DISTRICT COURT, LINCOLN COUNTY, COLORADO P.O. Box 128 Hugo CO 80821 719-743-2455	FILED IN DISTRICT COURT LINCOLN COUNTY CO APR - 7 2008 JANET BANDY, Clerk
THE PEOPLE OF THE STATE OF COLORADO **vs.** **ALEJANDRO PEREZ, Defendant**	
	Case Number 05CR74 Division: B

ORDER RE DEFENDANT'S P-46 (PEREZ ORDER No. 60)

This matter came before the Court for review, consideration and resolution of "Defendant Perez's motion to dismiss or, in the alternative, for disqualification of the district attorney and appointment of a special prosecutor (P-46)" filed June 4, 2007; and "Defendant Perez's motion to reopen evidence and for further hearing" (also concerning P-46) filed herein on January 30, 2008.

Hearings were held and evidence presented on June 27, 2007; June 28, 2007; October 2, 2007; October 3, 2007; October 24, 2007; October 25, 2007; December 6, 2007; January 16, 2008; March 25, 2008; March 31, 2008; and April 1, 2008.

Dan May and Richard Orman appeared for the People during all the 2007 hearing dates and on January 16, 2008. The People were represented by assistant district attorney Leslie Hansen and district attorney Carol Chambers on the final three dates in 2008. The defendant appeared in person and in custody for all hearing dates except January 16, 2008 when he appeared telephonically. The defendant was represented at all hearings by his

counsel Judy R. Lucero. David A. Lane and James A. Castle also appeared for the defendant and their appearances were excused for March 31, 2008 and April 1, 2008.

The Court, having reviewed all pleadings, briefs, affidavits and orders related to resolution of P-46 (including order of the Colorado Supreme Court wherein the matter was remanded to this court with limited jurisdiction to resolve Defendant's P-46 and Defendant's P-68)[1]; having again reviewed and considered the testimony presented by 36 witnesses; having taken judicial notice of all relevant adjudicative facts contained in the file and record of this action; having taken judicial notice of various minute orders issued by the Honorable Douglas Tallman in *People v. David Bueno*, Lincoln County District Court case No. 05CR73; having again considered and reviewed all exhibits admitted herein; having read written arguments submitted by the People and the defendant; and having heard oral arguments presented, and now being sufficiently advised in the premises and in compliance with the order of the Colorado Supreme Court, enters the following findings of fact; issues before the Court; conclusions of law, and Order, to-wit:

FINDINGS OF FACT

1. This criminal proceeding emanated from the alleged murder of Jeffrey Heird which occurred in housing unit 6 of the Limon Correctional Facility (LCF) on March 28, 2004.
2. When the murder occurred, the deputy district attorney leading the investigation was Robert Watson. Mr. Watson, now district attorney in the 13th Judicial District, had previously represented an LCF inmate named Michael Snyder concerning a Rule

[1] P-68 has been resolved by stipulation and is no longer relevant to the issue now before the Court.

35(c) motion before he became a district attorney and some five-plus years before the alleged murder herein. Mr. Snyder has been endorsed as a prosecution witness, testified at the preliminary hearing held in this case and has been identified by the defense as an alternate suspect.

3. According to testimony submitted by Beverly Rains, a clerical staff worker working in the district attorney's office at Hugo, Colorado on and after March 28, 2004, Mr. Watson did substantial amounts of work on both the Perez case and the David Bueno case and that he reviewed discovery as it came in. The evidence also indicates that Mr. Watson put together a power point suggesting the prosecution's theory of the case. He also put together trial notebooks for this case and was on the scene at LCF within hours of the homicide.

4. Neither Mr. Watson nor the district attorney for the 18th Judicial District (herein district attorney) disclosed the prior representation of Mr. Snyder by Mr. Watson. This fact was not disclosed until the defense brought the matter to the Court's attention in 2008.

5. Mr. Watson asserts that at the time the murder occurred, he had no memory of Michael Snyder, this notwithstanding the fact that he had worked for this individual and that the discovery as shown by Exhibit 9 under date of March 25, 2008 demonstrates information obtained very close to the date of the murder that would or could lead one to believe that Snyder may have committed the Heird murder.

