

CASE NO. CR 29-22-2805
2023 August 29 1:11 p.m.
CLERK OF DISTRICT COURT
LATAH COUNTY
BY Qm DEPUTY

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,
Plaintiff,

V.

BRYAN C. KOHBERGER
Defendant.

Case No. CR29-22-2805

NOTICE OF INTENT NOT TO
CROSS-EXAMINE DEFENSE
WITNESSES, DISTRICT COURT
DECISION, AND RECORDS TO
EXPLAIN WITNESS CONTACT

At the hearing on the State's motion for a protective order and Defendant's third motion to compel, held on August 18, 2023, the Court allowed the State to reserve cross-examination of two witnesses: Gabriela Vargas, who the defense disclosed—without a CV—the day before the hearing, and Leah Larkin, for whom the defense disclosed a PowerPoint presentation for the first time during her direct examination. The State has determined that it need not cross-examine either of these witnesses.

In addition, the State mentioned during its argument at the hearing that Judge Whitney in Canyon County ruled on a similar issue one week prior to the hearing and that

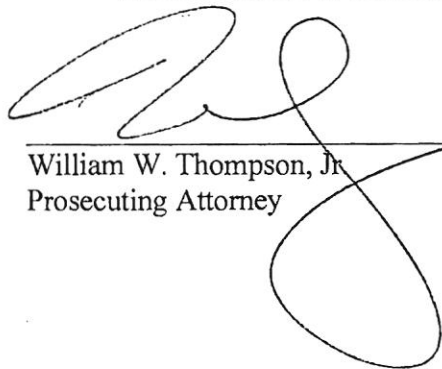
NOTICE OF INTENT NOT TO CROSS-EXAMINE DEFENSE WITNESSES, DISTRICT COURT
DECISION, AND RECORDS TO EXPLAIN WITNESS CONTACT

the State would provide the written ruling once available. The transcript of that hearing is now available, and the relevant portion of the transcript is attached as Exhibit A.

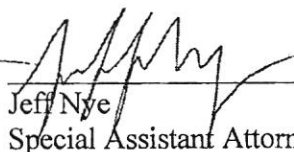
Finally, at the hearing on August 23, 2023, defense counsel suggested in open court that the State had improperly contacted Ms. Vargas. The State has attached under seal as Exhibit B the reports and other records that explain the contact.

The State would ask this Court to grant the requested protective order or permit the State to present the information it seeks to protect to the Court in an in-camera hearing.

RESPECTFULLY SUBMITTED this 29th day of August, 2023.



William W. Thompson, Jr.
Prosecuting Attorney



Jeff Nye
Special Assistant Attorney General

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the NOTICE OF INTENT NOT TO CROSS-EXAMINE DEFENSE WITNESSES, DISTRICT COURT DECISION, AND RECORDS TO EXPLAIN WITNESS CONTACT was served on the following in the manner indicated below:

Anne Taylor
Attorney at Law
PO Box 9000
Coeur D Alene, ID 83816-9000

- Mailed
- E-filed & Served / E-mailed
- Faxed
- Hand Delivered

Dated this 29th day of August, 2023.



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

STATE OF IDAHO,)	Case No. CR14-20-07840
)	
Plaintiff,)	
)	
vs.)	Motion Hearing
)	
DAVID ALLEN DALRYMPLE,)	
)	
Defendant.)	
_____)	

TRANSCRIPT OF PROCEEDINGS

Held on August 11, 2023,
before the Honorable Thomas W. Whitney
District Court Judge

TRANSCRIPTION BY:

Kimberly R. Hofkins, RPR, CSR #703
Canyon County Courthouse
1115 Albany Street
Caldwell, Idaho 83605

kim.hofkins@canyoncounty.id.org

EXHIBIT A

I N D E X
A P P E A R A N C E S

For the State: CANYON COUNTY PROSECUTORS OFFICE
CANYON COUNTY COURTHOUSE
By: **Virginia Bond**
Theodore W. Lagerwall
Sean Jorgensen
1115 Albany
Caldwell, Idaho 83605

