Anne Taylor Law, PLLC
Anne C. Taylor, Attorney at Law
PO Box 2347
Coeur d'Alene, Idaho 83816
Phone: (208) 512-9611
iCourt Email: info@annetaylorlaw.com

Elisa G. Massoth, PLLC
Attorney at Law
P.O. Box 1003
Payette, Idaho 83661
Phone: (208) 642-3797; Fax: (208)642-3799

Bicka Barlow
*Pro Hac Vice*
2358 Market Street
San Francisco, CA 94114
Phone: (415) 553-4110

*Assigned Attorney:*
Anne C. Taylor, Attorney at Law, Bar Number: 5836
Elisa G. Massoth, Attorney at Law, Bar Number: 5647
Bicka Barlow, Attorney at Law, CA Bar Number: 178723
Jay W. Logsdon, First District Public Defender, Bar Number: 8759

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

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| **STATE OF IDAHO,**<br><br>**Plaintiff,**<br><br>**V.**<br><br>**BRYAN C. KOHBERGER,**<br><br>**Defendant.** | **CASE NUMBER CR01-24-31665**<br><br>**REPLY TO STATE'S OBJECTION TO MIL #6**<br><br>**RE: NOWLIN AND "TOUCH" AND "CONTACT" DNA** |

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and hereby respectfully replies to the State's objection to Mr. Kohberger's motion to exclude specific opinions of Rylene Nowlin and the terms "touch" DNA and "contact" DNA. The State's objection is that the use of the term "touch" DNA will not mislead the jury; that Nowlin's testimony on the "how"

the DNA was placed on Q1.1 is "proper expert testimony;" and that despite Nowlin's opinion being the State's theory, that it is proper rebuttal to the testimony of defense expert Dr. Ruth Ballard. Mr. Kohberger will address each objection in order.

### *A. The use of term "touch" DNA will mislead and confuse the jury*

In Mr. Kohberger's MIL #6, at 3-8, he sets forth in detail the history of the use of the terms "touch" and "contact" DNA and the growing concern with the use of those words, so much that a recent report from NIST offered the recommendation that analysts should not offers opinions as to the "how" and "when" that a particular DNA sample came to be on an object. The State's opposition argues that the only purpose of the use of the word "touch" in the context of DNA is to distinguish between samples that collected from known or visible stains such as blood, saliva and semen and DNA that "may" be deposited on an item by handling or wearing (Opp. MIL #6, at 2).

What this argument fails to consider, and Mr. Kohberger forcefully explains, the use of the word "touch" in the context of DNA implies a fact that is not known: that the DNA was in fact deposited via touching the object. The implication of the word is the issue, not the description of the type of sample or the means that DNA can transfer through the environment. A close reading of Nowlin' now 3 disclosures,[1] shows the inherent problem with the use of the word "touch" and the lack of any need to use that term. In her first disclosure, S-11, Nowlin describes the ways in which DNA can move in the environment using language such as direct, indirect transfer with out use of the word "touch" except to describe the action of a person actually touching an item and transferring DNA. (Nowlin Discl. S-11, at 2 Feb. 16, 2025). In the March 3, 2025 disclosure S-17, Nowlin for the first time uses the term "touch" DNA as a descriptor and not an verb. (S-17, at 2). If the Court simply removed the word "touch" from the disclosure, the description of the concepts laid out would not suffer and would be as clear as the earlier similar description in S-7.

[1] A new different disclosure from Nowlin was filed on March 14, 2025. This disclosure was not touched on in MIL#6 because Mr. Kohberger had yet to see it.

Nowlin seems to switch between using the word "touch" in reference to describing a type of DNA, indicating that is it not necessary to offer a cogent description of the process of transfer laid out in her disclosures.

The State cites to a single case for the proposition that experts in other cases have used the phrase "touch DNA." This case is from 2016 and discussing the availability of technology to test "touch DNA" in the time frame from 2007 to 2012. (*McGiboney v State* 160 Idaho 232, 226). In further support, the State offers a single article which references sampling methods for "touch" DNA, it ignores the articles cited by Mr. Kohberger which are reviews of the literature. These reviews cover in total over 300 scientific articles as compared to the single article presented in the State's opposition. The State has presented no articles advocating for the use of "touch" DNA. Finally, the State offers Nowlin's statement that the term is "typically used" (Opp. MIL #6, Aff Nowlin at 2).[2] The State does not present any documents, peer reviewed journal articles or other materials that advocates for the use of the term "touch" or "contact" in reference to DNA samples taken from an item where the lab did not see an obvious body fluid stain and did nothing to determine the presence of any possible biological source.[3]

Nowlin's affidavit offers no support to the necessity of using the term "touch" DNA other than to state that it is a term that is widely used. Nowhere does she point to any references that support that position that this is the only means available to describe the type of sample that is being tested (Aff. At 2 ¶ 8). As is clear from her previous disclosures, she very clearly and concisely describes transfer as a concept without using the term.

