BRYAN F. TAYLOR ISB# 6400
Canyon County Prosecuting Attorney

PETER T. DONOVAN ISB# 11522
KARSON K. VITTO ISB# 11499
Deputy Prosecuting Attorney
Canyon County Courthouse
1115 Albany Street
Caldwell, Idaho 83605
Tel: (208) 454-7391
Fax: (208) 454-7474
Efile: CriminalEfile@canyoncounty.id.gov

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

THE STATE OF IDAHO, Plaintiff, vs. DAVID ALLEN DALRYMPLE, Defendant.	)	Case No. CR14-20-07840 **STATE'S OBJECTION AND BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS**

COMES NOW, THE STATE OF IDAHO, by and through its attorneys, Theodore W. Lagerwall Jr., Virginia Bond, Karson Vitto, and Peter T. Donovan, of the Canyon County Prosecuting Attorney's Office, and hereby OBJECTS to the Defendant's Motion to Suppress. The State objects to the Defendant's Motion for the following reasons.

I. STATEMENT OF FACTS

On February 24, 1982 at approximately 8:00 a.m., nine-year-old Daralyn Johnson, left her home in Nampa, Idaho to walk to her nearby grade school, Lincoln Elementary. Daralyn never made it to school. It was not until later that afternoon that Daralyn's mother discovered Daralyn was missing. Her mother called the school and learned she had been absent from class that day. A frantic search ensued involving Daralyn's family, police, neighborhood groups, and concerned citizens, all to no avail. Three days later, a young boy who was fishing with several family members, discovered Daralyn's body face down in a spring creek that fed into the Snake River in Melba, Idaho. Police responded and recovered Daralyn's body fully clothed, but with her panties and pants exhibiting blood stains in the crotch area.

An autopsy was performed later that day and it was determined that Daralyn had been sexually assaulted both vaginally and anally. Moreover, the forensic pathologist found she had sustained blunt force trauma to her skull and torso. The cause of death was determined to be drowning, with documentation of blunt force trauma. During the autopsy, numerous items of evidence were recovered. Of particular note was collection of the victim's socks and panties. The crime scene investigator recovered hairs and fibers from both items. Of greatest evidentiary value was one hair recovered from Daralyn's socks and hairs recovered from her panties.

In March of 1983, Charles Fain was arrested and charged with the rape and murder of Daralyn Johnson. A key piece of evidence centered on the three pubic hairs recovered from Daralyn's body, two from her panties and one from her sock. Charles Fain was found guilty and sentenced to death in the fall of 1983.

Forensic testing was completed on the pubic hairs in 2001 utilizing mitochondrial DNA testing. This type of testing examines the matrilineal or mother-line ancestry using the DNA

located in the mitochondria, which contains only DNA inherited from one's mother. That testing established all three hairs were related maternally and, more importantly, excluded Charles Fain as the grower of those hairs. The Prosecuting Attorney for Canyon County dismissed all charges against Charles Fain and the murder of Daralyn Johnson once again became an open investigation.

At the time of the DNA testing in 2001, the use of mitochondrial DNA for lead purposes was limited. Mitochondrial DNA is passed through one's maternal line. In other words, the mitochondrial DNA of a mother and her children will be the same. However, even to today, no mitochondrial DNA databases exist such that one could identify a particular familial line using a mitochondrial DNA result. On the other hand, STR DNA analysis, which measures the number of "short tandem repeats" present at approximately 20 regions within one's DNA, does allow for database comparisons in the FBI's CODIS database. However, hair was not initially conducive for obtaining STR DNA results.

From the time Charles Fain was cleared until 2018, the mitochondrial DNA profiles of more than two dozen suspects were manually compared to the profile obtained from the pubic hairs recovered from Daralyn's panties and sock. All potential suspects were excluded and the investigation went cold. In 2018, investigators decided to try a type of DNA analysis that had only recently begun to be used for forensic purposes. This type of analysis, called whole genome sequencing, sequences all available DNA present in a sample for comparison to a suspect.

Using the information gleaned from whole genome sequencing, a DNA scientist can also produce what is called a single nucleotide polymorphism (SNP) file. In recent years, commercial companies have begun processing and developing SNP files for the general public.

A SNP file can provide to a consumer information about one's ancestry as well as health information.

A SNP file contains about 650,000 of the human genome's 3.3 billion nucleotides, which can be used by investigators to identify leads using Investigative Genetic Genealogy ("IGG"). Once a SNP result has been obtained from a laboratory, IGG involves the uploading of the SNP profile from the crime scene evidence into a publicly available, direct-to-consumer genealogical database. Once done, an investigative genealogist is able identify those individuals in the database who share some degree of kinship with the uploaded profile. The genealogist may then evaluate the results from the website and use additional information, such as public databases, marriage records, birth records, public social media posts, newspaper articles, and other conventional investigative techniques, to build a family tree that particularly identifies individuals who may have a relevant relationship to the suspect whose profile was uploaded. From this work, the genealogist can then identify a possible suspect(s). IGG was most famously used in the highly publicized "Golden State Killer" case in California.

Based upon the increasing use of whole genome sequencing and SNP files for forensic purposes, and the concomitant development of IGG, Canyon County investigators asked Dr. Edward Green from the University of California at Santa Cruz Paleogenomics Lab ("UCSC Paleogenomics Lab") to examine one of the hairs recovered from Daralyn Johnson's panties. After conducting whole genome sequencing on the hair, Dr. Green was able to develop a SNP profile. That profile was in turn uploaded to a publicly available genealogical database. An FBI genealogist then used the results from the database to create a family tree. Based upon this work, the genealogist informed Canyon County investigators that they may want to look into the family line of the Dalrymple family.

