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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, **Plaintiff,** **V.** **BRYAN C. KOHBERGER,** **Defendant.**	**CASE NUMBER CR01-24-31665** **MOTION IN LIMINE #2** **RE: VAGUE AND UNDISCLOSED EXPERT TESTIMONY**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of records, and hereby moves the Court for an Order excluding vague and undisclosed expert testimony.

Allowing vague and undisclosed expert testimony violates Bryan's Federal and State Constitutional rights to due process, a fair trial, effective assistance of counsel, and confrontation of witnesses. This motion is based on the 5th, 6th and 14th Amendments to the United States Constitution, Article 1 Section 13 of the Idaho Constitution, Idaho Criminal Rule 16 and Idaho Rules of Evidence 102, 104, 701, 702, and 703.

The Due Process Clause requires that criminal prosecutions "comport with prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479, 485 (1984). The requested exclusions are made to "secure fairness in administration…to the end the truth may be ascertained and proceedings justly determined." See *I.R.E. 102*. These matters are ripe for consideration by the Court pursuant to I.R.E. 104 based on the existence of issues that involve preliminary questions of admissibility and because the determination of these issues now fundamentally impacts the defense's ability to prepare a comprehensive defense and focus on evidence and experts that will actually be at issue in the limited time frame prior to trial.

Mr. Kohberger hereby incorporates all arguments and authorities contained in his accompanying Motion to Preclude the Death Penalty and Adopt Other Necessary Procedures Due to the State's Numerous Disclosure Violations.

I. Mr. Kohberger requests exclusion and/or limitation of the following expert testimony:

1. S-1 Jennie Ayers – Forensic Scientist: testimony must be limited to only her work depicted in Idaho State Police Forensic Laboratory report 25 and her checklist of testing in Mr. Kohberger's apartment and office. She has not authored any Laboratory reports expressing opinion. Any other testimony is outside of Idaho Criminal Rule 16; Idaho Rules of Evidence; the Court's scheduling order and violates Mr. Kohberger's Federal and State Constitutional Rights of a fair trial, confrontation, and due process.

2. S-2 FBI Special Agent Nicholas Ballance – testimony must be prohibited as no report containing findings or opinions has been produced. The only disclosures are two PowerPoint presentations; one is noted as a draft. The PowerPoint depicts information derived from cell tower data, call detail records, drive test data and interpretation of the same. It is abundantly clear that in creating this PowerPoint, Special Agent Ballance used an unknown methodology to analyze and visualize certain data contained within the Defendant's Call Detail Records while omitting and/or ignoring other relevant data. It is impossible to determine why certain data was included in the PowerPoint while other data was omitted/ignored as Special Agent Ballance has produced no report documenting his actual analysis. The omitted/ignored data referenced above is exculpatory evidence in Mr. Kohberger's defense. The Call Detail Records, in full, provide partial alibi corroboration. As such, the complete lack of disclosure as to any opinion and/or report addressing this issue from Agent Ballance makes it impossible to anticipate what he may testify to as an expert on this matter. In its Expert Rebuttal disclosures the State provided a summary of Special Agent Ballance's proposed testimony. Portions of the summary are in direct conflict with his previous PowerPoint disclosures, further complicating Mr. Kohberger's "guesses" at what his testimony may be. Mr. Kohberger's expert, Sy Ray, has conducted a detailed analysis of Special Agent Ballance's PowerPoint and found severely flawed findings that are well outside of established and known best practices in the field. The PowerPoint is vague and makes it impossible to determine what Special Agent Ballance is claiming. Thus, the additional summary does not remedy the lack of disclosure leaving Mr. Kohberger an inability to prepare and meet the Constitutional protection of confrontation. Testimony must be prohibited pursuant to Idaho Criminal Rule 16; Idaho

Rules of Evidence; the Court's scheduling order and Mr. Kohberger's Federal and State Constitutional Rights of a fair trial, confrontation, and due process.

3. S-3 and S-4 Mr. and Mrs. Barnhart – testimony must exclude everything other than specifically disclosed, including purported "habit" evidence. The State has not produced a report specifying what "habits" are referred to. No expert opinion has been disclosed. Mr. Kohberger cannot prepare to confront purported evidence against him that is undisclosed. Testimony must be prohibited pursuant to Idaho Criminal Rule 16; Idaho Rules of Evidence; the Court's scheduling order and Mr. Kohberger's Federal and State Constitutional Rights of a fair trial, confrontation, and due process.

