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5 Attorney for BETHANY GRACE FUNKE

6 IN THE SECOND JUDICIAL DISTRICT COURT  
7 IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA

8 \* \* \*

9 THE STATE OF IDAHO,

10 Plaintiff,

Case No. CV23-00566

11 vs.

Dept. No. 8

12 BRYAN C. KOHBERGER,

13 Defendant.

14 **MOTION TO QUASH FOREIGN SUBPOENA**

15 Comes now, KELLI ANNE VILORIA, counsel for BETHANY GRACE FUNKE, and  
16 respectfully moves to quash the Foreign Subpoena - Out of State Commission obtained by Evelyn  
17 Grosenick, Interim Washoe County Public Defender on behalf of Defendant, BRYAN C.  
18 KOHBERGER for preliminary hearing in this case.

19 This motion is made and based upon the attached Points and Authorities, all papers and  
20 pleadings on file herein, and any evidence and argument to be heard on the matter.

21 **DATED** this 21<sup>st</sup> day of April, 2023.

22  
23  
24 By: 

KELLI ANNE VILORIA, Esq.  
Attorney For  
BETHANY GRACE FUNKE

ATTORNEYS AND  
COUNSELORS AT LAW  
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AMAN L.L.P.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. FACTS**

3 On April 3, 2023, Evelyn Grosenick, Interim Washoe County Public Defender sought and  
4 obtained an ex-parte Foreign Subpoena, which was issued April 11, 2023 that purports to require  
5 Bethany Grace Funke to appear in the Second Judicial District Court of the State of Idaho, County  
6 of Latah on “*June 28, 2023 (sic) at 8:00am and for the duration of the trial or when released by*  
7 *the court to testify in the above named case.*” The items provided in support of this subpoena  
8 were an ex parte: *Request For Foreign Subpoena – Out Of State Commission which contained*  
9 *the following: Certificate of an Idaho Judge To Secure The Attendance Of An Out Of State*  
10 *Witness; Ex Parte Motion For Certificate To Secure The Attendance Of An Out Of State Witness;*  
11 *and Affidavit In Support Of Motion For Out Of State Service.*

12 The *Affidavit In Support Of Motion For Out Of State Service* further claims that Ms. Funke  
13 (who name is repeatedly misspelled) has “information material to the charges against Mr.  
14 Kohburger (sic); portions of information Ms. Funke has is exculpatory to the defendant.” These  
15 statements are conclusory, without support and there is no further information or detail pertaining  
16 to the substance of the testimony, its materiality or the alleged exculpatory information of Ms.  
17 Funke or why it would be entertained at preliminary hearing. Moreover, the subpoena was issued  
18 by the Clerk of the Court without hearing. No hearing has been set for Ms. Funke to address these  
19 concerns. This motion follows.

20 **II. ARGUMENT**

21 **THE COURT SHOULD QUASH THE FOREIGN SUBPOENA ISSUED**  
22 **PURPORTING TO COMPEL MS. FUNKE’S ATTENDANCE AT THE IDAHO**  
23 **PRELIMINARY HEARING IN THIS CASE**

24 NRS 174.305 through NRS 174.385 governs the issues of a subpoena in criminal court.  
25 NRS 174.395 through NRS 174.445 governs the procedure for securing the attendance of a  
26 witness for testimony outside of this State. NRS 174.415 in particular addresses the process for  
27 summoning of a Nevada witness to testify in another state.

28 Specifically, NRS 174.415(10) requires the Court to “fix a time and place for a hearing”  
before it can issue any order directing testimony in another state. This hearing is necessary to  
provide a venue where “**the judge** determines that the witness is material and necessary, that it

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1 will not cause undue hardship to the witness to be compelled to attend and testify in the  
2 prosecution or a grand jury investigation in the other state, and that the laws of the state in which  
3 the prosecution is pending, or grand jury investigation has commenced or is about to commence  
4 (and of any other state through which the witness may be required to pass by ordinary course of  
5 travel)....” (emphasis added).

6 Once that procedure is followed and that burden is met, then and only then shall the judge  
7 “issue a summons, with a copy of the certificate attached, directing the witness to attend and  
8 testify in the court where the prosecution is pending, or where a grand jury investigation has  
9 commenced or is about to commence at a time and place specified in the summons. In any such  
10 hearing the certificate shall be prima facie evidence of all the facts stated therein.” Id.

