Anne Taylor Law, PLLC
Anne C. Taylor, Attorney at Law
PO Box 2347
Coeur d'Alene, Idaho 83816
Phone: (208) 512-9611
iCourt Email: info@annetaylorlaw.com

Jay W. Logsdon, First District Public Defender
Idaho State Public Defender
1450 Northwest Blvd.
Coeur d'Alene, Idaho 83814
Phone: (208) 605-4575

Elisa G. Massoth, PLLC
Attorney at Law
P.O. Box 1003
Payette, Idaho 83661
Phone: (208) 642-3797; Fax: (208)642-3799

Assigned Attorney:
Anne C. Taylor, Attorney at Law, Bar Number: 5836
Jay W. Logsdon, First District Public Defender, Bar Number: 8759
Elisa G. Massoth, Attorney at Law, Bar Number: 5647

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO **Plaintiff,** **V.** **BRYAN C. KOHBERGER,** **Defendant.**	**CASE NUMBER CR01-24-31665** **MOTION TO SUPPRESS AND MEMORANDUM IN SUPPORT** **RE: AMAZON ACCOUNT FEDERAL GRAND JURY SUBPOENAS AND WARRANTS DATED APRIL 26, 2023, AND MAY 8, 2023**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and submits the following Memorandum in support of his contemporaneously filed Motion for an Order suppressing all data found by law enforcement from its search of his Amazon.com account.

The Motion and documents in Support of a *Franks v. Delaware* 438 U.S. 154 (1978) hearing are hereby incorporated into this Memorandum. The proffer with supportive documentation regarding *Franks* are filed under seal. For that reason, they are not set forth in full detail here, but instead are incorporated.

ISSUES

I. Mr. Kohberger has a privacy interest in his Amazon.com account information protected by Art. I Sec. 17 of the Idaho Constitution and the Fourth Amendment, requiring information that requires a warrant.

II. The Affidavit Submitted in Support of the Application for the Issued Search Warrant Recklessly or Intentionally Omitted Material Information.

III. The Affidavit Submitted in Support of the Application for the Issued Search Warrant Included Information that Must be Excised.

- **a. All information in the affidavit was gathered because of law enforcement's unconstitutional use of Investigative Genetic Genealogy, and thus nothing in the warrant should remain.**
- **b. Information gathered about Mr. Kohberger via previous invalid warrants must also be excised.**

FACTS

Pennsylvania law enforcement, along with officers from Idaho and the FBI, raided Mr. Kohberger's parents' home on December 30, 2022, and arrested him. At some point, an FBI agent

subpoenaed Amazon records belonging to Mr. Kohberger's account.[1] On both December 30, 2022, and January 27, 2023, Amazon responded with records showing Mr. Kohberger's purchases.

Perhaps recognizing that subpoenaing Mr. Kohberger's records was a violation of the Idaho Constitution, on April 26, 2023, Det. Mowery of the Moscow Police requested a warrant for the same information, telling the court that an unnamed FBI Special Agent had "located" requested information. The warrant was amended due to a date error and ultimately issued May 8, 2023.

The affidavit for the warrant was signed by Detective Mowery. (Exhibit A) However, most of the information in the warrant was cut and pasted from an affidavit originally bearing the signature of Moscow Police Department Sgt. Blaker, but according to Mowery, now the sworn statement of Cpl. Payne.

The basic facts Mowery used to support the search beyond the arrest warrant facts were very minimal:

1) A vague reference that "an FBI Special Agent located an account for Kohberger. Amazon provided order history records regarding customer email bryanchristoper1994@gmail.com" How the agent "located" this was not explained.
2) Investigators know that Amazon holds records for identifying devices the customers used to access their account, all linked accounts, other items customers have search, "clicked" on to, placed in cart viewed, and saved. Who or how the investigators know this is not explained.
3) Little information about how Amazon collects and holds data was explained.

