REDACTED

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 MOTION FOR RELIEF DESIGNED TO ENFORCE AND PROTECT MR. HOLMES'S CONSTITUTIONAL RIGHTS ARISING FROM LAW ENFORCEMENT'S VIOLATION OF THIS COURT'S PRE-TRIAL PUBLICITY ORDER (D-224)

INTRODUCTION

In Motion D-224, the defendant asks the Court to "enforce his constitutional rights" by imposing sanctions on the prosecution based on law enforcement's alleged violation of a July 23, 2012 pretrial publicity Order and law enforcement's alleged perjured testimony during the hearings held on Motion D-17 in December 2012 and April 2013. Motion at pp. 1-2. In the alternative, the defendant seeks the appointment of a special prosecutor to investigate law enforcement's alleged misconduct. *Id.* at p. 1. The prosecution opposes the motion. *See generally* Response.

The defendant's motion for sanctions or for appointment of a special prosecutor fails. To the extent that the motion is based on law enforcement's alleged violation of the July 23, 2012 pretrial publicity Order, it lacks merit for all the reasons articulated in Order D-17. To the extent that the motion is grounded in law enforcement's alleged perjured testimony, it fails in light of the remedy provided in this Order. If the record before the Court is complete, it reflects that at least one law enforcement agent was untruthful at one of the hearings held on Motion D-17. Therefore, at trial, the Court will allow the defendant to attempt to impeach the credibility of every witness whose testimony was presented at one of those hearings. Given this decision, the Court concludes that neither of the sanctions requested by the defendant for law enforcement's alleged perjured testimony is warranted and that a special prosecutor is not necessary. Accordingly, Motion D-224 is denied without a hearing.

BACKGROUND

Almost immediately after this case was filed, on July 23, 2012, the Court entered an Order granting the defendant's motion to limit pretrial publicity. *See* Order D-2 (hereinafter "the July 23 Order"). As relevant here, the July 23 Order prohibits law enforcement officers from releasing "any extrajudicial statement for dissemination by means of public communication, if the law enforcement officers know or reasonably should know that it will have a substantial likelihood of

prejudicing a criminal proceeding." *Id.* at p. 3. Thus, the July 23 Order prohibits law enforcement officers from providing information about the case to the media.

In October 2012, the defendant filed Motion D-17, which sought sanctions against the government. Motion at p. 2. The defendant alleged that law enforcement violated the July 23 Order by leaking information about the case to the media—specifically, to Jana Winter, a New York investigative reporter employed by Fox News. *Id.* The motion was based on an "exclusive" report published by Winter on July 25, 2012, which included information purportedly provided to her on or about July 24 by two law enforcement sources about the contents of a notebook found by the University of Colorado at Denver Police Department (hereinafter "UCDPD") around noon on July 23 in a mailroom of the University of Colorado's Anschutz Medical Campus ("CU-Medical"). *See* Order C-26(a) at pp. 3-4. The notebook was mailed by the defendant to Dr. Lynne Fenton, the medical director of the Student Mental Health Service at CU-Medical, on July 19, just hours before the shooting charged in this case. *Id.* at p. 4. Dr. Fenton had seen the defendant as a patient in June 2012 while he was a student at CU-Medical. *Id.*

On December 10, 2012, the Court, the Honorable William Sylvester presiding, held an evidentiary hearing (hereinafter "December 10 hearing") during which the defense: (1) submitted six "affidavits of University of Colorado police

officers and lay witnesses" who were peripherally involved in the seizure of the notebook; and (2) presented the testimony of fourteen law enforcement agents who had "contact with [the] notebook." Motion D-26 at p. 2.[1] "While several of the law enforcement witnesses [who testified] admitted to partially viewing the contents of the notebook, none of [them] admitted to providing any information to the news media" or anyone else about the contents of the notebook. *Id.* Thus, the defendant asserted that he had "exhausted all known investigative and evidentiary avenues" to identify Winter's confidential sources, and that "Winter appear[ed] to be the only witness" who could name the law enforcement officer(s) who [allegedly] violated the July 23 Order. *Id.* at p. 3.

