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.	Ada County Case No. CR01-24-31665 **ORDER ON DEFENDANT'S MOTION TO SUPPRESS RE: GENETIC INFORMATION**

I. INTRODUCTION

Defendant is charged with one count of Burglary and four counts of Murder in the First Degree. It is alleged that Defendant entered a residence at 1122 King Road in Moscow, Idaho, in the early morning hours of November 13, 2022 and stabbed Madison Mogen, Kaylee Goncalves, Ethan Chapin, and Xana Kernodle with a knife. Left at the crime scene was a knife sheath from which single source male DNA was extracted. Using forensic investigative genetic genealogy ("IGG"), law enforcement was able to identify Defendant as a possible suspect weeks after the crime occurred. Subsequently, law enforcement conducted a trash pull from Defendant's family residence and obtained DNA tying Defendant to the DNA found on the knife sheath. Defendant was subsequently arrested pursuant to a warrant and charged in this matter.

Defendant asserts law enforcement violated his constitutional rights by failing to secure a warrant before conducting the IGG and trash pull. He seeks to suppress all evidence obtained through these searches, as well as all evidence obtained through subsequent warrants as fruit of the poisonous tree. The State disputes that Defendant's constitutional rights were violated.

A suppression hearing was held on January 23, 2025, during which the Court received testimony from members of law enforcement and experts in IGG, each of whom the Court found to be credible and reliable.[1] Following argument, the Court took the matter under advisement. The Court finds Defendant has failed to demonstrate his constitutional rights were contravened by the IGG and trash pull and, therefore, suppression is not warranted.

[1] Specifically, the Court received testimony from Detective Corporal Brett Payne, Rylene Nowlin, Matthew Gamette, Daniel Hellwig and Leah Larkin.

II. STANDARD

The standard of review of a motion to suppress is bifurcated. The power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995). A trial court's ruling on a motion to suppress evidence combines the issue of law and fact, and the trial court's factual findings will not be overturned unless they are clearly erroneous. *State v. Conant*, 143 Idaho 797, 799, 153 P.3d 477, 479 (2007). When a decision on a motion to suppress is challenged, the application of constitutional principles to the facts found will be freely reviewed. *State v. Veneroso*, 138 Idaho 925, 928, 71 P.3d 1072, 1075 (2003).

III. FINDINGS OF FACT

On November 13, 2022, law enforcement found the bodies of Madison Mogen, Kaylee Goncalves, Xana Kernodle, and Ethan Chapin inside a residence located at 1122 King Road in Moscow, Idaho. All four victims died from apparent knife wounds. A Ka-Bar knife sheath was found on a bed next to the bodies of Ms. Mogen and Ms. Goncalves. Law enforcement seized the knife sheath and swabbed around the button of the sheath for DNA. A sample of DNA, identified as Q1.1, was extracted from the swab by the Idaho State Police Forensics Lab and subsequently tested using standard DNA STR (Short Tandem Repeat) methods. The STR profile developed revealed that the DNA came from a single source male profile. Law enforcement uploaded the DNA profile to the CODIS[2] database, but it resulted in no hits to known offenders.

Subsequently, law enforcement made the decision to pursue forensic investigative genetic genealogy ("IGG") testing on Q1.1. Such testing begins with the generation of a large amount of raw sequencing data from the DNA sample, which is then organized into SNPs, or Single Nucleotide Polymorphisms. Using bioinformatics software, the SNPs associated with ancestry and genealogy can then be pulled out of the raw data and organized into an SNP profile that can, in turn, be uploaded to commercial genetic genealogy databases to search for a genetic match. Depending on the strength of the match, law enforcement can start building a family tree to identify potential genetic relatives of the uploaded SNP profile.

These genetic genealogy databases are hosted by private companies and populated by hundreds of thousands of members of the public who voluntarily submit their own DNA and

[2] CODIS is the Combined DNA Index System, a national DNA database.

publicly share personal information to allow the database to better match them with potential genetic relatives. Notably, at all relevant times, only two commercial genetic genealogy databases "permitted" searches by law enforcement: FamilyTreeDNA and GEDMatch Pro. The databases MyHeritage and GEDMatch purported to disallow such searches.

The IGG process essentially attempts to ascertain identity through genetic associations. Unlike STR profiles, which can only reveal whether a person is genetically male or genetically female, the SNPs in their raw form have the ability to reveal a trove of personal information, including sensitive health information such as whether the person has traits indicating an increased risk for cancer or Alzheimers. However, IGG does not target these particular SNPs because, according to defense expert Daniel Hellwig, they are neither "relevant nor probative nor appropriate" to the identification process. In fact, gleaning medical information from SNPs is not possible for a layperson to do and would take a forensic scientist like Mr. Hellwig "a lot of research."[3]

The IGG was first performed by Othram Labs, a company with which the Idaho Department of Purchasing had an existing contract for such work. Othram was asked to develop an SNP profile from Q1.1, upload it to those public genealogy databases permitting law enforcement entry and submit a preliminary report of its findings. Othram was not asked to ascertain medical information associated with Q1.1, nor is there any evidence it tested for such. Law enforcement did not obtain a warrant for Othram's work.

The Idaho State Police delivered Q1.1 to Othram on November 22, 2022. Othram developed an SNP profile from Q1.1 and searched FamilyTreeDNA and GEDMatch Pro.[4] This work revealed four brothers of interest,[5] all of whom were "low matches" to Q1.1. To further its family tree building, Othram asked the Idaho State Police to contact one of the identified

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[3] As defense expert Leah Larkin noted, however, it is possible for a person to upload an SNP profile to a third-party site called Promethease which, for a fee, will look for medically informative SNPs within the profile and generate a health report. There is no evidence or contention that was done here.

[4] Matthew Gamette, the Systems Director for the Idaho State Police Forensics Lab, testified that Othram searched two databases that allowed law enforcement searches, but then named "GEDMatch" as one of the two databases searched, which does not permit law enforcement searches. He later clarified that "GEDMatch" has two databases: GEDMatch and GEDMatch Pro, only the latter of which allows law enforcement searches. Thus, given Mr. Gamette's clarification, it is apparent that Othram searched GEDMatch Pro, not GEDMatch.

[5] These brothers did not share Defendant's last name.

brothers to provide a DNA sample to upload into either of the two databases. Despite Idaho State Police's request, the contacted brother declined to provide a sample.

On December 10, 2022, members of law enforcement, including the FBI, had a meeting to discuss Othram's work. As a result, a decision was made to turn the IGG work over to the FBI. That same day, Othram was instructed to stop work and turn over its SNP profile and search results to the Idaho State Police. Othram did so, along with a preliminary report of its findings. The preliminary report did not contain any medical information associated with the SNP profile.

The Idaho State Police then turned the information over to the FBI, which was able to use Othram's profile to develop a significantly larger SNP profile. The FBI uploaded the larger SNP profile to multiple genetic genealogy databases, including GEDMatch and MyHeritage, which purport to disallow law enforcement searches. At the time, the FBI had an "Interim Policy" issued by the United States Department of Justice related to IGG analysis and searches by its agencies. Exh. D19. On the one hand, the Interim Policy required that investigative agencies conduct IGG searches in genetic genealogy databases permitting law enforcement use. *Id.*, p. 6. However, on the other hand, the Interim Policy also stated it was intended only as "internal guidance" and did not impose any legal restrictions on investigative agencies, noting:

> [The Interim Policy] is not intended to, does not, and may not be relied upon to create any substantive or procedural rights or benefits enforceable at law or in equity by any party against the United States or its departments, agencies, entities, officers, employees, agents, or any other person in any matter, civil or criminal. This interim policy does not impose any legal limitations on otherwise lawful investigative or prosecutorial activities or techniques utilized by the Department of Justice, or limit the prerogatives, choices, or decisions available to, or made by, the Department in its discretion.

Id., p. 1 (emphasis added).

From the information it acquired through the databases search, the FBI was able to build a family tree and arrive at a potential match.[6] On December 19, 2022, the FBI provided Defendant's name to Idaho law enforcement as a possible source of the DNA. The FBI instructed that the identification of Defendant as a person of interest was to be considered solely as "a tip."

