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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 51091-2023**
Plaintiff-Respondent,	)	
	)	**Fremont County Case No.**
v.	)	**CR22-21-1624**
	)	
LORI NORENE VALLOW aka LORI NORENE DAYBELL,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE STEVEN W. BOYCE
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Lori Norene Vallow appeals from her judgment of conviction after a jury found her guilty of two counts of conspiracy to commit murder and grand theft, two counts of murder, one count of conspiracy to commit murder, and one count of grand theft.

Statement of the Facts and Course of the Proceedings

On February 20, 2020, Lori Vallow was arrested in Hawaii and subsequently extradited to Idaho. (R., p.458.) The State charged Vallow in case number CR33-20-0302 with two counts of felony desertion of a child and several misdemeanor charges. *Id.* The felony charges were for two of Vallow's minor children: Joshua "J.J." Vallow and Tylee Ryan. *Id.* Neither J.J. nor Tylee had been seen for several months. (R., p.242.)

Attorney Mark Means was retained to represent Vallow sometime in late February or early March 2020. (R., p.460.) The representation was arranged and paid for by Vallow's husband, Chad Daybell. *Id.* Means entered a notice of appearance as Vallow's counsel on March 4, 2020. *Id.*

On March 21, 2020, Daybell retained John Prior to represent him, though he had not yet been formally charged. (R., p.459.) Prior's law office was in the same building complex as Means's law office, but Prior and Means did not work for the same law firm. (R., p.459.)

Daybell also retained Means as his own attorney. On April 28, 2020, Means made public representations that he represented Daybell. (R., p.460.) Means posted the following on Twitter: "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." (R., p.459.) He also sent a press release to the media stating: "Please take notice that this office represents Mr. Chad Daybell. Please direct all requests for

communications/statements of the like to this office." (R., p.459.) Means also emailed the prosecutor on Vallow's case "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." (R., p.460.)

On the same day, April 28, 2020, Daybell expressly stated that Means was his attorney. In a jail communication with Vallow, Daybell stated, "Mark [Means] is my attorney." (R., p.459.) Daybell "alluded he had shared confidential information with Mr. Means that [Daybell] believed would be covered by attorney/client privilege." (R., p.459.) Daybell even "suggested" that he "believed he would not have to testify against [Vallow] if Mr. Means represented them both." (R., p.459.) "Daybell also stated he was 'eventually' going with 'the other guy,' ostensibly referring to Mr. Prior." (R., p.461.)

Two days later, on May 2, 2020, Vallow appeared in court for a bail reduction hearing. (R., p.459.) Means appeared on Vallow's behalf and told the court that he represented both Vallow and Daybell. (R., p.459.)

On June 9, 2020, law enforcement executed a search warrant on Daybell's property searching for J.J. and Tylee or evidence of their disappearance. (R., p.459.) Daybell was present and observed the search. (R., p.459.) "During the search, [Daybell] called Mr. Means before calling Mr. Prior." (R., p.459.) Law enforcement found J.J.'s body and Tylee's remains on Daybell's property. (R., p.461.)

After the execution of the search warrant, the State charged both Vallow (CR22-20-838) and Daybell (CR22-20-755) with the destruction of evidence and conspiracy to destroy evidence. (R., p.461.) The State named Daybell as a co-conspirator in Vallow's case and Vallow as a co-conspirator in Daybell's case. (R., p.459.)

Vallow's initial appearance in the new case occurred on June 30, 2020. (R., p.461.) The court asked Means whether he had ever represented any co-conspirator in the complaint and, despite his previous public statements to the contrary, Means told the court he had not. (R., p.461.) The prosecutor insisted that Means had a conflict. (Conf. Aug. R., p.3.) The court requested briefing on the issue. *Id.*

The State and Means filed briefs addressing the conflict issue. (Conf. Aug. R., pp.1-30.) The court then held a sealed hearing on the matter on July 20, 2020. (Aug. Conf. Docs., p.4, Tr., p.4, Ls.3-7.) Means now took the position, contrary to what he previously told the court, that a limited representation had occurred between him and Daybell, but it did not create a conflict: "Our position is that there was limited representation, that there was not an opportunity for conflict, that a conflict had not occurred, and the analysis should end there." (Aug. Conf. Docs., p.17, Tr., p.17, Ls.3-6.)

On July 31, 2020, the court issued its ruling. (Conf. Ex. R., pp.64-81.) The court held that "a conflict of interest exists in this case, but it is not an actual conflict that would *currently* rise to Mr. Mean's disqualification from representing [Vallow]." (Conf. Ex. R., p.73 (emphasis added).) The court thus allowed Vallow to waive the conflict and continue with Means as her attorney. (Conf. Ex. R., pp.78-80.) The court emphasized, however, that it would not have allowed the conflict to be waived if the charges carried a heavier punishment:

> The Court notes that this decision coincides with the current charges against the Defendants. If the charges carried maximum penalties of life imprisonment and/or the death penalty, the Court would be more inclined to find actual conflict and not honor the waiver.

(Conf. Ex. R., p.79.) Means provided the court with a waiver purporting to waive the conflict created by Means representing both Vallow and Daybell on substantially related matters. (Conf. Aug. R., pp.31-33.) The waiver was signed by Vallow and Daybell and dated March 31, 2020. *Id.*

On March 2, 2021, Means filed a request for Vallow to be evaluated for competency to stand trial. (R., p.462.) Then on April 30, 2021, Doctor John E. Landers issued a report concluding Vallow was incompetent to proceed to trial. (Conf. Ex. R., p.256.) Means did not contest the finding that Vallow was not competent but did seek and obtain an order from the court declaring Vallow indigent such that the county had to pay for the examination. (R., p.462.) The State initially challenged the incompetency determination but withdrew the challenge. (Conf. Ex. R., p.409 n.3.) The court found Vallow incompetent to stand trial on June 9, 2021. *Id.*

On May 24, 2021, after Dr. Landers issued his report finding Vallow incompetent, a Fremont County grand jury returned an indictment charging Daybell and Vallow as co-conspirators in the deaths of Tylee, J.J., and Chad's deceased wife, Tamra "Tammy" Daybell. (R., p.462.) Specifically, Vallow was charged with two counts of first-degree murder, two counts of conspiracy to commit first-degree murder and grand theft, and one count of conspiracy to commit first degree murder. (R., pp.52-60.)

The grand jury indictment spawned *two* additional criminal cases in the Daybell/Vallow saga. Despite the indictment naming and charging Vallow and Daybell as co-defendants and co-conspirators in the same indictment, two separate cases were opened: one case for Daybell (CR22-21-1623) and a separate case for Vallow (CR22-21-1624). (R., p.142.) The Vallow 1624 case is the case from which Vallow appeals in this matter.

On May 27, 2021, three days after the grand jury indicted Vallow and Daybell, the district court entered an order staying Vallow's case because of "the issue of Defendant's competency" that had arisen in CR22-20-838. (R., p.73.) Means filed a notice of appearance that same day claiming to represent Vallow in the new, death-penalty-eligible case. (R., p.75.) On June 9, 2021,

the district court entered an order finding Vallow was not competent to proceed and suspended the case except as provided in Idaho Code § 18-212(5) and (6). (R., p.88.)

Because the district court treated the single grand jury indictment as the start of two separate cases, only Vallow's case was suspended, and Daybell's case was allowed to proceed. This was true even though, at the time, the plan was for the two cases to go to trial together. (R., p.142.) To further complicate the matter, the parties and the district court continued filing into the purportedly suspended Vallow case while Vallow remained incompetent to proceed to trial. Means, for example, filed a motion to compel (R., pp.98-100), a declaration in support of his motion to compel (R., pp.112-15), a reservation of substantive and procedural rights (R., pp.118-20), a motion to change the venue of the trial (R., pp.121-23), and more—all while his client was still incompetent and the case was, at least purportedly, suspended.

In that same time frame, the State filed on June 27, 2021, a motion to disqualify Means as Vallow's attorney. (Conf. Ex. R., pp.39-63.) The State filed the motion in both Vallow's case and Daybell's case. *Id.* at 39. The motion argued that Means had a conflict from representing both Vallow and Daybell with respect to the facts underlying the alleged murders, that the nature of the conflict meant that it could not be waived, and that the district court should disqualify Means from all future proceedings related to the alleged crimes. *See id.* at 61.

On August 6, 2021, the district court entered an order requiring the appointment of a death-penalty qualified public defender to represent Vallow as co-counsel with Means. (R., p.147.) The district court explained that it entered the order in response to the State's motion to disqualify Means and to protect Vallow's constitutional rights. (R., pp.145-47.) R. James Archibald was appointed as co-counsel to represent Vallow. (R., p.149.)

Means did not file a response to the State's motion to disqualify him as Vallow's counsel. (*See* R., pp.4-9.) Instead, he chose to put his efforts into trying to intervene in Daybell's case to fight the State's allegations of a conflict. (Conf. Aug. R., p.168.) But the district court refused to allow Means to intervene in a separate criminal case, observing that no rule allowed for such intervention. (*State v. Daybell*, CR22-21-1623, 8/30/2021, Hr'g Tr., p.18, Ls.5-14.) The district court also made clear in all the proceedings related to the conflict in the Daybell case that the hearings were limited to the Daybell case and did not include the Vallow case.

On December 28, 2021, after still having not received a response to the conflict allegations in the Vallow case from Means, the district court entered an order disqualifying Means from the case. (R., pp.457-72.) The district court found, as did the magistrate court before it, that an actual conflict existed because Means had represented both Daybell and Vallow with respect to a common set of facts. (R., pp.467-69.) The district court also explained, consistent with the magistrate court's reasoning, that the district court would not allow waiver of the conflict in this case because of the seriousness of the charges Vallow faced. (R., pp.469-72.) In addition to the conflict, the district court also cited its lack of confidence in Means's ability to represent Vallow in a death penalty case. (R., pp.470-71.) Finally, the district court explained that it had to act prior to Vallow being restored to competency because of "the regularity with which pleadings continue to be filed by the Parties." (R., p.467.) The district court thus ordered that Means was disqualified from representing Vallow in the immediate case "and all matters substantially related thereto." (R., p.472.) The district court appointed Archibald to represent Vallow as lead counsel. (R., p.472.)

On April 11, 2022, the district court found Vallow had been restored to competency and was fit to proceed to trial." (Conf. Ex. R., pp.254-68.) It lifted the stay in the case and ordered that she be brought before the court for arraignment. (R., p.536.) Vallow was then arraigned on April

19, 2022. (R., p.570.) The next day, the district court set the trial for ten weeks starting on October 11, 2022. (R., p.572.)

On May 5, 2022, the State moved to continue the trial to January 9, 2023. (R., p.591.) The State argued that Vallow and Daybell should be tried together, and Daybell's trial had already been set for January 9. (R., p.591.) The district court granted the continuance. (R., p.615.) It found the length of the delay reasonable given the complexity and seriousness of the case and the short length of the delay requested: "82 days beyond the deadline of October 19, 2022 for purposes of evaluating Defendant's statutory right to speedy trial." (R., p.620.) The district court also found the reason for the delay supported the continuance, given the need to avoid improper severance of the Daybell and Vallow trial and to give both sides time to prepare for trial. (R., pp.621-22.) It also acknowledged that Vallow had unequivocally asserted her right to a speedy trial but that the delay would not prejudice her because it would give her team additional time to prepare. (R., pp.622-23.) Thus, the trial court moved the date of the trial from October 11, 2022, to January 9, 2023. (R., p.625.)

On September 30, 2022, prior to the original trial date, defense counsel filed a motion seeking to continue the trial and stay the case. (R., p.957.) The motion stated that the defense wanted to continue the trial date so that they could once again address the defendant's mental health. (R., p.957.) Attached to the motion was an affidavit from defense counsel explaining that three of their own mental health experts all agreed that Vallow was not competent to stand trial. (Conf. Ex. R., p.294.) The motion asked to continue the trial so that Vallow could receive restorative treatment. (Conf. Ex. R., p.294.) Attached to the affidavit was a report from a board-certified clinical psychologist who had concluded Vallow was not competent to stand trial. (Conf. Ex. R., pp.296-341.)

On October 6, 2022, and in response to the defense's motion and expert report, the district court set a competency hearing pursuant to Idaho Code 18-212(1). (Conf. Ex. R., p.369.) The district court also stayed the case "until such time as the Court renders a final decision regarding the Defendant's competency to stand trial following a contested competency hearing." (Conf. Ex. R., p.369.)

