STATE OF IDAHO)
County of KOOTENAI)ss
FILED 03/06/2024
AT 12:30 o'Clock p.m
CLERK OF DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, *Plaintiff/Appellant*, vs. **RICHARD JESSOP**, *Defendant/Respondent.*	Case No. CR28-22-8596 **MEMORANDUM DECISION AND ORDER ON APPEAL AFFIRMING THE MAGISTRATE COURT'S DISMISSAL UNDER IDAHO CRIMINAL RULE ~~16~~ 48** 3/6/24

This is an appeal from the Magistrate Court of the First Judicial District of the State of Idaho, Kootenai County, Honorable Destry Randles, Magistrate Judge. Appellant, State of Idaho ("State"), is represented by Deputy City Attorney for the Coeur d'Alene Prosecuting Attorney's Office Ryan Hunter. Respondent Richard Jessop ("Jessop") is represented by Christopher Schwartz.

The underlying matter was dismissed by the trial court on August 18, 2023, because the trial court, "conclude[d] dismissal [wa]s the only way [it] [could] instill some sense of justice back into this matter." Order 13, ¶ 59. The trial court had, "no confidence the State ha[d] even yet complied with its discovery obligations," and found that the State, "engaged in bad faith in its dilatory disclosures, non-disclosures, fail[ed] to comply with Court Orders, fail[ed] to appear in Court when required, all the while

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The underlying matter was dismissed by the trial court on August 18, 2023, because the trial court, "conclude[d] dismissal [wa]s the only way [it] [could] instill some sense of justice back into this matter." Order 13, ¶ 59. The trial court had, "no confidence the State ha[d] even yet complied with its discovery obligations," and found that the State, "engaged in bad faith in its dilatory disclosures, non-disclosures, fail[ed] to comply with Court Orders, fail[ed] to appear in Court when required, all the while

insisting it ha[d] provided everything to Defense Counsel and [was] prepared for trial."

Id.

This appeal concerns eight issues raised by the State:

I. Were the magistrate court's findings of fact upon which it relied in granting Respondent's third Motion to Dismiss pursuant to Idaho Criminal Rule (I.C.R.) 48 unsupported by the record of the proceedings and, as a result, clearly erroneous?

II. Did the magistrate court err by granting Respondent's third Motion to Dismiss pursuant to I.C.R. 48 when many less drastic, more proportional alternative sanctions were available?

III. Did the magistrate court err in basing its decision to grant Respondent's third Motion to Dismiss pursuant to I.C.R. 48 in part upon Appellant's filing of supplemental discovery responses as required under its continuing duty to disclose pursuant to I.C.R. 16(j)?

IV. Did the magistrate court err by granting Respondent's third Motion to Dismiss as a sanction for Appellant's alleged noncompliance with the Order to Compel dated April 6, 2023, despite the record clearly showing that Appellant complied with the plain language of that Order?

V. Did the magistrate court err by granting Respondent's third Motion to Dismiss based on Appellant's alleged noncompliance with the Order on Motion to Compel dated June 7, 2023, when that Order overstepped the boundaries of I.C.R. 16 by compelling disclosure of correspondence that is specifically prohibited from discovery under the plain language of I.C.R. 16(g)(1)(b) and of items that were not within Appellant's possession, custody, and control and, therefore, not discoverable under the plain language of I.C.R. 16(b)(4)?

VI. Did the magistrate court err in basing its decision to grant Respondent's third Motion to Dismiss pursuant to I.C.R. 48 in part upon the unsupported legal conclusion that the FBI was acting as an agent of the State when it sought and obtained a sealed federal search warrant that allowed it to seize and search the electronic devices in this case as part of its own, separate federal investigation?

VII. Did the magistrate court err by misapplying the analysis set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny to the facts of this case in reaching its decision to grant Respondent's third Motion to Dismiss?

VIII. Did the magistrate court err by misapplying the analysis set forth in *Arizona v. Youngblood*, 488 U.S. 51 (1988), as one of the bases for granting Respondent's third Motion to Dismiss despite there being no factual or legal support for the conclusion that any undisclosed information was either lost or destroyed?

Appl.'s Br. on Appeal 21, ¶¶ I – VIII. It is noted by this Court on appeal that the Notice of Appeal, filed September 13, 2023, includes thirteen items in comparison to these above mentioned eight.

This Court on appeal rephrases the claims brought by the State as follows: (1) the trial court's Findings of Fact relied on were clearly erroneous because they were not supported by the record; (2) the trial court's sanction of dismissal was drastic, as a lesser, more proportional, alternative sanction was available; (3) the trial court erred in using the State's filing of supplemental discovery responses as a basis for dismissal; (4) the trial court erred in determining that the Order to Compel had not been complied with; (5) the Order to Compel issued by the trial court overstepped the boundaries of Idaho Criminal Rule 16; (6) the trial court erred by concluding that, for the purpose of discovery, the FBI was acting as an agent of the State; (7) the trial court misapplied *Brady*; and (8) the trial court misapplied *Youngblood*.

Reading though record, the transcript, and the briefs filed in this appeal, it is clear to this Court that there is animosity between Appellant's counsel and Respondent's counsel. The hostility between the two attorneys handling the matter has been brought to the parties' attention by two different judges in the underlying matter alone. Most of that was done by the assigned magistrate, Judge Destry Randles, but on May 31, 2023, at a hearing on the defendant's Motion for Sanctions before Senior Magistrate Judge Douglas Payne, these two attorneys were told:

> Judge Payne: Okay. Both of you stop for a second. You know, I've got to tell you guys. I've worked with a lot of lawyers over the years, both from the bench and as my adversary, and, you know, you guys misunderstand that lawyers usually like each other and they're best buddies in court and all that. No. They often times get very angry at each other, get very frustrated.

> The question is your ability to rise above that and stay focused. Stay on the topic. Don't let it – don't assume the other side's personally motivated. You're both stuck with a crappy case, pardon the words, both of you are. Hard case to defend. Hard case to prosecute. Stakes are high for reasons beyond the scope of the case itself so you get all this interference that comes into it. Not a good case for either side so it's very frustrating, and unfortunately, the two of you are taking your frustrations out on each other. First of all, just stop that.
>
> I don't believe—Mr. Schwartz, I disagree with you on one point. I don't believe Mr. Hunter is purposely, like, you know, obstructing you. You say he was gonna try to get the CVs, give it to you all at once because he's already done like, what, eleven or twelve discovery things, so he's trying to minimize those. He screwed up, didn't get it to you, he said I'll get it to you. Apparently he's gotten it to you now except the CV for the one person (*unintelligible*). I don't find bad faith here.
>
> What I do find is a case that is, you know—that is stagnating, and these cases, all thirty of them frankly, seriously need to be resolved for the sake of the judicial process itself, not to mention the clients, and the State, in the interest of justice, these need to be done. These are a year old.
>
> And so the question at this point, and this is what I want you to both focus on, is not what kind of penalty can against—against the other side, but I want you to start looking at it prospectively. Where do we go from here? Would some sanction move that along?

May 31, 2023, Court Minutes, Tr. 87:13 - 89:4. Judge Payne concluded that hearing with:

> Judge Payne: And I'm telling you that because you're both better than that. Don't let it get personal. Stick to the facts, to the problem at hand.
>
> The problem at hand is how do you get this lousy case to trial? That's what it is. It's a bad case for both of you. It just happened. Get it to trial and get it over with so you can get on with your lives, and don't assume—I've seen both of you in court. Don't assume bad faith by the other. I think sometimes a frustrating case makes you frustrated at the other side, when it's actually the darn case that's the frustrating part. This is a frustrating one.

Id. at 94:15 - 95:2. This Court on appeal finds that ***multiple*** arguments brought up in the appellate briefs have no bearing on the actual issue on appeal, which is "whether the trial court abused its discretion in granting Jessop's motion to dismiss." This Court on appeal has attempted to ignore the attorney's attacks on each other, and the

aspersions case on the trial court, and has focused on the arguments related to that singular issue on appeal. At the end of this quite lengthy opinion on appeal, the Court mentions rule violations and transgressions committed by counsel for the State, in hopes that such will guide counsel for the State going forward. The Court makes clear that in doing so, those rule violations and transgressions do not factor into this Court's decision on appeal.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The facts underlying the charge in this matter are not of particular dispute on this appeal. This matter involves the alleged conspiracy between Jessop, and one or more other persons, between February 25, 2022, and June 11, 2022. Sworn Crim. Compl. 1.

On Saturday, June 11, 2022, two events, Pride in the Park and a celebration of the anniversary of "Gun d'Alene," were scheduled to occur in the downtown area of the City of Coeur d'Alene. Appellant's Br. on Appeal 5. According to the State:

> In the months leading up to those events, the Coeur d'Alene (CDA) Police Department and other area law enforcement agencies had received tips and credible information from various sources that out-of-area, and even out-of-state, protesters were being encouraged, and potentially planning, to come to Coeur d'Alene to protest both for and against both events. Due to these developments, local law enforcement became concerned about the potential for violent confrontations to erupt. As a result, the CDA Police, in coordination with Kootenai County Sheriff's Office (KCSO) and Idaho State Police (ISP), began preparations to provide security and crowd control for the various events and individuals in attendance, as well as adequately respond to any possible incidents that might occur.

Id. (citing to *Hearing Minutes – Motion Hearing* (Dec. 12, 2022), pp. 12-23; *Memo. Decision and Order on Def's Mot. To Suppress* (Jan. 26, 2023), pp. 5-6.)

During the afternoon of Saturday, June 11, 2022, Kootenai County Central Emergency Dispatch received an identified citizen report that a "little army" of at least

twenty persons all wearing masks and dressed alike, and possibly with shields, had arrived at the parking lot in various vehicles and began loading into the cargo area of a U-Haul moving truck. *Id.* at 5-6. The citizen informant advised dispatch that the U-Haul truck was headed southbound on Northwest Boulevard. *Id.* at 6. (citing to *Hearing Minutes – Motion to Suppress Continued* (Dec. 21, 2022), pp. 1-5; *Sworn Complaint* (Sept. 22, 2022); *Memo. Decision and Order on Def's Mot. To Suppress* (Jan. 26, 2023), pp. 6-8.)

After receiving this information, law enforcement performed an investigative traffic stop on the U-Haul. Appellant's Br. on Appeal 6. While two officers were talking with the driver and passenger, "the officers that had arrived on scene could hear movement and possible voices coming from the back of the U-Haul truck, leading officers to announce their presence and order any occupants to put their hands up with nothing in them before raising the liftgate." *Id.* The officers discovered "what appeared to be a well-organized and militant group of twenty-eight (28) individuals in the cargo area of the U-Haul truck," "[c]onsistent with the identified citizen informant's report." *Id.*

After the occupants were removed from the U-Haul, "on-scene members of the CDA police department command staff conferred and came to a joint decision that probable cause existed to arrest Respondent" "for the crime of Conspiracy to Riot," and "Judge Anna M. Eckhart found probable cause for that arrest on that charge the following day on June 12, 2022." *Id.* at 7 (citing to *Probable Cause Order* (June 12, 2022)).

The occupants of the U-Haul were searched incident to arrest, and a total of thirty seven "storage-capable electronic devices were seized." *Id.* According to the

State, these seized devices "were placed into numbered bags associated with each defendant, and those bags were then placed into the back of the U-Haul before it was closed, transported to the CDA Police impound yard, and sealed with evidence tape." *Id.* Thereafter, "CDA Police Det. J. Welch [ ] sought and obtained a search warrant for the U-Haul and two other vehicles associated with these defendants signed by Judge John Cafferty, which was executed on June 12, 2022." *Id.* (citing to Tr. 11:13-25.)

This alleged search warrant is not in the record provided to this Court on appeal. Though the return on execution of that search warrant is not provided for in the record, on appeal, the State additionally alleges that:

> The return on execution of that search warrant and the inventory of the items seized was provided to the court the following day on June 13, 2022, and the Honorable Ross Pittman signed an Order Preserving Seized Property that same day, which authorized that the "property, or any part thereof, may be delivered to any persons or laboratory or laboratories for the purpose of conducting or obtaining tests, analysis, or identification of said property which is deemed necessary by said Peace Officer or the Prosecuting Attorney of Kootenai County or his deputies, without further order of this Court."
>
> Consistent with the authorization provided in the Order Preserving Seized Property, Det. Welch delivered the thirty-seven (37) seized electronic devices identified above to FBI Special Agent (SA) Benjamin Barron with the FBI's Salt Lake Division on July 19, 2022. At that time, Det. Welch was advised that the FBI was awaiting issuance of a federal search warrant they had sought for the contents of the devices as part of their own, independent investigation, a copy of which would be provided to the CDA PD for its investigation; however, Det. Welch was not informed that the devices would be indefinitely seized pursuant to that sealed federal search warrant.

Id. at 8. The record does not include the Order Preserving Seized Property. Further, this Court on appeal has reviewed the record, in depth, and found that this specific rendition of how the FBI obtained these devices was never presented to the trial court.

At the April 4, 2023, hearing on Respondent's Motion to Compel and Motion to Dismiss, the trial court inquired into the FBI's possession of the devices:

> THE COURT: How did they get these devices?
>
> MR. HUNTER: They applied for a federal warrant and obtained them.

Tr. 16: 2-4. (*See also Id.* at 15:20-25: State's assertion that, "[The FBI] were contacted -- or actually, I think contacted Coeur d'Alene, were interested in being able to take a look at the devices, got their own warrant to be able to do so.") Similarly, at the August 9, 2023, hearing on Respondent's Motion for Reconsideration and Motion to Dismiss, the trial court asked the State how the FBI came to obtain the devices:

> THE COURT: Now, hang on a second because I think this is an important distinction here, and Mr. Simmons, I'm going to ask you. When these cell phones were turned over, was there a warrant?
>
> MR. SIMMONS: I believe so. I also believe it was a sealed federal warrant.
>
> THE COURT: Okay. Do you know that to be true? I'm not asking about the existence of a sealed federal warrant. I'm simply asking when Detective Welch turned these phones over, had that warrant been issued?
>
> MR. SIMMONS: I believe so, but I cannot represent that for certainty, simply because Mr. Hunter and Mr. Somerton have taken almost exclusive control of these cases . . . .

Id. at 113:7-22. At that same hearing, however, the trial court stated that it had reviewed the supplemental filings in this matter and the supplemental requests for discovery, and in one of those, Detective Welch says that he turned these cell phones over because the FBI was in the process of drafting a warrant. Tr. 113:23 – 114:2.

A citation was filed in the underlying matter on June 12, 2022, the day after the incident. This citation failed to provide notice to the defendant of what crime he was

alleged to have committed. A Sworn Complaint indicating to the defendant what crime he was alleged to have committed was filed 102 days later, on September 22, 2022. On June 13, 2022, the Probable Cause Affidavit was filed, and Jessop posted the $300 bond.

On August 9, 2022, counsel for defendant appeared in this case. On that same day Jessop propounded discovery on the State. In relevant part, this request for discovery included a request for:

> 4. Documents and tangible objects. Permit the Defendant to inspect and copy all books, papers, documents, photographs, tangible objects, and copies and portions thereof, which are in the possession or control of the prosecuting attorney and which are material to the preparation of the defense, or intended for use by the prosecutor as evidence at trial, or obtained from or belonging to the Defendant.
>
> a.) Permit the Defendant to inspect the results of reports of physical or mental examinations and of scientific tests or experiments made in connections with this particular case, and copies thereof, within the possession or control of the prosecuting attorney, the existence of which is known or is available to the prosecuting attorney by the exercise of due diligence.
>
> b.) Permit the Defendant to inspect any and all video or audio recordings which are in the possession, custody or control of the State, of any conversations between the Defendant, or co-Defendant and any agent of the State.
>
> . . . .
>
> 5. State witnesses. Provide a written list of the names, addresses, phone numbers and/or other reasonable means of contact for all persons having knowledge of relevant facts who may be called by the prosecuting attorney as witnesses at trial, together with a NCIC repent and a Spillman report of any such persons.
>
> a.) Provide the statements made by the prosecution witnesses, or prospective witnesses, made to the prosecuting attorney or their agents, or to any official involved in the investigatory process of the case. This includes statements to employees of the prosecutor's office such as witness coordinators and all members of any law enforcement agency that has had any involvement in the matter.
>
> 6. Expert witnesses. Provide written summary or report of any testimony that the state intends to introduce pursuant to Rules 702, 703 or 705 of the

Idaho Rules of Evidence at trial or hearing. The summary provided must describe the witness's opinions, the facts and data for those opinions, and the witness's qualifications. Disclosure of expert opinions regarding mental health shall also comply with the requirements of LC. 18-207.

a.) The underlying facts or data that form the basis of any expert testimony pursuant to Idaho Rule of Evidence 705.

. . . .

8. Exculpatory evidence. Provide to the Defendant all material evidence within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963). *United States v. Agurs*, 427 U.S. 97 (I976), *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555 (1995) and their progeny. Specifically, any and all favorable or exculpatory evidence, information, and documents in possession of the prosecuting attorney's office or other agency or person available to the prosecution through due diligence.

a.) See also, Idaho Rules of Professional Conduct 3.8 (d) and (g).

Def.'s Req. for Disc. 2-3, ¶¶ 4-8. On August 22, 2022, the State responded to that discovery. This response included:

2. Defendant advised of existence of and permitted examination of:

Video AND Audio - 44 media files provided via Dropbox
ISP Videos- 2 disk folders - Flash Drive via Mail
Yes Physical Evid. (SEE RPTs)
Yes Photographs/diagrams

. . . .

4. The State has requested the following information and will provide upon receipt: _____

Pl.'s Resp. to Disc. 2, ¶¶ 2-4 (underlining in original). It is noted by this Court on appeal that the above line in paragraph four is referred to as a "box" by the trial court.

On September 1, 2022, the State filed a Supplemental Response to Discovery. This first supplemental response included "Coeur d' Alene Police Department's Operation Plan dated June 11, 2022, 5 pages (entitled CDA PD OPERATION PLAN 000001-000005)." September 1, 2022, Suppl. to Pl.'s Resp. to Disc. 1.

On September 13, 2022, Jessop filed a Motion to Suppress evidence and supporting memorandum, along with a Motion to Enlarge Time. In response, on

September 13, 2022, the State filed an Objection to Defendant's Motion to Enlarge time, wherein the State claimed, related to discovery, that "the State fully complied with [Idaho Criminal] Rule 16 and timely provided Defendant with all discovery in the State's possession within 14 days of Defendant's request for it on August 9, 2022." Obj. to Def.'s Mot. to Enlarge Time 1-2.

On September 15, 2022, the State filed a second supplemental response to request for discovery. This Supplemental request included the "Redacted 911 Audio," "Supplemental Report from Coeur d' Alene Police Sgt. Shane Avriett and a photocopy of the original documents (CDA PD SUPP RPT AVRIETT AND PF OPERATIONAL PLAN 000001-000008), 8 pages," and "Email response SWAT team (CDA PD EMAIL INVESTIGATION FOLLOW UP SWAT TEAM 000001-000002), 2 pages." September 15, 2022, Suppl. to Pl.'s Resp. to Disc. 1.

On September 16, 2022, Jessop filed a Motion to Dismiss and Memorandum in Support of the Motion to Dismiss. In part, Jessop's Motion to Dismiss argues that the "citation fails to show jurisdiction of the Court and/or charge an offence." Mem. in Supp. of Mot. to Dismiss 3 (capitalization altered). Prior to responding to Jessop's Motion to Dismiss (which would not occur until November 18, 2022), on September 22, 2022, the State filed a Sworn Criminal Complaint.

On September 22, 2022, the State filed a third supplemental response to request for discovery, which included: "CDA PD Supplemental Reports (CDA SUPP RPTS NEWBILL WEISENFLUH SCHMITZ WELCH 000001-000005) - 5 pages" and "Earl Louis King, North Star Assisted Senior Living, 2340 W. Seltice Way #333, Coeur d'Alene, ID 83814." September 22, 2022, Suppl. to Pl.'s Resp. to Disc. (format altered).

On September 26, 2022, the parties filed a stipulation to continue trial and motions. An Order to Continue Trial and Motions was entered by the trial court on September 29, 2022.

On September 27, 2022, the State filed a fourth supplemental response to request for discovery. This supplemental report included: "CDA PD Supplemental Reports (CDA PD SUPP RPT GUTHRIE 000001) 1 page, CDA PD Supplemental Reports (CDA PD SUPP RPT CANTRELL 000001) 1 page, [and] CDA PD Supplemental Media Videos (Guthrie), 2 videos." September 27, 2022, Suppl. to Pl.'s Resp. to Disc.

On September 29, 2022, Jessop waived his right to a speedy trial. Waiver of Speedy Trial 1-2.

On October 21, 2022, State filed a fifth supplemental response to defendant's discovery request. This supplemental response added "CDA PD Supplemental Report (CDA PD SUPP REPT WALTHER 000001-000002), 2 pages" and "Coeur d' Alene Police Officer, J. Walther." October 21, 2022, Suppl. to Pl.'s Resp. to Disc. 1.

On Thursday, November 17, 2022, at 4:49 pm, the State filed a Response to Defendant's Motion to Suppress. On Friday, November 18, 2022, at 4:42 pm, the State filed a Response to the Defendant's Motion to Dismiss. On Monday, November 21, 2022, at 9:00 am, the trial court held a hearing on Jessop's Motion to Dismiss and Motion to Suppress. Due to the lateness of the State's responses, the hearing on the matter was continued to a later date. November 21, 2022, Ct. Min. On November 25, 2022, Jessop filed Reply Briefs in support of both the Motion to Suppress and Motion to Dismiss.

On December 12, 2022, a hearing on Jessop's Motion to Dismiss and Motion to Suppress took place. This December 12, 2022, hearing was continued, in part, to allow for the testimony of the State's out of County witness. More specifically, after a lengthy discussion on the State's Motion for Witness to Appear via Zoom and Motion to Shorten Time, the trial court denied the State's motions due to the diminished ability to judge credibility over zoom. December 12, 2022, Ct. Min. 2.

On December 13, 2022, the State filed a sixth supplemental response to Defendant's request for discovery. This supplemental response included the "Signed Affidavit Search Warrant that includes PC Order, Search Warrant Return, and Order Preserving Seized Property - 30 pages." December 13, 2022, Suppl. to Pl.'s Resp. to Disc. 1.

On December 21, 2022, the trial court heard the remaining witness from the continued Motion to Suppress. On December 27, 2022, the trial court heard the oral argument on the same.

On January 13, 2023 the trial court entered its Memorandum Decision and Order on Defendant's Motion to Dismiss. The trial court held, in part, that the sworn complaint cures the jurisdictional defect contained in the complaint. Mem. Decision and Order on Def.'s Mot. To Dismiss 2, ¶ 1.

On January 23, 2023, the State filed a seventh supplemental discovery response. This supplemental response added, "[m]ore than three (3) terabytes (TB) of media and information from cell phones, cameras, and other recording devices seized in this case." January 23, 2023, Suppl. to Pl.'s Resp. to Disc. 1. The supplemental discovery response "inform[ed] the Court that:" "You will need to provide a minimum

4TB storage capacity portable hard drive in its original sealed packaging onto which the State can download this information. However, please contact our office prior to obtaining that hard drive to get the correct technical specifications for proper interface and copying." *Id.*

On January 26, 2023, the trial court entered its Memorandum Decision and Order Denying Defendant's Motion to Suppress.

On February 2, 2023, the State filed its eighth supplemental response, which included, "Four (4) body camera videos from three Coeur d' Alene Police Officers: CDA PD Officer A. Gilbert - Media ID #1986025, CDA PD Officer C. Buhl - Media ID #1986022 & 1986021, [and] CDA PD Officer K. Newbill - Media ID #1985985." February 2, 2023, Suppl. to Pl.'s Resp. to Disc. 1.

On February 10, 2023, the State filed its ninth supplemental response. This supplemental response included, "5 TB hard drive containing more than 3 TB of data from cell phones, cameras, and other recording devices seized in this case." February 10, 2023, Suppl. to Pl.'s Resp. to Disc. 1.

On February 16, 2023, the State filed its tenth supplemental response. This response included a, "Supplemental Report from Officer Welch - 4 pages" and "250 Gigabytes (GB) of media from cell phones, cameras, and other recording devices from 13 files that were previously disclosed; however, these specific files did not include the Cellebrite reader reports on the original hard drive, said files being IWR092614, IWR092612, IWR092609, IWR092604, IWR092603, IWR092602, IWR092601, IWR092600, IWR092599, IWR092598, IWR092597, IWR092594, and IWR092591." February 16, 2023, Suppl. to Pl.'s Resp. to Disc. 1.

On March 6, 2023, Jessop filed a Motion to Compel and Memorandum in Support of the Motion to Compel. In such Motion, Jessop requested the Court enter an order compelling the State to furnish: (1) "The names of all people involved in the cell phone extraction process. This should include what agency these people work for and where they are located;" (2) "The training and experience of all people involved in the cell phone extraction process;" (3) "Any correspondence between the individuals conducting the analysis;" (4) "Any correspondence between the individuals conducting the analysis and the Coeur d'Alene Prosecutor's office;" (5) "Details regarding the process utilized in the analysis, including which computer programs were used;" and (6) "Any other information that has not been disclosed as required by Idaho Criminal Rule 16." Mot. to Compel 2, ¶¶ 1-6.

On March 6, 2023, Jessop filed a different Motion to Dismiss and a Memorandum in Support of his Motion to Dismiss. In this Motion to Dismiss, Jessop argues that, "the State's late disclosures of material evidence favorable to [him] deprives him of his due process because it has prejudiced his preparation for both pretrial motions and trial." Mem. in Supp. of Mot. to Dismiss 6, ¶ I (capitalization altered).

On March 28, 2023, the State filed its response to the Defendant's Motion to Compel. In this Response, the State provides that Jessop's "vague request is puzzling under the circumstances" because "the State has timely disclosed all discoverable material in its possession as it has been received, and the supplemental discovery responses that have resulted reflect nothing more than the State's compliance with its continuing discovery obligation pursuant to Idaho Criminal Rule 16(j)." Resp. to Def.'s Mot. to Compel. 1. The State asserts in this Response that it "had requested periodic

updates on the status of the extraction process and when it could expect the full results to provide in response to more timely requests from counsel for other defendants seeking their client's device-specific information." *Id.* at 3.

On March 29, 2023, the State filed their eleventh supplemental response to request for discovery. This supplemental response included "Coeur d' Alene Police Detective Welch Supplemental Report, 4 pages." March 29, 2023, Suppl. to Pl.'s Resp. to Disc.1.

