DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **202**

ORDER REGARDING DEFENDANT'S RENEWED MOTION FOR SANCTIONS FOR PROSECUTORIAL INTERFERENCE WITH DEFENSE INVESTIGATION (D-137a)

INTRODUCTION

The defendant is charged with shooting, and killing or injuring, numerous people inside the Century 16 Theatres in Aurora, Colorado, on July 20, 2012, during the midnight premiere of "The Dark Knight Rises." The prosecution has filed 166 charges.[1] The defendant has pled not guilty by reason of insanity.

In Motion D-137, the defendant sought sanctions for prosecutorial interference with the defense investigation. *See generally* Motion D-137. The defendant advanced several grounds in support of that motion, including his claim

[1] There are two counts of Murder in the First Degree for each of twelve deceased victims, two counts of Criminal Attempt to Commit Murder in the First Degree for each of seventy injured victims, one count of Possession of Explosive and Incendiary Devices, and one sentence-enhancing Crime of Violence count.

that "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 manipulate or turn a witness's words around." Motion at p. 2 (quotation omitted). The Court denied this part of the motion without prejudice, acknowledging that it had "arguable merit," but concluding that it was "so general and vague that the Court [could not] find that the defendant [had] met his burden of showing that there [had] been improper conduct by the prosecution and/or law enforcement justifying the imposition of sanctions." Order D-137 at p. 5. The Court observed that the defendant's assertion, that "someone who work[ed] for the prosecution or law enforcement suggested to one or more witnesses that information witnesses provide[d] to the defense [would] be manipulated or turned around," lacked specificity. *Id.* at p. 6

The defendant now asks for severe sanctions, contending that he "has documented evidence that the prosecution . . . 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 . . . compromised [the prosecution's] role as an impartial advocate for justice." Motion at p. 3. The defendant asks the Court to preclude the death penalty as a sanction. *Id.* at p. 17. In the alternative, the defendant requests that the Court either prohibit victim

impact evidence at any capital sentencing hearing or disqualify the Arapahoe County District Attorney's Office from this case. *Id.*

The Court concludes that none of the drastic sanctions requested is warranted. The email on which the defendant relies does not establish that the prosecution has compromised its role as an impartial advocate for justice, interfered with the defense's preparation, denied the defense equal opportunity to speak to witnesses, improperly attacked the integrity of defense counsel, or impeded and obstructed defense counsel's investigation through improper influence. Nevertheless, in an abundance of caution, to address a concern raised by the defendant, the Court requires the prosecution to send a clarifying email in accordance with this Order.

ANALYSIS

The defendant's motion is based on an email ("the email") sent by one of the prosecutors to all the victims on May 8, 2014. Motion Ex. A. The Court will address each of the defendant's twelve challenges to the email. However, before doing so, the Court explores the events that became the impetus of the email.[2]

[2] The defendant maintains that these events are irrelevant "because the subject of Motion D-137a is not whether the defense has done anything wrong" and the defense cannot be held accountable for "[t]he conduct of individuals who have acted on their own." Reply at pp. 1-2. While it is true that the email is the subject of the motion, and that defense counsel are not responsible for the behavior of individuals who are not associated with them, the Court cannot consider the email in a vacuum. In determining whether the email warrants any of the drastic sanctions requested, the Court must review it in its proper context. That includes actions taken by defense counsel, anyone hired by them, and those who may have no association with them.

Without this contextual backdrop, the Court cannot fairly and justly address whether any of the severe sanctions requested by the defendant is warranted.[3]

A. Events Preceding the Email

A few weeks before the 2012 holiday season, defense counsel sent a letter to some or all of the victims to introduce themselves. Response Ex. E-4. It is undisputed that the defense had not previously communicated with the victims. The letter, dated November 2, 2012, acknowledged that, pursuant to a Decorum Order, counsel were "prohibited from discussing most aspects of the case with the press or public." *Id.* Counsel nevertheless indicated that they "wanted to express [their] wishes for [the victims'] recovery," especially considering that "the holiday season" could make this "an especially painful time." *Id.*

On February 1, 2013, Tammy Krause, who describes herself as "an independent defense victim liaison," wrote a letter to some or all of the victims. Motion Ex. B at p. 1; Response Ex. E-7.[4] In the letter, Krause informed the victims that she works "in a criminal justice field called defense-initiated victim outreach." Response Ex. E-7. Krause referenced her "history and experience in working with families of homicide victims within the judicial system." *Id.* She

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[3] Because the Court rules on Motion D-137a without an evidentiary hearing, it relies primarily on the documents created contemporaneously as the relevant events unfolded. Thus, the Court does not consider the numerous affidavits prepared and submitted in support of the prosecution's response.

