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

STATE OF IDAHO, Plaintiff, vs. CHAD GUY DAYBELL, Defendant.	**CASE NO. CR22-21-1623** **OBJECTION TO DEFENDANT'S SECOND RENEWED MOTION FOR SEVERANCE**

The State of Idaho, by and through the Fremont County Prosecuting Attorney's Office, submits the following Objection and Memorandum in Support of the Objection to the Defendant's Second Renewed Motion for Severance.[1]

FACTUAL AND PROCEDURAL BACKGROUND

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

[1] The Defendant is referencing the same discovery in his Motion to Dismiss and Second Motion to Compel. The State would incorporate its Responses/Objections to the Defendant's Motion to Dismiss and Second Motion to Compel.

Theft by Deception wherein Tylee Ryan is the victim; One Count of First-Degree Murder wherein Tylee Ryan is the victim; One Count of Conspiracy to Commit First-Degree Murder and Grand Theft by Deception wherein JJ Vallow is the victim; One Count of First-Degree Murder wherein JJ Vallow is the victim; and One Count of Conspiracy to Commit First-Degree Murder wherein Tamara Daybell is the victim. In addition, Defendant Lori Vallow Daybell is charged with One Count of Grand Theft wherein the United States Government is the victim due to Defendant Lori Vallow Daybell receiving social security funds intended for the care of Tylee Ryan and J.J. Vallow. Defendant Chad Daybell has additional charges of One Count of First-Degree Murder wherein Tamara Daybell is the victim; and Two Counts of Insurance Fraud for the receipt of life insurance proceeds for Tamara Daybell's death.

On June 9, 2021, the Defendant was arraigned in the presence of his counsel on all his charges in the Indictment and entered not guilty pleas to all charges. Due to a stay in her case number, Defendant Vallow Daybell was not arraigned until April 19, 2022.

On August 9, 2021, the Defendants were advised of the existence of the electronic devices seized during the January 3, 2020 search of the Defendant's home.[2] The Defendants were notified of the existence of the electronic devices, the known contents and that the devices were available for inspection and copying as allowed by I.C.R. 16(b)(4). All reports on the seizure of these items were disclosed. Until recently, neither Defendant has requested, nor attempted to make any arrangements to review the devices or their contents.

The Defendant's Second Renewed Motion to Sever is almost identical to his Second Motion to Sever filed on September 27, 2022. The Defendant has added one additional section

[2] The Defendants were advised of this discovery previously in Fremont County Cases Fremont County Cases CR22-20-0755 and CR22-20-0838.

which has not been previously addressed.

The State has provided lengthy briefs in response to the Defendant's prior Motions to Sever and would incorporate those same arguments in response to this most recent filing. Furthermore, the standard and burden under Rule 14 require the same application regarding the determination of prejudice irrespective of the specific argument presented by the Defendant. The Defendant previously did not meet the high burden of establishing prejudice to such a degree that severance of the Defendants is the only option, and he again fails to meet that burden with his Second Renewed Motion to Sever.

The Defendant is essentially requesting this Court reconsider his Motion for Severance filed on September 27, 2022 which was denied in this Court's Memorandum and Decision dated November 17, 2022. Prior to entering the Order, this Court heard oral argument from both Parties on November 10, 2022.

According to his recent filing, the Defendant is requesting this Court reconsider the decision already entered. The bulk of the Defendant's Motion has already been argued and denied by this Court, and the Defendant has not provided any new argument or support for sections I-V. As stated above the Defendant has provided one additional section to his original Second Motion to Sever; however, the Defendant has still failed to meet his burden under Idaho Criminal Rule 14.

