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

STATE OF IDAHO **Plaintiff,** V. **BRYAN C. KOHBERGER,** **Defendant.**	**CASE NUMBER CR01-24-31665** **REPLY TO STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE #9** **RE: EXCLUDING AMAZON CLICK ACTIVITY EVIDENCE AT TRIAL**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and hereby

replies to the State's Response to Defendant's Motion in Limine # 9 Re: Excluding Amazon

Click Activity Evidence at Trial, filed on March 17, 2025 ("State's Response"). This Reply is

DEFENDANT'S REPLY TO STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE # 9 RE: EXCLUDING AMAZON CLICK ACTIVITY EVIDENCE AT TRIAL   Page 1

supported with the Declaration of David Howell ("Howell Dec."), as the Court issued an order prohibiting expert testimony in support of this motion, absent a specific need identified by the Court during the hearing (*Order Denying Witness Testimony at April 9, 2025 Hearing, filed 3/18/2025*.) The Court has instructed Mr. Kohberger to have his expert available via video live-stream (*Id.*)

For the first time, on March 14, 2025, the State provided an expert disclosure of opinions of Shane Cox and Federal Agent Michael Douglas regarding their opinions related to Amazon records. (*See* States' Expert Disclosure March 14, 2025, Exhibits S-1 and S-2, under seal). This is an example of abusive discovery tactics by the State. There is a pattern of failing to disclose evidence and expert opinions in compliance with the Court's order (*Motion to Compel I.C.R. 16(b)(7) Material and for Sanctions, filed 12/27/2024*). These prosecutors blow past deadlines and respond after it is brought to the Court's attention and after they have the benefit of having Mr. Kohberger's expert opinions. The State's expert disclosure is three months past its deadline, with trial looming in less than five months (*Redacted Order Governing Further Criminal Proceedings and Notice of Trial Setting, filed 10/9/2024*). Mr. Kohberger seeks to protect his rights to due process, effective assistance of counsel and a fair trial guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Section 13 of the Idaho Constitution.

ARGUMENT

The State seeks to use expert testimony to show that a very narrow set of Amazon records of purchase and click history related to a Ka-Bar knife and sheath "makes it more probable (than it would be without the evidence) that the Ka-bar knife sheath found at the crime scene was Bryan Kohberger's" and that click activity after the homicides "makes it more probable (than it

would be without the evidence) that Kohberger had a reason to search for Ka-Bar knife and sheath after the homicides". (*State's Response, p. 5*) Asserting that lay testimony would be appropriate for these issues, the State claims that Mr. Cox[1] is not needed as an expert because the Amazon records speak for themselves (*State's Response, pp. 2-3*.) It claims the expert disclosure is given in an abundance of caution on its part (*Id.*). In a separate motion, the State seeks self-authentication of the Amazon records (*Sealed State's Motion in Limine Re: Self-Authentication of Records, etc., filed 2/24/2025, p. 3*.) As set forth in the Mr. Howell's Declaration, Amazon data is complex (*Howell Dec., ¶ III(A)*). There is nothing about its production, review, or analysis, algorithm, or machine learning that a lay witness could explain to a jury. Without proper expert explanation, the data itself is misleading. (*Howell Dec., ¶¶ VIII(A)(1)-(4).*) Especially incomplete and cherry picked data, as is the case here.

Not only did the State fail to properly disclose the evidence and expert opinions, but it also advises that it is "awaiting additional information from Amazon that the State understands will clarify that to the extent AI is incorporated into Amazon's system, AI does not create a user's actual inquiry." (*State's Response, p. 3, fn. 1*.) Apparently, more late discovery tied to expert opinion is coming.

Of note, Mr. Kohberger sought to suppress the Amazon search warrants as overbroad and general warrants because of the extensive amount of records requested. (*Motion and Memorandum to Suppress Re: Amazon, filed 11/14/2024*.) This Court denied that motion (*Orders on Defendants' Motions to Suppress Re: AT&T, etc., filed 2/19/2025*.) Now that the State has disclosed expert opinions, it is clearer that the State intends to use incomplete data and mislead the jury (*Howell Dec., ¶¶III(B), IV(B), V(B), VII(A), VIII(A)(1)-(4).*) For example, the

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[1] The State also provided a late disclosure of Federal Agent Michael Douglass and Amazon data but does not reference him in its briefing.

State ignores that the Amazon records reflect a household of users on the Amazon account at issue and a long list of items purchased over a period of several months for a road trip or hiking, to include: a roadside repair kit, a tire inflator, a backpack, and bear spray.

