DISTRICT COURT, ALAMOSA COUNTY, COLORADO, 8955 Independence Way Alamosa, CO 81101 THE PEOPLE OF THE STATE OF COLORADO Plaintiff, v. BARRY LEE MORPHEW, Defendant.	DATE FILED April 13, 2026 11:34 PM ▲ COURT USE ONLY ▲
JANE FISHER-BYRIALSEN, #49133 FISHER & BYRIALSEN, PLLC 4600 S. Syracuse Street, 9th Floor Denver, CO 80237 (202)256-5664 Jane@fblaw.org 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	Case Number: 25 CR 128

MOTION TO EXCLUDE SO-CALLED 'VICTIMOLOGY' TESTIMONY

Mr. Barry Morphew, by and through undersigned counsel, hereby requests this Court exclude testimony or evidence, whether introduced through lay or expert witnesses, of so-called "victimology" or "pattern of life" testimony and exclude the hearsay that would be elicited by introduction of this type of evidence.

AS GROUNDS, Mr. Morphew states:

1. The law of the case should be applied to bind the People to their concession and the Court's ruling in Fremont County District Court No. 22CR47 ("*Morphew I*"). On February 24, 2022, the district court ordered, without objection from the People that the type of evidence that is the subject of this motion would be excluded from trial, ruling in pertinent part:

> Moving on to D39. Mr. Weiner [representing the People] has confessed that motion as well. He agrees testimony about victimology, while it may be useful in

conducting a criminal investigation it doesn't have a place for expert testimony in this trial. And for really the same reasons he articulated with regard to the profiling.[1]

…

[T]he Court didn't have to really consider how the People were going to use it because they told the Court today Judge, we're not using that testimony.

The Court is granting D39. The People shall not present any lay or expert testimony with regard to victimology. We're on notice about kind of what that is because there was testimony about that at the preliminary hearing and Mr. Weiner said that may have been fine at the preliminary hearing but we are not going to offer that at trial. Accordingly, it is excluded for use at trial.

…

Mr. McConnell or any other law enforcement officers who have been endorsed as experts in this case shall not, and are prohibited from testifying about victimology or profiling. This Court knows what that is. I think the People know what that is. Certainly the defense does.

If it comes in at trial the Court's in a position to recognize it and exclude it if there's a contemporaneous objection, and it would be excluded. The Court intends to enforce that ruling.

The defense needs -- and their due process requires they have meaningful time and opportunity to prepare for trial. Bringing this testimony in under the guise of something different would be unfair. It wouldn't provide notice.

And I don't think the Prosecution is going to attempt to do that. I don't. I'm just stating it so it's very clear. So were it to come in, if there's a contemporaneous objection, which I expect there would be, the Court will sustain it. All right? Okay.

Tr. 2/24/22, p. 96-98.

2. The prosecutors should not be permitted to circumvent the prior ruling of the court.

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[1] In *Morphew I*, the motion to exclude profiling was [D-38] and [D-38a], which is addressed in a separate motion filed in this Court.

3. "When a court issues final rulings in a case, the 'law of the case' doctrine generally requires the court to follow its prior relevant rulings." *Giampapa v. Am. Family Mut. Ins. Co*., 64 P.3d 230, 243 (Colo. 2003); *see also People v. George*, 2017 COA 75, ¶ 31 ("[U]nder the law of the case doctrine, '[p]rior relevant rulings made by the trial court in the same case are generally to be followed.' " (*quoting People v. Roybal*, 672 P.2d 1003, 1005 n.5 (Colo. 1983))). The law of the case doctrine is "merely discretionary" when it is applied to a judge's authority to reconsider his or her own prior rulings. *Giampapa*, 64 P.3d at 243; *Roybal*, 672 P.2d at 1005 n.5, but that principle does not apply here. The imperative to follow the law of the case is not merely one of efficacy or efficiency, but is grounded in fundamental fairness.

4. This Court should also decline to depart from the ruling in *Morphew I* because the People have waived their objection to this motion by consenting to the relief entered in *Morphew I*, i.e., exclusion of the evidence at trial.

5. No relevant circumstances have changed since the prior ruling excluding any victimology-type evidence. The *Morphew I* Court's ruling was correct for the reasons stated therein and set forth above, and for the reasons stated in the motion filed in *Morphew I* (D-39).[2] The *Morphew I* Court's ruling was correct for the reasons stated therein and set forth above, and for the reasons stated in the motion filed in *Morphew I*

6. Mr. Morphew attaches and fully incorporates by reference the arguments made in D-38 and D-38a as if set forth fully herein.

