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 ▲
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[D-035] REPLY - MOTION FOR EVIDENTIARY HEARING TO EXCLUDE SUMMARY TESTIMONY

Mr. Morphew provides the following Reply to the prosecution's response to his motion to preclude summary testimony:

1. The prosecution is correct that Mr. Morphew objects both to "overview" or "summary" witness testimony offered under CRE 1006.

2 The prosecution quibbles with the label – "summary witness" vs. "overview witness" vs. "expert summary witness," but does not deny the substance of the motion in the following key respects:

> (1) No witness – lay or expert – can testify to any hearsay or information that would violate the confrontation clauses of the state and federal constitution. Labeling a witness a "summary" witness does not

change Mr. Morphew's constitutional protections. U.S. Const., amends. VI, XIV; Colo. Const., art. II, sections 3, 16, 25.

(2) Assuming the government offers the "summary" witness as a lay witness, if that witness does not have personal knowledge of the facts *about whi*ch she or he testifies, the testimony is impermissible. See Motion, ¶¶ 4-7.

(3) The government cannot escape the prohibition against hearsay or circumvent the protections of the confrontation clause by labeling the "summary" witness as an expert witness. Motion, ¶¶ 3-7.

(4) Admissibility of any summary witness's testimony or visual aide must be established outside the presence of the jury. The prosecution suggests this should happen in court, in an interruption during trial, causing a delay while the jury steps out and the parties fully litigate the issue. Mr. Morphew instead suggests that this Court take control over the mode and manner of presentation and require these issues to be determined pretrial rather than during a trial interruption.

3. The government cites three Colorado cases, all cases about introduction of charts and the accompanying witness: the Colorado Supreme Court case that Mr. Morphew cited – *Murray v. Just In Case Bus. Lighthouse, LLC,* 374 P.3d 443 (Colo. 2016) – and two unpublished cases – *People v. Pettigrew*, 21CA1108, 2025 WL 1354055 (Colo. App. 2025) (unpublished) (admission of exhibit); *People v. Frankel*, 19CA0131, 2020 WL 14046037 (Colo. App. 2020) (unpublished). Only *Murray* is binding precedent. See *Patterson v. James*, 2018 COA 173, ¶ 40, 454 P.3d 345, 353 (unpublished cases may be cited, but they have no precedential value).

4. *Pettigrew* and *Frankel* are not instructive here. There, defense counsel failed to object on the grounds raised on appeal. *See e.g., Pettigrew*, ¶ 78 (Pettigrew did not object on confrontation grounds); *Frankel*, ¶ 17 (Frankel raised his best-evidence objection only as to one witness, not the other three witnesses). Even the *Murray* case's application is limited because there, again, the opponent of the evidence didn't object on the grounds on which Mr. Morphew objects. *See Murray*, ¶ 30, n. 7 (refusing to consider Murray's CRE 701 objections because he didn't raise them at trial). Mr. Morphew objects on all grounds and will do so with even more specificity when notice is provided.

5. *Murray* provides the standards this Court must apply if the government offers a chart or similar evidence under CRE 1006. The most important considerations are whether the proposed evidence is accurate, not misleading, nonprejudicial, and helpful to the jury. *Murray,* ¶ 52.

6. The prosecution does not even attempt to satisfy the *Murray* standards. It doesn't identify what summary evidence/chart/testimony it wants to present and doesn't discuss its evidence in light of the *Murray* factors. *See Murray,* ¶ ¶ 49-55.

- *Murray* requires notice to the opposing parties, who "must have access to examine the original documents at a convenient time and place." *Id.,* ¶ 49.

- "the evidence must be sufficiently voluminous such that in-court examination would be inconvenient." *Ibid,* ¶ 49.

- The summary must summarize the information contained in the underlying documents accurately, correctly, and in a nonmisleading manner. This Court does ***not*** accept the information contained in the summaries as true. *Id.,* ¶ 49.

- the underlying documents must be admissible. *Id.,* ¶ 49.

- the summary must not be "embellished" or annotated with conclusions or inferences drawn by the government or the witness – in other words, no highlighting, labeling, or other argumentative material. *Murray,* ¶ 51. See *id.*, ¶ 55 (concluding that summary charts were inadmissible because their "headings attempted to persuade the jury to assign more weight to certain evidence and reach particular conclusions").

- the court may order that the originals be produced at trial. *Id,* ¶ 49; CRE 1006.