The defendant subsequently moved for a Certificate under Seal of the Court to request that a New York court issue a subpoena to compel Winter to produce her notes from her conversations with the sources mentioned in her article and to disclose the identity of those sources. *Id.* at p. 1. Judge Sylvester granted the request, and the New York Superior Court thereafter issued a subpoena *deuces tecum* and *ad testificandum*, which the defendant served on Winter, thereby compelling her to appear before this Court and to provide both testimony and her notes.

[1] None of the affiants had an opportunity to view the contents of the notebook.

The defendant repeatedly maintained throughout the proceedings that Winter's testimony and notes were necessary to prove the violation of the July 23 Order alleged in Motion D-17. *See e.g.*, *id.* (asserting that defense counsel had "used all available means to determine which law enforcement agent violated this Court's [July 23] Order by leaking the contents of [the] notebook to the media," that "none of [their] efforts [had] revealed the source of the leaked information," and that, therefore, "Winter [had] become a material and necessary witness in this case and her notes [were] material and necessary to the defense in this matter"). At a hearing held on April 1, 2013, the defendant acknowledged that, without Winter's testimony and notes, the Court could not grant the motion for sanctions because it could not determine whether the July 23 Order was violated by law enforcement, much less the nature of the alleged violation and the individual responsible for it:

> THE COURT: [Counsel], what are you asserting are the substantial issues in the proceeding that the identity of the [confidential] sources is relevant to?
>
> DEFENSE COUNSEL: ***So without knowing specifically the identity of the sources in this case, I think it's difficult, A, for the Court to come to a full conclusion to decide that indeed a violation of a court order existed, number one. Secondly, without knowing the exact identity of the sources who leaked this information, I don't think the Court can determine what the level of that violation was.*** For example, are we talking about somebody who is the head of the division versus somebody who got the information secondhand who maybe wasn't aware of the order? ***Without knowing who it was that leaked the information, the Court simply doesn't have enough***

> ***information to evaluate the other factors that it's required to address in making the ultimate determination of contempt or violation of its own order. In addition, without knowing who the nature of the source is, it's relevant, as well, to what sanctions should then be imposed.*** I mean, certainly, some sanction has to sort of be weighed against the extent of the violation. Was it unintentional? Was it mistaken? Was it a direct violation of the court order? All of that will weigh in this Court's mind in determining the ultimate sanction. So that's why the identity is relevant to substantial issues in this proceeding.

4/1/13 Tr. at pp. 73-74 (emphasis added).

At a subsequent hearing held on April 10, 2013, defense counsel continued to take the position that they could not prove the alleged violation of the July 23 Order unless the Court compelled Winter to disclose her confidential sources:

> [A]t this point, we have shown by a preponderance of the evidence that ***the only reasonable means to try and enforce [the July 23] Order, to get out the person who is leaking this information, is through Ms. Winter***[;] if the Court fails to do that, what this Court is now going to say to the public through the media is, Hey, I'm going to put out these orders, right? I'm going to tell you that you can't release information. But guess what? You really can. You can tell it to any journalist out there. Just make sure they don't use your name, because then they can hide your wrongdoing, sir, behind this journalist shield. And I will never be able to enforce my orders by getting at the people that are violating them.

4/10/13 Tr. at p. 37 (emphasis added). Moments later, counsel reiterated that they could not "get at the people" who allegedly violated the July 23 Order. *Id.* at p. 38.

