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IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA CASE NO. 15-CF-000673 A (BEK)

vs.

JIMMY RAY RODGERS

_______________________________/

MOTION FOR NEW TRIAL

COMES NOW, the Defendant, Jimmy Ray Rodgers, by and through the undersigned counsel, pursuant to Florida Rule of Criminal Procedure 3.580, 3.600, and 3.620, the Florida Constitution, Art. I, Sections 2, 9, 16, 17, and 22, and United States Constitution Amendments 5, 6, 8, and 14, and files this Motion for New Trial. As grounds in support of this Motion, Defendant asserts that his substantial rights were prejudiced as follows:

Defendant, Jimmy Ray Rodgers, was charged by Indictment alleging One Count of First Degree Murder, One Count of Conspiracy to Commit Murder, and One Count of First Degree Burglary While Armed, for which the State sought a penalty of death; as such, heightened standards of due process applied.

Denial of Motion to Continue

On September 4, 2019, Defendant filed a Motion to Continue the trial in the within matter scheduled for October 1, 2019. A continuance was sought based on the inability to properly explore, investigate, and vet the 4,797 pages of additional discovery (not including the numerous embedded links that add an incalculable amount of material). The additional discovery contained the analysis and review of trace evidence and mitochondrial DNA.

Despite every effort and after consultation with expert witnesses in the field of trace evidence and mitochondrial DNA, who were specifically retained for purposes of reviewing the additional discovery disclosed in this case, the substantial volume of trace evidence material in question could not accurately and competently be analyzed and evaluated in sufficient time for trial on October 1, 2019. (*See*, attached, Affidavit of Albert H. Lyter, III, Ph.D., submitted to the Court in support of the Motion to Continue.)

Based upon the Court's denial of Defendant's Motion to Continue, the Defendant proceeded to trial on October 1, 2019. The jury rendered their verdict on Wednesday, October 23, 2019, finding the Defendant Guilty of Second Degree Murder and Trespass.

In support therefore, Defendant relies upon *Pickel v. State* (32 So.3d 638, 4th DCA, 2009), where the court opined that defendant was prejudiced by the trial court's denial of a motion for continuance where the state provided DNA evidence and disclosed its expert on the first day of trial. In denying the motion for the continuance, the trial court found this an inadvertent discovery violation, as counsel had been furnished reports regarding the DNA analysis. However, the case was reversed and remanded for a new trial based upon the court's recognition that, in the world of trial evidence, DNA is the single, most formidable evidence. The court further stated that:

> The admission of DNA evidence has two aspects. Its demands a scientific foundation of both molecular-biochemical and statistical convention: first, a sample specimen related to a crime must be show to match the DNA of an identified person; second, expert statistical testimony must quantify and explain the odds of someone other than defendant having that same DNA. When both parts of the foundation have been shown to point to defendant, the effect can be overpowering. Therefore the structure of both the State's presentation and the defense's right to attack its forensic foundation, is vital. Adequate time for the defense to prepare is indispensable.
> *Id*.

The case at bar presented issues of both trace evidence and mitochondrial DNA, both allegedly relating to the coverall or jumpsuit in question. However, the sentiment above regarding the scientific foundation and right to be adequately prepared to attack the forensic foundation of such evidence is vital. This is particularly true in this circumstantial evidence case wherein the trace evidence and mitochondrial DNA evidence were made features of the trial by the State.

Further, in *Chavez v. State* (48 So.3d 1022, 2nd DCA, 2010), the defendant appealed the denial of his motion to continue. In *Chavez*, the defendant had four separate cases pending for trial and, only a few days before trial was set to commence, the Judge, at the prosecutor's ore tenus request, changed which of the defendant's cases would go to trial without consultation with the defense attorney. The defense filed a motion to continue and advised he was not prepared to go forward on the case because he had spent his time preparing for the other case that was initially set for trial.

On appeal, the Court stated that the general rule that a denial of a motion for continuance is within the sound discretion of the trial court and the trial court's ruling will not be disturbed unless a palpable abuse of discretion is shown (citing *M.D.B. v. State*, 952 So.2d 590, Fla. 2nd DCA 2007). The Court stated that defendant and counsel are entitled to a reasonable time to prepare and listed seven (7) factors to be considered in determining whether a trial court abused its discretion in the denial of a motion for continuance based on inadequate time to prepare a defense (*M.F. v. State*, 920 S2d 1252, Fla. 2nd DCA, 2006). These factors are: (1) the time actually available for preparation; (2) the likelihood of prejudice from a denial of a motion to continue; (3) the defendant's role in shorting preparation time; (4) the complexity of the case; (5) the availability of discovery; (6) the adequacy of counsel actually provided; and (7) the skill and experience of chosen counsel and his pre-retention experience with either the defendant or the alleged crime. Id. (citing *McKay v. State*, 504 So.2d 1280, 1282 (Fla. 1st DCA, 1986).