ARGUMENT

The Defendant has had access to the identified electronic evidence since August 21, 2021 in this case. He actually had access previously in the discovery provided in Fremont County Cases CR22-20-0755 and CR22-20-0838. As outlined in explicit detail in the State's Response to the Defendant's Second Motion to Compel filed on February 16, 2023, the State has compiled

with all discovery rules and supplied reports and access to the electronic items which are the subject of the Defendant's complaint. Multiple times over a two-year period, the State has notified the Defense of the existence of physical evidence – including electronic items – and explained that all are available for inspection or copying. One specific disclosure was on May 31, 2022, where the State disclosed certain information from the named devices which appeared to have some evidentiary value. There is no exculpatory data which the State is aware of being recovered or contained on the devices or their contents. The Defendant continues to conflate exculpatory evidence with potential evidence throughout his filings and arguments. Clearly as a matter of trial strategy and to gain a tactical advantage for continuance. The Defendant has chosen not to contact either the Fremont or Madison County Prosecutors' Offices to request to review the devices identified in the Defendant's Motion or the data pulled from them. The Defendant now on the "eve of trial," as he repeatedly references in argument, has chosen to request to review those devices and/or the data on them.[3]

I. The State has Not Violated Its Duty of Disclosure with Regard to *Brady/Giglio* Evidence.

Idaho Criminal Rule 16(a) provides in part: "Mandatory Disclosure of Evidence and Material by the Prosecution. As soon as practicable after the filing of charges against the accused, the prosecuting attorney must disclose to defendant or defendant's counsel any material or information in the prosecuting attorney's possession or control, or that later comes into the prosecuting attorney's possession or control, that tends to negate the guilt of the accused as to the offense charged or that would tend to reduce the punishment for the offense."

[3] This request came on the heels of a prior motion to continue filed by the Defendant wherein this Court indicated if the State in fact had any exculpatory evidence which had not been provided to the Defendant, the Court would consider a new request for a severance. It was filed shortly after a Second Motion to Compel was filed "seeking" the items outlined in this Motion. *See State's Response to the Second Motion to Compel.*

In addition to I.C.R. 16, "[d]ue process requires all material exculpatory evidence known to the State or in its possession to be disclosed to the defendant." *Stevens v. State*, 156 Idaho 396, 406 (Ct. App. 2013) (Quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). However, the State does not have a general constitutional duty to provide a complete and detailed accounting of all police investigatory work to defense on a case. *Dunlap v. State,* 141 Idaho 50, 64 (2004). Nor is a prosecutor "required to disclose evidence the prosecutor does not possess or evidence of which the prosecutor could not reasonably be imputed to have knowledge or control." *Queen v. State*, 146 Idaho 502, 505 (Ct. App. 2008).

The court in *Queen* ultimately determined the proposition "that *Brady* does not place an affirmative duty on the state to seek out information for the defense" as being "consistent with Idaho law." *Queen* at 506.

In addition, "the prosecutor is not required to deliver his entire file to defense counsel…" *United States v. Bagley*, 473 U.S. 667, 675 (1985). Certain documents or tangible objects may be of a nature that requires defense counsel to view/inspect or photograph or make a copy of it. This process complies with the duty under I.C.R. 16.

The Defendant continues to assert the State's failure to provide a complete copy of 12 terabytes of data is a violation of *Brady/Giglio*; however, the Defendant continues to fail to provide authority requiring the production of the discovery in hard format versus making it available to the Defense– especially where there is no indication that it contains any *Brady* material. There is no evidence to support the Defendant's last-minute attempt at a continuance or severance.

II. The Defendant is Attempting to Place an Additional and Inappropriate Burden on the State.

In *Kyles v. Whitley,* the United States Supreme Court reiterated:

> The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). *Brady* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976), however, it became clear that a defendant's failure to request favorable evidence did not leave the Government free of all obligation. There, the Court distinguished three situations in which a *Brady* claim might arise: first, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured; second, where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence; and third, where the Government failed to volunteer exculpatory evidence never requested, or requested in a general way. The Court found a duty on the part of the Government even in this last situation, though only when suppression of evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial."
>
> In the third prominent case on the way to current *Brady* law, *United States* v. *Bagley*, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985), the Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes, and it abandoned the distinction between the second and third *Agurs* circumstances, *i.e.*, the "specific-request" and "general- or no-request" situations. *Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 514 U.S. 419, 432-433, 115 S.Ct. 1555, 1565 (1995). Internal Citations Omitted in Part.

