

<p>DISTRICT COURT, ALAMOSA COUNTY, COLORADO, 8955 Independence Way Alamosa, CO 81101</p> <hr/> <p>THE PEOPLE OF THE STATE OF COLORADO Plaintiff,</p> <p>v.</p> <p>BARRY LEE MORPHEW, Defendant.</p>	<p>DATE FILED April 13, 2026 11:00 PM</p> <p>▲ COURT USE ONLY ▲</p>
<p>JANE FISHER-BYRIALSEN, #49133 FISHER &amp; BYRIALSEN, PLLC 4600 S. Syracuse Street, 9<sup>th</sup> Floor Denver, CO 80237 (202)256-5664 <a href="mailto:Jane@fblaw.org">Jane@fblaw.org</a></p> <p>DAVID BELLER, #35767 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1400 Denver, CO 80202 (303)573-1900 Fax: (303) 446-9400 <a href="mailto:david@rklawpc.com">david@rklawpc.com</a></p>	<p>Case Number: 25 CR 128</p>
<p align="center"><b>[D-034] MOTION FOR NOTICE OF PROPOSED DUAL CAPACITY WITNESSES AND TO REQUIRE THAT PROSECUTION WITNESSES OFFERED AS EXPERTS MUST SATISFY CRE 702, PEOPLE V. SCHRECK, AND THE DUE PROCESS CLAUSE</b></p>	

Mr. Barry Morphey, by and through undersigned counsel, respectfully requests that this Court exclude any prosecution expert testimony — including through dual-capacity witnesses — unless the prosecution has first identified the witness as a proposed expert, complied with CRE 702 and *People v. Shreck*, 22 P.3d 68 (Colo. 2001), and obtained this Court's approval.

AS GROUNDS, Mr. Morphey states:

1. Allowing the Government to call a witness in both a lay and expert capacity raises significant concerns. As the Colorado Supreme Court recognized, "CRE 701 and 702 distinguish lay testimony from expert testimony." *Venalonzo v. People*, 2017 CO 9, ¶18, 388 P.3d 868, 874 (Colo. 2017).

2. “There are special concerns attendant to law enforcement expert testimony.” *People v. Ornelas-Licano*, 2020 COA 62, 64, 490 P.3d 714 (citations omitted) (holding that “extensive experience in shooting through various windshields” did not provide a reliable basis for testimony as to “the relationship between the angle of impact and the shape of the bullet hole”). *See also People v. Garrison*, 2017 COA 107, 55, 411 P.3d 270, 281 (trial court reversibly erred in admitting an officer’s testimony about email and IP addresses without undertaking the CRE 702/*Shreck* procedures and making the required findings); *People In Int. of A.F.*, 2025 COA 76, 579 P.3d 99 (trial court reversibly erred in admitting DHS caseworker’s testimony).

3. Under Colorado Rule of Evidence (“CRE”) 701, testimony is admissible as lay testimony (but not as expert testimony) if the testimony is “(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Lay opinions “must be rationally based on the witness's first-hand perceptions....” *People v. Stewart*, 55 P.3d 107, 122-123 (Colo. 2002).

4. Under CRE 702, prior to admitting expert scientific testimony, this Court must determine at least whether:

- (1) the scientific principles underlying the testimony are reasonably reliable;
  - (2) the expert is qualified to opine on such matters;
  - (3) the expert testimony will be helpful to the jury; and
  - (4) the evidence satisfies CRE 403.
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- (1) Whether the technique can and has been tested;
  - (2) Whether the theory or technique has been subjected to peer review and publication;
  - (3) The scientific technique's known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation;
  - (4) Whether the technique has been generally accepted;
  - (5) The relationship of the proffered technique to more established modes of scientific analysis;

(6) The existence of specialized literature dealing with the technique;

(7) The non-judicial uses to which the techniques are put;

(8) The frequency and type of error generated by the technique;

and

(9) Whether such evidence has been offered in previous cases to support or dispute the merits of a particular scientific procedure.