On March 29, 2023, the State filed a response to Jessop's Second Motion To Dismiss. In this response, the State claims that: "Defendant seeks to dismiss the case as a 'sanction' for alleged discovery violations. The alleged violations pertain to the disclosure of approximately 3.5 terabytes (TB) of data extracted from the evidence that Defendant never specifically requested." Resp. to Def.'s 2nd Mot. to Dismiss 1. The State claims that during its initial discovery response, by stating "Defendant [is] advised of existence of and permitted examination of: physical evidence (SEE RPTs)" the State "made [it] clear that the physical evidence seized in this case as outlined in detail in the provided reports, which included the electronic devices, was available for inspection," (*Id.* at 2) however, the State also asserts that "disclosed evidence was in the physical possession of the FBI at their Intermountain West Regional Computer Forensics Lab (RCFL) in Salt Lake City from July 19, 2022, until early January 2023." *Id.*

On April 4, 2023, the trial court held a hearing on Jessop's Motion to Compel and Motion to Dismiss. On April 4, 2023, the trial court denied the Motion to Dismiss.

On April 6, 2023, the trial court issued an Order to Compel. In this Order, the State was ordered to "immediately provide the following items to Defense Counsel:"

> 1. The names of all people involved in the cell phone extraction process. This should include what agency these people work for and where they are located;
> 2. The training and experience of all people involved in the cell phone extraction process;
> 3. Any information that has not been disclosed as required by Idaho Criminal Rule 16.

Order to Compel 1, ¶¶ 1-3. The Court additionally ordered the parties to "submit simultaneous briefing in regards to item numbers 3 and 4 contained in the Defendant's motion to compel." *Id.* at 2. Both parties filed their briefing on April 11, 2023.

On May 11, 2023, counsel for Jessop e-mailed the State requesting an update on the compelled information. Mot. for Sanctions, Attachment, 2-3.

On May 12, 2023, the State filed its twelfth supplemental response to the defendant's discovery requests. This supplemental request provided:

> **1. The names of all people involved in the cell phone extraction process. This should include what agency these people work for and where they are located.** RESPONSE: Extraction of the digital contents of the electronic devices seized in this case was performed by the following employees of the Intermountain West Regional Computer Forensic Laboratory (IWRCFL), Three Gateway Office Center, 440 West 200 South, Suite 300, Salt Lake City, UT 84101; (801) 456-4838: Randy Kim, Cheney Eng-Tow, Matthew Anderson, and Stacey Evans.
>
> **2. The training and experience of all people involved in the cell phone extraction process.** RESPONSE: This information is not within the custody or control of the Coeur d'Alene Prosecuting Attorney's Office or any law enforcement agency that is supervised by or reports to our office, but it has been requested and will be provided if/when received; additionally, Defendant can request this information directly from the individual examiners through the contact information provided herein.
>
> **3. Any information that has not been disclosed as required by Idaho Criminal Rule 16.** RESPONSE: The State maintains that it has complied with its obligations under Rule 16, and will continue to do so, throughout this case.

May 12, 2023, Suppl. to Pl.'s Resp. to Disc. 1 ¶¶ 1-3.

On May 12, 2023, Jessop filed a Motion For Sanctions. Attached to the Motion for Sanctions, Jessop's counsel filed emails between himself and the prosecutor. While the majority of the hostile emails are not of particular relevance, in one email the State provides, related to the discovery requests, that "it was drafted in early April and was supposed to be filed then, but I asked my assistant to hold off on filing while I waited to hear back from the FBI on the expert CVs. Unfortunately, I didn't get the promised response and it fell off my radar." Mot. for Sanctions 4.

On May 15, 2023, Jessop filed a Memorandum In Support Of his Motion For Sanctions. The State did not respond to the Defendant's Motion for Sanctions.

On May 16, 2023, the State filed their thirteenth supplemental response to the Defendant's discovery requests. This supplemental discovery response included a, "Curriculum Vitae for Cheney Eng-Tow - 2 pages, Curriculum Vitae for Stacey Evans - 4 pages, [and] Curriculum Vitae for Matthew Anderson - 4 pages" and provided that that the "Coeur d' Alene Prosecuting Attorney's Office has been informed that Randy Kim recently retired and is still awaiting receipt of his Curriculum Vitae, which will be provided in a supplemental discovery response immediately upon receipt." May 16, 2023, Suppl. to Pl.'s Resp. to Disc. 1.

On May 31, 2023, the trial court held a hearing on the defendant's Motion for Sanctions, in front of Senior Magistrate Judge Douglas Payne. During this hearing, the State provided that it was ready for trial. May 31, 2023, Ct. Min. on Mot. for Sanctions, 2. At the conclusion of that hearing, Judge Payne granted the Motion for Sanctions, and ordered that the State would be excluded from using any of the information contained in the 3 TB of data in its case-in-chief, though at the hearing the State had

asserted it was not planning to do so. The trial court issued an Order to that effect on June 5, 2023.

On May 31, 2023, the State filed its fourteenth supplement to its response to discovery. This supplemental response included, "employee of the Intermountain West Regional Computer Forensic Laboratory (IWRCFL), Three Gateway Office Center, 440 West 200 South, Suite 300, Salt Lake City, UT 84101; (801) 456-4838: Randy Kim" and a "Curriculum Vitae for Randy Kim- 4 pages." May 31, 2023, Suppl. to Pl.'s Resp. to Disc. 1.

On June 2, 2023, Jessop filed a Motion for Reconsideration related to the Motion for Sanctions. On June 5, 2023, Jessop filed and sent a Notice of Hearing regarding the Motion to Reconsider, set for July 3, 2023.

On June 8, 2023, the trial court issued an Order on the third and fourth issues of the Motion to Compel. The trial court granted the disclosure of correspondence between the individuals conducting the cellular extractions and denied the disclosure of correspondence between the individuals conducting the cellular extractions and the State. Order on Mot. to Compel 4.

On June 20, 2023, the State filed its fifteenth Supplement to Response to Discovery. This supplement response provided that:

> **1. Disclosure of correspondence between the individuals conducting the cellular extractions.**
>
> RESPONSE: The requested correspondence is not within the power, custody, or control of the Coeur d'Alene Prosecuting Attorney's Office or any law enforcement agency that reports to or is supervised by this Office. It involves communications made by employees of the Federal Bureau of Investigation's Intermountain West Regional Computer Forensics Laboratory (IWRCFL) located in Salt Lake City, Utah, which is a federal government law enforcement agency that falls within the purview of the United States Department of Justice; accordingly, this Office has no power

> or authority to obtain or require disclosure of the requested correspondence.

June 20, 2023, Suppl. to Pl.'s Resp. to Disc. 1 ¶ 1.

On June 26, 2023, the State filed a Motion for Zoom Appearance or Continuance, requesting that the trial court permit the State to appear via Zoom for the Motion for Reconsideration so that the undersigned attorney, Mr. Hunter, could be present, reset the hearing, or "simply decline to entertain Defendant's Motion to Reconsider and vacate the hearing." Mot. for Zoom Appearance or Continuance. In such Motion, the undersigned prosecutor acknowledged, "the hearing could be covered by another attorney for the State." *Id.*

On July 3, 2023, the trial court held a hearing on Jessop's Motion for Reconsideration. Neither Mr. Hunter nor another attorney for the State appeared at that hearing. Prior to the hearing, the State did not file any response or objection to Jessop's Motion for Reconsideration. Though counsel for the State was not present at the hearing, the trial court granted the State's Motion to Continue, and the hearing was reset for August 9, 2023. A Notice of Hearing regarding the new date for the Motion for Reconsideration was sent to all parties on July 3, 2023.

On July 7, 2023, Jessop filed another (third) Motion to Dismiss Pursuant to Idaho Criminal Rule 48, arguing that the, "matter has been consistently delayed and continued due to the actions of the State," including (1) "Failing to adequately prepare for the motion to suppress hearing, held on November 18, 2022, necessitating a continuance of the hearing;" (2) "Failing to disclose over three terabytes of information necessitating multiple continuances of the trial, several litigated hearings regarding the disclosure of this information, and the Court granting a motion to compel," (3) "Willfully withholding

information that the Court had required the State to tum over to Counsel for the Defense following the granting of the Defendant's motion to compel on April 6, 2023;" (4) "Refusing to comply with the Court's subsequent order regarding the motion to compel by filing a supplemental response to discovery on 6/20/23, in which the State indicates that they cannot or will not comply with the Court's order;" and (5) "Failing to appear for a hearing on July 3rd, 2023 requiring yet another continuance." Mot. to Dismiss 1-2, ¶¶ 1-4. A Notice of Hearing setting this Motion to Dismiss for August 9, 2023, was sent on July 11, 2023.

On July 25, 2023, the State filed a Response to Defendant's Third Motion to Dismiss and Declaration. This response stated that "COMES NOW, Ryan S. Hunter, Deputy City Attorney for the Coeur d'Alene Prosecuting Attorney's Office, and provides the following Response to Defendant's third Motion to Dismiss, dated July 7, 2023." Resp. to Mot. to Dismiss 1. While laying out the facts in the Response to Motion to Dismiss, the State provides a footnote of, "This response to Defendant's third claim addresses the issues raised in Defendant's Motion to Reconsider the partial granting and partial denial of his Motion for Sanctions. As a result, to avoid duplicative filings, this portion of the State's Response to Defendant's Third Motion to Dismiss also serves as the State's Response to Defendant's Motion to Reconsider." *Id.* at 2, fn 2.

On July 31, 2023, the State filed its sixteenth Supplemental Response to Request for Discovery. This supplemental response included, a "Property receipt of chain of custody of recording devices seized by Coeur d'Alene Police Department to FBI, 4 pages" and further that the, "information is believed to have been provided along with Det. Welch's supplemental report of this transaction dated July 19, 2022; however,

we are providing this information to ensure you have received the same." July 31, 2023, Suppl. to Pl.'s Resp. to Disc. 1.

On August 1, 2023, the State filed its seventeenth Supplemental Response to Request for Discovery. This Supplemental Response included, the "jury trial evidence, which is self-authenticating pursuant to IRE 902(4)" of "Certified copies of City Park Permits issued for the day of June 11, 2022 - 20 pages." August 1, 2023, Suppl. to Pl.'s Resp. to Disc. 1.

At the August 9, 2023, the trial court held a hearing on the defendant's Motion for Reconsideration and Motion to Dismiss, during which the State requested a continuance. At that hearing, Matthew Simmons appeared on behalf of the State, and stated the following:

> MR. SIMMONS: This is through no fault of Mr. Schwartz or his client. I am asking for this continuance due to the really singular nature of this hearing and the history of this case, it makes a great deal of sense for Mr. Hunter to cover this, and so Mr. Schwartz has graciously not objected to that and I certainly appreciate that. I don't have an objection really inherently to having it heard on the 11th. I will see if Mr. Hunter's available, but it's hard to tell given the status of the trial that's currently going.
>
> . . . .
>
> So if not, then a recess for -- excuse me, a reset for early next week would also be fine. I know that Monday morning is free for [Mr. Hunter], so that should work if Your Honor's calendar works and Mr. Schwartz, of course.

Tr. 104:22 - 105:13. The trial court did not grant a continuance. *Id.* at 104: 4. After oral argument on the defendant's Motion to Dismiss, the trial court announced its decision on the record to dismiss the matter. *Id.* a 123:15-152:7. The trial court ordered counsel

for Jessop to prepare a proposed order and have it presented by August 18, 2023. *Id.* at 152:12-19.

On August 18, 2023, the trial court issued its Order of Dismissal. The trial court granted the third motion to dismiss pursuant to Idaho Criminal Rule 48 based "on the grounds that dismissal by the [c]ourt will serve the ends of justice and the effective administration of the [c]ourt's business." Order for Dismissal 14.

The trial court recognized that under Idaho Criminal Rule 48, which permitted the trial court, "in its discretion, to dismiss criminal action on its own motion or on motion of any party based on the State's unnecessary delay in bringing the defendant to trial, or any other reason if the Court concludes that dismissal will serve the ends of justice and the effective administration of its business." *Id.* at 11, ¶ 55. The trial court noted that, "[i]n construing Idaho Criminal Rule 48," it was "guided by Idaho Criminal Rule 2, which requires consideration of just determination of every criminal proceeding, simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay." *Id.*

The trial court found that the, "totality of the dilatory discovery violations, the refusal to comply with the Court's Order regarding the Motion to Compel, the failure to appear for Court, the fourteen month long drip of discovery," and "the State's insistence at every turn that it has complied with discovery, that it has turned over everything, that it is prepared for trial" rose to the level of bad faith on the part of the State. *Id.* at 10-11, ¶ 54.

The trial court concluded that "dismissal [wa]s the only way [it could] instill some sense of justice back into this matter," as there was "no confidence the State has even

yet complied with its discovery obligations." *Id.* at 13, ¶ 59. Further finding that, "[t]he State [ ] engaged in bad faith in its dilatory disclosures, non-disclosures, failure to comply with Court Orders, failure to appear in Court when required, all the while insisting it has provided everything to Defense Counsel and is prepared for trial." *Id.* The trial court also considered, "the state's failure to appear to appear and provide any indication why it wasn't present at the hearing on the *Motion to Reconsider*, the State's failure to object to the *Motion to Reconsider*, and its failure to amend Mr. Jessop's citation for over three and a half months to give him notice of what he was charged with." *Id.* at 13, ¶ 61.

The trial court found that the State submitted supplemental discovery responses after it had advised the trial court that it had "fully complied and timely provided Defense Counsel with all discovery." *Id.* at 11, ¶ 56. This included the body camera footage from Coeur d'Alene Police officers" being submitted "eight months" after the Respondent's arrest, and "Officer Welch's supplemental report" which "was completed in January but not disclosed until March." *Id.*

The trial court found that the "information the Court ordered disclosed in its Order to Compel" has been requested, however, the State, "told his assistant not to send it out, then he stated it fell off his radar. As result, it wasn't provided to Defense Counsel." *Id.* at 10, ¶ 54.

The trial court noted it was "disturbed" by the State's noncompliance with its order compelling disclosure of certain evidence, "especially [ ] where the State is saying it has complied and is ready for trial." *Id.* at 10, ¶ 52. As result of the State's failure to

comply with the trial court's Order to Compel, the trial court viewed the evidence the State was withholding as lost evidence. *Id.* at 10, ¶ 53.

The trial court found that the State did not disclose the requested evidence, despite the Court's Order to Compel, and despite the argument that all discovery had been provided. *Id.* at 12, ¶ 57. The trial court found that the defense counsel had been unable to prepare for trial due to the "steady drip of discovery," including: "a dumping of 3.5 terabytes of data full seven months after [Respondent] was initially charged," and further, that Respondent went "102 days not even knowing what he was charged with, as it took that long for the defect in the citation to be cured." *Id.*

The trial court noted that it did not consider Judge Payne's sanction of disallowing evidence from the 3.5 terabytes to be sufficient where the State had no intention of using that evidence. *Id.* at 9, ¶ 50. Further, the trial court considered the option of sanctioning the State by disallowing any evidence past its September 2022 assertion that it has fully complied with its discovery obligations (*Id.*), however, it concluded that the Respondent "c[ould] not receive fair trial based on the constant dribble of discovery with the first response to discovery occurring on August 22, 2022, and its seventeenth supplemental response coming August 1, 2023," and that, the "initial response the State indicated no further information was forthcoming; no further information had been requested." *Id.* at 13, ¶ 60.

The trial court additionally considered the alternatives of lesser appropriate sanctions, including granting a continuance to, "allow Counsel for Mr. Jessop to review the materials and gather additional discovery (worth noting is Mr. Schwartz's indication that he recently learned of additional information that he has not been provided in

discovery)." *Id.* at 9, ¶ 51. However, the trial court stated it was, "loath to continue, again, misdemeanor trial that at this point is almost fifteen months removed from the alleged offense," as this "would push the trial out over eighteen months based upon delays largely caused by the State." *Id.* The court determined that another continuance would "not promote justice and would undermine the integrity of the entire judicial process." *Id.*

The trial court additionally stated that, "based on the late and/or non-disclosure of evidence, justice would require the Court to grant Mr. Jessop a second *Motion to Suppress* based upon the evidence disclosed after the initial *Motion to Suppress* was heard." *Id.* (emphasis in original).

The trial court found that the State's "level of failure to properly disclose evidence smacks of gamesmanship and hiding behind the FBI," who the trial court found was an agent of the State, (*Id.* at 12, ¶ 58), and that "[t]he evidence seized by local law enforcement pursuant to the arrest of the Defendant, is evidence germane to this Defendant and this prosecution" so the "State has duty to timely disclose that evidence." *Id.*

The trial court found that the "phones were turned over to the FBI, not seized by the FBI," instead, "these devices were *seized* by the Coeur d'Alene Police Department." *Id.* at 11, ¶ 56. The trial court was told that the FBI was not involved in the initial investigation, and that the trial court had "no information about how the FBI became involved," as "the only information" the trial court had was that, "Detective Welch turned the phones over to the FBI while warrant was being drafted." The trial court did note that: "during the *Motion to Suppress* testimony there was statement that the FBI was

present at the Command Center." *Id.* (This Court on appeal notes the contrary information provided to the trial court related to the FBI's involvement, discussed in further detail herein.)

On September 1, 2023, the State filed an appeal to this Court. On December 4, 2023, the State filed its Appellant's Brief on Appeal. On January 1, 2024, the Respondent filed its Respondent Brief on Appeal. On January 23, 2024, the State filed its Appellant's Reply Brief on Appeal.

This Court, sitting in its appellate capacity, heard oral argument on February 21, 2024. Thereafter, the Court took the matter under advisement.

II. STANDARD OF REVIEW

A reviewing Court reviews a trial court's decision on a motion to dismiss a criminal action for an abuse of discretion. *State v. Sarbacher*, 168 Idaho 1, 4, 478 P.3d 300, 303 (2020); *State v. Roth*, 166 Idaho 281, 283, 458 P.3d 150, 152 (2020). In reviewing discretionary rulings, a reviewing court determines 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." *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

The role of a court on appeal, "in determining if the [trial] court reached its decision by an exercise of reason, is to review the process the [trial] court engaged in to make its decision." *In re Prefiling Ord. Declaring Vexatious Litigant*, 164 Idaho 771, 777-78, 435 P.3d 1091, 1097-98 (2019) (quoting *Palmer v. Spain*, 138 Idaho 798, 801 - 02, 69 P.3d 1059, 1062–63 (2003)). In order for this Court on appeal to perform this function properly, "the [trial] court must disclose its reasoning ... unless its reasoning is

obvious from the record." *Id.* (quoting *Palmer*, 138 Idaho at 802, 69 P.3d at 1063 (citations omitted). Generally, a reviewing court "reviews the lower court's decision for reasonableness." *Id.*

Like a motion to suppress evidence, when a decision on a motion to dismiss is challenged, "the Court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to the facts as found." *State v. Bodenbach,* 165 Idaho 577, 589, 448 P.3d 1005, 1017 (2019) (quoting *State v. Moore,* 164 Idaho 379, 381, 430 P.3d 1278, 1280 (2018)). "This Court will accept the trial court's findings of fact unless they are clearly erroneous." *State v. Gonzales,* 165 Idaho 667, 671, 450 P.3d 315, 319 (2019) (quoting *State v. Purdum,* 147 Idaho 206, 207, 207 P.3d 182, 183 (2009)).

III. ANALYSIS

As mentioned above, this appeal concerns eight alleged issues raised by the State: (1) "The magistrate court's findings of fact upon which it relied in granting Respondent's third Motion to Dismiss pursuant to Idaho Criminal Rule (I.C.R.) 48 conflicted with and/or were unsupported by the record of the proceedings and, as a result, were clearly erroneous;" (2) "The magistrate court abused its discretion by granting Respondent's third Motion to Dismiss pursuant to I.C.R. 48 because several less drastic, more proportional alternative sanctions were available and, indeed, had already been imposed;" (3) "The magistrate court abused its discretion by granting Respondent's third Motion to Dismiss pursuant to I.C.R. 48 due to Appellant's filing of supplemental discovery responses consistent with its continuing duty to disclose pursuant to I.C.R. 16(j);" (4) "The magistrate court abused its discretion by granting Respondent's third Motion to Dismiss as a sanction for Appellant's alleged

noncompliance with the Order to Compel dated April 6, 2023, despite the record clearly showing that Appellant complied with the plain language of that Order;" (5) "The magistrate court abused its discretion by granting Respondent's third Motion to Dismiss based on Appellant's alleged noncompliance with the Order on Motion to Compel dated June 7, 2023, because that Order overstepped the boundaries of discovery provided pursuant to I.C.R. 16; (6) "The magistrate court abused its discretion by basing its decision to grant Respondent's third Motion to Dismiss in part upon the unsupported legal conclusion that the Federal Bureau of Investigation (FBI) was acting as an agent of the State in this case; (7) "The magistrate court misapplied the analysis set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny to the facts of this case in reaching its decision to grant Respondent's third Motion to Dismiss;" and (8) "The magistrate court misapplied the analysis set forth in *Arizona v. Youngblood*, 488 U.S. 51 (1988), as one of the bases for granting Respondent's third Motion to Dismiss despite there being no factual or legal support for the conclusion that any undisclosed information was either lost or destroyed." Appellant's Br. on Appeal 2, ¶¶ I-VIII.

A. The State's Motion to Strike Subsections of Jessop's Response Brief on Appeal.

The State Reply Brief on Appeal, it claims that the Jessop, "violated a foundational aspect of appellate review" by "frequently rel[ying] upon alleged facts that find no support either directly or by inference in the appellate record." Appellant's Reply Br. on Appeal 11. The State then provides that:

> Appellate courts are "bound by the record on appeal and cannot consider matters or materials that are not part of the record or not contained in the record." *Kootenai Co. v. Harriman-Sayler,* 154 Idaho 13, 17 (2012) (internal quotes omitted). However, Respondent ignored this basic tenet of appellate practice throughout his Brief by improperly referencing those

> alleged facts not found within the appellate record without first filing a motion to augment the record pursuant to I.C.R. 54(k) and I.A.R. 30.

Id. As a result, the State argues that certain, "improper references to alleged facts not found within the appellate record should be stricken from Respondent's Brief and disregarded by the Court." *Id.*

Specifically, the State points to: (1) Jessop's assertions regarding how the Order for Dismissal was drafted; (*Id.* at 11-12); (2) Jessop's "claims as to the contents of the reports disclosed in discovery, which are not a part of the record beyond what was testified to during the Motion to Suppress and Motion to Dismiss hearings," (*Id.* at 12); (3) Jessop's assertions regarding the Coeur d'Alene Police Departments' evidence retention system and policy manual (*Id.*); and (4) Jessop's claims related to the substance of the contents of the digital devices. *Id.* At oral argument on this matter, neither side addressed the State's Motion to Strike.

This Court on appeal will follow the directions and parameters of its duty on appeal as set forth by the Idaho Supreme Court. This Court is thus, "bound by the record on appeal and 'cannot consider matters or materials that are not part of the record or not contained in the record.'" *In re Prefiling Ord. Declaring Vexatious Litigant*, 164 Idaho 771, 776, 435 P.3d 1091, 1096 (2019) (quoting *Kootenai Cnty. v. Harriman-Sayler*, 154 Idaho 13, 16, 293 P.3d 637, 640 (2012)). Further, this Court recognizes that, "[t]he party appealing a decision of the district court bears the burden of ensuring that this Court is provided a sufficient record for review of the district court's decision." *Id.* (quoting *Gibson v. Ada Cnty.*, 138 Idaho 787, 790, 69 P.3d 1048, 1051 (2003). Consequently, "[w]hen a party appealing an issue presents an incomplete record, this Court will presume that the absent portion supports the findings of the district court." *Id.*

(quoting *Hansen v. White*, 163 Idaho 851, 853, 420 P.3d 996, 998 (2018)). In addition, this Court "will not presume error from a 'silent record or from the lack of a record.'" *Gibson*, 138 Idaho at 790, 69 P.3d at 1051 (citations omitted).

This Court on appeal will abide by the parameters set forth and will not consider matters or materials that are not a part of the record that are set forth by either Jessop or the State. This includes this Court not considering how the Order on Dismissal Pursuant to Idaho Criminal Rule 48 was drafted.

Throughout its Appellant's Brief on Appeal, the State accuses the trial court of blindly accepting and signing the Order for Dismissal set forth by the Respondent. (Appellant's Br. on Appeal 24: "as a result of the magistrate court adopting, verbatim, the *Order for Dismissal Pursuant to Idaho Criminal Rule 48*, which Respondent entirely drafted, and the magistrate court made absolutely no changes to before signing," "the magistrate court endorsed and adopted as its own the biased, argumentative, and hostile verbiage Respondent utilized," "From the outset, the Order exudes biased language injected by its defense counsel drafter, but that the magistrate court declined to remove or overlooked;" *Id.* at 25: "it simply adopted, uncritically, that argument of Respondent.") The State provides no support for these accusations.

Subsequently, in his response, Jessop attempts to negate the State's accusations by providing how the Order was drafted, and the changes that the trial court made. Respondent's Br. on Appeal. 10-11. In response, the State moves to strike the Respondent's reply to it's accusations as "facts not found within the appellate record." Appellant's Reply Br. on Appeal 12. First, no "motion to strike" has been filed by the State, and the Idaho Appellant Rules do not provide for a "motion to strike." Further,

this Court on appeal notes that it was counsel for the State who made the origins of the Order an issue on appeal. Appellant's Br. on Appeal 26. Finally, as mentioned above, at oral argument on appeal, neither side mentioned this motion to strike.

There is nothing in the record to indicate that the trial court blindly accepted and signed the Order for Dismissal set forth by Jessop. The transcript shows Judge Randles ordered Jessop's attorney to prepare the Order. Tr. 152:12-19. Nothing in the record indicates the process used by Jessop's counsel in drafting the Order on Dismissal. This Court has compared what was said on the record at the August 9, 2023, Motion for Reconsideration and Motion to Dismiss, and notes the almost identical wording to that in the Order for Dismissal Pursuant to Idaho Criminal Rule 48; specific examples of such are discussed in detail below. This Court on appeal finds no merit in the State's numerous complaints as to how the Order for Dismissal was drafted.

B. A Vast Majority of the Finding of Facts Supporting the Order for Dismissal are Supported by Substantial and Competent Evidence, and Thus, the Order of for Dismissal Was Not Clearly Erroneous.

On appeal, the State argues that multiple of the finding of facts relied on by the trial court were clearly erroneous. Appellant's Br. on Appeal 22-33. This Court will address each in turn.

