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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: PENNSYLVANIA SEARCH WARRANT FOR 119 LAMSDEN DR., ALBRIGHTSVILLE, PA AND STATEMENTS MADE**

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 evidence gathered by law enforcement as a result of the entry into and search of Mr. Kohberger's parents' home at 119 Lamsden Dr., Albrightsville, PA, including statements made after his arrest.

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. **Mr. Kohberger has standing to challenge the search of his parents' home.**

III. **Pennsylvania Law Enforcement Violated Mr. Kohberger's Fourth Amendment Rights by Entering and Searching His Parents' Home without a Valid Local Warrant.**

   a. **The Idaho arrest warrant could not have given police in Pennsylvania the authority to enter the home.**

IV. **Federal and Pennsylvania Law Enforcement Violated Mr. Kohberger's Idaho and Pennsylvania Constitutional Rights by not Knocking and Announcing their Presence and Presenting Mr. Kohberger with the Opportunity to Surrender.**

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

VI. **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.**

VII. Statements After Arrest are either Fruit of the Poisonous Tree from the Illegal Arrest or Should be Suppressed as a Miranda Violation.

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 f119 Lamsden Dr. Chestnut Hill Twp:

1) On December 28, 2022, Trooper Leri of Pennsylvania State Police became aware of the objective of arresting Mr. Kohberger via Moscow Police Cpl. Payne.
2) On December 29, 2022, at 4:44 PM EDT (1:44 PDT), a Magistrate in Pennsylvania issued a search warrant for 119 Lamsden Dr., Chestnut Hill Twp., Monroe County, the home of Mr. Kohberger's parents. (Exhibit A)
3) 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 Sgt. Blaker. (Exhibit B)

The basic facts Blaker 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 then support the idea that he left his apartment and went south. They then supported the phone being off. Then 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.
9. Pennsylvania agents seized garbage at Mr. Kohberger's parents' residence and found DNA it determined was likely the father of the suspect DNA found on the sheath.

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 weeks 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 weeks of 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 night, within his parents' home, was the best way to make their arrest.

On December 30, 2022, at 1:14 AM EDT (10:14 PM PDT), Pennsylvania SWAT raided Mr. Kohberger's parents' home. During the raid, law enforcement broke the front door of home, shattered the sliding glass door of the basement, held the entire family at gunpoint, and seized Mr. Kohberger. Mr. Kohberger made statements to his arresting officers. He was transported to a police station in Stroudsburg, PA, and made statements during transport. At the station, Mr. Kohberger was processed during which police collected information about his person. Finally, during interrogation, before requesting an attorney, Mr. Kohberger made statements to interrogators from the Idaho State Police and the Moscow Police Department.

At 4:00 AM EDT on December 30, 2022, Pennsylvania State Police filed a criminal complaint against Mr. Kohberger.

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 Pennsylvanian law controls the validity of the search warrant for Mr. Kohberger's parents' home 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*, 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 Pennsylvania 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); *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887, 888 (1991). 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*, 122 Idaho 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. *Id.*

However, it remains to be determined whether the actions of the FBI and Pennsylvania State Troops should be judged by the protections of Article I, Section 17, or its analogues. It is not at all clear that whether a search should be judged by Idaho's standards of reasonableness, or that of Pennsylvania, 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 Pennsylvania State Troopers were acting under its authorization. *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 Pennsylvania State Police. Mr. Kohberger was not under investigation for violating Pennsylvania or federal law. Thus, this Court should be required to apply Idaho search and seizure law to their actions in Pennsylvania.

However, this approach has its detractors. McGlynn argues that when the situs officer is performing the search they should only be held to upholding their own laws. McGlyyn, 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. *See*, *Guzman*, 122 Idaho at 992-93. 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 Pennsylvania Constitution. Both apply exclusion to a failure to knock and announce. *See*, *State v. Rauch*, 99 Idaho 586, 592 (1978); *Commonwealth v. Frederick*, 124 A.3d 748, 755-56 (Pa. Super. Ct. 2015). If anything, Pennsylvania appears to have stricter warrant requirements for particularity. *Commonwealth v. Grossman*, 555 A.2d 896, 899-900 & n.3 (Pa. 1989).

