IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, Plaintiff, v. BRYAN C. KOHBERGER, Defendant.	Ada County Case No. CR01-24-31665 **ORDER ON DEFENDANT'S MOTION FOR FRANKS HEARING**

I. INTRODUCTION

Defendant is charged with one count of Burglary and four counts of Murder in the First Degree. It is alleged that Defendant entered a residence at 1122 King Road in Moscow, Idaho, in the early morning hours of November 13, 2022 and killed Madison Mogen, Kaylee Goncalves, Ethan Chapin, and Xana Kernodle. Defendant is requesting a *Franks* hearing,[1] claiming law enforcement intentionally or recklessly misrepresented and/or omitted several material facts in their probable cause affidavits supporting various search warrant applications. These misrepresentations or omissions, according to Defendant, affect the validity of seventeen different search warrants.[2]

The State responds that Defendant has failed to make the requisite substantial preliminary showing under *Franks* that: 1) law enforcement either made false statements or omitted material information knowingly and intentionally, or with reckless disregard for the truth, and/or; 2) that the false statements or omissions were necessary to a finding of probable cause.[3]

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[1] *Franks v. Delaware*, 438 U.S. 154 (1978).

[2] There was a total of 25 search warrants issued in this investigation between December 23, 2022 and August 1, 2023. For each issue analyzed in this Order, the Court has identified the date range for the specific warrants Defendant claims are implicated.

[3] Defendant's Motion for *Franks* Hearing (Nov. 14, 2024) was accompanied by a Memorandum in Support of a *Franks* Hearing (Nov. 18, 2024) and a USB containing exhibits (1951 pgs), filed November 18, 2024 ("Original Exhibits"). The Court subsequently issued an order requesting that Defendant file an amended memorandum containing specific cites to the record and revise his Original Exhibits to include only those relevant to the motion. *See*, Order re: *Franks* Motion (Nov. 22, 2024). Defendant subsequently filed an "Amended Memorandum in Support of a *Franks* Hearing (Nov. 26, 2024), which included a USB containing a revised set of exhibits (1010 pgs.) ("Revised Exhibits"). The Revised Exhibits, however, only included excerpts of the search warrant affidavits being challenged. To properly consider a *Franks* motion, the Court must necessarily consider the search warrant affidavits

A hearing on Defendant's motion was held on January 23, 2025. In the interests of evidentiary efficiency, the Court permitted a full *Franks* hearing on the motion only insofar as it pertained to the alleged omission of information regarding Defendant's identification through Investigative Genetic Genealogy (IGG).[4] On the remaining challenges, the Court permitted argument on Defendant's proffer as to whether Defendant had satisfied his burden to warrant a subsequent *Franks* hearing.[5] The Court then took the matters under advisement.

The Court concludes that the search warrants are not invalid based on the omission of Defendant's identification through IGG because that information would have only bolstered probable cause for the searches. As to the remaining challenges, the Court finds Defendant has failed to carry his preliminary burden under *Franks* and, therefore, DENIES his motion for a *Franks* hearing.

II. STANDARD

In a *Franks* motion, the trial court's determination as to whether a representation is false and whether a misrepresentation or omission was made knowingly and intentionally or with reckless disregard for the truth are factual determinations reviewed under a clearly erroneous standard. *State v. Kay*, 129 Idaho 507, 512, 927 P.2d 897, 902 (Ct. App. 1996) (citations omitted). Whether a misrepresentation or omission is "material" is a question of law freely reviewed. *Id.*

III. ANALYSIS

For a search warrant to be valid, it must be based on probable cause. *State v. Fisher*, 140 Idaho 365, 369–70, 93 P.3d 696, 700–01 (2004). In *Franks v. Delaware*, the United States

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in their entirety to determine whether probable cause is affected. Consequently, the evidence considered by the Court for this motion is Defendant's Revised Exhibits as supplemented by Exhibits D2, D3A and D3B from the Original Exhibits. References in this Order to "Am. Memo" mean Defendant's Amended Memorandum. References in this Order to exhibits are from the Revised Exhibits, as supplemented.

[4] This was identified as Issues 5 in Defendant's Amended Memorandum.

[5] The Court notes that in response to some of the *Franks* challenges, the State submitted and argued evidence that was not included in Defendant's proffer. While this evidence can be considered at a *Franks* hearing, this stage only permits the Court to consider whether Defendant has made the "substantial preliminary showing" under *Franks* to warrant that hearing. *United States v. McMurtrey,* 704 F.3d 502 (7th Cir. 2013) ([T]he court should not give the government an opportunity to present its evidence on the validity of the warrant without converting the hearing into a full evidentiary *Franks* hearing, including full cross-examination of government witnesses.") Consequently, on these challenges, the Court is only relying on Defendant's exhibits and the parties' arguments regarding why or why not—based on that proffer—a *Franks* hearing is warranted.

Supreme Court held that a defendant can void a search warrant and suppress the fruits of the search when the affidavit used to procure the warrant contains a knowingly and intentional or recklessly false statement that is material to the probable cause determination. 438 U.S. 154, 155–56 (1978). "Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Id.*

Idaho has adopted the rule established in *Franks* and extended it to deliberate or reckless omissions of material, exculpatory facts in affidavits. *State v. Guzman*, 122 Idaho 981, 983-84, 842 P.2d 660, 662-63 (1992). "An omission of exculpatory facts is 'material' only if there is a substantial probability that, had the omitted information been presented, it would have altered the magistrate's determination of probable cause." *State v. Peterson*, 133 Idaho 44, 47, 981 P.2d 1154, 1157 (Ct. App. 1999) (citations omitted).

The analysis under *Franks* is a two-step process. The first step considers whether the defendant has made a "substantial preliminary showing" that the affiant knowingly and intentionally or recklessly falsified or omitted information from his or her affidavit.[6] *Guzman,* 122 Idaho at 984, 842 P.2d at 663. While the *Franks* court did not define this burden precisely, it is generally held to be something more than conclusory allegations but less than proof by a preponderance. 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.4(d) (6th ed.) (Nov. 2024 update) (hereinafter, "*LaFave*"). Courts have said this requires "direct evidence of the affiant's state of mind or else circumstantial evidence of a subjective intent to deceive." *United States v. Woodfork*, 999 F.3d 511, 518 (7th Cir. 2021) (internal quotes and citation omitted).[7] Negligent or innocent misrepresentations or omissions, even if necessary to

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[6] "Reckless" means a "high degree of awareness of probable falsity." *United States v. Senchenko*, 133 F.3d 1153, 1158 (9th Cir. 1998).

[7] Whether an omission was intentional or reckless may be inferred, in part, from the relative importance of the information and its exculpatory power. *Peterson*, 133 Idaho at 48, 981 P.2d at 1158. However, a court need not draw inferences from the evidence in a defendant's favor. 1 Andrew D. Leipold, Federal Practice and Procedure Crim. (*Wright & Miller*) § 54 (5th ed) (June 2024 update).

establish probable cause, will not invalidate a warrant. *Peterson*, 133 Idaho at 47, 981 P.2d at 1157.

> The challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished or their absence satisfactorily explained.

Fisher, 140 Idaho at 370, 93 P.3d at 701.

If the defendant successfully shows an intentional and knowing or reckless inclusion of a false statement or omission of exculpatory information, the trial court must then examine whether the remaining information in the affidavit is sufficient to establish probable cause absent the false statement or with the addition of the exculpatory information. *Franks*, 438 U.S. at 156; *Guzman*, 122 Idaho at 983-84, 842 P.2d at 662-63. A *Franks* hearing will be required only if the false or omitted information was necessary to a finding of probable cause. *Fisher*, 140 Idaho at 370, 93 P.3d at 701.

If a defendant makes a substantial preliminary showing under *Franks*, the matter moves to an evidentiary hearing where the defendant must establish by a preponderance of the evidence that intentional or reckless falsehoods were included in the warrant affidavit and were material to the magistrate's finding of probable cause, or that material exculpatory information was deliberately or recklessly omitted. *Peterson*, 133 Idaho at 47, 981 P.2d at 1157. It is at this stage where the State can provide additional evidence for the Court to consider. *McMurtrey,* 704 F.3d at 509.

Here, Defendant claims that seventeen search warrants issued in the investigation of the crime were based on false, misleading statements and/or omitted exculpatory information in the various search warrant affidavits. His proffer is arranged by issue, of which there are thirteen. As mentioned, for convenience sake, the Court granted an evidentiary hearing on the IGG issue.[8] This evidence will be considered under the preponderance of evidence standard, while the

[8] The Court was informed that the evidence of this issue substantially overlapped with evidence that was to be presented on Defendant's Motion to Suppress re: Genetic Information. Given that, the Court concluded it would be most efficient to have a full *Franks* hearing on the IGG issue since it was slated to largely be presented anyway.

proffer on the remaining issues will be considered under the "substantial preliminary showing" standard.

A. Defendant Has Not Met His *Franks* Burden on Issues 1 & 2: Challenges to Exhibit A[9]

In Issues 1 and 2, Defendant challenges "Exhibit A," which is a probable cause statement that individual investigative officers appended to their affidavits in seeking search warrants. As Defendant notes, Exhibit A was a working document drafted as a group effort among the multiple investigative officers working on the homicide investigation. *See*, Exh. D1-C ("Draft Exhibit A").[10] In their respective search warrant applications, the officers submitted and swore to Exhibit A as their own, even though it was the product of collective effort and not necessarily limited to the swearing officer's own investigation.[11] In Issue 1, Defendant challenges this approach, arguing that Exhibit A was "treated as a wild card to easily get a warrant." Am. Memo p. 9. In Issue 2, he challenges alleged misrepresentations in Blaker Exhibit A, Mowery Exhibit A and Payne Exhibit A.

Defendant has not met his burden under *Franks* on Issues 1 or 2. First, is not improper for law enforcement seeking a warrant to swear to matters within the collective knowledge of other officers involved in the same investigation. Second, Defendant has not demonstrated in his proffers any misrepresentations or omissions, much less that they were made intentionally or recklessly or had any effect on probable cause.

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[9]Issue 1 applies to all search warrants. Issue 2 applies to search warrants issued December 29, 2022 and later.