When a decision on a motion to dismiss is challenged, a reviewing court "accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to the facts as found." *State v. Sarbacher*, 168 Idaho 1, 4, 478 P.3d 300, 303 (2020) (quoting *State v. Bodenbach,* 165 Idaho 577, 589, 448 P.3d 1005, 1017 (2019). A reviewing Court "will accept the trial court's findings of fact unless they are clearly erroneous." *Id.*; (quoting *State v. Gonzales,* 165 Idaho 667, 671, 450 P.3d 315, 319 (2019)). A trial court's findings of fact

shall not be set aside unless they are clearly erroneous. *Greenfield Fam. Tr. v. Olive Fountain Land Co., LLC*, 170 Idaho 672, 680, 516 P.3d 96, 104 (2022). Clear error does not occur where the findings are supported by substantial and competent evidence, which is relevant evidence that a reasonable mind might accept to support a conclusion. *Id.* "When deciding whether findings of fact are clearly erroneous, [a reviewing court] does not substitute its view of the facts for that of the trial court." *Id.* Additionally, a reviewing court will "liberally construe the trial court's findings of fact in favor of the judgment entered, as it is within the province of the trial court to weigh conflicting evidence and testimony and judge the credibility of witnesses." *Id.* This is a long held rule of appellate courts because "[t]he trial court is in a far better position to weigh the demeanor, credibility and testimony of witnesses, and the persuasiveness of all the evidence." *Id.*

1. The Court's Wording Related to City Attorney Ryan Hunter Does Not Justify a Reversal of the Order for Dismissal.

The State argues that the "biased language" of the Order on Dismissal "undermines the reliability of the entire factual recitation." Appellant's Br. on Appeal 24. The biased language, in part, that the State argues is that:

> From the outset, the Order exudes biased language injected by its defense counsel drafter, but that the magistrate court declined to remove or overlooked; regardless, the consequence of retaining such inherently and obviously biased language is that it undermines the reliability of the entire factual recitation. On the very first page of the Order, it recounts the individuals present at the hearing, including "Matthew Simmons *on behalf of Ryan Hunter*, Coeur d'Alene City Prosecuting Attorney." Order at 1. The level of inaccuracy and bias in this single statement is difficult to overstate. Ryan Hunter is not a party to this case, and never has been; as such, Mr. Simmons could not appear on his behalf. Instead, the City of Coeur d'Alene is the entity prosecuting this case on behalf of the State of Idaho. The magistrate court's failure to identify this immediate example of biased and inaccurate wording in the Order it adopted is deeply problematic and shows a level of personalization in the Order that is

> fundamentally unacceptable. In short, that phrase drips with personal bias and is clearly erroneous on its face.
>
> But it would not be the only time that the Order singled out one of Appellant's attorneys—and, indeed, that same attorney, Mr. Hunter. Instead, the magistrate court left in the eighteenth finding of fact an inaccurate summary of a statement specifically attributed to "Assigned Prosecutor Ryan Hunter" instead of "the State" or "the City" or simply "the prosecutor," as is standard practice for all other orders in all other situations. Order at 4. It did the same thing again in the forty-sixth and forty-eighth findings of fact, and again in paragraphs 54 and 56. Order at 7, 8, 10, and 11, respectively. This repeated improper personalization of the terms of the Order shows unacceptable bias and partiality by the magistrate court and, as a result, is clear error that warrants reversal of the Order for Dismissal in and of itself.

Id.

The State does not cite to any authority or make any argument on how discussing a prosecutor by name would be considered "improper personalization" and "unacceptable bias." It is established in Idaho that "[i]ssues on appeal that are not supported by propositions of law or authority are deemed waived and will not be considered by [a reviewing court]." *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005). The State does not provide any propositions of law or authority to support these arguments, and thus this Court will deem this argument waived.

However, what is more, in reviewing the record there are multiple instances wherein prosecutors for the State presented to the trial court the assertion that Mr. Hunter, the prosecutor claiming bias, was in fact the handling attorney for this matter. When Mr. Simmons, the attorney present at the continued August 9, 2023, Motion for Reconsideration hearing, was unable to answer the trial court's question, he responded that:

> MR. SIMMONS: I believe so, but I cannot represent that for certainty, simply because Mr. Hunter and Mr. Somerton have taken almost exclusive control of these cases, so understand, like, staffing of issues with the attorneys

when I appear for court, but unfortunately, I can't make that representation.

Tr. 113:17-22. Additionally, in Mr. Hunter's own words he represented to the trial court that he was "carrying the load" of these cases with just one other attorney:

THE COURT:	. . . Mr. Hunter, are you doing all of these cases for the State or just this one? I mean, how many prosecutors are involved with this?
MR. HUNTER:	Judge, it's --
THE COURT:	There's thirty of these, right?
MR. HUNTER:	There's thirty, and it's Mr. Somerton and I that are carrying the load on this.

Id. at 83:21–84:4. Further, while discussing the pleadings in this matter, at the April 4, 2023, hearing, Mr. Hunter referred to the State's Response as "my motion." *Id.* at 21: 6-7. These comments by the State's attorneys show that the references to Mr. Hunter by name in the Order do not show bias, but rather, an integral part of the discussions on various motions.

The State's argument that the Order for Dismissal be reversed because of the reference to the State's prosecutor by name is entirely unavailing, and devoid of any merit. Additionally, without furnishing supporting authority, the State has waived this argument.

2. Finding of Fact 1 is Not Erroneous.

The State argues that the first finding of fact in the Order for Dismissal is "problematic" because it "purported to recognize as a fact an argument that Respondent made in his first Motion to Dismiss." Appellant's Br. on Appeal 24-25. The State argues that the trial court had denied the motion to dismiss, and "in its written decision issued January 13, 2023, recognized that whatever alleged defect might have existed in the

initial citation was cured by Appellant's filing of a Sworn Complaint on September 22, 2022." *Id.* at 25.

The first finding of fact provides that:

> 1. On June 12, 2022, a citation was filed charging Mr. Jessop with Idaho Code 18-1701, Criminal Conspiracy. There was nothing annotated to give Mr. Jessop notice of what crime he was alleged to have conspired to commit. As a result, this citation was defective.

Order for Dismissal 1, ¶ 1. This finding of fact is consistent with the findings made on the record:

> THE COURT: On June 12th of 2022, a citation was filed charging the defendant, Mr. Jessop, with criminal conspiracy under Idaho Code 18-1701 and nothing else. From the Court's perspective, that citation was defective and failed to provide notice to the defendant of what crime he was alleged to have committed. Conspiracy can attach itself to almost any crime in Title 18, in some other crimes Title 49, et cetera. There was nothing else annotated to that. It was simply conspiracy. Conspiracy is not a stand-alone offense.

Tr. 124:2-11. (*See also* ". . . not to mention that the defendant went 102 days not knowing what he was charged with. Citation was not cured for 102 days." Tr. 148:20-22.)

Further, this finding of fact is consistent with the trial court's Memorandum Decision and Order on Motion to Dismiss:

> The original citation issued to Defendant charged "Criminal Conspiracy" and cited to Idaho Code 18-1701. That code section does not criminalize specific conduct, rather it criminalizes the conspiring of two, or more, persons to commit crime prescribed by the laws of the State. The statute cannot stand on its own. When it is charged, as in the present case, it fails to provide notice to defendant of what conduct is being alleged. When charging document fails to apprise defendant of the criminal conduct he is charged with it deprives the defendant of the opportunity to prepare defense. *State v. Cahoon*, 116 Idaho 399, 775 P.2d 1241 (1989). Further, the Court lack jurisdiction when the charging

> document contains nothing by which the elements of an offense may be inferred. *State v. Murray*, 143 Idaho 532, 148 P.3d 1278 (Ct. App. 2006).
>
> The State timely filed Sworn Criminal Complaint that cured the defect in the citation. The State's charging document alleges the Criminal Conspiracy was undertaken in violation of Idaho's Riot statute, Idaho Code 18-6401. The Court determines the Sworn Complaint cures the defect contained within the citation, thus there is no jurisdiction, or notice, defect in the charging document.

Mem. Decision and Order on Mot. to Dismiss 3. The State did not object to this Memorandum Decision and Order. Further, prior to filing a response to Jessop's Motion to Dismiss, the State filed a Sworn Criminal Complaint. Thereafter, the State filed its response, and argued that, "[r]egardless, the State filed a Sworn Complaint on September 22, 2022, which set out in significant detail the facts establishing every element of the charged offense of Conspiracy to Riot, thereby remedying his claim about the alleged insufficiency of the initial citation and rendering the issue moot." Resp. to Mot. to Dismiss 7.

Finally, the State's assertion that "the inclusion of this as the very first finding of fact in the magistrate court's Order" "stands as a misstatement of the factual history of the case and the magistrate court's own decision on this issue," (Appellant's Br. on Appeal 25) is entirely inaccurate. It is clear from the record that the trial court viewed the citation as defective, as it did not inform Jessop what he was being charged with.

The trial court's determination that the original citation was defective is supported by substantial and competent evidence. Thus, the State's argument that it is clearly erroneous is lacking in any basis in fact and in law.

3. The Incorrect Date in Finding of Fact 2 is Nothing More Than a Typographical Error

The State next argues that Finding of Fact two, "included an incorrect date—June 12, 2022, instead of July 12, 2022—and notes that Appellant objected to

Respondent's Motion to Appear via Zoom, inaccurately implying that the Objection lacked merit or was frivolously filed. Order at 2." Appellant's Br. on Appeal 25-26.

The Second Finding of Fact provides that: "On June 12, 2022, Mr. Jessop filed a motion requesting to appear Via Zoom. On July 13, 2022, the State objected." Order for Dismissal 2, ¶ 2.

This Court on appeal has reviewed the record, and determined that the trial court did use the wrong date in this finding of fact. The State in fact filed an objection to the Respondent's Zoom Appearance on July 13, 2022, not June 13, 2022. However, this Court on appeal does not find that this incorrect date, "inaccurately implies that the Objection lacked merit or was frivolously filed" as asserted by the State. Appellant's Br. on Appeal 25. There truly is no way for this Court on appeal to make such an interference.

Instead, this Court on appeal finds that the trial court's use of the wrong date was a harmless error. Idaho Criminal Rule 52, entitled Harmless Error, provides that "[a]ny error, defect, irregularity or variance that does not affect substantial rights must be disregarded." When this incorrect date is read in context of the entirety of the Order for Dismissal Pursuant to Idaho Criminal Rule 48, it is clear that the trial court did not base its decision entirely (or even in any part) on the date of the State's objection to allow Jessop to appear remotely.

4. Finding of Fact 4 is Not Clearly Erroneous

The State argues that the fourth finding of fact, "included a finding regarding whether a link in Appellant's discovery response that had the CVs for Idaho State Police Forensic Service experts, which were completely irrelevant to this case, and which Appellant noted was raised for the first time at the hearing on Respondent's Motion to

Compel on April 4, 2023." Appellant's Br. on Appeal 26 (citing to "*Trans. on Appeal*, p. 21, 11. 17-25; p. 22, 11. 1-6.") The State argues that, "the inclusion of this irrelevant disputed point again shows the concerted effort at *post hoc* justification of the magistrate court's decision by the Order's drafter, Respondent." *Id.*

The fourth finding of fact provides in relevant part to the State's argument that:

> 4. On August 22, 2022, the State responded to Counsel's request. This response took place 71 days after Mr. Jessop's arrest and included 75 witnesses . . . . There was also a link for CVs of expert witnesses, but the link was inactive.

Order for Dismissal 2, ¶ 4.

As this Court on appeal has discussed above, the State provides no evidence that the trial court blindly accepted the Respondent's Finding of Facts. Instead, the transcript clearly shows that this finding was consistent with that made on the record:

> THE COURT: On August 22nd the State provided a response to the discovery, 71 days after Mr. Jessop's arrest in this case. In that response to discovery there were 75 named witnesses. There was a box on that form that indicates whether additional information is forthcoming or not. That box was not checked, indicating that there was no additional information forthcoming. There's also a box on there that the State has requested additional information. That box was not checked, indicating that there was no request for additional information. There was also a link on that form that was provided to defense counsel for the CVs of expert witnesses. That link was inactive.

Tr. 124:21-125:8.

The State does not argue that this finding of fact was erroneous. The State does not even argue that inclusion of what it deems an "irrelevant disputed point" was in error. The State simply is complaining that Judge Randles included an "irrelevant disputed point," without even telling this Court on appeal <u>why</u> it is complaining. Simply

complaining is not helpful to this Court on appeal. This Court on appeal finds that this portion of the trial court's fourth finding of fact is supported by substantial competent evidence. More importantly, the State has failed to make this a valid issue on appeal.

5. Finding of Fact 7 is Not Erroneous.

The State argues that the seventh finding of fact was, "contrary to the record and clearly erroneous" because the trial court, "incorrectly claimed that the referenced statement was made in Appellant's Objection to Respondent's Motion to Suppress [dated Sept. 13, 2022], when the relevant statement was actually made in Appellant's Objection to Def's Motion to Enlarge Time dated Sept. 13, 2022." Appellant's Br. on Appeal 26. Counsel for the State adds, "[t]he inclusion of this irrelevant disputed point again shows the concerted effort at *post hoc* justification of the magistrate court's decision by the Order's drafter, Respondent." *Id.*

The seventh finding of fact provides that, "[o]n September 13, 2022, the State objected to the suppression motion as being untimely. In its objection, the State indicated that it had *timely provided **all** discovery in its possession* within 14 days of Defense Counsel's request." Order for Dismissal 2, ¶ 7 (emphases in original). The State is claiming that the second sentence is clearly erroneous because it cites to the wrong objection; however, the second sentence does not cite to a specific objection.

The State filed two objections on September 13, 2022, and only in one of which did the State indicate that it had timely provided all discovery in its possession. The trial court did not indicate in what objection the State made that assertion, just simply that the State indicated it "[i]n its objection." Liberally construing the trial court's finding of facts in favor of the judgment entered, this Court on Appeal does not find that the seventh finding of fact was clearly erroneous, as the fact that the State, in its objection,

indicated that it had timely provided all discovery in its possession within 14 days of Defense Counsel's request, is supported by the record. Counsel for the State's Attack against the trial court (that the magistrate court *post hoc* justified it's decision) and opposing counsel ("by the Order's drafter, Respondent"), is not only not relevant on appeal, the complaint being made by the State finds no support in the record.

6. Finding of Fact 15 is Not Erroneous

The State next argues that the trial court's fifteenth finding of fact is clearly erroneous because it "included the facially inaccurate finding that Appellant's supplemental discovery response conflicted with alleged 'repeated assertions' by Appellant that it had provided all discovery in its possession," as the State "had made one assertion to that effect in its Objection to Defendant's Motion to Enlarge Time (Sept. 13, 2022) at 1, which assertion remained accurate, there had not been 'repeated assertions' of that when the referenced supplemental discovery response was filed on September 27, 2022." Appellant's Br. on Appeal 26.

The fifteenth finding of fact provides that:

> 15. On September 27, 2022, the State submitted its fourth supplemental response to Discovery. This included Coeur d'Alene Police supplemental reports and video from Coeur d'Alene Police officers. Again, this was in spite of the State's repeated assertions that it had previously provided all discovery in its possession.

Order for Dismissal 3, ¶ 15.

On September 13, 2022, the State filed an Objection to Defendant's Motion to Enlarge time, wherein the State claims, related to discovery that "the State fully complied with [Idaho Criminal] Rule 16 and timely provided Defendant with all discovery in the State's possession within 14 days of Defendant's request for it on August 9, 2022." Obj. to Def.'s Mot. to Enlarge Time. 1-2. Two days later, on September 15,

2022, the State filed a supplemental discovery response, with the "Redacted 911 Audio," "Supplemental Report from Coeur d' Alene Police Sgt. Shane Avriett and a photocopy of the original documents (CDA PD SUPP RPT AVRIETT AND PF OPERATIONAL PLAN 000001-000008), 8 pages," and "Email response SWAT team (CDA PD EMAIL INVESTIGATION FOLLOW UP SWAT TEAM 000001-000002), 2 pages." September 15, 2022, Suppl. to Pl.'s Resp. to Disc. 1. A week after that, on September 22, 2022, the State filed an additional supplemental response, with "CDA PD Supplemental Reports (CDA SUPP RPTS NEWBILL WEISENFLUH SCHMITZ WELCH 000001-000005) - 5 pages," and added a new witness of "Earl Louis King, North Star Assisted Senior Living, 2340 W. Seltice Way #333, Coeur d'Alene, ID 83814." September 22, 2022, Suppl. to Pl.'s Resp. to Disc. Then, five days after that, the State filed an additional supplemental response to request for discovery that included, "CDA PD Supplemental Reports (CDA PD SUPP RPT GUTHRIE 000001) 1 page, CDA PD Supplemental Reports (CDA PD SUPP RPT CANTRELL 000001) 1 page, [and] CDA PD Supplemental Media Videos (Guthrie), 2 videos." September 27, 2022, Suppl. to Pl.'s Resp. to Disc. Further, the original discovery response provided by the State indicated that had not requested any additional information. Pl.'s Resp. to Disc. 2, ¶ 4.

While the State did not make expressed assertions that it had provided all discovery in its possession in each supplemental response, during this time that the State was making periodic updates on the cell phones seized by the Coeur d'Alene Police Department that had been given to the FBI, and the State did not inform Jessop that there was additional information forthcoming. The State did not disclose this

information until January 23, 2023, after it "was ordered in a separate case on December 1, 2022, to provide all 3.5 TB to each defendant, so it coordinated with CDA Detective J. Welch and the FBI to do so." Resp. to Def.'s Mot. to Compel 3.

A trial court's findings of fact shall not be set aside unless they are clearly erroneous. *Greenfield Fam. Tr. v. Olive Fountain Land Co., LLC*, 170 Idaho 672, 680, 516 P.3d 96, 104 (2022). Clear error does not occur where the findings are supported by substantial and competent evidence, which is relevant evidence that a reasonable mind might accept to support a conclusion. *Id.*

A reasonable mind could accept that State's continued filings without the assertion that there are cell phone data extractions occurring as indications that there is not anything expected or requested. Thus, the trial court's assertion of such is not clear error or clearly erroneous.

7. Finding Of Fact 24 is a Typo, as the Described Conduct Occurred on December 12, 2022, not December 21, 2022, but Nonetheless is Not Supported by the Record, and thus Clearly Erroneous. However, That Error is Without Significance.

The State argues that the twenty-forth finding of fact is "entirely inaccurate" as the "[t]he Motion to Suppress hearing held on December 21, 2022, was continued at [Jessop's] request over [the State's] objection based on [Jessop's] representation that he wanted additional time to potentially submit an audio recording from a different hearing in a different case before a different judge." Appellant's Br. on Appeal 26.

The trial court's twenty-fourth finding of fact provides that:

> 24. On December 21, 2022, the Motion to Suppress was heard in part. The Court had to again continue the Motion to Suppress because one of the State's witnesses was not present.

Order for Dismissal 5, ¶ 24. This Court on appeal has reviewed the court minutes from the December 21, 2022, Motion to Suppress hearing and agrees with the State that the asserted conduct did not occur that day.

However, on December 12, 2022, the Motion to Suppress hearing was continued, in part, to allow for the testimony of the State's out of County witness. More specifically, after a lengthy discussion on the State's Motion for Witness to Appear via Zoom and Motion to Shorten Time, the trial court denied the State's motions due to the diminished ability to judge credibility over zoom. December 12, 2022, Ct. Min. 2. The court minutes reflect the following:

10:17:24 AM	Judge Randles	I understand the difficulty of arranging his presence as well. How would you like to do that?
10:17:45 AM	PA	Proceeding today and setting a hearing for our witness to testify would be our preference. Reviews.
10:18:12 AM	Judge Randles	We will proceed today with that understanding. I will allow parties to pick out a date for subsequent testimony.

The final comment on the minutes being that the trial court, "will not consider this matter fully submitted until parties discuss a time for State's other witness; reviews scheduling." *Id.* at 3.

The trial court's oral ruling on the matter supports this notion that the discussed conduct that it attributed to the December 21, 2022, hearing, actually occurred at the December 12, 2022, hearing:

> THE COURT: On December 9th of 2022, the State filed a motion for Zoom participation for another witness at the motion to suppress and filed a motion to shorten time to allow the request to be heard. It was noticed up for December 12th of 2022. At that hearing the Court denied the motion. The Court stated its reasons on the record, but in particular, the Court indicated that

> the difficulty sometimes with technology, not being able to have the witness in court so that the Court could determine -- make a credibility determination was a reason for denying that motion. Pursuant to that, the motion to suppress had to be continued again on the State's motion.

Tr. 128:24-129:11. The Order for Dismissal does not include any reference to the December 12, 2022, hearing, apart from it's eighteenth finding of fact, which provides:

> 18. On November 21, 2022, the Court determined that the State's late filings required continuance of both matters. Assigned Prosecutor Ryan Hunter stated that he did not feel there was time limit for his response, and he was ready to go forward without giving Defense Counsel any additional time. However, because the Court wanted to ensure time for Defense Counsel and the Court to review these documents, the Court continued the hearings to December 12, 2022. The Court was not aware the State had filed response, it had no opportunity to review the late filings or prepare for the hearing based upon the late filing.

Order for Dismissal 4, ¶ 18.

Nonetheless, the trial court's finding of fact stating what occurred on December 21, 2022, is not supported by the record. The Court finds the finding of fact is thus clearly erroneous. However, there is no significance to that error. Had Judge Randles said, "December 12, 2022" on the record and in the signed order, instead of "December 21, 2022," there would be no error. But the significance the State attaches to this error in a date is beyond specious. The State is upset that the hearing held on December 21, 2022, had to be continued at Jessop's request, not the State's request. Appellant's Br. on Appeal 26-27. Counsel for the State in this appeal then writes:

> But it was Appellant who was subjected to the magistrate court's baseless insinuation that Appellant had caused all the delays in completing the Motion to Suppress hearings despite the contrary factual record, which the court quickly backtracked on. *See Hearing Minutes – Motion to Suppress Continued* (December 21, 2022) at 13-14. Regardless, because of the clear factual record to the contrary, this finding of fact is clearly erroneous.

Id. at 27. The minutes of the December 21, 2202, hearing show counsel for the State (Ryan Hunter) said, "the representation that State has caused the delay in this proceeding is inaccurate." December 21, 2022, Ct. Min. 13. To which Judge Randles responded, "That was never position or viewing of the Court. Court is aware, procedurally, nature of the prior continuance. Reviews. I don't ascribe fault to either side here." *Id.*

The State's assertion that the trial court, "quickly backtracked on" its position that "Appellant had caused all the delays in completing the Motion to Suppress hearings," (Appellant's Br. on Appeal 27), is not supported in the record. That assertion is entirely discredited by the trial court providing that it was aware of the nature of the prior continuance, and that it didn't ascribe fault to either side. Because the trial court did not ascribe fault to either side related to the December 21, 2022, continuance, the fact that the trial court here included a wrong date was of no consequence on the trial court's decision to dismiss the matter.

8. Finding of Fact 25 is Not Erroneous.

The State argues that the twenty-fifth finding of fact in the Order for Dismissal is inaccurate, "as Respondent's first Motion to Dismiss had already been fully submitted to the magistrate court on December 12, 2022." Appellant's Br. on Appeal 27 (comparing *Order* at 5, to *Hearing Minutes – Motion to Suppress Continued* (December 12, 2022) at 4-8).

The trial court's twenty-fifth finding of fact provides that, "On December 27, 2022, both the Motion to Suppress and Motion to Dismiss were completed and submitted to the Court." Order for Dismissal 5, ¶ 25. This finding of fact is almost identical to that

made on the record at the August 9, 2023, Motion for Reconsideration and Motion to Dismiss, wherein the trial court stated that: "On 12/27 of 2022, the motion to suppress and motion to dismiss were completed and submitted to the Court." Tr. 129:20-22.

It is noted here that when Jessop responded to this argument, he cited the above finding of fact to say, "By December 27, 2022." *See* Respondent's Br. on Appeal 19, ¶ h (emphasis added). The Court on appeal notes that this argument and assertion is incorrect, as it is in direct conflict to the words used both in the trial court's Order for Dismissal and on the record.

Nonetheless, the State's argument that this finding of fact is inaccurate is nonsensical. On December 27, 2022, both motions were completed and submitted to the trial court. The State's assertion that the Motion to Dismiss was submitted on December 12, 2022, has no consequence to the finding of fact stating that on December 27, 2022, the matter was completed and had been submitted to the trial court.

9. Finding of Fact 27 is Clearly Erroneous, but Without Significance.

The State argues that the trial court's twenty-seventh finding of fact is erroneous because it, "incorrectly stated [the State] had represented four months prior to a supplemental discovery response filed on January 23, 2023, that 'there was no other information forthcoming,'" but "nowhere in the record, much less at the time alleged, did [the State] ever make any such representation." Appellant's Br. on Appeal 27. The State argues that throughout the matter it had, "*always* made clear that it had complied with its discovery obligations by timely providing everything in its 'possession, custody, or control,' see I.C.R. 16(b)(4), as it was received." *Id.* (italics in original).

The trial court's twenty-seventh finding of fact provides that:

> 27. On January 23, 2023, the State filed its seventh supplemental discovery response, which included 3.5 terabytes of information from cell phones, cameras, and other recording devices. This was four months after the State filed its response indicating that there was no other information forthcoming and stating it had fully complied with discovery.

Order for Dismissal 5, ¶ 27.

The State, which responded originally to discovery in this matter on August 22, 2022, indicated that it had not requested any other information, as the State responded:

> The State has requested the following information and will provide upon receipt: _____

Plf.'s Resp. to Disc. 2 ¶ 4. (underlining in original). By leaving that assertion "blank," the State asserted on August 22, 2022, that it had not requested any information.

However, the State noted that, related to the data produced in this case, that it was "requesting, up to that point [in early December], periodically updates on the status of the information." Tr. 15:2-3. The State has provided that the phones were delivered to the FBI on or about July 19, 2022. Appellant's Br. on Appeal 8. The State did not indicate to Jessop that this information was forthcoming until January 23, 2023. This is despite the fact that in its Response to Motion to Compel, the State provides that it, "was ordered in a separate case on December 1, 2022, to provide all 3.5 TB to each defendant, so it coordinated with CDA Detective J. Welch and the FBI to do so and sent sufficiently sized storage devices to them within days of that order." Resp. to Mot. to Compel 3.

Nonetheless, the record reflects that the State had indicated that it had not requested any additional information, not that there was no further information forthcoming. Therefore, this section of the finding of fact is not supported by the record,

and thus is clearly erroneous. Again, however, this is a distinction without a significant difference.

The trial court's twenty-seventh finding of fact relates to the State's seventh supplemental discovery response, wherein the 3.5 terabytes of information referenced discussed in depth in various parts of this appeal was disclosed.

