

<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 11:24 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-036] MOTION TO EXCLUDE PROFILING EVIDENCE AND REQUEST FOR HEARING</p>	

Mr. Barry Morpew, by and through undersigned counsel, hereby requests that this Court exclude for any purpose at trial profiling evidence (by that or any other name), and exclude the hearsay that would be elicited by introduction of this type of evidence.

AS GROUNDS, Mr. Morpew states:

1. The law of the case doctrine should bind the People to their prior concession and the Court's ruling in Fremont County District Court No. 22CR47 (“*Morpew I*”). On February 24, 2022, the district court entered an unopposed order excluding the category of evidence at issue in this motion, ruling in pertinent part:

The defense is asking for notice be given if the People intend to elicit any profiling testimony, expert profiling testimony.

Mr. Weiner has made clear to this Court they have no intention on doing that and in fact agrees with all the examples listed on page three, paragraph seven of the defense's motion and has stated we are not going to offer profiling testimony for that purpose and we agree with the defense. He even went on to say that would be inappropriate character evidence.

And I agree in this context were the Court to permit an expert to testify about profiling testimony and if it were used to show that that person acted in conformity with certain traits or characteristics and that therefore he likely committed this crime that would be impermissible character evidence. The People have stated they have no intention on using that testimony.

The Court is granting the defense's motion, D38 and D38A. The People shall not present any profiling testimony during trial through either a lay witness or an expert witness. It's excluded.

Tr. 2/24/22, p. 96:2-22 (emphasis added). See also *id.*, 98:3-6 (“What I am going to find though is that 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.”). The Court cautioned that the People shall not attempt to introduce it under some other guise: “Bringing this testimony in under the guise of something different would be unfair.” *Id.*, p. 98:9-22.

2. “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.

3. This Court should 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.

4. No relevant circumstances have changed since the prior ruling excluding any profiling 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-38 and D-38a).¹

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

6. Profile evidence is a description or listing of “characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity.” *United States v. McDonald*, 933 F.2d 1519, 1521 (10th Cir. 1991). The most frequently cited example is the drug courier profile, which the United States Supreme Court has defined as “a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics.” *Reid v. Georgia*, 448 U.S. 438, 440 (1980).

7. Profiling evidence is presumptively inadmissible. *Salcedo v. People*, 999 P.2d 833 (Colo. 2000)(reversing drug distribution conviction and holding inadmissible drug courier profile evidence); *Ruibal v. People*, 2018 CO 93, 432 P.3d 590.

8. Profile evidence is inherently prejudicial because of its potential for including innocent citizens as profiled criminals. “[P]rofile evidence is inherently prejudicial because it requires the jury to accept an erroneous starting point in its consideration of the evidence,” as demonstrated by the syllogism underlying profile evidence: “criminals act in a certain way; the defendant acted that way; therefore, the defendant is a criminal. Guilt flows ineluctably from the major premise through the minor one to the conclusion. The problem is the major premise is faulty. It implies that criminals, and only criminals, act in a given way.” *People v. Robbie*, 92 Cal. App. 4th 1075, 1085, 112 Cal. Rptr. 2d 479, 485 (2001) (reversing conviction). It is inadmissible because “[e]very defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officials in investigating criminal activity.” *Id.*, at 1084, 112 Cal. Rptr. at 485 (internal quotation omitted).

9. In *Salcedo v. People*, the Colorado Supreme Court excluded, under CRE 702 and CRE 403, expert testimony of a detective describing the profile of a drug courier and concluding that the defendant was a drug courier. The court concluded that this testimony was inadmissible because of the “lack of evidence indicating that [the detective] utilized an objective, widely

¹ D-38 requested an order requiring the prosecution to give notice. D-38a requested exclusion of the evidence. Because D-38 was the more lengthy motion, it largely duplicates D-38, and it encompasses the law set forth in D-38a, D-38 is set forth here. 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.

recognized profile” and the “lack of evidence ... indicating that conformity to [the detective's] drug courier profile is a reliable indicator of guilt.” *Salcedo*, at 839.

10. In *Ruibal v. People*, 2018 CO 93, 432 P.3d 590, the Colorado Supreme Court ruled that the trial court erred in admitting testimony that cases with a certain type of injury were likely committed by someone with an emotional connection to the victim. Such testimony was inadmissible, although given the overwhelming evidence of guilt there, it did not warrant reversal in that case.