[2] Nowlin also points to the use of "touch" DNA in Dr. Ballard's disclosure. Mr. Kohberger understands that if the Court grants his motion, Dr. Ballard will not be able to use that term.

[3] The State could have conducted blood, saliva or semen testing to eliminate or establish the presence of one of these fluid type but chose not to do so.

None of this is convincing and does nothing to rebut the peer reviewed opinions of the authors cited by Mr. Kohberger that the use of the terms can be misleading and suggests a mode of action which is unknown.[4] (MIL #6, at 4-5).

The use of the descriptors "touch" and "contact" DNA are not necessary to the description of transfer laid out in Nowlin's disclosures and would only mislead and confuse the jury and require a significant consumption of time in cross examine to prove a point that the State seems to concede: that the use of the word is not intended to imply the "how" of the DNA on Q1.1.

B. ***The opinion of "how" the transfer of DNA to Q1.1 is not proper expert testimony***

To rebut the citations to the research on the topic of transfer and analysts' ability to assess transfer in a particular case, the State offered a brief conclusory affidavit from Nowlin. This affidavit does nothing to assure or assist this Court in coming to a decision. As stated in MIL #6, the State intends to offer Nowlin's opinion that the DNA found on Q1.1 is from direct contact, despite acknowledging that "[c]urrent DNA technology cannot conclusively answer the question of when DNA was deposited on an item or by what mechanism." (MIL #6, at 3). Nowlin essentially places her subjective personal opinion in direct contradiction that the technology used cannot answer that question. This type of opinion and testimony is exactly the type of misleading testimony that the EWG group was concerned about. (MIL #6 at 6-7).

Idaho Rules of Evidence 702, 703 and 403 govern the admissibility of expert testimony. As set forth in MIL #6, Mr. Kohberger objects to the specific testimony of Nowlin regarding her opinion that the DNA found on Q1.1 is "more likely the result of direct transfer." A qualified expert "may testify in the form of an opinion only if their specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue. Because a verdict cannot rest on speculation or conjecture, expert opinion which is speculative, conclusory, or unsubstantiated

[4] Mr. Kohberger in no way suggests a substitute for the word "touch" or "contact." Nowlin's disclosure clearly shows that a description of the concept of transfer does not require the use of the "touch" or "contact" for the explanation and testimony to be clear and cogent.

by facts in the record is of no assistance to the jury in rendering its verdict, and therefore is inadmissible as evidence under Rule 702." (*Ryan v. Beisner*, 123 Idaho 42, 46 (1992) [citations omitted]).

> [The admissibility of expert opinion testimony] depends on the expert's ability to ***explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion***. Thus, the key to admission of the opinion is the validity of the expert's reasoning and methodology. In resolving these issues, the trial court should not substitute its judgment for that of the relevant scientific community. The court's function is to distinguish scientifically sound reasoning from that of the self-validating expert, ***who uses scientific terminology to present unsubstantiated personal beliefs***.

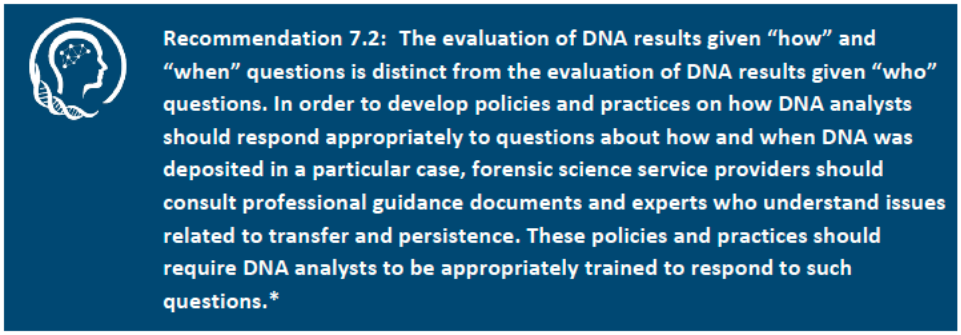
(*Id.* [quoting *Landrigan v. Celotex Corp*., 127 N.J. 404, 605 A.2d 1079, 1084 (1992)][emphasis added]).

