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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,)
)
Plaintiffs,)
)
vs.)
)
IRVIN LAZARO MALBOA-PENA,)
)
Defendants.)
_____)

No. CR 07-756-TUC-CKJ
ORDER

Pending before the Court is Defendant’s Motion for Disclosure [Doc. # 65]. Defendant has requested documents upon which Agent Heston will rely during the government’s case-in-chief to support his bases and reasons for his expert opinion on tandem driving. Specifically, Defendant seeks statistics from the Department of Homeland Security regarding incidents of tandem driving that result in stops but no arrest. The government has filed a response in which it asserts that the Border Patrol does not maintain statistics relating to “in tandem” driving.¹

¹The Court notes that Defendant has not requested the material pursuant to *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *Brady* and due process requires a prosecutor to disclose material exculpatory evidence on its own motion and without request. *Singh v. Prunty*, 142 F.3d 1157, 1161 (9th Cir.) (citing *Kyles v. Whitley*, 514 U.S. 419, 432-34 (1995) and *United States v. Agurs*, 427 U.S. 97, 107-08 (1976)). However, *Brady* only applies to materials within the government’s control. *United States v. Achiele*, 941 F.2d 761, 764 (9th Cir. 1991), *citation omitted*. Because the requested materials do not exist, disclosure pursuant to *Brady* is not appropriate.

