

Combined Court, Chaffee County P.O. Box 279 142 Crestone Avenue Salida, CO 81201	DATE FILED: October 22, 2021 12:19 PM
<hr/> THE PEOPLE OF THE STATE OF COLORADO vs. BARRY LEE MORPHEW, Defendant	<hr/> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<hr/> LINDA STANLEY, DISTRICT ATTORNEY Attorney Reg. # 45298 104 Crestone Avenue P.O. Box 699 Salida, CO 81201 Phone: 719-539-3563 FAX: 719-539-3565	<hr/> CASE NO.: D0082021CR00078 DIV.: 2 Courtroom:
<p style="text-align: center;">P-27 PEOPLE'S MOTION TO QUASH SUBPOENA ISSUED TO JEFFREY LINDSEY</p>	

COME NOW, the People of the State of Colorado, by and through LINDA STANLEY, District Attorney for the Eleventh Judicial District, hereby submits this "P-27 Motion to Quash Subpoena Issued to Jeffrey Lindsey." The District Attorney has authority to move to quash subpoenas to witnesses. *People v Brothers*, 2013 CO 31 ¶9, 308 P.3d 1213, 1215. The subpoenaing of an attorney for opposing counsel must be supported by a showing that the attorney will give material evidence to the issues before the Court and the evidence is unobtainable elsewhere. *Williams v District Court*, 700 P.2d 549, 556 (Colo. 1985). Finally, because the subject matter of the subpoena has not been disclosed, the People will assert privileges of work-product, executive, and attorney-client.

1. On October 21, 2021, Jeffrey Lindsey, a Senior Deputy District Attorney on

this case, was served with a “subpoena to appear.” That subpoena orders him to appear and testify on November 9, 2021 at 1:30 concerning this case. That is the date for a motions hearing concerning discovery and pretrial publicity.

2. The District Attorney has standing to move to quash subpoenas because they have “an in the case’s management and the prevent of witness harassment.” *People v Brothers*, 2013 CO 31 ¶9, 308 P.3d 1213, 1215, citing *People v Spykstra*, 234 P.3d 662, 666 (Colo. 2010). The prosecution has an “independent interest in ensuring the propriety of the subpoenas.” *Id.* The principles that applied to subpoena duces tecum pursuant to Crim.P. Rule 17 in *Spykstra*, was held to include witness subpoenas in *Brothers*. *Id.* ¶10, 308 P.3d at 1215.

3. The purpose of the hearings scheduled for November 9, 2021 in this matter is to consider issues related to discovery and pretrial publicity. Just as in *Brothers* that addressed a subpoena for a witness to testify at a preliminary hearing that was limited to a probable cause finding, the issues before this Court are limited. Just as the Court in *Brothers* had discretion to control the evidence at a preliminary hearing, this Court has the discretion to control the evidence at a motions hearing. *Brothers*, ¶17, 308 P.3d at 1217.

4. Pursuant to the Code of Professional Responsibility (superseded by the Rules of Professional Conduct), the calling of an attorney as a witness for the other party must be supported by a showing that the attorney will give evidence material to the determination of the issues being litigated, the evidence is unobtainable elsewhere, and that the testimony is or may be prejudicial to the testifying attorney’s client. *Williams v District Court*, 700 P.2d 549, 556 (Colo. 1985) (quashing prosecution’s subpoena to public defender) citing *Cottonwood Estates, Inc. v Paradise Builders*, 128 Ariz. 99, 624 P.2d 296 (1981).

5. As an officer of the court, the witness can, if necessary, make statements and offers of proof to the Court. There is no compelling need to have a witness for the People appear and testify in this case – and the defense has given none. Thus, if the People believe a response is required to something that is “unobtainable elsewhere,” the witness can give appropriate statements.

6. The subject matter of the subpoena has not been disclosed. The District Attorney therefore asserts the attorney-client, work-product and executive privileges.

The People respectfully request that this Court quash the subpoena.

Respectfully Submitted:

_____/s/_____
Daniel W Edwards 7938
Deputy District Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was served on the opposing party by filing in the Court's e-filing service on this date.

_____/s/_____
Dan Edwards

<p>DISTRICT COURT, CHAFFEE COUNTY, COLORADO</p> <p>Court Address: 142 Crestone Ave. Salida, CO 81201</p> <p>Court Phone: (719) 539-2561</p>	<p>DATE FILED: October 25, 2021 4:20 PM</p>
<p>THE PEOPLE OF THE STATE OF COLORADO,</p> <p>v.</p> <p>BARRY LEE MORPHEW, Defendant.</p>	<p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 21CR78</p>
<p>Iris Eytan, #29505 Dru Nielsen, #28775 Eytan Nielsen LLC 3200 Cherry Creek South Drive, Suite 720 Denver, CO 80209 Telephone: (720) 440-8155 Facsimile: (720) 440-8156 Email: iris@eytan-nielsen.com dru@eytan-nielsen.com</p> <p><i>ATTORNEYS FOR DEFENDANT BARRY LEE MORPHEW</i></p>	<p>Courtroom/Division: 2</p>
<p align="center">RESPONSE TO PROSECUTION MOTION TO QUASH SUBPOENA ISSUED TO JEFFREY LINDSEY [P-27-RESPONSE]</p>	

Mr. Barry Morphew, through undersigned counsel, OBJECTS to the Motion to Quash the Subpoena issued to Jeffery Lindsey. AS GROUNDS, Mr. Morphew states:

1. Mr. Morphew has filed a motion to sanction Mr. Lindsey and other prosecutors for misrepresentations made in court, discovery violations, and prosecutorial misconduct.
2. The prosecution claims that because Mr. Lindsey is a prosecutor, he has no obligation to come to court and testify like any other witness.

3. The prosecution is wrong: Mr. Lindsey has an obligation to testify just like any other fact witness.

4. Prosecutors may be called by the defense to testify at pre-trial and post-trial hearings. *People v. Ehrnstein*, 2018 CO 40, 417 P.3d 813, 817 (Colo. 2018).

5. No preliminary showing is ordinarily required to subpoena a witness. *Losavio v. District Court*, 533 P.2d 32 (Colo. 1975); *People v. Ensor*, 632 P.2d 641 (Colo.App. 1981). Parties have discretion to call those witnesses they choose to call. Crim. P. 17; *Ensor*, 632 P.2d at 641 (citing *Hampton v. People*, 465 P.2d 394 (Colo. 1970)).

6. Rule 17(a) gives parties the power to compel the attendance of witnesses by subpoena. “Although [Rule 17] provides supervision by the court, there is no authority under it to quash the subpoena if the [party] has complied with the technical requirements of the rule.” *Ensor*, 632 P.2d at 641.

7. In *People v. Ensor*, the prosecutor subpoenaed the defendant’s former counsel to testify at trial. The trial judge found this to be unethical, and so granted the former counsel’s motion to quash. The prosecutor filed a Rule 21 petition, and the Colorado Supreme Court ruled that “the court has no power to quash a subpoena that has been properly issued, and an attorney has no more right than any other witness to refuse to respond to a subpoena and must honor a subpoena properly issued and served.” *Id.*, 632 P.2d at 641, citing *Losavio*, 533 P.2d 32.

8. Prosecutors have been called to testify in Colorado. *See Ensor, supra*. Also:

A. In *People v. Contreras-Perez*, Crowley County No. 2012 CR 60, two prosecutors (including Dan Edwards, who signed P-27) testified at a pretrial motion for sanctions based on prosecutorial misconduct allegedly committed by one of them. *See Exhibit A: Transcript from Sept. 5, 2019, pp. 9, 15-16* (testimony of Jack Roth, prosecutor

who had just resigned from the case due to the misconduct); and pp. 58-59 (testimony of Daniel Edwards, who was serving as a Special Deputy District Attorney on the case at the time of his testimony).

