

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 June 22, 2026 4:21 PM ▲ COURT USE ONLY ▲
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-037] REPLY - MOTION TO EXCLUDE SO-CALLED ‘VICTIMOLOGY’ TESTIMONY	

Mr. Barry Morphey replies to the prosecution’s response to Motion D-037, his request that 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.

The prosecution appears to concede that, if it wants to introduce opinions based on “victimology” or “behavioral analysis,” it must give proper notice under CRE 702 and *People v. Shreck*, 22 P.3d 68 (Colo. 2001) because this subject matter may not be admitted through a lay witness. Thus, at the minimum, this Court should so order.

However, this Court should go further. For the reasons stated in Motion D-037 and its attachments, including the authority and arguments in *Morphew I*,¹ this Court should bar the prosecution from introducing this evidence at trial.

Victimology/Behavioral Analysis evidence is presumptively inadmissible and should be ruled inadmissible here.

This court should reject the prosecution's assertion that it doesn't know what Mr. Morphew seeks to exclude. Mr. Morphew referenced the prior litigation in *Morphew I* where the government introduced such evidence at the preliminary hearing – through the same government witness who testified at the Grand Jury in *Morphew II* about the same thing (sometimes using a slightly different label). See Grand Jury Transcript, 1/27/2025, p. 16:6-8, quoted in Motion D-037, p. 7, ¶¶ 26-27. In *Morphew I*, the government announced its intention to introduce an expert in behavioral analysis. In opposition, the defense referenced and attached numerous articles. There is no mystery.

As the government's own Grand Jury witness testified, behavioral analysts are profilers: "So the behavioral analysis unit sits at headquarters and has *teams of profilers* that look at different types of cases." Grand Jury Transcript, 1/27/2025, p. 16:6-8.

At the preliminary hearing in *Morphew I*, the People introduced what it called "victimology." See Motion D-037, Attachment A (*Morphew I* motion D-39, pp. 2-3). As the *Morphew I* motion points out, the attorney representing the People used the term almost a dozen times. In its later-filed expert witness notices in *Morphew I* and in the Grand Jury in *Morphew II*, the terminology shifted to "behavioral analysis." The prosecution knows what it is and simply employs a shell game with the labels.

The prosecution cites two unpublished court of appeals cases – both pre-date *Morphew I* and neither applies to this case. Writing for the three-judge division in *People v. Garza*, No. 18CA0872, 2021 WL 12341164, at *7 (Colo. App. May 6, 2021) (not published), Judge Yun referred to the child sex trauma testimony as "victimology," but that is not how the evidence came in at trial. At trial, the licensed clinical psychologist was called as an expert in "clinical psychology, including child sexual assault trauma, outcries, dynamics and effects." *Id.*, at ¶ 37. This case concerns the unique field of child sex assault trauma and bears no relationship to the way the People have been using "victimology" and "behavioral analysis" in this case.

The prosecution cites *People v. Hampton*, 746 P.2d 947 (Colo. 1987) but fails to acknowledge that *Hampton* was partially abrogated by *Shreck*. Decided almost a quarter of a century ago by a divided court, *Hampton* held that expert testimony concerning "rape trauma

¹ *People v. Barry Morphew*, Fremont County District Court No. 22CR47 ("*Morphew I*").

syndrome” was admissible to explain delay in reporting a sex assault. In that case (unlike here), none of the expert’s testimony concerned the particular alleged victim. Important to the court was the fact that the expert testimony “was not used to establish that a crime had been committed.” *id.*, at 952. Again, this case doesn’t make the government’s evidence admissible here.

In *People v. Velasquez-Trinidad*, No. 15CA0428, ¶ 36, 2018 WL 11713914 (Colo. App. May 17, 2018), even though it appears the trial court used that word in a ruling, no expert was called at trial on that subject and thus – even if the division’s unpublished opinion was precedent (it is not)² – this opinion would be irrelevant.

The out of jurisdiction cases are inapplicable. Most were decided under standards not used in Colorado. *Simmons v. State*, 797 So. 2d 1134, 1156 (Ala. Crim. App. 1999) (expert testified on a sentencing issue in a capital case, i.e., whether the offender “received sexual gratification” during the murder). The testimony referenced in *State v. Spaulding*, 2018-Ohio-3663, 119 N.E.3d 859,³ certainly would not be admissible in Colorado; because the testimony wasn’t challenged on appeal, the *Spaulding* Court, deciding a postconviction petition filed in a death penalty case, declined to issue any rulings on the issue. *See id.*, ¶ 107 (“this argument could have been raised on direct appeal and is now barred by the doctrine of res judicata”). The testimony in the 22-year-old unpublished California case *People v. Mouser*, No. F035773, 2004 WL 114687, at **16-17 (Cal. Ct. App. Jan. 26, 2004) (unpublished)⁴ would certainly be inadmissible in Colorado; there, both the defense and the prosecution called “experts” giving opinions on “profiling of victims and unknown offenders” (prosecution) and “criminal profiling” (defense).