Because Winter filed a motion for a protective order and to quash the subpoena served on her by the defendant, *see* Motion C-26, and because the defendant represented that he could not proceed on his motion without Winter's

testimony and notes, the Court deferred ruling on Motion D-17 until Winter's motion was resolved. *See* Order C-53 at p. 5. On December 10, 2013, the Court of Appeals of New York, the highest court in New York, concluded that the Superior Court violated New York public policy by issuing a subpoena directing Winter to appear at a judicial proceeding in Colorado, given that there was a substantial likelihood that she would be directed to disclose the names of confidential sources or face being held in contempt of court. *Holmes v. Winter*, 3 N.E.3d 694, 695, 705 (N.Y. 2013). On May 27, 2014, almost 2 years after Motion D-17 was filed, the United States Supreme Court denied the defendant's petition for certiorari to review the decision of the Court of Appeals of New York. *See Holmes v. Winter*, 134 S.Ct. 2664, 189 L.Ed.2d 209 (2014). Accordingly, later that day, this Court denied the defendant's motion for sanctions and granted Winter's motion for a protective order and to quash the subpoena served on her by the defendant. *See* Order D-17 and Order C-26-C.

In Order D-17, this Court reasoned as follows:

> [T]he defendant previously acknowledged that, without Winter's testimony and notes, he cannot prove the violation of the July 23 Order alleged in Motion D-17, the nature of any violation—i.e., whether it was intentional or inadvertent—or the person responsible for it—i.e., whether it was the head of a law enforcement agency's division or someone who obtained the information second-hand without knowledge of the July 23 Order. Of course, the nature of any violation and the identification of the person responsible for it are factors the Court would be required to consider in determining

> whether sanctions are appropriate, and, if so, what sanctions are reasonable.

Order D-17 at p. 5.

Although nothing has changed since the Court issued Order D-17, the defendant nevertheless renews his request to sanction the prosecution for law enforcement's alleged violation of the July 23 Order. Motion at p. 1. Additionally, the defendant asks for a remedial sanction based on the alleged perjured testimony of the law enforcement agents who testified at the December 10 hearing. *Id.* at pp. 5-6. In the alternative, the defendant seeks the appointment of a special prosecutor to investigate law enforcement's alleged misconduct. *Id.* at p. 1. The Court addresses each request in turn.

ANALYSIS

I. Request for Sanctions

The defendant asks the Court to adopt one of the following remedial measures to sanction the prosecution for law enforcement's alleged violation of the July 23 Order and alleged perjured testimony at the hearings on Motion D-17: (1) preclusion of the testimony of all law enforcement agents who testified at the December 10 hearing and the April 2013 hearings; or (2) dismissal of the death penalty as a possible sentence. Motion at pp. 5-6. The request is denied as inappropriate as it relates to the alleged violation of the July 23 Order, and is

denied as unwarranted and unnecessary as it relates to the alleged perjured testimony.

A. Law Enforcement's Alleged Violation of the July 23 Order

Neither of the suggested sanctions is appropriate because the defendant has not proven—and, admittedly, cannot prove—that law enforcement violated the July 23 Order. *See* Order D-17. The Court cannot sanction the prosecution based on speculation that law enforcement violated that Order.

Notably, the defendant does not take issue with the Court's conclusion in Order D-17. *See generally* Motion. Nor does he assert that he proved the alleged violation on which Motion D-17 was grounded. *See generally id.* Yet he nevertheless asks the Court to impose a remedial sanction in order to enforce his constitutional rights. *Id.* at p. 1. The defendant's renewed request to sanction the prosecution is, at its core, a motion to reconsider Order D-17. Because he has presented no basis warranting reconsideration of that Order, the request lacks merit.

It is possible, of course, that law enforcement leaked information about the contents of the notebook to Winter. But it is also possible that Winter misrepresented that her confidential sources were law enforcement agents. If a law enforcement officer spoke about the contents of the notebook to a civilian without any expectation that the information would be publicly disseminated, and that

civilian, in turn, shared the information with Winter, no violation of the July 23 Order occurred.

