

CASE NO. CR 29-22-2805
2023 June 22 4:36
P.M.
CLERK OF DISTRICT COURT
LATAH COUNTY
BY gcm DEPUTY

Anne C. Taylor, Public Defender
Kootenai County Public Defender
PO Box 9000
Coeur d'Alene, Idaho 83816
Phone: (208) 446-1700; Fax: (208) 446-1701
Bar Number: 5836
iCourt Email: pdfax@kcgov.us

Elisa G. Massoth, PLLC
Attorney at Law
P.O. Box 1003
Payette, ID 83661
208-642-3797

Assigned Attorney:

Anne C. Taylor, Public Defender, Bar Number: 5836
Jay Weston Logsdon, Chief Deputy Litigation, Bar Number: 8759
Elisa G. Massoth, Bar Number: 5647

**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 NUMBER CR29-22-2805

**OBJECTION TO STATE'S MOTION
FOR PROTECTIVE ORDER**

COMES NOW, Bryan C. Kohberger, by and through his attorney, Jay Weston Logsdon, Chief Deputy Litigation, and hereby objects to the State's Motion for Protective Order filed June 16, 2023 on the grounds that the material the State seeks to hide is discoverable and must be provided to Mr. Kohberger.

FACTUAL BACKGROUND

On November 13, 2022, law enforcement, responding to a 911 call found Madison Mogen, Kaylee Goncalves, Xana Kernodle, and Ethan Chapin deceased. Law enforcement later found a Ka-Bar knife sheath placed next to Ms. Mogen on her bed. The sheath was placed button side down and partially under Ms. Mogen and the comforter. On November 20, 2022, the Idaho State Police Lab in Meridian, Idaho located DNA on the button of the sheath and performed STR analysis that led nowhere when ran through CODIS (Combined DNA Index System), other than to show the provider was a male.

By December 17, 2022, lab analysts were aware of two additional males' DNA within the house where the deceased were located, and another unknown male DNA on a glove found outside the residence on November 20, 2022. To this date, the Defense is unaware of what sort of testing, if any, was conducted on these samples other than the STR DNA profiles. Further, these three separate and distinct male DNA profiles were not identified through CODIS leading to the conclusion that the profiles do not belong to Mr. Kohberger.

While this was ongoing, police were investigating many various possible suspects. Many of them provided DNA. At least one had his DNA surreptitiously taken from a discarded cigarette. Many also had their phones taken and downloaded.

One area of the investigation had to do with a white sedan seen on a camera located at 1112 King Road first glimpsed by officers on November 18, 2022. By November 25, 2022, police believed the car to be a white Elantra and asked law enforcement to be on the lookout for one. Precisely how the police came to believe the car was an Elantra is still unknown. A report from an analyst for the FBI dated March 21, 2023 shows the analyst heavily relying on a video of a car heading in the wrong direction and at the wrong time on Ridge Rd.

The State's latest filing admits that somewhere within all of this they engaged in "Investigative Genetic Genealogy" using the DNA taken from the button on the sheath, and now claims that it was due to the use of this technique that it "tip[ed]" local law enforcement to investigate Mr. Kohberger. It remains unclear what the police first relied on in focusing their investigation on Mr. Kohberger.

No matter what came first, the car or the genetic genealogy, the investigation has provided precious little. There is no connection between Mr. Kohberger and the victims. There is no explanation for the total lack of DNA evidence from the victims in Mr. Kohberger's apartment, office, home, or vehicle.

In essence, through the lack of disclosure and their motion to protect the genetic genealogy investigation, the State is hiding its entire case.

ARGUMENT

The State apparently thinks that they need not explain how they came to think that it was Mr. Kohberger's DNA on the sheath. Presumably, the Defense is expected to accept at face value that the sheath had touch DNA just waiting for testing by all the FBI's myriad resources. Additionally, the Defense is to guess whether the State focused its investigation on Mr. Kohberger via a bizarrely complex DNA tree experiment or through its faulty identification of the vehicle involved in this case.

Perhaps unsurprisingly, Mr. Kohberger does not accept that his defense does not need this information. It rather obviously falls within the ambit of Rule 16(b)(4) and (5), a fact the State's briefing makes clear in its kitchen sink approach to their briefing. The State begins their argument claiming Rule 16 has no interest in IGG testing and then ends their argument claiming

that somehow people will stop sharing their genetics if they were to realize the government is watching. Both arguments must fail.

To begin with, the State apparently only wants to prevent Mr. Kohberger from seeing *how* the IGG profile was created and *how many* other people the FBI chose to ignore during their investigation. In essence, the State argues that if the later STR testing is accurate then there is no reason to concern ourselves with how the State came to investigate Mr. Kohberger. State's brief at 9. What the State's argument asks this Court and Mr. Kohberger to assume is that the DNA on the sheath was placed there by Mr. Kohberger, and not someone else during an investigation that spans hundreds of members of law enforcement and apparently at least one lab the State refuses to name.

Perhaps most puzzling is the State's argument that while Rule 16(b)(5) requires them to turn over the results or reports from scientific investigations, it does not require "the State to disclose what law enforcement does with the results or reports." State's brief at 14. First of all, that sounds like an admission that the information as to how the IGG was carried out should be disclosed. Second, what law enforcement does with results or reports is covered by Rule 16(b)(6) (statements of prosecution witnesses) and (8) (police reports). Frankly, the fact that members of the FBI are so concerned about permitting Mr. Kohberger to know what they were up to with what was supposedly his DNA, does not give one the impression that there is "nothing to see here" as the State seems to imply.