6. Of significance and for reasons unknown, Snyder was not investigated, his cell was never tossed and he was never considered to be a suspect in the case.

7. Mr. Watson terminated his position with the district attorney's office in August 2004, some five months after the Heird murder occurred. The evidence indicates that there was no conflict screening policy in existence within the office of the district attorney when Mr. Watson was hired or at any time during or after Mr. Watson's employment was terminated.

8. By complaint and information filed December 20, 2005, the defendant Alejandro Perez was charged with murder in the first degree and conspiracy to commit the murder of Jeffrey Heird.

9. On October 13, 2006, some thirty months after the alleged murder, the district attorney issued a statement of intent to seek the death penalty against Alejandro Perez.

10. On November 2, 2006, the district attorney in People's pleading P- 9 gave notice of statutory aggravators in support of their notice to seek the death penalty. Specifically, aggravator No. 1 states as follows: "The class one felony was committed by a person under sentence of imprisonment for a class 1, 2 or 3 felony as defined by Colorado law." The record reflects that on March 28, 2004 Mr. Perez was under a 32 year sentence of imprisonment in Denver County District Court case No. 96CR5279 for second degree murder, a class 2 felony.

11. In People's P-9 the People endorsed 203 witnesses that may be called during the sentencing phase of this death penalty case. Of those endorsed, endorsements numbered 67 through 147 were inmate witnesses. According to the People, each endorsement contained the information as required by Colorado Rules of Criminal

Procedure 32.1(d)(2) and §18-1.3-1201 (3)(b)(II), C.R.S.. A review of the endorsements for the inmate witnesses indicates, with the exception of the endorsements numbered 67- Alejandro Perez (the defendant); 68- Miguel Ramirez; 69- William Wonnenberg; 70- Timothy Tischler; and 71- Joseph Girtin, that the information contained therein is substantially the same for each.

12. During the course of hearings on P-46, 26 of those inmates testified before this Court. With the exception of inmates Snyder, Tischler and Girtin, and by his testimony at the preliminary hearing the inmate Wonnenberg, all of the inmates denied that they ever made statements consistent with those set forth in their endorsements. In some cases, they deny that they ever talked to any investigator or that they were even present to be eye or ear witnesses.

13. Here, the Court finds while the People have set forth information that an eye or ear witness may possess, the evidence indicates that in no instance were the People specific with respect to the subject matter to be testified to by any particular inmate.

14. The People now admit that they mistakenly endorsed the defendant, and in at least one instance, mistakenly endorsed a noninmate witness who was deceased. In previous hearings concerning other motions, it has also been established that though required to give addresses for witnesses (not employed by the government), in numerous instances the addresses were not provided nor were some witnesses listed with specificity as to name until the People were ordered to do so.

15. The record also indicates that subsequent to People's P-9, defense counsel for Mr. Perez notified all inmate witnesses that they had been endorsed. While this may

have been proper, it appears to have had the effect of chilling any desire these witnesses might otherwise have had to testify in the within action.

16. P-46 was precipitated by the endorsements set forth in People's P-9; however, as matters progressed, the defendant also began to focus on disqualification of the office of the district attorney and the Colorado Attorney General's Office capital crimes unit.

17. Attorney Daniel Edwards, then in private practice, was appointed as attorney to represent Alejandro Perez, defendant herein, in Denver District Court case No. 96CR5279 on August 27, 2002 for purposes of prosecuting a Rule 35(c) motion.

18. On September 17, 2002, Daniel Edwards filed a motion to withdraw transcripts of the trial and related proceedings held in that case. According to his testimony, Mr. Edwards most likely notified Mr. Perez that he had been appointed to represent him and was added to Mr. Perez' phone list.

19. On March 4, 2003, Daniel Edwards, citing health problems, filed a motion to withdraw as counsel for Alejandro Perez in case No. 96CR5279. Said motion was granted and new counsel was eventually appointed to represent Mr. Perez concerning postconviction relief.

