appear on the record, the court determined Vallow had a pending Idaho Code § 18-211 evaluation and that because her competency was in question in another case, the State’s request for counsel to be appointed would not be considered at that time.

On June 8, 2021, this Court found Vallow not competent to stand trial and remanded Vallow to the Department of Health and Welfare for treatment to attempt to restore competency. On July 27, 2021, under seal, the State filed its motion objecting to the appearance of Mr. Means in the case and raised several issues, including the concern that Mr. Means was not death penalty certified counsel and that as a declared indigent, Vallow had a statutory right to appointed counsel. Accordingly, the Court appointed R. James Archibald to serve as co-counsel to Mr. Means while the Court assessed the conflict issue raised by the state.

Acknowledging that Vallow’s case was stayed on account of her treatment to restore competency, the Court nevertheless held a hearing where counsel for both Daybell and Vallow



were present on September 8, 2021, and ordered Daybell to appear for an inquiry to resolve the conflict issue. Daybell and his attorney, Prior, submitted to this Court on October 8, 2021, for an in camera inquiry.

Meanwhile, Mr. Means has continued to file pleadings in Vallow's case, CR22-21-1624 as sworn declarations signing his name under penalty of perjury to attest to facts that Mr. Means has furnished to the Court. Notably, Mr. Means filed a Declared Motion on October 27, 2021, where Mr. Means conveyed information he obtained from his client, Vallow, as the declarant and swore under penalty of perjury the veracity of the statements contained therein.<sup>6</sup>

#### Legal Authority:

##### 1. DUTY OF INQUIRY

The Court has a duty to inquire about attorney conflicts of interest when it is made aware of particulars of one. "Whenever a trial court knows or reasonably should know that a particular conflict may exist, the trial court has a duty of inquiry."<sup>7</sup> This inquiry is required when the court "knows or reasonably should know that a particular conflict exists"<sup>8</sup> and is not to be confused with the court being aware of a "vague, unspecified possibility of conflict."<sup>9</sup>

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<sup>6</sup> See e.g. DECL. MOT TO DISMISS THE GRAND JURY INDICTMENT. Aug 11, 2021; THIRD DECL. MOT. TO COMPEL. Aug. 11, 2021; DECL. MOT.(S) RE: (1) MOTION FOR STATE TO DISCLOSE BRADY VIOLATION DISCLOSURES, (2) MOTION FOR CRIMINAL DEPOSITIONS, (3) MOTION FOR OUT OF STATE SUBPOENA(S), (4) MOTION TO DISQUALIFY IDAHO DEPARTMENT OF HEALTH AND WELFARE. Oct. 27, 2021.

<sup>7</sup> *State v. Lovelace*, 140 Idaho 53, 60 (2003) (citing *Wood v. Georgia*, 450 U.S. 261, 272-73 (1981)).

<sup>8</sup> *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980).

<sup>9</sup> *Id.* at 348.



If the Court determines that an inquiry is warranted, the court's inquiry must be both "searching"<sup>10</sup> and "targeted at the conflict issue."<sup>11</sup> Failure from the Court to conduct an adequate inquiry can serve as a basis for reversal upon appellate review.<sup>12</sup>

## 2. SIXTH AMENDMENT RIGHTS

The Sixth Amendment of the Constitution guarantees a criminal defendant the right to legal counsel.<sup>13</sup> This right to counsel was applied to state prosecutions for felony offenses through the incorporation doctrine.<sup>14</sup> This right includes the right to *effective* assistance of counsel which is determined by a two-prong test.<sup>15</sup> To prove ineffective assistance of counsel, a defendant must show (1) their lawyer's performance fell below an "objective standard of reasonableness" and (2) "a reasonable probability that, but for counsel's unprofessional efforts, the result of the proceedings would have been different."<sup>16</sup> Case law demonstrates that an attorney conflict of interest can lead to ineffective assistance of counsel.<sup>17</sup> This occurs if a defendant's lawyer "actively represented conflicting interests" and that an "actual conflict of interest" existed and adversely affected the lawyer's performance.<sup>18</sup>

Included in the Sixth Amendment right to counsel is a defendant's right to choose his or her counsel.<sup>19</sup> However, "while the right to select and be represented by one's attorney is

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<sup>10</sup> *State v. Lopez*, 139 Idaho 256, 259 (2003) (citing *Garcia v. Bunnell*, 22 F.3d 1193, 1197 (9th Cir. 1994)).

<sup>11</sup> *Id.* (citing *Slesor v. Kaiser*, 81 F.3d 1492, 1501 (10th Cir. 1996)).