B. In *People v. Alejandro Perez*, Lincoln County No. 05CR74, at least four prosecutors (*including Dan Edwards, who signed P-27*) testified at a series of pretrial hearings seeking, among other things, an order disqualifying both an individual prosecutor (Daniel Edwards) and the 18th Judicial District Attorney's Office from the representation. The Lincoln County District Court granted the relief. While the prosecution did not appeal disqualification of Dan Edwards, they did appeal the office-wide disqualification order. The Colorado Supreme Court reversed the office-wide order and remanded for further proceedings. *People v. Perez*, 201 P.3d 1220 (Colo. 2009). While undersigned counsel does not have the transcripts of these hearings, the prosecution, in its Opening Brief filed in the Colorado Supreme Court references the various district attorneys that testified at the hearings held by the trial court. See Exhibit B: 08SA130, Opening Brief, pp. 6 (Mr. Edwards testified as a witness...), 7 (an assistant and a deputy district attorney testified), 13-14 (the Deputy District Attorney formerly assigned to the case testified), 27 ("Mr. Edwards testified..."), 30 ("Edwards has testified... Edward testified...").

C. In *People v. Montour*, Douglas County No. 02CR782, two prosecutors (*including Dan Edwards, who signed P-27*) testified on pretrial motions on several occasions. Counsel does not have every transcript from this case to present to this Court but has submitted a representative sample, i.e., excerpts and indexes from evidentiary hearings held on July 25, 2008 (Dan Edwards and Susan Trout testified), September 2, 2008 (minute order, noting testimony of a deputy attorney general), April 1, 2009

(testimony of the controller for the 18th Judicial District Attorney's office testified), and July 22, 2009 (showing Deputy District Attorney Robert Watson and Attorney General John Suthers testified). Counsel has provided these in a combined document as at Exhibit C.

9. The prosecutor has asserted no reason that Mr. Lindsey cannot or should not appear and testify.

10. *People v. Spykstra*, 234 P.3d 662, 668 (Colo. 2010) does not apply. That case governs only subpoenas duces tecum (SDTs) under Rule 17(c), not subpoenas to testify under Rule 17(a). When documents and materials are subpoenaed and there is a claim of a protected interest or right to confidentiality, this Court is required to balance interests. *People v. Spykstra*, 234 P.3d 662, 668 (Colo. 2010) (courts may block enforcement of an “unreasonable or oppressive” third-party SDT). Here, the subpoena is not an SDT, there is no claim of protected interest or right to confidentiality, it is not even to a true “third party,” and there is nothing to balance. The prosecution does not claim that *Spykstra*'s requirements apply but rather, appear to cite it on the issue of standing only.

11. In its motion, the prosecution does not cite RPC 3.7 -- undoubtedly because RPC 3.7 does not apply. Instead, the prosecution alludes to it by referencing the now-superseded Code of Professional Responsibility. (P-27, ¶4). Colo. RPC 3.7 concerns disqualification of counsel **at trial** based on counsel being called as **a trial witness**.

12. “The overriding purpose of Colo. RPC 3.7 is to avoid prejudice associated with **jury confusion**.” *Ehrnstein*. 417 P.3d at 817 (emphasis added). The reason RPC 3.7 does not apply to testimony at a pretrial hearing is critical for this Court's determination. The concern RPC

3.7 addresses – i.e., jury confusion – is not implicated “in the context of pre- and post-trial litigation in front of a judge.” *Id.* at 816. The Colorado Bar Association Ethics Committee has explained:

Colo. RPC 3.7, like Model Rule 3.7, addresses only advocacy at ‘trial.’ In reliance upon that language, courts in Colorado and elsewhere have held that the disqualification rule is inapplicable to proceedings other than ‘trials.’ Thus, in *People ex rel. S.G.*, 91 P.3d 443, 450 (Colo.App. 2004), the Court of Appeals held that Rule 3.7 was inapplicable to post-trial proceedings. The Court of Appeals further noted that courts from other jurisdictions with rules similar to Colo. RPC 3.7 have held that the disqualification rule is inapplicable to ‘appeals, summary judgment motions or pretrial or post trial proceedings.’

CBA Ethics Committee Opinion, *Formal Opinion No. 78: Disqualification of the Advocate/Witness* (as revised, February 20, 2013) (Attachment D).

13. The prosecution cites cases that concern trial witnesses: *Williams v. District Court, El Paso County*, 700 P.2d 549 (Colo. 1985) (prosecutor subpoenaed defendant’s attorney as a **trial** witness); *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 624 P.2d 296 (Ariz. 1981) (a civil litigant’s motion to disqualify opposing counsel because the litigant wanted to call opposing counsel as a witness **at trial**). These cases do not concern a motion to quash at a pre-trial motions hearing.

14. The reason there are barriers to calling an attorney to testify at trial is that it ends up depriving the litigant of his or her counsel of choice, because the attorney will not be able to serve at the jury trial as both a party’s lawyer and a witness. *Williams v. District Court, supra*, cited by the prosecution, is about the prosecutor subpoenaing a defense attorney to be a trial witness against his own client, which raised serious constitutional considerations based on the accused’s right to counsel. The Supreme Court recognized that such a tactic is effectively a motion to disqualify the defense attorney from representation of the defendant at trial and therefore was concerned about this practice used by the government. *Id.* at 554-55. The Supreme Court explained that, if the prosecution can successfully subpoena “the accused’s attorney to give

testimony adverse to his client in a pending criminal prosecution,” a prosecutor might use this as a litigation tactic to strip the accused of his or her attorney:

the practice of subpoenaing the accused’s attorney as a prosecution witness, if not carefully monitored by the judiciary, could be converted into a device for forcing a particular lawyer to terminate his representation of the accused.

Williams, 700 P.2d at 555. Therefore, the Supreme Court disallowed the prosecutor’s move and set forth special requirements for these types of effective disqualification motions. *Id.* Notably, the Supreme Court did not quash all of the prosecutor’s subpoenas – only those of the attorneys slated to represent the defendant at the upcoming trial.

15. *Williams* does not concern the circumstances under which a party’s attorney can be called to testify at a pretrial hearing. It is a case about trial.

16. In this case, the subpoenaed witness (Mr. Lindsey) is not going to be representing the People at trial. He has resigned from the Eleventh Judicial District Attorney’s office.¹ It appears that the People are now being represented by an employee of the Colorado Attorney General’s Office, who has been deputized to prosecute the case for Linda Stanley and is now representing Mr. Lindsey.²

17. The prosecution also cites a case where a defense attorney subpoenaed an alleged minor victim and his parents to testify at a preliminary hearing in a prosecution for SAOC/position of trust and other offenses. *People v. Brothers*, 2013 CO 31, 308 P.3d 1213. The Routt County District Court had refused to hear the prosecutor’s motion to quash the subpoena for the child victim and his parents. Not surprisingly, in large part because the child’s testimony wasn’t necessary to establish probable cause, the Supreme Court remanded for the district court to take

¹ It is not clear that Mr. Lindsey will be representing the People at the motions hearing since his resignation was announced to be effective November 5, 2021.

² While Linda Stanley’s name is in the caption of P-27, she did not sign it; nor did Dan Edwards appear to sign for her.

up the motion to quash and rule on it.³ The case was eventually bound over to the district court without a preliminary hearing, so the issue was never ultimately determined. See People v John Holland Brothers, Routt County No. 12CR48 (hearing entry of 2013-06-21, showing preliminary hearing “vacated” and minute order entry of 2013-08-02, showing “Bindover To Dist Ct W/o Prelim”).⁴ Yet, the prosecutors in this case cite *People v. Brothers* no less than four times in its six-paragraph motion, as if *Brothers* provides controlling law on the issue before this Court. It doesn’t.

18. The prosecution’s citation of *People v. Brothers* in paragraph 2 of P-27 is inaccurate and misleading. The portion of *Brothers* that the prosecution cites concerned only **standing**, not the merits of the SDT: “We see no reason for conferring **standing** to the District Attorney in one instance and not in the other.” *Brothers*, ¶10 (emphasis added)(cited in P-27, para. 2). The issue in that part of the opinion was “the **standing question** as it pertains to witness subpoenas...” *Ibid.* (emphasis added).

19. *Spykstra* does not apply to Rule 17(a) witness subpoenas, and contrary to the prosecution’s implication, *Brothers* did not so hold.

20. The prosecutor has failed to show any applicable legal authority for quashing the subpoena for Mr. Lindsey’s testimony.

21. *People v. Ehrnstein* is dispositive. There, the defense called a prosecutor to testify at a post-trial hearing on a motion for new trial. The district court ruled that the prosecutor’s

³ On remand, the prosecutor didn’t want the district court to even let the defense argue for the motion to quash, so filed another Rule 21 – which was denied.