[1] Grand Jury subpoenas issued by the government have been the subject of a motion to compel. There is an order to compel their production "if available to the state" or at a minimum for the state to provide dates of subpoenas. Order on Defendant's 4th and 5th Motions to Compel June 14, 2024. The state has done neither. The issues in the memorandum are among the reasons a copy of the subpoenas are necessary. It is unclear what the subpoena asked for or its scope. The subpoena return identifies two iCloud accounts.

4) The time frame March 20, 2022, through March 30, 2022, and November 1, 2022 – through December 6, 2022 were selected.

ARGUMENT

I. Mr. Kohberger has a privacy interest in his Amazon.com account information protected by Art. I Sec. 17 of the Idaho Constitution that requires a warrant.

Both the Fourth Amendment and Art. I Sec. 17 protect people's interest in privacy. A person challenging a search has the burden of showing that he or she had a legitimate expectation of privacy in the item or place searched. *Rawlings v. Kentucky,* 448 U.S. 98, 104 (1980); *State v. Cowen,* 104 Idaho 649, 651 (1983). That involves a two-part inquiry: (1) Did the person have a subjective expectation of privacy in the object of the challenged search? and (2) Is society willing to recognize that expectation as reasonable? *California v. Ciraolo,* 476 U.S. 207, 211 (2001).

The Fourth Amendment has generally refused to acknowledge that individuals have a privacy interest in records held by a bank, relying on the third-party doctrine. *United States v. Miller,* 425 U.S. 435, 443 (1976) (*citing Hoffa v. United States*, 385 U.S. 293, 301-302 (1966)). This despite the fact that laws required such records to be maintained *for the purpose of criminal investigations*. *Id.* at 441 (*citing California Bankers Ass'n v. Schultz*, 416 U.S. 21, 54 (1974)). Unsurprisingly, the federal Congress responded negatively. *See*, Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401, et seq.

As this Court is no doubt aware, the third-party doctrine holds that information shared with anyone with whom a person does not have a recognized evidentiary privilege is free for the government to take without a warrant. *See*, *Miller*, at 443. To put it another way, the third-party doctrine insists, as a matter of law, that you should trust your secrets to no one. *See*, Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth*

Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society", 42 DUKE L.J. 727, 732 (1993).

Idaho has taken a somewhat unclear approach to the third-party doctrine. In *State v. Mubita*, 145 Idaho 925 (2008) the Court permitted protected health records to be provided to the government. In *State v. Kluss*, 125 Idaho 14 (Ct.App. 1993) the court did the same for billing statements from utility company. In *State v. Donato*, 135 Idaho 469, 470–71 (2001), the Court held that people had no expectation of privacy in trash placed out for pickup. However, the Court has also held in *State v. Thompson*, 114 Idaho 746, 749 (1988), that under the Idaho Constitution citizens do have a right to privacy in who they call, and later extended that to text messages. *State v. Branigh*, 155 Idaho 404, 411 (Ct.App.2013).

Idaho is not the only jurisdiction to have trouble with the third-party doctrine. The United States Supreme Court has refused to apply it both to the search of cell phones and the use of cell sites. *See*, *Carpenter v. U.S.*, 585 U.S. 296, 309-10 (2018); *Riley v. California*, 573 U.S. 373, 400 (2014).

The issues the United States Supreme Court seems to take with the third-party doctrine in its most recent decisions seem to be the scope of the information available to the government without a warrant if one follows it closely. *Carpenter*, 585 U.S. at 309; *Riley*, 573 U.S. at 400. This concern was first fully articulated by Justice Sotomayor in her concurrence in *U.S. v. Jones*, 565 U.S. 400, 430 (2012). It is difficult to square this concern with what the Court decided in *Miller*, because as the third-party doctrine's defender Professor Kerr puts it:

> In *Miller*, the checking account created a substitution effect by replacing a transaction that would have included substantial public components with a transaction that would normally occur entirely in private. To see how, imagine a world without banks. If you need to pay for something in this world, you would need to get the money to do it: You would need to travel to your stash, pick up the money, and then travel to the place where you are making your purchase. If you are the seller, you need to receive the money, take it back to your stash, and store it

> away for safekeeping. There are public parts of the transaction on both sides. Checks and other credit instruments eliminate the need to travel. The buyer no longer needs to travel to bring the money to the seller, and the seller no longer needs to travel to put the money away. Instead, the seller deposits the check and the funds from the bank are sent directly to him. The buyer and seller don't have to move anymore, as the check moves the funds out of and into their accounts without them needing to go anywhere. The third-party of the checking account makes the entire economic transaction private.