The record reflects that after Jessop had been arrested and charged in this matter, but prior to Jessop retaining counsel, the State, through the Coeur d'Alene Police Department, had given the FBI the devices seized in the matter, for the FBI "to perform th[e] extractions and analyze the contents." Resp. to Mot. to Compel 3. This occurred on or about July 19, 2022. *Id.* On August 22, 2022, the State provided in it's discovery response that no other information had been requested. At this time, the State, which was aware that the extractions were taking place, was unaware if it was going to use the contents of the devices in trial, as evidenced by the State's comments months later, at the April 4, 2023, hearing, that: "I don't think -- you know, we're not -- at least at this point haven't disclosed any intent to use the particular evidence at trial." Tr. 18: 14-16. The trial court provided in its Order to Compel that it did not consider the senior judge's preclusion of the evidence to be sufficient as a sanction, because the State had no intention of using it. The trial court considered "sanctioning the State by disallowing any evidence past its September 2022 assertion that it has fully complied with its discovery obligations." Order for Compel 9, ¶ 51.

Further, in reviewing the Order to Compel, the trial court does not necessarily rely on the assertion that the State had indicated that there was "no other information forthcoming." Instead, the trial court relied on the State's assertions in September 2022

that it had supplemented the discovery response with all the evidence that it had in its possession. However, that the trial court later found that was not true.

The trial court looked at the "sixteenth supplemental response to discovery, which included chain of custody documentation and supplemental reports from Coeur d'Alene Police officers," which "was provided over year after the initial arrest and ten months after the State indicated it had fully complied with its discovery obligations," (*Id.* at 8, ¶ 47), and that:

> On August 1, 2023, the State submitted its seventeenth supplemental discovery response despite having advised this Court in September of 2022 that it had fully complied and timely provided Defense Counsel with all discovery. Eight months after Mr. Jessop's arrest, the State submitted body camera footage from Coeur d'Alene Police officers. Officer Welch's supplemental report was completed in January but not disclosed until March.

4, ¶ 48. (See also *Id.* at 5, ¶ 29: "On February 2, 2023, in spite of its September 2022 assertion that it had timely provided all discovery within its possession, the State submitted its eighth supplemental discovery response. This response included body camera footage from three Coeur d'Alene Police officers.")

The trial court's reliance on the State's assertions related to discovery in it's granting of Jessop's Motion to Dismiss pursuant to Idaho Criminal Rule 48 was that the State provided supplemental discovery response that included evidence that the State would have had in its possession prior to disclosing.

Thus, it is a distinction without a significant difference because the trial court never, in the context of viewing the State's late disclosures of evidence, relied on the assertion by the State that no other information would be disclosed. Instead, the trial court's reliance related to the State's assertions is when the State provided that it had

disclosed all evidence in its possession, while possessing these reports, body cam videos, and the contents of the devices seized in this matter.

10. Finding of Fact 29 is Not Erroneous

The State next argues that the trial court's twenty-ninth finding of fact "included an unfounded and unsupported 'presumption'" that was "unsupported by any facts in the record and was undermined by the face of the record of these proceedings." Appellant's Br. on Appeal 27-28.

The trial court's twenty-ninth finding of fact provides that:

> 29. On February 2, 2023, in spite of its September 2022 assertion that it had timely provided all discovery within its possession, the State submitted its eighth supplemental discovery response. This response included body camera footage from three Coeur d'Alene Police officers. There was nothing provided by the State indicating why these videos had not previously been provided and the Court presumes they were in the custody of the State from the day of arrest of Mr. Jessop until they were disclosed seven months later.

Order for Dismissal 5, ¶ 29.

This finding of fact includes more than what is stated on the record at the hearing on the Motion to Dismiss, wherein the trial court provided that:

> THE COURT: On February 2nd of 2023, the State submitted its eighth supplemental response to discovery, which included body cam footage from Coeur d'Alene Police Department, Officers Gilbert, Buhl and Newbill. Again, this is in spite of the fact that the State had indicated back in September of 2022 that it had timely filed or provided all discovery in the State's possession within 14 days of the request, and yet, in February, body cam footage from Coeur d'Alene Police Department officers was submitted in their eighth supplemental response.

Tr. 130:10-20.

In response to the State's argument related to this finding of fact, Jessop provides that:

> The pertinent videos were from Officer A. Gilbert, Detective C. Buhl, and Officer K. Newbill. Supplement to Plaintiff's Response to Discovery, February 2, 2023. These witnesses were on the list initially provided in the State's first discovery response. Plaintiff's Response to Discovery, August 22, 2022. Further, Officer Gilbert's report was included with that disclosure via a PDF file created June 21, 2022, and last modified June 22, 2022. Coeur d'Alene Police Law Supplemental Narrative. Officer Gilbert acknowledged that he uploaded media captured by his body worn camera to VIPER. *Id.*, p. 2. Detective Buhl is mentioned in the search warrant affidavit as having assisted with the booking process. Search Warrant Affidavit, June 13, 2022, p. 20. Officer Newbill's report was also included in one of the earlier discovery responses. Supplement to Plaintiff's Response to Discovery, September 22, 2022.

Respondent's Br. 21. The Supplemental Response listed claims that the September 20, 2022, Response to Discovery was supplemented to include:

> Four (4) body camera videos from three Coeur d' Alene Police Officers:
> - CDA PD Officer A. Gilbert - Media ID #1986025
> - CDA PD Officer C. Buhl - Media ID #1986022 & 1986021
> - CDA PD Officer K. Newbill - Media ID #1985985

February 2, 2023, Suppl. To Resp. to Disc. 1.

The trial court provided that it had "reviewed the supplemental filings in this matter and the supplemental requests for discovery." Tr. 113:23-25.

As this Court on appeal has previously noted: "[t]he party appealing a decision of the district court bears the burden of ensuring that this Court is provided a sufficient record for review of the district court's decision." *In re Prefiling Ord. Declaring Vexatious Litigant*, 164 Idaho at 776, 435 P.3d at 1096. Consequently, "[w]hen a party appealing an issue presents an incomplete record, this Court will presume that the absent portion supports the findings of the district court." *Id.* The State did not provide the contents of the supplemental responses, therefore this Court presumes that the absent portion of

the record, or the February 2, 2023, supplemental discovery response, supports the findings of the trial court.

Here, the trial court determined that the police officer's body cameras had been in the possession of the State from the day of Jessop's arrest until they were disclosed seven months later. While the State argues that this determination was in error, "[c]lear error does not occur where the findings are supported by substantial and competent evidence, which is relevant evidence that a reasonable mind might accept to support a conclusion." *Greenfield Fam. Tr.* 170 Idaho at 680, 516 P.3d at 104.

This finding of fact by the trial court is one that is supported by relevant evidence that a reasonable mind might accept to support a conclusion. Therefore, the trial court's finding of fact twenty-nine is not clearly erroneous.

11. Finding of Fact 33 is Entirely Accurate.

The trial court's thirty-third finding of fact in the Order to Dismiss provides that, "[o]n March 28, 2023, the State filed a response to the Motion to Compel." Order to Dismiss 6, ¶ 33.

The State argues that thirty-third finding of fact found in the Order to Dismiss is inaccurate because, "Appellant filed responses to Respondent's Motion to Compel *and* Motion to Dismiss on March 28, 2023." Appellant's Br. On Appeal 28 (Comparing Order at 6; to the March 28, 2023, Resp. to Mot. to Compel and March 28, 2023, Resp. to Def.'s Second Mot. to Dismiss.)

The State's argument that the Finding of Fact contained in the Order is inaccurate because it was filed on the same day that the State claims it was, is unreasoned, illegitimate, and not supported in law or fact. This Court on appeal has

reviewed the record, and the State filed a response to Jessop's Motion to Compel on March 28, 2023. This is precisely what the finding of fact states. The State's argument that the finding of fact is clearly erroneous is not based in fact or law.

12. Finding of Fact 36 is Not Erroneous.

The thirty-sixth finding of fact contained within the Order for Dismissal provides that:

> 36. On May 12, 2023, the State submitted its twelfth supplemental discovery response, in which it indicated marginal compliance with certain aspects of the Court's order compelling discovery.

Order for Dismissal 6, ¶ 36. This finding of fact, and the wording that the State takes issue with, is consistent with the trial court's oral ruling:

> THE COURT: On May 12th, the State submitted its twelfth supplemental response to discovery, indicating compliance or compliance marginally with this Court's order to compel as it related to certain aspects of that order.

Tr. 131:17-22.

The State argues that the trial court's this finding of fact is "inaccurate" because it references the State's twelfth supplemental discovery response was in "marginal compliance" with certain aspects of the Order to Compel, when the State claims it was "in full compliance with the Order to Compel signed by the magistrate court on April 6, 2023." Appellant's Br. on Appeal 28. More specifically, the State argues that:

> There is no explanation provided as to why that phrase was appropriate or what facts in the recorded supported it; instead, this biased language should have been removed by the magistrate court pursuant to its obligation to ensure only neutral, unbiased, accurate findings of fact were included in its Order for Dismissal providing the basis for that order as required by Rule 48(b). The magistrate court's failure to weed out such biased, unsupported language from the Order for Dismissal undermines every other finding of fact contained in that Order, making those findings clearly erroneous and warranting reversal of that Order for Dismissal.

Id.

As a preliminary matter, the Court does not find any merit in the State's assertion related to the biased language of the trial court. The State did not fully comply with the Order to Compel, as it held onto the information for at least a month prior to disclosing it, and the State did not provide all of the information required of it, as further evidenced by the May 16, 2023, Supplemental Discovery Response that included additional compelled information. Therefore, the trial court's use of "marginal" cannot be found to be biased or incorrect.

As discussed below, the State brings the assertion that it had fully complied with the Order to Compel, and the Order on Motion to Compel, as a sole and separate basis for the reversal and remand of the Order for Dismissal. (*See* Appellant Br. on Appeal 2, ¶ IV: "The magistrate court abused its discretion by granting Respondent's third Motion to Dismiss as a sanction for Appellant's alleged noncompliance with the Order to Compel dated April 6, 2023, despite the record clearly showing that Appellant complied with the plain language of that Order.")

While discussed in detail below, this Court on appeal finds that the State did not comply in full with the Order to Compel. Therefore, the trial court's finding of such is supported by the record.

13. Finding of Fact 39 is Not Erroneous.

The State asserts that the trial court's thirty-ninth finding of fact "included the inaccurate statement" that the State had suggested its own sanction at the May 31, 2023, hearing, on Jessop's Motion for Sanctions hearing, which it argues is completely irrelevant, and was included in the Motion for Sanctions. Appellant's Br. on Appeal 28 (citing to Mot. for Sanctions 3).

The trial court's thirty-ninth finding of fact provides that:

> 39. On May 31, 2023, the hearing on Mr. Jessop's Motion for Sanctions took place before Judge Payne. Judge Payne sanctioned the State by disallowing its use of the information contained on the 3.5 terabytes from seized digital devices. However, as the State had already stated on numerous occasions that it did not plan to use this evidence, this was not a sanction. The State had repeatedly asserted it was not going to use anything contained in the 3.5 terabytes at trial. Further, the State actually suggested its own sanction.

Order for Dismissal 6, ¶ 39.

The Motion for Sanctions in this matter provides that Jessop's Counsel "urges this [c]ourt to consider sanctions including:"

> 1. Dismissal of this action for prosecutorial misconduct;
> 2. Exclusion of all evidence related to the devices for which the State has failed to comply with the Court's order on the motion to compel;
> 3. Impose costs against the State for the time involved with litigating the State's improper conduct;
> 4. Continuance of the trial based upon the State's failure to comply with the Court's order;
> 5. Any other sanctions that the Court deems appropriate.

Mot. for Sanctions 3, ¶¶ 1-5. In contrast, Jessop's Memorandum in Support of Motion for Sanctions provides that:

> For the foregoing reasons, Counsel for Mr. Jessop respectfully requests that this Court dismiss Mr. Jessop's Criminal Complaint due to the flagrant misconduct evidenced by the prosecutor's continued disregard for his constitutional obligations throughout the discovery process and his disobedience of the Court's Order to Compel. Mr. Jessop continues to be substantially prejudiced by the State's failure to disclose evidence material to his case, and this prejudice cannot and should not be cured by another continuance, especially where it has been nearly a year since this misdemeanor case was filed, and his ability to mount a defense is impeded by this delay.

Mem. in Supp. of Mot. for Sanctions 7.

At the May 31, 2023, hearing, on Jessop's Motion for Sanctions, the senior judge presiding over the case asked if there could be a stipulation for the State not to object to

Jessop offering any exhibits from the device to come in, to which Mr. Hunter responded that:

MR. HUNTER:	Frankly, Judge, the more, I think, reasonable approach would be just that this -- nothing off the cell phones comes in. We have not once up to this point made any disclosure that we intended to introduce any evidence off of these phones at trial. Certainly that could change, but we don't anticipate it.
THE COURT:	Well, it's about to not change because my inclination is the State can bring nothing in because they haven't said so. We're a month from trial.
MR. HUNTER:	And we'd certainly --
THE COURT:	We're a year into this case.
MR. HUNTER:	I completely agree, Judge. We'd certainly stipulate that the evidence -- well, the information, because I don't think it's relevant evidence, on these phones simply doesn't come in at trial. It's largely a distraction. The majority of the information –
THE COURT:	It's a three-terabyte distraction is the problem.

Tr. 72:11- 73: 4.

The record reflects that Jessop urged the court to consider sanctions, specifically requesting that the trial court dismiss the complaint due to the State's conduct. At the hearing on the Motion for Sanctions, the State stated that the "more reasonable approach" to its misconduct would be to preclude the information that the State asserted it was already not planning to admit. While Jessop had urged the trial court to look at the exclusion of this evidence as a sanction, that does not preclude the State from being found to have suggested its own sanction.

Further, the State brought up on it's own accord that:

MR. HUNTER:	One thing I'd mention to the Court that hasn't been brought up, surprisingly, because I'm pretty sure he was included on the e-mail chains for this that we were provided, was they've

-- defense counsel for I think basically all of these cases has retained a single expert to review the data on these devices and provide reports for each individual defendant.

MR. SCHWARTZ: Judge, I'm sorry to interrupt. I'm not included in that. I have no expert. That's a different judge that signed an order for those defendants to have it. I have no access to what Mr. Hunter's speaking of.

THE COURT: Sounds like Mr. Schwartz doesn't have that.

MR. HUNTER: It's to my understanding that all the appointed –

THE COURT: Problem with thirty cases.

MR. HUNTER: Yeah. All the appointed 23 attorneys were in communication with that. If he's not, I think it would behoove him to get in communication with those attorneys to join in on that because it's a cost -- essentially a cost minimization effort under –

THE COURT: Is there any reason not to do that?

MR. SCHWARTZ: Judge, it hasn't been offered to me.

THE COURT: Well, it is now.

MR. SCHWARTZ: Well –

MR. HUNTER: Well, and it -- just to clarify, it's not the State's responsibility to offer that. This is -- this was something that was sought independently by several defense counsel. I couldn't even begin to explain why they –

THE COURT: Has it been court-ordered? Court ordered it in some other cases?

MR. HUNTER: Correct.

MR. SCHWARTZ: But Judge, think about what he's saying there. We didn't follow the rules. You should do extra work with other attorneys on other cases on other cases –

MR. HUNTER: That's not what I'm saying, Judge. He's continuously misrepresented what I've said –

MR. SCHWARTZ: He has not, Judge.

MR. HUNTER: -- throughout this case.

THE COURT: Okay. This is the unprofessionalism part. One person at a time.

MR. HUNTER: And that's where it's –

THE COURT:	Mr. Hunter, stop talking. Mr. Schwartz, go ahead.
MR. SCHWARTZ:	Judge, I can't -- the Court can't require me to deal with other people's cases to fix Mr. Hunter's mistakes, and that's what Mr. Hunter's suggesting.
MR. HUNTER:	That's not what I'm suggesting.
THE COURT:	It sounds like what he's saying is they've got this expert witness paid for that you might as well utilize the data for the process of this.
MR. SCHWARTZ:	So I guess I could submit an order for the Court to sign, but for Mr. Hunter to say I have access to that is patently false.

Tr. 84:5 – 86:15. It is certainly possible that the trial court was referring to the State's suggestion that its discovery sanction should be cured Jessop's counsel submitting an order for the court to sign regarding the expert witness retained by his alleged co-conspirators.

Nonetheless, the trial court's finding of fact is supported by the record, and thus the State's objection is not founded in fact or law.

14. Finding of Fact 42 is Not Erroneous.

The State argues that the trial court's forty-second finding of fact is "inaccurate" because the trial court found that the State "simply chose to ignore the Court's Order," when actually the State filed a Supplemental Discovery Responses wherein it provided that the State was unable to comply with the Order, as "[t]he requested correspondence is not within the power, custody, or control of the Coeur d'Alene Prosecuting Attorney's Office or any law enforcement agency that reports to or is supervised by this Office." Appellant's Br. on Appeal 28-29 (citing to June 20, 2023, Suppl. to Plf.'s Resp. to Disc. 1.)

The trial court's forty-second finding of fact provides that:

> 42. On June 20, 2023, the State filed its fifteenth supplemental discovery response. In this document, the State asserted that, despite the Court's order, there was no authority to provide communications between persons completing cell phone extractions. The State did not seek to reconsider the Court's decision, the State did not seek permission to appeal the Court's decision, the State simply chose to ignore the Court's Order and opine that the Court had not the authority to compel the disclosure.

Order for Dismissal 7, ¶ 42.

As noted by the trial court, "when it becomes apparent to a prosecutor that, for any reason, he or she cannot comply with a court-ordered deadline for production of evidence, the appropriate action is to notify the court, seek relief from the order and, if necessary, request a postponement of the trial." *State v. Hawkins*, 131 Idaho 396, 405, 958 P.2d 22, 31 (Ct. App. 1998); *See* Order for Dismissal 10, ¶ 52. The Idaho Supreme Court has held that "public policy dictates that a party must obey an express order of the court. Courts have the contempt power in order to preserve their effectiveness and sustain their inherent and statutory power." *In re Weick*, 142 Idaho 275, 279, 127 P.3d 178, 182 (2005) (citing to *Marks*, 105 Idaho at 566, 671 P.2d at 479). "This rule is based upon sound foundations of public policy. A trial court may make numerous rulings and issue a substantial number of orders during the course of a lawsuit. If a party were free to disobey any order with which he or she disagreed, the entire judicial process would break down." *Id.* (quoting *In re Reeves*, 112 Idaho at 579, 733 P.2d at 800. When a court has jurisdiction over the suit and the parties before it, its orders are to be obeyed until they are set aside by appropriate proceedings. *In re Weick*, 142 Idaho at 278, 127 P.3d at 181; citing *United Mine Workers*, 330 U.S. at 294, 67 S.Ct. at 696, 91 L.Ed. at 913; *see In re Reeves*, 112 Idaho 574, 579, 733 P.2d 795, 800 (Ct.App.1987) (quoting *Maness v. Meyers*, 419 U.S. 449, 458–60, 95 S.Ct. 584, 590–

92, 42 L.Ed.2d 574, 582–84 (1975)). The State did not attempt in the underlying matter to get the order set aside. Instead, the State simply asserted that it was not able to comply.

As discussed in detail below, the State did not comply with the trial court's Order on Motion to Compel. The State did not seek relief from the Order, instead the State notified the trial court that it was unable to comply and then took no further action related to the Order on Motion to Compel. The trial court's finding that the State ignored the Order is supported by the record, as the State did not comply with such Order, or move to set aside the order in through an appropriate proceeding.

The State did not meet its burden on appeal in showing that this finding of fact is clearly erroneous.

15. Finding of Fact 43 is Not Erroneous.

The State argues that the trial court's forty-third finding of fact is "inaccurate in its claim that Appellant failed to file an objection to Respondent's Motion to Reconsider" because "Appellant did file a Response to Defendant's Third Motion to Dismiss & Declaration on July 25, 2023, in which it also noted in a footnote on the second page that the filing also served as its Response to the Motion to Reconsider, as well, since they covered the same subject matter." Appellant's Br. on Appeal 29. The State also argues that this finding of fact, "implied that Appellant was obliged to file an objection to Respondent's Motion to Reconsider, when no such legal obligation exists." *Id.* at 29-30.

The trial court's forty-third finding of fact provides that:

> 43. On June 26, 2023, the State filed a motion to appear by Zoom and to continue the Motion to Reconsider. The motion was not stipulated to, nor was it noticed up for hearing. Further, the State did not file an objection to the Motion to Reconsider.

Order for Dismissal 7, ¶ 43. This is almost identical to the trial court's oral ruling, wherein it stated:

> THE COURT: On June of 2023, the State filed a motion for Zoom hearing and continuance of the motion to reconsider. There was no stipulation. It was never noticed for hearing. . . The State never filed an objection to the defendant's motion to reconsider.

Tr. 132:24 – 133:7.

The Motion for Reconsideration, filed by Jessop on June 2, 2023, was set to be heard by the trial court on July 3, 2023. The Notice of Hearing apprising the State of this date was sent by Jessop on June 5, 2023. Apart from filing a Motion for Zoom Hearing on June 26, 2023, filed by the State three weeks after the Notice of Hearing was sent out, the State took no other actions related to the Motion for Reconsideration prior to the time set for the motion to be heard. Then, at the time set for the hearing on the Motion for Reconsideration to be heard on July 3, 2023, the prosecutor who filed the Motion for Zoom Appearance or Continuance, Mr. Hunter, did not appear. Though the State had acknowledged that "the hearing could be covered by another attorney for the State," (June 26, 2023, Mot. for Zoom Appearance or Continuance), no other prosecutor from the State appeared. The hearing on the Motion for Reconsider was thus continued to August 9, 2023.

On July 7, 2023, Jessop filed a Motion to Dismiss, arguing in part that his "matter has been consistently delayed and continued due to the actions of the State." Mot. to Dismiss 1. In such Motion, Jessop specifically cites to the State's failure to appear at the July 3, 2023, hearing on the Motion for Reconsideration, "requiring yet another continuance." *Id.* at 2, ¶ 5. On July 11, 2023, Jessop's Motion to Dismiss was set to be heard the same day as the rescheduled Motion for Reconsideration.

Thereafter, on July 25, 2023, the State filed a Response to this Motion to Dismiss, wherein it included a footnote that:

> This response to Defendant's third claim addresses the issues raised in Defendant's Motion to Reconsider the partial granting and partial denial of his Motion for Sanctions. As a result, to avoid duplicative filings, this portion of the State's Response to Defendant's Third Motion to Dismiss also serves as the State's Response to Defendant's Motion to Reconsider.

Resp. to Third Mot. to Dismiss. 2, fn. 2.

Though the State provides that their Response to Jessop's Motion to Reconsider was done as a footnote to "avoid duplicate filings," the State does not mention anywhere in it's brief on appeal that its "response" to the Motion for Reconsideration was actually done twenty-two days after the scheduled hearing on the Motion for Reconsideration (and fifty-three days after the Motion for Reconsideration had been originally filed), which had to be continued because of the State's failure to appear.

The trial court's finding of fact that provides that the State did not file a Response to the Motion for Reconsideration is supported by the record when looked at in light of the proceedings and context of where it is located in the trial court's findings of fact (with the next finding of fact being that the State failed to appear at the Motion to Reconsider), and in the light of the fact that that prior to the Motion for Reconsideration, the State did not file a Response.

Further, the State argues that this finding of fact by the trial court "implied that [the State] was obliged to file an objection to Respondent's Motion to Reconsider, when no such legal obligation exists." Appellant's Br. on Appeal 29-30. While the State provides case law on its argument that a court should not grant a baseless motion, even in the absence of an objection from the prosecution, the State does not provide any comments, argument, or authority as to how finding of fact fourth-three by the trial court

would imply such response from the State is necessary. This Court on appeal does not read into trial court's finding of fact forty-three in the same way that the State does, and this Court does not find that there is a hidden implication. To read into such would be nonsensical. The State's argument related to the presumption of the trial court's finding of fact forty-three is lacking in any basis in fact and law.

16. Finding of Fact 44 is Not Inaccurate.

The State argues that the forty-fourth finding of fact is "inaccurate in its brevity" as it "failed to note that it is a common practice for defense counsel to be afforded significant leeway when tied up in in front of another court, and efforts are always made to contact them if they are not present for scheduled hearings" and that "for some unknown reason, no effort was made to contact the Coeur d'Alene Prosecuting Attorney's Office to see why an attorney was not present for that hearing or if a covering attorney was available to appear." Appellant's Br. on Appeal 30.

The trial court's forty-fourth finding of fact provides that:

> 44. On July 3, 2023, the State failed to appear at the Motion to Reconsider. The Court had cleared its afternoon docket and had no other matters on that docket. The Court reset the hearing for August 9, 2023.

Order for Dismissal 7, ¶ 44.

The State does not argue that the underlying facts are inaccurate; instead, the State argues that the trial court should have called around to find out why counsel for the State did not appear on time. This argument by the State, and the information that it seeks to include in this finding of fact is irrelevant. The State failed to appear at the July 3, 2023, hearing on Jessop's Motion for Reconsideration. What the trial court did or did not do in response to the State's failure to appear does not change or excuse the

State's failure to timely appear. As with other issues in this appeal, the State here is attempting to excuse it's mishandling of this matter by arguing that opposing counsel or the trial court could have done something to help it. This Court on appeal does not find those argument persuasive.

Further, as previously provided, a reviewing court will not consider an issue not "supported by argument and authority in the opening brief." *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010); *Jorgensen v. Coppedge*, 145 Idaho 524, 528, 181 P.3d 450, 454 (2008); *see also* Idaho App. R. 35(a)(6) ("The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to authorities, statutes and parts of the transcript and the record relied upon.") The State provides no authority showing that a trial court is required to contact the State when a prosecutor does not show up for a scheduled hearing, and this information is not contained within the record. The State instead argues, without providing any authority, that the trial court should have made an effort to ascertain where the prosecutor might be.

This Court on appeal has reviewed the record before it and found substantial and competent evidence to support the trial court's forty-fourth finding of fact. The State's argument is lacking in any basis of law or fact.

17. Finding of Fact 46 is Not Erroneous.

The State argues that the trial court's forty-sixth finding of fact is, "also inaccurate in its recitation of what the magistrate court does; specifically, it claims it does not call attorneys when they fail to show up, when it had done so numerous times before July 3, 2023, and has done so numerous times since." Appellant's Br. on Appeal 30. These

are not facts set forth in the record, therefore this Court on appeal will not consider this argument. The State further argues that:

> the magistrate court's claim that it would not "act unilaterally on a motion not noticed up for hearing" is disproven by the record, as the magistrate court had done exactly that on December 19, 2022, by granting Respondent's Motion to Appear via Zoom filed the same morning as the pretrial conference without a hearing. See Order to Appear via Zoom (Dec. 19, 2022). The magistrate court incorrectly claimed that Appellant had "simply cho[sen] not to show up for [the] hearing" despite having Appellant's Motion for Zoom Appearance or Continuance filed on June 26, 2023, stating the complete opposite.
>
> It was also completely improper for the magistrate court to claim, as a finding of fact, that it "is not going to attempt to divine the intent of an attorney that fails to respond and fails to appear for a hearing they have sufficient notice of." Order at 8. That was not a finding of fact, but pure argument, and it is clearly erroneous for the magistrate court to adopt it as such and seemingly feign ignorance as to whether Appellant would object to a Motion to Reconsider sanctions against it. It is even more absurd that the magistrate court would state, as a finding of fact, the legally unfounded claim that Appellant's alleged failure to appear on July 3, 2023, "waives the State's right to object to [Respondent's] request for relief on his Motion to Reconsider." Order at 8. Again, this was in contravention of the long-established legal tenet that it is improper for a magistrate to grant a non-meritorious motion, even in the absence of resistance by the prosecutor. See, e.g., *Swartz*, 109 Idaho at 1035. Thus, the magistrate court's continued reliance on the inaccurate account of the Appellant's alleged "failure to appear" at the July 3, 2023, hearing on Respondent's Motion to Reconsider is clearly erroneous.