[6] There is no evidence that, in developing the larger SNP profile, the FBI targeted or even had access to those SNPs that can reveal sensitive health information.

No warrant was obtained for the FBI's work, and subsequent warrant applications did not include the IGG results to inform probable cause.

As the investigation ensued, law enforcement discovered that Defendant had driven from Pullman, Washington to his parents' home in a gated community in Monroe County, Pennsylvania. At the time, Monroe County's municipal waste ordinance required homeowners to dispose of their garbage by placing it out for collection or delivering it directly to a licensed waste hauler. Only an authorized trash collector could collect garbage left out for collection.

Law enforcement decided to conduct a warrantless trash pull from the Kohberger residence. Arrangements were made with the local trash collector to isolate and turn over the Kohbergers' garbage to law enforcement for testing. Articles of trash were retrieved and sent to the Idaho State Police Forensics Lab to conduct standard DNA testing. A DNA profile developed from one article of trash was determined to be from the biological father of the source of Q1.1. Another article of trash revealed a mixture of male and female DNA. According to Defendant's expert, Gary Shulter, Ph.D, the male DNA from the mixture was consistent with Q1.1 profile. Aff. G. Shutler, ¶ 8 (December 19, 2024).[7] Importantly, Defendant has not claimed ownership or knowledge of the knife sheath from which Q1.1 was taken.

After obtaining a search warrant, law enforcement collected DNA from a buccal swab obtained from Defendant. A traditional STR DNA comparison was done between the Q1.1 profile and Defendant's DNA. The comparison showed a statistical match. Specifically, Defendant was 5.37 octillion times more likely to be the source of the Q1.1 profile than an unrelated individual randomly selected from the general population. Defendant was subsequently charged in this case.

IV. CONCLUSIONS OF LAW

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV.[8] In seeking suppression of evidence based on a

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[7] Because the DNA was a mixture, the Idaho State Police Forensics Lab's standards and protocols prevented it from doing a manual comparison of the male DNA to Q1.1.

[8]The Idaho Constitution offers protection for unlawful search and seizure as well, which Defendant cites as an additional basis for his motion. Idaho Const. art. I, § 17. However, with the exception of the trash pull argument set forth in §I(E) of his opening memorandum, Defendant does not explain how Idaho's Constitution provides greater protection than the Fourth Amendment or otherwise explain how the application of the *Donato* factors supports a divergence from Fourth Amendment law. *State v. Donato,* 135 Idaho 469, 20 P.3d 5 (2001) (observing that where

warrantless search, a defendant bears the evidentiary burden to show that he had a legitimate expectation of privacy in the item or place searched. *State v. Pruss*, 145 Idaho 623, 626, 181 P.3d 1231, 1234 (2008).[9] This involves a two-part inquiry: 1) did the defendant have a subjective expectation of privacy in the object of the challenged search, and; 2) is society willing to recognize that expectation as reasonable. *Id.* The former is a question of fact; the latter a question of law. *Id.* When a defendant makes such a showing, "the burden will shift to the State to show an exception to the warrant requirement exists or that the search was reasonable under the circumstances." *State v. Rebo*, 168 Idaho 234, 238, 482 P.3d 569, 573 (2021) (citation omitted).

Here, Defendant challenges three allegedly unlawful DNA-related searches: 1) the development of an SNP profile from Q1.1; 2) the trash pull from the Kohberger residence and subsequent DNA testing thereon, and; 3) the search of the commercial genetic databases using the SNP profile. He seeks to suppress not only the genetic information obtained by law enforcement, but all other evidence obtained as a result of the alleged illegality.[10] In response, the State argues Defendant has not met his threshold burden of demonstrating that a constitutional violation occurred with regard to any of the three searches. The State is correct.

A. Defendant has Not Established a Fourth Amendment Violation With Regard to the Development of the SNP Profile.

Defendant first asserts that the extraction and testing of DNA from the sheath to develop the SNP profile constituted an unreasonable search mandating suppression. Noting recent advances that have made DNA capable of revealing prolific and sensitive information, as well as the fact that humans continually shed DNA into the environment, Defendant asks this Court to find that he had a reasonable expectation of privacy in his DNA, the testing of which through SNP methods required a warrant despite that fact that law enforcement was lawfully in possession of the object containing the DNA, i.e., the sheath. He further posits that this privacy

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greater protection has been afforded under Idaho's constitution, it has been based on "the uniqueness of our state, our Constitution, and our long-standing jurisprudence.") Thus, the Court's analysis of his arguments, with the exception of the trash pull, is limited to Fourth Amendment law.

[9] While property interests are also protected under the Fourth Amendment, Defendant has not alleged violation of such interests. Therefore, the property-based test to determine whether a search occurred is not implicated.

[10] Defendant asserts that all evidence collected after he was identified through the FBI's IGG search, i.e., December 19, 2022, must be suppressed as fruit of the poisonous tree.

interest is not subject to the doctrine of abandonment because the shedding of DNA into the environment is not a voluntary or knowing act.

The State denies that the testing of the DNA from the sheath was a search, pointing out the DNA was lawfully seized evidence from the scene of the crime. The State further contends Defendant has not demonstrated he had a reasonable expectation of privacy in this DNA because he abandoned it and/or because he has not shown the existence of a reasonable privacy interest society is willing to recognize.

This is a matter of first impression in Idaho. However, applying well-settled principles of Fourth Amendment law, the Court finds no constitutional violation. First, Defendant abandoned any privacy interest in his DNA by disclaiming knowledge or ownership of the sheath from which the DNA was extracted. Second, even if no such abandonment occurred, there is no reasonable expectation of privacy in DNA found at a crime scene which is subsequently analyzed to identify an unknown suspect.

1. Defendant cannot establish a subjection expectation of privacy in the DNA found on the sheath due to abandonment.

It is well settled that a person who "voluntarily abandons property prior to a search cannot be said to possess the requisite privacy interest under the Fourth Amendment." *Stark v. State*, 171 Idaho 541, 545, 524 P.3d 43, 47 (2023) (citation omitted). When one abandons property, "[t]here can be nothing unlawful in the Government's appropriation of such abandoned property." *Abel v. United States*, 362 U.S. 217, 241(1960). In the Fourth Amendment context, abandonment occurs "through words, acts, and other objective facts indicating that the defendant voluntarily discarded, left behind, or otherwise relinquished his or her interest in his or her property." *Stark, supra* (citation omitted).

Disclaiming ownership or knowledge of an item constitutes abandonment. *State v. Melling*, 160 Idaho 209, 212, 370 P.3d 412, 415 (Ct. App. 2016) (citations omitted). In *Melling*, for example, officers reported to the defendant's house after reports of a fight. *Id.* at 210, 370 P.3d at 412. While officers were speaking to the defendant, his girlfriend gave officers a lockbox that she said belonged to the defendant. The defendant told officers he had never seen the box before, had no idea who it belonged to, that nothing in the box was his and that he did not know what was inside of it. *Id.* The Court held that by disclaiming ownership of the lockbox and its contents, the defendant abandoned any privacy interest therein. *Id.* at 416.

Moreover, a person need not specifically disclaim knowledge or ownership of the contents of a container to result in abandonment thereof. It is sufficient to disclaim knowledge or ownership of the container itself. *See, State v. Zaitseva*, 135 Idaho 11, 13, 13 P.3d 338, 340 (2000) ("by denying ownership of the bag in response to the officer's inquiry prior to the search, [the defendant] essentially relinquished or abandoned any privacy interest in the contents of the bag.").

There is no dispute here that Defendant has not claimed any knowledge or ownership of the sheath, thus resulting in its abandonment. Defendant concedes as much, but argues that abandonment of any privacy interest in the sheath did not result in the abandonment of the DNA found on the sheath. He contends that unlike the voluntary act leaving the sheath, leaving DNA on the sheath is not voluntary because a person has no way to know that their DNA has been left behind. DNA, he points out, is shed everywhere; humans have no ability to keep their biological material from the environment. Consequently, he reasons, a finding that the DNA on the sheath was abandoned would mean that a person voluntarily gives up privacy in their entire genetic makeup every time they interact with the public.