[4] According to Krause, "defense victim liaisons" were previously called "victim outreach specialists." Motion Ex. B at p. 1 n.1.

represented that the purposes of her work were "to help defense attorneys communicate with victims in a respectful and non-adversarial manner," as well as "to enable defense attorneys to address crime victims' concerns more directly throughout the legal proceedings." *Id.* Later in her letter, she reiterated that her role was "to assist [victims] by seeking answers to [their] questions, conveying any concerns [they] might have to the defense attorneys, and trying in any other way that [she] can to help the public defenders be responsive and sensitive to [victims] throughout the legal proceedings." *Id.*

Krause's letter discussed legal aspects of the case. She stated that, as the victims were already "likely aware," the Court postponed the arraignment during a hearing held the previous month. *Id.* The transcript of the hearing reflects that the People objected to the defendant's motion to continue the arraignment and advised the Court that 84 of the 93 victims they were able to contact "object[ed] to any continuance of [the] arraignment and wish[ed] to move forward [that day] with the arraignment," while six of the additional nine victims took no position on the defendant's request. 1/11/13 Tr. at pp. 3-5. Krause stated in her letter that she "imagine[d]" that the postponement of the arraignment by the Court "may have raised questions for [the victims and their families], as it was anticipated that the arraignment would occur at the end of the preliminary hearing[] in January."

Response Ex. E-7. She added that she hoped the defendant's motion to continue and the Court's ruling had "been clearly explained." *Id.*

Krause mentioned that she had been asked to contact the victims in this case by the defendant's attorneys "on their behalf," and encouraged the victims to share their "experiences of this case and share how [she] might best be able to assist [them]." *Id.* She told the victims that their "decision whether or not to speak to [her would] not have any effect on the case." *Id.* She did not state that anything the victims said to her could be used in court. *See id.*

Later in February, after speaking to one of the victims, Krause sent her a handwritten postcard thanking her for the opportunity to talk to her. Response Ex. E-8. Krause acknowledged in that postcard that "it may have been a bit disconcerting to talk with someone hired by Mr. Holmes' defense team." *Id.*

On April 11, 2013, Krause sent another letter to the victims as "an update to the letter that [she] sent in February." Response Ex. D-3. In this letter, Krause again discussed the proceedings in this case, including the April 1 hearing when the prosecution announced it was seeking the death penalty against the defendant:

> As you may know, the week before the hearing on April 1st, Mr. Holmes' attorneys filed a motion [redacted] ***In [the elected District Attorney's] response to the defense motion, he suggested that the defense team be directly in contact with the victims regarding the status of the***

case [redacted]

Id. (emphasis added).

The Court has reviewed the prosecution's response [redacted]. Contrary to Krause's claim, the prosecution did not suggest that the defense team should directly contact the victims regarding the status of the case and [redacted]. *See generally* Notice C-23 Response. Thus, in her April 11 letter, Krause conveyed inaccurate and misleading information to the victims.

The April 11 letter continued by noting that defense counsel were "keenly aware of the length of a trial and the years of appeals that a death penalty case can take." Response Ex. D-3. Krause told the victims that defense counsel "would like to avoid the impact a long judicial process would have on the victim community [redacted] *Id.* Krause then stated that defense counsel were aware that the victims "may be interested in information that would clarify [redacted], and that they "would do their best to answer any questions [the victims] may have." *Id.* At the end of the letter, Krause repeated that she "want[ed] to make every effort to be of assistance to [the victims and their families]." *Id.*

On November 8, 2013, defense counsel sent another letter to the victims, inviting them to a meeting at the Aurora Public Library. Response Ex. E-5. This meeting was described as "an opportunity" for the victims to meet defense counsel, ask them questions, "or to share with [them] information [the victims] would like [them] to know." *Id.* The letter identified Krause as simply "a victim outreach specialist," not a "***defense*** victim outreach specialist," and referenced her previous contacts "by letter or phone" with some of the victims. *Id.* Like Krause did in her February 1, 2013 letter, counsel expressed an interest in listening to and learning about the victims' "experiences of this terrible tragedy." *Id.* Counsel represented that they would "not record anyone's personal details" and that the victims should "feel free to talk without the fear of such statements being reported in the press." *Id.* There was no mention that some statements made by the victims could be recorded and used in court. *Id.*

On December 11, 2013, [redacted], one of the victims in this case, received an email from "[redacted]," whom he identified as an anti-death penalty advocate. Response Ex. F-6. [redacted] invited [redacted] to "a Holiday gathering" on December 21. *Id.* She told [redacted] that if he was unavailable on that date, she "would still look forward to . . . having a nice dinner" with him. *Id.* She added that she "really would love to have a set [sic] down with [him] and the wife." *Id.*

A few months later, on March 6, 2014, Krause emailed [redacted] to thank him for meeting with her. Response Ex. F-7. She recognized "that the idea of meeting someone who works on behalf of the defense team likely caused [him] some anxiety." *Id.* In the email, Krause referred to "***the other victim advocates*** working on the case," implying that she was one of the victim advocates working on the case. *Id.* (emphasis added). In addressing what she could offer "that [was] different than" the services provided by the Colorado Organization for Victim Assistance ("COVA") and the victim advocates at the prosecution's office, Krause commented again on the legal aspects of the case, [redacted] and discussing the conclusion of the first Court-ordered sanity examination on the issue of sanity. *Id.* She stated, in pertinent part, as follows:

1. [redacted].
2. If there is a question of sanity at the time of the crime, would that prohibit the defendant from pleading guilty now?
3. You may have specific questions about the defendant that only the defense attorneys could answer. [redacted]. Or you may want to know if he has any interest in his legal case, if he has been a threat to any other people in prison).
4. You may want to know why the defense team objects to a second insanity [sic] evaluation [redacted].

