

<p>DISTRICT COURT, FREMONT COUNTY,          COLORADO, 136 Justice Center Rd., Rm. 103          Canon City, CO 81212 (719) 269-0100</p>	<p style="text-align: right;">DATE FILED: April 5, 2022</p>
<p>THE PEOPLE OF THE STATE OF COLORADO,          Plaintiff,          v.          BARRY LEE MORPHEW, Defendant.</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  <a href="mailto:iris@eytan-nielsen.com">iris@eytan-nielsen.com</a>  <a href="mailto:dru@eytan-nielsen.com">dru@eytan-nielsen.com</a></p> <p>Jane Fisher-Byrialsen, #49133          Fisher &amp; Byrialsen, PLLC          4600 South Syracuse St., 9th Floor,          Denver, Colorado 80237  <a href="mailto:jane@fblaw.org">jane@fblaw.org</a></p> <p>Hollis Whitson, #32911          Samler and Whitson, PC          1600 Stout Street, Suite 1400          Denver, CO 80202 303-670-0575  <a href="mailto:Hollis@SamlerandWhitson.com">Hollis@SamlerandWhitson.com</a></p> <p><i>ATTORNEYS FOR BARRY LEE MORPHEW</i></p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 22CR47</p> <p>Division: 1</p>
<p><b>MOTION IN LIMINE TO EXCLUDE EVIDENCE ABOUT CRIME SHOWS [D-80]</b></p>	

Mr. Morphew requests an order excluding any testimony, tape recordings, or other evidence, and/or arguments regarding a crime show radio program that was playing while Mr. Morphew was driving his truck or that he allegedly listened to at any time. This Court should

prohibit not only direct evidence (tape recordings), but any indirect evidence (questions and comments by others, including Mr. Morphew when questioned about it).

This is a continuing objection based on the Constitutions of the United States and Colorado (as described below), and Rules of Evidence CRE 401, 402, 403, 404, and 608.

### **Factual Background**

Suzanne Morphew intentionally placed a recording device in Barry Morphew's truck. The surreptitious recording device was voice-activated. It apparently recorded portions of a crime-show program or programs playing on the truck radio as Mr. Morphew drove. In the Affidavit for Arrest Warrant (page ), these are identified as "*Forensic Files*" episodes.

*Forensic Files* is a HeadLine News ("HLN") network program that focuses on the ways in which forensic science helps solve violent crimes, mysterious accidents, and outbreaks of illnesses. It is HLN's highest rated original series ever and is one of the most popular crime and investigations docu-series in history.<sup>1</sup> It runs on the HLN channel, Sirius XM's "Court TV Plus," on channel 134, and possibly other streaming platforms. Produced by CNN Program Development and airing exclusively on HLN, the third season of *Forensic Files II* began airing in 2021. The series was also #1 in cable news and among true crime networks (ID, A&E and Oxygen) in its time period.<sup>2</sup>

The show, originally broadcast on TLC, broadcast 406 episodes from its debut on TLC in 1996 until its final episode in 2011. Reruns shown on the HLN network were initially retitled

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<sup>1</sup> "Forensic Files II', HLN's Highest Rated Original Series Ever, Is Renewed for Two Seasons with 32 Episodes," The Futon Critic (May 12, 2020), available at: <http://www.thefutoncritic.com/news/2020/05/12/forensic-files-ii-hlns-highest-rated-original-series-ever-is-renewed-for-two-seasons-with-32-episodes-788100/20200512hln01/>

<sup>2</sup> *Ibid.*

*Mystery Detectives* before settling on the main title of the show in 2014. A revival of the show, titled *Forensic Files II*, began airing on February 23, 2020. On the HLN network, “it is increasingly being used to fill many time slots due to program cancellations by budget cuts. By 2016, the program took up about 58% of the entire HLN channel each week.”<sup>3</sup>

The Affidavit for Arrest Warrant (page 29) contains a summary of the snippets from the episodes that were recorded on Suzanne’s pen register. The Affidavit focuses on three episodes (described below): one involving an 8-year-old who was abducted while riding her bicycle by a child molester who had been surveilling children from an alley by an elementary school (episode 37),

All three episodes mentioned in the Arrest Warrant Affidavit are discussed below.