Some of the cases the prosecution cited say nothing about the subject. In *State v. Graceffo*, No. 55553, 1989 WL 85144, at *1 (Ohio Ct. App. July 27, 1989) (unpublished),⁵ a clinical psychologist treating a child sex assault victim testified. The opinion notes in passing that the psychologist had experience teaching in the field of child sex abuse trauma, but there were no issues raised about this on appeal and it appears there were no objections at trial; it does not even appear that the subject was testified to at trial. In *State v. Freney*, 228 Conn. 582, 590, 637 A.2d 1088, 1092 (1994), expert medical professionals associated with an emergency room “victimology program” testified about what we in Colorado would call “rape trauma syndrome,” i.e., testimony to explain a sex assault victim’s fragmentary statements about the assault. *E.g. id.*, at 592, 637 A.2d at 1093 (“The sole purpose of the experts’ testimony was to establish that the

² See *Patterson v. James*, 2018 COA 173, ¶ 40, 454 P.3d 345, 353 (unpublished cases may be cited, but they have no precedential value).

³ The prosecution provides an incorrect citation for this case, “119 N.E. 859”.

⁴ The prosecution fails to reveal this is an unpublished case.

⁵ The prosecution fails to reveal this is an unpublished case.

victim's behavior was generally consistent with that of a victim of sexual or physical abuse.”). In *United States v. Jackson*, No. 3:19-CR-00458-MO-1, 2025 WL 2754031 (D. Or. Sept. 29, 2025) (unpublished),⁶ the defendant was charged with being the mastermind of a sex-trafficking organization. In another ruling that is unremarkable, the expert was allowed to testify about the characteristics and functioning of sex-trafficking organizations, because that was beyond the ken of most laypeople. Trial counsel did not object, *id.*, at *2, and at trial, the expert gave testimony the Ninth Circuit has found admissible in sex-trafficking cases – namely, “expert evidence about the sex-trafficking subculture.” *Id.*, at *4. In this federal habeas action, this district court found that counsel didn’t render ineffective assistance by not objecting to particulars of the testimony.

In *Duvarado v. Giurbino*, 649 F. Supp. 2d 980, 996 (N.D. Cal. 2009), *aff’d*, 410 F. App’x 69 (9th Cir. 2011), another federal habeas case, the federal court expressly “recognize[d] the controversial nature of crime analysis as courtroom evidence” and noted it “has met with mixed results in court[.]” There, “however, the offender profiling evidence was excluded so this court need not decide whether its admission would violate due process.” *Id.*, at 997. As for the remainder of the testimony, under the standards that apply to habeas under the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), 28 U.S.C. § 2254(d)(1),⁷ the court declined to vacate the conviction based upon the detective’s testimony about what our courts have called inadmissible “overkill” testimony. See *Ruibal v. People*, 2018 CO 93, 432 P.3d 590. In Colorado, an expert cannot be called for these purposes.

United States v. Alzanki, 54 F.3d 994, 1005 (1st Cir. 1995)⁸ was a highly unusual case involving a Kuwaiti couple that forced a Sri Lankan domestic worker into involuntary servitude. The testimony concerned “the exceedingly uncommon phenomenon of domestic servant abuse in the present-day United States.” *Id.*, at 1006. The testimony was targeted towards the actus reus, to counter the defense argument that the door was often unlocked, implying the alleged trapped victim could have left/escaped, so she must not have been held against her will and subjected to involuntary servitude.⁹ There was no objection at trial. Applying plain error review, the court refused to reverse the conviction based on the trial court’s ruling that allowed the government to admit evidence about “repressive Kuwaiti customs and practices towards domestic workers.” *Id.*, at 1007. Apparently, Kuwaiti police “were under orders to shoot undocumented domestic

⁶ The prosecution fails to reveal this is an unpublished case.

⁷ Before a federal court can vacate a state court conviction, the state court’s decision must be not merely wrong – it must constitute an unreasonable application of law or be contrary to clearly-established U.S. Supreme Court precedent. See 28 U.S.C. § 2254(d)(1). Thus, a federal district court that declined to grant a § 2254 habeas petition provides no guidance for this Court.

⁸ The prosecution incorrectly cites *Alzanki* as a Fifth Circuit case. It is a First Circuit case.

