

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

v.

BRYAN C. KOHBERGER,

Defendant.

Ada County Case No. CR01-24-31665

**ORDER ON DEFENDANT'S MOTION
TO STRIKE DEATH PENALTY AND
ADOPT OTHER NECESSARY
PROCEDURES**

I. INTRODUCTION

Defendant contends that the discovery produced by the State in this case has been voluminous and unorganized, thus rendering him unable to meaningfully review and investigate the State's evidence in time for trial. Asserting his due process rights have been violated, Defendant seeks sanctions in the form of striking the death penalty¹ and imposing certain organizational requirements upon the State to aid Defendant's review of discovery. The State responds that it has complied with all discovery obligations, including *Brady*,² and there is no basis for sanctions or other measures.

Oral argument on the motion was held on April 9, 2025, after which the Court took the matter under advisement. Because Defendant has failed to show a discovery violation or due process violation by the State, sanctions are not warranted. The Court further declines to require the State to provide further organizational assistance to Defendant.

II. STANDARD

A trial court's decision regarding discovery violations must be supported by substantial and competent evidence in the record. *State v. Koch*, 157 Idaho 89, 93, 334 P.3d 280, 284 (2014). Choice of sanctions for failure to comply with discovery obligations is discretionary. *State v. Cochran*, 129 Idaho 944, 949, 935 P.2d 207, 212 (Ct. App. 1997). On discretionary

¹ Defendant also moved to strike the State's experts, incorporating his Motion *in Limine* re: Vague and Undisclosed Expert Witnesses. The Court denied this motion in a separate order.

² *Brady v. Maryland*, 373 U.S. 83 (1963).

matters, the trial court must: 1) correctly perceive the issue as one of discretion; 2) act within the outer boundaries of its discretion; 3) act consistently with the legal standards applicable to the specific choices available to it, and; 4) reach its decision by the exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

III. ANALYSIS

Pursuant to *Brady v. Maryland*, a prosecutor has a constitutional duty to disclose favorable evidence to the accused where such evidence is “material” either to guilt or to punishment. 373 U.S. at 87.³ This duty covers not only exculpatory material, but also information that could be used to impeach a key government witness. *Giglio v. United States*, 405 U.S. 150, 154 (1972). *Brady* does not, however, grant broad discovery rights to a defendant. *State v. Campbell*, 170 Idaho 232, 248, 509 P.3d 1161, 1177 (2022) (quoting *United States v. Bagley*, 473 U.S. 667, 675 n.7 (1985) (“An interpretation of *Brady* to create a broad, constitutionally required right of discovery ‘would entirely alter the character and balance of our present systems of criminal justice.’”)). It simply imposes a due process standard upon prosecutors by requiring them to disclose favorable, material evidence. *Campbell*, 170 Idaho at 248, 509 P.3d at 1177 (citing *Bagley*, *supra*).

“In tandem” with *Brady*, the Idaho Criminal Rules require the prosecuting attorney to disclose “as soon as practicable following the filing of charges,” any evidence which “tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment.” *State v. Gardner*, 126 Idaho 428, 432, 885 P.2d 1144, 1148 (Ct. App. 1994) (quoting ICR 16(a)). The discovery obligations under both *Brady* and ICR 16 extend to all the government agents having a significant role in investigating and prosecuting the offense.” *Id.* at 433, 885 P.2d at 1149.

Defendant complains that the State has failed to satisfy its obligations under *Brady* and ICR 16 due to its method of discovery production.⁴ He contends that the State has turned over

³ In a capital case, this includes evidence that may mitigate punishment. *Cone v. Bell*, 556 U.S. 449, 475 (2009).