**This Court should exclude any reference to the Forensic Files episode or any other crime show program(s)**

1. Such evidence is irrelevant to this case, other than to paint Mr. Morpew as someone who enjoys listening to crime shows, so therefore he must be a criminal. More specifically, the intended purpose appears to be to paint a picture that, because Mr. Morpew listened to crime show episodes about murder, he must have acted in conformity with the programs he listened to.

2. The specter of the jury having to stop during this homicide trial and listen to numerous episodes of *Forensic Files* should give this Court great concern. The prosecution will not be able to cherry-pick which episodes it wants the jury to listen to or worse, which select facts from various select episodes the prosecution wants to introduce. The only fair approach would be to play them all for the jury and in fact, to play all episodes that were being aired on the

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<sup>3</sup> [https://en.wikipedia.org/wiki/Forensic\\_Files](https://en.wikipedia.org/wiki/Forensic_Files)

round trip from Pueblo – whether or not Suzanne’s pen register recorded them all. Of the approximate 20 files on the pen register, twelve were deleted. The only person with knowledge or access to this secret pen recorder was Suzanne Morpew. It is unknown which files Suzanne Morpew deleted or what was contained on those deleted files. Also on the pen register it could be heard that the radio channels were changing. The radio may have been set on Fox News where President Trump can be heard, to sports channels, to Forensic Files, to Mr. Morpew having telephone conversations through Bluetooth about work and life with other individuals. Playing the recordings of Suzanne Morpew’s surreptitious recordings of Mr. Morpew’s car radio, or of him talking on the phone with others who including him did not know they were being recorded, is a giant distraction that will cause admission of a substantial amount of inflammatory, completely irrelevant material.

3. The first “case” mentioned in the Arrest Warrant Affidavit is episode 37, in which a child molester runs over a small child and then abducts and kills her. The *Forensic Files* description states:

In 1984, 8-year-old Vicki Lynne Hoskinson left her home in Flowing Wells, Arizona to run an errand for her mother. She never returned home. Vicki's pink bicycle was found abandoned and slightly damaged later that afternoon on a nearby street, but there was no sign of her. Police investigators learned that Frank Jarvis Atwood, released after serving time for child molestation in California, had been in the Tucson area but was now gone. The FBI confiscated Atwood's car and found paint from Vicki’s bicycle on his car. They also matched nickel found on the bike to nickel on Atwood's bumper. Atwood was sentenced to death.<sup>4</sup>

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<sup>4</sup> [https://en.wikipedia.org/wiki/Forensic\\_Files\\_\(season\\_3\)](https://en.wikipedia.org/wiki/Forensic_Files_(season_3))

Apparently, the perpetrator's car also struck the mailbox where the child was delivering a letter. The crash and abduction happened about a block from the elementary school where the perpetrator had been surveilling children at the school.<sup>5</sup>

4. The Arrest Warrant Affidavit also contains snippets of a summary from episode 95. This episode involves a rapist and serial killer, Lemuel Smith, who assaulted and killed multiple people. The Forensic Files description of this episode is:

In 1981, correctional officer Donna Payant disappeared from Green Haven Correctional Facility in Beekman, New York and was later found in a landfill. The medical examiner not only identified the cause of death but also found an important clue. It was a signature element of a murder committed by Lemuel Smith 10 years earlier, which was also investigated by the medical examiner. Upon further investigation, it was discovered that Smith was an inmate at the same prison and could have committed the crime. But, did he?<sup>6</sup>

Prior to commencing his serial murder spree, Smith had sexually assaulted and beaten at least three women. Over a period of approximately nine months, Smith brutally killed and mutilated at least four people and continued to brutally beat and sexually assault others (including a grandmother) without killing them. While in prison, he brutally killed a female correctional officer – Donna Payant, who was specifically mentioned in the Arrest Warrant Affidavit in this case. The Arrest Warrant Affidavit also explicitly mentioned Smith's killing of Maralie Wilson, who, in 1977, "was found strangled and mutilated near train tracks in downtown Schenectady, New York."<sup>7</sup> Smith eventually confessed to five murders.<sup>8</sup>

