STATE OF IDAHO)
County of KOOTENAI) ss
FILED 07/09/2024
AT 4:35 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. **THOMAS ROUSSEAU,** *Defendant/Respondent.*	Case No. CR28-22-8737 **MEMORANDUM DECISION AND ORDER ON APPEAL AFFIRMING THE MAGISTRATE COURT'S DISMISSAL OF THIS CASE**

This is an appeal from the Magistrate Court of the First Judicial District of the State of Idaho, Kootenai County, Honorable John Cafferty, Magistrate Judge. Appellant, State of Idaho ("State"), is represented by Chief Deputy City Attorney for the Coeur d'Alene Prosecuting Attorney's Office, Ryan Hunter. Respondent Thomas Rousseau ("Rousseau") is represented by Conflict Public Defender Kinzo Mihara. The underlying matter was dismissed on November 3, 2023, through the trial court's granting of Rousseau's Motion to Dismiss; Alternatively Motions for Sanctions.

This appeal concerns six issues raised by the State:

I. Were the magistrate's findings of fact that formed the basis for its Order of Dismissal the product of legally erroneous procedures, and were specific finding[s]in the Order unsupported by the record of the proceedings, making those findings clearly erroneous?

II. Did the magistrate err by issuing its Order of Dismissal as a sanction when it had already imposed a less drastic sanction and when many other less drastic, more proportional alternative sanctions remained available?

III. Did the magistrate abuse its discretion by basing its Order of Dismissal on the State's alleged noncompliance with the Order Compelling Discovery and the Order Re: Motion for Independent Analysis of Evidence, which were issued in error and failed to comply with I.C.R. 16?

IV. Did the magistrate err as a matter of law when it declined to quash the improper subpoena duces tecum Defendant served on the State and abuse its discretion by citing the State's alleged noncompliance therewith as a basis for issuing the Order of Dismissal?

V. Did the magistrate err by misapplying the analysis set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), to the facts of this case and by relying on that misapplication as a basis for issuing its Order of Dismissal?

VI. Did the magistrate err by misapplying the analysis set forth in *Arizona v. Youngblood*, 488 U.S. 51 (1988), to the facts of this case and by relying on that misapplication as a basis for issuing its Order of Dismissal?

Appellant's Br. on Appeal 11-12, ¶¶ I – VI. This Court notes the Notice of Appeal, filed November 20, 2023, includes twenty issues on appeal (all related to the Order of Dismissal) in comparison to these above mentioned six. It is additionally noted by this Court on appeal that the State's Notice of Appeal does not include a copy of the judgment or order that the State is appealing, as required by Idaho Appellate Rule 11.[1]

This Court on appeal rephrases the issues brought by the State as follows: (1) were the trial court's Findings of Fact relied on clearly erroneous because they were a product of legally erroneous procedures and not supported by the record; (2) was the trial court's sanction of dismissal inappropriate, as the trial court had already imposed a lesser sanction, and a lesser, more proportional, alternative sanction was still available; (3) did the Order Compelling Discovery and the Order Re: Motion for Independent Analysis of Evidence fail to comply with Idaho Criminal Rule 16, and therefore, did the

[1] "An appeal as a matter of right may be taken to the Supreme Court from the following judgments and orders, a copy of which must be attached to the notice of appeal..." I.A.R. 11. Orders granting dismissal in a criminal case are specifically included in this rule. I.A.R. 11(c)(3).

trial court err using the State's noncompliance with the Orders as a basis for the Order of Dismissal; (4) did the trial court err in declining to quash the *subpoena duces tecum* and in using the noncompliance with such *subpoena duces tecum* as a basis for the Order for Dismissal; (5) did the trial court misapply *Brady*; and (6) did the trial court misapply *Youngblood*.

At the time of the arrest of Thomas Rousseau and his alleged co-conspirators, certain evidence, including all cellphones and recording devices, were seized. At that time, the phones were in possession, custody, and control of the City of Coeur d'Alene's prosecutor's agent, the Coeur d'Alene Police Department. Thereafter, Detective Welch, of the Coeur d'Alene Police Department, delivered the seized phones to the FBI. At the time of delivery, there was not a search warrant served upon the Coeur d'Alene Police Department. Instead, these phones were freely given to the FBI by the Coeur d'Alene Police Department. The phone of alleged co-conspirator Graham Whitson contained a "video of a briefing conducted prior to [the] intended demonstration . . . during which ground rules – which include[d] behaving in a law-abiding and non-violent manner – were addressed." Whitson Aff. 1, ¶ 4. The State contends that because these phones were given to the FBI, it no longer had possession, custody, or control of these items. Therefore, the State claims the State was unable to comply with the Order to Compel these phones, or the Order for Independent Analysis of Evidence.

This Court affirms the trial court, and finds the State lost the phones seized in this matter, and the data contained within these phones. This loss was due to the State's

delivery of the seized evidence to the FBI, in direct contravention to the Order Preserving Seized Property,[2] signed by (then) Magistrate Judge Ross Pittman.

Because the phones were delivered to the FBI, and not seized by the FBI, the FBI was acting as an agent of the State during the extraction process. Thereafter, the State was unable to get the seized evidence back from the FBI, its agent. The evidence lost by the State would have directly contradicted the intent necessary by Rousseau for the charged misdemeanor crime of conspiracy riot.

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 Rousseau, and one or more other persons, between February 25, 2022, and June 11, 2022. Sworn Crim. Compl. 1. On June 11, 2022, Rousseau was issued a citation for criminal conspiracy. On November 17, 2022, the State filed a Sworn Complaint charging conspiracy to riot, a misdemeanor.

From June 11, 2022, to December 16, 2022, Rousseau represented himself *pro se*. On December 14, 2022, Rousseau filed an Application for Attorney at Public Expense, and on December 16, 2022, Idaho attorney Kinzo Mihara ("Mihara") was appointed to represent Rousseau as a conflict public defender.

On December 16, 2022, Rousseau, through Mihara, filed a Motion to Continue and Request for Discovery. In his Motion to Continue, Rousseau requested that the trial court vacate and continue the pretrial and trial dates set in the case. Mot. to Vacate and Continue 1. The trial court heard this Motion to Continue at the December 30, 2022,

[2] Attached to the State's Memorandum In Support of Motion for Reconsideration, Ex. 2.

Pre Trial-Conference, wherein the State objected to the continuance, but recognized the "practical reality that the continuance [was] likely inevitable because of [Mihara's] just recent entry onto the case." Tr. 5:25-6:2. In doing so, counsel for the State made the record of Rousseau's "lack of diligence in filing the application for public defender and really not diligently pursuing this case." Tr. 6:3 – 6:5. At the conclusion of the hearing, the trial court continued the matter until its March 2023, docket.

On January 5, 2023, the State served a Request for Discovery and a Response to Request for Discovery on Rousseau.[3] In such discovery response, the State disclosed:

1. Copies of: **PPD = Previously Provided Discovery**
   CDA PD RPT (000001-000119) 119 pages
   CDA PD SUPP RPTS (00001-00024) 24 pages
   KCSO RPT (000001-000007) 7 pages
   ISP RPT (000001-000002) 2 pages
   CDA PD SUPP Proctor (000001) 1 page
   KCSO Jail Reports (000001-000006) 6 pages
   CDA PD SUPP Welch (000001-000002) 2pages
   CDA PD SUPP Todd (000001-000003) 3pages
   CDA PD SUPP White (000001-00002) 2 pages
   CDA PD SUPP Tilson (000001) 1 page
   CDA PD SUPP Guthrie (000001) 1 page
   Bandshell Permit (00001-00012) 12 pages
   CDAPD Operation Plan (000001-000005) 5 pages
   CDA PD SUPP Avriett (000001-000008) 8 pages
   CDA PD SUPP Newbill, Wiensenfluh, Schmitz, Welch (000001-000005) 5 pages
   CDA PD SUPP Cantrell (000001) 1 page
   CDA PD SUPP Walther (000001-000002) 2 pages
   CDA PD Email Response Swat (000001-000002) 2pages
   Signed Search Warrant Affidavit 30 pages

   103 PG Photos - (CDA PD 000001-000103)
   10 PG CAD Call Screen
   13 PG Search Warrant. Seizure Inventory & U-haul receipts
   YES NCIC Records

[3] The State claimed that it had previously sent a copy of the discovery request to Rousseau, along with a copy of the sworn complaint, but the documents were returned as unclaimed. Tr. 6: 7-13.

1 Prebooking Sheet 14 PC Affidavit & Order
1 Citation/Complaint 3 Sworn Complaint

2. Defendant advised of existence of and permitted examination by appointment of:
1 64GB jump drive with all discovery documents and Media containing: 2 ISP Disk Folders with videos; 46 CDAPD videos; 911 Audio
3. The State has requested the following information and will provide upon receipt: _____.

January 5, 2023, Pl.'s Resp. to Disc. 1-2 (formatting altered). Additionally, the State advised of 81 witnesses. *Id.* at 2-3, ¶ 4.

On January 10, 2023, the State filed a Motion to Join for Jury Trial Pursuant to I.C.R. 8(b) & 13. In such motion, the State sought an Order from the trial court joining this *State v. Rousseau* case with two other cases, *State v. Branden Haney* and *State v. James Johnson*. The State asserted that, "joinder of these defendants would have been proper at the outset of the case because they are alleged in their separate complaints to have participated in the same acts or transactions or in the same series of acts or transactions constituting the offenses" and that the "same witnesses and evidence will be presented in each case, so joinder is proper for judicial economy and court efficiency." Mot. to Join for Trial 1. On January 17, 2023, Rousseau filed an Objection to the State's Motion to Join, and filed a Motion to Continue.

On January 19, 2023, and January 23, 2023, the trial court held hearings in this matter related to Rousseau's Motion to Continue and the State's Motion for Joinder. On January 31, 2023, the trial court issued an Order to Join for Jury Trial, joining the cases of *State v. Thomas Rousseau* (CR28-22-8737), *State v. Branden Haney* (CR28-22-8739), and *State v. James Johnson* (CR28-22-8761) for jury trial. Order to Join for Jury Trial. 1.

On January 23, 2023, the same day that it's Motion for Joinder was set to be heard by the trial court, the State filed a Supplement to Plaintiff's Response to Discovery, supplementing it's January 5, 2023, Response to Discovery, to include "over 3 TB of media from cell phones, cameras, and other recording devices seized in this case," and added that Rousseau should "provide a minimum 4TB portable hard drive with 3.0 USB, or a separate SATA hard drive, on which State can download this information." January 23, 2023, Suppl. to Pl.'s Resp. to Disc. 1.

On January 26, 2023, Rousseau filed a Motion to Dismiss; in the alternative, Motion for Authorization of Defense Funds; in the alternative, Motion to Limit the State's Evidence, and for a Curative Instruction, as well as filing a First Declaration of Counsel (Mihara), and a Notice of Hearing setting the motion for hearing on February 9, 2023.

On February 3, 2023, the State filed a Supplement to Plaintiff's Response to Discovery, supplementing its previous response to discovery to include, "Videos, consisting of body cam video from Officer Gilbert #1986025, 2 body cam videos from Officer Buhl, #1986022 & 1986021 and body cam video from Officer Newbill #1985985." February 3, 2023, Suppl. to Pl.'s Resp. to Disc. 1.

On February 9, 2023, the day scheduled for hearing on Rousseau's motion, the State filed its Notice of Objection and State's Brief Re: Defendant's Motion to Dismiss, and Notice of Objection to Defendant's Request for Judicial Notice IRE 201. At the conclusion of the February 9, 2023, hearing, the trial court denied Rousseau's Motion to Dismiss.

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On February 11, 2023, Rousseau filed his Response to Request for Discovery, and the first Supplemental Request for Discovery. In his Request for Discovery, Rousseau requested:

> 1. CHAIN OF CUSTODY REPORTS. Permit the Defendant to inspect and copy or photograph any relevant chain of custody documents which relate to the physical and/or electronic evidence which has; or, is expected to be produced by the Plaintiff in this matter. This request expressly includes any correspondence between local, state, and federal law enforcement agencies as well as any unredacted search warrant(s) related to the electronic information seized from the Defendant and/or his alleged co-conspirators on the date of their arrest for the instant charges.
>
> 2. PHOTOGRAPHS TAKEN BY LAW ENFORCEMENT. For the second time, the Defendant demands to inspect and copy any and all photographs taken by any law enforcement officer (Kootenai County Sheriff's Office; Coeur d'Alene Police Department; Idaho State Patrol; and/or any federal investigative agency) during the date of the arrest of the Defendant herein.
>
> IT IS FURTHER REQUESTED that the State of Idaho's attorney, comply with the foregoing Request for Discovery by sending copies of all information, evidence or materials requested herein to the Defendant's attorney at the address shown above, pursuant to the Idaho Criminal Rules.

First Suppl. Req. for Disc. 1-2.

On February 13, 2023, the State filed its Supplemental Response to Request for Discovery, adding a "Supplemental Report from Officer Welch, 4 pages," and "250gb 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 13, 2024, Suppl. to Pl.'s Resp. to Disc. 1. The State, in this response, requested that

Rousseau, "provide a minimum 250gb USB flash drive on which State can download this information." *Id.*

On February 14, 2023, the State filed a Response to Defendant's Supplemental Rule 16 Request for Discovery, stating that it, "objects to Request No. 1 on the grounds that this information was previously provided to Defense; however, if defense wants to photograph the chain of custody, please make an appointment with the Coeur d'Alene Police Evidence Department, so that he can take photos of the chain of custody documents," and that it "objects to Request No. 2 on the grounds that photographs were previously provided to Defendant in Plaintiff's Response to Request for Discovery on January 5, 2023, consisting of 103 pages." Resp. to Def.'s Suppl. Rule 16 Req. for Disc. 1.

On February 14, 2023, the trial court ordered mediation take place on February 24, 2023. It is asserted in Rousseau's March 28, 2023, Motion to Enlarge Time, that the parties engaged in mediation on both February 24, 2023, and March 6, 2023. Mot. to Enlarge Time 2.

On February 17, 2023, Rousseau filed his first Supplement Response to Request for Discovery. Rousseau filed additional Supplemental Responses on March 2, 2023, March 16, 2023, and March 17, 2023. On March 14, 2023, the State filed a Supplement to Plaintiff's Response to Discovery.

On March 28, 2023, Rousseau filed a Motion to Continue Trial, Motion to Enlarge Time, a Motion to Suppress Evidence, a Memorandum in Support of Motion to Suppress Evidence, and a Notice of Hearing related to the motions. On April 12, 2023, the State filed a Notice of Objection to Enlarge Time for Motion to Suppress.

On May 2, 2023, the trial court heard the Motion to Enlarge Time. At the conclusion of the hearing, the trial court denied the Motion to Enlarge Time, and continued the trial.

On May 25, 2023, the State filed a Supplement to Plaintiff's Response to Discovery Expert Witnesses, "to include the following expert witnesses evidence" of "Curriculum Vitae for Cheney Eng-Tow - 2 pages," "Curriculum Vitae for Stacey Evans - 4 pages," "Curriculum Vitae for Matthew Anderson - 4 pages," and added that "[t]he Coeur d' Alene Prosecuting Attorney's Office has been informed that Randy Kim recently retired and the State is awaiting receipt of his Curriculum Vitae, which will be provided in a supplemental discovery response immediately upon receipt." May 25, 2023, Suppl. to Pl.'s Resp. to Disc. Expert Witnesses 1. On June 1, 2023, the State filed a Supplement to Plaintiff's Response to Discovery Expert Witness, adding, "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 the "Curriculum Vitae for Randy C. Kim - 4 pages." June 1, 2023, Supplement to Plaintiff's Discovery Expert Witness. 1.

On June 26, 2023, Rousseau filed a Motion to Compel Discovery, Motion for Independent Analysis of Evidence, Declaration in Support of Motion for Independent Analysis of Evidence, and a Declaration of Josiah Roloff. The next day, on June 27, 2023, the State filed an Objection to Defendant's Motion to Compel and Independent Analysis of Evidence. On July 3, 2023, Rousseau filed a Notice of Hearing, setting his Motion for Independent Analysis and Motion to Compel for hearing on July 18, 2023,

and also filed a Reply/Supplement Brief on Motions to Compel and Motion for Independent Analysis. On July 18, 2023, the trial court heard the motions.

On July 19, 2023, the trial court issued an Order Compelling Discovery, finding that the State "failed to properly and adequately support its arguments with factual foundation; and/or, has waived objection(s) to the production of the materials sought by the Defendant by not making such objection(s) in a timely manner," and therefore:

> (1) The STATE is COMPELLED to turn over to the Defendant any and all chain of custody documents which relate to the physical and/or electronic evidence which has been or is expected to be produced by the State from the time of its seizure to the present date.
>
> (2) The STATE is COMPELLED to turn over any and all correspondence between local, state, and federal law enforcement agencies as well as any unredacted search warrant(s) related to the electronic information seized from the Defendant and/or his alleged co-conspirators on the date of their arrest for the instant charges.
>
> (3) The foregoing items listed in paragraphs (1) and (2) above shall be turned over to the Defendant within 7 days of this order.

Order Re: Mot. to Compel 2, ¶¶ (1) - (3). The trial court additionally granted Rousseau's Motion for Independent Analysis or Evidence, and ordered that the parties meet and confer, in-person, to attempt to stipulate to the process and method for the examination of the item at issue, the cellular telephone of alleged co-conspirator Graham Whitson, by defendant's expert Roloff. *Id.* at 2, ¶ (4).

On July 24, 2023, Rousseau filed a Motion in Limine. On July 25, 2023, the State filed a Supplemental Response to Request for Discovery, which informed "the Court that the State's Response to Discovery, dated December 6, 2022, is hereby supplemented to include the following jury trial evidence, which is self-authenticating per IRE 902(4): Certified copies of City Park Permits issued for the day of June 11, 2022 - 20 pages." Suppl. to Pl.'s Resp. to Disc. 1.

On July 26, 2023, Rousseau filed two Supplemental Responses to Request for Discovery, and a Declaration of Counsel Regarding Compliance with Order. Additionally on July 26, 2023, the State filed a Supplemental Response to Discovery and Declaration.

On July 27, 2023, Rousseau filed a Motion for Sanctions, "pursuant to the U.S. Supreme Court cases of *Brady v. Maryland*, *Arizona v. Youngblood*, I.C.R. 16(k) and I.C.R. 48 as well as the case of [sic] for an order sanctioning the State for discovery violations." Mot. for Sanctions 1. Rousseau asserted that the, "basis of this motion is that the State has intentionally defied this Court's Order Compelling Discovery requiring the State to turn over documents to legitimate discovery requests." *Id.* Rousseau additionally filed a Motion to Shorten Time related to his motion, and an additional supplemental response to the State's Request for Discovery. Rousseau further filed a *subpoena duces tecum* to the City of Coeur d'Alene Idaho, requesting the City "to produce or permit inspection and copying of the following documents or objects, including electronically stored information" of:

> (1) All communications (including emails, letters, notes, text messages, instant messages) relating to the events in McEuen Park and City Park in the City of Coeur d'Alene (e.g., events with facility use permits (Order Nos. 1795, 275, 276, and 277).
> (2) All communications sent or received by City of Coeur d'Alene Mayor, Council Members, City Clerk, City Treasurer, and all other City Employees (including but not limited to police officers and Parks and Recreation Departments) containing the key words: "Gay" "Gay Pride" "Patriot Front" "Riot" "prosecute" "white supremacy" and/or "Nazi." The plural context of such words is also included.