*People v. Rector*, 248 P.3d 1196, 1200 (Colo.2011); *People v. Shreck*, 22 P.3d 68, 77-79 (Colo.2001); *Estate of Ford v. Eicher*, 250 P.3d 262, 267 (Colo 2011) (quoting *People v. Shreck*, 22 P.3d 68, 77-78 (Colo. 2001) and citing *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 593–94 (1983) and *United States v. Downing*, 753 F.2d 1224, 1238–39 (3d Cir.1985)). See also *People v. Rector*, 248 P.3d 1196, 1200 (Colo.2011); *People v. Martinez*, 74 P.3d 316, 322 (Colo.2003).

5. This Court may not admit expert testimony unless (1) the scientific principles underlying the testimony are reasonably reliable, (2) the expert is qualified to opine on such matters, (3) the expert testimony will be helpful to the jury; and (4) the evidence satisfies CRE 403. *Shreck, supra*, at 77-79; *Rector, supra*, at 1200.

6. Under CRE 702, expert testimony is permitted when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" — specifically, testimony that "goes beyond the realm of common experience and requires experience, skills, or knowledge that the ordinary person would not have." *Venalonzo v. People, supra*, ¶22, 388 P.3d at 875. A witness may not testify as an expert unless the prosecution demonstrates that the field constitutes a genuine area of expertise, the opinions are relevant and admissible, and the expert designation actually assists the jury on a material, contested issue rather than merely bolstering the evidence.

7. As the Ninth Circuit warned, allowing lay witnesses to offer "specialized knowledge" without proper qualification "would encourage the Government to offer all kinds of specialized opinions without pausing first properly to establish the required qualifications of their witnesses." *United States v. Figueroa–Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997). The Colorado Supreme Court endorsed this view, cautioning that mere perception of underlying facts "does not trump Rule 702" — otherwise, "a layperson witnessing the removal of a bullet from a heart during an autopsy could opine as to the cause of the decedent's death." *People v. Stewart, supra*, at 124 (quoting *Figueroa–Lopez*, 125 F.3d at 1246).

8. The Colorado Court of Appeals has recently reversed a case for just this type of error: admitting testimony without satisfying CRE 702. *People In Int. of A.F., supra*. There, the Court of Appeals ruled that a trial court presiding over a dependency and neglect proceeding reversibly erred in admitting expert testimony from department of human services caseworkers without making the findings required by *People v. Shreck, supra*. The Court rested its ruling on clear precedent from the Colorado Supreme Court:

the supreme court has made clear that *Shreck* and CRE 702 ‘govern[ ] the admissibility of *all* expert testimony in Colorado, including experience-based expert testimony.’ [*Kutzly v. People*, 2019 CO 55, 10, 442 P.3d 838] (emphasis added); *see also People v. Douglas*, 2015 COA 155, 75, 412 P.3d 785 (‘In all cases, even where expertise is based on experience alone, the trial court must maintain its role as a gatekeeper to ensure that ‘specialized testimony is reliable, relevant, and helpful to the jury.’ ’ (citation omitted)).

*People In Int. of A.F., supra*, 16, 579 P.3d at 105.

9. In *People v. Stewart, supra*, a police officer testified about his accident reconstruction training, crime scene observations, and the inferences he drew from them. 55 P.3d at 122–23. The trial court deemed him a "perceiving witness" rather than an expert, but the Colorado Supreme Court disagreed. *Id.* at 122. While the officer's direct observations were admissible as lay opinion testimony, his "deductions about ... the vehicle's direction, position, and speed" required specialized knowledge and thus constituted expert testimony. *Id.* at 124. The Court held that admitting the reconstruction testimony without qualifying the officer as an expert and satisfying CRE 702's requirements was an abuse of discretion. *Id.*

10. In *Romero v. People*, 2017 CO 317, 393 P.3d 973 (Colo. 2017), the Colorado Supreme Court again ruled that the trial court abused its discretion by allowing lay testimony on concepts that were properly the subject of expert testimony. *Romero v. People, supra*, ¶18, 393 P.3d at 978 (trial court committed reversible error in admitting lay opinions regarding the concept of a sexual predator’s grooming of victims). To differentiate between lay and expert testimony, the Supreme Court applied the following test from *Venalonzo*:

[I]n determining whether testimony is lay testimony under Colorado Rule of Evidence (“CRE”) 701 or expert testimony under CRE 702, the trial court must look to the basis for the opinion. If the witness provides testimony that could be expected to be based on an ordinary person's experiences or knowledge, then the witness is offering lay testimony. If, on the other hand, the witness

provides testimony that could not be offered without specialized experiences, knowledge, or training, then the witness is offering expert testimony.

