LATAH COUNTY PROSECUTOR'S OFFICE
WILLIAM W. THOMPSON, JR., ISB No. 2613
PROSECUTING ATTORNEY
JEFF NYE, ISB 9238
SPECIAL ASSISTANT ATTORNEY GENERAL
Latah County Courthouse
522 S. Adams Street, Ste. 211
Moscow, ID 83843
Phone: (208) 883-2246
ISB No. 2613
paservice@latahcountyid.gov

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, Plaintiff, V. BRYAN C. KOHBERGER, Defendant.	Case No. CR01-24-31665 STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE #6 RE: REFERENCE TO "TOUCH" AND "CONTACT" DNA

COMES NOW the State of Idaho, by and through the Latah County Prosecuting Attorney, and responds to Defendant's Motion in Limine regarding the use of the terms "touch" or "contact" DNA or opining on the means or mechanism by which DNA came to be present on the knife sheath. This Court should deny Defendant's motion because Ms. Nowlin's disclosures demonstrate she will not use the phrase "touch DNA" in a manner that will mislead the jury, her opinions as to the DNA found on the knife sheath are admissible under the Idaho Rules of Evidence, and her

opinions are proper rebuttal testimony.

A. Ms. Nowlin's disclosure demonstrates that she will not use the phrase "touch DNA" in a manner that will mislead or confuse the jury.

Ms. Nowlin's use of the phrase "touch DNA" will not mislead or confuse the jury. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." I.R.E. 403.

Ms. Nowlin's testimony, which will be consistent with her disclosures, will not mislead the jury or confuse the issues. As her disclosure indicates, Ms. Nowlin uses the phrase "touch DNA" only to distinguish that type of DNA with other kinds of DNA: "DNA may be present on an item in the form of biological materials such as blood, semen, and saliva or may be left on an item when it is worn (wearer DNA) or handled (touch or transfer DNA)." (State's Rebuttal to Defendant's Supplemental Response to Request for Discovery Regarding Expert Witnesses, Ex. S-11, p.1., filed 2/17/2025 ("Ex. S-11").) She goes on to explain how DNA can be transferred to an item, including that it can be transferred from one person to another person before being deposited on the item:

> DNA can be deposited on or transferred to an item through transfer of body fluids to an item, wearing an item, and/or handling an item. Primary or direct transfer refers to DNA transferring directly between individuals or between an individual and an object. Indirect or secondary transfer refers to the transfer of DNA from one person or object to another person or object through an intermediary.

(Ex. S-11, pp.1-2.) She then describes at length various factors that can affect primary and secondary transfer, including the shedder status of the individual(s). (Ex. S-11, pp.1-3.) Given Ms. Nowlin's explanation of primary and secondary transfer, no reasonable juror would be misled by her use of the phrase "touch DNA" to mean Defendant necessarily made physical contact with the

knife sheath.

Moreover, Ms. Nowlin's use of the phrase "touch DNA" is not unique but common within the field. (*See* Affidavit of Rylene Nowlin, ¶ 7, filed 3/17/25.) Most tellingly, Defendant's own DNA expert plans to use the phrase "touch DNA" in reference to the DNA on the knife sheath: "No blood, hair, or DNA from him was found on any of the crime scene evidence (except the touch DNA on the knife sheath)." (Defendant's Supplemental Response to Request for Discovery Regarding Expert Witnesses, Ex. D1-B, p.19., filed 1/23/25 ("Ex. D1-B").) Experts in other cases also use the phrase "touch DNA" in the same way. *See, e.g.*, *McGiboney v. State*, 160 Idaho 232, 236, 370 P.3d 747, 751 (Ct. App. 2016) (discussing history of "touch DNA" in other states). And the scientific literature is replete with references to "touch DNA." *See, e.g.*, Tozzo, P.; Mazzobel, E.; Marcante, B.; Delicati, A.; Caenazzo, L., *Touch DNA Sampling Methods: Efficacy Evaluation and Systematic Review*, Int. J. Mol. Sci. 2022, 23, 15541. https://doi.org/10.3390/ijms232415541.