The district court held a competency hearing on November 9, 2022, and then issued a written decision on November 15, 2022, finding Vallow competent to stand trial. (Conf. Ex. R., p.408.) The order also lifted the stay imposed on October 6, 2022. (Conf. Ex. R., p.428.) The January 9, 2023, trial date was also vacated due to the defense's motion. (R., p.1343.)

In December 2022, the district court held a scheduling conference to discuss a new date for the trial. (R., p.1139.) Daybell's counsel requested a trial date no sooner than October 2024; the State proposed a "late summer" 2023 start date; and Vallow's counsel insisted upon a date no later than February 21, 2023. (R., p.1350.) However, to give the parties time to complete discovery and for the court to arrange for trial in Ada County where it had been moved in response to Vallow's motion to change venue, the district court set the date for April 3, 2023. (R., pp.1350-53.) After the district court set the new trial date, Vallow moved to dismiss the case on the basis that the new trial date violated her rights to a speedy trial. (R., p.1226.) The district court denied the motion. (R., pp.1341-55.)

On January 27, 2023, the State provided notice under Rule 404(b) of the Idaho Rules of Evidence that it intended to introduce at trial evidence that fit into 25 different categories. (Conf. Ex. R., pp.491-501.) The defense objected, arguing the State had not provided sufficient notice of the facts it intended to introduce and that it had not provided reasonable notice prior to trial. (Conf.

Ex. R., pp.506-11.) At a hearing on February 9, 2023, the district court requested that the State "narrow their scope when looking at 404(b)." (Conf. Ex. R., p.517.)

On February 14, 2023, the State filed an amended notice for the introduction of evidence pursuant to Rule 404(b). (Conf. Ex. R., p.518.) This time, rather than list out categories of evidence, the State provided an "overview of proposed evidence" in narrative format. (Conf. Ex. R., pp.527-30 (capitalization altered).)

The State's notice proffered the evidence it had to show how Daybell, Vallow, and their group operated. *Id.* at 527-28. Their group included Zulema Pastenas, Melanie Boudreaux, Melanie Gibb, and Alex Cox ("Alex"), who was Vallow's brother. *Id.* As the group's de facto leader, Daybell "could determine if someone was light or dark, and if someone had a dark entity." *Id.* at 528. Once Daybell made the determination that someone was dark, he would inform Vallow and the others in their group that the person's body "was possessed by a dark entity/spirit which would then require their body to be destroyed/killed." *Id.*

Another feature of this group was that Daybell had designated Alex "as a protector" for Vallow. *Id.* at 527-28. Daybell had informed Vallow and Alex that "Alex was here in this creation (current probationary period on Earth) to protect" Vallow. *Id.* at 528. Multiple witnesses had also established that "Alex would do whatever [] Daybell asked him to do." *Id.* at 530.

The State's proposed 404(b) evidence showed how this group operated on two occasions prior to the murders in Idaho. The proposed evidence first covered the murder of Charles Vallow ("Charles") in Arizona. (Conf. Ex. R., p.527.) Charles was Vallow's husband at the time he was killed. *Id.* Prior to Charles's murder, Daybell had "pronounced" that Charles was "dark." *Id.* at 528. Vallow had been telling individuals that Charles "was no longer himself" and both Vallow

and Daybell "were informing people that [Charles's] spirit was no longer in his body, and that his body was instead inhabited by an evil spirit/entity." *Id.*

On July 11, 2019, Charles arrived home to find Vallow and Alex there. *Id.* Vallow and Alex "claimed there was some sort of a dispute which resulted in Charles obtaining a bat and Alex shooting him." *Id.* Vallow provided to law enforcement the outlandish story that "she heard the shot, went back and saw Charles on the floor, then left the residence to take her son to school." *Id.* "She went to Burger King, took her son to school, went to a CVS, then returned to her residence where law enforcement were already on scene." *Id.*

For his part, "Alex stated after he shot Charles, he washed his hands, put the gun away and called 911." *Id.* at 529. Alex claimed it was self-defense, but law enforcement could show that one of the two bullets that shot Charles was fired after Charles was on the floor; that Alex claimed he tried to provide CPR even though there was no indication CPR had been attempted; and that Alex had not called 911 for 43 minutes after the shooting. *Id.* The State also had evidence that, prior to Charles's murder, Vallow had taken $35,000 out of his business account and that Vallow believed she was the recipient of Charles's $1 million life insurance policy. *Id.* at 529-30.

The proposed evidence also covered the attempted shooting of Brandon Boudreaux ("Brandon") on October 2, 2019. *Id.* at 530. The State had evidence showing that, prior to the shooting, Daybell "had determined that Brandon was a dark spirit/entity" and requested that Alex kill him. *Id.* The investigation into the attempted shooting led law enforcement straight to Alex. *Id.* And, like with Charles, a member of the Daybell/Vallow group, Melanie Boudreaux, stood to benefit from Brandon's death as Brandon "had a life insurance policy." *Id.* The State also had evidence showing Melanie provided financial resources to both Vallow and Alex. *Id.*

The district court held a hearing on the State's amended 404(b) notice on February 16, 2023. (Conf. Ex. R., p.539.) The district court overruled the defendants' objections to the 404(b) evidence with a couple of exceptions. (Conf. Ex. R., pp.626-28.) First, the district court excluded evidence of Vallow taking $35,000 from Charles, finding it would be more prejudicial than probative because Vallow was married to Charles at the time and Arizona was a community property state. (Conf. Tr. R., p.885, L.20 – p.887, L.3.) Second, the district court excluded any reference to the past criminal case against Vallow in Madison County because the State had dismissed it with prejudice. (Conf. Tr. R., p.890, L.16 – p.893, L.11.) But the district did overrule the objection as to the allegations underlying the criminal case. *See id.*

A jury convicted Vallow on all counts at trial (R., pp.1895-96), and the district court sentenced her to a unified sentence of life imprisonment without the possibility of parole (R., pp.2117-18). This appeal followed.

ISSUES

Vallow states the issues on appeal as:

I. Lori Daybell was deprived of her Sixth Amendment right to counsel of her choice when the district court disqualified her retained attorney.

II. Ms. Daybell was deprived of her Sixth Amendment right to the assistance of counsel during pretrial hearings on the State's motion to disqualify her counsel after the district court denied her attorney's request to participate in those hearings.

III. Ms. Daybell was deprived of her right to due process under the Fourteenth Amendment when the district court held pretrial hearings that affected her substantial rights in her absence and while she was incompetent.

IV. The district court erred in allowing the State to introduce evidence of uncharged bad acts from Arizona into the Idaho criminal trial under Rule 404(b) of the Idaho Rules of Evidence.

V. The district court erred in denying Ms. Daybell's motion to dismiss based on a violation of her statutory and constitutional rights to a speedy trial.

(Appellant's brief, p.24.)

The State rephrases the issues as:

I. Has Vallow failed to show the district court violated her Sixth Amendment right to counsel of her choice by disqualifying her attorney?

II. Has Vallow failed to show the district court committed fundamental error by violating her Sixth Amendment right to the assistance of counsel?

III. Has Vallow failed to show the district court committed fundamental error by violating her due process right not to be prosecuted or to be physically present at proceedings?

IV. Has Vallow failed to show the district court erred by overruling Vallow's pretrial objection to the State's proposed 404(b) evidence?

V. Has Vallow failed to show the district court erred when it denied her motion to dismiss on the basis that her speedy trial rights were violated?

ARGUMENT

I.
Vallow Has Failed to Show that the District Court Violated Her Sixth Amendment Right to Counsel of Her Choice by Disqualifying Her Attorney

A. Introduction

The district court properly acted to protect Vallow's Sixth Amendment right to the effective assistance of counsel by disqualifying her attorney who had previously represented her co-conspirator with respect to the same conspiracy. Vallow's right to her counsel of choice does not extend to an attorney who is laboring under an actual conflict or serious potential conflict of interest. Nor could Vallow's proffered waiver of the conflict suffice because she was incompetent and could not knowingly, intelligently, and voluntarily waive her right to conflict-free counsel and because the nature and circumstances of this case required the district court to reject any waiver to protect the fundamental fairness of the proceedings. The district court did not err.

B. Standard of Review

"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, 696, 819 P.2d 110, 114 (Ct. App. 1991); *see Hepworth Holzer, LLP v. Fourth Jud. Dist. of State*, 169 Idaho 387, 394, 496 P.3d 873, 880 (2021) ("Deciding [motions to disqualify], even if those matters are grounded in the ethical rules, is a proper discretionary decision to be made by the trial courts of this state."). "When a violation of a constitutional right is asserted, [Idaho's appellate courts] will defer to the trial court's factual findings unless those findings are clearly erroneous." *State v. Stanfield*, 158 Idaho 327, 331, 347 P.3d 175, 179 (2015).

C. The District Court Acted Well Within Its Discretion in Disqualifying Means from Representing Vallow

The Sixth Amendment protects a criminal defendant's right to the assistance of counsel for her defense. One "element of the right to counsel 'is the right of a defendant who does not require appointed counsel to choose who will represent him.'" *State v. Daly*, 161 Idaho 925, 928, 393 P.3d 585, 588 (2017) (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006)). But the "right to choose one's own counsel is circumscribed in several important respects." *Wheat v. United States*, 486 U.S. 153, 159 (1988). As relevant here, a criminal defendant does not have an absolute right to the counsel of his choice when that counsel is burdened by a conflict of interest or the serious potential for a conflict of interest. *See id.* A defendant can sometimes waive the conflict, though a waiver by the defendant does not necessarily solve the problem because the district court has an independent interest in ensuring that justice is done. *See id.* A district court has broad discretion in refusing a proffered waiver of an actual conflict or the serious potential for a conflict. *See id.* at 164.

The district court acted within its broad discretion when it disqualified Means from representing Vallow. Specifically, the district court properly (1) found the existence of an actual conflict or serious potential for a conflict; (2) recognized Vallow could not waive any conflict because she was incompetent at the time of the disqualification decision; and (3) rejected any proffered waiver because of the seriousness of the charges and risk of prejudice to Vallow.

1. The District Court Properly Found an Actual Conflict or Serious Potential for Conflict Because Means Represented Both Vallow and Daybell During the Alleged Conspiracy

The district court properly found a conflict of interest or serious potential for a conflict arose from Means representing both Daybell and Vallow in the context of the same criminal conspiracy. A district court can disqualify defendant's counsel of choice "not only by a

demonstration of actual conflict but by a showing of a serious potential for conflict." *Wheat*, 486 U.S. at 164. "Unfortunately for all concerned," however, "a district court must pass on the issue . . . not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly." *Id.* at 162. Thus, district courts should be given "substantial latitude" in this area because "[t]he likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials." *Id.* at 162-63.

When it comes to conflicts, multiple representation is king. *See Culyer v. Sullivan*, 446 U.S. 335, 348 (1980) ("A possible conflict inheres in almost every instance of multiple representation."); *Wheat*, 486 U.S. at 159 ("In previous cases, we have recognized that multiple representation of criminal defendants engenders special dangers of which a court must be aware."). Indeed, courts routinely find conflicts where the same attorney represents co-conspirators in the context of the same conspiracy, regardless of whether the representation is successive or concurrent. *See, e.g.*, *United States v. Martinez*, 143 F.3d 1266, 1269 (9th Cir. 1998) ("It is true that, having previously represented [a co-conspirator] with regard to the same matter, [defense counsel] should not have represented [defendant]."); *United States v. Ruiz*, 649 F.Supp.3d 321, 331 (E.D. Tex. 2022) (finding serious potential for conflict in successive representation of co-conspirators); *United States v. Crinel*, 2015 WL 4394158, at *3 (E.D. La. 2015) (finding serious potential for conflict where attorney "represented [a co-conspirator] during part of the pre-indictment phase of this case"); *United States v. Collins*, 2012 WL 12951527, at *4-5 (W.D. Penn. 2012) (finding serious potential for conflict and disqualifying counsel who previously represented co-conspirator even though prior representation was "very limited in scope").

The *potential* concerns evoked are legion. The conflicted attorney may "pull punches on cross examination of his previous client or his knowledge regarding his previous client [c]ould provide an advantage on cross-examination." *Ruiz*, 649 F.Supp.3d at 332 (internal quotes omitted). The conflict could compromise counsel's "ability to explore plea negotiations should the [current] client choose to." *Id.* And it can risk the attorney improperly utilizing confidential information gained from the former client. *See Ruiz*, 649 F.Supp.3d at 331; *see United States v. Culp*, 934 F.Supp. 394, 398 (M.D. Fla. 1996) ("Because of the lawyer's continuing duty of confidentiality, the representation, be it simultaneous or successive, of more than one defendant charged in the same criminal conspiracy inevitably presents a conundrum for the lawyer who is so engaged.").

