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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed AUG 18 2014 CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO σ COURT USE ONLY σ
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. 12CR1522 Division 202
REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR RELIEF DESIGNED TO ENFORCE AND PROTECT MR. HOLMES'S CONSTITUTIONAL RIGHTS ARISING FROM LAW ENFORCEMENT'S VIOLATION OF COURT'S PRE-TRIAL PUBLICITY ORDER [D-224]	

Mr. Holmes, through counsel, submits the following in reply to the prosecution's response to the defense's motion for relief designed to enforce and protect Mr. Holmes's constitutional rights arising from law enforcement's violation of the Court's pre-trial publicity order [D-224]:

1. The prosecution's arguments in response to Motion D-224 are without merit. First, the prosecution takes the position that there may not have even been a leak in the first place, and that it is "not even reasonable" to assert that one or more of the law enforcement officials who testified at the December 2012 and April 2013 hearings was the source of the leak and/or committed perjury when testifying in this matter.

2. The prosecution's strained effort to search the record for support for the argument that someone other than one of the witnesses who testified in December 2012 and/or April 2013 is the original source of the leak fails. The defense called as a witness every individual who came into contact with the notebook. As the Court itself noted on April 1, 2013, only four individuals had any knowledge of the contents of the notebook:

THE COURT: You talked about Myrsiades and the possibility that maybe somebody talked to him even though he didn't actually see the contents of the notebook other than just to know that there were

letters. It seems to me that it makes more sense to analyze the issue by looking at the people who actually saw the contents of the notebook and then determining whether they talked to anybody.

MS. HANSWIRTH: Yes.

THE COURT: And it seems to me, at least based on my review of the transcript, that you've got four people who apparently had knowledge of the contents of the notebook. At least, based on my review, I show the four people being Detective Reed, I think Chief Abraham, Officer McDonald, and Sergeant Fyles. And I think Sergeant Fyles testified that the information was provided to him by Detective Reed. So it seems to me that it makes more sense to look at those four folks and then determine did they talk to anyone else.

Transcript, April 1, 2013, pp. 52-53. All of these individuals testified under oath that they did not disclose their knowledge concerning the specific contents of the notebook to anyone. *See* Transcript, December 10, 2012 pp. 75, 120-21; Transcript, April 1, 2013, pp. 119-23; Transcript, April 13, 2014, pp. 7-8.

3. Thus, as explained in paragraph 21 of the defense's original pleading, while it is possible that Ms. Winter's "law enforcement source" was a person who obtained the information second-hand, there is no question that one of four individuals named by the Court above was involved, at a minimum, as the original source of the leak.¹

4. The parties do not know at this point whether one of the four individuals identified by the Court was the individual who actually spoke to Ms. Winter herself, or whether one of these four individuals disclosed this information to another law enforcement official who then leaked the information to Ms. Winter.

5. Regardless of which is true, [REDACTED], it is highly likely that whoever leaked the information to Ms. Winter [REDACTED], or [REDACTED], which means that either Detective Reed, Officer McDonald, Chief

1 [REDACTED]

Abraham, or Sergeant Fyles lied under oath and committed perjury when they testified that they did not speak to anyone else about the contents of the notebook.

6. The prosecution next takes the position that even if a law enforcement officer who is an endorsed prosecution witness committed perjury in this case, it does not matter, because the contents of the notebook are reliable. The prosecution's assertion is galling. The fact that a law enforcement official lied under oath in a death penalty case about a key piece of evidence is an incredibly serious matter. As the Court fully recognized on April 1, 2013, "[T]his isn't just any witness credibility. We're talking about a notebook that both sides, based on the litigation that has taken place so far, obviously think is a critical piece of evidence in the case. If that ends up being a critical piece of evidence at trial, anyone who handled that notebook is going to have to testify. I mean, I can't imagine the credibility of any witness being more important." Transcript, April 1, 2013, pp. 55-56.

