

LATAH COUNTY PROSECUTOR'S OFFICE
WILLIAM W. THOMPSON, JR., ISB No. 2613
PROSECUTING ATTORNEY
ASHLEY S. JENNINGS, ISB No. 8491
SENIOR DEPUTY PROSECUTING ATTORNEY
Latah County Courthouse
522 S. Adams Street, Ste. 211
Moscow, ID 83843
Phone: (208) 883-2246
paservice@latahcountyid.gov

IN THE DISTRICT COURT OF THE FOURTH DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,
Plaintiff,

V.

BRYAN C. KOHBERGER,
Defendant.

Case No. CR01-24-31665

STATE'S OBJECTION TO
DEFENDANT'S MOTION
TO COMPEL I.C.R. 16(b)(7)
MATERIAL AND FOR
SANCTIONS

COMES NOW the State of Idaho, by and through the Latah County Prosecuting Attorney and respectfully objects and moves the Court to deny the Defendant's "Motion to Compel I.C.R. 16(b)(7) Material and for Sanctions" filed on December 27, 2024.

RELEVANT FACTS

The State has been actively engaged in replying to the Defendant's request for discovery, including materials related to potential expert witnesses, since the original discovery request was filed on January 10, 2023. As I.C.R. 16(j) contemplates, discovery involves a "continuous duty

to disclose” which the State has and will continue to comply with. This specific “continuing duty to disclose” evidences that I.C.R. 16 compliance is not a one-time event. Defendant currently notes this case involves a substantial amount of discovery. Defendant cites over sixty-eight (68) terabytes and the State does not dispute this. The discovery received by the State from multiple agencies has been provided to Defense in the same manner it was provided to the State. The State is in the same position as the Defendant in this regard¹. The Court record will reflect that the State has provided extremely detailed responses to Defendant’s Request for Discovery and Motions to Compel above and beyond what is required by Rule 16. On December 18, 2024, the State, in compliance with the Court’s Order, filed its guilt phase experts consistent with I.C.R. 16(b)(7). These disclosures were filed 7 months and 24 days before the commencement of trial. As of the date of this filing, we are 7 months and 12 days before the commencement of trial. Nevertheless, Defendant argues that he has been prejudiced and requests sanctions. Defendant’s arguments are without merit.

ARGUMENT

The State has complied with the Court’s Order and Idaho Criminal Rule 16(b)(7) regarding disclosure of expert witnesses. On December 18, 2024, the State filed “State’s Supplemental Response to Request for Discovery Regarding Expert Testimony” in compliance with the Court’s “Unredacted Sealed Order Governing Further Criminal Proceedings and Notice of Trial Setting” order on October 9, 2024. That Order stated as follows under “Section C. Discovery and Expert Disclosures:”

¹ Defendant complains and appears to represent that he has not been provided with adequate information from the State. This is patently untrue. By way of example, to appreciate the true degree of analysis and use by the Defendant of discovery that has been provided, the Court need look no further than the extensive detail in the Defendant’s motion for a *Franks* hearing, the 20 plus supplemental discovery requests and related materials, and the many other detailed substantive motions he has filed.

Experts: A list of experts the parties intend to call at trial, including a copy of the expert's report consistent with I.C.R. 16(b)(7) and a copy of the expert's curriculum vitae, shall be disclosed to the opposing party as follows: State's guilt phase experts: December 18, 2024.

Page 2.

The Order refers to I.C.R. 16(b)(7) which states in relevant part:

Expert Witnesses: On written request of the defendant, the prosecutor must provide a written summary or report of any testimony that the state intends to introduce at trial or at a hearing pursuant to Rules 702, 703, or 705 of the Idaho Rules of Evidence. The *summary* provided must describe the witness's opinions, the facts and data for those opinions, and the witness's qualifications. (emphasis added)

The Defendant cites *State v. Morin* in support of his motion. Defendant's Motion to Compel I.C.R. 16(b)(7), page 3. Morin was charged with Driving Under the Influence of Drugs (marijuana). The State filed the following expert disclosure for the forensic toxicologist:

Dr. Dawson is an expert in toxicology and pharmacology and will assist the trier of fact in understanding the evidence regarding the effects of drugs on the behavior and performance of the defendant as reported in this case. Dr. Dawson will utilize known and generally accepted scientific principles of absorption, distribution, metabolization and excretion of drugs. Testimony may include information on the effects of the drugs consumed by the defendant in this case and the possible effects of said drugs.