⁹ The court did not find any federal cases that barred a witness from providing “empirical findings on the behavioral reactions of abuse victims.” *Ibid.* But in Colorado, such statistics would almost certainly be held inadmissible and reversible error. Cf. *People v. Marx*, 2019 COA 138, ¶19 (finding testimony about percentage of teenagers who fabricate sexual assault allegations was improper bolstering).

workers who ventured out alone.” *Id.*, at 1007-1008. This case has nothing to do with Mr. Morphew’s case.

It doesn’t matter whether the government labels it “profiling,” “pattern of life,” “victimology,” “behavioral analysis,” or some other name, the shifting label is merely a shell game, an attempt to avoid the undeniable rule that this evidence is not admissible. It violates all the constitutional provisions and rules of evidence identified in Motion D-037 and the *Morphew I* motion D-39. It is unreliable, unhelpful, and unfairly prejudicial.

This Court does not write on a clean slate because Morphew II is a continuation of Morphew I

The prosecution urges this Court to regard the instant case (*Morphew II*) as if it were not a continuation of the *Morphew I* prosecution. Its approach would cause a violation of Article II, sections 3, 16 and 25 of the Colorado Constitution, and Amendments VI and XIV of the United States Constitution.

Of course a district court may reconsider its rulings if there are changed circumstances or a change in the law. That is not the question. The question is a matter of the burdens that should apply in this proceeding: If Mr. Morphew is correct – and the prior rulings are law of the case and the government is bound by the waivers previously entered by a different attorney representing the People of the State of Colorado – then the burden is on the government to come forward with a request for reconsideration of the *Morphew I* Court’s orders. If the government is correct, this Court writes on a clean slate and the burden is back with Mr. Morphew – even though both parties (Mr. Morphew and the People of the State of Colorado) already litigated this issue and the government’s current position did not prevail.

If the burden is on the government because fairness dictates this Court follow law-of-the-case principles, then the government must identify the evidence it seeks to admit and convince this Court that the prior rulings are “error or [are] no longer sound due to changed conditions.” *People v. Roybal*, 672 P.2d 1003, 1005 n. 5 (Colo. 1983) (cited in People’s Response, unnumbered p. 3). So far, the government has done neither.

On the question of whether victimology/profiling/behavioral evidence is inadmissible in the state of Colorado, nothing has changed between *Morphew I* and *Morphew II*. It was inadmissible then and it is inadmissible now. Intervening cases support Mr. Morphew’s position. E.g., *People In Int. of A.F.*, 2025 COA 76, ¶ 8, 579 P.3d 99, 104 (reversing order adjudicating child as abused or neglected because the court allowed testimony of caseworkers about, among other things, the child’s “unusual behavior” during her removal without making findings required by *People v. Shreck*, 22 P.3d 68 (Colo. 2001), and CRE 702).

In this case, a party – the People of the State of Colorado – engineered a change of venue by dismissing the case and re-filing it in a different jurisdiction. That move doesn’t make it a separate case.¹⁰ The parties are the same: Barry Morphew and the People.

Almost none of the cases the People cite are about the context here, where a district court – presiding over the *same parties*, in a case alleging the *exact same offense* and the *same victim* – is asked to honor the prior district court’s rulings on identical legal issues.

In *People v. Dunlap*, 975 P.2d 723, 758 (Colo. 1999) concerned a death penalty case voir dire. The parties agreed on the motion for individual in camera voir dire on the penalty-related issues. But then in open court, a venire member – followed by several others – blurted out death penalty views. At that point, the judge conducted questioning of the entire panel present. That made sense because they had all just heard the blurted-out public comments. Eventually, Dunlap moved for a mistrial. On appeal, he argued the law of the case prevented the court from conducting the open voir dire. He lost because the circumstances changed when the juror spoke in front of the entire panel about death penalty views, Dunlap failed to object initially or remind the court the questioning should be in camera, and the court had the discretion to respond in real time to the situation. This case has nothing to do with the instant one.

People ex rel. Gallagher, In & For Eighteenth Jud. Dist. v. Dist. Ct. In & For Arapahoe Cnty., 666 P.2d 550, 553 (Colo. 1983)¹¹ didn’t involve the same parties (as here). The prosecuting party – the People of the State of Colorado – was the same but the defending parties were two different codefendants prosecuted separately. That case is distinguishable.¹²

In *Kuhn v. State, Dep’t of Revenue*, 897 P.2d 792 (Colo. 1995), multiple plaintiffs-taxpayers brought an action challenging the legality of a state income tax scheme and

¹⁰ Under certain circumstances, that could be regarded as forum shopping. See *United States v. Lara*, 520 F.2d 460, 464 (D.C. Cir. 1975) (holding that the prosecutor’s dismissal of the charges in D.C. and reopening of the case in Florida because the forum would be more advantageous to his case was unjust and called for dismissal of the indictment); see also *United States v. Thomas*, 527 F. Supp. 261, 262-63 (D.D.C. 1981) (indictment dismissed because of forum shopping). See e.g. *State v. Garson*, 775 N.Y.S. 2d 827, 837 (N.Y. App. Div. 2004) (It is an abuse of the adversary system for a prosecutor to withdraw a criminal case from one grand jury in order to present it to another and it constitutes forum shopping if one of the prosecutor’s reasons for doing so was to reach a more compliant jury.).