<sup>12</sup> *Holloway v. Arkansas*, 425 U.S. 475, 488 (1978).

<sup>13</sup> U.S. Const. amend. VI.

<sup>14</sup> *Gideon v. Wainwright*, 372 U.S. 335.

<sup>15</sup> *Strickland v. Washington*, 466 U.S. 668, 669 (1984); *State v. Wood*, 132 Idaho 88, 95-96 (1998).

<sup>16</sup> *Id.*

<sup>17</sup> *Cuyler*, 446 U.S. at 336.

<sup>18</sup> *Burger v. Kemp*, 483 U.S. 776, 783 (1987); *Strickland*, 466 U.S. at 692; *Wood*, 132 Idaho at 98.

<sup>19</sup> *Wheat v. United States*, 486 U.S. 153 (1988).



comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.”<sup>20</sup> Representation of more than one criminal defendant in a case “engenders special dangers which a court must be aware” as it could interfere with effective assistance of counsel.<sup>21</sup> The right to one’s counsel of choice is not absolute, though it will only be disturbed in the most extraordinary of circumstances.<sup>22</sup>

Thus, this Court recognizes the Defendant has a Sixth Amendment right to counsel and, presumptively, the right to counsel of her choosing. However, the Court must also balance this right with the right to effective counsel which can be threatened by an attorney conflict of interest, as well as the effective administration of justice through a fair and orderly proceeding.

a. CONFLICT OF INTEREST

The decision to grant or deny a motion to disqualify counsel is within the discretion of the trial court. *Weaver v. Millard*, 120 Idaho 692, 697, 819 P.2d 110, 115 (Ct. App. 1991). The moving party has the burden of establishing grounds for the disqualification. *Id.* Where a motion to disqualify comes not from a client or former client of the attorney, but from an opposing party, the motion should be viewed with caution. *Id.*

Rule 1.7(a) of the Idaho Rules of Professional Conduct states, “...a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be

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<sup>20</sup> *Id.* at 159; See *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983).

<sup>21</sup> *Id.*, *Holloway*, 435 U.S. at 482.

<sup>22</sup> *U.S. v. Perez*, 325 F.3d 115 (2d Cir. 2003).



materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interests of the lawyer..."<sup>23</sup> Rule 1.7(b) states that, even if a concurrent conflict of interest exists, "a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing."<sup>24</sup>

To proceed forward, the Court must determine (1) whether it knows or has reason to know that a conflict exists,<sup>25</sup> (2) whether an actual conflict of interest exists, and (3) if a conflict exists, is it waivable in the present case.

#### Analysis:

Death is different. *See Woodson v. North Carolina*, 482 U.S. 280, 96 S. Ct. 2978 (1976). The duties of the trial court are many but the overarching duty is clear: protect all Parties' rights to a fair proceeding. Where capital punishment is a legitimate potential, the Court's duties to protect a fair and orderly proceeding are unquestionable. The State has raised the issue of a conflict of interest in Mr. Means' ongoing representation of Vallow. The Court has not taken these allegations lightly, nor has it been hasty to render a decision about the issue, instead conducting hearings, an *in camera* inquiry, and striving in all aspects to render justice and protect the interests of all Parties during these proceedings. Further, the case at bar is stayed pursuant to orders previously issued under I.C. §§ 18-211 and 212 after determination that Vallow is currently not

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<sup>23</sup> Idaho Rules of Professional Conduct, Rule 1.7(a).

<sup>24</sup> Idaho Rules of Professional Conduct, Rule 1.7(b).

<sup>25</sup> *Cuyler*, 446 U.S. at 347.



competent to proceed. Procedurally, this case is in its infancy, where Vallow has yet to be arraigned due to the incompetency finding and subsequent stay in the case. However, this case commenced with an indictment issued May 25, 2021, and thus the issue of a potential conflict has persisted for several months, notwithstanding the stay of the case. Further, while the case is currently stayed, the Court has considered the regularity with which pleadings continue to be filed by the Parties, and thus the Court determines that the matter is ripe for determination at this time.

*1. The Court has reason to know that a conflict exists.*

The State has, on several occasions, raised the issue of its allegation of a conflict and brought the issue to this Court formally through a motion filed July 27, 2021. The Court held hearings relating to the issue and ultimately conducted an *in camera* inquiry into what Defendant Chad Daybell knew and / or understood with respect to the possible conflict of Mr. Means' concurrent representation. Both Defendants Daybell and Vallow, through counsel, have acknowledged the issue, which was brought to the forefront of the case when it was determined by the Court that an *in camera* inquiry was necessary, and was conducted. Thus, the Court has a well-founded reason to know that there is concern that a conflict exists.