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<sup>5</sup> [https://en.wikipedia.org/wiki/Murder\\_of\\_Vicki\\_Lynne\\_Hoskinson](https://en.wikipedia.org/wiki/Murder_of_Vicki_Lynne_Hoskinson)

<sup>6</sup> [https://en.wikipedia.org/wiki/Forensic\\_Files\\_\(season\\_6\)](https://en.wikipedia.org/wiki/Forensic_Files_(season_6))

<sup>7</sup> [https://en.wikipedia.org/wiki/Lemuel\\_Smith](https://en.wikipedia.org/wiki/Lemuel_Smith) "The horrendous post-mortem mutilation was worse than some veteran investigators had ever seen in the region." *Ibid.*

<sup>8</sup> *Ibid.*

5. The final *Forensic Files* episode set forth in the Arrest Warrant Affidavit was episode 102, which concerned the murder of a popular singer. The *Forensic Files* description states:

Details the death of Walter Scott (Walter Notheis Jr.), lead singer for the 1960s band Bob Kuban and the In-Men, who disappeared in 1983. James H. Williams, Sr. was later arrested and convicted of the murder of Scott and the earlier murder of his wife, Sharon Williams.

Scott disappeared on December 27, 1983. After receiving a tip from the killer's son in April 1987, Scott's body was found floating face-down in a cistern. He had been hog-tied and shot in the chest. Police believed that Scott's wife and her lover (James Williams) worked together to kill Scott.<sup>9</sup> Police exhumed the body of Williams' first wife (who had been found at the scene of a car accident and had been presumed killed in the crash), only to learn that she had actually died not from the car accident, but from a back-of-the-head injury unrelated to the car accident.

6. It is reprehensible that law enforcement utilized these three *Forensic Files* episodes in the Arrest Warrant Affidavit as probable cause to arrest Mr. Morphew for murder. Information and/or the recordings of these *Forensic Files* episodes have no place in this case or in trial.

7. This type of speculative character and propensity evidence is excludable because it is not relevant under CRE 401 and carries substantial risk of unfair prejudice that would overwhelm any marginal probative value under CRE 403. Character evidence is explicitly precluded by CRE 404(b).

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<sup>9</sup> [https://en.wikipedia.org/wiki/Walter\\_Scott\\_\(singer\)](https://en.wikipedia.org/wiki/Walter_Scott_(singer))

8. Admission of this type of evidence is precluded by CRE 401 because it is not relevant. CRE 401 defines relevant evidence as that which has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” CRE 401. “In criminal cases, relevant evidence ultimately tends to make it more probable or less probable that a criminal act occurred (actus reus), and the defendant was the perpetrator (identity), and that the defendant acted with the necessary criminal intent (mens rea).” *People v. Cordova*, 293 P.3d 114 (Colo. App. 2011). *See People v. Carlson*, 712 P.2d 1018, 1021-22 (Colo. 1986).

9. The episodes are not relevant because they are unmoored from any provable case facts. It is not as if, hypothetically, a defendant learns about a unique or unusual way to execute a crime and then indisputable evidence shows that is what happened in the *actus reus* of the crime itself. Here, the prosecution is using a radio program to speculate that maybe what is mentioned on the program might be what happened to Suzanne. By definition, this type of argument can be neither proven nor disproven because there is no proof of where Suzanne is or what happened to her. Additionally, it could be argued that since Suzanne Morpew listened to the recordings, recording some, the defense could similarly argue that Ms. Morpew could have learned about how to stage her disappearance? That is just as absurd, but actually maybe even more believable.

10. This evidence is also inadmissible because it is bad character evidence for which the prosecution gave no notice as required by CRE 404(b)(3) and the District Court’s Orders. Any such evidence had to be noticed to the defense by December 7, 2021.<sup>10</sup> It was not.