[10] Defendant submits Exhibits D1(A)-(C) as evidence of the group effort. These exhibits are emails between Special Agent Nick Ballance of the FBI and Detective Brett Payne of the Moscow Police Department in which they are exchanging drafts of a probable cause statement.

[11]In addition to the Draft Exhibit A, Defendant has provided with his proffer the following three actual Exhibit As, which were submitted by officers with their search warrant applications: 1) the Statement of Dustin Blaker supporting the search warrant application for Defendant's Pullman, WA apartment and his office at Washington State University (Exh. D2 – "Blaker Exhibit A"); 2) the Statement of Lawrence Mowery supporting the search warrant application for Defendant's Google account (Exh. D3-A – "Mowery Exhibit A"), and; 3) the Statement of Brett Payne supporting the warrant application for Defendant's arrest (Exh. D3-B – "Payne Exhibit A"). These actual Exhibit As are not identical to the Draft Exhibit A or to each other; nevertheless, Defendant challenges them collectively in Issue 1 on grounds that they are "largely the same statement" and contain the same "core set of averments."

1. Defendant has not demonstrated any impropriety in law enforcement's execution of Exhibit A based on collective knowledge.

It is well settled that "statements of law enforcement officers that are based upon the observations of fellow officers participating in the same investigation carry a presumption of reliability." *State v. Elison*, 135 Idaho 546, 550, 21 P.3d 483, 487 (2001); *United States v. Ventresca*, 380 U.S. 102, 110–11 (1965) ("Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number."). The presumption extends to "hearsay information from 'government officials who, while engaged in investigatory … responsibilities, discover evidence of possible criminal activity.'" *State v. Wilson*, 130 Idaho 213, 216, 938 P.2d 1251, 1254 (Ct. App. 1997) (quoting *United States v. Flynn*, 664 F.2d 1296, 1303 (5th Cir. 1982)). The presumption arises from "the belief that facts gathered in the course of an investigation are unlikely to be based upon mere speculation or tainted by personal involvement with the suspect." *Id.* (quoting *United States v. Reed,* 700 F.2d 638, 642 (11th Cir.1983)).

Defendant acknowledges that a warrant can be based on law enforcement's common knowledge, but argues that officers cannot sign a collectively-drafted affidavit as their own without identifying who did the work described therein. Otherwise, it misleads the magistrate into believing that the swearing officer drafted the affidavit and performed the work therein when it was a collective effort.

This hyper-technical argument has no traction under *Franks*. Even if a search warrant affidavit does not specifically identify the precise source of the information from within law enforcement, it is still sufficient to support probable cause "if a reader would reasonably infer that the information came from other law enforcement personnel." *Wilson,* 130 Idaho at 216, 938 P.2d at 1254 *(*quoting *United States v. May,* 819 F.2d 531, 536 (5th Cir.1987)). In *Wilson*, for example, the defendant challenged an officer's search warrant affidavit on grounds that the swearing officer did not identify: 1) which facts were based on his own personal knowledge as opposed to hearsay information from other sources; 2) whether he had personally viewed the evidence; 3) the source of information for the drug dog's training and experience, and; 4) the identity of sources he contacted for the information. *Id.* Noting that search warrant affidavits are not to be "reviewed and tested in a hypertechnical manner," the Idaho Court of Appeals rejected the defendant's argument, finding that a "commonsense reading" of the affidavit could allow the

magistrate to reasonably infer that the information came from the officer's own observations or those of other officers engaged in the investigation. *Id.*

Here, Defendant's evidence demonstrates there were several law enforcement agencies working together in this case, including the Idaho State Police, the Moscow Police Department and the Federal Bureau of Investigation. During his testimony from a prior hearing in this matter, Detective Brett Payne from the Moscow Police Department explained that agents from these three agencies were co-located at a command center set up at the Moscow Police Department for purposes of the investigation. Exh. D4-B (May 30, 2024 Hearing Trans. at 36:6-37:9). These agents were assigned different investigative tasks. Pertinent information they learned in performing those tasks was then exchanged and transmitted into a working probable cause affidavit, i.e., Draft Exhibit A. *Id.* The information from the Draft Exhibit A was then incorporated by law enforcement in varying degrees into the Exhibit As supporting the search warrant applications. *Id.*

Importantly, the Exhibit As challenged by Defendant included statements alerting the magistrate that the affiant was assisted by other law enforcement agents and that the information contained within the Exhibit A was based on information provided by these other agents. S*ee, e.g.,* Blaker Exhibit A (Exh. D2 at Bates 5197) ("I am being assisted by other officers of the Moscow Police Department, members of the Idaho State Police (ISP) and agents of the Federal Bureau of Investigation (FBI)."). As found in *Wilson*, this is sufficient to allow the reviewing magistrate to reasonably infer that the information within Exhibit A came from not only the affiant's personal knowledge, but the knowledge of other law enforcement investigating the crime. Moreover, given the breadth of information in the affidavit, it is readily apparent that the affiant did not perform all the work identified therein on his own. Further, Defendant has not cited to a single case supporting the proposition that law enforcement's use of a working probable cause affidavit is improper. In sum, Defendant has failed to make the requisite showings under *Franks* on Issue 1. Further, under no circumstances could it be reasonably concluded that, had the swearing officer disclosed which members of law enforcement provided which piece of evidence, the magistrate would not have found probable cause.

2. Defendant has not established that alleged "misrepresentations" in any of the three challenged search warrant affidavits compels a *Franks* hearing.

The first misrepresentation identified by Defendant in Issue 2 is contained in Blaker Exhibit A supporting the warrant application for Defendant's Pullman, WA apartment and his office at Washington State University. Defendant claims that Sergeant Blaker "attributes discovering the knife sheath to Idaho State Police officers rather than Detective Payne." Am. Memo, p. 8. However, as the State correctly notes, Defendant's challenge is nothing more than a quibble over semantics. What Sergeant Blaker stated was: "I was later advised by ISP investigators they *located* a tan leather knife sheath laying on the bed next to Mogen's right side (when viewed from the door.)" Exh. D2 at Bates 5198 (emphasis added). In fact, it was Detective Payne who was the first investigator to discover the knife sheath. Exh. D14 (Grand Jury Trans. at 522:3-8). Once discovered, Detective Payne notified ISP investigators, who then collected and booked the sheath into evidence. *Id.* at 523:17-20. At best, Sergeant Blaker's use of the word "locate" is ambiguous as to whether it means discovering or collecting. Under no reasonable reading could it be characterized as a misrepresentation, let alone an intentionally or recklessly false one.

The second alleged misrepresentations are in Payne Exhibit A supporting Defendant's arrest warrant application and Mowery Exhibit A supporting the Google warrant application. Exhs. D3-B, D3-A, respectively. Defendant claims that both detectives simultaneously claim to have done cell-site location information ("CSLI") work as well as work to determine whether the Defendant's cell phone was in the area of the King Road residence.[12] Defendant notes, however, that both detectives admitted at a subsequent hearing in this matter that it was actually the FBI CAST agent Nicholas Ballance who performed the location work that the detectives then used to complete their respective affidavits. Exhs. D4-A (May 23, 2024 Hearing Trans. at 14:1-16; 24:5-9; D4-B (May 30, 2024 Hearing Trans. at 20:22-25; 22:24-23:20; 25:17-19; 28:8-29:3).

That Agent Ballance was the individual who actually did the location work does not render the detectives' statements intentionally or recklessly false, or even misleading. While

[12] These Exhibit As both state: "After consulting with [FBI CAST], I was able to determine estimated locations for the 8458 Phone from June 2022 to present. Records for the 8458 Phone showed the 8458 Phone utilizing cellular resources that provide coverage to the area of 1122 King Road on at least twelve occasions prior to November 13, 2022. All of these occasions, except for one, occurred in the late evening and early morning hours of their respective days." Exh. D3-A at Bates 4231; Exh. D3-B at Bates 5173.

Defendant asserts that the detectives both "claim to have done the work," they do not; they state they were able to "determine" the locations after consulting with FBI CAST. Both detectives explained in their respective affidavits that CAST was the FBI's "Cellular Analysis Survey Team." Thus, it was made abundantly apparent to the magistrate that the detectives were relying on work performed by more specialized law enforcement agents in "determining" the cell phone locations.

In sum, as to the statements encompassed in Issue 2, Defendant has not established that a misrepresentation was made. Moreover, even if the challenged statements could possibly be construed as false, there is not a shred of evidence they were intentionally or recklessly false. Finally, even if the statements were intentionally or recklessly included, Defendant has not established they were necessary to establish probable cause. In a common (and massive) investigation such as this, which specific member of law enforcement actually discovered the knife sheath or performed the location work using CSLI is irrelevant to probable cause. *Wilson*, 130 Idaho at 216, 938 P.2d at 1254. What is important is that the information came from other law enforcement personnel, which is a reliable basis for the warrant. Consequently, a *Franks* hearing is not warranted on the issue.[13]

B. Defendant Has Not Met His *Franks* Burden on Issues 3, 10: Eyewitness Statements[14]

In Issues 3 and 10, Defendant challenges the probable cause statements insofar as they set forth witness D.M.'s interview descriptions of things she heard and saw on the night of November 13, 2022.[15] Defendant claims that law enforcement failed to inform the magistrate that D.M.'s accounts describing the suspect were variable, that she questioned her memory, and that she did not recognize Defendant when provided with a photo of him after his arrest. Defendant also contends that law enforcement misrepresented statements made by D.M. that

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[13] Defendant makes a cursory allegation within Issue 2 regarding an email Agent Ballance sent to Detective Payne identifying the dates and times of prior occasions that Defendant's cell phone was using cellular resources consistent with it being in the area of 1122 King Road. Exh. D1-B. Defendant contends the dates in that email were different than those in Agent Ballance's CAST reports. Exhs. D5, D6. However, Defendant has not identified a search warrant affidavit that included these allegedly inconsistent dates. Thus, to the extent Defendant is claiming the dates in the email were false, *Franks* is not implicated.

[14] Insofar as the challenge pertains to omissions regarding D.M.'s reliability and consistency, it applies to all warrants. Insofar as it pertains to her non-recognition of Defendant, it applies to warrants issued after December 30, 2022.

[15] D.M. was a roommate of the deceased and was in her own bedroom at the time of the homicides.

would have demonstrated her unreliability. These allegedly false statements and omissions, according to Defendant, were exculpatory and material.