Orin Kerr, *The Case for the Third-Party Doctrine*, 107 Mich. L.R. 561, 579 (2009). In other words, as Professor Kerr argues, *Miller* makes public precisely the amount of information *Carpenter* held private. No doubt the fact that our economy has changed greatly since the 1970s has a part to play in this, but the fact remains that the *Miller* case and its progeny make little sense in today's world and are irreconcilable with the Court's current jurisprudence.

In Idaho, on the other hand, the Court in *Thompson* determined with relatively little analysis that Idahoans expected privacy beyond that which the United States Supreme Court had provided for the people they call. *See*, *Thompson*, 114 Idaho at 749-751. In essence, the Court, without much explanation, held that the dissent in *Smith v. Maryland*, 442 U.S. 735 (1979), had it right. *Id.* However, it remains that by adopting the dissent from *Smith*, the *Thompson* court adopted a rationale for rejecting the third-party doctrine. From Justice Stewart's dissent, Idaho adopted the notion that what a person does in private does not become public merely by the nature of the act. *Thompson*, 114 Idaho at 749-50 (*quoting Smith*, 442 U.S. at 746-48 (STEWART, J. dissenting). More sweeping is the rationale of Justice Marshall that the Court adopted:

> In my view, whether privacy expectations are legitimate within the meaning of *Katz* depends not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society. By its terms, the constitutional prohibition of unreasonable searches and seizures assigns to the judiciary some prescriptive responsibility. As Mr. Justice Harlan, who formulated the standard the Court applies today, himself recognized: "[s]ince it is the task of the law to form and project, as well as mirror and reflect, we should not ... merely recite ... risks without examining the desirability of saddling them upon society." *United States v. White, supra,* 401 U.S. [745] at 786, 91 S.Ct. [1122] at 1143 [28 L.Ed.2d 453 (1971)]

> (dissenting opinion). In making this assessment, courts must evaluate the "intrinsic character" of investigative practices with reference to the basic values underlying the Fourth Amendment. *California Bankers Assn. v. Shultz,* 416 U.S. [21] at 95, 94 S.Ct. [1494] at 1534 [39 L.Ed.2d 812 (1974)] (MARSHALL, J., dissenting). And for those "extensive intrusions that significantly jeopardize [individuals'] sense of security ... more than self-restraint by law enforcement officials is required." *United States v. White, supra,* 401 U.S., at 786, 91 S.Ct., at 1143 (Harlan, J., dissenting.)

Id. at 750 (*quoting Smith,* 442 U.S. at 747-48 (MARSHALL, J., dissenting). Despite this, in *Donato* the Court rejected Justice Marhsall's dissent in *California v. Greenwood*, 486 U.S. 35 (1988). All the same, the Court did not simply join the *Greenwood* majority. Instead, the Court took a middle path set out in the Colorado decision *People v. Hillman*, 834 P.2d 1271, 1277 (Colo. 1992). *Donato*, 135 Idaho at 473-74. That decision noted distinctions between garbage and telephone calls in that the latter are open to the public and carry duties of confidentiality, while the former do not. *Id.* at 474 (*citing Hillman*, 834 P.2d at 1277, n. 14). As our Supreme Court noted: "[c]learly, there is no duty of confidentiality owed by garbage handlers." *Id.* Included in that analysis, however, is that Colorado had rejected not only pen registers but that bank records should be obtainable without a warrant. *Id.* at 473-74 (*citing Hillman*, 834 P.2d 1271) ("The Colorado Court found their cases recognizing expectations of privacy in numbers dialed from a telephone and bank records,…").