For the Defendant: CANYON COUNTY PUBLIC DEFENDERS
OFFICE
CANYON COUNTY ADMINISTRATION BLDG.
By: **Gabriel McCarthy**
111 N. 11th Ave, Suite 120
Caldwell, Idaho 83605

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF CANYON)

I, KIMBERLY R. HOFKINS, RPR, CSR #703, one of the duly appointed qualified and acting official reporters of the Third Judicial District of the State of Idaho, do hereby certify that the foregoing transcript made of the proceedings in the matter of the motion hearing before the Honorable Thomas W. Whitney is complete a transcription as I was able to make.

IN WITNESS WHEREOF, I have hereunto set my hand this 18th day of August 2023.



KIMBERLY R. HOFKINS, RPR, CSR #703

1 purchased Fairfax Identity Lab, and they were involved
2 in examination of one of the hairs recovered from the
3 victim's underwear, and that is why we are making this
4 request. That's the only way we can get this
5 information from them.

6 THE COURT: All right. So that motion is
7 granted. I will sign the order, or rather I will sign
8 the subpoena.

9 All right. The next issue is the state's
10 Motion in Limine for Nondisclosure or for a Protective
11 Order Barring Disclosure. That was filed on July 14,
12 2023.

13 And, Mr. Lagerwall, Mr. Jorgensen, who is
14 going to be addressing that issue?

15 MR. JORGENSEN: I'll be addressing that today,
16 Judge.

17 THE COURT: Okay. Do you wish to be heard on
18 that motion?

19 MR. JORGENSEN: Yes, Your Honor.

20 THE COURT: Go ahead, please.

21 MR. JORGENSEN: Thank you, Your Honor. So your
22 Honor, as to the legal argument contained in the
23 state's brief or Memorandum in Support of this Motion
24 in Limine I don't have much to add. So what I would
25 like to do is give the court for the record a general

1 overview of specifically what we're asking not be
2 disclosed and why. And then if the court has any
3 questions for me as to the nature of this investigative
4 genetic genealogy or to our legal argument, I will
5 defer to the court.

6 But the overarching purpose of this motion,
7 Judge, is to ensure that the state is fully transparent
8 both with the court and with the defense regarding the
9 investigation of the case and what evidence the state
10 will or, in this case, will not be introducing at
11 trial. Because as we know we will not be introducing
12 any of this evidence at trial, that is why we believe
13 it is not discoverable and is immaterial to the
14 defense's preparation.

15 That being said it is not the state's
16 prerogative to decide and dictate what is and is not
17 discoverable, and that is why we brought this motion
18 before the court.

19 With respect to what is investigative
20 genealogy, investigative genetic genealogy -- I would
21 just also note for the record that Section 3 in the
22 factual and procedural background of our memorandum is
23 really more an offer of proof, or rather the state's
24 recitation of the facts as we understand them.

25 Sections 1 and 2 really just detail the

1 history of the case. I don't think there's any dispute
2 as to that background. But as to Section 3 I just want
3 to clarify we are not asking the court to make findings
4 of fact. We are offering to the court our
5 understanding of this investigative practice.

6 So with that, what is investigative genetic
7 genealogy. I would begin by noting I am not a
8 scientist. This information that we are proffering to
9 the court is really a broad overarching layman's
10 perspective and understanding of what this DNA profile
11 is and what was done with it with respect to the
12 genealogy part of the investigation.

13 So I begin first by noting the difference
14 between STR and SNP, or SNP, in the context of DNA
15 science.

16 Now, STR stands for short tandem repeat.
17 When we think of DNA evidence just colloquially,
18 culturally, that is generally what we're talking about
19 is this short tandem repeat profile that is obtained
20 from a sample of DNA at a crime scene and is then
21 screened through the CODIS database.