While Defendant's challenge may be fodder for cross-examination, it is not the proper subject of a *Franks* motion. Defendant's own proffer establishes that D.M.'s accounts were remarkably consistent throughout her multiple interviews with law enforcement and, further, the probable cause affidavits are very consistent with her accounts. Second, D.M.'s interview statements that her memories were fuzzy and dream-like and may have been affected by being tired or under the influence of alcohol do not call into question her reliability to the extent *Franks* would require disclosure. Finally, D.M.'s failure to recognize the photo of Defendant is of no consequence given that the intruder she saw was masked.

1. D.M's accounts were consistent and accurately summarized in the Exhibit As.

The Draft Exhibit A circulated by law enforcement included the following description of statements D.M. made during her interviews with law enforcement:

> [D.M.]… made statements during interview that indicated the occupants of the King Road residence were at home by 2:00 a.m. and reportedly asleep by approximately 4:00 a.m. This is with the exception of Kernodle, who received a Doordash order at the residence at approximately 4:00 a.m.
>
> [D.M.] stated she was awoken at approximately 4:00 a.m. by what she stated sounded like Goncalves playing with her dog in one of the upstairs bedrooms, which were located on the third floor. A short time later, [D.M] said she heard who she thought was Goncalves say something to the effect of 'there's someone here.' A review of forensic records associated with a download of Kernodle's cellular phone indicated she was likely awake and using the TikTok app at approximately 4:12 a.m.
>
> [D.M.] stated she looked out of her bedroom but did not see anything when she heard the comment about someone being in the house. [D.M.] stated she opened her door a second time when she heard what she thought was crying coming from Kernodle's room. [D.M.] then said she heard a male voice say something to the effect of 'its ok, im going to help you'…
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> At approximately 4:17 a.m., a camera at 1112 King Road picked up audio of what sounded like a struggle coming from off camera. The security camera is less than fifty feet from Kernodle's bedroom wall. The struggle lasted less than one minute and unintelligible sounds can be heard on the camera.
>
> [D.M.] stated she opened her door for the third time after she heard the crying and saw a figure clad in black clothing and mask that covered the person's mouth and

> nose walking towards her. [D.M.] described the figure as 5'10" or taller, male, not very muscular, but athletically built with bushy eyebrows. The male walked past [D.M.] as she stood in a 'frozen shock phase.' As the male walked towards the back sliding glass door. [D.M.] locked herself in her room after seeing the male.

Exh. D1-C, pp. 7-8.

This portion of the Draft Exhibit A was incorporated in varying degrees into Blaker's Exhibit A (Exh. D2 at Bates 5200-01), Payne's Exhibit A (Exh. D3-B at Bates 5161-62) and Mowery's Exhibit A (Exh. D3-A at Bates 4227).

When these Exhibit As were submitted in support of search warrant applications, D.M. had sat for at least three interviews with law enforcement: two on November 13, 2022 (one with Officer Nunes and, later, with Detective Mowry) and one on November 17, 2022 with Detective Gooch.[16] Her description of the intruder was notably similar during all three interviews: 1) white male; 2) slim/skinny/lean body type; 3) slightly taller than D.M. (5'10); 4) wearing all black; 5) wearing a mask that was covering his forehead and mouth; 6) a voice she didn't recognize saying he was "here to help," and; 7) the intruder walked out or towards the back sliding door without saying anything to her.[17] While she did not tell Officer Nunes that she noticed the intruder carrying a vacuum-type object in his hand, she did convey that information to Detective Mowry later that day, as well as to Detective Gooch a few days after that. Exhs. D8-B at 15:2-17; D8-C at 96:21-24. She also told Detective Gooch that she remembered the suspect's eyebrows were bushy, but could not remember their color. Exh. D8-C at 107:12-18. D.M. likewise told Detective Mowery she could not remember the color of his eyebrows. Exh. D8-B at 20:17-20.

More importantly, not only are D.M. statements consistent with each other with regard to the intruder's description, they were accurately included by law enforcement in the Exhibit As set forth above. There is not one statement in the affidavits regarding the intruder that cannot be traced directly to D.M.'s words. Consequently, Defendant has not demonstrated an intentional or reckless false statement or omission of a material, exculpatory fact with regard to law enforcement's recounting of D.M.'s descriptions of the suspect.

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[16] The interview with Officer Nunes is Exhibit D8-A, the interview with Detective Mowry is Exhibit D8-B, the interview with Detective Gooch is Exh. D8-C. D.M. was also interviewed on December 30, 2022 by Detective Lake after Defendant's arrest. Exh. D23.

[17] Exh. D8-A at 17:1-9; 21:2-11; 28:1-25; 31:8-32:3; Exhibit D8-B at 14:5-25; 15:20-24; 19:24-25; 21:4; Exh. D8-C at 61:25-62:3; 75:1-76:10; 105:13-106:1; Exh. D8-C at 97:21-23; 9:1-3; 99:13-15; 102:14-20; 103:7-12.

Defendant also asserts that Exhibit A "watered down" D.M.'s statements about hearing Kaylee Goncalves around the time of the homicides. According to Defendant, D.M. was unequivocal in her three interviews when she reported that, at approximately 4:00 a.m., she heard Ms. Goncalves walk upstairs with her dog before running back down the stairs saying "someone's here."[18] In Draft Exhibit A, however, law enforcement represented that "[D.M] said she heard who she *thought* was Goncalves say something to the effect of 'there's someone here.'"[19] (emphasis added). Defendant argues the addition of the word "thought" is false and, further, Defendant surmises it was intentionally false to cover up the fact that D.M. was wrong about what she heard. Defendant points out that Ms. Goncalves was killed in the upstairs bedroom where she was found the next morning; thus, it could not have been her who D.M. heard running down the stairs at 4:00 a.m. Defendant contends that D.M.'s misperception, had it not been covered up by law enforcement, would have cast doubt on her reliability and, therefore, probable cause.

However, the statement challenged by Defendant can be read in two ways: 1) that D.M. said "I think it was Ms. Goncalves," which is how Defendant apparently reads it and which he claims is inconsistent with D.M.'s interview statements, or; 2) that D.M. said she heard Ms. Goncalves, but law enforcement had reason to think it could have been someone else. When the statement is viewed in context, the latter makes more sense. In their respective Exhibit As, Detective Payne and Sergeant Blaker immediately followed up the challenged statement with the following: "A review of records obtained from a forensic download of Kernodle's phone showed this could also have been Kernodle as her cellular phone indicated she was likely awake and using the TikTok app at approximately 4:12 a.m." Payne Exh. A at Bates 5161; Blaker Exh. A at Bates 5200 (emphasis added). Through this explanation, Payne and Blaker are effectively conveying to the magistrate why they believed D.M.'s statement of who she heard was questionable. Thus, the Court cannot conclude there is anything false or misleading in this regard.

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[18] Exh. D8-A at 10:6-7; 16:12-24; 27:2-23; Exh. D8-B at 7:2-9:21; Exh. D8-C at 53:17-55:15.

[19] This statement was included in Payne Exhibit A at Bates 5161 and Blaker Exhibit A at Bates 5200. It was not included in Mowery Exhibit A.

In addition, even assuming it was a false statement, Defendant has not established that it was an intentional or reckless attempt to hide D.M.'s alleged misperception[20] or that her actual statement was exculpatory or otherwise material to probable cause. Consequen tly, a *Franks* hearing is not warranted with regard to statements in the relevant Exhibit As regarding D.M.'s account of what she saw and heard.

2. There is no evidence law enforcement intentionally or recklessly omitted information bearing on D.M.'s reliability or that such omissions were material to probable cause.

Defendant next asserts that the probable cause statements omitted important information bearing on D.M.'s reliability. Defendant notes that D.M. qualified her interview statements on several occasions by questioning her memory of the event. For example, she told Detective Mowry "everything was kind of blurry. Like I don't fully remember it, I would say." Exh. D8-B at 17:13-15. A few days later, while recounting the events to Detective Gooch, D.M. stated:

> Again, I believe I was also very drunk. I don't know how much of this is real. Like I don't know if my mind was, like, doing whatever. I don't know any of it. Like half this stuff I don't know if it's a dream or if it's real. I just have no clue.

Exh. D8-C at 54:18-23.

She also said her memory was "fuzzy and cloudy" (*Id.* at 75:2) and she could not "differentiate if anything is real or if anything is a dream." (*Id.* at 90:6-7). This information was not included in the Exhibit As. According to Defendant, this information was crucial to allow the magistrate to properly evaluate D.M.'s reliability and its omission was material and exculpatory.

The law does not favor Defendant on this argument. Probable cause is determined by examining the:

> totality of the circumstances, and making practical common-sense decision whether, giving all the circumstances set forth in the affidavit before the court, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238 (1983).

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[20] Based on Defendant's proffer, it is not a foregone fact that D.M. was mistaken when she said she heard Ms. Goncalves. D.M. reported it was approximately 4:00 a.m. when she heard Ms. Goncalves walk upstairs and then run back down the stairs saying, "Someone's here." Ms. Kernodle received a DoorDash delivery at the residence at 4:00 a.m. *See*, Payne Exhibit A at Bates 5160. It is entirely possible Ms. Goncalves ran downstairs when she heard the delivery-person and then went to bed, after which she was killed.

