

Are you ready to go live? Right, go ahead. Let me know when we're ready, Sandra. All right. We are uh back on the record in Statev Coburger CR 012431665, um. We are now, uh, I believe streaming, uh, the, uh. For the record, the defendant is present, uh, together with, uh, counsel, Ms. Taylor and Ms. Massoff. Uh, the state is, uh, present and represented by Mr. Thompson, Mr. Nye, and Ms. Jennings. Um, we are now going to hear arguments, uh, from, uh, the parties, uh, on the Frank's, uh, motions filed by the defense, um, that will include the Frank's hearing that was held on the IGG issue as well as the defense's proffer as to, uh, the rest of the Frank's uh issues as to why the court should hold a hearing on those matters we're holding evidentiary hearing on those matters. Am, am I missing something we talked about? Your Honor, I may have missed it, but I thought we were, um, offering argument on suppression IGG. Well, I The, the suppression IGG I, we can also argue that I think it's wrapped up in the same issue, um. I thought we were going to Frank's next. I Did not, I apologize. Yeah. No preference over here, Your Honor. Well, do you wanna argue suppression on IGG and then we can do the ranks. That's fine. I would need 5 minutes to get my Frank's items ready. Let's do argument on the suppression of the IGG uh related uh matters, and then, uh, we can, uh, then hear the Frank stuff. That's fine. That's what you're prepared to argue. Thank you. Go ahead. Your Honor, our position is that the court should suppress the IGG identification and everything that flows from that. This is supported by 4th Amendment of the United States Constitution, due process, Article 1, Section 17 of the Idaho Constitution. Honor, there was no warrant for several phases of the search that led to the IGG work investigative genetic genealogy, and we think every single one of those stages a warrant was required, none was given, and so this must be suppressed. Your, I'd like to identify the three stages, and they are when Moscow, Idaho State Police forensics lab through Moscow Police Department. Moved a DNA sample to Athram laboratories to develop a profile to run through genetic genetic genealogy investigations. There was no warrant for that search for a snip profile that could be used to attempt to identify somebody. The next stage would be when that was transferred to the FBI for their forensic investigative genetic genealogy work to try to identify somebody. No warrant was in place for that work either. Finally, there was a trash pool in Pennsylvania and there was no warrant for that trash pool either. All three of those stages of this case, there should have been a warrant and there wasn't, and this must be suppressed. Your Honor, for the purposes of the Fourth Amendment protections and Article 1, Section 17 of the Idaho Constitution, we are looking to see if somebody has a privacy interest that society is ready to support. In this case, If society is not ready to support suppression of every bit of our DNA when the government does not have a warrant and searches it, there is no privacy right left. Do you have any cases that hold that? I do not have any cases that hold that, nor do I have any to the contrary that say that's not the case. Your Honor, I, this is a situation where. This identification was done in complete secret behind closed doors, and it's been

continued to be a secret, and that should raise red flags for your honor about privacy interests that are at stake. The court can see from the various affidavits in this case. That there's a lot of things done that don't say how Mr. K Coburger was identified. And the reason for that is because nobody wanted to talk about what happened here with the genetic genealogy. That search was done. By making a profile in Oram Lab, that search did not lead anywhere. The FBI took over the search. And from there, they did things that we have no idea what it is. That entire segment of this case is secret. We have been through several motions to compel to try to get information, and we've gotten very, very little information. The court should know that we learned today about policies and procedures of Othram. That we have not been able to take a look at those have not been produced, in fact, we've been told they don't exist. We learned about investigative work that was done after Athram had done the work that they could do and before the FBI took over that we learned about for the first time this week. Not through the motion to compel process. This was a giant secret. When we get to the FBI, we don't know who did the work. You heard that any of that information is redacted. We don't know who did the work. It's a giant secret. We know that by the time the FBI gets involved. The profile, the text file that's a snip to use to try to identify somebody is more than twice as big when it gets to the FBI from Ara. We don't know how. We don't have any notes. We don't know who did any of the work. We don't have any lab protocols. We don't have any quality assurances. It's not reliable. You're not asserting that Mr. Coberger's DNA sample was um. Uploaded into any of those databases that his was like for example. His own DNA was one that was matched from the um crime scene. Not asking whether the crime scene DNA was uploaded, but whether he had as a for example customer of one of these companies uploaded his DNA. Well, Your Honor, I don't have the Jed.com file. I don't have, you're not asserting that fact, correct? Your Honor, I'm, I'm not sure what the court is asking me. Well, it goes to whether or not your client has standing to uh, complain about the searches of the databases, uh, because, uh, as the state has posited that wasn't his DNA that was uh searched at best it was his ancestors. Well, Your Honor, I am not sure why we're here if the state wasn't hasn't alleged that Brian Coburger's DNA was on the knife. No, I'm not talking about the knife sheet DNA. I'm talking about what they tried to match it to. Your Honor, I would answer it this way. Um, the way that those databases work is looking for shared DNA. Those databases don't turn out a name and say this is a privacy interest against any of my relatives that might want to um upload, uh, their DNA uh to one of those, uh. Systems I can, I should be able to stop them from doing that because I share some DNA with them. That is certainly not what I'm saying. What I am saying, Your Honor, is if somebody. Takes your DNA. And uploads it. I think you have a privacy interest in your own DNA if not necessarily in let's say my DNA is taken lawfully. What privacy interests do I have in the search of? The DNA of others. That's a loaded question. um, why is it a loaded question? Isn't it a factual question? Well, it is

Judge, but um you're assuming that the DNA was taken lawfully and our position. I, I agree that part was uh is an assumption um in my hypothetical I said my DNA was taken lawfully, um, why would I have standing to object to the search of other people's DNA. Simply because I might share some genetic information with them because they are distantly related to me. Well, Your Honor, our position is that this work was not done lawfully, that it was unlawful, that there needed to be a warrant, that this was done outside of a warrant, and I, I'm, I'm not asserting on behalf of anybody else in this in any relative, anybody who might have been named or not named. This is about an identification process. It needed to be a lawful process. It wasn't a lawful process. It was in violation of Mr. Coberger's rights. I, I don't know how he cannot. How was it in violation of his rights. Excuse me, how was it in violation of his rights? Well, Your Honor, he's been in custody. You're saying that I understand your position which frankly is not well supported in the law that. If hypothetically here he went to this crime scene, committed these murders and left DNA on a piece of evidence that he now has the ability to object to that. Evidence being searched for identification purposes. There's no case that suggests that, that concludes that, um, and it seems to me to be an extreme position to take in light of the case law, and I'm trying to understand how you get there. Well, I think Your Honor is asking me about things that I anticipated the state would argue the their abandonment theory and I would remind the court that the Ross case said that abandonment is a knowing intentional leaving of something for one thing for the other thing I think that the court is asking me to take a position where it it feels like burden shifting to me. I'm trying to understand the legal argument and how this is different from example from latent fingerprints. Well, Your Honor, I think that things like latent fingerprints and like CODIS, there's uh statutes about CODIS in Idaho, about what's allowed in CODIS. This is a different search. This isn't an STR search. That's what happens in CODIS. This is a different so I'm going now to, I'm sorry, the constitutionality of using the DNA that was, uh, uh, allegedly on the knife sheath. And because I understand your argument is twofold. One, I, your client, uh, complains that the uh a search was done of databases. Uh, of other people to determine whether or not any of them might be related to the person who left the DNA on the knife sheath. That's thing one. Thing 2 is an objection to the law enforcement. Searching the DNA by testing it and getting a profile from the knife sheath without a warrant. My question goes to that latter point, uh, um. Understanding the basis for that because I can't find any case law that would support that idea. That somehow a warrant would be needed for DNA left at a crime scene. Well, I think in our, our briefing, Your Honor, that we, we cited the court to some cases. I, I did, I think one concurring opinion in a case that held otherwise. Your Honor, I, I was going to talk to the court about third party data and I was going to talk to the court about the Davis case that talked about something that the police lawfully had and a subsequent test, the Skinner case, when there's something that's lawfully held, but there's a subsequent test. So those

are the things that I want to talk about. Our first point is it was an illegal search, and this is if. Search which search assumption which search it was illegal. Well, first, the, the snippet Ora, then the snip at the FBI, and then the trash pool. You're talking about the, the DNA testing of the material left allegedly on the knife sheath. I'm talking about the Idaho State Police forensics lab taking a piece of evidence given to them by Moscow Police Department collected at the scene, developing uh STR profile, uploading it into into CODIS, and I think that's the King case that says that's fine. I know Idaho has statutes on CODIS uploading it there and producing nothing. There are no results there. I'm talking about the next set of moves that are super secret. That happen when there's a portion of the DNA taken. And it's searched by Aram to create a snip. And then when that doesn't produce anything, the FBI says, OK, here we go. Let's search the snip ourselves. That's what I'm talking about. Those are the problems. As far as asserting family specific DNA tests done of the um sample that. Goes from legitimate to illegitimate. Yes, Your Honor, I think the Davis case is on point. If, if, if the court's theory that this is a lawful piece of evidence taken from the crime scene, the sheath. My theory, it's I'm just trying to understand your position, uh, in light of the case law and in light of the state's arguments. I'm trying to. Find where the um gristle is in this. I'm adopting the court's hypothesis for this this this purpose that the knife sheath was taken. I'm adopting it only for that purpose, and I'm relying on the Davis case that says subsequent searches need a warrant. And remind me Davis was the cell phone? No, Davis was not the cell phone. Davis was blood, a sample, um. With blood, the cell phone case is carpenter. I'm sorry. Can you give me the site to the Davis case? Give me 2 seconds. 2 seconds and glasses. And I apologize because my memory tends to be fact-based and not name-based, and so that's my uh liability. Well, it's gonna take me just a second. I apologize. I apologize. I wrote the name down, but not the site in my notes, but I know it's cited in our briefing. I can't remember what page. It is 690 F 3rd 226. OK OK. All right, and so. Those are the three areas that we believe that there should have been a search warrant and there wasn't. There is an expectation of privacy in one DNA that society is willing to recognize, and I think I'd talked to the court a little bit about the things that happened in this case that were super secret. I think we've gotten to the point where we were talking, uh, and, and this goes to recognizing an expectation of privacy when there's all of this secrecy surrounding it. We had gotten to the FBI where the SNP profile was twice as big as that from Athram and then the FBI went into databases that violate the Department of Justice interim policy. You heard a lot about that Department of Justice interim policy and that policy on um it's on page 6 of that particular exhibit that the court has it says that they're not to go into databases that aren't allowed, and they did that. The court has that in another exhibit. How is that a constitutional violation? Your Honor, it goes to privacy. Don't suppress for contractual violations or even statutory violations. I'm not suggesting that we do that. I'm suggesting that that's information that's pertinent to this court in making a very important decision as