*Venalonzo*, 2, 388 P.3d at 870–71. See also *People v. Ramos*, 2017 CO 6, 388 P.3d 888 (Colo. 2017) (reversing hate crimes convictions because of the trial court’s errors in permitting a lay witness to render expert opinions).

11. Allowing the prosecution to call a dual-capacity witness risks the same prejudice that caused reversals in *Venalonzo v. People*, supra, *People v. Ramos*, and *Romero v. People*, supra — namely, enabling the Government to circumvent the rules governing expert witnesses and inflict "the prejudice that the rules governing expert witnesses seek to prevent." *Venalonzo*, ¶50, 388 P.3d at 881.

12. If a witness is to be called as an expert, then the qualification as an expert testimony must be preceded by procedures designed to ensure heightened reliability, disclosure of expert opinions, reports, CV’s, and treatises. See e.g. Crim. P. Rule 16 (Part I) (a)(1)(III) (prosecutor must disclose “Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.” The notice must comply with this Court’s case management order. The expert must be subject to cross-examination by learned treatises, and the defense must be provided adequate notice and opportunity to hire defense consultants to review the expert opinions offered by the Government.

13. This Court should require that the Government “disclose the underlying facts or data supporting the opinion” for any dual capacity witness. Crim. P. Rule 16 (Part I) (d)(3). The interests would be served by a court order requiring the prosecution “to provide a written summary of the testimony describing the witness's opinions and the bases and reasons therefor, including results of physical or mental examination and of scientific tests, experiments, or comparisons.” *Ibid*. The Rules of Criminal Procedure explicitly state that the intent of the rules that permit this Court to order the prosecutor to make said disclosure is to benefit the defense: “The intent of this section is to allow the defense sufficient meaningful information to conduct effective cross-examination under CRE 705.” *Ibid*.

14. When a witness is slated to be both a lay and expert witness, it is incumbent upon this court to determine, pretrial, whether (1) testimony on the subject would be useful to the jury, and (2) the witness is actually qualified to render an opinion on the subject.

In determining whether the proposed testimony would be useful to the jury, the trial court must consider both whether the proposed

testimony would be logically relevant and whether its probative value would not be ‘substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by the consideration of undue delay, waste of time, or needless presentation of cumulative evidence.’

*Salcedo v. People*, 999 P.2d 833, 838 (Colo. 2000)(quoting CRE 403). *See also Shreck, supra*, 22 P.3d at 77.

15. In *Salcedo*, a detective testified both as an expert witness “concerning the behavior and characteristics that constitute the drug courier profile” and as an eyewitness “concerning [the defendant’s] actions and appearance” at the time of his arrest. 999 P.2d 833, 840 (Colo. 2000). The Supreme Court was primarily concerned with whether the detective’s testimony about the drug courier profile was unduly prejudicial. *Id.* The court concluded that the detective’s testimony was impermissible because it intermingled expert witness testimony concerning the behavior and characteristics that constituted the drug courier profile with eyewitness testimony concerning the defendant’s actions and appearance. *Id.*

16. An evidentiary hearing is required on these factors because this Court must make specific findings. *See People v. Rector*, 248 P.3d 1196, 1201 (Colo. 2011). It is impossible for this Court to make specific findings without holding an evidentiary hearing to identify and differentiate the lay testimony from the expert testimony. Depending upon what is offered, this Court may need to require a structure to the testimony that separates out the fact testimony from any expert testimony. This Court must specifically instruct the jury as to the nature of any witness who gives both fact testimony and expert opinion testimony, again requiring an evidentiary hearing to sort out in order to avoid a delay in the middle of trial.