Id. at 31-32. This Court on appeal notes and emphasizes the last line of the States argument, wherein the State refers to its conduct of not showing up at the July 3, 2023, hearing on Jessop's Motion for Reconsideration as its' "alleged 'failure to appear.'" *Id.* at 32. This is noted just to emphasize the lack of accountability that the State takes in this appeal for its own mistakes. Counsel for the State did not appear on July 3, 2023. Counsel for the State's inability to admit that fact does nothing to change that fact.

The trial court's forty-sixth finding of fact provides that:

> 46. On July 25, 2023, the State filed its response. Of note, while assigned prosecutor Ryan Hunter stated that the Court had simply ignored his motion to continue or appear Via Zoom, the Court did not ignore his motion; rather, the Court declined to act unilaterally on a motion not noticed up for hearing. Mr. Hunter also argued that the Court should have called his office, giving him the leniency that the Court affords defense attorneys. Of note, this Court did not receive any information from any other person that the prosecuting attorney was simply running late, was detained in another hearing, or was otherwise occupied. The Court did not have any information indicating that an attorney from the Coeur d'Alene Prosecuting Attorney's Office was going to show up. This Court routinely grants time when a party notifies Court staff that they will be late. However, the Court does not call attorneys or their office when they fail to show up. It is not the Court's obligation to remind attorneys when they are supposed to be in Court, particularly when they simply choose not to show up for a hearing. Further, the Court was also aware that the State had filed to file any objection to Defendant's motion. The Court is not going to attempt to divine the intent of an attorney that fails to respond and fails to appear for a hearing they have sufficient notice of. The Court finds that this failure to appear waives the State's right to object to Mr. Jessop's request for relief on his Motion to Reconsider.

Order for Dismissal 7-8, ¶ 46.

The State's arguments related to this finding of fact by the trial court are nonsensical for a number of reasons. The State's assertions here really are argument and complaining that the State was not afforded leniency in this matter to not show up for hearings and to get presumptions made in it's favor.

The State's argument of what the trial court had previously done, by choosing to grant a motion without a hearing previously, does not have any bearing on what the trial chose to or not to do with the State's motion, especially after the State had failed to file an objection or response to the motion.

The State then provides that the trial court's assertion that it chose to not show up for the hearing was discredited by the State's Motion for Zoom Appearance or Continuance. Appellant's Br. on Appeal 30-31. The State does not provide any argument or case law that would show that the filing of a Motion for Zoom Appearance

or Continuance would automatically excuse the appearance of the party, especially wherein the request for the continuance was focused on the single prosecutor's lack of availability and the acknowledgement that another attorney for the State could appear at the hearing. The trial court's assertion that the State chose not to appear at the hearing is supported by the record. The State acknowledged with it's filing of a Motion for Zoom Appearance or Continuance that there was a hearing set for that day, yet Counsel for the State did not appear at that hearing.

The State takes issue with the trial court's finding that it was "not going to attempt to divine the intent of an attorney that fails to respond and fails to appear for a hearing they have sufficient notice of," because the State argues that it was "seemingly feign ignorance as to whether Appellant would object to a Motion to Reconsider sanctions against it," wherein the record reflects that the State did not object to the Motion to Reconsider the sanctions issued against it. *Id.* at 31.

As with other arguments made by the State in this appeal, the State's arguments here are not based in any fact or law.

18. Finding of Fact 49 is Not Erroneous.

The State argues that the forty-ninth finding of fact "and all paragraphs that followed" are "clearly erroneous" because those paragraphs "should have been titled as the 'Conclusions of Law' portion of the Order for Dismissal. Appellant's Br. on Appeal 31. The State does not make any argument or provide any authority to support this argument.

In order to be considered by this Court on appeal, "the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening

brief." *Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 508, 95 P.3d 977, 990 (2004); I.A.R. 35. The State does not provide any argument or authority to support his assertion that paragraph forty-nine and all paragraphs that follow are clearly erroneous. Thus, this argument will not be considered on appeal.

19. The State's general attacks on remaining Findings of Fact, Specifically Finding of Fact 56 and Finding of Fact 57, will not be considered.

The State argues additional paragraphs, in which it claims are "properly identified as Conclusions of Law," "nevertheless repeated multiple clearly erroneous findings of fact." Appellant's Br. on Appeal 31. Specifically, the State points to paragraph 56, (*Id.*), and paragraph 57. *Id.* at 32. The State's arguments here focus on the trial court going from stating that it, "has no information about how the FBI became involved, and [then] a sentence later claim[ing] that 'during the Motion to Suppress testimony there was a statement that the FBI was present at the Command Center,' without identifying the exact statement, who made it, or where in the record support for that claim can be found," and that "the magistrate court seemingly abandoned all pretenses of impartiality, opting instead to fully embrace the biased argumentative language injected by Respondent's drafted of the Order." *Id.*

Similar to other arguments brought in this appeal, the State's argument here are not supported by any cited authority, case law or otherwise. The State's arguments are simply reiterations of the narrative that it attempts to paint of a biased magistrate court, without either stating how that bias affected the Order of Dismissal, as opposed to being made by the State simply to complain. Neither incomplete argument not mere complaints aids this Court on appeal to determine whether the trial court's finding of facts were clearly erroneous.

This Court on appeal will not consider an issue not "supported by argument and authority in the opening brief." *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010) (quoting *Jorgensen v. Coppedge*, 145 Idaho 524, 528, 181 P.3d 450, 454 (2008)); *see also* Idaho App. R. 35(a)(6) ("The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to authorities, statutes and parts of the transcript and the record relied upon."). Thus, these arguments will not be considered.

C. The State's Argument that the Trial Court Implemented a New Discovery Sanction Under Idaho Criminal Rule 16 is Not Supported By the Record, or the Order for Dismissal Pursuant to Idaho Criminal Rule 48.

On appeal, the State claims that the trial court, "abused its discretion by reconsidering the proportional, appropriate sanctions already imposed by Judge Payne via the Order for Sanctions that the magistrate court signed on June 5, 2023, and replacing those proportional sanctions with the most severe sanction possible—dismissal of the action," (Appellant's Br. on Appeal 32), and that "in doing so, the magistrate court failed to reach its decision by an exercise of reason, and by imposing the disproportionately severe sanction of dismissal when more proportionate sanctions had already been imposed, it also failed to act consistently with the legal standards applicable to the choices available to it." *Id.* at 33.

This Court on appeal notes a mischaracterization by the State that muddles the arguments made in this appeal. That mischaracterization by the State is also dispositive of the State's current argument.

On August 8, 2023, the trial court heard two motions. The first being Jessop's Motion for Reconsideration, related to his Motion for Sanctions wherein he claimed in part, that the senior judge presiding over the matter "[i]mposed a sanction, exclusion of

the evidence, which in no way addressed the State's Conduct." Mot. to Reconsider 2, ¶ 4. Jessop's Motion for Reconsideration was originally set to be heard on July 3, 2023, but was rescheduled to August 8, 2023, after the State failed to appear at the hearing on July 3, 2023. The second motion heard by the trial court on August 8, 2023, was Jessop's Motion to Dismiss Pursuant to Idaho Criminal Rule 48 – which had not been filed until July 7, 2023, over a month after the hearing on the Motion for Sanctions. The State confuses these two motions and the sanctions that were granted pursuant to the rule each Motion was brought under.

The State's confusion is made clear in its argument that there were "several less drastic, more proportional alternative sanctions" available to the trial court besides dismissal, which the State noted "had already been imposed:"

> Dismissal under Rule 48 is a drastic, last resort option reserved for only the most exceptional cases. "To warrant dismissal . . . on due process grounds, government conduct must be so grossly shocking and outrageous as to violate the universal sense of justice." *State v. Arrasmith*, 132 Idaho 33, 45 (Ct. App. 1998). "In the case of an alleged Brady violation, dismissal of [a complaint] is an appropriate sanction for a constitutional violation only where less drastic alternatives are not available. *Id.*
>
> Here, the magistrate court abused its discretion by reconsidering the proportional, appropriate sanctions already imposed by Judge Payne via the *Order for Sanctions* that the magistrate court signed on June 5, 2023, and replacing those proportional sanctions with the most severe sanction possible—dismissal of the action.

Appellant's Br. on Appeal 32. (internal citations omitted).

The Motion for Sanctions brought by Jessop, pursuant to Idaho Criminal Rule 16(f)(2)[1], was in response to the State's failure to comply with the trial court's Order to

[1] Mot. for Sanctions 3.

Compel. At the hearing on the Motion for Sanctions, honorable senior Judge Douglas Payne granted Jessop's Motion for Sanctions under Idaho Criminal Rule 16.

In it's Order for Dismissal, the trial court, discussing the Judge Payne's sanctions, stated that it did not consider Judge Payne's sanction of disallowing evidence from the 3.5 terabytes of data disclosed to be sufficient, as the State had asserted that it had no intention of using that evidence. Order for Dismissal 9, ¶ 50. This "lesser sanction of disallowing evidence disclosed after September of 2022" would still prevent Jessop from receiving a fair trial "based on the constant dribble of discovery with the first response to discovery occurring on August 22, 2022, and its seventeenth supplemental response coming August 1, 2023." *Id.* at 13, ¶60.

However, the trial court's dismissal of this case was pursuant to Idaho Criminal Rule 48(a)(2), which provides that a court, "on notice to all parties, may dismiss a criminal action on its own motion or on motion of any party" "for any other reason if the court concludes that dismissal will serve the ends of justice and the effective administration of the court's business." I.C.R.48(a)(2). (*See* Order for Dismissal 11 ¶ 55: "the [c]ourt recognizes that Defense Counsel has filed motion for dismissal under Idaho Criminal Rule 48"). In determining if the dismissal will serve the ends of justice and the effective administration of the court's business, the trial court considered "the State's failure to appear and provide any indication why it wasn't present at the hearing on the Motion to Reconsider, the State's failure to object to the Motion to Reconsider, and its failure to amend Mr. Jessop's citation for over three and half months to give him notice of what he was charged with" (Order for Dismissal 13, ¶ 61), considered the lesser

sanctions available to it, (*Id.* at 9, ¶ 51), and the sanctions already imposed. *Id.* at 9, ¶ 50.

Thus, the State's assertion that the trial court replaced it's "proportional" sanction and replaced it with an "extreme" sanction is not supported by the record. The dismissal of the matter pursuant to Idaho Criminal Rule 48 by Judge Randles was a separate sanction than that previously issued by Judge Payne under Idaho Criminal Rule 16. However, in it's dismissal of the action pursuant to Idaho Criminal Rule 48(a)(2), the trial court considered the sanctions that had been previously issued in the matter, and the inability of those sanctions to deter the State's actions. The State's argument related to the imposed sanctions being replaced is thus not supported in fact or law.

D. The Trial Court Did Not Abuse its Discretion by Considering the State's Filing of Multiple Supplemental Discovery Responses in it's Granting of Jessop's Motion to Dismiss under Idaho Criminal Rule 16.

The State claims that, "[t]he magistrate court also abused its discretion by granting Respondent's third Motion to Dismiss based in large part upon the number of supplemental discovery responses." Appellant's Br. on Appeal 34. Specifically, the State argues that:

> the magistrate court included reference to Appellant's representation that it had timely provided all discovery in its possession, which was an accurate statement at the time. See Objection to Def's Motion to Enlarge Time (Sept. 13, 2022) at 1 ("Defendant then asserts a claim regarding the State's response to discovery, seeming to imply that the State's response was untimely. It was not. Instead, the State fully complied with Rule 16 and timely provided Defendant with all discovery in the State's possession within 14 days of Defendant's request for it on August 9, 2022.").
>
> However, the eight finding of fact that followed began the magistrate court's adoption of Respondent's legally unsupported argument that a party's compliance with its continuing duty to supplement discovery pursuant to I.C.R. 16(j) can be a basis for granting dismissal of an entire criminal case pursuant to I.C.R. 48(a)(2). The fifteenth and twenty-seventh findings of fact included additional references to this point, but in

> doing so the magistrate court relied on a clearly erroneous finding of fact as noted herein. See *supra*, at 25-26.
>
> Despite extensive searching, Appellant could not find any controlling authority in Idaho or persuasive authority in any other state or federal jurisdiction that supports this proposition, and yet it formed one of the main bases for the magistrate court's decision to grant Respondent's third Motion to Dismiss as shown by how frequently it was referenced in the Order for Dismissal. See Order at 12, ¶ 57 (embracing the biased language used by Respondent and referring to Appellant's compliance with I.C.R. 16(j) as a "steady drip of discovery").

Id.

The trial court dismissed the underlying action under Idaho Criminal Rule 48, which provides in part that a court may dismiss a criminal action "for unnecessary delay in bringing the defendant to trial," or "for any other reason if the court concludes that dismissal will serve the ends of justice and the effective administration of the court's business." I.C.R. 48(a)(1),(2) (emphasis added). In constructing this rule, the trial court stated it was, "guided by Idaho Criminal Rule 2, which requires consideration of just determination of every criminal proceeding, simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay." Order for Dismissal 11, ¶ 55.

In looking to see if the dismissal of the underlying case would serve the end of justice and the effective administration, the trial court considered multiple issues in the case, and specifically those attributed to the State's mishandling of this case. Included within that determination was the consideration that, "Jessop cannot receive fair trial based on the constant dribble of discovery with the first response to discovery occurring on August 22, 2022, and its seventeenth supplemental response coming August 1, 2023." Order for Dismissal 13, ¶ 60. The trial court also considered the State's "bad faith in its dilatory disclosures, non-disclosures, failure to comply with Court Orders,

failure to appear in Court when required, all the while insisting it has provided everything to Defense Counsel and is prepared for trial." *Id.* at 13, ¶ 59.

The State has not provided why the State's handling of discovery would be precluded from being considered by the trial court as "any other reason" under Idaho Criminal Rule 48(a)(2) to dismiss the action. Therefore, the State has not provided that the trial court abused its discretion in this issue.

E. The Trial Court did not Abuse its Discretion by Considering the State's Noncompliance with the Court's Order to Compel and Order on Motion to Compel when Granting Jessop's Motion to Dismiss.

The State asserts that the trial court abused its discretion on relying on it's "alleged noncompliance with its Orders compelling the disclosure of evidence" in the Order for Dismissal, (Appellant's Br. on Appeal 35), because "contrary to what the magistrate court represented in its Order for Dismissal, the information [in the April 6, 2023 Order to Compel] *was* provided to Respondent." *Id.* at 36. In other sections, the State argues that the trial court "further abused its discretion by relying on the unsupported allegations that Appellant had not complied with that Order on Motion to Compel," (*Id.* at 42), which will be discussed here.

The State argues that the trial court's assertion that, "Mr. Hunter stated that he had requested the information the Court ordered disclosed in its Order to Compel. He told his assistant not to send it out, then he stated it fell off his radar. As result, it wasn't provided to Defense Counsel," (Order for Dismissal 10, ¶ 54), is "fundamentally undermined" by the "the email between the parties that Respondent improperly attached as an exhibit to his *Motion for Sanctions* filed on May 12, 2023." Appellant's Br. on

Appeal 35. Relevant to the discovery responses, Counsel for the State argues that the emails provide that:

> it was drafted in early April and was supposed to be filed then, but I asked my assistant to hold off on filing while I waited to hear back from the FBI on the expert CVs. Unfortunately, I didn't get the promised response and it fell off my radar. I still haven't gotten a response, so I've reached out to them again, but I'll go ahead and file that response noting that we're still waiting on the requested CV info.

Id. (citing to Ex. To Mot. for Sanctions, Attachment, 2-3.). Thereafter, the State filed its May 12, 2023, supplemental discovery response, proving "the information that was currently within Appellant's possession." *Id.*

The State asserts that the different wording is "subtle, but the difference in substance is immense" because the trial court's, "inaccurate restatement fed its pre-determined narrative, adopted uncritically from Respondent's unfounded claims, that Appellant was intentionally withholding exculpatory material evidence already in its possession," when the State asserts it was "nothing more than choosing efficiency over immediacy and subsequently falling victim to the ever-present cracks into which things fall for every person, attorney and judge alike, at some point." *Id.* at 36.

This argument by the State is unavailing, and not based in fact. The record clearly shows that the State had the information that it was required to disclose from "early April" (*Id.* at 35) until it was disclosed on May 12, 2023. The State claimed at oral argument on the Motion for Sanctions that the discovery "response was drafted April 12th, so just about a week after the Court had issued its order." Tr. 64:20-21. The State's arguments that the lack of disclosure during this time was "nothing more than innocent human oversight," (Appellant's Br. on Appeal 36), or it "choosing efficiency over immediacy," (*Id.*), simply do not matter. The trial court had compelled that

information to be disclosed immediately, and the State did not comply with that Order of the court.

The trial court found that disclosing the information fell off the State's radar, and therefore it had not been disclosed. The State's contentions related to this finding do not justify the State's actions of not disclosing the information that the State was compelled to disclose, which was in its possession from at least April 12, 2023, to May 12, 2023. Thus, the State has not shown that the trial court abused its discretion in finding that the State did not disclose the information it was compelled to disclose to Jessop.

Further, this argument by the State is directed towards the finding of fact by the magistrate, to which this Court on appeal liberally construes in favor of the judgment entered. *Greenfield Fam. Tr.*, 170 Idaho at 680, 516 P.3d at 104. This finding of fact is supported by the record. Therefore, this court on appeal does not find that it is clearly erroneous.

Turning to the State's non-compliance with the trial court's June 7, 2023, Order on Motion to Compel, this Court on appeal first looks at the record.

On February 10, 2023, the State filed a Supplement to Plaintiff's Response to Discovery, supplementing its August 19, 2022, response to include "5 TB hard drive containing more than 3 TB of data from cell phones, cameras, and other recording devices seized in this case." February 10, 2023, Suppl. To Pl.'s Resp. to Disc. 1. Thereafter, on March 6, 2023, Jessop filed a Motion to Compel, stating that the "motion is made pursuant to Idaho Criminal Rule 16(a),(b), and (f), on the grounds" that "Jessop timely requested discovery in this case, but the State failed to comply with turning over

evidence consisting of cell phone extraction data until just recently, resulting in Mr. Jessop receiving voluminous amounts of discovery only weeks before trial," and "[f]urther, the State continues to file supplemental discovery responses indicating that it is still sitting on evidence that should have been disclosed months ago." Mot. to Compel 1. Jessop then requested an Order from the trial court compelling the:

1. The names of all people involved in the cell phone extraction process. This should include what agency these people work for and where they are located;
2. The training and experience of all people involved in the cell phone extraction process;
3. Any correspondence between the individuals conducting the analysis;
4. Any correspondence between the individuals conducting the analysis and the Coeur d'Alene Prosecutor's office;
5. Details regarding the process utilized in the analysis, including which computer programs were used;
6. Any other information that has not been disclosed as required by Idaho Criminal Rule 16.

Id. at 2, ¶¶ 1-6.

A hearing on Jessop's Motion to Compel (and his Second Motion to Dismiss) was held on April 4, 2023. After such hearing, the trial court granted Jessop's Motion to Compel in part, denied it in part, and ordered additional briefing on two of Jessop's requested items. The trial court ordered that the State immediately provide, "[t]he names of all people involved in the cell phone extraction process. This should include what agency these people work for and where they are located;" "[t]he training and experience of all people involved in the cell phone extraction process;" and "[a]ny other information that has not been disclosed as required by Idaho Criminal Rule 16." See Ct. Min.; and April 4, 2023, Order to Compel 1, ¶¶ 1-3. The trial court denied the item requesting compelling of the "details regarding the process utilized in the analysis, including which computer programs were used;" and the trial court ordered the parties

to submit simultaneous briefing on the issues of "[a]ny correspondence between the individuals conducting the analysis;" and "[a]ny correspondence between the individuals conducting the analysis and the Coeur d'Alene Prosecutor's office." Order to Compel 2 (ordering the parties submit simultaneous briefing in regards to item numbers 3 and 4 in the Defendant's Mot. to Compel). Thereafter, the parties both submitted the additional briefing ordered on the two outstanding issues.

On May 11, 2023, after not receiving the information that was compelled on April 4, 2023, counsel for Jessop contacted the State. Mot. for Sanctions, Attachment. The State originally asserted that it had already provided the information, but the asserted that:

> the discovery response, [ ] was drafted in early April and was supposed to be filed then, but I asked my assistant to hold off on filing while I waited to hear back from the FBI on the expert CVs. Unfortunately, I didn't get the promised response and it fell off my radar. I still haven't gotten a response, so I've reached out to them again, but I'll go ahead and file that response noting that we're still waiting on the requested CV info.

Id.

On May 12, 2023, the State filed a Supplement to Plaintiff's Response to Discovery, and Jessop filed a Motion for Sanctions.

The State's May 12, 2023, Supplement to Plaintiff's Response to Discovery, filed at 9:26 a.m., provides that the State's August 19, 2022, Response to Discovery is supplemented to include the following:

> **1. The names of all people involved in the cell phone extraction process. This should include what agency these people work for and where they are located.**
> RESPONSE: Extraction of the digital contents of the electronic devices seized in this case was performed by the following employees of the Intermountain West Regional Computer Forensic Laboratory (IWRCFL), Three Gateway Office Center, 440 West 200 South, Suite 300, Salt Lake

City, UT 84101; (801) 456-4838: Randy Kim, Cheney Eng-Tow, Matthew Anderson, and Stacey Evans.

2. The training and experience of all people involved in the cell phone extraction process.

RESPONSE: This information is not within the custody or control of the Coeur d'Alene Prosecuting Attorney's Office or any law enforcement agency that is supervised by or reports to our office, but it has been requested and will be provided if/when received; additionally, Defendant can request this information directly from the individual examiners through the contact information provided herein.

3. Any information that has not been disclosed as required by Idaho Criminal Rule 16.

RESPONSE: The State maintains that it has complied with its obligations under Rule 16, and will continue to do so, throughout this case.

May 12, 2023, Supplement to Plaintiff's Response to Discovery 1, ¶¶ 1-3.

Jessop's May 12, 2023, Motion for Sanctions, filed at 12:00 p.m., provided that:

> While Counsel for the Defendant was drafting this pleading, the State filed a supplemental response to discovery, prompted by the email chain included above. In that response the State provides the names of certain employees of an organization that conducted the analysis of the devices involved in this case. The response does not include these employees' training and experience or their educational background as required by the Court's order to compel discovery. Additionally, it is disturbing and improper that clearly the State had this information and by the Prosecutor's own admissions via email continued to withhold it until after additional prompting by Counsel for the Defendant.

Mot. for Sanctions. 2.

On May 16, 2023, the State filed a Supplement to Plaintiff's Discovery response wherein it provided the CVs for three of the four examiners. The State indicated that the fourth examiner had retired since the examinations had occurred, and that the State was waiting on his curriculum vitae, which would disclosed via supplement when received. May 16, 2023, Suppl. to Plf.'s Disc. Resp.

Jessop's Motion for sanctions was set for hearing on May 31, 2023, and the Motion was heard before the honorable Judge Payne. Judge Payne granted the Motion

for Sanctions and ordered that the State was prohibited from entering any of the information in the 3 TB of data in its case in chief and issued a continuance. Judge Payne denied dismissal as a sanction. After such hearing, Jessop filed a Motion for Reconsideration.

On June 8, 2023, the trial court filed an Order on Motion to Compel, discussing the remaining two items requested in Jessop's Motion to Compel.

In issuing this Order on Motion to Compel, the trial court rejected the State's only objection related to the correspondence of the FBI's analysts as work product under Idaho Criminal Rule(g)(1)(b), providing that "(g) prosecution information not subject to disclosure" "(1) *work product*. Disclosure must not be required of:" "(b) correspondence." The trial court provided that:

> Idaho Criminal Rule 16 also provides that the defendant may request that the prosecution disclose other items. See I.C.R. 16(1)). Relevant to this issue, Idaho Criminal Rule 16(f) instructs the party receiving the request in the proper manner to respond based upon the choices available. The Rule requires specificity in the objection on proper grounds. *Id*. The discovery process in criminal cases in Idaho is governed by I.C.R. 16. Counsel is to respond to discovery request within fourteen days. I.C.R. 16(1). If party failed to comply with request for discovery, the court may order discovery, prohibit discovery of part of the information or enter such other order as it deems fit. I.C.R. 16(k). Failure to comply with discovery request shall be grounds for the imposition of sanctions by the court. I.C.R. 16(i)(2). *State v. Winson*, 129 Idaho 298, 302, 923 P.2d 1005, 1009 (Ct. App. 1996). The imposition of sanctions for Violations of Idaho Criminal Rule 16 is discretionary with the Court. *State v. Stradley*, 127 Idaho 203, 899 P.2d 416 (1995).
>
> Defendant argues the correspondence between the parties regarding the examination of the cellular devices is not work product and "is subject to discovery because it is intertwined with information or material favorable to [Defendant]." Defense Memorandum at 4. The State argues the correspondence is work product and is protected from disclosure under Idaho Criminal Rule 16(g) and compares that rule with the federal rule under 16(a)(2).

> There is nothing before the Court that such correspondence exists, or what might be contained within such correspondence if it does in fact exist. The Court is not inclined to find that correspondence between agents of law enforcement agency constitute work product. The Idaho Rule does not go as far as the federal rule in that regard. Work product is defined as "[t]angible material or its intangible equivalent that was either prepared by or for lawyer or prepared for litigation, either planned or in progress." Black's Law Dictionary, p. 379 (9th ed. 2010). The Court also notes in *State v. Guel*, Docket No. 38149 (Ct. App. 2012), an unpublished decision by the Idaho Court of Appeals, the court held that letter that was not written by, or at the direction of an attorney, was not considered work product. While the holding in *Guel* is not authority, it is persuasive to this Court. When interpreting rule the Court must give the words their plain, usual, and ordinary meaning. *State v. Taylor*, 160 Idaho 381, 373 P.3d 699 (2016). Idaho Criminal Rule 16(f)(1)(C) provides that in response to request for discovery the party must state its objection "to part or all of the information, evidence and materials sought to be discovered, which objection must be specific and state all grounds for the objection." Because this Court determines that correspondence between the individuals engaged in the cellular device extraction is not work product, the objection based upon work product must fail. The Court grants Defendant's Motion to Compel related to correspondence between the individuals conducting the extractions.