22 So what a short tandem repeat is is this is
23 a technique that has been -- again, according to my
24 understanding -- has been developed by DNA scientists
25 over the course of decades. And the purpose of it is

1 basically to identify the portions of the genome where
2 we see the greatest variability.

3 So human beings, just as a species, share
4 approximately 99.9 percent of their DNA. So STR is a
5 technique that is designed to get to that .01 percent
6 or approximately 3 million points of data from the DNA.
7 So the genome has approximately 3 billion. STR looks
8 at 3 million specific points. And those are taken from
9 particular loci or locations along the various
10 chromosomes. So every individual has 23 chromosomes.
11 22 are autosomes where all that genetic information is,
12 and then the 23rd is an X or a Y which determines the
13 individual's sex.

14 And so STR looks again at specific points,
15 and it compares those for variability. And from that
16 scientists are able to gain probability estimates to
17 link a sample to a suspect.

18 An SNP or a SNP is a single nucleotide
19 polymorphism. Now, in STR these variability points,
20 they're summarized in letters -- Ts, As, Cs, and Gs.
21 Each one of those T and A or T and T or C and G, that
22 is a single nucleotide polymorphism is a SNP.

23 In cases such as this where the genetic
24 material that was found at the crime scene, or in this
25 case found in the victim's underwear, that particular

1 -- in this case it was a hair. That particular hair
2 may not contain enough genetic information to get an
3 entire STR profile. That was the case in this case.

4 And so when the state sent the hair that was
5 tested by Dr. Green to his lab at UC Santa Cruz what
6 Dr. Green's methodology is is to use his proprietary
7 and developed method to extract essentially every SNP
8 that he can from that hair. Every single single --
9 every single nucleotide polymorphism that he can
10 extract he extracts.

11 Now, again, that doesn't necessarily give
12 him enough for an STR profile, but what it did do in
13 this case is it enabled him to create a SNP profile
14 that can be used for genealogical purposes.

15 Now, what we're talking about with SNP
16 profile for genealogical purposes is ultimately really
17 the same thing that we're now familiar with in our
18 common everyday culture with things such as
19 Ancestry.com.

20 For example, I myself got an Ancestry.com
21 profile for me. I had to spit in a little tube. You
22 send your spit off. They make a SNP profile, and they
23 upload into their database. And that's precisely what
24 investigative genetic genealogy is.

25 So from this SNP profile that Dr. Green

1 developed from his testing of that hair, an
2 investigator uploaded that profile into a genealogical
3 database, just as you or I would with Ancestry or 23
4 and Me. Something along those lines.

5 In this case particularly as we noted in
6 chambers the investigator was affiliated with the FBI.
7 And then the database, whatever database they use, that
8 is a private company, a private third-party. And so
9 the state -- the state does not have any information
10 from that private third-party or from the FBI that we
11 could tender to defense at this time. We're not
12 certain what we could or would get if we were ordered
13 by the court to try.

14 But the point that we want to make is
15 regardless of the court's ruling on that this was
16 simply an investigative technique that was aimed at
17 trying to find a suspect. And, again, it's not going
18 to be used at trial because the whole purpose of it is
19 simply to identify potential suspects.

20 Once a genealogist constructs a family tree
21 and identifies a particular family line that may be
22 connected to again that hair from which the SNP profile
23 was derived, it is incumbent on law enforcement to then
24 find their own independent evidence to investigate
25 those individuals to determine whether there is actual

1 reason to believe any of them may have committed this
2 crime.

3 And just to emphasize, the genealogist is
4 doing the same sort of genealogy that you and I would
5 do with an Ancestry-type profile. There is, of course,
6 the added reality that law enforcement has access to,
7 you know, databases and things that a common citizen
8 would not. But, again, it is purely investigative.
9 It's purely for a lead or a tip to give investigators a
10 potential avenue to investigate the suspect again
11 independently.

12 And so that is why we're not introducing it
13 at trial. It was just an investigation. It is not
14 substantive evidence. And that again is why we believe
15 it is not discoverable.