11. To admit expert testimony, the prosecutor would have to show a logical connection to the factual issues in this case, demonstrate that any such evidence would actually be helpful to the jury, that all of the requirements of CRE 702 and *People v. Shreck*, 22 P.3d 68 (Colo.2001) would be met, and that any such evidence would not be outweighed by the risk of unfair prejudice, confusion of the jury, and/or a decision made on an improper basis. CRE 403.

12. “While criminal profiling may have a legitimate function in law enforcement investigations, such information constitutes propensity evidence and, therefore, has no place in a trial to determine the guilt of a specific individual.” *State v. Huckabee*, 419 S.C. 414, 425, 798 S.E.2d 584, 589 (Ct. App. 2017).

13. Profiling evidence should not be admitted absent prior notice and opportunity for the defense to interpose objections and for this Court to conduct its gatekeeping functions required under CRE 702 and CRE 403.

14. In *People v. Cooper*, 2021 CO 69, 496 P.3d 430, the Colorado Supreme Court reiterated that generalized expert testimony is not automatically admissible. It must fit the facts of the case and clear the hurdles of CRE 702, *Shreck*, and CRE 403. *Cooper*, 98. It is apparent that, prior to any such information reaching the jury, this Court will have much work to do. Notice is a prerequisite to the court’s decisions about admissibility. the first step. This Court and Mr. Morphew both need notice if the prosecutor is going to attempt to travel down the profiling path.

15. A significant problem is that prosecutors sometimes try to admit profiling testimony through a lay witness who ends up rendering expert opinions that are not admissible through a lay witness. As the Supreme Court explained in *Salcedo v. People, supra*:

In this case, [the drug courier profile expert] testified as both a factual witness and an expert witness. During his direct examination, [the expert] intermingled expert testimony concerning the behavior and characteristics that constitute the drug courier profile with eyewitness testimony concerning Salcedo's actions and appearance. Consequently, [the expert's] testimony posed a risk of misleading the jury to believe that Salcedo exhibited all of the behaviors and characteristics in

[the expert's] profile or that all of Salcedo's behaviors and characteristics could be found in [the expert's] profile. [The expert's] testimony also posed an undue risk of misleading the jury because the jury reasonably could have believed it was reliable and logically relevant to Salcedo's guilt.

Salcedo v. People, at 840. “Those jurisdictions that have considered profiles of battering parents, pedophiles, rapists, and drug couriers unanimously agree that the prosecution may not offer such evidence in its case-in-chief as substantive evidence of guilt.” *United States v. Wells*, 879 F.3d 900, 922 (9th Cir. 2018)(collecting cases)(internal quotation marks omitted). 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); *People v. Fortson*, 2018 COA 46M, ¶¶ 121-122, 421 P.3d 1236, 1252–53 (Berger, J., specially concurring).

16. Without prior notice of proposed profiling testimony and an opportunity to identify the proposed method of proof, this Court could risk a mistrial or reversal on appeal. See e.g., *Venalonzo v. People*, 2017 CO 9, 388 P.3d (reversing SAOC conviction because a forensic interviewer gave expert opinions in the guise of lay testimony); *Romero v. People*, 2017 CO 37, 393 P.3d 973 (reversing SAOC conviction because a police officer was erroneously allowed to testify to expert opinions not admissible through a lay witness); *People v. Garrison*, 2017 COA 107, 411 P.3d 270 (District court abused its discretion by allowing police officers, testifying as lay witnesses, to testify about tracing a computer's unique identifying IP address); *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207 (10th Cir. 2011) (reversing damages verdict because a lay witness's valuation testimony was based on technical or specialized knowledge and should not have been admitted under the evidentiary rule addressing lay testimony); *People v. Kirtz*, No. 16CA1184 (Colo. App. Dec. 26, 2019) (unpublished) (vacating robbery and theft convictions because of a detective’s testimony about “the common practices of robbers”); *People v. Muhlenbruck*, No. 18CA1456 (Feb. 11, 2021)(unpublished) (reversing convictions for DUI & bail bonds violations because the DA’s investigator was allowed to give expert opinions at trial).

17. Profiling and/or characteristics evidence is essentially character evidence under CRE 404 and, pursuant to that rule, it must be noticed to the defense so that the defense may intelligently investigate the law and facts and prepare appropriate motions and/or jury instructions.

18. 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. 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 exclude for any purpose at trial profiling evidence or testimony, i.e., that which concerns the characteristics or features of any class of criminals, and exclude the hearsay that would be elicited by introduction of this type of evidence. If this Court disagrees, Mr. Morphew requests notice of any such evidence and requests that this Court hold a hearing pursuant to *People v. Schreck*, 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
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