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**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: SEARCH WARRANT FOR
DEFENDANT'S APARTMENT**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and submits the following Motion and Memorandum in support of an Order suppressing all evidence gathered by law enforcement as a result of the search of his apartment located at 1630 NE Valley Rd., #G201, Pullman, WA.

**MOTION TO SUPPRESS AND MEMORANDUM IN SUPPORT
RE: SEARCH WARRANT FOR DEFENDANT'S APARTMENT**

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. This Court Should Apply Idaho’s Exclusionary Rule and Law to this Search.**
- 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 about the client’s locations taken from his phone must also be excised due to being gathered from an invalid warrant.**

FACTS

Due to the haphazard way in which law enforcement has kept and disclosed records in this matter, the following are the facts relating to obtaining the search warrant for 1630 NE Valley Rd., #G201, Pullman, WA.

On December 28, 2022, Trooper Leri of Pennsylvania State Police became aware of the objective of arresting Mr. Kohberger via Moscow Police Cpl. Payne.

On December 29, 2022, at 4:45 PM EDT (1:45 PDT), a Magistrate in Pennsylvania issued a search warrant for Mr. Kohberger’s person.

On December 29, 2022, at 2:22 PM PDT, the Magistrate in this matter signed an arrest warrant for Mr. Kohberger in Latah County. The affidavit for the warrant was signed by Moscow Police Department Cpl. Brett Payne.

The basic facts Payne used to support the search were:

1. Next to the body of Madison Mogen was a tan leather knife sheath. The Idaho State Lab later located a single source of male DNA on the button snap of the knife sheath.
2. Footage from “the King Road Neighborhood” showed what the police suspected was the vehicle of the killer. This white sedan lacked a front license plate. A “vehicle specialist” decided based on the footage that the vehicle was a 2011-2016 Hyundai Elantra. A vehicle matching that description was spotted via surveillance in Pullman. It was later discovered that Mr. Kohberger drives a 2015 Hyundai Elantra, and that he lived not far from the last place a white sedan was seen driving in Pullman over an hour later. That same specialist indicated the car seen in Pullman was a 2014-2016 Hyundai Elantra.
3. Witness Dylan Mortensen had indicated the height of the person she saw at the time of the attack was between 5’10” and 6’, and they had bushy eyebrows. Police determined Mr. Kohberger fit that description.
4. Records from an August 21, 2022, traffic stop showed Mr. Kohberger was the driver of a white 2015 Hyundai Elantra with Pennsylvania plates, lacking a front plate. It also showed he had the phone number 509-592-8458. He noted “Investigators” learned this was an AT&T number.
5. Mr. Kohberger had changed his vehicle registration to Washington on November 18, 2022.
6. Cell tower records did not show Mr. Kohberger was in Moscow at the time of the murders. In law enforcement’s experience, however, people committing crimes typically turn off their phones.

7. Historical cell site location information (CSLI) was obtained and given to a Cellular Analysis Survey Team (CAST) with the FBI. That team determined that on Nov. 13, 2022, at approximately 2:42 AM, Mr. Kohberger's phone was "utilizing cellular resources" that provide coverage to his apartment in Pullman, WA. They support the idea that he left his apartment and went south. They supported the phone being off. They support at 4:48 AM that the phone is south of Moscow, ID, near Blaine, ID. The phone utilizes resources that make their way back to Pullman, coinciding with a white Elantra seen on some surveillance there. A similar data showing occurs at approximately 9:00 AM with a trip into Moscow and returning at around 9:32 AM.
8. That same team determined Mr. Kohberger had been to Moscow on "at least twelve" occasions prior to the event, and that he came into the area the morning following the murders. However, law enforcement, without explanation, indicated it did not believe that final trip ever occurred.

At 2:43 PM PDT on December 29, 2022, a criminal complaint and probable cause order were filed in this matter. At 10:00 PM EDT (7:00 PM PDT), Pennsylvania SWAT began preparations to arrest Mr. Kohberger. Despite days of constant FBI surveillance, Pennsylvania law enforcement did their own surveillance starting at 11:15 PM EDT (8:15 PM PDT). And despite the fact that the constant FBI surveillance showed Mr. Kohberger was unarmed and tended to go for runs around his parents' neighborhood, police decided that in the dead of the night, r within his parents' home was the way to make their arrest.

At 9:25 PM PDT on December 29, 2022, a Superior Court Judge in Washington issued a warrant for Mr. Kohberger's apartment in Pullman, WA. That warrant was based on the affidavit of Assistant Chief Dawn Daniels of the WSU Police Department. That affidavit shows that Sgt. Blaker of the Moscow Police Department requested the assistance of the WSU Police Department

in investigating this case. That affidavit relied on the same information outlined above.¹ (Exhibit A)

On December 30, 2022, at 1:14 AM EDT (10:14 PM PDT the previous day), Pennsylvania SWAT and federal agents raided Mr. Kohberger's parents' home. Law enforcement arrested Mr. Kohberger.

On December 30, 2022, Idaho State Police, Moscow Police, and other law enforcement searched Mr. Kohberger's apartment at 1630 NE Valley Rd., #G201, Pullman, WA.

