

<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 11:40 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-038] MOTION TO EXCLUDE OPINION TESTIMONY ON THE SIGNIFICANCE OF EVIDENCE, THE PROSECUTION'S THEORY OF THE CASE, AND MR. MORPHEW'S MENTAL STATE OR CREDIBILITY</b></p>	

Mr. Barry Morphew, by and through undersigned counsel, hereby requests that this Court exclude any witness testimony that (1) instructs jurors on the significance of particular evidence; (2) endorses the prosecution's theory of the case; (3) speculates about Mr. Morphew's subjective mental state, emotions, or credibility, or (4) speculates about what Mr. or Ms. Morphew would or would not have done under hypothetical circumstances.

In support, Mr. Morphew states:

1. Before the Grand Jury, the prosecution admitted a substantial amount of law enforcement testimony commenting on why this or that fact should be regarded as “important” or “significant.” Much of it amounted to merely setting forth the prosecution’s theory of the case about why certain facts or evidence or allegations point towards guilt.

2. While Mr. Morpew does not presume that the prosecution would attempt to introduce such testimony at trial, in an abundance of caution, Mr. Morpew files this motion to exclude it.

3. Unlike at the Grand Jury, at trial, the rules of evidence apply and there are other limitations on the prosecution's comments and presentation of evidence arising from Mr. Morpew rights under the U.S. Constitution and the Colorado Constitution.

4. The prosecution is entitled to introduce evidence that advances its theory of the case. What it may not do is call witnesses to *endorse* that evidence — to tell the jury how significant it is, how believable it is, or what conclusions the jury should draw from it. That function belongs exclusively to the jury, and testimony that usurps it is inadmissible regardless of whether it comes through a lay or expert witness. Law enforcement witness testifying that a fact is "significant" or that evidence "points toward guilt" is not merely giving an opinion — it is directing a verdict. When a witness tells the jury which evidence is "significant" or "important," or speculates about what a defendant was feeling, that witness is doing the jury's job and unconstitutionally usurps the jury's role in violation of a defendant's right to a fair and impartial jury and to due process. It displaces the jury's role as the sole judge of the weight and significance of evidence, in violation of both Colorado law and the constitutional right to trial by jury.

5. Such testimony is inadmissible under CRE 701. Under Colorado Rule of Evidence ("CRE") 701, lay testimony is proper only if "(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).

6. Testimony by a Sheriff's deputy (or any other witness) that a fact is or is not believable, or "significant" is an opinion. It is not a fact. It is not relevant. One witness's view about whether a piece of evidence is significant or points to guilt is not a "fact," and it is not relevant.

7. It is black-letter law that "a witness cannot testify that he [or she] believes that the defendant committed the crime at issue." *People v. Penn*, 2016 CO 32, 31, 379 P.3d 298, 305. This is a long-standing rule. *See McKee v. People*, 69 Colo. 580, 195 P. 649, 650 (1921) (doctor's opinion as to defendant's guilt was not "competent evidence" and was therefore improper for the jury to consider); It is improper to ask a witness to comment on the veracity of another witness. *Liggett v. People*, 135 P.3d 725, 731 (Colo.2006); *People v. Eppens*, 979 P.2d 14, 17 (Colo.1999).

Credibility determinations are for the finders of fact, and “asking a witness to opine on the veracity of another witness is prejudicial, argumentative, and ultimately invades the province of the fact-finder.” *Liggett*, 135 P.3d at 732; *People v. Penn*, 2016 CO 32, 36, 379 P.3d 298, 306.

8. Commentary on the evidence cannot be made admissible by labeling it expert opinion. Such evidence fails every prong of the tests established for admission of expert testimony under CRE 702 and *Shreck*. The prosecutor cannot call an expert witness to tell the jury why the prosecutor’s evidence shows a defendant is guilty. A witness cannot give opinions on guilt – lay or expert -- based on inferences from the evidence and credibility determinations.

9. “[B]oth federal courts and Colorado state appellate courts have uniformly concluded that proffered expert testimony was inadmissible when the expert either opined on whether the prosecution's factual allegations were true, gave opinion testimony that another witness was telling the truth on a specific occasion, or applied the law to the facts in such a way as to suggest that the expert had determined that the defendant was guilty.” *People v. Baker*, 2021 CO 29, 33, 485 P.3d 1100, 1107 (collecting cases).

10. Under CRE 702, “ [t]he critical question trial courts must answer’ to discern helpfulness to the jury is: ‘ ‘On *this subject* can a jury from *this person* receive appreciable help?’ ’ *People v. Cooper*, 2021 CO 69, 48, 496 P.3d 430, 440, quoting *People v. Fasy*, 829 P.2d 1314, 1316 (Colo. 1992) and *People v. Williams*, 790 P.2d 796, 798 (Colo. 1990)). The test calls for:

‘a common sense inquiry: whether an untrained lay person would be qualified to determine a particular issue ‘intelligently and to the best possible degree without enlightenment from those having a specialized understanding of the subject involved in the dispute.’ ’

*Cooper*, 48, quoting *Lanari v. People*, 827 P.2d 495, 502 (Colo. 1992) (quoting Fed. R. Evid. 702 Advisory Committee's Note).

11. Much of the type of testimony was expressly ruled to be inadmissible in *Howard-Walker v. People*, 2019 CO 69, ¶¶ 31-35, 443 P.3d 1007, 1013 (*Howard-Walker II*).<sup>1</sup> There, both the Supreme Court and the Court of Appeals found that the trial court erred in admitting evidence such as:

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<sup>1</sup> A more detailed discussion of the trial court’s errors appears in the Court of Appeals’ opinion, *People v. Howard-Walker*, 2017 COA 81M, 446 P.3d 843 (*Howard-Walker I*). The Supreme Court affirmed the Court of Appeals’ finding that admission of the evidence was error.

- A Detective’s testimony about that, when the defendant’s girlfriend “grew emotional” and cried when was shown the still photos showing her boyfriend committing the crime, it was because “[s]he recognized her boyfriend in the photos.” It was error to speculate about why she was crying. *Howard-Walker II*, ¶34. *Howard-Walker I*, 73.
- The prosecutor played the videotape of the event and had the officer opine that the handgun the man was holding was a real gun. This was error. *Howard-Walker I*, 47; *Howard-Walker II*, ¶31.
- It was error to permit the detective to speculate about what the man in the video might have done with the gun. “An opinion not based on personal knowledge is speculative and therefore inadmissible.” *Howard-Walker I*, 61; *Howard-Walker II*, ¶32.
- The trial court erred when it permitted the prosecutor asked Detective Garcia whether he felt that Howard-Walker was “forthcoming” or “truthful” during the police interview, because it is improper to ask one witness to opine on the truthfulness of another.” *Howard-Walker I*, ¶¶ 79-80; *Howard-Walker II*, ¶32.

These errors, which are only half of those found by both the Court of Appeals and Supreme Court, mirror those that would result from admission of the prosecution’s speculative, improper evidence.

12. CRE 403 provides an independent and powerful basis for exclusion. This type of testimony misleads the jury by suggesting the Court has endorsed the prosecution's theory of the case through its own witness. and should be argued explicitly.

13. 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. 16, RPC 3.8, CREs 401, 402, 403, 404, 608, 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. Morpew requests this Court prohibit the prosecution from introducing testimony that (1) instructs jurors on the significance of particular evidence; (2) endorses the prosecution's theory of the case; (3) speculates about Mr. Morpew's subjective mental state, emotions, or credibility, or (4) speculating about what Mr. or Ms. Morpew would or would not have done under hypothetical circumstances.

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