Even assuming Winter's confidential sources were law enforcement officers, the Court lacks information that is critical to finding a violation of the July 23 Order because the defendant has not established that those officers knew or reasonably should have known their actions would have a substantial likelihood of prejudicing these proceedings. *See* July 23 Order at p. 3. As defense counsel explained, "without knowing the exact identity of the sources who leaked this information," the Court cannot "evaluate . . . factors that it's required to address in making the ultimate determination of contempt or violation of its own order." 4/1/13 Tr. at p. 73. Further, without identifying the sources of the leak, the Court cannot assess the level of the violation or whether the violation was intentional or inadvertent, factors which the defendant conceded the Court must consider in deciding "what sanctions should [] be imposed." *Id.*

In any event, contrary to the defendant's assertion, he has not shown that Winter's report has prejudiced his constitutional right to a fair trial by an impartial jury. Motion at pp. 3-4. Given the pervasive publicity this case has received since the report was published, and given further the large amount of time that will have expired before trial—at least two and a half years—Winter's report was a proverbial "drop in a bucket." Any prejudice is further mitigated by the fact that

the contents of the notebook will be admitted at trial. Besides, the Court is confident that it will be able to address any prejudice caused by Winter's report through the extensive *voir dire* procedures it plans to utilize. Thus, regardless of whether law enforcement violated the July 23 Order, the Court concludes that the defendant's constitutional rights have not been violated as a result of Winter's report.[2]

B. Law Enforcement's Alleged Perjured Testimony

The defendant complains that his constitutional right to due process has been hindered because he will not be able "to obtain potential impeachment evidence" related to the law enforcement agents who testified at the December 10 or April 2013 hearings. *Id.* at p. 6. Consequently, asserts the defendant, his constitutional right to present a defense and confront witnesses at trial will be negatively impacted. *Id.* The Court concludes that the defendant has a reasonable, good faith belief that one or more of the law enforcement agents who testified at the hearings held on Motion D-17 was untruthful and committed perjury. At trial, the Court will allow the defendant to challenge the credibility of all of those witnesses by

[2] The defendant avers that his constitutional right to compulsory process has also been impeded because he cannot compel Winter to identify her confidential sources. Motion at p. 6. However, the defendant is unable to require Winter to identify her sources because the Court of Appeals of New York ruled that the Superior Court erred in subpoenaing her to appear in this proceeding in Colorado. While the defendant's disappointment in the outcome of the New York litigation is understandable, it is a stretch to argue that it resulted in his constitutional right to compulsory process being violated.

presenting evidence related to the proceedings held on the alleged violation of the July 23 Order. Accordingly, neither of the defendant's proposed remedial measures is warranted.

The prosecution contends that "there is no reason to think, and no evidence to support, that any of the individuals who testified [on December 10 or in April 2013] did anything other than truthfully answer the questions that were asked of them." Response at p. 2. This contention is belied by the record and is based on red herrings and misleading, incorrect, and irrelevant references to the testimony. The record before the Court establishes the following:

(1) The defendant presented testimony from fourteen law enforcement agents. The defendant maintains that "every individual who came into contact with the notebook" on July 23, 2012 was called as a witness. Reply at p. 1. No evidence in the record contravenes this contention.

(2) Only two witnesses, UCDPD Chief Douglas Abraham and Detective Alton Reed of the Aurora Police Department ("APD"), admitted that they learned about the contents of the notebook as Detective Reed thumbed through the notebook's pages before it was placed into evidence. Chief Abraham testified that, as Detective Reed "fanned the pages" of the notebook, he stopped on

one of the pages momentarily, allowing Chief Abraham to observe what was on that page. 12/10/12 Tr. at p. 66. Similarly, Detective Reed testified that, as he "thumbed through the pages of the notebook," he "could see some of the content of what was on the pages of the notebook." 4/10/13 Tr. at p. 7.