*2. An actual conflict of interest still exists in the case at bar, as found by Magistrate Judge Eddins in a related case.*

This issue has been thoroughly addressed in an earlier case brought against Vallow.<sup>26</sup> This Court has also additionally analyzed the issue and reviewed the record in regards to the conflict issue. Taking all of that into account, the Court finds that the record demonstrates that Mr. Means, in his capacity as a licensed Idaho attorney, represented Mr. Daybell between April, 2020 and June, 2020. The record is also clear that Daybell and Vallow are now charged as co-conspirators

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<sup>26</sup> See CR22-20-838. The Court has taken judicial notice of Judge Eddins' Findings of Fact and Conclusions of Law. Memorandum Decision and Order; Page 11 of 17



with multiple felony counts, including charges of first degree murder, and that Mr. Means is Vallow's current counsel of record. Finally, the indictment issued in Cases CR22-21-1623 and CR22-21-1624 sets forth alleged "overt acts" relating to the alleged conspiracy between Daybell and Vallow that occurred "[o]n or between October 26, 2018 and June 9, 2020," which timeframe includes the time when Mr. Means represented Daybell.<sup>27</sup> Thus, the Court concludes that Mr. Means concurrently represented the co-defendants in those cases within the timeframe of the alleged conspiracy.

In previously determining that there was an actual conflict of interest on account of Mr. Means' former representation of Chad Daybell, Judge Eddins held that given the fact that (1) the Defendants had since retained separate counsel and, importantly, (2) that the charges contemplated in that case carried a maximum penalty of five years of prison, and thus did not rise to the "serious nature" where a defendant could not rationally choose concurrent counsel, that the conflict could be waived in that case. The record reflects that Judge Eddins questioned conflicting information provided to the court about the date of the waivers and whether they had been properly executed. Judge Eddins emphasized that an acceptance of the waivers, even if dubious, was expressly limited to the case before him, and that should a subsequent case or subsequent charges be filed with more severe penalties, the waiver would likely not be honored and a per se conflict would need to be addressed.

Thus, nothing has served to cure the actual conflict, which has carried into in the present case, based on Mr. Means' concurrent representation of Daybell and Vallow, and the timing of that representation. It is clear that the Defendants' previous cases arose from some of the same facts and occurrences the State has alleged to be at the root of the pending murder charges in this

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<sup>27</sup> May 25, 2021 Indictment, Cases CR22-21-1623 and CR22-21-1624  
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case, which indisputably elicits a heightened scrutiny, given the potential for the death penalty to be brought herein.<sup>28</sup> Further, the Defendants were charged together in a single indictment in their pending cases, and are both charged as co-conspirators.

3. *Given the maximum possible penalties associated with the charges in the conspiracy case, including the death penalty, the conflict of Mr. Means's former representation of Chad Daybell cannot be waived as it triggers a per se ineffective assistance of counsel concern.*

The Court is aware that both Daybell and Vallow proffered a waiver of their right to conflict-free counsel in Case CR22-20-0838, where Judge Eddins found an actual conflict but permitted the waiver. However, the cases now before the Court are distinctly different and require a new analysis. Further, even were this Court able to determine that a waiver offered here was effective as knowing, intelligent, and voluntary, a defendant's waiver is not dispositive of a conflict inquiry because courts "have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."<sup>29</sup>

The Court finds an actual conflict. Daybell indicated in the Court's *in camera* inquiry that he never believed Mr. Means was his attorney. He did however acknowledge that he had previously talked to Mr. Means, and called Mr. Means when the search warrant was executed on Daybell's property. This occurred prior to the arrest and subsequent charging of Daybell for the murders of Vallow's children and Daybell's first wife. That acknowledged communication between Mr. Means and Daybell, in conjunction with the previously noted representations Mr. Means himself made indicating he represented Daybell, lead the Court to conclude that Mr. Means did represent Daybell, although the extent of the representation is unclear. Because Daybell and

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<sup>28</sup> A Notice of Death Penalty was filed in Daybell's case on August 5, 2021. See CR22-21-1623. Because Vallow's case is stayed pending treatment for competency, Vallow has not been arraigned. However, the notice does contain Vallow's case number (1624), as it was issued before the Court's order requiring separate case number filings.

<sup>29</sup> *Wheat v. U.S.*, 486 U.S. 153, 160, 108 S. Ct. 1692, 1698, (1998).



