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**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 NUMBER CR01-24-31665**

**REPLY TO STATE'S RESPONSE TO  
DEFENDANT'S MOTION IN LIMINE #7**

**RE: WITNESS IDENTIFICATION BY  
BUSHY EYEBROWS**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and hereby replies to the State's Response to Defendant's Motion in Limine Re: Witness Identification by Bushy Eyebrows, filed on March 17, 2025.

## ARGUMENT

Mistaken identifications have been one of the leading causes of wrongful convictions in the United States for decades—and still are.<sup>1</sup> When a witness swears under oath to the identification of the person on trial, the impact cannot be understated. In this case, if D.M. is allowed to say that she saw bushy eyebrows, it will not be different than her pointing to Mr. Kohberger and saying, “that is him.” To make matters even more prejudicial the State wants to admit into evidence a picture of Mr. Kohberger, as if D.M. identified him in the photo. This is how wrongful convictions occur.

The photo of Mr. Kohberger that the State attached to its’ response is not relevant and is overly prejudicial. (*State Exhibit S-5*). This is akin to the State trying to identify Mr. Kohberger for D.M. or create its own corroboration for her. D.M. previously said that she could not identify him. (*Motion in Limine 7 - Exhibit 9 Lake interview, p. 96, l. 23-p. 98, l. 5.*) There are literally millions of people in the world who might be described as having bushy eyebrows. The term itself is subjective. And D.M. has a fascination with drawing eyes and eyebrows. (*Motion in Limine 7 - Exhibits 4 and 5.*)

The State contends that D.M.’s statements are independently reliable as law enforcement did not employ a witness identification procedure. Mr. Kohberger is not suggesting the D.M.’s

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<sup>1</sup> Cindy Laub & Brian H. Bornstein, *Juries and Eyewitnesses*, in *Encyclopedia of Psychology and Law* 390, 390 (Brian L. Cutler ed., 2008); *see also* Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony: Civil and Criminal* § 1.05 (2d ed. 1992) (reporting that mock jurors were more likely to convict in cases with eyewitness testimony than they were with a variety of types of evidence); John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 *LAW & HUM. BEHAV.* 19, 19 (1983) (<https://doi.org/10.1007/BF01045284>) (explaining that “jurors appear to regard eyewitness evidence as one of the most persuasive kinds of evidence that can be presented”); Hal Arkowitz & Scott O. Lilienfeld, *Why Science Tells Us Not to Rely on Eyewitness Accounts: Eyewitness Testimony Is Fickle and, All Too Often, Shockingly Inaccurate*, *SCI. AM.* (Jan. 1, 2010), <https://www.scientificamerican.com/article/do-the-eyes-have-it/> [<https://perma.cc/R9NC-3YZ8>] (noting that research shows “that most jurors place heavy weight on eyewitness testimony when deciding whether a suspect is guilty”).

descriptive words were developed in conjunction with a line up. D.M. was interviewed five (5) times. Law enforcement was involved with each interview. According to the State, “D.M.’s multiple descriptions of the [intruder] were based on her own recollection and were not the result of suggestive identification procedures employed by law enforcement.” Mr. Kohberger points the Court to the following instances which are suggestive:

(1) In the second interview on November 13, 2022, D.M. was interviewed at the police department by Detective Mowery who inquired about facial features and asked D.M. if she knew what color the intruder’s eyebrows were. (*Motion in Limine 7 - Exhibit 3 Mowery interview transcript, p. 20, l. 16-p. 21, l. 4.*) Detective Mowery is the person who mentioned “eyebrows” not D.M.

(2) In the third interview on November 17, 2022, D.M. was interviewed by Detective Gooch who asked D.M. if she knew what a balaclava was and showed her a picture. (*Motion in Limine 9 – Exhibit 6 Gooch interview transcript, p. 106, ll. 2-25.*) In the fourth interview on December 1, 2022, D.M. drew the mask for the interviewer. (*State’s Response, p. 6; Motion in Limine 7 – Exhibit 7 Williamson interview transcript, p. 174, l. 8- p. 176, l. 3.*) A copy of D.M.’s drawing is attached. (*Motion in Limine 7 – Exhibit 11, Bates No. 8947, D.M. mask drawing.*) It looks remarkably similar to a balaclava.

