

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<p style="text-align: center;"><b>Filed</b></p> <p style="text-align: center;">JUN 17 2014</p> <p style="text-align: center;">CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO</p> <p style="text-align: center;">σ COURT USE ONLY σ</p>
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff  v.  <b>JAMES HOLMES,</b> 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. <b>12CR1522</b>       Division 201
<b>RENEWED MOTION FOR SANCTIONS FOR PROSECUTORIAL INTERFERENCE                  WITH DEFENSE INVESTIGATION [D-137a]</b>	

**CERTIFICATE OF CONFERRAL**

The prosecution states that it needs “more information about this motion before [it] can respond.”

Mr. Holmes, through counsel, moves this Court to sanction the prosecution in this case for violating his state and federal constitutional rights. *See* U.S. Const. Amends V, VI, XIV; Colo. Const. art. II, secs. 16, 25. The prosecution has committed misconduct by directly interfering with defense counsel’s constitutional obligation to investigate this case by misrepresenting critical information, encouraging witnesses and victims to refrain from speaking with the defense, improperly giving legal advice to victims, and falsely presenting themselves as representing the victims in this matter. In support of this motion, counsel state the following:

**I. Factual Background**

a. Prior Pleadings

1. On June 3, 2013, Mr. Holmes filed a Motion for Discovery of Records re: Prosecution Communication and Correspondence with Victims [D-069]. Communications between Lisa Teesch-Maguire and victims were specifically mentioned and requested in this pleading in paragraphs 9 and 11. That same day, Mr. Holmes filed a Motion for Specific Discovery-Witness/Victim Statements made to Lisa Teesch-Maguire [D-047].

2. These pleadings were denied by the Court without a hearing after the government filed responses containing full assurances that the government was and would continue to fulfill its obligations pursuant to Rule 16 and *Brady v. Maryland*, 373 U.S. 83 (1963), and stating that the request was overbroad because it included communications about court dates and scheduling issues and not issues of evidence or substance to the case.

3. On July 29, 2013, Mr. Holmes filed a Motion for Sanctions for Prosecutorial Interference with Defense Investigation [D-137], requesting sanctions because, *inter alia*, members of the prosecution team and/or law enforcement had discouraged witnesses from speaking with the defense and suggested that if a witness spoke to the defense, that the defense would “[m]anipulate” or “turn [a witness’s] words around.” *See* Motion D-137, para. 1.<sup>1</sup>

4. The prosecution claimed in response that it “has made no such statements to the witnesses in this case,” and that the witnesses in this case have simply been told by the prosecution team and/or law enforcement “that they should be aware that anything that they say to anyone about this case, including to the media, to the prosecution, to law enforcement, to the defense, and to other people about this case could potentially be used in court or filed in a motion during the pendency of this case.” Response to Motion D-137, para. 5. The prosecution further alleged that “[t]he prosecution team and/or law enforcement have not discouraged any witness from speaking to the defense in this case . . . .” *Id.* at para. 6. The prosecution also disavowed making statements communicating to witnesses that it would be better if they did not say anything to the defense, as well as statements communicating to witnesses not to talk to anyone without the approval of the prosecution. *See id.* at para. 11.

5. The Court denied the defense’s motion without prejudice with respect to its claim that the prosecution had discouraged witnesses from speaking with the defense by informing witnesses that information they provided to the defense would be manipulated or turned around by the defense.<sup>2</sup> The Court acknowledged that this ground “has arguable merit,” but concluded

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<sup>1</sup> The defense also alleged that the prosecution had asked witnesses to provide them with information about the defense’s interviews with them, and noted that it had had several experiences where witnesses had initially been eager and willing to speak with the defense, but had abruptly reversed course and refused after having subsequent communication with law enforcement or the district attorney’s office. Motion D-137, para. 1. In response, the prosecution admitted asking witnesses to provide information about the defense’s interviews with those witnesses but stated there was nothing wrong with this practice. The prosecution further stated that it has “told all witnesses in this case that it is completely their choice and their choice alone about whether they would like to speak to anyone regarding this case,” and that they “have not discouraged any witness from speaking to the defense in this case, but have informed victims and witnesses of their rights to speak or not speak to anyone regarding this case.” Response to Motion D-137, para. 4,6.

<sup>2</sup> The Court denied *with* prejudice Mr. Holmes’s claim that the prosecution had asked witnesses to provide them with information about the defense’s interviews with them, and that a number of witnesses had declined to speak with the defense after consulting with the prosecution and/or law enforcement, concluding that “no sanctions would be justified because neither ground establishes interference with the defense’s investigation.” Order re: Motion D-137, p. 2.

that Mr. Holmes's claim as articulated in Motion D-137 lacked specificity. It concluded: "[t]his denial is without prejudice to the extent that the motion asserts that the defense has learned that the prosecution and/or law enforcement have suggested to a witness or witnesses that information provided by witnesses to the defense will be manipulated or turned around by the defense." Order re: Motion D-137, pp. 5-7.

6. The defense now has documented evidence that the prosecution in this case has interfered with defense preparation, denied the defense equal opportunity to speak to witnesses, improperly attacked the integrity of the defense, impeded and obstructed defense counsel's investigation through improper influence, and has compromised its role as an impartial advocate for justice. Therefore, it renews its request for sanctions in Motion D-137.

b. Communications Between Deputy District Attorney Teesch-Maguire and Witnesses in this Case

7. Defense counsel recently obtained an email sent by the prosecution, via Deputy District Attorney Lisa Teesch-Maguire, to the victim-witnesses in the case on May 8, 2014. A copy of this email is attached as Exhibit A. This email contains significant factual and legal misrepresentations, clearly discourages victim-witnesses from speaking with the defense, and constitutes a serious violation of several legal and ethical rules.

8. At the outset, it is important to note that while Ms. Teesch-Maguire sent the email to herself and blind carbon copied the email to other recipients, it is reasonable to presume based on the nature and content of the email that the recipients include everyone from Theaters 8 and 9, and associated relatives of the victims – a group well in excess of 800 people. The overwhelming majority of these individuals are not only witnesses for the penalty phase by virtue of being victims, but are also *fact witnesses* and in many cases, eyewitnesses, to the shooting. As explained in Section II of this pleading, Mr. Holmes has a constitutional right, and defense counsel have a constitutional duty, to investigate this case and attempt to interview these individuals in preparation for trial, and the law prohibits the prosecution from interfering with the defense's investigation of this case. *See* Section II a., *infra*.

9. The email has the subject heading "Important Information—Please Read This Entire E-mail When you Have Time." The title of this email alone is misleading. A victim-witness receiving this email would think that it contained important information about the status of the case or case settings, when in fact the email contains no information about the case, just false information that encourages victim-witnesses not to speak with the defense or its victim liaison.

