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, 9th 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-036] REPLY - MOTION TO EXCLUDE PROFILING EVIDENCE AND REQUEST FOR HEARING

Mr. Barry Morphew, by and through undersigned counsel, files this Reply to the prosecution's response to his motion to 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.

The prosecution, arguing that because this Court cannot know what "profiling" means, this Court should stall the decision until trial and let it all blow up there. The prosecution also argues that it should get another bite at the apple and this Court should ignore the prior rulings in *Morphew I*,[1] where the same evidence was excluded.

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

<u>Profiling evidence is presumptively inadmissible and should be ruled inadmissible here.</u>

The prosecution's claim they are ignorant about the nature of "profiling" evidence falls flat. The prosecution certainly had no problem understanding what it was in *Morphew I*. Neither did Judge Lama. Neither does the Colorado Supreme Court, the U.S. Court of Appeals for the Tenth Circuit, and the jurists in the other case authority cited in Motion D-036.

There was no ambiguity at the Grand Jury, where the prosecution elicited testimony from an FBI agent about profiling evidence he called "behavioral analysis." GJ Transcript, 1/27/2025, p. 16:6-8. The Agent's testimony revealed that "behavioral analysis" is essentially profiling: "So the behavioral analysis unit sits at headquarters and has ***teams of profilers*** that look at different types of cases." *Ibid* (emphasis added).

The prosecution ignores the numerous definitions provided in the motion, including from the U.S. Court of Appeals for the Tenth Circuit. See D-036, p. 3, ¶ 6, quoting *United States v. McDonald*, 933 F.2d 1519, 1521 (10^{th} Cir. 1991) (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.")

As the exhibits to Motion D-036 (which were incorporated into D-036 by reference) demonstrate, in *Morphew I*, Mr. Morphew provided a very specific list of examples. See D-036, Exhibit A, p. 3, ¶ 7. The People and Judge Lama were completely aware of that list. See D-036, Exhibit C, p. 3 (Transcript of 2/24/2022, p. 14 (prosecution referencing the list). About that list, prosecuting attorney Robert Weiner stated that the People had no intention of "introducing any such evidence in that regard because that is profiling evidence and that is not admissible[.]" *Id*., Ex. C, pp. 4-5 (Transcript of 2/24/2022, pp. 15-16).

As pointed out in the motion (p. 3, para. 8), profiling evidence is any evidence that is intended to show: "criminals act in a certain way; the defendant acted that way; therefore, the defendant is a criminal." *People v. Robbie*, 92 Cal. App. 4th 1075, 1085, 112 Cal. Rptr. 2d 479, 485 (2001) (reversing conviction because of admission of rapist profile characteristics evidence). 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 (10^{th} Cir. 1991). Criminal profiling is well-recognized and well-defined in investigative work. But it is not admissible or appropriate for a criminal trial.

The prosecution tries to distinguish *Salcedo* by suggesting that, if it calls an expert whose profiling opinions are "supported by objective research" (Response, p. 2), it would be admissible.

Without identifying them as unpublished opinions, the prosecution also cites two unpublished sex trafficking/pimping cases: *People v. Peacock*, No. 20CA1469, 2022 WL 22928658 (Colo. App. Aug. 25, 2022)(not published) and *People v. Williams*, No. 16CA2169, 2019 WL 13573590 (Colo. App. Nov. 21, 2019) (not published). These cases are not 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).

- In *Peacock*, a pimping and human trafficking case, the Court of Appeals' division did not find error in admission of expert testimony about the human trafficking/pimping business, how pimps get paid, and how it differs from other financial transactions or payment of loans between two people. Peacock claimed the arrangement was a debtor-borrower relationship. The government's evidence was basic modus operandi evidence. Peacock did not object at trial. *Peacock*, ¶ 12. *Peacock* is highly fact-dependent. It is not unlike other accounting/fraud/racketeering cases where experts testify about business models. It is not surprising that it was not selected for publication. It provides neither precedent nor guidance here. To counsel's knowledge, the instant case has nothing to do with business models or payment schemes related to illegal financial enterprises.

- *Williams,* a pimping and sex trafficking case, was similar to *Peacock*. There, an expert in the areas of human trafficking and commercial sexual exploitation testified about the prostitution trade and the nature of the relationship between pimps and prostitutes. *Williams*, ¶ 9. This was modus operandi evidence about how to distinguish sex trafficking financial transactions from other transactions like gambling. Notably, as to another subject of the expert's testimony – the types of tattoos commonly seen on pimps – the court of appeals division found the trial court abused its discretion by allowing the tattoo testimony and admitting a photograph of them. *Id.*, ¶¶ 22-28.

The prosecution also cites a published case, *People v. Conyac*, 361 P.3d 1005 (Colo. App. 2014) for the proposition that modus operandi experts are admissible if the criminal behavior is not familiar to an "average layperson." (Response, unnumbered p. 4). *Conyac* is a child molester "grooming" case. It has nothing to do with this case. Conyac (and the two unpublished cases) concern circumstances where the actus reus of the crime itself requires expert explanation. That is certainly not the situation in an alleged murder case.

Of course, if the prosecution seeks to introduce this inadmissible evidence, it will have to endorse an expert and run the *Shreck*/CRE 403 gauntlet.[2] But that procedure alone will not protect Mr. Morphew from this inadmissible evidence reaching the jury or being talked about in Opening Statement or Voir Dire, because the prosecution might try to introduce this type of testimony through a lay witness. See Motion D-036, pp. 4-5, ¶¶ 14-17. That would be highly improper, *ibid,* but the damage would have been done before this Court has a chance to intervene.

This motion in *limine* must be decided pretrial 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.

This motion in *limine* must be decided pretrial to prevent the prejudice that would ensue from the prosecution presenting a witness, starting to elicit profiling testimony, 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. The prosecution should have to approach the bench beforehand so that any dispute is resolved outside the presence of the jury.

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

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.

On the question of whether profiling 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.

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

---

[2] *Ruibal v. People*, 2018 CO 93, ¶¶ 12-14 (discussing the specific findings a trial court must make on the record before admitting expert testimony under CRE 702 and CRE 403).

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.

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.[3] 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)[4] didn't involve the same parties (as here). The prosecuting

---

[3] 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.).

[4] The prosecution calls this case "*People v. District Court*."

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.[5]

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 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. Morphew agrees that this Court would not be abusing its discretion if it (as Mr. Morphew requests) declines to reopen the issues previously litigated in *Morphew 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 Morphew), the plaintiff is the same (the People of the State of Colorado), and the offense and victim are the same (murder of Suzanne Morphew), 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

[5] 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.

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. Morphew 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 Motion D-036 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-036, 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

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/ Abby Clement
Paralegal at Fisher & Byrialsen PLLC