(3) Chief Abraham testified that he never discussed the delivery of the package in which the notebook was found, or the contents of the package, with anyone in the media. 12/10/12 Tr. at p. 67. On redirect examination, he expanded on that answer, representing that "[t]he only thing that [he] shared with anybody was that it was a notebook—that the package had been located and that it was a notebook." *Id.* at p. 75. He confirmed that he "did not share anything else that [he] saw that day," and more specifically, that he did not share anything "that [he] may have seen when Detective Reed was flipping through the pages" of the notebook. *Id.* Chief Abraham also did not recall ever transmitting information about the contents of the package over the police radio. *Id.*

(4) Likewise, Detective Reed denied ever telling anyone "what [he] saw inside that notebook," although he "assume[d]" he had

"probably told Sergeant Fyles" about it while the Sergeant prepared a warrant. 4/10/13 Tr. at p. 7.

(5) Sergeant Matthew Fyles testified that, while preparing a warrant at police headquarters, Detective Reed spoke to him over the telephone about the notebook. 4/1/13 Tr. at p. 120. However, according to Sergeant Fyles, Detective Reed simply told him that the notebook contained an "unknown number of pages with unknown writing." *Id.* Thus, Sergeant Fyles made clear that he never learned about what was written or drawn on the pages of the notebook. *Id.* at pp. 121-22.

(6) APD Officer Jason McDonald testified that he, too, was present as Detective Reed thumbed through the notebook. 12/10/12 Tr. at pp. 118-20. He stated that he could see "[e]nough" to learn "that the pages weren't blank, that they were filled with content." *Id.* at p. 122. Later, he testified that he was able to see that there were "words" in the notebook. *Id.* at p. 123. Officer McDonald also heard a conversation about the contents of the notebook in Chief Abraham's presence immediately after Detective Reed leafed through it. *Id.* at pp. 119-20, 122. However, Officer McDonald

denied having "[a]ny further conversation about the contents of the package with anyone." *Id.* at p. 120.

(7) Two other witnesses were present as Detective Reed fanned through the pages of the notebook—UCDPD Commanders James Myrsiades and Stephen Smidt. Commander Myrsiades saw Detective Reed pick up the notebook and thumb the pages. *Id.* at pp. 24-25. Like Officer McDonald, he was able to see that the notebook contained "letters," but was not "able to read anything." *Id.* at p. 25. Similarly, Commander Smidt testified that he was able to observe Detective Reed flip through the pages of the notebook, but could not see the contents of the notebook. *Id.* at p. 169. Nor did anyone ever discuss the contents of the notebook with him. *Id.*

(8) The rest of the witnesses testified that they did not have knowledge of the contents of the notebook before Winter's report was published.

(9) Winter's report [redacted]

[redacted][3]

(10) Winter's report [redacted]

(11) Perhaps most compelling, Winter's report [redacted]

Chief Abraham wrote in his statement that, as Detective Reed fanned through the pages of the notebook, [redacted]

Response at p. 3.

[3] The prosecution maintains that this is untrue because [redacted] Response at p. 4. The Court declines to adopt the prosecution's literal interpretation [redacted] As the prosecution acknowledges, [redacted] *Id.*

The Court finds that the most reasonable inference drawn from the record is that Winter obtained the information in her report from sources who had direct or indirect knowledge of the contents of the notebook. Whoever spoke to Winter about the contents of the notebook must have obtained that information by viewing the contents of the notebook or by hearing about the contents of the notebook from someone with knowledge about the contents of the notebook. In either scenario, someone who viewed the contents of the notebook spoke about them. Because the Court has no way of ascertaining whether law enforcement officers talked with Winter directly, it has denied the defendant's request for sanctions for the alleged violation of the July 23 Order. However, if the record on this issue is complete, one of the following propositions is necessarily true: (1) at least one of the two agents who viewed what was written or drawn on the pages of the notebook—Chief Abraham and Detective Reed—was untruthful under oath about never sharing that information with anyone; or (2) at least one other witness who was

present when the notebook was found was untruthful under oath about not acquiring knowledge of what was written or drawn on the pages of the notebook.[4]