7. While this court has discretion to determine the admissibility of expert testimony, certain restrictions and rules apply to limit that discretion. *People v. Schreck*, [22 P.3d 68, 70, 77-78 (Colo. 2001)]; *Ruibal v. People*, 2018 CO 93, ¶ 12, 432 P.3d 590; *Golob v. People*, 180 P.3d 1006, 1011 (Colo. 2008). In exercising that discretion, the court must act as a "gatekeep[er]" and assure that specialized testimony is "reliable, relevant, and helpful to the jury." *People v. Prieto*, 124 P.3d 842, 849 (Colo. App. 2005).

8. Trial courts "admitting evidence pursuant to CRE 702 [must] ... determine and make specific findings on the record, not only as to the reliability of the scientific principles upon which the expert testimony is based, ... but also the usefulness of such testimony to the jury, including specific findings with regard to the court's obligation pursuant to CRE 403 ...." *Ruibal v. People*, *supra*, ¶ 12, (citing *People v. Shreck*, *supra*). This requirement has been "unwavering." *Id.* at ¶ 13; *People v. Yachik*, 2020 COA 100, ¶ 53, 469 P.3d 582, 592.

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[2] In *Morphew I,* D-39 requested both notice and exclusion of the evidence. Mr. Morphew also requested that the Court hold a hearing pursuant to *People v. Schreck*, 22 P.3d 68, 70, 77-78 (Colo. 2001) and exclude the hearsay that would be elicited by introduction of this type of evidence. The request for notice was mooted by the court's ruling excluding the evidence. If this Court were to deny application of those doctrines, Mr. Morphew renews those requests.

9. Evidence of this nature would violate the evidentiary rules prohibiting hearsay apply and the Confrontation Clauses of the Sixth Amendment to the U.S. Constitution and Article II, section 16 of the Colorado Constitution.

10. In addition, at trial, such evidence must be excluded because its unfair prejudicial effect outweighs any legitimate probative value. CRE 403. Evidence with unfair prejudicial value would rise to the level of a constitutional violation if it renders the trial unfair or impairs Mr. Morphew's right to present a defense. U.S. Const., amends. VI, XIV; Colo. Const., art. II, §§ 3, 16, 25.

11. "Victimology", "behavioral analysis" and any such concept by any label is not a reliable scientific field suitable for testimony at trial. It has no place in the courtroom where use of that loaded term introduces unfair prejudice and tells the jury that the court (because it is allowing use of that term) must believe that Ms. Morphew was in fact a "victim," when that is for the jury to decide.

12. A witness's status as an expert can augment improper testimony with an aura of trustworthiness and reliability, thereby magnifying the harm caused by the error in admitting such testimony. *See People v. Baker*, 2021 CO 29, 41, 485 P.3d 1100, 1108; *see also People v. Koon*, 724 P.2d 1367, 1371 (Colo. App. 1986) (observing that a therapist's status as an expert witness "augmented her [improper] testimony with an aura of trustworthiness and reliability").

13. In *Ruibal v. People*, 2018 CO 93, 432 P.3d 590, the Supreme Court, under CRE 702, found that the district court erred in admitting expert testimony from a forensic pathologist who stated that killings that demonstrate excessive mutilation, or "overkill," are frequently committed by someone with a real or perceived emotional attachment to the victim.

14. Testimony on this topic is a form of "profiling" evidence, the admission of which would be reversible error. *Cf. Salcedo v. People*, 999 P.2d 833, 838 (Colo. 2000). 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 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.

15. Allowing the testimony would amount to calling a summary witness to interpret case facts and give opinions about what they mean. But 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.

16. 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").

17. Permitting the 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. *Cf. Golob v. People*, 180 P.3d 1006, 1010 (Colo. 2008)(finding that notwithstanding CRE 703, the expert's testimony was inadmissible hearsay).

18. Because such testimony is based on testimonial hearsay, it 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). See also *People v. Yachik*, *supra,* 59, 469 P.3d at 592 (reversing conviction). The testimony violates not only CRE 403, but also CRE 404(b) and CRE 404(a) and should be excluded.