17. Admissibility of experience-based specialized knowledge under CRE 702 requires consideration of CRE 402 and 403, as any such determination “is inherently intertwined with a finding that the expert’s proposed testimony is both relevant under CRE 402 and not unfairly prejudicial under CRE 403.” *Ibid.* As *Martinez* further recognized, “CRE 403, in conjunction with CRE 702, tempers broad admissibility by giving courts discretion to exclude expert testimony unless it passes more stringent standards of reliability and relevance.” 74 P.3d at 322–23.

18. In *Salcedo*, the Colorado Supreme Court held that it was reversible error to allow a detective, testifying as an expert, that in his opinion the defendant knowingly possessed cocaine (*i.e.* was guilty) because his behavior and characteristics conformed to a drug courier profile. *Salcedo*, 999 P.2d at 834, 837-840. The Court characterized the detective’s testimony as “inherently subjective, of dubious reliability, and logically irrelevant, and [therefore] its

probative value was substantially outweighed by a risk of misleading the jury.” *Salcedo*, 999 P.2d at 840. Thus the testimony was not helpful to the jury. The court didn’t need to reach whether dual capacity testimony would be categorically banned. But later courts agree “dual capacity testimony is problematic” *People v. Fortson*, 2018 COA 46M, 99, 421 P.3d 1236, 1249. *Id.*, 121 (Berger, J. concurring in part) (“The hazards of dual capacity expert testimony, where a witness testifies as both an expert and lay witness, are well known.”).

19. In *Fortson*, “the risks of dual capacity testimony [were] obvious and substantial. Nevertheless, the prosecutor chose to play roulette and called a dual capacity expert.” *Id.*, 122. Although the court did not categorically bar all dual capacity experts, it did not have to. The conviction was reversed on other grounds.

20. “Expert testimony” that is not based on any specialized knowledge or experience amounts to opinions that belong only to the witness, or perhaps that are merely the witness’s opinions about the prosecutor’s theory of the case. See *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 906 (Tex.2004)(An expert's “bare opinion” will not suffice and is unreliable if “based solely upon his subjective interpretation of the facts.”) A detective’s theory of the case is not expertise, and it is not admissible under CRE 702. *Cf. United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2003):

when the prosecution uses a case agent as an expert, there is an increased danger that the expert testimony will stray from applying reliable methodology and convey to the jury the witness's “sweeping conclusions” about appellants' activities, deviating from the strictures of Rules 403 and 702. [*United States v. Simmons*, 923 F.2d 934, 946–47 n. 5 (2<sup>nd</sup> Cir. 1991)]. Although we approve of testimony interpreting drug code words, such expert testimony, unless closely monitored by the district court, may unfairly “provid[e] the government with an additional summation by having the expert interpret the evidence,” and “may come dangerously close to usurping the jury's function.” *United States v. Nersesian*, 824 F.2d 1294, 1308 (2<sup>nd</sup> Cir. 1987)]; *see also United States v. Rivera*, 22 F.3d 430, 434 (2d Cir.1994); *Simmons*, 923 F.2d at 947. As the testimony of the case agent moves from interpreting individual code words to providing an overall conclusion of criminal conduct, the process tends to more closely resemble the grand jury practice, improper at trial, of a single agent simply summarizing an investigation by others that is not part of the record. Such

summarizing also implicates Rule 403 as a “needless presentation of cumulative evidence” and a “waste of time.” Fed.R.Evid. 403.

*Ibid.* This type of “expert” theories and opinions are not relevant. Such pseudo expert-opinion testimony lacks probative value, distorts the government’s burden of proof, and improperly invades the province of the jury. *See, e.g., United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008)( Second Circuit expressed concern about such “experts” turning their testimony into the “central hub of the case”) “The officer expert transforms into the hub of the case, displacing the jury by connecting and combining all other testimony and physical evidence into a coherent, discernible, internally consistent picture of the defendant's guilt.” *Mejia*, 545 F.3d at 190-91. As part of its gatekeeping function, this court has the responsibility to determine whether proffered expert testimony is reliable, relevant, helpful to the jury, and not unfairly prejudicial. *See* CRE 401-403, 702; *Salcedo, supra*.