Subpoena Duces Tecum 1-2. Finally on July 27, 2023, the State filed a Supplement to Plaintiff's Response to Discovery, adding the "Property receipt of chain of custody of

recording devices seized by Coeur d'Alene Police Department to FBI, 4 pages." Suppl. to Pl.'s Resp. to Disc. 1.

On July 31, 2023, Rousseau filed an additional response to request for discovery, and an Amended *Subpoena Duces Tecum*. This Amended *Subpoena Duces Tecum* requested that the City of Coeur d'Alene "produce or permit inspection and copying of the following documents or objects, including electronically stored information" from January 1, 2021, to the date of the issuance of the Subpoena, of:

> (1) All communications (including emails, letters, notes, text messages, instant messages) relating to the events in McEuen Park and City Park in the City of Coeur d'Alene (e.g., events with facility use permits (Order Nos. 1795, 275, 276, and 277).
> (2) All communications sent or received by City of Coeur d'Alene Mayor, Council Members, City Clerk, City Treasurer, and all other City Employees (including but not limited to police officials/officers and Parks and Recreation Department employees) containing the key words: "Gay" "Pride" "Gay Pride" "Patriot Front" "Riot" "prosecute" "white supremacy" "FBI" and/or "Nazi." The plural context of such words is also included.

Amended Subpoena Duces Tecum 1-2.

On August 1, 2023, the trial court held a status conference related to the parties' requirement to meet and confer and find a way to exchange the phone at issue. Tr. 121: 15-18. At such hearing, the trial court ordered the "City of Coeur d'Alene to exercise its power and control over its selected agent to retrieve the required phone [of Graham Whitson] from its agents." *Id.* at 125:23 - 126: 1. The trial court ordered that the phone be available on or before the 8th of August 2023. *Id.* at 126:22-23. The trial court did not address any other outstanding issues that were not noticed for hearing that day.

The same day, on August 1, 2023, the State filed an Affidavit of Wes Somerton, Declaration of Counsel Ryan Hunter, and a Notice of Objection to Defendant's Motion

for Sanctions and to Strike Defendant's Motion for Sanctions. In the Objection, the State argues that the "grounds and reasons for this objection are that Defendant continues to file repetitive motions seeking information that the State has previously responded pursuant to ICR 16." Notice of Obj. to Def.'s Mot. 1. Despite the name of the document, in such Motion, the State did not move to strike the Motion for Sanctions.

On August 2, 2023, Rousseau filed a Declaration of Service related to the Amended *Subpoena Duces Tecum* on the City of Coeur d'Alene. Additionally on August 2, 2023, the State filed a Notice of Hearing and a Motion to Quash the *Subpoena Duces Tecum*. In such Motion to Quash *Subpoena Duces Tecum*, the State argues that:

> COMES NOW, Ryan S. Hunter, Deputy City Attorney for the Coeur d'Alene Prosecuting Attorney's Office, and moves the Court for an Order, pursuant to Idaho Criminal Rule 17(b), quashing the subpoena duces tecum issued to the City of Coeur d'Alene and personally served on City Clerk Renata McLeod on July 31st, 2023. This Motion is made on the grounds that Defendant's subpoena duces tecum is overbroad, unreasonable, oppressive, harassing, and abusive in nature. Further, it seeks information and items that are privileged under state and federal law, are irrelevant to this criminal matter or pertain only to collateral matters, and would only serve to unnecessarily delay the efficient resolution of this doddering criminal case. Finally, it represents a blatant attempt to circumvent the standard criminal discovery rules to which he is subject as the Defendant in this case and constitutes a flagrant abuse of the subpoena process provided in I.C.R. 17. Accordingly, the subpoena should be quashed.

Mot. to Quash Subpoena Duces Tecum 1. The next day, on August 3, 2023, the State filed a Motion to Stay Orders, which provided that:

> COMES NOW, Ryan S. Hunter, Deputy City Attorney for the Coeur d'Alene Prosecuting Attorney's Office, and hereby moves the Court to stay implementation of the Order Compelling Discovery issued on July 19, 2023, and the Order Granting Motion for Independent Analysis, issued orally on the record on August 1, 2023, with the signed written Order forthcoming ("Orders"). This Motion is made by and for the reason that staying implementation of those Orders pending adjudication of the State's contemporaneously filed Motion to Reconsider those Orders would be in

> the interest of simplicity of procedure, fairness in the administration of justice, and elimination of unjustifiable expense and delay as contemplated by Idaho Criminal Rule 2(a).

Mot. to Stay 1. Rousseau filed an Objection to State's Motion to Stay on August 4, 2023. The State filed a Response to Defendant's Objection to Motion to Stay Orders and Declaration on August 7, 2023.

On August 3, 2023, the State additionally filed a Motion to Reconsider Orders Compelling Discovery and Granting Motion for Independent Analysis. On August 4, 2023, the State filed a Motion for Protective Order Pursuant to Idaho Criminal Rule 16(l) and Declaration. On August 6, 2023, Rousseau filed an Objection and Opposition to State's Motion for a Protective Order.

On August 4, 2023, the trial court issued an Order regarding Rousseau's Motion for Independent Analysis of Evidence. In such Order, the trial court made the following findings:

> (1) At the time the State, by and through the Coeur d'Alene Police Department and its officers/employees, turned over the cellular telephone at issue to the U.S. Federal Bureau of Investigation ("FBI"), there was no active federal warrant to seize/hold/examine the phone; but, that the State knew of the FBI's intent of obtaining one; and,
>
> (2) At the time of the cellular phone's turn-over, the FBI was acting as an agent for the State to examine, inter alia, the cellular telephone at issue; thus, based on the information before the Court at the July 18, 2023 hearing of this matter, the Court finds that the FBI continues to be an agent of the State for the purposes of the instant motion.

Order re: Mot. for Independent Analysis of Evidence 1, ¶¶ (1), (2). The trial court compelled the State, pursuant to Idaho Criminal Rule 16, "to produce the physical cellular telephone at issue on the instant motion at the Coeur d'Alene Police Department and make the same available for a full and fair examination by the Defense

expert, Mr. Josiah Roloff (and/or his appropriate designee), on or before Tuesday, August 8, 2023." *Id.* at 2.

On August 7, 2023, the State filed a Notice to Court - Impossibility of Compliance and Declaration. This Notice provided that:

> it is impossible for Plaintiff to comply with the Court's Order Re: Motion for Independent Analysis of Evidence on the seven (7) day deadline provided in that Order. The facts establishing the practical inability for Plaintiff to obtain or make available for inspection a cellphone that it does not have possession, custody, or control over at this time, are set out in the *Declaration of Counsel – Ryan S. Hunter* and *Affidavit of Wesley J. Somerton*, both filed on August 1, 2023. Additionally, Plaintiff is prepared to show the Court in camera the federal warrant, which was recently partially unsealed on August 2, 2023, for the limited purpose of disclosing the federal warrant to the Court and Defense Counsel in this case—and no one else—in order to resolve any concerns as to the veracity of Plaintiff's consistent representation that the electronic devices in this case were seized pursuant to that warrant and removed them from Plaintiff's possession, custody, and control as of July 20, 2022, which remains the case as of the date of this Notice.

Notice to Court – Impossibility of Compliance 1.

On August 8, 2023, the State filed a Motion for Protective Order – Inspection of Coeur d'Alene Police Department and Declaration, and Rousseau filed an Objection and Opposition to State's Second Motion for a Protective Order, a Declaration of Counsel Regarding Opposition to Protective Orders, and Defendant's Objection and Motion to Strike [the Affidavit of Wesley Somerton and the Declaration of Ryan Hunter.]

On August 11, 2023, an Affidavit of Graham Whitson was filed. On August 14, 2023, a Declaration of Jason Van Dyke, Whitson's Texas attorney, was filed.

On August 21, 2023, Rousseau filed a Response/Supplemental Objection to the Motion to Reconsider, a Declaration of Counsel in Support of this Objection, and a Response to State's Motion to Strike and Motion to Quash Subpoena Duces Tecum. On August 25, 2023, over three weeks after the Motion had been filed on August 3,

2023, the State filed a Memorandum in Support of the Motion to Reconsider and Declaration, and Rousseau filed an Objection and Motion to Strike.

On August 28, 2023, the trial court heard oral argument on multiple issues. At the conclusion of the hearing, the trial court denied the State's Motion to Quash Subpoena Duces Tecum, denied the State's Motion to Strike the Defendant's Motion for Sanctions, denied the State's Motion for Reconsideration, granted Rousseau's Motion for Sanctions for Discovery Violations, and denied Rousseau's Motion to Strike Declarations of Somerton and Hunter. Tr. 171: 17-25. The trial court additionally noted that there were still outstanding motions from the State, the Motions for Protective Order and the Motion to Stay Discovery, but that these motions were not properly noticed for hearing. *Id.* at 172: 8-11. Thereafter, the State made a verbal request for permission to file an interlocutory appeal:

MR. HUNTER:	State would move for permission to file an interlocutory appeal on that, Judge.
THE COURT:	Is there a proposed order? I will allow that.
MR. MIHARA:	If the Court's going to allow that, the Court should probably vacate the September 8th --
THE COURT:	Probably, it –
MR. MIHARA:	-- and [inaudible].
THE COURT:	-- seems like a good idea because I don't think we're going to get it in front of the district court in the next month.
MR. HUNTER:	And just for the record, we'll be – the appeal will encompass basically all the Court's order in this matter.
THE COURT:	All right.
MR. MIHARA:	Objection to the interlocutory order being broad, Your Honor.
THE COURT:	Yeah. We need a written request for that. I would be inclined to do that. I will vacate the trial based upon the verbal request, but it won't be appropriate until I get something in writing, and something specific to allow guidance to defense counsel as well as guidance to the appellate court. All, right?

Tr. 174: 9 – 175: 8.

After the August 28, 2023, hearing, the State filed an Affidavit of Renata McLeod in Support of Motion to Quash. On August 29, 2023, Rousseau filed an Objection and Motion to Strike this Affidavit.

On August 29, 2023, the trial court issued an Order denying the State's Motion to Quash Subpoena Duces Tecum, denying the State's Motion to Strike the Defendant's Motion for Sanctions, denying the State's Motion for Reconsideration, denying the Rousseau's Motion to Strike Declarations of Wes Somerton and Ryan Hunter, and granting the Rousseau's Motion for Discovery Violations.

On September 1, 2023, the State filed a Motion for Permissive Appeal and to Stay Proceedings. This Motion provided that:

> Specifically, the State respectfully requests permission to appeal the following decisions of the Court contained in the Order dated August 29, 2023:
>
> • The Denial of the State's Motion to Quash Subpoena Duces Tecum dated August 2, 2023;
> • The Denial of the State's Motion to Reconsider Orders Compelling Discovery (issued on July 19, 2023) and Granting Motion for Independent Analysis (issued on August 3, 2023) dated August 3, 2023; and
> • The Granting of Defendant's Motion for Sanctions dated July 27, 2023.

Mot. for Permissive Appeal 1. (formatting altered). The Motion further provided that "if the Court grants the State's Motion for Permissive Appeal, the State further moves the Court to stay these proceedings, except for those matters identified in Misdemeanor Criminal Rule 54(e)(2), until that permissive appeal is resolved." *Id.* at 4. On September 6, 2023, the State filed a Notice of Hearing, setting their Motion for Permissive Appeal to be heard on September 20, 2023. On September 13, 2023,

Rousseau filed a Response and Objection the Motion for Permissive Appeal and To Stay Proceedings.

On September 13, 2023, Rousseau filed a Declaration of Counsel Regarding Compliance with Discovery Orders and a Supplemental Response to Request for Discovery. On September 19, 2023, the State filed a Reply to Defendant's Response and Objection to State's Motion, and Rousseau filed an Objection and Motion to Strike the State's Reply to Defendant's Response and Objection to State's Motion for Permissive Appeal and to Stay Proceedings, and a Motion to Shorten Time related to this Motion to Strike.

On September 20, 2023, the trial court heard oral argument on Rousseau's Motion to Strike and the State's Motion for Permissive Appeal. The transcript of this hearing is not included in this Court's record on appeal. On September 20, 2023, the trial court issued an Order, and then Amended Order, denying the State's Motion for Interlocutory Appeal.

On September 28, 2023, Rousseau filed a Motion to Dismiss; Alternatively for Additional Sanctions, supporting Declaration of Counsel, and a Notice of Hearing, setting the motion for hearing on October 13, 2023.

On September 29, 2023, the State filed a Motion to Reconsider Denial of Motion to Quash Subpoena Duces Tecum, and a Motion to Enlarge Time for this Motion for Reconsideration to be heard. On October 3, 2023, the State filed a Notice of Hearing, indicating that these motions would also be heard on October 13, 2023. On October 6, 2023, Rousseau filed a Response and Objection to Motions for Reconsideration and to

Enlarge Time. On October 10, 2023, the State filed a Reply to Defendant's Response and Objection to Motions to Reconsider and Shorten Time.

On October 13, 2023, the trial court heard Rousseau's Motion to Dismiss. At the conclusion of the hearing, the trial court indicated that it was going to grant the Motion, and gave the reasons for that ruling. On November 3, 2023, the trial court issued it's Order granting Rousseau's Motion to Dismiss, and ordered that the case be dismissed:

> pursuant to I.C.R. 48(a)(2) as well as multiple bases under I.C.R. 16, to include, but not necessarily limited to I.C.R. 16(t)(2) and 16(k)(3). An alternative basis for the entry of this order is found under both I.C.R. 48 as well as I.C.R. 17. In granting Defendant Rousseau's motion, pursuant to Rule 48, the Court concludes that the dismissal will serve the ends of justice and the effective administration of the Court's business.

Order for Dismissal 1. The trial court additionally stated it found the dismissal of the action to be "an appropriate discovery sanction," and that the trial court's "numerous attempts at lesser sanctions were not successful in obtaining compliance with the [trial c]ourt's orders and moving the case to trial," and therefore it was "left with the need to exercise its discretion and grant the Defense's request for dismissal." *Id.* at 5. Within the Order for Dismissal, the trial court noted that:

> In coming to the foregoing decision to grant Defendant Rousseau's instant motion the Court recognizes it as one which by law is entrusted to the trial court's discretion. The Court has reviewed the applicable law to include the court rules cited herein, as well as, applicable case law promulgated by the Supreme Court of the United States of America, as well as, the Supreme Court of the State of Idaho, contained within the sundry briefs of the parties and cited by the Court in open court. Thus, by issuing this order, this Court intends to act consistently with the legal standards applicable to the specific choices before it: (a) issue **another** order compelling discovery; (b) continuing the trial **yet again**; (c) ordering that the trial of this matter be subject to **another** curative order; (d) issuing an order suppressing certain evidence, which the State has never produced and has stated it does not want or intend to use; (e) imposition of costs and fees against the State; (f) dismissing this case; or, (g) any other sanction that this Court would deem right, just, and proper under the authority granted to it by applicable statutory, case law, and/or court rule.

Id. at 1-2. (emphasis in original).

The trial court held that the case had "languished for well over a year, with some of the delay attributable to both parties; but, noting that much of the delay is attributable to the State for failing to comply with its duties under the U.S. Supreme Court's decision in *Brady v. Maryland*." Order for Dismissal 2, ¶(2). The trial court noted the following acts evidenced the State's course of conduct:

> a. The State continuously represented to the Court and counsel that all information has been provided and the case was ready to proceed to trial.
> b. On December 30, 2022, the State objected to a continuance, alleging that discovery was complete and the case was ready to proceed to trial on January 17, 2023. The Court granted the continuance granted over the State's objection, and the trial was reset for March 20, 2023.
> c. On January 5, 2023, the State provided discovery to Defense counsel that was "previously provided" to Defendant, but not to his attorney, and likely returned to the state based upon an addressing issue.
> d. On January 23, 2023, the State's Motion for Joinder was heard. At the hearing, the defense noted that they were ready to proceed for a March trial. At the hearing, the Court granted the State's request, and noted its disfavor with the late timing of the Motions.
> e. Also, on January 23, 2023, the State filed its supplemental response to discovery with providing notice of three (3) plus terra Bites of data, available upon receipt of device from Defense.
> f. Based upon the newly provided evidence, the defense moved for additional funds on January 26, 2023, and the State objected.
> g. On February 3, 2023, the State filed an additional supplemental discovery.
> h. On February 9, 2023, the Defendant's Motion to Dismiss was heard. This was the first mention of the documents being in the possession of the FBI by the State. This Court vacated the trial to give Defense more time to prepare for trial. The Court exercised its discretion, and as a sanction for the late disclosure, imposed a continuance as a lesser sanction to the dismissal as requested by the Defense. The case was reset for a May 22, 2023 jury trial.
> i. On February 13, 2023, the State provided more Supplemental Discovery, specifically information from Officer Welch regarding the voluntary relinquishment of the defendant's, and those of his alleged co-conspirator's, phone to the FBI.

j. On March 14, 2023, the Sate provided Supplemental Discovery of more than three (3) terabytes of information to the defendant's attorney. It warrants mentioning that the trial was set for March 20, 2023, until continued on February 9, 2023, over the State's objection.
k. On May 2, 2023, this Court heard the Defendant's request to continue the trial, noting that the State had no objection. The trial was again continued, this time to September 22, 2023.
l. On May 25, 2023, the State supplemented its discovery responses with additional expert disclosures.
m. On June 1, 2023, the State supplemented its discovery responses with additional expert disclosures.
n. On July 18, 2023, the State represented to the Court that they had turned over everything.
o. On July 25, 2023, the State supplemented its discovery responses with park permits.
p. On July 27, 2023, the State supplemented its discovery responses with chain of custody, information which was not responsive to the request made by the Defendant.
q. On August 7, 2023, the State filed its Notice of Impossibility, representing to the court that it could not provide the phone being sought by the Defendant since the State had relinquished custody and control of the phone, contrary to the Order of Preservation previously issued several months earlier by Judge Pittman. Therefore, this Court found that a curative instruction was appropriate under *Youngblood* at the hearing on August 28, 2023. At the August 28, 2023, hearing the Court based the discretionary sanction upon the history of ongoing and newly discovered evidence provided by the State to the Defense, as recently as a month prior and more than a year since the defendant was arrested.

(3) The State continuously provided voluminous supplements to its mandatory discovery obligations past the due date for such discovery *as noted above*; and,
(4) The State's failure to comply with the Court's discovery order, *Order Re: Motion to Compel*, signed on July 19, 2023 and entered on July 20, 2023 (such failure confirmed as recently as Friday, October 13, 2023, by counsel for the State) and/or the Court's *Order Re: Motion for Independent Analysis of Evidence* signed on August 3, 2023, and entered on August 4, 2023 (a "*Notice to Court – Impossibility of Compliance & Declaration*" filed one day before the Court's deadline on August 7, 2023; and,
(5) The State's failure to comply with Defendant Rousseau's *Amended Subpoena Duces Tecum* served upon City Clerk, Renata McLeod, on or about August 1, 2023 in a timely manner (Ms. McLeod's Affidavit was filed *after* the hearing on August 28, 2023); and,

> (6) The State's untimely (and/or non-existent) objections (including objection to the original discovery requests at issue) and arguments, as well as declarations and/or affidavits which could have been filed timely, against the relief sought by Defendant Rousseau over the past several months, and as recently as the instant hearing; and, several other hearings in this matter; and,
> (7) The Court's lesser sanctions have been unavailing to this point; even up to, and including, granting the defense a spoilation instruction regarding the cellular telephone of Mr. Graham Whitson, an alleged co-conspirator of Defendant Rousseau. Given the information provided to the Court at the last hearing of this matter, and the Court's oral admonishments to the State at the July 18, 2023, August 1, 2023, and August 28, 2023 hearings of this matter; the Court is now firmly convinced that no lesser sanction would suffice to allow all parties and their legal counsel to this litigation equal access to, and allow reasonable analysis of, all of the material information related to this case to be able to go to trial on this matter in a timely fashion; and,
> (8) The Defense's repeated and timely attempts to gain access to potentially exculpatory information, information the Court has repeatedly ruled is material and relevant has gone without appropriate response by the State.