7. Even if the prosecution can satisfy the evidentiary requirements for the admission of the notebook, the fact remains that a law enforcement officer and endorsed prosecution witness *lied under oath* in a capital case.² Perjury is a class four felony. *See* C.R.S. § 18-8-502. Regardless of the subject of the lie, the fact that a law enforcement officer and endorsed prosecution witness *committed a felony offense* in the context of this very case calls into question the general reliability, integrity, and credibility of that witness, and is information the defense is constitutionally entitled to know. *Giglio v. United States*, 405 U.S. 150 (1972), U.S. Const. Amend. VI, XIV; Colo. Const. art. II, secs. 16, 25. Moreover, the roster of individuals who may have committed perjury includes the Chief of Police for the University of Colorado, and two homicide detectives who played significant roles in the investigation of this case.

8. Likewise, the prosecution's argument that "any prejudicial news coverage is far removed temporally from the start of the trial," not only fails but misses the broader point. As an initial matter, Mr. Holmes disagrees with the notion that Ms. Winter's articles concerning the contents of the notebook cannot prejudice him because they were published soon after the events of July 20, 2012. The articles were published at a time when public interest in this case was extremely high. The content of the articles was provocative and is likely to have an enduring impact on the minds of readers. Moreover, even if the Court could deal with any impact this article had on prospective jurors "during individual jury selection," as the prosecution suggests, this does not change the fact that this is an issue involving perjury, credibility, reliability, and fundamental fairness. Unless the Court imposes a sanction or orders a further investigation of the leak, Mr. Holmes will proceed to trial in a capital case without knowing which law

² The prosecution also makes the puzzling assertion that no sanctions are warranted because the defense elicited the perjured testimony. This argument is nonsensical. Obviously, the defense was attempting to ascertain the identity of the law enforcement source who leaked the information about the notebook to Ms. Winter. The defense did not deliberately elicit perjured testimony. It is not the defense's fault that a law enforcement officer chose not to tell the truth under oath. Moreover, as explained in his original pleading, the prosecution has willfully refused to conduct any sort of meaningful investigation of its own into the identity of the leak even though it has the means and ability to do so. Thus, it is eminently fair that the Court impose a sanction for the leak that may impact the prosecution's case.

enforcement official committed perjury in this case, and/or leaked prejudicial information to the news media, and with no recourse for the violations of his constitutional rights described in Motion D-224 that have occurred and will occur at trial.

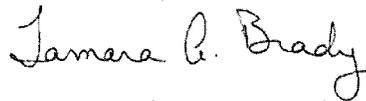
9. The prosecution also wrongly claims that the Court does not have the authority to appoint a special prosecutor in these circumstances. The cases cited by the prosecution involve situations where the prosecuting attorney is disqualified from serving in a case and a special prosecutor is appointed to take over the criminal prosecution. Those cases do not address the relief the defense is requesting, which is the appointment of a special prosecutor *to investigate the matter of the leak within the context of this case*, not to prosecute the criminal matter against Mr. Holmes. The prosecution cites to no case that prohibits the Court from doing so. To the contrary, “[i]t is within the inherent power of the court to appoint [a special attorney] in other cases where necessary in the furtherance of justice and for the due administration of the law.” *Bd. of Comm’rs of Hinsdale Cnty v. Crump*, 18 Colo. App. 59, 60-61, 70 P. 159, 160 (1902).

10. Finally, the prosecution argues, “it is unclear exactly what a grand jury would undertake to do.” Response, p. 7. This assertion blatantly ignores what the prosecution knows to be true: that a grand jury has significantly broader investigatory powers than the means that have been available to the defense to pursue the source of the leak, including freedom from “the technical procedural and evidentiary rules governing the conduct of criminal trials.” *United States v. Calandra*, 414 U.S. 338, 343-44 (1974).

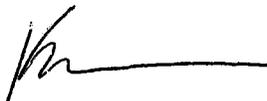
Mr. Holmes files this reply, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.



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Dated: August 18, 2014

I hereby certify that on August 18, 2014, I

mailed, via the United States Mail,

faxed, or

hand-delivered

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