In applying these factors and, considering that neither defendant nor counsel were at fault and that the state had not yet provided all discovery, the Court concluded the trial court abused its discretion in denying the request for continuance and reversed and remanded for a new trial. The Court also notably stated it could not say beyond a reasonable doubt that the failure to continue the case was harmless (citing *State v. DiGuilio*, 491 So.2d 1129, 1135, Fla. 1986).

Likewise, in *Trocola v. State* (867 So.2d 1229, 5th DCA, 2004), the defendant appealed a denial of his motion to continue, the basis for which was that discovery had not been concluded and there were still pending motions and depositions. The court reiterated that:

> As a general rule that denial of a motion for continuance is within the sound discretion of the trial court, and the action of the court will not be disturbed on appeal unless there is a clear showing that there has been a "palpable" abuse of discretion to the disadvantage of the accused, or, unless the rights of the accused might have been jeopardized by the continuance determination. *Id*. See *Robinson v. State*, 561 So.2d 419, 420 (Fla. 1st DCA 1990); *Smith v. State*, 525 So.2d 477, 479 (Fla. 1st DCA 1988); *Mills v. State*, 280 So.2d

35, 35 (Fla. 3d DCA 1973). Still, criminal defendants and counsel are entitled to a reasonable time to prepare for trial. See *Browne v. State*, 88 Fla. 457, 102 So. 546, 546-47 (1924); *Langon v. State*, 791 So.2d 1105, 1113 (Fla. 4th DCA 1999), review denied, 751 So.2d 1252 (Fla.), cert. denied, 530 U.S. 1218, 120 S.Ct. 2225, 147 L.Ed.2d 256 (2000); *McKay v. State*, 504 So.2d 1280 (Fla. 1st DCA 1986). The "common thread" connecting cases where a palpable abuse of discretion in the denial of a continuance seems to be that defense counsel must be afforded a reasonable opportunity to investigate and prepare any applicable defenses (citing *D.N. v. State*, 855 So.2d 258, 260, Fla. 4th DCA 2003). This right, however, is not absolute. At some point, the right bends before countervailing interests involving the effective administration of the courts." McKay, 504 So.2d at 1282.

The *Trocola* court relied on the seven (7) factors sets out in Chavez, above, holding the denial of defendant's motion to continue was a palpable abuse of discretion, reversed, and remanded for a new trial. The countervailing interests in the case at bar were merely to allow a brief postponement of trial in order to allow proper vetting of the late disclosure of scientific evidence for a defendant on trial for his life.

New and Material Evidence Disclosed by the State

New and material evidence has been disclosed to Defendant Rodgers in this matter. If said evidence had been introduced at trial, it would probably have changed the verdict or finding of the Court. Further, Defendant could not with reasonable diligence have discovered and produced this evidence at the trial. Notice of this evidence has been provided to counsel as follows:

a. On October 30, 2019, ASA Hamid Hunter notified counsel via email that they were in possession of additional statements from State witness Dr. Mark Petrites prior to Defendant Rodgers' trial; that said statements are as follows:
    i. Mark Sievers was committing Medicare Fraud and was taking cash from patients while also billing Medicare;
    ii. In the months prior to the murder, Dr. Petrites overheard a heated discussion between Dr. and Mr. Sievers wherein she was unhappy with him due to money paid to Curtis Wright for work on the company servers.
    iii. Mark Sievers, at some point early in the investigation, told Dr. Petrites that he "knew what all had happened."
    iv. After Curtis Wright was arrested, Mark Sievers wanted the jail staff to allow Curtis Wright access to a computer to work on the servers in the medical practice from jail.
    v. Mark Sievers defended Curtis Wright and questioned the evidence against him.

Rule 3.600 of the Florida Rules of Criminal Procedure states that courts shall grant a new trial where "new and material evidence, which, if introduced at trial would probably have changed the verdict or finding of the court, and which the defendant could not with reasonable diligence have discovered and produced at the trial, has been discovered. Fla. R. Crim. Pro. 3,600(a)(3). As set forth in *Woods v. State*, 733 So.2d 980, Fla. 1999), under this rule, a new trial will not be awarded on the basis of newly discovered evidence *unless*:

1. The evidence was discovered after trial;
2. Due diligence was exercised to have such evidence at the former trial;
3. The evidence goes to the merits of the cause and not merely to impeach a witness who testified;
4. The evidence is not cumulative; and,
5. It is such that it probably would have changed the verdict.

