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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 No. CR01-24-31665 STATE'S MOTION IN LIMINE RE: INVESTIGATIVE GENETIC GENEALOGY

COMES NOW the State of Idaho, by and through the Latah County Prosecuting Attorney, and respectfully moves the Court in limine for an order (1) describing the extent to which the parties can refer at trial to the investigative genetic genealogy ("IGG") used in this case and (2) excluding from the trial any testimony or evidence related to the United States Department of Justice Interim Policy on Forensic Genetic Genealogical DNA Analysis and Searching ("DOJ Policy"), the terms of service of any of the genetic genealogy subscription services, the policy debate on whether law enforcement should use IGG in criminal investigations, and any alleged discovery violations.

The name Bryan Kohberger first appeared on law enforcement's radar in this matter because of IGG, and IGG has been the subject of much litigation in this case. Most recently, the Court found the use of IGG during the investigation did not violate Defendant's Fourth Amendment rights. (*See* Order on Defendant's Motion to Suppress RE: Genetic Information ("Order"), filed 2/19/25.) The remaining question is the extent to which the parties will be allowed to discuss IGG and related information at trial.

The State's view from the outset has been that the IGG information was "nothing more than a tip" and was never intended to "prove or substantiate Defendant's guilt." (Mot. for Protect. Order, p.10, filed 6/16/23.) Instead, the State planned to rely at trial on the evidence developed after the use of IGG, such as the "STR DNA analysis [that] found Defendant's DNA matched the DNA collected from the Ka-Bar knife sheath." *Id.* The State also made clear from the beginning that it would need to reference the IGG information in some manner at trial—even if only as a generic tip—to help the jury understand how the investigation progressed. *See id.* at 13 n.6.

The defense, on the other hand, has been all in on presenting the IGG at trial. It has now disclosed two experts—Leah Larkin and Daniel Hellwig—whose sole focus is information related to the IGG. The disclosure for Ms. Larkin indicates that the defense wants to discuss more than the IGG itself but also present to the jury information one step further removed, including allegations that the FBI's use of IGG in the investigation violated a U.S. Department of Justice policy, the terms of service of certain genetic genealogy databases, and foreign law. The State now seeks an order from this Court describing the extent to which the parties will be allowed to reference IGG at trial and excluding the more tenuous information disclosed by the defense.

A. This Court should enter an order describing the extent to which the parties can refer at trial to the IGG used in this case.

The State should be allowed to present the IGG information—at least as a generic tip—to help the jury understand how the investigation progressed. Evidence must be relevant to be admissible. *See* I.R.E. 402. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." I.R.E. 401. Testimony from an investigator as to how an investigation progressed can be relevant and admissible. *See State v. Hall*, 163 Idaho 744, 773-74, 419 P.3d 1042, 1071-72 (2018).

In *Hall*, a detective testified about how he used DNA to eliminate an individual as a suspect in the investigation. *Id.* at 772, 419 P.3d at 1070. The district court overruled a relevancy objection, and the Idaho Supreme Court affirmed. *Id.* at 772-74, 419 P.3d at 1070-72. The court explained that the testimony was relevant because it "provided the jury with a complete story" in that "[i]t explained why the police no longer considered [the individual] a suspect" and "provided the jury with details about how the investigation progressed." *Id.* at 774, 419 P.3d at 1072. The court also observed that the testimony "was relevant to refute [the defendant's] contention that [the former suspect] was involved in [the victim's] murder." *Id.*

That is not to say, however, that such testimony is always relevant and admissible. *See State v. Boehner*, 114 Idaho 311, 314, 756 P.2d 1075, 1078 (1988). In *Boehner*, an officer testified that a dispatcher had told him that the defendant had said he wanted to kill a cop. *Id.* The district court overruled an objection on the basis that the statement "was offered for the limited purpose of showing what information the officers possess and how this information 'might bear on the subsequent actions of the officers.'" *Id.* The Idaho Supreme Court disagreed, finding that "limited

purpose" was not relevant. *Id.* The court reasoned that "the facts of consequence during the state's case-in-chief were facts bearing on the elements of the offense charged" and "[e]vidence of the motives of [the officers'] actions on the night in question did not prove any element of the offense charged." *Id.* But the court noted "the testimony would have been relevant to rebut a defense challenge to the reasonableness of the officers' conduct after hearing the radio report." *Id.* at 315 n.4, 756 P.2d at 1079 n.4.

