VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

COMMONWEALTH OF VIRGINIA

v. Case No. 11-102

GEORGE HUGUELY,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION FOR SUBPOENA DUCES TECUM FOR MEDICAL RECORDS

The defendant, George Huguely ("Mr. Huguely"), by counsel, submits the following Memorandum in Support of his *Subpoenas Duces Tecum* for Medical Records:

Mr. Huguely has submitted a Motion in connection with the issuance of *subpoenas duces tecum* for the medical records of the decedent, Yeardley Love ("Ms. Love"). The Motion requests that the Court deny any motion to quash. To the extent that the Motion cites any authority for the request, the Motion refers to authority referencing Rule 3A:12 of the Rules of the Supreme Court of Virginia, which authorizes the issuance of a *subpoena duces tecum*. See Gibbs v. Commonwealth, 16 Va. App. 697 (1993).

There is additional authority for the defendant's position that he is entitled to the documents and records sought, and that authority is set forth below.

In addition to other sources mandating the production of Ms. Love's medical records, the most compelling is found in the Constitution of Virginia. Article I, Section 8 of the Virginia Constitution provides, in pertinent part, "[t]hat in criminal prosecution a man hath a right … to call for evidence in his favor." The Constitution further provides

FILED
NOV -3 2011
CIRCUIT COURT CLERK'S OFFICE
CHARLOTTESVILLE, VA
PAUL C. GARRETT, CLERK
Paul C. Garrett
DEPUTY CLERK

that this section is "self-executing." Va. Const. art. I, § 8. The Supreme Court has stated that "[t]his right is central to the proper functioning of the criminal justice system. It is designed to ensure that the defendant in a criminal case will not be unduly shackled in his effort to develop his best evidence." Massey v. Commonwealth, 230 Va. 436, 442 (1985). It has been noted that "[i]n comparison with the language later adopted by the framers of the Constitution of the United States—'to have compulsory process for obtaining witnesses in his favor'—Mason's use of the word 'evidence' instead of 'witnesses' suggests a boarder range of privilege in Virginia. The right of the accused to call for evidence in his favor, while including the right to compulsory process in obtaining witnesses, also extends to protect his right to prepare for trial, which in turn permits him to interview material witnesses." A.E. Dick Howard, Commentaries on the Constitution of Virginia 106 (1974).

The United States Supreme Court has similarly recognized the right of the defendant to call evidence in his favor:

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary system, and that a criminal trial is fundamentally unfair if the State proceeds against [a] ... defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

The constitutional right to call evidence in one's favor "includes the right to interview material witnesses and to ascertain the truth," Bobo v. Commonwealth, 187 Va. 774, 779 (1948), the right to prepare for trial, and the right to present an adequate

defense, Gilchrist v. Commonwealth, 227 Va. 540, 547 (1984). "These rights lie at the heart of a fair trial, and when they are abridged, an accused is denied due process." Id.

Such concerns are particularly present when the defendant seeks to present opposing testimony of an expert witness. In Ake, the United States Supreme Court granted a psychiatrist to an indigent defendant; the Court noted that "[w]ithout a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor." Ake, 470 U.S. at 84.

In particular, when cause of death is an issue, due process may require that a defendant be able to effectively rebut the expert testimony of the Commonwealth. In Williams, the Fourth Circuit held that a defendant was deprived of due process when he was not appointed an expert witness to contest the prosecution's cause of death. Williams v. Martin, 618 F.2d 1021, 1026 (4th Cir. 1980). In that case, the defendant shot the victim, and the defendant was charged with attempted murder. But when the victim died of an embolism several months later, the prosecution argued that the embolism was caused by the wounds from the shooting, and it amended the charges to murder. Id. at 1023. The Fourth Circuit noted that several other conditions can cause an embolism, and that due process required that the defendant have an expert witness to develop that defense. The Court explained,

> [C]irrhosis and numerous other ailments may cause an embolism. Therefore, it is possible that a pathologist could have expressed an opinion on the likelihood that cirrhosis of the liver or some other disease caused the embolism. Such testimony could well have raised a reasonable doubt concerning the cause of death. Just as

> the state needed an expert to prove the cause of death, [the defendant] needed an expert to present his defense."

Id. at 1027.

Other courts have similarly noted the necessity for a defendant to fully develop an alternate explanation of cause of death. See, e.g., Rey v. State, 897 S.W.2d 333, 340–41 (Tex. Crim. App. 1995). See also Terry v. Rees, 985 F.2d 283, 284 (6th Cir.1993) (applying Ake and holding that due process required appointment of "independent pathologist in order to challenge the government's position as to the victim's cause of death").

In fact, the right of the defendant to call such evidence implicates the integrity of the judicial system itself. "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts.... To insure that justice is done, it is imperative to the function of courts that compulsory process be available for the product of evidence needed by the prosecutor or by the defense." Cox v. Commonwealth, 227 Va. 324, 328 (1984) (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)).

For these reasons, the right to "call for evidence" in one's defense is an "unqualified" right, which is restricted only by whether "a substantial basis for claiming materiality exists." Id. at 328 (quotation and citation omitted).

Following this line of authority, the Court in Henshaw v. Commonwealth, 19 Va. App. 338 (1994), held that the Virginia Constitution supports a defendant's right to view, photograph or measure the crime scene where the defendant was charged with

manslaughter. The Court in Henshaw noted that the victim had a "constitutional right to privacy," but it held that such a right would give way if "defense counsel can make a prima facie showing how his proposed inspection and observation would be relevant and material to his defense." 19 Va. App. at 419 (quotation and citation omitted).

