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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. LORI NORENE VALLOW AKA LORI NORENE DAYBELL, Defendant.	**CASE NO. CR22-21-1624** **STATE'S RESPONSE TO DEFENDANT'S MOTION TO COMPEL**

The State of Idaho, by and through the Fremont County Prosecuting Attorney's Office, provides the following response to the Defendant's Motion to Compel:

The Defendant acknowledges the discovery in this case is voluminous; however, the State's reference to the "bulk of the discovery" having been turned over continues to be intentionally misrepresented. Clearly, the State represented the Defendant has had in her possession the bulk of the discovery even before the Indictment in this pending matter was handed down.[1] The State has repeatedly represented that due to the significant amount of discovery in this case, the State has gone back through the evidence, and has continued to provide any discovery which has either has been determined to have not been turned over, or a

[1] The bulk of the discovery in the pending matter was previously provided in Fremont County Case CR22-20-xxxx.

concern exists it may not have been turned over.[2] The State has always represented the Defendant is entitled to all discovery, and that this is not limited to capital cases. Even if there were a discovery violation, the Defense has provided no authority or legal support that the appropriate remedy would be to dismiss the case.

The Defendant specifically references Idaho Criminal Rule 16(b)(2) regarding written or recorded statements of Codefendants. In the State's first discovery response, the State indicated that there may be additional video, jail calls and/or jail visits which would be provided by July 15, 2021. Due to an oversight within the offices, the actual recordings of the Codefendant's jail calls were not provided; however, the Defense was put on notice of their potential existence. While it is unfortunate the jail calls and visits were not specifically identified, the State has provided the details of any calls and/or in-person visits which were reviewed and determined to contain any inculpatory or exculpatory information. The disclosure of the jail calls and in-person visits is an on-going request and will continue to be supplemented.[3] The Defense has been provided copies of all the current jail calls relating the Codefendant, as well as, the in-person visits within the State's possession and control.[4] This request will be considered ongoing, so the recordings will continue to be provided to the Defense.

In *State v. Pacheco*, the Idaho Court of Appeals found: "Where an issue of late disclosure of prosecution evidence is presented, the inquiry on appeal is whether the lateness of the disclosure so prejudiced the defendant's preparation or presentation of his defense that he was

[2] Some of the more recently produced discovery has been determined to be duplicative, but in an attempt to avoid failure to disclose discovery, the State turned it over.
[3] This includes several in-person visits which were not obtained by the Prosecutor's office until after the discovery deadline of February 27, 2023 pursuant to this Court's Amended Order dated _____, 2023. However, as the State is reviewing those, any statements which could potentially contain any exculpatory information are still being turned over and the contents relayed to the Defense.

prevented from receiving a fair trial. The defendant bears the burden of establishing prejudice by showing that there is a reasonable probability that, but for the late disclosure of evidence, the result of the proceedings would have been different." 134 Idaho 367, 370, 2 P.3d 752, 755 (Ct.App. 2000).

Further, the Idaho Court of Appeals in *State v. Van Sickle* determined: "[T]he state is not required to initiate copying of the requested documents or to provide, without further request or court order, a copy of all materials sought. Van Sickle does not contend that the state created any obstacle to his ability to review or copy the requested items." *State v. Van Sickle*, 120 Idaho 99, 101, 813 P.2d 910, 912 (Ct.App., 1991). The State has not created any obstacles to the Defendant reviewing the recorded calls and/or visits or to obtaining a copy of them. Until recently, the specific request for copies of all jail calls and visits was not made – specifically such request was not made until March 3, 2023. Further, the State has accommodated arrangements for the Defense to review discovery materials any time it has been requested.

The Defense again throws out the term *Brady* with nothing to support that assertion. "'The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.' 427 U.S. at 109-110, 96 S.Ct. at 2400." *State v. Aragon*, 107 Idaho 358, 366, 690 P.2d 293, 301 (Ida. 1984). The Court in *Aragon* went on to find:

> The record reflects that Mrs. Brown's statement was hearsay, and she had no personal knowledge of her daughter Teresa hitting her child. Her statement that she would shake the child when it cries was at most cumulative and in no way exculpatory. Her statement that she had called the child abuse center on Teresa before appears to reflect only her own motive to obtain custody of the child. Accordingly, the statement does not establish the materiality necessary to constitute a violation of either the prosecution's constitutional duty to disclose exculpatory information under *United States v. Agurs, supra*, or a violation of I.C.R. 16. Accordingly, appellant was not deprived of a fair trial. *Id.*