10. The email begins by asking the recipients to read the entire email, stating, "I appreciate your help." Again, as explained below, the email encourages them not to speak with the defense or the defense's victim liaison, thanks them for their 'help' in this matter of not speaking with the defense, and asks with emphasis that they "CALL" with any questions or concerns.<sup>3</sup>

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<sup>3</sup> In fact, the recipients of the email are encouraged to "call" (as opposed to email or write) to Ms. Teesch-Maguire at least seven times in the email. As the district attorney has

11. The email next apparently included a photograph of Ms. Teesch-Maguire and states that “if anyone tries to meet with you and say that they are Lisa—hopefully they look something like this attached picture.” The implication is that members of the defense team or others affiliated with the defense may be impersonating Ms. Teesch-Maguire when attempting to contact victims, which is emphatically untrue. The implication that dishonest tactics are being used by the defense has no merit whatsoever and improperly impugns the integrity of defense counsel. No one affiliated with the defense has ever attempted to impersonate Ms. Teesch-Maguire, nor have they been misleading in any other way about their identities when approaching victims or witnesses in this case.

12. The email goes on to provide an inaccurate and falsely inflammatory description of the work of Tammy Krause, the defense’s victim liaison, as well as other unnamed individuals who are not members of the Holmes defense team.

13. First, the prosecution wrongly states that Ms. Krause’s “goal is to try to find Victims who will help the Defendant—she tries to find Victims who will try to persuade the prosecution and/or persuade a potential jury to have sympathy for the Defendant—she is an Advocate for the Defendant.” This is untrue and misleading.

14. As the affidavit from Ms. Krause, attached as Exhibit B, explains, her goal is not to “help” the defense. Rather, as she explains:

**The role of the defense victim liaison is to listen to the victim, and to learn of their needs within the judicial system to the extent possible. The liaison does not act as an advocate on behalf of the defendant, nor does the liaison advocate for any position or issue.** The liaison’s primary goal is to offer victims an opportunity to communicate their questions, concerns, or other information to the defense via the liaison. The work is based upon the principle that all legal professionals should attend to victims’ concerns unconditionally.

Furthermore, principles and protocols of victim outreach have been established to ensure that, while outreach to surviving family members is facilitated by the defense working with a liaison, it is the surviving family members who determine whether and how the communication proceeds. **Support for the victims is unconditional; a liaison’s work is offered without regard to a particular victim’s beliefs or wishes about the legal case or punishment.**

**The sole role of a victim liaison is to “engage the survivors wherever they are, wholly on the survivors’ terms, and to offer**

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asserted, the prosecution does not “have an obligation to reduce all oral witness statements to writing . . . .” See Response to Motion D-069, para. 5.

**a relationship with the offender, through the defense team, that may satisfy at least some of the survivors' needs and interests."** Mickell Branham and Richard Burr, *Understanding Defense-Initiated Victim Outreach and Why It Is Essential in Defending a Capital Client*, 36 Hofstra L. Rev. 1019, 1025 (2008). As such, liaisons have no other agenda; their work is not conditioned on the victims' or the victims' family members' beliefs about conviction or punishment. Liaisons attempt to "[l]earn from [the victims and/or victims' family members] the needs and interests they have that the defense might be able to meet, then meet their needs and answer their questions and concerns." *Id.* at 1029. Experience has shown that, in most cases where defense teams engage a victim liaison, surviving family members want some form of communication with the defense team. Traditionally, this avenue was not available to the surviving family members or was not considered possible by the defense attorneys. DVO allows both parties to learn from the other in a less adversarial environment, providing opportunities for information and redress not otherwise possible.

Exhibit B, paragraphs 11-13 (emphasis added). While Ms. Krause has previously explained her purpose and her role in her communications to the victim-witnesses in this case through letters and other communications, the prosecution's false characterization of Ms. Krause's purpose and her work has the effect of conveying the incorrect message that Ms. Krause has been somehow lying to victims about her role. The prosecution's inflammatory and incorrect description of Ms. Krause's purpose in contacting the victim-witnesses could have no other intended effect but to discourage the victim-witnesses from speaking with Ms. Krause. Furthermore, by suggesting that the defense has hired someone who has been deceptive, the prosecution wrongly suggests that the defense team as a whole has deceived the victim-witnesses and cannot be trusted, thereby casts aspersions on defense counsel.

15. Next, the prosecution informs victim-witnesses that

"[S]ome of you might be contacted by private Defense Attorneys—who are calling themselves Victims' Rights Attorneys. Again, please don't be confused—they are actually Defense Attorneys who are trying to help the Defendant. Some of these Defense Attorneys are actually even using Victims from other Death Penalty cases to try get [sic] you to attend meetings with them—to try to help the defendant.

See Exhibit A, p. 1.

16. This statement is misleading. The defense has had no involvement with any "private Defense Attorneys" calling themselves "Victims' Rights Attorneys" trying to set up meetings between the victim-witnesses in this case and victims from other death penalty cases.

If this has occurred, it has not been at the request or initiation of Mr. Holmes's defense team. However, the prosecution's email wrongly suggests that there are private individuals who are working *at the behest of the defense* so that they can "help the defendant," which again naturally implies that dishonest tactics are being used by the defense and improperly disparages the defense.

17. Ms. Teesch-Maguire next beseeches the victims in bold and capital letters:

**PLEASE—before you agree to talk with someone about this case—please find out who they REALLY are and decide whether you want to talk with them. PLEASE feel free to call me and ask me before you agree to talk with someone—please ask me if I know who they are and then you can make an informed decision about whether the person is anyone who you want to speak with.**

Exhibit A, p. 2 (emphasis in original). She goes on to suggest that if the victim-witnesses were to ask Ms. Krause or anyone affiliated from the defense team to hold off on speaking to them while they verified these individuals' identities with Ms. Teesch-Maguire, these individuals might "act strangely" which would be a "red flag":

Think about it—anyone who is trying to speak to you for a legitimate purpose to HELP YOU ... will be happy for you to call them back in 5 minutes while you check and found out who they really are—if they act strangely about your request to verify their information, probably that is [sic] red flag that you should be concerned about.

*Id.* This passage clearly and wrongly implies once again, that anyone affiliated with the defense team is out to trick victim-witnesses, and that their purpose for contacting victim-witnesses is not "legitimate." This is absolutely untrue.

18. Everyone affiliated with the defense team who has contacted victims or witnesses in this case has been forthright and honest with victim-witnesses about their identities and purpose in contacting them. With respect to defense investigators' and/or attorneys' efforts to contact victims, the defense is constitutionally and ethically obligated to fully investigate this case, which includes attempting to speak with the victims and witnesses in this case. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984); *People v. White*, 514 P.2d 69, 71 (Colo. 1973); Commentary to ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7A ("At every stage of the proceedings, counsel has a duty to investigate the case thoroughly. This duty is intensified (as are many duties) by the unique nature of the death penalty . . ."). Likewise, Ms. Krause's purpose in reaching out to victim-witnesses is, as she explains at length in her declaration, to provide victim-witnesses with information and support and to serve as a liaison between the defense and the victim-witnesses to the extent that the victim-witnesses have needs, desires, or concerns that would benefit from such a relationship. Contrary to Ms. Teesch-Maguire's implications, there is nothing illegitimate

about the defense's or Ms. Krause's attempts to contact the victim-witnesses in this case.