In that case, the victim was shot by the defendant after a scuffle in a residence between three men. Id. at 416–17. The defendant argued that he shot the victim out of self-defense. Id. at 417. Defense counsel was given photographs of the crime scene by prosecutors, but he represented that those photographs were insufficient to allow him to understand the defendant's and witness's versions of events, and to examine and cross-examine witnesses. Id.

In response to this request, the trial court asked what he wanted to do more than simply "go down there and look." Id. at 420. Defense counsel stated that he intended to take a camera and, if shown something not shown in the Commonwealth's photographs, would take a picture. Id. Defense counsel further informed the trial court that he would measure distances between objects to acclimate himself to be able to cross-examine witnesses. Id.

The Court concluded that the defense counsel had established that viewing the crime scene in this manner "was relevant to his being able to produce evidence in his behalf [and] to his ability to cross-examine [witnesses]." Id. Therefore, the trial court should have allowed entry into the home, under appropriate and reasonable conditions. Id.

In the instant case, Mr. Huguely can make the required prima facie showing. The findings of the medical examiner, his testimony, and the findings of others such as Dr. Lopes cast doubt on the conclusiveness of Dr. Gormley's opinion regarding blunt force trauma as the cause of death. The nature of the uncertainty is evident not only from a review of prior testimony given by the medical examiner, but also the testimony of Dr. Jack Daniel, a former medical examiner eminently qualified to offer expert medical opinion concerning cause of death. Cause of death will be a disputed issue at trial. In a murder case, there can be no more central controversy than cause of death. The decedent's records must be subject to examination by medical experts because medical experts alone possess the ability to determine the records' medical importance, and what relation they bear, if any, to cause of death.

It should be beyond dispute that if cause of death is an issue, then the decedent's medical records must be examined to determine whether any underlying conditions, prescription medications, and the like caused or contributed in any way to her demise. In that regard, this case differs from those in which cause of death is evident and beyond dispute, for instance, where a person dies of a fatal gunshot or stab wound.

The case also differs from those in which records are sought to impeach a complaining witness. There are numerous cases involving efforts to obtain the complainant's medical records, psychiatric records, and counseling records for the sole purpose of looking for anything that might be of use for cross-examination. See, e.g., Farish v. Commonwealth, 2 Va. App. 627 (1986). For example, in Farish, a defendant

was charged with rape. 2 Va. App. at 628. The defendant sought a subpoena for the victim's records "of any psychiatrist or psychologist" for the previous five years. Id. at 629. The trial court found that his request "was based on nothing more than surmise and speculation." Id. The Court of Appeals noted that the defendant had no grounds upon which he could base his request; the defendant merely "hoped that her psychiatric records would show that she had fantasies of being raped, thereby creating the inference that she consented to the sexual activity to punish her husband for arguing with her." Id. The Court of Appeals agreed that the defendant had produced "no evidence whatsoever" that the victim had experienced rape fantasies. Id. at 630. Instead, the Court of Appeals characterized the request for the subpoena as a "fishing expedition," and one that was not based on evidence that was "material" or that had a "substantial basis for claiming materiality." Id.

In the instant case, as a general matter, Mr. Huguely's request for evidence implicates his ability to contest the prosecution's own expert testimony as to the cause of death. The prosecution will offer its own expert witness regarding the cause of death, presumably formed without reference to Ms. Love's medical records. The purpose for obtaining the records is to allow for a fully-informed medical opinion on behalf of Mr. Huguely. No fully-informed medical opinion can be reached in this case without reference to Ms. Love's medical records. Just as the Fourth Circuit in Williams required an expert to explore alternative theories of the cause of an embolism, in this case, access to those medical records is constitutionally required so that Mr. Huguely can develop his

defense, explore reasonable alternative theories of cause of death, and rebut the prosecution's evidence of cause of death. The unique nature of medical opinion—that medical doctors routinely rely on a person's medical records/history to form an opinion—also leaves such experts vulnerable to cross-examination if they have not reviewed a person's medical history. The Commonwealth ought not be permitted to try to withhold vital information and then cross-examine defense medical experts on subjects they have been unable to explore or examine because no records were produced to them.

Moreover, Mr. Huguely has provided the Court with a substantial basis of materiality of the medical records. The cause of Ms. Love's death is a central issue in this trial. Like the defendant in Henshaw, counsel for Mr. Huguely have requested the medical records not merely to "go down there and look" and cast about for any evidence that might assist in a defense. To the contrary, Mr. Huguely's expert witnesses have posited, and Dr. Gormley has confirmed, the possible link between Ms. Love's medications and medical history and an arrhythmia. The evidence of both sides therefore establishes the need for counsel for Mr. Huguely to review those medical records to make a fully-formed opinion about a particular material issue: namely, to rebut the prosecution's theory of the cause of death.

For these reasons and based upon the authorities cited above, the defendant, George Huguely, respectfully moves the Court to 1) deny any motion to quash the subpoenas for medical records; 2) produce to the defendant the entire records for review by his medical experts; and 3) if the Court conducts an in camera review, rather than

substituting the Court's medical judgment for that of medical experts, undertake an examination that excludes only those items/documents/records clearly unrelated to the issues in this case.

GEORGE HUGUELY

By Counsel

ST. JOHN, BOWLING, LAWRENCE & QUAGLIANA, LLP

By:

Rhonda Quagliana
VSB# 39522
Francis McQ. Lawrence
VSB# 14754
416 Park Street
Charlottesville, Virginia 22902
434-296-7138 telephone
434-296-1301 facsimile
rq@stlawva.com
Counsel for George Huguely, V

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing was sent by hand delivery this 3rd day of November, 2011 to:

Warner D. Chapman
Charlottesville Commonwealth
Attorney's Office
P. O. Box 911
Charlottesville, Virginia 22902

Rhonda Quagliana