Defendant seems to suggest that Ms. Nowlin should use the phrase "trace DNA" instead of "touch DNA." (Mot. at 4.) However, as Ms. Nowlin explains in her affidavit, she does not use the phrase "trace DNA" because it implies there was only a trace amount of DNA found. (Nowlin Aff., ¶ 8.) Using that term in this case would itself be misleading to the jury "because a trace amount of DNA is not what was detected on Item 1.1" *Id.*

B. Ms. Nowlin's opinion as to the likelihood of how Defendant's DNA came to be on the knife sheath is proper expert testimony.

Ms. Nowlin's opinion is admissible as expert testimony. "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." I.R.E. 702. "The function of the

expert is to provide testimony on subjects that are beyond the common sense, experience, and education of the average juror." *State v. Tankovich*, 155 Idaho 221, 227, 307 P.3d 1247, 1253 (Ct. App. 2013) (holding district court properly allowed expert to testify as the meaning of "SS" lightning bolts because "average jurors might not have that knowledge"). "Courts should not overly restrict expert testimony that assists the jury." *State v. Almaraz*, 154 Idaho 584, 600, 301 P.3d 242, 258 (2013) (holding district court erred when it limited expert's testimony on suggestiveness of interview because such testimony "would have been helpful to the average juror's understanding of whether the interview was conducted in an overly suggestive way").

As Ms. Nowlin's disclosure indicates, she will assist the jury by helping them understand concepts related to DNA that fall outside the common sense or experience of the average juror. Specifically, Ms. Nowlin will explain primary and secondary transfer of DNA and factors that may affect primary and secondary transfer of DNA. (Ex. S-11, pp.1-3.) No average juror would understand those concepts without the type of training and experience Ms. Nowlin has.

Ms. Nowlin will also opine that the amount of DNA found on the sheath and the fact that it came from a single source make it more likely the DNA arrived on the knife sheath because of primary transfer rather than secondary transfer. (Ex. S-11, p.3.) That too will assist the jury because a non-expert possessing those same facts would have difficulty interpreting their significance. *See, e.g.*, *State v. Hester*, 114 Idaho 688, 693-94, 760 P.2d 27, 32-33 (1988) ("Because of her expertise, Dr. Powell was able to draw inferences which were 'beyond common experience.'"). Ms. Nowlin's explanations and inference both go to the significance of Defendant's DNA on the knife sheath, which will be a critical issue in the trial, especially considering Defendant's expert's proposed testimony that at least implies the jury should attribute little or no significance to Defendant's DNA on the knife sheath.

Defendant argues that Ms. Nowlin's opinion is inadmissible because she "cannot conclusively offer an answer to the question of when and how." (Mot. at 8-9.) But that's often the case with proper expert testimony. *See State v. Hall*, 163 Idaho 744, 778-82, 419 P.3d 1042, 1076-80 (2017).

In *Hall*, a woman was found dead floating in a river. *Id.* at 765, 419 P.3d at 1063. An autopsy determined her cause of death was strangulation. *Id.* At trial, the State called as an expert the forensic pathologist who conducted the autopsy. *Id.* at 778, 419 P.3d at 1076. Although he could not be sure, the forensic pathologist was allowed to give his "opinion on 'how [the victim] was tied just after death" using photos showing "a reenactment of the body as it is *postulated* to have been hogtied either before or soon after [the victim's] death." *Id.* (emphasis added). The Idaho Supreme Court held the district court properly admitted the expert testimony "that hogtied positioning" was the "most likely." *Id.* at 779-80, 419 P.3d at 1077-78. The court explained that the expert's "opinion regarding how [the victim] was tied was not based upon mere 'speculation' or 'possibilities,' but was based upon the lividity patterns observed on the body.'" *Id.* The court also observed that the pathologist "admitted the[] limitations" of his opinion. *Id.*; *see also, e.g.*, *Lanham v. Idaho Power Co.*, 130 Idaho 486, 492-94, 943 P.2d 912, 918-20 (1997) (holding it was not error to permit an expert to "testify about possible causes of the fire" and opine as to "the most likely cause of the fire" even though "he 'was not able to make any definitive cause or origin investigation'"); *State v. Merwin*, 131 Idaho 642, 646, 962 P.2d 1026, 1030 (1988) ("If, based on an expert's training, one possible cause is observed with greater frequency than others, this information would be useful to the trier fact.").