16 And as I noted at the outset, Your Honor,
17 our brief I think really says all that needs to be said
18 about Rule 16 and our position as to how it relates to
19 this type of investigation. If the court has any
20 questions for me on that, I would be happy to address
21 it or any additional questions as to IGG.

22 THE COURT: So -- take your time.

23 MR. JORGENSEN: So, Your Honor, sorry about that.
24 I will get to your question. Mr. Lagerwall just wanted
25 me to take a brief moment to clarify some of the

1 science that I summarized with respect to STR.

2 So STR -- I think I generally described it
3 correctly, but specifically it is a genotyping of
4 allele length at defined loci along these chromosomes.
5 And then an allele being a variation of a gene at that
6 locus. So that's the variability we're talking about.
7 I just wanted to make sure we're accurate for the
8 record as to again our description of that practice.

9 With that, Your Honor, I would be happy to
10 address your questions.

11 THE COURT: So genealogical databases of some
12 sort were used to narrow down the search by law
13 enforcement in this case. But those databases were not
14 used to specifically identify Mr. Dalrymple as the
15 person the state believes to have committed the crime
16 in this case. Is that accurate?

17 MR. LAGERWALL: That is my understanding, Your
18 Honor. My understanding is that the genealogical work
19 that was done identified the Dalrymple family line, and
20 then it was from -- it was that information that our
21 local law enforcement used to begin looking into
22 various members of the Dalrymple family, ultimately
23 identifying Mr. Dalrymple as their prime suspect.

24 THE COURT: Got it. Okay. All right. I don't
25 have any other questions. And thank you very much,

1 Mr. Jorgensen.

2 MR. JORGENSEN: Thank you, Judge.

3 THE COURT: Mr. McCarthy, are you ready to be
4 heard on this motion, or do you need a break to talk to
5 Mr. Dalrymple?

6 MR. MCCARTHY: I'm ready. And my comments will
7 be brief.

8 THE COURT: Okay. You can go ahead.

9 MR. MCCARTHY: Judge, I'm not sure that I
10 understand the controversy that the state is bringing
11 before the court. As long as the state turns over
12 every document and tangible item in their possession or
13 in state law enforcement's possession, then I believe
14 that they've complied with discovery.

15 If there is -- if there is discoverable
16 information out there that for some reason they want a
17 protective order, then I'd ask that they file a motion
18 for a protective order. And if it's reasonable, we
19 would agreed to not share it with outside parties as
20 long as the defense has complete access to it.

21 I don't -- so I don't have any objection to
22 the court entering an order as long as it preserves the
23 disclosure of the scope of the discovery that I've
24 described, and as long as it does not foreclose the
25 defense in the future filing either a Motion to Compel,

1 one, or, two, a Motion to Exclude evidence if
2 discoverable information has not been provided to the
3 defense.

4 I don't -- I don't have any information that
5 that has occurred today. I don't know what's going to
6 happen in the future. So as long as we get everything
7 discoverable from the state, and as long as we can file
8 motions in the future if we want to, I don't have any
9 objection to whatever order that the court wants to
10 enter.

11 THE COURT: All right. Thank you, Mr. McCarthy.

12 Mr. Jorgensen, anything further?

13 MR. JORGENSEN: Yes, Judge. Just a brief
14 response to Mr. McCarthy's point. First, I forgot to
15 note for the record that with respect to the SNP
16 profile itself, that SNP profile that was uploaded to a
17 database to begin the genealogical research, that will
18 be tendered to defense. At the moment it remains in
19 Dr. Green's possession. There will be additional
20 testing. And once everything is done, the defense will
21 get that. So the defense can essentially recreate a
22 genealogical investigation if they see fit.