Response Exs. F-7, F-8.[5]

On May 7, 2014, [redacted] received an email from David Lane, a prominent criminal defense attorney who just two months earlier had represented Edward Montour in another death penalty case ("Douglas County case") prosecuted by the same District Attorney's Office prosecuting this case. Response Ex. F-9.[6] Lane attached to his email a letter from Robert Autobee, the victim's father in the Douglas County case. Response Ex. F-10. According to news reports, Autobee publicly opposed the prosecution's decision to seek the death penalty in the Douglas County case. Jordan Steffen, *Potential jurors in death penalty case hear protests from victim's dad*, The Denver Post, Jan. 1, 2014, http://www.denverpost.com/news/ci_24854370/potential-jurors-edward-montour-death-penalty-case-hear. In fact, the Denver Post reported that he protested during jury selection. *Id.* In the letter addressed to the "[s]urvivors" in this case, Autobee speaks about his son's case, "the nightmare of court appearances," and "the prospect of re-living the horrors [his family] went through" following the Colorado Supreme Court's reversal of Montour's initial conviction and remand for further

[5] Krause attests that "a victim liaison . . . is not provided confidential or privileged information about the case" and that "[v]ictim liaisons review only publicly available information about the case and client to inform their work in a case." Motion Ex. B at p. 2. However, her March 6, 2014 email to [redacted], which contains information that is not publicly available, belies these attestations.

[6] [redacted] apparently initiated the contact with Lane at the request of an anti-death penalty advocate. Response Ex. F-2.

proceedings. Response Ex. F-10. After discussing Montour's entry of a new guilty plea and the imposition of a life sentence without the possibility of parole "last month," Autobee states that he and his family "believe the courtroom saga of [the] case is finally over—12 years after [his] beloved son's death." *Id.* He offers to share with the victims in this case his "insights into this emotional roller coaster," including a discussion on "how [he] finally came to a place of peace and tranquility after fighting the pain and torment [he] was undergoing for ten years." *Id.* He concludes the letter by inviting the victims to meet him to discuss "this journey from despair to peace" at the law office of Erica Grossman, who volunteered her conference room for the meeting. *Id.*

Although Autobee's letter stated that he was "motivated solely by [his] desire to share [his] journey with [the victims in this case] in the hope that it may help [them]," Lane's email thanked [redacted] and stated that [redacted] "help here is invaluable." Response Ex. F-9. Further, Lane's email reminded [redacted] that [redacted] had previously stated that he would distribute the letter from Autobee "to everyone on [his] email list" and that Autobee "greatly appreciate[d] [redacted] kind assistance." *Id.* In the email forwarding Lane's communication to the prosecution, however, [redacted] stated that he "never promised [Lane] anything" and had asked Lane not to contact him anymore. *Id.*

B. Knowledge by the Prosecutor Who Sent the Email

The prosecutor who sent the email ("the prosecutor") makes multiple representations to the Court regarding her knowledge as of May 8. The Court accepts these representations because they are made by an officer of the Court and they are uncontradicted by the defendant. *See generally* Reply.[7]

As of May 8, 2014, the prosecutor was aware that "[m]any of the victims and witnesses in this case [had] been confused and overwhelmed by the many individuals and organizations who have contacted [them] during the pendency of this case." Response at p. 2.[8] She also was aware that such contacts were "often a cause for consternation for the victims." *Id.* at p. 3. In fact, because the prosecutor is also the lead victim's rights advocate on the case, she knew that the victims had

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[7] The defense argues, in passing, that it "certainly disputes any suggestion or allegation that anyone affiliated with the defense . . . have done or said anything misleading or improper." Reply at p. 1. The defense further contests "a number of assertions in the prosecution's pleading" as "incorrect." *Id.* However, in the end, the defense "decline[d] to respond in further detail to the prosecution's allegations of wrongdoing." *Id.* at p. 2. In any event, the Court relies only on the prosecutor's representations regarding her knowledge at the time she sent the email.

[8] The list includes: law enforcement personnel; law enforcement victim advocates; community-based victim advocates; personnel from the District Attorney's Office (including victim advocates); victim compensation specialists and investigators; reporters and media representatives; social media bloggers; attorneys, investigators, and hired contractors from the Office of the State Public Defender, including Krause, a victim outreach specialist; organizations seeking to enlist the victims' help in anti-violence efforts; private attorneys working for plaintiffs in civil suits related to the shooting; private attorneys representing the Century 16 Theatres; attorneys representing the University of Colorado; attorneys working for other individuals; organizations seeking to publish commercial materials related to law enforcement responses in mass violence situations; organizations seeking to enlist the victims' help in anti-death penalty efforts; organizations seeking to enlist the victims' help in mental-health initiatives; individuals who wish to publish books about the victims; and individuals supporting the defendant. Response at pp. 2-3.

