

<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 11:08 PM</p> <p>▲ COURT USE ONLY ▲</p>
<p>JANE FISHER-BYRIALSEN, #49133 FISHER & BYRIALSEN, PLLC 4600 S. Syracuse Street, 9th Floor Denver, CO 80237 (202)256-5664 Jane@fblaw.org</p> <p>DAVID BELLER, #35767 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1400 Denver, CO 80202 (303)573-1900 Fax: (303) 446-9400 david@rklawpc.com</p>	<p>Case Number: 25 CR 128</p>
<p align="center">[D-035] MOTION FOR EVIDENTIARY HEARING TO EXCLUDE SUMMARY TESTIMONY</p>	

Mr. Barry Morphew, by and through counsel, requests that this Court disallow any government witnesses called to provide summaries of evidence. If this Court disagrees, it should enter an order requiring advance notice and an evidentiary hearing to determine the admissibility of the evidence. In support, Mr. Morphew states:

1. Summary testimony is permissible under certain limited circumstances. The underlying facts must be complex and a jury must be incapable of understanding them without the summary testimony. The court must determine that the evidence is sufficiently complex such that the testimony will assist the trier of fact. *Murray v. Just In Case Bus. Lighthouse, LLC*, 2016 CO 47M, 31.

2. The prosecutor cannot simply call a case agent as an expert to give his subjective interpretation of the facts and espouse the prosecutor's theory of the case by summarizing all the evidence and reciting hearsay. 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."). See *United States v. Dukagjini*, 326 F.3d 45, 53 (2nd 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 [in violation of] Rules 403 and 702.

3. In *Dukagjini*, the prosecutor called a so-called expert to summarize and interpret a series of telephone calls. In rejecting the practice, the U.S. Court of Appeals for the Second Circuit distinguished between the proper use of expert testimony to interpret "drug code words" and how it was used at the trial, to essentially provide the government "with an additional summation by having the expert interpret the evidence," thus "com[ing] dangerously close to usurping the jury's function." *Id.*, at 53:

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. See also e.g. *United States v. Casas*, 356 F.3d 104, 117 (1st Cir. 2004) (finding reversible error when the district court allowed a government agent to testify as an overview witness explaining to the jury the various defendants' roles in an alleged conspiracy); *United States v. Aviles-Colon*, 536 F.3d 1, 21 n.13 (1st Cir. 2008) (finding troubling the use of a government agent "to endorse the testimony of other witnesses, who testify from personal knowledge about the involvement of the defendant in the conspiracy, and thereby add the imprimatur of the government to those witnesses' testimony"); *United States v. Flores-De-Jesus*, 569 F.3d 8, 18 (1st Cir. 2009) ("there is no meaningful difference between the endorsement of credibility offered by the government's overview witness and the endorsement offered by the vouching prosecutor").

4. Permitting summary testimony would also violate the confrontation clause of the state and federal constitutions and the rules prohibiting hearsay. Hearsay is "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." CRE 801(c). Unless an exception applies, hearsay statements are generally inadmissible. CRE 802.

5. Such testimony would also violate CRE 703 (permitting an expert to testify to facts and data that are otherwise inadmissible in evidence so long as they formed the basis of the

expert's opinion and are of the type reasonably relied upon by experts in the field). It was the rank transmission of out of court statements. *Cf. Golob v. People*, 180 P.3d 1006, 1010 (Colo. 2008)(finding that notwithstanding CRE 703, the expert's testimony was inadmissible hearsay).

6. Use of a summary witness based on testimonial hearsay would also violate the confrontation clauses. *Crawford v. Washington*, 541 U.S. 36, 52 (2004). See *United States v. Garcia*, 793 F.3d 1194, 1214 (10th Cir. 2015), *cert. denied* 136 S.Ct. 860 (2016)(finding a confrontation clause violation when a gang expert testified to what was relayed to him by gang members); *People v. Sanchez*, 63 Cal. 4th 665, 374 P.3d 320 (2016) (when any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay, and if the case is one in which a prosecution expert seeks to relate testimonial hearsay, there is a Confrontation Clause violation); *People v. Roa*, 11 Cal. App. 5th 428, 433, 217 Cal. Rptr. 3d 604, 608 (Ct. App. 2017) (the trial court's error in allowing the experts to recite case-specific facts that were not independently proven by admissible evidence warranted reversal of conviction); *People v. Martinez*, 19 Cal. App. 5th 853, 228 Cal. Rptr. 3d 271 (Ct. App. 2018)(error in admitting gang expert's testimony, which was based on both testimonial and non-testimonial hearsay, warranted reversal).

7. As the Tenth Circuit explained in *United States v. Garcia*, a party cannot prove case-specific facts by having an expert repeat hearsay statements:

When the expert's testimony on such matters is not based on personal knowledge but on testimonial hearsay, the testimony violates not only the rules of evidence but also the Confrontation Clause. We have repeatedly cautioned about the impropriety of permitting an "expert" witness to "parrot[]" testimonial hearsay. *Kamahele*, 748 F.3d at 1000. As we said in *Pablo*, "If an expert simply parrots another individual's out-of-court statement, rather than conveying an independent judgment that only incidentally discloses the statement to assist the jury in evaluating the expert's opinion, then the expert is, in effect, disclosing that out-of-court statement for its substantive truth; the expert thereby becomes little more than a backdoor conduit for an otherwise inadmissible statement." 696 F.3d at 1288; see *United States v. Garcia*, 752 F.3d 382, 394 (4th Cir.2014) (expert not permitted to "channel[]" statements from nontestifying witnesses).

United States v. Garcia, *supra*, 793 F.3d at 1213, citing *United States v. Pablo*, 696 F.3d 1280, 1288 (10th Cir.2012) and *United States v. Kamahele*, 748 F.3d 984, 1000 (10th Cir.2014).

WHEREFORE, Mr. Barry Morpew, by and through counsel, requests that this Court disallow any government witnesses called to provide summaries of evidence. If this Court disagrees, it should enter an order requiring advance notice and an evidentiary hearing to determine the admissibility of the evidence.

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