[redacted]. *Id.* at p. 4 n.2. In fact, the prosecution goes so far as to assert that [redacted] This argument is preposterous. Although someone may well have surmised that the notebook [redacted]

The prosecution's other assertions are equally meritless. The Court addresses each separately:

(1) "Numerous individuals saw the outside of the package." *Id.* at p. 2. This is a red herring. It was not Winter's description of the outside of the package that gave rise to Motion D-17. What led the defendant to believe that there had been a violation of the July 23 Order, and what subsequently led to the extensive litigation on Motion D-17, was the part of Winter's report that discussed what

[4] The Court understands that certain witnesses testified that they could tell there were "letters," "words," or "unknown writing" in the notebook. However, they testified that they could not make out the letters, words, or writing.

was written or drawn on the pages of the notebook, information which was only available to a small number of agents.

(2) "Information about the package was discussed on police radio, and [UCDPD] ha[s] over 50 [such] radios." *Id.* This is a red herring, as it has nothing to do with what was written or drawn on the pages of the notebook. There is no evidence in the record that information related to what was written or drawn on the pages of the notebook was broadcast over the police radios. In fact, the evidence in the record is to the contrary.

(3) "Personnel from [UCDPD] and the FBI observed Detective Reed fan though the notebook." *Id.* This is a red herring. The only individual from UCDPD who admitted acquiring knowledge about what was written or drawn on the pages of the notebook was Chief Abraham. But he denied ever sharing that information with anyone. 12/10/12 Tr. at p. 75. Further, no one from the FBI testified about having knowledge regarding what was written or drawn on the pages of the notebook.

(4) "At least 20 people were present for the briefing about the search for the package." Response at p. 2 (citing Commander Myrsiades' testimony at the December 10 hearing). Although this is true, it is

irrelevant because this briefing took place ***before*** the notebook was found. 12/10/12 Tr. at pp. 28-30.

(5) "Adams County Bomb Squad personnel were aware that there was a notebook inside [a] package," and a "Bomb Squad technician" who "thumbed through the notebook" was not asked by defense counsel at the December 10 hearing if he discussed the contents of the notebook with non-media individuals. Response at pp. 2-3 (citing the testimony of Deputy Denzel Lukens at the December 10 hearing). This is misleading because Deputy Lukens testified that he was not able to see "what was contained in the notebook," other than "the currency" found. 12/10/12 Tr. at pp. 42-44.

(6) "Sergeant Fyles indicated that he had a conversation about the package with the command staff and members of the major crime homicide unit." Response at p. 3. This is misleading. Detective Reed said that he "assume[d]" he had "probably told Sergeant Fyles" about the contents of the notebook while the Sergeant prepared a warrant. 4/10/13 Tr. at p. 7. However, Sergeant Fyles made clear that the only information about the contents of the notebook he received from Detective Reed was that it contained an "unknown number of pages with unknown writing." 4/1/13 Tr. at

p. 120. This is the only information Detective Fyles shared with the command staff and members of the major crime homicide unit. *Id.* at p. 125.

(7) "Other personnel saw the pages of the notebook fanned, which was observed by numerous individuals." Response at p. 3. This is a red herring because it has nothing to do with what was written or drawn on the pages of the notebook. The prosecution insists, however, that Chief Abraham was not asked whether he discussed the contents of the notebook "with other personnel in his department, or with personnel from other local, state, or federal law enforcement agencies." *Id.* The prosecution is mistaken. Chief Abraham testified that "[t]he only thing that [he] shared with anybody was that it was a notebook—that the package had been located and that it was a notebook." 12/10/12 Tr. at p. 75. He confirmed that he "did not share anything else that [he] saw that day," and more specifically, "[n]othing that [he] may have seen when Detective Reed was flipping through the pages." *Id.*[5] The