⁴ Despite presenting this motion in briefing as a *Brady* violation, at the hearing on the motion Defendant confusingly requested that the Court view the motion “not as a *Brady* violation but as a due process violation[.]” However, Defendant appears to misapprehend the scope of his due process rights regarding discovery. “There is no general constitutional right to discovery in a criminal case.” *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). In fact, “the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded....” *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). Rather, it is *Brady* and its progeny that serve to uphold a criminal defendant’s due process rights with regard to discovery. As the United States Supreme Court has explained, “[t]he *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the

more than 68 terabytes of data in discovery consisting of in excess of 13,000 photographs, 15,000 video clips from businesses and 8000 video clips from residences.⁵ It also includes more than sixty digital devices, digital data and search warrant return data. Defendant also contends the State has not provided the discovery in a searchable format, has not provided detailed logs and indexes that would facilitate defense's review of the material and has not specifically identified any *Brady* evidence. Defendant argues he has been prejudiced by the State's "data dump" method of discovery and contends that sanctions are warranted in the form of striking the death penalty and excluding witnesses. He also asks that the Court required the State to identify *Brady* material or "hot documents" within its discovery.

While the State acknowledges there is a "massive" amount of data in this case, it contends the majority is "completely irrelevant." Specifically, the State contends that most of the data is from cell phone extractions and weeks of surveillance video footage throughout the Moscow area obtained following the homicides. It affirmed on the record that it is unaware of any *Brady* material in those videos other than those specifically identified in motion practice and otherwise throughout the case. Further, the State's experts who reviewed the various devices (including cell phones) and other digital data have disclosed opinions that they found no connection between Defendant and the victims from the devices and data.

The State also notes that since this case began over two years ago, it has continuously turned over to Defendant all the information it received from the various investigating agencies in the same format as the information was received by the State.⁶ This was done at Defendant's request, who specifically asked that the State produce "everything [the State] had" from the get-go. Defendant also issued 400 itemized requests for discovery in this case. Thus, the State contends it is on the "same playing field" as Defendant regarding discovery.⁷ In addition, the

primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675. Thus, it is *Brady* that governs the Court's analysis of Defendant's alleged due process rights violation.

⁵ Other than those identified in warrant applications, expert disclosures, motion practice and in the exhibit lists, the numerous surveillance videos show nothing of consequence.

⁶ The State explained that all the evidence in this case was routed to it from the various investigating agencies. Once received, the State would copy it and then place it directly on Defendant's server in the same fashion and format it was received. The State has maintained its files in that same format.

⁷ In his reply, Defendant asserted that the State utilizes an "expensive, technologically powerful" case management software program called "Prosecutor by Karpel" which has a global search function to search all discovery and case documents at one time, generate reports from such searches and automatically transcribe audio and video files.

State points out that on September 4, 2024—at approximately the same time as its discovery deadline—it provided Defendant with a 320-page index identifying the location of requested discovery, a description of the evidence, and the date discovered. In addition, all of the evidence received from the FBI—which comprises the majority—was provided to Defendant with a searchable index.⁸ In sum, the State asserts it has provided everything required by ICR 16(a) and *Brady* and disputes that it has engaged in any discovery violations.

A. Defendant Has Not Established a Discovery Violation, Thus Sanctions Are Not Warranted.

“‘There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.’” *State v. Hall*, 163 Idaho 744, 830, 419 P.3d 1042, 1128 (2018) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). Defendant, as he appears to have acknowledged at the hearing, cannot establish these elements because he has not identified any withheld evidence that is exculpatory or impeaching. Further, he has not identified any obligation under ICR 16 that the State has violated. His quibble, rather, is with the method in which the State has produced discovery, arguing it is effectively a data dump that prevents him from meaningfully review the discovery for *Brady* material. There are, however, several problems with Defendant’s position.

First, while neither *Brady* nor ICR 16 prescribe the form discovery must take, it is well settled under federal law that there is no direct obligation for the government to identify or itemize *Brady* material for the defense. *Rhoades v. Henry*, 638 F.3d at 1039 (noting absence of authority for the proposition that the government’s *Brady* obligations require it to point the defense to specific documents within a larger mass of material that it has already turned over). “While the Supreme Court in *Brady* held that the Government may not properly conceal exculpatory evidence from a defendant, it does not place any burden upon the Government to

Because he does not have access to similar technology, Defendant disputes he is on the same playing field as the State. However, at the hearing, the State disputed its evidence software program has any of these features. Instead, the prosecutors rely on a self-created spreadsheet to identify and manage discovery.