II. Mr. Kohberger has standing to challenge the search of his parents' home.

Mr. Kohberger grew up in his parents' home and at the time of the entry and search he was staying there for winter break. As an overnight guest, he undoubtedly has standing to challenge

the search in this case. *See*, *Minnesota v. Olson,* 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). Moreover, the Court in *Olson* clearly had a situation just like this case in mind:

> [t]hat the guest has a host who has ultimate control of the house is not inconsistent with the guest having a legitimate expectation of privacy. The houseguest is there with the permission of his host, who is willing to share his house and his privacy with his guest. It is unlikely that the guest will be confined to a restricted area of the house; and when the host is away or asleep, the guest will have a measure of control over the premises. The host may admit or exclude from the house as he prefers, but it is unlikely that he will admit someone who wants to see or meet with the guest over the objection of the guest. On the other hand, few houseguests will invite others to visit them while they are guests without consulting their hosts; but the latter, who have the authority to exclude despite the wishes of the guest, will often be accommodating. The point is that hosts will more likely than not respect the privacy interests of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household. **If the untrammeled power to admit and exclude were essential to Fourth Amendment protection, an adult daughter temporarily living in the home of her parents would have no legitimate expectation of privacy because her right to admit or exclude would be subject to her parents' veto.** [emphasis added]

Id., at 99-100. Thus, Mr. Kohberger as a son home for a weeks-long stay at his parents' home has standing to challenge the entry and search in this case, regardless of his authority within the home.

III. Pennsylvania Law Enforcement Violated Mr. Kohberger's Fourth Amendment Rights by Entering and Searching His Parents' Home without a Valid Local Warrant.

Pennsylvania courts require a warrant for a particular residence to go after a person police are aware has an arrest warrant. *Commonwealth v. Romero*, 183 A.3d 364 (Pa. 2018). The need for a warrant for a fugitive from another State is codified in 42 Pa.C.S.A. §§ 9128, 9129. Without a Governor's warrant, an officer can get a judicial warrant to permit entry into a home. *See* 42 Pa.C.S.A. § 9134. Without either type of warrant, an officer lacks this authority. *See* 42 Pa.C.S.A. § 9135. This understanding also comports with *Payton v. New York*, 445 U.S. 573, 602 (1980).

a. The Idaho arrest warrant could not have given police in Pennsylvania the authority to enter the home.

State warrants have no extraterritorial effect. *State v. Bradley*, 106 Idaho 358, 360 (1983). The use of an out-of-state warrant is *ipso facto* a warrantless entry. *Id.* Thus, law enforcement in Pennsylvania could not rely on the existence of the Idaho arrest warrant to enter the home.[1]

IV. Federal and Pennsylvania Law Enforcement Violated Mr. Kohberger's Pennsylvania and Idaho Constitutional Rights by not Knocking and Announcing their Presence and Presenting Mr. Kohberger with the Opportunity to Surrender.

As noted above, Idaho's law should apply to the entry in this case. However, Pennsylvania, like Idaho, has rejected the good faith exception. *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887, 888 (1991). Similarly, it insists upon suppression where the knock and announce rule has not been complied with absent an exigent circumstance. *Commonwealth v. Frederick*, 124 A.3d 748, 755-56 (Pa. Super. Ct. 2015). The Pennsylvania Supreme Court has only found four exigent circumstances permitting police to ignore the knock and announce rule:

> 1. the occupants remain silent after repeated knocking and announcing;
> 2. the police are virtually certain that the occupants of the premises already know their purpose;
> 3. the police have reason to believe that an announcement prior to entry would imperil their safety; [or[11]]
> 4. the police have reason to believe that evidence is about to be destroyed.
>
> Fn. 11 Even though the exigencies are enumerated with the conjunctive "and," courts have held that "any one of the instances justifies noncompliance with the knock and announce rule." *Commonwealth v. Piner*, 767 A.2d 1057, 1059 n. 1 (Pa.Super.2000) (holding that the second exigency applied because "a uniformed officer stood under a porch light and engaged the attention of at least several occupants with an announcement of his identity, authority, and purpose").

