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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-067] MOTION TO PRECLUDE OUT-OF-COURT STATEMENTS OF ALLEGED HISTORICAL FACTS, PAST MENTAL STATES, OR PURPORTED MENTAL STATES OF OTHERS (PAST OR PRESENT)

Mr. Morphew, by and through counsel, moves to exclude any evidence offered under CRE 803(3) that is an alleged historical fact, past mental state of the declarant, or purported mental states of others (past or present). In support, Mr. Morphew states:

1. It appears that the prosecution will assert that certain out-of-court statements are admissible under the "state of mind" hearsay exception in Rule of Evidence 803(3). But the hearsay exception is limited. The statement must reflect the declarant's own present mental or emotional condition and the declarant's mental or emotional condition must be relevant.

2. Mr. Morphew objects to admission of any such statements. He files this motion to make clear what the "state of mind" exception does not allow and to ask this court to prohibit out-of-court statements not authorized by CRE 803(3).

3. In addition to excluding out of court statements that do not fit within CRE 803(3), Mr. Morphew asks this Court to exclude any questions or comments about such out-of-court statements.

4. CRE 803(3) defines the state of mind hearsay exception as follows:

> (3) Then Existing Mental, Emotional, or Physical Condition. A statement of **declarant's** then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive design, mental feeling pain, and bodily health) **but not including a statement of memory or belief to prove the fact remembered or believed** unless it relates to the execution, revocation, identification, or terms of declarant's will.

Thus, the limitation can be found directly in the rule itself which excludes from the exception "statement of memory or belief to prove the fact remembered or believed," unless it concerns the declarant's will. CRE 803(3).

5. The threshold question is relevance. "Finding relevance in a victim's mindset in a criminal case is fairly uncommon. Indeed, a crime victim's state of mind typically is irrelevant and, thus, inadmissible. In murder cases in particular, it is the defendant's 'state of mind, not that of the victim, which [is] material to establish the degree of guilt, if any, on the charge of criminal homicide.'" *Commonwealth v. Fitzpatrick*, 667 Pa. 447, 485, 255 A.3d 452, 474 (2021) (quoting numerous cases). "The victim's emotional state must relate to some legitimate issue in the case." 2 McCormick On Evid. § 276, (9th ed.) (Feb. 2025 update) *See e.g. United States v. Rodriguez-Berrios*, 573 F.3d 55, 61 (1st Cir. 2009) (victim's statement of fear was a then-existing emotional condition but inadmissible because not relevant to any issue in the case).

6. The exception does not include statements the out-of-court declarant made about someone else's acts or state of mind. See *People v. Franklin*, 782 P.2d 1202, 1206 (Colo. App. 1989) ("statements [expressing a witness's state of mind] are not admissible to show the state of

mind of another, here the defendant."). Accord, *People v. Gonzales,* No. 13CA0479, 2016 WL 11998632, at *7 (Colo. App. Mar. 31, 2016)(unpublished).[1]

7. In *People v. Madson,* 638 P.2d 18 (Colo. 1981), the Court, citing *Shepard v. United States,* 290 U.S. 96 (1933), explained the requirements of admissibility as follows:

> Since the state of mind exception admits the assertion for the truth of the matter asserted, it is basic to admissibility that the assertion essentially depict the declarant's then existing state of mind as distinguished from a description of the acts or state of mind of another.

Madson, 638 P.2d at 27.[2]

8. The linchpin of the exception is the spontaneity of the statements. *People v. Nunez*, 698 P.2d 1376, 1378 (Colo. App. 1984) ("The state of mind exception to the hearsay rule is based upon the trustworthiness of spontaneous statements."), *aff'd on confrontation clause issue*, 737 P.2d 422 (Colo. 1987). Accord, *People In Int. of L.P.,* No. 20CA1192, ¶ 51, 2021 WL12346855, at *6 (Colo. App. May 13, 2021) (unpublished); *People v. Gonzales, supra*. Statements made after time for reflection do not fit the exception.

9. Justice Cardozo, in *Shepard, supra,* distinguished between statements of declarant's state of mind from statements or memory or belief to prove a fact:

> Declarations of intentions, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.