To further investigate this lead, investigators reviewed available records pertaining to the Dalrymple family, reached out to several of its members, and ultimately obtained a consensual buccal swab from the brother of the Defendant, namely [redacted] (also known as [redacted]), who was excluded as a suspect because he was in the military and outside the State of Idaho at the time of the Johnson homicide. This buccal swab was sent to Dr. Green at the UCSC Paleogenomics Lab for testing. Dr. Green conducted whole genome sequencing of [redacted] DNA and determined that he was a full and complete mitochondrial match to the hair.[1] This meant that [redacted] almost certainly had the same biological mother as the grower of the pubic hair. Ultimately, investigators were able to exclude all members of the Dalrymple family line, with the exception of the Defendant, David Dalrymple, who by default became the primary potential suspect.

Armed with this information, investigators secured a search warrant to obtain buccal swabs from the Defendant. Once secured, the Defendant's buccal swab was sent to the UCSC Paleogenomics Lab for testing in order to compare it to the hair from Daralyn's panties. Dr. Green conducted whole genome sequencing on the Defendant's buccal swab, and then compared it to the whole genome sequence he developed from the hair. His findings established that the data from the hair were more consistent with the defendant's genotype versus the alternative of DNA deriving from an individual unrelated to the defendant.

[1] Just as whole genome sequencing enables a scientist to develop a SNP profile, it also enables the development of a mitochondrial DNA profile.

I. ARGUMENT

A. The Defendant has no reasonable expectation of privacy and, therefore, no standing.

As a threshold matter, "[o]n a suppression motion challenging a warrantless search, the defendant bears the evidentiary burden to show that a search occurred, that there was no warrant, and that the defendant has 'standing' to challenge the search. By standing we mean that the defendant has a reasonable expectation of privacy in the place or thing that was searched." *State v. Porter*, 170 Idaho 391, 397 (Ct. App. 2022) (quoting *State v. Marshall*, 149 Idaho 725, 727 (Ct. App. 2008)). "Standing in the Fourth Amendment context is used as shorthand for the question of whether the defendant *personally* has a reasonable expectation of privacy in the place searched." *State v. Maxim*, 165 Idaho 901, 906 (2019). A reasonable expectation of privacy, and thus standing, is a two-part determination. *Porter*, 170 Idaho at 397 (citing *State v. Pruss*, 145 Idaho 623, 626 (2008)). The first part is a question of fact asking if the person had a subjective expectation of privacy, and the second part is a question of law asking if society is willing to recognize that expectation as reasonable. *Id*. "An expectation of privacy is objectively reasonable when it is legitimate, justifiable, and one that society should both recognize and protect." *Porter*, 170 Idaho at 398 (citing *State v. Fancher*, 145 Idaho 832, 837 (Ct. App. 2008)).

Idaho courts have looked to certain factors when evaluating if there is a reasonable expectation of privacy. *Porter*, 170 Idaho at 398. Those factors are "ownership, possession, control, ability to regulate access to the evidence, historical use of the item seized, and the totality of the surrounding circumstances. *Id*. (citing *State v. Johnson*, 126 Idaho 859, 862 (Ct. App. 1995)). Importantly, society does not recognize a reasonable expectation of privacy in abandoned property, meaning there is no Fourth Amendment privacy interest in abandoned

property. *Porter*, 170 Idaho at 398 (citing *State v. Ibarra*, 164 Idaho 209, 211-12 (Ct. App. 2018)). "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'". *State v. Snapp*, 163 Idaho 460, 463 (Ct. App. 2018) (citing *State v. Ross*, 160 Idaho 757, 759 (Ct. App. 2016); *State v. Melling*, 160 Idaho 209, 211-12 (Ct. App. 2016)). Significantly, disclaiming ownership or possession is abandonment. *Melling*, 160 Idaho at 212.

B. There is no Fourth Amendment protection afforded to information exposed to the public.

Moreover, The United States Supreme Court has long held that there is no Fourth Amendment protection for information knowingly exposed to the public. *Katz v. United States*, 389 U.S. 347, 351 (1967). In line with the holding of *Katz*, it has been further held that "individuals have no expectation of privacy in many aspects of their physical appearance. *Piro v. State*, 146 Idaho 86, 89 (Ct. App. 2008); See, e.g., *United States v. Mara*, 410 U.S. 19, 21-22 (1973) (finding no expectation of privacy in the characteristics of a person's handwriting); *United States v. Holland*, 378 F.Supp. 144, 155 (E.D. Pa. 1974) (holding that a dental examination to determine whether the defendant was missing a tooth did not constitute a search); *State v. Downes*, 57 N.C. App. 102, 291 S.E. 2d 186, 188-89 (1982) (finding that it did not violate the Fourth Amendment to remove arm and head hairs from a defendant because those personal traits are exposed to the public).

More recently, the Supreme Court upheld DNA identification of arrestees as part of a routine booking procedure. *Maryland v. King*, 569 U.S. 435, 465 (2013). Part of the analysis in *King* was that the DNA collection was to be used for identification only and would not reveal other information such as genetic traits. *Id*. at 464. Going even further, "[s]ome 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." *Piro*, 146 Idaho at 92; See *State v. Athan*, 160 Wash. 2d 354, 158 P.3d 27, 34 (Wa. 2007); see also *State v. Hauge*, 103 Hawai'I 38, 79 P.3d 131, 145-46 (2003). The Court in *Piro* stated that "this Court has found no case holding that a reasonable expectation of privacy should be determined by a suspect's desire to keep his or her genetic identity private." 146 Idaho at 92.

