BRYAN F. TAYLOR ISB# 6400
Canyon County Prosecuting Attorney

THEODORE W. LAGERWALL ISB# 7890
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 **MEMORANDUM IN SUPPORT OF STATE'S MOTION IN LIMINE FOR NONDISCLOSURE, OR, IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER BARRING DISCLOSURE**

THE STATE OF IDAHO, by and through its attorney of record, Theodore W. Lagerwall Jr., Sean Jorgensen and Virginia Bond, Deputy Prosecuting Attorneys for Canyon County, hereby submit the following Memorandum in Support of the State's Motion in Limine for Nondisclosure, or, in the Alternative, Motion for Protective Order Barring Disclosure, which motion is filed contemporaneously herewith.

/ / /

/ / /

FACTUAL AND PROCEDURAL BACKGROUND

I. THE MURDER OF DARALYN JOHNSON AND THE CONVICTION OF CHARLES FAIN

On February 24, 1982 at approximately 8:00 a.m., Daralyn Johnson, who was only 9 years old, 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 that involved 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 and 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 pubic hair recovered from Daralyn's socks and two pubic hairs recovered from her panties.

In March of 1983, Charles Fain was arrested and charged with the rape and murder of Daralyn Johnson. The case was largely circumstantial and buttressed by the testimony of two jailhouse informants. Another key piece of evidence centered on the three pubic hairs recovered

from Daralyn's body, two from her panties and one from her sock. An F.B.I. scientist examined the three hairs and compared them to pubic hair samples recovered from Charles Fain. The examiner opined that Charles Fain's pubic hair samples were similar to the pubic hairs recovered from Daralyn's sock and panties. Charles Fain was found guilty and sentenced to death in the fall of 1983.

Subsequent to Charles Fain's conviction, an appeal was filed with the Idaho Supreme Court. The court eventually remanded the case to the district court for sentencing issues and to allow a post-conviction petition to be filed and litigated. Thereafter, the district court ordered the testing of key items of evidence. Eventually, hearings were held in which testimony and evidence was presented. After these proceedings and rulings at the district court level, the case was sent back to the Idaho Supreme Court for further proceedings. The conviction and death sentence was later affirmed by the court.

Further post-conviction claims were filed in the early 1990's at the state district court level and rulings were made as to those claims, which were also eventually appealed to the Idaho Supreme Court. Concurrent to the legal proceedings at the state level, requests for federal court intervention and relief were filed concerning the underlying conviction and sentence of death. The Idaho Supreme Court and the United States District Court issued several orders for the release of physical evidence for various types of forensic testing during Charles Fain's appeals. These orders occurred from the early 1990's up until 2001. The only viable determinative items of evidence as to guilt or innocence were the pubic hairs recovered in the case, which became especially relevant with the creation and advance of forensic DNA testing that occurred between the time of the murder and the pendency of Charles Fain's appeal(s).

/ / /

II. THE EXONERATION OF CHARLES FAIN, THE REINVESTIGATION OF DARALYN JOHNSON'S MURDER, AND THE UTILIZATION OF ALTERNATIVE DNA TESTING TECHNIQUES

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 measuring 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 were not initially conducive for obtaining STR DNA results.

From the time Charles Fain was cleared to up 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 has 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.

From 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 police 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.

III. THE ROLE OF INVESTIGATIVE GENETIC GENEAOLOGY IN IDENTIFYING THE DALRYMPLE FAMILY AND THE ULTIMATE IDENTIFICATION OF THE DEFENDANT IN THIS CASE

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 pubic 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. A 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 were able to obtain 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 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 pubic 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 the pubic hair. His findings established that the data from the hair were more consistent with the defendant's genotype with

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

aggregate odds ratio greater than 1 x 10 to the -100 versus the alternative of DNA deriving from an individual unrelated to the defendant.

On May 1, 2020, the State filed a Criminal Complaint charging the Defendant with one count of Murder, a violation of Idaho Code §18-4001 and 18-4003(a), and one count of Rape, a violation of Idaho Code §18-6101. On May 4, 2020, the Honorable Matthew L. Bever signed a Warrant of Arrest ordering the Defendant's arrest for the crimes of Murder and Rape. Further, Judge Bever ordered the Defendant held with no bail on the Warrant. At the time the Warrant issued, Defendant was incarcerated in the Idaho Department of Corrections serving a sentence involving unrelated conduct, where he currently remains during the pendency of this case. Ultimately, Judge Bever entered an order binding Defendant over to this Court, which has now set Defendant's jury trial to commence on May 13, 2024.