to whether somebody's Fourth Amendment rights were violated as well as Article 1 Section 17 of the Idaho Constitution. The purpose of offering that information is because there's a policy, so there's an there's a recognized expectation of privacy in what's contained in a snip in a snip at all. There has to be a warrant to search these types of things and there wasn't there would be no need to have any policy if nobody cared about this. The court heard about the uh different IGG databases that changed their rules in terms of use. After a different case, used IDG to solve it because people don't expect to have their DNA was the point of my question about whether or not Mr. Coberger's DNA was in any of those databases. In other words, did he submit his DNA and said, I don't want law enforcement to look at it. I don't think that that's the way the question should be looked at. I think the question should be looked at is. In the way that we always look at warrantless searches. It's gotta be a standing Your Honor, we're, we're here because the state has alleged that a single piece of evidence ties Mr. Coburger to this case. They've alleged that there's a knife sheet that has DNA that they allege matches Brian Coburger. He's now been incarcerated for 2 years facing capital murder. I'm not sure Unless we're shifting the burden to me, what else I can say? Well, you have a burden of showing that the. Items ought to be suppressed. This is a warrantless search. There's no justification for this search. Assuming a warrant is required for this type of um. Inquiry. Well, Your Honor, we think it is and we think it is based on case law and third party doctrine case law that's Carpenter thinking about cell phones that's the Riley case um, if you have a cell phone that gets taken at uh an arrest out of a car, a subsequent warrant to search the cell phone is required. So we think a warrant was required for these subsequent searches, and there was no warrant in this case. There's an expectation of privacy struggle with um. Well, I struggle to be frank and where you're gonna have to try to convince me I guess is I, I struggle with the idea that. DNA left at a crime scene. That there's any expectation of privacy by someone who leaves DNA at the crime scene that that DNA can't be as you say, searched without a warrant to establish identity. Well, Your Honor, I don't think any of us can go out of our houses without leaving DNA all over the place. Do not go to a crime scene. The question of how something gets somewhere, that's the subject of the trial. I think the Carpenter case is really instructive for the court here and that case was about, uh, it was about third party with cell towers and there was a concurring opinion in that that case. I think that's instructive um. We leave DNA everywhere. If you carry a cell phone and it uses the towers, there can be a trail of where you went everywhere. I'm sorry, don't we leave fingerprints everywhere. We do leave fingerprints everywhere, but I would say, Your Honor, that things like Your movements, cell towers, um, the contents of your cell phone, those are really personal things. That's how you carry out your business. That's how you go, you drive your car to go to the doctor, your cell phone's heading on those towers. DNA is even more personal than that. The tests are so different than they used to be now. It can pick up all kinds of information. It takes very

little DNA DNA lives on surfaces a lot longer than fingerprints live on surfaces, so without more they're not much of an indication of anything. There's a warrant requirement to protect people from unreasonable searches, and that's what we're asserting here. Uh, it's, I mean, there, there's so much information contained in your DNA and you can't stop from shedding that when you go out of your house. None of us can. To be able to have that searched without a warrant could put anybody in jeopardy. There's no privacy left if that's going to be the standard, you put it in public so it can be searched. That can't be the standard that that would erode the Fourth Amendment. Our position is that there is an expectation of privacy that society's willing to accept. Our position is that there's case law that supports this, maybe not exactly directly on point, but the court talked about uh one of the cases that we cited that's similar, it's out of Washington. In that case, it keyed on whether the database was a voluntary. Law enforcement can search this or not in this situation that's not the case you know from the exhibit you have and from the testimony that you heard that the FBI went into two databases that they weren't permitted to search so if the court um. Wants to go clear to that extreme and the court shouldn't. The court should look at the Fourth Amendment. The court should look at expectation of privacy. The court should look at the three places there was a warrant required and it wasn't given. But if the court wants to go all the way down to whether or not there was a database searched where the people consented to have their DNA searched, our cases different. The FBI went into two other databases and searched those. There was nothing else happening until that happened. And it's instructive, I think, and important for the court to think about how secretive this all was. We are months from trial and we are learning things about how the government identified Brian today in open court when we've asked and asked for those things. There's a reason why there's so much secrecy. That's because there's a violation of privacy rights. That's why there's so much secrecy. Your Honor, this, this is an extremely important motion and the court is going to decide. Whether we do have any expectation of privacy left or not, the IGG evidence in this case should absolutely be suppressed. I suspect the state's gonna raise an issue that you may need to respond to, but I'll let you respond to that, uh, if they do raise that issue. I'll be prepared, Your Honor. Thank you. Thank you, Your Honor. Why should I, uh. Permit Evidence obtained potentially by Searching Databases That by its own policies, law enforcement said they wouldn't search. So a couple of points on that. First, um, even assuming that that's all correct and that they violated the terms seems to be the. The terms of service, Your Honor, don't affect the the Fourth Amendment. Uh, the terms of service and certainly Mr. Kolberger does not have standing to raise a violation of the terms of service. And even if he did, the remedy for the terms of service is not a violation of the Fourth Amendment. Um, as we argued in our brief, the individuals and as came out in testimony today, the individuals who are utilizing these databases and we're talking about millions of them. Are willingly sharing their information

with each other with millions of other people. Isn't there a subset that says, but I don't want these people to look at it in in some of the data, uh, FBI, as I understand the evidence, then says, OK, we agree we won't search those ones. So I'll address that part, but the on the database piece, the The issue is that no one sharing this information with millions of other people could have a reasonable expectation of privacy. The test for that isn't, do they have a reasonable expectation of privacy against law enforcement? It's against the public writ large. Um, so for example, like we cited in our brief 3 different cases where Idaho's appellate courts have found people have given up a reasonable expectation of privacy and information that we shared with a single company and it was shared with that company just to just so they could get the service from that company. Here we're talking about people sharing it not just with the company but with millions of other people because sharing it is the purpose of providing it to the database so regardless of what the FBI did or didn't do in terms of violating the terms of service, no one has a reasonable expectation. Is it different if they share it with the company and it's obtained by lawful process? Um, from that company. Versus uh going in the back window and taking it. Uh, no, Your Honor, because right now what we're asking is not reasonableness of the search. Right now, what we're asking is, is there even a reasonable expectation of privacy? And so, The fact that no one has a reasonable expectation of privacy in those databases means that even if the FBI violated those terms of service, no one has 1/4 Amendment right to complain, and certainly Mr. Koburger doesn't. He is not asserted factually or through evidence that he was uh a customer to one of these databases, and maybe that changes the case if he were, but he's not, he's not even claiming that he's not even asserting it. Now I do want to address the, the second part of the court's question about the FBI has indicated that they wouldn't do this. I believe that's a reference to the, the policy we've been discussing, the interim policy by the DOJ. Um, I certainly do not speak for the Department of Justice. I, I do not work for the FBI, um, I'm speaking for the state of Idaho, but I can read a document and if you look at the policy in footnote one. It clearly says this interim policy does not impose any legal limitations on otherwise lawful investigative or prosecutorial activities or techniques utilized by the Department of Justice or limit the prerogatives, choices or decisions available to or made by the department in its discretion. In other words, Their first problem is they're relying on a policy at all. The, the US Supreme Court has said policies do not equal Fourth Amendment violations. Their second problem is it's a circular argument. The policy doesn't say you cannot do any of these things. It's saying, best case scenario, you're not gonna do these things. Well if you were interpreting this as a matter of contract, when you have a problem, uh, in the sense that on the one hand it says don't do this, and on the other hand you've got a more general sort of catch all that says, but we're not really meaning anything we say. Uh, no, I don't think there's a problem interpreting that at all. Um, I think the problem is they're, they're putting way too much weight on this policy as if it's

somehow the law, uh, and it's not, it's, it's indicating, and we heard testimony about best practices and what those mean. This is indicating best practices but very clearly stating we're not limiting the Department of Justice to, to, um, have to follow what's in this document as long as it's not limited by the law. And they're trying to use a violation of this policy or an alleged violation of this policy to say that they violated the law. It's it's circular reasoning, um, but despite all of that, the US Supreme Court has said a policy violation isn't sufficient, um, to even the Department of Justice, as powerful as they are, they don't get to rewrite the Fourth Amendment by changing this policy. Um, now, I do want to address the defense is kind of, they're trying to pick and choose what they believe the searches are throughout this chain, and what they're leaving out repeatedly is where this DNA started, where did the chain start? Well, it started at a quadruple homicide at a crime scene. There is no case law uh anywhere that the state could find, and the defense has not cited any to suggest that there is a reasonable expectation of privacy and DNA found at a crime scene. And I want to talk about the Davis case, Your Honor, because it actually cuts against the defense. Davis is the case where it was a very unique set of facts. There was an investigation into a shooting. An officer went to the hospital, and when he went into the victim's room, he saw a bag of clothing. He sees that clothing under the plain view exception to the warrant requirement. So, the clothing wasn't abandoned. This was an exception to the warrant requirement. Later on, this individual who was a victim now becomes a suspect and they have this DNA and they test it. And the Fourth Circuit said, no, no, you can't do that. You can't take it because he's a victim and then later use it against him as a suspect. That is nothing at all like what we have here. And in fact, if this Court looks at the district court opinion that was affirmed by the 4th Circuit, it expressly states nothing about this holding is indicating that the government needs to get a search warrant for crime scene DNA. Um, that, that does not support their position. The Achilles heel in their entire chain argument here is that there is no case anywhere that suggests that a DNA analysis restores a reasonable expectation of privacy. So in the Davis case, they didn't, no one lost their reasonable expectation of privacy. It was seized pursuant to the Plainview doctrine. The other case that they're relying on is that recent Supreme Court decision from Arizona. Uh, they attached it to their reply. That case is similar to Davis in that the DNA was collected, uh, from someone who consented to it under a statutory framework because they had to provide two vials of blood so it could be tested for alcohol and drugs. Again, That case would have come out differently had the two vials of blood been found at a quadruple homicide. Uh, that is a pretty big factor in deciding whether or not someone has a reasonable expectation of privacy. In Idaho, while this specific issue has not been addressed by the appellate courts, the appellate courts have told us what to look for when you're talking about a reasonable expectation of privacy. And it's things like ownership, possession, control, ability to regulate access. Mr. Coberger had none of those things with