June 8, 2023, Order on Mot. to Compel 2-3.

Twelve days later, on June 20, 2023, the State filed a "Supplement to Plaintiff's Response to Discovery" wherein it supplemented its August 19, 2022, Response to Discovery to "include the following information required pursuant to the [trial c]ourt's Order on Motion to Compel signed June 7, 2023:"

> **1. Disclosure of correspondence between the individuals conducting the cellular extractions.**
> RESPONSE: The requested correspondence is not within the power, custody, or control of the Coeur d'Alene Prosecuting Attorney's Office or any law enforcement agency that reports to or is supervised by this Office. It involves communications made by employees of the Federal Bureau of Investigation's Intermountain West Regional Computer Forensics Laboratory (IWRCFL) located in Salt Lake City, Utah, which is a federal government law enforcement agency that falls within the purview of the United States Department of Justice; accordingly, this Office has no

> power or authority to obtain or require disclosure of the requested correspondence.

June 20, 2023, Suppl. to Pl.'s Resp. to Disc. 1.

On July 3, 2023, the State failed to appear at the scheduled Motion for Reconsideration on Jessop's Motions for Sanctions. On July 8, 2023, Jessop filed his Motion to Dismiss pursuant to Idaho Criminal Rule 48. The State responded to Jessop's Motion to Dismiss on July 25, 2023, arguing in part that it, "maintains that the compelled correspondence is not discoverable under the plain language of I.C.R. 16(g)(1)(b) and, even if it were, Defendant has still failed to provide any specific or legitimate basis to this Court or the State for its relevance; nevertheless, the State did its due diligence by requesting the compelled correspondence from the FBI." Resp. to Mot to Dismiss 4. Continuing, the State argued that:

> But, as expected, the FBI initially advised that a Touhy request from the party seeking the potential admission of the requested items (in this case, Defendant) would be required before they could respond to the request. Where, as here, the FBI and, more broadly, the DOJ is not a party to the litigation, DOJ's regulations expressly prohibit employees from producing material in its files in the absence of a "subpoena, order, or other demand . . . of a court or other authority" to DOJ directly and, "without prior approval of the proper [DOJ] official." 28 C.F.R. §§ 16.21(a)(2), 16.22(a).
>
> In this case, the proper official would be the United States Attorney for the District of Idaho. Thus, the State's supplemental response reflected the reality of the practical and legal limits to its ability to provide the compelled information; in short, it advised of the State's inability to provide what it does not have and is without legal authority to compel the FBI to provide. Despite that reality, the State has continued to work with the FBI and their assigned Assistant U.S. Attorney (AUSA) to determine, first and foremost, if there is any correspondence between the IWRCFL analysts regarding the extractions done in this case that falls within the scope of the order, and second, if the FBI would be able and willing to provide any of that correspondence without a Touhy request being required. As a result of those efforts, the assigned AUSA recently advised the FBI that it could provide correspondence between the analysts addressing relevant

> matters like chain of custody for the digital devices in this case, performing the extractions, or any issues that occurred with any of the extractions without a Touhy request.
>
> As a result, the FBI agreed to have the IWRCFL look for any such correspondence between the analysts and provide the results of that inquiry to the State. At the time of writing this Response [on or before July 25, 2023], the State is awaiting receipt of the results of the FBI/RCFL's inquiry in that regard, which will be provided to Defendant in a supplemental discovery response immediately upon receipt.

Id. 4-5.

Thereafter, the State filed two supplemental discovery responses – neither of which included the information required by the trial court to be disclosed pursuant to the June 8, 2023, Order on Motion to Compel, or any updates related to it. The record on appeal provides that the State never disclosed the information required by the Order on Motion to Compel, and even now on appeal, does not provide that the information has ever been disclosed.

This Court finds the State did not comply with the trial court's June 7, 20223, Order on Motion to Compel – contrary to the State's claims that it has. Thus, the State's contention that the trial court erred in relying on this is again unfounded and not based in fact or law. Further, in the same way that the State failed to show the court's alleged abuse of discretion as it related to the supplemental discovery responses, the State has also failed to provide how the State's noncompliance with the trial court's orders would be precluded from being considered by the trial court as "any other reason" under Idaho Criminal Rule 48(a)(2) to dismiss the action, "if the court concludes that dismissal will serve the ends of justice and the effective administration of the court's business."

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F. While the State Failed to Comply with Idaho Appellate Rule 12 by Attempting to Improperly Appeal an Interlocutory Order, that Noncompliance is Disregarded. The Order on Motion to Compel did not Overstep the Boundaries of Discovery Pursuant to Idaho Criminal Rule 16.

On appeal, the State argues that the trial court, "abused its discretion by granting Respondent's third Motion to Dismiss based on Appellant's alleged noncompliance with the Order on Motion to Compel dated June 7, 2023, because that Order overstepped the boundaries of discovery provided pursuant to I.C.R. 16." Appellant's Br. on Appeal 37, ¶ V.

As a preliminary matter, Jessop argues that the State's argument here related to the Order on Motion to Appeal should not be considered as it falls outside of the scope of Idaho Criminal Rule 54 as an appealable order, asserting that "the State is attempting to bootstrap an interlocutory appeal regarding the Magistrate's Order to Compel to its appeal of the Magistrate's final decision dismissing the case. The State did not pursue an interlocutory appeal and has not filed anything purporting to ask permission now." Respondent's Br. on Appeal 38. The State argues that this is an appeal from "an order granting a motion to dismiss a complaint," which is an appeal by right pursuant to I.C.R. 54(a)(1)(C). Reply Br. 21.

Both parties cite to *State v. Maynard*, 139 Idaho 876, 88 P.3d 695 (2004), to support their assertion. In *Mayard*, the State sought to appeal a discovery sanction of preclusion of evidence, arguing that the preclusion in essence was a motion to suppress as permitted in I.C.R.54. In finding that the district court erred, the *Mayard* court provided the following:

> An appeal, however, may be taken from an interlocutory order rendered by a magistrate when processed in the same manner provided by Rule 12

of the Idaho Appellate Rules and accepted by the district court. See I.C.R. 54.1(i). I.A.R. 12 provides in part:

> Permission may be granted by the Supreme Court to appeal from an interlocutory order or decree of a district court in a civil or criminal action, or from an interlocutory order of an administrative agency, which is not otherwise appealable under these rules, but which involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation.

I.A.R. 12(a). The rule also prescribes that the appealing party must seek permission from both the trial court that issued the interlocutory order and the appellate court.

> Motion to District Court or Administrative Agency—Order. A motion for permission to appeal from an interlocutory order or decree, upon the grounds set forth in subdivision (a) of this rule, shall be filed with the district court or administrative agency within fourteen (14) days from the date of entry of the order or decree. The motion shall be filed, served, noticed for hearing and processed in the same manner as any other motion, and hearing of the motion shall be expedited. In criminal actions a motion filed by the defendant shall be served upon the prosecuting attorney of the county. The court or agency shall, within fourteen (14) days after the hearing, enter an order approving or disapproving the motion.
>
> Motion to Supreme Court for Permission to Appeal. (1) Motion of a party. Within fourteen (14) days from entry by the district court or administrative agency of an order approving or disapproving a motion for permission to appeal under subdivision (b) of this rule, any party may file a motion with the Supreme court requesting acceptance of the appeal by permission. A copy of the order of the district court or administrative agency approving or disapproving the permission to appeal shall be attached to the motion. If the district court or administrative agency fails to rule upon a motion for permission to appeal within twenty-one (21) days from the date of the filing of the motion, any party may file a motion with the Supreme Court for permission to appeal without any order of the district court or administrative agency.

I.A.R. 12(b), (c).

State v. Maynard, 139 Idaho 876, 878–79, 88 P.3d 695, 697–98 (2004).

The *Maynard* court then noted that the State, like the State here, "failed to comply with the above-described procedures and never sought permission to appeal from the magistrate's interlocutory order." 139 Idaho at 879, 88 P.3d at 698. The *Maynard* court then noted, as is the case here, that the "record on appeal then does not contain a motion for permission to appeal from either the magistrate or the district court, as required by Rule 12 governing permissive appeals" *Id.*

In the present case, the State failed to comply with the procedures on appeal as the State never sought permission to appeal from the trial court's interlocutory order.

Maynard continued: "An appeal should not be dismissed automatically in every instance where the rules have not been strictly followed, however, a dismissal for non-compliance with the rules of appellate procedure is discretionary." *Id.* (citing *Bernard v. Roby*, 112 Idaho 583, 733 P.2d 804 (Ct.App.1987)). In finding that the State's "failure to obtain permission from the trial court and the appellate court, in violation of I.A.R. 12, was not fatal to the pursuit of the appeal" the Court in *Maynard* noted two cases that the district court relied on where the Idaho Supreme Court disregarded the appellant's noncompliance with I.A.R. 12: *North Pacific Ins. Co. v. Mai,* 130 Idaho 251, 939 P.2d 570 (1997) *and Kindred v. Amalgamated Sugar Co.,* 118 Idaho 147, 795 P.2d 309 (1990). The Court in *Maynard* provided that:

In *North Pacific*, the Court held:

> Under these circumstances, and because the trial court's decision involves a controlling question of law as to which there is substantial grounds for difference of opinion and because an immediate appeal may materially advance the orderly resolution of the litigation, we will consider and treat this appeal as an appeal by permission under I.A.R. 12. *Kindred v. Amalgamated Sugar Co.*, 118 Idaho 147, 149, 795 P.2d 309, 311 (1990).

North Pacific Ins. Co., 130 Idaho at 253, 939 P.2d at 572. The Court in *Kindred* stated:

> Generally, an appeal under I.A.R. 12 will be permitted when the order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal may materially advance the orderly resolution of the litigation. *Budell v. Todd*, 105 Idaho 2, 665 P.2d 701 (1983).

Maynard, 139 Idaho at 879–80, 88 P.3d at 698–99. The *Maynard* court held that the district court "erred because it failed to consider whether 'substantial legal issues of great public interest or legal questions of first impression are involved.'" *Id.* at 880. 88 P.3d at 699.

In this matter, this Court on appeal first finds that the State is attempting to appeal the trial court's Order on Motion to Compel through this appeal of the trial court's Order for Dismissal. The intent for the trial court's Order on Motion to Compel to be reviewed is highlighted in the State's Reply Brief, wherein it provides, without citing to any expressed authority, that "inherent in th[e] determination [of whether the sanctioned party committed a discovery violation when reviewing whether the lower court abused its discretion] is a review of whether the order allegedly violated was itself valid." Appellant's Reply Br. on Appeal 20. The State's argument on appeal is that that the Order on Motion to Compel overstepped the boundaries of discovery, and thus the trial court erred when it considered the State's "alleged" non-compliance of it. Appellant's Br. on Appeal 37. These arguments, and those throughout the State's briefs, are clearly related to the validity underlying the Order on Motion to Compel.

Here, the Order on Motion to Compel was an interlocutory order. An interlocutory order is one that does not completely adjudicate the parties' dispute. *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 107, 294 P.3d 1111, 1119 (2013). With

such, the appeal of the Order for Motion to Compel is governed by Idaho Criminal Rule 54(a)(1)(I), requiring the party seeking to pursue a permissive appeal from an interlocutory order to obtain permission from both the court from which the appeal is taken and the appellate court. *State v. Savage*, 145 Idaho 756, 757, 185 P.3d 268, 269 (Ct. App. 2008) (citing I.A.R. 12(b), (c)). The State failed to comply with the procedures on appeal as it never sought permission to appeal from the trial court's interlocutory order.

In determining if this Court should use its discretion and dismiss the State's argument on appeal, the Court considers whether substantial legal issues of great public interest or legal questions of first impression are involved. In an abundance of caution, this Court determines that it does, and hesitantly disregards a further noncompliance by the State.

Turning to the substantive argument made by the State on appeal, the State argues that the trial court, "failed to properly consider and follow the limits on criminal discovery and the clear boundaries on the authority to compel discovery as set out in I.C.R. 16." Appellant's Br. on Appeal 37. The State argues that the trial court "abused its discretion" in granting Jessop's "original Motion to Compel without requiring him to meet the burden required to justify issuance of an Order to Compel under I.C.R. 16(k) or otherwise show that the requested items fell within the bounds of discoverable information as provided by Rule 16." Appellant's Br. on Appeal 39. The State argues that the trial court was, "proceeding under the legally unsound conclusion that all evidence seized in a case is 'germane to this Defendant and this prosecution.'" (*Id.*

citing to Order at 12, ¶ 57)[2], when that view is, "contradicted by controlling case law of which the magistrate court was aware." *Id.*

The State further argues that the Order on Motion to Compel created a "non-existent duty to *gather* potentially exculpatory evidence for a defendant" because the "had to be within the prosecutor's possession or ability to obtain through due diligence." *Id.* (emphasis in original). The State cites the case of *State v. Reyna*, 92 Idaho 669, 448 P.2d 762 (1968), wherein the defendant argued that the state's failure to conduct a blood test deprived him of due process when he was charged with driving while intoxicated. The State also cites to *Wells*, where the defendant argued that "he was denied his due process right to a fair trial by the state's failure to obtain evidence of fingerprints and recognizable footprints at the scene of the burglary. He asserts that had the investigating officers taken and preserved such evidence it could have been exculpatory." *State v. Wells*, 103 Idaho 137, 138, 645 P.2d 371, 372 (Ct. App. 1982). This Court on appeal finds these arguments by the State to be unpersuasive, as both of these cases dealt with evidence that the defendants argue should have been created for it and thus should have been available, but was not because the evidence was never gathered during the investigation. In comparison, the issue here relates to the disclosure of the evidence that the State argues is not in its possession or control.

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[2] The quoted portion of this sentence is not found at the cite listed by the State. However, paragraph 58 of the Order for Dismissal provides that, "[t]he evidence seized by local law enforcement pursuant to the arrest of the Defendant, is evidence germane to this Defendant and this prosecution," while discussing that the State's "level of failure to properly disclose evidence smacks of gamesmanship and hiding behind the FBI." Order for Dismissal 12, ¶ 58. The State claims that this paragraph provides that "all evidence seized in a case is 'germane to this Defendant and this prosecution.' Appellant's Br. on Appeal 39. The State's miscited and misquoted rendition of the trial court's Order for Dismissal is noted here by this Court on appeal.

The State next argues that the trial court, "abused its discretion by making the underlying conclusion that correspondence of law enforcement was discoverable despite the plain language of I.C.R. 16(g)(1)(B) that established the unequivocal and unqualified point that "disclosure must not be required of: . . . (B) correspondence." Appellant's Br. on Appeal 40. However, the quoting of this rule highlights an important issue with the State's argument, as the State fails to include that immediately prior to the State's quoted section is the phrase "Work Product." I.C.R.16(g)(1). "Statutory interpretation 'begins with the literal language of the statute' and 'provisions should not be read in isolation, but must be interpreted in the context of the entire document.'" *Hayes v. City of Plummer*, 159 Idaho 168, 170, 357 P.3d 1276, 1278 (2015). In reading the word "correspondence" in context and not in isolation, the rule provides that "correspondence" which is "work product" must not be required. Work product is defined as "[t]angible material or its intangible equivalent that was either prepared by or for lawyer or prepared for litigation, either planned or in progress." Black's Law Dictionary, p. 379 (9th ed. 2010). Thus, for the correspondence to be non-disclosable, it must have been "either prepared by or for lawyer or prepared for litigation, either planned or in progress." The State does not make either of these arguments.

The State further asserts that, "consideration of federal authority that addresses the federal rule upon which Idaho Rule 16(g) was modeled is undoubtedly relevant and valuable." Appellant's Br. on Appeal 40. However, as stated by the trial court, the Idaho rule related to discovery does not go as far as the federal rule in regards to interpreting correspondence between agents of law enforcement agency constitute work product.

The expressed subsection of the Federal Rules of Criminal Procedure 16(a)(2) provides that:

> (2) *Information Not Subject to Disclosure*. Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

F.R.C.P. 16(a)(2). In comparison, the Idaho Criminal Rule 16 provides:

> (g) Prosecution Information Not Subject to Disclosure.
> (1) Work Product. Disclosure must not be required of:
> (A) legal research or of records,
> (B) correspondence, or
> (C) reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of the prosecuting attorney's legal staff.

I.C.R.16(g)(1)(A)-(C).

The State, in the alternative, argues that the correspondence is not in its possession, custody, or control. However, that argument is not proper when looking at it in light of an Order on Motion to Compel, as the State never made this objection prior to the filing of its already compelled Supplemental Response.

Idaho Criminal Rule 16(f) provides in relevant part that:

> **(f) Response to Request, Failure to File a Response.**
> (1) *Response to Request*. The attorney or defendant on whom a request has been served must file and serve a written response within 14 days of service of the request by filing the original copy with the court and serving a copy on the opposing party, which must state one or more of the following:
> (A) that the response has already been complied with and that the inquiring party has been furnished the information, evidence and material listed in the request;

(B) that there is no objection to the discovery of the information, evidence and materials sought by the request and that the opposing party will be permitted discovery at a time and place certain;
(C) that the responding party objects to part or all of the information, evidence and materials sought to be discovered, which objection must be specific and state all grounds for the objection.

(2) *Failure to Comply*. Unless otherwise ordered by the court on a showing of good cause or excusable neglect, the failure to file and serve a response within the time required by this rule constitutes a waiver of any objections to the request and is grounds for the imposition of sanctions by the court.

I.C.R. 16(f)(1)-(2).

In objecting to the now disputed request for "disclosure of correspondence between the individuals conducting the cellular extractions," the State only provided that it was protected under I.C.R.16(g)(1). The State did not provide that it was not in the possession, custody, or control. Idaho Criminal Rule(f)(1)(c) provides that the responding party must be specific and state all grounds for objection. This mandatory language precludes the State from subsequently bringing up new objections.

The authority for the trial court to issue disclosure is found in Idaho Criminal Rule 16(k), which provides that if "a party has failed to comply with a request for discovery under this rule, the court, on motion of a party, may" "(1) order a party to permit the discovery or inspection," "(2) prohibit the discovery of part or all of the information, evidence or material sought to be discovered, or" "(3) enter such other order as it deems just in the circumstances."

The State further argues, in part, that "naturally, seized evidence that falls outside any of these threshold parameters is not discoverable." Appellant's Br. on Appeal 38.

However, as discussed elsewhere in this Memorandum Decision and Order, the evidence freely given to the FBI was not seized evidence.

The State has not met its burden on appeal to show that the trial court abused its discretion by issuing an Order for Motion to Compel under Idaho Criminal Rule 16. Further, as discussed in detail above, the State does not meet its burden in showing that the trial court abused its discretion by finding and relying on, as a basis for its granting of Jessop's Motion to Dismiss, that the State failed to comply with its Order on Motion to Compel.

G. The Magistrate Court Did Not Abuse Its Discretion in Saying FBI Agent of the State for Discovery Purposes, or Stated a Different Way, that the Documents Held by the FBI Could be Discoverable by the Defendant.

The State argues that the trial court erred by basing the decision to dismiss the underlying case, in part, upon the "unsupported legal conclusion that the Federal Bureau of Investigation (FBI) was acting as an agent of the State during the course of this case" because it "never supported that conclusion with any relevant authority, nor did it ever require Respondent to do so; instead, it simply declared without any support that the FBI was an agent of Appellant for purposes of discovery in this case." Appellant's Br. on Appeal 42. More specifically, the State asserts that the trial court's "failure to address and resolve this factual issue and provide authority to support its resolution of that issue was an abuse of discretion because the magistrate court failed to identify any legal authority for the conclusion it reached, much less act consistent with that nonexistent legal standard" and that "because the magistrate court simply assumed that critical fact without any supporting authority or substantive analysis based on the

facts of this case, it did not reach that decision through an exercise of reason." Appellant's Br. on Appeal 43.[3]

At the time of their arrests, Jessop and his alleged co-conspirator's cell phones were seized by the Coeur d'Alene police department. Order for Dismissal 11, ¶ 56. Thereafter, the State provided conflicting information to the trial court on how (and why) the FBI obtained the devices. The final version of facts provided by the State, laid out below, is that the Coeur d'Alene police department delivered the seized devices to the FBI, while aware that there was not an issued warrant requiring such. Further, the record provides that the State was aware that these devices had been given to the FBI prior to the January 23, 2023, Supplement to Plaintiff's Discovery Response, wherein the State informed Jessop of the existence of the data, and that the State was periodically requesting updates from the FBI regarding the devices up until December 1, 2022, when the State was ordered in a separate case to provide all of the information obtained from the devices seized to each alleged co-conspirator.

In its March 28, 2023, Response to Defendant's Motion to Compel, the State asserts that it provided the "information [of the Cellebrite Reports] after receiving it back from the FBI's Intermountain West Regional Computer Forensics Lab in Salt Lake City, where the various devices had been taken and kept to perform those extractions and analyze the contents since approximately July 19, 2022." Resp. to Mot. to Compel 3. (emphasis of underlining added). The State further provided that it, "had requested

[3] It is noted by this Court that in the State's Reply Brief on Appeal, the State makes the additional argument that, "the magistrate court could have and should have held an evidentiary hearing at which Det. Welch could testify and make the record indisputably clear." Appellant's Br. on Appeal 14. While this argument was brought up for the first time in the reply brief, and therefore will not be considered by this Court on appeal, (*Bach*, 148 Idaho 790, 229 P.3d 1152), it is included here to show the continued lack of accountability by the State in this matter, as it was the State's own changing assertions related to the devices and the FBI's involvement that caused the record to be unclear.

periodic updates on the status of the extraction process and when it could expect the full results." *Id.*

Then, at the April 4, 2023, hearing on the Respondent's Motion to Compel, the State made the assertion that the delivery was pursuant to an obtained federal warrant:

> MR. HUNTER: The FBI was not directly involved in the initial investigation. They were contacted -- or actually, I think contacted Coeur d'Alene, were interested in being able to take a look at the devices, got their own warrant to be able to do so. We -- at no point were they acting under, I guess, our specific direction.
>
> THE COURT: How did they get these devices?
>
> MR. HUNTER: They applied for a federal warrant and obtained them.

Tr. 15:20 - 16:5. During this hearing, the State further provided that the FBI is a "is a partner that we worked with that," (*Id.* at 15:7) and again asserted that that the State had been requesting "periodically updates on the status of the information." *Id.* at 15:3.

Thereafter, at the August 9, 2023, hearing on the Respondent's Motion for Reconsideration and Motion to Dismiss, Counsel for the State asserted that it was unable to represent to the trial court that the warrant had been issued prior to the cell phones being delivered:

> THE COURT: When these cell phones were turned over, was there a warrant?
>
> MR. SIMMONS: I believe so. I also believe it was a sealed federal warrant.
>
> THE COURT: Okay. Do you know that to be true? I'm not asking about the existence of a sealed federal warrant. I'm simply asking when Detective Welch turned these phones over, had that warrant been issued?
>
> MR. SIMMONS: I believe so, but I cannot represent that for certainty, simply because Mr. Hunter and Mr. Somerton have taken almost exclusive control of these cases . . . .

Id. at 113:7-22. Now, during this pending Appeal, the State argues that:

> the inventory of the items seized was provided to the court the following day on June 13, 2022, and the Honorable Ross Pittman signed an *Order Preserving Seized Property* that same day, which authorized that the "property, or any part thereof, may be delivered to any persons or laboratory or laboratories for the purpose of conducting or obtaining tests, analysis, or identification of said property which is deemed necessary by said Peace Officer or the Prosecuting Attorney of Kootenai County or his deputies, without further order of this Court."
>
> Consistent with the authorization provided in the *Order Preserving Seized Property*, Det. Welch delivered the thirty-seven (37) seized electronic devices identified above to FBI Special Agent (SA) Benjamin Barron with the FBI's Salt Lake Division on July 19, 2022. At that time, Det. Welch was advised that the FBI was awaiting issuance of a federal search warrant they had sought for the contents of the devices as part of their own, independent investigation. . . .

Appellant's Br. on Appeal 8. The above is argument by the State, it is not evidence. There is not citation to the record in Jessop's case. As previously provided, the argument that the alleged authority to provide the phones to the FBI that the State claims the *Order Preserving Seized Property* provided was not an assertion ever brought by the State when this matter was in front of the trial court. Further, the alleged *Order Preserving Seized Property* is not included in the record on appeal.

Not to belabor the point, but even the immediately above mentioned recounting of facts by the State in its first briefing on appeal is different than that which is subsequently made in the State's Reply Brief on Appeal: "the sealed federal search warrant [the FBI] obtained as part of that separate investigation to access the electronic devices also authorized it to seize and hold them indefinitely." Appellant's Reply Br. on Appeal 14.

In its oral ruling at the August 9, 2023, hearing, on Jessop's Motion for Reconsideration and Motion to Dismiss, the trial noted that it:

THE COURT: . . . has reviewed the supplemental filings in this matter and the supplemental requests for discovery, and in one of those, Detective Welch says that he turned these cell phones over because the FBI was in the process of drafting a warrant, and the process of drafting a warrant is something different than seizing evidence pursuant to a warrant. . . .

Tr. 113:23 – 114: 4. Later, the trial court expands on this:

THE COURT: The supplemental from Detective Welch indicates that he turned the phones over pursuant to the drafting of a search warrant. I don't know if that means that the warrant wasn't issued yet. I don't know if it means if it was issued. In any event, I have no knowledge of that. I've asked that question at least three times now, and semantics aside, I haven't gotten a straight answer. . . .

Id. at 143:24- 144:6. This Court on appeal is not provided the supplemental report from Detective Welch as part of the record.

Continuing, the trial court went on to state that:

THE COURT: I have seen no warrant. The indication preliminarily is that Detective Welch turned those phones over while the FBI was working on a warrant, but not presented with a warrant. That's information that I do not have before me, and certainly, based on my review of everything I have before me, indicates that they were turned over to the FBI. They were not seized by the FBI.

Further, Mr. Hunter indicated that the FBI was not involved in the initial investigation. If they were not involved in the initial investigation, they are acting as agents of the State. . . .

Id. at 146:16 – 147:2.