19. The prosecution next very explicitly discourages victim-witnesses from speaking with the defense. It states that "If you want to help the Defendant—that is your choice and you are free to do so—but please know that you can voice those opinions through this office, just as strongly—if not more strongly—than you can through these other DIVO individuals and Defense Attorneys calling themselves Victims' Rights Attorneys."

20. The prosecution cannot disguise its message by simply providing lip service to the idea that witnesses can talk to the defense and then proceeding to directly undermine this statement. It could not be clearer that the prosecution's intent is to discourage victim-witnesses from speaking with the defense. It is hard to imagine that any of the victim-witnesses reading this passage would agree that they want to "help" Mr. Holmes. After reading this passage, victim-witnesses have not only received the unmistakably message that there no need for victim-witnesses to speak to Ms. Krause or to *anyone* affiliated with the defense because the district attorney's office can serve and fulfill all of their needs. Victim-witnesses have further been given the impression that it would in fact be inadvisable for them to speak to anyone affiliated with the defense because the effect of any communication with the defense or their liaison will be to "help" Mr. Holmes.

21. This is wrong. Victim-witnesses are free to express anything and everything to any member of the defense team or to Ms. Krause. The truth is that many victim-witnesses' statements to the defense may be hurtful to the defense, but as described in Ms. Krause's declaration, "Support for the victims is unconditional; a liaison's work is offered without regard to a particular victim's beliefs or wishes about the legal case or punishment." Again, as Ms. Krause's declaration explains, it is not her goal to "help" the defense. It is entirely false to suggest that speaking with the defense or with Ms. Krause will necessarily and only have the effect of "helping" Mr. Holmes. Moreover, the defense's ethical obligation to fully investigate this case – as in any case – obviously may result in discovering information that is detrimental, not helpful, to their client or case.

22. The prosecution's tone, words and context clearly convey that the defense could not possibly have the victim-witnesses' best interests at heart and are only trying to "trick" them into "helping" Mr. Holmes. Any attempts at contact by defense attorneys or investigators employed by the Office of the State Public Defender on behalf of Mr. Holmes have been to learn relevant information from victim-witnesses – whatever that information may be – not to manipulate victim-witnesses in any way. Additionally, the entire concept behind DVO is to assist the defense in being more sensitive to victims' needs and concerns. The purpose of DVO, as explained by Ms. Krause, is to allow the defense and the victims "to learn from the other in a less adversarial environment, providing opportunities for information and redress not otherwise possible." Exhibit B, para. 13.

23. The prosecution next incorrectly states that "these other DIVO individuals and Defense Attorneys calling themselves Victims' Rights Attorneys" have "legal obligations to help the Defendant—they do not truly represent your interests and you deserve to know that. We are here to represent your legal Victims' Rights interests (even if we disagree) –please know that

you have our commitment that we will do that through the entirety of this case.” Exhibit A, p. 2.

24. First of all, as Ms. Krause explains in her affidavit, it is not her “legal obligation” to “help” Mr. Holmes. Her purpose is to assist the defense team in understanding the possible concerns, questions, and needs of the victims in this case throughout the judicial proceedings, and to serve as a liaison between victims and family members of victims and the defense. As she puts it:

In my experience as a DVO liaison, I have learned from the survivors and victims’ family members that when victims are engaged in a principled manner, that defense attorneys can improve victims’ family members’ experiences with the criminal justice system. For instance, defense attorneys can reduce, if not eliminate, the historically adversarial relationship between the defense team and the surviving family members by addressing the perceived lack of understanding of victims’ experiences, concerns, and judicial needs. Secondly, if the victims or their surviving family members are interested, defense attorneys can provide invaluable information to them about the pre-trial and trial proceedings, the defendant, and their duties as defense attorneys. **The process that evolved from the first case in Oklahoma City taught me that more can be done for victims and their surviving family members by actively listening to their questions and concerns than by assuming what families want or what is best for them. Such interactions cannot be done with an ulterior motive; this work is the least that all legal professionals should do on criminal and capital cases with the aggrieved victims and victims’ surviving family members.**

Exhibit A, paragraph 14 (emphasis added).

25. Nor is it the “legal obligation” of any other private individual or attorney to “help the Defendant.” As explained, to the extent that individuals *other than* Ms. Krause and members of the defense team employed by the Office of the State Public Defender have had any contact with the victim-witnesses in this case, it has not been at the request of the defense. If any individuals have engaged in the conduct described by the prosecution, they have acted on their own, and have absolutely no “legal obligation” to assist Mr. Holmes or the defense.

26. The prosecution’s statement, “they do not truly represent your interests and you deserve to know that,” emphatically communicates to victim-witnesses that the defense is trying to deceive victims and that they “deserve” to know about the defense’s and Ms. Krause’s supposedly true intentions from the prosecution. There could be absolutely no other message communicated to victim-witnesses from this passage other than to discourage them from speaking with the defense and to disparage the defense’s reputation to the victim-witnesses.

27. Moreover, the prosecution’s contention that the district attorney’s office



“represents” the victims’ legal interests is also false. As explained in more detail in Section II b., below, while the district attorney’s office has certain statutory obligations to ensure that the rights of victims are enforced pursuant to C.R.S. § 24-4.1-301 *et seq.*, the prosecution does not represent the victims or their legal interests. They represent the People of the State of Colorado. *See Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005) (the prosecutor “represents the State and the People of Colorado,” and as such, have a “higher ethical responsibility than other lawyers because of their dual role as both the sovereign’s representative in the courtroom and as advocates for justice”). This passage from Ms. Teesch-Maguire’s email highlights the unacceptable tension between her position as a Deputy District Attorney *and* a Victims’ Rights Advocate discussed in Section II below.

28. The prosecution further states in the email that “In response to communications that some of you have received from Ms. Krause and/or any other Attorney, you should know that the prosecution has a responsibility to seek justice in this case and to carefully evaluate the legal consequences of the decisions that we make.” Exhibit A, p. 3. The defense is unsure which communications the prosecution is referring to, but once again, the unmistakable message is that Ms. Krause or others acting at the behest of Mr. Holmes’s defense team have misinformed victim-witnesses about the prosecution’s obligations and responsibilities in this case, which is again, untrue.

29. The email concludes with a suggestion that in the (highly unlikely, after reading this email) event that victim-witnesses wish to speak with the defense, “[t]he best way to ensure an accurate account of a conversation is to record the conversation.” Again, this implies that if conversations between victim-witnesses and the defense or their liaison are not recorded, the defense will misconstrue or twist victim-witnesses’ words or statements around. This message is incorrect, and further discourages victim-witnesses from speaking with the defense.

30. Upon information and belief, the email attached as Exhibit A is one of approximately 324 mass emails Ms. Teesch-Maguire has sent to the victim-witnesses in this case. The defense has moved for discovery of these emails in Motion D-219, filed simultaneously with this pleading.

## II. Legal Authority

### a. Legal and Ethical Violations

31. Prosecutors bear a heavy responsibility to seek justice in all cases. *See, e.g., Berger v. United States*, 295 U.S. 78, 88 (1935) (a prosecutor “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”); *see also* Colo. R. Prof. Conduct 3.8.