Here, the IGG information falls on the *Hall* side of the line. Presenting the fact that law enforcement received a tip directing them toward Defendant is necessary to "provide[] the jury with a complete story" by explaining why law enforcement considered Defendant a suspect. *Hall*, 163 Idaho at 774, 419 P.3d at 1072. And, unlike the challenged testimony in *Boehner*, the IGG information is "relevant to rebut a defense challenge to the reasonableness of the officers' conduct." 114 Idaho at 315 n.4, 756 P.2d at 1079 n.4. Specifically, the defense has signaled its plan to present to the jury the theory that law enforcement rushed to judgment when it focused on Defendant as the suspect. (*See, e.g.*, Mem. in Support of Mot. to Suppress RE: Genetic Information, pp.3-6, filed 11/14/25 (asserting law enforcement had a different "main suspect" prior to the IGG as well as two other "unknown male profiles . . . found in and around the residence"); Defendant's Supplemental Response to Request for Discovery Regarding Expert Witnesses, Ex. D1-B (Report of Ruth Ballard), p.19, filed 1/23/25 (including on the list of items that weigh in favor of Defendant that two other unknown male profiles were found on a handrail and on a glove but "the police never investigated the lead[s] further").) The IGG information is "relevant to refute" that theory. *Hall*, 163 Idaho at 744, 419 P.3d at 1072. Thus, the State should be permitted to present the IGG information—at least as a generic tip.

B. This Court should exclude from trial alleged violations of the DOJ Policy, terms of service, and foreign law; policy debates about privacy; and allegations of discovery violations.

No matter how the Court rules on the extent to which the parties can discuss at trial the IGG conducted in this case, the Court should exclude as irrelevant and prejudicial several categories of information the defense has indicated they plan on raising at trial. The Idaho Rules of Evidence require that evidence be relevant to be admissible at trial. *See* I.R.E. 402. "Evidence is relevant if it is probative, having 'any tendency to make a fact more or less probable' and material, being 'of consequence in determining the action.'" *State v. Ogden*, 171 Idaho 843, 857, 526 P.3d 1013, 1027 (2023) (quoting I.R.E. 401). "[W]hether an issue is relevant requires understanding those theories 'concerning the crime charged,' the elements of that crime, and the ultimate issue that the jury is asked to determine." *Id.* (quoting *State v. Garcia*, 166 Idaho 661, 671 n.3, 462 P.3d 1125, 1135 n.3 (2020)). "Even relevant evidence may be excluded by the district court if 'its probative value is substantially outweighed by a danger of … unfair prejudice." *State v. Garcia*, 166 Idaho 661, 670, 462 P.3d 1125, 1134 (2020) (quoting I.R.E. 403). The following categories of evidence should be excluded as irrelevant and inadmissible under Rule 403:

First, this Court should exclude testimony or evidence that the FBI's use of IGG in this case violated the DOJ Policy, the terms of service of certain genetic genealogy subscription services, or any foreign law. (*See, e.g.*, Larkin Rep.[1], pp.4-6, 9-11 (opining the FBI violated the DOJ Policy and the terms of service of certain genetic genealogy databases); Larkin Rep., p.6 (stating one of the databases is an Israeli company and opining that database users "may be protected by European privacy laws").) None of these allegations, even if true, bear any weight on

[1] Defendant's Supplemental Response to Request for Discovery Regarding Expert Witnesses, Ex. D5-B ("Larkin Rep."), filed 1/23/25.

the issue of Defendant's guilt. Tellingly, throughout all the IGG litigation in this case, the defense has failed to articulate any theory by which the alleged violations of the terms of service, DOJ policy, or any foreign law could have any effect whatever on the reliability of the IGG process. Instead, the defense pieces those alleged violations together to conclude "[t]he FBI would not have identified Mr. Kohberger so quickly had they followed protocol." (Larkin Rep., p.12.) But the *speed* with which law enforcement identified Defendant has no bearing whatever on whether Defendant committed the charged crimes.

