

VIRGINIA:
IN THE CIRCUIT COURT OF THE COUNTY OF
ARLINGTON

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IN THE MATTER OF:	:
	:
COMMONWEALTH OF VIRGINIA	: CR17000434-00
	: CR17000435-00
VS.	: CR17000436-00
	: CR17000437-00
ADIAM BERHANE	: CR17000699-00
	: CR17000753-00
DEFENDANT.	:

Tuesday,
May 22, 2018

Arlington, Virginia

The hearing re motion to continue and
motion to compel commenced at 9:57 a.m.

BEFORE:

THE HONORABLE WILLIAM T. NEWMAN, JR., JUDGE

APPEARANCES:**ON BEHALF OF THE COMMONWEALTH OF
VIRGINIA:**

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ON BEHALF OF DEFENDANT BERHANE:

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1 P-R-O-C-E-E-D-I-N-G-S

2 9:57 a.m.

3 CLERK: Adiam Berhane.

4 MR. ROBINSON: Good morning, your
5 Honor.

6 THE COURT: Good morning, good
7 morning.

8 MS. TINGLE: Good morning, Judge.

9 THE COURT: Good morning.

10 MS. COLLINS: Good morning, your
11 Honor.

12 THE COURT: Good morning. All right.

13 MS. TINGLE: There are several matters
14 that are before the Court this morning. First
15 and foremost, which I think that all the parties
16 agree on, is that we are here to pick a trial
17 date. So as the Court heard last time that it
18 was going to be a substantial amount of time
19 seeking a continuance, and at the time the
20 Commonwealth did not object to that.

21 We are again, at this point, not
22 objecting, and we are also not objecting to a

1 date set this time next year that ought to
2 eliminate. We reach out to our witnesses to find
3 out available dates leading all the way into the
4 spring. We have those dates. If the Court is
5 willing to go out that far, that accommodates all
6 of the witnesses, as well as the Commonwealth's
7 availability.

8 MR. HAYWOOD: We will happily accept
9 as much time as the Court is willing to give us.
10 The last time we were in court, I had mentioned
11 the time period of 18 months. The Court said
12 that that would be too long, but really the
13 latest date the Court would be willing to give us
14 would be --

15 THE COURT: Like I said, I do believe.
16 But I will go as much as till next spring. That,
17 I think, you know, I appreciate there's a lot of
18 life in this case; it's rather voluminous. But I
19 do believe still with able counsel, you should be
20 able to get everything together by a date in the
21 spring of next year.

22 MS. TINGLE: What month would the

1 Court like in the spring?

2 THE COURT: I will go until late
3 spring, I'll go until May.

4 MS. TINGLE: Okay. How about May 6 is
5 case-setting.

6 THE COURT: Well, only -- hold on. It
7 can be problematic because of the mandatory
8 conference for judges. Why don't we say the end
9 of April, I mean sometime in April. Because the
10 conference is always the third week of --

11 MS. TINGLE: The third week of May.
12 If we started, so the third week of May would be
13 May 20. So if we started --

14 THE COURT: Well, hold on, I can tell
15 you when the conference is. When is Mother's
16 Day? It's always the, the conference always
17 starts the Tuesday after Mother's Day, whenever
18 that is.

19 MS. TINGLE: All the children should
20 have an answer.

21 THE COURT: Okay, then that's my way
22 of remembering when the conference is.

1 MS. TINGLE: So that's May 12.

2 THE COURT: Yeah, okay, all right.

3 MS. TINGLE: That's the second Sunday.

4 So perhaps April 22? That would give enough, if
5 that's -- but if we're looking at a three-week
6 trial, that would take us through the last two
7 weeks, and then the first week of May.

8 THE COURT: All right, is that good?

9 MR. HAYWOOD: We just have to note our
10 objection for the record, but if we're available
11 then.

12 MS. TINGLE: I'm sorry, what is their
13 objection for the record, given that this is
14 their motion to continue and they wanted 18
15 months to begin with?

16 MR. HAYWOOD: Well, because it's not
17 18 months. But I mean, we're available those
18 dates.

19 THE COURT: All right, we're going to
20 set it those dates.

21 MS. TINGLE: On their motion?

22 THE COURT: On their motion.

1 MS. TINGLE: Thank you, Judge.

2 SPEAKER: What's the date? I'm sorry?

3 MS. TINGLE: April 22.

4 SPEAKER: Thank you.

5 MS. TINGLE: And then next, your
6 Honor, I think there was the issue of experts in
7 terms of naming the experts. The Commonwealth
8 did not oppose the request for two separate
9 experts, and I believe that they were supposed to
10 provide those names to the Court today.