20. Daniel Edwards was employed by the Colorado Attorney General's Office on May 1, 2007 to serve in the capital crimes unit of that office. Thereafter, Daniel Edwards was appointed as special deputy district attorney by the district attorney. Neither the capital crimes unit nor the district attorney's office had conflict screening policies in place when Mr. Edwards was hired/appointed.

21. The capital crimes unit adopted a conflict screening policy on or near June 11, 2007. This policy was drafted by Daniel Edwards after June 4, 2007.

22. Neither Daniel Edwards, the capital crimes unit, nor the district attorney's office had disclosed Mr. Edwards' representation of Mr. Perez prior to the filing of P-46.

23. The district attorney has never taken steps, either prior to June 4, 2007 or subsequent thereto, to adopt a conflict screening policy, it being the statement of the district attorney that she relied upon her attorneys to follow the law and their ethical obligations.

24. The Court received evidence for the first time on March 25, 2008 that the district attorney's office was working to put something together (screening policy) as of that date, although it has not been completed.

25. In response to Defendant's P-47 (a motion for protective order) filed June 4, 2007, this Court entered Perez Order No. 25 on that date.

26. The People filed "People's motion for Court to reconsider protective order (Perez Order No. 25) dated June 4, 2007 (P-SS)". In said motion filed June 5, 2007, the People requested the Court to rescind Perez Order No. 25 to allow communication between Mr. Edwards and the district attorney for purposes of responding to P-46. During argument provided June 27, 2007, the People, among other things, specifically asked the Court to modify Perez Order No. 25 to allow Daniel Edwards to work on the Bueno case.

27. The Court allowed both the People and the defendant to examine Daniel Edwards on the record in open court on June 28, 2007. According to Mr. Edwards, he believed

that he still had a file in the Perez Denver District Court matter; however, according to his testimony, he had no memory of the matter and at that time had not communicated any information concerning his representation to either Susan Trout (the other member of the capital crimes unit) or any attorney handling the current Perez prosecution. After Mr. Edwards' examination concluded, further discussion ensued concerning whether Mr. Edwards could work on the Bueno case. That record appears in the transcript of June 28, 2008, pages 264 through 269. The Court declined to amend its protective order and indicated to the People that they would proceed at their own risk if Mr. Edwards were to participate in the Bueno case.

28. As stated heretofore, the defendant filed his motion to reopen the evidence on June 30, 2008 and said motion has affidavit support.

29. The Court now finds that the district attorney authorized Daniel Edwards to work on the Bueno case but limited his involvement to legal issues. According to Mr. Edwards, he was not to work on factual issues. The evidence shows that after June 4, 2007, Mr. Edwards reported more than 300 hours worked on that case. It is the People's position that Perez Order No. 25 was not violated.

30. It was also disclosed by the People for the first time after June 4, 2007 that Mr. Edwards had previously represented two inmates previously endorsed in People's P-9, i.e., Joseph Herrera and Michael Snyder. It was disclosed by defense counsel on March 31, 2008 that Mr. Edwards, as a defense attorney, also represented the endorsed witness Dereck Martin, referenced in People's P-9 as Derrido Martin El.

31. Subsequent to June 4, 2007, Daniel Edwards, either at the request of the district attorney, Susan Trout or on his own initiative, engaged in substantial research concerning aggravators in death penalty cases and concerning jury selection for such cases. In Exhibit 26 under date of March 25, 2008, the Court, among other documents, was presented for in camera review two separate notebooks, each containing at least one inch of paper showing in depth research conducted by Mr. Edwards on those two subjects. He also prepared numerous drafts of pleadings in the Bueno case, including but not limited to the People's response to Defendant's B-240, a motion filed by defense counsel in the Bueno case to disqualify the district attorney in that case.

32. Mr. Edwards has testified that the research he did was general research that was given to Susan Trout and that he had no control over how it was used thereafter. He admitted that if the district attorney chose to do so, the work product could be used by her in any death penalty case now being prosecuted in the 18th Judicial District, including the Perez case. He also acknowledged that the work done by him in drafting pleadings could be changed and used in various death penalty cases. Furthermore, the evidence indicates that Mr. Edwards has been active in researching and drafting instructions in the so-called "ROC" death penalty cases now being prosecuted in Arapahoe County District Court by district attorneys for the 18th Judicial District.