4. S-5 Mr. Cox – Amazon – testimony must be excluded because no opinion, or full analysis of the data has been provided. It appears Mr. Cox has credentials to gather data at Amazon, but nothing disclosed indicates he has the expertise to form an opinion on data and if he does have an opinion, based on analysis, neither the analysis or opinion has been disclosed. The full amount of raw data received from Amazon has never been disclosed. Only narrow dates with some purchases have been disclosed, despite warrants seeking very broad materials, over the span of a year, and according to warrant returns, produced. Excel spreadsheets, apparently relied on by the State, have "redacted" purchases without explanation. Contexts for purchases at least six months prior to what has been provided are critical for drawing opinions. There is no full disclosure or analysis of clickstream history that spans the scope of the multiple warrants and subpoenas. There is no full Amazon advertising history, AI-Driven recommendations, or cookies disclosed or analyzed. The identification of the device(s) used is not disclosed or analyzed, no cart or Wishlist data is disclosed or analyzed. No omnichannel tracking data or platforms are disclosed and

analyzed for a household where multiple members used the same Amazon account. The search warrants request account-wide data, including linked accounts and device identifiers for a year span. That has not been produced, analyzed or explained as an expert opinion. Mr. Kohberger cannot prepare to confront purported evidence against him that is undisclosed, and lacks context. The State has produced a select portion of a whole record; the State has cherry-picked information, He cannot determine if the State is asserting a direct search or review of items algorithmically suggested through Amazon's ad system. Testimony must be prohibited pursuant to Idaho Criminal Rule 16; Idaho Rules of Evidence; the Court's scheduling order and Mr. Kohberger's Federal and State Constitutional Rights of a fair trial, confrontation, and due process. The subject matter of this testimony is challenged separately in Motion in Limine #15.

5. S-7 Michael Douglass – any opinion testimony must be excluded. All arguments set forth in Shane Cox in paragraph 4 above, are incorporated for Michael Douglass as it relates to any testimony about Amazon and Amazon Clicks. The State intends to use Agent Douglas as an Amazon expert without any explanation, other than what a cherry picked group of records might show. The State has produced some records and reports relating to documents collected by this witness. Not all raw data has been disclosed; no explanation of underlying raw data or how it was analyzed has been disclosed. The State has not produced a summary of an opinion about the purported meaning of such documents. Opinion testimony must be prohibited pursuant to Idaho Criminal Rule 16; Idaho Rules of Evidence; the Court's scheduling order and Mr. Kohberger's Federal and State Constitutional Rights of a fair trial, confrontation, and due process.

6. S-15 - S-25 various Idaho State Laboratory expert witnesses are anticipated in trial. To the extent their opinions are limited to the reports authored by them and based on their own expert evaluation is not the subject of this Motion in Limine. This motion seeks an order preventing testimony outside of their reports. Testimony through any of these witnesses, other than their own opinions, stated in Idaho State Police Forensic Laboratory Reports, must be prohibited pursuant to Idaho Criminal Rule 16; Idaho Rules of Evidence; the Court's scheduling order and Mr. Kohberger's Federal and State Constitutional Rights of a fair trial, confrontation, and due process.

7. S-21 Rylene Nowlin (S-21) has been disclosed. Challenge to her proposed testimony is covered in a separate Motion in Limine # 6.

8. S-22 Eric Seat – The expert opinion of this DNA technician provides an explanation of possible testimony regarding a methodology for DNA testing (Y-STR) for which the defense has received no discovery or indication that the method has been used in this case. There is no opinion disclosed other than "because of the large volume of discovery, the State directs the defense to summary reports of the expert's ultimate conclusions, which can be found in lab report 3". Lab Report 3 bates 5721-5731 is DNA data of an alternate suspect, but no ultimate opinion or result is specified.[1] Testimony through this witness, other than that relating to an alternate perpetrator, must be prohibited pursuant to Idaho Criminal Rule 16; Idaho Rules of Evidence; the Court's scheduling order and Mr. Kohberger's Federal and State Constitutional Rights of a fair trial, confrontation, and due process.

[1] Motion in Limine #2 Exhibit 1 ISP Lab Report 3

9. S-10, S-13, and S-14 Mowery, Tanzola, and Uhrig – The State has provided no disclosure of any expert opinions related to 67 electronic devices and third-party data collected during the investigation. The State has failed to identify what portions of the electronic device data, digital data and/or third party (search warrant return) data will be presented. The State has failed to disclose any expert opinion about what any analysis of the devices and data depict. The State has disclosed, in discovery, a new report stating further examination is taking place.[2] That disclosure came well after the State's discovery deadline. The report does not contain any sort of opinion. Recently, the State submitted rebuttal expert disclosures. Repeatedly the State writes that it cannot provide rebuttal as Mr. Kohberger has not provided information about what his experts may say. The State's disclosure would seem to be the proverbial chicken and egg anecdote except in criminal proceedings the accused has rights under the United States Constitution and the Idaho Constitution. Court proceedings are rule bound and presiding judges pronounce deadlines. As such, the State was required to provide expert opinions to which Mr. Kohberger would rebut. The State's disclosures remain vague. Mr. Kohberger cannot prepare to confront purported evidence that is undisclosed. The electronic evidence in this case is critical and the State is impeding the defense from being able to prepare to confront evidence or use evidence in Mr. Kohberger's Capital trial. Testimony must be prohibited pursuant to Idaho Criminal Rule 16; Idaho Rules of Evidence; the Court's scheduling order and Mr. Kohberger's Federal and State Constitutional Rights of a fair trial, confrontation, and due process.[3]