Order for Dismissal 2 ¶(2)(a) - 4 ¶ (8).

On November 20, 2023, the State filed its Notice of Appeal. On January 4, 2024, the transcript on appeal was lodged. The transcript on appeal includes the December 20, 2022, Pretrial Conference; the February 8, 2023, hearing on Respondent's Motion to Dismiss; the May 2, 2023, hearing on Respondent's Motion to Continue and Expand Time for Pretrial Motion; the July 18, 2023, hearing on Respondent's Motions to Compel and for Independent Analysis of Evidence; the August 1, 2023, status hearing; the August 28, 2023, hearing on Respondent's Motions for Sanctions and to Strike Declarations, Appellant's Motions to Quash Subpoena Duces Tecum, Strike Defendant's Motion for Sanctions, and for Reconsideration; and the October 13, 2023, hearing on Respondent's Motion to Dismiss or for Additional Sanctions, and on Appellant's Motions to Enlarge Time and for Reconsideration of the Motion to Quash Subpoena Duces Tecum. On January 31, 2024, Rousseau filed an Objection to the Transcript.

On February 23, 2024, the State filed a Motion for Extension of Time for Filing Brief. On February 27, 2024, Rousseau filed his Objection to the Motion to Extension, and supporting Declaration of Counsel. On February 29, 2024, a different court on appeal heard oral argument on these two Motions. At such hearing, Rousseau withdrew his Objection to the Transcript, and the court granted, in part, the Motion to Extend Time to File Brief, allowing the State 35 days instead of the requested 45 days.

On April 3, 2024, the State filed its Appellant's Brief on Appeal. On April 10, 2024, this appeal was reassigned to the undersigned district judge. On April 30, 2024, Rousseau filed his Respondent's Brief on Appeal. On May 21, 2024, the State filed its Reply Brief.

This Court, sitting in its appellate capacity, heard the oral argument for this appeal on June 11, 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 set forth above, this appeal concerns six alleged issues raised by the State: (1) "Were the magistrate's findings of fact that formed the basis for its Order of Dismissal the product of legally erroneous procedures, and were specific finding[s]in the Order unsupported by the record of the proceedings, making those findings clearly erroneous;" (Appellant's Br. on Appeal 11, ¶ I); (2) "Did the magistrate err by issuing its Order of Dismissal as a sanction when it had already imposed a less drastic sanction and when many other less drastic, more proportional alternative sanctions remained available?" (*Id.* at ¶ II); (3) "Did the magistrate abuse its discretion by basing its Order of Dismissal on the State's alleged noncompliance with the Order Compelling Discovery

and the Order Re: Motion for Independent Analysis of Evidence, which were issued in error and failed to comply with I.C.R. 16?" (*Id.* at 11-12, ¶ III); (4) "Did the magistrate err as a matter of law when it declined to quash the improper subpoena duces tecum Defendant served on the State and abuse its discretion by citing the State's alleged noncompliance therewith as a basis for issuing the Order of Dismissal?" (*Id.* at 12 ¶ IV); (5) "Did the magistrate err by misapplying the analysis set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), to the facts of this case and by relying on that misapplication as a basis for issuing its Order of Dismissal?" (*Id.* at ¶ V); and (6) "Did the magistrate err by misapplying the analysis set forth in *Arizona v. Youngblood*, 488 U.S. 51 (1988), to the facts of this case and by relying on that misapplication as a basis for issuing its Order of Dismissal?" *Id.* at ¶ VI.

In response to the State's appeal, Rousseau asserts that, "[t]he State's many 'issues' contained in its issue statements can be condensed into the following issue statement: whether the trial court erred as a matter of law by exercising its discretion under the applicable criminal rules to dismiss this case?" Respondent's Br. 20. Because Rousseau recharacterized the State's appeal into the one issue, counsel for Rousseau fails to address and respond to multiple issues brought up by the State.

Despite Rousseau's deficient briefing on these issues, this Court still is tasked with the determination of whether the State has shown error on the part of the trial court, as it is the appellant who bears the burden of proving error, not the respondent who bear the burden of disproving the error. *See Allen v. Campbell*, 159 Idaho 125, 492 P.3d 1084 (2021) ("In sum, '[t]he appellate rules are designed to facilitate thorough adjudication of relevant issues; and, although arguments made by the respondent would

further those ends, this Court must make an independent determination of whether the appellant has carried its burden sufficiently to show that error has occurred." (quoting *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 745, 9 P.3d 1204, 1211 (2000)).

With such, this Court on appeal will address each of the State's issues.

A. Preliminary Note and Standard for Review

Prior to addressing the merits of this appeal, this Court first notes that there are conclusory statements made by the State that this Court on appeal is unable to analyze. As stated by the Idaho Supreme Court in *State v. McDay*, 164 Idaho 526, 432 P.3d 643 (2018), there are established standards for a reviewing court's determination on whether to consider the issues a litigant raises on appeal:

> We will not consider an issue not "supported by argument and authority in the opening brief." *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."). Regardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court. *Inama v. Boise County ex rel. Bd. of Comm'rs*, 138 Idaho 324, 330, 63 P.3d 450, 456 (2003) (refusing to address a constitutional takings issue when the issue was not supported by legal authority and was only mentioned in passing).
>
> Where an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court. *Randall v. Ganz*, 96 Idaho 785, 788, 537 P.2d 65, 68 (1975). A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue. *Michael v. Zehm*, 74 Idaho 442, 445, 263 P.2d 990, 993 (1953). This Court will not search the record on appeal for error. *Suits v. Idaho Bd. of Prof'l Discipline*, 138 Idaho 397, 400, 64 P.3d 323, 326 (2003). Consequently, to the extent that an assignment of error is not argued and supported in compliance with the I.A.R., it is deemed to be waived. *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).

McDay, 164 Idaho at 528, 432 P.3d at 645 (quoting *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 323, 297 P.3d 1134, 1140 (2013)).

To the extent that the State only asserts conclusory statements, or merely asserts an allegation against the trial court, or generally attacks the trial court's rulings, these are not addressed by this Court on appeal.

An additional note on appeal is the fact that counsel for the State on appeal, Ryan Hunter, continues to disregard the rules he is bound to live by as an attorney licensed in Idaho. Idaho Criminal Rule 54(o) requires briefs on appeal in criminal matters be in the content and arrangement as the Idaho Appellate Rules. Idaho Appellate Rule 34(b) request no brief in excess of 50 pages be filed. Ryan Hunter's Appellate Brief on Appeal is 54 pages. At no time did Ryan Hunter move the Court for its consent to allow Hunter to file a non-conforming brief. This is a repeat offense. In *State v. Jessop*, Kootenai County Case No. CV28-22-8596, this Court pointed out to Hunter that he had violated I.A.R. 36(b) by not double spacing either of his two briefs in that case. March 6, 2024, Mem. Decision and Order on Appeal Affirming the Magistrate's Dismissal Under I.C.R. 48, 124-125. As mentioned above in footnote one, Ryan Hunter disregarded I.A.R. 11 by not including a copy of the Order appealed from in the State's Notice of Appeal.

Finally, counsel for the State asserts that this Court on appeal cannot consider the above noted Order on Appeal in *State v. Jessop*, Kootenai County Case No. CV28-22-8596, in this appeal of Rousseau. Reply Br. 24-25. The State argues that Rousseau "did not properly put that Order before this Court for consideration in this matter through a request to augment the record or a proper request for the Court to take Judicial Notice

pursuant to I.R.E. 201" and that "this is a separate case with unique issues and procedural history, and the appellate decision in *State v. Jessop* is not precedent for, or relevant to, this case." *Id.* at 24. While this Court does determine this case separately from the *State v. Jessop* case, this Court finds it is not precluded from considering it's Memorandum Decision and Order in that case as persuasive authority.

B. The Trial Court's Findings of Fact Were Not the Product of Legally Erroneous Procedures, Unsupported by the Record, or Clearly Erroneous.

In this section, the State accuses the trial court of using a "warped mishmash of the criminal and civil procedural rules," (Appellant's Br. on Appeal 14), which resulted in a "hollow record" with "no admitted exhibits or testimony of any witnesses provided under oath during any hearings in this matter." *Id.* at 13. In essence, the State argues that the trial court was not "beholden to the proper application of the rules of criminal procedure and evidence." *Id.* at 14.

The State argues that, "[f]rom the outset of this case, the magistrate deployed an inconsistent and legally untethered approach to decision-making and fact finding. In one moment, the magistrate would assume critical facts and take at face value speculative claims made by Defendant, even overlooking procedural defects to do so; in the next moment, the magistrate would apply a bizarre concoction of procedural rules that imported civil requirements into the criminal realm to effectively exclude, ignore, and dismiss the State's factual assertions and representations." *Id.*

1. Nature of Evidence Considered by the Trial Court

The first argument by the State begins with the accusation that the trial court "deployed an inconsistent and legally untethered approach to decision-making and fact finding" by "assum[ing] critical facts and tak[ing] at face value speculative claims made

by Defendant, even overlooking procedural defects to do so;" and then "apply[ing] a bizarre concoction of procedural rules that imported civil requirements into the criminal realm to effectively exclude, ignore, and dismiss the State's factual assertions and representations." Appellant's Br. on Appeal 13. The State alleges that this approach "ultimately led to the complete derailment of this case" and "the articulated findings of fact in the operative *Order of Dismissal* being inherently defective; unsurprisingly, it also resulted in specific findings contained in the *Order* being unsupported by the record." *Id.*

Without any support for its assertion, the State asserts that "the magistrate seemed to import the civil summary judgment procedure for admitting evidence via attachment to affidavits and declarations of counsel into the criminal context, which was both error as a matter of law and an abuse of discretion." Appellant's Br. on Appeal 14. The State argues that:

> the Idaho Criminal Rules do not have a provision comparable to a motion for summary judgment. *State v. Stewart*, 149 Idaho 383, 388 (2010). Even in pseudo-civil post-conviction proceedings, the civil summary judgment procedure for admitting evidence via affidavits or declarations, or attachment thereto, is not applicable. Instead, "unless introduced into evidence *at the hearing*, verified applications and affidavits do not constitute evidence." *Loveland v. State*, 141 Idaho 933, 936 (Ct. App. 2005) (emphasis added). It follows, then, that the unique procedure for introducing evidence to support a civil summary judgment motion would not apply to the criminal realm.
>
> Here, the record is replete with declarations of counsel, affidavits, and exhibits attached to those declarations and other filed pleadings. However, none of those declarations, affidavits, or exhibits were introduced or admitted as evidence during any hearing, and none were supported by live testimony subject to cross-examination. This is reflected in the appellate transcript itself, which identifies no witness examinations and no admitted exhibits for either party throughout the ten-month span of transcribed hearings. *See App. Tr.,* p. 3 (Index of Examinations and Exhibits, both listing "[None]" for both parties). Furthermore, aside from

> the attachment of emails to which he was a party, Defendant's counsel did not have the necessary personal knowledge of any of the other plethora of documents attached to his many declarations of counsel such that they could be deemed admissible evidence. Whenever the State objected to consideration of these unadmitted and unverified documents, the magistrate invariably found a way to deny the State's objections.

Id. at 15.

As a preliminary note, the State's citing and reliance on *Loveland* here is misplaced, as *Loveland* discussed evidence presented at a post-conviction evidentiary hearing. In essence, counsel for the State is citing to what he calls a "pseudo-civil post-conviction proceeding" case to discuss what does or does not constitute evidence in a criminal case, while accusing the trial court of conflating civil and criminal procedure. The State's argument additionally purports to quote the *Loveland* court, with the State's own added emphasis, however the quoted section is not present anywhere in *Loveland.* Nowhere in *Loveland* does the Idaho Court of Appeals state that, "unless introduced into evidence *at the hearing*, verified applications and affidavits do not constitute evidence" as asserted by the State. Appellant's Br. on Appeal 15.

What the Idaho Court of Appeals in *Loveland* does hold at the cite given by the State is:

> Loveland also asserts that, because the Uniform Post-Conviction Procedure Act permits the district court to accept affidavits as evidence, his application and affidavits automatically constituted evidence for purposes of the evidentiary hearing. A verified pleading that sets forth evidentiary facts within the personal knowledge of the verifying signator is, in substance, an affidavit and is accorded the same probative force as an affidavit. *Mata v. State,* 124 Idaho 588, 593, 861 P.2d 1253, 1258 (Ct.App.1993). However, the purpose of pleadings is to frame the issues upon which a cause is to be tried. Unless introduced into evidence, pleadings are not evidence. That Loveland's application was verified did not dispense with the need to prove his allegations.

> At a post-conviction evidentiary hearing, the court may receive proof by affidavits, depositions, oral testimony, or other evidence and may order the applicant brought before it for the hearing. I.C. § 19–4907. Section 19–4907, therefore, modifies the rules of evidence insofar as it permits the admission of certain forms of hearsay that might otherwise be inadmissible. *See* I.R.E. 801–05. However, Section 19–4907's modification of what evidence can be admitted during a post-conviction evidentiary hearing does not establish that all potentially admissible documents are automatically admitted into evidence. Thus, Section 19–4907 does not support Loveland's position that his verified application and affidavits were *automatically* introduced into evidence at the evidentiary hearing. Further, the adoption of such an interpretation would deprive the parties of the opportunity to object to the admissibility of any such proof. *See* I.R.E. 103.

141 Idaho 933, 936, 120 P.3d 751, 754. Idaho Code Section 19-4907, located within the Uniform Post-Conviction Procedure Act of chapter of Title 19 of the Idaho Code, is not applicable in this matter on appeal. This is an appeal from the magistrate division related to the granting of a Motion to Dismiss brought by a defendant; nothing in this case is related to post-conviction relief.

More telling, however, is that in this section the State does not assert what the trial court should have done or what the correct standard is, and instead *only* asserts that what the trial court did was wrong. The State fails to include the correct standard, argument, or authority relevant to the what it asserts is the correct standard for the admission of evidence in a criminal case. As stated above, the State asserts that the trial court treated this criminal Motion to Dismiss as a civil Motion for Summary Judgment. This Court on appeal has reviewed the transcript of the Motion to Dismiss hearing, and does not find that the trial court ever cited to the Civil Motion for Summary Judgment standards, called the Motion to Dismiss a Motion for Summary Judgment, or

otherwise indicated that it seemed to conflate Rousseau's criminal Motion to Dismiss as a civil Motion for Summary Judgment.

The State, as the appealing party, does not meet its burden on appeal to show that the trial court has errored in how it considered the information provided to it. Ultimately, the appellant bears the burden of proving error on appeal. *McCreery v. King*, 172 Idaho 598, 535 P.3d 574, 582 (2023) (citing *Dorr v. Idaho Dep't of Lab.*, 171 Idaho 306, 309, 520 P.3d 1266, 1269 (2022)). Idaho Appellate Rule 35(a)(6) requires an appellant's argument be supported by citations to the authorities, statutes and parts of the transcript and record relied on. Here, the allegations made by the State related to the trial court's error are conclusory statements not supported by argument or authority to how the trial court erred.

The State additionally argues that, "the magistrate repeatedly refused to accept and consider the representations of the State's attorney when making the decision at issue in this case." Appellant's Br. on Appeal 16. The State further asserts that, "[t]he [United States] Supreme Court had recognized this [sic] Courts are entitled to rely on the representations of counsel, as attorneys have an affirmative duty to be candid and truthful before the Court." *Id.* at 17 (emphasis added) (citing *Azar v. Garza*, 584 U.S. 726, 729 (2018)).

The State relies on Idaho Rule of Professional Conduct 3.3, comment 3, to support its assertion. *Id.* at n. 3. This comment entitled "Representation by a Lawyer," states:

> *[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and*

> *not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).*

Idaho R. Prof. Cond. 3.3, Comment 3 (italics in original). In further support, counsel for the State cites to *Alex M. Azar, II v. Rochelle Garza*, which states that:

> The Government also suggests that opposing counsel made "what appear to be material misrepresentations and omissions" that were "designed to thwart this Court's review." Pet. for Cert. 26. Respondent says this suggestion is "baseless." Brief in Opposition 23. The Court takes allegations like those the Government makes here seriously, for ethical rules are necessary to the maintenance of a culture of civility and mutual trust within the legal profession. On the one hand, all attorneys must remain aware of the principle that zealous advocacy does not displace their obligations as officers of the court. Especially in fast-paced, emergency proceedings like those at issue here, it is critical that lawyers and courts alike be able to rely on one another's representations. On the other hand, lawyers also have ethical obligations to their clients and not all communication breakdowns constitute misconduct. The Court need not delve into the factual disputes raised by the parties in order to answer the *Munsingwear* question here.

Garza, 584 U.S. 726, 730, 138 S. Ct. 1790, 1793, 201 L. Ed. 2d 118 (2018). Counsel for the State additionally cites to *United States v. Christensen*, 828 F.3d 763 (9th Cir. 2015), for the assertion that, "Attorneys are officers of the Court and expect to be respected and to have their representations accepted as true." Appellant's Br. on Appeal 17, n. 4. In the quoted section of *Christensen*, the 9th Circuit is quoting the reasoning of the trial court in applying a two-level upward adjustment under § 3B1.3 of the Sentencing Guidelines for abuse of a position of trust. *Christensen*, 828 F.3d at 816. Counsel for the State next cites to *Ransom v. JMC Leasing Specialties, LLC* for

the assertion that, "Our courts have allowed attorneys, as officers of the court, to offer explanations of matters that have occurred during a case." Appellant's Br. on Appeal 17, n. 4. However, counsel for the State omits the full quotation, which puts that claim in context. The full quotation of that statement by the Court of Appeals of Arkansas, Division IV, is that:

> Our courts have allowed attorneys, as officers of the court, to offer explanations of matters that have occurred during a case. An attorney is required to use candor as an officer of the court and should make only those representations in open court that purport to be of his or her own knowledge only if he or she knows them to be true or believes them to be true based on reasonably diligent inquiry. Here, attorney Riable, stating that he was acting as an officer of the court, provided the court with an account of his post judgment attempts to obtain the Camry title and the expenses he incurred in doing so. The court believed Riable's account over the explanations offered by Ms. Alexander. This credibility determination was the court's prerogative and provided sufficient evidence to hold John in contempt.