In *State v. Cates*, the Idaho Court of Appeals reviewed an allegation of a lack of pretrial disclosure of a Codefendant's presentence report, and determined that any error in the late disclosure of the presentence report was not fundamental. 117 Idaho 90, 94, 785 P.2d 654, 658 (Ct.App. 1989). In *Cates*, the presentence report was not even mentioned in any pretrial discovery, but the Codefendant was listed as a potential witness. Further, once the defense was put on notice that the State intended to ask the Codefendant about the statements made in the presentence report (which were inculpatory for *Cates*), the Defense did not request a continuance to look at the report or speak to the presentence investigator. *Id.*

Further, in *State v. Phillips*, the Idaho Court of appeals determined that: "[B]ecause the aggregate disclosure did include the witness in question, and because Phillips did not demonstrate any prejudice, we uphold the magistrate's decision that substantial compliance with the rule was sufficient. *See e.g. State v. Marek*, 112 Idaho 860, 736 P.2d 1314 (1987) (lack of showing prejudice from failure to comply with discovery request renders error, if any, harmless). 117 Idaho 23, 27, 784 P.2d 353, 357 (Ct.App. 1989).

"Pursuant to I.C.R. 16(e)(2), the court is authorized to impose sanctions for discovery violations. See *State v. Marek*, 112 Idaho 860, 868, 736 P.2d 1314, 1322 (1987). The choice of an appropriate sanction for failure to comply with a discovery request is within the discretion of the trial court, and the trial court's exercise of that discretion is beyond the purview of a reviewing court unless it has been clearly abused. *State v. Matthews,* 124 Idaho 806, 812, 864 P.2d 644, 650 (Ct. App. 1993). *State v.* Cochran, 129 Idaho 944, 949, 935 P.2d 207, 212 (Ct.App. 1997).

In applying this analysis to several discovery violations alleged in *Cochran*, the Court provided, the State should have turned over a written policy, but that the Defendant was not prejudiced by the nondisclosure. *Id.*

Regarding an audio recording that actually did not exist, the Court found "[i]f there was a discovery violation, because Cochran has failed to demonstrate that he was prejudiced by the violation, such error was harmless." *Id.*

"On review of the record, assuming without deciding that the state did commit a discovery violation, Cochran has failed to show how he was prejudiced by this violation because all the charges against B.B. were brought out on cross-examination in front of the jury. Thus, any error on the part of the district court was harmless." *Id.* at 950.

"In light of the fact that there was no marked money to be discovered, and the state never represented in response to discovery that marked money was found on Cochran, we conclude the district court did not err in this regard." *Id.*

The State would assert this discovery has not been disclosed late because the discovery deadline in this case was February 27, 2023.[5] In the State's discovery response provided on February 27, 2023, the State indicated there were recordings of jail calls and in-person visits which had not specifically been requested by the Defense.[6] Furthermore, the Defense was put on notice of the potential existence of the jail recordings, but until the Friday before filing this motion has never requested copies of the recordings. Finally, based on the request of Defense,

[5] The State would incorporate the timeline and argument provided in the State's Objection to the Defendant's Motion in Limine filed March 13, 2023.

[6] The State recognizes the Defense may assert that all written and recorded statements of a Codefendant qualified as a specific request for the jail calls. However, generally I.C.R. 16 qualifies statements as "relevant." If the standard was to turn over any potential recordings in the State's possession, it could very easily result in a plethora of statements and recordings which have nothing to do with the proceeding in question. The State maintains recordings of a Defendant's conversations regarding everyday things with family or friends is not what is anticipated under Rule 16.

the State has turned over the existing jail phone call recordings and in-person visits related to the Codefendant.

If the Court finds the discovery disclosure was late or untimely, the Court can consider the appropriate remedy, but to dismiss the case would be an unprecedented and extreme remedy for which the Defense has provided no support – especially where they have failed to establish any prejudice by receiving such discovery at this juncture.

Respectfully submitted this 13th day of March, 2023.

/s/Lindsey A. Blake
Lindsey A. Blake
Prosecuting Attorney

/s/Rob H. Wood
Rob H. Wood
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CERTIFICATE

I HEREBY CERTIFY that on this 13th day of March, 2023, that a copy of the foregoing document was served as follows:

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