***1. Nowlin is not an expert in transfer***

The first question for the Court is whether Nowlin has the proper expertise to proffer an opinion of how the DNA arrived on the sheath (I.R.E. 703). As set forth in Mr. Kohberger's MIL #6, at 4-8, the expertise for "how" and "when" opinions require a different type of expertise that exceeds that of the standard training and expertise of a DNA lab analyst.

Nowhere in its reply does the State address the question of Nowlin's expertise in this area, nor does Nowlin in her affidavit. Not mentioned by Nowlin in her affidavit is the recommendation of EWG:[5]

[5] This recommendation was objected to by 2 of the 25 members of the EWG: "not because training on this subject is not important or necessary, but because they question how FSSPs will determine who the "experts" are (for TPPR and formal activity evaluation training) as well as what constitutes "appropriate professional guidance" in the United States. They are also concerned that currently available guidance might not employ the necessary safeguards that typically exist in a quality system of an accredited FSSP (e.g., validation, competency and proficiency testing, appropriate discovery, reporting processes, and similar measures). Additionally, as stated in their objection to 7.1, these members believe Recommendation 7.2 is premature until Recommendation 7.3 is implemented."




(Forensic DNA Interpretation and Human Factors: Improving Practice Through a Systems Approach, at 177).

A close review of Nowlin's experience shows that she has no specialized training or experiences in the area of transfer. Her CV attached to Discl. 12/18/24, S-21, lists no substantive training in the area of transfer. It appears that she may have attended some presentations at the American Academy of Forensic Science (AAFS) meeting in February 2025 but she provides no details regarding the presentation she attended despite the fact that the materials are available online.[6] None of her presentations or publications involve transfer and she has pointed to no research or experience she has in the area of transfer to substantiate her ability to offer an opinion on the "how" and "when" of the DNA in this case. While Nowlin may be qualified to testify about DNA testing, she is not competent or qualified to offer an opinion regarding the specific evidence in this case.

***2. Opinion of Nowlin re direct transfer is speculative and not founded in sufficient facts***

The Idaho courts have long held that speculative expert testimony is inadmissible. "Testimony is speculative when it theorizes about a matter as to which evidence is not sufficient for certain knowledge." (*Adams v. State*, 158 Idaho 530, 538 (2015)). "An opinion that is speculative suggests only possibilities and may be properly excluded since the opinion would not assist the trier of fact." (*State v. Caliz-Bautista*, 162 Idaho 833, 836 (2017)). "[E]xpert testimony will assist the trier of fact when the reasoning or methodology underlying the opinion is

[6] https://www.aafs.org/resources/annual-conference-proceedings (last visited 3/20/25).

scientifically sound." (*Coombs v. Curnow* 148 Idaho 129, 140 (2009)). In determining whether expert testimony is admissible, the Court must "must evaluate 'the expert's ability to explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion.'" (*Id.* [quoting *Ryan, supra*, 123 Idaho at 46.]).

> While the court must "distinguish scientifically sound reasoning from that of the self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs," it may not "substitute its judgment for that of the relevant scientific community."

(*Id.* at 141 [citations omitted]).

Here Nowlin presents an opinion that the Idaho Supreme Court specifically warns against a personal belief, presented as a "possibility," without any scientific basis to support the opinion. In response to Mr. Kohberger's MIL #6, the State filed a short affidavit from Nowlin, reasserting without any factual or scientific support, that "there is not a consensus in the forensic community that DNA lab analysts should not opine about DNA transfer, persistence and recovery (DNA-TPPR). In support of this argument, Nowlin points to the dissent of two of the EWG members to the recommendations from the EWG that analysts ***not*** present these opinion (Aff. Nowlin at 2, ¶ 5). However, the statement by Nowlin is incomplete and misleading. While Nowlin is correct in that two of the 25 members dissented, their dissent is not supportive of Nowlin's position because they like all the other EWG members agree that this type of testimony can be misleading and otherwise problematic.