Vallow are named co-conspirators, necessarily, they have interests adverse to one another, and each has a right to counsel who is free to zealously advocate for each of them independently, without that ability being hampered by a conflict of interest. The Sixth Amendment guarantees each criminal defendant the right to assistance of counsel unhindered by a conflict of interests. U.S. const. amend. VI. *U.S. v. Elliot*, 463 F.3d 858 (9th Cir. 2006), petition for cert. filed (U.S. Oct. 10, 2006). Given these facts and the charges at hand, the Court determines that even if waived by both Daybell and Vallow, the conflict would persist in this case such that Mr. Means' continued representation is untenable.

Another consideration weighs into this decision: capital charges are more than a mere possibility in Vallow's case. As such, Vallow has the right to death-penalty qualified counsel, if she is represented by a public defender. Mr. Means is not presently certified to represent clients in capital cases. Because death is different, this Court must ensure that at every critical stage of her case, she is represented by counsel who is able to zealously and competently advocate on her behalf. If and when Vallow is restored to competency, the Court could conduct an inquiry into her interest in waiving qualified counsel; however, until such time, this Court's duty to protect her rights remains. The Court has determined the best protection for her exists in the appointment of a death penalty qualified public defender, and on August 6, 2021 appointed as co-counsel attorney R. James Archibald.

This decision came in part because of the request of Mr. Means, who had been Vallow's privately retained attorney, for a finding of indigency. Further, her commitment to the Department of Health and Welfare carries with it a presumption of indigency that further lead the Court to determine that it was necessary to issue the order appointing Mr. Archibald on August 6, 2021 as co-counsel in this case.



Finally, the very actions taken by Mr. Means raise questions about his ability to continue in his representation of Vallow. Concomitant to a conflict analysis is an analysis of whether the decisions of counsel demonstrate their ability to uphold their duties to clients—past and present. Mr. Means has potentially made himself a witness in the case, by filing multiple pleadings in the form of declarations, containing factual assertions of Mr. Means submitted under penalty of perjury. That unusual manner of practice has further caused the Court to be concerned about the effectiveness of Mr. Means' representation of Vallow in the case. Also of concern, is a possible intentional or unintentional waiver of Vallow's attorney-client privilege, where Mr. Means has submitted to the record purported facts from statements Vallow made to Mr. Means under the umbrella of the privilege she enjoys, while she has been deemed incompetent to proceed. This is precisely the situation that ethics rules caution against, where the rules stress that lawyers should avoid becoming witnesses in their clients' cases.<sup>30</sup>

An actual conflict exists in this case due to Mr. Means' former representation of Daybell, and the timing of that representation, and Daybell's waiver is insufficient to overcome the risk of harm in allowing Mr. Means to remain counsel to any party connected to this case. Additionally, Mr. Means' practice of submitting declarations under penalty of perjury have called into question his ability to competently and effectively represent Vallow going forward, despite the pending stay in this case. Finally, the Court, in balancing the rights of Vallow to counsel of her choice, and her present inability to be thoroughly examined to ascertain whether she could knowingly, intelligently, and meaningfully waive her right to conflict-free qualified counsel, given the potential for a penalty of death she faces in the crimes she is charged with, must cautiously act to protect her rights. On balance, because "conflict questions should be addressed by trial courts on

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<sup>30</sup> Idaho Rule of Professional Conduct 3.7 "Lawyer as Witness"  
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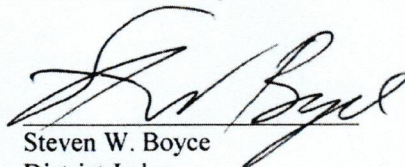
a case-by-case basis, where the court takes individual situations into consideration to determine whether a defendant's right to counsel is threatened by competing interests," the decision of the Court is to remove Mr. Means as counsel to and to continue the appointment of R. James Archibald as counsel in this case.<sup>31</sup>

Conclusion:

For the foregoing reasons, the State's motion is GRANTED. Mr. Means is hereby disqualified, as of today's date, from representing Lori Norene Vallow Daybell in Fremont County Case CR22-21-1624 and all matters substantially related thereto.

IT IS SO ORDERED.

Dated this 28<sup>th</sup> Day of December, 2021.

  
Steven W. Boyce  
District Judge

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<sup>31</sup> *State v. Cook*, 144 Idaho 784, 791-94, 171 P.3d 1282, 1289-92 (Ct. App. 2007) (citations omitted).



### CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 2021, the foregoing Order was entered and a true and correct copy was served upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes; by causing the same to be hand-delivered, by facsimile, or by e-mail.

Parties Served:

Lindsey A. Blake  
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*Attorney for Lori Norene Vallow Daybell*

Clerk of the District Court  
Fremont County, Idaho

by Becky Harrington  
Deputy Clerk