32. This responsibility is even greater in a capital case. “The prosecutor’s role is especially important in death penalty cases because the prosecutor is a determining force in the

decision of whether a human being lives or dies.” Jeffrey L. Kirchmeier et. al., *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 Wayne L. Rev. 1327, 1330 (2009). See also *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (noting in capital cases that because “death is a different kind of punishment from any other” there must be special efforts to ensure the death penalty is imposed fairly).

33. The email sent to the victims by Ms. Teesch-Maguire conveys the clear message that all of the efforts at contacting the victims described in the email have been coordinated by the Holmes defense team in an effort to manipulate, trick, and lie to victims and that anyone affiliated with the defense is not to be trusted. By conveying this unmistakable message and wrongly disparaging the defense to victim-witnesses in this case, the prosecution has improperly impeded and interfered with a number of Mr. Holmes’s constitutional rights.

34. As a criminal defendant, Mr. Holmes has a basic right to due process and fundamental fairness embodied in the state and federal constitutions. U.S. Const. Amends. V, XIV; Colo. Const. art. II, secs. 16 & 25. In addition, the United States and Colorado Constitutions protect a criminal defendant’s right to investigate and present a defense. See U.S. Const. Amends. VI, XIV; Colo. Const. art. II, secs. 16 & 25. “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment,” it is by now axiomatic that the Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense.” *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986)); see also *Washington v. Texas*, 388 U.S. 14 (1967). Furthermore, a criminal defendant has the right to the effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668 (1984).

35. Mr. Holmes’s ability to present a defense in this capital case, as well as counsel’s ability to discharge their constitutional duties in an effective manner, hinge on having the unimpeded opportunity to speak with the victim-witnesses about their experiences in this case. The prosecution’s conduct in this case has irreparably infringed upon these constitutionally-protected interests by strongly discouraging victim-witnesses from speaking with the defense and creating a barrier to Mr. Holmes’s right to present a defense.

36. As the D.C. Circuit held in reversing a capital conviction in *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966), where the prosecutor advised two eyewitnesses that they could speak to “anyone they liked” but advised that they not speak to anyone about the case unless he was present:

Witnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them. Here the defendant was denied that opportunity which, not only the statute, but elemental fairness and due process required that he have . . . . Presumably the prosecutor, in interviewing the witnesses, was unencumbered by the presence of defense counsel, and there seems to be no reason why defense counsel should not have an equal opportunity to determine, through interviews with

the witnesses, what they know about the case and what they will testify to.

*Id.* See also *United States v. MacCloskey*, 682 F.2d 468, 479 (4th Cir. 1982) (prosecutor's "eleventh hour" telephone call to witness's attorney suggesting that she "would be well-advised to remember the Fifth Amendment" was a due process violation; "[t]he government's 'suggestion' destroyed the choice of [the witness] to testify freely"); *United States v. Morrison*, 535 F.2d 223, 225 (3d Cir. 1976) (finding a due process violation where the prosecuting attorney sent a witness messages warning her that "if she testified, that testimony would be used as evidence against her" and subpoenaed her to his office for a meeting with three agents to communicate the dangers of testifying); *United States v. Tsutagawa*, 500 F.2d 420, 423 (9th Cir. 1974) (affirming trial court's dismissal of indictment where government deported witnesses and placed them beyond the reach of the defendant; "A defendant has the right to formulate his defense uninhibited by government conduct that, in effect, prevents him from interviewing witnesses who may be involved and from determining whether he will subpoena and call them in his defense."); *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973) (government violated appellant's due process rights where secret service agent approached witness prior to his testimony at the request of the prosecutor and gratuitously admonished witness that he could be prosecuted for misprision of a felony if he testified; "the Government's action here substantially interfered with any free and unhampered determination the witness might have made as to whether to testify and if so as to the content of such testimony."); *United States v. Peter Kiewit Sons' Co.*, 655 F. Supp. 73, 78 (D. Colo. 1986) (ordering witnesses to submit to depositions by defense counsel after prosecution's conduct "substantially chilled [certain] witnesses' previously expressed willingness to discuss the facts with the defense"); *State v. Hammler*, 312 So. 2d 306, 309 (La. 1975) (reversing conviction where prosecution instructed witnesses not to speak to any lawyers for the defense; "It is our opinion that the prosecuting attorney's conduct in advising the witnesses not to speak to defense attorneys significantly interfered with the defendants' constitutionally guaranteed right to effective counsel because their counsel were denied the opportunity to adequately prepare a defense.").

37. The email also violated Mr. Holmes's right to fundamental fairness by improperly attacking the integrity of defense counsel. See, e.g., *People v. Hill*, 17 Cal. 4th 800, 832, 952 P.2d 673, 689-90 (Cal. 1998) ("A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel . . . . An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable." (internal citations and quotations omitted)); U.S. Const. Amend. XIV; Colo. Const. art. II, sec. 25.

38. In addition to constitutional violations, the prosecution's email also violated Colorado Rule of Criminal Procedure Rule 16(III)(a), entitled "Investigation Not to be Impeded." This Rule specifically provides that:

Subject to the provisions of Parts I(d) and II(d), **neither the prosecuting attorney, the defense counsel, the defendant nor other prosecution or defense personnel shall advise persons having relevant material or information (except the defendant) to**

**refrain from discussing the case** or with showing any relevant material to any party, counsel or their agent, **nor shall they otherwise impede counsel's investigation of the case.**

(Emphasis added). There can be no serious question that the prosecution's email had the effect of advising, or at a bare minimum strongly suggesting, that victim-witnesses refrain from discussing the case with members of the defense team or Ms. Krause. While the email technically states that victim-witnesses can speak to whomever they wish, the prosecution's tone, language, and context conveys a very strong message aimed at preventing victim-witnesses from doing so by purportedly (and falsely) describing the defense's supposed deceit, misrepresentation, and lies. The email has also most certainly "impeded" defense counsel's investigation of the case by making it far less likely that victim-witnesses will speak to defense investigators conducting fact investigation of the case in the future.

39. The prosecution's email also violates several ethical rules.

40. Rule 3.4(f) of the Colorado Rules of Professional Conduct, entitled "Fairness to Opposing Party and Counsel" explicitly states that:

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; [or]

...

(f) **request a person other than a client to refrain from voluntarily giving relevant information to another party . . . .**

(Emphasis added).

41. Comment [1] to this Rule states, "The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, **improperly influencing witnesses, obstructive tactics in discovery procedure**, and the like." (emphasis added).

42. Additionally, Rule 4.1(a) of the Rules of Professional Conduct prohibits an attorney from knowingly making "a false statement of material fact or law to a third person."

43. Furthermore, ABA Standard for Criminal Justice §3-3.1(d) states, "A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give the defense information which such person has the right to give."

44. The prosecution has violated each of these ethical precepts and improperly influenced victim-witnesses not to speak with the defense. No victim-witness who reads the

email from Ms. Teesch-Maguire would come away feeling as though the prosecution was neutral about whether or not they should speak with the defense or Ms. Krause. *Cf. People v. Antunes*, 680 P.2d 1321 (Colo. App. 1984) (prosecution’s advisement to witnesses that “[i]t is up to all of you. If you want to talk to . . . anybody from the public defender’s office, you may, and if you don’t want to, you don’t have to,” met the requirements of Crim.P. 16(III)(a) and ABA Standard 3—3.1(c)). To the contrary, any victim-witness who read this email received the strong message that the prosecution disapproves of victim-witnesses interacting with the defense and that it is not in victim-witnesses’ best interest to communicate with anyone affiliated with the defense.