respect to the DNA on the knife sheath. We are talking about not just a crime scene, not just a murder scene. We're talking about a murder scene in a house to which he has asserted no connection whatsoever, uh, for victims to which he has asserted no connection whatsoever. We're not just talking about his DNA happened to be found in, you know, a dresser drawer or something. It was found on a knife sheath where 4 people were killed by a knife. Um, this is as crime scene as it gets. And that's where the DNA was found, and they can't cite any case law whatsoever. And so they try and just ignore that and skip over it and say, well, let's just talk about the DNA analysis. The other problem they have is this court uh questions indicated is the analysis that was done in this case, as we heard the evidence today, um, is not something that revealed a bunch of private medical information. In fact, the defense's own expert, who was engaged in the same kinds of conduct as Othram in terms of developing these SNP profiles, said he had successfully developed hundreds of snip profiles and never once learned medical information about any of those individuals. Um, he testified that He has never even heard of a forensic investigative genetic genealogy case that was solved using medical information. And in fact, and I wrote this down when I asked him what he would need to do to learn medical information from those snips, he said, quote, it would be a lot of research. So, the defense is positing this this question of, they're saying the court needs to ask itself, what could law enforcement do with the DNA? And then decide whether or not there's a violation of the Fourth Amendment, but that's not what the US Supreme Court says. In Maryland v. King, they were very clear when it comes to DNA because the defense there was asserting the same argument. We have DNA DNA can reveal a bunch of private medical information, and the US Supreme Court said, quote, even if non-coding alleles could provide some information, they are not in fact tested for that end. So the question under the Fourth Amendment is not what could law enforcement possibly do with this. The question is, what did they do? And in this case, there is no evidence whatsoever that they did anything to find out medical information about Mr. Coberger. It was all related to ancestry and identity. And as the US Supreme Court said in King, There is no greater privacy interest in DNA than in fingerprints, so long as law enforcement is limiting its activities to identification. And that's what we have in this case, is identification. Now, the other problem that Mr. K Coberger has here is, um, in my view, at least he's been a little bit wishy-washy on the DNA on the knife sheath itself. Um. You, you don't get to claim Fourth Amendment standing and then just say, well, that may be my DNA, but I have no idea how it got there. Um, again, the Idaho Court of Appeals has held on in a couple different cases that If someone, for example, in one of the cases, uh, denied the existence of a bag that had been thrown out of the window, and the court said, well, you, you can't have a reasonable expectation of privacy in a bag that you deny exists. This is a very similar thing. We have a defendant who is trying to get the best of both worlds. He's trying to say, well, it's not my DNA and the state can't prove that, but he's also trying to say

that he has Fourth Amendment standing, and I, that that is not how the Fourth Amendment works. Uh, Your Honor, I also wanted to respond to an argument that was made in the reply brief since I didn't get a chance to do it in the briefing, and this has to do with the, the trash poll, um, in Pennsylvania. And I'll start by saying that the defense has offered no evidence whatsoever that would take the trash pool in this case outside of uh the Idaho Supreme Court's decisions in Donato and Pelluzzi. Pelluzzi is very recent, uh, came out in the middle of the briefing, in fact, and rejected the exact arguments that are being pressed by the defense here. Um, obviously this court is bound by that reasoning. When the state pointed that out in their in their uh response brief, in the reply, the defense uh made an assertion that this case is different because the documents the state has provided are not clear on where the garbage cans were located, and that maybe the officers went up onto the driveway instead of collecting them from the street. Trash company collected it. Correct, I'm sorry, Your Honor, I misspoke. The trash company collected them on behalf of the officers. You just did the regular pick up I thought and pulled over after they got out of the neighborhood and said here's what we got. Well, I, I do believe it was prearranged with the FBI to, to for them to do that, but, but my point is just, I do think it's telling that they didn't provide the court with these documents that they believe are not clear, um. And I looked them up to make sure that they were, and in fact, there is an FBI report that was disclosed in Discovery that details that the garbage cans were at the end of the driveway, at the end of the property, and at the end it says see video. And there was a video disclosed in Discovery where you can see the officer's body cam as he drives by the house shortly before they look in the garbage cans, and they're in the exact place you would expect garbage cans to be when they're out for collection. Um, so they, of course, have the burden of establishing a search. They haven't presented any evidence to that. It's not sufficient for them to stand up here and say, well, it's just not clear. Um, which brings me to my final point, and that is, Miss. Taylor continues to say there was a lot of secretive stuff happening in this case. That is not sufficient to satisfy their burden that there was a search, that someone had a reasonable expectation of privacy. When you have the burden, you have to present evidence. You don't get to just stand up and say, well, it was very secretive. Um, I, I will note in this case, as the court may be familiar with it, as it's probably read back through the record, the defense in this case has gotten a lot more information than many defendants in other states who have, uh, where there's been an IGG investigation because the majority of courts have found this isn't really relevant information, it's just a tip. Um, now it is what it is in this case, and we of course complied with all the court's orders and provided the information, but The This isn't there's not a lot of information, not because it's secretive, but because it's just not our case. It's not what we're focused on, it's not the evidence we plan on using a trial, um, and yes, it, it IGG was used in this case and yes it did point to the defendant, um, but the fact that that happened doesn't mean that there was a violation of

the Fourth Amendment. Unless the court has any questions, we ask them to deny the motion to suppress. FBI In fact, violated the Fourth Amendment rights of Mr. Coburger. You would agree the state is uh Burdened by that. It's a great way of putting it, Your Honor. Yes, the state would be burdened by that, yes. I'll start backwards. I'll, I will. Answer the court's question that the court posed to Mr. and I. The state is burdened by what the FBI did here. Every action the FBI took in here, all of the secret actions that they took show you that there is an expectation of privacy that society is willing to accept. They didn't want anybody to know what they're doing. It is interesting to hear that discovery requests and motions to compel and orders have been complied with when I've learned at least 3 new things in the course of preparing for this hearing and being at this hearing so far today. That's a surprise to me. So I wanted to say that, and I want to go back to the trash pool. And I want you to know when you consider this, that that particular area had an ordinance that trash had reject that argument very recently. Your Honor, they might have, but that ordinance isn't all. I, I was starting with the ordinance, um, that it has to be collected by a trash collector, that a certain trash collector, and that you have to put your trash out too. In that circumstance, the FBI worked with the trash collector and had them go just to get that trash and then take that trash somewhere else too, and those are some extra actions that the FBI took in this particular case that how does that change the analysis? Well, Your Honor, I think that it changes the expectation of privacy is lost when you put it in the trash can, uh, to be taken away for the Supreme Court's opinion, even if it's a well regulated neighborhood by ordinance that says when and where you have to put your trash. Well, Your Honor, I think that there is an expectation of privacy when you have to comply, you have to put your trash out in that particular manner. OK, I And as you're saying the Supreme Court was wrong, the Supreme Court was wrong, and you're reserving that for a later higher appellate court. I, that's fine, Your Honor. I, I may not always agree with the Idaho Supreme Court on everything, but I have to follow what they say. But I, I, I have to make a record when I don't agree. I'm just trying to make sure we're talking about the same thing, and I have to distinguish the case as best I can as well. And I think it is different when you have the FBI telling the trash man what to do. I'll move on to something else I wanna talk about. Now where Mr. Nice started that um Department of Justice interim policy and he he read you the first footnote and I would just direct the Court to pages 6 and 7 in that and that is that um the FBI is not to search databases that they're not allowed to in this case the two of the 4 that they did and the next page talks about the things that have to be kept in case there's a prosecution case. The prosecutor talked to you about well this is a tip this is just a tip it's like an informant and it's thought of in this department of justice policy as more if they're told to keep things in case there's a prosecution case and so that should be considered when you're considering the entire picture that we have here in light of the amount of secrecy that happened here that takes it out of being a tip it takes it out of being a lead in

the case. I would. the court I'm sure the court knows pretty well when we're talking about um confidential informants and that type of law you have to have some reliability and there should be a big question here about how reliable this is how reliable whatever it was the FBI did um to develop this profile with the rest of the secret things that they did in this case and their willingness to violate their own policy, certainly not. Suggesting that this court create a new Fourth Amendment right based on violation of Department of Justice policy, but I'm saying you should look at that and consider that when you're thinking about what the FBI did here and how credible this informant was, how credible this lead was in this particular case, that's fair for you to consider just like you would in any other confidential informant type of case. I would like to um. Distinguish what we have here with our subsequent search. I talked a lot about that before. I won't go too far on that. This is a 2nd search and a 3rd search if we're just focusing on the 2 snip files. These are extra searches that happen after the initial search is done and the STR profile is developed and it goes into. The CODIS database this is completely different and a snip is different. You heard a lot of testimony about how this is sort of new and evolving technology and the the standards that apply are catching up and there's best practices you heard a lot about that today, so I don't think we can just say, well, if CODIS is fine this is fine it's not the same at all. There is a ton of information. It's your whole genome that gets profiled. Maybe the snip that uploads into my heritage, which it shouldn't have, maybe that snip doesn't tell you certain things about a health profile, but the potentiality is there in the SNP profile. For \$12 you can upload that profile and find out all kinds of personal health information. It's the potentiality of that and that's the Carpenter case that talked about the potentiality of that. People have an absolute privacy interest in their health matters. Um, Idaho has a couple of different laws on the books. It has the family G uh DNA law on the books and think about HIPAA. I mean that we all have to sign those forms every time we go to the doctor if we want anything released to our surgeon. It health matters are important. If you can upload one of these profiles for \$12 and find out all kinds of information. How is that not a 4th Amendment issue? That's what that snip profile can do, and that was done twice without a warrant. In this case, and there should have been a warrant. It violates Fourth Amendment rights, Article 1, Section 17 rights, and this must be suppressed. Thank you. All right. The matter will be uh taken under advisement. Um, let's proceed with the uh Frank's argument on the IGG and the Frank's proffer more generally. Or did I get it wrong again, Your Honor, I'm, I'm prepared to do that. I would request that the court maybe give me 5 minutes. I have different things. We'll take 5. Thank you. back in All right. Uh, let's take a, uh, Franks. You, I think on the court's bench there was. A document place so. What uh It had initials to comply with the courts. All right, um, Your Honor, the, the purpose we're here for today is to offer you a preliminary showing of why we should have a Frank's hearing. To do that we will show you that in this circumstance the affidavits that supported search warrants in this case had false