This brings us to *Mubita*. The Court in *Mubita* adopted *Miller* finding without explanation that nothing in Idaho's jurisprudence would "support a divergence." *Mubita*, 145 Idaho at 935. Although the Court in *Mubita* analyzes both *Donato* and *Thompson*, the Court makes no mention of their rationales and instead differentiates them based on whether there can be a finding that greater protection exists due to "the uniqueness of our state, our Constitution, and our long-standing jurisprudence." *Id.* at 934. This holding ignores the holdings in both cases to craft a new one that should have required the *Mubita* Court to reject *Miller*, given that the "long-standing

jurisprudence" of the only two cases on point in their holdings rejected the simplicity of the third-party doctrine embodied by the *Miller* holding.

Instead, the Court in *Mubita* looked at a Court of Appeals decision about utility bills. *Id.* at 935. Once again, the Court ignored the actual rationale of the holding in *Kluss*, merely noting that it also applied *Miller* to billings. *Id.* In reality, the court in *Kluss* did no such thing. In *Kluss*, the court simply adopted the ruling of the district court in the case. *Kluss*, 125 Idaho at 19. That holding, which it adopted, did not simply "apply" *Miller*. Instead, the district court had rejected the reasoning of Californian and Washington cases on the grounds that power usage did "not provide any intimate details of Kluss's life, identifying his friends or political and business associates, nor [did] it provide or complete a 'virtual current biography'". *Id.* at 21.

Finally, the *Mubita* Court "not[es]" that one's HIV status is heavily regulated via statute and regulation and may be disclosed to protect the public. *Mubita*, 145 Idaho at 935 (citations omitted). This part of the Court's decision, although treated as almost an afterthought, provides the reasoning in the case as to why the defendant could not show a privacy right under Art. I Sec. 17. After all, if the confidentiality of the information had a disclosure requirement built in, it was necessarily different from phone records. Phone records would not, on the face of them, alert a company to a threat to society. Diseases are different.

Thus, although the *Mubita* Court held that *Miller* controlled, every aspect of the decision belies that holding. Idaho's constitutional exclusionary rule, unlike the federal constitution, protects privacy. *See State v. Guzman*, 122 Idaho 981, 992 (1992). Given the rationales in the holdings of all the cases, even *Mubita*, *Miller* has no place in Idaho.

This case is not about bank records, but purchase records from an online company. From the standpoint of the Fourth Amendment, one's behavior with Amazon.com can provide a massive amount of information about a person's private life, such as:

Your name, address, searches, and recordings when you speak to the Alexa voice assistant. It knows your orders, content you watch on Prime, your contacts if you upload them and communications with it via email. Meanwhile, when you use its website, cookie trackers are used to "enhance your shopping experience" and improve its services, Amazon says.

Some of the data is used for "personalization" – big tech speak for using your data to improve your online experience – but it can reveal a lot about you. For example, if you just use its online retail site via the app or website, Amazon will collect data such as purchase dates and payment and delivery information.

"From this information, Amazon can work out where you work, where you live, how you spend your leisure time and who your family and friends are," says Rowenna Fielding, director of data protection consultancy Miss IG Geek.

At the same time, Prime Video and Fire TV information about what you watch and listen to can reveal your politics, religion, culture and economic status, says Fielding. If you use Amazon to store your photos, a facial recognition feature is enabled by default, she says. "Amazon promises not to share facial recognition data with third parties. But it makes no such commitment about other types of photo data, such as geolocation tags, device information or attributes of people and objects featured in images."

Amazon Photos does not sell customer information and data to third parties or use content for ad targeting, an Amazon spokesperson says, insisting the feature is for ease of use. You also have the option to turn the feature off in the Amazon Photos app or on the website.

