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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 United States of America,
10 Plaintiff,

No. CR-17-01311-001-PHX-DGC

11 v.

12 Anthony Espinoza Gonzales,
13 Defendant.

14

15 United States of America,
16 Plaintiff,

No. CR-18-00539-001-PHX-DGC

17 v.

18 Aaron Anthony Ordonez,
19 Defendant.

ORDER

20

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22 Defendants Anthony Espinosa Gonzales and Aaron Ordonez are charged in two
23 separate cases with distributing and possessing child pornography in violation of 18
24 U.S.C. § 2252(a). Each has filed a motion to compel disclosure of the Torrential
25 Downpour software program used by the FBI in the investigation that led to his
26 indictment. Doc. 25, Case No. CR-17-01311; Doc. 32, Case No. CR-18-00539. Both
27 motions are fully briefed, and the Court held a joint evidentiary hearing on January 31,
28 2019. Computer forensics expert Tami Loehrs testified on behalf of Defendant Gonzalez,

1 and FBI Agent Jimmie Daniels testified for the government. The Court will grant
2 Defendant Gonzalez's motion in part and deny it in part, and will deny Defendant
3 Ordonez's motion.

4 **I. Background.**

5 **A. The BitTorrent Network and Torrential Downpour.**

6 The indictments in these cases allege that Defendants downloaded and shared
7 child pornography files using the BitTorrent file-sharing network. BitTorrent is an online
8 peer-to-peer network that allows users to download files containing large amounts of
9 data, such as movies, videos, and music. Instead of relying on a single server to provide
10 an entire file directly to another computer, which can cause slow download speeds,
11 BitTorrent users can download portions of the file from numerous other BitTorrent users
12 simultaneously, resulting in faster download speeds.

13 To download and share files over the BitTorrent network, a user must install a
14 BitTorrent software "client" on his computer and download a "torrent" from a torrent-
15 search website. A torrent is a text-file containing instructions on how to find, download,
16 and assemble the pieces of the image or video files the user wishes to view. The client
17 software reads the instructions in the torrent, finds the pieces of the target file from other
18 BitTorrent users who have the same torrent, and downloads and assembles the pieces,
19 producing a complete file. The client software also makes the file accessible to the other
20 BitTorrent users in a shared folder on the user's computer.

21 Torrential Downpour is law enforcement's modified version of the BitTorrent
22 protocol. Torrential Downpour acts as a BitTorrent user and searches the internet for
23 internet protocol ("IP") addresses offering torrents containing known child pornography
24 files. When such an IP address is found, the program connects to that address and
25 attempts to download the child pornography. The program generates detailed logs of the
26 activity and communications between the program and the IP address. Unlike traditional
27 BitTorrent programs, the government claims that Torrential Downpour downloads files
28 only from a single IP address – rather than downloading pieces of files from multiple

1 addresses – and does not share those files with other BitTorrent users.

2 **B. The Investigations into Defendants’ BitTorrent Activity.**

3 **1. Defendant Gonzales.**

4 In December 2016, Agent Daniels used Torrential Downpour to identify IP
5 address 24.255.44.200, which allegedly was making known child pornography files
6 available on the BitTorrent network. Agent Daniels testified that he used Torrential
7 Downpour to connect with this IP address and download child pornography video files on
8 eight occasions between December 13, 2016 and January 9, 2017. He reviewed the
9 Torrential Downpour activity logs to confirm that the program downloaded complete
10 files solely from this IP address, and reviewed the video files to confirm that they were
11 child pornography.

12 Through further investigation, Agent Daniels learned the subscriber information
13 for the IP address. He obtained a search warrant for the subscriber’s residence, and FBI
14 agents searched the residence on February 8, 2017. They found a Microsoft tablet and
15 other computer equipment. Gonzales, who lived there with his parents and siblings,
16 stated during an interview that he had used a tablet to find and view child pornography.
17 Forensic examinations performed by the FBI and Loehrs revealed child pornography files
18 on the tablet, but the video files that Torrential Downpour allegedly had downloaded
19 from the IP address were not found on the tablet or any other seized device.