> Two members (Lynn Garcia and Dawn Boswell) do not support Recommendation 7.1. While they acknowledge that analysts are often asked to respond to "how" and "when" questions in criminal cases and ***agree that testimony on this subject can be misleading or otherwise problematic***, they believe that the broad prohibition in Recommendation 7.1 puts the proverbial "cart before the horse" by not first requiring an assessment of the type outlined in Recommendation 7.3. ***Moreover, they worry that supporting 7.1 would imply the imply the need for analysts to shift to a new paradigm that has not yet been sufficiently vetted within the specific context of the U.S. court system***.

(Forensic DNA Interpretation and Human Factors: Improving Practice Through a Systems Approach, at 177 fn. 455). This objection is not an endorsement of this type of testimony, rather it voices concerns that essentially there is no adequate training or system in place to support the scientific validity of the "how" and "when" opinion.

Nowlin next points to the lack of consensus within the forensic DNA community on the use of this type of testimony (Aff. Nowlin at 2, ¶ 6). However, this is more argument than fact. Nowlin asserts that the "other side" of the debate "believes that not offering an opinion based on knowledge of molecular biology/DNA when it may aid the trier of fact is unethical" and that there were presentation on "both sides of the argument" at a recent meeting of the American Academy of Sciences (AAFS) (*Id.*). Nowlin does not provide the identities of the community she cites for support or any article or presentation that supports her statements. Nor does she explain how ethical norms are being violated or that there are ethical guidelines that support this contention. Nowlin has presented no scientific arguments or research on the topic that supports her opinions as is demanded by Idaho law and so clearly stated in *Ryan, supra*, 123 Idaho at 46: "[The admissibility of expert opinion testimony] depends on the expert's ability to ***explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion***. Thus, the key to admission of the opinion is the validity of the expert's reasoning and methodology."

Even in a signed affidavit Nowlin can produce no scientific principles that apply to the formulation of her opinion and she has offered this Court no reasoned basis for her opinion other than two bare facts. The Court needs to consider carefully her full opinion:

> Many complicated factors can influence the likelihood of transfer of DNA and the persistence of the transferred DNA after deposition. Current DNA technology cannot conclusively answer the question of when DNA was deposited on an item or by what mechanism (i.e. direct or indirect transfer). It is possible the DNA detected on M2022-4843 Item 1.1 resulted from secondary transfer; however, based on Nowlin's training and experience it is her opinion given the quantity of DNA detected on M2022-4843 Item 1.1 (0.168ng/µl) and given the DNA profile obtained is single source it is more likely the result of a direct transfer.

(Rebuttal Expert Disclosure: Rylene Nowlin, Exhibit S-11 at 3). First Nowlin explains that there are many complicated factors effecting the transfer of DNA, states that the current technology cannot conclusively answer the question of the "how" and "when" of transfer, explains that the DNA on the item Q1.1 could "possibly" be due to indirect transfer, but that her own personal training and experience lead her to the conclusion that the DNA is more likely due to direct transfer.

Nowlin essentially offers the Court and ultimately the jury, a confusing opinion that the science does not allow for conclusive determination of "how" and "when" of transfer, and that both scenarios, direct and indirect transfer are possible, but she believes that the direct transfer is more likely. This opinion could not be more speculative: "[a]n opinion that is speculative suggests only possibilities and may be properly excluded since the opinion would not assist the trier of fact." (*Caliz-Bautista*, *supra*, 162 Idaho at 836).

This opinion would not be helpful to a jury and would tend to confuse and mislead the jury. Nowlin only offers possibilities based on no substantive scientific principles and which flies in the face of the science that Nowlin herself agrees with, that this type of opinion cannot be conclusively determined. Mr. Kohberger would be prejudiced by this speculative opinion and substantial court time would be consumed in the cross examination and impeachment of this witness and this opinion and therefore, this opinion should be excluded.

**CONCLUSION**

Mr. Kohbergers's motion to exclude the use of the words "touch" and "contact" DNA as well as the opinion of Nowlin regarding the "how" and "when" of the DNA should be excluded.

DATED this ___24____ day of March, 2025.

BICKA BARLOW

**CERTIFICATE OF DELIVERY**

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the ___24____ day of March, 2025 addressed to:

Latah County Prosecuting Attorney –via Email: paservice@latahcountyid.gov
Elisa Massoth – via Email: legalassistant@kmrs.net
Jay Logsdon – via Email: Jay.Logsdon@spd.idaho.gov
Bicka Barlow, Attorney at Law – via Email: bickabarlow@sbcglobal.net
Jeffery Nye, Deputy Attorney General – via Email: Jeff.nye@ag.idaho.gov