[5] At the April 1, 2013 hearing, the Court agreed with defense counsel's reading of Chief Abraham's testimony. 4/1/13 Tr. at p. 80. Without objection from the People, the Court indicated that it understood Chief Abraham's testimony as conveying that he did not share his knowledge of what was written or drawn on the pages of the notebook with anyone and did not discuss that knowledge on the police radio. *Id.* Based on that observation by the Court, defense counsel did not call Chief Abraham as a witness again at that hearing or at the April 10, 2013

prosecution's response is also inaccurate with respect to Officer McDonald's testimony. *See* Response at p. 3. Officer McDonald denied having "[a]ny further conversation about the contents of the [notebook] with anyone." 12/10/12 Tr. at p. 120.

(8) "[T]he testimony demonstrates that numerous people were present when Detective Reed described the contents [of the notebook] over the telephone" to Sergeant Fyles. *See* Response at p. 3. This is misleading. As indicated, Sergeant Fyles testified that when Detective Reed spoke to him on the telephone about the notebook, all he conveyed is that there were an "unknown number of pages with unknown writing." 4/1/13 Tr. at p. 120. [redacted]

(9) "[N]umerous individuals had an opportunity to observe at least a portion of the contents of the notebook, and would be expected to share this information with other law enforcement personnel." Response at p. 3. According to the prosecution, Chief Abraham, Detective Reed, Officer McDonald, and Commanders Myrsiades and Smidt were among such individuals. *Id.* This is misleading.

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hearing. Other comments by the Court prompted defense counsel to re-call Sergeant Fyles at the April 1 hearing and Detective Reed at the April 10 hearing. *See id.* at pp. 82-84.

These witnesses testified either that they did not view what was written or drawn on the pages of the notebook or, if they did, that they did not share that information with anyone.

If the prosecution believes that the record is incomplete and that there are witnesses with relevant information who were not called by the defense at the Motion D-17 hearings, it is free to conduct a further investigation and to request another evidentiary hearing.[6] Similarly, if the prosecution believes that the Court misunderstands some of the testimony presented at the hearings held on Motion D-17, it may seek leave to schedule another evidentiary hearing so that the witnesses may clarify their previous testimony. In the event that another hearing is set, the prosecution must comply with its discovery obligations before the hearing.[7]

This Order should reflect the Court's agreement with the defendant that when a law enforcement agent provides untruthful testimony in a pretrial hearing

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[6] In the immediate aftermath of the alleged violation of the July 23 Order, the prosecution represented that it had "spoken with the United States Attorney for the District of Colorado and indicated to him that any leak of information relating to [the] alleged contents of the notebook need[ed] to be fully investigated." Motion D-8 Response at p. 2. However, according to the defense, it "has received absolutely no indication that the District Attorney's office has made any effort to follow up on these supposed efforts to determine the nature and source of the leak or has undertaken any other sort of investigation, via grand jury or otherwise, to determine the source of the leak." Motion at p. 5.

[7] The defendant states that the prosecution has had no incentive to investigate the allegation of perjured testimony. Motion at p. 5. To the extent the defendant is correct, this Order may well provide such incentive. The Court notes that a prosecutor should never be afraid of the truth, no matter how damning it may be; his duty is to do justice, not to obtain a conviction or to convince the jury to impose a desired penalty. Especially in a death penalty case, a prosecutor's duty to do justice must be discharged with unabated rigor.

in a death penalty case, it is a serious matter. The Court is mindful that it must be ever vigilant to ensure that the defendant receives a fair trial. Given the record, it would be utterly unfair to proceed to trial without affording the defendant an opportunity to show the jury that there is a reasonable, good faith basis to conclude that at least one law enforcement agent testified untruthfully under oath at one of the hearings held on Motion D-17. The fact that none of the witnesses has stepped forward and admitted such and that, despite diligent efforts, the defendant has been unable to identify any particular witness who lied under oath, should not prevent the jury from being fully and accurately informed.