The State argues that D.M. is a reliable witness. Should the Court apply the five-factor *Manson-Biggers* balancing test to evaluate witness reliability, it should not ignore either the limited amount of time that D.M. had to view the intruder or her state of intoxication. (*Motion in Limine 7, pp. 6-7.*) A witness is less likely to provide an accurate identification from a fleeting

view and a witness's attention is likely compromised when they are intoxicated.<sup>2</sup> *State v. Almaraz*, 154 Idaho 584, 595, 301 P.3d 242, 253 (2013). D.M. saw the intruder briefly in a dark hallway and in her own words she was probably "very drunk" and tired when she saw the intruder at 4:00 a.m. (*Motion in Limine 7*, pp. 6-7.) Should the Court apply a relevance test and weigh the reliability of D.M., exclusion of the term "bushy eyebrows" is appropriate for all of the reasons explained in the *Manson-Biggers* test and intoxication as referenced in *Almaraz*.

If the Court decides not to rely upon *Manson-Biggers*, and *Almaraz*, it should consider the scientific studies that explain the fragility and inaccuracy of memory. This analysis which is applicable to a court's decision to exclude/limit this evidence, is the fact that scientific studies conducted on memory show that there are several steps to creating and retaining memory, and influences such as amount of time of exposure to view, the amount of stress involved, level of intoxication and post event influences (among others) should be taken into consideration when determining reliability. The science of memory is laid out below.

The first phase in the development of memory is the *acquisition or encoding phase*. The acquisition of memories depends on perception and all of the factors that affect perception, such as distance, lighting, and duration of exposure.<sup>3</sup> Because perception also depends on several individualized factors, the encoding phase of developing memories is affected by many of those same criteria:

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<sup>2</sup> On Saturday November 12, 2022 through the early morning hours of Sunday November 13, 2022, D.M. had consumed champagne, 9-10 seltzers (White Claws with 5 percent alcohol), Borg (a concoction of hard alcohol, water, and flavoring in a big plastic jug), and unknown amount of alcohol while participating in a drinking game. (*Motion in Limine 9 – Exhibit 6 Gooch interview transcript*, p. 19, l. 2-p. 30, l. 16; p. 50, l. 14- p. 51, l. 25.) This footnote just recites the alcohol consumed in an approximate 24-hour period and does not include alcohol consumed in the immediate days prior to November 12, 2022.

<sup>3</sup> Kathleen B. McDermott & Henry L. Roediger III, Memory (Encoding, Storage, Retrieval), in *Noba: Psychology* (Robert Biswas-Diener & Ed Diener eds., 2023), <https://nobaproject.com/modules/memory-encoding-storage-retrieval> [<https://perma.cc/J7PA-ZJDU>].

The contents of short-term memory are limited and highly subject to interference by subsequent sensory, cognitive, emotional, or behavioral events; the contents can also be biased by prior knowledge, expectations, or beliefs, resulting in a distorted representation of experience. Short-term memories of events that happened early in a witnessed proceeding may simply be forgotten with the passage of time or badly compromised by attention directed to subsequent emotional events or cognitive and behavioral demands (e.g., anxiety, fear, the need to escape). In such cases, the compromised information may never be consolidated fully into long-term storage or that storage may contain distorted content. At the same time, the quality of encoding of stimuli that are attended is commonly enhanced by highly emotional content.<sup>4</sup>

Sensory overload has particular relevance to the encoding phase. It can lead to so much incomplete sensory acquisition that *confabulation*— “the creation or substitution of false memories through later suggestion”— can occur to fill in the many gaps that exist.

In this case, the time period of observation was seconds at most, with limited lighting, under stress and expressed fear, and with a witness who has repeatedly expressed she is unsure. (*Motion in Limine 7*, pp. 4, 6.) She was in “a frozen shock phase,” she did not know “if it’s a dream,” and there is a time delay in her reporting what she saw. (*Id.*, p. 3; *Ex. 7*, p. 54, ll. 21-25; p. 98, ll. 4-10.)

The next part of the memory process is the *retention or storage phase*. During this phase, the brain stabilizes and consolidates memories for storage until they are called upon for retrieval.<sup>5</sup> The amount of data being encoded and retained is one factor that affects this phase. The greater the amount of data presented, especially in shorter periods of time, the less that will

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<sup>4</sup>Nat’l Rsch. Council, *Identifying the Culprit: Assessing Eyewitness Identification* (2015, at 61 (citing John Robert Anderson, *The Architecture Of Cognition* (1983); John Robert Anderson & Christian Lebiere, *The Atomic Components Of Thought* (1998)).