The State argues that the rule of completeness does not apply and therefore it is appropriate that limited information about Amazon be placed in front of the jury (*State's Response, pp. 3-5*). This argument ignores and violates Mr. Kohberger's right to present a complete defense. As Justice Potter Stewart wrote, "any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81, 79 S.Ct. 136, 140, 3 L.Ed.2d 125 (1958) (concurring). Allowing the State to produce limited data, without context and the methodology of how Amazon works is akin to telling the jury that it may assess the product of an investigation, but that it may not analyze the quality of the investigation that produced the product. This illogically removes from the jury potentially relevant information, "[d]etails of the investigatory process potentially affected [the investigator's] credibility and, perhaps more importantly, the weight to be given to evidence produced by his investigation." *United States v. Sager*, 227 F.3d 1138 (9th Cir. 2000).

Mr. Howell explains the critical need for full data and an understanding of what it means to click on Amazon. (*Howell Dec., ¶¶ III(B), IV(B), VII(A), VIII(A)(1-3).*) Click data sounds like a specific user action when in fact Amazon's algorithm, machine learning, and methods of paid advertisements force information to account users which fall under the definition of click data. (*Id., ¶ III(A).*) Features like, "customers also bought," "frequently bought together," omni channel influence, and household accounts with multi users have a significant impact on what is considered click data. (*Id., ¶¶ IV(A), V(A)(1-4), VI(A).*) Additionally, Amazon notifies users of items bought in the past as a reminder, which can be

interpreted as click data. (*Id., ¶ V(A)(3)*.) Logs of this data are retained by Amazon because Amazon bills its advertisers. (*Id., ¶ V(B)*.)

<div align="center">**CONCLUSION**</div>

For the reasons addressed above and in his initial brief, Motion in *Limine* #2 to exclude expert testimony, the details in the expert disclosure of Mr. Howell, Motion for Leave to call him as a witness, and the Declaration of Mr. Howell, Mr. Kohberger respectfully requests this Court grant his Motion in *Limine* to exclude any Amazon and Amazon Click Activity evidence. He renews his request for live testimony by Mr. Howell on April 9 or 10th. Should the Court allow the State to continue in its abuse of deadlines and incomplete expert disclosures by allowing this evidence Mr. Kohberger seeks to confront the Amazon evidence at trial with the testimony of Mr. Howell.

DATED this 24th day of March, 2025.

BY:

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ELISA G. MASSOTH
ELISA G. MASSOTH, PLLC ATTORNEY

<div align="center">**CERTIFICATE OF DELIVERY**</div>

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

Latah County Prosecuting Attorney –via Email: paservice@latahcountyid.gov
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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
	
	DECLARATION OF DAVID HOWELL IN SUPPORT OF DEFENDANT'S MOTION IN LIMINE #9
	
	RE: EXCLUDING AMAZON CLICK ACTIVITY EVIDENCE AT TRIAL

I, David Howell, hereby declare and state the following:

I. Qualifications

A. I am the Founder and Principal of Howell & Associates, a firm specializing in brand protection, e-commerce channel compliance, digital forensics, and online marketplace analytics. I have more than 20 years of experience in the e-commerce ecosystem, with a significant focus on Amazon's marketplace. I have worked with national and international brands in evaluating threats, fraud, and marketplace manipulation involving Amazon and other major platforms.

B. My work includes investigating counterfeit activity, digital behavior, product diversion, unauthorized sales, channel management violations, and identifying algorithmic manipulation across e-commerce platforms. I am regarded in the industry as an expert in online marketplace data analysis and forensic evaluations of digital purchase behavior.

C. Artificial Intelligence (AI), for the purposes of this declaration, refers to systems that simulate human intelligence by making predictions and decisions based on user data. Machine Learning (ML) refers to the subset of AI that enables these systems to improve over time through exposure to new data. Both AI and ML are core components of Amazon's internal recommendation systems, search result algorithms, advertising delivery, and behavioral targeting tools.

D. My firm regularly analyzes Amazon data to uncover fraud, track user behavior, and interpret system-driven changes in product visibility and recommendations. Our work is focused specifically on Amazon because it is the largest online retailer, and our clients face daily challenges with how their products are promoted, represented, or counterfeited through its ecosystem.

II.   **Scope of Review**

A.   I have reviewed the materials produced by the State in this matter, including Amazon clickstream and purchase records, as well as expert declarations and summaries submitted by State-designated experts. I have also reviewed the Motion in Limine (MIL) filings related to Amazon data.