Nevertheless, neither of the drastic sanctions the defendant requests is appropriate because this Order eliminates any prejudice the defendant may have otherwise suffered. In fact, this Order arguably places the defendant in a better position than if he had identified the witness who was untruthful under oath, as it allows defense counsel to attack the credibility of all of the witnesses who testified with respect to Motion D-17.

If a law enforcement agent had been identified as having provided untruthful testimony at the December 10 hearing or at one of the April 2013 hearings, he presumably would have been dismissed from his employment and would have been prosecuted for perjury, a felony. Although his testimony at trial in this case would be subject to impeachment by the defense, without a showing of prejudice

to the defendant, the Court would not additionally exclude the testimony of all the other witnesses who testified at the hearings held on Motion D-17 or dismiss the death penalty as a potential sentence.

Rather than challenge the credibility of one witness, the defense will now be able to cast doubt on the credibility of fourteen witnesses, including the UCDPD Chief and "two homicide detectives who played significant roles in the investigation of this case." Reply at p. 3. In other words, to the extent that the status quo remains, it will appropriately inure to the defendant's benefit, not to the prosecution's benefit. Of course, the prosecution may repeat at trial the arguments advanced in its response. In the end, the jury will determine whether any of those arguments holds water and whether the evidence on this point is sufficient to show that at least one law enforcement officer was untruthful under oath during the December 10 hearing or at one of the April 2013 hearings. The jury will decide what weight, if any, to give to the testimony of all those witnesses and other law enforcement witnesses.[8]

II. Request for a Special Prosecutor to Conduct an Investigation

In the alternative, the defendant asks the Court "to appoint a special prosecutor for the purpose of facilitating an investigation . . . to determine how and

[8] The Court wishes to be clear that it will not permit this to become a trial within a trial. However, the Court will afford the defendant adequate leeway to attempt to show that one or more of the law enforcement agents who testified at a Motion D-17 hearing was untruthful.

why the leak occurred, and whether any of the government's witnesses did in fact perjure themselves." Motion at p. 7. Even assuming the Court has the authority to order an investigation by a special prosecutor, which is highly questionable, it denies the request.[9] First, as indicated, the Court is confident that any violation of the July 23 Order will not interfere with the defendant's right to a fair trial by an impartial jury or with any of his other constitutional rights. Second, this Order renders moot the defendant's alleged need to identify the untruthful testimony provided at a Motion D-17 hearing. Moreover, as mentioned earlier, this Order gives the prosecution a strong incentive to conduct an investigation into this matter, thereby further obviating the need for a special prosecutor.

CONCLUSION

For all the foregoing reasons, Motion D-224 is denied without a hearing. However, at trial, the Court will afford the defendant an opportunity to show that at least one law enforcement agent was untruthful under oath during the hearings held on Motion D-17.

Dated this 28th day of August of 2014.

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[9] The defendant's reliance on the 1901 decision in *People v. District Court*, 29 Colo. 5, 66 P. 896 (Colo. 1901), is unpersuasive because that case is inapposite. There, an attorney was appointed because the trial court had credible information indicating that the elected district attorney had been involved in the commission of offenses in the administration of justice, namely the attempt to bribe jurors. 66 P. at 897. The matter was submitted to the grand jury for investigation, with the appointed attorney as adviser to the grand jury. *Id.*

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2014, a true and correct copy of the **Court's Order Regarding Defendant's Motion for Relief Designed to Enforce and Protect Mr. Holmes's Constitutional Rights Arising from Law Enforcement's Violation of this Court's Pre-Trial Publicity Order (D-224)** was served upon the following parties of record:

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Christina Taylor
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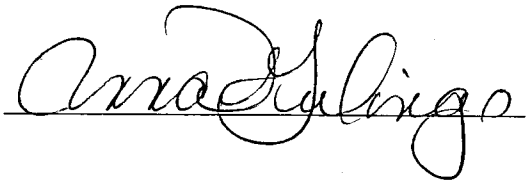
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