33. Mr. Edwards has never been asked to withdraw as counsel in either the Perez or the Bueno case, it being his statement that Perez Order No. 25 acted as a *de facto*

withdrawal of his involvement in Perez. Of interest, however, is the fact that in the Bueno case Mr. Edwards, while acting as a special deputy district attorney, filed a motion to quash on behalf of his client Alejandro Perez. The motion to quash was made in response to a subpoena issued by the Bueno defense team for the production of the Perez file which Mr. Edwards possessed concerning Denver District Court case No. 96CR5279. During the same time frame, Mr. Edwards was also responding to a subpoena duces tecum issued by the Bueno defense team wherein they requested time records generated by Mr. Edwards as a prosecutor in the Bueno case.

34. An additional issue identified by the defendant in his supplement to P-46 concerned the relationship of the district attorney's office with the department of corrections with respect to financing the within litigation.

35. Lincoln County, together with Elbert County, Douglas County and Arapahoe County, is one of four counties comprising the 18th Judicial District. Carol Chambers is the elected district attorney for the 18th Judicial District.

36. The LCF is a state-operated correctional facility located in Lincoln County, Colorado and is operated under the direction of the Colorado Department of Corrections. LCF housed Jeffrey Heird, now deceased, and the defendant Perez on March 28, 2004.

37. Historically in the 18th Judicial District, when crimes are allegedly committed at LCF, both deputy district attorneys and clerical staff have been encouraged, if not trained, to keep track of the time spent by them concerning such DOC cases. Conversely, on non-DOC cases, neither the attorneys nor the clerical staff are required to keep track of time spent.

38. As shown on the last two pages of Defendant's 37, entered into evidence during the hearings held March 25, March 31 and April 1, 2008, 70 FTEs, comprised of 72 attorneys, work under the direction of the district attorney. Included in this employment is one assistant district attorney, 12 chief deputy district attorneys, 14 senior district court deputy district attorneys and 24 district court deputy district attorneys. The budget for the district attorney's office in 2007 (before new position requests) for salaries was $11,643,000.00.

39. During the Perez prosecution, the district attorney has billed the department of corrections directly for all time kept by clerical staff and attorneys who worked on the Perez prosecution. Dan May, as chief deputy district attorney in charge of the Perez prosecution, has billed the department of corrections full-time for his monthly salary during 2008.

40. DOC has also been billed directly for substantial sums billed monthly for Rich Orman's salary. Mr. Orman is the attorney assisting Mr. May in this case.

41. The defendant for the first time on January 15, 2008 raised the issue that the district attorney should be disqualified because the financial arrangement said office has with the department of corrections has created an impermissible conflict for the following reasons, to-wit: (1) The district attorney has abandoned her independence, i.e., instead of serving the people of the state of Colorado, she is now serving the department of corrections; (2) the department of corrections is alleged by the defendant to be the victim and is directly funding Mr. Perez' prosecution; (3) the district attorney has a governmental profit motive, specifically she is doubling up by

receiving funds from the department of corrections for salaries while receiving her budget from both the state and the four counties comprising her district; (4) direct billing by the district attorney violates the statutory scheme referenced in §16-18-101(3) and violates the law since salaries are not costs; and (5) the present arrangement not only violates the law but also violates various of the Colorado Rules of Professional Conduct.

42. Ms. Chambers approached the Lincoln County Board of County Commissioners on January 30, 2008 and requested two resolutions, i.e., Resolution 677 wherein the district attorney presented and the Board approved the 72 district attorneys listed on Exhibit 37, as well as their respective salaries for work in Lincoln County; and Resolution 678 wherein the commissioners authorized the district attorney to act for them in requesting funding from the legislature for costs of prosecuting present and future cases for any crime alleged to have been committed by a person incarcerated at LCF.

