LATAH COUNTY PROSECUTOR'S OFFICE
WILLIAM W. THOMPSON, JR., ISB No. 2613
PROSECUTING ATTORNEY
ASHLEY S. JENNINGS, ISB No. 8491
SENIOR DEPUTY PROSECUTING ATTORNEY
Latah County Courthouse
522 S. Adams Street, Ste. 211
Moscow, ID 83843
Phone: (208) 883-2246
paservice@latahcountyid.gov

IN THE DISTRICT COURT OF THE FOURTH DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, Plaintiff, V. BRYAN C. KOHBERGER, Defendant.	Case No. CR01-24-31665 STATE'S OBJECTION TO DEFENDANT'S MOTION TO SUPPRESS AND MEMORANDUM IN SUPPORT RE: APPLE ACCOUNT FEDERAL GRAND JURY SUBPOENA AND SEARCH WARRANT DATED AUGUST 1, 2023

COMES NOW the State of Idaho, by and through the Latah County Prosecuting Attorney, and respectfully responds to "Defendant's Motion to Suppress and Memorandum in Support Re: Apple Account Federal Grand Jury Subpoena and Search Warrant dated August 1, 2023" filed on November 13, 2024.[1]

[1] Defendant's filing refers to a "contemporaneously filed Motion for an Order suppressing all evidence gathered by law enforcement from its search of his Apple accounts, primarily his iCloud account." However, the State is not aware of a separate "contemporaneous" filing, so the State's response is only to the contents of the Defendant's singular "Motion to Suppress and Memorandum in Support."

FACTS

Regarding the Defendant's represented "FACTS," the State respectfully refers the Court to the Defendant's Exhibits A-D filed in support of his instant motion as opposed to relying on the Defendant's subjective summary and interpretation that begins at Page 3.

The State's Exhibits are attached as follows:

- Affidavit for Search Warrant for Apple with appended Exhibits (State's Exhibit S-1)
- Apple Search Warrant (State's Exhibit S-2)
- Order for Return (State's Exhibit S-3)
- Apple Records obtained from the U.S. Attorney's Office which show the limited scope of information (State's Exhibit S-4 – separate thumb drive)

ARGUMENTS

I. APPLE ACCOUNT INFORMATION FALLS WITHIN THE THIRD-PARTY DOCTRINE

The Defendant first argues "Mr. Kohberger has a privacy interest in his Apple Account information protected by the Fourth Amendment of the United States Constitution and Art. I Sec. 17 of the Idaho Constitution, requiring a warrant."

As detailed in the State's Response RE: Amazon Account Federal Grand Jury Subpoena and Search Warrants dated April 26, 2023, and May 8, 2023, the information the Defendant seeks to suppress that was obtained by Federal Grand Jury subpoenas falls squarely within the third-party doctrine as recognized in *Smith* and *Miller*, and as the Supreme Court has continued to endorse in *Carpenter*. *See Smith v. Maryland* 442 U.S. 743, 744 (1979) (holding that persons have no reasonable expectation of privacy in phone numbers they dial because they necessarily

share those numbers with phone companies to make calls); *United States v. Miller,* 425 U.S. 435 (1976) (holding that persons have no reasonable expectation of privacy in banking business records because they voluntarily share that information with banks); *but see Carpenter v. United States* 585 U.S. 296, 306-309 (2018). First, the Defendant voluntarily disclosed the subpoenaed information to Apple. Second, as the Defendant knows from review of the discovery, the information obtained from Apple was in no way a detailed and comprehensive record of the Defendant's movements. *See Carpenter*, 585 U.S. at 309. The information provided was solely account subscriber information (i.e. emails, addresses, phone numbers) and the date account was created. The information provided by Apple was devoid of any location information. The State was justified in relying on the information provided from the U.S. Attorney's Office which simply confirmed that Defendant had Apple iCloud accounts, and the email addresses/usernames associated. This is allowed. As to the subsequent search warrant, the State established probable cause for the remainder of the items sought as shown by the lengthy and detailed Affidavit for Search Warrant (State's Exhibit S-1).

II. DEFENDANT HAS NOT DEMONSTRATED THE SEARCH WARRANT AFFIDAVITS CONTAIN INTENTIONALLY OR RECKLESSLY FALSE STATEMENTS OR OMISSIONS

In response to the Defendant's arguments under "The Affidavit Submitted in Support of the Application for the Issued Search Warrant Recklessly or Intentionally Omitted Material Information, relies on information gained in violation of the constitution, and fails to provide probable cause for the requested search;" the State refers the Court to and hereby incorporates "State's Objection to Defendant's Motion and Memorandum in Support for a *Franks* Hearing" and State's Objection to Defendant's Motion to Suppress Re: Genetic Information".