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2013-06-21	01:15 PM		1A	Preliminary Hearing	Vacated	James Herbert Garrecht (9405)
2013-08-02	BIND			Bindover To Dist Ct W/o Prelim		

appearance on the witness list required appointment of a special prosecutor, under the theory that the prosecutor could not serve as both a litigant and a witness at the hearing. The prosecutor filed a Rule 21 petition challenging the disqualification order. The Colorado Supreme Court reversed, because there is no prohibition against the prosecutor testifying at a non-jury hearing and also serving as a litigant at that hearing. The Supreme Court found that RPC 3.7 did not apply, so no special prosecutor was required. *Id.*, at 817.

22. The prosecution makes a vague claim of privilege. (P-27, para. 6)(“The subject matter of the subpoena has not been disclosed. The District Attorney therefore asserts the attorney-client, work-product and executive privileges.”). This is not a proper invocation of privilege. “The burden of establishing that a particular communication is privileged rests on the party asserting the privilege.” *Wesp v. Everson*, 33 P.3d 191, 198 (Colo. 2001) (attorney-client privilege). *See also Hartmann v. Nordin*, 147 P.3d 43, 49 (Colo. 2006) (burden to establish applicability of physician-patient privilege in the first instance is upon the party who asserts it).

23. The prosecution cites no caselaw in support of its vague claim of privilege. Nor does the prosecution cite any case that allows it to make a blanket claim of privilege, with a laundry list of potential privileges, simply because it does not know what questions will be asked. This is not grounds to quash a subpoena.

24. Claims of privilege must asserted be on a question-by-question basis.

25. Mr. Lindsey has not yet been asked any questions. The prosecutor must wait until a question is posed, assert any privilege to that particular question, and then at that point this Court would rule on whether the particular question calls for an answer that is privileged from disclosure. *Compare People in Interest of K.S.-E.*, 2021 COA 93, 2021 WL 2842044 (the Fifth Amendment privilege must be asserted on a question-by-question basis).

26. Although the attorney-client privilege and attorney work product doctrines “may be asserted at trial as a bar to specific questions, they are not grounds for quashing a subpoena properly issued.” *S.C. Ins. Co. v. Fisher*, 698 P.2d 1369, 1371 (Colo. App. 1984), citing *People v. Ensor*, *supra*; *Wesp v. Everson*, 33 P.3d 191, 198 n. 10 (Colo. 2001) (“the appropriate way to assert the [attorney-client] privilege is on a question-by-question basis and not by a general assertion of the privilege.”); *United States v. White*, 950 F.2d 426, 430 (7th Cir.1991)(The claim of attorney-client privilege cannot be a “blanket claim,” rather, it must be made and sustained on a question-by-question basis, with the party claiming the privilege bearing the burden of establishing all of the requirements for invoking the privilege).

27. “[T]he work product doctrine safeguards only an attorney's opinion of the facts, not the facts themselves.” *Gall ex rel. Gall v. Jamison*, 44 P.3d 233, 238 (Colo. 2002) (citing *Hickman v. Taylor*, 329 U.S. 495, 507–08 (1947)). When a lawyer functions in an investigative capacity, and not as a legal counselor, the work product privilege does not protect communications he makes or receives. *Compare Munoz v. State Farm Mut. Auto. Ins. Co.*, 968 P.2d 126, 130 (Colo. App. 1998)(neither work product doctrine nor an insurance statute protected the lawyer from disclosure when he operated in an investigative capacity). In this case, Mr. Lindsey purports to have already revealed to this Court the communications he received, which would strip them of any work-product-privileged status. He opened the door to this topic when he alleged that certain statements were made to him by witnesses.

28. Mr. Lindsey’s communications with lay and law enforcement witnesses regarding this case, are not attorney-client conversations.

29. The prosecutor does not explain its claim to “executive privilege.” There is no Colorado case precedent upholding the prosecutor’s refusal to testify about an investigation or

about his or her own alleged misconduct based on a claim of “executive privilege.” Even when such claims are legitimately asserted by an Executive, they are subject to judicial review. See *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973)(the President does not have absolute discretion to withhold material subpoenaed by a grand jury and it is for the court, not the President, to determine the applicability of a president’s claim of executive privilege); *United States v. Nixon*, 418 U.S. 683, 706 (1974)(“neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”); *Clinton v. Jones*, 520 U.S. 681, 703 (1997)(“when the President takes official action, the Court has the authority to determine whether he has acted within the law”). This Court should reject the suggestion that the prosecutor – simply because he is a prosecutor – may violate the rules of discovery, violate his ethical rules, and snub his nose at a subpoena.

30. The prosecution makes the remarkable claim that Jeff Lindsey does not have to give testimony under oath because he is “an officer of the court.” (P-27, para. 5). The prosecution cites no caselaw in support of this proposition. This idea is contradicted by *Ehrnstein, supra*. If the prosecution’s argument were true, prosecutors could never be called as a witness. There simply is no such “prosecutorial immunity from testifying” in court, and that is undoubtedly why the prosecutor can cite no authority for such theoretical immunity.

31. Mr. Morphew makes this objection and response, 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, and RPC 3.8. Mr. Morpew cross-references and incorporates by reference all pleadings filed or to be filed in this case, and caselaw cited therein and at oral argument.

Respectfully submitted this 25th day of October 2021.

EYTAN NIELSEN LLC

s/ Iris Eytan

Iris Eytan, #29505

s/ Dru Nielsen

Dru Nielsen, #28775

CERTIFICATE OF SERVICE


I hereby certify that on this 25th day of October 2021, a true and correct copy of the foregoing **RESPONSE TO PROSECUTION MOTION TO QUASH SUBPOENA ISSUED TO JEFFREY LINDSEY [P-27-RESPONSE]** was served via CCE as follows:

Mr. Jeffrey Lindsey
Mr. Daniel Edwards
11th Judicial District Attorney's Office
101 Crestone Ave.
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s/ Tonya Holliday _____
Tonya Holliday

District Court, Chaffee County, Colorado Chaffee County Combined Courts P. O. Box 279, 142 Crestone Avenue Salida, CO 81201 (719) 539-6031	<input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
THE PEOPLE OF THE STATE OF COLORADO vs. Barry Lee Morphew, Defendant	
Linda Stanley DISTRICT ATTORNEY BY: Mark Hurlbert Deputy District Attorney 104 Crestone Avenue P. O. Box 699 Salida, CO 81201 Telephone: (719) 539-3563 Fax: (719) 539-3565 Attorney Registration No.: 24606	Case No: D0082021CR000078 Division 2
NOTICE OF ENDORSEMENT OF WITNESS	

LINDA STANLEY, District Attorney in and for the Eleventh Judicial District, State of Colorado, hereby notifies the defense and court of the endorsement of the following witnesses in the above entitled case.

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Mallory Morphew


Melinda Moorman-Baumunk


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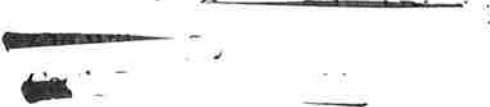
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William Tezak