In support of his argument, Defendant relies exclusively on a concurring opinion in *State v. Carbo*, which is factually similar to this case. 6 N.W.3d 114 (Minn. 2024). In *Carbo*, the evidence at issue was semen deposited inside the deceased crime victim and skin scrapings from underneath her fingernails. *Id.* at 120. In an attempt to identify a suspect, law enforcement contracted with a lab to conduct a genetic analysis of the DNA extracted from this evidence. *Id.* Like here, the lab created a SNP profile from the DNA and utilized commercial genealogical databases to determine a potential source. It also generated a report that provided information about the suspect's physical traits and ancestral origin. *Id.* This information ultimately led law enforcement to the defendant. Law enforcement then created a DNA profile from trash discarded by the defendant, which matched the DNA profile from the crime scene. *Id.* Subsequently, the defendant provided a voluntary DNA sample, which matched the profile from the crime scene and the garbage. *Id.*

The defendant moved to suppress evidence of his genetic information left behind at the crime scene. He argued, as Defendant does here, that although he may have abandoned his privacy interests in his semen and skin cells, it did not equate to an abandonment of the "vast troves" of genetic information that biological material contained. *Id.* at 121. Making short work

of this argument, the Minnesota Supreme Court found that by voluntarily leaving his semen and skin at the crime scene, he abandoned any subjective privacy interest in his genetic information contained therein. *Id.*

In the concurring opinion relied upon by Defendant, one justice disagreed with the majority on this issue because, given the sensitive genetic information revealed by SNP testing, he would have required a warrant before allowing such testing. *Id.* at 127 (J. Procaccini, concurring). He further opined that the concept of abandonment—which requires voluntariness—is an "ill fit" for genetic information because it is virtually impossible for humans to prevent leaving personal genetic information everywhere they go. *Id.* at 131-32. To this end, he analogized DNA to the cell phone site location information (CSLI) at issue in *Carpenter v. United States*, 585 U.S. 296, 310-11 (2018), where the United States Supreme Court reasoned that CSLI is not "voluntarily exposed" given that virtually any activity on a phone—which is essential to participate in modern life—will leave a trail of location data. *Id.* at 132 (citing *Carpenter*). While there are safeguards to prevent the dissemination of CSLI (i.e., turning off a phone), he observed there are no similar safeguards for DNA, thus rendering "the case against abandonment … all the more clear[.]" *Id.* "When we venture into public spaces, we simply cannot help but shed our DNA." *Id.*

The majority, however, pointed out that the inquiry as to whether the defendant abandoned his subjective privacy interests looks to his specific actions. *Id.* at 121-22, n. 2. When viewed in this way, the majority found Justice Procaccini's logic inapt given that the defendant's DNA was "not collected from a shed skin cell or flake of dandruff" nor was it a mere consequence of the defendant venturing into the public sphere. *Id.* It was collected from semen he voluntary left inside the victim and skin cells he voluntarily left under her fingernails. *Id.*

Defendant argues that Justice Procaccini's case against abandonment is particularly appropriate here. Defendant argues the biological material left on the sheath was not blood or semen or some bodily fluid that the *Carbo* court found could be voluntarily left behind. Instead, he argues it was more likely "shed" cells, which humans cannot help but discard.

However, as the State points out, there is nothing that distinguishes semen voluntarily left at a crime scene from the sheath. Both were abandoned vehicles carrying DNA. Stated another way, the semen in *Carbo* and the sheath here were both containers of DNA. As discussed, disclaiming ownership or knowledge of a container results in abandonment of a privacy interest

in its contents. *Zaitseva*, *supra*. Thus, by effectively disclaiming knowledge or ownership of the sheath, Defendant necessarily abandons any privacy interest in the DNA it contains.

Indeed, *Carbo* is not an anomaly in finding abandonment. Courts uniformly hold that a person abandons any privacy interest in their DNA for purposes of the Fourth Amendment when they abandon property that contains their DNA.[11] In *State v. Burns*, for example, law enforcement extracted DNA from a bloodstained dress of the victim and created a genetic profile which was run through genetic genealogy. 988 N.W.2d 352, 357-58 (Iowa 2023), *cert. denied,* 144 S. Ct. 288 (2023). The defendant was identified as a suspect through this process. Officers then followed him to a restaurant and collected a straw the suspect deposited in the trash. *Id.* Testing of the DNA on the straw indicated that the DNA extracted from the dress could be the defendant's. A subsequent test confirmed it. *Id.*

The defendant did not move to suppress the extraction and analysis of his DNA from the bloodstained dress, but he did unsuccessfully seek suppression of the DNA extracted from the straw. *Id.* at 359. On appeal, the court had little difficulty finding that any privacy interest he had in his DNA profile developed from the straw was abandoned. *Id.* at 361. First, by failing to make any effort to preserve the straw as private, he relinquished any subjective privacy interest therein. Second, even if he retained a subjective privacy interest, it was not one society would recognize as reasonable considering he voluntarily left the straw behind in the restaurant. *Id.* Further, the court rejected the defendant's attempt to distinguish the DNA on the straw from the straw itself, finding no practical difference between the two. By abandoning the straw, he also abandoned any DNA on the straw. *Id.* at 362.

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[11] *See, e.g., People v. Sterling,* 57 A.D.3d 1110, 1111, 869 N.Y.S.2d 288 (2008) ("[O]nce defendant drank from the milk carton, which was thereafter lawfully obtained by police, he no longer retained any expectation of privacy in the discarded DNA); *McCurley v. State*, 653 S.W.3d 477, 490–91 (Tex. App. 2022), *reconsideration en banc denied* (Sept. 22, 2022), *petition for discretionary review refused* (Mar. 1, 2023) (holding defendant did not maintain a right to privacy in his DNA evidence obtained from an abandoned cup); *Lovchik v. Commonwealth*, 2020 WL 6139896 at *4 (Va. Ct. App. 2020) ("when appellant abandoned the items that carried his DNA, he not only relinquished any objectively reasonable right to privacy in those items, but also any such right to privacy in the DNA profile developable from those items to identify him"); *United States v. Hicks*, 2020 WL 7311607 at *2 (W.D.Tenn. 2020) ("Defendant abandoned the cigarette butt containing his DNA sample and in doing so, surrendered any expectation of privacy he had in the DNA profile that could be extracted from the sample"); *State v. Athan*, 158 P.3d 27, 33-34 (Wash. 2007) (holding defendant abandoned DNA when he sent the envelope in the mail because "[t]he envelope, and the saliva contained on it, becomes the property of the recipient); *People v. Gallego,* 190 Cal.App.4th 388, 117 Cal.Rptr.3d 907, 913 (2010) ("By voluntarily discarding his cigarette butt on the public sidewalk, defendant actively demonstrated an intent to abandon the item and, necessarily, any of his DNA that may have been contained thereon."); *State v. Williford*, 767 S.E.2d 139, 144 (N.C. Ct. App. 2015) (same)).

The *Burns* court additionally rejected the argument Defendant makes here—that DNA cannot be voluntarily abandoned due to involuntary shedding. *Id.* at 363. In doing so, the court aptly analogized DNA shed to fingerprints, something individuals also unconsciously and continually shed. *Id.* at 363. First, the court observed, all the different ways a person can shed DNA is irrelevant for Fourth Amendment purposes; what is relevant is the DNA left on the particular item the defendant abandoned, i.e, the straw or, here, the sheath. Second, the court noted that DNA shed is no different than latent fingerprints. Like DNA, latent fingerprints are left—typically without volition—everywhere humans go. Like DNA, they are "powerful means of individual identification" not visible to the human eye and must be developed through the use of specialized technology. *Id.* (quoting Thomas D. Holland, *Novel Features of Considerable Biologic Interest the Fourth Amendment and the Admissibility of Abandoned DNA Evidence*, 20 Colum. Sci. & Tech. L. Rev. 271, 310 (2019) ("*Holland*"). The court concluded that because the testing of latent fingerprints does not raise Fourth Amendment concerns, neither should DNA collected and tested from an abandoned item. *Id.* at 364.

