NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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August 13, 2018

LETTER OPINION

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Re: *Commonwealth of Virginia v. Darwin Martinez Torres*
Case No. FE-2017-1245

Dear Counsel:

Before the Court is Defendant's *Ex Parte* Motion for Forensic Testing (Def's. Mot. No. 63). This motion was made pursuant to the authorized *ex parte* provisions of Va. Code § 9.1-1104. At the *ex parte* hearing on the motion, and after hearing argument from defense counsel in support of its motion, the Court determined that the motion should be granted. The Court then requested that the Assistant Commonwealth's Attorney return to the courtroom, and advised the

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attorney that the motion had been granted. The question now before the Court is a matter of first impression in the Commonwealth:

When an Order is issued pursuant to Va. Code § 9.1-1104, directing law enforcement authorities to transmit evidence in the custody of the Commonwealth to the Department of Forensic Science [hereinafter "DFS"], and directing DFS to conduct forensic testing of the evidence, is that Order issued ex parte and under seal?

On this issue, the parties disagree and have filed supplemental memoranda setting out their positions. While there does not appear to be any circuit court or appellate case law on this precise issue, each party has referenced § 9.1-1104 orders in other cases in the Commonwealth in which the order was either issued *ex parte* and under seal or not issued *ex parte* and under seal.

For the reasons stated in this opinion, the Court finds that the Order should not be issued *ex parte* and under seal. Defense counsel has indicated that there is a possibility that it will withdraw its request for forensic testing if the Court determines that the Order should not be issued *ex parte* and under seal. Therefore, the Court will give defense counsel 14 calendar days from the date of this opinion and associated order, to determine, and notify the Court and opposing counsel, whether it wishes to proceed with the forensic testing.

Background

The Defendant was indicted on October 16, 2017 on seven felony counts: capital murder in the commission of abduction, capital murder in the commission of rape, two counts of capital murder in the commission of object sexual penetration, abduction, rape, and object sexual penetration. The jury trial is set to begin on January 7, 2019.

On July 12, 2018, defense counsel filed a motion entitled *Ex Parte* Motion for Forensic Testing, pursuant to Va. Code § 9.1-1104. That section reads, in pertinent part, as follows:

> In any case in which an attorney of record for a person accused of violation of any criminal law of the Commonwealth, or the accused, may desire a scientific investigation, he shall, by motion filed before the court in which the charge is pending, certify that in good faith he believes that a scientific investigation may be relevant to the criminal charge. The motion shall be heard ex parte as soon as practicable, and the court shall, after a hearing upon the motion and being satisfied as to the correctness of the certification, order that the same be performed by the Department or the Division of Consolidated Laboratory Services and shall prescribe in its order the method of custody, transfer, and return of evidence submitted for scientific investigation. Upon the request of the attorney for the Commonwealth of the jurisdiction in which the charge is pending, he shall be furnished the results of the scientific investigation.

Va. Code § 9.1-1104.

Pursuant to statute, the Court held an *ex parte* hearing on July 26, 2018. At the conclusion of the hearing, the Court granted the motion for forensic testing of certain evidence in the custody of the Fairfax County Police Department [hereinafter "FCPD"]. In other words, the Court was "satisfied as to the correctness" of defense counsel's certification that "in good faith he believes that a scientific investigation may be relevant to the criminal charge." Va. Code § 9.1-1104.

After the Commonwealth returned to the courtroom, the Court determined that the parties disagreed as to whether the Order arising out of the hearing should be issued *ex parte* and under seal. The Court set a briefing schedule for the filing of supplemental memoranda on this issue. The Court is now prepared to resolve the issue.

Discussion

For several reasons, the Court finds that an Order issued pursuant to Va. Code § 9.1-1104 should not be issued *ex parte* and under seal.

1. The plain language of the statute does not authorize an *ex parte* Order.

The statute states that "[t]he motion shall be heard *ex parte*." Va. Code § 9.1-1104. It does *not* state that the resulting order shall be issued *ex parte*. This is significant. In the adversary system, upon which our criminal and civil justice systems are based, the only time a Court may act *ex parte* on a substantive matter is when it is authorized by rule or by statute.

Thus, the General Assembly has seen fit to explicitly authorize *ex parte* proceedings in certain situations. *See, e.g.*, Va. Code § 19.2-264.3:1.3 (authorizing *ex parte* requests for appointments of defense experts in capital cases under certain circumstances); Va. Code § 20-146.32 (authorizing *ex parte* orders for law enforcement officers to take physical custody of an endangered child); Va. Code § 19.2-68 (authorizing *ex parte* orders to intercept certain wire, electronic or oral communications); Va. Code § 19.2-10.1 (authorizing *ex parte* proceedings regarding the issuance of a subpoena *duces tecum* by the Commonwealth to certain financial institutions); and Va. Code § 19.2-70.3 (authorizing *ex parte* proceedings in connection with disclosure orders for records provided by an electronic communication service).