43. On January 24, 2008, the Joint Budget Committee for the state legislature added a new line item which was approved and is referenced "payments to district attorneys". Notwithstanding the action of the Joint Budget Committee, neither §16-18-101(3), C.R.S. nor the provisions of Title 20 were amended. Section 16-18-101(3), C.R.S. has not been amended since 1977.

44. According to the district attorney, she authorized Dan May to make contact with officials at the department of corrections to work out the present funding mechanism.

There is no evidence that any of the county commissioners for the four counties comprising the 18th Judicial District agreed to the funding mechanism.

45. The People claim that the defendant has no standing to challenge the manner in which the district attorney funds the prosecution of death penalty cases. The defendant disputes this position.

46. The Court cannot find nor has it been presented with any legal authority other than §16-18-101(3), C.R.S., or §20-1-302, C.R.S., which would allow the department of corrections to assist counties or local district attorneys with funding of DOC cases.

ISSUES BEFORE THE COURT

1. Whether Dan Edwards should be disqualified from participation in the Perez case?
2. Whether under the totality of all relevant facts and circumstances the district attorney and the special deputy district attorneys from the capital crimes unit of the attorney general's office should be disqualified from prosecuting the Perez case?
3. Whether the Court should dismiss that portion of the Perez case wherein the death penalty is requested because of prosecutorial misconduct?

CONCLUSIONS OF LAW

1. Disqualification of a district attorney shall be raised by motion filed pursuant to §20-1-107(2), C.R.S., and shall be supported by affidavit of a witness competent to testify to the facts set forth in the affidavit. Here, as originally filed, P-46 as characterized by defendant was a motion to dismiss alleging prosecutorial misconduct by the People in filing P-9. Disqualification of Daniel Edwards, the district attorney's office and the special district attorney from the capital crimes unit of the attorney general's

office was requested as an alternative to dismissal. Said motion was not supported by an affidavit. The Court allowed the motion to be heard as a motion to dismiss; however, before decision was rendered, the supplemental motion was filed by the defendant. The supplemental motion did have affidavits in support as required by statute. As such, the Court has now heard additional evidence and argument. The Court now concludes that it may properly address the issue of disqualification. The Court also concludes that this has become the primary issue in P-46 as supplemented.

2. One who seeks to disqualify a prosecuting attorney must establish supportive facts. *Wheeler v. District Court*, 180 Colo. 275, 504 P.2d 1094 (1993).

3. Trial courts have broad discretion to determine whether they should disqualify a district attorney from prosecuting a particular case. A court abuses its discretion if it makes a manifestly arbitrary, unreasonable or unfair decision. *People v. Dunlap*, 124 P.3d 780, 778 and 779 (Colo. App. 2004).

4. According to §20-1-107(2), C.R.S., a district attorney may only be disqualified (1) at the request of the district attorney; (2) upon a showing that the district attorney has a personal or financial interest or (3) the Court finds special circumstances that would render it unlikely that the defendant would receive a fair trial. The defendant raised issues with respect to the second and third prongs of §20-1-107(2), C.R.S. in defendant's motion as supplemented.

5. Defendant also asserts that notwithstanding the language of §20-1-107(2), C.R.S., which provides that a district attorney may only (emphasis added) be disqualified under the limited specific provisions of the statute, that historically Colorado courts

have been vested with inherent authority to protect their dignity, independence and integrity. *In the Interest of J.E.S.*, 817 P.2d 508, 511 (Colo. 1991) wherein the Colorado Supreme Court cited *Pena v. District Court*, 681 P.2d 953 (Colo. 1984). The Supreme Court defined the inherent powers of the judiciary as

> "[a]ll powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence, and integrity, and to make its lawful actions effective. These powers are inherent in the sense that they exist because the court exists; the court is, therefore, it has the powers reasonably required to act as an efficient court."

6. The Court concludes that it should engage in its analysis concerning disqualification by first reviewing the third prong of §20-1-107(2), C.R.S. At issue is whether, considering the totality of all relevant facts and circumstances present in the within matter, special circumstances exist that would render it unlikely that the defendant would receive a fair trial.