"consistently reached out" to her office "in an attempt to ascertain whether or not they should speak with these individuals." *Id.* Some of the confusion resulted from personnel in so many organizations with titles like "victim-advocate" or "victim-specialist." *Id.*[9]

More importantly, some victims had specifically indicated to the prosecutor that they were misled by communications sent to them by a "defense 'victim-outreach specialist.'" *Id.* at p. 12. Two victims had expressed concern to the prosecutor "that they felt that they had been manipulated" by the defense victim-outreach specialist. *Id.* The same victims advised the prosecutor that they wished her office "had more clearly explained the role of the 'victim-outreach specialist' to [them]." *Id.* Additionally, the prosecutor was aware that Lane had contacted one of the victims without contacting that victim's attorney first, and that Lane appeared to have enlisted the assistance of Autobee. *Id.*

These events—particularly the communications and concerns from the victims—convinced the prosecutor that she needed to provide them with clarifying information. To that end, she drafted and sent the email.

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[9] According to the prosecutor, the victims were met by "an outpouring" of law enforcement victim advocates across the state who assisted victims at the crime scene and in the days, weeks, and months following the shooting. Response at p. 3. There was also a fund set up for the victims by the Community First Foundation; those funds were distributed by COVA, an organization that has "victim-advocates." *Id.* Additionally, the victims were introduced to victim advocates in various community-based organizations throughout the country and to the victim advocates and victim compensation specialists at the District Attorney's Office. *Id.*

C. The Email

-------- Original message --------
From: [The prosecutor]
Date: 05/08/2014 9:34 AM (GMT-07:00)
To: []
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: [].

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: [].

Thanks,

Lisa

[The prosecutor]
Deputy District Attorney
Victims' Rights Advocate
Office of the District Attorney
18th Judicial District

D. The Defendant's Challenges

i. First Challenge

The defendant maintains that "[t]he title" of the email, "Important Information—Please Read This Entire E-mail When you Have Time," "is misleading," as the email does not contain any information about the case. Motion at p. 3 (quoting Motion Ex. A at p. 1). This subjective criticism warrants little discussion. While the email may not seem important to the defendant, it was obviously important to the prosecutor based on her awareness of the victims' concerns. Additionally, her choice of title was influenced by her recent communications with a victim who admitted ignoring most of the emails from the District Attorney's Office. Response at p. 31. Calling the email "important" certainly does not amount to prosecutorial misconduct.

ii. Second Challenge

The defendant notes that the email begins by expressing appreciation for the victims' help, a comment he equates with encouraging the victims "not to speak with the defense or the defense's victim liaison." Motion at p. 3. According to the defendant, the prosecutor was thanking the victims "for their 'help' in this matter of not speaking with the defense." *Id.* This contention is wholly speculative. It lacks even the remotest support and is based on an unreasonable interpretation of the first part of the email.[10] Accordingly, it is rejected.

iii. Third Challenge

The defendant accuses the prosecutor of implying "that members of the defense team or others affiliated with the defense may be impersonating [her] when attempting to contact victims, which is emphatically untrue." *Id.* at p. 4. In the email, the prosecutor included a picture of herself "[f]or those . . . who [had not] met [her]" yet "so that [they would] know what [she] look[s] like." Motion Ex. A at p. 1. The Court disagrees that there was anything improper with the inclusion of the photograph or the explanation surrounding it. As the prosecutor explained in the email, she did not "love" pictures so she had "dreaded sending [it]

[10] Equally unreasonable is the defendant's inference that the prosecutor repeatedly encouraged victims to "CALL" with questions or concerns (as opposed to encouraging them to use email or another written method of communication), because "the prosecution does not have an obligation to reduce oral witness statements to writing." Motion at pp. 3-4 n.3 (quotation omitted). Nothing in the prosecution's statement may reasonably be construed as discouraging victims from using written communication.

out before." *Id.* Further, approximately twenty-four hours before the email was sent, the District Attorney's Office's technology department "extend[ed] the functionality of [the] email system [] and add[ed] current DA Badge pictures to the People Pane component of email." Response Ex. K. The prosecutor took advantage of this new feature and included her "DA Badge" photograph in the email. *See id.*; Response at p. 31.

It is true that the prosecutor informed the victims that "if anyone trie[d] to meet with [them] and say that they are Lisa—hopefully they look something like th[e] attached picture." Motion Ex. A at p. 1. However, the prosecutor was aware that some of the victims were concerned about not knowing who to trust. Response at pp. 2-3. More importantly, the statement did not mention the defense, much less "improperly impugn[] the integrity of defense counsel" by implying that they were using "dishonest tactics." Motion at p. 4. The prosecutor had been informed that private defense attorneys, anti-death penalty advocates, and many others had contacted some of the victims.

iv. Fourth Challenge

The defendant indignantly claims that the email "provide[s] an inaccurate and falsely inflammatory description of the work of Tammy Krause . . . as well as other unnamed individuals who are not members of the Holmes defense team." *Id.* The Court is unpersuaded.

To the extent that the email included information about "unnamed individuals who are not members of the Holmes defense team," *id.*, the Court fails to see how it prejudiced the defendant. With respect to Krause specifically, there is a drastic difference of opinion between the parties. Because the prosecutor has a good faith basis for her views about Krause and Krause's role in this case, the email does not warrant any of the severe sanctions sought by the defendant. Given the record before the Court, it is not surprising that the prosecutor is dubious of Krause's stated purposes and that the prosecutor believes Krause is "an [a]dvocate for the [d]efendant" whose "goal is to try to find [v]ictims who will help the [d]efendant" or "will try to persuade the prosecution and/or [] a potential jury to have sympathy for the [d]efendant." Motion Ex. A. at p. 1.

