

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA  
Plaintiff,

v.

██████████  
Defendant.

Case No.

FE-2009-██████████  
FE-2010-██████████

FILED  
CRIMINAL

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CLERK OF THE COURT  
FAIRFAX COUNTY, VA

MOTION FOR EXCULPATORY EVIDENCE

COMES NOW the Defendant, ██████████, by counsel, and moves this Court for an order directing the Commonwealth to provide exculpatory evidence and in support thereof states as follows:

1. ██████████ is charged with conspiracy to sell, give or distribute a controlled substance classified in Schedule II, Cocaine in violation of § 18.2-256/18.2-248 of the Code of Virginia and with possessing with intent to distribute 5.0 kilograms or more of cocaine in violation of § 18.2-248 of the Code of Virginia.

2. The Discovery and Inspection Order entered by this Court requires that: “the Commonwealth of Virginia provide to the Defendant any evidence of an exculpatory nature, as defined in Brady v. Maryland, 373 U.S. 83 (1973), and those cases interpreting that opinion.

3. On July 2, 2010, The Defendant requested the inspection of the data and hard drive of his personal laptop computer that was seized by the Fairfax County Police Department (the “FCPD”) upon the belief that it contained exculpatory evidence that would require inspection by a computer forensics expert.

4. A jury trial was schedule for July 13, 2010 in this matter and Defendant diligently pursued inspection of the requested laptop data and informed the Commonwealth that upon

receipt of the data, a certain amount of time would be required for a forensic expert to examine the data and for counsel to review the information gained.

5. On July 8, 2010, the Commonwealth had not yet provided the laptop data and Defendant, without objection by the Commonwealth, was granted a continuance of trial to September 14, 2010.

6. Defendant diligently pursued the inspection of the laptop after the continuance was granted and was in communication with the Commonwealth and FCPD.

7. On August 6, 2010, the Commonwealth informed Defendant that there were in fact three laptop computers seized by FCPD and Defendant requested the inspection of all three and the data contained therein.

8. Defendant continued to diligently pursue the inspection of the three laptop computers, one of which is the Defendants and two of which are believed to have been owned by co-defendants.

9. On September 1, 2010, the Commonwealth informed the Defendant that the approximate sizes of the laptop hard drives were: 200GB Hard Drive or Larger, 400GB Hard Drive or Larger, 250GB Hard Drive or Larger; and that the FCPD was still behind in processing the laptops prior to turning over the data to Defendant's expert.

10. It quickly became clear to Defendant that given the large size of the hard drives, the fact that the data had not yet been provided to Defendant's expert and based on the estimated time for the expert's examination and the unknown quantity of recoverable data for defense counsel to ultimately examine, that a continuance would be in everyone's best interests.

11. On September 3, 2010, Defense counsel and the Commonwealth appeared at calendar control and requested an agreed upon a continuance based on substantially the same foregoing facts. The request for continuance was denied.

12. On September 3, 2010, the Defendant was allowed to inspect evidence held by the FCPD including the three laptops and hand delivered to the FCPD a forensic hard drive onto which the three laptop hard drives could be downloaded.

13. Detective Ryan Rowson of the FCPD Special Investigations Unit indicated that he would likely receive the forensic hard drive by Tuesday September 7, 2010. The Commonwealth indicated that it would be September 8, 2010 at the earliest that the data could be provided to Defendant's forensic expert.

14. Defendant's forensic expert estimated that examination of the three laptop hard drives would require four to five (4-5) business days.

15. Assuming that Defendant's expert receives the data by September 8, 2010, they would have at most three (3) business days before trial to analyze and process the information before defense counsel is able to even look at it.

16. Further, Defendant's expert is expected to have to conduct a field investigation depending on what is revealed after examination of the data.

17. Defense counsel expects to have substantial data to review and examine, the content, quality and relevance of which cannot be determined until after an expert analysis which can only be performed after the FCPD provides the data.

18. Defendant relies upon the Virginia Supreme Court's decision in Lomax v. Commonwealth, 228 Va. 168 (1984) in which it was held that:

“When a court orders discovery pursuant to Rule 3A:11, the Commonwealth has a duty to disclose the materials in sufficient time to afford an accused an opportunity to assess and develop the evidence for trial. The right to explore and develop this evidence was critical to the defendant's case. In refusing a continuance, the court denied the defendant a basic right to call for evidence in his favor, which prejudiced his trial.” Id at 173.

19. Defendant believes that the materials potentially contained on the laptop computers is critical to his case because, among other reasons, on August 9, 2010 the Commonwealth provided a supplemental response to Defendant's request for written discovery and potential Brady material, that contained an excerpt of an investigation report stating how two co-defendants, “██████████ and ██████████”, had met:

“██████████ met ██████████ about two months prior to their arrest in Raleigh, N.C. Tho had a great deal of money and had houses in Raleigh and Charlotte N.C. that were listed I someone else's name. They had met over the computer.”

A copy of the August 9, 2010 letter is attached as Exhibit A.

20. Defendant has also made numerous requests for the written investigative report from which the August 9, 2010 Brady disclosure was derived, however, the Commonwealth has not yet provided any such report. Defendant believes this may be contained on the redacted portion of a “Fairfax County Police Department Supplementary Investigation Report” dated July 1, 2009. A copy of the redacted page 9 of 9 of the investigation report is attached hereto as Exhibit B.

21. In light of the potential Brady material contained on the laptops, Lomax provides that the Defendant has a right to disclosure of such material in sufficient time to allow Defendant to assess and develop the evidence for trial.

22. Defendant asserts that proceeding to trial without having sufficient time to asses and develop the evidence would prejudice the outcome of his trial.

23. Defendant asserts that the proper remedy would be to enter an order directing the Commonwealth to provide the data in a timely manner and to continue the trial date so as to allow sufficient time as required by Lomax.

WHEREFORE, the Defendant, having fully set forth its grounds for his motion respectfully prays that this court enter an order:

- A. Compelling the Commonwealth and FCPD to produce the laptop hard drive data to Defendant or his designated forensic expert within three (3) days of the entry of this order; and
- B. Compelling the Commonwealth and FCPD to produce the entire, unredacted, written investigation report dated July 1, 2009 as partially provided in Exhibit B, as well as any other written statements and/or audio/visual recordings from which the August 9, 2010 Brady disclosure or any other disclosed Brady material was derived; and
- C. Continue the jury trial until a date no earlier than November 15, which is the date of continuance originally agreed upon by Defendant and the Commonwealth.

Respectfully submitted,



By Counsel



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CERTIFICATE OF SERVICE

I HEREBY certify that on this the 7<sup>th</sup> day of August 2010, a true and accurate copy of the foregoing Motion for Exculpatory Evidence was hand delivered and emailed to:

Camille Turner, Esq.  
Office of the Fairfax County Attorney  
4110 Chain Bridge Rd. Room 114  
Fairfax, Virginia 22030  
[REDACTED]

  
Richard H. Nguyen