20 On October 4, 2017, the government charged Gonzales with eight counts of
21 distributing child pornography and one count of possessing such material. Doc. 6.
22 The eight distribution counts are based on the video files that Torrential Downpour
23 allegedly downloaded between December 13, 2016 and January 9, 2017. *Id.* at 1-5. The
24 possession count is based on the child pornography found on the tablet after the search.
25 *Id.* at 5-7.

26 **2. Defendant Ordonez.**

27 Agent Daniels conducted a similar investigation into Defendant Ordonez’s
28 BitTorrent activity. On five occasions between December 2, 2017 and February 5, 2018,

1 Agent Daniels used Torrential Downpour to connect with and download child
2 pornography files from IP address 24.251.70.98. The FBI obtained a search warrant for
3 the residence associated with that IP address, and seized Ordonez’s computer during a
4 search on April 4, 2018. The FBI performed a forensic examination of the computer and
5 found thousands of child pornography files in the recycle bin, including the files
6 Torrential Downpour had downloaded. On April 17, 2018, the government charged
7 Ordonez with five counts of distributing child pornography and one count of possessing
8 such material. Doc. 10.

9 **II. Discussion.**

10 Defendants contend that Torrential Downpour may be flawed and should be tested
11 and verified by a third party. They also contend that they need access to the program in
12 order to prepare effective cross examination of Agent Daniels and the presentations by
13 their own computer experts. Defendants seek disclosure of an installable copy of the
14 software pursuant to Federal Rule of Criminal Procedure 16, *Brady v. Maryland*, 373
15 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Gonzales also seeks
16 disclosure of Torrential Downpour’s user and training manuals. Neither Defendant seeks
17 the program’s source code.

18 The government contends that Defendants have failed to show how Torrential
19 Downpour is material to their defense. The government further contends that even if
20 materiality has been shown, Torrential Downpour is protected from disclosure by the
21 qualified law enforcement privilege recognized in *Roviaro v. United States*, 353 U.S. 53
22 (1957).

23 **A. Rule 16(A)(1)(E)(i) – Items Material to Preparing a Defense.**

24 Under Rule 16(a)(1)(E), the government must disclose any “books, papers,
25 documents, data, . . . or portions of any of these items, if the item is within the
26 government’s possession, custody, or control and: (i) the item is material to preparing the
27 defense[.]” To obtain disclosure under subsection (i), “[a] defendant must make a
28 ‘threshold showing of materiality[.]’” *United States v. Budziak*, 697 F.3d 1105, 1111 (9th

1 Cir. 2012) (citing *United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995)). “Neither
2 a general description of the information sought nor conclusory allegations of materiality
3 suffice; a defendant must present *facts* which would tend to show that the [g]overnment is
4 in possession of information helpful to the defense.” *United States v. Mandel*, 914 F.2d
5 1215, 1219 (9th Cir. 1990) (emphasis added); *see also Budziak*, 697 F.3d at 1111-12.

6 **1. Discoverability of Investigative Software.**

7 Many cases have addressed the discoverability of government software programs
8 used to investigate child pornography offenses. The parties each cite lines of cases to
9 support their positions.

10 Defendants rely primarily on *United States v. Budziak*, 697 F.3d 1105 (9th Cir.
11 2012), and cases that have adopted its reasoning. *Budziak* involved the FBI’s use of an
12 enhanced version of the LimeWire file-sharing program called “EP2P.” *Id.* at 1107.
13 Using that program, the FBI downloaded several child pornography files from an IP
14 address registered to Budziak. *Id.* A forensic examination of his computer revealed
15 multiple child pornography files, including several images the EP2P program had
16 downloaded. *Id.* Budziak was charged with multiple counts of distributing and
17 possessing child pornography. *Id.* The district court denied Budziak’s motions to
18 compel disclosure of the government’s EP2P program, and he was convicted on each
19 count. *Id.* at 1107-08.