ARGUMENT

I. This Court Should Apply Idaho's Exclusionary Rule and Law to this Search.

The first question this Court must determine is whether there is a conflict of laws in this matter, i.e., whether Idaho law or Washington law controls the validity of the search warrant for Mr. Kohberger's apartment and the necessary relief. Unlike the issue of arrest warrants, cases involving multi-state investigations have produced far less case law. In fact, the Defense could not find a precise case on point for the state of Idaho.

The issue, however, has received some attention in academia. Professor Kerr argued in his article for the Harvard Law Review that the jurisdiction where the crime occurred should control how the investigation is done, but that states and/or the federal government should provide some form of authorization to each other to participate in each other's criminal investigations. *See*, Orin Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 Harv. L. Rev. 471, 531 (2018). As it stands, there are at least five different approaches to this increasingly common situation *See*,

¹ There was a supplemental section to the affidavit indicating DNA of the father of the person whose DNA was on the sheath had been found in the trash at Mr. Kohberger's parents' home, however, the Superior Court Judge specifically did not rely on that information in determining probable cause.

Megan McGlynn, *Competing Exclusionary Rules in Multistate Investigations: Resolving Conflicts of State Search-and Seizure Law*, 127 Yale L. J. 406 (2017).

Fortunately for this Court, Idaho and Washington do not differ in their approaches to the enforcement of their Fourth Amendment analog provisions- both do not accept the good faith exception. *See, State v. Guzman*, 122 Idaho 981, 995 (1992); *State v. Afana*, 233 P.3d 879 (Wash.2010). Thus, this Court can likely afford to leave as an open question which forum's exclusionary rule applies. However, it is also clear from the grounding of the exclusionary rule in Art. I Sec. 17 that evidence obtained in violation of the constitution must be excluded. *See, Guzman*, at 992-93. Thus, Mr. Kohberger argues that the Idaho Constitution's exclusionary rule must apply, as its basis lies not only in deterring police misconduct, but because exclusion is constitutionally mandated and judicial integrity demands it.

However, it remains to be determined whether the actions of the FBI and WSU Police should be viewed through the lens of Article I, Section 17, or its analogues. It is not at all clear whether a search should be judged by Idaho's standards of reasonableness, or that of Washington, or in the case of the FBI agents, by the Fourth Amendment.

As noted, Professor Kerr would have Idaho's reasonableness apply in that the FBI and the WSU Police were acting under its authorization to investigate a violation of its laws. *See, Kerr*, 132 Harv. L. Rev. at 531. This approach would also mesh well with older cases such as *U.S. v. Di Re*, 332 U.S. 581 (1948) (looking to the laws of the state where the defendant was arrested in the absence of a federal law permitting the arrest by a federal agent for a federal law violation), *Johnson v. U.S.*, 333 U.S. 10 (1948). It also goes along with the legal framework of agency. *See, generally*, Restatement (Third) of Agency (Am. Law. Inst. 2024). In this matter, Idaho authorities requested assistance from the FBI and the WSU Police. Thus, this Court should be required to apply Idaho search and seizure law to their actions in Washington.

However, this concept has its detractors. McGlynn argues that when the situs officer is performing the search they should only be held to upholding their own laws. McGlynn, 127 Yale L. J. at 447-48. While that position has merit as it does not require a situs officer to get a rundown of the differences between their law and the trial state's laws, it remains that the Idaho Constitution is not merely concerned with deterrence to officers who misbehave. Moreover, it is of concern that such a rule would permit forum shopping. After all, if Idaho's law enforcement may take advantage of laxer restrictions in a different state, they may simply pause their investigation until their suspect is in that new jurisdiction, or in the case of the FBI, state law enforcement could at any point, even within Idaho, call upon federal agents with the far laxer rules of the Fourth Amendment.

Finally, it must be said that there is very little daylight between the Idaho Constitution and the Washington Constitution. If anything, Washington appears to have stricter requirements for probable cause. *State v. Afana*, 233 P.3d 879 (Wash.2010).

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). Because “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion” stands “[a]t the very core’ of the Fourth Amendment,” *Kyllo v. United States*, 533 U.S.

27, 31, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)), [courts] have firmly established the “basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.”” *Groh v. Ramirez*, 540 U.S. 551, 559, 124 S. Ct. 1284, 1290, 157 L. Ed. 2d 1068 (2004) (quoting *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)).

“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.

The challenge pursuant to this section of the motion is separately laid out in Mr. Kohberger's motion for hearing under *Franks*. The motion and proffer are incorporated but not repeated.

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 his driveway, in a gated community, subject to a refuse removal ordinance. Because the IGG analysis is the origin of this matter, everything in the affidavit should be excised.

b. Information about the client's locations taken from other illegal searches must also be excised due to being gathered from invalid warrants.

Separately, the information gathered via the warrant for Mr. Kohberger's AT&T account and the pen trap and trace device warrant should be excised for the reasons set out in those warrants. Other excision should be applied in accordance with the other motions to suppress filed contemporaneously.

CONCLUSION

Mr. Kohberger requests this Court suppress all evidence obtained by police via the warrant that permitted them to search his apartment. As explained above the warrant 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 13th day of November, 2024.

BY: 

JAY WESTON LOGSDON
FIRST DISTRICT PUBLIC DEFENDER

/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: Apartment

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