Absent such express authority, *ex parte* proceedings on substantive matters are prohibited. This prohibition is reflected in the Canons of Judicial Conduct for the Commonwealth of Virginia. Va. Sup. Ct. R. pt. 6, sec. III [hereinafter Canons]. The Canons state, in part: "A judge shall not initiate, permit, or consider *ex parte* communications," except in some limited circumstances. Canons, at 3(B)(7). *See also* Canon 3(B)(7)(e): "A judge may initiate or consider any *ex parte* communications *when expressly authorized by law to do so*." (emphasis added.)

It is a fundamental principal of statutory construction that "[c]ourts must not construe the plain language of a statute in a way that adds a requirement that the General Assembly did not expressly include in the statute." *David v. David*, 287 Va. 231, 240 (2014) (citation omitted). *See also Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 552-53 (1987), quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("When statutory language is plain, and nothing in the Act's structure or relationship to other statutes calls into question this plain meaning, that is ordinarily 'the end of the matter.'"). For the Court to issue its Order *ex parte* and under seal would be "add[ing] a requirement that the General Assembly did not expressly include in the statute." *David*, 287 Va. at 240.

Moreover, in certain statutes in which the General Assembly has authorized *ex parte* proceedings and also intends the resulting orders to be *ex parte*, it has said so. For example, the General Assembly in Va. Code § 19.2-264.3:1.3 authorizes the circuit court to conduct an *ex parte* hearing regarding the appointment of defense experts in capital cases under certain circumstances. The statute, however, also addresses the need for placing the resultant order under seal, which has the effect of maintaining its *ex parte* character until at least the trial is concluded. See Va. Code § 19.2-264.3:1.3(c): "All ex parte hearings conducted under this section shall be on the record, and the record of the hearings, together with all papers filed *and orders entered* in connection with ex parte requests for expert assistance, shall be kept under seal as part of the record of the case. Following decision on the motion, whether it is granted or denied, the motion shall remain under seal. On motion of any party, and for good cause shown, the court may unseal the record after the trial is concluded." (emphasis added.)[1]

It is significant that the General Assembly in other statutes – but not in this one – has explicitly required that the orders arising out of *ex parte* proceedings be maintained under seal. "[W]hen the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional." *Zinone v. Lee's Crossing Homeowners Ass'n*, 282 Va. 330, 337 (2011) (citations omitted).

Therefore, the Court concludes that the statute does not authorize a § 9.1-1104 order to be issued *ex parte*, and that the absence of authorizing language must be deemed to be intentional.

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[1] Nor is this the only example in the Code in which the General Assembly has explicitly authorized both *ex parte* proceedings and *ex parte* orders. *See, e.g.*, Va. Code § 19.2-70.3 ("Upon issuance of an order for disclosure under this section, the order and any written application or statement of facts may be sealed by the court for 90 days for good cause shown upon application of the attorney for the Commonwealth in an *ex parte* proceeding."), and Va. Code §19.2-68 ("Upon such application the judge may enter an *ex parte* order, as requested or as modified, authorizing interception of wire, electronic or oral communications.")

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2. A § 9.1-1104 Order is limited in its nature and its scope.

The principal purpose of a § 9.1-1104 Order is to issue instructions to two parties: (1) the law enforcement agency which has custody of the evidence and is responsible for maintaining a secure chain of custody; and (2) the agency that will be performing the forensic testing. In the instant case, it is the Fairfax County Police Department which has custody of the evidence and it is DFS who will perform the forensic testing.

It is not the purpose of a § 9.1-1104 Order to disclose the defendant's theory of the case, the defendant's strategy, or the defendant's reason and rationale for the requested forensic testing. An Order arising out of a § 9.1-1104 hearing need only – and must only – address four issues: (1) Whether the defense has met the statutory criteria for issuance of a § 9.1-1104 Order; and, if so, (2) What evidence is to be tested; (3) Which tests are to be performed on the evidence; and (4) What are the mechanics and logistical details necessary to effectuate the Court's Order.[2]

While the reason and rationale for the testing may well have been the focus of the *ex parte* hearing, it has no place in the Order arising out of the hearing. It is axiomatic, of course, that a court speaks through its orders. But this order has a limited and narrow purpose and need only speak to the issues necessary to effectuate its objectives. Neither the law enforcement agency with custody of the evidence nor the agency conducting the forensic testing needs to know the defendant's theory of the case, trial strategy, or why the Court concluded that the criteria of Va. Code § 9.1-1104 had been met.

3. The practical difficulties of an *ex parte* § 9.1-1104 Order support the conclusion that the General Assembly did not intend the Order to be issued *ex parte*.

In addition to the foregoing legal considerations, issuing the § 9.1-1104 Order as an *ex parte* Order would present substantial practical difficulties.

At the outset, it should be noted that the FCPD, as the law enforcement agency that conducted the instant investigation, is the agent of the Commonwealth. This point has frequently been noted in the context of criminal discovery. "[W]here an agency is involved in the investigation or prosecution of a particular criminal case, agency employees become agents of the Commonwealth for purposes of Rule 3A:11 and must be considered a party to the action for purposes of Rule 3A:12." *Ramirez v. Commonwealth*, 20 Va. App. 292, 296-97 (1995) (citation omitted).

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[2] For example, these details would include such matters as the property identification numbers for the particular evidence in question, the identification of the law enforcement agency with custody of the evidence, and the deadline for the law enforcement agency to transport the material to DFS.