11 Moreover, there is no authority for an **Idaho criminal defendant** to summon a Nevada  
12 witness to Idaho for preliminary hearing. There is also no authority for an Idaho criminal  
13 defendant to summon a Nevada witness to an Idaho matter without a hearing and there is no  
14 authority to summon a Nevada witness to an Idaho matter without a Nevada Judge making a  
15 finding of materiality, necessity and the lack of undue hardship. NRS 174.315 does contemplate  
16 a Nevada criminal defendant’s ability to subpoena a witness to appear before a court in Nevada.  
17 However, there is also a requirement for a hearing requirement there. Thus, even if that law  
18 applied by analysis, no hearing occurred and that important procedural requirement was not met.

19 Additionally, NRS 174.415(1) provides that “if a judge of a court of record in any state  
20 which by its laws has made provision for commanding persons within that state to attend and  
21 testify in this State certifies under the seal of such court that there is a criminal prosecution  
22 pending in such court, or that a grand jury investigation has commenced or is about to commence,  
23 that a person being within this State *is a material witness in such prosecution, or grand jury*  
24 *investigation*, and that the person’s presence will be required for a specified number of days,  
25 upon presentation of such certificate to any judge of a court of record in the county in which  
26 such person is such judge shall fix a time and place for a hearing, and shall make an order  
27 directing the witness to appear at a time and place certain for the hearing.” (emphasis added)

28 Importantly here, there is no certification by any judge of any a court of record in any state  
(Nevada or Idaho) that clearly states Bethany Grace Funke is a material witness in such  
prosecution, or grand jury investigation. A close reading of the certification purported to be

1 from a judge, merely states Ms. Funke “may” be a material witness. This insufficient under the  
2 law for this foreign subpoena to stand.

3 Lastly, as this Court is well aware, a preliminary hearing is limited to a finding of probable  
4 cause, rather than reasonable doubt, which is the evidentiary burden at trial. This is the same  
5 standard in both Idaho and Nevada. *See State v. Mantz*, 148 Idaho 303, 307, 222 P.3d 471, 475  
6 (Ct. App. 2009); *see also Marcum v. Sheriff* 85 Nev. 175, 451 P.2d 845 (1969) (which  
7 specifically holds that a preliminary is not a substitute for trial and the purpose of a preliminary  
8 hearing is to determine whether a public offense has been committed and whether there is  
9 sufficient cause to believe that the accused committed it.) A preliminary hearing is not meant to  
10 become a mini-trial due to its limited purpose in deciding of probable cause. *Id.*

11 Arguably then, even if Ms. Funke possesses exculpatory evidence, which remains  
12 unknown, there is no place or reason to present that evidence at a preliminary hearing. A  
13 preliminary hearing requires the state to offer competent evidence to support probable cause and  
14 convince the magistrate that a trial should be held not the issue of innocence or guilt of the  
15 defendant. Exculpatory evidence is an issue for trial, which the documents presented  
16 misleadingly suggest the preliminary hearing to be.

17 For all of these reasons, the subpoena served upon Ms. Funke is improper. Accordingly,  
18 the Court should quash the subpoena issued purporting to compel Ms. Funke’s attendance at  
19 preliminary hearing in this case.

20 **III. CONCLUSION**

21 The Foreign Subpoena was improperly issued. There was no component of the statutes  
22 followed in issuing it and the Court should quash the subpoena issued to Ms. Funke now.

23 **AFFIRMATION PURSUANT TO NRS 239B.030**

24 The undersigned does hereby affirm that the preceding document does not contain the  
25 social security number of any person.

26 **DATED** this 21<sup>st</sup> day of April, 2023.

27 VILORIA, OLIPHANT  
28 OSTER & AMAN L.L.P.

By:   
KELLI ANNE VILORIA, Esq.

DECLARATION OF KELLI ANNE VILORIA

KELLI ANNE VILORIA, being first duly sworn, upon oath, deposes and says:

1. That I am the attorney of record for BETHANY GRACE FUNKE, a witness served with a foreign subpoena to testify in Idaho in the above-captioned action;
2. That I am licensed to practice law in the State of Nevada and that I am rendering this Declaration on behalf of my client, BETHANY GRACE FUNKE;
3. That I have read the attached motion and know the contents; that the same is true of my own knowledge, except as to those matters stated upon information and belief, and as to those matters, I believes them to be true.
4. I swear under penalty of perjury that the assertions of this Declaration are true.

Executed in Reno, Nevada, this 28th day of April 2023.

By: [Signature]  
KELLI ANNE VILORIA, Esq.