¹¹ The prosecution calls this case “*People v. District Court*.”

¹² The same is true of *Edmonds v. Smith*, 922 F.3d 737 (6th Cir. 2019), a federal habeas case involving two separate prosecutions of two separate codefendants. The Sixth Circuit stated the obvious: the law-of-the-case doctrine did not apply across separate habeas actions brought independently by the petitioners on the theory they were codefendants in the Kentucky state court prosecutions.

seeking refund of taxes paid on their federal military retirement benefits. The history of this class-action lawsuit is somewhat convoluted. The bottom line for purposes here is that the doctrine of law of the case didn't apply because there had been no prior decision on the statute of limitations question that was at issue. *Id.*, at 796. Here, there were prior decisions on the matters.

The case cites a case in which law of the case precluded relitigation where the parties and case were the same, but the plaintiff filed a different motion for injunction to have a ditch owner relocate a ditch back to its original location. *Verzuh v. Rouse*, 660 P.2d 1301, 1304 (Colo. App. 1982). The court of appeals ruled that "the trial court's decision not to reopen the issue of ditch relocation was not an abuse of discretion, and did not work an injustice." *Ibid.* Mr. Morpew agrees that this Court would not be abusing its discretion if it (as Mr. Morpew requests) declines to reopen the issues previously litigated in *Morpew I* – or at least to place the burden on the People where it belongs.

The People cite a speedy trial case, *People v. Small*, 631 P.2d 148, 154 (Colo. 1981). In *Small*, the Court "considered the entire forty-nine-month period of time between the initial indictment and the defendant's actual trial" – even with an intervening dismissal without prejudice and a re-filing of charges – "as the 'length of delay' during which he was entitled to a speedy trial." *Id.*, at 154. This certainly suggests that when (as here), the defendant is the same (Barry Morpew), the plaintiff is the same (the People of the State of Colorado), and the offense and victim are the same (murder of Suzanne Morpew), fairness dictates that the prosecution be regarded for some purposes as one and the same.

The People also cite a case involving severance of counts in a civil case. *Jones v. Samora*, 2016 COA 191, 395 P.3d 1165 (Colo. App. 2016). There, a judge severed two groups of civil claims – claims raised under state law and claims raised under a federal civil rights statute (42 U.S.C. § 1983). The state law claims were adjudicated and ultimately concluded with a ruling by the Colorado Supreme Court. *See id.*, at ¶¶ 13-18, 50-51. Then back in trial for the federal claims, the plaintiffs tried to raise the same legal arguments the Colorado Supreme Court had already decided. *Id.*, at ¶ 19. The court of appeals ruled that the doctrine of issue preclusion prevented re-litigation of the issues the Supreme Court decided in the appeal of the state law claims. This case provides no guidance. There are not multiple counts in this case, there is no severance of counts issue, and the Colorado Supreme Court has not issued a ruling on the motions Mr. Morpew now raises.

For the same reason, *Sherley v. Sebelius*, 689 F.3d 776, 778 (D.C. Cir. 2012) is irrelevant. There, a motion for preliminary injunction was fully litigated and the ruling upheld by the appellate court. Then, back in the district court for litigation on the merits, the plaintiffs tried to upend the appellate court's ruling. The D.C. Circuit rejected this attempt, ruling that the legal issues were the same and the plaintiff was precluded from relitigating the issue.

At first blush, the prosecution's string cites may look impressive. But an actual reading of the cases belies that superficial impression. None of them address the fundamental due process rights that animate the present litigation. None of them concern the umbrella of protections provided by the Constitution of the State of Colorado and the U.S. Constitution.

WHEREFORE, for the reasons stated in the Motion D-037 and this Reply, and those stated in the litigation and ruling in *Morphew I* attached and provided to this Court with Mr. Morphew's Motion D-037, this Court should grant the relief requested.

Respectfully submitted this 22nd day of June, 2026.

FISHER & BYRIALSEN, PLLC

/s/ Jane Fisher-Byrialsen

Jane Fisher-Byrialsen, #49133

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/s/ David Beller

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Certificate of Service

I hereby certify that on June 22, 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