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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** **REPLY TO 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, Bryan C. Kohberger, by and through his attorneys of record, and submits the following Reply to the State's objection to his Motion to Suppress and Memorandum in Support Re: Apple Account Federal Grand Jury Subpoena and Search Warrant Dated August 1, 2023.

Securing a search warrant after seeking privately protected information with a federal subpoena does not rectify a search in violation of the Fourth Amendment to the United States Constitution or Article 1 Section 17 of the Idaho Constitution. The words "proof upon oath" are not synonymous with "the affidavit for search warrant is here by incorporated". A non-particularized general affidavit in support of a search warrant held in the hands of law enforcement, which never accompanied the electronically served warrant, cannot be relied upon to validate a warrant. All contents of the Apple/iCloud must be suppressed.

ARGUMENT

I. The Contents of the Apple/iCloud are Privately Protected Information, Not Protected by the Third-Party Doctrine.

The comparison that dialing a person's phone number is akin to a copy of the contents of an Apple account is inaccurate. An Apple or iCloud account is a copy of a cellular phone, IOS or other device. Without the information obtained by the federal grand jury subpoena, the State did not know what Apple and/or iCloud accounts were associated with Mr. Kohberger to seek with a search warrant. All they knew was that there was a receipt for an IPad, purchased in 2018, in his car. To collect the records that law enforcement requested from Apple, it had to have a valid warrant, and that valid warrant could not rely on records obtained with a federal grand jury subpoena or a search warrant that recklessly and intentionally omitted material facts.

The Supreme Court observed in *Katz v. United States*, 389 U.S. 347, 351 (1967) that the Fourth Amendment "protects people, not places" in finding the Fourth Amendment protects a person's conversations and that a physical intrusion into the area a person occupies is not necessary to a constitutional violation. A party has standing to argue a violation of Fourth Amendment rights if his reasonable expectation of privacy has personally been infringed. *United States v. SDI Future Health, Inc.*, 568 F.3d 684, 695 (9th Cir. 2009) [hereinafter "*SDI*"].

Through the use of federal grand jury subpoena, the State learned that the Apple iCloud accounts searched were registered to Mr. Kohberger. Mr. Kohberger's expectation of privacy in these personal accounts is objectively reasonable, which establishes his standing to challenge the search and seizure of those accounts under the Fourth Amendment.

II. The Warrant was General, and the Affidavit was Not Incorporated into the Warrant or Served with the Warrant.

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 17 of the Idaho Constitution is virtually identical to the Fourth Amendment, except that "oath or affirmation" is termed "affidavit."

The Supreme Court has acknowledged "that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *Groh v. Ramirez*, 540 U.S. 551, 557–58, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004). In *SDI,* the Ninth Circuit held that a statement on the face of the warrant noting "the supporting affidavit(s)" was sufficient as a suitable reference and incorporation. *Id*. at 699–700 The warrant contained no language that the affidavit was incorporated. The process described at pages 5-6 of the State's Objection lacks proof that the affidavit of search warrant was provided to Apple. The State indicates that the "investigators necessarily had copies of the affidavit in their possession when they executed the warrant by emailing it to Apple." See Objection, p. 5. Further, the State offers that "[t]he effect of this is that the Affidavit for Search Warrant and appended Exhibit A cure any supposed deficiencies in the naked warrant." See Objection, pp. 5-6. An officer sitting at a computer executing a search