ARGUMENT

The State respectfully asks the Court to enter an Order finding that the IGG process and the potential leads it generates are not subject to discovery under Idaho Criminal Rule 16. In the alternative, the State asks the Court to enter a protective order to bar the dissemination of discovery related to the IGG testing and analysis utilized in the investigation of this case. These requests rely upon the application of various provisions of I.C.R. 16 to the nature and limitations of IGG itself.

I. IGG INFORMATION IS NOT SUBJECT TO DISCLOSURE UNDER IDAHO CRIMINAL RULE 16 AND IS NOT EXULPATORY UNDER *BRADY*.

A. Rule 16(a) does not require the disclosure of the IGG information because the IGG information is not exculpatory.

Idaho Criminal Rule 16(a) establishes the foundational parameters of what material and information is discoverable in a criminal prosecution. It provides, in relevant part:

> As soon as practicable after the filing of charges against the accused, the prosecuting attorney must disclose to Defendant or Defendant's counsel any material or information in the prosecuting attorney's possession or control, or that later comes into the prosecuting attorney's possession or control, that *tends to negate the guilt of the accused* as to the offense charged **or** that would tend to reduce the punishment for the offense.

I.C.R. 16(a) (emphases added). As IGG obviously does not influence punishment for the offense, the inquiry required by Rule 16(a) is whether the information obtained in the IGG investigation "tends to negate the guilt" of the Defendant.

At the outset, it is critical to note that IGG is inherently limited by the nature of the public genealogical databases it employs. First, the databases contain only DNA samples and identifying information that consumers have voluntarily uploaded for use in publicly accessible genealogical research. That is to say, the databases not only rely on consumers to voluntarily submit samples and information, but the companies must assume that the individual submitting a sample and information is being truthful. Second, the usefulness of the information obtained from the genealogical databases is limited by the complex nature of life and human behavior. For example, children born out of wedlock, adoptions, and lack of reliable public information to corroborate possible kinship can all call into question whether or an individual in the database is in fact biologically related to the unknown culprit whose DNA is being tested.

Because of these limitations, the IGG process does not definitively identify a culprit; it merely potentially narrows the pool of possible culprits. IGG's inability to precisely identify a particular suspect renders it reliable only as a source for potential leads. Even when IGG produces a viable lead, further investigation and scientific testing are always necessary to confirm whether there is independent evidence sufficient to establish probable cause to identify, arrest, and/or proceed with a criminal prosecution of a potential culprit.

Additionally, the genealogical portion of the IGG process involves the creation of a family tree that traces degrees of kinship between the individuals in the database and the DNA profile obtained from the crime scene. The people identified in the lineage leading to the suspect have some level of kinship, depending upon where they fit within the family line, compared with the potential suspect. The fact that an individual in the database is or may be related to a suspect, by any level of consanguinity, does not in any way suggest that the individual may have been involved in the crime.

In sum, the information gathered through IGG research does not tend to negate the guilt of the Defendant and is therefore not discoverable pursuant to I.C.R. 16(a). Indeed, when IGG is successful at generating an investigative lead, the information gathered is actually *inculpatory*. However, as further explained below, the State will not introduce evidence of the IGG investigation conducted in this case. Therefore, the results of the IGG investigation in this case are not discoverable.

B. Rule 16(b)(4) does not require the disclosure of the IGG information because the IGG information does not satisfy any of the required criteria.

Idaho Criminal Rule 16(b)(4) requires the prosecution to allow the defense to inspect and copy or photograph papers, documents, and photographs, among other items, that are in the custody or control of the prosecution. The rule goes on to establish limitations to this requirement. Specifically, information and documents must be tendered only if they:

> (A) are material to the preparation of the defense,
>
> (B) are intended for use by the prosecutor as evidence at trial, or
>
> (C) were obtained from the Defendant or belong to the Defendant.

I.C.R. 16(b)(4). When applied to the use of IGG in this case, the rule does not require that any

information be tendered because none of the three triggering provisions applies.

/ / /

1. *The IGG process and results are not material to the preparation of the defense.*

The use of IGG provides only base-level information about why the police decided to investigate the Defendant, nothing more. The mechanism of how the police became interested in the Defendant is not material to the preparation of the defense. Stated more thoroughly, the processes of genealogical tracing, the data associated with determining levels of consanguinity, and the identification of people who may have a familial relationship with the suspect, are all irrelevant to the elements of the crime and have no bearing on the evidence that establishes probable cause to arrest a suspect.