The risk of a conflict "significantly increase[s]" when the disqualification decision is made early in the case "since the defense does not yet know much of the substance of the government's case-in-chief" which necessarily creates "uncertainties in defense strategy." *United States v. Cleveland*, 1997 WL 148572, at *5 (E.D. La. 1997); *see also Wheat*, 486 U.S. at 163 ("A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants."). And even if it turns out that neither co-conspirator chooses to turn on the other, they might still "have divergent interests at sentencing, when issues such as the defendant's role in the offense and his relationship to other defendants come into play." *United States v. Crinel*, 2015 WL 4394158, at *3 (E.D. La. 2015) (internal quotations omitted); *see Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) (recognizing defense attorneys in multiple defendant cases often "minimize the culpability" of their own client by "emphasizing that of another [defendant]").

With these concerns in mind, the presence of a conflict or serious potential for a conflict is self-evident in this matter. For starters, there can be no doubt but that Means represented Daybell

with respect to the alleged conspiracy. Means publicly stated as much on social media when he posted on April 28, 2020: "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." (R., p.460.) "[N]either the content nor the source of the communication has been disputed." *Id.*

Means also contacted the prosecutor overseeing the State's efforts and asked him "to direct investigation efforts relating to Daybell or Vallow to him." *Id.* He also published a press release indicating that he represented Daybell, and Means expressly informed the court that he represented both Vallow and Daybell. *Id.* at 459-61. Means was not the only person involved in the representation to indicate the representation occurred. At the same time Means was publicly stating he represented Daybell, Daybell indicated on a phone call with Vallow that Means was both Daybell's and Vallow's attorney. (R., p.460.) In light of this evidence, the district court properly found that "Means concurrently represented the co-defendants in those cases within the timeframe of the alleged conspiracy." (R., p.468.)

That factual finding supported by the record leads to the inescapable conclusion that a conflict or serious potential for a conflict existed. Under the Idaho Rules of Professional Conduct, Means had a conflict that—at the very least—had to be waived by Vallow and Daybell because of the significant risk that his representation of Vallow would be limited by his prior representation of Daybell. *See* I.R.P.C. 1.7; *see also* I.R.P.C. 1.9. As the district court explained, in the context of this case, "[b]ecause Daybell and Vallow are named co-conspirators, necessarily, they have interests adverse to one another." (R., pp.469-70.)

The district court's conclusion is supported by the same rationales articulated by other courts who have found a conflict in similar situations. For example, if Daybell decided to testify—

a decision over which Means had no control—Means may either "pull punches on cross examination" or benefit from knowledge he obtained from his former representation of Daybell. *Ruiz*, 649 F.Supp.3d at 332 (internal quotations omitted). Means's divided loyalties may also interfere with any plea negotiations, and there is always a risk that Means would utilize (intentionally or inadvertently) information protected by his previous representation of Daybell. *See id.*

Moreover, as the district court explained, the case was "in its infancy" at the time it disqualified Means. (R., p.467.) Vallow had not yet been arraigned. *Id.* Neither Means, Vallow (who was at the time incompetent), Daybell, nor Prior could accurately predict at the time how the defense strategy would play out for either the trial or the sentencing. This significantly increased the risk that a conflict would occur given the likelihood that Vallow or Daybell could turn on the other, either to attempt to avoid a guilty verdict or the death penalty.

Vallow argues the district court erred because the record does not contain concrete evidence of an actual conflict such as specific information Means learned when he represented Daybell that would affect his representation of Vallow. (App. Br., pp.31-36.) Her demand for concrete answers "in the murkier pre-trial context" would place an impossible burden on district courts and runs contrary to the U.S. Supreme Court's decision in *Wheat*. 486 U.S. at 162.

The very nature of trying to predict how potential conflicts will play out necessarily includes some amount of speculation. Indeed, the primary reason the Court affirmed the disqualification of defense counsel in *Wheat* was that "[t]he Government *intended*" to call defense counsel's former client as a witness and "*might* readily have tied certain deliveries of marijuana by [the former client] to [the defendant]." *Id.* at 164 (emphases added). Neither of those eventualities could have been known by the district court when "[v]iewing the situation as it did

before trial." *Id.* at 164. Yet the Supreme Court affirmed the district court's "instinct and judgment based on experience in making its decision" even though "[o]ther district courts might have reached differing or opposite conclusions with equal justification." *Id.* at 163-64; *see also United States v. Sotelo*, 97 F.3d 782, 791 (5th Cir. 1996) (rejecting argument that district court's disqualification decision was "unsupported and dubious speculation as to a conflict" because "[t]he evaluation of the facts and circumstances of each case . . . must be left primarily to the informed judgment of the trial court.") (quoting *Wheat*, 486 U.S. at 164); *United States v. Sanders*, 688 F. Supp. 373, 374 (N.D. Ill. 1988) ("Thus, although [conflicted counsel] may think he learned nothing that would be useful in cross-examining [his prior client], it may be next to impossible to predict with certainty that such is the case.")

Here, the district court had a capital case that was "in its infancy" (R., p.467), making "[t]he likelihood and dimensions of nascent conflicts of interest . . . notoriously hard to predict," *Wheat*, 486 U.S. at 162-63. But the Court had in front of it sufficient facts to reasonably conclude an actual conflict or serious potential for a conflict existed: Means had concurrently represented two co-conspirators on the issue of and during the timeframe of the alleged conspiracy to commit multiple murders; he continued to represent one of the co-conspirators and planned to do so through trial; the co-conspirator who was his former client had "alluded he had shared confidential information with Mr. Means that [the former client and co-conspirator] believed would be covered by attorney/client privilege" (R., p.459); and both co-conspirators were scheduled for a joint trial, which would invite all the conflict issues explained above. The district court acted well within the substantial latitude the U.S. Supreme Court has given it when it decided an actual conflict or a serious potential conflict existed that would require—at the very least—a waiver of the conflict from Vallow.

2. Vallow Could Not Waive the Conflict Because She Was Incompetent

The district court's finding of a conflict or serious potential of a conflict was sufficient in this case to disqualify Means without deciding whether the conflict could be waived because Vallow was in no position to waive the conflict. "To be valid, a waiver of the right to counsel must have been effected knowingly, voluntarily, and intelligently." *State v. Lovelace*, 140 Idaho 53, 64, 90 P.3d 278, 289 (2003). Just "[a]s with the relinquishment of other important constitutional rights, waivers of conflict-free counsel must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences," and courts must accordingly "indulge every reasonable presumption against the waiver of the unimpaired assistance of counsel." *Douglas v. United States*, 488 A.2d 121, 138 (D.C. 1985) (cleaned up). There is no controversy here: "there appears to be unanimous federal circuit court consensus that a criminal defendant's waiver of the Sixth Amendment right to conflict-free counsel must be knowing, voluntary, and intelligent." *State v. Duffy*, 453 P.3d 816, 824 (Ariz. Ct. App. 2019), *aff'd,* 486 P.3d 197 (Ariz. 2021) (collecting cases). And that standard requires something *more* than mere competency. *See Godinez v. Moran*, 509 U.S. 389, 396 (1993) ("A criminal defendant . . . may not waive his right to counsel . . . unless he does so competently and intelligently.") (internal quotations omitted); *United States v. Stites*, 56 F.3d 1020, 1025 (9th Cir. 1995) (explaining even a competent person may not have the mental wherewithal to waive a constitutional right). At the time the district court disqualified Means as Vallow's attorney, Vallow was not competent to stand trial according to Idaho law. *See* I.C. § 18-210. If Vallow "lack[ed] the capacity to understand the proceedings against [her] or to assist in [her] own defense," I.C. § 18-210, she could not possibly waive a fundamental constitutional right knowingly, voluntarily, and intelligently.

Vallow argues any conflict was mitigated because she previously signed a waiver prior to being declared incompetent. (App. Br., p.34.) But the waiver erroneously espoused Means's

flawed and doubly rejected theory that he had provided only "limited" representation to Daybell. (Conf. Aug. R., p.31.) A waiver that misstates the nature of the conflict is no waiver at all. *See United States v. Shwayder*, 312 F.3d 1109, 1117 (9th Cir. 2002) ("The waiver document stated that there was no conflict of interest, so it can hardly be read as waiving one."). Given the erroneous description of the conflict in the waiver itself, Vallow's signing of the waiver does not constitute a knowing, intelligent, and voluntary waiver of the actual conflict at issue.

Moreover, a conflict waiver signed prior to the issuance of an indictment is not valid. *See Shwayder*, 312 F.3d at 1117 ("[T]he document was signed before the indictment was issued and a few years before trial, so it could not have taken into account the actual scope of the case as it proceeded."). Vallow signed the waiver she cites on March 31, 2020, more than one year prior to the grand jury's indictment. At the time she signed the waiver, she had no knowledge that she would be charged with murder in a death-eligible case—factors any reasonable person would consider in deciding whether to waive a fundamental constitutional right. Thus, Vallow had not signed a legally valid waiver at the time of the district court's decision, and her incompetence to proceed to trial meant she could not sign one.

Vallow also suggests that the district court should have waited until Vallow's competency was restored to decide the disqualification issue so she could decide whether to sign a waiver. (App. Br., pp.25-44.) However, as the district court explained, it could not wait to decide the disqualification issue and properly protect Vallow's constitutional rights because Means continued to actively represent Vallow under a conflict of interest while she was incompetent, including by engaging in suspect ethical behavior by publicly filing apparently privileged information Means obtained from Vallow "under the umbrella of the privilege she enjoys." (R., p.471.) Though, to be clear, the district court left the door open to Vallow raising the issue again once competent: "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." (R., p.470.) Neither Vallow nor her counsel took the district court up on its offer. Because the district court properly found a conflict or serious potential conflict existed and Vallow could not waive the conflict, the district court properly disqualified Means as Vallow's attorney.

3. The District Court Properly Found the Conflict Could Not Be Waived

Even if the district court could have accepted Vallow's March 31, 2020, waiver as knowing, intelligent, and voluntary, the district court properly decided the conflict in this case could not be waived. "[T]he district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Wheat*, 486 U.S. at 163. A waiver is not always a sufficient cure when a conflict or serious potential conflict exists 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." *Wheat*, 486 U.S. at 160.

Two primary goals in deciding whether to accept the waiver of conflict-free representation are "to protect the critically important candor that must exist between client and attorney[] and to engender respect for the court in general." *United States v. Moscony*, 927 F.2d 742, 749 (3d Cir. 1991). To that end, "the trial court may enforce the ethical rules governing the legal profession with respect both to client-attorney communications and to conflict-free representation, again regardless of any purported waiver." *Id.*

Even in the "murkier pre-trial context," *id.*, courts have readily identified the representation of multiple co-conspirators as a serious potential conflict that may justify refusing a waiver. *See*

United States v. Sotelo, 97 F.3d 782, 791-92 (5th Cir. 1996) (affirming district court's refusal to accept waivers from co-conspirators represented by same counsel because district court believed "a conflict would arise, particularly in pretrial plea negotiations"). In the case of successive representation, "the probability of prejudice dramatically increases in circumstances where the attorney represented a co-defendant during the pre-indictment phase of the same proceeding." *Moss v. United States*, 323 F.3d 445, 462 (6th Cir. 2003). "This probability reaches near certainty where . . . the attorney's former and current clients collaborate to mount a defense." *Id.* The potential for harm is further increased where the representation of the defendant was paid for by a co-defendant. *See Wood v. Georgia*, 450 U.S. 261, 268 (1981). Ultimately, however, "[t]he evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court." *Wheat*, 486 U.S. at 164.

The district court acted within its substantial latitude when it found the conflict or serious potential conflict could not be waived. In addition to the issues explained above, *see* Part I.C.1., the district court had at least three additional reasons to reject any waiver:

First, the nature of the case weighed in favor of not accepting a waiver. *See Wheat*, 486 U.S. at 163 (affirming decision to reject waiver, in part, because the attorney sought to represent multiple co-conspirators "in a complex drug distribution scheme"). The State charged both Vallow and Daybell with a massive conspiracy resulting in the deaths of three people. And this was a family affair: the State's theory was that Vallow and Daybell engaged in their criminal conduct and killed their own family members—two of Vallow's children and Daybell's wife—so that Vallow and Daybell could be together. Even the "complex drug distribution scheme" in *Wheat* could not hold a candle to the complicated conspiracy with which Vallow had been charged. And Vallow's alleged co-conspirator had facilitated and paid for Means's representation to boot. *See*

Wood, 450 U.S. at 268 ("Courts and commentators have recognized the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party, particularly when the third party is the operator of the alleged criminal enterprise.")