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<sup>10</sup> See “Order re: Hearing of November 9, 2021” (filed Nov. 12, 2021), p. 2, granting defense motion D-31. See Transcript of Nov. 9, 2021, pp. 116-117 (the court set the deadline for the

11. CRE 404(b) does not exclude merely acts or conduct; it prohibits admission of a wide range of “bad character” evidence. See e.g. *People v. Serra*, 2015 COA 130, ¶ 78, 361 P.3d 1122, 1136. 361 P.3d 1122. In *Serra*, one of the issues was that witnesses were permitted to testify that Mr. Serra had “smirked” at them before. “To the extent that the witnesses testified that they had seen Serra smirk before, they were describing prior acts of his that could give rise to an inference of bad character.” *Id.*, at ¶ 78. “To fall within the scope of 404(b), an act need not be criminal, so long as it tends to impugn a defendant's character.” *United States v. Kendall*, 766 F.2d 1426, 1436 n.5 (10th Cir. 1985). “The protections of CRE 404(b) recognize that it is unfair to require a defendant to disprove prior acts or explain his or her personality.” *Kaufman v. People*, 202 P.3d 542, 557 (Colo. 2009).

12. As an ultimate precaution, the defense argues that this evidence should not be admitted pursuant to 404(b). First, There is no similarity between the act of Mr. Morphew listening to a crime show on the radio and the charged offense, nor can there be. The prosecution has no facts regarding the alleged murder of Ms. Morphew: they don’t even have proof she is deceased, and no articulable theory about whether she was killed, how she was killed, and how her body was disposed of without leaving a trace.

13. The inflammatory content of the shows mentioned in the Arrest Warrant Affidavit have nothing to do with this case. They have zero probative value on any material issue.

14. The prosecution seems to have a theory that Mr. Morphew got ideas from a radio show about how to commit a murder. This is undisguised propensity evidence wrapped in rank speculation.

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People’s CRE 404(b) notice as December 7, 2021). At this Court’s status conference on this case on January 12, 2022, this Court stated accurately that Judge Murphy’s order was law of the case.

15. With no similarity, the fact that Mr. Morphew once listened to a crime show on the radio has no relevance independent of the impermissible propensity inference. *See Yusem v. People*, 210 P.3d 458, 467 (Colo. 2009)(admission of character evidence that merely painted the defendant as a bully warranted reversal of the conviction). *See Kaufman v. People, supra* (the trial court abused its discretion in admitting evidence that the defendant owned other weapons not involved in the charged offense; the court also erred in admitting evidence about the defendant’s training in martial arts, self-defense law, and various other evidence because it violated the tenets of CRE 404(b)). In *Yusem v. People*, the conviction was reversed because a prior act in which the defendant did *not* pull a gun was inadmissible in his present case, in which defendant *is* accused of pulling his gun. When other crime evidence is used to prove identity, it must be so similar that it is like a “signature” crime.

16. The prosecution is trying to use the evidence as some sort of “modus operandi” evidence, i.e., that Mr. Morphew heard some crime shows and then acted them out. The purpose of “modus operandi evidence” is to provide identity – to identify the perpetrator of a crime by his or her “distinctive methodology.” *People v. Williams*, 2016 COA 48, ¶ 29, 477 P.3d 721, 727 (“*Williams I*”), *aff’d* 2020 CO 78, ¶ 29, 475 P.3d 593 (“*Williams II*”). “Courts properly admit modus operandi evidence when there are ‘striking similarities’ between the uncharged misconduct and the charged crime.” *Id.*, ¶ 28, 477 P.3d at 727. This feature is sometimes referred to as a “signature crime.” *See e.g. United States v. Shumway*, 112 F.3d 1413, 1420 (10th Cir. 1997) (“[T]o prove identity, evidence of prior illegal acts need not be identical to the crime charged, so long as, based on a ‘totality of the comparison,’ the acts share enough elements to constitute a ‘signature quality.’”)(internal quotations and citations omitted). *See also People v.*

*Delsordo*, 2014 COA 174, ¶ 21, 411 P.3d 864, 868-869 (reversing conviction because of improper admission of CRE 404(b) evidence); *People v. Torrez*, 11CA1748 (April 16, 2015)(unpublished)<sup>11</sup> (“While similarity between the other act and the charged offense is not required under CRE 404(b), the lack of similarity between the other act and the charged offense makes it more likely that the other acts have no relevance independent of the impermissible propensity inference.”)(reversing conviction because of improper admission of CRE 404(b) evidence); *People v. Ali*, 17CA0379, ¶ 91 (Sept. 17, 2020)(unpublished) (“the common features to which the People point are not distinctive enough to show Ali’s modus operandi,” thus, court erred in admitting evidence of a separate alleged robbery); *People v. Stane*, 14CA438 (Nov. 22, 2017)(unpublished)(“When offered to show identity, the other acts reflected in modus operandi evidence must not only be similar to each other; they must also be dissimilar to the methods generally used in such offenses.”)(reversing conviction notwithstanding prosecutor’s claim that the other crime evidence showed a common plan or modus operandi). Without signature-quality similarities, the evidence is merely asking the jury to conclude that Mr. Morpew is a bad person who likes to listen to true crime shows and he acted in conformity with that bad character.

