UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF

DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. No.

,

Defendant.

**Motion to Authorize the Services of a Defense-Based Victim Liaison (*Ex Parte* and Under Seal)**

Defendant , by counsel, respectfully requests that the Court authorize the services of a defense-based victim liaison. In support of this request, counsel set forth the following:

1. Under 21 U.S.C. § 848(q)(9), the Court may authorize the defense to obtain investigative, expert, or other services that are “reasonably necessary for the representation of the defendant.” The services of a defense-based victim liaison are reasonably necessary for the representation of .
2. Until recently, defense counsel in capital prosecutions viewed the surviving relatives of a murder victim as informal members of the prosecution team. Often seen for the first time in court hearings, accompanied by law enforcement officers and prosecutors, the survivors were not deemed approachable. The prosecution team reinforced this perception by

conferring with the survivors and purporting to represent their interests – treating the survivors, at least informally, as their clients.

1. The appearance that homicide survivors are adjuncts to the prosecution team has been nurtured by programs within the Department Justice designed to serve crime victims and the survivors of crime victims.1 Moreover, in federal capital prosecutions, the United States Attorney is directed to consult with survivors in the process of determining whether to seek the death penalty. The United States Attorneys Manual, § 9-10.060, “Consultation with Family of Victim,” prescribes the following:

The United States Attorney should consult with the family of the victim concerning the decision whether to seek the death penalty. The United States Attorney should include the views of the victim's family concerning the death penalty in any submission made to the Department. The United States Attorney shall notify the family of the victim of all final decisions regarding the death penalty.

1. Over the past five years, the capital defense community has come to realize that their traditional view of survivors as clients of the prosecution is a mistake, both from the perspective of survivors and from the perspective of defending clients zealously. *See* Richard Burr, *Litigating with Victim Impact Testimony: The Serendipity that Has Come from Payne v. Tennessee*, 88 Cornell L. Rev. 517 (2003).
2. From the perspective of survivors, survivors are not members of the prosecution

1Congress, for example, has required each federal agency or department involved in the detection, investigation, and prosecution of crimes to provide a variety of services to crime victims and survivors, 42 U.S.C. § 10607, has established an Office for Victims of Crime in the Department of Justice to oversee and fund various programs for providing services to victims, 42

U.S.C. § 10605, and has taken care to see that funding is available to improve federal agencies’ services to crime victims, 42 U.S.C. § 10601(d)(3).

team nor the clients of the prosecutors. They are, in fact, third parties in a capital prosecution. They have suffered an egregious, immeasurable loss through no fault of their own. While they have an interest in seeing that whoever is responsible for this loss is identified and held accountable, this is not the only interest they have that the judicial process might address.

Survivors also have a need for information, including the need to know:

Why was my loved one murdered? What did my loved one experience in the course of being killed? What did he or she say and do before death came? What is going to happen in the prosecution? How long will it take? What are the steps that must be taken before the prosecution is over? What is going on in the prosecution at any particular time?

88 Cornell L. Rev. at 526-527. Further, survivors have a need to “get through the prosecution with as little re-traumatization as possible.” *Id*. at 527. Yet the judicial process is rife with opportunities for re-traumatization:

Every court proceeding creates the risk that survivors will relive the experience of learning of their loved one’s murder and re- experience, empathetically, the murder itself. This problem is often at its worst during the trial, where the details of the murder are revealed publicly. If a death sentence is imposed, every post- conviction proceeding and development poses the risk of further traumatization. Indeed, because post-conviction proceedings usually span a number of years, the cycle of continuing re- traumatization may also extend for many years.

*Id*. Moreover, survivors’ interests in seeing that whoever is responsible for the loss of their loved one is identified and held accountable vary from survivor to survivor. Some do not care what kind of punishment is imposed on this person. Some do. Some want the death penalty. Some do not; some would even be aggrieved if the death penalty were imposed. Most want some assurance that the offender will not hurt anyone else. Some want to meet with the offender. Some do not.

1. While the prosecution can respond to some of these needs, only the defense team and the defendant can respond to others.2 Moreover, only when the prosecution and the defense act together can some of the needs be met, such as the need to have the judicial process come to a final conclusion quickly so that the survivors can tend to the inner work they must do to live with the loss they have suffered.
2. From the perspective of defending clients zealously, defense counsel make a mistake if they cede exclusively to the prosecution the opportunity to develop a relationship with the survivors. Unless they develop a relationship with survivors, the defense may never know the broad and diverse range of interests and needs that survivors feel and are able to articulate. They may never know, for example, that the survivors want the judicial process to be over quickly and would be amenable to a disposition of the case by plea bargain. They may never know the particular suffering that the murder has brought into the survivors’ lives, and how they might respond compassionately to their suffering, rather than insensitively, due to ignorance.