Ransom v. JMC Leasing Specialties, LLC, 2016 Ark. App. 509, 7, 505 S.W.3d 737, 741–42 (2016). This omission by counsel for the State, in failing to give the entire quote in context, is telling. Counsel for the State goes on, claiming that due to an attorney's ethical obligation, he or she is incapable of lying to the Court, claiming:

> The State repeatedly attempted to point out what seemed to be a universally recognized fact of the practice of law—that the court may rely on attorney representations on matters within the attorney's own knowledge made in open court because of the affirmative ethical duty of candor and veracity inherent in that position. *App. Tr.*, p. 104, ll. 1-14; p. 111, ll. 3-16. The Supreme Court had recognized this Courts are entitled to rely on the representations of counsel, as attorneys have an affirmative duty to be candid and truthful before the Court. *Azar v. Garza*, 584 U.S. 726, 729 (2018) ("[I]t is critical that lawyers and courts alike be able to rely on one another's representations.") Even when the State's attorney offered to be placed under oath to assuage the magistrates concerns and promotes the goal of I.C.R. 2(a) in promoting fairness and efficiency, the magistrate refused to accept that, claiming the State had waived its opportunity to present the practical and actual factual circumstances that were central to the decision facing the magistrate at that time. *App. Tr.*, p.

> 104, ll. 15-25. And even when the State's attorneys reduced their representations to an affidavit and declaration filed on Aug. 1, 2023, which the magistrate noted at the Aug. 1 status hearing were "technically timely" and relevant to the decisions it made at the July 18, 2023, hearing (see *App. Tr.*, p. 123, L. 18; p. 127, ll. 18-23), the magistrate changed its position at the Aug. 28 hearing and ignored the factual assertions contained therein because it now deemed them part of the State's "lack of timeliness" in filing. *App. Tr.*, p. 161, ll. 18-22. Notably, the magistrate's unwillingness to consider or give any weight to the representations of the State's attorney made as an officer of the court was not applied equally to Defendant's counsel. *See App. Tr.*, p. 45, ll. 14-19 (considering information in defense counsel's unsigned affidavit because of his "clarifications" at the Feb. 9, 2023, hearing offered "[a]s an office of the court.")

Appellant's Br. on Appeal 16 – 17.

In the cases cited by the State there is not any authority that would require a court to take an attorney's representation as evidence without a credibility determination. Decisions regarding the credibility of witnesses, weight to be given to conflicting evidence, and factual inferences to be drawn are within the discretion of the trial court. *State v. Munoz*, 149 Idaho 121, 128, 233 P.3d 52, 59 (2010); *State v. Bishop*, 146 Idaho 804, 810, 203 P.3d 1203, 1209 (2009). While the State argues that the trial court did not consider the testimony of the undersigned prosecutor for the State, it is very possible that the trial court did consider the testimony, but used its discretion regarding the credibility of that testimony, and give the testimony the weight that the trial court deemed fit. (For example, the trial court is now on appeal being chastised by counsel for the State for not taking the State's undersigned attorney at his word that there was a signed, sealed, search warrant that the phones were turned over pursuant to. This differs from the information set forth in the Memorandum in Support of Motion to Reconsider and Declaration, wherein the same undersigned prosecutor claims that the phones were delivered pursuant to authority of the Order Preserving Seized

Property, that while delivering the phones the detective learned that there was a search warrant being drafted for the phones, and that the warrant was issued subsequent to that delivery. Mem. in Supp. of Mot. to Reconsider and Decl. 6.) The State does not argue the trial court abused its discretion in weighing the credibility of the witnesses in this matter. However, to the extent that the State does argue this, this Court on appeal disagrees. The trial court did not abuse its discretion in weighing credibility.

Finally, as the last general error related to the finding of facts, the State claims that "the magistrate abused its discretion by refusing to take judicial notice of adjudicative facts properly cited pursuant to I.R.E. 201." Appellant's Br. on Appeal 17-18. The State argues that:

> the magistrate denied the State's request that it take judicial notice of an order in a co-conspirator's case denying a nearly identical motion as Defendant's *Motion for Independent Analysis*, claiming that the request was deficient because the State had not included a copy of the order with its request. *App. Tr.*, p. 106, ll. 11-25; p. 107, L. 1. However, when the State pointed out that the rule did not require a copy be provided and allowed specific identification of the relevant document, which the State had provided, the magistrate claimed the citation was insufficient. *App. Tr.*, p. 107, ll. 2-15. When further pressed by the State to explain how the citation was defective when it provided the co-defendant's name, case number, date of filing, title of the document, and signing judge - in essence, all possible relevant information needed to identify the order - the magistrate changed position and claimed that the order denying a virtually identical motion seeking identical information in a companion case had "no bearing on this case" and was "not relevant to any issue before this case [sic]." *App. Tr.*, p. 107, ll. 16-19. The magistrate erred in that conclusion and abused its discretion by refusing to follow the mandate of I.R.E. 201(c) that it "must take judicial notice" of an adjudicative fact the State requested and supplied "the necessary information" for it to do so. That error by the magistrate led it to make clearly erroneous findings of fact at the July 18, 2023, hearing and after, including that the State had physical possession, custody, or control over Whitson's cellphone. *App. Tr.*, p. 110, ll. 12-25.

Appellant's Br. on Appeal 18-19. The State additionally adds that "[n]otably, the magistrate *did* consider the motion and other documents filed in that same co-

conspirator case . . . because Defendant had attached them (but not the order denying that motion) to his Declaration. . . underscoring the erroneous approach to factual decisions the magistrate took throughout this case. . ." *Id.* at 18, n. 5.

In relevant part, Idaho Rule of Evidence 201, entitled Judicial Notice of Adjudicative Facts, states:

> (a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
>
> (b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:
>
> (1) is generally known within the trial court's territorial jurisdiction; or
>
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
>
> (c) Taking Notice. The court:
>
> (1) may take judicial notice on its own; or
>
> (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
>
> When a court takes judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case, the court must identify the specific documents or items so noticed. When a party requests judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case, the party must identify the specific items for which judicial notice is requested or offer to the court and serve on all parties copies of those items.

I.R.E. 201. "An 'adjudicative fact' is a 'controlling or operative fact, rather than a background fact; a fact that concerns the parties to a judicial or administrative proceeding and that helps the court or agency determine how the law applies to those parties.' " *IDHW v. Doe (2023-24)*, 172 Idaho 891, 537 P.3d 1252, 1259 (2023) (quoting *Bass v. Esslinger*, 171 Idaho 699, 704-05, 525 P.3d 737, 742-43 (2023)).

The trial court, at the July 18, 2023, hearing on Rousseau's Motion to Compel and Motion for Independent Analysis, denied the State's request for judicial notice,

because the State did not include a copy or an adequate cite (Tr. 106:11 - 107:1), and that the requested document had no bearing on the current case. *Id.* at 107:18-24. The State, at both the July 18, 2023, hearing, and on appeal, asserts that the citation was adequate, as it included the date, case number, and identified the specific document requested that the trial court take judicial notice of.

This Court on appeal agrees that the citation given by the State was adequate enough to trigger the mandatory judicial notice requirement of Idaho Rule of Evidence 201(c)(2). The State identified the specific document that it was requesting judicial notice of, providing the co-defendant's name, case number, date of filing, title of the document, and signing judge. The trial court erred in not taking judicial notice of the requested order by the State.

However, this Court finds this error by the trial court to be harmless. As the trial court held at the July 18, 2023, hearing, the requested document that the State was seeking judicial notice of, wouldn't have affected the current matter because: "[i]t has no bearing on this case. It's not relevant to any issue before this case because, as argued under collateral estoppel, it doesn't apply. You have different defendants. You have different attorneys. You don't have the full opportunity to litigate." Tr. 107: 18-23. This Court on appeal finds that whether the trial court did or did not take judicial notice of the State's request had no bearing on the outcome of Rousseau's case. A review of the Order Re: Motion for Independent Analysis and the Order Compelling Discovery show that both Orders were based upon the facts set forth in the case in front of it, not the facts as set forth in the Tucker (co-defendant with Rousseau) case.

The State argues that this error led the trial court to later make erroneous findings of fact related to the State's possession of the phone at issue at the July 8, 2023, hearing. This Court disagrees. The trial court's determination that the City of Coeur d'Alene had possession of the phone was not based on another judge's decision in a separate matter. Instead, as shown by the record, the trial court came to this conclusion because the City of Coeur d'Alene was unable to show, and does not show even on this appeal, that there was a signed search warrant seizing the phones by the FBI at the time that the phones were freely delivered by the City of Coeur d'Alene police Department to the FBI.

Idaho Criminal Rule 52, entitled Harmless Error, requires that "[a]ny error, defect, irregularity or variance that does not affect substantial rights must be disregarded." The trial court did not put any weight into the related motions when considering dismissal in this action, thus the order denying these motions would not affect a substantial right of the State. This error on the trial court of not taking judicial notice is deemed by this Court on appeal to be harmless error.

2. The Order for Dismissal was Not Based Upon Erroneous Facts.

The State next argues:, "several of the specific findings of fact included in the Order of Dismissal are inaccurate and unsupported by substantial and competent evidence in the record." Appellant's Br. on Appeal 19. The Court addresses each in turn.

a. Subparagraph B

The first issue relates to subparagraph b in the second paragraph of the trial court's order of dismissal, which states:

> b. On December 30, 2022, the State objected to a continuance, alleging that discovery was complete and the case was ready to proceed to trial on January 17, 2023. The Court granted the continuance granted over the State's objection, and the trial was reset for March 20, 2023.

Order for Dismissal 2, ¶ (2)(b).

The State asserts that:

> the magistrate's finding that the State had objected to Defendant's request for a continuance on Dec. 30, 2022, claiming the State had alleged that "discovery was complete and the case was ready to proceed to trial" as set, is not supported by the record. *Order of Dismissal*, p. 2, ¶ (2)(b); *App. Tr.*, p. 155, ll. 14-19. The State never asserted that "discovery was complete" or anything similar during the Dec. 30, 2022, hearing and, instead, simply lodged a general objection to continuing without issuing a bench warrant for Defendant's failure to appear. *App. Tr.*, p. 5, ll. 21-25; p. 6; p. 7, ll. 1-8. The magistrate's finding to the contrary was, therefore, clearly erroneous.

Appellant's Br. on Appeal 19.

Rousseau asserts that, "[a]t the pretrial conference held on December 30, 2023,[4] the State objected to the defense's request for a continuance. Tr. at 5, l.22 to 6, l.14. Implicit in the objection was that the State's *Brady* obligations were fulfilled and trial was appropriate. *Id.*" Respondent's Br. 2.

This Court has reviewed the transcript of the December 30, 2022, hearing. At such hearing, the State did object to the continuance. Tr. 5: 24. In part, the State made the record that it had sent a discovery request, a copy of the Sworn Complaint, and a public defender application to the defendant, which came back to the State as unclaimed. *Id.* 6: 7-13. This Court on appeal does not find in the transcript wherein counsel for the State explicitly stated that the discovery was complete and that the case

[4] This Court notes that there was not a pretrial conference held on December 30, 2023; the Court assumes that Rousseau means December 30, 2022.

was ready to go to trial. However, this Court on appeal finds that to be, as Rousseau puts it, **implicit** in the objection. The State, in objecting to the continuance, is purporting to the trial court that it was ready to continue to trial. In explicitly telling the trial court that the State was ready to go to trial, the State implicitly tells the court that all pretrial procedures, including discovery, are complete. While the State did not allege it explicitly had complied with all discovery, there was that implicit allegation made by State. The trial court's finding of fact is supported by the record, and thus not clearly erroneous.

b. Subparagraph H

The second issue relates to subparagraph h in the second paragraph of the trial court's order of dismissal, which reads:

> h. On February 9, 2023, the Defendant's Motion to Dismiss was heard. This was the first mention of the documents being in the possession of the FBI by the State. This Court vacated the trial to give Defense more time to prepare for trial. The Court exercised its discretion, and as a sanction for the late disclosure, imposed a continuance as a lesser sanction to the dismissal as requested by the Defense. The case was reset for a May 22, 2023 jury trial.

Order for Dismissal 2, ¶ (2)(h). The State alleges that this is "inaccurate" because:

> At the Feb. 9 hearing, the magistrate did not make a specific finding that the State had provided late disclosure or any rationale to support such a finding, but instead simply assumed that disputed point; notably, the magistrate specifically found at that hearing that the State had "turned over the [extracted from the electronic devices] as soon as [it] had it." App. Tr., p. 46, ll. 9-12.

Appellant's Br. on Appeal 19 – 20.

This Court has reviewed the transcript of the February 9, 2023, hearing on Rousseau's Motion to Dismiss. At such hearing, the trial court did not explicitly state that there was late disclosure on the part of the State. Instead, the trial court stated that

it "[did]n't think that the State's actions were of such an egregious nature as to require the extreme measure of dismissal," (Tr. 44: 16-19), and that it didn't "think that the [State's] activities are so egregious as to cause irreparable harm to the defendant." Tr. 46: 23-24. These two findings are related to the effect that the late disclosure of the information had on the defendant, which the trial court found at that time did not raise to the level to require dismissal. The trial court found that the prosecutor turned over the evidence as soon as he had it. *Id.* at 46: 10-11. At the conclusion of the hearing, the trial court vacated the trial and the pretrial to give defense counsel an opportunity to go through the information provided by the State. *Id.* at 47: 13-18.

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.*

This finding of fact that there was a late disclosure is supported by relevant evidence that a reasonable mind might accept to support a conclusion. The trial court

did not dismiss the matter at that time because the effect of the State's actions on the defendant did not rise to the level to warrant dismissal. However, a lesser sanction of continuance was given. This sanction of a continuance supports at least the inference that the trial court found there was a late disclosure. This supports the trial court's later specific determination that there was a late disclosure. This late disclosure does not have to be solely due to the prosecutor, it can also be due to the prosecutor's agent. With such, this Court on appeal does not find this finding of fact to be clearly erroneous.

c. Subparagraph I

The State's third issue related to the facts of this case is subparagraph i in the second paragraph of the trial court's order of dismissal, which states:

> i. On February 13, 2023, the State provided more Supplemental Discovery, specifically information from Officer Welch regarding the voluntary relinquishment of the defendant's, and those of his alleged co-conspirator's, phone to the FBI.

Order of Dismissal 3, ¶ (2)(i).

The State alleges that this:

> finding was unsupported by the record; not only were the contents of that supplement never properly before the magistrate for consideration as facts, but even if they were, the content did not support the magistrate's finding and, in fact, said nothing to that effect. See Reply/Supp. Brief in Support of Motions (July 3, 2023), attached Ex. B.

Appellant's Br. on Appeal 20.

On January 17, 2023, Officer Welch writes the following in his supplemental report, which was provided to Rousseau on February 13, 2023:

> I returned to work after being at training for a week. I had previously sent a disk hard drive to the FBI's RCFL where the cell phones that were seized information was located. Previously the FBI had written a search warrant for the cell phones seized in this case. I received the disk back with over 3 terabytes of data on it. I received the disk from Taylor Couch. I have no contact information for Couch. I looked through the data and

> below is who I was able to match each phone to and what file the specific data is under.

July 3, 2023, Reply/Suppl. Br. in Supp. of Mots., Ex. B (attaching the January 17, 2023, Supplemental Report from Officer Welch). Thus, counsel for the State's claim to this Court on appeal that the supplement was "never properly before the magistrate for consideration" (Appellant's Br. on Appeal 20) is patently false.

The trial court found that the phones were voluntarily relinquished to the FBI, (Tr. 126: 20-21), and this supplemental report by Officer Welch contains additional information related to this relinquishment. Again, counsel for the State's claim to this Court on appeal that "the content (of the supplement) did not support the magistrate's finding and, in fact, said nothing to that effect" (Appellant's Br. on Appeal 20), is also, patently false. This Court on appeal finds that the contents of this supplemental report thus support the magistrate's finding. Therefore, this finding by the trial court is not clearly erroneous.

d. Subparagraph J

The fourth issue relates to subparagraph j in the second paragraph of the trial court's Order of Dismissal, which states:

> j. On March 14, 2023, the State provided Supplemental Discovery of more than three (3) terabytes of information to the defendant's attorney. It warrants mentioning that the trial was set for March 20, 2023, until continued on February 9, 2023, over the State's objection.

Order of Dismissal 3, ¶ (2)(j). The State alleges that the trial court's finding here was "incorrect" because "[t]he State disclosed and made available the extracted digital contents on Jan. 23, 2023, and Defendant failed to obtain those contents until March 15, as explained previously herein." Appellant's Br. on Appeal 20. (citing to Appellant's Br. on Appeal 6).

In response, Rousseau argues that while, "the existence of the data of over three terabytes ("TB") of information from the FBI was orally disclosed on the record in January of 2023, it was not formally produced until March 14, 2023." Respondent's Br. 4. (citing to Plf.'s Supp. Resp. to Req. for Disc. (Mar. 14, 2023)) (emphasis in original).

This Court has reviewed the March 14, 2023, Supplement to Plaintiff's Response to Discovery. This supplemental response to discovery stated that:

> the State's original Response to Discovery, dated January 5, 2023, and subsequent discovery responses are hereby supplemented to include the following evidence: 5 TB hard drive containing more than 3 TB of data and 250gb of media from cell phones, cameras, and other recording devices seized in this case. As well as a Supplemental Report from Officer Welch, 4 Pages.

March 14, 2023, Supplemental Discovery Response.

The trial court's finding is directly supported by the record. On March 14, 2023, the State filed a supplemental discovery request, providing more than three terabytes of data. Thus, this finding of fact was not clearly erroneous.

e. Subparagraph L and Subparagraph M

The State's next issue relates to subparagraphs l and m in the second paragraph of the trial court's Order of Dismissal, which state:

> l. On May 25, 2023, the State supplemented its discovery responses with additional expert disclosures.
>
> m. On June 1, 2023, the State supplemented its discovery responses with additional expert disclosures.

Order of Dismissal 3, ¶¶ (2)(l), (2)(m). The State argues that:

> The content of those disclosures consisted of the CVs for the identified individuals and did not meet the requirements for expert witness disclosure under I.C.R. 16(b)(7). Importantly, the supplement *did not* indicate anywhere that any of these individuals were proposed as witnesses for the State, all of which the State explained to the magistrate

> when this issue was raised during the July 18, 2023, hearing. App. Tr., p. 88, ll. 24-25; p. 89-91; p. 92, ll. 1-18

Appellant's Br. on Appeal 20. (emphasis in original).

This Court has reviewed the State's May 25, 2023, supplemental response, which is entitled Supplement to Plaintiffs Response to Discovery Expert Witnesses. In such supplemental response, the State claims that it "hereby informs the Court that the State's Response to Discovery, dated January 5, 2023, is hereby supplemented to include the following expert witnesses evidence." May 25, 2023, Supplement to Plaintiffs Response to Discovery Expert Witnesses. This supplemental response additionally states, "[t]he Coeur d' Alene Prosecuting Attorney's Office has been informed that Randy Kim recently retired and the State is awaiting receipt of his Curriculum Vitae, which will be provided in a supplemental discovery response immediately upon receipt." *Id.* This Court has additionally reviewed the State's June 1, 2023, supplemental discovery, entitled Supplement to Plaintiffs Response to Discovery Expert Witness. In such supplemental response, the State writes that it, "hereby informs the Court that the State's Response to Discovery, dated January 4, 2023, is hereby supplemented to include the following evidence: 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 "Curriculum Vitae for Randy C. Kim - 4 pages." June 1, 2023, Supplement to Plaintiffs Response to Discovery Expert Witness.