20 On appeal, the Ninth Circuit held that the district court abused its discretion in
21 denying Budziak’s motions to compel. It noted that he did more than assert a generalized
22 need to review the EP2P program before trial; he identified particular defenses to the
23 distribution charges that discovery on the EP2P program could help him develop. *Id.*
24 at 1112. Specifically, he “presented evidence suggesting that the FBI may have only
25 downloaded fragments of child pornography files from his ‘incomplete’ folder, making it
26 ‘more likely’ that he did not knowingly distribute any complete child pornography files
27 to [the FBI].” *Id.* at 1112. He also presented “evidence suggesting that the FBI agents
28 could have used the EP2P software to override his sharing settings.” *Id.* Given this

1 evidence, the Ninth Circuit concluded that “access to the EP2P software was crucial to
2 Budziak’s ability to assess the program and the testimony of the FBI agents who used it
3 to build the case against him.” *Id.*

4 Other cases have followed *Budziak*. For example, the district court in *United*
5 *States v. Crowe*, No. 11 CR 1690 MV, 2013 WL 12335320, at *7 (D.N.M. Apr. 3, 2013),
6 required the government to allow the defense expert to examine and use a copy of the
7 government’s confidential Shareaza software at a secure government facility. The court
8 did so because the defendant in *Crowe*, like the defendant in *Budziak*, presented specific
9 evidence to suggest that access to the software was material to preparing the defense.
10 *See id.* Specifically, the defense expert testified that “some of the files alleged to have
11 been found by law enforcement in the shared space of Defendant’s computer, were not
12 found there during her analysis.” *Id.*

13 Another line of cases has refused to permit defendants in child pornography cases
14 to gain access to confidential government investigative software. In *United States v.*
15 *Pirosko*, 787 F.3d 358 (6th Cir. 2015), a case cited by the government in response to
16 these motions, the court of appeals affirmed a district court decision denying discovery of
17 the “law enforcement tools” used to locate and download child pornography from the
18 defendant’s computer. The Sixth Circuit distinguished *Budziak*, noting that the defendant
19 in that case had presented the evidence described above. 787 F.3d at 365-67. The
20 defendant in *Pirosko*, by contrast, “failed to produce any such evidence, simply alleging
21 that he might have found such evidence had he been given access to the government’s
22 programs.” *Id.* at 365. As a result, discovery was not warranted. *Id.*

23 Other cases have likewise found that the defendant in child pornography cases has
24 failed to make a showing to support their claim that disclosure of government
25 investigative software would be material to preparing the defense. *See United States v.*
26 *Jean*, 891 F.3d 712, 715 (8th Cir. 2018) (affirming denial of motion to compel
27 government software because the defendant was convicted of receiving and possessing
28 child pornography and “the likelihood of any help to [his] defense was ‘vanishingly

1 small”); *United States v. Chiaradio*, 684 F.3d 265, 277 (1st Cir. 2012) (expressing no
2 view on whether the EP2P source code was discoverable under Rule 16 where the
3 defendant “neither contradicted nor cast the slightest doubt upon” the government’s
4 evidence that the FBI had downloaded child pornography from his computer); *United*
5 *States v. Hoeffener*, No. 4:16-CR-00374, 2017 WL 3676141, at *13 (E.D. Mo. Aug. 25,
6 2017) (denying motion to compel where “nothing in the . . . receipt-of-child-pornography
7 charge reveal[ed] that the charge [was] based, to any extent, on materials downloaded
8 from [the defendant’s] computer while [the FBI] used Torrential Downpour”); *United*
9 *States v. Blouin*, 2017 WL 2573993, at *3 (W.D. Wash. June 14, 2017) (denying motion
10 to compel where the defendant did not dispute that the government’s software downloads
11 files from a single source); *United States v. Maurek*, No. CR-15-129-D, 2015 WL
12 12915605 at *3 (W.D. Okla. Aug. 31, 2015) (denying motion to compel where the
13 defendant failed to present specific facts which would tend to show how disclosure of
14 Torrential Downpour would be material to his defense); *United States v. Feldman*, No.
15 13-CR-155, 2015 WL 248006, at *6 (E.D. Wis. Jan. 19, 2015) (finding a lack of
16 materiality where the defendant was charged with receiving and possessing child
17 pornography based on a search of his computer and not the use of the government’s
18 software).