⁸ When Defendant ran into a problem with some of the disclosed PDF documents with password protection, the State worked with Defendant to resolve the problem.

conduct a defendant's investigation or assist in the presentation of the defense's case.” *United States v. Marrero*, 904 F.2d 251, 261 (5th Cir.1990).⁹

Further, voluminous discovery alone is not a basis for finding concealment under *Brady*. This occurs typically in “open file” discovery where the government effectively makes its entire file available to a criminal defendant. *United States v. Saffarinia*, 424 F.Supp.3d 46, 85 (D.D.C. 2020). This method of discovery—which Defendant requested of the State in this case—carries the recognized benefit of increasing “the efficiency and fairness of the criminal process.” *Strickler v. Greene*, 527 U.S. 263, 283, n. 23 (1999). It is only when the government uses the open file policy to hide exculpatory material or otherwise prevent a defendant’s access to such material that a *Brady* violation will be found. For example, in *United State v. Skilling*, the Fifth Circuit observed that while the use of voluminous open file does not alone violate *Brady*, its misuse by the government can give rise to a *Brady* violation, stating:

For instance, evidence that the government ‘padded’ an open file with pointless or superfluous information to frustrate a defendant's review of the file might raise serious *Brady* issues. Creating a voluminous file that is unduly onerous to access might raise similar concerns. And it should go without saying that the government may not hide *Brady* material of which it is actually aware in a huge open file in the hope that the defendant will never find it. These scenarios would indicate that the government was acting in bad faith in performing its obligations under *Brady*.

554 F.3d 529, 577 (5th Cir. 2009), *rev'd in part on other grounds by Skilling v. United States*, 561 U.S. 358 (2010).

However, where there is no proof that the government “larded its production with entirely irrelevant documents” or “made access to documents *unduly* onerous,” a *Brady* violation will not be found. *U.S. v. Warshak*, 631 F.3d 266, 296–97 (6th Cir.2010) (emphasis in original).

Here, Defendant has not shown any bad faith by the State with regard to discovery production. While the discovery is indeed voluminous, the Court does not find that the manner in which the State produced it violates *Brady* or otherwise constitutes misconduct. The discovery was produced to Defendant as he specifically requested. The State received the information from its investigating agencies, labeled the materials and turned them over to Defendant through a shared access drive in the same format as received. This method not only puts the State and

⁹ See also, *United States v. Pelullo*, 399 F.3d 197, 212 (3d Cir. 2005) (*Brady* does not impose an obligation “on the prosecution team members to ferret out any potentially defense-favorable information from materials that are so disclosed.”)

Defendant on equal footing regarding discovery review, it also serves the important purpose of protecting against claims of missing or manipulated documents if the State puts them in a different format or organization or otherwise conveys them to Defendant in a different manner than received. While the State acknowledges that much of the discovery is “completely irrelevant,” including surveillance videos and data from the numerous phones, computers and other devices, it did not produce it for purposes of padding the file or otherwise attempting, in bad faith, to hide *Brady* information in its haystack of information. Rather, Defendant asked for “everything” and “everything” is what he received. Defendant cannot demand everything under the sun and then complain about the weight of all the planets.

Moreover, Defendant has not produced any evidence showing the State has hidden *Brady* material or made his access to discovery unduly onerous. Although the State did not provide all of the discovery in a searchable format (as it was not received by the State in such a format), it provided a 320-page index identifying the specific location of evidence produced in response to Defendant’s 400 individual discovery requests, a description of the evidence, and the date discovered. In addition, the discovery received from the FBI—which comprised the majority—was provided to Defendant in a searchable format. Other than the cell phone/digital data and video surveillance footage, Defendant has not identified what information his counsel will be unable to review prior to trial and why that information is material. Further, the State has stipulated that it is unaware of any *Brady* material in the video surveillance footage (other than that specifically identified in motion practice) and its experts who have reviewed all the cell phone and other digital data in the case have opined they found no connection linking Defendant to the devices and data analyzed.