45. The effect of the email, when read as a whole, unequivocally communicated to victim-witnesses the following messages: (1) the defense team cannot be trusted to mean what it says and is attempting to deceive victims and trick them into helping Mr. Holmes, and (2) there is no reason to speak with the defense because the victims can receive all the help they need from the district attorney’s office, who purportedly “represent” the victims and their interests. Not only are these messages precisely what the above-cited legal and ethical rules are designed to prevent, they contain false information. The prosecution’s description of Ms. Krause’s work is blatantly and knowingly incorrect. Moreover, as explained elsewhere in this pleading, Ms. Teesch-Maguire’s statement that the prosecution represents the victim-witnesses’ interests is incorrect as a legal matter.

b. The Arapahoe County District Attorney’s Office Has Adopted Conflicting Roles in this Case.

46. The office of the district attorney is created by Article VI, section 13 of the Colorado Constitution which provides:

In each judicial district there shall be a district attorney elected by the electors thereof, whose term of office shall be four years. District attorneys shall receive such salaries and perform such duties as provided by law.

47. The legislature has established the responsibilities and duties of the district attorney in C.R.S. § 20-1-101 *et seq.* The statute makes abundantly clear that when prosecuting a criminal action, the district attorney “represents the people of the state of Colorado,” and explicitly states, “nothing within this section shall be construed to create an attorney-client relationship between the district attorney and any party, other than the people of the state of Colorado.” C.R.S. § 20-1-102(3). *See also Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005) (the prosecutor “represents the State and the People of Colorado,” and as such, have a “higher ethical responsibility than other lawyers because of their dual role as both the sovereign’s representative in the courtroom and as advocates for justice”); *People v. Chambers*, 154 P.3d 419, 427 (Colo.O.P.D.J.,2006) (“[I]t is well settled that the prosecutor is a “minister of justice,” not a *private advocate* who represents individual interests. Of all the lawyers in our system of justice, none other than the prosecutor practices in a ‘quasi-judicial’ capacity.”(citing ABA Standards for Prosecution and Defense, Commentary to Standard 3–1.2 (1993)); Colo. R. Prof. Cond. 3.8, Comment [1] (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

48. Moreover, in order to protect the integrity of the role of the district attorney's office, the Colorado legislature has specifically provided that a district attorney may be disqualified in a particular case "upon a showing that the district attorney has a personal or financial interest or finds special circumstances that would render it unlikely that the defendant would receive a fair trial." C.R.S. § 20-1-107(2). *See also Huang v. County Court of Douglas County*, 98 P.3d 924, 928 (Colo. App. 2004) (disqualification is appropriate "when the district attorney has some involvement in the litigation, apart from his or her professional responsibility of upholding the law, which would impair that office's ability to prosecute the case fairly.").

49. Likewise, the Colorado Rules of Professional Conduct prohibit the concurrent representation of a party and a witness under most circumstances, precisely because, "[e]ven where there is no direct adverseness," there may still be "a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." Colo. R. Prof. Cond. 1.7, Comment [8].

50. It is not difficult to perceive the significant risk that the prosecution's ability to carry out its primary responsibility of seeking justice will be compromised if it is simultaneously engaged in advocating for the victims' responsibilities and interests. As the United States Supreme Court has recognized, "The concern that representation of other clients may compromise the prosecutor's pursuit of the Government's interest rests on recognition that a prosecutor would owe an ethical duty to those other clients. Indeed, it is the highest claim on the most noble advocate which causes the problem—fidelity, unquestioned, continuing fidelity to the client." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987). Put another way,

**The laws of this country are designed to protect the due process rights of criminal defendants from the arbitrary imposition of criminal punishments. Our system is also designed to prevent vengeance from replacing justice. It is this concern that lends the greatest support to the use of impartial representatives of the government as prosecutors. The goal of the prosecutor "in a criminal prosecution is not that it shall win a case, but that justice shall be done." This is not to say that victims have no role in the criminal law process, only that the relationship between the prosecutor and the victim must remain appropriately limited. The prosecutor's larger duty to the public interest precludes collapsing his role into that of the victim's advocate.**

Matthew S. Nichols, *No One Can Serve Two Masters: Arguments Against Private Prosecutors*, 13 Cap. Def. J. 279, 287-88 (2001) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

51. Ms. Teesch-Maguire is a Deputy District Attorney on this case, and as such, pursuant to the authority above, she has only one client – the People of the State of Colorado.

Yet she also claims the title “Victims’ Rights Advocate,”<sup>4</sup> and has essentially held herself out as representing two clients – the People of the State of Colorado, and the victims. This is improper and has created a conflict of interest. Again, while the district attorney’s office has certain statutory obligations to ensure that the rights of victims are enforced pursuant to C.R.S. § 24-4.1-301 *et seq.*, the prosecution does not and cannot *represent* the victims.

52. The prosecution has unequivocally provided “representation” to the victim-witnesses in this case by giving them legal advice, communicating the very strong suggestion and encouragement to these victim-witnesses not to speak with the defense. Moreover, it has clearly indicated that this advice was to the victim-witnesses’ benefit. *See People v. Mercer*, 35 P.3d 598, 604 (O.P.D.J. 2001) (noting that Rule 1.7 is crafted in terms of “representation,” which is “broader than the mere creation of the attorney/client relationship” and requires only “some affirmative act on the part of the lawyer to benefit the client.”).

53. In doing so, the prosecution has not only violated Rule 1.7 of the Colorado Rules of Professional Conduct, but has also violated Mr. Holmes’s state and federal constitutional rights to due process. *See, e.g., Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967) (prosecutor’s simultaneous representation of the defendant’s wife in divorce proceeding and prosecution of defendant for assault on wife violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment); *Davenport v. State*, 278 S.E.2d 440, 441 (Ga. App. 1981) (“In our opinion public policy prohibits a district attorney from prosecuting a case, even though he does not actually try the case himself, while representing the victim of the alleged criminal act in a divorce proceeding involving the accused.”); *State v. Eldridge*, 951 S.W.2d 775, 782 (Tenn. Crim. App. 1997) (participation by special prosecutors who represented victim in civil matter arising from same incident giving rise to criminal prosecution violated defendant’s due process rights); *Cantrell v. Commonwealth*, 329 S.E.2d 22, 26–27 (Va. 1985) (participation of private prosecutor who had also been retained by parents of victim in civil action infringed defendant’s right to fair and impartial trial).