Whether the hearsay supplier is reliable is dependent, in part, on their status. Unlike an informer from the criminal millieu, crime victims or witnesses are presumed reliable and may be relied upon without independent corroboration. *LaFave* at § 3.4(a); *United States v. Banks,* 539 F.2d 14, 17 (9th Cir.1976) ("A detailed eyewitness report of a crime is self-corroborating; it supplies its own indicia of reliability."). Despite this presumed reliability, "police must always be alert to whether other facts which have come to their attention raise doubts about the veracity of the witness[.]" *Id.* Such facts might include a motive to exaggerate or falsify statements made to law enforcement or when the hearsay supplier is a young child or suffers from psychological delusions. *Id.* In such circumstances, corroboration is required to establish reliability. *Id.*[21] However, this is not a burdensome requirement; "[t]he corroboration of even innocent, minor details can support a finding of probable cause." *United States v. Stevens*, 530 F.3d 714, 719 (8th Cir. 2008). Any omissions of facts bearing on an individual's reliability will only be considered misleading under *Franks* if the omitted facts cast doubt on probable cause. *United States v. Vines*, 9 F.4th 500, 511 (7th Cir. 2021) ("[M]isrepresentations or omissions that could impact the credibility assessment [of a witness] do not trigger a *Franks* hearing where probable cause is nevertheless established through other evidence."[22]

None of D.M.'s qualifications during her interviews reasonably placed her presumed reliability in dispute. She was a direct witness and was able to consistently articulate the details she remembered throughout each interview—especially as to the facts relied on in the search warrant affidavits—despite the fact that she claimed her memory was fuzzy or that she felt like it was a dream or that she was still intoxicated. Further, even if her reliability were in question,

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[21] *See, e.g., Wesley v. Campbell,* 779 F.3d 421 (6th Cir.2015) (no probable cause based on uncorroborated sexual abuse claim by 7-year-old who had history of psychological problems); *Hebron v. Touhy*, 18 F.3d 421, 423 (7th Cir. 1994) (where officer knew alleged victims were being evicted and likely bore a grudge against their landlord, it was unreasonable to arrest landlord on victims' report alone without further corroboration.).

[22] *See, e.g., State v. Peterson*, 133 Idaho 44, 48, 981 P.2d 1154, 1158 (Ct. App. 1999) (although officer failed to include in search warrant affidavit that juvenile informant had lied to the officer in the past and was expecting favorable treatment in return for providing information to police, no *Franks* violation because these omissions were not of a sufficient magnitude to compel an inference that they were intentionally or recklessly omitted, nor would it have substantially undermined the juvenile's credibility to the point of affecting probable cause.); *Ogden v. D.C.,* 861 F.2d 303, 303 (D.C.Cir.1988) (although police failed to alert magistrate that eyewitness was homeless, a chronic alcoholic, had a less-than-sterling character and had trouble remembering certain events and times and had been drinking when he witnessed the event, it did not affect probable cause where police corroborated details of his story, his account was first-hand, no improper motives were suspected and the witness was sober when he made the identification.); *State v. Altayeb*, 11 A.3d 1122 (Conn. App. 2011) (omission of discrepancy in witness's recollection of license plate number did not defeat probable cause where other aspects of his account were corroborated).

there was other evidence included in the Exhibit As that corroborated her account. For example, the security camera from 1112 King Road picked up audio of a struggle at 4:17 a.m., which coincides with when D.M. stated she thought was crying coming from Ms. Kernodle's room and a male voice speaking. It was shortly after this she opened the door for a third time and saw the suspect walk by her toward the sliding glass door, which corresponds with the surveillance video showing the suspect vehicle leaving 1122 King Road at 4:20 a.m. In addition, law enforcement corroborated D.M.'s description of Defendant through its vehicle identification efforts, which led investigators to Defendant's driver's license information. The Exhibit As note that Defendant's physical description was consistent with D.M.'s account. *See*, Payne Exhibit A, Exh.D3-B at Bates 5167.

Defendant has shown no objective indication that D.M.'s interview statements were unreliable—particularly given the other corroborating evidence—and, therefore, no reason for law enforcement to include her qualifications in the affidavit. For this reason, it cannot be said that law enforcement intentionally or recklessly omitted the information. Further, the Exhibit As inferred that D.M. was traumatized when they noted that she stood in a "frozen shock phase" when she saw the intruder. This necessarily alerted the magistrate that D.M.'s memories were colored by trauma and shock, which goes to the issue of her reliability that Defendant targets in this motion.

Finally, even had the Exhibit As included D.M.'s qualifications to her memory, it would not have significantly undermined her credibility and would not have negated probable cause. It would be no surprise to the magistrate that a person experiencing what D.M. must have experienced would be shaken by what happened and would have questioned the reality of what she perceived. This does not render her unreliable. Additionally, the bulk of probable cause came from other sources, including the extensive vehicle identification efforts. Thus, even if the magistrate questioned the reliability of D.M.'s account, she had sufficient grounds through other evidence to issue the warrants.

In sum, Defendant has not shown that D.M.'s various qualifications to her memory are material, exculpatory facts that were intentionally or recklessly omitted and that would have affected probable cause. It is evident from the applicable Exhibit As that D.M.'s account was largely relied upon to establish the timing of the homicides and a general description of the perpetrator, not to identify Defendant specifically. Her statements on these matters were

consistent. While any perceived weaknesses in her memory may be fodder for cross-examination, they do not negate probable cause. Consequently, a *Franks* hearing is not warranted.

3. D.M.'s non-recognition of Defendant is immaterial.

Defendant also contends that law enforcement's failure to include D.M.'s non-recognition of Defendant in the Exhibit As warrants a *Franks* hearing. During her December 30, 2022 interview with law enforcement, D.M. was shown Defendant's mug shot and asked by Detective Lake whether Defendant was the person she saw in her house. D.M. responded:

> I have no clue. From what I remember, I just remember seeing this figure that was .... more of like the skinnier tone build, and some mask on ... I don't know if it was covering his mouth, his nose, or below his mouth and nose. I just remember he was white, but I didn't know how he was white. I just knew he was. And ... I knew he looked at me because of the bushy eyebrows.

Exh. D23 at 97:15-98:5.

However, the fact D.M. could not identify Defendant is hardly exculpatory or material to probable cause. *See, United States v. Colkley,* 899 F.2d 297, 302 (4th Cir.1990) (holding that omission of non-identification from photo spread was not material, and that the Fourth Amendment does not require an affiant to include all potentially exculpatory evidence in the affidavit). Her interview statements consistent described a black-clad, masked person who was not someone she thought she knew or could identify. Her inability to recognize Defendant unmasked is expected, particularly where her description as relayed in the Exhibit As describes "a mask that covered the person's mouth and nose." *See, e.g.,* Exh. D1-C, p. 8. Thus, because her non-recognition is not material and exculpatory, Defendant cannot demonstrate the failure to include this fact in the probable cause affidavit warrants a *Franks* hearing. Defendant has not demonstrated law enforcement omitted it intentionally or recklessly, nor has he shown how including the information would have affected probable cause. One simply cannot say that, had law enforcement included a statement that D.M. (unsurprisingly) was unable to recognize Defendant from a photo, the magistrate would not have found probable cause. A *Franks* hearing is not warranted on this issue.

C. Defendant Has Not Met His *Franks* Burden on Issue 4: Vehicle Identification[23]

In Issue 4, Defendant takes issue with Exhibit A insofar as it describes the suspect vehicle captured through various surveillance cameras. It states:

> Law enforcement officers provided video footage of Suspect Vehicle 1 to vehicle specialists with the Federal Bureau of Investigation that regularly utilize surveillance footage to identify the year, make, and model of an unknown vehicle that is observed by one or more cameras during the commission of a criminal offense. After reviewing the numerous observances of Suspect Vehicle 1, the vehicle specialists initially believed that Suspect Vehicle 1 was a 2011-2013 Hyundai Elantra. Upon further review, they indicated it could also be a 2011-2016 Hyundai Elantra.

Draft Exhibit A, Exh. D1-C.[24]

Defendant claims there are two material and exculpatory omissions in this paragraph. First, he asserts law enforcement should have disclosed the FBI's vehicle specialist "felt more comfortable" with the 2011-2013 date range for the suspect vehicle. Second, he asserts that the specialist's opinion expanding the date range was "predicated on the erroneous use of a video taken from Ridge [Road], which law enforcement knew or should have known was not the suspect vehicle." Am. Memo, p. 14. Defendant also faults the officers for failing to provide the magistrate with the footage reviewed by the specialist which, according to Defendant, would have demonstrated to the magistrate that a vehicle identification could not have been reasonably made.

The Court finds Defendant's challenges are unsupported by his proffer and do not warrant a *Franks* hearing.

1. That the FBI specialist may have been more comfortable with a narrower date range than that represented in Exhibit A is unsupported and immaterial.

Defendant's claim that the FBI vehicle specialist "felt more comfortable setting the year range of 2011-2013" and "law enforcement knew their specialist was of the opinion the car was also certainly between 2011 and 2013" is based on an email chain between that specialist, Agent Anthony Imel, and another FBI agent about their investigation. However, the email chain does

[23] Issue 4 applies to all warrants.

[24] Similar statements were made in Blaker Exhibit A (Exh. D2 at Bates 5203-04), Mowery Exhibit A (Exh. D3-A at 4229), and Payne Exhibit A (Exh. D3-B at Bates 5164).

not support his argument. What the email chain shows is that, on November 26, 2022, Agent Imel directed the FBI to "open up" their search to "2011-2016." Exh. D9 at Bates 15580. In doing so, he discussed the changes to the Hyundai Elantra in 2014 and 2017 and stated that he wanted a "better shot of the vehicle's front fog lights and rear reflectors." He further added, "rather not leave anything out – better safe than sorry." Five minutes later he sent another email stating "yea I see the change in 2014 and [I'm] not really a fan of the 2014 much prefer the 2011-2013 but wanted to lay that out – have a good night. Will keep looking and send any new info I can come up with." *Id.*

These emails demonstrate that it was Agent Imel's decision to open the date range to 2011-2016, despite his "prefer[ence]" for 2011-2013. Exhibit A accurately captures this decision by stating that the specialist initially believed it was a 2011-2013 but opened it up to 2011-2016 upon further review. While Exhibit A did not call out that Agent Imel preferred narrower time frame, Defendant has not shown this omission to be exculpatory and material. Exhibit A is replete with evidence linking Defendant's vehicle and cell phone to Suspect Vehicle 1. Considered as a whole, it cannot be reasonably concluded that Agent Imel's "preference" for a narrower date range would have derailed the magistrate's finding of probable cause had it been included.

Probable cause is not an exact science and does not require that law enforcement establish with absolute certainty that the facts alleged in search warrant affidavits are in fact true. *See*, *Messerschmidt v. Millender*, 565 U.S. 535, 551(2012) (citation omitted). Simply because Agent Imel may have felt more comfortable with earlier years within the range he provided does not mean he felt "uncomfortable" with the later years. Thus, it is highly unlikely the magistrate would have disregarded the specialist's identification of the larger date range or otherwise declined to find probable cause simply because Agent Imel preferred the narrower range. Further, there is no evidence the information was intentionally or recklessly omitted.[25] Thus, a *Franks* hearing is not warranted on the issue.