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Darin Oliver

Dave McGill

Gina McGill

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Holly Burman

Curtis Sigler

Robert Oleckv

Daniel Minton

Emily Saxon

Jeff Iles

Laura Roth

Nathan Roth

Dean Remington

Shirley Morphew

Lindsay Davis

Holly Booton

Seth Richardson

Susan Richardson

Lara Ruth Richardson

Nicholle Brashears

Tracey Nichols

Megan Walberg

Abigail Hutchinson

Melvin Reedy

Ashley Johnson

Hollie Hirst

Heather Kelley

Tim Farrell

Eric Schmalz

James Hansen

Cindy Criswell

John Schmitz

Margaret Thomas

Madison Adams

Kurt Simpson

Cassidy Cordova

Scott Banks

Shoshona Darke

Joseph Ellsworth

Rocky Mazza

Ben Parker

Geroge Davis Jr

Trenton Howard

Sandra Christensen

Shelly Kundle

Christopher Moorman

Anthony Miller

James Johnson

Jacob Hadley

Justin Burns

P

Karen Fortier

Jeffery Criswell

Jose Perez

Erik Kaye

David Booton

Hanley Harvey

Michael Coleman

Jason Hardwick

Valerie Sites

Kent Townsend

Jeffery Puckett

Nicholas Wrights

Justin Cribari

Joseph Zukowski

Jacqueline Guggenheim

Jacob Wood

Karry Wooddell

Lisa Wood

Cody Lee Lambert

Casey Wood

Andrew Bullard

Thomas Dufficy

David Kisiel

Tisha Leewaye

Lynn Megyeri

Kyle Stoddard

Samuel Davis

Rebecca Hauser

Taylor Mellick

Wade Swift

Matthew Mullally

Roy Kerbey

Matthew Burton

David Mennel

James Freeman

Seth Pickett

Walter Skinner

Daniel Ritchie

Patrick Tubbs

Kyle Hamilton

Jaime Becerra

Loretta Ehnes

Scott Goodpasture

John Grass

Joshua Cooper

Jerzy Zelinski

Jonathan Keller

Susan Bonne

Kelly Gillum

Timothy Gillum

Sarah Noel

Marcy Kirkwood

Scott Beck

Christopher Wilson

Erin Wilson

Thomas Barnes

Donna Barnes

Julie King

William King Jr

Kyle Cambre

Salvatore Cannatella

Randy Lockwood

Marcia Finkbiner

Nicholas Finkbiner

Crist Blassaras

Steven Sundling

Janet Sherwood

Larry Sherwood

Tanner Coy

Tawnya Vonallmen

Jerry Mobley

Janie Ohare

John Bartha

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Custodian Of Records
Forensic Files
The Learning Channel
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Portland, OR 97201

Custodian Of Records
Forensic Files - Court Tv
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Ted Turner

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William Scribner

Garry Negroni

Trevor Noel

Samantha Brooke Bennett

Maureen Hartman

Trish Ruben

Cassi Morgan

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Terry Balko

Carol Blackwell

Jason Benci

Christina Brown

Heather Bourget

Craig Campbell

Brittney Buchholz

Judson Casebeer

Jackson Campbell

Kayla Collins

Alexander Chacon

Patrick Collins

Laurin Collins

Jennifer Cone

Samantha Collins

Catherine Cushman

John Cramm

Cecilia Darracott

Peter Cushman

Brian Edwards

Terry Deveney

Ronald Fox

Nathan Emmert

Shayla Grovan

Cindy Glovan

Esta Elizabeth Hamilton

Joshua Hadley

Hillary Hastings

Jason Hansen

Marty Howard

Mary Margaret Herbert

Eric Johnson

Mary Howard

Sean Douglas Klein

Scott Kimberlin

Tara Marcilla

Erich Kondziolka

Steve Marshall

Cara Marshall

Kenneth Ray Martinez

Dominick Martinez

Erik Moorman

Kathy Mcquillan

Colton Neppl

Frank Musselwhite

Kate Okada

Janelle Neppl

Christina Ormsby

Mary Oliver

Georgina Mae Pinheiro

Charlotte Pasquale

Bethany Rediger

Joseph Plotner

Luke Reinsch

Christina Reinsch

Cinda Rilev

Julie Richardson

Daniel Jay Roche

Vincent Robinson

Andrew Roth

Christine Rochester

Curtis Scheib

Lora Jean Saranga

Thomas Smith

John Sell

Aaron P Stitzman

Holly Steckler

Mark Andrew Street

Eric Stone

Kathryn Theising Balko

Ned A Suesse

Doyle Trimble

Jonathan James Treat

Michelle L Vold

Jake Vold

Joshua Webb

Delmart E Vreeland
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Canon City, CO

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Merideth Calhoun

Patricia Cauthron

Ethan Cauthron

Charles Conrad

Holly Clem Maclachlan

Jennie Dandridge

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Lila Ezell

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Teresa Fountain

Gregory Gentile

Emily Gentile

Ken Gibson

Stephen Michael Gentile

Abraham Gonzalez-Ramos

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Matthew Halsall

Katherine Rose Keast

Michael Jones

Mark Alan Knaus

Dillon Kimberlin

Alexis Machlachlan

John Lunsford

Lisa Martin

Angela Marinucci

Brent Russell Montgomery

Diane Matheny

Steve Nelin

Rodney Morphew

Teresa Pelke

Janel Oversole

Alice Petersen

Virginia Perez

Kim Rossie

James Ramsey

Kathy Scarbrough

Lisa Savoy

Janene Shuey

Eric Shoenfeld

Jessica Tezak

Willis Shuey

Linnie Velasquez

Jill Townsend

Sheila Almeida Hannigan

Holly Jo Wesner

Cody Bitz

Heidi Anderson

Mark Branson

Roanld Braden

Melody Brantman

Mary Branson

Tiffany Butala

Matthew Burton

Janelle Campbell

Jonathan Byrd

Cody Cellentani

Nick Campbell

Terry Clegg

Jason Chemofsky

Chris Davis

Kristina Collins-Carr

Dusty Draper

John Diesslin

Stormy Erbschloe

Kenneth Durham

Carol Games

Greg Fisher

Shelley Garcia

John Gano

Harmony Hartranft

Kylie Hager

Wendy Kessinger

Robert Keesling

Terry Lott

Amanda Lewey

Deborah Moorman

Miranda Lujan

Felix Munoz

Steve Metz

Jillian Osswald

John Arnold

Julie Pratt

Don Owens

Rodney Reasen

Judith Raski

Daniel Sachtleben

Dave Remington

Lauren Kay Scharf

Roxanne Sachtleben

Reid Schwinn

Brett Schneider

Heather Smith

Aaron Smith

Alyssa Townsend

Bella Styles

Jodi Weiss

Zo Von Eaton

Thomas Wilson

Lauren Whitaker

Fiorela Zuniga

Shane Wright

Brenda Rivera-Valdez

Address information will be added when known.

This is a current list subject to updating and supplementing.

Respectfully submitted this 29 day of October, 2021.

By: /s/ Mark Hurlbert Date: 10/29/2021
Mark Hurlbert #: 24606
Deputy District Attorney

CERTIFICATE OF SERVICE

I certify that on this 29th day of October, 2021, a true and correct copy of the foregoing Notice To Endorse was served via Colorado Courts E-Filing on all parties who appear of record and have entered their appearances herein according to Colorado Courts E-Filing.

By: /s/ Crystal Keim

District Court, Chaffee County, COLORADO 142 Crestone P.O. Box 279 Salida, Colorado 81201 (719) 539-2561	DATE FILED: October 29, 2021 3:20 PM
Plaintiff(s): THE PEOPLE OF THE STATE OF COLORADO, v. Defendant(s): MORPHEW, BARRY LEE	▲ COURT USE ONLY ▲ Case No.: 2021CR78 Division: 2
Case Management Order	

On October 13, 2021, the Court heard arguments from the parties regarding Defense Proposed Pre-Trial Case Management Order D-27, and Request for the Prosecution to Inventory the Discovery D-20 and hereby enters the following Orders:

I. DISCOVERY

1. Pursuant to Crim. P. 16 V.(d), the parties shall each submit a Compliance Certificate by **November 1, 2021**. The prosecution’s certificate should identify the discovery, bates numbering if applicable and the date the discovery was furnished to the defense.

II. PRE-TRIAL MOTIONS AND MOTIONS HEARINGS

1. Pre-Trial Motions (except motions *in limine* and motions directed to expert testimony as addressed in the subsequent sections) shall be filed no later than **December 7, 2021**. Responses to Pre-Trial Motions are due **January 7, 2022**. Replies to Responses to Pre-Trial Motions are due **January 21, 2022**.

2. Motions Hearings are scheduled for **January 25, 2022 at 8 a.m., February 1, 2022 at 9:30 a.m., and February 8, 2022 at 8:00 a.m.**

III. EXPERT DISCLOSURES

1. Prosecution expert disclosures are due **February 14, 2022** and supplement expert disclosures are due **March 21, 2022**. Defense expert disclosures are due **March 7, 2022**. These disclosures should include the underlying facts or data supporting the opinion, as well as providing a written summary of the testimony describing the witness' testimony (if no report has been prepared by the expert). Rule 16 I(a)(d)(3). Objections to the admissibility of any expert testimony under C.R.F. 702 (e.g., *People v. Shreck*, 22 P.3d 68 (Colo. 2001)), or for any other reason, shall be filed by the parties by **March 29, 2022**.
2. A hearing on any expert objections is scheduled for **April 7, 2022 at 8:00 a.m.**

IV. MOTIONS *IN LIMINE*

1. Motions *in limine* shall be filed no later than **April 5, 2022**, and the nonmoving party shall have **14 days** to respond thereto. Any motion filed after these deadlines must state with particularity the reasons that the motion was not timely filed.