Id. (*citing Commonwealth v. Chambers*, 528 Pa. 403, 598 A.2d 539, 541 (1991); *accord Commonwealth v. Means*, 531 Pa. 504, 614 A.2d 220, 222 (1992); *Commonwealth v. Crompton*, 682 A.2d 286, 288 (1996); *Commonwealth v. Carlton*, 701 A.2d 143, 147 (1997)).

[1] Note, there is an Idaho Court of Appeals decision, *State v. Branigh*, 155 Idaho 404 (Ct.App.2013), that seems to be counter to the holding in *Bradley*. The *Branigh* court, however, never mentions or analyzes *Bradley*, and does not appear to be aware of it. The holding in *Branigh* could not have overruled *Bradley*, and thus it remains governing law in this state.

Idaho's understanding of the knock and announce rule is set out in *Rauch*. The *Rauch* Court did not adopt a test such as that in Pennsylvania but held a case by case analysis must be made. 99Idaho 586, 590 (1978) (citations omitted).

> The general circumstances which have been found to constitute exigent circumstances are (1) a reasonable belief that compliance with a "knock and announce" statute would result in the destruction of evidence, or (2) a reasonable belief that compliance would place the officer in peril.

Id. (citing People v. Tribble, 484 P.2d 589 (Cal. 1971); *State v. Clarke*, 242 So.2d 791 (Fla.Ct.App.1970)).

In this case, there is and can be no showing of these exigencies. Mr. Kohberger had been surveilled by the FBI for weeks. At no point during this surveillance was he seen to have any weapons. There was no reason to take him inside the house, as surveillance undoubtedly was aware of his daily runs. The evidence the police sought was simply not of the kind that giving him a chance to exit the residence would have imperiled.

In *State v. Ramos*, 142 Idaho 628, 632-33 (Ct.App. 2005), our Court of Appeals held that an officer knocking and announcing and then breaking in the door two second later was done without exigency where the only evidence offered was that large quantities of drugs were believed to be within the home.

> The state urges us to also consider the district court's finding that SWAT officers approaching the front door of the house were exposed and could be easily seen by any occupants of the house looking out the window. We are unpersuaded. The police would have been aware of the tactical environment of the front of Ramos's house when requesting the warrant, and the record indicates they did not seek a no-knock warrant on these grounds. We note also that the visibility of the area in front of the house through windows in Ramos's home, as described in the district court's opinion, seems typical of most residential houses. We do not accept that, in every case, the exposed nature of a suburban home is a fact giving rise to reasonable suspicion of some exigency allowing for near immediate police entry into a private dwelling.

Id. at 633. There is little difference between what, if anything, the officers could claim required the destruction of the Kohberger home and what the state relied upon in *Ramos.*

Pennsylvania cases show that the failure to announce in this case was egregious. In *Chambers*, detectives covered both doors of a residence, knocked, and then immediately shoved the Defendant back into his house the moment he started to open the door while aiming their weapons at him. 598 A.2d at 540. The Supreme Court found the "forcible entry.. was completely unwarranted." *Id.* at 542.

In *Commonwealth v. Kitchener*, 506 A.2d 941, 944 (Pa. Super. Ct. 1986), the court found exigent circumstances where the Defendant had a history of violence and fleeing police, and after they announced themselves, heard running and believed the suspect was either fleeing or going to arm himself. By a history of violence, the Defendant had arrests for attempted murder, aggravated assault, and assault with a deadly weapon. *Id.* He was known to have handgun in his car and was "reputed to be 'a person who like guns, machine guns, in particular.'" *Id.*

In comparison, Mr. Kohberger has no criminal history, no reputation for violence or even being a gun aficionado. It makes no sense that police were willing to announce themselves in *Kitchener* and not to him. Taking the allegations in this case as true, there is still no explanation as to why a small army was required to capture Mr. Kohberger. Given the force the police decided to use here, there was no reason whatsoever to break down the front door, shatter the basement sliding door and point guns at the inhabitants.

V. 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.

In this case, law enforcement either intentionally or recklessly (but, likely intentionally) omitted exculpatory evidence as to almost every facet of its affidavit for this warrant. Thus, it will require suppression. The arguments proffered for a *Franks* hearing, in support of this argument is filed as a separate motion and adopted here.

VI. 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 aruges 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 previously argued. 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 out front. 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 his phone must also be excised due to being gathered from an invalid warrant.