The Court finds the analysis in *Burns* compelling and consistent with Fourth Amendment law. The Court recognizes that a distinction can be drawn given the fact that, in *Burns*, there was no question that the defendant abandoned the straw, and here, Defendant argues it cannot be conclusively stated that he abandoned the sheath. However, as the State notes, this distinction does not preclude a finding of abandonment for two reasons. First, as discussed, abandonment does not occur solely by discarding an item. It also occurs by disclaiming ownership or knowledge or otherwise relinquishing an interest in property. *Zaitseva*, *supra*. By not claiming ownership of the sheath or any knowledge as to how his DNA arrived on the sheath, Defendant abandoned any privacy interest in the DNA.

Second, the fact that a person does not knowingly expose his DNA to the public does not contravene a finding of abandonment. Like DNA, fingerprints and bodily fluids are left unknowingly on surfaces of public places merely as a consequence of venturing into the public sphere yet, as noted in *Burns*, this does not raise constitutional concerns. *Burns*, 988 N.W.2d at 363; *see also*, *Holland*, 20 Colum. Sci. & Tech. L. Rev. at 331 ("The manner in which humans shed cellular material is not fundamentally different from the manner in which the oils comprising fingerprints are shed."). What matters is that the material was left in the public domain. Applying this rationale, the Maryland Supreme Court concluded that the defendant

abandoned any privacy interest he had in his shed DNA collected from a chair in which he had been sitting. *Raynor v. State*, 99 A.3d 753 (Md. 2014). In doing so, the court rejected that notion that abandonment required an explicitly voluntary, knowing act, noting:

> [T]he fact that one has not knowingly exposed to the public certain evidence does not, by itself, demonstrate a reasonable expectation of privacy in that evidence. '[W]hile *Katz* says it is no search to discover what one 'knowingly exposes,' it does not declare the exact reverse of this proposition. That is, the [Supreme] Court did not say that discovery of what was not knowingly exposed is inevitably a search.' [1 Wayne R. LaFave, Search and Seizure § 2.2(d), at 649 (5th ed. 2012)].

Id. at 766–67 (2014).

Likewise, here, at some point Defendant apparently interacted with the sheath to a sufficient enough degree that he left his DNA thereon. Whether he knew he left his DNA behind is of no consequence. It is only relevant that he exposed his DNA to the public by leaving it on the sheath, thus forfeiting any reasonable expectation of privacy in the DNA left behind.

2. Even if not abandoned, Defendant has not established his subjective privacy interest in his DNA is objectively reasonable.

A Fourth Amendment search occurs when the government seeks to gain information by infringing upon a person's "reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). "An expectation of privacy is objectively reasonable when it is legitimate, justifiable, and one society should both recognize and protect." *State v. Fancher*, 145 Idaho 832, 837, 186 P.3d 688, 693 (Ct. App. 2008).

It is true that DNA testing—particularly SNP testing—can unlock a wealth of intensely private information about an individual, including family relationships, ancestry, genetic disorders and the propensity for health-related risks. Victoria Romine, *Crime, DNA, and Family: Protecting Genetic Privacy in the World of 23and me*, 53 Ariz. St. L.J. 367, 379 (Spring 2021). Such highly private information is already protected under the law in other contexts, including in Idaho through the Genetic Testing Privacy Act, I.C. § 39-8301 *et. seq*, which prohibits genetic discrimination in employment. Given the privacy interests implicated by DNA testing, Defendant argues that DNA even lawfully in possession of law enforcement cannot be tested absent probable cause and a warrant.

In Defendant's view, the breadth of information SNP testing can reveal is analogous to the CSLI at issue in *Carpenter,* where the United States Supreme Court held that a person

maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI data maintained by the person's wireless carrier. 585 U.S. at 315-16. The *Carpenter* court reasoned that those "detailed, encyclopedic" records—which provided an "all-encompassing record" of the defendant's location over a course of 127 consecutive days—can give law enforcement "an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Id.* at 310-11 (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring). "These location records 'hold for many Americans the "privacies of life."'" *Id.* at 311 (quoting *Riley v. California*, 573 U.S. 373, 403 (2014)).

Defendant also relies on *Riley*, where the United States Supreme Court held that police may not search digital information from a cell phone seized pursuant to the search incident to arrest exception to the warrant requirement. 573 U.S. at 403. The Court observed that, unlike physical objects, digital data on a cell phone does not implicate the same government interests justifying searches incident to arrest, i.e., preventing loss of evidence and threats to officer safety. *Id.* at 401. Further, the Court found that the extent of personal information digital data would reveal about a person implicated significant privacy interests, noting that while an arrestee has "diminished" privacy interests, it does not mean the arrestee has no Fourth Amendment protections. *Id.* at 392. By analogy to *Riley*, Defendant contends that law enforcement should be required to obtain a search warrant to analyze the DNA from the sheath, despite being in lawful possession thereof.

With regard to the SNP testing of DNA in particular, Defendant relies on *Skinner v. Railway Labor Executives' Association,* where the United States Supreme Court held that the collection and subsequent testing of an employee's legally obtained urine constitutes a Fourth Amendment search. 489 U.S. 602, 618 (1989). The Court observed that while a physical intrusion into an employee's body to collect the urine is an obvious infringement of the employee's reasonable expectation of privacy, the subsequent chemical analysis of the urine sample to obtain physiological data about the employee is "a further invasion" of the employee's privacy interest given that such testing can "reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant , or diabetic." *Id.* at 617.

Based on *Carpenter, Riley* and *Skinner*, Defendant contends that because SNP testing of DNA is even more revealing than CLSI data or urine testing, it should be allowed only upon a

warrant, regardless whether the DNA was lawfully obtained. Defendant argues that this is precisely what the Fourth Circuit did in *United States v. Davis*, when it held that "the extraction of DNA and the creation of a DNA profile result in a sufficiently separate invasion of privacy that such acts must be considered a separate search under the Fourth Amendment even when there is no issue concerning the collection of the DNA sample." 690 F.3d 226, 246 (4th Cir. 2012). At issue in *Davis* was DNA extracted from the defendant's clothing which had been lawfully seized four years earlier when the defendant was a crime victim in an unrelated case. Relying on *Skinner*, the court reasoned that the extraction and analysis was a search "because the analysis of biological samples, such as those derived from blood, urine, or other bodily fluids, can reveal 'physiological data' and a 'host of private medical facts,' such analyses may 'intrude[] upon expectations of privacy that society has long recognized as reasonable.' " *Id.* at 243 (quoting *Skinner*, 489 U.S. at 616-17).[12]

However, these cases lend no support to Defendant when applied to the specific circumstances presented here for three reasons: 1) there is no reasonable expectation of privacy in identity; 2) Defendant has not shown his DNA was tested for anything other than identifying purposes, and; 3) even if the DNA analysis revealed sensitive personal details, there is no reasonable expectation of privacy in crime scene DNA.

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[12] Defendant also cites to the recent decision of *State v. Mitcham*, where the Arizona Supreme Court found that the DNA testing of a blood sample lawfully collected from the defendant during a DUI arrest constituted a search. 559 P.3d 1099 (Ariz. 2024). The blood sample had been voluntarily provided by the defendant after his 2015 DUI arrest for purposes of testing for alcohol or drugs only. *Id.* at 1102. The defendant was informed that the sample would be destroyed after testing. A month later, a woman was murdered and law enforcement developed a male DNA profile from biological swabs from the crime scene. *Id.* CODIS did not return a match. *Id.* at 1103. Two years later, law enforcement initiated a familial DNA investigation of the male DNA profile which pointed law enforcement to the defendant. Officers then performed a DNA test of the blood he had provided in connection with his DUI arrest, which they had not destroyed. *Id.* The court found the DNA test was a search based on prior Arizona precedent holding that the DNA testing of an arrestee's buccal swab was a Fourth Amendment violation. *Id.* at 1106 (citing *Mario W. v. Kaipio*, 230 Ariz. 122, 129, 281 P.3d 476, 483 (2012)). It further found the search was unreasonable because it exceeded the scope of the defendant's consent when he provided the blood sample. *Id.* at 1108. *Mitcham*, however, is distinguishable for the same reasons as *Davis*. It is the status of the individual providing the sample that frames the reasonableness. Although the defendant was an arrestee when he provided the blood, he was not robbed of all privacy interests in his blood. *Riley*, 573 U.S. at 392 (explaining arrestees only have "diminished" expectation of privacy). As an arrestee, he consented to search of his blood only for alcohol and drug purposes and anticipated the blood sample would thereafter be destroyed. When officers failed to destroy the blood sample and then subsequently tested it for entirely different purposes, it not only contravened his consent but also the reasonable expectation of privacy he maintained in his blood at the time it was provided. Here, however, officers tested discarded crime scene DNA from an unknown murder suspect—a circumstance that is outside the margins of *Mitcham*.