19 *Budziak* is, of course, binding precedent for this Court. But the Court finds the
20 distinction between it and the cases just discussed to be consistent with traditional
21 Rule 16 principles. As already noted, “[n]either a general description of the information
22 sought nor conclusory allegations of materiality suffice [under Rule 16(a)(1)(E)(i)]; a
23 defendant must present *facts* which would tend to show that the [g]overnment is in
24 possession of information helpful to the defense.” *Mandel*, 914 F.2d at 1219 (emphasis
25 added). In *Budziak* and *Crowe*, the defendants presented evidence to support their
26 contention that discovery of the government software was material to preparing their
27 defense to distribution of child pornography. In the other line of cases, they did not. The
28 Court will keep this distinction in mind as it considers the arguments of Defendants

1 Gonzalez and Ordonez.

2 **2. Gonzales Has Shown Materiality.**

3 Counts one through eight allege violations of 18 U.S.C. § 2252(a)(2). Doc. 1.
4 That section provides criminal punishment for any person who “knowingly receives, or
5 distributes, any visual depiction using any means or facility of interstate or foreign
6 commerce . . . including by computer, . . . if (A) the producing of such visual depiction
7 involves the use of a minor engaging in sexually explicit conduct; and (B) such visual
8 depiction is of such conduct[.]” Evidence is sufficient to support a conviction for
9 distribution under § 2252(a)(2) “when it shows that the defendant maintained child
10 pornography in a shared folder, knew that doing so would allow others to download it,
11 and another person actually downloaded it.” *Budziak*, 697 F.3d at 1109.

12 Defendant Gonzales argues that Torrential Downpour is material to his defense
13 because the distribution charges are based on child pornography files that Torrential
14 Downpour purportedly downloaded from his tablet but that were not found on the tablet
15 when it was seized by the FBI. Doc. 25 at 8-9. He has presented an affidavit from his
16 expert, Tami Loehrs, confirming that the files are not on the tablet. Doc. 25-5. Loehrs
17 explains in her affidavit that it is critical to Gonzales’s defense to understand how
18 Torrential Downpour functions in order to determine the program’s reliability and
19 accuracy in identifying files that Gonzales is charged with knowingly distributing. *Id.*
20 at ¶ 17. She further states that based on her many years of research and testing of peer-
21 to-peer file sharing software, including BitTorrent, she has discovered that all of these
22 programs “contain bugs, they do not always function as intended and the data reported by
23 these applications is not always accurate or reliable.” *Id.* ¶ 22.

24 Loehrs offered similar opinions at the evidentiary hearing. She opined that all
25 software programs have flaws, and Torrential Downpour is no exception. *See* Doc. 50,
26 Hr’g Tr. at 16:15-23, 18:17-19, 31:6-10 (Jan. 31, 2019). She bases this opinion on her
27 work in other cases involving Torrential Downpour and the fact that the files the program
28 allegedly downloaded in this case were not found on Gonzales’s tablet. *Id.* at 16:1-23.