19. Because there is no reported Colorado case admitting testimony on this topic and establishing its reliability, this Court must hold an evidentiary pretrial hearing and issue findings as required by *Shrek, Ruibal*, and progeny.

20. The People may argue that the discovery of Suzanne Morphew's remains in 2024 constitutes a change in circumstances that justifies departing from the *Morphew I* ruling. This argument should be rejected for several independent reasons.

21. First, while the *Morphew I* Court noted the no-body context in the course of its ruling, the legal bases for exclusion are entirely independent of whether a body has been found. Victimology evidence is inadmissible because it is inherently unreliable propensity evidence that fails under CRE 702, CRE 403, and CRE 404 — regardless of whether remains have been recovered. The discovery of a body does not make profiling or victimology methodology more reliable, more scientifically valid, or less prejudicial. *Salcedo v. People*, 999 P.2d 833 (Colo. 2000). See also *People v. Gamboa-Jimenez*, 2022 COA 10, 22, 508 P.3d 263, 270 (finding the court's admission of profiling evidence was reversible error; the detective "'intermingled expert testimony concerning the behavior and characteristics that constitute the drug courier profile with eyewitness testimony concerning [the defendant's] actions and appearance ...'") (quoting *Salcedo*, at 840). *Cf. also People v. Fortson*, 2018 COA 46M, ¶¶ 121-122, 421 P.3d 1236, 1252–53 (Berger, J., specially concurring).

22. Second, the central issue in this trial remains the identity of the perpetrator. That is precisely what profiling, behavioral analysis, and victimology purport to address — and precisely why they are inadmissible. The discovery of Suzanne Morphew's remains does not change the unreliable, speculative, and prejudicial nature of evidence that purports to use behavioral characteristics as substantive evidence of guilt.

23. Third, the People's concession in *Morphew I* was absolute and unconditional. Mr. Weiner did not say "we will not offer victimology testimony in a no-body case." He said: "we do not intend to proffer to this Court anyone who would testify to 'victimology.'" Tr. 2/24/22, p. 17:13-14. That concession was not contingent on the presence or absence of a body.

24. Fourth, the *Morphew I* Court expressly warned that "[b]ringing this testimony in under the guise of something different would be unfair." Tr. 97:16-17. Relabeling the same evidence as "behavioral analysis" is precisely the conduct the Morphew I Court warned against.

26. At the Grand Jury, the People subtly recast the evidence, calling it "behavioral analysis." GJ Transcript, 1/27/2025, p. 16:6-8. [redacted] testimony revealed that "behavioral analysis" is essentially profiling: "So the behavioral analysis unit sits at headquarters and has teams of profilers that look at different types of cases." *Ibid.*

27. [redacted] Grand Jury testimony that "behavioral analysis" is essentially profiling — because "the behavioral analysis unit sits at headquarters and has teams of profilers" — directly proves that the People are doing exactly what the *Morphew I* Court warned against: bringing the same excluded evidence in under a different label. In Morphew I, the court expressly warned: "I don't think the Prosecution is going to attempt to [bring this in under the guise of something different]. I don't. I'm just stating it so it's very clear." Tr. 98:18-20. Now, in *Morphew II*, the People have done precisely that. Pattern of life evidence, as used by the prosecution, is victimology by another name — the *Morphew I* Court recognized that Mr. Weiner was essentially arguing for victimology under a different label.

28. For the reasons stated above, and stated in Mr. Morphew's motion to exclude any evidence of profiling, this Court should rule the evidence inadmissible regardless of how the People characterize it or what label they put on it.

29. The "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Allowing this type of testimony 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.

30. Mr. Morphew 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. Rules 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. Morphew 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. Morphew requests that this Court apply the law of the case doctrine to bind the People to their *Morphew I* concession. This Court should hold that the changed circumstance of the body being found does not alter the legal basis for exclusion. This Court should exclude from the trial for any purpose exclude use of the term "victimology," "behavioral analysis", "pattern of life," and/or "profiling," exclude so-called expert testimony or lay testimony about "victimology" (under any synonym or label), and exclude the hearsay that would be elicited by introduction of this type of evidence. If this Court disagrees, Mr. Morphew requests notice and requests that this Court hold a hearing pursuant to *People v. Shreck*, 22 P.3d 68, 70, 77-78 (Colo. 2001).

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
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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