C. The Defendant has no reasonable expectation of privacy in the abandoned crime scene evidence.

In this case, evidence was left, or abandoned, at the location where Daralyn Johnson's body was found. That evidence includes hairs that do not belong to Daralyn Johnson. Those hairs were located on Daralyn's underwear and on her socks. Those hairs were subjected to various tests, which resulted in information being generated. That information was then uploaded to the genetic genealogy database used in this case. The resulting investigation led the State to charge the Defendant with the murder and rape of Daralyn. It would seem too plain to pontificate upon the abandoned nature of hair left at the scene of a crime, let alone any expectation of privacy. To claim that a defendant maintains a reasonable expectation of privacy in abandoned biological material left on the dead body of a victim would strain credulity past the point of breaking.

The Defendant certainly has no subjective expectation of privacy in the crime scene hairs. The crime scene hairs are well and truly abandoned, and there can be no expectation of privacy, subjective or otherwise, in abandoned property. The Defendant has effectively disclaimed any connection to the crime scene hair and cannot now attempt to claim any subjective expectation of privacy in the hairs, the information gathered from them, or where that information ultimately led. Even if the Defendant were to assert a subjective expectation, the claim would still fail for

want of an objective expectation that society is willing to accept as reasonable. Even if the hairs were not abandoned, there is no legitimate or justifiable expectation of privacy to be found in evidence left at the scene of a murder and rape.

D. The Defendant has no reasonable expectation of privacy in the DNA database or in the information contained within the DNA database.

In this case, a DNA database was utilized to identify the person who left the hairs on Daralyn's body. The Defendant has no expectation of privacy in the DNA database that was used or in the DNA information that was inside the database. The Defendant neither exhibited a subjective expectation of privacy in the DNA database or its information, nor is any such expectation one society should protect as reasonable. "A legitimate expectation of privacy requires that an individual, by his or her conduct, has exhibited a subjective expectation of privacy in the searched premises or the item seized". *Piro*, 146 Idaho at 89; citing *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Katz*, 389 U.S. at 361(Harlan, J., concurring); *State v. Shearer*, 136 Idaho 217, 222 (Ct. App. 2001). As the Defendant readily cedes in his brief, the Defendant never uploaded or otherwise made his DNA available to any DNA database. It would seem difficult for the Defendant to exhibit a subjective expectation of privacy in a location foreign to him containing information of which he was unaware, and impossible for any such expectation to be objectively reasonable. Moreover, the DNA information inside the database does not belong to the Defendant. It belongs to persons related to the Defendant who voluntarily submitted samples to the DNA database, for the express purpose of identification and connection. The Defendant has no *personal* connection to the database or the contents therein. It follows then that the Defendant also lacks a *personal* expectation of privacy and standing. When looking to the reasonable expectation of privacy factors listed in *Porter*, it becomes clear the

Defendant has no basis to suggest he has standing in this case. The Defendant has no ownership of the website or the DNA of his relatives, no possession of the website or the DNA of his relatives, no control of the website or the DNA of his relatives, no ability to regulate access to the website or the DNA of his relatives, and no historical use of the website or the DNA of his relatives.

Additionally, the information obtained in this case using the DNA database was exclusively used for the identification of the Defendant. This identification involved no more intrusive measures than what the Defendant himself would readily expose to the public on a daily basis. The fact that DNA from the crime scene and DNA from the Defendant's relatives was used for the identification is legally irrelevant. The State did not delve into the genetic makeup of the Defendant to discover or expose any personal, hidden, or private information. The State simply used crime scene DNA and DNA from the Defendant's relatives as a mechanism of identification, a practice the Fourth Amendment certainly allows.

Although this issue is relatively new, it is not entirely novel. For example, recently in the State of Minnesota, a District Judge was asked to rule on a Motion to Suppress very similar to the one currently at issue. The defendant in that case asserted that his rights were violated by the State of Minnesota when a commercial genealogical website was used, without a warrant, to identify him as the potential murderer. That defendant further argued that the subsequent obtaining of his DNA for testing violated his rights.

In essence, the trial court ruled that the use of the website was not a search under the U.S. or Minnesota Constitutions. The trial court further found that the defendant failed to show an expectation of privacy in the general identification information obtained from DNA analysis. The court held both that there was no subjective expectation and that there was no privacy

interest society would recognize as reasonable. Looking to *Maryland v. King*, the court found no privacy interest in the analysis of DNA for identification purposes only. The comparison to this case is clear. The order of the Honorable Martha Holton Dimick denying that Motion is attached hereto as "Exhibit A."

E. Even if a Fourth Amendment violation occurred, the doctrine of attenuation applies to the State's evidence.

The doctrine of attenuation is an exception to the exclusionary rule. Under this doctrine, evidence may be admitted (even evidence acquired as a result of illegal police action) where the link between the action and the acquisition of the evidence is sufficiently attenuated to dissipate the taint of the illegality. *State v. Bainbridge*, 117 Idaho 245, 249 (1990) (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)). The doctrine of attenuation has long been recognized in Idaho. *See id; State v. Page*, 140 Idaho 841 (2004). In *Page*, the Idaho Supreme Court stated that "[t]o determine whether to suppress evidence as 'fruit of the poisonous tree,' a court must decide whether the evidence has been recovered as a result of the exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." 140 Idaho at 846.