<sup>5</sup> Nat’l Rsch. Council, *supra* note 4, at 62.

be retained.<sup>6</sup> A second key factor is the *retention interval*—how much time passes between storage of the memory and retrieval of it. A third, factor has the most potentially negative effect on memory retention: the *post event misinformation effect*. Exposure to subsequent information affects how earlier memories are retained and retrieved.<sup>7</sup> This means that an eyewitness exposed to post event misinformation, can accept erroneous or even nonexistent details as if they were true.

In this case, not only was there an 8 hour delay in reporting, prior to the first law enforcement interview, D.M. was allowed to mingle with B.F. and many other friends. Law enforcement did not separate all of the friends who came to 1122 King Road prior to interviews and no warning was given to not discuss the facts and no effort was made to limit such a discussion. Many of the friends who were at 1122 King Road when police arrived also stayed in the same hotel room the night of November 13, 2022. There was also extensive media coverage. Post event misinformation must be considered as a factor on the accuracy of D.M.’s memory retention.

Finally, during the *retrieval phase*, the brain searches for the pertinent information, retrieves it, and communicates it. This process occurs when eyewitnesses describe what they observed to police, when they participate in identification confrontations, and when they testify in court. Several factors affect retrieval. *Time* is a very important factor in memory retrieval. As

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<sup>6</sup> See, e.g., Mark W. Schurgin, *Visual Memory, the Long and the Short of It: A Review of Visual Working Memory and Long-Term Memory*, 80 Attention Perception & Psychophysics 1035 (2018) (<https://doi.org/10.3758/s13414-018-1522-y>).

<sup>7</sup> Peter J. Cohen, *How Shall They Be Known? Daubert v. Merrell Dow Pharmaceuticals and Eyewitness Identification*, 16 Pace L. Rev. 237, 246 (1996) (citing Elizabeth F. Loftus, *Eyewitness Testimony* 35, 54 (1979)); see also Carl Martin Allwood, Jens Knutsson & Pär Anders Granhag, *Eyewitnesses Under Influence: How Feedback Affects the Realism in Confidence Judgements*, 12 Psych. Crime & L. 25 (2006) (<https://doi.org/10.1080/10683160512331316316>).

a rule, the longer the period between acquisition, retention, and retrieval, the more difficulty we have retrieving the memory, a phenomenon referred to as *memory decay*.<sup>8</sup>

By the time D.M. testifies, almost three years will have passed, after five law enforcement interviews where her recitation of the events of November 13, 2022 changes, and after extensive media coverage about this case, which almost always includes pictures of Mr. Kohberger. Memory retrieval in these circumstances weighs against reliability.

### CONCLUSION

For the reasons addressed above and in Mr. Kohberger’s initial brief, the Court should grant Mr. Kohberger’s Motion in *Limine* to exclude D.M. from using the words “bushy eyebrows” to identify the intruder that she saw and to exclude D.M. from identifying Mr. Kohberger based on “bushy eyebrows.” The Court must additionally prohibit the State from acting as an identifying witness by admitting a picture of Mr. Kohberger in evidence in support of D.M.’s testimony or for any other reason.

DATED this 24<sup>th</sup> day of March, 2025.

BY:



ELISA G. MASSOTH

ELISA G. MASSOTH, PLLC ATTORNEY

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<sup>8</sup> Nat’l Rsch. Council, *supra* note 4, at 62.

## 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](mailto:paservice@latahcountyid.gov)

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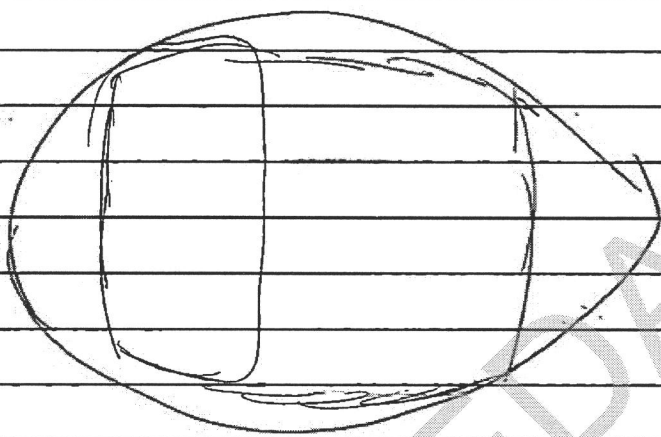
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**DEFENDANT'S  
MOTION IN LIMINE # 7  
EXHIBIT NO. 11  
IDENTIFICATION/EVIDENCE  
CASE NO. CR01-24-31665**