-----···-·-· ·-·. ····-·-----·------ ----------···------·-·----·- ---

FILED

CRIMINI.\L

# VIRGINIA:

IT COIJRf

VA

IN THE CIRCUIT COURT OF

**COMMONWEALTH OJ? VIRGINIA,** )

## )

**v.** )

## )

)

 )

## )

**Defendant.** )

**CRIMINAL No.:**

**The Honorable Hearing Date:**

On

,the

Department asked DPS to examine pubic hair

combings of the deceased for further DNA evidence, and to examine the deceased's pubic hair combings for the presence of foreign hairs. In a **--.rcertification,** DFS reported out additional DNA testing results. In addition, in that Certification, DFS indicated that foreign

hairs were obtained from the pubic hair combings. The Commonwealth provided this Certificate

to the defense on

. The defense quickly issued a subpoena *duces tecum* to

1

**NOTICE AND MOTION FOR TESTING OF RECOVERED EVIDENCE**

**PLEASE TAKE NOTICE** that on at 10:00 a.m., or as soon thereafter as this Motion can be heard, the Defendant, - through his attorneys,

,and fthe

will move this Honorable Court, pursuant to his rights under the Fifth, Sixth, Eighth and Fmnteenth Amendments to the United States Constitution and Article 1, sections 8, 9 and 11 of the Virginia Constitution, for the entry of an Order compelling the DNA testing of foreign hairs recovered from the pubic hair region of the deceased's body.



obtain the notes and raw data that support this Certification, with a return date of­

... however, DFS did not meet that return date and ultimately complied with the subpoena on . Upon review of the information in the note and raw data, the subpoenaed records clearly demonstrate that DFS observed **5 human hairs** found amidst the deceased's pubic hairs.1 These hairs were not matched to the deceased.

There are two types of DNA testing that can be done on hairs to exclude an individual

suspect as the contributor of hairs and determine the possible source of contribution. Nuclear

·,

DNA testing can be done if there is a root attached to the hair. If no root is attached, then the method of DNA testing used on hairs is mitochondrial DNA testing. DFS determined that none of the hairs are suitable for nuclear.DNA testing but did not attempt mitochondrial DNA testing.

--equests the foreign hairs recovered from the deceased's pubic hairs are submitted for

mitocl:iondnal DNA testin:g. The hairs·are identified within Item 1 (the PERK recovered froth **W** · **a** ( , but are not separately itemized. These hairs are clearly relevant and material as they came from someone who had contact with the deceased's pubic hairs the night of the offense and

thus may eliminate **1** is the contributor of the hairs and provide DNA evidence pointing to a third-party perpetrator.

The Court has the authority and responsibility to order the Commonwealth to provide the defense team with access to the above identified collected items to allow the defense to test these items - the five foreign human head hairs and the 3 other hairs that were not definitely identified as being either human or animal. This authority derives from s rights to due process, compulsory process and effective assistance of counsel under the Sixth and Fourteenth

I Three other hairs were also recovered from the deceased's pubic hairs. These are identified as "possible animal

# Amendments to the United States Constitution and Article 1, section 8 of the Constitution of Virginia. s right to be free from cruel and unusual punishment under the Eighth Amendment to the U. S. Constitution and Article 1, section 9 of the Virginia Constitution further justifies and necessitates the Court granting the requested relief. The Court should exercise its authority in the circumstances of this case for the following reasons.

First, the United States Constitution requires the disclosure of any evidence tending to negate a criminal defendant's guilt and/or punishment. *Brady v Maryland,* 373 U.S. 83 (1963) Beca se this is a capital prosecution, exacting standards must be met to assure that it is fair. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs·more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976).

Because "death.is different," the United States·Constitution requites that "extraotcH.nmyi:i;i.easures

[are] to insure that"- "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." *Caldwell v. Mississippi,* 472 U.S. 320,329 n.2 (1985) (quoting *Eddings v. Oklahoma,* 455 U.S. 104, 118 (1981) (O'Connor, J., concurring)). Therefore, in order to prevent any miscarriage of

justice, due process requires that the Court exercise its authority and make available for testing the items listed above to remove any unfair and prejudicial obstructions to l ( defense.

The right to call witnesses and present evidence in your own defense is a fundamental right of due process protected under both the United States Constitution and the Virginia

hairs?"