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Issuance of an *ex parte* Order would place these agents of the Commonwealth in an impossible situation. It would require the agents to remove from the FCPD property room certain items of evidence, transport that evidence to DFS, transport the evidence back to the FCPD property room, *and all the while keep it a secret from the Office of the Commonwealth's Attorney*. Yet it is that same Commonwealth Attorney that, in the course of trial preparation, will need to obtain from the FCPD the documents associated with the chain of custody for each item of evidence that the Commonwealth seeks to admit at trial. These documents might well reveal that certain items of evidence were transported to DFS pursuant to a § 9.1-1104 Order, information that an *ex parte* Order would prohibit the FCPD from disclosing to the Commonwealth. Moreover, the Commonwealth Attorney – like the defendant – is preparing for trial. It might well wish to have its agents arrange for it to inspect certain items of evidence based on the entirely reasonable assumption that the evidence is in the FCPD's custody. But what if it is not? What if the evidence is in DFS custody pursuant to a § 9.1-1104 Order? How would an FCPD detective respond to such a request without violating an order issued *ex parte*?

These are not wild or improbable hypotheticals. Rather, they illustrate the practical difficulty of erecting a wall of silence between the Assistant Commonwealth's Attorneys preparing for trial and their agents. Nor would it be a solution to designate another law enforcement agency to transport the material to and from DFS. Regardless of who is transporting the evidence, it will still have to be removed from the FCPD property room, and it will still have to be returned to the FCPD property room. In other words, it is impossible to remove the FCPD from the chain of custody equation. All that would be accomplished, therefore, is that another law enforcement agency would have been inserted into the chain of custody.

4. Va. Code § 9.1-1104 provides for disclosure to the Commonwealth.

Finally, the last sentence of Va. Code § 9.1-1104 provides compelling support for the proposition that the General Assembly did not intend to make the § 9.1-1104 Order *ex parte.* It reads as follows: "Upon the request of the attorney for the Commonwealth of the jurisdiction in which the charge is pending, he shall be furnished the results of the scientific investigation." In other words, the statute explicitly contemplates that the Commonwealth *before trial* will be given everything that would be in a § 9.1-1104 Order. A § 9.1-1104 Order will disclose no more, and considerably less (because such an order will, of course, precede testing), than what DFS must produce to the Commonwealth pursuant to the statute.

This distinguishes this statute from Va. Code § 19.2-264.3:1.3, which authorizes both *ex parte* proceedings and sealed orders in connection with defense requests for experts. Those experts work for the defense and their work product may never be used at trial – and never disclosed to the Commonwealth -- if the defense decides not to offer their expertise. Therefore, in a proceeding pursuant to Va. Code § 19.2-264.3:1.3, the motion, the hearing, and the orders are all placed under seal until at least after the trial is over. In contrast, Va. Code § 9.1-1104

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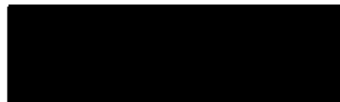
requires disclosure of the results of testing to the Commonwealth, *regardless of whether the results are helpful or harmful to the defense*.

Conclusion

For the foregoing reasons, the Court finds that an Order issued pursuant to Va. Code § 9.1-1104 should not be issued *ex parte* and under seal. An Order in accordance with this Letter Opinion shall issue today.

Sincerely,



Randy I. Bellows
Circuit Court Judge

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	**CRIMINAL NUMBER FE-2017-1245**
VERSUS	)	
DARWIN MARTINEZ TORRES	)	**INDICTMENT - CAPITAL MURDER**

ORDER REGARDING DEFENSE MOTION #63
(EX PARTE MOTION FOR FORENSIC TESTING)

Now before the Court is Defense Motion #63. Pursuant to statute, the matter was heard *ex parte* on July 26, 2018, with the defendant and defense counsel present. At the conclusion of the hearing, the Court found that the forensic testing should be ordered, given that the defendant met the statutory criteria set out in Virginia Code Section 9.1-1104. After the Commonwealth returned to the courtroom, an argument ensued as to whether the resulting order should be issued *ex parte* and under seal. It was the defendant's position that it should be. It was the Commonwealth's position that it should not be. Therefore, the Court set a schedule for the filing of supplemental briefs.

In today's letter opinion, which is incorporated by reference into this Order, the Court has found that the Order arising out of the § 9.1-1104 hearing should not be issued *ex parte* and under seal. In light of that ruling, the defendant is given fourteen (14) calendar days to advise the Court and opposing counsel as to whether he wishes to go forward with the forensic testing.

In the event the defendant does wish to go forward with the forensic testing, the defendant shall also provide both the Court and the Commonwealth a draft order, in which the defendant may note his objection to the order not being issued *ex parte* and under seal.

In the event the defendant does not wish to go forward with the forensic testing due to the Court's determination that the order should not be issued *ex parte* or under seal, the defendant may file a pleading so stating in order to preserve his objection.

SO ORDERED, this 13 day of August 2018.

JUDGE RANDY I. BELLOWS

RIB/ccs
FE-2017-1245