

DISTRICT COURT, ALAMOSA COUNTY, COLORADO, 8955 Independence Way Alamosa, CO 81101 <hr/> THE PEOPLE OF THE STATE OF COLORADO Plaintiff, v. BARRY MORPHEW, Defendant	<p style="text-align: right;">DATE FILED May 29, 2026 2:49 PM</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
JANE FISHER-BYRIALSEN, #49133 FISHER & BYRIALSEN, PLLC 4600 S. Syracuse Street, 9 th 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
[D-044] MOTION TO PROHIBIT ANY REFERENCE TO MR. MORPHEW'S POST-ARREST SILENCE AND INVOCATION OF HIS CONSTITUTIONAL RIGHTS	

Through counsel, Mr. Morphey moves this Court moves to prohibit any observations, evidence, and statements made in and around the issue of Mr. Morphey's post-arrest silence or his invocation of his constitutional rights, including but not limited to his right to remain silent, request for an attorney, or assertion of any other constitutional or statutory right. In support, Mr. Morphey states the following:

FACTUAL BACKGROUND

Mr. Morphey was arrested twice in this matter: once on May 5, 2021 in Salida, and again on June 20, 2025, in Gilbert, Arizona. On both occasions he asserted his right to counsel, right to

remain silent, and other constitutional rights. Throughout the history of this case, he has exercised his constitutional rights and privileges.

LEGAL AUTHORITY

1. A person has the privilege to remain silent and not to speak to law enforcement. U.S. CONST. AMENDS. V, VI, XIV; COLO. CONST. ART. II, § 16, 25; *Miranda v. Arizona*, 384 U.S. 436 (1966).
2. It is impermissible to penalize an individual for exercising his Fifth Amendment privileges or his privileges and rights under the Colorado Constitution. *Doyle v. Ohio*, 426 U.S. 610 (1976). The prosecution can neither present evidence of, nor comment on, a defendant's post-*Miranda* silence. See *Griffin v. California*, 380 U.S. 609, 613–15 (1965); *People v. Ortega*, 198 Colo. 179, 182–84, 597 P.2d 1034, 1036 (1979). Any reference to a Mr. Morpew's post-arrest silence would not only abridge his constitutional privilege against self-incrimination, it would also violate the constitutional right to a fair trial implicit in the guarantee of due process. U.S. Const., Amends. V and XIV; Colo. Const., Art. II, sections 18 and 25. See *Doyle v. Ohio*, *supra* (“The prosecution violates due process when it ‘seek[s] to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving’ warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).”).
3. Courts have repeatedly reversed convictions when a prosecutor comments on a person's decision not to speak with police or invocation of the right to counsel as an inference of guilt. *Doyle v. Ohio*, *supra*; *United States v. Ward*, 135 F.4th 1265 (10th Cir. 2025 (reversing conviction)); *United States v. Kee*, 129 F.4th 1249 (10th Cir. 2025) (reversing conviction); *People v. Hardiway*, 874 P.2d 425 (Colo.App.1993) (reversing conviction); *People v. Mingo*, 181 Colo. 390, 509 P.2d 800 (Colo. 1973) (reversing conviction); *People v. Wright*, 182 Colo. 87, 511 P.2d 460 (1973) (reversing conviction). See also *People v. Gentry*, 22CA1354, 2024 WL 3812047 (Colo. App. July 11, 2024) (not selected for publication) (reversing conviction); *People v. Higdon*, No. 23CA0799, ¶ 15, 2026 WL 1181400, at *2 (Colo. App. Apr. 30, 2026) (not selected for publication) (reversing conviction) (“We conclude that the district court reversibly erred by allowing the prosecutor to cross-examine Higdon about, and comment during closing argument on, his post-*Miranda* silence.”); *People v. Martinez*, No. 23CA0994, 2025 WL 2859782 (Colo. App. Oct. 9, 2025) (not selected for publication), *cert. denied*, No. 25SC692 (Colo. Mar. 2, 2026) (reversing conviction); *People v. Woodruff*, No. 20CA0275, 2023 WL 12047797 (Colo. App. Nov. 30, 2023) not selected for publication) (reversing conviction).