Second, as the district court explained, its decision considered Means's unusual behavior in the case. Means "potentially made himself a witness in the case," thereby increasing the risk of conflicts, "by filing multiple pleadings in the form of declarations, containing factual assertions of Mr. Means submitted under penalty of perjury." (R., p.471.) Yet the Idaho Rules of Professional Conduct stress that an attorney should avoid becoming a witness in his client's case. *See* I.R.P.C. 3.7. The district court was also "concern[ed]" by what appeared to be Means's "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." (R., p.471.) A second apparent violation of Idaho's ethical rules for attorneys. *See* I.R.P.C. 16. The district court's reliance on this behavior to refuse to accept any waiver was proper. *See Moscony*, 927 F.2d at 749 ("[T]he trial court may enforce the ethical rules governing the legal profession with respect both to client-attorney communications and to conflict-free representation, again regardless of any purported waiver."); *cf. United States v. Stites*, 56 F.3d 1020, 1026 (9th Cir. 1995) ("[A defendant] cannot complain because a well-informed trial court would not let a lawyer who had already grossly misbehaved in the case return to the scene of his misbehavior.").

Vallow downplays the district court's concerns by labeling Means's ethically suspect behaviors as "idiosyncrasies" and claiming Vallow had the right to choose those idiosyncrasies. (App. Br., pp.36-37.) But, given Vallow was incompetent at the time, nothing in the record suggests Vallow was aware of or chose Means's behavior that had raised serious concerns with

the district court set to preside over her capital trial. Even if she wanted to choose Means's ethically suspect behaviors, Vallow did not have the right to her counsel of choice if that counsel could not follow the ethical rules. The district court had "an independent interest" in ensuring that Vallow's case was "conducted within the ethical standards of the profession" and that her high-profile legal proceedings "appear[ed] fair to all who observe[d] them." *Wheat*, 486 U.S. at 160.

Third, the district court was confronted with two facts that made this virtually impossible task even more difficult: Vallow was incompetent and faced the death penalty. *See Wheat*, 486 U.S. at 163-64 (stressing the difficulty of the analysis meant these decisions "must be left primarily to the informed judgment of the trial court"). The district court was primarily concerned with protecting Vallow's fundamental right to the effective assistance of counsel (R., p.470), exactly as it should have been. *See Wheat*, 486 U.S. at 159 ("[T]he essential aim of the [Sixth] 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."). And, because Vallow was incompetent at the time, all the district court had was Means's insistence that Vallow would want to waive any conflict so that he could represent her even though Vallow was now charged with capital offenses and the stakes were infinitely higher than they had been before Vallow was determined to be incompetent. *Cf. Wheat*, 486 U.S. at 163 ("Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them."). The district court was, in effect, hamstrung by Vallow's "present inability to be thoroughly examined to ascertain whether she could knowingly, intelligently, and meaningfully waive her right to conflict-free counsel." (R., p.471.) In those circumstances, the district court decided to cautiously act in favor of Vallow's

right to the effective assistance of counsel by disqualifying Means and appointing a death-penalty qualified attorney as lead counsel. This Court should affirm that decision.

II.
Vallow Has Failed to Show the District Court Committed Fundamental Error by Violating Her Sixth Amendment Right to the Assistance of Counsel

A. Introduction

Vallow's framing of this issue is both fatal and flawed. Set on placing blame on the district court for not hearing her attorney's objection to his own disqualification, she tries to turn the district court's denial of her motion to intervene in a separate criminal case into a constitutional violation. But, in reaching beyond her grasp, she fails to recognize that the only reason her attorney's objection was not heard is that he failed to communicate the way lawyers do: by filing an objection in their client's case. The district court did not err, much less fundamentally err, by refusing to allow Vallow to intervene in a separate criminal proceeding.

B. Standard of Review

"Alleged constitutional errors during trial that are not followed by a contemporaneous objection 'must be reviewed under the fundamental error doctrine.'" *State v. Medina*, 165 Idaho 501, 505, 447 P.3d 949, 953 (2019) (quoting *State v. Bernal*, 164 Idaho 190, 193, 427 P.3d 1, 4 (2018)).

C. The District Court Did Not Commit Fundamental Error by Denying Vallow's Attorney's Request to Intervene in a Separate Criminal Case

The district court's denial of Means's motion to intervene in the Daybell case did not constitute fundamental error. To prove fundamental error, Vallow must show that any error in the district court's denial of Means's motion to intervene (1) violated an unwaived constitutional right; (2) plainly exists, and (3) was not harmless. *See State v. Perry*, 150 Idaho 209, 228, 245 P.3d 961, 980 (2010). She cannot do so.

1. The District Court's Denial of Means's Motion to Intervene Did Not Violate an Unwaived Constitutional Right

Vallow has failed to show the district court violated her right to counsel by denying her counsel's request to intervene in a separate criminal proceeding. "The Sixth Amendment guarantees a criminal defendant the right to counsel during all 'critical stages' of the adversarial proceedings against him." *Estrada v. State*, 143 Idaho 558, 562, 149 P.3d 833, 837 (2006) (quoting *United States v. Wade*, 388 U.S. 218, 224 (1967)). "In determining whether a particular stage is 'critical,' it is necessary 'to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.'" *Id.* (quoting *Wade*, 388 U.S. at 227).

Vallow's claim that the district court deprived her of counsel by refusing to allow Means to argue at a hearing in the Daybell case fails for multiple reasons, starting with the doctrine of invited error. "The doctrine of invited error applies to estop a party from asserting an error when the party's own conduct induces the commission of the error." *Beebe v. N. Idaho Day Surgery, LLC*, 171 Idaho 779, 789, 526 P.3d 650, 660 (2023) (cleaned up). Put simply, "[e]rrors consented to, acquiesced in, or invited are not reversible." *State v. Owsley*, 105 Idaho 836, 838, 673 P.2d 436, 438 (1983). Vallow's entire Sixth Amendment claim rests on the district court's refusal to grant Means's motion to intervene, which she interprets on appeal as the district court affirmatively

stopping her counsel from being heard. (App. Br., pp.25-37.) But that is not what happened. The district court ensured both Means and Archibald were present at the hearing. (*State v. Daybell*, CR22-21-1623, 8/30/2021, Tr., p.5 L.19 – p.6, L.6) Then, when it denied Means's motion to intervene, it expressly stated that it understood Means's request to be for Vallow to become a party in Daybell's case and that "it's *not* a request to allow argument on an issue affecting your client, Mr. Means." *Id.* at p.18, Ls.5-14 (emphasis added). Despite the district court's clear explanation of its ruling, Means remained at the rest of the hearing but never asked to be heard. The district court ensured Means was present at the hearing; it did not also have an obligation to open Means's mouth.[1] Means also failed to file his objection in the proper forum, which was his client's case. Means's failure to seek an opportunity to be heard either by filing his objection in his client's case or speaking up at a hearing at which he was present was, at the very least, "acquiesce[nce]" in the error Vallow now (erroneously) claims on appeal. *Owsley*, 105 Idaho at 838, 673 P.2d at 438.

Even setting aside invited error, the procedural history of Vallow's case confirms she was not denied the right to counsel with respect to the State's motion to disqualify Means. The State filed its motion to disqualify Means *in Vallow's case* on July 27, 2021. (Conf. Ex. R., pp.39-59.) The district court entered its order *in Vallow's case* disqualifying Means on December 28, 2021. (R., pp.457-73.) In the five months between the State filing its motion and the district court granting the motion, Means did not file a substantive response or otherwise object *in Vallow's case* to the State's motion. (R., pp.4-9.) This even though Means filed at least 9 other filings in the same period, including substantive motions and responses such as a motion to dismiss the indictment

[1] The district court did make clear at the end of the hearing that it "didn't allow for [Means's] testimony" but noted he "was not called as a witness" anyway. *Id.* at p.38, Ls.10-13 This changes nothing: Vallow's argument on appeal is not that the district court should have allowed her attorney to testify as a witness at the hearing.

and an objection to proceedings occurring in Daybell's case. (R., pp.155-57, 164-66, 167-69, 186-89, 269-78, 292-94, 303-05, 336-37, 357-63.) For whatever reason, Means *chose* not to file a response or otherwise object to the State's motion in the appropriate forum. That is not the deprivation of counsel.

Without acknowledging Means's failure to file anything in the proper forum (i.e., his client's case) regarding the State's motion, Vallow now argues the district court somehow violated her Sixth Amendment right by refusing to allow her counsel to argue a motion in a different criminal case. (App. Br., pp.37-44.) She cites no authority for the proposition that a criminal defendant has a Sixth Amendment right to have counsel argue in a co-conspirator's separate criminal case. And in all the examples she gives of courts identifying "critical stages," the courts were obviously referring to stages in the defendant's own criminal proceeding. (*See* App. Br., p.39 (giving as examples "post-indictment police lineups, arraignments, preliminary hearings, and sentencing").) Vallow has the right to counsel in the criminal proceedings against her; she does not have the right to counsel in the criminal proceedings against someone else. *See Estrada*, 143 Idaho at 562, 149 P.3d at 837 ("The Sixth Amendment guarantees a criminal defendant the right to counsel during all 'critical stages' of the adversarial proceedings *against him*.") (emphasis added).

Even though Vallow did not have a constitutional right to have counsel heard at the Daybell hearings, the district court was careful to include both Means and Archibald in the hearings in the Daybell case. The district court did not allow Means to formally intervene, but it allowed both Means and Archibald to be present for the sealed hearing in the Daybell case because it recognized the motion to disqualify "really does pertain to both cases as it's been filed [in both cases]" and thought "it's appropriate for determinations to be made in each of the cases, as well as having all

counsel appear as they are here today." (*State v. Daybell*, CR22-21-1623, 8/30/2021, Tr., p.5 L.19 – p.6, L.6.) The State also explained that it "did intend for this motion to be filed in both cases" because "it is an applicable motion to both cases." *Id.* at p.10, Ls.2-11. The State even went so far as to explain, with Means present, that the Vallow case was "the more appropriate place for Mr. Means to raise his argument." *Id.* p.16, L.24 – p.17, L.2.) Means heard all of this and still chose not to file a response to the State's motion in the Vallow case, despite affirmatively arguing "[w]e have two different cases." *Id.* p.14, L.21.

Vallow concedes the hearings were heard under a different case number but argues the case number does not matter because the topic of the hearing was whether to disqualify her counsel. (App. Br., p.40.) But the parties and the district court were careful in the hearing to focus on Daybell's rights as opposed to Vallow's rights. As Vallow concedes elsewhere in her brief, "[t]he State steered the direction of the hearing—which occurred on August 30 and was continued to September 8, 2021—to focus on *Chad*'s rights to conflict-free counsel rather than *Lori'*s right to counsel of her choice. (App. Br., p.16 (emphases in original).) Similarly, the district court's order disqualifying Means, which was entered in Vallow's case, focused solely on Vallow's rights.

Vallow's concession with respect to the content of the hearing at least implicitly acknowledges that Daybell also had rights that needed to be protected because of Means's conflict. Unsurprisingly, the arguments over Daybell's rights happened in Daybell's case and the arguments over Vallow's rights happened in Vallow's case (in writing).[2] Means had the opportunity to

[2] Vallow has not raised on appeal the argument that the district court should have held a hearing in the Vallow case. In any event, the district court did not need to hold a hearing because Means never objected to the State's motion. *See United States v. Mays*, 69 F.3d 116, 121 (6th Cir. 1995) (affirming disqualification of defense counsel even though district court did not hold a hearing because, "[a]lthough [defense counsel] said he would file a brief in opposition to the motion, he never did").

participate in the arguments over Vallow's rights by filing a response to the State's motion in the appropriate forum, he just chose not to do so. Vallow has thus failed to prove her constitutional right to counsel was violated.