ISSUE NO. 1

7. Analysis first begins with Daniel Edwards. Mr. Edwards was appointed to represent Mr. Perez in the Denver District Court case for the purpose of prosecuting a Rule 35(c) motion. This is now the very case the People would use as an aggravator in sentencing the defendant to death in this case. Mr. Edwards was only in Mr. Perez' Denver case for six and-a-half months, and even though he filed no motions, he did order transcripts and most likely notified Mr. Perez that he had been appointed and was added to Mr. Perez' phone list.

8. Here, unlike the facts presented in *People v. Chavez*, 139 P.3d 649 (Colo. 2006), there is no question about whether or not Mr. Edwards was defendant's attorney. He was

appointed by the court and entered his appearance. Furthermore, in his response to the subpoena duces tecum issued in the Bueno case, Mr. Edwards asserted both an attorney-client privilege and work product privilege as they concerned his client, Mr. Perez. Clearly, Mr. Edwards was attorney for Mr. Perez in the Denver District Court case No. 96CR5279.

9. Furthermore, case No. 96CR5279 is substantially related to the present case not because of similarities between the factual situations and the legal questions posed as referenced in *Armstrong v. McAlpin*, 625 F.2d 433 (2nd Circuit, 1980), but because conviction for the class 2 felony in 96CR5279 is being used as a statutory aggravator, if not the primary aggravator, by the People as they seek the death penalty against Mr. Perez.

10. This Court, without reservation, concludes that this is a fact pattern which fits squarely within the special circumstances that would render it unlikely that the defendant would receive a fair trial if Daniel Edwards were allowed to remain the prosecutor in the Perez case and, therefore, disqualification of Daniel Edwards is warranted under the third prong of the statute.

ISSUE NO. 2

11. The next issue concerns whether or not the district attorney and the capital crimes unit of the attorney general's office (which, without Mr. Edwards, would consist only of Ms. Susan Trout) should be disqualified as prosecutors herein. Here, the Court concludes that analysis may be rendered using either the third prong of §20-1-107(2), C.R.S. or by applying the Court's inherent powers.

12. Of significance is the following: Both Robert Watson and Daniel Edwards were hired by offices that did not have in force an effective conflict screening policy. In fact, the district attorney's office still does not have a conflict screening policy. For his part, Robert Watson was the deputy district attorney in charge of the initial investigation of the Heird murder. In that position, Mr. Watson received and analyzed discovery, put in substantial amounts of time on the investigation, developed the theory of prosecution which was shared with the department of corrections and prepared trial notebooks. All of this occurred even though he had previously represented a primary witness, if not a possible suspect, Michael Snyder. According to her own testimony, had Carol Chambers known that Mr. Watson had represented Mr. Snyder previously, it would have been "unseemly" for him to lead the investigation from the district attorney's office.

13. After Daniel Edwards was hired on May 1, 2007, he then reviewed the evidence available in the present case and he filed a pleading in this case. Notwithstanding Perez Order No. 25 and notwithstanding substantial record discussion about the impact upon this proceeding if Mr. Edwards were allowed to work on the Bueno case, Mr. Edwards was ordered to do so by the district attorney. According to Mr. Edwards, his involvement was limited to legal issues and he was precluded from looking at factual issues. While this Court cannot conclude that there was a literal violation of Perez Order No. 25 since Mr. Edwards did not communicate directly with Mr. May or Mr. Orman, his efforts in drafting pleadings in Bueno; his efforts in researching aggravators in death penalty cases; and his efforts in researching jury

selection and jury instructions, indicates that neither Perez Order No. 25 nor the attorney general's screening policy were enough to protect against Mr. Edwards' involvement in the Perez case. In the back room, Mr. Edwards was providing the fodder that could be used indiscriminately by the district attorney's office and the capital crimes unit in prosecuting death penalty cases, including Mr. Edwards' own client, Mr. Perez. Mr. Edwards' efforts against Mr. Bueno, an individual charged with conspiracy allegedly conducted with Mr. Perez, were efforts applied against Mr. Perez. Mr. Edwards has literally switched sides.