### III. Request for Sanctions

54. The prosecution’s actions call for serious and significant sanctions from this Court. Because the government’s conduct in deterring witnesses from interacting with the defense through false statements and inflammatory denigrating accusations was undoubtedly

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<sup>4</sup> While there is no single statutory definition of a “victim advocate,” the duties of a victim advocate are generally, precisely as such a title suggests, to advocate on behalf of victims and provide them with advice, counsel and support. *See, e.g., Colo. Rev. Stat. Ann. § 13-90-107(k)(I)* (creating statutory testimonial privilege prohibiting a “victim’s advocate,” whose primary function is to “**render advice, counsel, or assist victims** of domestic or family violence or sexual assault” from being examined “as to any communication made to such victim’s advocate by a victim of domestic violence”) (emphasis added); *Colo. Rev. Stat. Ann. § 16-10-401* (“Notwithstanding any sequestration order entered by the court that excludes members of the general public from a jury trial or a trial before the court, the court may allow a victim’s advocate to remain in the courtroom during such trial. For the purposes of this section, ‘victim’s advocate’ means any person whose regular or volunteer duties **include the support of an alleged victim** of physical or sexual abuse or assault.”).

intentional and was also unethical, the Court should impose sanctions in order to deter this egregious conduct pursuant to its supervisory power to ensure the fair administration of justice. See, e.g., *United States v. MacCloskey*, 682 F.2d 468, 479 (4th Cir. 1982) (harmless error rule does not apply to government's violation of defendant's due process right to present defense witnesses freely (citing, *inter alia*, *Webb v. Texas*, 409 U.S. 95 (1972))); *United States v. Hammond*, 598 F.2d 1008, 1013 (5th Cir. 1979) (defendant's due process right to present witnesses was violated where witnesses refused to testify after government agent threatened one of them with trouble in pending state prosecution if he "continued on," was harmful *per se*, and did not require showing of prejudice to defendant). See also *People v. Auld*, 815 P.2d 956, 959 (Colo. App. 1991) (upholding dismissal as sanction for outrageous governmental conduct even though "no actual prejudice to the defendant by the governmental misconduct was demonstrated"; prosecution very likely violated Code of Professional Responsibility and ABA Standards for Criminal Justice, and trial court properly exercised its supervisory power in dismissing criminal charges against defendant).

55. In *Commonwealth v. Balliro*, 349 Mass. 505, 517-18, 209 N.E.2d 308, 315-16 (1965), the Massachusetts Supreme Court held that reversal was required where the prosecution interfered with defense's access to witnesses and that no showing of prejudice required. The Court noted:

The Commonwealth argues in effect that the defence [sic] must sustain a burden of establishing what might have been when the Commonwealth by its own action has rendered the sustaining of such a burden difficult if not impossible. Nor is there any greater persuasiveness to the contention that the interviews could have been 'fishing expeditions.' Pejoratives of this sort are no answer. It is too plain to be labored that the interviewing of prospective witnesses is an essential part of the preparation of a case for trial. That the witnesses, as the Commonwealth argues, were 'victims' of the acts of the defendants does not alter the defendants' rights.

*Id.*

56. While the Court should impose sanctions upon a finding that the government's conduct was harmful *per se*, the prejudice the prosecution's actions have caused to the defense is also obvious in this particular circumstance.

57. The prosecution's interference with victim-witnesses described above has permanently damaged the defense's ability to conduct an ongoing investigation in this capital case. It is highly unlikely that, after receiving the prosecution's email, any victim-witnesses will be willing to speak with the defense or anyone affiliated with the defense going forward. This is particularly problematic given the critical victim-impact testimony that these individuals are likely to provide at any penalty phase held in this proceeding.

58. The prosecution has sabotaged the defense's credibility with the victim-witnesses in this case, and wrongly inflamed the victims and their families. Indeed, it is impossible to truly quantify the damage done to the defense's ability to investigate the case. The reach of this email,



which falsely accuses the defense of illicit, dishonest, and illegal tactics, is exponential, as each recipient of this email undoubtedly formed an incorrect impression of the defense team that cannot be erased. These impressions are likely to amplify if and when the email is shared with victim-witnesses' family members, close friends, employers, and the like. The email has left the victim-witnesses with the lasting and false impression that the defense is attempting to manipulate them during what may be one of the worst and most vulnerable times in their life, when nothing could be further from the truth.

59. Given that the prosecution's actions have been particularly injurious to Mr. Holmes's ability to investigate the testimony concerning the impact that the alleged offenses have had on victims that the prosecution will seek to introduce at the potential penalty phase of this capital case, this Court should issue an order precluding the death penalty as a possible sanction in this case.<sup>5</sup> Alternatively, this Court should consider prohibiting the prosecution from presenting victim impact evidence at the potential penalty phase of the trial, given that its actions have unfairly inhibited the defense's investigation of this evidence. Finally, because the prosecution in this case has violated a number of ethical rules and improperly assumed the conflicting role of an advocate for the victims, at a minimum, the Court should consider disqualifying the Arapahoe County District Attorney's Office in this case pursuant to C.R.S. § 20-1-107(2), and appointing a special prosecutor to assume the prosecution of this matter.

#### **Request for a Hearing**

60. Mr. Holmes requests a hearing on this motion.

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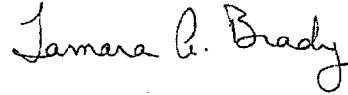
<sup>5</sup> While the Court has indicated that it will require the prosecution to provide some sort of notice of the victim impact evidence it intends to introduce, this does not remedy the fact that the defense's ability to independently investigate this evidence on its own has been permanently damaged.

Mr. Holmes files this motion, 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.



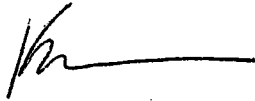
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Daniel King (No. 26129)  
Chief Trial Deputy State Public Defender



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Tamara A. Brady (No. 20728)  
Chief Trial Deputy State Public Defender



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Kristen M. Nelson (No. 44247)  
Deputy State Public Defender

Dated: June 17, 2014

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff  v.  <b>JAMES HOLMES,</b> Defendant	σ COURT USE ONLY σ
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: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a>	Case No. <b>12CR1522</b>       Division 26
<b>ORDER RE: RENEWED MOTION FOR SANCTIONS FOR PROSECUTORIAL INTERFERENCE WITH DEFENSE INVESTIGATION [D-137a]</b>	

Defendant's motion is hereby GRANTED \_\_\_\_\_ DENIED \_\_\_\_\_.

BY THE COURT:

\_\_\_\_\_

JUDGE

\_\_\_\_\_


Dated

I hereby certify that on 6/17, 2014, I

mailed, via the United States Mail,  
 faxed, or  
 hand-delivered

a true and correct copy of the above and foregoing document to:

George Brauchler  
Jacob Edson  
Rich Orman  
Karen Pearson  
Lisa Teesch-Maguire  
Office of the District Attorney  
6450 S. Revere Parkway  
Centennial, Colorado 80111  
Fax: 720-874-8501

  
\_\_\_\_\_

**D-137a**

**Exh. A**

----- Original message -----

From: Lisa Teesch-Maguire

Date: 05/08/2014 9:34 AM (GMT-07:00)

To: Lisa Teesch-Maguire

Subject: Important Information--Please Read This Entire E-mail When you Have Time

Hi Everyone! Please take the time to read this entire e-mail—I appreciate your help. Please CALL me with any questions or concerns: [REDACTED]

For those of you who haven't met me—I wanted to send you a picture so that you know what I look like (I don't "love" pictures so I've dreaded sending this out before)—but if anyone tries to meet with you and say that they are Lisa—hopefully they look something like this attached picture.