Speaking specifically to the facts of this case, the fact that IGG identified individuals that may be related to the grower of the pubic hair from which the relevant DNA sample was extracted has no bearing on the preparation of the defense. That is to say, at the time the IGG investigation was conducted, there was no defendant; there was only an unknown grower of the pubic hair. Now that the Defendant is charged with particular crimes based on independent evidence, the State's burden is to prove the elements of those crimes beyond a reasonable doubt. Whether the individuals identified in the IGG investigation are actually related to the Defendant is immaterial to the State's burden of proof and, thus, to the preparation of the defense.

Furthermore, the use of IGG cannot form the basis for a potential motion to suppress evidence based on constitutional violations. Such potential claims would invariably rest upon the protections of the Fourth Amendment. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures[.]" U.S. Const., Amend. IV. The purpose of the Fourth Amendment's "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v. United States*, 138 S. Ct. 2206, 2213, 201 L.Ed.2d 507 (2018). "To show a violation of the Fourth Amendment's prohibition on unreasonable searches, the Defendant 'must come forward with evidence sufficient to show there was a Fourth Amendment search, [the Defendant] has standing to challenge the search, and the search was illegal.'" *State v. Hoskins,* 165 Idaho 217, 220-21, 443 P.3d 231, 234-35 (2019) (quoting *State v. Holland*, 135 Idaho 159, 162, 15 P.3d 1167, 1170 (2000)).

"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, 454 P.3d 543, 548. Thus, "even if a search is unreasonable, a Defendant must have a privacy interest that was invaded by the search in order to suppress evidence discovered in the search." *State v. Rebo*, 168 Idaho 234, 238, 482 P.3d 569, 573 (2020) (as amended Mar. 23, 2021) (quoting *State v. Mann*, 162 Idaho 36, 41, 394 P.3d 79, 84 (2017)). 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). The Court in *Katz* articulated a two-step analysis to determine whether a person would have a legitimate expectation of privacy: (1) the Defendant must show he had an actual subjective expectation of privacy, and (2) the Defendant must show the expectation was reasonable. *Id*.

Here, the Defendant will never be able to establish standing to bring any viable constitutional claim based on the IGG investigation. First, the Defendant was not a user of the genetic database, and the information obtained from the IGG investigation did not contain any specific information about the Defendant. Therefore, he has no cognizable privacy interest

whatsoever in the results of the IGG investigation, subjective or otherwise. Furthermore, the Defendant does not have a reasonable expectation of privacy in his own genetic material contained in the pubic hair that provided the DNA sample analyzed in the IGG investigation. Specifically, the Defendant exposed his genetic material to the public by leaving his abandoned pubic hairs to be found in/on the victim's clothing. Even if the Defendant could somehow demonstrate a subjective expectation of privacy in his abandoned pubic hairs, society would never recognize a privacy interest in DNA left at a crime scene. In sum, the results of the IGG could not possibly provide a basis for a potential Fourth Amendment claim.

Finally, it bears noting that non-disclosure of the results of the IGG investigation does not prevent the Defendant from pursuing his own IGG investigation. In essence, the IGG investigation employed in this case could be duplicated by anyone. Any member of the public can upload a DNA profile into a publically accessible ancestry database and utilize public records, newspaper stories, social media and the like, to construct a family tree. In fact, the defense has the option to duplicate the genealogical research using a full DNA profile from the Defendant. The quandary for the defense, and at the same time the gist of this motion, is the fact that such efforts would not produce any information that is relevant – let alone material – to the defense.

2. *The State will not introduce evidence of the IGG investigation during the trial.*

At trial, the State will not introduce evidence regarding the IGG investigation conducted in this case. The government will only elicit testimony that the Defendant became a potential suspect and then introduce the evidence that ties the Defendant directly to the crime, namely the SNP analysis comparing the pubic hair to the Defendant's SNP profile. The State will not

introduce the use of IGG, the maternal linkage of the pubic hair with the Defendant's brother, or the contents of the application for a search warrant to obtain a DNA sample from the Defendant. The only caveat is the State reserves the right to introduce evidence about DNA testing of the Defendant's brother if the defense raises the issue. This approach to IGG is equivalent to other types of investigative leads, such as DNA associations discovered in the CODIS database, fingerprint associations found in the AFIS database, associations generated by facial recognition technology, and so forth. Like IGG, these types of investigative leads are not introduced at trial.