17. In *Williams II*, *supra*, the Colorado Supreme Court affirmed the *Williams I* ruling reversing the conviction, and added the following analysis when CRE 404(b) evidence is offered ostensibly to prove identity, common plan, or corpus delicti:

proof of “identity” actually includes two separate aspects, or component parts, each involving a distinctly different matter of proof: on the one hand, that the defendant, rather than someone else, was the person who was present at the time and place of the charged offense, such that if the criminal act was committed at all, it was committed by him; and on the other, what has at times been

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<sup>11</sup> The unpublished opinions cited in this Motion are cited pursuant to the policy of the Court of Appeals, which permits citation of unpublished opinions in the district court.

characterized as proof of the corpus delicti—that the criminal act as alleged in the charge was actually committed. *Rath*, 44 P.3d at 1040; Edward J. Imwinkelried, 1 Uncharged Misconduct Evidence §§ 3:2, 4:2 (2020). Although both implicate proof that the defendant committed the charged crime, each clearly requires a substantially different evidential hypothesis to justify its proof by other-crime evidence.

*Williams II*, ¶ 18, 475 P.3d at 598. These are well-settled principles. Modus operandi evidence tends to prove identity only when it shows other acts “so nearly identical in method as to earmark them as the handiwork of the accused.” 1 Charles T. McCormick, McCormick on Evidence § 190 (7th ed. 2013).

18. Here, there is no credible allegation of a “signature crime,” i.e., a modus operandi that is unique to the crime shows and the present charged acts. There is no showing that the other crimes discussed in the crime shows is similar enough to conduct alleged in this case that the crime shows prove that Mr. Morphew and not someone else committed the charged offenses. More to the point, it fails to prove that the charged offense was committed by anybody.

19. The probative value in these types of “identity” cases depends upon the similarity. The similarity must be so strong that it distinguishes the charged offense in such a way as to virtually point to the defendant as the only likely perpetrator.

20. The Forensic Files episodes (including the three described in the Arrest Warrant) are dissimilar to each other and dissimilar to this case.

21. This evidence is simply confusing. It is misleading. A jury would believe that the evidence must have something to do with Suzanne’s disappearance, otherwise, why would the DA be presenting it and why would the court be permitting it unless it had something to do with the case. This evidence is inadmissible under CRE 403.

22. To refute the prosecution’s inferences and speculation – all of the episodes would have to be played for the jury. The jurors would have to spend close to a day simply listening to old *Forensic Files* reruns. The inflammatory impact of listening to hours of *Forensic Files* reruns in the midst of a murder trial is patently obvious.

23. The episodes – and any mention of them – must be precluded under CRE 403 because the material carries an overwhelming risk of unfair prejudice that would overwhelm any marginal probative value and lead to an unfair trial in violation of the due process clauses of the constitutions of the state of Colorado and the United States. If admitted, this evidence would rise to the level of a constitutional violation because it would render the trial unfair and impairs Mr. Morpew’s right to present a defense. U.S. Const., amends. VI, XIV; Colo. Const., art. II, §§ 3, 16, 25. It invites a sideshow that would take over the circus. Suddenly, all of the radio content that Mr. Morpew *ever* listened to on the crime shows would be admissible in an attempt to show that the prosecution was just cherry picking one fact or facts from a single program, when thousands of facts have been put forth on radio crime show programs over all the years when Mr. Morpew might have had such shows playing on the radio. This is because trying to invent similarities between any particular program and the facts of this case is completely irrelevant if, in the universe of radio crime shows, all kinds of facts are described in all kinds of programs.