information in them that was intentionally placed there. There was intentional omissions of information that are material and exculpatory to Mr. Coberger and. Without the false statements and with the added information in, probable cause on the warrants should not be found. Today I'm asking you to listen to what we have to say, look at the exhibits that have been admitted, and I'll walk through those with you to talk about the 13 areas, um, and at the end of this hearing we will have met the preliminary showing required in order to schedule a Frank's hearing and fully challenge this. With the exception of the um IGG which I think we've already heard the evidence on, so. We did hear the evidence, Your Honor, and I, I will not repeat that evidence. I'll argue from that today, um, my point being that's not in the preliminary stage that all the other issues are on. OK. Well, I'll try to hit that as hard as I can then. Your Honor, in In this case, there were a lot of search warrants. I'm gonna draw the court's attention to those beginning on December 23rd. That day is important because it was just a few days prior to that that for the first time ever Brian Coburger's name came up in the course of this investigation. Your Honor wouldn't know that by reading the affidavits for probable cause. Nobody would know that. That's because that information is omitted from the affidavit. That information is something that you heard about this morning in testimony that but for. The FBI's work going into databases, they shouldn't have been going into. Violating their own policy, keeping no records and doing this all behind the scenes in secret, that's the only way a name was produced. Prior to that time, the lead detective in the case had not heard the name Brian Coburger. He had not crossed their radar. That's nowhere in the affidavit and that's important because that's intentionally withheld from the affidavit because of the work the FBI did because the FBI went behind the scenes and did things that they shouldn't have been doing because they searched databases that they shouldn't have been doing we don't know what else they did wrong because everything else is a secret. We don't know what else they did wrong because there's no record kept. There's no process kept. We can't rebuild the process that they did to identify Mr. Coberger. We can't do any of that because they kept no records, produced no records, and did this all behind closed doors and it was withheld from the magistrate. Had the judge heard about that signing probable cause that would have been really important to understand we don't know this name we heard it for the first time now and we only know it because we violated our own policy to find that. That may have given the judge caution. It may have made the judge wonder what else are they doing behind the scenes. But that was withheld from the judge. That judge never got to know that. Let's talk about what the judge did get to know with that in mind, and that's a really important backdrop. These affidavits are. A group effort I think the courts, I've heard a little bit about that, and if the court has some of the initial exhibits, the court will know, and I'm at uh D2. Um, the court will know that this was a group effort, the FBI, the same FBI that went behind and violated their own policy to try to identify somebody. They were co-located with Moscow Police Department

and working on these affidavits to present to the judge. The first warrant that gets anything related to Mr. Coberger is I refer to it as AT&T1. It's on 1223 22, and it's for 48 hours' worth of records of Mr. Coberger, and I wanna go through that warrant with the court having in mind that the IGG was purposefully and intentionally withheld from the magistrate, and I want to talk about some of the other problems with that warrant. This probable cause affidavit. Talks about. An interview they had where. The, the person that was interviewed said that she heard things and saw things within her house. But what is written in the probable cause affidavit is seriously lacking in detail, it's wrong and it's false in many places. The way the affidavit reads, it says, this person stated she went to sleep on the 2nd floor, she was awoken at 4 by what she stated sounded like one of the victims playing with the dog. Which was on the 3rd floor. A short time later, she thought she heard one of the victims say something. That caveat she thought she heard is a problem. That's not at all what was said. She was this person was interviewed, uh, shortly after 9/11 was called in the afternoon of December November 13th, 2022 and she was sure. I'm at Defendants exhibit 8A page. 281 lines 4 through 10, when this witness was sure that she heard this particular victim. Go down the stairs, go up the stairs, and then come running back down the stairs. That is not what's contained in this affidavit at all. That is repeated. During this same interview, a couple of different times at page 287, it's also repeated. In a subsequent interview that that same day, this is Defendants exhibit 8B. That's at page 3:13. And again at 3:20. And I've got one more of these where this is repeated. It's repeated again in in D8 C as well. That is important because that's misleading to the judge that waters down what was said, and that matters in a, in the probable cause affidavit. Because the officers when they wrote this, knew that wasn't the case. They knew this particular person that DM said was upright and running down the stairs that that's not what happened. That person was killed in the bed and never left the bed. And so the officers water that down because they know that fact is wrong, but they don't tell the magistrate that. They also don't tell the magistrate that this witness. has claimed memory problems that this witness has claimed that she's not sure what she heard or saw was real or whether it's, it was at a dream and that is contained in defendants. 8C and that's going to be beginning at lines 3 page 396 398 399403. There's further statements from that witness in that police interview that said that she had had too much to drink and couldn't remember. None of that is given to the magistrate. That is information that's withheld. That's credibility of the person telling. Law enforcement these things and the magistrate had a right to know that whatever is laid out in here isn't exactly the way it was that person had credibility issues and she said things that were just absolutely untrue and couldn't have been true. Law enforcement knew that that was intentionally withheld from the magistrate that matters when we're talking about credibility and sets this whole thing into motion. Your Honor, the, the next part of the affidavit talks about what they have determined to be suspect vehicle number one, and it, uh, it trails a

path of pieced together cameras, but what they don't tell the magistrate is that the camera near the residence, the 1112 King Road camera near 1122 King Road. You can't tell what kind of car it is. They don't tell the magistrate that that's an impossible card that their expert can't make an identification of that. They don't tell the magistrate that this is pieced together from various other videos throughout the area that's withheld from the magistrate. That's important information when you tell a magistrate we found this car doing this thing and we know what it is it's around this particular area. The next issue is the year of the car. Law enforcement works with the FBI to determine the year of the car and the FBI provides some possibilities after numerous submissions to them and the court knows this and can read about this. This is going to be in D10 that's in D9 and finally after several submissions, that's when the FBI IMIL says I can make a car identification. The issue with that that's not disclosed to the magistrate is that car appears one time on one video. And not any of the others that they try to say are the path it it's not let me see if I can say this right, it's not following a consistent trail where the one camera that can identify the car where it appears again it appears one time and then what law enforcement did was they took several videos from all over the area and said well it's the same car and we have an identification. That's not all. The identification was most comfortably from that FBI agent to be a 2011 to 2013 Elantra. And that's what law enforcement relied on. The court has, it is D12 and it's the be on the lookout that was issued by Moscow Police Department where they look for a 2011 to 2013 Hyundai Elantra. And that's what they're, they're looking for. And they don't tell the magistrate that's what they're looking for. They mislead the magistrate and let the magistrate believe that they have a clear view of this car making this loop and that's just not what happened. It's pieced together and it doesn't make a whole lot of sense. Law enforcement in their affidavits talked about this dog barking and they key some time and they say this is when something was happening inside this house we can hear this dog barking and they use the videotape to get it to get a time off that surveillance tape from the neighborhood, the 1112 came. And so they've got this time, but they also have this video, this trail that they've picked out a time that something probably happened here and they don't tell the magistrate that this dog that's barking continues on long after the car they're interested in has left the area and then abruptly stops. Your Honor, the dog was found the next day. Inside the house, in a bedroom with an open door, where the other bedrooms that contained people that died. Their bedroom doors were open, and this dog had not tracked any blood around. The dog had no blood on it whatsoever, but it was just sitting in an open room a day later. The magistrate is not informed about that either. Then the then the police department goes through maneuvers to tell the magistrate that they did this investigation. They talk about a traffic stop, um two traffic stops actually, and there's no connector in there. This is where the lack of the IGG becomes really important if you know about the IGG, you know why that would be built otherwise. Two random traffic stops months ago in

pretty populated areas with a lot of college kids really doesn't add up to be an investigation. But those are put in there to try to bolster up this investigation and say it was something that it wasn't probably the the worst part of that is relying on um after the BOLO went out for 2011 to 2013 Elantra. Then WSU Washington State University officers find cars. They find one that's registered to Brian Coburger parked at the apartments he lived in, but it was a 2015 Elantra and so they don't really do much with it, but this is place that is placed in the affidavit like it was an investigative fact and it wasn't. It was on the 20th of December when the detective, the lead detective, got a hold of WSU police and found out about that and said, oh hey, you, you called this in. He didn't know about that before, but there's no context around that. That's just stacked in there like it creates probable cause when it doesn't. You know that's the case when you look at. A couple of our exhibits. One is prior testimony from that same detective. And if you look at the messaging between the detective. And the WSU police officer about the timing of that. So it's based on. This false investigation trail. And it's based on. Statements that are completely out of context from and somebody that they interviewed that are incorrect statements when you take the totality of the circumstances together and statements that this person disclaimed a couple of days later because she wasn't sure what she remembered was real. And give that to the judge. If you add in the missing piece of IGG and what happened with that, and as a judge, you know you've got law enforcement willing to violate their own policy. And you know that you're not being told the full story about what a witness is saying, and you're being led down this path to say there's a real investigation when there wasn't a real investigation. You don't find probable cause on that if I uh. Find that the IGG was not unconstitutionally obtained. Um, Doesn't it just add to the probable cause? No, no. Um, it would have been disclosed, it would have simply created more basis to suspect, Your Honor, if it had been disclosed, think about how that would read. We used A process to make an identification. This is a new technology this is called investigative genetic genealogy and we identified somebody. We did not keep any of our documentation because even though Department of Justice policy says we need to, we decided not to. Even though it says we can't go into certain databases, we really wanted to figure out who this was, so we just ignored that policy altogether. I don't know how a judge could find that credible. It, you don't even know how that happened. There is a great big question mark about how that happened. To your Honor's point. You should find it unconstitutional. If you don't find it unconstitutional, it's a separate analysis. I appreciated being able to talk to the witness about that today, but it's a completely separate analysis. You're looking at. Integrity, you're looking at what a court can rely on to sign off on an affidavit or a search warrant. If an affidavit is presented to a judge. And you know. That the rules don't matter. That terms of use of a database don't matter, and that you're gonna hide what you do, and that doesn't matter either. There's not a lot to rely on. If law enforcement came to the magistrate and said, We wanna go search this