It is important to emphasize why IGG in particular is not evidence to be introduced at trial. As previously noted, the DNA databases are publically accessible and lack centralized oversight. Moreover, the investigator must rely on information derived from public records, newspapers, and social media, which involves multiple levels of hearsay. If successful, the investigator is able to create a family tree. However, the inherent limitations on determining whether someone is truly a biological relative all militate against introduction of IGG as evidence at trial. That is to say, a successful IGG investigation essentially generates no more than a tip for law enforcement.

With this in mind, the Department of Justice has promulgated guidelines regarding law enforcement's use of genetic genealogy databases for investigative purposes. On September 24, 2019, the Department issued its Interim Policy on Forensic Genetic Genealogical DNA Analysis and Searching ("DOJ Interim Policy").[2] The guidelines, which became effective on November 1, 2019, hold that genealogy websites can only serve as an investigative lead after law enforcement has exhausted all other investigative methods. Furthermore, suspects may not

[2] https://justice.gov/olp/page/file//1204386/download

be arrested based solely on a genetic association generated by IGG. The State recognizes the limitations of IGG and will abide by the DOJ Interim Policy not to use genetic genealogy as evidence at trial.

3. *The IGG information was not derived directly from the Defendant and does not belong to him.*

The genealogical tracing involved in IGG does not utilize any information derived directly from the Defendant or legally belonging to the Defendant. As discussed above, the IGG investigation in this case was based on crime scene evidence, namely a pubic hair found from the victim's panties. Investigators tested that evidence, developed a DNA SNP profile, uploaded the profile to a public database, obtained results, and then utilized forensic genealogy to create a family tree of individuals who may be related to the grower of the pubic hair. Throughout this process, investigators never used any material obtained from the Defendant. Likewise, the Defendant cannot claim that the IGG information, in the form of documents and data, came from him or belongs to him.

In sum, I.C.R. 16(b)(4) clearly establishes that the Defendant is not entitled to any discovery regarding the information and data generated during the IGG investigation. The information will not aid the Defendant in the preparation of his defense, will not be introduced at his trial, and does not involve material that came from or belongs to the Defendant.

C. Rule 16(b)(5) does not require the disclosure of the IGG information because the IGG information is not the result of a scientific test or experiment.

Rule 16 requires the disclosure of results or reports of scientific tests or experiments. But a process, procedure, or investigative technique is not a "scientific test[] or experiment[]" merely because it involves the comparison of information or objects or requires the use of logic

or reason. See State v. Matthews, 108 Idaho 482, 486, 700 P.2d 104, 108 (Ct. App. 1985) (holding an officer's comparison of two keys did not constitute a scientific test or experiment because it was "merely an observation of similarity between two keys"). The only scientific test or experiment conducted with respect to the IGG information was the creation of the SNP profile that Dr. Green created after conducting whole genome sequencing on the hair.

Critically, the rule does not require the State to disclose what law enforcement does with the SNP profile. See I.C.R. 16(b)(5). Law enforcement uploading the SNP profile to a commercial database and using the information received coupled with traditional genealogy and investigative techniques to build an ancestral tree does not constitute a scientific test or experiment.

D. The information obtained during the IGG investigation does not meet the requirements of disclosure under *Brady*.

While I.R.C. 16 establishes the duties and obligations of the discovery process, constitutional requirements dictate those obligations as well. Due process requires all material exculpatory evidence known to the State or in its possession to be disclosed to the Defendant. *Dunlap v. State*, 141 Idaho 50, 64, 106 P.3d 376, 390 (2004) (summarizing *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Grube v. State*, 134 Idaho 24, 27, 995 P.2d 794, 797 (2000)). *Brady* requires the State to tender information that is favorable to the accused, either because it is exculpatory, or because it is impeaching. *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286 (1999). The constitutional duty of disclosure and the requirement to disclose under Rule 16(a) both relate to exculpatory evidence. *State v. Pierce*, 107 Idaho 96, 106, 685 P.2d 837, 847 (Ct. App. 1984).

However, "there is 'no constitutional requirement that the prosecutor make a complete

and detailed accounting to defense of all police investigatory work on a case.'" *State v. Horn*, 101 Idaho 192, 195, 610 P.2d 551, 554 (1980) (quoting *Moore v. Illinois*, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706, 713 (1972)). Further, the "State is not constitutionally compelled to disclose any and all information which may assist said Defendant in preparing for trial[,]" nor does the constitution require the court to facilitate a defendant's preparation by compiling for him all relevant public documents. *Id*.