These are consistent with the written Order for Dismissal, wherein the trial court found that the "phones were turned over to the FBI, not seized by the FBI," instead, "these devices were *seized* by the Coeur d'Alene Police Department." Order for Dismissal 11, ¶ 56. (emphasis in original). The trial court was told that the FBI was not

involved in the initial investigation, and that the trial court had "no information about how the FBI became involved," as "the only information" the trial court had was that, "Detective Welch turned the phones over to the FBI while warrant was being drafted." *Id.*

> While declaring "issues on appeal," the State provides this issue as:
>
> Did the magistrate court err in basing its decision to grant Respondent's third Motion to Dismiss pursuant to I.C.R. 48 in part upon the unsupported legal conclusion that the FBI was acting as an agent of the State when it sought and obtained a sealed federal search warrant that allowed it to seize and search the electronic devices in this case as part of its own, separate federal investigation?

Appellants Br. on Appeal 21, ¶ VI. There is no evidence in the record provided to this Court on appeal that the FBI ever sought and obtained a sealed federal search warrant, or any type of search warrant. There is nothing in the record that this undisclosed sealed federal search warrant allegedly obtained allowed the FBI to seize the devices. There is nothing in the record to indicate that the FBI ever initiated its own, separate federal investigation. The State's argument that the trial court abused its discretion by taking Jessop's claim that the FBI was acting as the State's agent when it when it took custody of the digital devices and then held them pursuant to a sealed federal warrant is unsupported by the record.

Instead, the trial court's determination that the FBI was an agent of the State for purposes of discovery is supported by the record and assertions made to the trial court. The record reflects that the seized devices were freely given by the State to the FBI, when the FBI was not involved in the initial investigation, and this occurred without the FBI obtaining a search warrant for the same. The reason that the devices were given, which is supported by the record, was for the FBI to conduct the extraction and analysis

of the contents of the devices. During this process, the State, who considered the FBI a "partner agency," was periodically requesting updates on this information.

What is more, after the appeal in this matter had been filed, the Idaho Supreme Court had an opportunity to determine what documents are considered to be in the prosecutor's "possession, custody, or control" as it relates to documentation held by other agencies, in its September 20, 2023, decision in *State v. Pendleton*, 537 P.3d 66, 2023 WL 6133219 (Idaho 2023). In such case, the Idaho Supreme Court agreed with the "prevailing view" of interpreting "possession, custody, or control," to "include materials in the hands of a governmental agency closely connected to the prosecutor." *Pendleton*, 537 P.3d 66, 76.

After noting that the federal counterpart has nearly identical language, the Idaho Supreme Court provided the following to interpret Idaho Criminal Rule 16(b)(4):

> Some federal courts have found that "the 'possession, custody, or control of the government' requirement includes materials in the hands of a governmental investigatory agency closely connected to the prosecutor." *United States v. Jordan*, 316 F.3d 1215, 1249 (11th Cir. 2003). *See also United States v. Scruggs*, 583 F.2d 238, 242 (5th Cir. 1978) ("Nor is the government excused from its obligation by the fact that the documents were in the possession of the FBI prior to trial."); *United States v. Ghailani*, 687 F. Supp. 2d 365, 372 (S.D.N.Y. 2010) (DOJ officials were "sufficiently involved with the prosecution" to be properly considered "the government" under Rule 16); 2 *Orfield's Criminal Procedure Under the Federal Rules* § 16:25 ("the 'possession, custody, or control of the government' requirement includes materials in the hands of a governmental investigatory agency closely connected to the prosecutor"). Another federal jurisdiction has indicated that "appellate authority" does not generally equate "government" with local law enforcement for the purposes of Rule 16 discovery. *United States v. Poulin*, 592 F. Supp. 2d 137, 142 (D. Me. 2008).
>
> In the Ninth Circuit, "the scope of the government's obligation" under the criminal discovery rule turns on "the extent to which the

> prosecutor has knowledge of and access to the documents." *United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995) (citing *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989)). "Documents held by another executive branch agency are deemed to be 'in the possession of the government' if the prosecutor has 'knowledge of and access to' the documents." *United States v. Cano*, 934 F.3d 1002, 1023 (9th Cir. 2019) (citing *Bryan*, 868 F.2d at 1036). While the prosecutor is not required to "comb the files of every federal agency," "[k]nowledge and access are presumed *if the agency participates in the investigation* of the defendant." *Id.* (emphasis added). *See also Bryan*, 868 F.2d at 1036 ("The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant."). Because prosecutors hold a "unique position to obtain information known to other agents of the government," they "have an obligation to disclose what they do not know but could have learned." *Cano*, 934 F.3d at 1023 (quotation marks and brackets omitted). This includes information from "investigating police officers, and sometimes extends to information held by other executive branch agencies." *Id.* (citations omitted).

Id. at 77. Next, the Idaho Supreme Court looked at other state's courts that have "similarly extended the scope of their 'possession, custody or control' prerequisites to records held by investigating agencies working in conjunction with the prosecution to investigate and try a defendant." *Id.*

> State courts interpreting "scope" clauses that do not refer specifically to investigating agencies have interpreted those clause [sic] as implicitly extending to items within the files of all those investigative agencies of the state that have participated in the development of the particular prosecution. Their files are deemed within the "control" of the prosecutor under provisions that refer to the "prosecution," or as items within the possession of the "government" that should be known to the prosecutor under the federal-type provision. Some courts have held that the prosecutor's control extends to records in the possession of "any ... prosecutor or law enforcement office" of the particular state, whether or not involved in the investigation or ordinarily reporting to the particular prosecutor.

> 5 Wayne R. LaFave et al., Criminal Procedure § 20.3(a) (4th ed. 2022). *See also Myers v. United States*, 15 A.3d 688, 690 (D.C. 2011) ("We have held that the duty of disclosure applies not only to the prosecutor's office, but also to all other investigative agencies of the government."); *Chambers v. People*, 682 P.2d 1173, 1180 n.13 (Colo. 1984) ("the prosecutor's duty of disclosure extends to material and information in the possession or control of all law enforcement agencies which 'have participated in the investigation or evaluation of the case and [which] either regularly report, or with reference to the particular case have reported, to his office.'" (alteration in original) (quoting Colo. R. Crim. P. 16(1)(a)(4)); *State v. Crews*, 296 N.C. 607, 252 S.E.2d 745, 752 (1979) (discussing N.C. Gen. Stat. § 15A-903(d) (1979)) ("'Within the possession, custody, or control of the State' as used in these provisions means within the possession, custody or control of the prosecutor or those working in conjunction with him and his office.").

Id. at 77–78. The Idaho Supreme Court then discussed the reasons for this, which it stated was "at least twofold." *Id.* at 78.

> First, law enforcement agencies typically work closely with the prosecution arm of the state to investigate and try criminal activity. As the Court of Appeals in Wisconsin explained:
>
> > For purposes of the criminal discovery statutes, we view an investigative police agency which holds relevant evidence as an arm of the prosecution. In most criminal cases, the evidence against the accused is garnered, stored and controlled by the investigating police agency. Depending upon local practice, many courts and district attorneys entrust the custody and control of such material to the police even after it has been elevated to formal evidentiary status in a criminal proceeding.
>
> *State v. Martinez*, 166 Wis.2d 250, 479 N.W.2d 224, 229 (Wis. Ct. App. 1991). Second, even where courts have concluded that law enforcement is *not* an arm of the prosecution, they have expressed concern for potential "mischief" and "gamesmanship" in the discovery process—especially in the context of *Brady* violations—because prosecution teams can keep evidence out of a defendant's hands simply by leaving it in the possession and control of another agency. *United States v. Marshall*, 132 F.3d 63, 69 (D.C. Cir. 1998); *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995); *Bryan*, 868 F.2d at 1036; *Poulin*, 592 F. Supp. 2d at 142–43. In *Marshall*, the District of Columbia Circuit determined that such

> circumstances plainly put the evidence within the prosecutor's "control" under Rule 16. 132 F.3d at 69.

Id. at 78. Finally, the Idaho Supreme Court provided that:

> if a law enforcement agency is involved in the prosecution of a defendant, then that agency's records—which are material to that defendant's guilt or innocence—are effectively within the possession, custody, or control of the prosecutor. *Cano*, 934 F.3d at 1023. While the prosecutor is not required to "comb the files of every ... agency," the prosecutor's possession, custody, or control of the evidence may be presumed "if the agency participates in the investigation of the defendant." *Id.* Or, as the Court of Appeals in Wisconsin articulated, the investigating police agency holding relevant and material evidence acts as an "arm of the prosecution" for the purposes of criminal discovery statutes. *Martinez*, 479 N.W.2d at 229.

Id.

With the proper analysis set forth above, this Court on appeal now turns to the matter at hand. At the onset of the investigation into Jessop and his alleged co-conspirator's phones were seized by the Coeur d'Alene Police Department. The Coeur d'Alene Police Department held these seized phones and other electronic devices until the agency willingly provided these phones to the FBI, "to perform th[e] extractions and analyze the contents." Resp. to Mot. to Compel 3. During this time, the State considered the FBI a "partner" that it was working with. Tr. 15:7. The FBI thus effectively was an agency that participated in the investigation of the defendant, therefore the prosecutor's possession, custody, or control of the evidence could be presumed.

Thus, when looking solely at the interlocutory issue (improperly) brought by the State in this appeal, that the trial "court abused its discretion by basing its decision to grant Respondent's third Motion to Dismiss in part upon the unsupported legal conclusion that the Federal Bureau of Investigation (FBI) was acting as an agent of the

State during the course of this case," (Appellant's Br. on Appeal. 42, ¶ VI), this Court on appeal finds the State's argument entirely unpersuasive. The trial court did not abuse its discretion in determining that the State's "possession, custody, or control" would be extended to the information held by the FBI, because the State's possession, custody, or control include materials in the hands of a governmental agency closely connected to the prosecutor. This has been made clear by the Idaho Supreme Court in *Pendleton*.

H. The Trial Court Did Not Misapply *Brady* to the Facts of this Case.

"Due process requires all material exculpatory evidence known to the State or in its possession be disclosed to the defendant." *Baker v. State*, 169 Idaho 284, 293, 494 P.3d 1256, 1265 (Ct. App. 2021) (quoting *Dunlap v. State*, 141 Idaho 50, 64, 106 P.3d 376, 390 (2004)). This obligation is not only for the individual prosecutor assigned to the case, but also extends to "all the government agents having a significant role in investigating and prosecuting the offense." *Id.* 169 Idaho at 303, 494 P.3d at 1275. "The prosecution has a duty to disclose evidence that is *both* favorable to the defense and *material* to either guilt or punishment." *State v. Campbell*, 170 Idaho 232, 509 P.3d 1161, 1176 (2022) (quoting *State v. Hall*, 163 Idaho 744, 830, 419 P.3d 1042, 1129 (2018) (emphasis in original). Beyond a mere duty to disclose, the State has an expanded "duty to include volunteering exculpatory evidence never requested, or requested only in a general way." *Thumm v. State*, 165 Idaho 405, 422, 447 P.3d 853, 870 (2019).

Establishing a *Brady* violation requires a three-part showing: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the State must have suppressed that evidence, either willfully or inadvertently; and

(3) prejudice must have ensued. *Id.*; *see also Thumm v. State*, 165 Idaho 405, 422, 447 P.3d 853, 870 (2019) (same); *Dunlap*, 141 Idaho at 64, 106 P.3d at 390 (same).

Exculpatory evidence is "evidence which clears or tends to clear an accused person from alleged guilt, or excuses that person." *Schultz v. State*, 155 Idaho 877, 882–83, 318 P.3d 646, 651–52 (Ct. App. 2013); *Gibson v. State*, 110 Idaho 631, 633, 718 P.2d 283, 285 (1986); *Baker v. State*, 142 Idaho 411, 422, 128 P.3d 948, 959 (Ct.App.2005). In comparison, impeachment evidence "is that which is designed to discredit a witness, i.e., to reduce the effectiveness of [the witness'] testimony by bringing forth evidence which explains why the jury should not put faith in [the witness or the witness'] testimony." *Id.*; *Small v. State*, 132 Idaho 327, 334, 971 P.2d 1151, 1158 (Ct.App.1998) (quoting *Zimmerman v. Superior Court in and for Maricopa County*, 98 Ariz. 85, 402 P.2d 212, 215 (1965)).

Further, prejudice is shown where the "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 proceedings would have been different.'" *Thumm v. State*, 165 Idaho 405, 422, 447 P.3d 853, 870 (2019) (quoting *Dunlap*, 155 Idaho at 389, 313 P.3d at 45; *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). "A reasonable probability of a different result is accordingly shown when the government undermines the confidence in the outcome of the trial." *Baker*, 169 Idaho at 304, 494 P.3d at 1276 (quoting *Thumm*, 165 Idaho at 422, 447 P.3d at 870 (internal quotation marks and citations omitted).

The Idaho Supreme Court has acknowledged that "late disclosure of evidence by the State may, in some cases, amount to a *Brady* violation." *Thumm,* 165 Idaho at 423, 447 P.3d at 871. It is noted here that the State argues that the trial court misapplied the *Brady* standard by citing this above assertion, as this "misstates the holding in *Thumm* and resulted in it being misapplied in this case." Appellant's Br. on Appeal 45 (citing to Order for Dismissal 8, ¶ 49). However, this Court on appeal does not find the State's argument is based in law or fact, as it is a direct quote from the Idaho Supreme Court's decision in *Thumm.*

In the first impression of this issue, the Idaho Supreme Court in *Thumm* looked to and agreed with the "rationale of" "persuasive cases" from other circuits for this assertion that late disclosure of evidence by the State may, in some cases, amount to a *Brady* violation. *Thumm,* 165 Idaho at 423, 447 P.3d at 871. In citing to a case from the First Circuit Court of Appeal, *Ingraldi*, the *Thumm* court quoted that "when the *Brady* issue is one of delayed disclosure, as opposed to nondisclosure, 'the test is whether defendant's counsel was prevented by the delay from using the disclosed material effectively in preparing and presenting the defendant's case.'" *Id.* (citing to *United States v. Ingraldi*, 793 F.2d 408, 412 (1st Cir. 1986)). The Idaho Supreme Court further quoted to the Tenth Circuit Court of Appeal, which:

> has recognized that "[i]t would eviscerate the purpose of the *Brady* rule and encourage gamesmanship were we to allow the government to postpone disclosures to the last minute, during trial." *United States v. Burke,* 571 F.3d 1048, 1054 (10th Cir. 2009). "[T]he belated disclosure of impeachment or exculpatory information favorable to the accused violates due process when an 'earlier disclosure would have created a reasonable doubt of guilt.'" *Id.* (quoting *United States v. Young,* 45 F.3d 1405, 1408 (10th Cir. 1995)). The court held further:
>
> > Where the district court concludes that the government was dilatory in its compliance with *Brady*, to the prejudice of the defendant, the

> district court has discretion to determine an appropriate remedy, whether it be exclusion of the witness, limitations on the scope of permitted testimony, instructions to the jury, or even mistrial.

Id. After the *Thumm* court stated it agreed "with the rationale of these persuasive cases," it provided that "when the State is 'dilatory in its compliance with Brady,' the trial court is given discretion to determine the appropriate remedy to address the State's carelessness." *Id.*

The *Thumm* court did caution though that, "not every delay in disclosure of *Brady* material is necessarily prejudicial to the defense." *Id.* (quoting *Burke,* 571 F.3d at 1056). "To justify imposition of a remedy, the defense must articulate to the district court the reasons why the delay should be regarded as materially prejudicial." *Id.* Continuing, the *Thumm* court provided that "when assessing the materiality of such a late disclosure, [court's should] consider the significance of the late disclosure in light of the entire record" and that "the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* (quoting to *United States v. Gonzalez-Montoya*, 161 F.3d 643, 650 (10th Cir. 1998), and to *Strickler v. Greene*, 527 U.S. 263, 290, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), respectively).

With the standards set out, the *Thumm* court did not find a *Brady* claim where a piece of evidence was "ultimately disclosed, even if only a week before trial" and defendant's Counsel "had enough time to review the report and use its conclusions if [Counsel] sought to do so." *Thumm*, 165 Idaho at 424, 447 P.3d at 872. The *Thumm* court additionally noted that there was "no evidence that the State's prosecutors knowingly or even negligently *suppressed* evidence from the defense," as the record

showed that, "while the fingerprint report was tendered to defense counsel about a week before trial, it was tendered at the same time the State received the report from the State crime laboratory. Thus, there was no purposeful delay or even negligent delay by the prosecutor leading to the late production of the evidence." 165 Idaho at 423, 447 P.3d at 871 (italics in original).

As the Supreme Court has explained, "[t]he *Brady* rule is based on the requirement of due process." *Campbell*, 170 Idaho at 248 (quoting *United States v. Bagley*, 473 U.S. 667, 675 (1985)). "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." *Id.* (footnote omitted). "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[.]" *Id.*

In the matter at hand, the State disclosed the existence of the data received from the cell phone and other device extractions on January 23, 2023, after a Motion to Suppress, Motion to Dismiss, and stipulated motions to continue had already been heard in the case. The State had been aware of the devices sent given to FBI for analysis on July 19, 2022, and that the State had been "ordered in a separate case on December 1, 2022, to provide all 3.5 TB to each defendant." Resp. to Mot. to Compel 3. Still, the State provided during this time that no further information had been requested, and the State did not notify Jessop, his attorney, or the trial court of "the existence of the additional evidence or the names of the additional witness or witnesses in order to allow the other party to make an appropriate request for additional discovery or inspection" under it's continuing duty to disclose pursuant to Idaho Criminal Rule

16(f). The information was not tendered to the defense counsel at the same time that it was disclosed to the State, as was the case in *Thumm*. Further, Jessop's counsel, at the time that the trial was continued, had not had enough time to review the evidence, due to the large amount of data contained within the over three terabytes of data disclosed, in comparison to the relatively simple finger print report provided for in *Thumm*.

Jessop provided to the trial court that there was evidence found in the late disclosure that was favorable and negated his guilt on the charged crime, conspiracy to riot:

> Mr. SCHWARTZ: The State says that the accoutrement that these people are wearing is indicative of their intent to do violence. There are pictures on these phones that show them in the exact same outfits and same equipment peacefully protesting at previous occasions. This is a conspiracy case, Judge. It's not that they actually did something. It's that they -- the State's theory is that they were planning on doing something, so it's purely based on intent, and I can use that to show the jury that they've done this many times and never had a violent encounter. It's clearly relevant to show if they were planning on committing a violent act or planning to riot.

Tr. 53: 8-21.

Further, as the U.S. Supreme Court held in *Brady*: "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 of bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. 1194; *State v. Sarbacher*, 168 Idaho 1, 4–5, 478 P.3d 300, 303–04 (2020). Here, the trial court found that the State's suppression rose to a level of bad faith. Order for Dismissal 10-11, ¶ 54. While

the finding of bad faith is not necessary for a *Brady* violation, the trial court nonetheless found that the State had suppressed the favorable evidence, which goes to establishing a *Brady* violation. That finding by the trial court is supported by substantial, competent evidence in the record. This finding that the State suppressed the evidence is not clearly erroneous.

In further support of this finding, this Court on appeal would add that the record reflects that on December 8, 2022, Counsel for the State filed a Motion for Zoom Participation at Trial, where it moved the trial court for "an Order permitting Zoom participation of ISP Trooper Michael Archer at the jury trial in this matter scheduled for the week of December 19, 2022." December 8, 2022, Mot. for Zoom Participation at Trial 1. This motion by the State, asserted that: "due to the physical impossibility for Trooper Archer, who is a material witness in this matter, to personally appear for trial as scheduled, allowing him to testify by Zoom video conference would be in the interest of justice and efficient administration of this case." *Id.* The presumption that follows this filing for a witness's remote participation at the trial is that the State did not anticipate the trial being continued to a time where Trooper Archer could be physically present; the State did not ask for a continuance of the trial. This Motion was made after the State "was ordered in a separate case on December 1, 2022, to provide all 3.5 TB to each defendant." Resp. to Mot. to Compel 3. The State had not provided that information to the Jessop, and did not indicate in this motion or otherwise that this information was forthcoming. Instead, the State attempted to continue full speed ahead with the trial set without disclosing the information to Jessop or indicating to him that the information was forthcoming.

Further, the *Sworn Complaint* in this matter, filed on September 22, 2022, 102 days after Jessop was arrested, provides that Jessop, "on, about, or between February 25 and June 11, 2022, did willfully and knowingly combine and/or conspire, with one or more other persons, to commit the crime of Riot," (Sworn Compl. 1) and further alleges that:

> 1. On, about, or after February 25, 2022, Thomas Rousseau, Defendant, and/or other co-conspirators did knowingly and willfully agree, and did begin planning and preparing, to disrupt the Pride in the Park event scheduled to occur at City Park in the City of Coeur d'Alene, Kootenai County, State of Idaho, on June 11, 2022, and disturb the public peace of the individuals in attendance.
>
> 2. Pursuant to that agreement, and as part of their planning and preparations, Thomas Rousseau, Defendant, and/or other co-conspirators created a written document that detailed their plan and intent to meet near Coeur d'Alene on June 10, 2022; rent a U-Haul moving truck for the purpose of covertly transporting they and their co-conspirators to City Park in Coeur d'Alene on June 11, 2022; and deploy near City Park with the intent to enter it and create "an appropriate amount of . . . confrontational dynamic" at the Pride in the Park event and with the attendees thereof.

Id. at 2 ¶¶ 1, 2.

The cell phone records of the defendants included text messages, and the State acknowledged that some of which would be relevant to the matter at hand:

> MR. HUNTER: Certainly. There's -- there are a lot of text messages. Now, the time frame that would be relevant for this case is pretty limited.

Id. at 79: 3-4.

Text messages between Jessop and his other alleged co-conspirators that showed their alleged planning and preparing to disrupt the Pride in the Park event, or the lack of these messages, as the State has provided that it did not plan to introduce anything located on the phones at trial, would support a conclusion that the State had

suppressed favorable evidence. The charges in this matter allege that the co-conspirators made an agreement, and began planning and preparing to disrupt an event at the park and the individuals in attendance. The correspondence between these individuals could be highly dispositive of these claims.

Finally, Jessop was able to show that prejudice had occurred, which included his counsel's hindrance of using the disclosed material effectively in preparing and presenting his case at his underlying Motions to Dismiss, Motion to Suppress, and the continuance of the trial that was caused by the same. The trial court provided that, "based on the late and/or non-disclosure of evidence, justice would require the Court to grant Mr. Jessop a second *Motion to Suppress* based upon the evidence disclosed after the initial *Motion to Suppress* was heard." Order for Dismissal 9, ¶ 51. In light of the entire record, including other late disclosures by the State (the supplemental reports and the body cam videos), this late disclosure was significant. The State was required to disclose to Jessop evidence favorable to him, that if suppressed, would deprive him of a fair trial. The suppression of the evidence that provided Jessop the ability to show that the alleged co-defendants had not discussed a conspiracy to riot, and/or that they were going to peacefully protest would deprive Jessop of a fair trial on the alleged crime of conspiracy to riot.

Finally, as argued by Jessop, the Ninth Circuit has not limited *Brady* exclusively to trial, when the information is not inculpatory, but is helpful to the accused. Respondent's Br. 44-45 (citing to *United States v. Gamez-Orduno*, 235 F.3d 453 (9th Cir. 2000) (applying *Brady* to suppression hearings); and *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995) (holding that *Brady* applies during plea hearings)). Instead, the

Ninth Circuit has held that "[t]he suppression of material evidence helpful to the accused, whether at trial or on a motion to suppress, violates due process if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Gamez-Orduno*, 235 F.3d at 461. Such a violation can be cured, but only if the disclosure occurs "at a time when disclosure would be of value to the accused." *Id.* This assertion that a *Brady* violation could occur prior the conclusion of a jury trial is further supported by the State, when it asserts that "courts typically review *Brady* violations post-trial." Appellant's Br. on Appeal 44 (quoting *United States v. Lewis*, 368 F.3d 1102, 1107 (9th Cir. 2004) (citing *United States v. Smith*, 282 F.3d 758, 770 (9th Cir. 2002)) (emphasis added).

This Court on appeal finds that a *Brady* violation was shown by Jessop. The evidence of the "peaceful protests" by the Patriot Front that was suppressed by the State is deemed exculpatory evidence, because it would clear or tend to clear Jessop of the alleged crime of conspiracy to riot. The State suppressed this evidence, and it had been aware of the evidence, as it claimed that as of May 31, 2023, the State had gone through most of the information. Tr. 90:24. Further, the State had been compelled in another case to disclose the evidence produced by the devices analysis on December 1, 2022. However, the State failed to inform Jessop that this information was forthcoming until January 23, 2023. During this period, the parties were participating in multiple Motion to Suppress hearings. Though this, Jessop showed prejudice by showing that the government conduct had undermined the confidence in the outcome of the State. Jessop's counsel was not able to use the information on the devices in preparing and presenting Jessop's case. This point is further evidenced by the trial

court's assertion that "based on the late and/or non-disclosure of evidence, justice would require the Court to grant Mr. Jessop a second *Motion to Suppress* based upon the evidence disclosed after the initial *Motion to Suppress* was heard." Order for Dismissal 9, ¶ 51 (emphasis in original).

However, even if the trial court would have been wrong in its application of *Brady* to this matter, it would not have been dispositive of the appeal of the Order for Dismissal. The trial court's dismissal of the case was pursuant to Idaho Criminal Rule 48. In making the determination under that criminal rule if the dismissal would serve the ends of justice and the effective administration of the court's business, the trial court considered multiple factors, including the State's late and non-disclosure of evidence. The trial court did not dismiss the case under *Brady*. Instead, the trial court considered the State's mishandling of discovery, which it deemed a *Brady* violation, as a basis for dismissal under Idaho Criminal Rule 48. If the trial court had not deemed the mishandling of the disclosure of the evidence a *Brady* violation, the mishandling of the disclosure of the evidence would have still been considered in the trial court's dismissal under Idaho Criminal Rule 48.

I. The Trial Court Misapplied *Youngblood* to the Facts of this Case by Deeming the Evidence Withheld by the State as Lost or Destroyed.

"The due process clause of the Fourteenth Amendment requires that criminal prosecutions comport with prevailing notions of fundamental fairness," which "requires a meaningful opportunity to present a complete defense" and "constitutionally guaranteed access to evidence." *State v. Sarbacher*, 168 Idaho 1, 4, 478 P.3d 300, 303 (2020) (quoting *Lewis,* 144 Idaho at 66, 156 P.3d at 567.) Thus, the State has a constitutional duty to disclose "all material exculpatory evidence known to the state or in its

possession." *Id.* *(See Brady,* 373 U.S. 83, 86-88, 83 S.Ct. 1194); *Grube v. State,* 134 Idaho 24, 27, 995 P.2d 794, 797 (2000). "This is a crucial protection under the Fourteenth Amendment because it helps ensure the fair administration of justice." *Id.* at 5, 478 P.3d at 304 (quoting *Id.* at 87-88, 83 S.Ct. 1194). In addition, "a constitutional violation for failure to disclose material evidence requires a showing of 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* (quoting *Stuart v. State,* 127 Idaho 806, 815, 907 P.2d 783, 792 (1995).