7. To satisfy these CRE 1006 factors requires notice in advance of trial, production of the summarized material, and the opportunity for Mr. Morphew to raise objections with this Court and for this Court to determine if the summary exhibits are accurate. Cf. *United States v. Saunders*, No. CRIM.A. 12-141, 2013 WL 2903071, at *7 (E.D. La. June 13, 2013) (denying government's motion to introduce a summary Power Point, finding it "contains prejudicial information beyond the scope of the underlying telephone records, and which assumes operative facts that the Government is required to prove as part of the alleged offense"). This Court should reject the prosecution's attempt to defend its admission of CRE 1006 exhibits in the abstract, without ever providing notice.

8. The cases the prosecution cites are inapplicable and not helpful to the prosecution's arguments.

- In *United States v. Lemire*, 720 F.2d 1327 (D.C.Cir. 1983),[1] the summary concerned only "routine computations" involving evidence "about the complex cash flow through offshore companies that the government had introduced via direct examination of its witnesses." *Id*., at 1346, 1351. This case merely confirms that, when this type of evidence is allowed in federal court, the typical use is in complex accounting and financial schemes when voluminous detailed accounting records have been admitted.

- *United States v. Mann*, 884 F.2d 532 (10th Cir. 1989) was a complex tax case, again involving detailed financial records. Like most tax cases, tax experts are presented to assess and provide a technical analysis of voluminous and complex documentation. In *Mann*, the witness, testifying as an expert in the field of income tax calculation and accounting, summarized already-admitted evidence and compiled it as part of his testimony about Mann's taxable income for the years 1979–81. While it is unclear because the prosecution hasn't yet provided any notice to Mr. Morphew, it does not appear the prosecution plans on introducing voluminous and complex accounting or tax evidence or any related expert that would make *United States v. Mann* relevant to Mr. Morphew's case.

- *United States v. Ray*, 370 F.3d 1039 (10th Cir. 2004), *judgment vacated on other grounds,* 543 U.S. 1109 (2005)[2] and *United States v. Stiger*, 413 F.3d 1185 (10th Cir. 2005)[3] were codefendants in a multi-state complex drug conspiracy case with multiple defendants in a joint trial.[4] The Tenth Circuit found that neither FRE 1006 nor FRE 702 permit the use of summary exhibits and testimony. *Id*., at 1046. Noting that the defense that Mr. Ray's counsel never requested a recess to review the charts, *id*., at 1047, the Tenth Circuit ultimately affirmed their admission under FRE 611 as against him. Stiger's attorneys didn't object at trial to much of the material. The Tenth Circuit ruled the trial court erred by admitting a chart the witness "constructed" in part from interviews conducted during the investigation. The Tenth Circuit noted there were no defense objections to certain aspects of the testimony and exhibits, affirmed admission of one chart, and approved of the judge striking some of the officer's testimony

[1] The prosecution miscites this case as appearing in the third edition of the Federal Reporter ("F.3d"). That is incorrect as it is a 43-year old case appearing in the second edition ("P.2d").
[2] The prosecution miscites this case by referencing pages 10046-48. Those page numbers do not appear in the case. Also, the prosecution fails to cite the later history, i.e., the fact that the judgement was vacated.
[3] The prosecution miscites this case. It appears at 413 F.3d 1185, not 413 F.3d 1184.
[4] See *United States v. Bellamy*, *et al*., No. 00-CR-126-C, *Second Superseding Indictment* (N.D. Okla. July 13, 2001), available at 2001 WL 36082658, listing Mssrs. Ray and Stiger among seventeen defendants.

with respect to another. *Id*., at 1350. This multi-defendant, multi-state complex drug conspiracy case provides no guidance for this Court.

9. As to the calling of "overview" or "summary" witnesses, the prosecution appears to defend the practice – again, while providing no notice about what (if any) such witnesses it seeks to call.

10. A summary witness that essentially gives the prosecution's opening statement or closing argument from the witness stand is no different than an expert who testifies based solely on their "subjective interpretation of the facts." *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 906 (Tex. 2004).

11. The prosecution cannot call a "summary witness" that essentially provides a summary of the case, using a power point, timeline, chronology or other chart/outline. That type of testimony is not admissible, and having the witness use a chart doesn't make it admissible under CRE 1006.