Under the *Brady* analysis, the IGG investigation in this case is definitively not exculpatory. On the contrary, the IGG analysis would more accurately classified as inculpatory in nature. The information generated by the IGG investigation led the police to look at the Defendant's possible involvement in this crime. Once independent probable cause had been established – after the genealogical information was confirmed by a DNA sample from the Defendant's brother – the police obtained buccal swabs from the Defendant. This enabled the police to request a direct comparison of the pubic hair from the victim's panties to the Defendant. The results established that the Defendant's swab is genetically identical to the grower of the pubic hair. There is not one facet of this process that can conceivably be characterized as exculpatory.

Not only is the IGG information not favorable to the defense because it is in fact inculpatory, but it is also lacks any ability to potentially be used as impeachment. Once again, the State is not seeking to introduce the IGG process or results at trial. There will be no witnesses presented at trial that could plausibly be impeached by the IGG information. Additionally, the IGG results and family tree would only provide names of people that potentially have some degree of kinship with the Defendant. None of these people would properly be considered as potential witnesses.

Finally, the IGG process and results merely provided potential suspects to consider in the investigation. It only explains the "why" behind the police looking at the Defendant. This in and of itself does not dictate the information must be tendered to the defense. As noted above, *Brady* does not impart to the government a duty to provide a "complete and detailed accounting to defense of all police investigatory work on a case." *Horn*, 101 Idaho at 195, 610 P.2d at 554. Indeed, non-disclosure of certain investigative details is a routine aspect of criminal prosecutions. For example, tips from anonymous concerned citizens and confidential informants are not disclosed with any identifying information. The same is true with undisclosed surveillance locations typically used during narcotics investigations. These methods, like IGG, are simply investigative activities that may generate leads that the police may choose whether to act upon or not.

In sum, *Brady* does not require the State to disclose any information generated or obtained by the IGG investigation in this case.

II. GOOD CAUSE EXISTS FOR THE COURT TO ENTER AN ORDER PROTECTING THE IGG INFORMATION PURSUANT TO IDAHO CRIMINAL RULE 16(L).

The mere fact that the IGG information does not fall within the discovery parameters of Rule 16 is good cause enough for this Court to enter an order protecting the IGG information. However, if this Court concludes that some or all of the IGG information is discoverable, good cause exists for the Court to enter a protective order barring discovery, pursuant to Rule 16(l). Specifically, the disclosure of the IGG information risks harm to the IGG investigative technique and the particular individual who are identified during the IGG process. Those individuals, and the databases that make their information available, are effectively informants in a criminal investigation.

The process used to collect IGG information requires gathering information from numerous sources, including the commercial database(s) to which the SNP profile was submitted and, indirectly, from the relatives of Defendant who "hit" on the SNP profile. Pursuant to Rule 16, "[d]isclosure must not be required of an informant's identity unless the informant is to be produced as a witness at a hearing or trial." I.C.R. 16(g)(2). This is consistent with the State's privilege "to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer." I.R.E. 509(a). The State has no intent of presenting the IGG information for which a protective order is sought as evidence at trial, which means none of the IGG "informants" will be produced as witnesses at trial.

As a general matter, as the U.S. Supreme Court has explained, we protect the identity of informants to encourage the flow of "information concerning the commission of crimes" to law enforcement. *McGray v. Illinois*, 386 U.S. 300, 308 (1967). Such communications "are discouraged if the informer's identity is disclosed." *Id*. The Court's words, written long before SNP profiles were used for investigative purposes, apply with particular force to IGG information. Both the commercial databases to which law enforcement submit a suspect's SNP profile and the customers of those commercial databases, who may unknowingly be related to a suspect, would be less likely to make their information available if courts start requiring the disclosure of their information in criminal cases.

CONCLUSION

For these reasons, the State respectfully asks the Court to enter a finding that the results of the IGG investigation conducted in this case are not subject to discovery under Idaho Criminal Rule 16 or *Brady*. In the alternative, the State requests that the Court enter a protective

order to bar the dissemination of discovery related to the IGG investigation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on or about this _____ day of July, 2023, 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

() U.S. Mail, Postage Prepaid
() Placed in Court Basket
() E-Mail
() Via Canyon County File Transfer Site

_____
THEODORE W. LAGERWALL JR.
Deputy Prosecuting Attorney

_____
SEAN JORGENSEN
Deputy Prosecuting Attorney

_____
VIRGINIA BOND
Deputy Prosecuting Attorney