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**VIRGJNIA:**

### IN THE CIRCUIT COURT OF

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# PM 3: 42


### COMMONWEALTH OF VIRGINIA, )

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**Defendant.** )

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-VA

### CRIMINAL Nos:

**Ho orable Hearing Date:**

### MOTION FOR DESIGNATION OF A JUDGE TO HEAR DEFENDANT'S

* ***EX PARTE* REQUESTS FOR FUNDING FOR EXPERT ASSISTANCE, PURSUANT TO VA. CODE** § **19.2-264.3:1.3**

**COMES NOW,** the Defendant, 

*:* '

by counsel, on

10:00 a,m.., or as soon .thereafter as counsel may be heard, respectfully *moves* .this Court to. designate another judge in this Circuit to hear *ex parte* funding requests for appointment of experts to assist in the preparation of defense in the above case.1

In making this Motion, --elies upon his right to be free from cruel and unusual punishment, his right to due proces·s, his right to a fair trial, his right to counsel, his· right to present a defense, his right to reliable sentencing detennination, his right to·equal protection, and other rights safeguar d by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, §§ 8, 9, and 11 of the Virginia Constitution, Va. Code § 19.2- 264.3:1.3 & .4, and such other authorities as cited in this Motion. In further support,\_, through counsel, states:

1. - is charged with two counts of capital murder. He is indigent and is

1 The defense notes that the anticipated requests do *not* concern appointments previously considered by

* this Court, such as the appointments ofDrs. Blumberg, Hopper, and James, but rather concern requests for appointment of experts to assist in the preparation **ofM¥¥ tUlB'**s defense as it pertains to the guilt/innocence phase·of the trial. ·

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## represented by court-appointed counsel. As such, he also receives court"appointed expert assistance.

1. Recognizing the special considerations required in a death-penalty case,2 the Virginia General Assembly recently enacted § 19.2-264.3:1.3 for the express purpose of allowing indigent capital defendants to make *ex parte* requests. for funding for expert assistance in cases where the court found the defendant unable to pay for expert assistance. *See* § 19.2" 264.3:1.3(A) ("In any case in which an indigent defendant (i) is charged with a capital offense and (ii) is found by the court to be financially unable to pay for expert assistance ").
2. In the circumstances listed above in paragraph 2, § 19.2-264.3 :1.3(A) provides,

«[T]he defendant or his attorney, may, upon notice to the Commonwealth, move in circuit court for the court to designate another judge in the same circuit to hear an ex parte request for the appointment of a qualified expert to assist in the preparation of the defendant's defense." This Motion is for the designation of that judge. .

1. Upon notice and moti<;m and prior to designation, "a proper·showing is made in an

2 The U.S. Supreme Court has long acknowledged that capital cases are qualitatively different than other criminal cases. Accordingly, in capital cases, the Court must exercise heightened vigilance to ensure that

a defendant is treated fairly and that the verdict is reliable.. *S e, e.g., Woodson* v. *North Carolina,* 428 U.S. 280, 305 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its :finality, differs mbre:from life imprisonment than a 100-year prison term differs from one of only a year or two."); *Caldwell* v. *Mississippi,* 472 U.S. 320, 329 n.2 (1985)

.("'extraordinary measures [be taken] to ensure that"' [accused] "'is afforded process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake."') (quoting *Eddings* v. *Oklahoma,* 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)); *Caspari* v. *Bolden,* 510 U.S. 383, 393 (1994) ("Time and again the [Supreme]' Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case.") (citation omitted). This elevated level of due process and heightened need for reliability appl es to any stage of the proceedings, including during the pretrial and guilt phases. "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing detennination. The same reasoning must apply to rules that diminish the reliability of the guilt detennination." *Beckv. Alabama,* 447 U.S. 625, 638 (1980) (citation omitted). *See Kyles v. 'Whitley,* 514 U.S. 419, 422 (1995) (trial court's "duty to search for constitutional error with painstaking·care is never more exacting than it is in a capital case"·) (quoting *Burger* v. *Ke,:np,* 483 U.S. 776, 785 (1987)).