warrant by emailing it to Apple and having the affidavit for search warrant in his hand is different than an officer being physically present when executing a search warrant and having the affidavit for search warrant available for reference. The State has not provided proof (*e.g.* transmittal email to Apple) that the Affidavit for Search Warrant and appended Exhibit A was either attached to the search warrant or emailed to Apple as a separate document along with the search warrant. The August 9, 2023, Affidavit of Det. Brett Payne corresponding to the Return of Warrant has no indication that the Affidavit of Search Warrant with the appended Exhibit A was provided to Apple along with the search warrant. See Defendant's Exhibit E, p. 1, ¶ 4. To the contrary, the sworn document states "The warrant was served by Cp. Payne on August, 2023 to Lawenforcment@apple.com." *Id*. Where a supporting affidavit does not accompany the search warrant at the time of execution, the detail set out in the affidavit does not cure any deficiencies. *U.S. v. Pilling*, 721 F.Supp. 3d 1113, 1126 (D. Idaho 2024). An affidavit is considered "to be part of a warrant, and therefore potential curative of any defects, 'only if (1) the warrant expressly incorporated the affidavit by reference and (2) the affidavit either is attached physically to the warrant or at least accompanies the warrant while agents execute the search.'" *SDI at* 699 (citing *United States v. Kow,* 58 F.3d 423, 429 n. 3 (9th Cir.1995).

III. The Search Warrants Fail to Provide Specific Particularization of What to Search or separate any production that was not related.

Courts consider three factors in analyzing the potential overbreadth of a warrant: (1) "whether probable cause existed to seize all items of a category described in the warrant," (2) "whether the warrant set forth objective standards by which executing officers could differentiate items subject to seizure from those which were not," and (3) "whether the government could have described the items more particularly in light of the information available." *United States v. Flores*, 802 F.3d 1028, 1044 (9th Cir. 2015) (quoting *United States v. Lei Shi*, 525 F.3d 709, 731–32 (9th

Cir. 2008)).

The Fourth Amendment requires particularity. "The particularity requirement's objective is that those searches deemed necessary based on a probable cause determination by a magistrate should be as limited as possible." *State v. Teal*, 145 Idaho 985, 991, 188 P.3d 927, 931 (2008). Even if the Affidavit of Search Warrant had been incorporated into the warrant, it could have described particularized items as opposed to the laundry list of everything held by Apple with dates more restrictive than October 7, 2016 to December 30, 2022 and a designation of a duty to separate lawful items.

The particularity requirement means that a warrant must be "specific enough to enable the person conducting the search reasonably to identify the things authorized to be sized." *U.S. v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986). Once the warrant is specific enough, there must still be a search that provides guidelines to 'distinguish items used lawfully form those the government had probably cause to seize." *Id.* 1t 961. Not only did the State obtain the entirety of Mr. Kohberger's Apple accounts or 13.3 gigabytes of data, but it has taken no action to sort through that which is lawful or applies to the charges. It has produced the warrant return without any analysis whatsoever.

The fact that an Apple account is sought because it may hold some of the objects of the proposed search does not automatically give the State authority to seize every file, photograph, or text that ever touched the account. Instead, the "balance between the government's interest in law enforcement and the right of individuals to be free from unreasonable searches and seizures of electronic data must be determined on a case- by-case basis." *United States v. Schesso*, 730 F.3d 1040, 1050 (9th Cir. 2013).

The Apple Search warrant was not supported by probable cause to search and seize everything listed, there were absolutely no limiting standards included at all, and the state could

have particularized the warrant to specific dates and items that would be evidence of the specific crimes. The Apple Search Warrant did none of that. This result is worse than that in *Pilling* because no separation of data was even attempted leaving 13.3 gigabytes of data without any analysis about what the State intends to use as evidence. The State has rummaged through it all. In *Pilling*, the prosecution narrowed the Apple data to 9 documents. The court suppressed, as it must here.

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

In response to the State's arguments under "Defendant Has Not Demonstrated the Search Warrant Affidavits Contain Intentionally or Recklessly False Statements or Omissions," Defendant refers the Court to and hereby incorporates Defendant's Replies in Support of Defendant's pleadings in support of a *Franks* Hearing and suppression of Genetic Information.

CONCLUSION

Mr. Kohberger requests that this Court suppress all evidence obtained by police via the subpoenas and warrants that permitted them to search Mr. Kohberger's Apple and iCloud accounts.

DATED this _19_ day of December, 2024.

BY: _/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 ___19____ day of December, 2024 addressed to:

Latah County Prosecuting Attorney –via Email: paservice@latahcountyid.gov
Elisa Massoth – via Email: legalassistant@kmrs.net
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