house over here and they said we really think there's going to be evidence of a crime in there because we've got this confidential informant and this confidential informant has provided a lead but we need to tell you that we don't have real reason to trust this confidential informant because they won't tell us how they know that they gave us a picture but they won't tell us where they got it from or when they got it. Or what means they use, they threw away their camera, they threw away all the metadata, they won't tell us anything about that. And by the way, the confidential informant maybe has some integrity issues. A judge is not gonna sign off on that. And then if you say, but to support that. I built this false look at it a whole investigation here. I'm gonna tell you these other things that I know that I had no idea about before my confidential informant was here, and these things don't add up anyway. There is not, in my view, a judge that's going to find probable cause because somebody got stopped. By law enforcement, I think it was a seatbelt ticket months before. The purpose of the submission of that was simply to identify the car that he drove and the fact it didn't have a license plate on the front. Wasn't to suggest it's otherwise connected to the homicide except to say this is a car of interest and the defendant was found driving it. Well, let's talk about that license plate for for a second though because that. That's not something you can see from the videos and that was testimony you heard today. You can't see that from the video that the cops relied on here so that bit about the license plate, that that's something a little bit extra that happened after we have this IGG stuff that wasn't known before um. There was no video collected from WSU before. There was no communication with the officers at WSU before. So if. Before the identification through I I'm just not tracking why that matters. Go ahead. It matters because. This wasn't a real investigation. These are things that are put in there to make it look like an investigation happened to say don't look here at this big glaring thing that's missing this whole piece about why we identified him. Don't look here we don't want you to look here because this is ugly this is dirty, and this isn't real. That's precisely why those things are placed in that PC affidavit like that. So based on that, the first warrant gets issued. It doesn't end there. This warrant It is not good. There's too much missing information, false information, and information withheld from the magistrate here. But then the warrants just rely on one another. There are other things to add into later warrants as well. And so I want to go through some of those other things with you. I do wanna comment on. The affidavits being used by a variety of officers, I understand the collective knowledge doctrine, but that's not what is going on here. You have an affidavit that sometimes Moscow police attribute it to the person that really wrote it, but quite often it's just the name taken off and who claims to have done the work is whoever signed the bottom of it and it can't be the same so it's not quite the same thing. And that matters as well. But let's talk about the second warrant, um. The second one is also AT&T. The first one comes in and an hour later. They say they have all this data analyzed, and they say they now need 6 months' worth of phone records for Brian

Coburger's phone. They do acknowledge that his phone wasn't contained within the geo fence, um, when they looked at the geo fence. But this second warrant. It is important and we're gonna talk about minutes difference of time in the first AT&T warrant. In that affidavit, the police officer talks about 2:42 a.m. that WSU cameras, because they start looking at WSU cameras after the IGG identification. They find A white car that they say is an Elantra at 2:42. So they get the phone records and then it becomes 2:44 that they say, Mr. Coburger's leaving his residence, 2:44 a.m. And the place near Bishop Boulevard, where one could turn to go to Moscow. At 2:42 is inconsistent with 244, but they don't correct that. They don't correct that. They don't say that vehicle at 242 cannot have been the right white Elantra running around that night. Because we now know it was at 2:44 a.m. They want to keep that in there because they want the car positioned like it's going to be going to Moscow and that is really important with the misleading of the magistrate. When you look at one A, that's the map we looked at earlier today where there's the whole loop, um, around, but there's a blue line as if pointing the car towards Moscow, and that's not what happened. They then report the car, the phone. Stops reporting to the network at 2:47 a.m. And that's not right. Um, we submitted their their cell experts report that say the phone stops reporting at 2:54 a.m., we submitted two affidavits to you from our experts who have worked with the call detail records, and that's just not right. Don't get caught up in thinking 7 minutes don't matter here. We're talking about ground that can be covered in a vehicle in a short time. We're talking about two towns that are fairly close together and so the way a car points when they go off the network matters a whole lot in the circumstance. That's not corrected in any of the affidavits. That's the part that's really exculpatory to Mister Coburger is what direction. When the phone stops reporting to the network, what direction is the car traveling? And you, you can know that based on the cell towers, the handoffs from tower to tower as it tracks where a phone's going. The FBI knows how to do this. They chose not to do this. They chose to take a time 7 minutes before it really stopped recording, and they chose to make a map that showed a direction that that phone wasn't traveling in to create a false narrative for the magistrate to rely on to find probable cause. Your Honor, I draw the court's attention to D 7 and 8. Those are the affidavits from the defense experts. Their CVs are in, uh, D 28. Once the second AT&T warrant comes, then you end up with warrants for, um, Mr. Coburger's arrest, you end up with warrants for. Uh, DNA samples to be taken, warrants for the search of his apartment, the search of his car, the search of his parents' house. Those are the warrants that are next implied in that. Here what's added to that set of affidavits is the paragraph that talks about Mr. Coburger's phone using a tower that provides service to 1122 King on a number of occasions. The PC affidavit says 12. Your honor needs to. Take a look at. it is D1 B and C. That's an email from Nicholas Balance and he's talking to the detective in Moscow about the dates that he says this thing happens and then he puts those dates in his cast draft report and in his cast final report and they don't

match up they're they're different dates on those different times on those. But the really big deal about that. Is that it's misleading when you say the cell tower that also services this particular location. Moscow has I think 2 cell towers that service the town. Those cover places that one shops, places that one eats, places that one gets gas in Moscow, um, from the records you can see handoffs and so you know where a vehicle is going, you can know whether it's stationary or not. You can know whether it's parked looking at a particular place or not. Based on those records we also provided the records just so the court would know there's a volume of records. I don't expect the court to decipher those records, but based on those records they absolutely knew that Mr. Coberger wasn't around that residence, wasn't parked near the residence, didn't stop and have his phone in a stationary position at that residence they absolutely knew that that's not what was happening but they put it in there. To make a connection that didn't exist, they put it in there so that the judge would think that this was the right person. And they shouldn't have done that. They knew that was incorrect. They also, um. Changed that quite a bit, performed a drive testing. And so there were other bits of data that kept coming in. So that they would know that was untrue. Now, for a magistrate to be relying, remember on. Somebody who's a witness, somebody who's been interviewed. 4 or 5 times and continually says something that's absolutely impossible. Has memory problems. And the judge never knows that. And we'll keep the IGG identification off to the side, um. But then you have this false narrative that looks like stalking, that looks like following, and it's not true. That is extremely damaging. It's very misleading. It's an outright lie to the magistrate when you omit that kind of information, when you take that context out, you might as well say stalking because that's what you're trying to say, and you know that's not true. This court can rely on our proffer in D 1 B. And in the cast draft report and in the cast final report because those dates change, the court can rely on the evidence that it will will be produced at a hearing from defense experts that will talk about the handoffs, the patterns of handoffs and how misleading that paragraph was to the magistrate. The real story is exculpatory to Mr. Coburger. He was not stationary around that house. He was never at that house. He did go to Moscow. He did drive around. But he wasn't over there. And the phone records absolutely show that. We'll move forward to the set of warrants that come a little bit later in February, March, April. I'm talking about Amazon, Google, Apple, those kinds of warrants that come later. Here's what is left out of all of those warrants. The fact that. Mr. Coburger gets arrested, his apartment gets searched, his car gets searched. His car gets searched again, and his car gets searched again. And there's absolutely no connection between him and anybody from 1122 King. And what I mean by that is that. There's no blood in his car. There's no. He wasn't connected to that house, to those, to the people in the house. Your Honor, I'm, I, I'm maybe I mis mistake me thinking of a different date for the AT&T at the at the cell tower stuff so you're still talking about the cell tower stuff? No, I've, I mean that stuff applies to every

single warrant we have because that was early you transitioned to warrants that were obtained after the arrest. I, I did, yeah, and by the time the arrest they had a direct DNA connection. Your Honor, what I'm talking about some other evidence that the defense can claim in cross-examination or their own cases exculpatory, but isn't. The DNA connection in itself probable cause to support any of it from there. Your Honor, the DNA I'm talking about is the lack of DNA in Mr. Coburger's car and the lack of DNA in his apartment, the lack of connection to the individuals. Even if disclosed. Preclude a finding of probable cause when there's a DNA match between the DNA and the sheath and Mr. Coburger. Isn't that probable cause every day and twice on Sunday. Not in this context. Not in this context, um, because of the IGG work. Because, um, I mean, that's the ultimate question that will be before a jury. What does that mean, right? What does a knife sheath at a scene mean? That's gonna be the ultimate question. You're killed by a knife, it probably means a lot. It might, it might mean a lot. Probable cause is not a proof beyond a reasonable doubt standard, it's. There's probable cause to think that this person might have done it. Um, And I'm not sure how that. Direct DNA connection. To a she Found on or near one of the victims. Doesn't close the book on anything on probable cause after that. Well, I think it doesn't close the, the door on probable cause. I think when you know the other factual information that the magistrate should have known. I, I think that there, there's a lot of pause even at a probable cause level. Judge, I, it's this was information withheld from the magistrate and I'm talking about. But let's just go with a car, let's just go with. I understand the the lack of evidence of DNA material or other. Victim-related material, uh, in the car and in his apartment as asserted, but I'm not sure how that precludes probable cause when there's a direct DNA match. There's plenty of reasons that that might be the case. And when a magistrate's looking at this, they have a direct DNA match to a person from an object associated likely associated with a murder weapon. I, I have not yet a magistrate would not find that probable cause. If the magistrate had the other facts, I think the magistrate would have some serious concerns and would not find probable cause, Your Honor, the, the vehicle, um, and, and I know the court knows what I'm gonna say there's not DNA in that vehicle that was brought out from a crime scene. This absolutely matters, Your Honor, if. If you want to go to the state's theory right with their videos that they've talked about that they told the magistrate about that this is the video, this is what matters it parks at this certain time it leaves at this certain time if you want to go to that, there's about 13 minutes of time, right? 13 minutes between the last time you see the car and the next time you see the car on the on the video. And if you end up with a car that's searched, and I mean searched and taken apart, the brake is taken apart, the gear shift is taken apart, the key fob is checked. There's no blood on any of that, none. The steering wheel. There's some kind of spray all over the interior of the car to check for it. There's no blood. I think that there's context that the magistrate should have known that's absolutely exculpatory to Mister K Coburger, and it