A three-factor balancing test is used to determine whether the doctrine of attenuation applies to evidence alleged to be "fruit of the poisonous tree". *Id.* The factors are: (1) the elapsed time between the misconduct and the acquisition of the evidence; (2) the occurrence of intervening circumstances; and (3) the flagrancy and purpose of the improper law enforcement action. *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975) (cited in, e.g., *Page*, 140 Idaho at 846; *State v. Deisz*, 145 Idaho 826, 830-831 (Ct. App. 2008)). The longer the elapsed time between the misconduct and the acquisition of the evidence, the less the first factor factor weighs in favor of exclusion. *See Deisz*, 145 Idaho at 831 (citing *State v. Schrecengost*, 134 Idaho 547, 550 (Ct. App. 2000)). Where

intervening circumstances other than the original law enforcement action significantly influence the course of the investigation and the evidence ultimately obtained, the second factor is more likely to weigh against exclusion. *See Page*, 140 Idaho at 846 (citing *United States v. Green*, 111 F.3d 515, 522 (7th Cir.1997)). The final "flagrancy and purpose" factor is effectively an analysis of whether or not exclusion of the evidence would promote the broader purpose of the exclusionary rule: to deter law enforcement misconduct. *Deisz*, 145 Idaho at 831 (observing that "the rationale of the exclusionary rule is that police officers, knowing that unlawfully discovered evidence will be excluded at a subsequent trial, will avoid illegal conduct to the best of their ability.").

In the present case, the three-factor balancing test is difficult to fully apply because it remains unclear what law enforcement action actually occurred. At the time of this writing, neither the State nor the Defendant possess complete (or even detailed) knowledge of the investigative genealogy technique(s) employed by the FBI using the DNA evidence. *Arguendo*, the State will analyze the attenuation issue under the general factual premise asserted in the Defendant's brief: that the law enforcement action at issue began with Dr. Barbara Rae-Venter's GEDmatch genealogical research using data extracted from evidence found on Daralyn Johnson's body. *See Def.'s Br. in Supp. Mot. to Suppress*, 2-3. Factors 1 and 3 are particularly difficult to apply in this case, but they do not appear to weigh strongly in favor of suppression in any event. Factor 2, on the other hand, plainly and powerfully militates against suppression of the State's evidence.

1. The temporal proximity, although not clearly defined, is likely low.

The first factor of the attenuation balancing test—the temporal proximity of the law enforcement action and the acquisition of the evidence sought to be suppressed—cannot be comprehensively addressed at the time of this writing. As noted above, it is unclear precisely

when, how, and for how long genealogical database research was conducted. However, several known timeline details conclusively demonstrate that the duration at issue here is relatively long compared to the touchstone periods of time described in the available caselaw addressing attenuation. The genetic genealogy research must have been undertaken at some point between 2018 (when Dr. Edward Green developed a DNA profile using the physical evidentiary specimens from the crime scene) and December 2019 (when Det. Mark Taylor interviewed [redacted] after the Dalrymple family was brought to the attention of law enforcement by the genetic genealogical research). Evidence in this vein, so to speak, continued to be obtained by investigators for several years. *See, e.g.,* Defense Exhibit D (an affidavit for a search warrant dated "2020"). A warrant to obtain a DNA sample from the Defendant was granted and executed, and still further evidence was subsequently generated by analysis of that sample.

Consequently, the length of time for consideration under the *Brown v. Illinois* balancing test is several months or years in this case, depending on the individual item of evidence or investigative step in question. A period of this magnitude is vastly longer than those typically addressed in an attenuation analysis; therefore, the first factor of the balancing test likely weighs against suppression here. *See, e.g., Brown*, 422 U.S. 590 (holding that a *Miranda* warning, by itself, does not necessarily purge the taint of an illegal arrest when questioning is undertaken less than two hours after the arrest); *Schrecengost*, 134 Idaho at 549-550 (declining to suppress evidence due to an intervening circumstance but cautioning that a contraband seizure during an ongoing illegal arrest carries high temporal proximity); *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (holding that the taint of an illegal arrest was attenuated by a defendant's release and voluntary decision to return and give a confession several days later).

2. Numerous intervening circumstances are present.

The second factor of the *Brown* attenuation test—the presence or absence of intervening circumstances—weighs very strongly against suppression in this case. Although colloquial use of the word "intervening" generally implies an occurrence that takes place during a sequence of events, for purposes of attenuation an intervening circumstance may instead be a pre-existing condition. *Page*, 140 Idaho at 846-847 (citing *Green*, 111 F.3d at 522-523, holding that the existence of an outstanding warrant was an intervening circumstance that attenuated the taint of an otherwise unlawful seizure.). Numerous intervening circumstances, both prior and subsequent to the genealogical search, are apparent here. These circumstances include: the decision of one or more relatives of the Defendant to upload DNA to a genealogical database; the discovery through conventional investigation of details such as the Defendant's criminal history and his prior residence along Daralyn Johnson's school route; [redacted] voluntary submission of a DNA sample; and the fact that the Defendant's own DNA itself was already subject to collection, analysis, and comparison under Idaho Code Title 19, Chapter 55.

The Supreme Court of the United States has long regarded voluntary submission of information as an intervening circumstance that may attenuate the taint of an unlawful law enforcement action. *See Wong Sun*, 371 U.S. at 491. Idaho courts have likewise recognized that voluntary actions or agreements (even those undertaken before the allegedly unlawful law enforcement action at issue) may constitute intervening circumstances for purposes of attenuation. *See State v. Fenton*, 163 Idaho 318, 321-322 (Ct. App. 2017). The voluntary act in question need not be an act of the defendant; intervening circumstances may also be created by "a third party's discretionary act." *Id.* at 322 (citing *United States v. Ceccolini*, 435 U.S. 268, 279 (1978)). Both the participation of the Defendant's relative(s) in a genetic genealogy database

and the voluntary submission by [redacted] of a DNA sample to law enforcement are plainly intervening circumstances that affected the overall course and outcome of the investigation irrespectively of the Defendant's own decisions or actions.

