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

STATE OF IDAHO

Plaintiff,

V.

BRYAN C. KOHBERGER,

Defendant.

CASE NUMBER CR29-22-2805

**OBJECTION TO THE STATE'S
MOTION TO COMPEL
"MOTIVE OF DEFENSE OF ALIBI"
OR, ALTERNATIVELY TO BAR
CERTAIN EVIDENCE**

COMES NOW, Bryan C. Kohberger, by and through his attorney of record, Anne C. Taylor, Public Defender, and hereby and Objects to the State's Motion to Compel "Motive of Defense of Alibi" or, Alternatively to Bar Certain Evidence.

Idaho Code 19-519 and ICR 12.1 require an alibi disclosure of a specific location, with a specific location and witnesses to so testify. By statutory definition, Mr. Kohberger may remain silent yet testify that he was not at 1122 King Road November 13, 2022. However, in an abundance of caution, and recognizing the Court has authority to exclude witnesses, Mr. Kohberger has indicated he anticipates corroborating witnesses.

“When determining whether to exclude evidence due to late disclosure or nondisclosure, the trial court must weigh the prejudice to the State against the defendant's right to a fair trial. *Albert*, 138 Idaho at 287, 62 P.3d at 211. It is error for a trial court to exclude a witness based solely on late disclosure without analyzing whether the State would suffer prejudice from the late disclosure. *State v. Lamphere*, 130 Idaho 630, 634, 945 P.2d 1, 5 (1997). In addition to weighing the competing interests at stake, the trial court should consider whether less severe remedies would be sufficient for the untimely disclosure or nondisclosure, such as a short continuance, a mistrial, or sanctions against defense counsel, before excluding a defense witness. *State v. Thomas*, 133 Idaho 800, 803, 992 P.2d 795, 798 (Ct. App. 1999). The trial court has an obligation to “fashion a sanction which will impress counsel with the importance of responding to discovery requests, and yet will not prejudice the defense of the case.” *State v. Stradley*, 127 Idaho 203, 211, 899 P.2d 416, 424 (1995). However, when the defendant's discovery violation was willful and designed to facilitate the presentation of fabricated testimony or to impede the State's ability to conduct effective cross-examination or to present rebuttal evidence, exclusion may be a proper remedy notwithstanding the availability of other sanctions that would prevent prejudice to the State. *Taylor*, 484 U.S. at 414-15, 108 S.Ct. 646; *Albert*, 138 Idaho at 287, 62 P.3d at 211.” *State v. Juarez*, 169 Idaho 274, 277, 494 P.3d 822, 825 (Ct. App. 2021), reh'g denied (Sept. 27, 2021)

Mr. Kohberger has long had a habit of going for drives alone. Often he would go for drives at night. He did so late on November 12 and into November 13, 2022. Mr. Kohberger is not claiming to be at a specific location at a specific time; at this time there is not a specific witness to say precisely where Mr. Kohberger was at each moment of the hours between late night November 12, 2022 and early morning November 13, 2022. He was out, driving during the late night and early morning hours of November 12-13, 2022.

Counsel for Mr. Kohberger is aware that case-law broadens the definition of alibi with the statutory requirement of a specific location to more broadly include disclosure of information that tends to state the person claiming alibi was at a place other than the location of an offense. Mr. Kohberger has complied to the extent possible at this time.

Corroboration of Bryan Kohberger NOT being at 1122 King may be brought out through cross-examination of the state's witnesses. At this time, Mr. Kohberger cannot be more specific about the possible witnesses and exactly what they will say. The defense has been hampered by the state's own choices. The state chose a secret grand jury rather than the planned preliminary hearing. Had the state moved forward with the preliminary hearing, the defense would have had the opportunity to develop testimony through cross-examination and witness presentation.

Instead, the defense has only received (on July 27th, 2023) a copy of the testimony the state chose to elicit. Review of such is underway. The defense had to obtain investigative materials from the state's investigative counterparts, the FBI, through an order compelling the state to provide such materials. The state made "draft" disclosures just two weeks ago. The sufficiency of these disclosures is currently being analyzed.

Corroboration of Bryan Kohberger NOT being at 1122 King may be brought out through expert witness presentation. That analysis is underway. The defense has been diligently working to analyze relevant discovery materials and conduct its own investigation. Notably, the defense had to obtain a court order to receive relevant discovery materials; that delay hampers the defense investigation.

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). *Taylor v. Illinois*, 484 U.S. 400, 409, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988)

The defense acknowledges a vast amount of discovery has been provided. Discovery is received on a nearly weekly basis. The defense reviews and acts on the discovery as quickly as possible including making appropriate supplemental requests for discovery.

The state's motion is an attempt to force the defense to open its work product files and let the state peek inside. The defense has stated all that can firmly be stated at this time. This is not trial by ambush from the defense. This is the defense requesting information as quickly as possible yet in some instances face the delay of requesting a court order to obtain information. The state continually uses those opportunities to attempt to force a waiver of speedy trial. That is a decision left to Mr. Kohberger and Mr. Kohberger alone.

Mr. Kohberger was out driving alone. Corroborating evidence may come from cross-examination of state's witnesses. Corroborating evidence may come from presentation of

defense experts. Mr. Kohberger is aware of and will comply with his continuing duty to disclose information.

The Court may exempt Mr. Kohberger from further inquiry. Mr. Kohberger requests such an exception at this time. Continued inquiry at this juncture delves into his case investigation as well as protected work-product. In support of an exemption, Mr. Kohberger is prepared to provide further detail in an ex parte' hearing with the court.

DATED this 2 day of August, 2023.

ANNE C. TAYLOR, PUBLIC DEFENDER
KOOTENAI COUNTY PUBLIC DEFENDER



BY: _____

ANNE TAYLOR
PUBLIC DEFENDER
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 2 day of August, 2023 addressed to:

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