III. THE APPLE WARRANTS INCORPORATED THE AFFIDAVIT FOR PROBABLE CAUSE AND EXHIBIT A BY REFERENCE

The Defendant next asserts that "The Search Warrants Fail to Command Law Enforcement to Search the Accounts or Contents of the iCloud."

The Fourth Amendment to the United States Constitution requires that warrants must "particularly describ[e] the place to be searched, and the persons or things to be seized." However, decisions must "reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract." *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). The Ninth Circuit held that courts consider the affidavit to be part of a warrant which would "cure" any deficiencies in the naked warrant when: (1) the warrant expressly incorporates the affidavit by reference; and (2) the affidavit is either attached physically or accompanies the warrant while agents execute the warrant. *U.S. v. SDI Future Health, Inc.*, 568 F.3d 684 (9th Cir. 2009); citing *United States v. Kow,* 58 F.3d 423, 429 n. 3 (9th Cir.1995) (applying requirements with respect to overbreadth of a warrant); *see also United States v. Vesikuru,* 314 F.3d 1116, 1120 (9th Cir.2002) (applying requirements with respect to the lack of particularity of a warrant). The Court held:

> When the officer who requests authorization for the search, the magistrate who grants such authorization, and the officers who execute the search expressly rely upon a given set of papers containing a given series of words, they identify *that* set of papers and *that* series of words as the proof that proper precautions were taken to prevent an unreasonably invasive search. Fairness and common sense alike demand that we test the sufficiency of the precautions taken ... by examining *that* evidence.

Id.

The *SDI Future Health* Court held "a warrant expressly incorporates an affidavit when it uses 'suitable words of reference.'" Courts have not defined "precisely what verbiage is suitable for this purpose" as there are "no required magic words of incorporation." *Vesikura*, 314 F.3d at 1120.

In *Vesikura,* the "suitable" words were "upon the sworn complaint made before me." *In SDI Future Health*, the "suitable" words were "the supporting affidavits."

As to the second prong "the affidavit is either attached physically or accompanies the warrant while agents execute the warrant," the *SDI Future Health* Court stated by making the affidavit available to the search team, the search team ensured that it "accompanied the warrant" to satisfy the requirements of incorporation. Nothing more is necessary for the affidavit to ensure "that the discretion of the officers executing the warrant is limited." *Towne,* 997 F.2d at 548 (internal quotation marks omitted). The *SDI Future Health* Court went on to hold that a copy of the affidavit does not need to be given to the defendant stating, "SDI's argument that the Fourth Amendment required the search team to provide all defendants a copy of the affidavit fails." *SDI Future Health,* 568 at 701.

In the case at hand, the Search Warrant expressly incorporates the Affidavit for Search Warrant by reference. The language included on the face of the Search Warrant is "Corporal Brett Payne, having given me *proof, upon oath*, this day showing probable cause establishing ground for the issuing of a search warrant." (emphasis added). The suitable words "proof, upon oath" is akin to "upon the sworn complaint before me" and "the supporting affidavits." The Affidavit for Probable Cause (and appended Exhibit A) was the only "proof" presented to the magistrate. To read any other way would render the word "proof" meaningless and would be an "abstract" application not supported by *Ventresca*. As a result, the Affidavit for Search Warrant (and appended Exhibit A) was incorporated by reference into the Search Warrant.

With respect to the second prong, the investigators necessarily had copies of the affidavit in their possession when they executed the warrant by emailing it to Apple. The effect of this is that the

Affidavit for Search Warrant and appended Exhibit A cure any supposed deficiencies in the naked warrant.

Next, regarding the Defense's argument that the warrant fails to "actually provide a command to search" but instead "orders seizure and it has no time frame," the Defendant's argument fails to recognize that law enforcement must necessarily search for the items to seize them. Further, these items would have been inevitably discovered since the Order signed by Judge Marshall on August 14, 2023 (the Search Warrant was signed on August 1, 2023) directed law enforcement as follows:

> IT IS FURTHER ORDERED that said property or any part thereof, may be delivered to any person or laboratory or laboratories for the purpose of conducting or obtaining any tests, analysis, or identification of said property which is deemed necessary by the custodial law enforcement agency or jurisdictional prosecuting attorney without further order of this Court.

State's Exhibit S-2. Again, "constitutional requirements are practical and not abstract." *Ventresca* 380 U.S. at 108, 85 S.Ct. at 746.