Similarly, investigation of the Defendant was aided by conventional techniques such as a review of his family's residential history and his own criminal history. Taint from any impermissible database search has therefore been attenuated by additional, causally independent discoveries and realizations. For example, the Defendant resided along the route of Daralyn Johnson's walk to school at or near the time of her disappearance. He has also previously kidnapped and sexually abused another 9-11 year old girl. These inculpatory details about the Defendant were obviously not obtained from a genealogical search (even if that search was part of what brought the Defendant to investigators' attention). As noted above, evidence is not necessarily suppressible simply because an unlawful law enforcement action initiated or occurred during the chain of events that resulted in discovery of the evidence. *See Bainbridge*, 117 Idaho at 249 (1990).

An additional intervening circumstance is inherent in the fact that the Defendant's genetic information is *per se* subject to collection, analysis, and comparison under Idaho Code Title 19, Chapter 55 ("The Idaho DNA Database Act of 1996," hereinafter "the Act"). I.C. §19-5506, establishing the scope of the Act, requires that "[a]ny person . . . who is convicted, or pleads guilty to, any felony crime, the attempt to commit any felony crime or any crime that requires sex offender registration pursuant to sections 18-8304 and 18-8410, Idaho Code, regardless of the form of judgment or withheld judgment, and regardless of the sentence imposed or disposition rendered, shall be required to provide to the Idaho state police a DNA sample . . ." I.C. §19-5505 requires that these samples be stored, compiled, correlated, maintained, and used

for forensic casework, criminal investigation, demonstration of probable cause, statistical analysis, and trial litigation.

The Defendant, having been convicted in 2004 of three felonies (two of which require sex offender registration), was within the purview of the Act when the genetic genealogical research at issue was undertaken. The State does not contend in fact that the sample obtained from the Defendant pursuant to the Act was used to identify him as a suspect in this case. However, the applicability of the Act to the Defendant is nevertheless a major intervening circumstance involving his DNA from a legal perspective because it is analogous in effect to an outstanding warrant or a probationary status permitting warrantless search and seizure. *See Green*, 111 F.3d at 521-523; *Fenton*, 163 Idaho at 321-322; *Page*, 140 Idaho at 846-847. As the Seventh Circuit Court of Appeals remarked in *Green*, "[i]t would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of 'Olly, Olly, Oxen Free.' Because the arrest is lawful, a search incident to the arrest is also lawful." 111 F.3d at 521. Here, it would likewise be illogical to suppress genetic database research that is ultimately realized to inculpate an individual whose genetic information is specifically required by statute to be available for criminal investigative purposes. Overall, the quantity and significance of the intervening circumstances present in this case clearly indicate that the second factor of the *Brown* balancing test should weigh against suppression.

3. The flagrancy and purpose of the law enforcement action in question, although unclear at this time, should not be assumed to be high.

The final factor of the *Brown* balancing test—the flagrancy and purpose of the improper law enforcement action viewed in context with the rationale of the exclusionary rule—cannot

currently be argued to weigh strongly either in favor of or against suppression in this case. This is because the flagrancy and purpose analysis, like the temporal proximity analysis, is frustrated by the parties' current inability to access detailed information describing the law enforcement action at issue. Because the primary purpose of the exclusionary rule is the deterrence of police misconduct, application of the rule "does not serve this deterrent function when the police action, although erroneous, was not undertaken in an effort to benefit the police at the expense of the suspect's protected rights." *Fenton*, 163 Idaho at 322 (quoting *United States v. Fazio*, 914 F.2d 950, 958 (7th Cir.1990)). Without knowing what exactly it was that law enforcement did in the first place, neither the State nor the Defendant can adequately describe how suppression would or would not advance the deterrent function of the exclusionary rule. However, as described above, the Defendant does not appear to possess any reasonable expectation of privacy in the physical evidence from the crime scene or the genetic databases such that the law enforcement action could be characterized as an abuse in the first place, let alone a flagrant and purposeful one. Consequently, whatever the exact nature of the genetic genealogical research, it would be unreasonable to suggest that law enforcement knew or should have known that they were violating the Defendant's rights by engaging in it.

II. CONCLUSION

Because the Defendant had no reasonable expectation of privacy that would require application of the Fourth Amendment to the investigative genetic genealogy and because, even if the Fourth Amendment did apply, any taint in the evidence sought to be used at trial has been attenuated, the State requests that the Court DENY the Defendant's Motion to Suppress.

Respectfully submitted on this 10th day of April, 2024.

PETER T. DONOVAN
Deputy Prosecuting Attorney

KARSON K. VITTO
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on or about April 10, 2024, I caused a true and correct copy of the foregoing instrument to be served upon the attorney for the Defendant by the method indicated below and addressed to the following:

Canyon County Public Defender
111 N. 11th Ave, Suite 120
Caldwell, ID 83605
E-File Address: PDMail@canyoncounty.id.gov

(X) E-Mail

PETER T. DONOVAN
Deputy Prosecuting Attorney

KARSON K. VITTO
Deputy Prosecuting Attorney

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

State of Minnesota,

Court File No. 27-CR-19-3844
Judge Martha Holton Dimick

Plaintiff,

ORDER DENYING MOTION TO SUPPRESS

v.

Jerry Arnold Westrom,

Defendant.