In addition, Defendant’s complaints of being unable to meaningfully review the discovery ring hollow. Defendant has been receiving discovery in the same manner for over two years. In that time, he has not once sought a remedy from this Court to regulate discovery, such as requiring the State to provide discovery in a different format. He has not sought additional resources under ICR 12.2 to hire additional staff to review discovery or obtain litigation document control software to help organize and sort the evidence. His lead counsel insisted that she be allowed to take on a second high-profile capital case despite the voluminous discovery in

this case.¹⁰ Further, at oral argument, lead counsel indicated that her practice is to personally review all the discovery herself, rather than rely on associates and staff to review materials to cut through the less relevant information and point to what materials need review by lead counsel. These actions are not indicative of an overburdened defense team. In fact, it is evident Defendant has been able to capably navigate the discovery given his more than robust motion practice, the scope and breadth of the experts retained and the disclosures filed. *See, Warshak*, 631 F.3d at 197-98 (no *Brady* violation where there was no proof the government hid exculpatory evidence and where the defendant's motion practice belied his claim that he was unable to navigate the discovery).

In the cases cited by Defendant where the courts have struck the death penalty as a sentencing option, the defendant had demonstrated that the prosecution either willfully¹¹ or inadvertently (but with extreme resulting prejudice)¹² violated discovery obligations. Here, however, Defendant has not established a discovery violation under *Brady* or ICR 16 in the first place. He has not shown the State has attempted to concealed specific materials within the discovery and he has not shown discovery to be unduly burdensome to the point where he is unable to examine the items that are material and of evidentiary value.¹³ Consequently, there is no basis for any sanction, let alone striking the death penalty.

¹⁰ *State v. Skylar Meade*, Nez Perce County Case No CR35-24-3750. *See, State v. Kohberger*, CR01-24-31665, October 8, 2024, *ex parte* Hearing Minutes (Sealed).

¹¹ *United States v. Rivera-Clemente*, 2012 WL 12911051, at *1 (D.P.R. Sept. 19, 2012) (where the government showed a "troubling reluctance" to disclose information that was relevant to the death penalty certification process, including *Brady* material, decertification was appropriate due to prejudice to defendant); *United States v. Rosado-Rosario*, 1998 WL 28273, at *3 (D.P.R. Jan. 15, 1998) (striking death penalty as sanction where the government refused to comply with discovery order and filed a notice of intent to seek the death penalty without first seeking certification); *Gardner v. Florida*, 430 U.S. 349 (1977) (vacating death sentence for violation of due process where death sentence was imposed based, in part, on a presentence investigation report that was not disclosed in full to defendant so as to allow him the opportunity to deny or explain).

¹² *State v. Lori Vallow Daybell*, Fremont County Case No. CR22-21-1624 (March 21, 2023 hearing) (striking death penalty as a sanction for the State's inadvertent failure to produce over 100 hours of phone calls and video visits containing statements of the defendant until two weeks prior to jury selection and the defendant had not waived speedy.) The transcript of the hearing was filed Nov. 24, 2023 in that case and, to the extent necessary, the Court takes judicial notice thereof under IRE 201(c).

¹³ Indeed, Defendant has struggled to identify materials that he has been unable to review at all, except to indicate that lead counsel has not been able to personally review all the surveillance videos and devise data produced (most of which the State has conceded are not of evidentiary value and are neither exculpatory nor inculpatory).

B. The Court Declines to Impose Organizational Requirements on the State.

Defendant additionally asks the Court to require the State to identify *Brady* material or “hot documents” within its discovery.¹⁴ The Court finds neither is warranted.