23 As to the substance of Mr. McCarthy's
24 comments I would -- I'd simply voice my concern that
25 the state's -- the purpose of the state's motion is

1 essentially to seek an order from the court finding
2 that the IGG information as we've described it that is
3 in the possession of outside third-parties -- the FBI
4 and databases, private companies -- that we are not
5 obligated to disclose that. Again, I don't know what
6 we could reasonably expect to discover if we had to
7 attempt to obtain any of that documentation. And I
8 would note for the record as well that anything we have
9 as far as physical documentation will go to defense,
10 including again that SNP profile.

11 So I don't think it would make sense to
12 leave open the possibility of a Motion to Compel
13 because what we're really asking the court to rule on
14 is that the state is correct in its assessment that we
15 do not have an obligation under Rule 16 to pursue or
16 disclose any additional information that is not in our
17 possession at this time.

18 THE COURT: All right. Thank you, Mr. Jorgensen.

19 Mr. McCarthy, anything else?

20 MR. MCCARTHY: Judge, I'd ask that the court not
21 enter that order because it -- because I don't know
22 what I don't know. The defense doesn't know what it
23 doesn't know in that we haven't filed a Motion to
24 Compel. I trust that the state has disclosed
25 everything or will disclose every document, tangible

1 item, everything subject to Rule 16, but I don't want
2 an order out there that stops the state from taking any
3 affirmative action in the future that -- I mean,
4 frankly, I just don't know what the investigation is.
5 I don't know the people to contact and everything.

6 And also apparently we're talking about an
7 investigation that was partially conducted by the FBI.
8 And I'm not prepared to answer anything about that
9 today. I understand that Mr. Lagerwall and
10 Mr. Jorgensen don't have fiat over the FBI and can't
11 order them around. But I'm not prepared to answer
12 today what obligations the State of Idaho has with
13 respect to information that -- an investigation that
14 was conducted by federal authorities and whether or not
15 you can say today, well, just forget about it; you
16 don't have to look into it any further.

17 So I just think that what we're talking
18 about right now would just be the subject of a Motion
19 to Compel if the defense chose to bring one later. But
20 we haven't done that, and I don't know that we will.
21 And so I don't know that the court needs to enter an
22 order at all.

23 THE COURT: All right. Thank you.

24 Well, let me start with the motion itself.
25 Again, it was filed on July 14th, 2023. And it's

1 entitled State's Motion in Limine for Nondisclosure or
2 in the Alternative Motion for Protective Order Barring
3 Disclosure.

4 And in the first paragraph here's what the
5 state is seeking, quote, "An order finding that the
6 state is not required to disclose any information
7 relating to the use of investigative genetic genealogy,
8 (IGG), as an investigative technique in this case,"
9 unquote.

10 So that's overbroad. I understand what
11 you're arguing, Mr. Jorgensen. I am going to enter an
12 order that you're not obligated -- the state is not
13 obligated to disclose any genealogical database not in
14 its possession.

15 So the databases that were used during the
16 IGG process my understanding is you don't possess them.
17 That's right, isn't it?

18 MR. JORGENSEN: That is correct.

19 THE COURT: Yeah. So I am going to enter an
20 order that you're not required to disclose any
21 genealogical database not in your possession. But I'm
22 not going to enter an order saying you're not required
23 to disclose any information relating to the use of
24 investigative genetic genealogy because the defense
25 needs to -- must get copies of what you actually get,

1 such as the report, even though I understand it's not
2 your intention to introduce it at trial. Still,
3 Mr. Dalrymple and his attorneys have a right to know
4 how it was that things were narrowed down to him
5 because it may be that they can use that information to
6 prepare a defense.

7 So what you do have must be disclosed, but
8 that doesn't of course include the genealogical
9 database because you don't have that.

10 Does that make sense to you, Mr. Jorgensen?

11 MR. JORGENSEN: It does, Your Honor. And I just
12 want to note for the record again for the sake of
13 transparency and candor to defense and the tribunal,
14 there is no report in our possession. And it appears
15 that we would not be able to get one even if we tried.
16 And that's the crux of it. So if -- I certainly
17 understand the court's point. If we were ever to be
18 obtain anything, from the FBI, for example, of course
19 we would disclose it. But the chances of that
20 occurring appear to be zero at this point in time.