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adversarial proceeding before the !rial judge demonstrating a particularized need for confidentiality." § 19.2-264.3:l.3(A). Here, as a particularized need for confidentiality of consideration of his requests for appointment of qualified experts to assist in the preparation o defense at the guilt phase of the trial, as set forth belo in the following.3

1. were forced to have consideration of the experts and the defenses for which they are relevant made in open court before the Commonwealth, the Commonwealth would learn-'s possible tri\_al defenses, thereby interfering with his various constitutional rights. For example, if a hearing on the consideration of the experts that-
* sought to use to prepare his guilt/ii:mocence phase defense at trial was open to the prosecution, it would prejudice the defense in several ways. First, it would provide the Commonwealth with discovery- a figurative roadmap - of the defense theory of the case. Second, it would give the Commonwealth a window into defense strategy and potential factual

. defenses. Third, the hearing would .give the Commonwealth notice of the identities of potential defense expert witnesses, even witnesses who the defense elect not to call at trial. Virginia's discovery rules do not entitle the Commonwealth to discovery of potential expert witnesses.

Virginia law only entitles the Commonwealth to discovery of expert witnesses named and provided in formal notice to the Commonwealth. § 19.2-.264.3:1;4. All of these prejudicial disclosures would provide the Commonwealth with extra time for preparation relating to those witnesses and may alert the Commonwealth to problems in its own case at both the guilt phase

3 The need for *ex parte* hearings for judicial consideration of defense requests for the appointment of experts is recognized by the U.S. Supreme Court and many other courts. *See Ake* v. *Oklahoma,* 470 U.S. 68, 82-83 0985) (defendant may make *ex parte* threshold showing to receive expert assistance); *see generally* JustinB. Shane, *Money Talks: An Indigent Defendant's Right to an Ex Parte Hearing/or Expert Funding,* 17 Cap. Def. J. 347 (2005) (for detailed list of jurisdictions that provide for *ex parte* funding requests for expert assistance, citing 18 U.S.C. *§* 3006A(e)(l), state statutes, and case law).



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## and the penalty phase of the trial. \_The Commonwealth could then use this knowledge to prepar or tailor its pre-trial investigation, opening and closing statements, presentation of witnesses and evidence, and cross-examination.

1. In addition, an open hearing for consideration of expert assistance would violate

- s Sixth Amendment right to assistance of counsel. Under the Sixth Amendment to the United States Constitution, a defendant is entitled to the effective assistance of counsel.

Hearings open to the·commonwealth for funding of expert assistance in preparation of the defense efforts create a situation in which even the most competent counsel is forced to be ineffective - either having to forgo thorough investigation to preserve his client's Fifth and

·Fourteenth Amendment rights, or having to conduct hearings that reveal defense strategy and

work product and violate attorney-client privilege. Theref<:>re, defense counsel assert that, if

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## counsel were unable to proceed *ex parte* in their applications seeking funding to support

investigation, such a ruling would cause their representation to be ineffective..

1. Further, open. hearings for funding assistance violate the defendant's Sixth Amendment right to assistance of counsel because they permit the Commonwealth to intrude into the attorney-client relationship. The United States Supreme Court has noted that the "assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with hi\_s attorney are p\_rivate and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding."

*Weatherfordv. Bursey,* 429 U.S. 545, 554 n.4 (1977) (citation omitted). The "communication of defense strategy to the prosecution," *id* at 558, such as would occur should the defense have to reveal to the prosecution who it [the defense] wanted to talk to and why, would be an unconstitutional intrusion on the attorney-client communication., including chilling the

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relationship between- and his counsel. In order to protect the defendant's Sixt Amendment right to counsel, the court should not pen.nit the Commonwealth to learn privileged

information and intercept the defense strategy in this way.

1. Finally, ( I has a right to call witnesses in his own behalf. "'Whether

rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment," it is by now axiomatic that the Constitution guarantees criminal defendants "'a meaningful opportunity to present a complete defense."' *Holmesv. South Carolina,* 126 S. t. 1727, 1728 (2006) (quoting *Crane v. Kentucky,* 476 U.S. 683, 690 (1986)); *see generally,* Peter Westen, *Compulsory Process,* 73 Michigan Law Rev. 71, 120-21 (1974). For similar reasons to those set out above, it would violate.