1 Loehrs also provided a plausible explanation for how Torrential Downpour may
2 have erroneously identified Gonzales’s tablet as offering child pornography files over the
3 BitTorrent network. Loehrs explained that, because a torrent is simply a text-file
4 containing the hash values – or “fingerprints” – of the target image and video files, a
5 BitTorrent user who downloads a torrent has fingerprints of the target files, even if he has
6 not yet downloaded them. *Id.* at 22:14-23:8. Loehrs stated that the actual downloading
7 of the target files occurs only when the client software instructs the torrent to search for
8 those files on the BitTorrent network and download them to a designated folder on the
9 user’s computer. *Id.* at 23:9-25:3. She further stated that a forensic examination of the
10 device used to download the torrent can determine whether the torrent has been used to
11 download the file, and her examination of Gonzales’s tablet revealed no evidence
12 suggesting that he downloaded the files listed in counts one through eight. *Id.* at 25:4-22,
13 28:7-9. She opined that Torrential Downpour may have obtained the files from other
14 BitTorrent users, particularly in light of the fact that this is how peer-to-peer file sharing
15 programs are designed to work. *Id.* at 31:3-32:12.¹

16 The Court finds that this evidence brings this case squarely within the holding of
17 *Budziak*. Defendant Gonzalez has done more than simply request access to the software
18 and argue that it is material to his defense. He has presented evidence that calls into
19 question the government’s version of events. Given his evidence, the Court finds that
20 “the functions of the [program] constitute[] a ‘very important issue’ for [Gonzales’s]
21 defense.” *Budziak*, 697 F.3d at 1112 (quoting *United States v. Cedano-Arellano*, 332
22 F.3d 568, 571 (9th Cir. 2003)); *see Crowe*, 2013 WL 12335320, at *7.²

23 The government concedes that the child pornography files charged in counts one
24

25 ¹ The government contends that Loehrs’s affidavit is unreliable, citing several
26 cases rejecting or limiting the scope of her testimony. Doc. 29 at 5, 20-22. The Court
27 found Loehrs credible at the evidentiary hearing and has no basis at this point for
excluding her opinions under Federal Rule of Evidence 702.

28 ² Gonzales asserts that the government’s need to present evidence of Torrential
Downpour in its case-in-chief also entitles him to discovery under Rule 16(a)(1)(E)(ii),
but he fails to develop this argument or cite relevant case law.

1 through eight were not found on Gonzales's tablet. Doc. 29 at 3. The government notes,
2 however, that torrent names associated with these files were located in a "µTorrent"
3 client software folder on the tablet, that some of these torrent names were in a
4 "jump list," which suggests that Gonzalez had clicked on them, and that other child
5 pornography files were found on the tablet. *Id.* at 13. Materiality is defeated, the
6 government contends, because these facts corroborate its claim that Gonzales once
7 possessed the files charged in counts one through eight and was able to distribute them to
8 the FBI. *Id.* at 17.

9 But where a defendant has demonstrated materiality, the Court "should not merely
10 defer to government assertions that discovery would be fruitless." *Budziak*, 697 F.3d
11 at 1112-13. While the Court has no reason to doubt the government's good faith in this
12 case, Gonzales "should not have to rely solely on the government's word that further
13 discovery is unnecessary." *Id.* at 1113. Because Gonzales has shown that the Torrential
14 Downpour is material to his defense, he should be given access to the program to
15 investigate its reliability and help him prepare for cross-examination of Agent Daniels.³

16 Gonzales also contends that Torrential Downpour is material to a Fourth
17 Amendment challenge because the program "searches beyond the public domain,
18 essentially hacks computers searching for suspect hash values, and therefore conducts a
19 warrantless search[.]" Doc. 25 at 6. But Gonzales identifies no evidence suggesting that
20 Torrential Downpour accessed non-public space on his tablet. Gonzales has failed to
21 show that Torrential Downpour is material to a Fourth Amendment challenge. *See*
22 *Hoeffener*, 2017 WL 3676141, at *15 (finding a lack of materiality where the defendant
23 pointed to no "aspects of his expert's declaration that support his request for information
24 based on a search warrant challenge").

25
26 ³ The government presents a log file purportedly showing that Agent Daniels used
27 Torrential Downpour to download from Gonzales's tablet the child pornography file
28 listed in count four. Doc. 29-2; *see* Doc. 6 at 3. The government asserts that this log file
and the ones associated with the other distribution counts independently confirm that
Agent Daniels downloaded complete child pornography files solely from Gonzales's
tablet. Doc. 29 at 26. But the log files were created by Torrential Downpour. If it is
flawed in the ways Gonzales suggests, they likely would be flawed as well.