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[25] Defendant infers that it was intentionally or recklessly omitted by pointing out that one of the earlier search warrant affidavits (Exh. D10) and ISP's November 25, 2022 "Be on the Lookout (BOLO)" bulletin (Exh. D12) indicated the suspect vehicle was a 2011-2013 Hyundai Elantra. He posits that it was only after he was identified through Investigative Genetic Genealogy ("IGG") that the date range of the Hyundai was opened up to include the model year of Defendant's Elantra. However, the Court is not willing to accept Defendant's inference. Discrepancies between these documents and the later Exhibit As challenged by Defendant merely reflect that there was an initial belief that the suspect vehicle was a 2011-2013 that was subsequently revised. It is not indicative of an

2. Defendant has not demonstrated a false representation or omission with regard to identification of the suspect vehicle.

Defendant next challenges Exhibit A on grounds that the FBI vehicle specialist's identification of Suspect Vehicle 1 as a 2011-2016 Hyundai Elantra was based on video footage from Ridge Road that law enforcement knew or should have known was not Suspect Vehicle 1. Defendant states that he "knows" law enforcement based its identification of the vehicle on the Ridge Road footage "because we have the emails from the FBI's specialist, who explains on November 23, 2022, that their team is 'mainly looking at the window configuration', something these other images do not. But later that day, an FBI agent sends them images from this video, calling it a 'GREAT one!" Am. Memo, p. 18.

However, Defendant's proffer does not show the FBI specialist's identification was, in fact, made on the Ridge Road footage. The FBI emails Defendant contends support his position contain no mention of "Ridge Road" footage and no mention that the FBI was "mainly looking at the window configuration."[26] *See*, Exh. D9. Defendant asserts that the email stating "Got a GREAT one!" attached images from the Ridge Road footage, but there is nothing in the proffer establishing that images were, in fact, attached and, importantly, what those images were. *Id.* at Bates 15582. At the pre-*Franks* hearing, the Court inquired further into Defendant's support for his position that the identification of Suspect Vehicle 1 was based on the Ridge Road footage. Counsel again referred to the FBI emails and unlabeled screen shots reproduced on page 17 of Defendant's amended memorandum that Defendant claims were from the Ridge Road footage. This is insufficient to establish, beyond speculation, the Ridge Road footage was the basis for the identification.

Even assuming it were, however, Defendant has still failed to carry his burden under *Franks*. Because the vehicle identification came from the FBI—which was disclosed to the magistrate in the Exhibit As—there is a presumption of reliability. *See, Ventresca*, 380 U.S. at

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intentional or reckless omission. Further, the FBI emails clearly show that the specialist expanded the date range on November 26, 2022—well before Defendant was identified through IGG in mid-December of 2022.

[26] Defendant's lack of citations to the record was the reason the Court required Defendant to submit an amended *Franks* memorandum and exhibits. Defendant's continued failure to cure the problem on this issue indicates there is no evidence showing the vehicle identification was based on the Ridge Road footage. In any event, the Court will not scour the record to find factual support for Defendant's argument. *Venable v. Internet Auto Rent & Sales, Inc.*, 156 Idaho 574, 582, 329 P.3d 356, 364 (2014).

110–11 (1965) ("Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number.") Thus, at a minimum, Defendant must establish that the search warrant affiants knew the FBI specialist's identification was based on incorrect footage yet intentionally or recklessly relied on it anyway to obtain warrants. There is no evidence to this end. Assuming the Ridge Road footage was, in fact, not of Suspect Vehicle 1, the affiants were not part of the FBI email chain which allegedly evidences the use of the Ridge Road footage to make the identification. Further, there is no evidence law enforcement provided the Ridge Road footage to the FBI for identification purposes knowing it was not of Suspect Vehicle 1. Consequently, a *Franks* hearing is not warranted.

C. Defendant Has Not Met His *Franks* Burden on Issue 5: Misleading Timeline[27]

In Issue 5, Defendant claims that law enforcement created a false narrative of their investigative timeline in Exhibit A so as to make it appear that Defendant was identified through their investigative efforts and not, in fact, through IGG. In other words, he argues that law enforcement, having already identified Defendant through IGG, tailored their Exhibit A to support probable cause for an already-identified suspect, not an unknown suspect. Defendant provides two examples of what he contends are misleading timelines about his identification, but these examples fall far short of the *Franks* standard.

First, Defendant notes that in Payne Exhibit A, Detective Payne states that on November 29, 2022, officers from Washington State University (WSU) queried white Hyundai Elantras registered at the school and pulled up a 2015 white Elantra with Pennsylvania plates that was registered to Defendant. Exh. D3-B at Bates 5166-67. That same day, Detective Payne states another WSU officer was patrolling the area by Defendant's apartment and located a 2015 white Elantra with Washington plates. He ran the plate and it returned to Defendant. *Id.* Defendant points out that Detective Payne was not even aware of the WSU officers' findings in this regard until December 20, 2022, after Defendant was already identified by IGG. However, he contends Payne Exhibit A makes it appear that Defendant was identified, in part, through the WSU queries.

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[27] Issue 5 applies to all warrants.

Second, Defendant takes issue with Detective Payne's focus on Suspect Vehicle 1's lack of front license plate. In Payne Exhibit A, he discussed his review of surveillance footage, noting:

> A review of camera footage indicated that a white sedan, hereafter "Suspect Vehicle 1", was observed traveling … westbound on Styner Avenue at Idaho State Highway 95 in Moscow at approximately 3:28 a.m. On this video, it appeared Suspect Vehicle 1 was not displaying a front license plate.

Exh. D3-B at Bates 5162-63.

Detective Payne later points out that Defendant registered his 2015 white Elantra with Washington State on November 18, 2022. He noted that, previously, the vehicle was registered in Pennsylvania which, unlike Idaho and Washington, "does not require a front license plate to be displayed[.]" *Id.* at Bates 5167. Defendant contends that although Exhibit A makes it appear that law enforcement was focused on the lack of a front license plate early on, it was not until after he was identified through IGG that it became an object of inquiry.

In neither example has Defendant established Detective Payne's investigation timeline to be misleading or false, much less intentionally or recklessly so. There can be no question that Defendant was identified, in part, through the WSU officer's queries and through the suspect vehicle's lack of a front license plate, as observed in surveillance videos from the night of the murders. The fact that law enforcement had additional DNA evidence tying Defendant to the crime does not render it improper for law enforcement to rely on independent evidence accomplishing the same. It would arguably be irresponsible for law enforcement to rely solely on DNA evidence without making an effort to corroborate it, particularly given the novelty of IGG. Defendant has not established there is anything wrong with this approach. *See, United States v. Taylor,* 63 F.4th 637, 648 (7th Cir. 2023) (observing that requirement under *Franks* that search warrant affidavit be truthful and complete does not require that every fact recited therein be correct or that every detail of investigation be provided.). Indeed, what is important to probable cause is the totality of the evidence once all gathered and examined in light of what that collection of evidence shows, not looking at it in isolation as each piece of evidence was separately gathered.

Moreover, had law enforcement indicated in Exhibit A that the WSU query and lack of a front license plate only came across its radar after Defendant had been identified through IGG, Defendant has not explained how this would have eroded probable cause. Indeed, as discussed

below, including the IGG evidence would have provided more—not less—probable cause supporting the search warrants. Consequently, a *Franks* hearing is not warranted on this issue.

E. Defendant Has Not Met His *Franks* Burden on Issue 6: Dog Barking[28]

In this issue, Defendant challenges omissions pertaining to the barking dog referenced in the Payne Exhibit A. It states that at 4:17 a.m., a security camera located at a nearby residence on King Road picked up "distorted audio of what sounded like voices or a whimper followed by a loud thud. A dog can also be heard barking numerous times starting at 4:17 a.m." Exh. D3-B at Bates 5161.[29] The only other information in the Payne Exhibit A pertaining to a dog refers to the fact that Kaylee Goncalves' dog, Murphy, was found in her bedroom by first responders. *Id.* at Bates 5157.

Defendant contends that Detective Payne failed to include three allegedly important pieces of information pertaining to the dog: 1) that the dog heard on the security camera continued to bark for thirty minutes after the suspect left; 2) that Detective Payne conducted a test to determine that the dog was likely outside while barking,[30] and; 3) that Murphy was found without any blood on him even though the bedroom doors were open where the decedents were found.[31] According to Defendant, this omitted information would have revealed that "whoever was in the house brought the dog back inside after the suspect vehicle left." Am. Memo, p. 23. He further argues this information is material and exculpatory because it "undermines the narrative and timeline that supports probable cause." *Id.*

However, Defendant's argument assumes, without proof, there were no doors left open in the home after the suspect left. This assumption is not only speculative, but contrary to evidence in his proffer that the sliding glass door to the residence—the same door toward which D.M. reportedly saw the suspect walk—was left open. Exh. D14 at 521:14-21; Exh. D23 at 103:23-104:10. Thus, if the dog heard barking was in fact Murphy, it could well have come back inside

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[28] Issue 6 applies to all warrants.

[29] This same security camera shows the suspect vehicle departing from the area of 1122 King Road at 4:20 a.m.

[30] Exhibit D13 is a police report authored by Detective Mowery describing the test he and Detective Payne performed to ascertain whether the dog heard on the audio was inside or outside.

[31] Exhibit D15-A is a police report indicating Murphy did not have blood on him and Exhibit D15-B is a screen capture of Officer Nunes's body camera when he arrived at the house, showing the Murphy lying on Ms. Goncalves' bed with no blood on him.

through the open door and gone into Ms. Goncalves' room on his own, where it evidently remained. There is simply no evidence to adopt Defendant's speculation that someone brought Murphy inside after the suspect left the residence. Consequently, Defendant has not shown that the failure of law enforcement to so speculate was a material and exculpatory omission that was intentionally or recklessly excluded. A *Franks* hearing is not warranted on this issue.