4. Exercise of statutory and/or constitutional rights by Mr. Morpew are irrelevant for any purpose and introduction of such evidence would violate CRE 401, CRE 402, and CRE 403.
5. Only relevant evidence is admissible. CRE 402. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” CRE 401. Even if relevant, evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.” CRE 403.
6. In *United States v. Hale*, 422 U.S. 171, 176 (1975), the Court recognized that “[i]n most circumstances, silence is so ambiguous that it is of little probative force.” An arrested person “is under no duty to speak and, as in this case, has ordinarily been advised by government authorities only moments earlier that he has a right to remain silent, and that anything he does say can and will be used against him in court.” *Id.* Numerous innocuous reasons could account for a defendant's silence: he may be intimidated, confused, or emotional, he may not have heard or understood the question, or he may be afraid or unwilling to incriminate another. *Id.* at 177. Thus, where a defendant has been advised of his right to remain silent, his failure to offer an explanation to officers can just as easily indicate his reliance on this right as it does support an inference that he later fabricated his exculpatory testimony. *Id.* “There is simply nothing to indicate which interpretation is more probably correct.” *Id.* And “[n]ot only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice.” *Id.* at 180. *See Doyle*, 426 U.S. at 617 (“Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.”).
7. Adopting *Hale*'s reasoning, the Colorado Supreme Court has determined that evidence of a defendant's pre-arrest, pre-advisement silence was erroneously admitted under CRE 403. *People v. Welsh*, 80 P.3d 296, 305-08 (Colo. 2003). Again, relying upon *Hale*, the Colorado Supreme Court likewise held that a defendant's post-arrest, pre-advisement silence should have been excluded “[d]ue to the many possible explanations for the defendant's post arrest silence[.]” *People v. Quintana*, 665 P.2d 605, 611 (Colo. 1983). *Quintana* identified a myriad of other reasons why an arrestee may remain silent: his awareness that he has no obligation to speak, his belief that any efforts to exonerate himself may be futile, or his mistrust or fear of officers. *Id.* “[H]is prior silence also may be attributable to a variety of innocent circumstances that are completely unrelated to the

truth or falsity of his testimony.” *Id.* (quoting *People v. Conyers*, 420 N.E.2d 933, 935 (N.Y. 1981)).

8. Thus, even if Mr. Morpew’s post-arrest silence were to have any relevance, this court should nonetheless exclude this evidence on CRE 403 grounds. “The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent[.]” *Hale*, 422 U.S. at 180.
9. This motion in *limine* is required to prevent mention of the information (and information derived from it) in remarks or questions to prospective jurors or in the prosecution’s Opening Statement. The damage will be done long before the prosecution even calls the witness to the stand.
10. This motion in *limine* is also required to prevent the prejudice that would ensue from the prosecution presenting a witness, starting to question that witness about this material, and then forcing the defense to object in front of the jury. The jury would certainly view this as if the defense were trying to hide something. Because the prosecution may not introduce this material, the prosecution should not be allowed to call a witness to the stand who relied upon such information. The prosecution should be required to approach the bench beforehand so that any dispute is resolved outside the presence of the jury.
11. Whenever Mr. Morpew objects to evidence, testimony, and information, regardless of whether the objection is made in a pretrial motion or at trial, he is also objecting to arguments, remarks, prosecutor’s questions, and all other comments on that topic. He requests this Court prohibit the prosecution from making any statements, arguments, remarks, or any other comment on that topic or including it in any questions to any witness. Mr. Morpew makes a continuing objection.
12. Mr. Morpew 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, and RPC 3.8. Mr. Morpew cross-references and incorporates by reference all pleadings filed or to be filed in this case, and case law cited therein and at oral argument.

WHEREFORE, Mr. Morpew moves this Court to find that any reference to Mr. Morpew's invocation and/or exercise of his statutory or constitutional rights is inadmissible at trial for any purpose and to prohibit any comments, questions, or references concerning his invocation and exercise of his statutory or constitutional rights.

Respectfully submitted this 29th day of May, 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 May 29, 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