The above-entitled matter came on before the Honorable Martha Holton Dimick, Judge of District Court, on written submissions. Plaintiff is represented by Assistant Hennepin County Attorney Michael Radmer, Esq. Defendant is represented by Steven Meshbesher, Esq.

On June 3, 2021, Defendant filed his Memorandum in Support of Motion to Suppress Evidence. On June 25, 2021, the State filed their Memorandum in Opposition to Defendant's Motion to Suppress. On July 9, 2021, Defendant filed their Reply to State's Response to Defendant's Memorandum in Support of Motion to Suppress Evidence. The Court thereafter took this matter under advisement. The Court subsequently requested from both parties a waiver of the typical 30-day timeline for a ruling on the matter, to which both parties consented.

Based on the arguments of the parties and counsel, and all the files, proceedings and records herein, the Court makes the following:

ORDER

1. Defendant's motion to suppress evidence is hereby **DENIED**.

2. The Clerk of Court shall serve a copy of this Order via e-service upon counsel of record, or the parties by U.S. mail if *pro se* at their last known addresses on file with the Court, which shall be good and proper service for all purposes.

BY THE COURT:

Dated: October 4, 2021

Martha A. Holton Dimick
Judge of District Court

MEMORANDUM

FACTS

According to the Complaint, on June 13, 1993, a woman, J.C. (the "Victim"), was found dead in a Minneapolis apartment from multiple stab wounds. A large amount of evidence was gathered from the crime scene. Among the items collected included a bed comforter, a blue towel hanging in the bathroom, a washcloth found on the toilet seat, a red t-shirt found on the toilet seat, and a scraping of a blood stain from the sink. DNA testing was performed on many of the items, revealing the presence of many DNA profiles. A male DNA profile (the "DNA Profile") was developed from a single source sperm cell fraction found on the blue towel in the bathroom. This profile matched DNA found on the comforter, and could not be excluded as a source of DNA present in the DNA mixture found on the washcloth, the t-shirt, and a scraping from the bathroom sink. At the time, the DNA Profile was never matched to a known individual. Despite a full investigation, no one was charged and the case went cold.

In 2018, further genetic analysis was conducted by investigators to create a DNA Single-Nucleotide Polymorphism data file. In January 2019, investigators, with help from a genetic genealogist, submitted this data file to commercial genealogical websites FamilyTreeDNA and MyHeritage under the pseudonym Steve Bell. MyHeritage indicated that the DNA Profile had genetic similarities to that of another user of

the site (the "User"). The genetic and genealogical information obtained from the site indicated that the DNA Profile likely belonged to the User's first cousin once removed. Further investigation narrowed down the source of the DNA Profile to Defendant or his brother, both of whom were the User's first cousin once removed. Defendant was also believed to have lived in the Minneapolis metropolitan area at the time of the homicide and has a history of soliciting prostitutes.

Investigators began surveilling Defendant in January 2019 in order to obtain a sample of his DNA. Defendant was attending a hockey game where he ordered food from a concession stand. Defendant used a napkin to wipe his mouth and discarded the napkin in a trashcan. Investigators obtained the napkin and submitted it for DNA testing. The major male profile contained in the DNA taken from the napkin matched the DNA Profile from the crime scene. Defendant was subsequently taken into custody and a known DNA sample was taken from him. This sample was analyzed and also matched the DNA Profile from the crime scene.

On February 14, 2019, Defendant was charged with one count of Murder in the Second Degree, in violation of Minn. Stat. § 609.19 Subd. 1(1). On June 25, 2020, Defendant was charged, by indictment, with one count of Murder in the First Degree, in violation of Minn. Stat. § 609.185 Subd. (a)(l).

Defendant now argues that an unlawful search occurred when investigators, without a warrant, accessed the genetic information Defendant held in common with the User on MyHeritage. Defendant also argues that the analysis of the DNA found on the discarded napkin was an additional unlawful search. Because of these violations, Defendant argues that all evidence obtained as fruits of these acts should be suppressed.

ANALYSIS

I. The analysis of Defendant's abandoned DNA for identification purposes, and law enforcement's use of the MyHeritage website, were not searches under the U.S. or Minnesota Constitutions.

The U.S. and Minnesota Constitutions protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. These protections are not triggered

unless the individual has a legitimate expectation of privacy in the invaded space. *State v. Perkins*, 588 N.W.2d 491, 492 (Minn. 1999). This analysis is a two-step process: the first step is to determine if the defendant exhibited an actual subjective expectation of privacy in the item searched, and the second is whether the expectation is reasonable. *State v. Gail*, 713 N.W.2d 851, 860 (Minn. 2006). In the first step, the court should focus on the defendant's conduct and whether he sought to preserve something as private. *Id.* The Minnesota Supreme Court has found that a defendant illustrates a subjective expectation of privacy when they attempt to conceal activity or items. *Id.* An expectation of privacy is reasonable when "it is one that society is prepared to recognize as reasonable." *Perkins*, 588 N.W.2d at 493.

Here, Defendant is not challenging the collection of the items that contained the genetic material, or the seizure of the genetic material itself. Rather, Defendant argues that the analysis of the DNA found on the napkin was an unlawful search, as is the matching of his DNA profile to that of the User on MyHeritage. Defendant argues that he has a legitimate expectation of privacy in his genetic material that contains incredibly sensitive, private information, and that an analysis of this material constitutes a search for the purposes of the Fourth Amendment. He also argues that he maintains a similar expectation of privacy in his genetic information contained in the DNA of his relatives, and the access and use of his relative's genetic information violates his own legitimate expectations of privacy. However, Defendant has failed to show that law enforcement used his DNA to uncover any of the sensitive information he claims it contains, and has failed to show that Defendant had an expectation of privacy in the general identification information gleaned from the DNA analysis in this case.