III.   **Clarifying "Click Data"**

A.   The State refers to a portion of the Amazon records as "Click Data." While this terminology may suggest a comprehensive behavioral log, it does not reflect the depth or complexity of how Amazon tracks user behavior. In reality, a click on a product listing is just one visible output of Amazon's AI-driven and advertising-based system. These clicks are influenced by recommendation algorithms, sponsored ads, cross-device history, retargeting behavior, and account personalization—all of which shape what the user is shown before they click.

B.   My expert opinion is that "click data," as presented, is only a surface-level snapshot. It must be understood as part of a broader ecosystem of behavioral inputs and algorithmic outputs. Without the accompanying data—such as recommendation logs, ad exposure, keyword bidding records, and ranking logic—the click data is not forensically complete or contextually sound.

IV.   **Omnichannel Tracking and Multi-Device Activity**

A.   Amazon synchronizes user activity across multiple devices and platforms. Activity from a phone, laptop, smart TV, tablet, or even third-party apps is integrated into a single behavioral profile. This cross-device tracking influences what products are shown, which ads are delivered, and how recommendations are prioritized.

B.   If the data provided does not include metadata or logs from multiple devices used by the user—or distinguish between them—then the resulting dataset is necessarily incomplete.

V.   Sponsored Ads, AI Recommendations, and Clickstream Retargeting

A.   Amazon's search results and product recommendations are driven by:

1.   Sponsored advertising paid for by brands and sellers

2.   "Frequently Bought Together" and "Customers Also Bought" placements

3.   AI-generated product suggestions based on past behavior and similarity clustering

4.   Retargeting campaigns based on prior engagement both on and off Amazon

B.   Amazon's ad platform operates on a pay-per-click (PPC) and commission basis. This structure requires Amazon to retain click and ad attribution data for billing purposes. If advertisers are billed for these interactions, logs of them must exist. The absence of this data in the State's production indicates it is incomplete.

C.   It is not technically possible for Amazon to function as a PPC platform without storing the data necessary to verify ad delivery and performance. Therefore, I assert that Amazon retains more data related to this user's behavior than what has been disclosed.

VI.   Shared Account Usage and Session Attribution

A.   Amazon accounts are often used by multiple individuals in a household. Search, click, and purchase histories are generated by numerous users across multiple devices. Without clear device IDs or session segmentation, it is not possible to attribute activity to a specific person with forensic certainty.

VII.   **Historical Data and Narrowed Timeframe**

A.   The dataset produced appears to begin in March 2022 and end in November 2022. Amazon's AI systems use historical behavior to inform present-day recommendations and search results. Recommendations shown in November may have been shaped by user activity months—or even years—prior. By cutting off earlier data, the system's output becomes decontextualized and misleading.

VIII.   **Conclusion and Assertions Regarding Data Completeness**

A.   Based on Amazon's own public-facing documentation, its advertising platform structure, and my extensive professional experience, it is my expert opinion that:

1.   The dataset produced in this case does not constitute the full extent of data Amazon retains on this user.

2.   Certifying this dataset as "complete" is misleading unless clearly limited to a subset. Amazon collects and retains far more.

3.   No forensic opinion about intent or user behavior can be accurately rendered from this incomplete dataset.

IX.   **Supporting Documentation and Citations**

A.   The following documentation confirms that Amazon collects, tracks, and retains data far beyond basic user search and purchase logs:

1.   Amazon Attribution Overview – Explains how off-platform ads are tracked and linked to Amazon conversions.

https://advertising.amazon.com/en-us/solutions/products/amazon-attribution

2.   Amazon Sponsored Products Overview – Confirms ads appear in search results and rely on click and conversion tracking.

https://advertising.amazon.com/en-us/products/sponsored-products

3.   Amazon Personalization and AI Recommendations – Demonstrates Amazon's use of AI to customize product visibility.

https://www.aboutamazon.com/news/innovation-at-amazon/how-amazon-personalizes-your-shopping-experience

4.   Amazon Retargeting & Cross-Channel Behavior – Details how Amazon serves ads based on user activity across devices and platforms.

https://advertising.amazon.com/en-us/library/guides/retargeting-guide

5.   AWS Machine Learning Blog – Technical breakdown of how Amazon uses ML to rank search results and drive behavior.

https://aws.amazon.com/blogs/machine-learning/

B.   These sources (listed in paragraph IX. A. 1-5 above) validate the statements made in this declaration regarding Amazon's behavioral tracking, ad targeting, recommendation systems, and retention practices.

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

DATED this 23rd day of March 2025.

David Howell
_____
            DAVID HOWELL