IV. THE APPLE SEARCH WARRANT WAS NOT A GENERAL WARRANT

The Defendant next asserts that the "Search Warrants Fail to Provide Specific Particularization of What to Search." Here the Defendant attempts to challenge the Apple Search Warrant on the grounds that it is too broad or too general in time and descriptions of the items to be seized to meet the particularity requirement of the Fourth Amendment. The State notes the Defendant fails to identify what pieces of evidence he seeks to suppress from the Apple Search Warrant.

A. Analysis

The Fourth Amendment of the United States Constitution and Article I, section 17 of the Idaho Constitution prohibit the issuance of a warrant unless it "particularly describe(s) the place to

be searched and the person or thing to be seized." U.S. Const. Amend. 4; Idaho Const. Art. 1, § 17. "The purpose of this guarantee is to safeguard the privacy of citizens by insuring against the search of premises where probable cause is lacking." *State v. Teal*, 145 Idaho 985, 989, 188 P.3d 927, 931 (Ct. App. 2008). Searches pursuant to a warrant are typically reasonable; however, the "specific evil is the 'general warrant' abhorred by colonists, and the problem is not that of the intrusion per se, but of general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S. Ct. 2022, 2038 (1971). To prevent "general, exploratory rummaging" the Fourth Amendment requires a "particular description of the things to be seized." *Id.* Whether a warrant is overbroad or lacks sufficient particularity is a legal question. *Teal*, 145 Idaho 990, 188 P.3d at 932.

The Fourth Amendment requires particularity to prevent the seizure of one thing under a warrant describing another thing and to prevent the discretion of officers executing the warrant. *Id.* at 991, 188 P.3d at 933. The particularity requirement's objective is that searches deemed necessary by a magistrate should be as limited as possible. *Id.*; *and see State v. Caldero*, 109 Idaho 80, 84, 705 P.2d 85, 89 (Ct. App. 1985). The Idaho Court of Appeals held: "A search warrant must be particular enough so that '[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant.'" *Id.* (quoting *Marron v. United States*, 2785 U.S. 192, 196 (1927)). However, the Court cautioned, "this statement is not to be read literally." *Id*; *State v. Weimer,* 133 Idaho 442, 449, 988 P.2d 216, 223 (Ct. App. 1999); 2 Wayne R. LaFave, Search and Seizure § 4.6(a), at 605 (4th ed. 2004). Instead, the "warrant must allow the searcher to reasonably ascertain and identify the things which are authorized to be seized." *Id.*; *United States v. Cook*, 657 F.2d 730, 733 (5th Cir. 1981); *United States v. Betencourt*, 734 F.2d 750, 754 (11th Cir. 1984). Courts look to the following to determine if a description is sufficiently particular:

(1) Whether probable cause exists to seize all items of a particular type described in the warrant;
(2) Whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not; and
(3) Whether the government was able to describe the items more particularly considering the information available to it at the time the warrant was issued.

State v. Teal, 145 Idaho 985, 989, 188 P.3d 927, 931 (Ct. App 2008).

The 9th Circuit has held "the specificity required in a warrant varies depending on the circumstances of the case and the type of items involved." *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986). Further, "warrants which describe generic categories of items are not necessarily invalid if a more precise description of the items subject to seizure is not possible." *Id. See United States v. Cardwell,* 680 F.2d 75, 78 (9th Cir.1982). As stated above, Idaho Courts allow a search warrant affidavit to support the particularity requirement. *Adamcik v. State*, 163 Idaho 114, 124-25, 408 P.3d 474, 484-85 (2017).

While the particularity requirement is not usually difficult to apply to a physical world, courts have recognized that it is challenging to apply to the digital world. For example, the United States Supreme Court has observed "cell phones differ in both a quantitative and qualitative sense from other objects that might be kept on...a person." *Riley v. California*, 573 U.S. 373, 393, 134 S.Ct. 2473, 2489 (2014). To be compliant with the Fourth Amendment the search warrant:

> must specify the particular items of evidence to be searched for and seized from the phone and be strictly limited to the time period and information *or other data for which probable cause has been properly established* through the facts and circumstances set forth under oath in the warrant's supporting affidavit. Vigilance in enforcing the probable cause and particularity requirements is thus essential to the protection of the vital privacy interests inherent in virtually every modern cell phone and to the achievement of the "meaningful constraints" contemplated in *Riley*.

Burns v. United States, 235 A.3d 758, 773 (D.C. 2020) (quoting *Riley*, 573 U.S. at 399) (emphasis added).