First, it should be noted that the present case is distinguishable from much of the relevant case law available on the matter of DNA analysis and Fourth Amendment rights. Much of the case

law that addresses DNA analysis does so in the context of physical intrusions of the person, either through a blood draw or, more commonly, a buccal swab. These cases quickly conclude that a search has occurred because a person is subject to the physical intrusion of the collection process, which implicates the legitimate expectation of privacy we have in our own bodies. Here, there was no physical intrusion of Defendant. The DNA that is the subject of this motion was naturally deposited on a napkin and subsequently discarded into a public trash can. The privacy concerns relevant to Defendant, and the legal analysis required, are different than those of an individual that has been seized by law enforcement, forced to submit to the physical intrusion of a cheek swab or blood draw, and then subject to DNA analysis. The question before the court is whether the analysis of Defendant's abandoned DNA itself, without any physical seizure or intrusion of Defendant's person, is a search that triggers constitutional protections, and whether the submission of the crime scene DNA Profile to commercially available genealogical websites likewise constitutes a search. As Defendant notes, the answers to these questions are not settled law.

Going back to the two-step analysis, Defendant does not provide any evidence or argument that he exhibited, through his conduct, a subjective expectation of privacy in his genetic material or its subsequent analysis. The US Supreme Court has held that the Fourth Amendment does not provide protection for "what a person knowingly exposes to the public." *Katz v. United States*, 389 U.S. 347, 351, (1967). In today's society, it is common knowledge that genetic information is contained in the cells of our body and that those cells are shed constantly, throughout the day, wherever we go. It is unclear how one would demonstrate an attempt to conceal this constantly shedding material. It is also unclear how one would demonstrate an attempt to prevent this abandoned DNA from being analyzed, surreptitiously, in a faraway lab.

As to the second step, Defendant has failed to show that society recognizes as reasonable a privacy interest in identifying information contained within abandoned DNA.

Defendant references Minnesota's Genetic Privacy Act to illustrate society's expectation of privacy in genetic information. However, this act defines genetic information as "information about an identifiable individual derived from the presence, absence, alteration, or mutation of a gene, or the presence or absence of a specific DNA or RNA marker…" and "medical or biological information collected from an individual about a particular genetic condition that is or might be used to provide medical care to that individual or the individual's family members." Minn. Stat. § 13.386 Subd. 1(a); Minn. Stat. § 13.386 Subd. 1(b). The information subject to protection under this statute includes genetic details beyond simple identification, with an emphasis on genes and sensitive medical information. Similarly, Defendant references HIPPA to demonstrate a privacy interest in genetic information, but the driving purpose of those regulations is the protection of sensitive medical information gathered and stored by healthcare providers and insurers. These statutes may demonstrate a privacy interest in sensitive medical information, but the Court does not find that they demonstrate a privacy interest in information derived for purely identification purposes.

The U.S. Supreme Court has analyzed the privacy implications of DNA analysis used for the purposes of identification in *Maryland v. King*. Although the legal analysis in *King* was in the context of a post-charge buccal swab, the holding is instructive here. The Court held that one of the reasons the DNA analysis used in *King* did not intrude on the defendant's privacy in an unconstitutional way was because it was used for identification purposes and did not reveal genetic traits, predispositions for particular diseases, or other hereditary factors not relevant to identity. *See Maryland v. King*, 569 U.S. 435, 464–65 (2013). The Court further noted that even if the

genetic material could yield this private information, law enforcement did not use it for purposes outside of simple identification. *Id.* at 464. The Court in *King* indicated that the way in which the DNA was analyzed, and the way this analysis was used, was a relevant factor in the Fourth Amendment legal analysis. It indicates that just because DNA analysis can provide protected private information, it does not necessarily follow that all DNA analysis, and their uses, are treated equal in the context of the Fourth Amendment. Similarly, the U.S. Supreme Court also indicates as much in the context of drug tests administered to student athletes in public schools, stating, "it is 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 Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995).

The DNA analysis in this case did not involve a deep dive into the medical predispositions of Defendant. Instead, the analysis provided law enforcement with a genetic dataset that could be used for comparison with other genetic datasets analyzed from DNA samples found in the physical world, or genetic datasets uploaded to electronic databases and websites. This analysis is akin to fingerprinting. A fingerprint is analyzed to reveal unique characteristics. These characteristics are compared to other fingerprint samples to reveal similarities and differences. Society has not evidenced an expectation of privacy in fingerprints, or their analysis, a biological identifier that is deposited on most things we touch. The U.S. Supreme Court has noted, "Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Davis v. Mississippi*, 394 U.S. 721, 727 (1969).

This Court finds no reason to treat the collection and analysis of abandoned genetic material any differently from the collection and analysis of abandoned fingerprints, so long as the

genetic analysis is limited to identifying information and does not reveal information society deems private.

Defendant references multiple cases that deal with the use of technology to surreptitiously gather information about an accused. Defendant argues that his DNA analysis is akin to tapping a public telephone booth, using a device to monitor the heat escaping from a residence, or using a tracking device to log a person's movements. *Katz v. United States*, 389 U.S. 347 (1967); *Kyllo v. United States*, 533 U.S. 27 (2001); *United States v. Jones*, 565 U.S. 400 (2012); *Carpenter v. United States*, 138 S. Ct. 2206 (2018). The information gathered in these cases were the contents of private conversations, data about a person's activities performed within the privacy of their own home, and detailed information of all their comings and goings. As stated previously, although DNA may reveal sensitive personal information, and thereby may implicate constitutional protections, such an analysis and use did not occur here. Law enforcement's analysis simply matched abandoned genetic material of an unknown individual to the abandoned genetic material of a known person. The sanctity of Defendant's home, his person, his private conversations, and any other detailed personal information was not violated.