V. PRE-TRIAL CONFERENCE

1. A Pre-Trial Conference is scheduled for **April 8, 2022 at 8:00 a.m.**

VI. LIST OF WITNESSES AND EXHIBITS AND EVIDENCE PROSECUTION INTENDS TO ADMIT AT TRIAL

1. The prosecution shall provide a witness list of the names and addresses of the witnesses known to the district attorney whom he or she intends to call at trial by **November 9, 2021**. Crim. P. Rule 16 I(b)1(VIII).
2. The prosecution shall submit updates to the witness list when the prosecution knows it may call additional witnesses.
3. The parties shall submit their good faith written witness lists by **March 4, 2022**.

4. The prosecution shall submit its good faith witness list for trial on **April 18, 2022.**

VII. JURY QUESTIONNAIRES

1. The parties shall exchange their proposed juror questionnaires by **April 1, 2022** and be prepared to present to the Court any non-agreed upon questions on **April 8, 2022.**

VIII. JURY INSTRUCTIONS

1. Proposed jury instructions and verdict forms should be prepared in accordance with Crim. P. 30 and submitted to the court and opposing counsel on or before **May 2, 2022.**

IX. OUTSTANDING ISSUES

1. On May 3, 2022, the jury will be summoned to appear to fill out the questionnaires. The parties will be provided with the completed jury questionnaires on May 3, 2022.
2. On May 3, 2022, the parties may address the court with other last-minute motions and issues.
3. Jury Selection will begin on **May 4, 2022.**

IT IS SO ORDERED.

By the court, this 28th day of October, 2021.

/s/ Patrick W. Murphy, District Court Judge

<p>DISTRICT COURT, CHAFFEE COUNTY, COLORADO</p> <p>Court Address: 142 Crestone Ave. Salida, CO 81201</p> <p>Court Phone: (719) 539-2561</p>	<p>DATE FILED: November 1, 2021 3:14 PM</p>
<p>THE PEOPLE OF THE STATE OF COLORADO,</p> <p>v.</p> <p>BARRY LEE MORPHEW, Defendant.</p>	<p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 21CR78</p>
<p>Iris Eytan, #29505 Dru Nielsen, #28775 Eytan Nielsen LLC 3200 Cherry Creek South Drive, Suite 720 Denver, CO 80209 Telephone: (720) 440-8155 Facsimile: (720) 440-8156 Email: iris@eytan-nielsen.com dru@eytan-nielsen.com</p> <p><i>ATTORNEYS FOR DEFENDANT BARRY LEE MORPHEW</i></p>	<p>Courtroom/Division: 2</p>
<p align="center">CERTIFICATE OF COMPLIANCE [D-30]</p>	

Mr. Barry Morphey, by and through undersigned counsel, pursuant to Court Order entered on October 13, 2021 certifies he has complied with Rule 16 (V)(d)(1) as ordered by the Court.

Respectfully submitted this 1st day of November, 2021.

EYTAN NIELSEN LLC

s/ Iris Eytan
Iris Eytan, #29505

s/ Dru Nielsen
Dru Nielsen, #28775

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2021, a true and correct copy of the foregoing **CERTIFICATE OF COMPLIANCE [D-30]** was served via CCE as follows:

Mr. Mark Hurlbert
11th Judicial District Attorney's Office
101 Crestone Ave.
Salida, CO 81201

s/ Tonya Holliday _____
Tonya Holliday

Combined Courts, Chaffee County P. O. Box 279 142 Crestone Avenue Salida, CO 81201	DATE FILED: November 1, 2021 4:22 PM
THE PEOPLE OF THE STATE OF COLORADO vs. BARRY LEE MORPHEW, Defendant	<input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
Linda Stanley Eleventh Judicial District District Attorney, # 45298 District Attorney's Office 104 Crestone Avenue P. O. Box 699 Salida, CO 81201 Phone Number: (719)539-3563 Fax: (719)539-3565	Case No: D0082021CR000078 Div: 2 Courtroom:
DISCOVERY COMPLIANCE CERTIFICATE	

COME NOW, the People of the State of Colorado, by and through Linda Stanley, District Attorney for the Eleventh Judicial District and submit this discovery compliance certificate.

Throughout the pendency of this case the People have produced ongoing discovery in a couple of ways; physical media and e-Discovery. The initial disclosure was on 6/2/21 as indicated below in more detail and will continue until this case is closed as we receive reports, media, or other information.

A list of e-Discovery items is attached as attachment 01 (367 pages). Attachment 01 shows the date of disclosure as well as the date(s) of download by defense counsel. The list is current through 10/28/2021 and packet 106. It contains the dates of the disclosures and has a list of each item disclosed on that date.

Regarding the physical media, the dates and overview list of items is included in this document which will track pages 1-5 of Investigator Ordway's report that is attachment 02 (27 pages). Attachment 02 starts with an overview of the items physically handed over to defense counsel. That is followed by the individual reports of each disclosure.

The additional documentation submitted as attachments will also be attached as suppressed documents. The suppressed documentation will include descriptions of the data disclosed, file names, names of people and personal information, and directories of each of the items listed. They

are suppressed in order to keep information private from the public to help ensure a fair trial and protect privacy interests of individuals while allowing the parties and the court to review the items for discovery compliance.

Directories are a listing of the files contained within the physical media. Directories do not contain the data within the files. For example, it will show "initial report" is contained within a folder but does not show the content of "initial report." Directories may be very large and upward of 20,000 pages for some items due to the numerous files contained therein. Those directories may be broken down into multiple attachments for uploading and downloading purposes.

6/2/21

An external hard drive, 9 DVD's, 8 CD's and 1 flash drive. A list of those items is on page 9 of Investigator Ordway's reports, attachment 02. On pages 10-12 of Investigator Ordway's report are overview screenshots of the folders from the external hard drive discovered to defense on 6/2/21. The hard drive contained reports and associated media. The seventeen DVD's and CDs are combined into one attachment (attachment 04, 226 pages). The flash drive directory (attachment 05, 193 pages) and Elements hard drive directory (attachment 03, 747 pages) are filed as separate attachments.

7/6/21 and 7/19/21

A SATA hard drive containing data scrapes from 3 iPhones and an iPad on 7/6/21. On 7/19/21, an external hard drive with the same material. Two disclosures were done because defense counsel indicated they could not open the original SATA drive. This directory is broken up into 4 separate attachments based on device. Only one directory is done for both disclosures because they are the same data. There are 4 directories with the following page counts: 1) iPhone (attachment 06, 4,410 pages), 2) iPad (attachment 07, 744 pages), 3) iPhone (attachment 08, 4855 pages), 4) iPhone (attachment 09, 9585 pages).

7/12/21

A SATA hard drive containing an iCloud/Apple account. The name of the iCloud holder is indicated in Investigator Ordway's report. A directory of this item is not included at this time.

7/15/21

A flash drive containing vehicle extraction files. The description of the vehicle is indicated in Investigator Ordway's report. A directory of this item is not included at this time.

7/21/21

5 discs from CBI, the directories are attached in one attachment (attachment 10, 5 pages).

7/26/21

18 DVDs/CDs and 2 USB flash drives. Directories for all 20 items are contained in one attachment (attachment 11, 37 pages). The directories are in the order of the items as indicated on page 1-2 of Investigator Ordway's report.

Hard drive 1D7 copy 12-18-20/5-11-21. A directory of this item is not included at this time.

7/29/21:

4.52gb USB flash drive – directory is attachment 12 (20 pages).

47 DVD's - directory of all 47 DVD's is attachment 13 (315 pages).

Toshiba external hard drive containing 1.20tb of files. The directory is attachment 14 (2662 pages).

8/4/21:

External hard drive containing 203gb in 92 folders under the head folder name of "08-02-2021". The directory for this hard drive is attachment 15 (209 pages).

9/10/21:

13 DVDs and 1 flash drive containing calls, notes and a CV. All 14 items are contained in one directory that is attachment 16 (108 pages).

Discovery is an ongoing process in this case and will continue until the conclusion of this case.