21 THE COURT: Got it. Okay. And it's -- you know,
22 granting the motion in part and denying it in part
23 preserves for you, Mr. McCarthy, what you were talking
24 about. And that is that in the future if evidence
25 develops such that the defense has a right to more than

1 it's received, file a motion. I'll address it at this
2 time.

3 But right now the only ruling is that the
4 state doesn't have to -- doesn't have to disclose any
5 genealogical database not in its possession. And
6 Mr. Jorgensen argues that there's no report to disclose
7 either. Well, clearly under Rule 16 if he doesn't have
8 the report, how is he going to disclose it. So, I
9 mean, that's already not covered by the rule. But I do
10 think it's -- the motion is well taken. It's fair to
11 order at this time that the state need not go and try
12 to obtain copies of those databases because that's not
13 something in your possession. And Mr. McCarthy is
14 equally able perhaps through the use of the Rule 17
15 subpoena process to get those databases if he wanted
16 them for his work for Mr. Dalrymple. That seems
17 unlikely, but it may be likely. I'm leaving that door
18 open. That's up to Mr. Dalrymple and his attorneys to
19 determine.

20 So I'll enter a short written order on that.

21 Anything else on that issue, Mr. Jorgensen,
22 before we move on?

23 MR. JORGENSEN: Would you like the state to
24 prepare an order, or will the court?

25 THE COURT: I'll do it.

1 MR. JORGENSEN: Thank you.

2 THE COURT: Thank you for offering.

3 Mr. McCarthy, before we move on to the next
4 issue, anything else on that?

5 MR. MCCARTHY: Judge, I just want the court to
6 clarify for my client that the court's ruling on this
7 issue has nothing to with trial admissibility or
8 inadmissibility of any topic. This is just the state
9 turning over information in its possession to the
10 defense.

11 THE COURT: Correct.

12 MR. MCCARTHY: Because I think my client had some
13 discomfort with whether or not any of this would be
14 appropriate to introduce at trial. But the court's
15 ruling doesn't -- has nothing to do with the
16 admissibility or inadmissibility at trial.

17 THE COURT: That's correct.

18 And, Mr. Dalrymple, your lawyer is going to
19 find out and then share with you what the state did
20 that led it to accuse you. So your lawyer is going to
21 find out what happened there.

22 THE DEFENDANT: Right. I got all that.

23 THE COURT: Okay. All right. And it's just the
24 databases themselves that the state doesn't even
25 possess that the state is saying they want an order

1 that they don't have to get that and turn it over. And
2 that is the law. They don't have to do that under Rule
3 16. They don't have to go get those things not in
4 their possession.

5 So I'll enter a short written order on that.

6 Now, Mr. Lagerwall, was there anything else
7 the state wanted to address today?

8 MR. LAGERWALL: Yes, Your Honor. The state did
9 file a Second Notice of Consumption. This was filed on
10 July 14th. This is dealing with a consumption -- we
11 had this argument with the court prior. It was just
12 notifying the defense, appearing in open court so the
13 defendant understands testing processes and procedures
14 that will be employed. We specifically identified that
15 this is dealing with additional hairs -- these are
16 beyond the hairs that we've already talked about with
17 the court. And we've gotten an agreement that the
18 evidence could be consumed. This was dealing with
19 Q29Q1. There was two hairs. We dealt with Q29Q1 one
20 of the hairs. This would be hair number 1 of Q29Q1.
21 There was no order for that prior.

22 There's also Q29Q2. This hair again was
23 found associated with the underwear of our victim,
24 Daralyn Johnson. And then lastly one of the hairs has
25 been identified as Q29. We gave the identifying lab

Under Seal with the Court:

Exhibit B attached to State's Notice of Intent Not to
Cross-Examine Defense Witnesses, District Court Decision, and
Records to Explain Witness Contact