Constitution. *Washington v Texas,* 338 U.S. 14, 19 (1967). The 6th Amendment of the U.S. Constitution proclaims that an accused is guaranteed a "compulsory process for obtaining witnesses in his favor." U.S. Const. am. VI. Under the Virginia Constitution, an accused has the right to "call evidence in his favor." Va. Const. art. I. section 8. Defense counsel must be afforded the ability to "investigate and evaluate the evidence in preparation for trial."" *Gilchrist v Commonwealth,* 227 Va. 540,546 (1984). "[A]n accused has the unqualified right to 'call for evidence in his favor' This includes the right to prepare for trial which, in turn, includes the right to int rview material witnesses and ascertain the truth." *Warmouth v Commonwealth,* 29 Va.

App. 476,485 (1999), (quoting Bobo v Commonwealth, 187 Va. 774, 779, (1948)), Va. Const. art. I, section 8.

The Court of Appeals of Virginia observed that a criminal defendant's rights to a

. compulsory·process arid due process.(denominated the "tight tci call for ·evidence in his favor" under the state constitution) require that a trial court grant a defendant's request to compel defense "access to the raw materials integral to the building of an effective defense." *Id.* at 344 (quoting *Ake v. Oklahoma,* 470 U.S. 68, 77 (1985)). The court elaborated in *Henshaw v.*

*Commonwealth,* 19 Va App. 338 (1994).

This ... includes the right to interview material witnesses and to ascertain the truth." *Bobo v. Commonwealth,* 187 Va. 774, 779, 48 S.E.2d 213,215 (1948)), the right to prepare for trial, and the right to present an adequate defense. *Gilchrist v. Commonwealth,* 227 Va. 540, 547, 317 S.E.2d 784, 787 (1984). "These rights lie at the heart of a fair trial, and when they are abridged, an accused is denied due process.

In fact, the Supreme Court of Virginia has established that a defendant is entitled to inspect potential evidence upon a plausible showing that the material might have exculpatory

... - ·- --------------------·--···- - -· ... ··--··----·------

rel,evance, see *Ramdass v Commonwealth,* 246 Va. 413,437 (1993), and impeachment value alone may make the information exculpatory. *Fitezgerald v Bass,* 6 Va. App. 38, 52-53 (1988).

Furthermore, the Court of Appeals has ruled that a failure on the part of the Commonwealth to conduct a particular form ofinvestigative testing, which potentially could provide exculpatory evidence, requires dismissal. *Breeden v Commonwealth,* 15 Va.-App. 148, 150 (1992).

Finally, any barriers imposed on the defense's investigation in this case, if allowed to

persist, will rendei w s counsel constitutionally ineffective. The seriousness of a capital

murder charge and the defendant's possibility of a sentence of death are circumstances that must be considered in evaluating whether counsel provides the effective assistance required under the Sixth Amendment. *See Virginia Dept. of Corrections v. Clark,* 227 Va. 525, 534 (1984).

Counsel must conduct a reasonable pretrial investigation in a capital case. *Id.* A thorough

·defense investigation in a capital case is "vitally importiihtt *Powell* v. *Alabama;* 287 U.S. '45, 57 (1932). As stated, "[c]ounsel at every stage have an obligation to conduct thorough and *independent* investigations relating to the issues of both guilt and penalty." Guideline 10.7, *Guidelines for lhe Appointment and Performance of Defense Counsel in Death Penalty Cases,* ABA (2003)(emphasis added).

For all the same constitutional reasons that support the testing of these hairs for mitochondrial DNA results, -asksthat the testing is done at a private laboratory, rather than DFS. The leading mitochondrial DNA laboratory in the country is\_

Technologies, Inc., which is located in Pennsylvania. Mitochondrial DNA analysis of shed hairs and hair fragments is that laboratory's specialty, resulting in a 95.5% sµccess rate in developing profiles from hair fragments. *See* However, if, as with the nuclear

,

I ------------------·----······- · ··--··

..

·"-•

- ··--·--··-- ···-------------.



# DNA testing requested before, the Court rejects the defense request to do the testing at a private laboratory, the defense asks that the testing is done at DFS, which has the capability to do mitochondrial DNA testing.

WHEREFORE, by counsel, requests that this Court enter an order that requires the Commonwealth to ·order mitochondrial DNA testing of the 8 foreign hairs recovered from the deceased's pubic hair combings, as well as known reference samples of the mitochondrial DNA profiles of the deceased,-• and of-for comparison purpo es.

## tted,

By Counsel

Co-Counsel for' Defendant



Co-Counsel for Defendant

------

----•---•••••••-•--•••••-•••--••••••r~-•••-•-•-•• ,

/

I

I

VSB-

**CERTIFICATE OF SERVICE**

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

Esquire mmonwealth's Attorney

**:=:a'**

and the original was forwarded for filing to:

## Hon.-.

Clerk

 