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**CERTIFICATE OF SERVICE**

1 I certify that I am an employee of the law firm of VILORIA, OLIPHANT, OSTER &  
2 AMAN L.L.P., and that on the date shown below, I caused service of a true and correct copy of  
3 the attached:  
4

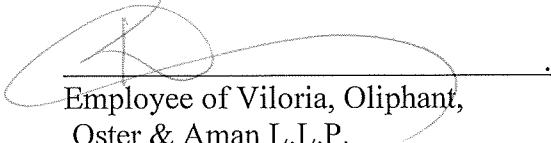
5 **OPPOSITION TO MOTION TO QUASH SUBPOENA DUCES TECUM – ORAL**  
6 **ARGUMENT AND EVIDENTIARY HEARING REQUESTED L.C.R. 7 (c) (d)**

7 to be completed by electronic service upon electronically filing the within document with the  
8 Second Judicial District Court addressed to:

9 EVELYN GROSENICK,  
10 INTERIM WASHOE COUNTY PUBLIC DEFENDER

11 ANNE TAYLOR  
12 THE LAW OFFICE OF THE PUBLIC DEFENDER OF KOOTENAI COUNTY  
13 P.O. Box 9000  
14 Coeur d'Alene, ID 83814  
15 ataylor@kcgov.us

16 DATED this 21<sup>st</sup> day of April, 2023.

17   
18 Employee of Viloría, Oliphant,  
19 Oster & Aman L.L.P.  
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7

IN AND FOR THE COUNTY OF WASHOE

8

9

THE STATE OF IDAHO

10

Plaintiff,

11

vs.

CASE NO.

12

BRYAN C. KOHBERGER,

DEPT. NO.

13

Defendant.

14

15

REQUEST FOR FOREIGN SUBPOENA - OUT OF STATE COMMISSION

16

WITNESS:

17

BETHANY GRACE FUNKE

18

19

20

AFFIRMATION PURSUANT TO NRS 239B.030

21

The undersigned does hereby affirm that the preceding document does not  
22 contain the social security number of any person.

23

DATED this 4<sup>TH</sup> day of April, 2023.

24

25

/s/ Evelyn Grosenick  
EVELYN GROSENICK  
Interim Washoe County Public Defender

26

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FILED  
CLERK OF DISTRICT COURT  
IDAHO  
BOISE, IDAHO  
JAN 11 2011

INDEX OF EXHIBITS

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1. Certificate of an Idaho Judge to Secure the Attendance of an Out-Of-State Witness
2. Ex-Parte Motion for Certificate to Secure the Attendance of an Out-Of-State Witness.
3. Affidavit in Support of Motion for Out-Of-State Service

GRAND JURY TRULECRIME DOCKET



FILED  
Electronically  
CV23-00566  
2023-04-03 05:15:31 PM  
Alicia L. Lerud  
Clerk of the Court  
Transaction # 9592185 : csulezic

EXHIBIT 1

GREENN, TRAVELER CRIME

THE DOCKET

IN THE DISTRICT COURT OF THE STATE OF ILLINOIS  
IN AND FOR THE COUNTY OF COOK

Case No. 23-00566

Case Name: GREENN, TRAVELER CRIME

Case Type: Criminal

Case Status: Pending

Case Description: Criminal Case

Case History: Case filed on 04/03/23.

Case Details: Case No. 23-00566, Case Name: GREENN, TRAVELER CRIME, Case Type: Criminal, Case Status: Pending, Case Description: Criminal Case.

Case History: Case filed on 04/03/23.

Case Details: Case No. 23-00566, Case Name: GREENN, TRAVELER CRIME, Case Type: Criminal, Case Status: Pending, Case Description: Criminal Case.

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

STATE OF IDAHO

Plaintiff,

V.

BRYAN C. KOHBERGER,

Defendant.

CASE NUMBER CR29-22-2805

CERTIFICATE OF AN IDAHO JUDGE  
TO SECURE THE ATTENDANCE OF AN  
OUT-OF-STATE WITNESS

Having considered the Defendant's *Ex-Parte Motion for Certificate to Secure the Attendance of an Out-of-State Witness* and the *Affidavit of Richard Bitonti* in support of said motion, and the Court being otherwise fully advised herein,

I, Megan E. Marshall, do hereby certify as follows:

1. I am a Magistrate Judge for the Second Judicial District of the State of Idaho, which is a constitutionally and statutorily proscribed court of record in the State of Idaho.
2. In this case, Bryan Kohberger is charged with four (4) counts of first degree murder under Idaho Code §18-4003, which is punishable by death or by imprisonment for life, and one (1) count of burglary under Idaho Code §18-1401, which is punishable by imprisonment in the state prison for not less than one (1) nor more than ten (10) years.
3. I am the judge assigned to preside over the preliminary hearing that scheduled to occur on June 26, 2023, at 9:00 a.m. through June 30, 2023.
4. Bethany Funke may be a material witness for the Defendant in this case.
5. For the reasons stated in the *Affidavit of Richard Bitonti*, the presence of Bethany Funke is required at the Latah County Courthouse located at 522 S. Adams St., Moscow, Idaho, beginning at 8:00 a.m. on June 28, 2023.
6. Under the laws of the State of Idaho, if Bethany Funke comes into this State in obedience of a summons requiring her presence at this hearing, she will not be subject to arrest or service of any process relating to matters that arose before she entered the state under the Summons.

CERTIFICATE OF AN IDAHO JUDGE TO SECURE  
THE ATTENDANCE OF AN OUT-OF-STATE WITNESS



7. This Certificate is made for the express purpose of being presented to a Judge of a Court of record in the State of Nevada in support of an order to compel the attendance of Bethany Funke at the time and place and for the reasons stated above.

WITNESS my hand on this 24<sup>th</sup> day of MARCH, 2023.

  
MEGAN MARSHALL  
MAGISTRATE JUDGE

STATE OF IDAHO  
County of Latah

I, Julie Fry, Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Latah, do hereby certify that the Honorable Megan E. Marshall, who signed the foregoing Certificate, is a duly commissioned and qualified Magistrate Judge of the Second Judicial District of the State of Idaho, in and for the County of Latah.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal of the said court of the State of Idaho on 3/24/23.

JULIE FRY  
CLERK OF THE DISTRICT COURT

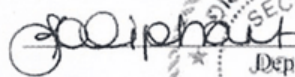




EXHIBIT 2

THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO  
CLERK OF DISTRICT COURT  
1000 WEST THIRD STREET  
BOISE, IDAHO 83726

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO  
IN AND FOR THE COUNTY OF LATAH

Case Number: 2023-00000  
Case Name: [Faint Name]

Plaintiff: [Faint Name]  
Defendant: [Faint Name]

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO  
PLAINTIFF,  
vs  
BRYAN C. KOWALSKI,  
DEFENDANT.

CASE NUMBER: 2023-00000  
EX PARTE MOTION FOR  
CERTIFICATE TO SECURE  
THE ATTENDANCE OF  
AN OUT-OF-STATE WITNESS

COMES NOW, Bryan C. Kowalski, by and through his attorney, Anne C. Taylor, Public Defender, hereby appears in this Court for a certificate to assist in securing the attendance of [Faint Name] as a witness on behalf of the defendant in this case. This Motion is made pursuant to Idaho Code, Title 19, Section 19-412 and the attached Affidavit of [Faint Name] for the Sheriff's Office (Exhibit A).

DAIED this \_\_\_\_\_ day of \_\_\_\_\_, 2023.

ANNE C. TAYLOR, PUBLIC DEFENDER  
LATAH COUNTY PUBLIC DEFENDER

BY \_\_\_\_\_  
ANNE C. TAYLOR,  
PUBLIC DEFENDER

EX PARTE MOTION FOR CERTIFICATE TO SECURE  
THE ATTENDANCE OF AN OUT-OF-STATE WITNESS

CRIMINAL JUSTICE TRAINING CENTER



EXHIBIT 1  
Anne C. Taylor, Public Defender  
The Law Office of the Public Defender of Kootenai County  
PO Box 9000  
Coeur d'Alene, Idaho 83816  
Phone: (208) 446-1700; Fax: (208) 446-1701  
Bar Number: 5836  
Email: [pdfax@kegov.us](mailto:pdfax@kegov.us)

Assigned Attorney:  
Anne C. Taylor, Public Defender, Bar Number: 5836

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

STATE OF IDAHO

Plaintiff,

v.

BRYAN C. KOHBERGER,

Defendant.

CASE NUMBER CR29-22-0002805

EX-PARTE MOTION FOR  
CERTIFICATE TO SECURE  
THE ATTENDANCE OF  
AN OUT-OF-STATE WITNESS

COMES NOW, Bryan C. Kohberger, by and through his attorney, Anne C. Taylor, Public Defender, hereby moves this Court for a certificate to assist in securing the attendance of Bethany Funke as a witness on behalf of the defendant in this case. This Motion is based on Idaho Code Section 19-3004, 19-3005, 19-852 and the attached Affidavit in Support of Motion for Out-of-State Service (Exhibit A).