1 **3. Ordonez Has Failed to Show Materiality.**

2 Defendant Ordonez asserts that it is critical to understand how Torrential
3 Downpour functions “to determine its reliability and accuracy in identifying files
4 reported[ly] involving [his] IP address and whether law enforcement went beyond
5 accessing information that was publicly available.” Doc. 32 at 3. But Ordonez has
6 identified no “specific defense to the charges against him that the Torrential Downpour
7 program could help him develop.” *Maurek*, 2015 WL 12915605 at *3. Nor has he
8 presented any evidence in support of this materiality argument. Conclusory allegations
9 of materiality are not sufficient to compel disclosure under Rule 16(a)(1)(E)(i). *See*
10 *Budziak*, 697 F.3d at 1111-12 (citing *Mandel*, 914 F.2d at 1219); *Santiago*, 46 F.3d
11 at 894-95 (the defendant’s “assertions, although not implausible, do not satisfy the
12 requirement of specific facts, beyond allegations, relating to materiality”).

13 Defendant Ordonez does argue in his motion that his expert needs access to
14 Torrential Downpour to determine its reliability. Doc. 32 at 2. He clarified in his reply
15 brief that an associate with Loehrs’s firm, Michele Bush, is his defense expert. Doc. 45
16 at 4. Bush apparently was retained by Ordonez’s former counsel and prepared a report of
17 her examination of Ordonez’s computer in July 2018, but the report has not been
18 disclosed to the government and has not been provided to the Court. *See* Doc. 43 at 2
19 & n.1. Nor did Defendant Ordonez present an affidavit from Bush to support his motion,
20 or call Bush to testify at the evidentiary hearing. Loehrs testified at the hearing that her
21 firm is no longer working on Defendant Ordonez’s case and she has no familiarity with
22 the FBI’s investigation in that case. Doc. 50 at 58:3-7. Ordonez’s counsel stated that he
23 intends to engage another expert going forward (*id.* at 169:5-6), and he cross-examined
24 Agent Daniels at the hearing, but he has presented no case-specific expert evidence to
25 support the motion to compel.

26 Because Defendant Ordonez has failed to make a threshold showing of materiality
27 under Rule 16(a)(1)(E)(1), his case falls within the line of cases that distinguish *Budziak*
28 and deny discovery of government investigative software. *See Pirosko*, 787 F.3d at 366

1 (the defendant’s mere allegation that there were unanswered questions about the
2 government’s software was not sufficient to show materiality); *Maurek*, 2015 WL
3 12915605, at *3 (denying motion to compel disclosure of Torrential Downpour where the
4 defendant offered nothing more than conclusory allegations of materiality); *United States*
5 *v. Alva*, No. 2:14-cr-00023-RCJ-NJK, 2018 WL 327613, at *2 (D. Nev. Jan. 8, 2018)
6 (distinguishing *Budziak* where the defendant presented no evidence that he did not store
7 child pornography in shared folders and made no showing that his “theory behind
8 requesting the RoundUp source code amount[ed] to anything more than an abstract
9 possibility”); *United States v. Harney*, No. CR-16-38-DLB-CJS, 2018 WL 1145957,
10 at *6 (E.D. Ky. Mar. 1, 2018) (finding that the defendant’s arguments in support of his
11 need for the software were closer to *Pirosko* than *Budziak* because he “merely alleged he
12 might find evidence in support of his defense if his expert [was] provided the opportunity
13 to analyze the requested information in its entirety”).