First, there is no reasonable expectation of privacy in our identifying characteristics, such as fingerprints. *United States v. Dionisio*, 410 U.S. 1, 14 (1973). This is because the analysis of such physical characteristics "involves none of the probing into an individual's private life and thoughts that marks" a Fourth Amendment search. *Id.* at 15. On this basis, courts have held that testing of DNA for identification purposes does not run afoul of the Fourth Amendment because it is no more revealing than fingerprints. *See, e.g.*, *Raynor*, 99 A.3d at 767 (where DNA testing is not obtained by means of a physical intrusion into the person's body, "is no more a search for purposes of the Fourth Amendment, than is the testing of fingerprints, or the observation of any other identifying feature revealed to the public—visage, apparent age, body type, skin color."); *Burns*, 988 N.W.2d at 364-65 (likening DNA analysis used for identification purposes to analyzing latent fingerprints).

The Idaho Court of Appeals has all but followed suit. In *Piro v. State*, a post-conviction action, the Court of Appeals addressed whether the petitioner's counsel was deficient by failing to argue his client had a reasonable expectation of privacy in his genetic material left behind on a water bottle. 146 Idaho 86, 91-92, 190 P.3d 905, 910-11 (Ct. App. 2008). In rejecting the claim, the Court first noted that since the issue of genetic privacy in DNA was a "novel theory in an undeveloped area of law[,]" counsel was not ineffective by failing to raise it. *Id.* Moreover, the Court cast doubt of the substantive value of the argument, noting that in other jurisdictions "courts have held that the use of DNA for identification purposes only does not infringe on a privacy interest in one's genetic identity because the DNA is not being used to reveal personal information." *Id.* (citations omitted).

Second, in *Maryland v. King*—decided after *Skinner, Riley* and *Davis*—the United States Supreme Court confirmed that the objective reasonableness of a privacy interest in DNA depends on how the DNA is actually used by the government, not what it is capable of revealing. 569 U.S. 435, 465 (2013). At issue in *King* was a Maryland statute which permitted the warrantless acquisition of a buccal swab from an arrestee to obtain a DNA sample. Because the testing was for identification purposes—which is constitutionally permissible—and did not reveal genetic traits or private medical information, the Court found it did not contravene an arrestee's privacy in any way. *Id.* at 464. Notably, the DNA testing in *King* was of the STR alleles which, unlike SNP testing, "are not known to have any association with a genetic disease

or any other genetic predisposition." *Id.* at 445 (citation omitted). However, the Court signaled that it is *how* the DNA is tested that is legally relevant, not what it is capable of revealing, to wit:

> And even if non-coding alleles could provide some information, they are not in fact tested for that end. It is undisputed that law enforcement officers analyze DNA for the sole purpose of generating a unique identifying number against which future samples may be matched. This parallels a similar safeguard based on actual practice in the school drug-testing context, where the Court deemed it 'significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic.' *Vernonia School Dist. 47J,* 515 U.S., at 658, 115 S.Ct. 2386. If in the future police analyze samples to determine, for instance, an arrestee's predisposition for a particular disease or other hereditary factors not relevant to identity, that case would present additional privacy concerns not present here.

Id. at 464-65 (emphasis added).

Thus, under *King*, testing of lawfully obtained DNA samples may run afoul of the Fourth Amendment only if law enforcement uses it for purposes irrelevant to identification. Otherwise, it is no more a search for Fourth Amendment purposes than the testing of fingerprints. *See also*, *Burns*, 988 N.W.2d at 366 (noting that if law enforcement had tested the defendant's DNA to reveal physiology and health conditions such as a genetic predisposition to cancer, it might implicate privacy interests, but law enforcement did not do so); *Raynor*, 99 A.3d at 768 ("That Petitioner's DNA could have disclosed more intimate information is of no moment in the present case because there is no allegation that the police tested his DNA sample for that purpose."); *State v. Athan*, 158 P.3d 27, 34 (Wash. 2007) (while DNA has potential of revealing a vast amount of personal information, no privacy interest was implicated where the testing of DNA was limited to identification purposes.).

Here, Defendant provided no evidence that the SNP profile developed from Q1.1 through IGG revealed any genetic predispositions or physiological or medical conditions. As Mr. Hellwig testified, the SNPs that carry such sensitive information are not targeted or revealed in IGG because they are neither "relevant nor probative nor appropriate" to the identification process, which is the goal of IGG. Rather, IGG only implicates those SNPs associated with ancestry and genealogy in order to determine genetic associations, build a family tree and identify potential genetic relatives of the uploaded SNP profile. It is simply an identification tool. In this regard, *Carpenter* is unavailing authority, as has been found by other courts addressing the issue of

privacy interests in DNA generally.[13] The CLSI in *Carpenter* was not used as an identification tool; it was used as a comprehensive surveillance tool after a suspect had already been identified. 585 U.S. at 301-02. At best, *Carpenter* can be applied to technologies that provide the government with comprehensive surveillance of known person's physical movements. This is not the type of information the DNA provided in this case. Law enforcement here extracted and analyzed the DNA of an unknown suspect solely for identification purposes. It provided no information as to location of a known person and does not begin to approach the surveillance described in *Carpenter*.[14]

Riley is distinguishable as well as it was context-driven, focusing on the lack of connection between the justifications underpinning the search incident to arrest exception to the warrant requirement and a search of digital data on a cell phone. 573 U.S. at 386-87. The Court noted that after an arrestee's cell phone is secured by officers, the digital data it contains cannot harm the officer or be destroyed. *Id.* at 387. Thus, a search of the digital data becomes solely a fishing expedition without justification.[15] Here, by contrast, law enforcement analyzed the DNA from a crime scene item associated with a weapon for purposes of identifying the perpetrator. Identification is an accepted justification for testing DNA. *King, supra.* Thus, *Riley* is unavailing.

Moreover, even assuming there were sensitive genetic details revealed by the IGG performed here, the fact that the DNA was obtained from a crime scene and analyzed for purposes of identifying the perpetrator displaces any reasonable expectation of privacy. The Court of Appeals of Washington recently came to the same conclusion under similar facts. In *State v. Hartman*, law enforcement extracted DNA from semen and hair left on a murder victim's body. 534 P.3d 423, 427-28 (Wash. App. 2d 2023). The DNA was then sent to a

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[13] *See, e.g., People v. Mendez*, 73 Misc. 3d 715, 718–20, 155 N.Y.S.3d 534, 536–37 (N.Y. Sup. Ct. 2021) ([T]he extraction and analysis of DNA for the sole purpose of developing a profile is not, like the cell-cite location information at issue [in *Carpenter*], 'deeply revealing' or of substantial 'depth, breadth, and comprehensive reach,' since the genetic information obtainable from DNA that is deeply revealing and comprehensive is neither sought nor revealed in the process."); *Burns*, 988 N.W.2d at 364-65 (distinguishing *Carpenter* on grounds that DNA analysis used for identification does not provide police with the type of comprehensive surveillance at issue in *Carpenter*); *State v. Hartman,* 534 P.3d 423, 435 (Wash App. 2023) ("Cell site location information is distinguishable from DNA.")

[14] Further, in *Carpenter*, the United State Supreme Court expressly limited its holding to CLSI. 585 U.S. at 316 ("Our decision today is a narrow one. We do not express a view on matters not before us.")