matters a whole lot. I'm not saying it's not potentially exculpatory. I'm just saying I'm not sure how knowing that in light of a positive DNA connection with trump. Would, would cause any magistrate to say, well, OK, I guess there's no probable cause here because you couldn't find other connection to. Forensic evidence, uh, when there are other things in the affidavit that were affidavits at that point that could explain that, including the use of covering clothing and covering gloves and all that that could be put into a bag real quick on the way out, that was in one of the affidavits. I, I guess, and I, I don't intend to argue with you about it. I'm just, I mean, I understand your other arguments, but when you get to once they have the actual DNA. Evidentiary DNA. It seems to me that it's an uphill battle to say there's not probable cause at that point. Well, Your Honor should never get to that question, but I'm gonna answer it for you, but you should never get to that question because you should have already found that AT&T 1 and AT&T 2 were terrible, and they were there's no probable cause for those, and they just build on each other so you should find that the very first one lacked probable cause and then everything else does as well. But let me answer your question there if the magistrate judge had been told. There's unknown male beat in blood in the house attached to the handrail. That might have made more of a difference to her, maybe. A sheath that can be carried to the house and blood in the house that's not the same maybe that matters and then maybe the car being completely empty of any blood DNA connection maybe that matters a little bit more maybe. Well, I'm just not sure why it matters for for probable cause, but I think we're talking over each other, so I'll just go on. OK. I don't think probable cause is in a vacuum. I think probable cause isn't one thing. I hope it's not one thing. I hope there has to be a little bit more than one thing, especially when you've got another thing. That's the same as the one thing. Well, I, I said I wouldn't do this, but I'm gonna do it anyway because you brought up a, a blood DNA of an unknown, uh, individual that was found, I think, on the handrail, um. Doesn't that necessarily not exclude Mr. Koeberg? What it may do is suggest there might be a potential other person in addition involved if you assume that that blood was related to. Uh, the victims, uh, uh, and not some earlier event in the house. If What the what the court is saying is exactly why the magistrate needed to know that. Is there another explanation here? I've got this sheath. But there are all these other things that if I know about them matter. What's the other explanation? What's going on with this investigation? What's happening here? That's exactly the point, Your Honor. What other explanation is there? The magistrate wasn't given a chance to ask that. She wasn't given a chance to ask that one she wasn't told about unknown male B, blood on the handrail. She wasn't given a chance to ask about that when she wasn't told about unknown male D, blood on a glove right outside the residence. She wasn't given a chance to ask any of those questions. She didn't know that. Brian's car and the court's question, good question. What does that mean? Could it mean there's more than one person? The answer to that is, or it could mean it's not Brian,

because his car's got nothing in it, and there were only 13 minutes to do this. The magistrate didn't get to know that. In his DNA is still on the knife sheath though, that's the problem, counsel, for probable cause purposes. If that's the only thing she's told, I can see why I should find probable cause. It's these other things that are withheld that create a context around it. I. I think the purpose of Frank's is to ask this very question, and this is a question What do we want to do with our criminal justice system? Do we want to have one thing with no context around it when there's this other context that really matters? the Frank standard, which is even if you add that stuff does that take away probable cause, counsel and my problem is once you have a direct DNA tie to the defendant. Uh, for purposes of probable cause. This isn't for purposes of conviction, for purposes of probable cause. You have not explained to me why. A reasonable magistrate, let alone any magistrate, wouldn't find probable cause there even if they knew all those other facts. As to Mister Coburger, now there may be, as you say, other people that Creates concern or issues about that need to be investigated further. But I'm not sure that that diminishes the probable causes to Mister Coburger if his DNA is found on a knife sheath found on or near the victim who was stabbed with said alleged knife that would have been in said alleged sheath. I think The most prominent question is how did that sheath get there? And I, I think when you ask that question, I think you can have DNA on an object at a scene. When you know about all of these other things and you don't find probable cause because there are more questions than there are answers and all of a sudden this one thing doesn't look as big it doesn't look as everything pointing to it when you have the context around it the magistrate didn't have to have every detail of the case. But knowing how many attempts to find a DNA connection there were. And it didn't exist. And Brian's car in Brian's apartment. That there's no other DNA in there other than unknown male be that we know of for sure, an unknown male D outside. There There is a lot of context there and all of a sudden this one thing. The question of how is that there? Is the question that the magistrates should have had, and then we come to all of the other things that we've talked about. We've, we've come to what we relied on. One of the witnesses saying things that absolutely couldn't be true. One of the things that the, the witness who said these things that couldn't be true, also admitted she didn't really know anything. You can't rely on that anymore, so you take that out. You know the identification to this sheath that. Maybe seems like it would be really good. You don't really even know how that happened. And you don't know how it got there. This isn't like. DNA and blood on the wall from Mr. Coburger, that, that's not there, that doesn't exist in this scene. You're talking about. An item That the question of how should be, especially when you know about the other male DNA in the house, and especially when you know about the lack of DNA connections. There's also no connection. Between the people in the house, um, and Mr. Koburger based on their cell phones, based on social media accounts. There's just no connection. The magistrate wasn't aware of all of those

factors when she was being asked to decide on probable cause. I don't think criminal justice means one piece of evidence out of the context of everything else is all you need context matters a whole lot. You're not suggesting the magistrate was told that there was DNA evidence found on in Mr. Coberger's car or in his apartment. The, the, the lack of inclusion also can be viewed as the implied of, they're obviously not telling me they found this, and they would have if they did. I, I'm not 100% sure I followed, um. I, I'm not sure. I, are you asking me why I think that's important as far as the Frank's purposes? Well, for Frank's purposes, you. You, you, you are implying, I think necessarily that the police intentionally didn't tell the magistrate that they didn't find. The lack of evidence in other places, the apartment, the car, etc. right, that's right. they, they didn't tell the magistrate. That there was evidence this is a omission. This is one of the omissions, yes, yes, we have false statements and we have omissions both. It's not one thing in this case. I was understanding. Yeah, yeah, thank you for that. I wasn't following the question the court was asking. I think the other Thing I think I covered all on my proper, Your Honor. Thank you. S I think uh now Mr. are you gonna address the IGG Franks issue or is uh Ms. Jennings gonna cover all of it? Your Honor, I think I'm gonna cover all of it. All right, go ahead. Good afternoon, Your Honor. Um, as you're well aware. You have to make 2 separate inquiries for each of the claims that Ms. Taylor has brought before you. First, you have to decide today. Has the defendant made a substantial, not just a preliminary showing, but a substantial preliminary showing. That the affidavits and in our case we're referring to the exhibit A's. They were attached to each of the affidavits for probable cause. That they were the basis, which were the basis for multiple search warrant applications that within those exhibit A's, there were deliberate or recklessly false statements or omissions. This is a high burden. And this is a very high hurdle for them to jump over. Now if you can answer yes to that. Um, then and only then should, should we move on. And then ask the second question. Um, does that even matter? Does that statement actually diminish the probable cause finding? It's only when the answer to both of those questions is yes, should you then. Even consider granting a Frank's hearing. The motion for Frank's hearing is a serious allegation. The allegation is that law enforcement acted improperly, that they lied to the magistrate in order to secure the warrant. The statements have to be deliberate. Reckless, false, that's the standard. Frank's is not implicated by just simple mistakes or misunderstandings about the evidence or Scribner's errors or even just negligence. As the court is well aware. This is serious. The defendant is alleging law enforcement lied to secure the probable cause in this case. And the state submits the defendant has failed to back up this claim. And they failed because they can't. Law enforcement submitted probable cause affidavits to the magistrate based on the information they had to the. They had available to them at the time that the various applications were made. That's how it's supposed to work. And that's how it worked. The defendant has alleged 13 separate areas uh where they say there's a Frank's

violation. Um, I'm gonna go through those so that I make sure that I get through each of them in the same order that defendant addressed them in, uh, their motion and as the state addressed them in our response. And that starts with this idea of attacking exhibit A. Um, As the court knows in Lear County, it's our practice we submit an affidavit for probable cause. As I said, attached to that affidavit is what we call an exhibit A. That exhibit A. Is law enforcement officers' statements laying out all the various facts known to them related to probable cause in order to support the issuance of a search warrant. In this case, exhibit A, by the time we get to where we're challenging. It was about 20 pages of facts for the magistrate to review. Essentially the same exhibit A was relied upon for the application of multiple warrants. This was a massive investigation. You heard testimony earlier today from Detective Payne. Multiple officers were involved in this investigation from multiple agencies. And they were doing briefings. For weeks at a time they received 2 briefings a day with all the lead investigators in the same room receiving the same information. This information was then put into. This exhibit A for the basis of of a probable cause affidavit for search warrants. A working document like this. What with the most up to date information. Um, was the best way to ensure the magistrate was getting the most complete and accurate information. And defendant wants to take issue with this process. But What do I do, um. If the affidavit is attached to detective A's. Submission is Detective A's affidavit, right? And there's a, for purposes of my question, a uh material. Um, Reckless statement. In there. But Uh, Detective A isn't the one that made it. It was another person on the team, let's say the cast member, uh, expert. Well, how does that affect the Frank's analysis as it relates to the affidavit submitted by uh detective A? Um, I would say that Detective A would have to have reason to know that that was a materially reckless statement. Made by Detective B. Even if the person that made the statement on the team knows that that statement going into the affidavit, the group affidavit, if you will, or the group statement is gonna ultimately make its way to the magistrate. I concede, I think there's an issue there. But that's not what happened. Um, I don't think that any officer can submit. A statement that they know is gonna go in front of a magistrate and do so recklessly. And if they do so, then I agree. That has to, the the court should take issue with that. But the cooperative nature of this investigation. And this kind of group effort is allowed. Um, as discussed more extensively in the state's response, you know, we have several Idaho cases that support this. State be Rubio, State be Gomez, state be Alger. And in our case, the probable cause affidavit, it wasn't as if the judge wasn't put on notice that this was exactly what was happening the judge was put on notice. They each affidavit explicitly told the magistrate blank officer depending on who was applying for it, quote, is being assisted by members of the Idaho State Police and agents of the Federal Bureau of Investigations. Through throughout. Um, the document, it, it makes references. I consulted with FBI vehicle specialist SA Aimmel. I consulted with FBISA balance regarding cast. I consulted with FBI