21. Another constitutional problem with allowing an investigator-officer or case agent to interpret conversations and behavior is that it obviates the need for a jury review of the facts. If this line of “Government expertise” is permitted,

... there would be no need for the trial jury to review personally any evidence at all. The jurors could be “helped” by a summary witness for the Government, who could not only tell them what was in the evidence but tell them what inferences to draw from it.

*United States v. Grinage*, 390 F.3d 746, 749 (2d Cir. 2004). Not only does bestowing expert status on an investigating officer impart an aura of credibility, it also limits the ability to effectively cross-examine what is essentially a fact witness because “he is providing an opinion that, unlike a factual matter, is not easily contradicted.” *United States v. Dukagjini, supra*, at 53. While this is true of any expert, when the expert is also a fact witness, a “failed effort to impeach the witness as expert may effectively enhance his credibility as a fact witness.” *Ibid.*

22. When the prosecution calls a law enforcement official to testify as both a fact and expert witness, the prosecution confers upon the witness an aura of special reliability and trustworthiness. *See, e.g., Cruz*, 363 F.3d at 194; *Mejia, supra*. This aura poses a particular risk of prejudice because: (1) the jury may infer that the officer witness’ opinion about the criminal nature of the defendant’s activities is based on knowledge of the defendant beyond the evidence produced at trial; and (2) simply by qualifying as an “expert,” the witness attains unmerited credibility.

23. Allowing a lay witness to testify as an “expert” would render the proceeding unreliable and lower the government’s burden to prove the allegations beyond a reasonable doubt

in violation of the due process clauses of the federal and state constitutions. U.S. Const. amend. XIV, § 1; Colo. Const. art. II, § 25; *Victor v. Nebraska*, 511 U.S. 1, 5 (1994); *Vega v. People*, 893 P.2d 107, 111 (Colo.1995); *Montez v. People*, 2012 CO 6, 21, 269 P.3d 1228, 1232. “A verdict cannot rest on guessing, speculation, conjecture, or a mere modicum of relevant evidence.” *McBride v. People*, 2022 CO 30, 38; *People v. Donald*, 2020 CO 24, 19.

24. This Court should require advance notice so that these issues can be identified, raised, and resolved prior to trial. This is well within this Court’s authority and rules that require advance notice of trial witnesses and experts.

25. Mr. Morphey makes this motion, and all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, as a continuing objection based upon (in addition to the above authority) the following grounds and authorities: the due process, trial by jury, right to counsel, equal protection, equal access to and administration of justice, right to defend life, cruel and unusual punishment, confrontation, compulsory process, right to remain silent, and right to appeal clauses of the federal and Colorado Constitutions, and the first, fourth, sixth, eighth, ninth, tenth, and fourteenth amendments to the United States Constitution, and article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28 of the Colorado Constitution, Crim. P. 16, RPC 3.8, CREs 401, 402, 403, 404, 608, 701, 702, 703, 801, 802, 901, and other applicable Rules of Evidence or Criminal Procedure. Mr. Morphey cross-references and incorporates by reference all pleadings filed or to be filed in this case, and caselaw cited therein and at oral argument.

WHEREFORE, Mr. Morphey respectfully requests that this Court exclude any expert testimony — including through dual-capacity witnesses — unless the prosecution has identified the witness as a proposed expert, complied with CRE 702 and *People v. Shreck*, 22 P.3d 68 (Colo. 2001), and obtained this Court's prior approval.

Respectfully submitted this 13th day of April, 2026.

**FISHER & BYRIALSEN, PLLC**

/s/ Jane Fisher-Byrialsen  
Jane Fisher-Byrialsen, #49133

**RECHT KORNFELD, P.C.**

/s/ David Beller  
David Beller, #35767

**Certificate of Service**

I hereby certify that on April 13, 2026, I caused the foregoing to be filed with the Alamosa County District Court and a copy of the same to be served on the Alamosa County District Attorney's office via CCE-File Service.

/s/ Abby Clement  
Paralegal at Fisher & Byrialsen PLLC