2. Vallow Has Failed to Show Any Error Plainly Exists in the Record

The second prong of the fundamental error test requires Vallow to show the alleged error plainly exists. *Perry*, 150 Idaho at 228, 245 P.3d at 980. Demonstrating an error plainly exists requires a showing that the error is clear as a factual matter, "without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision." *Id.*

Vallow has not shown that the error plainly exists. Her alleged constitutional claim is that the district court violated her right to counsel by excluding Means from arguing the State's motion to disqualify in a separate criminal proceeding. But, as explained above, Means had the opportunity to file a response to the State's argument in *his client's* criminal proceeding but failed to do so for reasons that are anything but plain in the record. Determining Means's motivation and intent "is factual in nature and thus more appropriately addressed via a petition for post-conviction relief." *State v. Miller*, 165 Idaho 115, 119, 443 P.3d 129, 133 (2019).

Presumably, Vallow will respond that Means did not file a response to the State's motion because the court had stayed the case pending Vallow's restoration to competency. But that is the kind of "inferential leap" that cannot satisfy the second prong of fundamental error, *State v. Alvarado*, 168 Idaho 189, 198, 481 P.3d 737, 746 (2021), especially given the numerous documents Means filed in the Vallow case during the same timeframe.

Vallow cites Means's motion to intervene as proof that Means did not make a tactical decision when he failed to raise the Sixth Amendment claim. (App. Br., pp.41-42 (citing *State v. Bodenbach*, 165 Idaho 577, 587, 448 P.3d 1005, 1015 (2019).) Her reliance on *Bodenbach* is

misplaced. In *Bodenbach*, the Idaho Supreme Court found the second prong of fundamental error satisfied because the defense attorney had objected to the challenged jury instruction on a different basis. *See* 165 Idaho at 587, 448 P.3d at 1015. The court concluded the failure to raise a constitutional objection could not have been tactical because defense tried to stop the instruction from being given at all. *Id.* The court's implied logic, of course, was that defense counsel would not tactically refrain from making a constitutional argument that would have had the same result as defense counsel's non-constitutional objection.

The *Bodenbach* logic does not apply here. The district court expressly stated that it did *not* interpret Means's motion to intervene as a request to be heard. (*State v. Daybell*, CR22-21-1623, 8/30/2021, Tr., p.18 Ls.5-14.) Yet Vallow's appellate claim is that the district court violated her Sixth Amendment right to counsel by refusing to hear from Means. (App. Br., pp.43-44) Thus, Means's motion to intervene does not serve the same purpose as defense counsel's objection in *Bodenbach*, and Vallow is still left without evidence in the record showing any error plainly exists.

3. Vallow Has Failed to Show Any Error Was Not Harmless

Vallow has failed to satisfy the third prong of the *Perry* fundamental error test. The third prong of the *Perry* fundamental error test requires Vallow to show the alleged error was not harmless. 150 Idaho at 228, 245 P.3d at 980. Vallow claims she need not offer any proof in the record on this prong because the complete deprivation of counsel is structural error and prejudice is presumed. (App. Br., pp.42-44.) She is correct that the *complete* deprivation of counsel is structural error, but the partial deprivation of counsel is not. *See Satterwhite v. Texas*, 486 U.S. 249, 256 (1988) (explaining the deprivation of counsel is structural error only where it "affected—and contaminated—the entire criminal proceeding"); *see, e.g.*, *Rushen v. Spain*, 464 U.S. 114, 117 n.2 (1983) (explaining counsel's absence from ex parte communication between judge and juror

was subject to harmless error review); *United States v. Morrison*, 946 F.2d 484, 503-04 (7th Cir. 1991) (holding counsel's absence during return of verdict subject to harmless error review); *Vines v. United States*, 28 F.3d 1123, 1128 (11th Cir. 1994) (holding counsel's absence during trial subject to harmless error review because no evidence directly inculpating defendant was presented while defense counsel was absent).

The error Vallow alleges is subject to harmless error review because she was not completely deprived of counsel during the hearings. The record shows that Vallow was represented by two attorneys during the period she now claims total deprivation of counsel. Means was present during both hearings, and Archibald was present during the first and much of the second.[3] Most importantly, as Vallow concedes, the hearings were focused "on *Chad*'s rights to conflict-free counsel rather than *Lori*'s right to counsel of her choice." (App. Br., p.16.) Means's inability to participate in a hearing focused on a different criminal defendant's constitutional rights, even a co-conspirator, does not constitute the complete deprivation of counsel required for structural error, especially where he had the opportunity to file a response in his client's case.

In an effort to show prejudice, Vallow throws out several possibilities of how the hearing might have been different if Means participated. None of them satisfy the third prong of fundamental error because none of them are based on evidence in the record.

For example, Vallow claims the proceeding would have been different because Means would have shared his version of events. (App. Br., p.43.) But she fails to point to any specific

[3] Vallow also asserts deprivation of counsel because Means could not participate in the hearing where the district court inquired of Daybell alone with his counsel. (App. Br., p.43.) But that was intentionally an ex parte hearing to protect Daybell's Fifth Amendment rights. (*State v. Daybell*, CR22-21-1623, 10/8/2021, Tr., p.5, L.24 – p.6, L.3.) Even if the district court had granted Means's motion to intervene, he would not have been allowed to participate in that hearing.

facts in the record that Means would have shared at the hearing, much less explain how those facts would have affected the proceedings.

Similarly, Vallow claims Means "could have impressed upon the court the importance of Ms. Daybell's right to counsel of choice, which seemed to get overlooked in the process." (App. Br., p.43.) But Vallow's right to counsel of choice did not get overlooked at the hearings. The parties and the district court *intentionally* focused on Daybell's rights at the hearings because they were hearings in Daybell's case. (*E.g.*, *State v. Daybell*, CR22-21-1623, 8/30/2021, Tr., p.34 Ls.17-20 ("This isn't about Lori. Chad Daybell has independent rights to not have a former attorney in an adversarial position against him.").) The district court's written decision disqualifying Means analyzed Vallow's right to counsel of choice at length (R., pp.464-65, 470-72), and Vallow has failed to explain what else Means would have said about the right that would have affected the proceedings. Vallow has thus failed to show any error was not harmless.

III.
Vallow Has Failed to Show the District Court Committed Fundamental Error by Violating Her Due Process Right Not to Be Prosecuted or to Be Physically Present at Proceedings

A. Introduction

Vallow has failed to show fundamental error in the district court's decision to hold hearings in Daybell's separate criminal case while Vallow was incompetent. Neither Vallow's right not to be prosecuted nor her right to be physically present apply to proceedings in a separate criminal case. Moreover, the unique procedural circumstances of this case placed the district court in between multiple constitutional rights belonging to Vallow, who was at the time incompetent. The district court's decisions reflect that it protected—not violated—Vallow's constitutional rights. That is not fundamental error.

B. Standard of Review

"Alleged constitutional errors during trial that are not followed by a contemporaneous objection 'must be reviewed under the fundamental error doctrine.'" *State v. Medina*, 165 Idaho 501, 505, 447 P.3d 949, 953 (2019) (quoting *State v. Bernal*, 164 Idaho 190, 193, 427 P.3d 1, 4 (2018)).

C. The District Court Did Not Commit Fundamental Error by Holding a Hearing in a Separate Criminal Proceeding Without the Then-Incompetent Vallow

The district court's decision to hold a hearing in Daybell's separate criminal case without Vallow present and while she was incompetent did not constitute fundamental error. To prove fundamental error, Vallow must show that the alleged error (1) violated an unwaived constitutional right; (2) plainly exists, and (3) was not harmless. *See State v. Perry*, 150 Idaho 209, 228, 245 P.3d 961, 980 (2010). She cannot satisfy her burden on any prong.

1. The District Court's Decision to Hold a Hearing in a Different Criminal Proceeding While Vallow Was Incompetent Did Not Violate Her Constitutional Rights

Vallow asserts the district court violated two of her unwaived constitutional rights when it held hearings in the Daybell case while she was deemed incompetent. She is wrong on both counts.

Vallow first contends that the district court violated her right not to be prosecuted while incompetent. (App. Br., p.45.) The due process right to a fair trial encompasses a "right not to be tried or convicted while incompetent to stand trial." *Drop v. Missouri*, 420 U.S. 162, 172 (1975). The same standard applies to those who plead guilty. *See Godinez v. Moran*, 509 U.S. 389, 398 (1993). "[A] state's statutory procedure for determining an accused's mental capacity to stand trial is constitutionally adequate to protect a defendant's due process right not to be tried while legally incompetent." *State v. Lovelace*, 140 Idaho 53, 62, 90 P.3d 278, 287 (2003).

In Idaho, this right is protected by Idaho Code §§ 18-210 through 18-212. Pursuant to these statutes, "[n]o person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, sentenced or punished for the commission of an offense so long as such incapacity endures." I.C. § 18-210. "If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended" except for further proceedings related to the defendant's competency or if the defendant escapes from custody. I.C. § 18-212(2), (5), (6). The case law in Idaho explaining this suspension is sparse but suggests the obligation to suspend proceedings would apply at least as early as a preliminary hearing. *See Lovelace*, 140 Idaho at 62, 90 P.3d at 287 (rejecting claim that magistrate failed to suspend proceedings at preliminary hearing because requirements for suspension not met).

The district court properly suspended the proceedings in Vallow's case. On May 27, 2021, prior to finding Vallow was in fact incompetent to proceed to trial, the district court entered an order staying Vallow's case because of "the issue of Defendant's competency." (R., p.73.) Then, on June 9, 2021, the district court entered an order finding Vallow was not competent to proceed and suspended the case except as provided in Idaho Code § 18-212(5) and (6). (R., p.88.) The suspension was not lifted until the district court found Vallow's competency was restored on April 11, 2022. (Conf. Ex. R., p.268.)

Vallow contends the district court violated the suspension of proceedings by holding several hearings while Vallow was incompetent. (App. Br., p.48.) But the hearings she cites were all held in a separate criminal case against Daybell. (*See State v. Daybell*, CR22-21-1623, 8/30/2021, Tr., p.5, Ls.8-11 (calling only Daybell's case number); *State v. Daybell*, CR22-21-1623, 9/8/2021, Tr., p.6, Ls.6-9 (same); *State v. Daybell*, CR22-21-1623, 10/8/2021, Tr., p.4,

Ls.23-24 (same).) The district court went out of its way to clarify that the proceedings Vallow now cites were not happening in the Vallow case because of the stay. (*See State v. Daybell*, CR22-21-1623, 8/30/2021, Tr., p.18, L.25 – p.19, L.2) ("But right now Case -1624 is stayed, and we're only having a hearing on Case -1623 as a result."); *State v. Daybell*, CR22-21-1623, 9/8/2021, Tr., p.6, Ls.8-11 ("[N]ote that the 1624 case is stayed. So this . . . is not a hearing in the 1624 case."); *State v. Daybell*, CR22-21-1623, 10/8/2021, p.5, Ls.6-8 ("As I think everyone's aware, [Vallow's] case is currently stayed pending a determination that [Vallow] be found competent to proceed.").) Vallow's constitutional right to not be tried while incompetent did not require the district court to suspend a separate criminal case. *See* I.C. § 18-212(2) ("If the court determines that the defendant lacks fitness to proceed, the proceeding *against him* shall be suspended[.]" (emphasis added)).

Furthermore, the district court's entry of an order disqualifying Means in Vallow's case while Vallow was incompetent did not violate this right.[4] Neither the U.S. Supreme Court nor Idaho's appellate courts have clearly defined the suspension of proceedings that due process requires upon a finding of incompetency. But we know, for example, that not *all* proceedings are halted because certain proceedings necessarily must move forward. *See* I.C. § 18-212(2), (5), (6) (suspending proceedings *except* for further competency proceedings and when the defendant escapes custody). We also know that constitutional rights are less rigid than Vallow suggests, at least when placed in competition with other constitutional rights, *see, e.g.*, *Indiana v. Edwards*, 554 U.S. 164 (2008) (holding the constitutional right to represent oneself must yield to the

[4] The State reads Vallow's opening brief to argue only that the hearings violated Vallow's due process right, and she has thus waived the argument that the entry of the order did so as well. *Gallagher v. State*, 141 Idaho 665, 669, 115 P.3d 756, 760 (2005) (holding that when an appellant fails to support an issue in the opening brief with law, authority, or argument, that issue has been waived and cannot be revived in the reply brief). However, the State covers the issue out of an abundance of caution. The same argument would apply to the hearings if this Court were to determine that the hearings were somehow part of Vallow's case.

constitutional right not to be tried while incompetent when a state insists that a borderline competent individual must be represented at trial), or the fundamental fairness of the proceedings, *see, e.g.*, *Wheat v. United States*, 486 U.S. 153, 160 (1988) (holding trial court can reject defendant's waiver of a conflict counsel, in part, 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").