This Court on appeal finds that the trial court's classification of these two Supplemental Discovery Response contents as expert witness disclosures to be supported by the record. The State asserts that the documents do not include any

indication that the listed individuals were going to be called as witnesses for the State, however, as pointed out to the State by the trial court, (Tr. 89:19 – 90:7), the May 25, 2023, Supplement to Plaintiffs Response to Discovery Expert Witnesses, states that the listed names, information, and CV's are "expert witness evidence." The State additionally claims that these disclosures did not meet the requirements for expert witness disclosure under I.C.R. 16(b)(7), so therefore cannot be disclosures, however, the deficiencies of the expert disclosure does not negate that the disclosure occurred. The State argued at the July 18, 2023, hearing, that "[t]his was disclosing these experts who potentially could be witnesses if called by, I guess, defense counsel or the State, but was not an indication of we're calling them as expert witnesses." Tr. 91: 5-9. While this Court on appeal finds that these are deficient disclosures, the trial court's determinations that they were disclosures (and that is all the trial court found) is certainly not clearly erroneous.

f. Subparagraph N

The next issue asserted by the State relates to subparagraph n in the second paragraph of the trial court's Order of Dismissal, which states that, "On July 18, 2023, the State represented to the Court that they had turned over everything." Order of Dismissal 3, ¶ (2)(n). The State argues that this is "inaccurate" because the State instead "represented that everything extracted from - or able to be extracted from -the digital devices had been turned over. App. Tr., p. 97, ll. 2-25." Appellant's Br. on Appeal 20-21.

This Court has reviewed the transcript of the July 18, 2023, hearing. During such hearing, counsel for the State argued, in part, that:

MR. HUNTER: -- we can't be compelled to give something we don't have and can't get. I guess that's the sum total at least of the State's argument.

Oh, as for the pictures, there was pictures -- a claim that we haven't provided all the pictures. Judge, we've given everything. I've searched through the evidence that we have, the pictures that were taken. He's got 410, I believe, pictures on 103 pages that were provided to him. I don't know what else to tell counsel other than there are no more pictures, which we've told him multiple times.

Tr. 95:21 – 96: 6. Further, the State clarified to the trial court that:

THE COURT: The representations thus far from the State have been that they don't know what is there, but they've turned over what they can.

. . . .

MR. HUNTER: It's not that we're saying we don't know what's on the phone. We – our representation to the Court and to counsel and to all counsel from the outset has been we do know, and that's what's been provided.

Everything that was able to be extracted by the FBI has been extracted. There is no incentive, there is no basis, there is no reason for them to provide the State with partial extraction or an incomplete extraction. We're not aware -- we haven't been provided with any evidence. We haven't been in the reports that are generated for these extractions, Cellebrite reports. There's no indication that this was an incomplete extraction, that there was an error, that they were unable to retrieve any otherwise retrievable evidence.

To the contrary, everything that we've gotten, everything that was able to be obtained from these digital devices that we received, we have absolutely no basis, no facts, no information, not even a rumor or hint to believe that these are incomplete extractions. To the contrary, we provided it, and so they have everything that we've got. They have everything that's obtainable.

Id. at 96:20 – 98:1.

The State's assertion is that Rousseau and his counsel have received everything that the State has, which is exactly what the trial court found in it's finding of fact – that the State has turned over everything. The trial court's finding of fact is supported by the transcript, and thus not clearly erroneous.

g. Subparagraph O

The next issue alleged by the State relates to subparagraph o in the second paragraph of the trial court's Order of Dismissal, which states that, "On July 25, 2023, the State supplemented its discovery responses with park permits." Order of Dismissal 3, ¶ (2)(n). The State argues that this was "incorrect" because, "that supplement provided *certified copies* of park permits already disclosed in its initial discovery response on Jan. 5, 2023." Appellant's Br. on Appeal 21.

This Court on appeal has reviewed the initial, January 5, 2023, discovery response and the July 25, 2023, Supplement to Plaintiff's Response to Discovery. In the January 5, 2023, Response to Discovery, the State provided "Bandshell Permit (00001-00012), 12 Pages." January 5, 2023, Plaintiff's Response to Discovery 1. In the July 25, 2023, Supplement to Plaintiff's Response to Discovery, the State supplemented their previous discovery response to include, "Certified copies of City Park Permits issued for the day of June 11, 2022 - 20 pages." Supplement to Plaintiff's Response to Discovery 1.

The two disclosed documents differ in both name and length. While the initial disclosed documents included 12 pages of the Bandshell Permit, the later disclosure included 20 pages of the City Park Permits issued for the day. Even if the Bandshell Permit was additionally included within the supplemented City Park Permits later

disclosed, there were additional park permits disclosed in the July 25, 2023, supplement. The trial court's finding that the State supplemented its discovery responses with park permits on July 25, 2023, is supported by the record, and thus not clearly erroneous.

h. Subparagraph Q

The next issue asserted by the State relates to subparagraph q in the second paragraph of the trial court's Order of Dismissal, which reads:

> q. On August 7, 2023, the State filed its Notice of Impossibility, representing to the court that it could not provide the phone being sought by the Defendant since the State had relinquished custody and control of the phone, contrary to the Order of Preservation previously issued several months earlier by Judge Pittman. Therefore, this Court found that a curative instruction was appropriate under *Youngblood* at the hearing on August 28, 2023. At the August 28, 2023, hearing the Court based the discretionary sanction upon the history of ongoing and newly discovered evidence provided by the State to the Defense, as recently as a month prior and more than a year since the defendant was arrested.

Order for Dismissal 3, ¶ 2(q). The State argues that this finding that "it could not provide the phone being sought by the Defendant since the State had relinquished custody and control of the phone" is "unsupported by the record," because it "misrepresents the content of that document, which made no such representation." Appellant's Br. on Appeal 21.

This Court has reviewed the Notice to Court – Impossibility of Compliance and Declaration, filed by the State on August 7, 2023. In such Notice, the State argues that, "[t]he facts establishing the practical inability for Plaintiff to obtain or make available for inspection a cellphone that it does not have possession, custody, or control over at this time, are set out in the *Declaration of Counsel – Ryan S. Hunter* and *Affidavit of Wesley J. Somerton*, both filed on August 1, 2023." Notice to Court – Impossibility of

Compliance and Decl. 1. This document thus represents to the Court the "practical inability" of the State to provide the cell phone, because it does not have custody or control of the phone anymore.

In the Declaration of Ryan Hunter, the prosecutor states, in part, that "the Plaintiff does not have custody or control over the physical electronic devices, which have been in the physical custody of the FBI and held at the FBI's Intermountain West Regional Computer Forensic Laboratory," (Hunter Decl. 3, ¶ 9), and that "the electronic devices had been seized and held, and their contents extracted, pursuant to the federal warrant referenced in the supplemental report of Det. Jesse Welch dated July 19, 2022, which was provided to counsel in initial discovery on January 4, 2023." *Id.* at ¶ 11. This Court on appeal does not have the July 19, 2022, supplemental report in the record; it only has the January 17, 2023, supplemental report (discussed above), which was disclosed to Rousseau on February 13, 2023.

In the Affidavit of Wesley Somerton, the prosecutor states:

> 4. I personally provided to Mr. Mihara the State's Response to Discovery providing the chain of custody from the Coeur d'Alene Police Department to the FBI of the electronic recording devices. The copy of the chain of custody is dated July 19, 2022, and believed to have been previously provided in discovery in January 2023.
>
> 5. I explained to Mr. Mihara it was my belief this document had been provided to him in the State Response to Discovery in January 2023 that included Coeur d'Alene Detective Welch's written report regarding the transfer of the electronic recording devices to the FBI on July 19, 2022. If I was mistaken that the specific document accompanied the report, it was not intentional.

Somerton Aff. 1, ¶¶ 4, 5.

The Notice of Impossibility represents that the State cannot provide the phone, because of the State's claim that it does not have custody and control of the phone.

The Declaration of Ryan Hunter and the Affidavit of Wesley Somerton, referenced in the Notice of the Impossibility, both seemingly assert that the FBI has possession of the cell phone. Thus, the trial court's finding of fact that the Notice of Impossibility represented that the State could not provide the phone being sought because the State had relinquished custody and control of the phone, is clearly supported by the record. This finding of fact is not clearly erroneous.

i. Paragraph 3

The next issue asserted by the State relates to paragraph 3 of the trial court's Order of Dismissal, which states that: "The State continuously provided voluminous supplements to its mandatory discovery obligations past the due date for such discovery *as noted above*." Order of Dismissal 3, ¶ 3 (emphasis in original). The State argues that this finding "is both legally unsound and factually inaccurate." Appellant's Br. on Appeal 21. More specifically, the State claims that:

> First, the only "voluminous supplement" the State provided was the extracted digital contents, which were disclosed within days of receipt by the State. Further, the magistrate never identified any authority establishing that the State should have disclosed this information prior to having the actual and practical ability to do so. Indeed, despite extensive searching, the State could not find any controlling authority in Idaho or elsewhere that supports the proposition that compliance with the obligation to supplement discovery set out in I.C.R. 16(j) can provided [sic] a basis for dismissing a criminal case. Even if this finding were accurate, the magistrate abused its discretion by even partially relying on this to justify the ultimate sanction of dismissal because it exceeded the outer boundaries of its discretion, was inconsistent with applicable legal standards, and was not reached by an exercise of reason.

Id.

This Court on appeal has reviewed the discovery responses filed by the State in this matter. In the State's original discovery response, filed on January 5, 2023, over six months after the arrest of Rousseau, the State provided 275 pages of documents, 103

pages of photos, and 1 64GB jump drive with all discovery documents and Media containing: 2 ISP Disk Folders with videos; 46 CDAPD videos; and 911 Audio. Thereafter, on January 23, 2023, the State supplemented over 3 TB of media from cell phones, cameras, and other recording devices seized in this case. On July 25, 2023, the State provided 20 pages of supplemented jury trial evidence. On February 3, 2023, the State supplemented "Videos, consisting of body cam video from Officer Gilbert #1986025, 2 body cam videos from Officer Buhl, #1986022 & 1986021 and body cam video from Officer Newbill #1985985." On May 25, 2023, the State supplemented their disclosure to include ten pages of curriculum vitiates of expert witnesses. On February 13, 2023, the State supplemented to add a four-page supplemental report, and "250gb of media from cell phones, cameras, and other recording devices." On June 1, 2023, the State supplemented to add a four-page Curriculum Vitae. On July 27, 2023, the State supplemented its response to include a four-page property receipt. It is reasonable to conclude that some of these supplemental disclosures would be considered "voluminous." Therefore, that section of the trial court's findings is supported by the record, and not clearly erroneous.

Continuing, the trial court dismissed this case, in part, due to the State's late disclosures of evidence that it deemed to be in violation of *Brady*. The State seemingly argues that it cannot find any authority that would allow the trial court to rely on late disclosures, which it states is "compliance with the obligation to supplement discovery set out in I.C.R. 16(j)," as a basis for dismissing a criminal case. Whether or not *Brady* was implicated in this matter, discussed below, subsequent cases discussing *Brady* clearly show that there are differences between compliance with the obligations to

supplement discovery and late disclosures of evidences, with the latter, in some cases, amounting to a *Brady* violation. *See Thumm,* 165 Idaho at 423, 447 P.3d at 871. In any event, the trial court's finding that "The State continuously provided voluminous supplements to its mandatory discovery obligations past the due date for such discovery" is not clearly erroneous.

j. Paragraph 5

The State next asserts an argument related to paragraph 5 of the Order of Dismissal, which states:

> (5) The State's failure to comply with Defendant Rousseau's Amended Subpoena Duces Tecum served upon City Clerk, Renata McLeod, on or about August 1, 2023 in a timely manner (Ms. McLeod's Affidavit was filed *after* the hearing on August 28, 2023);

Order of Dismissal 4, ¶ 5. The State argues that this is "clearly erroneous," because:

> Not only was that subpoena duces tecum invalid and facially overbroad and oppressive, as discussed at length hereafter in Section V, but this finding ignored the factual reality established in the *Affidavit of Renata McLeod* that the estimated minimum time needed to review the responsive emails to remove the litany of protected information was thirty weeks. *Id.* at ¶¶ 8- 10. In other words, the magistrate had facts before it showing the State had begun the lengthy process of complying, which it chose to ignore to make this clearly erroneous finding of fact.

Appellant's Br. on Appeal 21-22.

The State is seemingly arguing that because it stated that compliance would take thirty weeks, that the State therefore complied. This argument is not persuasive to this Court on appeal. The State did not timely comply with the subpoena duces tecum served upon it. The State being in partial compliance, or beginning the process to be in compliance, does not change the fact and finding of fact that the State was not in compliance. Further, as specifically stated by the trial court in paragraph 5, the State

did not file the *Affidavit of Renata McLeod* until after the hearing on the State's Motion to Quash Subpoena. This finding of fact by the trial court is not clearly erroneous.

k. Paragraph 8

The State's final issue is with paragraph 8 of the Order of Dismissal, in which the trial court states: "[t]he Defense's repeated and timely attempts to gain access to potentially exculpatory information, information the Court has repeatedly ruled is material and relevant has gone without appropriate response by the State." Order of Dismissal 4, ¶ 8. Counsel for the State argues that:

> Finally, and most critically, the magistrate's finding that the information Defendant sought and that it had compelled disclosure of constituted "potentially exculpatory information" that the magistrate had "repeatedly ruled is material and relevant" was unsupported by the record. Order of Dismissal, p. 4, ¶ (8). Throughout these proceedings from the July 18, 2023, hearing onward until dismissal, Defendant had not provided any admissible factual basis for his central claim that he was "able to identify information which led [him] to believe that there is a high-likelihood of highly-exculpatory information" on Whitson's cellphone. *Decl. of Counsel* (June 26, 2023), at ¶ 4. Defendant never identified any personal knowledge that could form the basis of his affied claims, and the magistrate never required Defendant to specify what "information" he supposedly identified, or how he identified it, that gave him a good faith basis to believe that any relevant information remained on Whitson's cellphone, much less why that information could be deemed "highly exculpatory information" as alleged. Instead, Defendant has only ever provided speculation on those matters. *See Decl. of Counsel* (June 26, 2023) & *Reply/Supp. Brief in Support of Motions to Compel and for Independent Analysis* (July 3, 2023).

Appellant's Br. on Appeal 22.

This Court on appeal finds this argument to be nothing more than a request by the State to reweigh the evidence in this matter. To that extent, this Court declines. There was evidence put on by Rousseau, including the Affidavit of Graham Whitson (filed in this case on August 11, 2023, two months before the hearing (October 13, 2023) on defendant's Motion to Dismiss, filed on September 28, 2023), that shows the

potentially exculpatory information on the cell phone. The Affidavit of Graham Whitson states that:

> 2. I was one of thirty-one individuals who was arrested for allegedly conspiring to riot in the City of Coeur d'Alene on or around June 11, 2022.
> 3. A number of items of a personal nature were seized from my person incident to my arrest on June 11, 2022. These items include, a digital camera, a personal cellular telephone, and an audio recording device.
> 4. I have reason to believe that my personal cellular telephone contains evidence that is exculpatory with respect to the conspiracy charges pending against me and the other individuals who were arrested and charged for the same offense. Specifically, there is a video of a briefing conducted prior to our intended demonstration at approximately 2 pm. on June 10, 2022, during which ground rules - which include behaving in a law-abiding and non-violent manner — were addressed and/or discussed as a group.
> 5. With respect to my digital camera, I have reason to believe it contains evidence that is exculpatory with respect to the conspiracy charges pending against me and the other individuals who were arrested and charged for the same offense. Specifically, there is believed to be a video of the interaction between Thomas Rousseau and the one of the officers who responded to the scene during which he stated the peaceful intentions of the group and that the group did not have weapons.
> 6. Finally, I have reason to believe that on the same camera, or possibly on another external audio device, there is an audio recording of Thomas Rousseau during the time leading up to the arrest on June 11, 2022, in which expectations for the demonstration were discussed.
> 7. I have reason to believe these recordings are contained on my cellular phone and/or my digital camera and/or an external audio recording device that was in my possession at the time of my arrest because I personally recall making these recordings prior to being arrested.
> 8. These video and/or audio recordings are of the utmost importance both to my own defense and the defense of others similarly charged, for the following reasons:
>
> a. It demonstrates that there was no conspiracy to engage in any activity that would have been unlawful;
> b. It demonstrates both my own intention, and the intention of others present, to remain law-abiding at all times during our intended demonstration;
> c. It demonstrates both my intention, and the intention of others present, to remain non-violent and respectful of the property of others at all times during our intended demonstration; and
> d. It bolsters my position that the state's prosecution of myself and others in this matter is not due to any intention by myself or others to engage in unlawful activity, but rather, has been motivated solely

based upon the content of the opposing view we had intended to present in a lawful manner; and
e. It provides potential impeachment evidence with respect to the testimony of the officers, including, but not limited to, evidence that the policies and procedures of their own department were not followed in making these arrests.

9. I have made multiple efforts to retrieve these devices and their contents both through the discovery process in this case and through the efforts of my attorney in Texas. I have been told that my cellular telephone is being held by the Federal Bureau of Investigation pursuant to a sealed search warrant. However, I have been unable to personally verify the accuracy of this information.

10. In regards to my cellular phone only, my Texas attorney has provided me with correspondence from Special Agent Jason M. Merill, Chief Division Counsel, of the Federal Bureau of Investigation's Salt Lake City office. Special Agent Merrill's letter to my Texas attorney states that Deputy Chief Attorney Ryan Hunter has not received a request for discovery for this information. However, both my own attorney and attorneys representing other defendants charged similarly have requested this information.

Whitson Aff. 1-3, ¶¶ 2-10.

The trial court's finding of facts were thus supported by the record, and not clearly erroneous. Whitson's Affidavit is supported by personal knowledge and it clearly sets forth exculpatory information regarding Rousseau's charged offense of conspiracy to riot.

C. The Trial Court Did Not Misapply the Relevant Standard Under Idaho Criminal Rule 48, Nor did it Fail to Provide Notice to the State Under Idaho Criminal Rule 48.

The State alleges that the trial court, "erred as a matter of law when dismissing this case because it failed to comply with the notice requirement of I.C.R. 48, and misapplied I.C.R. 48 to the facts of this case." Appellant's Br. on Appeal 23. In the State's first part of this section, the State argues that it "was never provided any notice—formal or implied—that the magistrate was considering dismissal based upon alleged delay in bringing Defendant to trial under I.C.R. 48(a)(1)." *Id.* at 24 (emphasis

added); *See also* ¶ II, A ("The magistrate erred by failing to five the State notice that it was considering relying on I.C.R. 48(a)(1) as a basis for dismissal." (emphasis of bolding removed, emphasis added)).

