

**VIRGINIA
IN THE CIRCUIT COURT FOR LOUDOUN COUNTY**

COMMONWEALTH OF VIRGINIA :
 :
v. :
 :
DARWIN BOWMAN, : **CASE NO. 22005**
Defendant. :

MOTION TO QUASH SUBPOENA DUCES TECUM

COMES NOW Cybergenetics Corporation, by Counsel, and moves the Court to quash the subpoena duces tecum requested by the Defendant, and in support thereof states as follows:

1. The defendant, Darwin Bowman, is charged with several crimes, including Capital Murder, in violation of Virginia Code Section 18.2-31.
2. The Virginia Department of Forensic Science contracted with Cybergenetics Corporation to conduct an analysis of DNA recovered at the scene of the crime.
3. The defense has requested a subpoena duces tecum requiring Cybergenetics Corporation to provide several things including:
 - The source code or pseudo code for TrueAllele©;
 - An executable version of TrueAllele©;
 - Case-Specific data:
 - All specific input data and files for work done in conjunction with the Supplemental report of July 14, 2011, relating to FS Lab #1881 (Virginia Department of Forensic Sciences);
 - All specific output data and files for work done in conjunction with the Supplemental report of July 14, 2011, relating to FS Lab #1881 (Virginia Department of Forensic Sciences)'
 - The specific run parameters for the sample in this case.

- Validation studies:
 - The specific input data and files
 - All specific output data and files;
 - The specific run parameters for the validation samples to include:
 - Samples described in “Validating TrueAllele DNA Mixture Interpretation”, Perlin *et al.*, *J.Forensic Sci*, 2011, 56(6)
 - All other samples that comprise the basis for the accuracy and reliability of TrueAllele©, including both published and unpublished data.
4. Va. Sup. Ct. R. 3A:12 (b) states that “Where subpoenaed writings and objects are of such nature or content that disclosure to other parties would be unduly prejudicial, the court, upon written motion and notice to all parties, may grant such relief as it deems appropriate, including limiting disclosure, removal, and copying..”
 5. In regard to the first requested item, the Source Code or Pseudo code for TrueAllele© is proprietary information. In fact, the Pennsylvania Superior Court, in a ruling upholding the validation of TrueAllele© in Indiana County, Pa., addressed the defendant’s claim that “no outside scientist can replicate or validate Dr. Perlin's methodology because his computer software is proprietary.” Commonwealth v. Foley, 2012 PA Super 31, 38 A.3d 882, 888-89 (Pa. Super Ct., 2012). The Court went on to state that “Foley's third reason for exclusion is misleading because scientists can validate the reliability of a computerized process even if the ‘source code’ underlying that process is not available to the public. TrueAllele is proprietary software; it would not be possible to market TrueAllele if it were available for free.” Id. at 889.
 6. The source code (or a pseudo code) is a trade secret of Cybergenetics Corporation.

Disclosure of this proprietary material would make it impossible for the company to provide the commercial technology.

7. Both of the defense experts in this case develop their own software and provide commercial services based on that software. As this essentially makes them competitors of Cybergenetics, the release of trade secrets to direct competitors would be unduly prejudicial to Dr. Perlin and Cybergenetics Corporation. Further this Court, as a matter of public policy should not be placed in a position of unbalancing the scales between commercial competitors.
8. Dr. Perlin or a representative of Cybergenetics Corporation is willing to meet with the defense (either in person or via an internet meeting) both to go over the results of this case and to explain to them on a TrueAllele© computer how the system works.
9. In regards to the second item requested by the defense, the base price of a TrueAllele© system is \$60,000, and is made available for purchase to government DNA laboratories. Cybergenetics does not provide free systems.
10. Dr. Perlin or a representative of Cybergenetics Corporation is willing to meet with the defense (either in person or through an internet meeting) both to go over the results of this case and to explain to them on a TrueAllele© computer how the system works.
11. In regards to the third item requested by the defense, the case specific data relating to the Supplemental Report of July 14, 2011 will be provided to the defense.
12. In regard to the fourth item requested by the defense, Cybergenetics corporation works with data files only, and has no access to the underlying biological samples.

13. The data files addressed in these validation studies are related to criminal cases in other jurisdictions. Cybergentics Corporation does not feel it has the authority to release personal and confidential records.
14. Cybergentics Corporation is willing to conduct additional TrueAllele© testing on a limited set of defense-provided data to further their understanding of the system, its operation, and its reliability.
15. The two experts for the defense, Dr. Rudin and Dr. Lohmeuller are acting as experts in a Frye hearing in Southern Virginia challenging TrueAllele© and it's software. These two experts, who are conducting essentially the same hearing less than two months after the scheduled date of their testimony in Loudoun County, have requested neither an executable copy of TrueAllele© nor the source code requested in this case. In fact no subpoena duces tecum was requested in that case for any items. It is baffling how the defense is able to prepare for the exact same hearing in another jurisdiction with the same experts without these items while the defense in this case finds them necessary.

For the above stated reasons, the Commonwealth respectfully requests that her motion be granted and the Court enter an order quashing items one (source code), two (executable version of TrueAllele©), and four (requesting data files in relation to the validation studies) of the above-mentioned *subpoenas duces tecum*.

Respectfully Submitted,
COMMONWEALTH OF VIRGINIA

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CERTIFICATE OF SERVICE

I, Ryan W. Perry, hereby certify that on this 24th day of May, 2013, a true copy of this Motion to Quash was electronically mailed to Jonathan Shapiro, counsel for the defendant.

Ryan W. Perry