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[1] Unpublished cases may be cited in this court. *See Patterson v. James,* 2018 COA 173, 454 P.3d 345 and are cited herein to demonstrate that older published cases continue to provide Colorado precedent today. The rule that only the declarant's state of mind, when relevant, may be admitted is so universal as to be axiomatic. See *Commonwealth v. Fitzpatrick,* 667 Pa. 447, 481, 255 A.3d 452, 472 (2021) ("Axiomatically, and by its unambiguous terms, the exception renders admissible only those statements that reflect the "declarant's then-existing state of mind ... or condition," Pa.R.E. 803(3), not someone else's state of mind or condition. Nothing in the plain terms of the exception would allow, for instance, a party to introduce an out-of-court statement of one person to prove the intent, motive, feelings, pain, or health of another person. The bounds of the exception are limited to the then-existing state of mind of the declarant only.").

[2] Because the rule tracks the common law definition of the state of mind exception, cases interpreting this exception are equally applicable, regardless of whether they were decided before or after adoption of the Colorado Rules of Evidence.

Shepard, 290 U.S. at 106.

10. The result of ignoring the distinction "would practically abolish the hearsay rule altogether... [as] [t]he recollection proves the perception, which in turn proves the existence of the thing perceived." Hinton, *State of Mind and the Hearsay Rule*, 1 U.Chi.L. Rev. 394, 423 (1934).

11. In applying this exception, "[d]eclarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past," with the former allowed and the latter excluded. *Madson*, 638 P.2d at 28 (quoting *Shepard*, 290 U.S. at 106); *see also People v. Manyik*, 2016 COA 42, ¶ 88, 383 P.3d 77 (exception didn't apply to the defendant's statements "that spoke to his mental state in the past").[3]

12. The Colorado Supreme Court, in *People v. Carlson*, 712 P.2d 1018, 1022 n.4 (Colo. 1986) recognized the slippery slope that results when statements of past events are allowed in under the state of mind exception: "To permit statements of memory to come in under the state of mind exception would result, for all practical purposes in the abolition of the exclusionary rules pertaining to hearsay." *Ibid* (*citing Shepard, supra; Madson, supra.*)

13. In its CRE 807 Notice, the prosecution states its intention to introduce numerous out-of-court statements attributed to Suzanne Morphew, in which she is either describing her own past state of mind (inadmissible), Barry Morphew's present or past state of mind (inadmissible), and/or alleged historical facts such as actions of Barry, herself, or others (inadmissible). These types of statements are not admissible under CRE 803(3).

14. Colorado courts have strictly enforced the requirement that the statement must reflect a present, not a past, mental state. In 2016, the Court of Appeals held that hearsay statements made by a defendant to family members during cell phone conversations did not fall under CRE 803(3) because most of the defendant's statements spoke to his mental state **in the past** rather than to his then-existing state of mind. *People v. Manyik*, 2016 COA 42, 383 P.3d 77 (2016). ("CRE 803(3) expressly does not include statements of memory or belief to prove the fact remembered. Rather, 'the statement must describe the declarant's mental or emotional condition at the time the statement was made.'" *Id.,* at ¶ 87 (*quoting People v. Haymaker,* 716 P.2d 110, 113 n. 3 (Colo.1986)). *See People v. Spencer*, No. 14CA0860, 2017 WL 11931031, at *2 (Colo. App.

[3] The rule prohibiting statements of memory/facts is universal. E.g., *Philip Morris USA Inc. v. Lipp,* 423 So. 3d 522 (Fla. Dist. Ct. App. 2025) (A hearsay statement which recounts observations made previously is by definition an after-the-fact statement of memory and expressly excluded from the state-of-mind hearsay exception.); *State v. Snyder*, 2025-Ohio-4444, ¶ 139, 274 N.E.3d 787, 824 (witnesses could testify that the out-of-court declarant "felt fearful or anxious" but not "about *why* [the out of court declarant] felt fearful or anxious.').

Mar. 30, 2017) (unpublished) ("messages were overwhelmingly recountings of Mr. Singleton's fight with the victim and how someone had shot at the two of them — statements of memory or belief.") (*See Madson*, 638 P.2d at 27 ("Excluded from the state of mind exceptions are statements of memory or belief such as 'I had a fight yesterday with X.' ").

15. 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 to exclude any evidence offered under CRE 803(3) that is an alleged historical fact, past mental state of the declarant, or purported mental states of others (past or present).

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