The district court's actions in this case respected—rather than violated—Vallow's constitutional rights. The court found itself in an unenviable position between Vallow's right to the effective assistance of counsel (i.e., conflict-free counsel) and her right not to be tried while incompetent. Means not only had a conflict or the serious potential for a conflict, but he continued to take actions on Vallow's behalf despite the district court's order suspending the proceedings. Means's actions were both serious (filing motions to dismiss the indictment and to change venue in Vallow's capital case) and seriously concerning (making himself a witness to the proceeding and apparently violating attorney-client confidences of an incompetent client). (R., p.471.) And Means's actions necessarily could not have been knowingly authorized by Vallow, given her incompetence. If the district court waited to disqualify Means, it would do so at the cost of Vallow's right to conflict-free representation in a capital proceeding—not to mention its own "independent interest in ensuring . . . that legal proceedings appear fair to all who observe them," *Wheat*, 486 U.S. at 160. Recognizing that it had a "duty to protect her rights" while Vallow remained incompetent, the district court correctly acted and disqualified Means. (R., p.14.)

Notably, the district court's decision left the door open for Vallow to raise any concerns with the process after she was restored to competency. (*See* R., p.470 ("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.").) Neither she nor her counsel did so. The district court's actions in this case protected Vallow's right to conflict-free counsel while also preserving her right not to be prosecuted while incompetent.

Vallow next argues that the district court violated her right to be present by conducting the hearings in the Daybell case while she was incompetent. (App. Br., p.45.) Separate from the Sixth Amendment right to confront witnesses, a criminal defendant has a due process right "'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.'" *State v. Dunlap*, 155 Idaho 345, 368, 313 P.3d 1, 24 (2013) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987)). But the defendant does not have a right to appear "when presence would be useless, or the benefit but a shadow." *Stincer*, 482 U.S. at 745. A defendant claiming his absence from a hearing constituted a due process violation has the burden of showing that he would "have gained anything by attending." *United States v. Gagnon*, 470 U.S. 522, 527 (1985) (per curiam); *see Dunlap*, 155 Idaho at 368, 313 P.3d at 24 (holding defendant failed to show constitutional violation because he "has not shown how his presence could have affected the outcome of either hearing"); *see also Clark v. Chappell*, 936 F.3d 944, 991 (9th Cir. 2019).

In *Clark*, the defendant claimed his due process right to be present had been violated when the district court held a meeting to discuss the defendant's counsel's potential conflict outside of the defendant's presence. 936 F.3d at 990. He claimed that "if he were present at the meeting about [his counsel's] conflict, he would have insisted on a full hearing and removal of counsel." *Id.* at 991. The Ninth Circuit rejected his argument: "The discussions at this meeting were later described by defense counsel in open court for the trial judge in [the defendant's] presence, and [the defendant] made no objections or requests for a further hearing." *Id.* Thus, the court found, the

defendant's constitutional claim failed because he had "not shown that he would 'have gained anything by attending.'" *Id.* (quoting *Gagnon*, 470 U.S. at 527.)

Vallow's claim fails for more reasons than the defendant's claim in *Clark*:

First, as explained above, the hearings Vallow now claims she wanted to attend were held in a separate criminal case. Neither the U.S. Supreme Court nor Idaho's appellate courts have held that a defendant has a due process right to be physically present in hearings held in someone else's criminal case.

Second, Vallow was incompetent at the time of the hearings. By definition, Vallow's presence would be "useless, or the benefit but a shadow," *Stincer*, 482 U.S. at 745, because it is uncontested that she "lack[ed] capacity to understand the proceedings against [her] or to assist in [her] own defense," I.C. § 18-210.

Third, even setting aside the issue of competency, Vallow's presence would have been useless because the district court properly found that the conflict created by Means's dual representation could not be waived. *See People v. Jean-Baptiste*, 51 A.D.3d 1037, 1038 (N.Y. App. Div. 2008) (finding defendant's presence was not required at hearing on his counsel's disqualification "since defense counsel could not have continued to represent the defendant under the circumstances of this case"). Therefore, Vallow's presence was not constitutionally required.

Fourth, like the defendant in *Clark*, Vallow "has not shown that [she] would 'have gained anything by attending.'" 936 F.3d at 991 (quoting *Gagnon*, 470 U.S. at 527). She did not even try. (*See* App. Br., p.47 (arguing under the first prong of *Perry* only that she could not have waived her right to be present).) Whatever Vallow comes up with in her reply brief is insufficient because, like the defendant in *Clark*, she did not present that request, argument, or fact to the district court. *See* 936 F.3d at 991 (rejecting same constitutional claim where defendant was made aware of

proceedings in his absence and "made no objections or requests" when he became aware of the proceedings). Vallow failed to present any such argument or additional facts even though the district court, at least implicitly, invited Vallow to raise the issue again upon her restoration to competency. (R., p.470 ("If and when Vallow is restored to competency, the Court could conduct an inquiry into her interest in waiving qualified counsel[.]").) Vallow has thus failed to prove she had a due process right to be present at the hearings held in the Daybell case.

2. Vallow Has Failed to Show Any Error Plainly Exists in the Record

The second prong of the fundamental error test requires Vallow to show the alleged errors plainly exist. *Perry*, 150 Idaho at 228, 245 P.3d at 980. Demonstrating an error plainly exists requires a showing that the error is clear as a factual matter, "without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision." *Id.* Vallow cannot do so on either of these constitutional claims.

Vallow has failed to show that any error plainly exists with respect to her right not to be prosecuted while incompetent. Means's motion to intervene at least strongly implied that he was trying to intervene for the purpose of arguing the conflict on the merits. (Conf. Aug. R., p.34 ("Intervention requests [sic] is timely and appropriate for this matter to present to the Court facts and events necessary to determine said Motion.").) Then, at the hearing, he seemed to suggest he wanted to object to moving forward in the hearing at all because of the stay. (*State v. Daybell*, CR22-21-1623, 8/30/2021, Tr., p.14, L.2 – p.15, L.8.) But, as explained above, Means still continued to file and take actions in Vallow's case. Thus, Means could have made a tactical decision not to raise the constitutional objection because *he* wanted to be able to keep filing motions and taking actions in his client's case.

Vallow has also failed to show that any error plainly exists with respect to her right to be physically present at the proceedings. All she cites in her brief to meet her burden on this claim is

(1) that she was physically absent from the hearing and (2) that Means stated in his oral argument on the motion to intervene that he was objecting to the hearing proceeding. (App. Br., p.47.) Neither of those facts imply—much less prove—that Means did not make a tactical decision on the issue of Vallow's physical presence at the hearing. Means did not say anything about Vallow being present at the hearing, and he did not make any efforts prior to the hearing to arrange for her presence. If anything, the more reasonable inference from the current record is that Means made the tactical decision to forego Vallow's physical presence because she was deemed incompetent. Inferences aside, *see State v. Alvarado*, 168 Idaho 189, 198, 481 P.3d 737, 746 (2021), the evidence Vallow cites in the record does not show the alleged error plainly exists.

3. Vallow Has Failed to Show Any Error Was Not Harmless

Vallow has failed to satisfy the third prong of the *Perry* fundamental error test. The third prong of the *Perry* fundamental error test requires Vallow to show the alleged errors were not harmless. 150 Idaho at 228, 245 P.3d at 980. Vallow attempts to short-circuit this prong by asking this Court to assume prejudice (App. Br., pp.47-48.) Unfortunately for Vallow, that is not the law.

Structural errors, where the error is assumed to be prejudicial, "are the exception and not the rule." *Rose v. Clark*, 478 U.S. 570, 578 (1986). "The Supreme Court has never held that the exclusion of a defendant from a critical stage of his criminal proceedings constitutes a structural error." *Campbell v. Rice*, 408 F.3d 1166, 1172 (9th Cir. 2005). On the contrary, the Court has explained that "the right to be present during all critical stages of the proceedings . . . as with most constitutional rights, [is] subject to harmless error analysis, unless the deprivation, by its very nature, cannot be harmless." *Rushen v. Spain*, 464 U.S. 114, 117 n.2 (1983). Subsequently, courts have found that "violations of these rights are generally subject to harmless-error analysis." *Bourne v. Curtin*, 666 F.3d 411, 413 (6th Cir. 2012). This includes at a hearing where the court discussed a potential conflict with defendant's counsel. *See Campbell*, 408 F.3d at 1172-73; *see also, e.g.*,

Rice v. Wood, 77 F.3d 1138, 1141 (9th Cir. 1996) (holding error subject to harmless error review where defendant was absent when jury sentenced him death). Harmless error analysis makes sense when the defendant has been erroneously excluded from a hearing because the error "can be quantitively assessed in order to determine whether or not it was harmless." *Rice*, 77 F.3d at 1141.

The hearings in this case are no different. One could readily determine whether Vallow's absence from the hearings had any effect on those hearings by determining what information Vallow could have provided the court or what action she could have taken during the hearings and then decide whether that information or action would have "actually affected the outcome of the . . . proceedings." *State v. Miller*, 165 Idaho 115, 119-20, 443 P.3d 129, 133-34 (2019).

This might require the development of new facts after the hearings, but that does not make the error structural—quite the opposite. *See Rushen*, 464 U.S. at 119 (defendant's absence from conversation between judge and juror is subject to harmless-error analysis because effect of supposed error "can normally be determined by a post-trial hearing"). The effect Vallow's absence had is therefore only "unknowable" (App. Br., p.47) on *this* record, meaning Vallow cannot satisfy the third prong of fundamental error and "the matter would be better handled in post-conviction proceedings." *Perry*, 150 Idaho at 226, 245 P.3d at 978.

IV.
Vallow Has Failed to Show the District Court Erred by Overruling Vallow's Pretrial Objection to the State's Proposed 404(b) Evidence

A. Introduction

The district court properly overruled Vallow's objections to the State's proposed 404(b) evidence. The time between the State's notice and trial was reasonable, especially considering that Vallow's defense team had the information from early in the case. The State demonstrated the proposed evidence was relevant for purposes other than propensity and that the risk of unfair

prejudice did not substantially outweigh the probative value of the evidence. On appeal, Vallow limits her argument to the circumstances surrounding the murder of Charles Vallow and the attempted killing of Brandon Boudreaux. She also limits her challenge to the district court's pretrial ruling as she does not cite or rely on any objections made her trial. The district court properly rejected Vallow's pretrial objections.

B. Standard of Review

The trial court has broad discretion in the admission and exclusion of evidence. *State v. Folk*, 162 Idaho 620, 625, 402 P.3d 1073, 1078 (2017). Idaho's appellate courts defer to a trial court's factual determination that a prior bad act has been established by sufficient evidence if that finding is supported by substantial and competent evidence in the record. *State v. Parmer*, 147 Idaho 210, 214, 207 P.3d 186, 190 (Ct. App. 2009). Whether proposed Rule 404(b) evidence is admissible for a purpose other than propensity is given free review while the determination of whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice is reviewed for an abuse of discretion. *State v. Grist*, 147 Idaho 49, 51, 205 P.3d 1185, 1187 (2009). In determining whether a trial court has abused its discretion, the appellate court evaluates "whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *State v. Herrera*, 164 Idaho 261, 270, 429 P.3d 149, 158 (2018); *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)).

C. The District Court Did Not Err When It Overruled Vallow's Objections to the State's Proposed 404(b) Evidence

The State has an obligation in any criminal case in which it intends to use evidence under Rule 404(b) to provide notice to the defense "reasonably in advance of trial." I.R.E. 404(b). Under the rule, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character," but "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." I.R.E. 404(b). When determining the admissibility of 404(b) evidence, the trial court must engage in a two-tiered analysis. *State v. Anderson*, 168 Idaho 758, 769, 487 P.3d 350, 361 (2021). "The first tier has two steps: (1) the trial court must determine whether there is sufficient evidence to establish the other crime or wrong as fact; and (2) the trial court must determine whether the evidence of the other act would be relevant to a material and disputed issue concerning the crime charged, other than propensity." *Id.* at 769–70, 487 P.3d at 361–62 (cleaned up). "The second tier requires the trial court to engage in a Rule 403 balancing test to assess if the risk of unfair prejudice substantially outweighs the evidence's probative value." *Id.* at 770, 487 P.3d at 362.