State v. Morin, 158 Idaho 622, 625, 349 P.3d 1213, 1216 (2015) At trial, Dr. Dawson testified that dilated pupils, confusing speech patterns, impairments to balance and other psychomotor function "lack of convergence" and green coating of the tongue were all diagnosis indications of marijuana intoxication. *Id.* Dr. Dawson also testified to the physiological effects of other drugs found in Morin's system. Ultimately, Dr. Dawson testified that it was his opinion that Morin was impaired and unsafe to operate a motor vehicle. *Id.* The Court held that the State's response disclosed nothing more than Dr. Dawson's qualifications. *Id.* at 626, 1217. The generic response

vaguely described the subject matter, not the content, of Dr. Dawson's anticipated testimony. The Court held "a mere list of topics or general subject matter which an expert witness may testify is not a discovery response that complies with this rule." *Id.* The Court also stated even if the State did not know all details of Dr. Dawson's testimony at the time of the initial discovery response:

I.C.R. 16 (j) imposes a continuing duty to supplement the response if a party later discovers or decides to use additional evidence. Discovery rules are drafted to safeguard the truth-seeking function of trials. The rules are designed to 'promote fairness and candor,' 'facilitate fair and expedient pretrial fact gathering,' and 'prevent surprise at trial.'

Morin at 625, 1217 citing *Edmunds v. Kraner*, 142 Idaho 867, 873-78, 136 P.3d 338, 355-49 (2006).

By way of contrast, in *State v. Koch*, the Defendant was charged with lewd conduct with a minor. The State filed the following expert disclosure for an expert:

Ms. Yeager's curriculum vitae is attached. She'll testify to the dynamics of delayed disclosure as it relates to child sexual abuse. The state intends to elicit expert testimony from Mydell Yeager regarding behavior of children who have been sexually abused and Ms. Yeager will testify that it is rare that a child immediately discloses their sexual abuse especially when they know the perpetrator. Ms. Yeager will testify about the dynamics of child sexual abuse as it relates to grooming a victim, keeping the abuse secret, the effects and threats on whether a child chooses to disclose.

157 Idaho 89, 93-94, 334 P. 280, 284-285 (2014). Koch argued that the above disclosure was insufficient because it failed to disclose Yeager's "opinions, and facts and data behind those opinions" as required by I.C.R. 16(b)(7). *Id.* at 93, 285. Koch also claimed the disclosure was insufficient because it did not include a summary or report written by Yeager. The Idaho Supreme Court disagreed. The Supreme Court held that the disclosure:

informed Koch of the main opinion to which Yeager was going to testify, and while it did not specifically disclose that Yeager's opinions were

based on her training and experience, ‘which would be better practice,’ it did provide her curriculum vitae that presumably disclosed her education and experience.

Id. at 94-95, 285-286. Further, the Idaho Supreme Court held that the State does not have to produce a written report where none had previously existed stating “if there is no data, [the State doesn’t] have to produce data. She is simply an opinion witness” (noting that Koch could object if the testimony varied from the State’s disclosed summary). *Id.* at 94, 286.

The Idaho Supreme Court in *Koch* discussed the scope of I.C.R. 16(b)(7) disclosure requirements and looked to the Federal Rule of Criminal Procedure 16(a)(1)(G). The Supreme Court noted that the main difference is that the federal rule requires “the bases and reasons for those opinions” whereas the Idaho rule requires “the facts and data for those opinions” suggesting the federal rule requires broader disclosure. *Id.*

The Idaho Supreme Court further noted that the expert’s conclusions “were adequately explored by defense counsel on cross-examination with no particular difficulty” evidencing that the State’s disclosure was adequate. *Id.* at 95. The goal of Rule 16 is “to provide the opponent with a fair opportunity to test the merit of the expert’s testimony through focused cross-examination.” *Id.* citing *United States v. Lipscomb*, 539 F.3d 32, 38 (1st Cir. 2008).