Significantly, in July 2009, the board of directors of the National Association of Prosecutor Coordinators passed a resolution related to defense initiated victim outreach ("DIVO") that mirrors the sentiments expressed in the email about Krause.[11] *See* Response Ex. J. The board resolved that, "[b]ecause a DIVO is specifically hired as a defense expert only when as a tactical matter it may benefit the defendant, ***by definition the DIVO program is not a program that has at its heart the best interest of the victims of crime.***" *Id.* at p. 3 (emphasis added).

[11] "The National Association of Prosecutor Coordinators [] is the only national professional association of prosecutor coordinators." National Association of Prosecutor Coordinators, http://www.napc.us. It has "50 member states." *Id.*

Further, the board resolved that "[t]he DIVO program . . . ***has nothing to do with the best interests of the victims of crime*** but with the pretrial negotiation process to ensure more reliable jury verdicts and sentences." *Id.* at pp. 3-4 (emphasis added) (quotation marks omitted). According to the board, "[t]he DIVO program at its best offers the defense team a legitimized, yet uncontrolled, opportunity to develop a relationship with victims ***not for the victims' benefit, but solely for the benefit of the criminal defendant."*** *Id.* at p. 4 (emphasis added). The resolution goes on to caution that "[t]he DIVO program ***most often will offer an aggressive criminal defense team the ability to seriously undermine the prosecution of a violent crime*** with promises to the victims of all of the salutary benefits of a 'restorative justice' approach . . . all in the interest of reducing and minimizing the sentence of the defendant." *Id.* (emphasis added).

The board acknowledged that "victim service coordinators and district attorneys are receiving multiple complaints from victims who are further traumatized to receive communications from a person identifying themselves as a DIVO working on behalf of the defendant." *Id.* at p. 3. The Board urged the federal government to "immediately cease funding" the DIVO program "which promises to ***further harm and traumatize*** the victims of crime." *Id.* at p. 4 (emphasis added). The resolution concluded that "[t]he DIVO experiment needs to

be recognized ***as a defense tool with which to gain tactical advantage*** in a serious criminal case." *Id.* (emphasis added).

The Court does not take a position on these resolutions. They are significant, however, because they are consistent with, and corroborative of, the prosecutor's views on Krause's role and work in this case.

The Court agrees with the defendant that the email suggests "that the defense has hired someone who has been deceptive" and "that the defense team as a whole has deceived the victim-witnesses and cannot be trusted." Motion at p. 5. But the prosecutor had a good faith basis for believing that the defense had deceived the victims into thinking that Krause was their advocate and had their best interests at heart. It follows that the prosecutor's characterization of Krause's purposes and work cannot fairly be characterized as a "false" factual assertion. *Id.* Rather, the prosecutor articulated an opinion that is markedly different from the defense's opinion. What defense counsel genuinely view as legal and ethical violations and the denigration of their character, the prosecution genuinely views as setting the record straight and rectifying the misimpression created by the defense. Given that the prosecutor acted in good faith, and given that there is a colorable factual basis for this part of the email, the parties' difference of opinion, no matter how striking, does not warrant any of the severe sanctions requested by the defendant.

The Court should not be misunderstood as finding that the prosecutor's suggestion was accurate. The Court simply concludes that the prosecutor had a good faith, colorable basis for her beliefs and did not "cast[] aspersions" in bad faith or based on conjecture. *See id.* Just as the defense is entitled to take the position that Krause's role is to assist the victims, the prosecutor is entitled to take the position that Krause is an advocate for the defendant.[12] In the Court's view, the defense's aggressive approach was met with an aggressive electronic communication, and the defense cannot cry foul now.

v. Fifth Challenge

The defendant challenges the part of the email that warns victims that they "might be contacted by private [d]efense [a]ttorneys . . . calling themselves Victims' Rights Attorneys . . . who are trying to help the [d]efendant," and that "[s]ome of these [d]efense [a]ttorneys are actually even using [v]ictims from other [d]eath [p]enalty cases to try to get [the victims in this case] to attend meetings with them—to try to help the defendant." *Id.* (quoting Motion Ex. A at p. 1). The defendant complains that "[t]his statement is misleading" because "[t]he defense has had no involvement with any '[p]rivate [d]efense [a]ttorneys' calling themselves Victims' Rights Attorneys trying to set up meetings between the

[12] While the defense adamantly insists that Krause is a victim liaison whose primary role is to assist the victims, he asks the Court to preclude all victim impact testimony from any capital sentencing hearing. Motion at pp. 4-5, 17.

victim-witnesses in this case and victims from other death penalty cases." *Id.* The Court is not persuaded.