[15]Further, the Court did not hold that law enforcement is always required to obtain a warrant to search a cell phone and specifically noted that other exceptions to the Fourth Amendment could apply to allow such a search. *Id.* at 388.

genealogy consultant, who uploaded a genetic profile to various genealogy databases for analysis. *Id.* From that analysis, law enforcement learned the suspect had alleles related to substance abuse, bipolar disorder and baldness and was approximately 9% native American. *Id.* at 960. The genealogist used the information obtained from the databases and other resources to begin building a family tree, from which she learned there was an instance of "misattributed paternity" in the suspect's family. *Id.* Her research ultimately pointed law enforcement toward the defendant.

Like here, the defendant in *Hartman* argued he had a reasonable privacy interest in the DNA extracted from the semen which law enforcement violated through its analysis revealing private personal details. *Id* at 438. In declining to recognize his privacy interest as reasonable, the Court observed it was a "well-established rule that analysis of evidence left behind at a crime scene does not require a warrant where the abandoned evidence contains DNA, even though DNA contains a wealth of personal information." *Id.* The court observed that the DNA was not only abandoned, the analysis performed by law enforcement was "to determine the killer's identity and nothing more." *Id.* Thus, even though the analysis revealed personal details, they were identifying characteristics that served to narrow the suspect pool and, therefore, did not run afoul of the Fourth Amendment.

This holding highlights another important point – it is the status of the individual whose DNA is tested that helps frame the reasonableness of the privacy expectation. In *Davis*—relied upon heavily by Defendant—the Fourth Circuit's holding rested entirely on the fact that the DNA tested was taken from clothing police seized years earlier when the defendant was a crime victim, noting:

> [W]e agree with the district court that a person who is solely a crime victim does not lose all reasonable expectation of privacy in his or her DNA material simply because it has come into the lawful possession of the police. And, although Davis later was arrested, because the police seized his clothing when he was solely a crime victim, we conclude that his later arrest does not eradicate his expectation of privacy in his DNA material.

690 F.3d at 244.

In fact, the district court affirmed in *Davis* drew a distinction between the analysis of crime scene DNA and other DNA, stating:

> This finding would not, as the Government argues, require the police to seek a warrant in order to analyze any items recovered from a crime scene for DNA

> evidence. No one would argue, for example, that a rapist retains a reasonable expectation of privacy in the DNA contained in the semen that he leaves on his victim. Society considers it reasonable that if one has committed a crime, any evidence one leaves behind while doing so is fair game; the intentional, volitional act of committing the crime itself supports the theory that the criminal intends to abandon any privacy interest he has in his blood, fluid, cells, etc. that he may leave behind at the crime scene. Furthermore, the very fact that a given area is a crime scene changes the balance of interests relevant to a Fourth Amendment analysis of crime scene evidence.

United States v. Davis, 657 F. Supp. 2d 630, 650 (D. Md. 2009).

This distinction between crime scene DNA and other DNA likewise renders *Skinner* of no use to Defendant. In *Skinner*, the urine was collected from employees for workplace purposes and subjected to testing. 489 U.S. at 606. It was not obtained to be tested for identification purposes; it was obtained to test whether the employees had drugs or alcohol in their system. *Id.* Had it been urine that was left by an unknown suspect at a crime scene and then tested to determine identity, the result would undoubtedly be different.

Even legal commentators who advocate for increased protection over DNA evidence agree that the Fourth Amendment does not prevent law enforcement from analyzing genetic evidence left at a crime scene. *See*, Adrienne N. Kitchen, *Genetic Privacy and Latent Crime Scene DNA of Nonsuspects: How the Law can Protect an Individual's Right to Genetic Privacy While Respecting the Government's Important Interest in Combatting Crime*, 52 No. 2 Crim. Law Bulletin ART 5 (Spring, 2016) ("[i]f the DNA was found on the victim, on a murder weapon, or on another object closely related to the crime, that DNA may be analyzed without implicating the Fourth Amendment."); Palma Paciocco, *Abandoning Abandoned DNA: Reconsidering How the Fourth Amendment Abandonment Doctrine is Applied to DNA Samples,* 51 No. 6 Crim. Law Bulletin ART 6 (2015) (observing that her proposal requiring a warrant to test all DNA samples discarded by crime suspects would not apply to DNA collected at crime scenes or in testing of rape kits because there is no reasonable expectation of privacy in DNA deposited at a crime scene); Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 Nw. U. L. Rev. 857, 884 (2006) (requiring a warrant to test DNA recovered at a crime scene would be "pointless, for there is nothing for a magistrate to consider.").

In sum, Defendant's argument finds no support under the law. Any privacy interest he can claim in this DNA was abandoned along with the sheath, to which he claims no ownership or knowledge. Even if no such abandonment occurred, Defendant has not demonstrated it is reasonable to recognize a privacy interest in DNA left at a crime scene, particularly when it is analyzed for identification purposes and nothing more. Further, to find that Defendant retained a reasonable privacy interest in DNA left at a crime scene—indeed, on an item intimately associated with the suspected weapon—would have the untenable effect of eliminating the use of abandoned DNA as an investigative tool. As observed by the United States Supreme Court in *King*, this tool has utmost importance. "Since the first use of forensic DNA analysis to catch a rapist and murderer in England in 1986, law enforcement, the defense bar, and the courts have acknowledged DNA testing's 'unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices.'" *King,* 569 U.S. at 442 (quoting *DA's Office v. Osborne*, 557 U.S. 52, 55 (2009)). Neither society nor this Court are prepared to go where Defendant seeks to take us. Therefore, because the development of the SNP profile did not contravene Defendant's Fourth Amendment rights, suppression is not warranted.

B. Defendant has Not Established a Fourth Amendment Violation With Regard to the Trash Pull and Testing of DNA Therefrom.

Defendant next asserts that law enforcement's trash pull from his parents' Pennsylvania residence and subsequent DNA testing thereon constituted warrantless and unreasonable searches mandating suppression. He argues he had a reasonable expectation of privacy in his parents' garbage that was violated when law enforcement arranged for a trash pull. The privacy interest, according to Defendant, is predicated on not only Monroe County's municipal ordinance prohibiting anyone other than a garbage collector from collecting the Kohberger family's curbside trash, but also from the fact that the Kohbergers resided in a gated neighborhood and the garbage cans were on the driveway as opposed to a public area.[16] While Defendant acknowledges binding precedent holds otherwise,[17] he asserts it is time to "rethink" these

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[16] Defendant provided no evidence that the garbage cans were on the driveway as opposed to the street curb.

[17] *See, California v. Greenwood*, 486 U.S. 35 (1988) (warrantless seizure and search of garbage did not violate Fourth Amendment rights because the defendant did not have a reasonable expectation of privacy in the garbage he placed out for collection); *State v. Donato*, 135 Idaho 469, 20 P.3d 5 (2001) (following *Greenwood* and further holding that Article I, section 17 of the Idaho Constitution did not afford greater privacy protections than the Fourth Amendment to such items.)

decisions and find a reasonable expectation of privacy exists, if not under the Fourth Amendment, then under the "increased protection" afforded by Art. 1, § 17 of the Idaho Constitution. Alternatively, he argues that even if the trash pull was lawful, the testing of the DNA found on the items of trash was not under *Skinner* and *Davis, supra.*

However, after Defendant filed his motion, the Idaho Supreme Court reaffirmed its holding in *Donato* and rejected the very argument asserted by Defendant here, i.e., that a local waste management ordinance can create a reasonable expectation of privacy. *State v. Pulizzi*, 559 P.3d 1220 (Idaho, 2024) ("[A]n objective expectation of privacy is not created simply because an ordinance aimed at maintaining society's interest in sanitation dictates how trash is to be collected."). As for the subsequent DNA testing of the discarded items, relevant here is the abandonment theory.