[2] Motion in Limine #2 Exhibit 2 Police report indicating additional analysis of Mr. Kohberger's computer

[3] A companion motion to Strike the Death Penalty because of the State's repeated failures to produce discovery and expert opinions is filed contemporaneously and should be considered in conjunction with this motion.

10. S-7 Detective Gilbertson - the State did not disclose Detective Gilbertson in their initial disclosures but instead listed him as a "rebuttal witness." The State did not identify any specific expert or opinion that the Detective will rebut. Thus, the court should exclude this testimony as outside the scope of rebuttal and irrelevant. Moreover, the Court should exclude the testimony under 403(b). The relevance of this testimony is minimal, at best, and carries a serious risk of juror confusion. The detective walked alone through a house that he is intimately familiar with in the middle of broad daylight more than one week after the house had been vacated and changed significantly due to a homicide investigation. He simply counted out loud upon entering rooms. This is a far, far cry from what the State alleges occurred. Additionally, Mr. Kohberger attempted to learn more about the experiment through discovery; he sought things such as recordings or photographs of the timed run, or written notes taken and documented during the experiment. Nothing was provided in discovery; the Prosecution stated those items did not exist.[4] Finally, the Court should exclude this testimony because it violates Mr. Kohberger's due process rights. The house has been torn down; the defense cannot now effectively rebut this inflammatory and minimally relevant testimony.
11. Gary Dawson – this expert was disclosed for the first time in the State's rebuttal experts. He is a toxicology expert. Mr. Kohberger did not disclose an expert relating to toxicology. This expert is not a rebuttal expert and should be excluded from trial.
12. David Mittelman – this expert was disclosed as a Rebuttal expert relating to IGG matters. This expert is addressed in a separate motion (See Motion in Limine #12).

II. <u>It is In the Interests of Fairness, Justice, and Judicial Economy to Exclude the Listed Experts.</u>

[4] See MIL #2 Exhibit 3 Discovery request and response. This is Defense 9th Supplemental Discovery Request Item 211 and State's 8th Supplemental Discovery Response, Item 211.

Late-disclosed expert opinions do not allow the defense sufficient opportunity to conduct the follow up investigation necessary and put the defense at a significant disadvantage. The State has turned over numerous generic responses identifying expert names but only vaguely describing the subject matter that they will testify to. The disclosures do not identify the content of the anticipated testimony nor the documents or evidence that the expert relied on to reach that conclusion. "As federal courts applying the analog federal criminal rule have held, a mere list of topics or general subject matter about which an expert witness may testify is not a discovery response that complies with the rule. *State v. Morin*, 158 Idaho 622, 626, 349 P.3d 1213, 1217 (Ct. App. 2015). The disclosure rules are not simply for case management purposes, but fundamental to a defendant's right to a fair trial:

> The rules are designed to "promote fairness and candor," "facilitate fair and expedient pretrial fact gathering," and "prevent surprise at trial." *Edmunds v. Kraner,* 142 Idaho 867, 873–78, 136 P.3d 338, 344–49 (2006) (discussing similar rules applicable to civil cases); *see also* cmt. 1993 Amendment to Federal Rule of Criminal Procedure 16 ("The amendment [requiring the disclosure of expert opinion testimony] is intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination."). These purposes are not accomplished by a generic discovery response of the type presented here.

Morin, 158 Idaho at 626.

Other courts analyzing the analogous federal rules have explained why late disclosures are so prejudicial to the opposing party, even in the civil context, in which constitutional protections are far fewer than those guaranteed to criminal defendants. For example, in *Churchill v. U.S.*, the trial court found that exclusion of several expert witnesses was necessary when one party complied with the court's expert disclosure deadline and one party provided only the names of experts and failed to provide detailed reports or opinions. Case No. 1:09-cv-01846 LJO JLT (E.D. Cal. Feb.