Vallow does not challenge on appeal that there was sufficient evidence to establish the State's proposed 404(b) evidence as fact. (*See* App. Br., p.48-56.) As to the rest, the district court conducted the appropriate analysis and properly found that (1) the State provided reasonable notice, (2) the proposed evidence was relevant for a permissible purpose, and (3) proposed evidence passed the Rule 403 balancing test.

1. The District Court Properly Found the State Provided Reasonable Notice of the Proposed Rule 404(b) Evidence

Rule 404(b) requires the State to provide notice of its intent to use evidence under the rule "reasonably in advance of trial." I.R.E. 404(b). It goes without saying that the purpose of this rule

is "to reduce surprise and promote early resolution on the issue of admissibility." *State v. Sheldon*, 145 Idaho 225, 230, 178 P.3d 28, 33 (2008). When determining whether the State provided reasonable notice, district courts may properly consider when the defense first learned of the information. *See State v. Jones*, 140 Idaho 41, 50, 89 P.3d 881, 890 (Ct. App. 2003) (explaining defense may learn of the information through discovery thereby reducing the chance of surprise).[5]

Here, the district court properly found the State's 404(b) notice was provided reasonably in advance of the time of trial. The time between the formal 404(b) notice and the trial was 40 days: from January 26 to March 27. (Conf. Tr. R., p.874, Ls.6-11.) That amount of time is reasonable on its face, even in a complex case. *Cf., e.g.*, *United States v. Evengelista*, 813 F.Supp. 294, 302 (D.N.J. 1993) (ten business-day deadline imposed in multi-defendant case); *United States v. Williams*, 792 F.Supp. 1120, 1133 (S.D. Ind. 1992) (ten day deadline imposed in two-defendant, multi-count money laundering case); *United States v. Alex*, 791 F.Supp. 723, 729 (N.D. Ill. 1992) (seven day deadline imposed in multi-defendant, multi-count racketeering case); *United States v. Green*, 144 F.R.D. 631, 645 (W.D.N.Y. 1992) (30 day deadline imposed in 26-defendant, multi-count drug and racketeering case).

But the district court gave two other reasons for its decision as well, both of which cut against Vallow's claim that her attorneys were surprised by the formal motion filed on January 26.

[5] The trial courts of this state have relied on this rationale as noted in dicta in at least two appellate decisions. *See State v. Naranjo*, 152 Idaho 134, 139-40, 267 P.3d 721, 726-27 (Ct. App. 2011) (observing district court found disclosure reasonable where defendant had previously been made aware of proposed evidence from a disclosed police report); *State v. Rawlings*, 159 Idaho 498, 503-04, 363 P.3d 339, 344-45 (2015) (finding district court implicitly ruled 404(b) notice timely and noting that the prosecutor provided the relevant information in discovery months before the trial). The Idaho Court of Appeals has expressly relied on this rationale in an unpublished opinion, which the State cites only for this Court's information and not as authority. *See State v. McHale*, 2009 WL 9152147, at *2 (Ct. App. 2009) (Unpublished Opinion) (finding 404(b) disclosure provided ten days before trial reasonable because the State previously provided the evidence in discovery meaning defendant had "longstanding knowledge of [the evidence's] existence").

On December 27, a full month before the notice was formally filed, the State informally notified the defense by email that it would be filing a 404(b) notice. (Conf. Tr. R., p.874, Ls.4-6.) And, more importantly, "the State has turned over the subject evidence well ahead of the filing of the formal notice" meaning "[t]hese facts have been in the possession of the defense since early on in the case." (Conf. Tr. R., p.874, L.24 – p.875, L.7.) Vallow has not challenged those factual findings on appeal. The district court properly found that the timing of the State's disclosure was reasonable because Vallow's attorneys could not have been surprised by evidence that had been in their possession "since early on in the case." *Id.*

Vallow vaguely asserts she did not have enough time "to prepare and to meet the evidence," without any explanation as to what her attorneys might have done differently had the notice been provided even earlier. (App. Br., p.52.) She also argues the State was "hiding the ball" (App. Br., p.53)—an accusation the district court rejected on the common-sense basis that providing defense all the proposed evidence early in the case would be a strange way of intentionally hiding the ball (Conf. Tr. R., p.874, L.24 – p.875, L.5). Vallow has thus failed to show the district court abused its discretion when it found the 404(b) evidence was disclosed at a reasonable time before trial.

2. The District Court Properly Found the State's Proposed 404(b) Evidence Was Relevant for a Purpose Other than Propensity

To be admissible, evidence must be relevant. I.R.E. 401, 402. "Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence, and (b) the fact is of consequence in determining the action." *State v. Garcia*, 166 Idaho 661, 670, 462 P.3d 1125, 1134 (2020) (cleaned up) (citing I.R.E. 401). "Evidence of other crimes, wrongs, or acts is not admissible to prove a defendant's criminal propensity. However, such evidence may

be admissible for a purpose other than that prohibited by I.R.E. 404(b)." *State v. Truman*, 150 Idaho 714, 717, 249 P.3d 1169, 1172 (Ct. App. 2010) (citations omitted).

Under Rule 404(b), evidence of a prior crime, wrong, or act may be admitted to prove, among other things, motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. I.R.E. 404(b). "The rule represents one of inclusion which admits evidence of other crimes or acts relevant to an issue in the trial, except where it tends to prove only criminal disposition." *State v. Salinas*, 164 Idaho 42, 44, 423 P.3d 463, 465 (2018) (internal quotations and citations omitted, emphasis original). "Of course, evidence of a prior crime, wrong or act may implicate a person's character while also being relevant and admissible for some permissible purpose, such as those listed in the rule." *State v. Folk*, 157 Idaho 869, 876, 341 P.3d 586, 593 (Ct. App. 2014). However, such evidence runs afoul of Rule 404(b) only "if its probative value is entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior." *Id.*

As the district court concluded, the State's proposed evidence was relevant to plan, preparation, knowledge, or identity. Evidence is relevant to prove a common scheme or plan where "the commission of two or more crimes [is] so related to each other that proof of one tends to establish the other, knowledge, identity, or absence of mistake or accident." *State v. Leavitt*, 171 Idaho 757, 767, 525 P.3d 1150, 1160 (2023) (emphasis omitted). "The events must be linked by common characteristics that go beyond merely showing a criminal propensity and instead must objectively tend to establish that the same person committed all the acts." *State v. Johnson*, 148 Idaho 664, 668, 227 P.3d 918, 922 (2010).

The State sought to introduce evidence showing a pattern of how Vallow and Daybell operated to get what they wanted. Daybell would pronounce someone had a dark spirit and instruct

his followers that the problem could only be solved by killing the body of the person. The State had evidence that Daybell and Vallow had utilized this method on two occasions in the recent past to target individuals close to them from whom they could materially profit.

First with Charles: Daybell pronounced Charles had a dark spirit; Daybell and Vallow spread that information to others, including Alex; Alex then killed Charles under incredibly suspicious circumstances; and it just so happened Charles had a $1 million life insurance policy that Vallow believed she would inherit after his death.

Next with Brandon: Daybell pronounced Brandon had a dark spirit; Daybell shared that information with others, including Alex; Alex then shot at and tried to kill Brandon; Brandon had a life insurance policy that Melanie Boudreaux would have benefitted from upon his death; and it just so happened that Melanie Boudreaux provided financial assistance to Vallow.

As the district court recognized, this pattern was relevant to Vallow's case because the State had evidence showing the same pattern with the three victims in the State's case. Daybell pronounced Tammie, J.J., and Tylee all had dark spirits; Daybell and Vallow shared that information with others, including Alex; Tammie, J.J., and Tylee were all killed under suspicious circumstances; and Vallow and Daybell would benefit financially from each of their deaths. That pattern and its repeated use including in the instant case was more than sufficient to establish relevancy based on plan, preparation, knowledge, or identity.

Vallow attempts to counter the district court's reasoning by whitewashing it. (App. Br., p.54.) The State's proposed evidence is not relevant, Vallow claims, because even under the State's theories none of the victims were physically killed the same way. *Id.* Charles was "somehow lured into a trap, then shot under the guise of self-defense"; "the attempted shooting of Brandon Boudreaux [was] from the back of a vehicle"; and the victims in this case were all killed in different

ways. *Id.* But the obvious pattern, and the one the district court relied on to find relevance, was not how the individuals were physically killed but the plan leading up to their death or attempted death: in all instances Daybell labeled the victims as "dark" and "the plan [for Charles and Brandon] mirrors the castings alleged to have been performed on JJ, Tylee, and Tammy." (Conf. Tr. R., p.878, Ls.2-11.) A self-proclaimed religious leader with a small but committed following who targets individuals by labeling them as dark spirits before utilizing his love interest's assigned "protector" to kill his targets in the hope of obtaining a financial benefit is about as unique of a calling card as one can have. The district court properly relied on these similarities to find the State's proposed evidence relevant in Vallow's case.[6]

3. The District Court Properly Found the Risk of Unfair Prejudice Did Not Substantially Outweigh the Probative Value of the State's Proposed Evidence

Rule 404(b) also "requires the trial court to engage in a Rule 403 balancing test to assess if the risk of unfair prejudice substantially outweighs the evidence's probative value." *State v. Anderson*, 168 Idaho 758, 770, 487 P.3d 350, 362 (2021). "Rule 403 does not require the exclusion of prejudicial evidence." *State v. Rawlings*, 159 Idaho 498, 506, 363 P.3d 339, 347 (2015). "Most evidence offered to prove a defendant's guilt is inherently prejudicial." *Id.* "The rule only applies to evidence that is unfairly prejudicial because it tends to suggest that the jury should base its decision on an improper basis." *Id.* "The rule suggests a strong preference for admissibility of relevant evidence." *State v. Martin*, 118 Idaho 334, 340 n.3, 796 P.2d 1007, 1013 n.3 (1990).

The district court walked through this process for each category of the State's proposed evidence. The district court recognized, as explained above, that the similarities between the killing of Charles and attempted killing of Brandon and the killings of the victims in this case made the

[6] The State has limited its response to the 404(b) evidence related to the killing and attempted killing of Charles and Brandon because those are the only specific categories of evidence Vallow challenges in her opening brief. (App. Br., pp.53-55.)

State's proposed evidence highly probative. (Conf. Tr. R., p.878, Ls.2-11.) It also recognized that it could mitigate the risk of prejudice by properly instructing the jury on the proper use of the evidence. (*E.g.*, Conf. Tr. R., p.878, Ls.17-20.) And, where that would not be sufficient protection, the district court excluded the State's proposed evidence. (*E.g.*, Conf. Tr. R., p.885, L.20 – p.887, L.3.) The district court did not abuse its discretion.

On the issue of unfair prejudice, Vallow takes a flawed approach. She argues only that "the danger of unfair prejudice was extreme" because "about one-third of the witnesses testified partially or entirely to what the State contended was criminal activity or bad acts in Arizona." (App. Br., pp.55-56.) But the *amount* of 404(b) evidence, especially in terms of the total number of witnesses, could not possibly have been known by the district court when it made its pretrial ruling that Vallow challenges on appeal. *State v. Radue*, 175 Idaho 297, ___, 564 P.3d 1230, 1247 (2025) (emphasizing the abuse of discretion standard applies to the record before the district court when it ruled); *cf. State v. Gray*, 129 Idaho 784, 794, 932 P.2d 907, 917 (Ct. App. 1997) ("If the evidentiary challenge on appeal is not the same as that presented in the motion in limine and no objection during trial raised the specific basis, then that issue was not preserved for appeal.").

In fact, the district court explained to the defense that "any ruling here as to 404(b) is limited in scope, just as to 404(b)" so it was "not ruling the evidence comes in." (Conf. Tr. R., p.879, Ls.3-8.) And it reminded the defense that "[a]ny evidence is still subject to any of the other evidentiary objections that could be raised, such as hearsay, foundation, etc." *Id.* The unfair prejudice Vallow now asserts could not have been known until the State presented its evidence at trial, at which point the defense could have objected. *See, e.g.*, I.R.E 403. But Vallow has not cited any objection to such prejudice in the record at trial and has challenged instead only the district

court's pretrial determination on the State's proposed 404(b) evidence. She has failed to show the abuse of discretion.

V.
Vallow Has Failed to Show the District Court Erred When It Denied Her Motion to Dismiss on the Basis that Her Speedy Trial Rights Were Violated

A. Introduction

The district court properly found Vallow's rights to a speedy trial were not violated. Though the time between the indictment and trial was nearly two years, most of the delays were attributable to Vallow and included two stays because she had been deemed incompetent. Given the complexity of the charges against, the voluminous discovery, and the need to prepare for trial, the district court properly rejected Vallow's statutory and constitutional claims as to speedy trial.