While *Brady* applies when the State fails to disclose *known* exculpatory evidence, the Idaho Supreme Court applies a different federal precedent in cases where the State has failed to preserve material evidence of unknown exculpatory value: *Youngblood.*

> *[I]f the nature of the evidence lost or destroyed is unknown,* and cannot be established indirectly by other testimony or evidence, *then the materiality tests are not meaningful.* In those cases, it would appear necessary to *focus primarily upon the reasonableness of the government's conduct,* placing a heavy burden upon the government to show that none of its procedures, or the conduct of its agents, has been tainted by disregard for an accused's right to a fair trial.

State v. Sarbacher, 168 Idaho 1, 6, 478 P.3d 300, 305 (2020) ((quoting *State v. Leatherwood,* 104 Idaho 100, 103, 656 P.2d 760, 763 (Idaho Ct. App. 1982) (emphasis in original)). Evidence is "material" under this standard if, viewed in relation to all competent evidence admitted at trial, it appears to raise a reasonable doubt concerning the defendant's guilt. *Id.* This court notes here on appeal that the Idaho Supreme Court in the type of case that is presented, places the "heavy burden upon the government to show that none of its procedures, or the conduct of its agents, has been tainted by disregard for an accused's right to a fair trial." *Id.* The State does not meet its burden, either on this appeal or in the underlying matter.

In discussing the State's failure to produce the compelled evidence the trial court provided it was:

> viewing the evidence it is withholding as lost evidence. Pursuant to *Stuart v. State*, 127 Idaho 806, 907 P.2d 783 (1995), where destroyed evidence is of unknown value, the Court adopts the test in *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). This test dictates that materiality and prejudice to the defense can be presumed where the government acts in bad faith. As outlined in *State v. Sarbacher*, 168 Idaho (2020), bad faith is high bar and requires more than mere negligence. Rather, bad faith refers to calculated effort to circumvent the disclosure requirements under *Brady*. Deviation from normal practice must be accompanied by additional evidence of intent and calculated efforts.

Order for Dismissal 10, ¶ 53. The trial court found that the State's actions through the, "totality of the dilatory discovery violations, the refusal to comply with the Court's Order regarding the Motion to Compel, the failure to appear for Court, the fourteen month long drip of discovery, the State's insistence at every turn that it has complied with discovery, that it has turned over everything, that it is prepared for trial" rose to the level of bad faith. *Id.* at 10-11, ¶ 54.

This Court on appeal freely reviews the application of constitutional principles to the facts as found by the trial court.

A *Youngblood* analysis is applicable to material evidence that the State has failed to provide material evidence of unknown exculpatory value, and if the nature of the evidence is lost or destroyed. Here, the trial court provided that it was viewing the evidence the State is withholding as lost evidence, the authority for which was not provided. *Id.* at 10 ¶ 54. The State argues that: "Simply declaring that undisclosed information is lost or destroyed, as the magistrate court did her[e], is an abuse of discretion because it is not a decision reach[ed] by an exercise of reason nor consistent with the applicable legal standard before it." Appellant's Br. on Appeal 48. This Court

on appeal agrees, and finds that the trial court's determination that the undisclosed information was lost or destroyed, was in error.

However, because this case was not dismissed only pursuant *Youngblood*, this determination by this Court on appeal does not warrant reversal of the case. As the case was dismissed pursuant to Idaho Criminal Rule 48, the trial court considered the *Youngblood* violation in context of the entire case to determine if the dismissal would serve the ends of justice and the effective administration of the court's business. The non-disclosure, even though it did not rise to the level of a *Youngblood* violation, was still able to be considered by the trial court in its determination.

J. The Trial Court's Granting of Jessop's Motion for Dismissal Pursuant to Idaho Criminal Rule 48 is Affirmed.

To the extent that the State argues that the trial court's granting of the Motion to Dismiss was in general an abuse of discretion, this Court on appeal analyzes this argument. As this Court provided for above, when a decision on a motion to dismiss is challenged, "the Court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to the facts as found." *State v. Bodenbach,* 165 Idaho 577, 589, 448 P.3d 1005, 1017 (2019)

The trial court dismissed the action pursuant to Idaho Criminal Code 48, which provides:

> (a) Dismissal on Motion and Notice. The court, on notice to all parties, may dismiss a criminal action upon its own motion or upon motion of any party upon either of the following grounds:
>
> > (1) For unnecessary delay in presenting the charge to the grand jury or if an information is not filed within the time period prescribed by Rule 7(f) of these rules, or for unnecessary delay in bringing the defendant to trial, ...

> (2) for any other reason if the court concludes that dismissal will serve the ends of justice and the effective administration of the court's business.

I.C.R. 48(a)(1),(2). Rule 48(a) uses the permissive term "may dismiss" rather than a mandatory "shall dismiss" and therefore, a reviewing court views the dismissal motion in a case to have been subject to the trial court's discretion. *State v. Dixon*, 140 Idaho 301, 304–05, 92 P.3d 551, 554–55 (Ct. App. 2004); *See State v. Dudley,* 104 Idaho 849, 851, 664 P.2d 277, 279 (Ct.App.1983). "[A]n order of dismissal must state the reasons for dismissal." *State v. Roth*, 166 Idaho 281, 284, 458 P.3d 150, 153 (2020) (quoting *State v. Dieter*, 153 Idaho 730, 733, 291 P.3d 413, 416 (2012)). Idaho Criminal Rule 48 is considered with the directive of I.C.R. 2(a) that provides that: "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and elimination of unjustifiable expense and delay." *See Id.* This Court on appeal notes that the State makes the bold assertion that, "[d]ismissal under Rule 48 is a drastic, last resort option reserved for only the most exceptional cases," (Appellant's Br. on Appeal 32) but the State provided no citation or authority for this assertion.

The trial court looked at the mistakes present in the prosecution of this matter, starting from the defective citation filed on June 12, 2022, charging Jessop with Idaho Code 18-1701, because there "was nothing annotated to give [ ] Jessop notice of what crime he was alleged to have conspired to commit," (Order for Dismissal Pursuant to Idaho Criminal Rule 48. 1, ¶ 1), as well as the initial discovery response provided for by the State, including that indicated that the State had not requested any additional information, and noted that "[t]here was also link for CVs of expert witnesses, but the link was inactive."' *Id.* at 2, ¶ 4.

The trial court noted the State's noncompliance with the trial court's Orders (*Id.* 10, ¶ 52), and how the "State did not seek to reconsider the Court's decision, the State did not seek permission to appeal the Court's decision, the State simply chose to ignore the Court's Order and opine that the Court had not the authority to compel the disclosure." *Id.* at 7, ¶ 42. The trial court further noted the State's failure to appear for the Motion to Reconsider hearing. *Id.* at 7, ¶ 43.

The trial court noted the number and timing of the State's supplemental discovery responses, especially in light of the State's repeated claims that it was prepared for trial and had timely provided all discovery in the State's possession. *Id.* at 8, ¶ 48. This included the City Park permit from the day of the incident in June of 2022, being disclosed in the August 1, 2023, supplemental response to discovery. *See Id.* This further included, "Officer Welch's supplemental report [which] was completed in January but not disclosed until March," and that, "[e]ight months after Mr. Jessop's arrest, the State submitted body camera footage from Coeur d'Alene Police officer." *Id.* at 11, ¶ 56.

The trial court considered that, "based on the late and/or non-disclosure of evidence" by the State, "justice would require the [c]ourt to grant Mr. Jessop a second *Motion to Suppress* based upon the evidence disclosed after the initial *Motion to Suppress* was heard" which would "push the trial out over eighteen months based upon delays largely caused by the State." Order for Dismissal 9, ¶ 51. The trial court additionally looked at the additional sanctions, such as continuances and preclusion of evidence, but determined that those sanctions would not allow Jessop to receive a fair

trial (*Id.* at 13, ¶ 60) and "would not promote justice and would undermine the integrity of the entire judicial process." *Id.* at 9, ¶ 51.

Here, freely applying the trial court's finding of facts, this Court on appeal finds that dismissal under Idaho Criminal Rule 48 was appropriate as it would serve the end of justice and the effective administration of the court's business. The trial court did not abuse its discretion in doing so. The trial court's decision to dismiss the case was not clearly erroneous.

This Court looks at this determination in the light of fairness of the administration, wherein there are multiple instances of gamesmanship of the State apparent in the case. For example, on December 19, 2022, the parties filed a Stipulated Motion to Continue Trial, which was, "based upon the fact that the dispositive motions have not been fully submitted and ruled upon as of this point, both parties agree that in the interests of judicial economy it is best to continue the matter until those issues are resolved." Stipulated Mot. to Continue 1. During this time, wherein the dispositive motions referenced above included Jessop's Motion to Suppress, the State had been ordered to disclose the data extracted by the FBI to Jessop and his other co-conspirators. Resp. to Mot. to Compel 3. The State did not inform the trial court or Jessop that this information was forthcoming, or that it had been compelled to disclose this information nineteen days earlier. The State did not disclose the information it was compelled to in another case to Jessop for over month after this Stipulation, on January 23, 2023. The overarching example here being the argument the evidence that the FBI possessed, which the Coeur d'Alene Police Department willingly gave for them to investigate the contents, was not in the possession, custody, or control of the State.

Further, Idaho Criminal Rule (2)(a) directive provides that the determination of dismissal under Idaho Criminal Rule 48 is looked at for the elimination of unjustifiable expense and delay. Though Jessop was appointed a conflict public defender in this matter, and thus the expense when it comes to Jessop personally is minimally low, there has been substantial costs to Kootenai County between the hours provided for by the assigned conflict public defenders, the State prosecutors, the Judges, and court staff. Additionally, the unjustifiable delay by the State cannot be overlooked. The alleged conspiracy to riot charged by the State against Jessop, was alleged to occur from February 2022 to June 2022, yet the State did not disclose the "Certified copies of City Park Permits issued for the day of June 11, 2022" until August 1, 2023. This dilatory way that the State handled its discovery responses prompted a Motion to Compel, and multiple continuances of the scheduled trial. In the same regard, the State's nonappearance at a hearing prompted a continuance of that hearing.

The dismissal of the underlying action served the ends of justice and the effective administration of the court's business. The trial court's granting of the Motion to Dismiss under Idaho Criminal Rule 48 is affirmed. Judge Randels did not abuse his discretion in granting Jessop's Motion to Dismiss. Judge Randles' granting of Jessop's Motion to Dismiss was not clearly erroneous, and it was supported by substantial evidence in the record.

IV. CONDUCT OF THE STATE'S COUNSEL BEFORE THIS COURT ON APPEAL.

This Court finds the much of the conduct of Ryan S. Hunter, Deputy Prosecuting Attorney for the plaintiff/appellant State of Idaho, on its appeal before this Court, to be quite troubling. The conduct before this Court on appeal has no bearing on this Court's

decision to affirm Magistrate Judge Destry Randles, in his decision to grant Jessop's Motion to Dismiss. The purpose of this Court in discussing Mr. Hunter's conduct is to hopefully provide Mr. Hunter (and other members of the bar) with some professional and ethical guidance moving forward. Each of the following instances this Court finds troubling enough to provide comment, and collectively, these instances of Mr. Hunter's conduct are even more concerning.

All attorneys in this State are bound by the Idaho Rules of Professional Conduct. Prosecuting Attorneys and Deputy Prosecuting Attorneys have additional applicable rules. Idaho Rule of Professional Responsibility 3.8 is entitled "SPECIAL RESPONSIBILITIES OF A PROSECUTOR." Specific attention should be paid by Mr. Hunter in the future, to I.R.P.C. 3.8(d) and (g). Mr. Hunter is advised to read I.R.P.C. 3.2, "EXPEDITING LITIGATION", all subsections of I.R.P.C. 3.3, "CANDOR TO THE TRIBUNAL", all subsections of I.R.P.C. 3.4, "FAIRNESS TO OPPOSING PARTY AND COUNSEL", and all subsections of I.R.P.C. 3.5. All of those rules apply to all Idaho attorneys.

A. Claims of Bias.

Specifically, Mr. Hunter would do well to heed I.R.P.C. 3.5 "commentary" [4]:

> The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

When this Court on appeal first began reading Mr. Hunter's Appellant's Brief on Appeal, it began a tally every time Mr. Hunter accused Judge Randles of being biased. Soon though, such claims were so frequently made that this Court abandoned the tally.

Assuming for the moment, and only for the sake of discussion, that Judge Randles was biased in this case, it would not matter on appeal. Mr. Hunter has failed to realize any bias by the trial court is not relevant before this Court on appeal. What is relevant before this Court on appeal is whether or not Judge Randles got things right. In general, what is usually relevant before this Court on appeal is whether the trial court stated the law correctly, applied the law correctly to the facts, and whether the trial court's findings of fact are supported by the evidence. Specifically though, in this case on appeal, the issue is did Judge Randles abuse his discretion. Given that singular issue, it matters not if Judge Randles was biased. The only thing that is relevant is whether Judge Randles' ultimate decision to dismiss this case was supported by substantial competent evidence, thus not clearly erroneous, thus acting within the bounds of his discretion. Under that standard, stated three different ways (supported by substantial evidence, not clear error, not an abuse of discretion), bias is not an issue. Bias is simply not relevant in this appeal. By repeatedly chanting the claim of bias countless times in his briefing, Mr. Hunter does not succeed in making the irrelevant (bias), somehow relevant.

Repeatedly casting the aspersion of "bias" upon Judge Randles also seems to be very short sighted by Mr. Hunter. Members of the Coeur d'Alene City Attorney's office most often (nearly exclusively save for appeals from the Magistrate Division) appear before First District Magistrate Judges, one of whom is Judge Randles. Why a member

of the Coeur d'Alene City Attorney's Office would tag Judge Randles with the moniker "biased", when that member knows he will in all likelihood appear in front of that judge in the future in some other case (as will his co-workers), is certainly beyond this Court's understanding.

B. Ignorance of Violation of the Idaho Appellate Rules.

When this Court on appeal first began reading Mr. Hunter's Appellant's Brief on Appeal, from the moment it looked at page five, the start of the brief on appeal, the "Statement of Case" section, the Court immediately noticed three things. The Court brought one of these to Mr. Hunter's attention at the oral argument before this Court on February 21, 2024.

Glaringly apparent is the fact that Mr. Hunter used space and a half throughout all of both of his briefs on appeal, which violates I.A.R. 36(b). Idaho Appellate Rule 36(b) requires all parties to use 12 point Times New Roman and double spacing. The impact of this is significant as Mr. Hunter's opening brief is 50 pages long, which is the maximum length for any brief under I.A.R. 34(b). All Idaho Appellate Rules are applicable to the attorneys before this Court on appeal, pursuant to I.C.R. 54(o). By violating I.A.R. 36(b) by not double spacing, Mr. Hunter thwarts the page limitation rule of I.C.R. 34(b) by being able to submit what amounts to a more than 60 page brief, had he double spaced. Clearly, Mr. Hunter has not followed a very simple and straightforward rule when he wrote both of his briefs. The Court pointed this out this rule violation to Mr. Hunter at oral argument on February 21, 2024. Instead of taking responsibility for that rule violation, Mr. Hunter said, "That must be our default setting at the City Attorney's Office." Even if that claim were true, that space and a half is the

default setting at the City Attorney's Office, Mr. Hunter is charged with knowledge of the Idaho Criminal Rules and the Idaho Appellate Rules. When this Court pointed out to Mr. Hunter, the violation of rules he committed, Mr. Hunter had a great opportunity to take responsibility for that rule violation by stating: "I am sorry your Honor, I take responsibility for that error, it is my signature on page 50, and it is my responsibility to make sure I comply with the rules, it won't happen again." Instead, Mr. Hunter laid the responsibility for this rule violation in the briefs that he wrote, on some IT (Information Technology) person within the City of Coeur d'Alene. It would seem Mr. Hunter has difficulty taking responsibility for the mistakes he has made.

This is especially pertinent given the mistakes made by counsel for the plaintiff, the State of Idaho, while he was prosecuting this case before Magistrate Judge Destry Randles. As mentioned, the only issue on appeal is whether the decision by Judge Randles' decision to grant Jessop's motion to dismiss, is supported by substantial evidence. Judge Randles' decision to grant Jessop's motion to dismiss was in turn, based on several mistakes in discovery made by counsel for the State over a long period of time. For example, one of the discovery lapses by the State which lasted over a month, Mr. Hunter gave Judge Randles and opposing counsel the excuse that it "fell off his radar." Appellant's Br. on Appeal 35, citing to Ex. To Mot. for Sanctions 4, Attachment, 2-3; Order for Dismissal Pursuant to I.C.R. 48, 10, ¶ 54. That it "fell off his radar" is simply not a valid excuse for a mistake in failing to provide mandatory discovery. Not taking responsibility for a key mistake only compounds the problem.

Another example is the discovery itself, or lack thereof. Even though local law enforcement (City of Coeur d'Alene Police) were in charge of collecting and maintain

the evidence, and even if those City gave some of that evidence to the FBI, it is not the City of Coeur d'Alene Police Officers or the FBI agents who are responsible for complying with the Idaho Criminal Rules as they pertain to discovery...it is Mr. Hunter. It is Mr. Hunter who signs discovery requests and responses. It is Mr. Hunter's responsibility alone, albeit with assistance of those officers and agents, to make sure Mr. Hunter's client, the State of Idaho, complies with the Idaho Criminal Rules.

Idaho Appellate Rule 35(a)(3) also defines and delineates the elements of which the Statement of the Case portion of an Appellant's brief consists. Those elements are "(i) A statement of the case indicating **briefly** the nature of the case, (ii) The course of the proceedings in the trial court or the hearing below and its disposition, and (iii) A **concise** statement of the facts." What Mr. Hunter submitted is sixteen pages (again, not double spaced) of anything but a concise and brief description of the proceedings. About half way through that sixteen page section, the aspersions of defense counsel began: "From the outset of the hearing held that day, Respondent's arguments were infected with petty (and false) personal attacks directed toward a specific attorney for Appellant." Appellant's Br. on Appeal 13. Then, Mr. Hunter let fly his casting of his aspersions upon Judge Randles:

> Instead of placing the burden on Respondent of establishing the threshold showing that he made a valid request for discoverable information that Appellant failed to respond to or comply with, the magistrate court instead assumed the procedural validity of Respondent's *Motion to Compel* and reversed that burden onto Appellant to explain why Respondent's request should not be granted. *See, e.g., Trans. on Appeal*, p. 13; p. 14, l. 1.
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> Moreover, the magistrate court raised legal counterarguments on Respondent's behalf based on alleged "case law" that was never specifically provided. *See Trans. on Appeal*, p. 15, ll, 8-17. The magistrate court never asked Respondent to address Appellant's argument that Respondent had failed to make any effort to request the

information identified in his *Motion to Compel* before filing that Motion. Nor did the magistrate court require Respondent to address the relevance of the practical reality of the situation Appellant had raised and Responded had not factually disputed—the FBI having physical possession of the seized electronic devices since July 19, 2022—on what Appellant could provide in discovery on that issue. Instead, the magistrate court again argued on Respondent's behalf to the point that Appellant had to correct the magistrate court's representations as to what Appellant had argued. *See Trans. on Appeal*, p. 19. The magistrate court continued to carry Respondent's argument by focusing on the alleged need for the requested information to lay foundation for introduction of the extracted contents from Respondent's own phone. *See Trans. on Appeal*, p. 19-20. However, the magistrate court neither required Respondent to provide, nor itself identified, what authority required Appellant to obtain and provide information like curriculum vitae for witnesses Appellant did not intend to have testify at trial. Respondent was also never required to show any efforts he made to obtain the requested information on his own. *See Trans. on Appeal*, pp. 20-21.

* * *

After Respondent finished his argument, the magistrate court noted that it had "some concerns about the way that discovery's been handled in this matter," adding that the magistrate had "handled homicide cases where their [sic] weren't ten supplemental discovery responses spanning a period of one year." *Trans. on Appeal*, p. 25, l. 25; 26, ll.1-4. The magistrate court did not explain the relevance of this aside or identify any authority that even suggested that the number of supplemental discovery responses n a case was at all relevant to the substance of the case, much less a potential basis for dismissal as would be the case here. Ultimately, the magistrate court concluded that Appellant was obligated to provide "all information, certainly evidence related to the case that you're prosecuting," without providing any authority to support that broad declaration of the scope of discovery under Rule 16. The magistrate court also skipped any form of analysis, findings, or conclusions that Respondent had met his burden of showing that the met the threshold requirement of making a valid request for discoverable information that Appellant failed to respond to. *Trans. on Appeal*, p. 26-27. As a result, the magistrate court granted Respondent's Motion to Compel as to requests 1 and 2, but limited the latter to include only the place of employment at the time of the extraction, seeming to recognize that it was Respondent's duty to do any further due diligence needed to use the extracted digital information in his defense. *Trans. on Appeal*, p. 28, ll 5-17.

The magistrate court then—for the first time—asked Respondent about the relevance of his request for correspondence, and the only basis Respondent was provided amounted to nothing more than a fishing expedition. Indeed, Respondent's asserted basis for 4requesting

> correspondence between the FBI analysts and with the Appellant's Office was to pursue a collateral discovery issue based on his speculative, baseless beliefs of "possible misconduct" by Appellant; Respondent provided noting to support those baseless claims and did not articulate any relevance or expected probative value, much less any exculpatory value, of the requested correspondence to the criminal charge he faced. *Trans. on Appeal*, p. 28, ll. 18-25; p. 29, ll. 1-7. * * * Nevertheless, the magistrate court took requests 3 and 4 under advisement, requiring the parties to submit simultaneous briefing on Aprill [sic] 11, 2023. The magistrate court then granted request 6, despite no evidence being provided or finding made that Appellant was in possession of any undisclosed information subject to Rule 16. The only request the magistrate court denied was request 5, but in doing so recognized that it had completely tilted the balance in discovery obligations so as to make it Appellant's duty to provide whatever information Respondent requested without any connection to caselaw or what Rule 16 actually required. *Trans. on Appeal*, p. 30.

Appellant's Brief on Appeal 13-15. Mr. Hunter then continued:

> Before the magistrate court issued its decision on Respondent's *Motion to Compel* for number 3 and 4, Respondent filed a *Motion for Sanctions* that attached part of an email chain between the handling attorneys. *Motion for Sanctions* (May 12, 2023). The arguments made in Respondent's reactionary *Motion for Sanctions* and the subsequently [] *Memo in Support of Motion for Sanctions* dated May 14, 2023, boiled down to a claim that Appellant had intentionally withheld evidence in contravention of the magistrate court's *Order to Compel* signed on April 6, 2023, despite that Order not including any specific due date. That claim was based entirely on a partial email chain attached to Respondent's *Motion for Sanctions*, which did nothing more than make clear that the Motion was based on a petty dispute with an attorney for Appellant, which dispute Respondent opted to publicly air in hopes that it might upset the magistrate court enough to result in the requested dismissal of the case as a sanction for alleged "prosecutorial misconduct." *Memo in Support of Motion for Sanctions* (May 15, 2023), pp. 3, &5-7.
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> Respondent's *Motion to Reconsider* was set for hearing on July 3, 2023, but short staffing and being tied up with other court dockets prevented any of Appellant's attorney's from being present at the time the case was called up for hearing at 2:59:24 p.m. After briefly noting that an attorney for Appellant was not present, the magistrate court noted that it had reviewed Appellant's *Motion for Zoom Appearance or Continuance* filed on June 26, 2023, which had requested that Mr. Hunter be allowed to appear via Zoom despite being out of town traveling on the date set for the hearing or, in the alternative, to continue the hearing so he could be

present to contest the personal attacks Respondent had repeatedly made on him to justify his Motions for Sanctions and to Dismiss. Despite having that explanation and notice that Appellant would be short staffed, the magistrate court declared that Appellant had "failed to appear" for the hearing, but then granted Appellant's motion to continue and ended the hearing at 3:03:45 p.m., just over four minutes after it began. In those four minutes, the magistrate court gave no leeway in time to allow Appellant to appear and made no effort to determine why an attorney for Appellant was not present, if one was on its way, or if they were all tied up in another courtroom, as is standard practice in this judicial district. In short, the magistrate court gave Appellant not even a fraction of the latitude that is routinely granted to all other agencies and defense counsel in identical situations. *See Trans. On Appeal*, pp. 98-101, *Response to Def's Third Motion to Dismiss & Declaration* (July 25, 2023)

* * *

Nevertheless, that untimely and improperly presented information was apparently considered by the magistrate court at the hearing on Respondent's *Motion to Reconsider* and third *Motion to Dismiss* held the following day on August 9, 2023. At that hearing, the magistrate court declared that Appellant had waived any objection to the *Motion to Reconsider* without any authority provided to support that decision, and then proceed to make a litany of pre-determined findings and conclusions using Respondent's plainly biased terminology and uncritically adopting Respondent's legally unsound arguments as its own, which will be set out in more detail herein. Based upon those one-sided, pre-determined, biased and erroneous findings and conclusions, the magistrate court granted Respondent's *Motion to Reconsider* and *Motion to Dismiss Pursuant to I.C.R. 48*, and dismissed this case. Instead of drafting its own order setting out that pre-determined basis for granting Respondent's *Motion to Dismiss Pursuant to I.C.R. 48*, as I.C.R 48(b) seems to require, the magistrate court abdicated that duty to Respondent and provided him no guidance other than to base it off what the magistrate court had just stated on the record. *See Trans. On Appeal*, pp. 102-153.

Id. at 17-20. Again, this is a violation by Mr. Hunter of Idaho Appellate Rule 35(a)(3) which delineates the elements contained in the "Statement of the Case" portion of an Appellant's brief . Those elements are "(i) A statement of the case indicating **briefly** the nature of the case, (ii) The course of the proceedings in the trial court or the hearing below and its disposition, and (iii) A **concise** statement of the facts." I.A.R. 35(a)(3).

(bold added). Mr. Hunter chose to ignore that rule, and instead simply conveyed twenty pages of pent up bad feelings, primarily about Judge Randles.

Again, the Court has provided this discussion in the section immediately above in the hopes of changing conduct of Mr. Hunter moving forward. The discussion has nothing to do with this Court's decision on appeal finding Magistrate Judge Destry Randles did not abuse his discretion in granting Jessop's motion to dismiss, that his decision was supported by substantial competent evidence in the record, and was not clearly erroneous.

V. CONCLUSION AND ORDER

For the foregoing reasons, the trial court's granting of Richard Jessop's Motion to Dismiss is Affirmed.

IT IS HEREBY ORDERED that the decision of Judge Randles to grant Respondent Jessop's Motion to Dismiss is AFFIRMED.

Entered this 6th day of March, 2024.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 6th day of March, 2024, a true copy of the foregoing was emailed, mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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Jeanne Clausen, Deputy Clerk