8, 2011). The Court found that "simply reciting the names of the experts does not prevent surprise by the opponent," *id.* at 8, and specifically noted the prejudice that occurs when one party complies with the deadline and the other party does not, as in this case: "[the State's] experts have had the benefit of being in a position to examine and rebut the opinions set forth by Defendant's experts in their initial reports. This is a significant litigation advantage." *Id.* at 9. The party who failed to comply with the deadline set forth several reasons why the defense was not prejudiced, but the Court observed that forcing the innocent party to complete everything necessary on an expedited timeline was inherently prejudicial to their case:

> Even assuming [all of the necessary investigation and preparation] can achieved in six weeks, an ambitious schedule to impose on Defendant as the innocent party, there would be insufficient time for the Court to hear and decide nondispositive motions related to expert discovery before the dispositive motion-filing deadline less than one month later on April 12, 2011. (Doc. 25.) Thus, the cascade of time extensions will affect the deadlines set for dispositive motions, the pre-trial conference scheduled for July 6, 2011, and ultimately the trial which is currently scheduled for August 12, 2011. (Id.)

Id. at 10. The Court then noted the importance of parties complying with the scheduling order in good faith:

> Plaintiff's assumption that six months is sufficient time to revamp the scheduling order in this case to timely proceed to trial is mistaken and shows a fundamental misunderstanding of the purpose of the Court's scheduling orders. The dates were not haphazardly selected or unrelated to the needs of the parties or the Court. Instead, the scheduling order "represent[ed] the best estimate of the court and counsel as to the agenda most suitable to dispose of this case." (Doc. 20 at 6.) As the Ninth Circuit has made clear: "Disruption to the schedule of the court and other parties . . . is not harmless." *Wong v. Regents of University of California*, 410 F.3d 1052, 1062 (9th Cir. 2005). "In these days of heavy caseloads, trial courts . . . routinely set schedules and establish deadlines to foster the efficient treatment and resolution of cases." *Id.* at 1060. "As the torrent of civil and criminal cases unleashed in recent years has threatened to inundate the federal courts, deliverance has been sought in the use of calendar management techniques. Rule 16 is an important component of those techniques." *Johnson v. Mammoth Recreations, Inc*., 975 F.2d

> 604, 611 (9th Cir. 1992). **Thus, "[a] scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril**." *Id.* at 610 (citations and internal quotation marks omitted). "**Parties must understand that they will pay a price for failure to comply strictly with scheduling . . . orders, and that failure to do so may properly support severe sanctions and exclusions of evidence.**" *Wong*, 410 F.3d at 1060.

Id. at 10 (emphasis added). *See also*, *Albert D. Seeno Constr. Co. v. Aspen Ins. UK Ltd.*, No. 17-CV-03765-SI, 2020 WL 6118497, at *4 (N.D. Cal. Oct. 16, 2020) (excluding witness because the report was not provided "until almost three months *after* the deadline passed, depriving [the opposing party] of time it could have used to prepare accordingly and providing [the disclosing party] with a litigation advantage."); *State v. Martinez*, 137 Idaho 804, 807, 53 P.3d 1223, 1226 (Ct. App. 2002) ("In *Taylor v. Illinois*, the United States Supreme Court stated that when "the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause to exclude the witness' testimony.").

The same analysis is applicable here and carries even more force. Mr. Kohberger is a capital defendant who is entitled to his day in court without undue delay by the prosecution. He is entitled to a "heightened standard of reliability" because prosecutors are seeking his execution. Prejudice is magnified in a criminal case when the State has the advantage of the defendant's expert disclosures in drafting their initial expert opinions. The State has the resources of dozens, if not hundreds, of people working on its behalf from various state and federal agencies. It has the advantage of technology that is available only to law enforcement agencies, and not to the defense. It is bringing the full resources of the State of Idaho to bear, alongside assistance from the federal government, while Mr. Kohberger has a defense team consisting of three attorneys, one

investigator, and one mitigation specialist, who must not only review all of the State's evidence, but conduct an independent investigation into both the circumstances of the crime *and* into Mr. Kohberger's entire life history. The preexisting resource disparity must be taken into account when assessing the additional tactical advantage that the State has improperly obtained.

Notably, the State did not seek modification of the scheduling order to allow for a later disclosure deadline, which would have equally applied to the defense and would not have given the prosecution a tactical advantage. *See id.* at 11. It is fundamentally unfair for the State to shirk the Court's order and reap the tactical advantage of being able to review the defense's expert opinions before making their initial disclosures, in addition to the already existing advantage in resources. The Court should exclude the listed expert reports and evidence listed above and preclude the death penalty at trial in order to cure some measure of the prejudice to Mr. Kohberger.

DATED this ___24____ day of February, 2025.

BY: _____
ANNE C. TAYLOR
ANNE TAYLOR LAW, PLLC

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the ___24____ day of February, 2025 addressed to:

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