The Defendant continues to assert *Brady* where it is simply not applicable. As stated above, the State pursuant to Idaho Criminal Rule 16 is required to disclose "any material or information in the prosecuting attorney's possession or control" which "tends to negate the guilt of the accused…." Further, as stated above, the State is not required to produce full copies of all discovery.

"The Supreme Court repeatedly has emphasized that, [t]he *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L. Ed. 2d 481 (1985)." *State v. Widmer*, 2013-Ohio-62, 2013 Ohio App. LEXIS 44, 2013 WL 142041 (Ct. App. 2013).

Further, "[i]nitially, we reiterate the Supreme Court has rejected a standard of materiality that focuses on the accused's ability to prepare for trial. '[A]s a rule, undisclosed evidence is not material simply because it may have helped the defendant to prepare for trial[.]' The vast majority of Widmer's brief discusses how the perjury was material to his *Kyles* strategy and trial preparation, rather than his guilt or innocence." *Id.*

The Defendant cites to multiple cases wherein the Courts extended the *Brady/Giglio* line of cases to require the Prosecution to review the evidence in order to determine what may be exculpatory evidence and produce such evidence. In *United States v. Salyer,* the Court found:

> The Supreme Court most assuredly did not hold that because it is not possible to look into defense counsel's mind about possible defenses, there is no duty to look for exculpatory evidence. When the prosecution, in good faith, determines that a piece of evidence, on its face, significantly tends to controvert what it is attempting to prove, disclosure (and in this case, identification as well) is mandated. Similarly, for Giglio information, the prosecution knows, from its vantage point, what information is significantly inconsistent with the testimony it expects *its* potential witnesses to present or with their credibility generally.
> 2010 U.S. Dist. LEXIS 77617, *17, 2010 WL 3036444 (E.D. Cal. 2010).

However, the Court went on to provide: "The Supreme Court has directed prosecutors to err on the side of disclosure, but it has not held that exculpatory or impeaching evidence is to be speculatively gauged by what defense counsel may desire to argue." *Id.* at 18.

Furthermore, the Court recognized that "cases cited from outside the Ninth Circuit, primarily from the Fifth Circuit, do stand more for an outright rejection of any governmental need to identify Brady in a large documents case…" *Id.* at 22.

The Defendant also cites to *United States v. Cutting* as support for his argument; however, in that case, the Court found:

> [T]he government's production has not only been voluminous, but its electronic production has been marred by technical problems that seriously impede defendants' ability to search the ESI. Although the government represented in January 2015 that it had produced to defendants all of the material seized by the FDIC when SVB failed in August 2010, that representation was not in fact correct. Further, the government has recently produced, in response to a trial subpoena, an additional 23 boxes of material, including defendant Cutting's emails as well as emails of other SVB employees who were involved in the loan transactions at issue. Under all of these circumstances, the Court finds it appropriate to order the government to identify the Bates number the *Brady/Giglio* material in the discovery that has been produced. 2017 U.S. Dist. LEXIS 5006, *15 (N.D. Cal. 2017).

The Court went on to state: "Typically, the government has no obligation to 'single out' particular pieces of exculpatory evidence. *Rhoades v. Henry*, 638 F.3d 1027, 1039 (9 th Cir. 2011). (en banc) ('Rhoades points to no authority requiring the prosecution to single out a particular segment of a videotape, and we decline to impose one.'). However, as defendants note, courts have also recognized that there may be circumstances where the "duty to disclose [exculpatory evidence] may be unfulfilled by disclosing too much; at some point, 'disclosure,' in order to be meaningful, requires 'identification' as well." *United States v. Salyer*, 271 F.R.D. 148, 155 (E.D. Cal. 2010). *Id.* at *24.