Adam Gershowitz articulated the complication of the particularity requirement regarding digital information in his Vanderbilt Law Review Article "The Post Riley Search Warrant: Search Protocols and Particularity in Cell Phone Searches." Gershowitz correctly observed that"[b]ecause electronic data can be hidden anywhere on a computer or cell phone, it is very hard for officers to narrow down in advance the area that should be searched." 69 Vand. L. Rev. 585, 599 (2016). Gershowitz' review found there are two fairly narrow categories of cases in which courts tend to find particularity violations: (1) when the search warrant does not state on its face what crime the search is being conducted to find evidence of; and (2) where the search warrant contains overbroad, catch-all language. *Id.*

Defendant's argument focuses on the second category stating, "data compilation requested in the Apple warrant is too broad in that it makes no attempt at narrowing and results instead in a blanket request for everything available in two Apple accounts with iCloud." Defendant's Motion to Suppress, Page 14. Defendant relies on *Wheeler v. State,* a Delaware Supreme Court case that is not binding on this Court. However, the *Wheeler* Court held that warrants "must be tested by courts in a commonsense and realistic fashion," and reviewing courts should avoid a "hyper technical approach." 135 A.3d 282, (Del. 206) (quoting *U.S. v. Christine*, 687 F2d 749, 69 A.L.R. Fed. 503 (3d Cir. 1982). The *Wheeler* Court did not require a time frame to meet the particularity requirement, instead explaining that while investigators should generally include specific information known to them within the body of a search warrant, "[w]e hesitate to prescribe rigid rules and instead reiterate that warrants must designate the things to be searched and seized as particularly as possible." *Id.* at 305. *Wheeler* made it clear that cases must be reviewed on a case-by-case basis. *Id.*

In *Wheeler*, the Defendant was being investigated for witness tampering and his digital devices were collected pursuant to search warrants. *See generally Id.* Despite orders to search for "text-type" documents (a letter regarding witness intimidation) the forensic examiner captured "image files" and "video files." *Id.* Within these files the investigators found child pornography. *Id.* As a result, the challenged search warrant failed to satisfy the particularity requirement for two reasons: (1) the search warrant did not "guide and control" the forensic examiner's judgment as to what was to be seized on the computer; and (2) the language of the search warrant clearly included items that were not subject to seizure (i.e. activity regarding witness intimidation). *Id.*

The Seventh Circuit Court of Appeals has noted that broad language may be permissible where the warrant constrains the search to evidence of a specific crime. The rationale is that "criminals don't advertise where they keep evidence." *Bishop*, 910 F.3d at 336. "A warrant authorizing the search of a house for drugs permits the police to search everywhere in the house, because 'everywhere' is where contraband may be hidden." *Id.* at 336-37. Applied to electronic devices "criminals can - and often do – hide, mislabel, or manipulate files to conceal criminal activity [such that] a broad, expansive search of the [device] may be required." *U.S. v. Bass*, 785 F.3d 1043, 1049-50 (6th Cir. 2015) (citations omitted). Because law enforcement cannot know in advance how a suspect may label or code files, other courts have held that "by necessity government efforts to locate particular files will require examining many other files to exclude the possibility that the sought after data are concealed there." *See, e.g., People v. English*, 52 Misc. 3d 318, 321-22, 32 N.Y.S. 3d 837 (N.Y. Sup. Ct. 2016). This does not mean that law enforcement can search electronic files where evidence is unlikely to be (i.e. if there is probable cause evidence will be found in text messages but not photos then access to all data violates the particularity requirement). *See, e.g., United States v. Winn*, 79 F. Supp. 3d 904, 919 (S.D. Ill. 2015); *Gershowitz* at 633.

What courts have made resoundingly clear is whether a search warrant satisfies the particularity requirement depends on the facts and circumstances of the crime for which the warrant is being sought. "Determining the permissible parameters for a cell phone search is a fact-intensive inquiry and must be resolved based on the particular facts of each case." *Snow*, 486 Mass. at 594; citing *Commonwealth v. Morin*, 478 Mass. 415, 426, 85 N.E.3d 949 (2017). "Similar to the nexus analysis, the inquiry can be based on 'the type of crime, the nature of the [evidence] sought, and normal inferences' about how far back in time the evidence could be found." *Id.* citing *Commonwealth v. White*, 475 Mass. 583, 589, 59 N.E.3d 369 (2016).