SA Hill regarding surveillance footage. It's very clear what the sources of the information were coming from. It could absolutely be reasonably inferred where the information was coming from. That the magistrate was not at all misled regarding the sources of each of all the information. I I'm gonna talk a little bit about um this idea that there's some issue with um who did the work um. In reference to Google, they claimed that the CSLI work alleges co-worker around Ken Road residents. And this same clay, same clay is in exhibit A signed by Detective Blaker. Well, this isn't accurate. Um, the officer signing the affidavit did not claim to do the cast work. Um, you mean, um, AT&T? Uh, yes, um, they didn't claim to have gotten those records and put them in to their program to determine the approximate locations of the, the phone. That was done by Special Agent Balance and the affidavit makes that clear. And defendant ignores the entire paragraph within exhibit A that makes that clear, quote, I consulted with an FBI special agent that's a certified member of CAT this paragraph goes on to explain what cast is, what cast does, the experience that's involved, um, as a balance his own experience. And then the law enforcement officer then states from information provided by CAT I was able to make determination I was able to determine estimated locations for the 8458 phone. That's not claiming to have done the CSLI work, but instead it's just a reflection. The work was done by balance. Investigators reviewed that and then made some determinations of the approximate locations for that 8458 phone. And we're gonna get into this in a little bit down because this comes up again. All about the cell phone and we're just gonna take two we have two different opinions about what those records show we have an expert who tells us and that's what was relayed in the probable cause affidavit and those opinions haven't changed. Were we differ on a few factual issues. I believe there are 3 towers that provide service to the Moscow area. Defendant is cool. Here's my concern with you telling me that at this stage of things, where in the record is that currently? Apart from anything you may have submitted after they filed the Frank's motion. Uh, what specifically that there are 3 towers. I believe I referenced it, but if you give me and I rely on that evidence, then I have to give them a full Frank's hearing. And So, that's why I've been very clear to say I'm looking at what the proper is from the defense. Without evidence submitted by the state. To determine whether they have met their threshold burden. And so I get concerned when you start telling me things that are not necessarily part of the evidence. Understood, we can, we can move past the number of towers. Um, here's what is in evidence though, uh, and based off of the PC affidavit is that the phone was in the area for the tower that provides service to the 1122 residents. Still maintain that's true. Regardless, none of this has any bearing on the validity of the search warrant. Their argument is merely a clarification about which member did what work. Um, and, and that doesn't matter to the ultimate determination for probable cause. Defendant then um make some allegations regarding an eyewitness statements related to DM. There's kind of two buckets of attacks here. Uh, the first bucket is that the defendant claims the magistrate

was never informed that uh DM told law enforcement she. When shown a picture, didn't recognize the defendant. Well, It's clear from reading the probable cause affidavit that she's not gonna recognize the defendant. What was the? What relevance was the statements of DM that were included in the affidavit as to probable cause. The I cited those in my response um throughout she was. What were they? OK. I can tell you generally consistently she gave the same set of facts. I understand the things that she said. Why was it important the magistrate know those things? In other words, are they going to who the ID of the perpetrator is? Are they going to establish a timeline of when the uh alleged, uh, or when the murders took place? Oh So it's part ID as well. I think that it goes to giving a general description of the person that she saw in the residence around the time that corroborates when we know these crimes occurred, yes, a general description is material and relevant. And that material in that general description which is what was provided in the PC affidavit was consistent throughout all of her interviews. She describes seeing someone wearing all black. A mask with only a portion of their face showing invisible. This person was male, white, she heard a voice that was not something that she recognized. The person was a slim, skinny, lean build. And the person was about was taller than she was, is around 58. That's what's. Important, it was that general description. And that general description did not change. They're also important to establish the timeline. It is. Um, it's, it's important to establish a timeline to know when the the timeline match the vehicle surveillance of when a suspect vehicle is coming into the area. Of 11:22 and then leaves as well as text communications of her relaying what she's observing. During the same time period. And And and even if, if the state's wrong. That somehow there was some exculpatory um relevance to um some of her statements um not being included in the probable cause affidavit um you can take all of it out and the magistrate would still have probable cause. The second issue defendant, the second kind of bucket that they take issue with with DM, um, is about these, these other just statements that she gives during her interviews. Um, The defendant argues when an eyewitness states she's not sure anything she saw was real, a magistrate should know about it. Well, The simple answer is, investigators knew what she saw was real. Uh, and we know it wasn't a dream. Uh, because they found the evidence, discovered the next morning. Those statements didn't need to be included in the PC affidavit because they weren't exculpatory. They didn't support this idea that this didn't really happen. That somehow we got it wrong. Uh, next defendant attacks the vehicle identification. Um, well, This this picture they're painting about how uh how this happened, um, just it's simply not true. Um, the magistrate was given a very detailed picture of the investigation. At the time, related to the white sedan, which was later determined to be a a Hyundai Elantra. This was about 5 pages of the probable cause affidavit. Um, the reality is, yeah, still images and video were provided to a vehicle specialist. Based on his review, he provided information to investigators. That the suspect

vehicle was likely a Hyundai Elantra. There was some discussion regarding what was the most appropriate year range. But at the specialist direction. He said that the year range to be focused on was 2011 to 2016. So Detective Payne reasonably relied on his expertise as a vehicle specialist and included that in his probable cause affidavit. And the court has in front of it the emails attached as exhibits that show that's exactly what occurred. And the definite. Appears to argue that well the vehicle specialists shouldn't have relied on this video because they they can't tell that that was a Hyundai Elantra. To them, but it doesn't look like I guess a Hyundai Elantra. And the video that is clear. Well, they take issue with that video because and specifically we're talking about 1125 Bridge Road. Because they say, well, that can't be surveillance video of the white Elantra even though it was caught on video about 0.3 miles from the crime scene. About 3 minutes right before when we see the suspect vehicle in the area of the crime scene. Which 0.3 and 3 minutes appear to be. The amount of time it would take the vehicle to travel to the area of the crime scene they say well that that can't be the right video um because if it were then. The uh surveillance right up the street would have also caught this video. But we know that's not true. And that's been submitted to this court. Excuse me? When was it submitted to this court? Well, it was submitted through my response. I was afraid that you're gonna say. Um, it was submitted through my response, um, that, that could, that their logic is flawed. And it, I can tell you it has since been confirmed. Um, I do not have, um, and that, and it has been discovered to defense. Um, we had Special Agent Hill confirm and he discovered this as Bates 15,990. Which confirms that the. Can surveillance camera that was set up to capture motion. Um, would not have captured the corner. The defendant says must have been necessarily captured. Again, uh, it doesn't matter at the end of the day. The the defendant's speculation about the the route of travel and their differing opinion on it isn't the basis for Frank's hearing. There's no legal basis for second guessing a vehicle specialist opinion. And and they haven't made a substantial or sufficient proffer for you to do that. Next, the briefing addresses the IGG issue. Is it possible to tell from the affidavit uh what Shots and what cameras were relied upon to make the identification. Um, I know that the app. Well I don't know that you needed to. I don't know that all of that information had to be included. That wasn't my question. My question is, um, whether, uh. That the affidavit uh describes the specific uh shots and cameras relied upon to make the identification. No. It discusses that several um surveillance videos were reviewed. That images were turned over to a vehicle specialist and then that specialist made a determination but no we didn't walk through describing each and every still image or video to the magistrate. No. Nor did we need to. Um, Really the IGG has has been discussed extensively. Um, I, I think the only real Frank's issue is. Should the IGG process, the fact that it was not included in the PC, is that the basis for Frank's hearing? But you heard testimony today that law enforcement received this tip. And they made a strategic decision not to include it. They were told it's only a tip.

And that they should develop probable cause separately. And that's what they did. And at the end of the day. Your Honor is already And it hit the nail on the head with through your questioning of Miss Taylor at the end of the day. This information regarding IGG and the use of IGG is only inculpatory. And and the non-reliance on the IGG information. Does not diminish probable cause. And the IDG information was confirmed through the STR testing. I can't wrap my head around. Any argument. The IGG and STR testing would be exculpatory. Defendant makes um. How he about the dog barking. Um, and that I guess the magistrate should have been informed that that a dog barked for 25 to 30 minutes. Um, And, and this is just a reach for me. I, I'm still unclear how this is exculpatory. And again, this fact just. Does not diminish, take out all information related to the dog. It doesn't diminish probable cause. Circling back to the cell phones, um. At the end of the day. This is the proffer is their opinion of the evidence. That's not the basis for Frank's hearing. We're relying on our expert's opinion. They disagree. And, and that is a dispute that should be had and it should be had at trial, and I suspect it will. But it doesn't give you the basis. To grant a Frank's hearing. Um, defendant next, the next area is the footprint. There was a footprint found outside of DM's bedroom. Um, they claimed that that the inclusion of this was misleading. But again, there's nothing misleading about the statement. Um, the statement says during the process of the crime scene, the investigators found a latent shoe print. It was located during the second processing. Um, it came back using a presumptive blood test and showed the presence of cellular material. Um, they let the judge know that it was outside the door to DM's bedroom located on the 2nd floor and it's consistent with her statements. Yeah. Um, the investigators provided the magistrate the information they had at the time of the investigation. Um, Defendant's opinions about where the shoe print should have been located and it couldn't necessarily have been located there again that just doesn't rise to the level to warrant a Frank's hearing. Again, our case doesn't hinge on the identification of the shoe print. Um, neither did the PC affidavit. There was sufficient probable cause with or without this information. Go just grand jury subpoenas, they didn't discuss it today, but it's it's. Addressed in their motion. Yes, um, before you get to that, can you dress the. Allegation that the cell phone data uh was. I guess, um. Purposefully. erroneous as to the time that the phone was uh no longer reporting. Which then relates to the supposed. I Uh, position of travel, right. Well, I, I still. I don't know that I completely wrap my head around the defendant's logic in this. I, I have to, so help me out. Well, I still don't understand. I understand her statement and her argument. I'm trying to understand your response. I guess what was reported was was the information known at the time that the probable cause affidavit was was given there's. information that he was given from this goes to my first question about imputed erroneous statements. So I understand the allegation in that regard, not necessarily to be that Detective Payne knew the statement was wrong cause I'm not sure there's evidence of that. But did the cast specialists know that there was A

