V I R G I N I A:

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 #100

(Environmental Sampling)

Before the Court is the Defendant's "Motion to Authorize Funding for Sampling, Transport, and Testing of Environmental Neurotoxins." The Court has reviewed the pleadings on this matter as well as considered the argument of Counsel. For the reasons stated below, the motion is DENIED.

The defendant seeks $20,000 "to allow the defense team to take environmental samples in El Salvador, package and transport them to the United States, and have those samples tested at a laboratory for neurotoxins.: Motion at 1.[1] Specifically, the defense contemplates an elaborate testing protocol, including taking soil samples from various locations, river sediment samples, tree samples from mango, cashew and other trees, well-water samples, fish samples and bond samples from livestock, other animals and humans. Motion at 4-6. The motion is denied for the following reasons:

The defendant appears to have already acquired evidence indicating the defendant's exposure to neurotoxins. The defense motion states: "In April of 2018, defense investigation revealed evidence indicating Mr. Martinez Torres was exposed to neurotoxins in his prenatal and early developmental periods." Motion at 2. Indeed, the defendant's court appointed neurotoxicologist, Dr. Peter Spencer, has already

[1] At oral argument, defense counsel indicated that some toxicological sampling had already been done in El Salvador and the defense sought $6,000 to have the samples transported and analyzed. For the same reasons that the Court denies the $20,000 requested, the Court also denies the $6,000 request. The mere fact that some sampling has already been completed does not alter the Court's judgment that the defense has failed to establish a particularized need for this expenditure of funds, nor does it significantly ameliorate the Court's concerns about the relevance, admissibility, or practicality of the undertaking that is contemplated.

"determined there is a high probability that Mr. Martinez Torres suffers from the effects of prenatal and developmental exposure to neurotoxins, including mining effluents, pesticides, and herbicides." Motion at 2. Further, Dr. Spencer has already concluded that the defendant "exhibits extensive symptoms of neurotoxic exposure...." Motion at 7.

Moreover, the defense represents that it has already established through its "extensive research" that in the area where the defendant was "born and raised" there was a "proliferation of neurotoxic compounds in the air, soil, potable water and food supply chain over the past 50 years." Defendant also indicates that various metals and chemical compounds "have all been found" in the river where the defendant's mother obtained food and water while pregnant and from which the defendant drank and ate in his early developmental period. Motion at 4.

Defendant also appears to have witnesses for these assertions, including family members. Motion at 3. According to the defendant's motion for a continuance, the defendant's mother "can testify directly to Mr. Martinez Torres's exposure to neurotoxins during his prenatal period and in infancy." Continuance Motion at 13.

Thus, it appears from the defendant's own motion that he is in a position to place before the jury evidence of the defendant's exposure to neurotoxins and the effect of that exposure on the defendant. This undermines the contention that it is necessary to undertake the sampling, packaging, transporting and testing of samples at various locations in El Salvador.[2]

Moreover, the allegation in this case is that the defendant was exposed to neurotoxins prenatally ("in utero," Motion at 3) and in his early developmental period. The defendant is 23 years old, so this is a reference to exposure that occurred as long as 23-24 years ago, if you include prenatal development. Yet the sampling that is contemplated would be taken *now*, as in *the present day*, raising substantial questions about its relevance and admissibility in the instant case.[3] For example, the defense is asking this Court to authorize

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[2] The defendant argues, however, that sampling and testing is necessary to render Dr. Spencer's assertion admissible at trial. Motion at 7. But Dr. Spencer's finding – that the defendant "exhibits extensive symptoms of neurotoxic exposure" – could only be based on his observations or testing of the defendant. Moreover, it is premature and speculative to make assumptions about what may or may not be admissible at trial.

[3] At least indirectly, the defense acknowledges this issue in its continuance motion, referring to "the sheer complexity of the science involved in sampling and testing for neurotoxic exposure dating back over two decades...." Continuance Motion at 16.

funds to take fish samples, even though there is no indication that the fish that would be sampled were alive when the defendant was "in utero," and no indication that the "levels of neurotoxins" in the fish – whether they were alive or not when the defendant was "in utero" – would be relevant to what was in the water decades ago. Similarly, the defendant seeks authorization to take "bone samples" from "livestock, other animals, and humans" to test for neurotoxins and other pollutants, which raises not only the same relevance concerns but fails to articulate how exactly the defense contemplates taking "bone samples" from livestock, let alone humans.

These two considerations – first, the failure to establish necessity and, second, concerns regarding the relevance and admissibility of this *present day* evidence – would be enough to deny the motion for the $20,000 authorization. But there is more. For while the defendant's motion for the $20,000 authorization expresses no reservation that this undertaking would be successfully and productively accomplished, the defendant's motion for a continuance actually raises a substantial question as to whether this undertaking is even possible.