12. The prosecution wonders aloud why Mr. Morphew has cited cases involving "expert" summary witnesses. E.g. *United States v. Dukagjini*, 326 F.3d 45 (2nd Cir. 2003). That is the way such witnesses are analyzed in federal court. *Ibid; United States v. Brooks*, 736 F.3d 921 (10th Cir. 2003). In the case cited by the prosecution, *United States v. Brooks*, the court acknowledged that the Agent's testimony required that he be qualified as an expert – because it is inadmissible as lay testimony. The government did not offer the Agent as an expert, but the defense didn't object. *Id*., at 932 ("the government did not properly qualify Agent Swanson as an expert on the testimony it now defends. At the same time, the defendants did not object at trial to the admission of improper expert evidence.") The court found the testimony "troublesome under our case law," and "agree[d] with the defendants that it is doubtful expert opinion was necessary in this case to help educate the jury." *Id*., at 933. However, without an objection, the appellate standard of review was very restricted. The court ultimately reached the issue not because the evidence was admissible, but because "any error" was not "plain error" under the standard of review.

13. The prosecution asks this Court to distinguish other cases Mr. Morphew cites – *United States v. Casas*, 356 F.3d 104, 117 (1st Cir. 2004); *United States v. Aviles-Colon*, 536 F.3d 1, 21 n.13 (1st Cir. 2008), and *United States v. Flores-De-Jesus*, 569 F.3d 8, 18 (1st Cir. 2009) – on the prosecution's theory that the government witnesses in those cases were called early in the trials, not at the end of the trials.[5] This is the

[5] Does this mean the government intends to call such a witness at the end of their case to give a closing argument from the witness stand? They do not say. It is Mr. Morphew's position that, if the government intends to do so, they must endorse the witness as an expert and give the proper notice required by the Colorado Rules of Criminal Procedure and Rules of Evidence and as required in this Court's Omnibus Case Management Order.

government's theory, but that is not what the only case they cite – *United States v. Brooks, supra* – held. As explained above, that case was decided because of the "plain error" standard of review that attaches when the defense does not lodge an objection (as Mr. Morphew is doing here).

14. Calling a so-called "summary witness" near the end of the government's case does not cure the problem, it makes the problem worse. The Fifth Circuit has expressly ruled that summary testimony cannot be used "to allow the Government to repeat its entire case-in-chief shortly before jury deliberations." In another "plain error" case – where the defense did not object – the Fifth Circuit explained:

> While such witnesses may be appropriate for summarizing voluminous records, as contemplated by Rule 1006, rebuttal testimony by an advocate summarizing and organizing the case for the jury constitutes a very different phenomenon, not justified by the Federal Rules of Evidence or our precedent. For example, ***summary witnesses are not to be used as a substitute for, or a supplement to, closing argument.***

United States v. Fullwood, 342 F.3d 409, 414 (5th Cir. 2003) (emphasis added).The government may not, however, use a witness to summarize portions of the live testimony previously introduced in the government's case.

15. *Fullwood* came on the heels of *United States v. Hart*, 295 F.3d 451, 458–59 (5th Cir. 2002), another case where the summary witness was called later in the trial (not as the first witness). In *Hart,* the Fifth Circuit recognized that the government, through its summary witness, had introduced a chart as "summary" evidence even though the chart "assum[ed] that which [the government] was required to prove beyond a reasonable doubt as operative facts of the alleged offense." *Id.* at 459. Essentially, the government had been permitted to introduce evidence that filled in holes necessary for the government's case, which surely was not summary evidence at all. The alleged summary evidence was essential to the government's evidentiary obligation; admission of the evidence thus had a substantial and injurious effect on the jury's verdict. The Fifth Circuit concluded that admitting the evidence and testimony was reversible error. *Id.*

16. The government argues that an evidentiary hearing is not necessary to permit this Court to make its rulings. That may ultimately be true. Because the government has not provided notice, a decision about an evidentiary hearing may be premature. If the government does not intend to introduce any summary testimony or evidence at trial, an evidentiary hearing would not be necessary.

WHEREFORE, this Court should rule the government's summary testimony inadmissible. It is hearsay. It violates the confrontation clauses, the due process clauses,[6] the best evidence rule, and the hearsay rules. It usurps the role of the jury. It is not authorized by CRE 1006 or CRE 702, and it violates numerous Rules of Evidence, including CRE 602, 701, 702, 703, 704, 802, 1002, and 1006.

If the government (as it implies in its Response) wishes to introduce evidence under CRE 1006, this Court should require sufficient pretrial notice so the defense can review the foundational documents and lodge any objections and so this Court has time to determine if the government's proposed evidence satisfies the *Murray* standards.

Respectfully submitted this 22nd day of June, 2026.

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[6] Admission of summary testimony under the expert witness rubric would constitute admission of unreliable "expert" testimony, which, Mr. Morphew contends, is a due process violation. *See* Judge Berger's 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)."

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
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