14 **B. *Brady and Giglio.***

15 Defendants also seek disclosure of Torrential Downpour under *Brady v. Maryland*,
16 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). “The *Brady*
17 standard for materiality is higher than Rule 16’s, and its scope narrower.” *United States*
18 *v. Pac. Gas & Elec. Co.*, No. 14-cr-00175-TEH, 2016 WL 3185008, at *2 (N.D. Cal.
19 June 8, 2016). Under *Brady*’s constitutional mandate, the government “is obligated by
20 the requirements of due process to disclose material exculpatory evidence on its own
21 motion, without request.” *Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997). Under
22 *Giglio*, the government’s obligation to disclose exculpatory evidence was expanded to
23 include information that could be used to impeach government witnesses. *See Giglio*,
24 405 U.S. at 154.

25 But it is the government, not the defendant or the trial court, that decides
26 prospectively what information, if any, is exculpatory and must be disclosed under *Brady*
27 and *Giglio*. *See United States v. Lucas*, 841 F.3d 796, 807 (9th Cir. 2016). “The
28 *Brady/Giglio* doctrine does not require the government to disclose neutral . . . evidence.”

1 *United States v. Correia*, No. 2:17-CR-00001-JAD-CWH, 2018 WL 3416517, at *2 (D.
2 Nev. July 9, 2018) (citing *United States v. Stinson*, 647 F.3d 1196, 1208 (9th Cir. 2011)).
3 Defendants have made no showing that Torrential Downpour will prove to be
4 exculpatory or could be used to impeach a government witness. The Court will deny
5 Defendants' motions to the extent they seek disclosure of Torrential Downpour under
6 *Brady* and *Giglio*.

7 This ruling is not inconsistent with Gonzales's showing of materiality under
8 Rule 16 because "[i]nformation that is not exculpatory or impeaching may still be
9 relevant to developing a possible defense." *United States v. Muniz-Jaquez*, 718 F.3d
10 1180, 1183 (9th Cir. 2013). Indeed, "[e]ven inculpatory evidence may be relevant
11 [because a] defendant who knows that the government has evidence that renders his
12 planned defense useless can alter his trial strategy [or] seek a plea agreement instead of
13 going to trial." *Id.*; see also *United States v. Toilolo*, No. CR-11-00506-LEK, 2014 WL
14 1091715, at *3 (D. Haw. Mar. 17, 2014) ("Rule 16 is broader than *Brady*, 'requiring
15 disclosure of all documents material to preparing the defense.'" (quoting *Muniz-Jaquez*,
16 718 F.3d at 1183)).

17 **C. The Qualified Law Enforcement Privilege Under *Roviaro*.**

18 Even when a defendant is entitled to disclosure under Rule 16(a)(1)(E)(i), the
19 evidence may be withheld under a law enforcement privilege. In *Roviaro*, the Supreme
20 Court held that the government had a privilege to withhold from disclosure the identities
21 of certain confidential informants. 353 U.S. at 59. Subsequent cases have expanded the
22 privilege to other investigative techniques, including software programs like Torrential
23 Downpour. See *Pirosko*, 787 F.3d at 366 (applying the privilege to the government's
24 Shareaza program); *United States v. Van Horn*, 789 F.2d 1492, 1508 (11th Cir. 1986)
25 (surveillance equipment); *United States v. Harley*, 682 F.2d 1018, 1020-21 (D.C. Cir.
26 1982) (surveillance locations).

27 The Supreme Court has declined to establish fixed rules for deciding whether the
28 government may withhold material information under a law enforcement privilege,

1 holding instead that trial courts must engage in balancing on a case-by-case basis:

2 We believe that no fixed rule with respect to disclosure is justifiable. The
3 problem is one that calls for balancing the public interest and protecting the
4 flow of information against the individual's right to prepare his defense.
5 Whether a proper balance renders non-disclosure erroneous must depend on
6 the particular circumstances of each case, taking into consideration the
7 crime charged, the possible defenses, the possible significance of the
8 informer's testimony, and other relevant factors.