Ms. Nowlin's opinion that the DNA on the knife sheath "is more likely the result of a direct transfer" than "from secondary transfer," (Ex. S-11, p.3.), is admissible for the same reasons the

court approved the admission of the pathologist's "most likely" testimony in *Hall*, 163 Idaho at 779-80, 419 P.3d at 1077-78. Like the pathologist in *Hall* who explained his opinion was based on lividity patterns, Ms. Nowlin has provided a sufficient factual basis by explaining her opinion is based on "the quantity of DNA detected on M2022-4843 Item 1.1 (0.168ng/µl)" and the fact that "the DNA profile obtained is single source." (Ex. S-11, p3.) Ms. Nowlin's full acknowledgement that she cannot conclusively state how the DNA arrived on the knife sheath does not mean her opinions are excludable as Defendant claims; it simply means she has "admitted their limitations," which weighs in favor of admission. *Hall*, 163 Idaho at 779-80, 419 P.3d at 1077-78.

Defendant erroneously asserts Ms. Nowlin's opinion is not admissible because there is agreement in the forensic DNA community that experts should not give such opinions. (Mot. at 8.) Defendant's assertion is flawed both as a legal and factual matter.

Defendant's assertion is legally incorrect because consensus of the scientific community is not the appropriate standard to determine admissibility of an expert opinion. "The question under the evidence rule is simply whether the expert's knowledge will assist the trier of fact; not whether the information upon which the expert's opinion is based is commonly agreed upon." *State v. Merwin*, 131 Idaho 642, 646, 962 P.2d 1026, 1030 (1998). As explained above, Ms. Nowlin's testimony will assist the trier of fact.

Defendant's claim of universal agreement in the forensic DNA community is also factually incorrect. Defendant relies most heavily on a report titled Forensic DNA Interpretations and Human Factors: Improving Practice Through a Systems Approach.[1] (Mot. at 6-8.) Specifically, Defendant relies on sections 7.1 and 7.2. But as to those sections, not even the authors of the report

[1] Available at https://nvlpubs.nist.gov/nistpubs/ir/2024/NIST.IR.8503.pdf.

were in agreement. *See* NIST Rep., p.177 n.455, p.177 n.456. Two of the committee members dissented from the recommendation that DNA analysts should not opine about the possibility or probability of direct or indirect transfer having occurred in a case. *See* NIST Rep., p.177, n.455. Put differently, there is not even universal agreement amongst the authors of the work on which Defendant relies. Further, as Ms. Nowlin explains in her affidavit, there is even more of a divide in the community than the two dissenters in the working group. (*See* Nowlin, ¶¶ 5-6.)

Here again, for the second time in a single motion, Defendant's own expert contradicts his position. According to the recommendation from the working group espoused by Defendant, a DNA expert is not allowed to answer any question of how or when DNA arrived on an object. *See* NIST Rep., p.176, Table 7.1. But Defendant's expert goes to great lengths to make the DNA on the knife sheath seem meaningless for the jury based on the very subjects Defendant now claims the expert should refuse to discuss. For example, Defendant's expert discusses the possibilities of how the DNA arrived on the knife sheath that most benefit Defendant: "Mr. Kohberger could have shed cells/DNA onto the sheath days, weeks, or even months earlier." (Ex. D1-B, p.19.) And she opines that the DNA was found on "a protected area where a prior handler's DNA might be expected to persist even if the sheath was more recently held/used by someone else." (Ex. D1-B, p.19.) Defendant's expert's opinion is itself evidence that there is no agreement in the community that DNA experts should not testify on these topics.

In all events, it is not the non-unanimous recommendations of a divided working group that determine the admissibility of evidence in Idaho's courts; it is the Idaho Rules of Evidence. And, as explained above, Ms. Nowlin's opinions are admissible under those rules.