Dated: November 1, 2021

Respectfully submitted,
LINDA STANLEY
/s/ Aaron Pembleton, # 53924
Deputy District Attorney
/s/ Linda Stanley, # 45298
/s/ Mark Hurlbert, #24606
/s/ Daniel Edwards, # 7938
/s/ Jeffery Lindsey, #24664

CERTIFICATE OF SERVICE

I certify that on November 1, 2021, a true and correct copy of the foregoing Motion was served via Colorado Courts E-Filing on all parties who appear of record and have entered their appearance herein according to Colorado Courts E-Filing.

By: /s/ Aaron Pembleton

Combined Courts, Chaffee County P. O. Box 279 142 Crestone Avenue Salida, CO 81201	DATE FILED: November 1, 2021 4:57 PM
THE PEOPLE OF THE STATE OF COLORADO vs. BARRY LEE MORPHEW, Defendant	<input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
Linda Stanley Eleventh Judicial District District Attorney, # 45298 District Attorney's Office 104 Crestone Avenue P. O. Box 699 Salida, CO 81201 Phone Number: (719)539-3563 Fax: (719)539-3565	Case No: D0082021CR000078 Div: 2 Courtroom:
NOTICE RE: ATTACHMENTS	

COME NOW, the People of the State of Colorado, by and through Linda Stanley, District Attorney for the Eleventh Judicial District, and hereby provide the Court and the Defendant the following:

1. Various attachments were too large to upload to the court in the format they are currently in, to wit:
 - a. Attachment 6 – 2021-07-06 Data Scrape 1
 - b. Attachment 8 – 2021-07-06 Data Scrape 3
 - c. Attachment 9 – 2021-07-06 Data Scrape 4
 - d. Attachment 14 – 2021-07-29 – Toshiba Hard Drive
2. The People are working to resolve this issue and they will be filed as soon as possible.
3. The items may need to be split into additional segments
4. The People will keep the Court and counsel apprised of any numbering changes to the attachments.

Dated: November 01, 2021

Respectfully submitted,
 LINDA STANLEY
/s/ Aaron Pembleton
 Aaron Pembleton, #53924
 Deputy District Attorney

CERTIFICATE OF SERVICE

I certify that on November 01, 2021, a true and correct copy of the foregoing Motion was served via Colorado Courts E-Filing on all parties who appear of record and have entered their appearance herein according to Colorado Courts E-Filing.

By: /s/ Aaron Pembleton

DISTRICT COURT, CHAFFEE COUNTY, COLORADO

FILED November 2, 2021 2:06 PM

Court Address: 142 Crestone Ave., P.O. Box 279
Salida, CO 81201

Phone number: 719-539-2561

THE PEOPLE OF THE STATE OF COLORADO

vs.

BARRY LEE MORPHEW,
Defendant

Attorney for Chaffee County Sheriff's Office :

Daniel Tom, #48100

Chaffee County Attorney's Office

104 Crestone Avenue

P.O. Box 699

Salida, CO 81201

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▲ COURT USE ONLY ▲

Case No. 21CR78

ENTRY OF APPEARANCE

The Office of the Chaffee County Attorney, through the undersigned counsel, hereby enters its appearance on behalf of the Chaffee County Sheriff's Office.

DATED November 2, 2021.

CHAFFEE COUNTY ATTORNEY'S OFFICE

By: S/ Daniel K. Tom

Daniel K. Tom, #48100

Attorney for Chaffee County Sheriff's Department

Filed electronically via ICCES

(Original signature on file at the

Chaffee County Attorney's Office)

CERTIFICATE OF SERVICE

I CERTIFY that I served a true and correct copy of the foregoing document by electronic transmission through ICCES or by depositing a copy in the US mail, postage prepaid first-class mail, addressed as follows:

Via ICCES on November 2, 2021

11th Judicial District Attorney's Office

104 Crestone Ave

P.O. Box 699

Salida, CO 81201

Iris Eytan

Dru Nielsen

Eytan Nielson LLC

3200 Cherry Creek South Drive, Suite 720

Denver, CO 80209

S/ Marcella Post _____

Marcella Post

(Original signature on file at the
Chaffee County Attorney's Office)

<p>DISTRICT COURT, CHAFFEE COUNTY, COLORADO</p> <p>Court Address: 142 Crestone Ave. Salida, CO 81201</p> <p>Court Phone: (719) 539-2561</p>	<p>DATE FILED: November 2, 2021 3:26 PM</p>
<p>THE PEOPLE OF THE STATE OF COLORADO,</p> <p>v.</p> <p>BARRY LEE MORPHEW, Defendant.</p>	<p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 21CR78</p>
<p>Iris Eytan, #29505 Dru Nielsen, #28775 Eytan Nielsen LLC 3200 Cherry Creek South Drive, Suite 720 Denver, CO 80209 Telephone: (720) 440-8155 Facsimile: (720) 440-8156 Email: iris@eytan-nielsen.com dru@eytan-nielsen.com</p> <p><i>ATTORNEYS FOR DEFENDANT BARRY LEE MORPHEW</i></p>	<p>Courtroom/Division: 2</p>
<p align="center">MOTION FOR NOTICE OF THE PROSECUTION’S INTENTION TO INTRODUCE ANY EVIDENCE OR TESTIMONY UNDER CRE 807 [D-32]</p>	

Mr. Barry Morphey, by and through undersigned counsel, hereby requests that this Court order the prosecution to provide Mr. Morphey with written notice, on or before December 7, 2021, of any evidence or testimony it seeks to introduce under CRE 807. It is imperative this notice be filed by December 7, 2021 to allow time to respond to and litigate at the Motions Hearings. Further, Mr. Morphey requests that this Court rule that no such evidence will be admitted if said notice is not provided. AS GROUNDS, Mr. Morphey states:

1. C.R.E. 807 contains the “residual exception” to the hearsay rule. It provides, in pertinent part:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

2. Pre-trial notification of intent to introduce a statement under Rule 807 is essential.

The rule states:

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

3. No time period is provided within the Rule for the pre-trial disclosure of statements sought to be introduced under Rule 807. The Defendant requests the Court direct the Prosecution to provide notice of the Prosecution's intent to introduce statements under Rule 807, together with the particulars of the statements, including the names and addresses of the declarants, by December 7, 2021, the motions filing deadline.

4. Early notice is required in part because of the way the prosecution has provided discovery in this case. The volume of discovery and the manner in which it has been disclosed is insufficient to give notice. "[T]he defense need not search for a needle in a haystack" *People v. Bueno*, 2018 CO 4, ¶ 40, 409 P.3d 320, 328, citing *Banks v. Dretke*, 540 U.S. 668 (2004). "A rule thus declaring 'prosecutor may hide, defendant must seek,' the [*Banks*] Court further reasoned, 'is not tenable in a system constitutionally bound to accord defendants due process.'" *Bueno*, at ¶ 40, quoting *Banks*, at 696.

5. The prosecution has already hindered defense preparation "by providing mountains of documents to defense counsel" and burying the exculpatory deep within the mountain. *Cf. United States v. Bortnovsky*, 820 F.2d 572, 574-75 (2d Cir. 1987)(ruling that the trial court erred in refusing a motion for a bill of particulars)(" We conclude that appellants were hindered in preparing their defense While we commend the Government for cooperating in the turning over of documents prior to trial, we do not look with favor on the manner in which the Government conducted the prosecution. The relevance of key events was shrouded in mystery at the

commencement of and throughout the trial. The Government did not fulfill its obligation merely by providing mountains of documents to defense counsel....”).

6. This Court has already found that the prosecution has violated its discovery obligations under Crim. P. Rule 16 and *Brady v. Maryland*, 373 U.S. 83 (1963).

7. Under these circumstances, notice must be interpreted as well in advance of trial, so that the defense has an opportunity to investigate and respond, as well as to interpose objections with this Court, and so this Court has sufficient time to hold necessary evidentiary hearings and issue findings.

8. CRE 807 is “to be used only rarely, and in exceptional circumstances and applies only when certain exceptional guarantees of trustworthiness exist and when high degrees of probativeness and necessity are present.” *People v. Shifrin*, 2014 COA 14, ¶ 59, 342 P.3d 506, 518, quoting *United States v. Turner*, 718 F.3d 226, 233 (3d Cir.2013) (internal quotation marks and alterations omitted). CRE 807 “is reserved for exceptional cases and is not intended as a broad license for judges to admit hearsay that does not fall within other specifically enumerated exceptions.” *People v. Tafoya*, 13CA1745, ¶ 21 (Colo. App. Dec. 15, 2016)(unpublished),¹ citing *Conoco Inc. v. Dep’t of Energy*, 99 F.3d 387, 392 (Fed. Cir. 1996); *People v. Shifrin*, 2014 COA 14, ¶ 59; *In re Steven D.*, 23 A.3d 1138, 1165 (R.I. 2011), and S. Rep. No. 93-1277 on bill (H.R. 5463) to establish rules of evidence, at 36 (Oct. 11, 1974) (exception applies “very rarely, and only in exceptional circumstances”).