In *State v. Caswell*, Caswell was charged with possession and delivery of methamphetamine. The State discovered a report by criminalist Donald Wyckoff who tested the controlled substance and determined it was methamphetamine. At trial, Caswell objected to the introduction of this report, claiming the State failed to “provide him with the working papers or graphs from which Wyckoff drew his conclusions that the tested substance was methamphetamine.” Five months before trial the State provided Caswell with Wyckoff’s report, Exhibit C, containing his test results and conclusions. The State did not provide the working

papers and graphs on which the conclusions were based until requested at trial. 121 Idaho 801, 803, 828 P.2d 830, 832 (1992). On appeal, the Idaho Supreme Court found that the State's disclosure, Exhibit C, was adequate.

Turning to the case at hand, on December 18, 2024, the State disclosed 25 potential² experts the State intends to call at trial. The Defendant takes issue with 22 of the disclosures claiming they are insufficient. All 25 of the State's disclosures comply with the Court's Order and I.C.R. 16(b)(7) and are not the "generic discovery response" as presented in *Morin*. All 25 disclosures encompass more than a "mere list of topics or general subject matter which an expert witness may testify." *Morin* at 626, 1217. Each disclosure informs Defendant of the main opinion to which each expert will testify and the CV which that opinion is based upon as required by *Koch*. For experts where the State does not have a report, as further held by *Koch*, "if there is no data, [the State doesn't] have to produce data." The State addresses each objection to the proposed disclosures as follows:

For Exhibit S-1 and S-6, the State disclosed expert opinions regarding the toxicology results for all decedents as detailed in the provided Toxicology Reports. In addition, the State included the toxicologists Curriculum Vitae (CV) which supported his/her opinions. This disclosure was not merely a topic list of general subject matter which the expert may testify as precluded by *Morin*. Instead, it is the main opinion and the CV which supported the opinion as required by *Koch*. As noted by the Koch Court, the Idaho rule is not as broad as the federal rule which requires the "bases and reasons for those opinions" whereas the Idaho rule requires "the facts and data for those opinions" State's S-1 and S-6 disclosure satisfy the requirements of Rule

² In an abundance of caution, the State included witnesses that the State does not label as technically "experts" within the meaning of I.C.R. 16(b)(7) but anticipates that the Defendant might disagree.

16(b)(7).

For Exhibit S-2, the State disclosed Special Agent (SA) Ballance. The State's disclosure was adequately specific. For example, S-2 states "SA Ballance will provide his opinion as the general locations in which the target cellular telephones were located at various times before and after the homicides at 1122 King Road and the cellular phones' directions of travel." The attached report detailed the target cellular phones analyzed, the dates analyzed, and the direction of travel. In addition, Defense was directed to the cell phone records provided by AT&T and the drive testing files which support the report. The Defendant appears to be requiring compliance with the federal standard which is much broader than I.C.R. 16(b)(7). The State's disclosure provides Defendant with adequate notice of Ballance's anticipated testimony to satisfy the requirements of I.C.R. 16(b)(7).

For Exhibit S-3 and S-4, Defendant correctly agrees these disclosures meet I.C.R. 16(b)(7) requirements.

For Exhibits S-5 and S-7, the State disclosed two likely fact witnesses as experts out of an abundance of caution and was clear about this intent. The Defendant's argument that the State erred in this good-faith disclosure is without merit. In the event either of these witnesses are in fact experts within the meaning of I.C.R. 16(b)(7), it is clear from each disclosure, exactly what these witnesses will testify to based upon the provided disclosures.

For Exhibit S-8, the State disclosed the Vehicle Identification Expert, SA Imel. The disclosure specifies he will testify to his "use of the Forensic, Audio, Video and Image Analysis Program. The Forensic, Audio, Video, and Image Analysis *Program* was used to determine the make, model, and year of a suspected vehicle involved in the 1122 King Road burglary and homicides in Moscow, Idaho, on or about November 13, 2022." It is clear from the disclosure

that this witness is an expert in vehicle identification. Defendant has repeatedly been provided the images relied upon which are detailed in his Report of Examination which was attached to the State's disclosure (See S-8(a), Page 1). The State's disclosure provides Defendant with adequate notice of SA Imel's anticipated testimony to satisfy the requirements of I.C.R. 16(b)(7).