11 MR. ROBINSON: Yes, your Honor. John
12 Hanson is the name of the financial accountant
13 expert. I think, I believe we'd already gone
14 over the original expert, but the Commonwealth
15 did have reservations about a named expert. John
16 Hanson is the CPA. I've mailed the CV
17 electronically over to the Commonwealth.

18 They reviewed it. I could file that
19 with the Court if it's necessary, but he is a
20 CPA, Judge, he's a fraud examiner, I believe he's
21 former FBI. But he's well qualified as far as
22 this goes. I don't know if the Commonwealth has

1 any additional information they'd like to bring.

2 MS. EASTMAN: I replied to Mr.
3 Robinson, I don't object to that accountant.

4 THE COURT: All right, all right. All
5 right, and why don't you, for the record, make,
6 get a copy to the Clerk's office.

7 MS. COLLINS: Absolutely.

8 THE COURT: Yes, indeed. All right.

9 MS. TINGLE: And then, Judge, there's
10 still the, there's the leftover motion in terms
11 of discovery, Defense's motion to compel
12 production of discovery and Brady information.
13 As the Court is more than likely aware, there
14 were additional motions that were filed
15 yesterday, late afternoon. There are two motions
16 that relate to the motion to compel in terms of
17 discovery.

18 There are two additional motions that
19 seek to dismiss the indictments and/or disqualify
20 the Office of the Commonwealth's Attorney. We
21 are asking that those two motions, the motions to
22 dismiss and/or disqualify, those motions need to

1 be heard on a date that Ms. Stamos is available
2 to argue them, as these are accusations against
3 our office and she needs to be able to argue
4 them.

5 THE COURT: I understand. If they
6 came late, we saw it, I said, well, this is
7 obviously not clear tomorrow, well, this morning.
8 So what date can we agree on? And I assume that
9 we're going to need a couple hours or so.

10 MS. STAMOS: Well, I think we're going
11 to need to respond in writing. And quite
12 honestly, I have hip replacement surgery June 11.
13 So I'm looking for some time after that, which, I
14 also know Ms. Tingle is going to address the
15 Court about moving forward with discovery and
16 planning for trial.

17 But I would suggest that the motion
18 that Counsel filed yesterday afternoon be held
19 sometime at the end of June or at the beginning
20 of July.

21 THE COURT: All right, yeah.

22 MS. STAMOS: But I also want to make

1 the point that if that is going to cause the
2 Court not to rule on any other motions, which
3 Counsel is asking for in their moving papers that
4 they filed yesterday, then we will do our level
5 best to have that happen, have this argument take
6 place before I go out on June 11.

7 But I think that we should be given an
8 opportunity to fully explicate our opposition to
9 these motions, and I need to be able to argue
10 them.

11 THE COURT: I understand, I'm just
12 asking for a date.

13 MS. TINGLE: If the Court wants to put
14 dates at the end of -- because the question
15 really is whether or not the Court really wants
16 to hear all of these motions at once, or whether
17 the Court believes that it can be parsed out.
18 The Commonwealth believes that we can go forward
19 today on the discovery motion.

20 There seems to be no reason why the
21 Court and the parties could not reach some form
22 of a resolution in terms of arguing those facts

1 today, whether or not it has anything to do with,
2 Commonwealth doesn't believe it has anything to
3 do with the motion to dismiss or disqualify. So
4 discovery could be handled today.

5 If the Court is not so inclined, we
6 would hear them all at once. In which case, then
7 we would need to hear them before Ms. Stamos goes
8 out.

9 THE COURT: Well, first of all, I
10 would say that this is not a motions day. And I
11 mean, I understand that we're here and so forth.
12 I would prefer that, can we get a date in the
13 next week or so that you can just deal with the
14 discovery issue?

15 MS. TINGLE: Yes, of course.

16 THE COURT: When's the next?

17 MR. HAYWOOD: Would the Court be
18 willing to make it two weeks? I'm going to file
19 an amended thing on that, just based on what's
20 occurred in the past week or so.

21 THE COURT: June 7.

22 MR. HAYWOOD: Seventh?

1 MS. TINGLE: Now, would the Court
2 anticipate that that would be just for discovery,
3 or is that also on the motions to compel and
4 disqualify?

5 THE COURT: Well, no, I'm going to
6 give Ms. Stamos an opportunity, so that's, you
7 need a date like in July?

8 MS. STAMOS: Yes, but what I don't
9 want, Judge, though is our position is this: we
10 would like to continue trial preparation, settle
11 the discovery issue. We anticipate that those
12 motions ultimately will be unavailing and not
13 persuasive to this Court. So, but we still want
14 to address them fully and, you know, as
15 forcefully as we can.