While the general rule is that the government need not specifically identify *Brady* material within a larger mass of disclosed evidence, courts will sometimes “order the government to organize voluminous discovery to comply with the spirit of its statutory and constitutional obligations.” *United States v. Salyer*, 2010 WL 3036444, at *2 (E.D. Cal. Aug. 2, 2010) (citing *U.S. v. W R Grace*, 526 F.3d 499, 509–510 (9th Cir. 2008)). Such organization measures include requiring that the government specifically designate any known *Brady* material within the discovery. Whether to order such identification is highly dependent on the facts and circumstances of the case. *Saffarina*, 424 F.Supp.3d at 85. Courts consider not only the volume of discovery and how it was produced, but the relative position of the defendant requesting identification, such as “(i) a defendant's access to counsel, (ii) whether the defendant is incarcerated, (iii) a defendant's access to resources, (iv) a defendant's ability to participate in the preparation of his own defense, and (v) whether the interests of multiple defendants are aligned.” *United States v. Lacey*, 2018 WL 4963292, at *2 (D. Ariz. Oct. 15, 2018) (citations omitted).

In *Saffarina*, for example, the government produced approximately one million records and 3.5 million pages of documents in discovery. With this discovery, the government provided production logs, Bates-stamping, and metadata in an electronic and searchable format. *Id.* at 83–84. The court found that, under the circumstances, the government’s *Brady* obligations required it to identify “any known *Brady* material to the extent that the government knows of any such material in its production[.]” *Id.* at 85. In doing so, the court emphasized that the defendant was “an individual defendant who neither ha[d] the benefit of parallel civil litigation, nor access to voluntary corporate assistance to sift through the massive amounts of documents within the government's voluminous production”; that the defendant’s counsel was handling the case *pro bono* with “time constraints” and “limited financial resources”; and “that the government—assisted by at least two federal prosecutors and several federal agents from at least two law

¹⁴ Nonetheless, this issue is largely moot given the representations by the State regarding its knowledge of *Brady* materials within the discovery and the exchange of the State’s expert disclosures and exhibit lists that, from the state’s perspective, call out the “hot” documents.

enforcement agencies—... had the luxury of reviewing this material on a rolling basis over the course of its three-year investigation.” *Id.* at 88.¹⁵

Likewise, in *Salyer*, the court directed the government to identify previously disclosed *Brady/Giglio* material to the defendant where the government collected documentary information during a five-year investigation, and the government's massive production consisted of electronic information with multiple gigabytes and millions of pages. *Salyer*, 2010 WL 3036444, at *1, *3. The court reached that conclusion based on the circumstances of that case, which included: (1) there was a “singular, individual defendant, who [was] detained in jail pending trial, and who [was] represented by a relatively small defense team[;]” and; (2) “[t]here [was] no parallel civil litigation, and [the defendant] [did] not have access to voluntary corporate assistance in attempting to find the documents needed by the defense.” *Id.* at *7.

By contrast, in *United States v. Meek*, the court declined to compel the government to identify *Brady* material in its discovery, noting that: 1) the government produced the discovery in a user-friendly, searchable, and indexed format; 2) there was no indication that the government deliberately concealed or buried any exculpatory evidence in the information it turned over to the defense; 3) the defendants were sophisticated, formerly high-level executives represented by experienced and talented counsel from notable law firms, and; 4) the defendants had access to the discovery for over a year and had it in the same format as did the government. 2021 WL 1049773, at *5 (S.D. Ind. Mar. 19, 2021). The court further pointed out that ordering the government to “identify or label *already produced* material as covered by *Brady*—and by omission, identify non-*Brady* material—only invites future disputes as to whether the Government did an adequate job of identifying such material or characterized the material consistent with the Defendants’ view of it.” *Id.* (emphasis in original).¹⁶

¹⁵ See also, *United States v. Blankenship*, 2015 WL 3687864 (S.D.W.Va. June 12, 2015) (requiring government to specifically designate any known *Brady* materials within its four million pages of discovery that was “disorganized and unsearchable,” where the government had several years to review the material yet the defendant had only five months, and where the defendant claimed the government was burying exculpatory evidence); *U.S. v. Hsia*, 24 F.Supp.2d 14, 29 (D.D.C. 1998) (“The government cannot meet its *Brady* obligations by providing [the defendant] with access to 600,000 documents and then claiming that [the defendant] should have been able to find the exculpatory information in the haystack.”); *United States v. Cutting*, 2017 WL 132403, at *8–9 (N.D. Cal. Jan. 12, 2017) (requiring government to identify all known *Brady* material in discovery numbering in the millions of pages).