Idaho Criminal Rule 48(a)(1) was not a stated basis for the trial court's dismissal of this action. However, the State asserts that it actually was, because the trial court's language in its findings states that the case "was 'very old . . . for a misdemeanor' and had 'languished for well over a year, with some of the delay attributable to both parties'-[which] would only be supportive of a dismissal for unreasonable delay under I.C.R. 48(a)(1)," and this "was not asserted, argued, supported with authority, or otherwise referenced in Defendant's *Motion to Dismiss* or by the magistrate as a possible basis for dismissal under I.C.R. 48 prior to the Oct. 13, 2023, hearing." Appellant's Br. on Appeal 24. The State argues that these two references to the length of the pending case in the trial court's Order for Dismissal would not be appropriate under Idaho Criminal Rule 48(a)(2), because the basis for subsection (1) and subsection (2) are mutually exclusive, and therefore the trial court actually dismissed the case pursuant to Idaho Criminal Rule 48(a)(1). *Id.*

Besides citing to the actual words of the statute, counsel for the State does not cite to any authority that would support its argument that Idaho Criminal Rule 48(a)(1) and Idaho Criminal Rule 48(a)(2) are mutually exclusive, to the extent that a court cannot consider the amount of unnecessary delay in bringing the defendant to trial (I.C.R. 48(a)(1)), and the reasons for the delays, when considering if dismissal will serve the ends of justice and the effective administration of the court's business under Idaho Criminal Rule 48(a)(2). Further, the trial court listed a plethora of reasons for which it

dismissed the matter. Never did the trial court list that dismissal was "for unnecessary delay in bringing the defendant to trial pursuant to Idaho Criminal Rule 48(a)(1)." This argument by the State is unpersuasive. What is more, the State's argument is dispelled by the State a few lines later, wherein it quotes the trial court stating that the trial court did not believe anyone was purposefully delaying the case. Appellant's Br. on Appeal 24. It is clear to this Court on appeal after reading of the trial court's Order of Dismissal that Idaho Criminal Rule 48(a)(1) was not the trial court's basis for dismissal.

The State compares the lack of notice in this case to that in *State v. Swartz*, 109 Idaho 1033, 712 P.2d 734 (Ct. App. 1985). Appellant's Br. on Appeal 24. In *Swartz*, after a prosecutor for the State failed to appear at a scheduled Motion to Dismiss hearing, the trial court dismissed the charges. *Swartz*, 109 Idaho at 1034, 712 P.2d at 735. Thereafter, the trial court issued an order of dismissal, which the Court of Appeals found "patently ambiguous," because it was unclear on the face of the order if the charges were dismissed on the merits, or because the prosecutor failed to appear at the hearing. *Id.* at 109 Idaho at 1035, 712 P.2d at 736. The Court of Appeals in *Swartz* held that by dismissing the charges solely because the prosecutor failed to appear at the hearing, the magistrate violated I.C.R. 48, as "[n]o notice was given to the prosecutor that the cases would be dismissed by the court on its own volition for failure of the prosecutor to appear and resist the motions of the defendants." *Id.* The Court of Appeals stated it "believe[d] the prosecutor was entitled to such advance notice under rule 48, affording him an opportunity to explain to the magistrate his reasons for not appearing." *Id.*

It is patently obvious that *Swartz* is distinguishable from the case at hand. Rousseau filed his Motion to Dismiss; Alternatively for Additional Sanctions and a supporting Declaration of Counsel on September 28, 2023. That same day, Rousseau noticed his Motion to Dismiss up for hearing. At the hearing on the parties' various motions, the State acknowledged that it did not file a Response to Rousseau's Motion to Dismiss:

> MR. HUNTER: No response was filed, Judge, because there really was nothing to respond to that hasn't already been raised, hasn't been argued, hasn't been addressed. [Inaudible] made additional -- essentially the same broad, rhetorical text with little in the way of actual substance, of actual legal analysis in terms of why that makes sense in this circumstance under these facts and law to support why what he's requesting would be appropriate.
>
> So when there's nothing to respond to, I don't think it serves the purpose of these proceedings or any criminal proceedings to simply file paperwork and participate [inaudible].

Tr. 192: 7 – 19.

While the State argued against the Motion to Dismiss, and made other arguments in the case, counsel for the State did not argue at the October 23, 2023, hearing, that it was unaware that there was a Motion to Dismiss brought by Rousseau, that the trial court was contemplating granting this motion, or that the Motion to Dismiss could be granted. The Motion to Dismiss was brought by Rousseau under, in part, Idaho criminal Rule 48(a). The Order for Dismissal was issued, in part, pursuant to Idaho Criminal Rule 48(a). The State was given an opportunity to respond to the Motion to Dismiss at the hearing, despite counsel for the State not feeling obligated to file a response in opposition. The assigned prosecutor for the State's incorrect conclusion

that the Motion to Dismiss was unmeritorious, does not constitute a lack of notice that the Motion to Dismiss was being considered by the trial court. This Court on appeal cannot find that the trial court violated the notice requirements of Idaho Criminal Rule 48. The State knew this was a Motion to Dismiss under I.C.R. 48, so the State had all the notice that was requested under that rule.

Rousseau's Motion to Dismiss was filed 16 days before oral argument in that Motion. That is all the "notice" (and more) required by Idaho Criminal Rule 48(a). The fact that counsel for the State chose not to file a response to Rousseau's Motion to Dismiss, is on Ryan Hunter alone. He had all the notice to which he was entitled.

In the second section, counsel for the State argues that the trial court, "abused its discretion in finding that the facts of this case met the high bar required for dismissal of a criminal case pursuant to I.C.R. 48(a)(2)." Appellant's Br. on Appeal 25, ¶ B. In this section, the State argues that the defendant, "derail[ed] an entire criminal case, supported by a finding of probable cause, based upon a speculative pursuit of a phantom video of minimal relevance or probative value to the offense charged." Appellant's Br. on Appeal 25. It is not a phantom video. Whitson's Affidavit tells us what is on his phone and on his digital camera. Thereafter, counsel for the State argues, the "problem in this case: neither the phones nor their contents were ever contemplated or proffered as evidence in the case against Defendant or any of his co-conspirators." *Id.* That simply does not matter. Counsel for the State has an affirmative duty to disclose "any material or information in the prosecuting attorney's possession or control," "that tends to negate the guilt of the accused." I.C.R. 16(a). Marisa Tormei's character in *My*

Cousin Vinny was right in telling Vinny: "He *has* to, by law, you're entitled! It's called 'disclosure!'"

Counsel for the State conflates the discovery analysis and rules of evidence analysis while ignoring the requirements of *Brady* and I.C.R. 16. Counsel for the State argues:

> Here, Defendant sought an order requiring the State to surrender physical custody of a co-conspirator's cellphone; that co-conspirator, Graham Whitson, was not joined with Defendant's case and, instead, had failed to appear for his pretrial conference in his own criminal case (CR28- 22-8590) on March 13, 2023, resulting in the issuance of a still-active bench warrant. *App. Tr.*, p. 98, ll. 2-8. The magistrate again misapplied the analysis and failed to require Defendant to meet his burden of showing "substantial need" for the requested item; indeed, Defendant was never required to identify the good faith factual basis he relied upon in asserting the very existence of the phantom video alleged to be on Whitson's cellphone, as set out in detail herein in. Instead, the magistrate relied on the plainly incorrect reasoning that, because the "information was looked at by the experts from the State, that gives the defense experts that opportunity to do the same." App. Tr., p. 115, ll. 1-8. No authority was cited to support this dubious claim.

Appellant's Br. on Appeal 35.

While the counsel for the State starts off this section by asserting that the, "magistrate abused its discretion in finding that the facts of this case met the high bar required for dismissal of a criminal case pursuant to I.C.R. 48(a)(2)," (Appellant's Br. on Appeal 25, ¶ B), and by quoting to case law related to Idaho Criminal Rule 48(a)(2), (*Id.* at 25), the State discusses only discovery sanctions in this section. ("In short, there were much more proportional and appropriate sanctions that the magistrate could have—and should have—imposed before jumping to the ultimate discovery sanction of dismissal of an entire criminal case." *Id.* at 26-27 (emphasis added)). Additionally, after the first paragraph wherein the State sets forth the standard for a due process ground violation, the only other authority that the State cites to is *State v. Anderson*, 145 Idaho

99, 175 P.3d 788 (2008), and *State v. Wilson*, 158 Idaho 585, 349 P.3d 439 (Ct. App. 2015). In *Anderson*, the reviewing court affirmed the trial court's decision to not enter a discovery sanction of exclusion of the State's witness, despite the State not complying with the requirement to provide the witnesses curriculum vitae, because there was no prejudice to the defendant. *Anderson*, 145 Idaho 99, 104, 175 P.3d 788, 793 (2008). *Wilson* is only cited by counsel for the State as "(citing *Anderson*)." Appellant's Br. on Appeal 28.

Counsel for the State argues that the trial court could have required different things from Rousseau than what the trial court required. The State seemingly argues that these other requirements of Rousseau should have been the focus of the matter, in order to alleviate any prejudice that Rousseau might face, but instead that "the focus was always placed on the process and a pedantic view of procedure," which the State apparently disagreed with. Appellant's Br. on Appeal 27. What the trial court could have done, but was not required to do, cannot be a basis for this appeal. The State does not support with any authority its assertion that the trial court's inactions were an abuse of discretion. This Court on appeal does not address this argument any further.

Next, the State asserts that the trial court "couched that decision [to dismiss the case] as resulting, first and foremost, from the State's continued inability (or, as it saw it, unwillingness), to comply with the *Order Compelling Discovery* and its prior 'noncompliance' with the *Order Re: Motion for Independent Analysis of Evidence*." *Id.* The State asserts several arguments why this was an abuse of discretion, including that this was a duplicative sanction, but with none of these reasons does the State cite to the record or support these contentions with propositions of law or authority that would

show that this is an error. These contentions are thus not in compliance with Idaho Appellate Rules and are deemed to be waived. *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005); *Hall v. State*, 172 Idaho 334, 533 P.3d 243, 253 (2023), reh'g denied (Aug. 10, 2023).

D. The trial court did not abuse its discretion in basing the Order for Dismissal, in part, on the State's noncompliance with the Order Compelling Discovery and the Order Re: Motion for Independent Analysis of Evidence.

The State's third argument is that the trial court's finding that the State had failed to comply with the trial court's Order Compelling Discovery and its Order Re: Motion for Independent Analysis of Evidence was "inherently defective," and it's "reliance thereon as justification for dismissal of this case an abuse of its discretion, because those Orders were both fundamentally invalid from their inception." Appellant's Br. on Appeal 29. More specifically, the State argues that "the magistrate failed to comply with I.C.R. 16(k) by requiring Defendant to meet his burden of justifying issuance of those Orders under either I.C.R. 16(b)(10) or 16(k), and the magistrate failed to provide 'reasonable terms and conditions' for compliance in the terms of the Orders as required by I.C.R. 16(k)." *Id.* at 29-30.

The State compares this case to *State v. Rhoades*, 120 Idaho 795, 820 P.2d 665 (1991), wherein the reviewing court found error on the part of the trial court "in ordering a defense expert to prepare a report for opposing counsel, or to submit to an interview by opposing counsel, [because] the court overstepped the boundaries of [Discovery] rule [16(c)]." 120 Idaho 795, 811, 820 P.2d 665, 681 (1991). In the instant case the trial court did not order that the State to prepare anything that was not already in the possession of its own office or the office of its agents. The evidence requested by

Rousseau in this case was the seized evidence itself, or evidence directly related to the evidence seized. This Court on appeal finds *Rhoades* inapplicable.

The State argues that, "compliance with a discovery request eliminates the predicate requirement for obtaining an Order to Compel." Appellant's Br. on Appeal 31. However, it is undisputed here that the State did not comply with the discovery request. (Even on appeal, the requested phone or chain of custody documents, including the correspondence related to such, have not been produced by the State.) Because the State did not comply with his discovery request, Rousseau brought a motion under Idaho Criminal Rule 16(k). The State further argues that the trial court abused its discretion by granting the Motion to Compel, "without requiring him to meet his burden of justifying that relief sought 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," and instead, "improperly revers[ing] the relevant burden of proof." Appellant's Br. on Appeal 32.

In granting the Motion to Compel, the transcript show the following:

> THE COURT: So as to the first issue, the chain of custody and the photographs, I think we have kind of a[n] underlying theme here. I think Mr. Mihara hit the nail squarely on the head. We have representations; we have argument. We have no facts. I have no facts that lead me to believe that the chain of custody reports can't be produced.
>
> As such, I will be granting that, noting that the motion to compel was brought under Rule 16. Defense was asking for information under 16 -- seeking an order under 16 [inaudible] information contained in 16(b) based on the declaration of Mr. Mihara seeking the chain of custody showing where and how this information was transferred around to the chain of custody on those items.

Also it is declaration, evidences, or request for compliance, evidence by email exchange back in September -- excuse me, February 11th, 2023, first supplemental request for discovery, that's -- I believe that's Exhibit A to Mr. Mihara's declaration. Let's see. I think that was right. Let me double check that.

Yes, Defendant's first supplemental request for discovery, and that was the 11th of February. To date, we're still looking for the same information. We heard arguments. I've heard curmudgeoning. I have not, as Mr. Mihara noted, seen any factual recitation that I'm the custody of the records; this is all the record that I have. I haven't seen any type of declarations under penalty of perjury where the penalty is up to 14 years in prison. I haven't seen a declaration from an attorney putting his bar license on the line. I've heard arguments. That's not persuasive to the Court and it's not facts.

MR. HUNTER: Judge, I think my representations --

THE COURT: No, no.

MR. HUNTER: -- would count as the latter.

THE COURT: Nope, they do not.

MR. HUNTER: I'm an officer of the State and my representations carry that weight --

THE COURT: And I --

MR. HUNTER: -- Judge.

THE COURT: -- need a declaration -- you're not the custody of the records.

MR. HUNTER: If the Court would like to place me under oath, I'd be happy to testify to each of these facts.

THE COURT: You've waived that opportunity by not making the argument previously as noted under the rules, under 16.

MR. HUNTER: Just to note for the Court, the burden is on the defendant to justify the compelling of --

THE COURT: Yep. And he --

MR. HUNTER: -- evidence, and there's --

THE COURT: -- has met that based upon the lack of response from the State. As such, I will grant the motion to compel. As to the -- let's see. Let me double check here. So under 16(f), subpart 2, failure -- that's the wrong one. That's not what I'm looking for.

So, yeah, under 16(f)(2), unless otherwise ordered by the Court on a showing of good cause or excusable neglect, that they're to file and serve a response within the time required by this rule.

> Constitutes a waiver of any objection to the request and is grounds for the imposition of sanctions by the Court under 16(f). And based on the arguments of Mr. Mihara, I'm granting the motion to compel.

Tr. 102: 20 – 105:14. While lengthy, this Court on appeal includes the full transcript here (instead of a summary) to negate the State's apparent argument that that the Motion to Compel was only granted based only upon the lack of response from the State. Appellant's Br. on Appeal 33. Instead, the trial court took into consideration the argument set forth by Rousseau's counsel in granting the Motion. Further, the Court does not agree with the State's characterization of the trial court reversing the burden to the State. Instead, in context, this Court on appeal finds that the trial court found that the State waived the objection that it was attempting to make, due to it not complying with the discovery request. This is not reversing the burden, as it is directly found in Idaho Criminal Rule 16(f)(2): ". . . 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." The State's later objection at the hearing, when it had failed to file and serve a response within the time required by the rule, was inappropriate, as the objection had been waived.

Thereafter, the State argues that Idaho Criminal Rule 16(f)(2), "inherently requires that the discovery request be for discoverable items within the Rules," (Appellant's Br. on Appeal 33), however, as shown above, the trial court found that the requested phone and chain of custody documents were within the rules.[5] The Affidavit of Graham Whitson, as discussed above, shows through personal knowledge that there

[5] The counsel for the State's arguments related to a hypothetical defendant requesting a vial of blood from a State's attorney (Appellant's Br. on Appeal 33) is not relevant to the determination of what evidence is discoverable under Idaho Criminal Rule 16. It is not discussed any further by this Court, but the absurdity of the argument was worth noting.

is exculpatory evidence contained on his seized devises that were not given to the defendant. Aside from the State's affirmative duty to disclose this information, exculpatory evidence is obviously discoverable.

Recently, the Idaho Supreme Court held that:

> Under the Idaho Criminal Rules, a defendant may request certain evidence and materials from the prosecution, including copies of documents and tangible objects that "are material to the preparation of the defense." I.C.R. 16(b)(4). Materiality in this context has not been defined by the Idaho Criminal Rules, nor by Idaho's case law. However, the Federal Rules of Criminal Procedure provide a similar right to the defendant for the discovery of documents that are "material to preparing the defense." Fed. R. Crim. P. 16(a)(1)(E). Where a federal rule is identical in material respects to an analogous Idaho rule, this Court may look to decisions on the scope of the federal rule for guidance on interpreting our Idaho rule. *Brauner v. AHC of Boise, LLC*, 166 Idaho 398, 408, 459 P.3d 1246, 1256 (2020); *Martin v. Hoblit*, 133 Idaho 372, 376 n.3, 987 P.2d 284, 288 n.3 (1999) (citing *Compton v. Compton*, 101 Idaho 328, 334, 612 P.2d 1175, 1181 (1980)).
>
> The Ninth Circuit explains that "materiality" is a "low threshold ... satisfied so long as the information ... would have helped to prepare a defense." *United States v. Soto-Zuniga*, 837 F.3d 992, 1003 (9th Cir. 2016) (internal quotation marks omitted) (quoting *United States v. Hernandez-Meza*, 720 F.3d 760, 768 (9th Cir. 2013)). To show materiality under the federal rules "the defendant must demonstrate that the requested evidence bears some abstract logical relationship to the issues in the case. ... There must be some indication that the pretrial disclosure of the disputed evidence would [enable] the defendant significantly to alter the quantum of proof in his favor." *United States v. Lloyd*, 992 F.2d 348, 350–51 (D.C. Cir. 1993) (alteration in original) (citations omitted). The "evidence is material as long as there is a strong indication that it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.' " *Id.* at 351 (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C.1979)).

State v. Pendleton, 172 Idaho 825, 537 P.3d 66, 72–73 (2023) (emphasis added).

Looking at this standard, it is clear that Rousseau requested material evidence from the State: the cell phone seized from his alleged co-conspirator that shows that "peaceful"

intentions of the group. In a case wherein the State has charged conspiracy to riot, this evidence is material. It follows that it is also discoverable.

The State 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)." Appellant's Br. on Appeal 33. However, Idaho Criminal Rule 16(g), entitled Prosecution Information Not Subject to Disclosure, states, in part that: "(1) *Work Product.* Disclosure must not be required of: . . . . (B) correspondence." In interpreting a statute, the process "'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 states 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. Instead, the State compares this case to *State v. Ish*, 166 Idaho 492, 461 P.3d 774 (2020), which the State asserts discusses that "prosecutor's *voir dire* notes fall squarely within the scope of I.C.R. 16(g)(1)(C) because they would contain the 'opinion, theories, or conclusion of the prosecuting attorney.'" Appellant's Br. on Appeal 34 (citing *State v. Ish*, 166 Idaho 492, 511, 461 P.3d 774, 793 (2020)). This argument has no bearing on the present case or discussion at hand, that being whether the

correspondence of agents related to the chain of custody and seized evidence falls under work product.

In a footnote, the State then discusses the federal counterpart to Idaho Criminal Rule 16(g) - Federal Rule of Criminal Procedure 16(a)(2). However, 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) states:

> (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 states:

> (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). Thus, to the extent that the State is arguing that this Idaho case should be analyzed under the Federal Rule of Criminal Procedure, instead of the Idaho Rules, this Court disagrees.