B. The Apple Search Warrant, When Considered with the Search Warrant Affidavit and Exhibit A, Satisfies the Particularity Requirement

As mentioned above, Idaho allows a search warrant affidavit to support the particularity requirement when the warrant references the affidavit for probable cause. *Adamcik*, 163 Idaho at 124-25, 408 P.3d at 484-85. There are no magic words for reference. As stated above, the Apple Search Warrant specifically referenced the Search Warrant Affidavit (and incorporated Exhibit A) with the words "Proof, upon oath, this day showing probable cause." When the Apple Search Warrant is considered along with the Affidavit for Probable Cause and the 25-page Exhibit A, the warrants are sufficiently particular and valid. While the Apple Search Warrant was broadly worded regarding each category of digital evidence listed, the Search Warrant Affidavit and Exhibit A provide the particularity necessary to satisfy the three-factor test set forth in *Teal*. 145 Idaho 985, 989, 188 P.3d 927, 931 (Ct. App. 2008).

First, probable cause existed to seize all items of a particular type described in the warrant. The Apple Search Warrant sought "evidence of Defendant's plans, thought process, research, locations, photos or other pertinent information" located on two Apple accounts shown to be

associated with Defendant. To determine the parameters the Court should look to the particular facts of this case. Based on the affidavit of probable cause we know several facts. Defendant was a suspect in a burglary and homicides occurring at 1122 King Road in Moscow, Idaho on or about November 13, 2022 (Exhibit A, Pages 1-19). Defendant was the owner of two Apple/iCloud accounts. *Id.* Pages 22-24. Detective Payne set out what information Apple captures in connection with an Apple ID; *Id.* Pages 19-22. The two Apple/iCloud accounts were accessed by the Defendant leading up to the homicides and following the homicides. *Id.* Page 24. The Defendant was seeking an advanced degree in criminology and had studied cloud-based forensics prior to the crimes. *Id.* Page 12. Defendant had attempted to conceal his location during the time of the crimes *Id.* Page 16. Together, the above established probable cause to search for evidence of Defendant's "plans, thought process, research, locations, photos or other pertinent information" located on two Apple accounts shown to be associated with Defendant.

Second, the warrant set out objective standards by which executing officers could differentiate items subject to seizure from those that were not. The seizure of items was limited to the crime for which the Defendant was arrested: "investigation into burglary/and or homicides at 1122 King Road in Moscow, Idaho on or about November 13, 2022." The temporal range of October 7, 2016 (dates accounts were created) to December 30, 2022 (date of Kohberger's arrest) was justified given the "type of crime, nature of evidence sought, and normal inferences about how far back in time the evidence could be found." *Commonwealth v. White*, 475 Mass. 583, 589, 59 N.E.3d 369 (2016).

Third, the government was not able to describe the items more particularly considering the information available to it at the time the warrant was issued. Detective Payne could not reasonably narrow the scope further. Since Detective Payne was seeking evidence that could be located in

multiple formats and areas, and considering electronic data can be stored anywhere, it was impossible for Detective Payne to narrow down in advance the Apple areas that should be searched. As a result, if the Court employs a "commonsense and realistic" approach and not the "hyper technical" approach the Defense is suggesting; the Court should find the Apple Search Warrant passes the *Teal* test and sufficiently particular. *See, e.g., Wheeler v. State*, 135 A.3d 282, (Del. 206) (quoting *U.S. v. Christine*, 687 F2d 749, 69 A.L.R. Fed. 503 (3d Cir. 1982).

In summary, given the circumstances of this case, the Apple Search Warrant and its respective Affidavit and Exhibit A are as particular as can reasonably be expected and therefore fall within the proper parameters set forth in *Teal* and consistently applied by other courts around the country. Unlike general exploratory warrants, the Apple Search Warrant allowed the searcher to "reasonably ascertain and identify the things which are authorized to be seized." *Teal*, 145 Idaho 992 188 P.3d at 924. Thus, suppression is not warranted.

CONCLUSION

Based on the above, the State respectfully requests that the Court deny the Defendant's "Motion to Suppress and Memorandum in Support RE: Apple Account Federal Grand Jury Subpoena and Search Warrant Dated August 1, 2023."

RESPECTFULLY SUBMITTED this 6th day of December 2024.

Ashley S. Jennings
Senior Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the STATE'S OBJECTION TO DEFENDANT'S MOTION TO SUPPRESS AND MEMORANDUM IN SUPPORT RE: APPLE ACCOUNT FEDERAL GRAND JURY SUBPOENA AND SEARCH WARRANT DATED AUGUST 1, 2023 were served on the following in the manner indicated below:

Anne Taylor
Attorney at Law
PO Box 2347
Coeur D Alene, ID 83816
info@annetaylorlaw.com

☐ Mailed
☒ E-filed & Served / E-mailed
☐ Faxed
☐ Hand Delivered

Dated this 6th day of December, 2024.