This Court is bound by the decisions of the Idaho Supreme Court.[18] There are no facts presented here that meaningfully distinguish this case from *Donato* or *Pulizzi*. That the garbage cans may have been placed in the Kohbergers' driveway for collection as opposed to on a public road and that the Kohbergers' neighborhood was gated are legally irrelevant factors given that the garbage was placed for the purpose of having it collected by another. *State v. McCall*, 135 Idaho 885, 887, 26 P.3d 1222, 1224 (2001) (finding no reasonable expectation of privacy in garbage placed out for collection regardless of whether it was in or outside the defendant's curtilage); *Greenwood*, 486 U.S. at 40–41 (privacy interest in trash is lost when it is deposited "in an area particularly suited for public inspection and … public consumption, for the express purpose of having strangers take it.)[19] Therefore, the trash pull did not contravene Defendant's Fourth Amendment rights.

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[18] *State v. Guzman*, 122 Idaho 981, 987, 842 P.2d 660, 666 (1992) (observing that the Idaho Supreme Court is "the ultimate authority in fashioning, declaring, amending, and discarding rules, principles, and doctrines of precedential law by application of which the lower courts will fashion their decisions. This Court has been and remains the final arbiter of Idaho rules of law, both those promulgated and those evolving decisionally.")

[19] *See also, Commonwealth v. Pratt*, 555 N.E.2d 559 (Mass. 1990) (concluding that *Greenwood* applies to garbage left for collection in driveway); *People v. Pinnix*, 436 N.W.2d 692 (Mich. App. 1989) (same); *State v. Beltz*, 160 P.3d 154 (Alaska Ct. App. 2007) (same); *U.S. v. Redmon*, 138 F.3d 1109 (7th Cir. 1998) (same); *State v. Carriere*, 545 N.W.2d 773 (N.D. 1996) (same); *United States v. Thompson*, 881 F.3d 629 (8th Cir. 2018) (same); *United States v. Harris*, 6 F. App'x 304, 308 (6th Cir. 2001) (curbside trash not protected under Fourth Amendment simply because the defendant lived in a gated community because it was still accessible to other residents, their guests and service providers, including the garbage collector.); *United States v. Powell*, 943 F. Supp. 2d 759, 786 (E.D. Mich. 2013), *aff'd*, 847 F.3d 760 (6th Cir. 2017) ("[R]esidence in a gated community [does not] transform[] the entire community into an individual's private property for Fourth Amendment purposes.")

Moreover, as already discussed, it is well settled that one abandons a privacy interest in one's DNA by discarding an item containing the DNA. *See*, footnote 11, *supra*. By throwing away an item of trash containing his DNA, Defendant cannot object to the testing of that DNA, particularly given that it was standard DNA testing.[20] Consequently, no suppression is warranted with respect to the trash pull and subsequent testing.

C. Defendant Cannot Establish the Search of the Genetic Genealogy Databases Implicated his Fourth Amendment Rights.

Defendant's final argument is that law enforcement's warrantless search of the commercial genetic genealogy databases violated his right to privacy in his relatives' genetic information. Observing that this issue has not been addressed by the United States Supreme Court or Idaho's appellate courts, he asks this Court to recognize as a matter of first impression that he has a reasonable expectation of privacy in the genetics he shares with his relatives and further find that such privacy was not undermined when his relatives uploaded their genetic information to the commercial genetic genealogy databases. Alternatively, he claims that the FBI's search of MyHeritage and GEDMatch was unlawful because those databases were off limits to law enforcement, both under the Interim Policy and those databases' own terms.

The State responds that Defendant has failed to demonstrate a reasonable expectation of privacy either in any of the commercial genetic genealogy databases or in his relatives' DNA. Even if Defendant could assert a privacy interest in the latter, the State contends that such interest was lost when such relative shared that DNA with the public by uploading it to the databases. Moreover, it argues that any violation by law enforcement of the terms of service of these databases or its own internal policies does not implicate the Fourth Amendment.

This Court has already determined that Defendant failed to show a legitimate privacy interest to challenge the development of the SNP profile from Q1.1. If Defendant does not have a reasonable expectation of privacy in the SNP profile, there is no basis to find an expectation of privacy in those portions of his SNP profile he shares with genetic relatives. However, to the extent the Court's prior conclusion does not dispose of the issue, Defendant's assertions lack merit because: 1) Defendant has not shown a reasonable expectation of privacy in any of the commercial genetic genealogy databases or in his relatives' DNA, and; 2) any alleged violation

[20] Defendant also lacks standing to object to testing of his father's DNA, as it is not his own. However, even if he had standing as to his father's DNA, the fact the item carrying the DNA was voluntarily placed in the trash for collection results in abandonment.

by law enforcement of its own policies and those of the databases is not of constitutional importance.

1. Defendant cannot demonstrate a reasonable expectation of privacy in common segments of DNA a relative has uploaded to the public sphere.

To invoke the exclusionary rule to suppress evidence under the Fourth Amendment, a defendant must establish that his own personal rights were violated by an unlawful search. "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *State v. Rebo*, 168 Idaho 234, 238, 482 P.3d 569, 573 (2021) (citing *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978)). Defendant acknowledges that the search challenged is that of his relatives' uploaded DNA and not his own. To get around this hurdle, he claims a reasonable expectation of privacy in the segments of shared DNA his relatives uploaded to the databases. This argument requires accepting that: 1) an individual has a privacy interest in the genetic makeup of another individual, and; 2) that such privacy interest persisted despite the other individual sharing his or her genetic makeup with the public at large. The Court will not make this leap.

First, there is no authority for Defendant's position. Granted, given the novelty of using commercial genomic platforms as an investigative tool, there are very few cases addressing it. However, not one has found that a defendant has a reasonable privacy interest in a relative's shared DNA. The primary case cited by both parties is *Hartman*, where the State of Washington Court of Appeals rejected the defendant's contention that he had a privacy interest in those segments of his DNA he shared with relatives that was violated when law enforcement searched commercial genealogy databases to find a familial match to the crime scene DNA. 534 P.3d at 437. Like here, the defendant likened DNA to the CSLI at issue in *Carpenter* and urged the court to follow *Carpenter* to find that his relatives' voluntary upload of their shared DNA did not forfeit his expectation of privacy in the information. *Id.* at 432-33 (citing *Carpenter*, 585 U.S. at 315).

The court's determination that the defendant lacked a reasonable privacy interest in segments of shared DNA rested on multiple grounds. The court first observed that the sole purpose of a genealogy database is to let others search for and share private information about the user's personal and family history for the purpose of finding relatives. *Id.* at 978. To this end, the court found shared DNA is unlike the CSLI in *Carpenter*, which was not shared for the

purpose of public perusal. *Id.* at 977-78. The court further noted that the comparison of the DNA obtained from the crime scene to the genetic profiles of the defendant's relatives was limited to identification purposes and, therefore, did not support a privacy interest. *Id.* at 973. In addition, the court found no historical protection for voluntarily shared genetic material or for information posted on websites intended for public access. *Id.* at 978-79. Consequently, the court concluded that because law enforcement's investigation of the genealogy databases did not disturb a reasonable privacy interest, the defendant had no standing to challenge the search. *Id.*[21]

Other courts addressing the issue have held similarly. *See, State v. Weston*, 2012 WL 12298861 (Minn. Dist. Ct., Oct. 4, 2021) (finding no reasonable expectation of privacy in genetic identifying information voluntarily uploaded to genealogy database by defendant's relatives); *People v. Williams*, 77 Misc. 3d 782, 785, 178 N.Y.S.3d 420, 423 (N.Y. Sup. Ct. 2022) (finding the defendant lacked standing to suppress evidence obtained through investigative genealogy search because "Williams cannot assert a personal privacy interest in his relatives' DNA profiles."); *United States v. Mitchell*, 652 F.3d 387, 409 (3d Cir. 2011) (in responding to the defendant's argument that collection of his DNA upon arrest was improper because, *inter alia*, it could be used to investigate biological relationships between individuals, court observed that he had no standing to assert the Fourth Amendment rights of his relatives.)

Other than claiming that the *Hartman* court failed to "appreciate" its holding, Defendant has not offered any basis or even a reasonable analogue from which the Court could make the unprecedented finding that he has a personal privacy interest in someone else's DNA. While he may share segments of this DNA, it is not his own DNA that was searched in the genetic databases. Further, there is no evidence he took efforts to shield his genetic relatives' DNA from the public view. *See, Rebo*, 168 Idaho at 239, 482 P.3d at 574 (noting that a defendant must show he sought to preserve the object of the search as private). Thus, since he cannot establish a personal expectation of privacy in the item searched, he cannot challenge the search.