Defendant provides no authority for the argument that society has recognized, as reasonable, a privacy interest in the gathering of naturally shed and discarded genetic material and its analysis for identification purposes. Therefore, the collection of Defendant's DNA, and its analysis, was not a search that would implicate protections under the Minnesota or U.S. Constitution.

Because of the foregoing, Defendant therefore also does not have a legitimate expectation of privacy in his identifying information contained within the DNA of his family members. If Defendant does not have an expectation of privacy in his own genetic identifying information,

there seems no reason to find that Defendant would somehow have a greater expectation of privacy in the identification information shared with other people.

As this Court has found, the identifying information gleaned from MyHeritage is not information society deems private for purposes of the Fourth Amendment. The function of the website itself illustrates this. MyHeritage charges individuals a fee to analyze their DNA and host the subsequent dataset on their website so that the public can compare their genetic identifying information to find familial matches. The User voluntarily uploaded his DNA profile for the express purpose of being freely compared to millions of other DNA profiles. This shows how little privacy value society places on the identification information contained within an individual's DNA. The fact that Defendant himself did not voluntarily broadcast his shared genetic identifying information though MyHeritage is not particularly relevant because the information at issue does not implicate constitutional protections. Accessing this freely available identification information is not a search for constitutional purposes. 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.

In summary, the Court finds that society has not recognized, as reasonable, an expectation of privacy in identifying information contained within abandoned DNA. As such, the analysis of Defendant's DNA does not run afoul of the protections of the Minnesota or U.S. Constitutions. Similarly, the uploading of the DNA Profile to MyHeritage, and the information gleaned from the comparison of this profile to that of the User, is likewise not a violation.

II. Even if the Court assumes, *arguendo*, that the analysis of Defendant's abandoned DNA for identification purposes, and law enforcement's use of the MyHeritage website, were searches, these searches were reasonable under the U.S. and Minnesota Constitutions.

Even if the Court were to find that the analysis of Defendant's DNA was a search, and that the use of MyHeritage was also a search, Defendant's motion still fails.

The Minnesota Supreme Court has held:

> The Fourth Amendment to the U.S. Constitution states that [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. The language of Article I, Section 10, of the Minnesota Constitution is identical. The touchstone of the Fourth Amendment is reasonableness....

State v. Johnson, 813 N.W.2d 1, 5 (Minn. 2012) (internal quotations and citations omitted). Whether a search is reasonable "requires a court to weigh 'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.'" *King*, 569 U.S. at 448. (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

For many of the same reasons provided above, an analysis of Defendant's DNA for identification purposes involves a very minor intrusion upon an individual's privacy, if any, as does a comparison of this identification information to readily available public databases. Law enforcement collected Defendant's DNA from a homicide crime scene and an abandoned napkin placed in a public trash receptacle. There was no seizure of Defendant's person and no intrusion into his body. There was likewise no intrusion into his home or any of his personal effects. The information gained from the DNA analysis was used to compare DNA samples and to reveal identity matches. If this is an intrusion at all for the purposes of the Fourth Amendment, it is extremely slight.

In comparison, there is a significant and legitimate governmental interest in exonerating the innocent, identifying offenders of past crimes, and bringing closure for victims of unsolved

crimes. *State v. Bartylla*, 755 N.W.2d 8, 18 (Minn. 2008). Given the state of this case and other cold cases, the sort of DNA analysis performed here may be the only method available to law enforcement to solve these crimes. These interests strongly outweigh the Defendant's privacy interest in his identifying information contained in his abandoned DNA. It also strongly outweighs any privacy interest he may have in the genetic information he shares with his family or any interest he may have in having his identifying information compared to public DNA databases for identification purposes.

Courts have found that the suspicionless taking of buccal swabs from convicted or merely charged defendants, and subsequent DNA analysis and submission to databases, are not unreasonable searches. *Maryland v. King*, 569 U.S. 435 (2013); *State v. Bartylla*, 755 N.W.2d 8 (Minn. 2008). Here, although Defendant arguably had greater privacy interests than those in these cases, given his status as an uncharged suspect, he was not subject to, in any way, what is often the hallmark of unreasonable searches or seizers, i.e. physical restraint or intrusion, of either his person or effects. Given the exceedingly small privacy intrusion involved in this case, and the significant and legitimate government interest in solving crimes and exonerating the innocent, especially in cases where DNA is the only remaining lead, the analysis of Defendant's DNA for identification purposes was a reasonable search.

In addition, the Court sees no reason to find the search of MyHeritage unreasonable. Defendant's family member voluntarily shared his genetic identifying information to the world through the website for the express purpose of being matched to other individuals. Although Defendant did not consent to his shared genetic identifying information being broadcast in this way, the privacy concerns involved here are small. Any privacy interests the Defendant claims to

have in this shared identifying information is heavily outweighed by the substantial government interests as laid out above.

In conclusion, the analysis of Defendant's abandoned DNA for identification purposes, and law enforcement's use of the MyHeritage website, are not searches under the Minnesota and U.S. Constitutions. Even if the Court assumes that such acts are searches, they are reasonable searches that do not run afoul of constitutional protections. Therefore, Defendant's Motion to Suppress is denied.