24. There can be no claim that having a radio program on in a car while driving is part of the alleged conduct underlying the charged offenses. In *Rojas v. People*, 2022 CO 8, ¶35 n. 6, 2022 WL 521921 (Feb. 22, 2022) – the Colorado Supreme Court case that abolished the doctrine of *res gestae* – the Supreme Court explicitly “disavow[ed] the suggestion” that “Rule 404(b) is implicated only by other criminal acts.” The Court referenced *Kaufman v. People*,

*supra*, 202 P.3d at 552–60 and noted that, there, the Court analyzed the admissibility of the defendant's non-criminal conduct, which included martial arts and weapon training, drawings, and weapons collection, under CRE 404(b) and *People v. Spoto*, 795 P.2d 1314 (Colo. 1990). Accord, *United States v. Kendall*, 766 F.2d 1426, 1436 n.5 (10th Cir. 1985) (“[t]o fall within the scope of 404(b), an act need not be criminal, so long as it tends to impugn a defendant's character.”). See also *People v. Serra*, 2015 COA 130, ¶ 78, 361 P.3d 1122, 1136 (reversing conviction) (“To the extent that the witnesses testified that they had seen Serra smirk before, they were describing prior acts of his that could give rise to an inference of bad character.”)

25. Admission of speculative character evidence about Mr. Morphew listening to a radio show about murder would diminish the constitutional protection that no conviction shall enter absent the prosecution’s satisfying their burden to prove the elements of the offense beyond a reasonable doubt. Making Mr. Morphew defend against character insinuations is fundamentally unfair and would violate such cases as *In re Winship*, 397 U.S. 358, 363 (1970). The U.S. Supreme Court has called the presumption of innocence “that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.’” *Ibid.* See also *Tibbels v. People*, 2022 CO 1, ¶ 23, 501 P.3d 792, 797 (remarks that diminished the “proof beyond a reasonable doubt” standard warranted reversal).

26. “The protections of CRE 404(b) recognize that it is unfair to require a defendant to disprove prior acts **or explain his or her personality**.” *Kaufman v. People*, 202 P.3d 542, 557 (Colo. 2009)(emphasis added). The Supreme Court explains:

The reasoning behind the exclusion of such evidence is three-fold. First, there is a concern that a jury will convict a defendant as a means of punishment for past deeds or merely because the jury views the defendant as undesirable. *Masters v. People*, 58 P.3d 979, 995 (Colo.2002). Second, there is a ‘possibility that a jury will overvalue the character evidence in assessing the guilt for the crime charged.’

**Id. Third, it is unfair to require a defendant to defend not only against the crime charged, but moreover, to disprove the prior acts or explain his or her personality. Id.**

*Id.*, at 552 (emphasis added). See *People v. Serra*, 2015 COA 130, ¶ 78, 361 P.3d 1122, 1136. 361 P.3d 1122.

27. The inference that a person who casually listens to a crime show on the radio while driving might be prompted to then kill his or her spouse is a leap far too far. This fantastical theory merely invites speculation and forces Mr. Morphew to defend his personality or why he was listening to such a program while driving.

28. Listening to the radio while driving is constitutionally-protected conduct. U.S. Const., amend. 1<sup>12</sup> Colo. Const., art. II, §10. The Colorado Supreme Court has repeatedly recognized that the Colorado Constitution provides broader free speech protections than the Federal Constitution. *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1051 (Colo. 2002)(citing numerous Colorado Supreme Court opinions)(hereinafter, “*Tattered Cover*”); *Bock v. Westminster Mall Co.*, 819 P.2d 55, 58 (Colo.1991)(detailing the differences between the language of the First Amendment to the United States Constitution and the language of the Colorado Constitution.).

29. The Colorado Supreme Court has relied, for example, on this state's “extensive history of affording broader protection under the Colorado Constitution for expressive rights.” *Id.* at 59. These constitutional rights “safeguard[ ] a wide spectrum of activities, including the right to distribute and sell expressive materials, the right to associate with others, and, most importantly to this case, the right to receive information and ideas. These various rights, though

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<sup>12</sup> The First Amendment is binding upon the states through the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 664 (1925).

not explicitly articulated in either the Federal or Colorado Constitution, are necessary to the successful and uninhibited exercise of the specifically enumerated right to ‘freedom of speech.’” *Tattered Cover*, at 1051 (footnotes omitted).

