

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-038] REPLY - 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	

Mr. Morphey provides the following Reply to the prosecution's response to his motion to preclude inadmissible opinion testimony about the significance of evidence, the prosecution's theory of the case, and Mr. Morphey's mental state or credibility.

The prosecution's only response is that they believe this Court cannot rule without more information about "any specific testimony or evidence the Defendant seeks to exclude." However, Mr. Morphey has been specific enough for this Court to rule. Because the principles of law are clear and indisputable, and the prosecution does not dispute them, this Court should grant the motion.

Mr. Morphew's motion gives numerous examples of testimony that would violate the rules he sets forth, e.g.:

- Law enforcement testimony commenting on why this or that fact should be regarded as "important" or "significant" (Motion D-038, ¶¶ 1, 4, 6);
- Witness testimony that endorses evidence or theories by telling the jury how significant it is, how believable it is, or what conclusions the jury should draw from it (Motion D-038, ¶ 4);
- Law enforcement witness testifying that a fact is "significant" or that evidence "points toward guilt" (Motion D-038, ¶ 4);
- Speculation about what Mr. Morphew was feeling (Motion D-038, ¶ 4);
- Testimony that the witness (or that any other witness or person) believes that Mr. Morphew committed the crime (Motion D-038, ¶¶ 7, 8);
- Opinions that Mr. Morphew is guilty (*Ibid*);
- Opinions about "whether the prosecution's factual allegations [are] true," opinion testimony that another was or wasn't "telling the truth on a specific occasion," or similar applications of law to the facts "in such a way as to suggest that the expert had determined that the defendant was guilty." (Motion D-038, ¶ 9) (quoting *People v. Baker*, 2021 CO 29, ¶ 33, 485 P.3d 1100, 1107 (collecting cases). See also (Motion D-038, ¶ 11) (citing *Howard-Walker v. People*, 2019 CO 69, ¶¶ 32, 443 P.3d 1007 (*Howard-Walker II*) and *People v. Howard-Walker*, 2017 COA 81M, ¶¶ 79-80, 446 P.3d 843 (*Howard-Walker I*)).
- When a video or photo is shown, speculation about what the person in the video or photo must have done, even though that is not depicted or seen on the video/photo. (Motion D-038, ¶ 11) (citing *Howard-Walker II*, ¶¶ 31-35, and *Howard-Walker I*, ¶¶ 47, 61).
- Other errors found by both the Court of Appeals and Supreme Court in *Howard-Walker I* and *Howard-Walker II* (Motion D-038, ¶ 11).

The plethora of examples in these cases and those that Mr. Morphew identifies are not speculative or imaginary: these recount specific testimony offered by prosecutors in actual cases in this State that were later found to be improper and inadmissible. By claiming ignorance, the

prosecution is either admitting ignorance of this well-established body of law or hedging their bets, hoping to elicit such testimony before the defense can object and before this court can instruct the jurors to “unring the bell” they just heard.

By not responding, the prosecution concedes that the above testimony is inadmissible. If the prosecution nevertheless elicits such testimony, given the prosecution’s advance notice, admission would warrant a mistrial.

The prosecution does not deny that admission of material that rises to this level can constitute a due process violation. (Motion D-038, ¶ 13). This court can be guided by the powerful words of Judge Berger in his concurring opinion in *People v. Genrich*, 2019 COA 132M, ¶ 136, 471 P.3d 1102, 1122–23: “Colorado appellate courts have not previously considered whether the admission of scientifically unreliable expert testimony results in a due process violation. However, in *Han Tak Lee v. Houtzdale SCI*, 798 F.3d 159, 166 (3d Cir. 2015) (quoting *Han Tak Lee v. Glunt*, 667 F.3d 397, 403 (3d Cir. 2012)), the Third Circuit Court of Appeals held that the admission of scientifically unreliable expert testimony would violate due process guarantees if the ‘expert testimony undermined the fundamental fairness of the entire trial because the probative value of [that] evidence, though relevant, [was] greatly outweighed by the prejudice to the accused from its admission.’ The Ninth Circuit Court of Appeals adopted this approach in *Gimenez v. Ochoa*, 821 F.3d 1136 (9th Cir. 2016).” While Judge Berger was specifically discussing expert testimony, the principles he articulated would apply to all testimony, lay or expert.

WHEREFORE, because the prosecution does not object to the motion, does not disagree with the rules of law, case authority, evidentiary rules, or constitutional claims set forth, this Court should enter an order precluding the prosecution from 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) speculating about what Mr. or Ms. Morphew would or would not have done under hypothetical circumstances.

Respectfully submitted this 22nd day of June, 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 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/ Abigail Clement

Paralegal at Fisher & Byrialsen PLLC