misinterpretation or an erroneous report. I don't think that I don't. I don't think that you have before you, um, a sufficient proffer that proves that the cast. Specialist submitted to submitted false information. Apparently there's a difference in the handoffs of 7 minutes at the end of the day. OK. Um, no, I, I don't think it's incredibly material. The material, if you look at it in terms of where the where the phone was in that 7 minutes. Well, it's material going in a direction different than what your uh affidavit says it was going, isn't that material. The the. Direction of travel like. Yes, I, I would say it was if it was found outside of Pullman, uh, it was not. Um, it was, it was reporting to a tower in Pullman. Um, it. I mean this is this assumption assumes that cars can't change direction of travel. We Assuming that then the same. Cell phone. Which was then turned off. Um, isn't then also tied to the evidence where we do have information to believe a white sedan. Tied to Mr. Coberger is then found on surveillance. We're not talking about 7 minutes we're talking about 7 minutes at 2:50 in the morning when we, which is about an hour. Approximately a little over an hour before the crimes occurred. I, I don't follow the logic that this 7 minutes, an hour and 10 minutes prior proves that there's no way. The defendant couldn't have traveled the 7 miles to Moscow whether or not the car was pointed in a different direction or not. It it's a, it's a leap for for me. That answer. Um, well, it's your answer, so. Let's say it was, um, let's let's say that it was um. Exculpatory, let's say it was materially that it was false. It was reckless recklessly included. It wasn't, but let's say it was. Well, you still, the magistrate still had enough information before her. To to grant probable cause for the arrest. So we still don't get to a Frank's hearing. Even if you want to make that leap. Um, I can quickly go through grand jury subpoenas, um, at, at the end of the day, um, their desire still this has come up several times throughout this process. The desire to see the actual grand jury subpoenas is not the basis for Frank's hearing. There's just simply no legal basis to support that idea. Um, and there is nothing obtained that was in obtained in violation of any of the defendant's constitutional rights. Um, they say they needed to know the scope, but it is not clear to the state how that would have made any difference in the probable cause determination or why the magistrate would need to know that. Again, this just appears to be another attempt by the defendant to try to obtain these federal grand jury subpoenas and I submit to you Franks, it is not the proper avenue. Um, we're gonna go to lack of connection. I think this is already been, um, addressed by your honor. Um, at the end of the day this fact just has no bearing on the probable cause determination. Uh, the investigators relayed the known information they had at the time and timing is important at the time of the application of, of most of the warrants, the evidence taken from the defendant and his vehicle was still being reviewed. We didn't know if there was a connection. Only a few warrants even fell outside of that, um, Apple, YouTube, Instagram, TikTok, PayPal, and Microsoft. However, even for those warrants, I, the state submits to you that fact's not necessarily exculpatory. The defendant's belongings and the vehicle recovered

approximately 6 weeks after the homicides and, and that fact was known um in the probable cause affidavit. It could be reasonably inferred. Um, and, and, but to the extent the court believes that law enforcement should have included this information again. I can accept that, but it's not enough to outweigh the balance of the information that was included that did establish probable cause. I submit to you the defendant has wholly failed to establish a single false statement or a mission without which the magistrate would not have found probable cause. I ask that you deny their motion for Frank's hearing. Thank you. I don't Briefly. I'll try. I'll try to do my part to make you, uh, so that you can and avoid asking questions unless I truly stumped. Before I get started on what I want to tell you, I'm in response to what the state said and then my summary. I'm curious about. The new police report that was talked about, I didn't see it in the submission given to your honor. I've had such an avalanche. I can't think of what it is off my head. If it did, it certainly wouldn't be part of the analysis for the court in determining whether or not you've met your showing to have a Frank's share. Well, that's good, because it occurred after my Frank's briefing came, so I didn't get a chance to respond to that yet. All right, let's, let's start with the grand jury subpoenas and, um, yeah, we wanted those in discovery, we didn't get those, we were told no a couple of different times. The, the issue with that is that um. At least one of the warrants was. Used the the returns from the or the grand jury subpoenas it used the return from the grand jury subpoena to obtain information and um we don't have those so we don't know the scope and parameters of that. So the magistrate relied on something that's not reviewable by us and that's kind of gotten to be. Is that Amazon. It is Amazon, Your Honor, and the return on the search warrant says that they already produced them pursuant to something else and the affidavit says. We saw these things, so now give them to us in a search warrant. That just seems to be problematic to me. It's. Kind of the same thing that's laying on pretty, pretty thick here. You can't have it. We're not gonna tell you about it, but don't worry, we didn't do anything wrong and that that's a problem. That's a theme of this case, and that's really a problem. Um, so I, I'm, I think we should have Frank's hearing to explore what that really is about, um, if for nothing or the misstatement that you're as it relates to the Amazon. Um, One The omission, um, is. The FBI used the grand jury system and obtained this information outside of the warrant process, but for some reason we need to come and get a warrant because nobody gets to. I, I have them in other cases, Judge. I don't know why they're withheld here. It makes me really suspicious. I mean, I guess from a Frank's perspective though. The question is, is, is there a material. Intentional misstatement or a reckless misstatement. Frank's perspective. Wasn't material, well, it was relied on to get the warrant, right? It it disclosed to the magistrate that this was the result of information given as a result of a federal grand jury. It absolutely was. What did they say that was not true or what did they fail to disclose? I think they failed to disclose the parameter around that grand jury subpoena. How is that? Well, I, I, I understand. I

promised I wouldn't slow you down, so I'm gonna just go ahead. OK. Um I'll go backwards, the. The 7 minutes that's not disclosed, that, that's intentional, but that's not given to the magistrate to make the, the decision. There are a lot of these things that are intentional withholdings and a lot of things that are deliberate you heard a lot earlier today about the hours of meetings that took place and the decisions to keep certain things secret so I think we've. Satisfied the prong of deliberate and intentional withholding from the magistrate or deliberate false statements to the magistrate on all of those um areas I wanna talk only about a couple of other things the credibility of the witness that they talked to the one that they cited information from that was relied on that appears in these affidavits and it's relied on. After Mr. Coberger's identified to say, well, he has bushy eyebrows, so this person has to be right. It's relied on when the police officers put into the affidavit, the footprint that I didn't talk about on my, on my first one. We gave the court the photographs of it. I'm happy to give the court these. That, that's a misleading statement to the court or to the magistrate that was asked for probable cause. This footprint is at the very edge of the door. It's a single footprint. And it's not repeated throughout the house, so to act like that bolsters this witness is really important, especially in context of the misstatements of the witness. I wanna go through these. I won't read them in their entirety to the court, but Your Honor asked the prosecutor what they were, and I counted up and at the very first interview, the remember the issue was whether or not one of the victims ran downstairs. And she didn't say it once, she said it. 4 times in a row in the very first interview, and that just didn't happen. It just couldn't have happened. And that was not told. In fact, that statement was brushed over and withheld from the magistrate. About the memory issues in the 2nd interview the same day, there are two references to not remembering. A couple of days later, there's the third interview and there's references to not remembering, being drunk, a statement I don't know any of it, like half the stuff. I don't know if it's a dream or if it's real. That's at page 399. At page 406, I don't know if this was real or in my mind was just like playing with me, but from what I think I heard someone was crying in the bathroom. These are definite statements that were not given to the magistrate and in fact were brushed over. And credibility is really, really important when that person is relied on in the investigation. So, let's talk about the vehicle. The court asked some questions about what the magistrate could see um in the PC affidavit. The way it's laid out. Would cause one to think that the vehicles identified on the camera near the house and that's not so it's not identifiable the state's experts said it's not identifiable from that particular video it's piecing together the other videos that they come up with something. What's the evidence that law enforcement relied on the ridge Road footage to identify the vehicle? What did they rely on? What's the evidence that they relied on Ridge Road, which you say doesn't show anything. What's the evidence they relied on that to ID the vehicle? They relied on the Ridge Road camera and you can see that in the emails from AL and the other law enforcement officers when they

say they have Paradise Creek Road and then they say we finally got a good one and it produced to us is the 1125 Ridge Road uh footage and photograph and that's the only one that you can make a positive ID on the car. Where is that in the record? The 1125 Ridge Road. Well, it's in our discovery in the motion and I believe, I believe we put a picture of that in our motion. I can look at my, it's in my original memorandum. I think there's a picture of that. Let me grab that page for you. Is it in the box it's in one of these. Your Honor, I believe it's on page 17 of the amended memorandum. That's just the photograph, but not the information that ties that to the Ridge Road camera. Your Honor, it's tied by our argument based on our review of the discovery. I don't have an affidavit from any police officers saying it was that. I probably don't have an email other than the ones from Immel and that transaction that we did provide for the court that that was the, the video that the identification was made on. That I'd love to know more about that as well, Your Honor. Oh, but that's not the standard. I understand that. I understand that. um, I would refer the Court to the to our exhibit with. Agent Immel's communication, that is going to be at D9. And then the pictures contained in the Frank's motion. Let me talk a little bit more about IGG even though we've done that all day long today. I would remind the court that IGG doesn't identify a person. It suggests a family group and an investigation um can happen from there. But nothing happened until the the IGG happened. Behind the scenes and in a closet. That Brings me to talk about. The intentionalness of this in an overview and. The court should look at the entire picture of what's happened. It's a long investigation it's a complicated investigation but you have law enforcement repeatedly meeting and you have FBI agents sprinkled in. And there are a lot of things that you've heard about today that are withheld that are super secret that nobody's gonna talk about um and there's a lot of meetings that are happening particularly around the IGG that's a definite we're not going to put that in there. But there's also the communication about the AT&T records about what do those phone records mean what does it mean when there's call calls being handed off or phone tower reporting being handed off to track a vehicle? What does that mean? There's communication about that. There's review of the videos together and what these things mean is that a partial picture was decided upon a picture that left out a lot of detail. A picture that gave false statements to the magistrate to get probable cause to get that first AT&T warrant. That was uh. The officers went back and forth talking about what kind of statements to use statements were changed to be included in that and definite decisions were made at that time. The decision was made to leave the witness' statements in as they were, even though there had been interview after interview after interview, and they knew those were incorrect. The state the decision was made to build a false investigation and leave out the super secret IGG part and that decision was made based on the behavior of the agents and based on not wanting anybody to review what they did so that we could check their work and see if they did anything right that just continued with decisions to



leave things out in this case probable cause doesn't get. Determined by one little thing without context, especially when there's context of omitted information that's why we have the opportunity for a Frank's hearing to ask for a Frank's hearing and to offer information for your your honor to rely on. It is imperative that there be integrity in the warrant process. There's a lot of power and going to a magistrate and having no other, no attorney there, nobody to cross examine, nobody to question. There's a lot of power in that to obtain a warrant and there's a lot of danger when there's that much power to to leave just a little out here to add a little more here and go get a warrant and then build everything that comes from that and that's what happened here. Your Honor, we ask for Frank's hearing to more fully explore these. The court can see this is a massive amount of information. The court has 1000 pages. These aren't just pages that we made up. There's a lot going on here and we need to have a hearing to fully explore this. Thank you. All right. Uh, we will adjourn for today. Um, I will take the Frank's motion related to IGG under advisement, I will take the Frank's proffer under advisement, issue opinions on those forthwith. Um, we will pick up tomorrow with, uh, I'm trying to think. We're probably at the evidence on the motions to suppress tomorrow, correct? Yes, Your Honor. All right, I'll see you in the morning.