The prosecutor had been notified that private defense attorneys were reaching out to the victims in this case and had made arrangements for a meeting that would be attended by Autobee. A private defense attorney had forwarded Autobee's letter to one of the victims and asked him to distribute it to other victims, while another defense attorney had volunteered her conference room for the meeting. Response Ex. F-9. At any rate, the Court accepts the defense's representation that it had nothing to do with Lane's involvement or with any other private defense attorney's actions. Motion at pp. 5-6. Contrary to the defendant's allegation, however, the email does not "wrongly suggest[]" that these "private individuals" were "working at the behest of the defense." *Id.* at p. 6 (quotation marks and emphasis omitted). There is no mention or implication in the email that the defense attorneys had asked any private defense lawyer to act on their behalf.

vi. Sixth Challenge

The defendant's sixth assertion suffers from the same malady as his previous assertion: it speculates that a passage in the email must have been a reference to Krause and others affiliated with the defense. *Id.* The prosecutor advised victims to "find out" who someone is before agreeing to talk with him or her, and that they should feel free to call the prosecutor before agreeing to talk with someone and ask

the prosecutor if she knows the caller so that "[the victims] can make an informed decision about whether the person is anyone [they] want to speak with." Motion Ex. A. at p. 2. Additionally, the prosecutor explained that "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," but "if they act strangely about your request to verify their information, probably that is [a] red flag that you should be concerned about." *Id.* The defendant mistakenly equates these comments with suggesting "that if the victim-witnesses were to ask ***Ms. Krause or anyone affiliated [with] the defense team*** to hold off on speaking to them while they verified these individuals' identities . . . , these individuals might act strangely which would be a red flag." Motion at p. 6. (emphasis added) (quotation marks omitted). This part of the email did not mention Krause or anyone affiliated with the defense team, and it was based on the prosecutor's knowledge of the concerns expressed by the victims, including some that were not related to Krause or anyone else associated with the defense team. *See* Motion Ex. A at p. 2.

vii. Seventh Challenge

The defendant objects to the prosecutor advising the victims that if they wish to help the defendant, "that is [their] choice and [they] are free to do so," but they should know "that [they] can voice those opinions through [the District Attorney's]

[O]ffice, just as strongly—if not more strongly—than [they] can through these other DIVO individuals and [d]efense [a]ttorneys calling themselves Victims' Rights Attorneys." Motion at p. 7 (quoting Motion Ex. A at p. 2). Although this admonishment should have been more artfully stated, it does not constitute prosecutorial misconduct. Inasmuch as Colorado law places certain obligations on the prosecution in relation to the rights of victims, *see* § 24-4.1-303(1), C.R.S. (2013), there is a good faith basis for the prosecutor's opinion that the victims may voice any comment through the prosecution at least as strongly as through the defense.

Section 24-4.1-303(1) states, in pertinent part, that "prosecutorial agencies . . . shall ensure that victims of crimes are afforded the rights described in section 24-4.1-302.5." Section 24-4.1-302.5, in turn, lists the extensive rights that victims have in Colorado. Among them is "[t]he right to be heard" at many "court proceeding[s]." § 24-4.1-302.5(1)(d). As a result, throughout this litigation, the prosecution has repeatedly stated on the record the position of the victims on numerous issues, even when a victim's position is incongruous with the prosecution's request. The Court does not recall the defense ever doing so. This is not surprising, considering that the defense does not have any legal obligations in relation to the rights of victims. *See* § 24-4.1-303(1).

The defendant insists, however, that the prosecutor's utterance was a disguised attempt "to discourage victim-witnesses from speaking with the defense." Motion at p. 7. For multiple reasons, the Court disagrees with the defendant that the prosecutor's statement justifies the imposition of any of the drastic sanctions he proposes.

First, the prosecutor represents that "[i]t is the habit and practice of the District Attorney's Office" to advise the victims that "[t]he right to speak or not to speak to anyone about this case is completely [their] choice alone to make." Response at p. 3 (quotation marks omitted). According to the prosecutor, even when the victims have "specifically asked about individuals who have contacted them from the Office of the State Public Defender," the prosecutor's office has always responded "that the right to speak or not to speak to anyone about this case is completely [their] choice alone to make, and that the Public Defender's Office is just diligently completing their [sic] investigation of this case and that it is normal and expected that the Public Defender's Office would reach out to victims . . . during their [sic] investigation of this case." *Id.* at p. 4 (quotation marks omitted). The prosecutor emphasizes that her office has repeated this information to victims "on multiple occasions, probably to the point of tedium" or "annoyance," and that "the victims have heard this information so frequently . . . that when asked about [it], most of [them] can recite [it] from memory." *Id.* The prosecutor points out

that victims "often press on and say, 'I know that you say the right to speak or not to speak to anyone about this case is completely my decision to make, but really, what should I do?'" *Id.* The prosecution assures the Court that "[t]he response . . . is always the same . . . 'the right to speak or not to speak to anyone about this case is completely your choice alone to make.'" *Id.*