F. Defendant Has Not Met His *Franks* Burden on Issue 7: Cell Phone Data[32]

Issue 7 challenges Exhibit A insofar as it discusses data from Defendant's phone (referenced as the 8458 Phone in Exhibit A) and conclusions drawn therefrom. He asserts that Exhibit A falsely implies Defendant's location on the night of the murders based on improper speculation, misrepresentations and omissions about four topics: 1) the geo fence return; 2) the timing of the second AT&T warrant; 3) the time Defendant's phone stopped reporting, and; 4) the cell tower coverage area.[33] Defendant's proffer on each of these topics is insufficient to warrant a *Franks* hearing.

1. The Geo Fence Return assertion was not a false or misleading statement.

Defendant first takes issue Detective Payne's assertions regarding the geo fence return. In Payne Exhibit A, Detective Payne informs the magistrate that "a query of the 8458 Phone in these returns did not show the 8458 Phone utilizing cellular tower resources in close proximity to the King Road Residence between 3:00 a.m. and 5:00 a.m." Exh. D3-B at Bates 5169. He then states:

> Based on my training, experience, and conversations with law enforcement officers that specialize in the utilization of cellular telephone records as part of investigations, individuals can either leave their cellular telephone at a different location before committing a crime or tum their cellular telephone off prior to going to a location to commit a crime. This is done by subjects in an effort to avoid alerting law enforcement that a cellular device associated with them was in a particular area where a crime is committed. I also know that on numerous occasions, subjects will surveil an area where they intend to commit a crime prior to the date of the crime. Depending on the circumstances. this could be done a few days before or for several months prior to the commission of a crime. During these types of surveillance, it is possible that an individual would not leave their cellular telephone at a separate location or turn it off since they do not plan to commit the offense on that particular day.

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[32] Issue 7 applies to all warrants issued after December 23, 2022.

[33] Defendant included a subsection on CSLI data, indicating that it supports a finding that Defendant traveled south from Pullman sometime after 2:42 a.m. This appears to be duplicative of the section regarding the time Defendant's phone stopped reporting to the network.

Id.

Defendant contends that Detective Payne's claim that criminals will turn off or leave their cell phone elsewhere before committing crimes is "highly speculative and conclusory." He argues that it is just as likely the phone was not present in the area.

Defendant has not demonstrated the statement was deliberately or recklessly false. What Payne Exhibit A shows it that Detective Payne—based on his training and experience—drew one conclusion about the lack of a return to the exclusion of other possibilities. While there certainly may be other reasons for the lack of a return, "[t]he mere fact that the affiant did not list every conceivable conclusion does not taint the validity of the affidavit." *United States v. Burnes*, 816 F.2d 1354, 1358 (9th Cir.1987). Further, Detective Payne's conclusion was expressly based on his training and experience and conversations with other experts, which further belies any suggestion that it was deliberately or recklessly false. A *Franks* hearing is not warranted on the issue.

2. Challenge to timing of the second AT&T Warrant is conclusory.

Defendant next challenges the one-hour turn-around from when law enforcement received the return on the first AT&T warrant and submitted the application for the second AT&T warrant. According to Defendant's expert, Thomas Slovenski, it takes one to two days at a minimum to secure call detail records from AT&T and then convert, analyze and peer review them. Exh. D7 (Aff. Slovenski, p. 6). He surmises that the fact Detective Payne was able to complete these tasks in one hour means that the FBI has already secured and analyzed the information and provided their analysis to Detective Payne who simply reported to the magistrate what he was told without telling the magistrate the truth about how the investigation truly unfolded. *Id.*

Franks does not contemplate such conclusory accusations. *Fisher*, 140 Idaho at 370, 93 P.3d at 701 ("The challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine.") Mr. Slovenski was not involved in the investigation and his attempt to impute untoward conduct to law enforcement lacks any foundation. As Detective Payne testified at a prior hearing in this matter, he received the return from the first AT&T warrant and immediately turned the material over to FBI Agent Ballance to begin deciphering it while Detective Payne started on the second search warrant application. Exh. D4-B at 22:16-25:19. While Defendant may wish to cross-examine Detective Payne on this issue, it

is not a basis for a *Franks* hearing. Further, even if the FBI had already secured the records prior to receiving the return on the first AT&T warrant, Defendant has not shown how the inclusion of this information in Exhibit A would have negated probable cause. A *Franks* hearing is not warranted.

3. Defendant has not shown the alleged misstatement regarding when Defendant's phone stopped reporting was intentionally false or exculpatory.

Defendant next asserts that Detective Payne misrepresented the time Defendant's cell phone stopped reporting to the network to imply that Defendant was traveling toward Moscow between 2:47 a.m. and 2:54 a.m. when he was not. Am. Memo, p. 25. On this point, Defendant relies foremost on the affidavit of his expert, Mr. Slovenski, who states:

> Affiant has found inaccurate information in Officer Payne's AFFIDAVIT FOR SEARCH WARRANT AND APPLICATION FOR AN ORDER FOR A PEN REGISTRY OR A TRAP AND TRACE DEVICE' (Bates 003748-003774) dated December 23, 2022.
>
> ...
>
> Payne makes a false statement in his Affidavit. Payne states in his Affidavit, Bates 003772 that 'At approximately 2:47 a.m. the 8458 Phone stops reporting to the network...' This statement is erroneous. Payne has failed to advise the court of the following:
>
> 1. The 2:47 am traffic is a continuous seven (7) minute stream on multiple towers that ends at 2:54 am. Payne does not document this seven (7) minute traffic.
>
> 2. Payne did not inform the magistrate about these handoffs, which would have clearly and directly shown him the fact that on November 13, 2022, from 2:47 to 2:54, Mr. Kohberger's device was NOT heading to Moscow as purported by Payne but was indeed heading southbound from Pullman, Washington.... The fact that Payne either disregarded or was not aware of the handoffs and direction of travel of Mr. Kohberger's device gives this Affiant grave concern over the lack of training and experience Payne has in mobile forensics and the credibility of his Affidavit.

Exh. D7-A at pp. 4-6 (emphasis in original).

Defendant's other cellular expert, Sy Ray, likewise contends he has reviewed "multiple search warrant affidavits prepared by Detective Payne" and his statement that Defendant's cell phone stopped reporting to the network at 2:47 a.m. is "blatantly false" and not supported by the AT&T data. Exh. D7-B, p. 4.

In addition to these two expert affidavits, Defendant includes in his proffer the AT&T call detail records ("CDRs") that purportedly reveal that the actual time the phone stopped reporting to the network was 2:54 a.m. Exh. D17 at p. 24.

As an initial matter, Defendant has not provided the search warrant affidavit identified by Mr. Slovenski with his proffer. The only search warrant affidavit authored by Detective Payne that Defendant has provided with his proffer is Payne Exhibit A, which is dated December 29, 2022 and accompanied an application for a warrant for Defendant's arrest. *See*, Exh. D3-B. The Court cannot consider the effect the alleged misstatement would have on probable cause without the correct affidavit before it. However, the search warrant affidavit referenced by Mr. Slovenski is otherwise part of the record in this case as to other motions and the Court will take judicial notice of it for purposes of deciding this issue.[34]

The Court does not find Defendant's proffer deserving of a *Franks* hearing. First, Defendant has not established the challenged statement is a misrepresentation. Detective Payne expressly qualified his statement by noting it was an approximation only. As he testified to at an earlier hearing in this matter, Detective Payne is not an expert in deciphering CDRs. Thus, he provided the records to FBI Special Agent Ballance to analyze and relied on Agent Ballance's analysis in drafting the Pen Register Affidavit. Exh. D4-B at 22:21-23:9; 25:9-19; 27:11-17; 36:6-37:9. That affidavit disclosed both Detective Payne's reliance on Agent Ballance's analysis and Agent Ballance's training and experience to the magistrate. To the extent the approximation was off, a seven-minute discrepancy (particularly one occurring more than one hour prior to homicides) is not so far outside the approximate window as to render the statement false.

Further, even if the statement could be characterized as false, Defendant has not shown it to be intentionally or recklessly so. In fact, not even Mr. Slovenski goes so far impute this mens rea to Detective Payne. Rather, he points out that Detective Payne "either disregarded or was unaware" of the handoff data that would have revealed the correct time the phone stopped reporting. Based on Detective Payne's self-described lack of expertise in analyzing CDRs, it is reasonable to infer the latter, which amounts to, at most, negligence. Further, Detective Payne

[34] *See*, Affidavit for Search Warrant and Application for an Order For a Pen Register Or A Trap and Trace Device, attached as Exhibit S-1 to State's Objection to Defendant's Motion to Suppress and Memorandum in Support Re: Pen Trap and Trace Device (Dec. 6, 2024) ("Pen Register Affidavit").

relied on Agent Ballance to decipher the CDRs, which he is entitled to do in executing probable cause affidavits.

Finally, Defendant has not shown Detective Payne's mistake in identifying the "handoff data" to be exculpatory. Mr. Slovenski claims it was exculpatory because a correct interpretation of the data would show the device "was NOT heading to Moscow as purported by Payne but was indeed heading southbound from Pullman, Washington." There are two problems with this assertion. First, the Pen Register Affidavit represents that the device *was* traveling south at 2:47 a.m. when, according to Detective Payne, it last reported, to wit:

> On November 13, 2022 at approximately 2:42 a.m., the 8458 Phone was utilizing cellular resources that provide coverage to 1630 Northeast Valley Road, Apt G201, Pullman, WA, hereafter the 'Kohberger Residence.' At approximately 2:47 a.m., the 8458 Phone utilized cellular resources that provide coverage southeast of the Kohberger Residence consistent with the 8458 Phone leaving the Kohberger Residence and traveling south through Pullman, WA.

Pen Register Affidavit, Exh. A (emphasis added).

Thus, because the "exculpatory" information identified by Mr. Slovenski appears to have been represented in the affidavit, the Court is at a loss at to how a "correct" statement of the time the phone stopped reporting to the network would affect probable cause.

Second, even if the Pen Register Affidavit did misrepresent that Defendant's cell phone was headed to Moscow between 2:47 a.m. and 2:54 a.m. as opposed to southbound from Pullman, a correction would have no effect on probable cause. Traveling southbound from Pullman at 2:54 a.m.—more than an hour prior to the homicides—does not disprove that Defendant could have driven to Moscow after 2:54 a.m., after his phone stopped reporting to the network. As the affidavit points out, footage from multiple videos obtained from the neighborhood around 1122 King Road showed several sightings of a vehicle matching the description of Defendant's vehicle starting at 3:29 a.m. and ending at 4:20 a.m. Given the proximity of Pullman to Moscow, the fact that Defendant may have been traveling southbound in Pullman at 2:54 a.m. does not exclude him as the potential driver of the suspect vehicle from a probable cause standpoint.