14. Whether Daniel Edwards did these things on his own initiative, at the direction of Ms. Trout or the district attorney, this Court concludes that not only were numerous Rules of Professional Conduct violated but also these are indeed special circumstances that would render it unlikely that Mr. Perez would receive a fair trial if the district attorney and the attorney general's capital crimes unit were allowed to remain in the case. When these facts are intertwined with the problems surrounding Mr. Watson's involvement in the case [2] and the prosecution's apparent lack of compliance with §18-1.3-1201(3)(b)(II), C.R.S. and Colorado Rules of Criminal Procedure 32.1(d)(2), a web has been woven from which no fair trial can be obtained should the People continue to be represented by the present prosecutor's office and the capital crimes unit of the attorney general's office.

[2] An issue, if standing alone, might not require disqualification of the entire office. See *People v. Lincoln*, 161 P.2d 1274 (Colo. 2007).

15. The above and foregoing are enough; however, there is also added to the mix the mechanism used by the district attorney's office in funding this particular prosecution.

16. While this Court understands the claim made by the People that the defendant in this case does not have standing to challenge how the People fund the within prosecution, this Court concludes that §20-1-107(2), C.R.S. is intended to give the defendant an opportunity to seek disqualification of the district attorney's office and, in so doing, he may show special circumstances that would indicate that it is unlikely that he would receive a fair trial. As such, the defendant must have standing to challenge issues that implicate those special circumstances.

17. A review of §16-18-101(3), C.R.S. indicates that "The department of corrections, from annual appropriations made by the general assembly shall reimburse the county or counties in a judicial district for the costs of prosecuting any crime alleged to have been committed by a person in the custody of the department. In obtaining its reimbursement, the county or counties shall certify these costs to the department, and upon approval of the executive director of the department, the costs shall be paid. The statute then states that provisions of this subsection (3) shall apply to costs not otherwise paid by the state."

18. First, this Court concludes that costs do not include attorney's fees. A review of the case law interpreting said statute leads this Court to the conclusion that the appellate courts of this state have never deviated from that position. Additionally, this Court concludes that even if salaries were included in costs, that the statute itself has been

circumvented by the district attorney's office by her direct billing of not only costs but also of salaries to the department of corrections . In other words, the counties have been completely bypassed as the district attorney and the department of corrections have violated §16-18-101(3), C.R.S.

19. Notwithstanding the above and foregoing, §20-1-302, C.R.S. does provide the mechanism for funding this type of prosecution. In that section it is provided that "nothing in part 2 of this article or this part 3 shall prohibit any municipality, county, or governmental entity from agreeing to fund programs, projects, personnel, or salaries that are in addition to the funds provided for the reasonable and necessary expenses of the district attorney with the agreement of the relevant board of county commissioners." Again, the district attorney, acting in concert with the department of corrections and the Joint Budget Committee, circumvented this statute. This was done when the district attorney gave authority for Dan May to approach officials of the department of corrections in order to make an agreement for funding of the death penalty cases. While this may have been acceptable, there is no evidence that the Lincoln County Board of County Commissioners ever was part of that agreement process.

20. While the district attorney argues that she was proceeding according to tradition and that interpretation of statutes by agencies should be given great deference by the court, it is up to the court to point out violations notwithstanding tradition.

21. If this were not enough, the evidence before this Court certainly leads the Court to believe that while the four counties of the 18th Judicial District were funding salaries

for 18th Judicial District personnel, i.e., attorneys, that at the same time the department of corrections was likewise being billed, and the question then arises as to whether or not this was doubling up on the part of the district attorney's office which would provide governmental profit for that department. Because this Court is aware of the fact that there are substantial auditing procedures in effect in the state of Colorado, the Court is unwilling to conclude that the district attorney was obtaining any intentional financial gain for her office and accepts her statement that this money would be returned to some other entity in due course. Notwithstanding those conclusions, it remains that the statutory violations cannot be ignored in view of the fact that compliance could have been easily accomplished.