Moreover, any subjective privacy interest he claims in his relatives' DNA is not reasonable. "[O]ne cannot have a reasonable expectation of privacy in what is knowingly exposed to public view." *State v. Christensen*, 131 Idaho 143, 146–47, 953 P.2d 583, 586–87

[21] Notably, the genealogy databases search by law enforcement in *Hartman* allowed law enforcement access whereas, here, the databases purportedly did not. However, as explained below, this does not alter the result.

(1998) (citing *Katz,* 389 U.S. at 351). Even information exposed to just a single person results in forfeiture of a reasonable privacy interest under the "third party doctrine."[22]

Here, Defendant's relatives did not voluntarily share their genetic information with just a single entity; they voluntarily shared it with hundreds of thousands of other participants. *See, Hartman,* 534 P.3d at 434 ("[C]onsumers frequently upload their DNA to consumer databases like GEDmatch for the very purpose of learning *and sharing with strangers* the exact private information—details about their ancestry and familial relations—at issue here."). Consequently, Defendant cannot claim any subjective expectation of privacy he had was reasonable.

Defendant warns that applying the third-party doctrine mechanically to DNA would have deleterious results. He points out that DNA can reveal a vast array of private details about a person. Further, he argues it is not truly shared. He notes that when one individual provides DNA to a consumer genomic platform, the identities of hundreds of genomic relatives can be revealed through shared DNA sequences. Finally, he observes that while Idaho law protects genetic privacy in some circumstances, there are no comparable limits over law enforcement's use of DNA taken from a crime scene. Noting that DNA can be left everywhere and last in the environment for a long time, he warns that the entire population could find themselves the targets of police investigation absent some controls.

Despite Defendant's dystopian warnings, the Court does not find a departure from settled Fourth Amendment principles is warranted. In *Carpenter*, the United States Supreme Court observed that the application of the third-party doctrine does not turn solely on the act of sharing; other factors to consider are the nature of the information sought and any limitations on the revealing nature of the information. 585 U.S. at 314-15. Doing so, the Court declined to apply the third-party doctrine to CSLI data obtained from the defendant's cellular carrier. *Id.* First, the Court noted that CSLI data is not truly shared; it logs a cell-site record by virtue of its operation,

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[22] The third-party doctrine is derived from a pair of cases from the 1970's where the United States Supreme Court carved out from the reasonable expectation of privacy standard information that an individual shares with a third party from whom law enforcement subsequently obtains that information. *See, United States v. Miller*, 425 U.S. 435, 440 (1976) (no expectation of privacy in financial records held by a bank); *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979) (no expectation of privacy in records of dialed telephone numbers conveyed to a telephone company). Idaho's appellate courts have applied the third-party doctrine to other situations, including lab reports turned over to the health department (*State. v. Mubita*, 145 Idaho 925, 933-34, 188 P.3d 867, 875-76 (2008)) and power consumption records turned over to a utility company (*State v. Kluss*, 125 Idaho 14, 19-21, 867 P.2d, 247, 252-54 (Ct. App. 1993)).

"without any affirmative act on the user's part beyond powering up." *Id.* Second, it observed there are no limits on what CSLI can reveal about a person. *Id.*

The shared portions of DNA Defendant's relatives uploaded to genetic databases do not merit this same treatment. While the Court agrees that DNA can be revealing like CSLI, such DNA was affirmatively shared in this case, unlike CSLI. Defendant's relatives did not simply reveal the information as a byproduct of the participating in modern society. They engaged in an affirmative act of uploading their DNA to public databases for the very purpose of sharing it with others. Consequently, the reasoning in *Carpenter* does not apply.

Moreover, any suggestion that Defendant's relatives preserved their expectation of privacy against law enforcement by sharing genetic information on databases that excluded law enforcement use is also unavailing. First, consent or non-consent to a search goes to the reasonableness of the search, not whether a privacy interest is objectively reasonable. *State v. Maxim*, 165 Idaho 901, 907, 454 P.3d 543, 549 (2019). Second, as discussed, a privacy interest can be lost by sharing information with even a single entity under the third-party doctrine. Even though the relatives may not have consented to law enforcement searching their genetic information, it was nevertheless shared with other members of the public, which is all that is required to remove any Fourth Amendment protections. *Katz*, 389 U.S. at 351 (Information that is "knowingly expose[d] to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

In sum, even if Defendant could vicariously assert constitutional rights of others (a dubious claim, at best), he has not shown that any subjective privacy right he may have had in his relatives' shared DNA was reasonable. Therefore, Defendant lacks standing to challenge law enforcement's search of the genetic genealogy databases.

2. Defendant has no basis to challenge law enforcement's alleged violation of its own policies and those of the geneaology databases in conducting the search.

Defendant next argues that even if the Court were to find shared DNA falls within the traditional Fourth Amendment rules (as it has), law enforcement's alleged search of databases in violation of both the databases' terms and the Interim Policy "cries out for judicial intervention."

Memo, p. 33.[23] Defendant has provided no authority that these alleged violations of policy or user agreements bear on the Fourth Amendment.

Again, because Defendant has not demonstrated a reasonable privacy interest in his relatives' DNA, Defendant has no basis to challenge the propriety of the search. *Rebo*, 168 Idaho at 239, 482 P.3d at 574. Second, even if he could establish a reasonable privacy interest, these alleged violations are of no significance. With regard to the violation of the databases' user policies, while this may give rise to a civil action between the FBI and the particular database or perhaps the individuals whose DNA profiles were used, Defendant has not explained how this implicates the Fourth Amendment. At least one state district court has found it does not. See, *State v. Westrom*, 2021 WL 12298861, at *4 (Minn.Dist.Ct. Oct. 04, 2021) ("Law enforcement's possible violation of MyHeritage's service agreement may subject them to action from MyHeritage, but the Court does not see any reason why this violation of a private company's terms would implicate constitutional protections.).

With regard to the FBI's alleged violation of its own policies or guidelines, the State correctly points out that noncompliance with a law enforcement policy does not provide a basis for a Fourth Amendment challenge. *See*, *Whren v. United States*, 517 U.S. 806, 815 (1996) ("[P]olice enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable.")[24] In addition, the Interim Policy at issue here expressly states it is intended to provide "internal guidance" only and does not "create any substantive or procedural rights or benefits" or "impose any legal limitations on otherwise lawful investigative … techniques[.]" See, *Interim Policy*, p. 1. Therefore, violation of its terms cannot alone give rise to a Fourth Amendment challenge where, as the Court has already found, the

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[23] Defendant also posits that law enforcement violated Israeli law when it searched MyHeritage, which is located in Israel. He claims that Israel's Genetic Information Law, 5671-2000 prohibits law enforcement uses, but does not provide a cite to the particular provision of the law or quote it within his brief, nor does he explain how this Court is bound by it or why law enforcement was required to follow it.

[24] *See also*, *State v. Lancaster*, 171 Idaho 236, 241, 519 P.3d 1176, 1181 (2022) (noting that suppression of evidence is a court-created remedy to ensure compliance with constitutional standards, not statutes.)

search of the databases was otherwise lawful. Suppression, therefore, is not warranted with regard to the databases search.[25]

V. CONCLUSION

Based on the foregoing, the Court DENIES Defendant's Motion to Suppress Re: Genetic Information.

IT IS SO ORDERED.

DATED this 17th day of February, 2025.

Steven Hippler
District Judge

[25] In the absence of a constitutional prohibition on law enforcement's use of public genetic genealogy databases for forensic purposes, it is within the purview of the legislature—not the courts—to implement policies restricting such use.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of February, 2025, I caused a true and correct copy of the above and foregoing instrument to be mailed, postage prepaid, or hand-delivered, to:

William W. Thompson, Jr.
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TRENT TRIPPLE
Clerk of the District Court

By: _____
Deputy Court Clerk