Moreover, the strength of the other evidence described in the Pen Register Affidavit cannot be overlooked. The affidavit describes how CSLI data showed that Defendant's cell phone left his apartment at approximately 2:45 a.m. and started traveling south before it ceased

reporting to the network—approximately 90 minutes before the homicides occurred. The phone then started reporting to the network again approximately 90 minutes after the homicides occurred, at which time it was travelling south on Hwy. 95 just south of Moscow before looping back north into Pullman via Hwy. 195. Consistent with this CSLI, surveillance cameras from the Pullman area showed a white Hyundai Elantra consistent with Defendant's vehicle returning to area of Defendant's apartment at 5:25 a.m. As Detective Payne pointed out, individuals commonly turn off their phones prior to committing a crime to avoid alerting law enforcement of their presence near a crime scene. The obvious inference is that Defendant turned off his cell phone to avoid detection until he was clear of the crime scene.

In addition, the affidavit described footage from multiple surveillance videos that captured a vehicle consistent with Defendant's make three passes by 1122 King Road between 3:29 a.m. and 4:20 a.m., at which time it departed from the residence at a high rate of speed. On one surveillance camera, according to Detective Payne, the suspect vehicle did not appear to have a front license plate. He noted that Defendant's vehicle had been registered in Pennsylvania at the time of the homicides, which does not require that front license plates be displayed.

Finally, CSLI evidence shows that at approximately 9:00 a.m. November 13, 2022—a mere three and one-half hours after Defendant's return to his apartment—he again left his apartment and returned to Moscow, utilizing cellular resources that provided coverage to 1122 King Road from between approximately 9:12 a.m. and 9:21 a.m. before travelling back to the area of his apartment at 9:32 a.m. This is consistent with Defendant returning to the scene of the crime.

Detective Payne also noted that Defendant's height, weight and ethnicity were consistent with D.M.'s description of the perpetrator. He informed the magistrate that Defendant was a Ph.D student in criminology at Washington State University and had studied how technological data is used by law enforcement. The inference to be drawn from this information is that Defendant knew, particularly from a technological perspective, how to cover his tracks.

When the extent of evidence recounted in the Pen Register Affidavit is considered as a whole, it is evident to the Court that had Detective Payne stated Defendant's cell phone was travelling southbound from Pullman when it stopped reporting to the network at 2:54 a.m., there

was still enough probable cause linking Defendant to the homicides to justify the issuance of the search warrant.[35] Consequently, a *Franks* hearing is not warranted on this issue.

4. Defendant has not shown any omission regarding cell tower coverage area was reckless, intentional or material.

The final claim raised by Defendant is that Detective Payne omitted important information about cell tower coverage in Moscow when he stated:

> The records for the 8458 Phone show the 8458 Phone utilizing cellular resources that provide coverage to the area of 1122 King Road on at least twelve occasions prior to November 13, 2022.

Payne Exhibit A, Exh. D3-B at Bates 5173

According to Mr. Slovenski, the two towers that provide AT&T service to King Road also provide coverage to all of Moscow, including the areas Defendant is known to shop. Exh. D7, pp. 6-7. Thus, Defendant claims Detective Payne misled the magistrate about the location of Defendant's cell phone on these twelve occasions.

The accusation here is one of omission; specifically, whether Detective Payne recklessly or intentionally withheld from the magistrate that the same towers providing service to King Road also provide coverage to all of Moscow. There is no direct evidence that Detective Payne intended to mislead the magistrate, nor can it reasonably be inferred given that Defendant has not shown the omission to be material and exculpatory. While including the information may shed some doubt on whether Defendant was actually in the vicinity of Kings Road on these twelve occasions as opposed to some other nearby location, it does not disprove Detective Payne's statement or otherwise exculpate Defendant. Given the breadth of exculpatory evidence included in Payne Exhibit A, it is difficult to ascribe ill intent to this alleged omission. Further, and importantly, probable cause did not rise and fall on the evidence of Defendant's twelve prior visits to Moscow. A *Franks* hearing is not warranted on this issue.

[35] The search warrant sought by Detective Payne through the Pen Register affidavit was for historic CDRs and CSLI for Defendant's cell phone for the preceding six month period, as well as authorization for a pen register and trap and trace device.

G. Defendant Has Not Met His *Franks* Burden on Issue 9: Footprint Outside D.M.'s Door[36]

In Issue 9, Defendant challenges as false a statement made in the Payne Exhibit A about a footprint found outside D.M.'s door. Detective Payne stated:

> During the processing of the crime scene, investigators found a latent shoe print.... The detected shoe print showed a diamond-shaped pattern (similar to the pattern of a Vans type shoe sole) just outside the door of [D.M.'s] bedroom (located on second floor). This is consistent with [D.M.'s] statement regarding the suspect's path of travel.

Exh. D3-B at Bates 5162.

Defendant contends the last sentence is false, noting that the footprint is closer to her bedroom door than she reported the suspect to be, there are no other prints before or after it, and it is not positioned toward the sliding glass door, which is where D.M. said the suspect walked after passing by her.[37] Defendant further claims it is an intentional or reckless statement because its only purpose was to corroborate D.M.'s unreliable statements.

There is nothing false or misleading about Detective Payne's statement. The shoe print was consistent with D.M.'s account. She told law enforcement she saw Defendant walked past her bedroom door after she opened it for a third time. *See*, Exh. D8-B ("And then I opened the door again and the guy is right there."); Exh. D8-C ("I think he was walking past my door and, like, saw me.... I would say [he was] about 3 feet [away from her]"). D.M.'s bedroom door is immediately at the landing at the base of the stairs leading to the upstairs bedrooms. D22. The shoe print was, therefore, reasonably within the suspect's path of travel as described by D.M. Further, the fact the footprint was located only in one spot and there were not others before and after it does not make Detective Payne's statement false about the path of travel. Consequently, Defendant has not shown Detective Payne's statement was false or otherwise misleading.

Additionally, Defendant has not established that D.M.'s interview statements were wholly unreliable, as discussed *supra*, or that there was otherwise a need to bolster her credibility in the magistrate's eyes through false corroborations. Consequently, even if the shoe print was not totally consistent with D.M.'s account, Defendant has not demonstrated that the statement

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[36] Issue 10 applies to warrants issued December 29, 2022 and later.

[37] Exhibit D22 shows the footprint at the threshold of D.M.'s bedroom door.

was made deliberately or recklessly. Moreover, Defendant has not articulated how excision of the statement would have any bearing on probable cause. In fact, it would not. A *Franks* hearing is not warranted on this issue.

H. Defendant Has Not Met His *Franks* Burden on Issue 11: Grand Jury Subpoenas

Issue 11 faults law enforcement for omitting information in the Exhibit A supporting the search warrant for Amazon records, which was issued May 8, 2023.[38] Specifically, he asserts that the affiant, Detective Mowery, requested the warrant in reliance on federal Grand Jury Subpoenas issued by the FBI to Amazon, but did not tell the magistrate "information about the timing and scope of information obtained and relied upon." Am. Memo, p. 31. Defendant further states he is unable to ascertain whether the omission was material and exculpatory because the Grand Jury Subpoenas have not been disclosed.

Defendant has not established that this issue is the proper subject of a *Franks* motion. He has not provided the search warrant affidavit at issue, has not identified any false statement, and the only omission he challenges is that Detective Mowery did not disclose unidentified particulars about the timing and scope of information obtained from the Grand Jury Subpoenas. He admittedly cannot show this omission was material and exculpatory and, therefore, cannot establish that probable cause would have been affected had the omitted information been included. What this challenge appears to be is an attempt to use *Franks* as a means for discovery, which is not its purpose. Consequently, a *Franks* hearing is not warranted.

I Defendant Has Not Met His *Franks* Burden on Issue 12: Lack of Connection Between Defendant and Victims[39]

In Issue 12, Defendant challenges law enforcement's omission in their Exhibit As of the fact that their investigation failed to reveal any connection between Defendant and the victims. Defendant claims this information was material and exculpatory because it sheds doubt on law enforcement's theory that Defendant was "the right person." Am. Memo, p. 32.

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[38] Defendant does not provide the search warrant application for Amazon or the warrant itself.

[39] Issue 12 applies to warrants issued December 24, 2022 and forward.

However, Defendant has not established the lack of connection was a fact conclusively known to law enforcement at the time the search warrant applications were submitted.[40] Thus, he cannot establish it was intentionally or recklessly omitted. Moreover, this omission was not material or exculpatory. Had law enforcement found a connection between Defendant and the victims prior to applying for search warrants, it is reasonable to assume the connection would have been disclosed in the search warrant affidavits. The fact it was not disclosed necessarily allowed the magistrate to reasonably infer that no connection had yet been found, yet she still found probable cause to authorize the search warrants, as was reasonable to do. Consequently, Defendant has not carried his burden under *Franks* on this issue.

J. Defendant Has Not Met His *Franks* Burden on Issue 13: Lack of Victim DNA in Apartment and Vehicle[41]

Similarly, Defendant challenges law enforcement's omission in the Exhibit As of the fact that lab testing performed by the Idaho State Police ("ISP") did not reveal the victims' DNA in Defendant's vehicle or his apartment. Exh. D25-A through D25-C (Lab Reports 28, 29, 32). Defendant contends the lack of DNA is "devastating" to law enforcement's theory of the case and was intentionally or recklessly omitted.

However, as with the prior issue, Defendant has not established when law enforcement knew of the lack of victim DNA in Defendant's vehicle and apartment. The three ISP Lab Reports relied upon by Defendant were issued on March 2, March 8 and May 23, 2023, respectively. Thus, it cannot be said that law enforcement knew of the lack of DNA until the last report was issued. Defendant has not provided or identified any search warrant affidavits submitted after May 23, 2023, much less explained why the lack of DNA was material to probable cause for those warrants.