16 So I would like to have those motions
17 heard at the end of, beginning of July. But we
18 don't want it to stall the discovery and the
19 progression towards trial.

20 THE COURT: Well, that's why I'm
21 saying we'll set June 7 only for the discoveries.

22 MS. STAMOS: Perfect.

1 MR. HAYWOOD: I need to make our
2 position clear to the Court. The reason we asked
3 for the discovery motion to be continued and to
4 add to the other motions is that obviously we're
5 challenging the fitness of the Commonwealth's
6 Attorney's Office to handle matters related to
7 this case.

8 And obviously if it relates to issues
9 of the Commonwealth's discretion or the position
10 the Commonwealth is taking, and that position is
11 what's implicated in those motions to dismiss and
12 disqualify, I don't know that it's appropriate to
13 have it heard before the motions to dismiss and
14 disqualify.

15 THE COURT: So your motion is then
16 that everything be held all in one day.

17 MR. HAYWOOD: I think that the motion,
18 our motion was to add the part after the motion
19 to dismiss and disqualify.

20 THE COURT: All right, we'll set
21 everything then. We'll do it, I will grant your
22 motion then. What date in July?

1 MS. STAMOS: That's not going to work,
2 Judge, with all due respect. We need to get this
3 show on the road. So is the Court available to
4 hear the entirety of these motions on June 8?
5 It's a Friday. Your Honor, does your Honor's
6 schedule permit? First, before Counsel looks at
7 their schedule.

8 THE COURT: June 8 is, it was a civil
9 day. All right, civil day I could take that, we
10 can get a sub in for that. Let me just make
11 sure. Not a good day.

12 MS. STAMOS: The morning of Thursday,
13 June 7?

14 THE COURT: Hate to tell you again,
15 that's again, not a good day.

16 MS. STAMOS: Well, okay, Judge, I'm
17 going to ask the Court to reconsider the idea of
18 -- Counsel can make whatever arguments he's
19 making in his moving papers about the unfitness
20 of my office to do any of this, to prosecute this
21 case in its entirety. I find that unmeritorious,
22 and as a result, we're asking the Court to allow

1 this case to progress.

2 They can -- if ultimately the Court
3 determines that Counsel prevails on the motion to
4 dismiss, that's one thing. But we need to get
5 this thing moving forward. So my suggestion to
6 the Court, with all due respect, is that the
7 discovery motion that the Court wants to, was
8 going to consider today be done before June 11.

9 And that can, the parties can continue
10 on and prepare for trial. We can then come back,
11 and if the Court entertains that motion and you
12 somehow find that my office is unfit to prosecute
13 this case, there is plenty of time for other
14 counsel, which I don't think's going to happen
15 because we're going to oppose it quite
16 vociferously, I would like to have that held
17 later, because if we wait till July to have this,
18 that everything's held in abeyance, nothing's
19 getting done, there's no discovery being done,
20 they're not preparing for trial.

21 They say they need more time, they
22 need to use this precious time that they have to

1 start preparing with the idea that if they
2 prevail, fine, no harm, no foul. If they don't,
3 we've gone on a path to trial preparation, so
4 that that April date can hold. That's my request
5 to the Court.

6 MR. HAYWOOD: I don't know how we can
7 consistently consent to that while at the same
8 time arguing that the person who is going to
9 carry out that motion has abused her discretion.
10 So we're stuck. I mean, we need to have, I
11 think, and our position, the motion related to
12 dismissing any indictments or disqualifying the
13 Commonwealth's Attorney needs to be heard first.

14 MS. TINGLE: Your Honor, if I may, the
15 motion to be heard on discovery is an issue of
16 discovery. It is plain and simple what the rules
17 allow and what the rules do not allow. That is
18 what the discovery motion is about. It is purely
19 about what it is that they believe they should
20 have access to.

21 This isn't about whether or not,
22 having anything to do with fairness. It's about

1 what the rules require, what the Commonwealth
2 provides, and what they are seeking beyond that.
3 That is the entirety of the scope of the
4 discovery motion.

5 The additional motions they can
6 certainly argue whatever they want to argue about
7 fairness, whatever other issues that they want to
8 bring to the table. But about discovery, that is
9 governed by the rules and the Constitution.

10 It is a relatively constrained lane
11 that the Court would need to consider on that
12 front. So there's not really a reason why it is
13 that they need to be heard together.

14 THE COURT: All right, last word.
15 Anything further?

16 MR. HAYWOOD: Well, your Honor, I
17 think that one of the issues that we have is that
18 the Commonwealth has adopted a procedure for
19 providing us discovery that's arbitrary. And I
20 think that that's, it's hard to really separate
21 that from, it's impossible to separate that from
22 the issue of them using their discretion.