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 motions to suppress and all other motions to suppress that impact the warrant language.

VII. Statements After Arrest are either Fruit of the Poisonous Tree from the Illegal Arrest or Should be Suppressed as a *Miranda* Violation.

Any statements post arrest of Mr. Kohberger are fruit of the poisonous tree from an unlawful arrest. In addition, statements made as soon as he was placed in zip ties and held at gun point by many police officers, without a Miranda warning, should be suppressed.

To protect the Fifth Amendment privilege against compulsory self-incrimination, police "must inform individuals of their right to remain silent and their right to counsel, either retained or appointed, before undertaking a custodial interrogation." *Silver*, 155 Idaho at 31, 304 P.3d at 306 (citing *Miranda*, 384 U.S. at 467-68). The requirement for *Miranda* warnings is triggered by custodial interrogation. *State v. Arenas*, 161 Idaho 642, 645, 389 P.3d 187, 190 (Ct. App. 2016) (citation omitted). A person need not be under arrest to be "in custody" for *Miranda* purposes. *Parkinson*, 135 Idaho at 363, 17 P.3d at 307 (citing *Frank*, 133 Idaho at 369, 986 P.2d at 1035).

> Short of an actual arrest, "the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" …. "The 'custody' test is an objective one; it is not based upon the subjective impressions in the minds of either the defendant or the law enforcement officer." … "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood the situation."

Frank, 133 Idaho at 369, 986 P.2d at 1035 (internal citations omitted). "Custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Arenas*, 161 Idaho at 646, 389 P.3d at 191 (quoting *Miranda*, 384 U.S. at 444). Interrogation includes not only express questioning, but also words or actions that the police should know are reasonably likely to elicit an incriminating response. *Id.* (citation omitted).

Mr. Kohberger was zip tied after a no knock warrant was served. He was zip tied at his hands and surrounded by police at gun point. Law enforcement did not mirandize him immediately. Instead, they waited until after he was transported in a police car, hand cuffed, with at least two officers in the car. One was seated next to him in the back seat. *See Frank*, 133 Idaho at 369-70, 986 P.2d at 1035-36 (defendant was in custody for purposes of *Miranda* when he was questioned while handcuffed and restricted to the area of the patrol car). A reasonable person in Mr. Kohberger's position would have understood himself to be in custody.

Two conversations took place before Mr. Kohberger was mirandized at the police station. It is clear from the police station video that detectives asked him if he had ever been mirandized before and said they needed to go through the formality of mirandizing him. He said no. No video or audio recording of the entry into the home and initial arrest has been produced. Video and audio begin with Mr. Kohberger in the police car.

In determining whether a person has been subjected to custodial interrogation for purposes of *Miranda*, courts may also consider "the conduct of the officers, and the nature and manner of the questioning." *Arenas*, 161 Idaho at 646, 389 P.3d at 191 (citations omitted). The conduct of law enforcement with Mr. Kohberger in the house is referred to as "small talk" when he is being recorded during transport. This cannot be verified because no audio or video is produced. The conduct of the officer in the police car during transport cannot be described as "an interrogation". However, without a video or audio recording of in custody discussions inside the house, the true

nature of the statements made in the car are without context. All statements made at the police station were post *Miranda*. Information in the media, right after arrest, and attributed to law enforcement, report that Mr. Kohberger [redacted] Such a statement is not in a police report or in an audio/video recording that can be found in discovery. If it is a statement that the state will seek to attribute to him at trial, it should be suppressed as a non-mirandized statement. If the conversation with Mr. Kohberger inside the house was custodial in nature, that context may warrant suppression of the conversation in the police car during transport.

CONCLUSION

Mr. Kohberger requests this Court to suppress all evidence obtained by police via the warrant that permitted them to search his parents' home. As explained above, law enforcement failed to knock and announce before raiding the home, and 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. Any statements made by Mr. Kohberger are the fruit of the poisonous tree of the illegal arrest. Some statements may also be excludable under *Miranda.*

DATED this 13 day of November, 2024.

BY: Jay Logsdon
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

Exhibits A and B

Motion to Suppress and Memo in Support RE: 119 Lamsden Dr.

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