2The information that is often uniquely within the domain of the defendant and defense team includes information about the victim’s last moments and last words, about why the murder happened, about why the victim was singled out, and about what the defense lawyers are doing to defend their client and why they feel like they have to defend their client in the way they are. To be sure, attorney-client confidences and the need to protect clients from self-incrimination – as well as the need to defend on the basis of doubt about guilt – may shape the way the defense can respond to these needs of survivors. However, the potential for the defense to be helpful to survivors is always there. As Tammy Krause, one of the pioneers of defense-based victim outreach, has said,

The organic relationship is between the defense and the victim, not between the prosecution and the victim. The prosecutors are, at best, very interested observers, who can do little to meet the survivor’s needs within the criminal justice system without the interest and cooperation of the defense.

88 Cornell L. Rev. at 527.

They may never know that the survivors would like to meet with their client and, through that contact, begin to come to some peace about what has happened.3 They may never know that the development of a relationship based on respect and compassion for survivors may help survivors feel less like distraught bystanders and more like real participants in a process which usually affects them profoundly. 88 Cornell L. Rev. 517-518, 527-529.

1. To be able to reach out to murder survivors, defense lawyers need the assistance of an expert – a victim liaison, who by training and experience knows how to approach and develop a relationship with survivors with appropriate respect for their plight, their suffering, and their fears. Such persons are encouraged to become advocates for the survivors with the defense team. They are not sent out to manipulate or in any manner take advantage of victims. They are sent out with only one goal: to develop a relationship with, get to know, and serve as bridge between, the defense and the survivors. How the relationship develops thereafter and the fruits of that relationship are solely determined by the interests of the survivors and the ability of the defense – and in some instances the prosecution – to meet those interests.
2. Defense-based victim liaisons have been authorized in a growing number of federal capital cases, including the following:

*U.S. v. Timothy James McVeigh*, No. 96-CR-68-M (D.Colo.). Presiding Judge - Richard P. Matsch

3As counter-intuitive as such a meeting process might seem, nearly every day new stories are reported about such meetings and the positive effects they have on the lives of survivors and defendants alike. *See, e.g.,* “Jackson County Quaker Asks Court to Spare Killer of Woman He Raised,” *Nashville Tennessean*, December 26, 2002 (Appendix A, attached hereto). A similar spirit of reconciliation and commitment to restorative justice has emerged among prisoners as well. *See, e.g.,* “”Reconciliation on Death Row: ‘If They Harm People, They Should Be Accountable,’” *St. Louis Post-Dispatch*, January 2, 2003 (Appendix B).

*U.S. v. Christopher Dean*, No. 2:98CR63-01(D. Vt.) Presiding Judge - William K. Sessions III

*U.S. v. Khalfan Khamis Mohamed*, No. 98-CR-1023(S-6) (S.D. N.Y.) Presiding Judge - Leonard B. Sand

*U.S. v. Marvin Gabrion*, No. 1:99-CR-76 (W.D.Mi.) Presiding Judge - Robert Holmes Bell

*U.S. v. Kofi Orleans-Lindsay*, No. 00-CR-440-ALL (D.D.C.) Presiding Judge - Colleen Kollar-Kotelly

In addition, at least six federal capital cases funded through the budgets of Federal Defender offices have utilized the services of defense-based victim liaisons.

1. In one of the federal defender cases, the victim liaisons developed a mission statement to assist survivors in understanding what they sought to do. That statement captures succinctly the mission of defense-based victim liaisons in any capital case:

MISSION OF DEFENSE-BASED VICTIM LIAISON

The mission of the victim liaison is to meet the needs of victims that can be addressed through a relationship with the defense team. The victim liaison works on behalf of victims at the request of the defense team. Victim liaisons are professionals guided by the values embedded in the philosophy of restorative justice.

Restorative justice encourages offender accountability, seeks opportunities for victims to play a more central role in the process through which criminal charges are resolved by the courts, and seeks to address the needs of both the victim and the offender that can be met during the judicial process.

The defense attorneys representing [the defendant] recognize the adversarial nature of the legal process and the potential of that process to re-traumatize victims. In an attempt to ameliorate this source of trauma, the attorneys have sought the assistance of trained victim liaisons to bridge the gap that often exists between victims and the defense team. Victim liaisons provide an opportunity for victims to have access to the defense team, which has historically not been available. This allows for victims to have interaction with both the prosecution and defense teams to address

the victims’ questions, concerns, and needs.

1. In keeping with these principles, the declaration of the victim liaison whom the defense seeks to retain, , attached hereto as Appendix C, explains the work that will be done in relation to the survivors of . Estimated costs of the victim liaison’s work during the [pre-][post-]authorization period are

, based on the time and expenses set forth in ’s declaration.

WHEREFORE, counsel for respectfully request that they be authorized to retain the services of as a victim liaison in this case, and to be able to expend up to for the services and expenses of .

Respectfully submitted,