ISSUE NO. 3

22. With respect to the issue of prosecutorial misconduct as concerns P-9, a review of the language concerning the inmate endorsements against the backdrop of the information then in the People's possession, i.e., approximately 4500 pages of discovery, first leads the Court to conclude that even though approximately thirty months has transpired since the alleged murder, no one from the district attorney's office had taken the time to specifically review the discovery material applicable to each inmate witness. If they did so, they ignored it. The shotgun effort as contained in P-9 should never have occurred.

23. The Court concludes that the People have viewed the provisions in Rule 32.1 and §18-1.3-1201, C.R.S. concerning witness endorsements as nothing more than notice

provisions. If that were so, why are those provisions written in different language than those in Rule 16?

24. The Court concludes that these provisions are different because both the legislature and courts have concluded that in fact death is different. While this Court believes that the concept of heightened reliability, as that concept has been interpreted and construed by the various courts around the United States, applies only to the penalty phase of a death penalty case; that is the specific stage of the trial for which these endorsements were made. If that conclusion is correct, then this particular statute and this particular rule required substantially more effort from the People than they gave in preparing P-9.

25. Having reached those conclusions, this Court recognizes that the People were dealing with a unique kind of witness. Inmate witnesses, unlike witnesses who are not incarcerated, appear to move in and out of their sphere of willingness or unwillingness to cooperate with authorities, depending on how they perceive that which would be in their best interest. It could even be concluded that the district attorney was damned if she endorsed the witnesses in blanket form, as done here, and she was damned if she did not endorse witnesses until later. This ignores the fact that there is not only a provision for late endorsements but the endorsements required in a scheme of heightened reliability called for an endorsement which is much more exact than was provided by the People. This Court does conclude that Rule 11 of Colorado Rules of Civil Procedure applies even with regard to criminal pleadings and that good faith was not exercised here by the People in these inmate endorsements.

26. Having reached the above and foregoing conclusions, this Court finally concludes that both under the provisions set forth in the third prong of §20-1-107(2), C.R.S., i.e., special circumstances, and the Court's inherent powers, that in order to ensure a fair trial in this case, the following should occur, to-wit: (1) Daniel Edwards should be disqualified from having any participation, whether it be direct or indirect, in the Perez case; (2) that the entire district attorney's office from the 18th Judicial District and the capital crimes unit which, for all intents and purposes, consists of Sue Trout, should be disqualified from further prosecution of Mr. Perez, directly or indirectly; (3) that it is required by §20-1-107(4), C.R.S. that the Court should appoint a special prosecutor to prosecute the within matter.

27. Applying the concept of heightened reliability, the Court concludes that the inmate witnesses listed in People's P-9 numbered 72 through 147 should be stricken as possible witnesses in the sentencing phase and any death penalty proceeding against Mr. Perez.

ORDER

IT IS HEREBY ORDERED AS FOLLOWS:

A. Daniel Edwards is disqualified as a prosecutor in the within action. Daniel Edwards shall not participate directly or indirectly in any future prosecution of the defendant herein and his work product shall not be used in any future prosecution of the defendant in this case.

B. The entire office of the district attorney for the 18th Judicial District and the capital crimes unit of the attorney general's office are disqualified as prosecutors in the within action. No district attorney presently employed by the district attorney's office nor Susan Trout shall participate directly or indirectly in any future prosecution of the defendant herein. No work product generated herein by the office of the district attorney or the capital crimes unit for the attorney general's office (including that generated by Robert Watson) shall be used in the prosecution of the defendant or provided to newly-appointed prosecutors. (Work product does not include discovery which does not contain prosecution notes or from which said notes have been redacted.)

C. At such time as this order becomes a final order after interlocutory appeal as authorized by §20-1-107(3), C.R.S., the Court shall appoint a special prosecutor in the within action as is authorized by §20-1-107(4), C.R.S. Said special prosecutor shall be authorized to pursue the action as if he or she was the prosecutor in the first instance and shall have full prosecutorial discretion.

D. Inmate witnesses listed in People's P-9 numbered 72 through 147 shall be stricken as prosecution witnesses in the sentencing phase of any death penalty proceeding against the defendant Alejandro Perez.

DATED this 7th day of April, 2008.

BY THE COURT:

STANLEY A. BRINKLEY, DISTRICT JUDGE

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