Finally, the State's claim that I.C.R. 16(g)(2) applies to this matter is quite bizarre. Presumably, the independent company the government relied on was paid for its work and would stand by it in a court. The State provides no real argument as to why the company needs to be protected. Mr. Kohberger is left to suspect they wish to keep their methods from being

questioned. To the extent that there is some concern about intellectual property, that can be addressed via a protective order that permits Mr. Kohberger and his defense team to review their work. *See, e.g., State v. Pickett*, 466 N.J.Super. 270, 246 A.3d 279 (N.J. Super. Ct. App. Div. 2021).

Second, the State appears to argue that everyone living on earth that provides genetic information is A. unaware that their DNA could be used by a government somewhere for something and B. is an “informant” within the meaning of the term in the rule. The State citations to cases involving actual informants hardly help it make this incredible leap. No court has ever found the existence of a DNA informant. It would appear that the State is acknowledging that the companies are providing personal information to the state and that those companies and the government would suffer if the public were to realize it. The only two databases that allow access are ones that already inform their users and those users can opt in to allow law enforcement searches. The statement by the government implies that the databases searched may be ones that law enforcement is specifically barred from, which explains why they do not want to disclose their methods. If the fact that the government is looking at the genetic information that people are sharing was at all an issue, then the State’s very public acknowledgement of such investigations was clearly a big mistake.

In any case, it is hard to understand why Mr. Kohberger should be the one to suffer because these companies and our government choose to either mislead or not educate the public. According to the Pew Research Center, in February 2020, 48% of respondents thought it was acceptable to give their data to law enforcement to solve crime, 33% said no and 18% were unsure. James Halpin, *Police Use of Forensic Genealogy Tech Raises Privacy Concerns*, The Citizen’s Voice (Mar. 28, 2022) (available at). However, 60% thought their genetic information

could not be shared with other companies. *Id.* There is no federal law about the sharing of genetic information, but multiple states have begun regulating police use. *Id.*, *see also*, Lindsey Van Ness, *DNA Databases are Boon to Police but Menace to Privacy, Critics Say*, Stateline (Feb. 20, 2020) (available at <https://stateline.org/2020/02/20/dna-databases-are-boon-to-police-but-menace-to-privacy-critics-say/>).

Mr. Kohberger has reasons to be extremely suspicious of the IGG used in this case. Rather than seeing it as some sort of complex tree building that led to him, it appears far more like a lineup where the government was already aware of who they wanted to target. Rather than have the investigation done by someone blind to that fact, the FBI chose to do it themselves. This is akin to the police pulling in Mr. Kohberger and five of his cousins off the street and then pointing at him.

The only authority the State has in its favor that is on point is a trial court order from a Californian case that settled before it could lead anywhere. That decision relied on is *People v. Johnson*, 139 Cal.App.4th 1135, 43 Cal.Rptr.3d 587 (Cal. Ct. App. 2006). The court in *Johnson* was not deciding whether a defendant had a right to know how he was identified, only that his identification could come in a trial without a mini-trial about it.

A better case on the issue is *State v. Arteaga*, 2023 WL 3859579, --- A.3d --- (N.J. Super. Ct. App. Div. 2023). In this case, an appellate court heard similar arguments about the need for software used for facial recognition to be discovered to the defendant, though they would not be admitted at trial. The court, considering the matter, found:

We are keenly aware the cases we have discussed involved instances concerning *Frye* hearings and potential expert testimony, and that here, we are dealing instead with eyewitnesses who have already identified the perpetrator, and the identification found admissible under *Wade*. However, the facts of this case convince us defendant will be deprived of due process if he “does not have ‘access to the raw materials integral to the building of an effective defense’” *In*

re A.B., 219 N.J. 542, 556, 99 A.3d 782 (2014) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 77, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)). The evidence sought here is directly tied to the defense's ability to test the reliability of the FRT. As such, it is vital to impeach the witnesses' identification, challenge the State's investigation, create reasonable doubt, and demonstrate third-party guilt.

...

The FRT's reliability has obvious implications for the accuracy of the identification process because an array constructed around a mistaken potential match would leave the witness with no actual perpetrator to choose. The reliability of the technology bears direct relevance to the quality and thoroughness of the broader criminal investigation, and whether the potential matches the software returned yielded any other viable alternative suspects to establish third-party guilt. Defendant's request for the identity, design, specifications, and operation of the program or programs used for analysis, and the database or databases used for comparison are relevant to FRT's reliability.

At trial, the State will likely have the investigating officer explain the police investigation, including the process of retrieving the still photo from the surveillance cameras ultimately used to generate an image of defendant. Although we do not speculate regarding the exact nature of this testimony and whether defendant will seek to impeach it, the fact the State does not bear the burden of adducing testimony regarding the composition of the photo array does not bar the defense access to the discovery sought.


Id. at 9, 11.

Mr. Kohberger finds himself in a similar position as Mr. Arteaga. A massive investigation came to focus on him and him alone. The State appears to be trying to hide its original domino such that he cannot discover why. Mr. Kohberger has a right to discover and question the investigation that led to him. This Court should so find.

DATED this 22 day of June, 2023.

ANNE C. TAYLOR, PUBLIC DEFENDER
KOOTENAI COUNTY PUBLIC DEFENDER

BY:



JAY WESTON LOGSDON
CHIEF DEPUTY LITIGATION
ASSIGNED ATTORNEY

CERTIFICATE OF DELIVERY

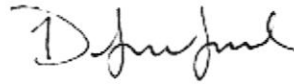
I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the 22 day of June, 2023 addressed to:

Latah County Prosecuting Attorney – via Email: paservice@latahcountyid.gov

Elisa Massoth - via Email: legalassistant@kmrs.net

Ingrid Batey – via Email: ingrid.batey@ag.idaho.gov

Jeff Nye – via Email: jeff.nye@ag.idaho.gov



A handwritten signature in cursive script, appearing to read "D. Nye", is written above a horizontal line.