9. If this Court decides to admit evidence under CRE 807, this Court is going to have to make “adequate findings on the record.” *People v. Shifrin, supra*, ¶ 60. Early notice will facilitate this Court’s ability to hold the necessary evidentiary hearings to assess reliability and to determine the issues.

10. Mr. Mophew 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

¹ Unpublished cases may be cited in this Court. *Patterson v James*, 2018 COA 173, 454 P.3d 345. *People v. Tafoya* is provided as Exhibit A to this motion.

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, and RPC 3.8. Mr. Morphey cross-references and incorporates by reference all pleadings filed or to be filed in this case, and caselaw cited therein and at oral argument.

WHEREFORE, Mr. Morphey respectfully requests that this Court order the prosecution to provide the defense, by December 7, 2021, with written notice of any evidence or testimony it seeks to introduce under CRE 807.

Respectfully submitted this 2nd day of November, 2021.

EYTAN NIELSEN LLC

s/ Iris Eytan

Iris Eytan, #29505

s/ Dru Nielsen

Dru Nielsen, #28775

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 2021, a true and correct copy of the foregoing **MOTION FOR NOTICE OF THE PROSECUTION'S INTENTION TO INTRODUCE ANY EVIDENCE OR TESTIMONY UNDER CRE 807 [D-32]** was served via CCE as follows:

Mr. Mark Hurlbert
11th Judicial District Attorney's Office
101 Crestone Ave.
Salida, CO 81201

s/ Tonya Holliday
Tonya Holliday

<p>DISTRICT COURT, CHAFFEE COUNTY, COLORADO</p> <p>Court Address: 142 Crestone Ave. Salida, CO 81201</p> <p>Court Phone: (719) 539-2561</p>	<p>DATE FILED: November 2, 2021 3:26 PM</p>
<p>THE PEOPLE OF THE STATE OF COLORADO,</p> <p>v.</p> <p>BARRY LEE MORPHEW, Defendant.</p>	<p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 21CR78</p>
<p>Iris Eytan, #29505 Dru Nielsen, #28775 Eytan Nielsen LLC 3200 Cherry Creek South Drive, Suite 720 Denver, CO 80209 Telephone: (720) 440-8155 Facsimile: (720) 440-8156 Email: iris@eytan-nielsen.com dru@eytan-nielsen.com</p> <p><i>ATTORNEYS FOR DEFENDANT BARRY LEE MORPHEW</i></p>	<p>Courtroom/Division: 2</p>
<p align="center">MOTION FOR NOTICE OF THE PROSECUTION’S INTENTION TO INTRODUCE ANY EVIDENCE OR TESTIMONY UNDER CRE 404(B) BY MOTIONS FILING DEADLINE [D-31]</p>	

Mr. Barry Morphew, by and through undersigned counsel, hereby requests that this Court order the prosecution, on or before December 7, 2021, to give written notice of any evidence or testimony it seeks to introduce under CRE 404(b) and, in that notice, to “articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose.” (CRE 404(b)(3)(B)). It is imperative this notice is filed by December 7, 2021 to allow time to respond to and litigate at the Motions Hearings. Further, Mr. Morphew

requests that this Court rule that no such evidence will be admitted if said notice is not provided.

AS GROUNDS, Mr. Morphew states:

1. Notice is required by CRE 404(b)(3), which states:

(3) *Notice in a Criminal Case.* In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial--or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

2. The prosecutor should be required to put the notice “in writing before trial,” and this Court should find that no good cause excuses lack of pretrial notice in this case. Putting the notice in writing is especially necessary in this case because the volume of discovery and the manner in which it has been disclosed is patently insufficient to give notice. “[T]he defense need not search for a needle in a haystack” *People v. Bueno*, 2018 CO 4, ¶ 40, 409 P.3d 320, 328, *citing Banks v. Dretke*, 540 U.S. 668 (2004). ““A rule thus declaring ‘prosecutor may hide, defendant must seek,’ the [*Banks*] Court further reasoned, ‘is not tenable in a system constitutionally bound to accord defendants due process.’” *Bueno*, at ¶ 40, quoting *Banks*, at 696.

3. The prosecution has already hindered defense preparation “by providing mountains of documents to defense counsel” and burying the exculpatory deep within the mountain. *Cf. United States v. Bortnovsky*, 820 F.2d 572, 574-75 (2d Cir. 1987)(ruling that the trial court erred in refusing a motion for a bill of particulars)(“ We conclude that appellants were hindered in preparing their defense While we commend the Government for cooperating in the turning over of documents prior to trial, we do not look with favor on the manner in which the Government conducted the prosecution. The relevance of key events was shrouded in mystery at the commencement of and throughout the trial. The Government did not fulfill its obligation merely by providing mountains of documents to defense counsel....”).

4. This Court has already found that the prosecution has violated its discovery obligations under Crim. P. Rule 16 and *Brady v. Maryland*, 373 U.S. 83 (1963).

5. Under these circumstances, “reasonable” notice, CRE 404(b)(3)(A), must be interpreted as well in advance of trial, so that the defense has an opportunity to investigate and respond, as well as to interpose objections with this Court.

6. The notice requirement was added to Federal Rule of Evidence 404(b) in 1991. The advisory committee notes are apt here:

The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility.

...

The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal.

....

Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.

Fed. R. Evid. 404, Advisory Committee Notes to 1991 Amendment.

7. In 2020, in the amendment that prompted Colorado to adopt the same changes, the Advisory Committee observed that “[a]dvance notice of Rule 404(b) evidence is important so that the parties and the court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of Rule 403 have been satisfied--even in cases in which a final determination as to the admissibility of the evidence must await trial.” *Ibid.* These same considerations apply here.

8. Mr. Mophew 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, and RPC 3.8. Mr. Mophew cross-references and incorporates by reference all pleadings filed or to be filed in this case, and caselaw cited therein and at oral argument.

WHEREFORE, Mr. Morpew requests that this Court order the prosecution, on or before December 7, 2021, to give written notice of any evidence or testimony it seeks to introduce under CRE 404(b) and, in that notice, to “articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose.” (CRE 404(b)(3)(B)). This Court should further rule that the prosecution is prohibited from introducing any such evidence at trial for which it did not provide notice.

Respectfully submitted this 2nd day of November, 2021.

EYTAN NIELSEN LLC

s/ Iris Eytan

Iris Eytan, #29505

s/ Dru Nielsen

Dru Nielsen, #28775

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 2021, a true and correct copy of the foregoing **MOTION FOR NOTICE OF THE PROSECUTION'S INTENTION TO INTRODUCE ANY EVIDENCE OR TESTIMONY UNDER CRE 404(B) BY MOTIONS FILING DEADLINE [D-31]** was served via CCE as follows:

Mr. Mark Hurlbert
11th Judicial District Attorney's Office
101 Crestone Ave.
Salida, CO 81201

s/ Tonya Holliday _____
Tonya Holliday

Combined Courts, Chaffee County P. O. Box 279 142 Crestone Avenue Salida, CO 81201	DATE FILED: November 2, 2021 5:13 PM
THE PEOPLE OF THE STATE OF COLORADO vs. BARRY LEE MORPHEW, Defendant	<input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
Linda Stanley Eleventh Judicial District District Attorney, # 45298 District Attorney's Office 104 Crestone Avenue P. O. Box 699 Salida, CO 81201 Phone Number: (719)539-3563 Fax: (719)539-3565	Case No: D0082021CR000078 Div: 2 Courtroom:
Discovery Compliance Certificate Addendum	

COME NOW, the People of the State of Colorado, by and through Linda Stanley, District Attorney for the Eleventh Judicial District and informs the Court and counsel of the filing of the missing attachments from the Discovery Compliance Certificate.