DATED this 24<sup>th</sup> day of March, 2023.

ANNE C. TAYLOR, PUBLIC DEFENDER  
KOOTENAI COUNTY PUBLIC DEFENDER

BY: \_\_\_\_\_

ANNE C. TAYLOR  
PUBLIC DEFENDER

EX-PARTE MOTION FOR CERTIFICATE TO SECURE  
THE ATTENDANCE OF AN OUT-OF-STATE WITNESS

EXHIBIT 3

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IOWA, IN AND FOR THE COUNTY OF LATAK

STATE OF IOWA

CASE NUMBER CRJ 22-28004

Plaintiff,

vs.

LEONARD W. STOFFER JR. DISTRICT ATTORNEY  
BUREAU OF STATE SERVICES

BRYAN C. KOHBERGER,

Defendant.

STATE OF IOWA

Case No. 22-28004

Subpoena, being first duly served upon said witness and says:

1. I am a regular investigator hired by the defense as an investigator in the investigation of Bryan Kohberger.

2. I was called by, appointed counsel, Jesse C. Taylor, to investigate the alleged incident which led to the arrest of Bryan Kohberger.

3. Bryan Kohberger was charged with second degree murder and first degree assault of a child.

4. The defendant took place in a house. There are 2 bedrooms on each floor, bathrooms on each floor, and a kitchen, living room and dining room on the second floor.

5. Mr. Kohberger is alleged to have entered the house around 4:00 A.M. where all the people were sleeping. Killing four (4) people in two (2) separate rooms.

6. The people listed were located in two bedrooms, one on the second floor and the other on the third floor.

7. Evidence found in the house includes the following:

8. The office containing defendant's belongings was searched.

9. Evidence found was interviewed by police on several occasions. The items and things are listed and described as follows:

10. Evidence found in the house on the night of the murder includes the following: a record, a list of names and addresses of the house.

WITNESSED AND SUBSCRIBED AT  
DES MOINES, IOWA, THIS 15th DAY OF 2022

GREENWICH TRAVELER DOCKET



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

STATE OF IDAHO

Plaintiff,

V.

BRYAN C. KOHBERGER,

Defendant.

CASE NUMBER CR29-22-0002805

AFFIDAVIT IN SUPPORT OF MOTION  
FOR OUT-OF-STATE SERVICE

STATE OF IDAHO )  
                          ) : ss.  
County of Latah )

Richard Bitonti, being first duly sworn upon oath, deposes and says:

1. I am a criminal investigator hired by the defense to assist in the representation of Bryan Kohberger.
2. I was asked by appointed counsel, Anne C. Taylor, to investigate the alleged incident which lead to the arrest of Bryan Kohberger.
3. Bryan is charged with four (4) counts of First Degree Murder and one (1) count of Burglary.
4. The deaths took place in a 3-story home. There are 2 bedrooms on each floor; bathrooms on each floor and a kitchen, dining and living room on the middle floor.
5. Mr. Kohberger is alleged to have entered the house around 4:00 a.m. while six (6) people were sleeping/present, killing four (4) people in two (2) separate rooms.
6. The people killed were located in two bedrooms; one on the second floor and the other on the third floor.
7. Bethany Funke's bedroom was on the first floor.
8. The other surviving roommate's bedroom was on the second floor.
9. Bethany Funk was interviewed by police on several occasions. She disclosed things she heard and things she saw.
10. Bethany Funk was present at the home eight (8) hours later when police were called, arrived on scene and discovered the homicides.

AFFIDAVIT IN SUPPORT OF  
MOTION FOR OUT-OF-STATE SERVICE

Page - 1

DEFENDANT'S  
EXHIBIT NO. A  
IDENTIFICATION/EVIDENCE  
CASE NO. CR29-22-2805  
DATE: \_\_\_\_\_

11. During the course of my investigation, it became known to me that Bethany Funke has information material to the charges against Mr. Kohburger; portions of information Ms. Funke has is exculpatory to the defendant. Ms. Funke's information is unique to her experiences and cannot be provided by another witness.

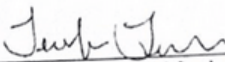
12. Bethany Funk resides in the State of Nevada and it is necessary to subpoena this witness because the witness' testimony is material and necessary to this case.

DATED this 22<sup>ND</sup> day of March, 2023.

  
RICHARD BITONTI  
CRIMINAL INVESTIGATOR

SUBSCRIBED AND SWORN to before me this 22 day of March, 2023.



  
Notary Public in and for the State of Idaho  
Commission Expires: 11/21/28