For Exhibit S-9, the State disclosed Cathy Mabbutt, the Latah County Coroner. The State specially detailed each opinion to be proffered. The opinions were supported by the attached Death Certificates authored by the Coroner, and the Coroner's CV. The Defendant fails to mention that in addition to being an attorney and an Elected Coroner, Ms. Mabbutt was a registered nurse for 44 years which is detailed in her CV. The State's expert disclosure satisfies the requirements of I.C.R. 16(b)(7).

For Exhibit S-10, S-13, and S-14 the State disclosed Forensic Detectives. These disclosures specifically listed each forensic item to which the witnesses would testify regarding. The witnesses' expertise is the process of extracting and identifying the data that is on each of the listed devices. The contents of each of these devices have been disclosed to Defendant. Any opinion related to that extraction (i.e. whether a connection was found or not) is not an expert opinion. As a result, the disclosures meet the requirements of Rule 16(b)(7).

For Exhibit S-11, Defendant correctly agrees this disclosure meets the requirements of I.C.R. 16(b)(7).

For Exhibit S-12, the State disclosed an expert on crime scene reconstruction and bloodstain pattern analysis. The State specially detailed each opinion to be proffered. The opinions were supported by attached referenced report and CV. The State's disclosure provides Defendant with adequate notice of this expert's anticipated testimony to satisfy the requirements of I.C.R. 16(b)(7). As noted by the *Koch* Court, the Defendant has identified areas through the

disclosure for cross-examination which only evidences the adequacy of the disclosure; defense should be able to “cross examine with no particular difficulty” satisfying the goal of Rule 16.

Koch at 95, 286.

Exhibits S-15 through S-25 all relate to Idaho State Police Forensic Lab experts. First, the Defendant claims “not a single DNA expert opinion or report was produced.” This is simply not true. In each of these responses the State refers the Defendant to specific lab reports and the corresponding bates numbers. The Defendant’s apparent argument that the State is required to make duplicative disclosures is unsupported. A simple reference to where Defendant can find the report is adequate.

Each report provides a basis to determine what the expert’s opinion is through the referenced Lab Report. As an example, the State is attaching bates 9323-9354 for the Court’s review of how these disclosures comply with the requirements of I.C.R. 16(b)(7). See Exhibit S-1 attached. The State follows suit in disclosures S-16 through S-20, and S-22 through S-25. The State’s expert disclosures regarding Lab experts satisfy the requirements of I.C.R. 16(b)(7).

For S-21, the State disclosed Rylene Nowlin as an expert. It is anticipated that this witness is actually a rebuttal witness who is prepared to testify regarding secondary transfer if necessary. The State contends the notice provided is sufficient pursuant to Rule 16(b)(7) but reserves the right to amend this disclosure upon review of the Defendant’s guilt phase experts and pending discovery disclosure.

As required by Rule 16(j) the State will continue to supplement the response if the State later discovers or decides to use additional evidence.

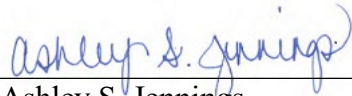
Lastly, if the Court determines that any of the disclosed expert disclosures do not meet the requirements of Rule 16(b)(7)(b), the State will promptly amend. Any contention that the

Defendant has been prejudiced or does not have adequate time to respond is wholly unsupported.
The Defendant's request for sanctions is premature and without merit.

CONCLUSION

The State respectfully request that the Court deny Defendant's "Motion to Compel I.C.R. 16(b)(7) Material and for Sanction" based upon the filings in the case; pursuant to Fourth Judicial District Rule 5.3 the State is not requesting a hearing on this matter.

RESPECTFULLY SUBMITTED this 31st day of December 2024.



Ashley S. Jennings
Senior Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the State's Objection to Defendant's Motion to Compel I.C.R. 16(b)(7) Material and for Sanctions were served on the following in the manner indicated below:

Anne Taylor
Attorney at Law
PO Box 2347
Coeur d'Alene, ID 83816
info@annetaylorlaw.com

- Mailed
- E-filed & Served / E-mailed
- Faxed
- Hand Delivered

Dated this 31st day of December 2024.