The Discovery Compliance Certificate listed 4 attachments that were not filed at the same time as the Certificate. The People gave notice that those 4 items were not filed on 11/1/2021 in Notice Re: Attachments. As indicated in the Notice, the reason the attachments were not filed at the same time was due to their size. The new designations are as follows:

- A) Attachment 6 will have two filings designated:
 - a. Attachment 06 - 2021-07-06 Data Scrape - 1.1 (1-2205)
 - b. Attachment 06 - 2021-07-06 Data Scrape - 1.2 (2206-end (4410))
- B) Attachment 8 will have two filings designated:
 - a. Attachment 08 - 2021-07-06 Data Scrape - 3.1 (1-2428)
 - b. Attachment 08 - 2021-07-06 Data Scrape - 3.2 (2429-end (4855))
- C) Attachment 9 will have two filings designated:
 - a. Attachment 09 - 2021-07-06 Data Scrape - 4.1 (1-3195)
 - b. Attachment 09 - 2021-07-06 Data Scrape - 4.2 (3196-6390)
 - c. Attachment 09 - 2021-07-06 Data Scrape - 4.3 (6390-end (9585))
- D) Attachment 14 will have one filing designated Attachment 14 - 2021-07-29 - Toshiba Hard Drive

Attachments 6, 8 and 9, had to be split as nearly as possible into equal parts. This was accomplished by using the split function in Acrobat Adobe. This saved the original file into multiple files based upon the number of pages input into the split feature of the program. Attachment 6 was split into multiple files by inputting 2205 as the number of pages as the separation point. This produced two equal paged files. Attachment 8 was split into multiple files by inputting 2428 pages to be the separation point producing one file with 2428 pages and one with 2427 pages. Attachment 9 was split into multiple files by inputting 3195 pages to be the separation point producing 3 files with equal page numbers.

The new separated files and Attachment 14 were still too large to upload. So, they were all resaved using the “reduce file size” filing option. This does not change the content of the information within the file.

The attachments are a listing of the folders and files contained within the external media produced.

Dated: November 02, 2021

Respectfully submitted,
LINDA STANLEY
/s/ Aaron Pembleton
Aaron Pembleton, #53924
Deputy District Attorney

CERTIFICATE OF SERVICE

I certify that on November 02, 2021, a true and correct copy of the foregoing Motion was served via Colorado Courts E-Filing on all parties who appear of record and have entered their appearance herein according to Colorado Courts E-Filing.

By: /s/ Aaron Pembleton

<p>Combined Court, Chaffee County P.O. Box 279 142 Crestone Avenue Salida, CO 81201</p> <hr/> <p>THE PEOPLE OF THE STATE OF COLORADO</p> <p>vs.</p> <p>BARRY LEE MORPHEW, Defendant</p> <hr/> <p>LINDA STANLEY, DISTRICT ATTORNEY Attorney Reg. # 45298 104 Crestone Avenue P.O. Box 699 Salida, CO 81201 Phone: 719-539-3563 FAX: 719-539-3565</p>	<p>DATE FILED: November 5, 2021 6:56 AM</p> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>CASE NO.: D0082021CR00078</p> <p>DIV.: 2 Courtroom:</p>
<p style="text-align: center;">P-27 PEOPLE'S REPLY TO MOTION TO QUASH SUBPOENA ISSUED TO JEFFREY LINDSEY</p>	

COME NOW, the People of the State of Colorado, by and through LINDA STANLEY, District Attorney for the Eleventh Judicial District, hereby submits this People's Reply to Motion to Quash Subpoena Issued to Jeffrey Lindsey. The Court has authority to consider and grant a motion to quash. *People v Brothers*, 2013 CO 31, 308 P.3d 1213. That no motions to quash were filed in other cases is irrelevant to this Court's consideration. The Court has authority to permit an attorney to proceed by way of statements as an officer of the Court. *People v Lincoln*, 161 P.3d 1274, 1281 (Colo. 2007).

THIS COURT HAS AUTHORITY TO CONSIDER
AND TO GRANT A MOTION TO QUASH A WITNESS SUBPOENA

1. The authority of the court to quash a subpoena for testimony has been established by the Colorado Supreme Court in *People v Brothers*, 2013 CO 31, 308 P.3d 1213. In fact, “the District Attorney has an independent interest in ensuring the propriety of the subpoenas at issue and avoiding witness harassment.” *Id.* ¶13.
2. While it is true that parties generally have broad power to issue witness subpoenas, “certain narrow circumstances require closer monitoring of the subpoena power in order to prevent abuse.” *Id.* ¶15.
3. The Supreme Court in *Brothers* looked at a subpoena concerning a witness’s presence and testimony at a preliminary hearing. *Id.* ¶17. The Court rejected the argument that because Crim.P. Rules 17(a) and (d) are silent as to quashing a witness subpoena, that the trial court had no authority to quash a subpoena. *Id.* The Court stated: “we do not believe that there is anything in Rules 17(a) and (d) that removes that discretionary authority” for the trial court to quash subpoenas. *Id.*
4. The trial court has discretion to hear a motion to quash prior to any testimony concerning the issue. *Id.* ¶18. It is within the discretion of the court to decide when and under what circumstances a motion to quash a witness subpoena may be taken up. *Id.* ¶19. In *Brothers*, the Court found that it was an abuse of discretion not to take up the issue of a subpoena to a child victim in a sexual assault case before any testimony. *Id.* ¶20.
5. *Brothers* provides the authority for this Court to consider and to grant a motion to quash a subpoena to a witness.
6. The defense cites caselaw that predates *Brothers*. That law has simply been replaced by the rule from *Brothers*.

THAT A MOTION TO QUASH WAS NOT FILED
IN OTHER CASES DOES NOT DIMINISH THE RIGHT IN THIS CASE

7. The defense argues that because one of the attorneys for the People testified in other cases, therefore, any right to do a motion to quash in this case is inappropriate and improper. Apparently, the defense is arguing some type of waiver. The defense cites no authority for this proposition.
8. This is simply not the case. What other prosecutors may have done in other cases does not diminish the right of the People to move to quash a subpoena in this case. The argument by the defense is irrelevant to the motion in this case.

THE COURT HAS THE AUTHORITY TO PERMIT THE PEOPLE
TO PROCEED BY WAY OF STATEMENTS BY AN OFFICER OF THE COURT

9. A trial court can “ask for and accept a prosecuting attorney’s assurance” concerning the facts surrounding a case. *People v Lincoln*, 161 P.3d 1274, 1281 (Colo. 2007). “This is so because, like all attorneys, the prosecuting attorney as an officer of the court must not lie or misrepresent facts to the court.” *Id.* (concerning disclosure of exculpatory evidence and finding no special circumstances to disqualify the district attorney’s office) citing Colo. RPC 3.3(a)(1), (4); Colo. RPC 8.4; *In the Matter of Pautler*, 47 P.3d 1175, 1178-79 (Colo. 2002).
10. RPC Rules 3.3(a)(1) and Comment and (4) state that

(a) A lawyer shall not knowingly:

- (1) Make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

COMMENT [2] . . . A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by

false statements of law or fact or evidence that the lawyer knows to be false.

(4) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

11. RPC Rule 8.4, in pertinent part, provides:

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation . . .

(d) engage in conduct that is prejudicial to the administration of justice

12. *In re Pautler*, 47 P.3d 1175 (Colo. 2002) involved a situation where a prosecutor deceived a murder suspect to believe that he was actually a public defender. The Court condemned the actions as improper deceptive conduct. The “purposeful deception by lawyers is unethical and will not go unpunished.” *Id.* at 1184. The prosecutor was suspended for three months, which was stayed for a 12 month probation period where he was required to take ethics courses and retake the professional responsibility examination. *Id.*

13. The Oath of Admission to practice in the State of Colorado requires all attorneys to swear: “will employ such means as are consistent with Truth and Honor; I will treat all persons whom I encounter through my practice of law with fairness, courtesy, respect, and honesty.”

14. Finally, if subpoenaing opposing counsel is appropriate, the prosecution may well subpoena defense counsel to explain to this court what and when discovery was received by them and when it was reviewed to determine if the actions of defense counsel have been taken in good faith or is simple harassment of the prosecution.

The People move this Court for an Order quashing the subpoena to a person who was one of the prosecutors in the case and permit him to make statements as an officer of the court.

Respectfully Submitted

_____/s/_____
Daniel W Edwards #7938
Deputy District Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply was served on the defense by e-filing with the Court's e-filing system.

_____/s/_____
Daniel W Edwards