9 *Roviaro*, 353 U.S. at 62. The trial court's balancing must afford due regard to the
10 government's interest in maintaining the secrecy of its investigative technique, but must
11 also fully protect the defendant's interest in a fair trial. When the two interests come
12 squarely into conflict, the defendant's right to a fair trial should prevail because the
13 government can always choose to protect its investigative technique by dropping the
14 prosecution and due process dictates that a citizen should never be convicted in an unfair
15 trial. *See United States v. Turi*, 143 F. Supp. 3d 916, 921 (D. Ariz. 2015).

16 Having considered the particular circumstances of this case and the factors to be
17 balanced under *Roviaro*, the Court finds that disclosure of an installable copy of
18 Torrential Downpour for testing by a third-party is not warranted. Child pornography is a
19 scourge, victimizing the most innocent for the basest of reasons. The government has a
20 legitimate interest in preserving its ability to investigate and prosecute distribution of this
21 material – distribution that creates the market and fuels the demand for creation of more
22 child pornography. Agent Daniels testified that the government's investigative efforts
23 would be severely hampered if a copy of Torrential Downpour got into the wrong hands.
24 Countermeasures could be developed that would thwart law enforcement's monitoring of
25 the BitTorrent network for suspected child pornography. Doc. 50 at 126:10-20. For this
26 reason, the government closely guards Torrential Downpour and limits the persons
27 granted access to it. He testified that the program must remain in law enforcement
28 custody at all times to avoid the risk of disclosure to unauthorized third-parties. *Id.*
at 126:23-128:15.

1 The Court concludes that this substantial government interest outweighs
2 Defendant Gonzales's need for an independent copy of Torrential Downpour. *See*
3 *Harney*, 2018 WL 1145957, at *11 (finding that the risk of inadvertent leaking by third
4 parties who would have access to the government's software outweighed the defendant's
5 need for such material). But given the substantial defense interest established by
6 Defendant Gonzalez, the Court concludes that his expert should be granted access to
7 Torrential Downpour for purposes of assisting in preparing the defense. The Court will
8 balance these interests by adopting the Rule 16 disclosure method authorized in *Crowe*:

9 [T]he defense expert [will be permitted] to examine the software at issue at
10 a designated law enforcement facility, at a mutually convenient date and
11 time, for as much time as is reasonably necessary for the expert to complete
12 her examination. No copies of the software shall be made. The software
13 shall not leave the custody of the law enforcement agency that controls it.
14 Any proprietary information regarding the software that is disclosed to the
15 defense expert shall not be reproduced, repeated or disseminated in any
16 manner. Violation of [this] order shall subject the defense expert and/or
17 defense counsel to potential sanctions by this Court.

18 2013 WL 12335320, at *8.⁴

19 The Court at this point will not require discovery of the Torrential Downpour
20 manuals. Defendant Gonzalez has not provided evidence or explained how the manuals
21 will aid in preparation of his defense. Defendant Gonzalez may raise this issue with the
22 Court if examination of the software by Loehrs suggests that the manuals would be
23 helpful to the defense, at which point the Court will hear from both parties before making
24 a decision.

25 **IT IS ORDERED:**

- 26 1. Defendant Gonzales's motion to compel discovery (Doc. 25, Case No. CR-
27 17-01311) is **granted in part** and **denied in part** as set forth in this order.
- 28 2. Defendant Ordonez's motion to compel discovery (Doc. 32, Case No. CR-

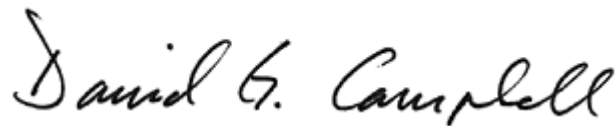
⁴ Agent Daniels made clear that such access would pose no security risk. Doc. 50
at 156:25-157:1-3.

1 18-00539) is **denied**.

2 Excludable delay pursuant to U.S.C. § 18:3161(h)(1)(D) is found to run from
3 6/28/2018 in Case No. CR17-01311 PHX DGC and 12/7/2018 in Case No. CR18-00539
4 PHX DGC.

5 Dated this 19th day of February, 2019.

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David G. Campbell
Senior United States District Judge