DATE FILED
October 29, 2026 4:52 PM

DISTRICT COURT, ALAMOSA COUNTY, COLORADO, 8955 Independence Way Alamosa, CO 81101 --- THE PEOPLE OF THE STATE OF COLORADO Plaintiff, v. BARRY LEE MORPHEW, Defendant.	▲ 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-066] MOTION FOR PRETRIAL REVIEW OF ALL PHOTOGRAPHS SOUGHT TO BE INTRODUCED BY THE PROSECUTION THAT HAVE THE POTENTIAL TO BE INFLAMMATORY AND PREJUDICIAL

Mr. Morphew, by and through counsel, moves *in limine* for an order requiring that any photographs, whether printed, projected or in any form, that the prosecution intends to introduce that have the potential to inflame the passions and prejudices of the jury be reviewed by the Court prior to the trial with fair opportunity for objections before the images are displayed to the jury. Such photographs include, but are not limited to, those from the site where Ms. Morphew's remains were found, images of her remains, and similar images or photographs.

In support, Mr. Morphew states:

1. “[E]vidence offered to prove undisputed facts has marginal probative value.” *Yusem v. People,* 210 P.3d 458, 468 (Colo. 2009); *People v. McClelland*, 2015 COA 1, ¶ 50, 350 P.3d 976, 984–85. *See also People v. Ray*, 2025 CO 42M, ¶ 125, 575 P.3d 400, 434.

2. In *McClelland*, 2015 COA 1, ¶ 50, 350 P.3d 976, 984–85, the Colorado court of appeals reversed a conviction because admission of “in life” photographs violated CRE 403. The court found the photos to have little probative value because there was no dispute about the victim’s identity, nor was there a dispute about “whether he was alive at the time of the shooting.” *Ibid.* Those facts were established by eyewitness testimony. “In short, the ‘in life’ photographs were evidence of an undisputed fact.” *Ibid*. The prosecutor’s references, combined with the photos themselves, “heightened the likelihood that the jury's decision was based on sympathy.” *Id*., ¶ 54. The same is true here. Gruesome photographs have no probative value on any disputed fact and heighten the likelihood of a jury verdict based on sympathy or other emotions.

3. The introduction of irrelevant evidence can rise to the level of a federal due process violation when it deprives the defendant of a fundamentally fair trial. “[C]learly established law provide[s] that the Due Process Clause forbids the introduction of evidence so unduly prejudicial as to render a criminal trial fundamentally unfair.” *Andrew v. White*, 604 U.S. 86, 96 (2025); *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). *See Bloom v. People*, 185 P.3d 797, 806 (Colo. 2008) (The right to a fair trial and a fair and impartial jury “may be violated when ‘evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair.’”) (quoting *Payne,* at 809). *See Martinez v. Quick*, 134 F.4th 1046, 1064–65 (10th Cir. 2025) (applying the “due-process principle that the admission of irrelevant evidence can render a trial fundamentally unfair”) (*citing Andrew v. White, supra*, and *Payne, supra*). *See also Andrew v. Tinsley,* 164 F.4th 789, 798 n. 3 (10th Cir. 2026) (introduction of irrelevant evidence can rise to the level of a federal due process violation).

4. Admission of these photos would violate CRE 403 and the due process clause. Images of Ms. Morphew’s remains have no probative value because, obviously, her body had been altered from the time she was killed. The photos are graphic and carry a significant risk of unfair prejudice. Presenting these images risks invoking an emotional reaction from jurors, which could impede their ability to evaluate the issue of guilt dispassionately and objectively.

5. Criminal convictions have been reversed because of admission of the types of inflammatory, graphic photographs the prosecution may seek to introduce here. *E.g., State v. Saunders*, 275 S.E.2d 920 (W. Va. 1981) (reversing conviction where the only disputed issue was the identity of the killer and the photographs provided no clue for identifying the assailant and served no purpose other than to inflame the jury). In *State v. Clawson*, 270 S.E.2d 659 (W. Va.

1980), the West Virginia Supreme Court ruled it was reversible error to admit gruesome color photographs of the victims' partially decomposed bodies as they appeared on the pathologist's autopsy table. In words that should guide this Court, the court explained why such images are inadmissible:

> The most obvious reason for their inadmissibility is the fact that they do not depict the condition of the victims at the time of the offense but some three months later after they had decomposed and had been eaten by wild animals. Even more appalling is that some of the photographs were taken after the chest cavity was cut apart by the pathologist and the internal organs were eviscerated. Courts have been almost universal in their condemnation of admitting photographs depicting the victim's body after it has been subject to autopsy procedures. [numerous citations omitted] Other courts have held photographs to be inadmissible as excessively gruesome where the victim's body was mutilated by causes other than the crime or in a decomposed state when discovered. *Commonwealth v. Richmond*, 371 Mass. 563, 358 N.E.2d 999 (1976) (victim's face mutilated by dog after murder); *Commonwealth v. Liddick,* 471 Pa. 523, 370 A.2d 729 (1977) (photograph of decomposed body of victim pulled from lake).

Clawson, 270 S.E.2d at 672 (also citing cases from the Supreme courts of Utah, Pennsylvania, Louisiana, Kansas, Indiana, Illinois, and California). *E.g.*, *Corbett v. State*, 764 N.E.2d 622, 628 (Ind. 2002) (it was error to admit photographs depicting the hollow shell of the victim and focusing on his ribs, because the probative value was slight as the existence of broken ribs was not a material issue and their unfair prejudicial effect was high given their gruesomeness).

6. Display of such images in opening statements or closing arguments aggravates the unfair prejudice. In *Stringer v. State*, 500 So. 2d 928, 935 (Miss. 1986), the Mississippi Supreme Court found a reversible abuse of discretion when inflammatory photos of the condition of the deceased's body were displayed to the jury during the prosecutor's closing argument as part of its slide show. The Mississippi Supreme Court "deplore[d] this practice" because "the effect is to take the pictures far beyond their evidentiary value and use them as a tool to inflame the jury." *Ibid.* The Court found deplorable the projection of these color slides of the body as "an unnecessary dramatic effect that can only be intended to inflame and prejudice the jury." *Ibid.*

7. Under the circumstances of this case, the probative value of graphic and explicit photographs of Ms. Morphew's remains is substantially outweighed by the danger of unfair prejudice and admission would violate CRE 403 and the due process clause.

8. Advance review and resolution of disputes is the best way to avoid a mistrial based on inflammatory images reaching the jury.

9. If this court elects to conduct its review during trial, then Mr. Morphew requests an order that no images or photographs may be shown in voir dire, Opening Statements, or at any point prior to being offered at trial and that they all must be reviewed by the Court and defense counsel before being offered at trial.

10. Mr. Morphew 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, RPC 3.8, and the Colorado Rules of Evidence (including CREs 401, 402, 403, 404, 608, 801, 802, 803, 804, and 901). Mr. Morphew 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. Morphew moves *in limine* for an order requiring that any photographs, whether printed, projected or in any form, that the prosecution intends to introduce that have the potential to inflame the passions and prejudices of the jury, including all images of remains, be reviewed by the Court prior to the trial with fair opportunity for objections before the images are displayed to the jury.

Respectfully submitted this 29th day of October, 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 October 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/ Abigail Clement
Paralegal at Fisher & Byrialsen PLLC