The State next argues that the trial court erred by not making Rousseau meet his burden of establishing the "substantial need" for the State to surrender the cell phone of Graham Whitson. However, Rousseau provided though other means but also

specifically through his expert, Roloff, the substantial need for the phone. Roloff stated under oath that:

> we received a Before First Unlock (BFU) file system extraction of a Google Pixel 3 (IWR092594) believed to have been operated by Mr. Graham Whitson. As stated previously, a BFU file system extraction only provides access to unprotected areas of the device's memory. Thus, this extraction did not produce call logs, text messages, or user created multimedia files. In fact, it contains almost no user generated content and almost exclusively irrelevant system files. An After First Unlock (AFU) file system extraction is possible with this device. This would allow access to the protected areas of the device's memory.

Roloff Decl. 5-6, ¶ 8. Roloff's Declaration was filed contemporaneously with the Motion to Compel Discovery and the Motion for Independent Analysis.

Continuing, the State argues that the time limit of seven days to comply with the Order Compelling Discovery and Order Re: Motion for Independent Analysis was an impossible term under which the State could not comply. Apart from the argument, there is nothing in the State's briefing on appeal to indicate why seven days was not enough time. The trial court found that the FBI was acting as an agent of the State to assist in the extraction of information from the phones. Tr. 125: 9-12. This is supported by the record. There is nothing in the record to support the State's assertion on appeal that it would take longer than seven days to retrieve an item that it had freely given to it's agent. The trial court's term of seven days was not unreasonable.

Finally, the State's Notice to Court – Impossibility of Compliance and Declaration states that the reason that it was impossible for the State to comply with the trial court's orders was the "practical inability for Plaintiff to obtain or make available for inspection a cellphone that it does not have possession, custody, or control over at this time" Notice of Impossibility 1. The trial court found that the State was in possession, custody, and control over the evidence at issue, as discussed and upheld elsewhere in this

Memorandum Decision and Order on Appeal. Because the State's basis for not being able to comply with these two orders (we don't have the phones) is not a legitimate basis, the trial court's finding that the State did not comply with these two Orders is supported by the record. The State did not comply with the Orders, nor did the State provide a viable reason why it couldn't comply. Therefore, the trial court's reliance on the State's noncompliance was not an abuse of discretion.

E. The State Failed to Meet it's Burden to Show that the Trial Court Erred in Declining to Quash the Subpoena Duces Tecum Served Upon the City of Coeur d'Alene.

The State next argues, "[o]ne of the most egregious errors:" the trial court's "refusal to quash the obviously problematic and legally invalid subpoena duces tecum" and its "reli[ance] on the State's alleged non-compliance with that improper" subpoena duces tecum as a basis for dismissal. Appellant's Br. on Appeal 36-37. The State starts off this section by arguing that Idaho Criminal Rule 16, and not Idaho Criminal Rule 17, applies because "'Rule 16 applies to the prosecutor and defense counsel, while the subpoena power under Rule 17 extends to all others.' *Ish*, 166 Idaho at 511 (comparing I.C.R. 17(b) (governing the attendance of "Witnesses") with I.C.R. 16(b) (governing the disclosure of evidence and materials 'by the Prosecution' on written request)." Appellant's Br. on Appeal 38. The Amended Subpoena Duces Tecum, however, was served upon the City Clerk for the City of Coeur d'Alene, Renata McLeod, not the prosecutor.

Counsel for the State relies heavily on *State v. Ish*, 166 Idaho 492 (2020) for the assertion that the wrong rule was relied on, summarizing the case as follows:

> In *Ish*, the Court reviewed the district court's grant of the State's motion to quash an SDT the defendant served on the prosecutor's office to obtain any communications and documentation regarding *voir dire* to

> support the defendant's post-trial Batson challenge. *Id.* at 509-10. The Court explicitly declined to review that decision under I.C.R. 17(b) and, instead, applied I.C.R. 16(g), recognizing the bright-line distinction between those two distinct rules: "Rule 16 applies to the prosecutor and defense counsel, while the subpoena power under Rule 17 extends to all others." *Id.* at 511. After applying the plain language of I.C.R. 16(g) to the facts, the Court determined that a prosecutor's *voir dire* notes fell squarely within the scope of I.C.R. 16(g)(1)(C) because they would contain the "opinion, theories or conclusion of the prosecuting attorney." *Id.* Despite recognizing that there might be few things more relevant to such a challenge than the prosecutor's *voir dire* notes, the Court upheld the decision granting the motion to quash the subpoena duces tecum based upon the fact that the information sought constituted protected work product under I.C.R.16(g). *Id.*

Appellant's Br. on Appeal 38-39. *Ish* directly discuss a subpoena served upon the prosecutor – which did not occur here. The holding by the Idaho Supreme Court in *Ish* is that "Rule 16 applies to the prosecutor and defense counsel, while the subpoena power under Rule 17 extends to all others." *Ish*, 166 Idaho 492, 511, 461 P.3d 774, 793. (emphasis added). A case discussing service on a prosecutor does not support the State's assertion that service on the City Clerk for the City of Coeur d'Alene would be the same as service upon the "prosecutor," and not instead fall into the category of "all others." Counsel for the State additionally relies on *State v. Loera*, 167 Idaho 533, 473 P.3d 802 (2020), for the same assertion. *Id.* at 39. The discussion of this rule in *Loera* states:

> As we recently noted, Rule 17 is independent of the discovery and exchange of information between the prosecution and the defense. *See State v. Ish*, 166 Idaho 492, 511, 461 P.3d 774, 793 (2020) ("Rule 16 [the discovery rule] applies to the prosecutor and defense counsel, while the subpoena power under Rule 17 extends to all others."). Thus, with third parties involved, it is appropriate for the trial judge to consider whatever information it deems necessary to determine whether a request is unreasonable or oppressive.

167 Idaho at 538, 473 P.3d at 807. In *Loera*, the subpoena was served upon the Idaho Department of Corrections. 167 Idaho at 535, 473 P.3d at 804. Thus, *Loera* does not

support the counsel for the State's assertion that service on the City of Coeur d'Alene would be the same as service upon the "prosecutor." The Idaho Supreme Court has held that service of a subpoena upon anyone else, apart from the prosecutor and the defense counsel, is appropriate under Idaho Criminal Rule 17. This Court declines the counsel for the State's invitation to redefine the use of the word "prosecutor" in the Idaho Supreme Court's holding, to include other entities apart from the "prosecutor."

The State next argues that the trial court additionally erred by not quashing the subpoena because it was not narrowly tailored, and therefore it was an abuse of discretion on the part of the trial court. Appellant's Br. on Appeal 41. However, apart from asserting that the subpoena here was not narrowly tailored, counsel for the State provides no authority on what a narrowly tailored subpoena would be and how the subpoena in this case differs. In other words, the State does not support it's contentions with propositions of law or authority that would show that this was an error. As discussed above, to the extent that an assignment of error is not argued and supported in compliance with the Idaho Appellate Rules, it is deemed to be waived. *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).

However, even if the trial court did err in failing to quash the subpoena, this would have been a harmless error when viewed in light of the Order of Dismissal in it's entirety. In context, the section of the trial court's Order for Dismissal discussing the State's noncompliance, section 5, states that:

> (4) The State's failure to comply with the Court's discovery order, Order Re: Motion to Compel, signed on July 19, 2023 and entered on July 20, 2023 (such failure confirmed as recently as Friday, October 13, 2023, by counsel for the State) and/or the Court's Order Re: Motion for Independent Analysis of Evidence signed on August 3, 2023, and entered on August 4,

> 2023 (a "Notice to Court – Impossibility of Compliance & Declaration" filed one day before the Court's deadline on August 7, 2023; and,
> (5) The State's failure to comply with Defendant Rousseau's Amended Subpoena Duces Tecum served upon City Clerk, Renata McLeod, on or about August 1, 2023 in a timely manner (Ms. McLeod's Affidavit was filed after the hearing on August 28, 2023); and,
> (6) The State's untimely (and/or non-existent) objections (including objection to the original discovery requests at issue) and arguments, as well as declarations and/or affidavits which could have been filed timely, against the relief sought by Defendant Rousseau over the past several months, and as recently as the instant hearing; and, several other hearings in this matter; and,

Order of Dismissal 3-4, ¶¶ (4)-(6) (underlining in original).

The trial court found there were many actions of non-compliance by the State in this matter, and that the State's attorney did not file the Affidavit it relied upon until after the hearing on the Motion to Quash the Subpoena had already occurred. These are not legal basis for dismissal, as the State correctly points out that Idaho Criminal Rule 17 does not provide a basis for dismissal. Appellant's Br. on Appeal 41. However, counsel for the State is dead wrong in its bold assertion that: "This alone should warrant reversal of the *Order of Dismissal* and Remand." *Id.* The City of Coeur d'Alene, and Renata McLeod, are separate from the City of Coeur d'Alene Prosecutors office. The finding of fact by the trial court that the State filed a supporting Affidavit after the hearing on the State's Motion to Quash the Subpoena, aided in the determination of whether the dismissal of the action under Idaho Criminal Rule 48(a)(2) would serve the ends of justice and the effective administration of the court's business. However, any statement by the trial court that the State did not comply with the Subpoena would be in error. This Court finds such error to be harmless.

Idaho Criminal Rule 52, entitled Harmless Error, states that "[a]ny error, defect, irregularity or variance that does not affect substantial rights must be disregarded." As

the State's course of conduct of late filings was a factual basis for dismissal, and not a legal basis, any error by the trial court was harmless, because the conduct of the late filings inthe trial court's reasoning was used as a factual basis for the trial court's dismissal under Idaho Criminal Rule 48(a)(2). The trial court dismissed this case "pursuant to I.C.R. 48(a)(2) as well as multiple bases under I.C.R. 16, to include, but not necessarily limited to I.C.R. 16(t)(2) and 16(k)(3)" (Order for Dismissal 1) and then the alternative basis of "I.C.R. 48 as well as I.C.R. 17." *Id.* This Court on appeal additionally finds this to be an harmless error because, as stated above, that this was an *alternative* basis for dismissal. As discussed elsewhere in this Memorandum Decision and Order, the trial court's other basis for dismissal that it relied on provided it authority for dismissal. As such, any error related to an alternative basis would not warrant reversing and remanding the case back to the trial court.

F. The trial court did not misapply *Brady* to this case, though *Brady* was not a basis for dismissal.

"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." 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); *Dunlap*, 141 Idaho at 64, 106 P.3d at 390.

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. 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. 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 in *Thumm* 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 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 held 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 present case, the State argues that the trial court "failed to properly apply the *Brady* standard consistent with the clear limits recognized in *Campbell* based on the 'clear' holdings of the U.S. Supreme Court" because it "failed to require Defendant to meet his burden of showing suppression, materiality, or prejudice as *Brady* requires." Appellant's Br. on Appeal 47. The State asserts that "[t]here was no recitation of facts in the record or assertions by Defendant that might establish any form of material prejudice at trial Defendant could have suffered." *Id.*[6]

[6] The State additionally argues that the dismissal "prevented the full *Brady* analysis from being applicable to the only proceeding to which *Brady* and its progeny apply—jury trial." Appellant's Br. on Appeal 47. The State, through the same undersigned prosecutor, made a similar argument in a separate appeal of an alleged co-conspirator of Rousseau, Richard Jessop. As stated in the Memorandum Decision and Order in the *Jessop* matter, the Ninth Circuit has not limited *Brady* exclusively to trial when the information is not inculpatory, but is helpful to the accused. *See 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)). In the *Jessop* appeal, the prosecutor, who is the same prosecutor in this appeal, cited to *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)), which held that, "courts typically review *Brady* violations post-trial." (emphasis added). The prosecutor therefore knew that there was case law that disagreed with his current proposition (that *Brady* is *only* applicable to jury trial) as he had previously quoted to a case that disagreed with this position – a case that he intentionally omits in this matter.

The State further argues that the trial court "also entirely ignored the State's assertions as to discoverability of those items that were not within the State's possession, custody, control, or ability to obtain, and refused to consider and account for the practical impossibility for the State to disclose the items Defendant sought." *Id.* at 48. The fallacy of that argument is the uncontroverted fact that those items were within the State's possession, custody, control, or the ability to obtain such. This Court on appeal has already upheld the trial court's finding of fact that the FBI was acting as an agent of the State, because the State freely delivered the phones to the FBI, and therefore the State did have possession, custody, control, and the ability to obtain the cell phone at issue. Therefore, this Court on appeal will not address that issue again.

In response to the State's assertion that he did not establish prejudice, Rousseau states that he "was able to present the affidavit of his counsel [Mihara], [the Affidavit of] Mr. Whitson, as well as [the Affidavit of] Mr. Whitson's Texas counsel, Mr. Van Dyke." Rousseau also argues he "showed that information reported by Rolling Stone magazine, reported upon public records request responses it had received, totally and utterly contradicted the sworn testimony of CDA PD officers." Respondent's Br. 34-35. (citing: *See Aff. G. Whitson* (Aug. 11, 2023); see also *Decl. J. Van Dyke* (Aug. 14, 2023); see also *Decl. Counsel 35* (Aug. 8, 2023), Exh. B (Rolling Stone article (noting that the FBI had worked extensively with the CDA PD)), Exh. C (transcripts of sworn CDA PD testimony omitting FBI involvement in the initial June 6, 2022 arrests)); *Cf. Jessop App. Dec.* at 26-27, 69 ("[t]he trial court did note that: "during the Motion to Suppress testimony there was statement that the FBI was present at the Command Center.")). Further, Rousseau states that, "[c]ertainly, there is a 'reasonable probability' had such

material been timely disclosed it would have been used by Rousseau and his counsel extremely effectively." *Id.* at 34. This claim by Rousseau does not provide anything of substance to this Court on appeal. At oral argument before the trial court, defense counsel argued that: "They were relevant. They were relevant to bias of witnesses. They were relevant to the ability to cross-examine witnesses. They were relevant and apropos to potential sentencing issues, punishment if my client was found guilty after a fair trial." Tr. 215: 7-11. Again, this argument by Rousseau's counsel gives little substance to this Court on appeal. What provides "relevance" to the missing material, and thus, "substance," is Whitson's Affidavit.

The State asserts that the trial court erred in its *Brady* analysis: "[s]pecifically, [it] failed to require Defendant to meet his burden of showing suppression, materiality, or prejudice as *Brady* requires." Appellant's Br. on Appeal 47. This Court on appeal disagrees. Under *Brady*, the appropriate result would be dismissal if the elements of *Brady* show: 1) materiality and favorability to the accused, 2) State suppressed the evidence, and 3) prejudice ensued. *Thumm,* 165 Idaho at 422, 447 P.3d at 870; *Dunlap*, 141 Idaho at 64, 106 P.3d at 390.

Here, the State Rousseau was able to show materiality. The Idaho Supreme Court held that:

> The materiality prong of a *Brady* analysis is essentially a question of fairness: whether the defendant, in the absence of the suppressed evidence, received "a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555. "Reasonable probability" of a different result does not require the defendant to prove by a preponderance of the evidence that he would have received a different verdict had he received a trial with the suppressed evidence. *Id.* Rather, "confidence in the verdict" is evaluated by the net effect of the suppressed favorable information, which must be considered "collectively, not item by item," *see Kyles*, 514 U.S. at 436, 115 S.Ct. 1555, under a "the totality of

> the circumstances" analysis. *See United States v. Bagley*, 473 U.S. 667, 683, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Abdullah v. State, 173 Idaho 127, 539 P.3d 947, 963 (2023). In *Thumm*, the standard of materiality was summarized as, "if there is a reasonable probability that disclosure of the undisclosed evidence would have produced a different outcome in the proceeding." *Thumm v. State*, 165 Idaho 405, 423, 447 P.3d 853, 871 (2019). "When assessing the materiality, '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.* at 165 Idaho 423–24, 447 P.3d 871–72 (quoting *Strickler v. Greene*, 527 U.S. 263, 290, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Here, the undisclosed evidence is a video that Rousseau and his alleged co-conspirators had peaceful intentions. The Sworn Complaint that the State would have had to prove that:

> The defendant, THOMAS RYAN ROUSSEAU, 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, as defined by section 18-6401(c), Idaho Code, to-wit: disturb the public peace by loud or unusual noise; tumultuous or offensive conduct; and/or threatening, traducing, quarreling, challenging to fight, or fighting, at the Pride in the Park event at Coeur d'Alene City Park, on June 11, 2022, in the County of Kootenai, State of Idaho, which constitutes the offense of Conspiracy to Riot, a misdemeanor, pursuant to Idaho Code sections 18-1701, 18-6401(c), & 18-6402(2).

Sworn Complaint. 1.

It is well settled that the essential elements of conspiracy are: (1) the existence of an agreement to accomplish an illegal objective, (2) coupled with one or more overt acts in furtherance of the illegal purpose and (3) the requisite intent necessary to commit the underlying substantive offense. *State v. Gamble*, 146 Idaho 331, 337, 193 P.3d 878, 884 (Ct. App. 2008) (citing *State v. Munhall,* 118 Idaho 602, 606, 798 P.2d 61, 65 (Ct.App.1990). Suppressed evidence showing that Rousseau did not have the requisite

intent to commit the underlying substantive offense, or that there was not an illegal objective that Rousseau and his alleged co-conspirators were attempting to accomplish, would be material. This undisclosed evidence could reasonably be taken to put the whole case in a different light. Whitson's Affidavit provides "relevance" to the missing evidence. The suppressed evidence by the State was material.

It is also noted by this Court on appeal that in the Declaration of Ryan Hunter, he claims that had been in contact with a member of the FBI to coordinate receipt of the multiple terabytes of data disclosed in this case since November 30, 2022. Hunter Decl. 3, ¶ 10. This information was not given to Rousseau until March of 2023. Related to late disclosures of evidence, verses the non-disclosure of evidence, this is distinguishable from *Thumm* wherein there evidence was tendered to the defense at the same time it was tendered to the State. Further, in comparison to the relatively simple finger print report provided for in *Thumm*, the late disclosed evidence here consisted of over three terabytes of data.

Ryan Hunters' declaration also states, in direct contravention to the personal knowledge of Graham Whitson, stating that there are other videos on the devises, and in direct contravention of the defense's expert that asserts that the extraction process was not complete, that:

> Upon information and belief, it appears that Defense Counsel already has all videos of the Patriot Front preparations leading up their arrest for the current charge of Conspiracy to Commit Riot by Disturbing the Public Peace. It further appears that he should have known this through the exercise of reasonable due diligence but, instead, has wasted immense amounts of public dollars and judicial time and resources with this fishing expedition.

Id. at 6, ¶ 30. The first sentence is conclusory, lacks foundation, and the language "it appears" is entirely speculative. The second sentence is nothing but argument (thus,

entirely inappropriate in an affidavit), and an argument which is also entirely speculative. Most importantly, this is not the correct standard of the State in prosecuting a defendant. There is competent evidence in the record that there was more information on the phone than what was provided to defense counsel, and that the evidence was exculpatory. Rousseau has proven, through the Affidavit of Whitson, that this evidence was favorable to Rousseau and all other co-defendants. The State has the affirmative duty to provide that evidence.

Rousseau has also proven the remaining two elements of *Brady*. The State did not provide the evidence, despite multiple opportunities to do so. By losing the evidence the State seized and controlled, the State has "suppressed the evidence." And, again through Whitson's Affidavit, Rousseau has proven that "prejudice ensued."