In his reply, Defendant claims that the actual testing for DNA was performed by ISP long before the three Lab Reports were issued. He asserts he has "reason to believe" that the results of

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[40] Defendant's argument presumes that *Franks* requires law enforcement to disclose that evidence does not exist or has not been found. This is not a realistic burden, particularly given that search warrant affidavits are typically executed under rapidly unfolding circumstances. Indeed, there is no requirement under *Franks* that law enforcement disclose every detail of an investigation or describe "every wrong turn or dead end they pursued." *United States v. McMurtrey*, 704 F.3d 502, 513 (7th Cir. 2013). Certainly, then, there is no requirement to disclose a lack of evidence, particularly when the obvious inference to be drawn from the absence of any mention of such evidence is that it does not exist or has not been located.

[41] Issue 13 applies to warrants issued January 5, 2023 and forward.

the testing were verbally transmitted to law enforcement at that time. However, the evidence submitted by Defendant does not support his assertion.

First, Defendant submits the ISP lab notes from Lab Report 28 and claims that the testing was done on February 13, 2023, three weeks before the report was actually issued. Exh. D33. A closer review of those lab notes reveals that testing of the various items at issue in Lab Report 28 took place between February 13, 2023 and February 24, 2023. The final report was issued four working days after the last test. Thus, this evidence does not show that law enforcement knew well before Lab Report 28 was issued that there was no victim DNA on the tested items. This is, at best, Defendant's speculation.

Defendant also submits lab reports from a hair and fiber analysis performed by the FBI Lab. The first lab report, dated January 27, 2023, revealed that hair and fibers collected from the crime scene were not consistent with Defendant's hair sample. Exh. D31. The second lab report, dated February 28, 2023, revealed that hair and fiber samples collected from Defendant's vehicle and apartment were not consistent with the victims' hair samples. Exh. D32. Again, this evidence does not support Defendant's assertion that law enforcement knew of the lack of victim DNA in his vehicle and apartment as of January 5, 2023.[42]

At best, it can be said that law enforcement was aware as of February 28, 2023 that the FBI's testing did not reveal the victims' hair/fibers in Defendant's apartment or vehicle, but it is evident from the various lab reports that law enforcement's investigation with regard to DNA was still continuing. Therefore, there was no basis for law enforcement to definitively aver there was an absence of victim DNA in the vehicle and apartment until the final reports were issued. In other words, Defendant has not demonstrated an omission, much less that it was intentional or reckless.

Further, Defendant has not demonstrated how including this "omission" would have affected the magistrate's finding of probable cause. He contends that it would affect all warrants issued January 5, 2023 and beyond, but he has not provided any search warrant affidavits from this time period for the Court's consideration. However, based on the Payne Exhibit A that is

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[42] Defendant also submits what appears to be a worksheet from the DNA handling on January 23 and 24, 2023 by the ISP lab. Exh. D34. It is entitled "Differential DNA Extraction." There are no findings or conclusions made in the worksheet, nor is there any indication of what DNA samples were handled and what "DNA extraction" means within this worksheet. Thus, it is unclear how this worksheet supports Defendant's argument.

included in Defendant's proffer (Exh. D3-B), the probable cause as of December 29, 2022 included, among other things, that the DNA profile obtained from the trash pull of the Kohberger family's trash was determined to be from the biological father of the source of DNA left on the knife sheath at the crime scene. Given this evidence, no reasonable magistrate would conclude that the lack of victim DNA in Defendant's vehicle and/or apartment weeks after the crime would negate probable cause. Thus, a *Franks* hearing is not warranted on this issue.

K. Defendant Has Not Established the *Franks* Elements By a Preponderance on Issue 8: Defendant's Identification by IGG.[43]

In Issue 8, Defendant challenges law enforcement's omission in Exhibit A that Defendant was identified through an allegedly unconstitutional use of IGG. He contends law enforcement should have disclosed in Exhibit A that: 1) the methods used by Othram Labs[44] to conduct the IGG testing allegedly did not meet minimum standards; 2) that the FBI failed to document its own IGG search using Othram's data; 3) that the FBI "manipulated" Othram's data to create a much larger DNA profile, and; 4) that the FBI violated its own policy and that of the commercial IGG databases it used when it uploaded the DNA profile to databases restricting law enforcement use. Defendant contends these omissions from Exhibit A were purposeful. He also argues the omissions were material and exculpatory because they would have undermined probable cause by exposing law enforcement's "false narrative" of the investigation.[45]

As mentioned, the Court permitted a full *Franks* hearing on this issue. The Court's findings of fact on the evidence and testimony presented and its conclusions of law are fully set forth in its Memorandum Decision and Order on Defendant's Motion to Suppress re: Genetic Information, filed contemporarily herewith and incorporated herein. As the Court determined in that Order, law enforcement's use of IGG to identify Defendant as a potential suspect was not unconstitutional. The Court found that regardless of whether the FBI arguably contravened its

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[43] Defendant does not identify what search warrants this issue applies to, but presumably it includes all warrants issued after Defendant was identified through IGG as a possible suspect.

[44] Othram Labs was the company Idaho State Police contracted with to perform the IGG testing on the DNA sample located on the knife sheath.

[45] Again, Defendant tries to place the focus of the probable cause evaluation on the "narrative" of the investigation. What is important for probable cause purposes is what the evidence is at the time the warrant is applied for, not the time sequence in which the evidence was developed.

own policy and contravened that of My Heritage and GEDMatch when it uploaded the DNA profile to their databases, it was not of constitutional importance.

Moreover, Defendant has not established that the search warrant affiants knew, when submitting their respective Exhibit As, that the FBI or Othram did anything "untoward" with regard to their IGG searches.[46] Detective Payne was the only person who had submitted a search warrant affidavit from whom Defendant elicited testimony at the hearing with regard to IGG.[47] Detective Payne testified that he knew the FBI was handling the IGG search after Othram Labs ceased work, but said his communication with the FBI about the issue was sparse and limited to check-ins to ensure the IGG search was continuing. He testified that, on December 19, 2022, the FBI provided him only with Defendant's name and instructed that it was to be considered solely a "tip." At some point after Defendant was identified through IGG, the FBI walked Detective Payne through the details of the family tree it had developed from its search, but that was all. Further, he testified to having no familiarity about the IGG databases or rules that applied to them. Given the lack of evidence Detective Payne knew or even had reason to know that Othram or the FBI did anything unconstitutional in their IGG searches, Defendant cannot establish any omission in this regard from Exhibit A was intentional or reckless.

Even assuming Detective Payne had been privy to the methods in which Othram and the FBI conducted the IGG search, *Franks* does not require law enforcement to divulge every detail of their investigation and describe every lead followed or rock unearthed for evidence. *McMurtrey*, 704 F.3d at 513. Probable cause affidavits are neither designed nor intended to be an opportunity for the reviewing magistrate to grade the police work on the case by requiring law enforcement to show every step that led to the evidence relied upon. As observed by one circuit court.

> [T]here is no legal requirement that a police officer recite every fact that he knows in a search warrant affidavit, so long as what he does say is sufficient to support a judicial officer's finding of probable cause. *See Ogden v. D.C.*, 861 F.2d 303, 303 (D.C.Cir.1988) ('An affidavit must be more than wholly conclusory, but it need only provide the magistrate with a substantial basis for concluding that probable

[46]There only evidence of allegedly untoward conduct was the FBI searching genealogy databases that did not permit law enforcement searches. There was no evidence presented that the methods used by Othram Labs to conduct the IGG testing failed to meet minimum standards. While there was evidence presented that the FBI created a larger SNP profile than Othram did, even Defendant's expert, Danny Hellwig, found no reason to suspect the FBI of wrongdoing in this regard.

[47] The Court found Detective Payne to be credible and reliable.

> cause exists; it need not present all the relevant information known to the police at the time."'. In other words, '[t]he Fourth Amendment ... does not set forth some general "particularity requirement." It specifies only two matters that must be "particularly described" in the warrant: "the place to be searched" and "the persons or things to be seized."' *United States v. Grubbs,* 547 U.S. 90, 97, 126 S.Ct. 1494, 164 L.Ed.2d 195 (2006).

United States v. Turner, 73 F. Supp. 3d 122, 125 (D.D.C. 2014).[48]

Likewise, there is no requirement that police include evidence as a strawman simply so that evidence can then later be attacked. *See, United States v. Allen*, 211 F.3d 970, 975 (6th Cir. 2000 (en banc) (A warrant application "is judged on the adequacy of what it does contain, not on what it lacks, on what a critic might say should have been added.") The focus of an application for a search warrant is whether, based on the evidence that is presented, there is probable cause that evidence will be found in a particular place, not whether an evidence-gathering technique used was potentially unconstitutional. *See*, *United States v. Loera*, 923 F.3d 907, 927 (10th Cir. 2019) (noting that when a magistrate issues a warrant based on potentially illegally obtained evidence, typically the manner in which the affidavit evidence is obtained is not before the magistrate, and the magistrate is not asked explicitly to endorse the evidence-gathering procedure.) While this may be fodder for a later motion to suppress, it is not a basis for a *Franks* challenge.

Franks, in cases of omission, asks simply whether the affiant left out evidence which, if known, would negate the inculpatory effect of the existing evidence and leave an insurmountable deficit in proof of probable cause. Defendant has not established that omitting Defendant's identification through IGG evidence or the means in which IGG was performed had this effect. Indeed, had the IGG information been included, even with the problems complained of by Defendant, its only effect would have been to add to probable cause, not detract from it. Consequently, relief under *Franks* is not warranted.

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[48] *See also, United States v. Colkley,* 899 F.2d 297 (4th Cir. 1990) (noting that requiring officers to recite all evidence that might be construed as exculpatory opens up officers to "endless conjecture about investigative leads, fragments of information, or other matter that might, if included, have redounded to defendant's benefit.").

VI. CONCLUSION

Based on the foregoing, Defendant's Motion for a Franks Hearing is DENIED.

IT IS SO ORDERED.

DATED this 19th day of February, 2025.

Steven Hippler
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of February, 2025, I caused a true and correct copy of the above and foregoing instrument to be mailed, postage prepaid, or hand-delivered, to:

William W. Thompson, Jr.
Ashley Jennings
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TRENT TRIPPLE
Clerk of the District Court

By:_____
Deputy Court Clerk