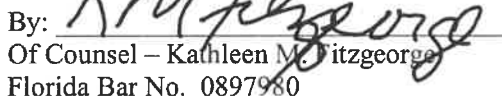
Defendant submits that he was both procedurally and substantially prejudiced by the court's ruling in denying the motion to continue, which, when coupled with the newly discovery evidence, demands that a new trial be granted.

WHEREFORE, the Defendant's counsel for good cause shown hereby certifies that this motion is made in good faith and respectfully requests that this Honorable Court grant this Motion for Continuance in this cause.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically furnished to the persons and entities appearing upon the Service list below, on this 4th day of November, 2019.

Service List:
Hamid Hunter and Cynthia Ross
Office of the State Attorney
Servicesao-lee@sao.cjis20.org

KATHLEEN A. SMITH
Public Defender
Office of the Public Defender
Fort Myers, FL 33901
Ph: (239) 533-2911



By: ______________________
Of Counsel – Kathleen M. Fitzgeorge
Florida Bar No. 0897980

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State of North Carolina }
}
County of Wake }

Affidavit of Albert H. Lyter, III, Ph.D.

Before me, the undersigned Notary Public, personally appeared **Albert H. Lyter, III, Ph.D.**, who after being first duly sworn, deposes and says:

My name is Albert H. Lyter, III, and I have personal knowledge of the matters contained in this Affidavit;

I am and have been the President and Chief Scientific Officer of Federal Forensic Associates, Inc., located in Raleigh, North Carolina, since 1981 and until the present time;

In this capacity, I provide professional services, including but not limited to consultation, examination, training, research, and testimony in forensic science, including but not limited to the areas of trace evidence and microscopy for pigment and fiber identification;

I was contacted by the Law Office of Kathleen A. Smith, Public Defender in and for the 20th Judicial Circuit of Florida, by and through Kathleen M. Fitzgeorge, Chief Assistant Public Defender, on behalf of Defendant Jimmy Ray Rodgers in May, 2019, and asked to review the trace evidence analysis conducted by the FBI Laboratory in Quantico, Virginia, in connection with the above-captioned case.

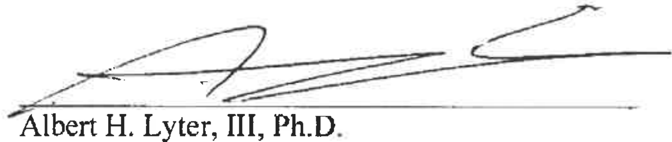
I received and reviewed pertinent portions of discovery as it pertains to my forensic analysis in preparation of examination, review, and analysis of the Trace Evidence Report submitted by the FBI. Upon my review of the discovery, I explained to Ms. Fitzgeorge the necessity of obtaining the case files, bench notes, and other relevant data from the FBI in order to properly complete my review.

I have received what has been labeled as discovery pages 84,282 – 89,079, in the within matter; after an initial review and to the best of my understanding, these documents consist of the FBI's case file, bench notes, and other documentation requested as necessary for my review of the FBI Trace Evidence Report; Due to business and professional obligations requiring travel, in addition to the volume of material in this case, I am unable to complete my examination, review, and analysis of this material, render an opinion, and assist counsel in preparation for depositions prior

to the scheduled trial date of October 1st, 2019. I anticipate my work in this case will take an additional 6 to 10 weeks, with completion of these particular tasks by mid-November, 2019.

This is my best estimate of the time necessary to complete the duties and responsibilities for which I have been retained on behalf of Jimmy Ray Rodgers. This Affidavit is prepared in good faith and I am in no way trying to delay or interrupt the cause of the within matter.

FURTHER, AFFIANT SAYETH NOT.



Albert H. Lyter, III, Ph.D.

State of North Carolina }
}
County of Wake }

I, the undersigned Notary Public, in and for said State and County, hereby certify that Albert H. Lyter, III, Ph.D., whose name is signed to the foregoing Affidavit, and who is known to me/provided identification, acknowledged before me on this day that, being informed of the contents of said Affidavit, he executed same voluntarily on the day the same bears date.

Given under my hand and seal this 10th day of Sept, 2019.

Notary Public

NICOLE GORDON
Notary Public
Durham Co., North Carolina
My Commission Expires Mar. 26, 2022