The Order for Dismissal states that much of the delay in this case is "attributable to the State for failing to comply with its duties under the U.S. Supreme Court's decision in *Brady v. Maryland* as affirmed by the Supreme Court of the State of Idaho in progeny cases." Order for Dismissal 2, ¶ (2). The record reflects that the State was not diligent in this duty. Therefore, the trial court's determination is supported by the record. 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(a)(2), and multiple bases under I.C.R. 16, including I.C.R. 16(t)(2) and 16(k)(3), with alternative basis of Idaho Criminal Rule 48. Order for Dismissal 1. In making the determination under Idaho Criminal Rule 48(a)(2) 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 State did not turn over the phone that contained exculpatory evidence. Regarding the phones, the State did not provide the chain of custody documents or related correspondence. When it did provide evidence, the State provided evidence months after it was aware of it. The trial court did not dismiss the case under *Brady*. Instead, the trial court considered the State's mishandling of discovery, which it deemed to not be in compliance with *Brady*, as a basis for dismissal under Idaho Criminal Rule 48(a)(2). 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(a)(2).

G. The Trial Court's Application of *Youngblood* to this Case as it Relates to a Curative Instruction for the Jury Trial that did not Occur is not Relevant to the Appeal of the Trial Court's Motion to Dismiss.

"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.*

The Idaho Supreme Court discussed *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed. 281 (1988), in *Sarbacher,*

> *[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 argues that the trial court, "made clear that it was basing its decision to dismiss this case in part upon its view that the State was withholding evidence that it deemed to be lost," however, "it misapplied that standard in this case and, as a result, abused its discretion by relying on that misapplied analysis in its Order of Dismissal."

Appellant's Br. on Appeal 48. The paragraph of the trial court's Order for Dismissal cited to by the State reads:

> q. On August 7, 2023, the State filed its Notice of Impossibility, representing to the court that it could not provide the phone being sought by the Defendant since the State had relinquished custody and control of the phone, contrary to the Order of Preservation previously issued several months earlier by Judge Pittman. Therefore, this Court found that a curative instruction was appropriate under *Youngblood* at the hearing on August 28, 2023. At the August 28, 2023, hearing the Court based the discretionary sanction upon the history of ongoing and newly discovered evidence provided by the State to the Defense, as recently as a month prior and more than a year since the defendant was arrested.

Order for Dismissal 3, ¶ (2)q.

This finding of fact makes clear that the trial court found a curative instruction was appropriate under *Youngblood* due to the State's assertions in the Notice of Impossibility that it was unable to provide the phone in its possession. Such finding also has little bearing on this appeal. This is a finding of fact that the trial court found the instruction would be necessary if the case were to go to trial, it does not show that the trial court dismissed the case pursuant to a *Youngblood* violation. The case did not go to trial.

However, the State argues that it is unable to produce the phone and exculpatory evidence on the phone. The State has lost the phone and the evidence contained therein that it was ordered by Judge Pittman to preserve. The State did not comply with the Order to Preserve when it freely turned the phone over to the FBI, its agent. According to alleged co-conspirator Graham Whitson, the phone at issue states, in part, that:

> 8. These video and/or audio recordings are of the utmost importance both to my own defense and the defense of others similarly charged, for the following reasons:

> a. It demonstrates that there was no conspiracy to engage in any activity that would have been unlawful;
> b. It demonstrates both my own intention, and the intention of others present, to remain law-abiding at all times during our intended demonstration;
> c. It demonstrates both my intention, and the intention of others present, to remain non-violent and respectful of the property of others at all times during our intended demonstration; and
> d. It bolsters my position that the state's prosecution of myself and others in this matter is not due to any intention by myself or others to engage in unlawful activity, but rather, has been motivated solely based upon the content of the opposing view we had intended to present in a lawful manner; and
> e. It provides potential impeachment evidence with respect to the testimony of the officers, including, but not limited to, evidence that the policies and procedures of their own department were not followed in making these arrests.

Whitson Aff. 2, ¶ (8). The State did not meet its heavy burden in showing that it's loosing of the phone at issue in this case, either through its own department or one of its agents, did not taint an accused's right to a fair trial by disregarding the Order to Preserve. Thus, *Youngblood* would require an instruction, but this case was not dismissed pursuant to *Youngblood*.

H. Attorney Fees and Costs Will Not be Award Against the State on Appeal.

In Rousseau's Response Brief, his attorney argues what he asserts is a "good faith argument for the extension, modification, or reversal of existing law." That existing law being that the costs may not be taxed against the State on any appeal which has its genesis in a criminal prosecution because no statute authorizes the imposition of such costs. Counsel for Rousseau argues:

> In this case, costs and fees should be taxed against the City of Coeur d'Alene. In all reality the State should have never have pursued this appeal; and, should have abandoned this case after becoming aware of the Pendleton decision, supra, as well as when this Court's decision in *Jessop* was not appealed and became final.

> The State's 'course of conduct' which led to the dismissal of this case, as noted by the trial court, are blatant violations of well-established constitutional law and of direct and express court orders. The State fails to give analysis of recent, controlling case law (e.g., *Pendleton*, or the *Jessop* decision, supra) and makes new arguments not made below. At some point, deference to the State and its officers should be called to account. Rousseau, in good-faith, makes that plea to this court.
>
> Rousseau acknowledges that Kootenai County is paying the undersigned legal counsel; however, pursuant to Idaho Criminal Rules 16(f)(2) (sanctions); 16(k)(3) (any order appropriate under the circumstances) in conjunction with Idaho Appellate Rules 40 and 41 (noting that any request for fees and costs must be made in the first appellate brief); thus, any fees awarded to Rousseau's request should be directed to be paid to Kootenai County.

Respondent's Br. 45.

It has long been held in Idaho that neither costs nor attorney fees are available against the State in a criminal matter, absent an explicit statutory authorization. *State v. Rae*, 139 Idaho 650, 656, 84 P.3d 586, 592 (Ct. App. 2004); *State v. Thompson*, 119 Idaho 67, 70, 803 P.2d 973, 976 (1989); *State v. Spurr*, 114 Idaho 277, 280, 755 P.2d 1315, 1318 (Ct.App.1988).

Rousseau has not directed this Court on appeal to any statutory authority which would allow this Court to award costs and attorney fees on appeal against the City of Coeur d'Alene. *See* I.A.R. 41(a) and 35(a)(5). Rousseau has not provided a reason that the longstanding rule should be overturned. Therefore, Rousseau is not entitled to an award for costs or attorney fees on appeal.

I. Court's Analysis of the Cumulative Error Doctrine

"Under the cumulative errors doctrine, an accumulation of irregularities, each of which might be harmless in itself, may in the aggregate reveal the absence of a fair trial in contravention of the defendant's right to due process." *State v. Fox*, 170 Idaho 846, 868, 517 P.3d 107, 129 (2022) (quoting *State v. Samuel*, 165 Idaho 746, 778, 452 P.3d

768, 800 (2019). "The presence of errors, however, does not by itself require the reversal of a conviction, since under due process a defendant is entitled to a fair trial, not an error-free trial." *Id.* (quoting *State v. Capone*, 164 Idaho 118, 127, 426 P.3d 469, 478 (2018)). Errors are viewed "in relation to the totality of the evidence presented at trial." *Id.* (citing *State v. Moore*, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998)).

This Court on appeal cannot find any authority on the application of cumulative error doctrine to an appeal of the granting of a defendant's Motion to Dismiss, or discussing the application of the cumulative error doctrine to the State's rights to a fair trial. However, in an abundance of caution, this Court analyzes the cumulative error doctrine to this case.

This Court has identified the two errors that, in isolation, it has deemed harmless: (1) declining to take Judicial Notice of the Tucker Order requested by the State (*Supra*, 37-40), and (2) by citing Idaho Criminal Rule 17 as a basis for the appeal due to the City of Coeur d'Alene's noncompliance with the Subpoena (*Supra,* 75-77). Considering the cumulative impact of these errors, this Court on appeal cannot conclude that these errors, in combination, affected the outcome of the case, had any impact on the trial court's granting of Rousseau's Motion to Dismiss, or affected any other right of the State.

While the trial court should have taken judicial notice of the Order denying the motion in the Tucker case, it would not have affected the present case as the Tucker case, or the related motions, were not relied on by the trial court. The trial court granted the Order to Compel and Order for Independent Analysis due to the merits of this case, and not because of anything that was granted or denied in the Tucker case. Similarly,

the trial court provided basis for dismissal, and then an alternative basis for dismissal under Idaho Criminal Rule 17. The fact that the alternative basis for dismissal was not legally adequate did not affect the other legal basis given. When a decision is "based upon alternative grounds, the fact that one of the grounds may be in error is of no consequence and may be disregarded if the judgment can be sustained upon one of the other grounds." *Andersen v. Pro. Escrow Servs., Inc.*, 141 Idaho 743, 746, 118 P.3d 75, 78 (2005) (quoting *MacLeod v. Reed*, 126 Idaho 669, 671, 889 P.2d 103, 105 (Ct.App.1995). Therefore, this error by the trial court cannot be deemed to have affected the State's rights.

Further, as the Idaho Supreme Court has held, a reviewing court "will uphold the decision of a trial court if any alternative legal basis can be found to support it." *Syringa Networks, LLC v. Idaho Dep't of Admin.*, 159 Idaho 813, 827, 367 P.3d 208, 222 (2016) (quoting *Daleiden v. Jefferson Cnty. Joint Sch. Dist. No. 251,* 139 Idaho 466, 470–471, 80 P.3d 1067, 1071–1072 (2003)). Here, the trial court's legal basis for dismissal under Idaho Criminal Rule 48(a)(2) has been upheld. The dismissal of this action served the ends of justice and the effective administration of the court's business. There is an alternative legal basis found to support the decision of the trial court that does not rely on these two errors.

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

On March 6, 2024, this Court on appeal in *State v. Jessop*, Kootenai County Case No. CR28-22-8596, filed its Memorandum Decision on Appeal Affirming the Magistrate Court's Dismissal Under Idaho Criminal Rule 48 (*Jessop* Memorandum Decision). Jessop was a co-defendant along with Rousseau and twenty-nine other

people known as the Patriot Front. Ryan Hunter represented the plaintiff, State of Idaho in *Jessop*.

In the *Jessop* Memorandum Decision, this Court discussed some of what this Court read when Ryan Hunter repeatedly accused Magistrate Judge Destry Randles (the trial court judge in the *Jessop* case) of bias. The hope of this Court in discussing such conduct by counsel for the State, was to hopefully change behaviors by Ryan Hunter moving forward. Again, that decision was issued and filed by this Court in the *Jessop* case on March 6, 2024. That was nearly a month before Ryan Hunter authored and filed its Appellant's Brief on Appeal in the instant case, *State v. Rousseau*, on April 3, 2024. And this Court's *Jessop* Memorandum Decision was filed two and one half months before Ryan Hunter authored and filed is Appellant's Reply Brief on Appeal in the instant case, *State v. Rousseau* on May 21, 2024.

This Court's hope of discussing (in the *Jessop* Memorandum Decision) such conduct by the State's attorney (Ryan Hunter), that his behaviors would change moving forward, was misplaced. Those behaviors have persisted by Ryan Hunter in this appeal involving Rousseau. Instead of repetitively accusing Judge Randles in *Jessop* of being biased, Hunter repeatedly accuses Judge Cafferty of similar nefarious behavior. As noted in this Court's decision *supra* at page 29-30:

> In this section, the State accuses the trial court of using a "warped mishmash of the criminal and civil procedural rules," (Appellant's Br. on Appeal 14), which resulted in a "hollow record" with "no admitted exhibits or testimony of any witnesses provided under oath during any hearings in this matter." *Id.* at 13. In essence, the State argues that the trial court was not "beholden to the proper application of the rules of criminal procedure and evidence." *Id.* at 14.
>
> The State argues that, "[f]rom the outset of this case, the magistrate deployed an inconsistent and legally untethered approach to decision-making and fact finding. In one moment, the magistrate would assume critical facts and take at face value speculative claims made by Defendant, even overlooking

> procedural defects to do so; in the next moment, the magistrate would apply a bizarre concoction of procedural rules that imported civil requirements into the criminal realm to effectively exclude, ignore, and dismiss the State's factual assertions and representations." *Id.*

Mem. Decision and Order on Appeal 29-30. What this Court is simply unable to understand, is why Ryan Hunter would treat two different magistrate judges so badly, when by the nature of his job, he will represent his client, the State of Idaho, before each of these magistrates nearly every week of the year, year after year. Just as in *Jessop*, it matters not if Judge Randles was biased, what matters is whether he got the decision right, or not. In the instant case, Rousseau's case, it matters not whether Judge Cafferty engaged in a "warped mishmash of the criminal and civil procedural rules, was not "beholden to the proper application of the rules of criminal procedure and evidence", whether he "deployed an inconsistent and legally untethered approach to decision making", and whether he employed a "bizarre concoction of procedural rules", or not. What matters is whether Judge Cafferty got the decision in Rousseau's case right, or not. This Court finds that Judge Cafferty got most things right, the few things he got wrong individually and collectively, amount to harmless error. So, rather than cast aspersions on the magistrate judge that made the decision in your case, the same magistrate judge that you would have to try this case before if this Court were to reverse on appeal, the same magistrate judge that you know you will have to appear before frequently for the rest of your professional career, why would you not simply set forth the areas where you feel the magistrate judge got it wrong, support those feelings with cogent argument based on the applicable Idaho Criminal Rules, Idaho Statutes, Idaho Rules of Evidence and Idaho appellate case law? To this Court, that seems an easy

choice to make, but it wasn't made by Ryan Hunter in Jessop, and it wasn't made by Ryan Hunter in the present case, Rousseau.

Ryan Hunter on appeal seems to be incapable of holding aspersions to himself, even with this Court. In his Appellant's Reply Brief on Appeal, Hunter writes:

> Accordingly, the State object to Defendant's repeated references throughout his Brief to the Jessop co-conspirator case and this Court's resulting Order in that case. The State respectfully asks that this Court not consider that decision, or Defendant's arguments based thereon, in any way as part of this appeal because doing so would be improper and immediately confirms the State's concern that it cannot receive a fair, impartial, and unbiased consideration of its claims, arguments, and cited authority in this appeal due to the contents of the Jessop Order, but especially the direct personal commentary leveled at the undersigned State's attorney at pages 121-30.

Appellant's Reply Br. on Appeal 24. The entire portion of the Jessop decision which Ryan Hunter characterizes as a "direct personal commentary leveled at the undersigned States attorney" appears immediately below in this decision. First of all, as to the "direct personal commentary", it is a commentary to a person's (Ryan Hunter's) **actions**, and his **decisions**, it is not a commentary on his person or his personality. The Court noticed several professional conduct violations in the *Jessop* case, just as are pointed out in the Rousseau case. The Court noticed rule violations in the Jessop case, just as the Court pointed out Ryan Hunter violating the page limitation of I.A.R. 34(b), and in violating the requirement of I.A.R. 11 in not attaching the order appealed from to his Notice of Appeal, as pointed out above at pages two and twenty-eight *supra*. The Court notes the State has not appealed this Court's decision in *Jessop*, which was filed on March 6, 2024, and the time in which to file a Notice of Appeal has long since passed.

As to "the State's concern that it cannot receive a fair, impartial, and unbiased considerations of its claims, arguments, and cited authority in this appeal due to the

contents of the Jessop Order, but especially the direct personal commentary leveled at the undersigned State's attorney at pages 121-30", this Court notes that the State could have at any time filed a motion to disqualify this Court for cause under I.C.R. 25(b) (there is no ability to file a motion to disqualify without cause on an appeal, see I.C.R. 25(a)(9)(A). Additionally, the Court feels compelled to note the following which occurred after this Court's decision in Jessop was filed, and prior to oral argument in the Rousseau case. On April 11, 2024, attorney Randy Adams, City Attorney and Legal Service Director for the City of Coeur d'Alene, wrote the following email to this Court:

> I'm reaching out to you on a delicate matter, but one which is very important to my office and to the City as a whole. My prosecutors recently received notification that the intermediate appeal in the above-referenced case has been reassigned to you for handling. With all due respect, my office requests that you invoke I.C.R. 25(d) and voluntary disqualify yourself from handling this appeal. I don't make this request lightly, but your decision in a co-defendant's case, *State v. Jessop*, CR28-22-8596, and particularly the last nine pages of that decision, suggests that Mr. Hunter may well be starting at a distinct disadvantage before you which, as I see it, could adversely affect the City's ability, acting on behalf of the State of Idaho, to fully and fairly present the appellate issues it has raised in this separate, but related, case. A voluntary disqualification, without stating any reason as allowed by the Rule, would go a long way to avoid any appearance that the outcome of this appeal is foreordained because of your opinion regarding Mr. Hunter's actions and character as expressed in your previous decision. I'm sure that all parties and you want to make sure this appeal is completely fair both in appearance and in fact.
>
> I believe that a voluntary disqualification in this case is appropriate and expedient, and I'm asking this only to preserve the integrity of bench and bar, and the trust in our great legal system. Regardless of what you decide, I appreciate your consideration of this request and I hope that you receive it in the spirit in which it's intended, that of trying to resolve genuine concerns in a respectful and collegial manner.

This communication was not ex parte, as Randy Adams copied opposing attorney Kinzo Mihara, and a copy was sent to present Administrative District Judge Lamont Berecz.

Nor did this Court feel this request was improper, as the Court stated in its response email to Randy Adams sent the same day:

> I understand your request for voluntary DQ and the reasons you put forth. I do not think it is improper for you to make the request. However, I think it would actually be improper for me to disqualify myself voluntarily. Before making that decision, I have re-read what I wrote in the last nine pages of the Jessop decision.
>
> I am glad you copied all counsel and our District Administrative Judge. For Judge Berecz' benefit, my decision in Jessop is in Kootenai County Case No. CR28-22-8596. I think it is appropriate for me to file your request and my response in the Rosseau case (file CR28-22-8737) under seal.

The Court points the fact that all this occurred, in this Court's response to Ryan Hunter's most recent aspersion on this Court, that "the State's concern that it cannot receive a fair, impartial, and unbiased considerations of its claims, arguments, and cited authority in this appeal due to the contents of the Jessop Order, but especially the direct personal commentary leveled at the undersigned State's attorney at pages 121-30." Appellant's Reply Br. on Appeal 24. If Ryan Hunter still feels this court is unfair, he had a duty to file a motion to disqualify for cause, and he didn't. Also, the purpose of the last nine pages of the *Jessop* decision, reiterated here in this Court's Rousseau decision, is to point out issues this Court has spotted where Ryan Hunter is acting inappropriate under his professional responsibilities as a lawyer and as a prosecuting attorney...that is not **unfairness**. It is in fact, as pointed out in *Jessop*, something this Court is duty bound to do. That is exactly what this Court is doing in this portion of Rousseau's decision on appeal. Doing so has no bearing on this Court's decision in the instant case on appeal.

In the *Jessop* decision filed on March 6, 2024, under the identical heading, "IV. CONDUCT OF THE STATE'S COUNSEL BEFORE THIS COURT ON APPEAL" this Court wrote the following. The entire section of that decision is set forth as follows:

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.

Jessop Mem. Decision 121-130.

IV. CONCLUSION AND ORDER

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

IT IS HEREBY ORDERED that the decision of magistrate Judge John Cafferty granting Respondent's Motion to Dismiss is AFFIRMED.

Entered this 10th day of July, 2024.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 10th day of July, 2024, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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Jeanne Clausen, Deputy Clerk