Is right "to call witnesses in his favor" (as put by the Virginia Constitution) if the Commonwealth were permitted to weigh in on whether the c urt should appoint expert witnesses to assist-•s lawyers in preparing liis defense.

1. The General Assembly's passage of Va. Code§ 19.2-264.3:1.3 reflects its awareness that confidentiality is often needed in a capital case. Requiring defense counsel to reveal potential experts may limit his investigation of possible defenses and hinder the defendant's preparation of a defense, thereby compromising his client's constitutional rights t0 effective assistance of counsel, to present a defense, to due process, and to confront and cross

examine witnesses. The Virginia Code further provides safeguards to ensure that the defendant

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does not use the statute to obtain unnecessary funds or to unfairly surprise the Commonwealth. For one, the designation of a judge to hear an *ex parte* request does not mean that the defendant's *ex parte* request for expert assistance will necessarily be granted. Section 19.2-264.3:I.3(B) requires a defendant.to.prove to the designated judge both that "the provision ·of the requested

. expert services would materially a sist the defendant in preparing his defense and the lack of such confidential assistance would result in a fundamentally unfair trial." And Va. Code§ 19.2- 264.3:4, which was promulgated at the same time as§ 19.2-264.3:1..3, requires a defendant to notify the Commonwealth at least 60 days before trial of any expert testimony that he will use at trial, as well as details about the proposed testimony.

1. The Defendant further notes that this ex parte statute only applies to indigent defendants, as it is indigent defendants who need to tum to the Court for. the appointment of experts. Capital defendants who are able to retain private counsel need not approach the Court for funding. An indigent defendant should not be forced to reveal information to the State that a wealthy defendant would not have to reveal. *See Ex parte Moody,* 684 So.2d 114, 120 (Ala.

1996). *See also United States v. Meriwether,* 486 F.2d 498, 506 (5th Cir. 1973) (government

should not be able to obtain witness list in case of indigent defendant when it could not do so in· case of non-indigent defendant); *People v. Loyer,* 425 N.W.2d 714, 720 (Mich. Ct. App. 1988) (defendant denied equal protection because he was required to disclose to prosecution names of witnesses and substance of their testimony in order for state to pay for subpoenas). Forcing an indigent defendant to reveal his trial strategy to the prosecution to obtain the necessary tools of defense, when a monied defendant does not have to reveal such information to the State, violates the Equal Protection guaranteed by the-Fourteenth Amendment of the United States Constitution.

1. Finally,-notes an objection to that portion of§ 19.2-264.3:lJ(C) that provides: "No ex parte ruling by a designated judge pursuant to this section in a proceeding where the Commonwealth is excluded shall be the subject cif a claim of error on appeal, or form the basis for relief in any post-conviction litigation on behalf of the defendant." This provision mittlmizes the constitutiqnal protects afforded-by both the United.States Constitution

and the Constitution of Virginia, along the with the protections recognized by the *ex parte* proceeding in the first place. Requiring-to either disclose his trial strategy to preserve any appellant rights or to arbitrarily waive those appellant rights to pursue this statutory provislon puts the defendant in the situation of having to choose the lesser evil.

**WHEREFORE,** the Defendant -• through counsel, respectfully moves this Honorable Court to enter an Order4 designating another judge in this Circuit to hear *ex parte*

Respectfully submitted,



By Counsel

Fax:

**-VAL**

Phone:

Fax:

(admitted *pro hac vice* in this matter)

### CERTIFICATE OF SERVICE

We/I hereby certify that a true copy of the foregoing Motion was delivered and/or mailed, first class mail to:

' 4 This is, of course, a relatively new statute. Counsel attaches an Order Appointing Judge to Hearing Ex

Parte Requests for Funding for Expert Assistance, issued on by the Honorable

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* + Circuit Court for the *Commonwealth v. Artis,* Case Nos. CR10000758-10000764.

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## And the original was forwarded for filing to:

Hon. b

Clerk



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