However, more on point with this case, is *United States v. Pellulo*, where the Court was "especially mindful of the massive amounts of documents involved in th[e] case and the concomitant practical difficulty faced by the government in discovering and revealing all *Brady*-type material" when reviewing the case to determine if the State had suppressed evidence. The

Court accepted the description by the District Court which included: "All of this activity generated mountains of documents, as disclosed by the search of the Miami warehouse. *No one but Pelullo could comprehend it all in its entirety. He alone, an obviously highly intelligent person, was able to keep track of it all and manipulate it to his advantage.*" 399 F.3d 197, 210, 2005 U.S. App. LEXIS 3289, *28 (3rd Cir., 2005).

Further the Court adopted: "As a practical matter no one, either prosecutor or defense counsel, can ever expect to get all of this material under control. There will always be something more which can arguably be relevant to the issues in this case." *Id.* "[T]he sheer volume of documents interspersed through many jurisdictions, many of which could be relevant to any or all the various prosecutions, seriously weakens any claim that the government suppressed evidence." *Id.* at 210-211. In addition, Pelullo himself had admitted when seeking a trial continuance, "I'm the one that should determine what's relevant or what I'm going to need to defend myself.'" *Id.* at 211.

The Court found that "defense knowledge of, or access to, purportedly exculpatory material is potentially fatal to a *Brady* claim, even where here might be some showing of governmental impropriety." The Court found the following factors did not support a finding of suppression: (1) the massive amount of documents, which belonged to Pelullo; (2) the government's lack of knowledge as to the exculpatory nature of the material contained in the warehouse documents; (3) the defense knowledge of, and access to, the subject documents." *Id.* at 215.

The devices referenced by the Defendant are those which were seized from his home during a search carried out pursuant to a warrant on January 3, 2020. The Defendant has received a copy of the report regarding the search, along with an attached evidence log in the

previous Fremont County Cases CR22-20-0755 and CR22-20-0838, and in the current pending case. In the pending case, the disclosure was provided on August 9, 2021, and the Defendant was again notified he could make arrangements to review those items/materials. Further on May 31, 2022, the State disclosed an FBI Report in its Fourth Supplemental Discovery Disclosure regarding multiple devices in which the raw data was downloaded and provided. The Defendant has clearly been notified of the discovery, has had access to the discovery, is in a better position to know the contents of the devices (they were taken from his home), and has been provided the reports and data deemed to have evidentiary value by the State.

III. The Defendant's Trial Strategy and Apparent Legal Tactic of "Not Looking" Does Not Amount to Any Fault of the State.

"In order to establish a *Brady* violation, there must be evidence that (1) is favorable to the accused because it is either exculpatory or impeaching; (2) was willfully or inadvertently suppressed by the State; and (3) was prejudicial or material in that there is a reasonable probability that its disclosure to the accused would have led to a different result." *State v. Lankford*, 162 Idaho 477, 503 (2017). Further, "…a defendant must establish that his or her failure to discover the evidence was not the result of a lack of due diligence." *United States v. Skilling,* 554 F.3d 529, 574, 2009 U.S. App. LEXIS 204 (5th Cir. 2009).

"As a general rule, the government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence." *Id.* at 576. "'The government is not required…to facilitate the compilation of exculpatory material that, with some industry, defense counsel could marshal on their own.' Further, where potentially exculpatory information is available to the defendant through an exercise of due diligence, there is no suppression for the purposes of *Brady*. 'When evidence is equally available to both the defense and the prosecution,

the defendant must bear the responsibility of failing to conduct a diligent investigation.' 'When information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim.'" *Id.*

As the Defendant points out in *Skilling,* the open file was electronic and searchable. The same is true in the case before this Court. The Defendant's failure to request to review the full data contained on the devices until very recently is not the fault of the State. Further, the State has provided copies of extracted materials and reports which the State deemed to have evidentiary value, and the State has not located anything which would be exculpatory. Additionally, similar to *Skilling*, there is nothing to indicate the State has found anything exculpatory in the devices.