Meanwhile, Amazon's Kindle e-reader will collect data such as what you read, when, how fast you read, what you've highlighted and book genres. "This could reveal a lot about your thoughts, feelings, preferences and beliefs," says Fielding, pointing out that how often you look up words might indicate how literate you are in a certain language.
Smart speakers have been criticised by privacy advocates and devices such as Amazon's Echo have been known to be activated accidentally. But Amazon says its Echo devices are designed to record "as little audio as possible."

No audio is stored or sent to the cloud unless the device detects the wake word and the audio stream is closed immediately after a request has ended, an Amazon spokesperson says.

More broadly, Amazon says much of the information it collects is needed to keep its products working properly. An Amazon spokesperson says the company is "thoughtful about the information we collect."

But it can add up to a lot of data. In 2020, a BBC investigation showed how every motion detected by its Ring doorbells and each interaction with the app is stored,

> including the model of phone or tablet and mobile network used. Ring can share your stored data with law enforcement, if you give your consent or if a warrant is issued.

Kate O'Flaherty, *The Data Game: What Amazon Knows About You and How to Stop It*, THE GUARDIAN (Feb. 27, 2022) (available at https://www.theguardian.com/technology/2022/feb/27/the-data-game-what-amazon-knows-about-you-and-how-to-stop-it). Given the sheer amount of information Amazon retains, the Fourth Amendment as understood in *Carpenter* requires a warrant before the government can access such information.

And as for Idaho, there can be no doubt that Art. I Sec. 17 requires a warrant before law enforcement can access Idahoan's online records. Amazon.com, like phone companies, is heavily regulated and guarantees its customers' privacy. *See*, Amazon.com Privacy Notice, https://www.amazon.com/gp/help/customer/display.html?nodeId=GX7NJQ4ZB8MHFRNJ (last visited Feb. 27, 2024). It is not garbage one leaves on the street where snoops can find it, nor is it HIV information that society has a stake in knowing.

For these reasons, this Court should find a warrant is required to access such information. Thus, the FBI's subpoena gathering the information from Mr. Kohberger's account violated his rights, and its results must be suppressed.

II. The Affidavit Submitted in Support of the Application for the Issued Search Warrant Recklessly or Intentionally Omitted Material Information.

"The Fourth Amendment states unambiguously that "no warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Groh v. Ramirez,* 540 U.S. 551, 557 (2004) (quoting U.S. Const. Amend. IV.). 'Probable cause' exists when, given all the circumstances set

forth in the affidavit, "there is a fair probability that contraband or evidence of a crime will be found *in a particular place*." *Illinois v. Gates,* 462 U.S. 213, 238 (1983) (emphasis added).

"For a search warrant to be valid, the judge issuing the warrant must rely on an affidavit or affidavits sworn to before the judge or by testimony under oath and recorded that establish the grounds for issuing the warrant." *State v. Nunez,* 138 Idaho 636, 640, 67 P.3d 831, 835 (2003). "Any discrepancy between the items for which there was probable cause and their description in the search warrant requires suppression." 23 C.J.S. *Criminal Procedure and Rights of Accused* § 887 (2022). "It is clear that the issuing Magistrate himself, if he is to fulfill the constitutionally mandated function of interposing an independent intelligence between the law enforcement officer and the citizen, must actually and in fact, draw the inferences from the evidence presented to him." *People v. Potwora,* 48 N.Y.2d 91, 94, 397 N.E.2d 361, 363 (Ct. App. 1979). "It is for this reason that the courts have insisted that the full facts from which inferences might be drawn, and information necessary to determine their reliability, be placed before the issuing magistrate." *Potwora,* 48 N.Y.2d at 94, 397 N.E.2d at 363.