B. Standard of Review

"Whether there was an infringement of a defendant's right to speedy trial presents a mixed question of law and fact." *State v. Davis*, 141 Idaho 828, 835, 118 P.3d 160, 167 (Ct. App. 2005) (citing *State v. Clark*, 135 Idaho 255, 257, 16 P.3d 931, 933 (2000)). The appellate court defers to the trial court's findings of fact that are supported by substantial and competent evidence but freely reviews the trial court's conclusions of law. *Id.*

C. Vallow's Rights to a Speedy Trial Were Not Violated

The district court did not err when it found no violation of Vallow's rights to a speedy trial. All criminal defendants in Idaho have a constitutional right to a speedy trial pursuant to both the U.S. Constitution and the Idaho Constitution. The right to a speedy trial under the U.S. Constitution is assessed by the balancing of four factors: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted the right to a speedy trial; and (4) the prejudice to the defendant. *See Barker v. Wingo*, 407 U.S. 514, 530 (1972). "This approach has been adopted in Idaho for

determining whether a speedy trial violation has occurred under the Idaho Constitution." *State v. Clark*, 135 Idaho 255, 258, 16 P.3d 931, 934 (2000); *see State v. Lankford*, 172 Idaho 548, ___, 535 P.3d 172, 184 (2023) ("Thus, the United States Constitution and the Idaho Constitution are both interpreted under *Barker*.").

Criminal defendants in Idaho also have a statutory right to a speedy trial pursuant to Idaho Code § 19-3501. However, trials can be delayed under the statute for "good cause," and "good cause" exists when "there is a substantial reason that rises to the level of legal excuse for the delay." *State v. Clark*, 135 Idaho 255, 257, 16 P.3d 933, 936 (2000).

Predictably, the case-specific balancing test adopted by the Idaho Supreme Court has resulted in a wide variety of permissible lengths of delay before trial. Delays from fifteen months, *see State v. Ish*, 174 Idaho 77, 93, 551 P.3d 746, 762 (2024), to seventeen months, *State v. Lopez*, 144 Idaho 349, 355, 160 P.3d 1284, 1290 (Ct. App. 2007), to two years, *see Lankford*, 535 P.3d at 187, have all been found permissible. Applying the *Barker* factors to this case, and considering all the circumstances for good cause under Idaho Code § 19-3501, shows no violation of Vallow's speedy trial rights.

The first factor—the length of delay—favors Vallow only slightly. "Under the Sixth Amendment, the period of delay is measured from the date there is a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge." *Lopez*, 144 Idaho at 352, 160 P.3d at 1287 (quotation marks omitted). "Similarly, under the Idaho Constitution, the period of delay is measured from the date formal charges are filed or the defendant is arrested, whichever occurs first." *Id.* at 352-53, 160 P.3d at 1287-88. "[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Barker*, 407 U.S. at 530.

Vallow was indicted on May 24, 2021, and the trial started on April 3, 2023. She was charged with a massive conspiracy that resulted in the deaths of multiple people. A delay of 679 days is presumptively prejudicial and weighs in favor of a speedy trial violation. *See Ish*, 174 Idaho at 89-90, 551 P.3d at 758-59 (collecting cases and finding delay of 448 days was presumptively prejudicial). "But the delay was not unreasonable given the complexity of the charges, so this factor favors [Vallow] only slightly." *United States v. Lewis*, 116 F.4th 1144, 1160 (10th Cir. 2024) (finding length of delay of two years only slightly favored defendant in complex case).

The second factor—reason for the delay—weighs heavily against Vallow. "[P]retrial delay is often both inevitable and wholly justifiable." *State v. Davis*, 141 Idaho 828, 837, 118 P.3d 160, 169 (Ct. App. 2005) (citing *Doggett v. United States*, 505 U.S. 647, 656 (1992)). Different weights attach to different reasons for delay. *State v. Avila*, 143 Idaho 849, 853-54, 153 P.3d 1195, 1199-1200 (Ct. App. 2006). "A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the State." *Id.* "A more neutral reason" carries less weight "but nevertheless slants against the State." *Id.* at 853-54, 153 P.3d at 1199-1200. "Defense-caused delays are not weighed against the State." *Id.* at 854, 153 P.3d at 1200.

The longest delay, by far, was caused by the defense for the purpose of determining Vallow's mental competency to stand trial. *See, e.g.*, *United States v. Sutcliffe*, 505 F.3d 944, 957 & n.4 (9th Cir. 2007) (excluding period of mental competency proceeding in speedy trial calculation either as "necessary in the interests of justice" or attributable to the defense). The case was stayed, at the defense's request, on two occasions to address Vallow's mental competency to stand trial: from May 27, 2021, to April 11, 2022, and from October 6, 2022, to November 9, 2022. Those 353 days are either attributable to the defense or, at the very least, not attributable to the

State. *See Vermont v. Brillon*, 556 U.S. 81, 92 (2009) (holding delays by defense counsel, even public defenders, attributable to the defendant for purposes of speedy trial).

The next longest delay was at least partially attributable to the defense. The defense's motion to stay the case a second time for Vallow's mental competency "necessarily vacated" the January 9, 2023, trial setting. (R., p.1343.) The 145-delay between the end of that stay on November 9, 2022, and the start of the trial on April 3, 2023, resulted in large part from Vallow's successful effort to change venue. (R., pp.1352-53.) "The transfer [from Fremont County to Ada County] required complex, multi-faceted planning and case administration that must be taken into account[.]'" (R., p.1352.) The district court "immediately began the preparations to schedule the trial to the host county" after "lifting the stay" but Vallow's requested change of venue came with hurdles that necessarily required delay: "[s]ecurity, staffing of personnel, jury commissioner preparations and designation of physical accommodations for a large jury pool and courtroom at the host county's location, have all factored into the timeframe that was determined to be the earliest feasible date to conduct this trial Boise." (R., pp.1352-53.) The inevitable delay that accompanied changing venue must be attributed to the defense who moved for the change of venue over the State's objection. *Cf. Lankford*, 172 Idaho at 563, 535 P.3d at 187 (holding delay caused by defendant's motion to appoint new counsel against defendant because "[m]otions of this nature will almost inevitably lead to considerable delays in going to trial").

The district court also gave a second reason for this delay: discovery in a complex conspiracy case. (R., pp.1350-52); *see Lankford*, 172 Idaho at 563, 535 P.3d at 187 (finding two-year delay reasonable, in part, to allow prosecutors and defense counsel time to prepare for trial); *see also United States v. Hall*, 551 F.3d 257, 272 (4th Cir. 2009) (finding "serious, complex conspiracy charge that implicated multiple parties in at least two jurisdictions" acceptable basis

for delay); *United States v. Bikundi*, 926 F.3d 761, 780 (D.C. Cir. 2019) ("Given the complex conspiracy charges at issue here, with voluminous discovery and multiple defendants, a delay of eighteen months was justifiable."); *United States v. Ruiz*, 665 F. App'x 607, 609 (9th Cir. 2016) (finding delay justified, in part, because "[t]he reason for the delay . . . was to facilitate review of the large amount of discovery"). The district court recognized that "[t]his is a complex, multiple defendant and multiple victim capital case." (R., p.1351.) And that "[a]s a natural consequence of the complexity of the investigation in this case, the preparation and dissemination of the discovery" was an "ongoing issue" with "[a]ll parties" arguing "at various times that the discovery is exceptionally voluminous." (R., p.1351.) The district court properly relied on the complexity of the case, volume of discovery, and need to prepare for trial to find this specific delay (and the overall delay from indictment to trial) reasonable.

The only other delay identified by Vallow is the State's motion to continue the trial from October 11, 2022, until January 2023 to line up with Daybell's trial. (App. Br., pp.60-61.) Not only was this 90-day delay relatively minor but, as Vallow concedes on appeal, it should be considered a neutral factor because the State was trying to avoid improper severance of the cases. (App. Br., p.61 (stating the "placing [of] the cases on the same track for trial . . . do[es] not necessarily weigh in favor of either party")); *see also Ruiz*, 665 F. App'x at 609 (finding delay justified because the reason for delay, in part, was to "ensure all defendants were tried together"). "On balance, the reasons for the delay weigh in favor of the State in justifying good cause for the delay attributed to this critical factor." (R., p.1353.)

The third factor—the defendant's assertion of her right to a speedy trial—favors Vallow as she "unequivocally asserted her right to a speedy trial." (R., p.1353.)

The fourth factor—prejudice to the defendant—weighs in favor of the State. There are three "interests" used to evaluate the prejudice factor: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired. *See Ish*, 174 Idaho at 92, 551 P.3d at 761. The third is the most serious "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* (quoting *Barker*, 407 U.S. at 532).

Vallow has failed to show prejudice as to her alleged oppressive pretrial incarceration or her anxiety. The Idaho Supreme Court has explained that these first two interests require a showing of "legal prejudice." *Id.* at 92-93, 551 P.3d at 761-62. It must be more than claiming incarceration is "unpleasant" in a way that is "common to most of the incarcerated population" and must "constitute the excessive 'anxiety and concern' *Barker* contemplates." *Id.*

Vallow has made no such showing. She argues that she was in jail or the state mental hospital for a set period. (App. Br., p.62.) But that is "common to most of the incarcerated population." *Ish*, 174 Idaho at 92-93, 551 P.3d at 761-62; *see State v. Burke*, 166 Idaho 621, 625-26, 462 P.3d 599, 603-04 (2020) (analogizing being held in state hospital to being held in jail or prison). And she waived her claim that her anxiety increased because she faced the death penalty by failing to assert it in the district court. (R., p.1353 ("The second factor, to minimize anxiety and concern has not been argued by [Vallow].")); *see State v. Radue*, 175 Idaho 297, ___, 564 P.3d 1230, 1249 (2025) (explaining waiver). Even if not waived, she cites nothing in the record to support her appellate counsel's claim that she faced "anxiety and concern" on the basis that she faced the death penalty. (App. Br., p.62.) Instead, the district court observed that any "anxiety and concern" she was experiencing had not affected her ability "to cogently and rationally cooperate with the preparation of her defense." (R., p.1353.)

Conceding the proper timeframe for the speedy trial analysis is two years (App. Br., p.59), Vallow argues the prejudice portion of the analysis should consider the time she was incarcerated in two previous cases starting in February 2020 (App. Br., pp.61-62). She is wrong. Speedy trial rights apply only to "the same alleged offense." *State v. Davis*, 141 Idaho 828, 837, 118 P.3d 160, 169 (Ct. App. 2005). The two prior cases were based on different criminal charges. Even if those two previous cases would otherwise count toward her speedy trial rights in this case, Vallow fails to acknowledge in her opening brief that she signed waivers of her speedy trial rights in both previous criminal cases. (R., pp.1341-42.) She cannot now turn around and try to use the time she was incarcerated in those two cases against the State. *See State v. Youngblood*, 117 Idaho 160, 162, 786 P.2d 551, 553 (1990) (finding "waiver to be dispositive of [a defendant's] claim of denial of speedy trial").

Vallow has also failed to show that any delay prejudiced her by impairing her ability to present a defense. On the contrary, as the district court explained, delaying the trial "serve[d] to *prevent* unnecessary impairment to [Vallow's] defense" because "of the severity and complexity of the crimes charged and the voluminous discovery in this case." (R., p.1354 (emphasis added)); *see Sutcliffe*, 505 F.3d at 957 (finding this factor favored government where delaying trial allowed defense counsel necessary time to prepare defense). Vallow essentially concedes as much on appeal. (App. Br., p.62 ("Ms. Daybell acknowledges that her counsel voiced concern about what they thought was the shortness of time to prepare.").) The fourth factor thus favors the State. *See Ish*, 174 Idaho at 93, 551 P.3d at 762 (holding prejudice factor favors the State where defendant fails to show prejudice).

On balance, all Vallow has going for her on this claim is the length of delay, which runs face first into the indisputably complex nature of this case and the fact that she contributed to most

of the delay, as well as her bare assertion of her right to a speedy trial. She has failed to show the district court erred when it found "good cause" under Idaho Code § 19-3501 for delaying the trial and rejected her constitutional speedy trial claims.

CONCLUSION

The State respectfully requests this Court affirm the judgment of conviction.

DATED this 15th day of December, 2025.

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 15th day of December, 2025, served a true and correct copy of the foregoing RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

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