Second, the prosecutor informs the Court that "many of the victims were deeply distressed and traumatized" to receive the November 2, 2012 letter from the attorneys representing the man "charged with murdering their family members," as "[t]his was the first holiday season" since the shooting. *Id.* at p. 5. The prosecutor recalls that many of the victims contacted her office, complained about the letter, and repeatedly asked her office "to intervene and to ask the Public Defender's Office to stop contacting [them]." *Id.* However, the prosecutor states that "[t]he District Attorney's Office specifically refused" to interfere with the defense's attempts to reach out to the victims. *Id.* Instead, the prosecutor represents that she explained to the victims that "[t]he Public Defender's Office [was] just diligently doing [its] job and [that] it [was] normal and expected that [it] would reach out to victims . . . during [its] investigation of this case." *Id.*[13]

[13] The exhibits accompanying the prosecution's response show that at least two victims ultimately contacted Krause directly to inform her that they did not wish to be contacted by her again. Response Exs. C-3, D-5. One of the emails specifically requested no contact from Krause or "anyone else employed by the defense team," including "the attorney's [sic] themselves and or [sic] any other future employee." Response Ex. C-3. The same email reiterated that there should be "no attempt" to make contact "from this day forward" by any means." *Id.*

Third, the prosecutor indicates that a particular victim who received a letter from Krause contacted the District Attorney's Office to inquire whether she should agree to speak with Krause. *Id.* at p. 6. Like all the other victims, this victim was reportedly told that it was her "decision whether or not to speak with anyone she wished." *Id.* Following this advisement, the victim agreed to speak with Krause, as reflected in the subsequent postcard Krause sent her to thank her for the opportunity to talk. Response Ex. E-8. The contemporaneous documentation accompanying the prosecution's submission shows that at least one other victim, [redacted], talked to Krause. Response Ex. F-7, F-8.

Fourth, as the defendant concedes, at the beginning of the challenged statement, the prosecutor informs the victims that if they wish to help the defendant, they may choose to do so. Motion Ex. A at p. 2. Contrary to the defendant's argument, nothing in the statement implies "that speaking with the defense or with Ms. Krause will necessarily and only have the effect of 'helping' Mr. Holmes," and that, therefore, it may be "inadvisable . . . to speak to anyone affiliated with the defense." Motion at p. 7. The Court agrees with the defendant that "[v]ictim-witnesses are free to express anything and everything to any member of the defense team or to Ms. Krause," and that defense counsel have an "ethical obligation to fully investigate this case," even if doing so leads to the discovery of "information that is detrimental, not helpful, to their client or case." *Id.* However,

this part of the email did not address whether victims could (or should) speak to the defense; it was limited to a victim's possible desire to help the defendant. Later in the email, the prosecutor reminds the victims in no uncertain terms, and in bold font, that they "can speak with anyone [they] wish about this case," including "the [d]efense." Motion Ex. A at p. 3. This reminder is not tied to a victim's desire to help the defendant and cannot reasonably be read as suggesting that the effect of any communication with the defense attorneys, their liaison, or anyone else associated with them will be to help the defendant.

Lastly, when the remark is read in the context of the rest of the email and when considered in conjunction with the prosecution's repeated advisements to the victims about being free to speak to the defense, it becomes readily apparent that the prosecutor did not act in bad faith. There is no basis to believe that the prosecutor intentionally attempted to convince the victims that they should not agree to speak with the defense.

Nevertheless, the Court sympathizes with the defendant's criticism because, as a result of imprecise draftsmanship, the statement could be misinterpreted. A victim may misunderstand the prosecutor as incorrectly implying that, while he is free to speak to Krause and anyone else affiliated with the defense, there is "no

need" to do so "because the district attorney's office can serve and fulfill all of [the victims'] needs." Motion at p. 7.[14]

The Court realizes that the prosecution views the defense's retention of Krause's services as "throw[ing] a wolf in sheep's clothing at the victims in this case." Response at p. 31. The Court further recognizes that the prosecutor felt compelled to counter what she viewed as deceptive defense tactics aimed at turning some of the victims against the prosecution and in favor of the defense. *See generally id.* The Court has already found that the prosecutor had a good faith, colorable basis for believing that the defense team and Krause were misleading victims and that it was necessary to take some action to rectify the situation.

However, the parties are not competing businesses attempting to sway consumers to choose a product or service. This is a criminal case, and a prosecutor has a bounden duty to seek justice even when she may be convinced that the defense has implemented an imposturous strategy involving underhanded tactics.

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[14] Although not mentioned in the defendant's filings, another paragraph in the email contains language that could be misread as buttressing the idea that there is no need to speak to anyone associated with the defense because, regardless of a victim's beliefs about the death penalty, the prosecution will make sure those beliefs are shared with the elected district attorney and the Court. Motion Ex. A at p. 2. Two other passages in the email risk the possibility of a victim drawing a similar inference. First, the email advises victims that, while they are free to help the defendant, they have the ability to voice through the District Attorney's Office an opinion that is favorable and helpful to the defendant "just as strongly—if not more strongly—than . . . through . . . DIVO individuals and [d]efense [a]ttorneys." *Id.* Second, after informing the victims that private defense attorneys are attempting to set up meetings with victims from other death penalty cases "to help the [d]efendant," the email offers the victims the same opportunity: "[i]f you are interested in meeting [v]ictims from other [d]eath [p]enalty cases—please let me know and I'll try to arrange meetings with other [v]ictims for you as soon as possible." *Id.* at pp. 1-2.