30. To permit the State to speculate that perhaps Barry killed Suzanne because of the radio program, with zero evidence for that proposition, would violate the First and Fourteenth Amendments to the United States Constitution, Article II, section 10 of the Colorado Constitution, as well as a host of other constitutional provisions, as well as the Colorado Rules of Evidence (CRE 401, CRE 402, CRE 403, and possibly CRE 404).

31. The Court’s opinion in *Dawson v. Delaware*, 503 U.S. 159 (1992) provides guidance. In *Dawson*, a Delaware Superior Court convicted the defendant of first-degree murder and sentenced him to death after permitting the prosecution to admit at the sentencing hearing evidence pertaining to Dawson’s association to a white-supremacist gang, the Aryan Brotherhood. *Dawson v. State*, 581 A.2d 1078, 1081, 1102 (Del. 1990). In a nearly unanimous opinion, the United States Supreme Court vacated Dawson’s death sentence after determining that it was constitutional error to admit the evidence. *Id.* at 165. The Court ruled that such evidence would lead to mere conjecture and speculation. *Id.* at 166-67.

32. In *Flanagan v. State*, 930 P.2d 691, 696-97 (1996), the Supreme Court of Nevada recognized the momentous error of admitting evidence of constitutionally protected conduct under the pretext of “bad character evidence.” The *Flanagan* Court found constitutional error occurred when the prosecution was allowed to introduce evidence of the defendants’ cult participation or beliefs even though they were irrelevant to the charged crimes:

[T]he State's closing argument during the guilt phase of the trial also violated appellants' First Amendment rights under *Dawson*. The evidence was irrelevant to the crimes charged, and the prosecutor improperly used it in the guilt phase simply to demonstrate

the appellants' bad character. He implied that devil worship was somehow linked to the crimes, asserting that Flanagan and Moore 'let their black and their white magic spill over into this conspiracy,' but he never presented evidence of such a link.

*Id.* The Nevada Supreme Court thus applied *Dawson's* holding to the guilt phase of the trial.

33. Whenever Mr. Morpew objects to evidence, testimony, and information, regardless of whether the objection is made in a pretrial motion or at trial, he is also objecting to arguments, remarks, prosecutor's questions, and all other comments on that topic. He requests this Court prohibit the prosecution from making any statements, arguments, remarks, or any other comment on that topic or including it in any questions to any witness. Mr. Morpew makes a continuing objection.

34. Mr. Morpew makes this motion and all other motions and objections during all proceedings in this case whether or not explicitly stated at the time of the making of the motion or objection, under the Due Process, Right to Counsel, Confrontation, Right to Remain Silent, Privilege Against Self-Incrimination, Compulsory Process, Ex Post Facto, Trial by Jury, Equal Protection, Right to Appeal and Cruel and Unusual Punishment Clauses of the federal and Colorado Constitutions, and Article II, Sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28 of the Colorado Constitution, and Article I, Section 9, and the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the U.S. Constitution, as well as the Rules of Evidence, including but not limited to CRE 401, 402, 403, 404, 608, 701, 702, 801, 802, 803, and 901. 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.

WHEREFORE, Mr. Morpew requests an order excluding any testimony, tape recordings, or other evidence, and/or arguments regarding the *Forensic Files* or any other crime

show program that was playing on the radio while Mr. Morphew was driving his truck or that he listened to at any other time.

Respectfully submitted this 5th day of April 2022.

**EYTAN NIELSEN LLC**

*s/ Iris Eytan*

Iris Eytan, #29505

**FISHER & BYRIALSEN, PLLC**

*s/ Jane Fisher-Byrialsen*

Jane Fisher-Byrialsen, #49133

**SAMPLER AND WHITSON**

*s/ Hollis Whitson*

Hollis Whitson, #32911

**CERTIFICATE OF SERVICE**

I hereby certify that on this 5th day of April 2022, a true and correct copy of the foregoing **MOTION [D-80]** was served via CCE as follows: 11<sup>th</sup> Judicial District Attorney's Office, 101 Crestone Ave., Salida, CO 81201

*s/Hollis Whitson*

Hollis Whitson