1 They, it was an exercise of discretion
2 to make that choice of the, you know, adopting
3 that procedure for giving us discovery. So I
4 just don't see how we separate these issues.

5 THE COURT: All right, last word, I'm
6 going to make it right now. We will hear
7 everything together. I appreciate everybody's
8 argument, but I'm going to hear it all together.
9 Can we have a date, and some time the first week
10 of July?

11 MS. TINGLE: Your Honor, is there
12 anything possibly on June 5, on Tuesday, June 5,
13 just to see if we can get this done sooner rather
14 than later?

15 MR. HAYWOOD: I'm unavailable that
16 day. I have a court of appeals argument in
17 Richmond on the Andrew Schmuhl case.

18 MS. STAMOS: Your Honor, can the Court
19 look at its July calendar and give us the date
20 that the Court will be available so we're not --

21 THE COURT: I will be, I intend to be
22 available. I'll make sure. I will be available

1 I believe all through July until the last week.

2 MS. STAMOS: Tuesday, July 10 or
3 Wednesday, July 11?

4 THE COURT: That's fine for me.

5 MS. TINGLE: I mean, I've got a jury
6 trial, but if that's the only day that works for
7 everybody, I can certainly --

8 THE COURT: Fine for the Court.

9 MR. HAYWOOD: I think it's fine with
10 us.

11 THE COURT: All right, then June 10.
12 I mean July 10, I meant July 10. And any papers
13 that need to be, please get them to the Court as
14 early as possible, any motions or briefs or
15 whatever.

16 MS. STAMOS: Counsel -- I'm sorry, go
17 ahead.

18 THE COURT: So that the Court will
19 have an opportunity to go through them.

20 MS. STAMOS: Excellent. And Judge,
21 Counsel made reference to some supplemental
22 motions. Can Counsel edify us as to when he

1 expects to have those submitted to us so that we
2 can incorporate one response?

3 MR. HAYWOOD: It's just the discovery
4 motion that I was intending to amend. And I can
5 get that done in a couple weeks. But I'd also
6 ask the court, the past two motions in the case
7 that we've filed, we haven't received any
8 responses from the Commonwealth.

9 I really think we have a due process
10 right to know their position on these matters. I
11 think it maybe it's gotten to a point that they
12 feel compelled that they need to take a position,
13 but I really do think that we have a right to
14 know what their position is. So I would ask the
15 Court to order a reply from the Commonwealth to
16 our motions.

17 MS. STAMOS: Judge, with all due
18 respect, I mean, we're going to make a written
19 response to the motions that were filed yesterday
20 afternoon that are moving this Court to
21 disqualify my office and to appoint a special
22 prosecutor, which is wholly, I want to say

1 without merit, and we will argue that.

2 The discovery motion, Judge, for the
3 record, as this Court knows, and for three
4 decades plus, we have been providing open file
5 discovery well beyond what the 3.a.11 requires us
6 to do. That Counsel is not satisfied with what
7 my office and what I have decided is the policy
8 as far as discovery goes is something that he can
9 rail against all he wants in his effort for
10 institutional change.

11 But unless and until someone else gets
12 elected Commonwealth's Attorney and has a
13 different method of providing discovery well
14 beyond what 3.11 now requires, or, in the
15 alternative, the Virginia Supreme Court
16 determines that they're going to change the rules
17 of discovery, we are going to argue the rules,
18 Judge. That's what we're going to argue. And
19 also our policy.

20 And to keep throwing around due
21 process like it's the, you know, the magic wand
22 that's going to force this Court to order us to

1 do something they've never ordered us to do in
2 the past I find remarkable.

3 THE COURT: Well, I think that what
4 you can do is just to put in writing exactly what
5 you just said. And if that's the position, it is
6 a written response. The Court would direct that
7 whatever that position is --

8 MS. STAMOS: Excellent.

9 THE COURT: The -- so we will have a
10 response. All right, thank you.

11 MS. STAMOS: Thank you, Judge.

12 THE COURT: We'll set it for, in an
13 abundance of caution, we'll set it for four hours
14 on that day.

15 MS. STAMOS: At 9:30, morning?

16 THE COURT: Yes. And make sure they
17 put that on my calendar. Yeah.

18 (Whereupon, the above-entitled matter
19 went off the record at 10:16 a.m.)
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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Virginia v Adiam Berhane

Before: The Honorable William T. Newman, Jr., Judge

Date: 05-22-18

Place: Arlington, VA

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