In *State v. Ochoa*, the Idaho Supreme Court found: "To qualify for a continuance based on a late discovery, a party must not only show that the late disclosure generally prejudiced the party, but they must also show that a fair trial was denied because there is a reasonable probability that the result of the proceedings would have been different had the additional time been granted." Ochoa waited until the morning of her trial to request a continuance based on "information in the toxicology report that she 'didn't get a chance to really explore more fully.' The Court found: "[M]erely claiming that additional investigation could have taken place 'is not sufficient to demonstrate unfair prejudice so as to support a motion for continuance." The Court found that while there was a late disclosure on the morning of the trial, Ochoa had previously been "advised of the results of the toxicology report." "The substance of the report had been disclosed months earlier. The late disclosure, while containing more pages supporting the results of the report, did not change those results." 169 Idaho 903, 916, 505 P.3d 689, 702 (Ida. 2022).

"Where the denial of a motion to continue is attacked on the basis of late disclosure or discovery of evidence, the alleged tardiness of the disclosure must be shown to so prejudice the defendant's case preparation that a fair trial was denied. To prove prejudice, a defendant must show there is a reasonable probability that, but for the late disclosure of evidence, the result of the proceedings would have been different. Further, the bare claim that additional investigation could have been conducted is not sufficient to demonstrate unfair prejudice so as to support a motion for a continuance." *Id.* Internal Citations Omitted.

In *State v. Webster*, the Idaho Court of Appeals similarly determined the defendants had failed establish the information (a complete list of baggers) which was not disclosed by the State deprived them of exculpatory evidence. "[W]hen viewed in relation to the other evidence admitted at trial," there is nothing to support that the list of baggers, "would have raised a reasonable doubt concerning their guilt, thus depriving them of their fundamental right to due process." 123 Idaho 233, 235-236, 846 P.2d 235, 236 (Ct.App. 1993).

In reviewing the State's disclosure, or lack thereof, the Idaho Supreme Court in *State v. Caswell* determined: "Even assuming, however, that the State's original response was inadequate, we find no abuse of discretion in the trial court's conclusion that Caswell's failure for five months to pursue the matter further and request more specific test information, such as the computer printout, or to obtain his own expert and request that a portion of the remaining contraband be submitted to his own expert, precludes him from complaining about any perceived inadequacy of the State's response." 121 Idaho 801, 804, 828 P.2d 830, 833 (Ida. 1992). "Caswell had five months from the time the State provided Wyckoff's test results and conclusions until trial to request further information from the State. Given that significant amount of time in which Caswell could have acted, he cannot wait to raise the issue of

inadequacy of the State's response by merely objecting at trial when the State's witness is called to testify." *Id.*

The Defendant's request for a severance is couched in his need for additional time to prepare for trial. However, similar to the cases cited above, the Defendant has been aware of the existence of the discovery (and until recently has made no effort to review it), has been provided with reports and data which the State has determined to have some evidentiary value, and has failed to establish there is any exculpatory material contained in or on the devices. The Defendant is merely asking for additional time to prepare his defense, and indicating the evidence (which has been available for over two years) may have some information or evidence which he may find useful.

CONCLUSION

Based on the case law and authority provided by the State in the prior Responses to the Defendant's Motions to Sever, it is clear the courts and case law support joinder of parties to provide for judicial economy and efficiency. Joinder further avoids duplication of evidence, witness testimony, inconsistent verdicts and unfair advantages for either Defendant. This is especially true in cases including charges of conspiracy. It is further clear the courts have established defendant(s), in this case Defendant Daybell, bears a significant burden to establish that such manifest prejudice exists and cannot be overcome with other remedies which may be established by the trial court.

The Defendant again fails to provide any supported and/or ripe argument(s) that he will suffer prejudice if his trial is not severed from his Codefendant Vallow Daybell as is required under Rule 14 and case law. Mere conjecture or conflated statements regarding allegations of

late disclosures and/or *Brady* material not being disclosed without any evidence to support such allegations, is not enough to meet the Defendant's high burden with regard to a Motion to Sever.

Wherefore, the State respectfully requests this Court deny the Defendant's Second Renewed Motion to Sever.

DATED this 21st day of February, 2023.

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

/s/Lindsey A. Blake
Lindsey A. Blake
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of February, 2023, that a copy of the foregoing document was served as follows:

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