<image001.png>

More importantly, some of you may have already received, or may soon receive, some sort of communication from a woman who works for the Defense by the name of Tammy Krause. The Public Defender's Office hired Tammy Krause as a contractor to work for them in this case. She calls herself a "Defense Initiated Victim Outreach" or "DIVO" Specialist—meaning she calls herself a Victim Advocate—but she works for the Defendant. That might be confusing—because you might think, "oh, she is a Victim Advocate." Please don't be confused. She works for the Defendant and her goal is to try to find Victims who will help the Defendant—she tries to find Victims who will try to persuade the prosecution and/or persuade a potential jury to have sympathy for the Defendant—and to help the Defendant win his case—she isn't a Victims' Advocate—she is an Advocate for the Defendant. In addition, some of you might be contacted by private Defense Attorneys—who are calling themselves Victims' Rights Attorneys. Again, please don't be confused—they are actually Defense Attorneys who are trying to help the Defendant. Some of these Defense Attorneys are actually even using Victims from other Death Penalty cases to try get you to attend meetings with them—to try to help the Defendant. To my knowledge, there are only two legitimate Victims' Rights Attorneys in the State of Colorado—please call me and I'll be happy to tell you who they are—and happy to provide you with questions that you should ask them to determine if the focus of their legal practice is actually Victims' Rights or if it is actually Criminal Defense.

**PLEASE—before you agree to talk with someone about this case—please find out who they REALLY are and decide whether you want to talk with them. PLEASE feel free to call me and ask me before you agree to talk with someone—please ask me if I know who they are and then you can make an informed decision about whether the person is anyone who you want to speak with. Think about it—anyone who is trying to speak to you for a legitimate purpose to HELP YOU... will be happy for you to call them back in 5 minutes while you check and find out who they really are—if they act strangely about your request to verify their information, probably that is red flag that you should be concerned about. For instance, as you know, you can call me 24 hours a day—I'm happy to help and I would be happy to call you back if you wanted to verify who I really was. Also, if you have been contacted by any of these individuals, it would be really helpful if you would let me know that you talked to them. They do not have any obligation to tell me that they talked to you about—so if I don't know that you talked to them, I can't help you with concerns that you may have, and I can't be fully prepared for trial.**

If you are interested in meeting Victims from other Death Penalty cases—please let me know and I'll try to arrange meetings with other Victims for you as soon as possible.

If you want to help the Defendant—that is your choice and you are free to do so—but please know that you can voice those opinions through this office, just as strongly—if not more strongly—than you can through these other DIVO individuals and Defense Attorneys calling themselves Victims' Rights Attorneys. These individuals have legal obligations to help the Defendant—they do not truly represent your interests and you deserve to know that. We are here to represent your legal Victims' Rights interests (even if we disagree)—please know that you have our commitment that we will do that through the entirety of this case.

Please also know that our goal is to provide comprehensive and truthful communication to all of you during the criminal justice process while simultaneously maintaining the integrity of the prosecution of this case. I want to make sure that you know that you have rights—and I want to make sure your rights are enforced through the entirety of this process. It honestly only matters to me that your rights are enforced in this process. If you don't believe in the Death Penalty, and you don't want us to seek the Death Penalty—PLEASE CALL ME and talk to me about your opinions. I will ensure that your important voice and your important opinions are communicated to George (our Elected DA) and to the Court. If you want to meet with George to talk to him personally about it—I'll arrange that meeting too. If you do believe in the Death Penalty, and you do want us to seek the Death Penalty—PLEASE CALL ME and talk to me. I will ensure

that your important voice and your important opinion is communicated to George (our Elected DA) and to the Court. If you want to meet with George to talk to him personally about it—I'll arrange that meeting too.

In response to communications that some of you have received from Ms. Krause and/or any other Attorney, you should know that the prosecution has a responsibility to seek justice in this case and to carefully evaluate the legal consequences of the decisions that we make. To that end, George Brauchler, our elected District Attorney, requested that we have a second, more complete, additional sanity examination so that we could have the BEST possible information to determine what is best to do in this case. We will share with you the new information when we learn any new information—and we will ask for all of your input again—about what you think is the “right thing” to do in this case. I will personally be asking for all of your input about this case—all of the time. Any time your opinion changes or any time you just want to talk about your opinion—please call me.

**Please know that you can speak with anyone you wish about this case. You can speak to the Defense, to the Prosecution, or anyone you wish. However, the right to speak or not speak to anyone about this case is completely your choice alone to make.** Please also know that you can set whatever parameters you would like for any potential conversations or interviews you choose to have in the future. The best way to ensure an accurate account of a conversation is to record the conversation (with the knowledge and consent of persons involved). You can have any potential conversations or interviews alone, you can ask to record the conversation, you can ask to have a law enforcement officer present during the conversation, you can ask to have a friend present, or you can ask to have someone from the District Attorney's Office present, or you can ask to have anyone you want present. You are also welcome to contact anyone you wish, or me, if you ever have any questions about speaking to anyone about this case.

**Please remember that anything that you say to anyone about this case (or that you e-mail, that you tweet, that you blog about, or that you post), including communications to the District Attorney's Office, to your friends, to the media, and/or to the Defense may potentially be used in Court at some point during the pendency of this case.**

Please call me if you have any further questions or concerns: [REDACTED].



Thanks,

Lisa

**Lisa Teesch-Maguire**

**Deputy District Attorney**

Victims' Rights Advocate

Office of the District Attorney

18<sup>th</sup> Judicial District

6450 S. Revere Parkway

Centennial, CO 80111

[REDACTED]

Phone: [REDACTED]

Cell: [REDACTED]

**D-137a**

**Exh. B**

## DECLARATION OF TAMMY KRAUSE

I, Tammy Krause, declare as follows:

### *Background and Qualifications*

1. I am an independent defense victim liaison. Along with defense attorney Richard Burr and Restorative Justice expert Dr. Howard Zehr, I developed the field known as Defense Victim Outreach (DVO), which was previously referred to as Defense-Initiated Victim Outreach (DIVO).<sup>1</sup> I have worked and trained in this field for over fifteen years. I have a B.A. from the University of Alaska, received an M.A. in Conflict Transformation from Eastern Mennonite University in 1999, and will be awarded a PhD from the University of Manchester, England School of Law this year (2014).

2. My role and responsibility as both practitioner and a trainer is to teach defense attorneys about the importance of giving victims' family members the opportunity to voice their concerns to the defense team, to offer responses and information, and to try to help the defense team meet victims' family members' needs within the judicial process in any other ways that it ethically and professionally can. I am also responsible for raising defense attorneys' awareness of how their actions as advocates for their clients can have negative and traumatizing effects on the victims' surviving family members.