This evidence is also inadmissible under Rule 403 of the Idaho Rules of Evidence. The presentation of this evidence could unfairly prejudice the State's case if one or more jurors decide to give unrelated evidence less weight because they believe the FBI violated the DOJ Policy, the terms of service, or foreign law—even though those alleged violations could have no effect on Defendant's guilt. Moreover, allowing the defense to present this evidence would turn the criminal trial into something it is not. As this Court observed, violations of the databases' user policies "may give rise to a civil action between the FBI and the particular database or perhaps the individuals whose DNA profiles were used." (Order, p.27.) But that action would be between two *other* parties in an entirely *different* case. Litigating that case during this trial would risk "confusing the issues, misleading the jury, undue delay, [and] wasting time." I.R.E. 403.

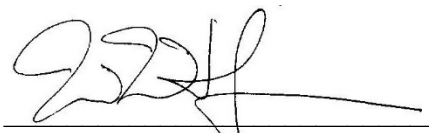
Second, this Court should exclude any evidence or argument on the policy debate of whether law enforcement should use IGG in criminal investigations. (*See, e.g.*, Larkin Rep., pp.3-4 (claiming DNA used for IGG can reveal "intensely private information" like "biomedical details" and "genetic risks such as addiction, Alzheimer's, autism, bipolar disorder, cancer, cystic fibrosis, heart disease, schizophrenia, and many more"). Whether, as a matter of policy, law enforcement should use IGG in criminal investigations has nothing whatever to do with the issue of guilt in this

case. This Court has already resolved the privacy issues as they relate to the Fourth Amendment. Any residual privacy concerns fall within "the purview of the legislature—not the courts"—and certainly not juries in criminal trials. (Order, p.28 n.25.) If the defense is allowed to argue privacy policy to the jury, there is a significant risk that a juror will make their decision in the case based on their subjective view on privacy as opposed to their view of the evidence with respect to Defendant's guilt. *See* I.R.E. 403.

Third, this Court should exclude any evidence or allegations related to the discovery process in this case. (*See, e.g.*, Larkin Rep., pp.7-8 (lamenting that "discovery has been an extremely involved and drawn-out process" and opining that the protective order hamstrung the defense).) Whether the defense received everything the defense believes it was entitled to during discovery has nothing to do with Defendant's guilt. And allowing the defense to argue to the jury that the State should have produced more in discovery significantly risks unfairly prejudicing the State by improperly (and inaccurately) suggesting the State has hidden information to which Defendant is legally entitled.

The State therefore respectfully submits that this Court should enter an order describing the extent to which the parties can discuss IGG at trial and excluding argument or evidence related to the DOJ Policy, terms of service, foreign law, policy debates about privacy, and allegations of alleged discovery violations under Rules 401, 402, and 403 of the Idaho Rules of Evidence.

RESPECTFULLY SUBMITTED this 24th day of February 2025.



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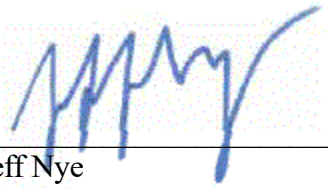

Jeff Nye
Special Assistant Attorney General

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the STATE'S MOTION IN LIMINE RE: INVESTIGATIVE GENETIC GENEALOGY were served on the following in the manner indicated below:

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

Dated this 24th day of February 2025.