¹⁶ See also, *Skilling*, 554 F.3d at 576 (holding government was not required to identify *Brady* material where there was no indication that the government was hiding exculpatory evidence and where its discovery, consisting of several hundred million pages of documents, was electronic and searchable, accompanied by indices and identified “hot documents” that the prosecution viewed as particularly relevant).

While Defendant is currently incarcerated, he has a robust defense team¹⁷ and has not faced time constraints given his speedy trial waiver, with this case well over two years old. Further, unlike in *Saffarinia* and *Salyer*, Defendant has had nearly as much time as the State to review discovery. Defendant was arrested on December 30, 2022, approximately six weeks after the homicides. Defense counsel filed a notice of appearance on January 12, 2023, and the State first began providing discovery on January 18, 2023. Thus, this is not a situation where the State has had the benefit of a years-long investigation compared to a defendant who has mere months to review the investigative material.

Further, the Court shares the significant concern voiced in *Meek* that requiring the State to identify *Brady* material in already produced discovery, or to organize it in a way different from how the State received it, would simply invite future litigation as to whether the State did a sufficient job. *Meek*, 2021 WL 1049773, at *5. Not infrequently, what constitutes *Brady* material is fairly debatable. Where the circumstances do not, as here, cry out for a departure from the general rule, the Court will not invite such future disputes.

In addition, there is no need to require the State to disclose a list of “hot documents,” which is a tool imposed by some courts for particularly voluminous discovery to aid the defendant in identifying material that deserve closer attention. Chen, Brian, *Big Data and Brady Disclosures*, 99 N.Y.U.L.Rev. 1754, 1788 (Nov. 2024). The State has effectively already done so. Defendant was indicted by a grand jury. This process required the State to present evidence supporting the elements of the charges and identify any “substantial evidence which directly negates the guilty of the subject of the investigation.” ICR 6.1(b)(1). Defendant is privy to all the evidence produced by the State at the grand jury proceedings in this matter. Further, the State recently disclosed its exhibit and witness list identifying precisely what the State intends to use to support its case. Additionally, the State has taken reasonable steps to aid Defendant in navigating the discovery, including by: 1) providing a detailed index of all the discovery produced identifying the location, a description of the evidence, and the date discovered; 2) providing the FBI materials with a searchable index; 3) working with counsel to resolve access problems to documents, and; 4) representing that the surveillance videos other than those

¹⁷ For capital cases in Idaho, a defendant who has court appointed counsel must have a lead and a second chair attorney. Here, Defendant has always employed at least three attorneys, has employed investigators and mitigation specialists and has retained dozens of experts.

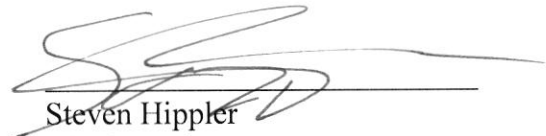
highlighted by the State do not contain any relevant footage and that the devices, phones and other digital data of the victims and others do not show any connection between the Defendant and the victims. Collectively, this provides Defendant reasonable means to meaningfully review the discovery he requested.¹⁸ Consequently, the Court declines to impose additional organizational requirements.

V. ORDER

Based on the foregoing, Defendant's Motion to Strike the Death Penalty and Adopt Other Necessary Procedures Due to State's Disclosure Violations is DENIED.

IT IS SO ORDERED.

DATED this 29th day of April, 2025.


Steven Hippler
District Judge

¹⁸ The Court continues to strongly urges defense counsel to request additional resources and personnel from the money judge if it is felt needed.

CERTIFICATE OF SERVICE

I hereby certify that on 4/29/2025, I served a true and correct copy of the **ORDER ON DEFENDANT'S MOTION TO STRIKE DEATH PENALTY AND ADOPT OTHER NECESSARY PROCEDURES**

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