3. DVO evolved out of work that I had done in 1997 for the defense team in the case *United States v. McVeigh*. While I was a graduate student in the Conflict Transformation Program, I worked as a graduate assistant for Dr. Howard Zehr, Distinguished Professor of Restorative Justice. During the Spring 1997 semester, the defense attorneys for Timothy McVeigh, accused of the Oklahoma City bombing, contacted Dr. Zehr to better inform the team on victim awareness and restorative justice. I was invited to the meeting and soon after was appointed by Judge Richard Matsch to work on behalf of the defense team to reach out to the Oklahoma City bombing survivors and victims' family members. Our goal was to learn from their experiences and determine how the defense team could be more sensitive to their judicial concerns, needs, and experiences.

4. At the completion of *United States v. McVeigh* and my graduate studies, I applied for and received a Soros Justice Fellowship from the Open Society Institute (OSI) from January 1999-January 2001 to develop a principled approach for defense attorneys to engage victims' surviving family members. Upon completion of the Fellowship, the OSI nominated me for an Ashoka: Innovators for the Public Fellowship, which I was awarded from 2001 through 2004. With the Ashoka Fellowship, I was able to train other individuals in the principled approach known as Defense-Initiated Victim Outreach. Since October 2001, I have conducted ten forty-hour trainings to prepare, evaluate, and mentor individuals as victim liaisons.

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<sup>1</sup> The title was changed to reflect and include the growing number of cases in which victims/survivors initiate contact and communication with defense teams. Also, defense victim liaisons were also called 'victim outreach specialists' for a period of time, but "victim liaison" as become the preferred term. See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) (Commentaries to Guidelines 10.7 & 10.11).

5. Since working on the McVeigh case, I have also worked as a victim liaison on over twenty cases including: *United States v. Zaccarias Moussaoui*, *People of the State of California v. Eric Copple*, *United States v Joseph Duncan*, *United States v. Eric Rudolph*, *United States v. Cary Stayner*, and *United States v. Chris Dean*.

6. Additionally, I have lectured extensively on defense victim outreach in national capital defense seminars nationwide under the auspices of the Administrative Office of the United States Courts. I also have lectured extensively on victim outreach for capital defense communities in Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Louisiana, Maryland, Missouri, Nevada, New Mexico, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, and Washington.

7. I have written two separate chapters regarding DVO in *WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY* titled *Reaching Out to the Other Side: Defense-Based Victim Outreach in Capital Cases* and in *ROADS TO RECONCILIATION: CROSS-DISCIPLINARY APPROACHES TO CONFLICT IN THE TWENTY-FIRST CENTURY*, titled *Murder, Mourning, and the Ideal of Reconciliation*.

8. The field of Defense Victim Outreach has grown significantly over the last fifteen years and I consider it an honor and a responsibility to ensure that those who work in this field proceed with the principled approach that has been developed by me and my colleagues to conduct DVO work ethically, responsibly, and with concern for those whose lives have been tragically altered because of a crime.

#### ***The Role of the Victim Liaison in the Defense Team***

9. Though victim liaisons act as experts on behalf of the defense, they are not integral members of the defense team. In practical terms, this means that a victim liaison does not meet with or have contact with the defendant (unless a victim's family member so requests), is not provided confidential or privileged information about the case, and does not participate in strategic discussions about the defense of the case.

10. Victim liaisons review only publicly available information about the case and the client to inform their work in a case. As such, a victim liaison does not have access to the investigation, discovery, or privileged communications with the defendant. Such information would only be shared with a liaison after a specific request from a victim's family member to obtain the information from the defense team and provide that information directly to the victim.

11. The role of the defense victim liaison is to listen to the victim, and to learn of their needs within the judicial system to the extent possible. The liaison does not act as an advocate on behalf of the defendant, nor does the liaison advocate for any position or issue. The liaison's primary goal is to offer victims an opportunity to communicate their questions, concerns, or other information to the defense via the liaison. The work is based upon the principle that all legal professionals should attend to victims' concerns unconditionally.

12. Furthermore, principles and protocols of victim outreach have been established to ensure that, while outreach to surviving family members is facilitated by the defense working with a liaison, it is the surviving family members who determine whether and how the communication proceeds. Support for the victims is unconditional; a liaison's

work is offered without regard to a particular victim's beliefs or wishes about the legal case or punishment.

13. The sole role of a victim liaison is to "engage the survivors wherever they are, wholly on the survivors' terms, and to offer a relationship with the offender, through the defense team, that may satisfy at least some of the survivors' needs and interests." Mickell Branham and Richard Burr, *Understanding Defense-Initiated Victim Outreach and Why It Is Essential in Defending a Capital Client*, 36 Hofstra L. Rev. 1019, 1025 (2008). As such, liaisons have no other agenda; their work is not conditioned on the victims' or the victims' family members' beliefs about conviction or punishment. Liaisons attempt to "[l]earn from [the victims and/or victims' family members] the needs and interests they have that the defense might be able to meet, then meet their needs and answer their questions and concerns." *Id.* at 1029. Experience has shown that, in most cases where defense teams engage a victim liaison, surviving family members want some form of communication with the defense team. Traditionally, this avenue was not available to the surviving family members or was not considered possible by the defense attorneys. DVO allows both parties to learn from the other in a less adversarial environment, providing opportunities for information and redress not otherwise possible.

14. In my experience as a DVO liaison, I have learned from the survivors and victims' family members that when victims are engaged in a principled manner, that defense attorneys can improve victims' family members' experiences with the criminal justice system. For instance, defense attorneys can reduce, if not eliminate, the historically adversarial relationship between the defense team and the surviving family members by addressing the perceived lack of understanding of victims' experiences, concerns, and judicial needs. Secondly, if the victims or their surviving family members are interested, defense attorneys can provide invaluable information to them about the pre-trial and trial proceedings, the defendant, and their duties as defense attorneys. The process that evolved from the first case in Oklahoma City taught me that more can be done for victims and their surviving family members by actively listening to their questions and concerns than by assuming what families want or what is best for them. Such interactions cannot be done with an ulterior motive; this work is the least that all legal professionals should do on criminal and capital cases with the aggrieved victims and victims' surviving family members.

#### ***Defense Victim Outreach on People v. James Holmes***

15. As the victim liaison for the defense in Mr. Holmes' case, I have worked to help the defense team understand the possible concerns, questions, and needs of the victims of the Aurora theater shooting throughout the judicial proceedings. I further assisted the defense attorneys in their letter of introduction to the victims, and by offering victims an opportunity to meet with the defense attorneys at the Aurora Public Library to ask the defense attorneys questions about the case, the client, or their role as defense attorneys. In addition, I sent an introductory letter to the victims, as well as other letters regarding the status of the case. In my letters, I clearly identify myself as the victim liaison that has been hired by the defense team to reach out to the families. I also state that my role is to try to answer any questions or to hear any concerns a victim might have about the case that they would like the defense attorneys to know.

16. In every instance in this case, I am guided by the needs of each individual victim. He or she controls the level and form of engagement. In conversation with the

victims, I let them know that I will talk or meet with them in whatever forum they feel most comfortable and with whomever they would like to have present. If a victim requests that I no longer contact them, I respect their wishes. In Mr. Holmes's case, I have followed the DVO principles and practices outlined in this declaration.

I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct, this 12 day of June, 2014.

TAMMY KRAUSE

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Tammy Krause