Finally, "[a] criminal defendant may challenge the veracity of an affidavit used to obtain a search warrant." *State v. Peterson,* 133 Idaho 44, 47, 981 P.2d 1154, 1157 (Ct. App. 1999). Upon a preliminary showing of a warrant's deficiency, the defendant must prove, by a preponderance of the evidence, "that intentional or reckless falsehoods were included in the warrant affidavit and were material to the magistrate's finding of probable cause, or that material exculpatory information was deliberately or recklessly omitted." *Peterson,* 133 Idaho at 47, 981 P.2d at 1157. "An omission of exculpatory facts is "material" only if there is a substantial probability that, had the omitted information been presented, it would have altered the magistrate's determination of probable cause." *Id.* "Whether an omission was intentional or reckless might be inferred, in part,

from the relative importance of the information and its exculpatory power." *Id.,* 133 Idaho at 48, 981. P.2d at 1158.

In this case, law enforcement either intentionally or recklessly omitted exculpatory evidence as to almost every facet of its affidavit for this warrant. Thus, it will require suppression. The proffer required for a *Franks* hearing is filed contemporaneously under seal. The proffer asserted applies here. In additional to the proffer, the affidavit for the Amazon search warrant did not explain to the magistrate that federal agents had been talking to Amazon and issuing subpoenas and that was how they had gathered information for the affidavit. Mowery intentionally failed to disclose the illegal means by which investigators had "located" the Amazon information.

III. The Affidavit Submitted in Support of the Application for the Issued Search Warrant Included Information that Must be Excised.

Where information in a warrant was obtained via a violation of the constitution, Idaho courts excise that information. *See, e.g*., *State v. Johnson*, 110 Idaho 516, 526 (1986); *State v. Bunting*, 142 Idaho 908 (Ct.App.2006)*; State v. Buterbaugh*, 138 Idaho 96, 101 (Ct. App.2002).

a. All information in the affidavit was gathered because of law enforcement's unconstitutional use of Investigative Genetic Genealogy, and thus nothing in the warrant should remain.

Mr. Kohberger has argued in a separate Motion that the genetic genealogy investigation in this matter was done in violation of the constitution. Additionally, he argues there would be no investigation into him without that original constitutional violation. It is not that the results of the IGG sped up the investigation. Instead, they focused the investigation on Mr. Kohberger, a person whose only connection to the case was his mode of transportation and the shape of his eyebrows, two identifications of little to no value. As the Idaho Supreme Court has explained, while the initial burden in showing a factual nexus between the illegality and the evidence, the State must show it

would have been discovered anyway. *State v. Maahs*, 171 Idaho 738, 752 (2022). The State cannot make this showing. Without IGG, there is no case, no request for his phone records, surveillance of his parents' home, no DNA taken from the garbage on his driveway, in a gated community, under a garbage collection ordinance. Because the IGG analysis is the origin of this matter, everything in the affidavit should be excised.

b. Information gathered about Mr. Kohberger via previous invalid warrants must also be excised.

Separately, the information gathered via the various other warrants should be excised for the reasons set out in the other motions to suppress.

CONCLUSION

Mr. Kohberger requests this Court suppress all evidence obtained by police via the subpoenas and warrants that permitted them to search his Amazon account. As explained above, a warrant was required to search his account, and the warrants used lacked probable cause as written, given its heavy reliance on conclusions reached by law enforcement without the details necessary for the magistrate to draw its own conclusions, and because the warrant omitted exculpatory information and information that put into question the reliability of the facts upon which it relies, and finally because the affidavit relied on evidence gained in violation of the constitution, all in violation of the Fourth Amendment and Art. I Sec. 17.

DATED this 13 day of November, 2024.

BY: 

JAY WESTON LOGSDON

/s/ Elisa G. Massoth
Elisa G. Massoth

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the ___14____ day of November, 2024 addressed to:

Latah County Prosecuting Attorney –via Email: paservice@latahcountyid.gov
Elisa Massoth – via Email: legalassistant@kmrs.net
Jay Logsdon – via Email: Jay.Logsdon@spd.idaho.gov
Jeffery Nye, Deputy Attorney General – via Email: Jeff.nye@ag.idaho.gov
Ingrid Batey, Deputy Attorney General – via Email: ingrid.batey@ag.idaho.gov

Exhibit A

Motion to Suppress and Memo in Support RE: Amazon

Filed Under Seal with the Court on 11/18/24