While the Court understands why both parties are vying for the victims' support and cooperation, the prosecution must be circumspect to avoid creating the impression that victims need not talk to the defense because, regardless of what they may think, believe, or want, the prosecution will take care of them just as well as, if not better than, the defense.

Although none of the severe sanctions requested by the defendant is warranted, in an abundance of caution, the Court orders the prosecutor to send an additional email to all the victims addressing the aforementioned passages from which a victim may inaccurately infer that there is no need to talk to the defense because the prosecution offers the same, if not better, services or benefits. After sending the clarifying email, the prosecutor should serve it on the defense and file it with the Court so that it is part of the record.[15]

viii. Eighth Challenge

The defendant protests the sentence in the email regarding the "legal obligations" of "DIVO individuals and [d]efense [a]ttorneys [who] call[] themselves Victims' Rights Attorneys" to assist the defendant. Motion at pp. 7-8 (quoting Motion Ex. A at p. 2). As it relates to Krause, this sentence reflects the strong difference of opinion that exists between the parties about her role and her work. As such, it is not grounds for any of the severe sanctions requested by the

[15] The victims' names and addresses should be omitted or redacted from the copy of the clarifying email filed with the Court.

defendant. The prosecution's assertion related to private defense attorneys is, in fact, inaccurate because they do not owe a legal duty to the defendant. However, the defendant does not assert, much less show, that this error "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, [or] . . . compromised [the prosecution's] role as an impartial advocate for justice." *Id.* at p. 3. Nor is there any basis to believe that the prosecutor intentionally included the erroneous information in the email.

ix. Ninth Challenge

The defendant urges the Court to impose one of the severe sanctions requested because the prosecutor told the victims that DIVO individuals and private defense attorneys "do not truly represent [their] interests" and that the victims "deserve to know that." *Id.* at p. 8 (quoting Motion Ex. A. at p. 2). The Court declines to do so. The comment about private defense attorneys, in addition to being accurate, is not prejudicial to the defendant and was included in response to some of the concerns the victims had expressed to the prosecutor. The comment about DIVO individuals is consistent with the prosecutor's good faith beliefs about a DIVO's role in a criminal case and the reasons for the defense's retention of a DIVO's services in a criminal case.

x. Tenth Challenge

The defense is critical of the prosecutor's declaration that the District Attorney's Office is "here to represent" the victims' "legal [] [r]ights," even if it disagrees with the victims, and that the victims should "know that [they] have the [office's] commitment . . . through the entirety of this case." *Id.* at pp. 7-9 (quoting Motion Ex. A at p. 2). However, as the defendant acknowledges, under Colorado law, "the district attorney's office has certain statutory obligations to ensure that the rights of victims are enforced." *Id.* at p. 9.

Based on an overly literal reading of the prosecutor's comment, the defendant asserts that "the prosecution does not represent the victims or their legal interests." *Id.* The Court does not understand the prosecutor's remark to refer to "legal representation" as that term is used when a client retains private counsel in a civil lawsuit. Rather, the Court understands the prosecutor's statement to be a promise to comply with the legal obligations placed upon her office to "ensure that victims of crimes are afforded the rights described in section 24-4.1-302.5." § 24-4.1-303(1).

Nor does the Court agree that a prosecutor cannot simultaneously represent the people of the State of Colorado and ensure that the rights of the victims are enforced without a conflict of interest. *See* Motion at pp. 14-15. Not only can a prosecutor do so; she is required to do so by law. § 24-4.1-303(1).

xi. Eleventh Challenge

The defendant rebukes the prosecutor for advising the victims as follows: "[i]n response to communications that some of you have received from Ms. Krause and/or any other [a]ttorney, 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." Motion at p. 9 (quoting Motion Ex. A at p. 3). He contends that the prosecutor "unmistakabl[y]" communicated to the victims that "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." *Id.* The Court disagrees. The prosecutor did not identify what "communications" from Krause and others she was referring to and did not accuse Krause or anyone associated with the defense team of any wrongdoing.

xii. Twelfth Challenge

The defendant expresses displeasure with the suggestion at the end of the email that "[t]he best way to ensure an accurate account of a conversation is to record the conversation." *Id.* (quoting Motion Ex. A at p. 3). The Court does not understand why the defendant believes this statement is improper, especially considering the context in which it was made: following the prosecutor's advisement that the victims are free to "speak with anyone [they] wish about this

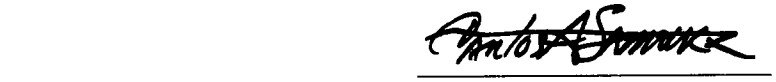
case," including "the [d]efense, [] the [p]rosecution, or anyone" else. Motion Ex. A at p. 3.

CONCLUSION

For all the foregoing reasons, the Court concludes that none of the drastic sanctions requested by the defendant is warranted. However, in an abundance of caution, to address a concern raised by the defendant, the Court requires the prosecutor to send a clarifying email in accordance with this Order.

Dated this 16th day of July of 2014.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2014, a true and correct copy of the **Order regarding Defendant's renewed motion for sanctions for prosecutorial interference with defense investigation (D-137a)** was served upon the following parties of record:

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