C. Ms. Nowlin's opinions are proper rebuttal expert testimony.

The expert testimony disclosed by Ms. Nowlin constitutes proper rebuttal testimony.

"Rebuttal evidence is evidence 'which explains, repels, counteracts, or disproves evidence which has been introduced by or on behalf of the adverse party.'" *State v. Moses*, 156 Idaho 855, 867, 332 P.3d 767, 779 (2014). The State disclosed in its initial expert disclosures experts from the Idaho State Police lab who swabbed the knife sheath for DNA, swabbed Defendant for DNA, and compared the DNA from the knife sheath to Defendant's DNA. Based on those disclosures, the DNA lab analyst who compared the DNA will testify that Defendant's DNA matched the DNA obtained from the knife sheath.

Then Defendant disclosed his DNA expert. Defendant's DNA expert could not refute that the DNA on the knife sheath matched Defendant's DNA, acknowledging that "[t]here is good support that Mr. Kohberger's DNA was found on Item 1.1, a swab from the knife sheath." (Ex. D1-B, p.19.) Instead, the disclosure for Defendant's DNA expert indicates she will inform the jury that DNA on an item could be the result of "indirect transfer" from "skin cell DNA." (Ex. D1-B, p.18.) The disclosure implies the jury should give little weight to Defendant's DNA at the crime scene because it could just mean Defendant's DNA was nothing more than "innocuously shed skin cells/DNA" prior to the crime and the knife sheath could "be picked up and transported to a crime scene by someone else who sheds no DNA onto it." (Ex. D1-B, p.18.) She also opines that the DNA was found in a location that suggests it would persist for a long time because it was protected. (Ex. D1-B, p.19.)

Ms. Nowlin's rebuttal disclosure "explains" and "counteracts" the disclosure of Defendant's DNA expert. *Moses*, 156 Idaho at 867, 332 P.3d at 779. While Ms. Nowlin acknowledges the limitations of current technology in determining how DNA arrived on an object, she also explains factors that can affect persistence and that may suggest whether DNA arrived on an object via primary or secondary transfer. (Ex. S-11, pp.1-3.) Ultimately, she concludes that it is

more likely Defendant's DNA on the knife sheath arrived via primary transfer, which means—contrary to Defendant's expert's opinion—the DNA on the knife sheath has more significance than the source being Defendant. (Ex. S-11, p.3.) That is textbook rebuttal testimony.

Defendant claims, without citation to any authority, that Ms. Nowlin's testimony should be excluded as improper rebuttal evidence because it "appears to be the State's theory of the case." (Mot. at 9.) But "[t]he mere fact that testimony might well have been presented during [a party's] case in chief does not, by itself, make it inadmissible for rebuttal.'" *Moses*, 156 Idaho at 867, 332 P.3d at 779 (quoting *State v. Rosencrantz*, 110 Idaho 124, 129, 714 P.2d 93, 98 (Ct. App. 1986)). True, the State could use Ms. Nowlin's testimony to help the jury understand primary and secondary transfer from the outset. But the value of Ms. Nowlin's testimony to the State is to rebut Defendant's theory that his DNA on the knife sheath is "innocuously shed skin cells/DNA."

The State properly disclosed Ms. Nowlin both in its initial disclosures and in its rebuttal disclosures. The State may choose to have Ms. Nowlin testify in its case-in-chief. But it may also wait until rebuttal. The State's disclosures and the nature of Ms. Nowlin's testimony permit the State to make either decision.

CONCLUSION

For all these reasons, the Court should deny Defendant's motion.

RESPECTFULLY SUBMITTED this17th day of March 2025.

William W. Thompson, Jr.
Prosecuting Attorney

Jeff Nye
Special Assistant Attorney General

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE #6 RE: REFERENCE TO "TOUCH" AND "CONTACT" DNA were served on the following in the manner indicated below:

Anne Taylor
Attorney at Law
PO Box 2347
Coeur D Alene, ID 83816

☐ Mailed
☒ E-filed & Served / E-mailed
☐ Faxed
☐ Hand Delivered

Dated this 17th day of March 2025.