A section of the motion for a continuance is devoted to the need for neurotoxin sampling. It makes it clear that virtually every aspect of the proposed sampling is rife with danger and potentially intractable problems. First, the area where the sampling is to take place is described as so life threatening that even a police escort would be insufficient. According to the defense, it is a place where gangs shoot at police officers and rob and murder "with impunity."[4] Second, the defendant makes no representation that it has actually identified individuals capable and willing to acquire the samples.[5] Third, the defendant

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[4] See Continuance Motion at 17: "Not only is El Salvador the most dangerous country in the world not currently at war, but the area of Mr. Marttinez Torres's exposure is among the more dangerous areas in El Salvador. The mining camp where he was born, the contaminated river from which his mother drank while pregnant with him and from which he drank in his early developmental period, and the polluted hills from which he and his mother foraged for food, are largely controlled by violent street gangs that extort money from artisanal gold miners still operating in the area. Defense investigators who have traveled near the area have found even armed drivers unwilling to travel to the mining camps and have informed counsel that even police escort would be insufficient to guarantee the safety of defense team members. Gangs in this area, as in much of rural El Salvador, are known to shoot at police officers rather than be engaged by them and to rob and murder perceived intruders to their territory with impunity."

[5] See Continuance Motion at 17-18: "Given the extraordinary dangers posed to defense team members in gathering the crucial evidence of Mr. Martinez Torres's neurotoxic

acknowledges that there is no assurance that whoever was to conduct the sampling would be permitted to travel to the United States to authenticate the sampling at trial.[6] Finally, even if all of these obstacles were overcome, the defendant notes that the current physical conditions on the ground are not appropriate for sampling because El Salvador is in its rainy season.[7]

In short, the defense is seeking $20,000 authorization for this undertaking but has failed to establish any of the following: (1) that it is necessary; (2) that it is likely to actually result in relevant and admissible evidence; (3) that – given what the defendant describes as "the extreme levels of violence and lawlessness in the area", Continuance Motion at 17 – it has identified, or even will be able to identify, individuals willing and able and competent to do the sampling; (4) that these individuals will actually be allowed to travel to Virginia to testify; and (5) that the physical conditions on the ground even permit the sampling to go forward. Moreover, the defendant acknowledges that while it has identified several laboratories that can do the testing of the samples, the defense "has not yet been able to determine which [laboratory] can test to the necessary sensitivity within a reasonable timeframe and for an acceptable cost," Motion at 4, fn. 1, and further suggests that more than one laboratory will need to do the testing. Motion at 7.

Under *Akes v. Oklahoma*, 470 U.S. 68 (1985) and *Husske v. Commonwealth*, 252 Va. 203 (1995), the appointment of an expert at the Commonwealth's expense "is not absolute." Husske, 252 Va. at 211. The indigent defendant must show a "particularized need." Id. at 212. "An indigent defendant may satisfy this

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exposure, counsel has worked hard to locate people with experience on the ground in El Salvador who can advise on collecting samples or who can potentially conduct the sampling themselves."

[6] See Continuance Motion at 18 (footnote omitted): "Difficulties in navigating U.S. State Department and Homeland Security regulations about Salvadoran witnesses traveling to the U.S. have further complicated the process of determining who can both conduct testing and travel to Virginia for trial if needed to testify. To date, counsel has not been assured that even Salvadoran government scientists could obtain the necessary visas to travel to the U.S. to testify. Additional time is needed to determine whether these witnesses will be able to travel and to make any needed changes to defense strategy regarding presentation of this crucial evidence."

[7] See Continuance Motion at 19: "The rainy season in El Salvador, which generally lasts through mid-November, has also complicated and delayed progress in sampling riverbeds and waters, as many of the locations that must be tested are inaccessible or unsafe to test until the dry season begins."

burden by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial." Id.

Throughout this case, this Court has found a "particularized need" for the appointment of defense experts, including the appointment of a criminal investigator, a mitigation specialist, a mitigation psychologist, a forensic pathologist, a prison risk expert, a DNA expert, a neurologist, a neurotoxicologist, a crime scene expert, and an immigration attorney. In addition, the Court has authorized additional funding for neurological testing, for expedited transcripts, for attorney travel to El Salvador, for additional security and logistics for travel to El Salvador, for mitigation records collection, for travel funds for mitigation investigation, and for extensive translation of documents.

Here, however, the Court does not find that the defendant has shown a "particularized need" for authorization of this expenditure.

Therefore, the motion is DENIED.

SO ORDERED, this 29 day of October, 2018.

[redacted]

JUDGE RANDY I. BELLOWS