

VIRGINIA:
IN THE CIRCUIT COURT OF THE COUNTY OF
ARLINGTON

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IN THE MATTER OF:	:
	:
COMMONWEALTH OF VIRGINIA	: CR-17000434-00
	: CR-17000435-00
VS.	: CR-17000436-00
	: CR-17000699-753-00
ADIAM BERHANE	:
	:
DEFENDANT.	:

Tuesday,
May 1, 2018

Arlington, Virginia

The hearing re motion to continue,
motion to compel, motion to appoint accountant,
and motion to appoint computer expert commenced
at 9:44 a.m.

BEFORE:

THE HONORABLE WILLIAM T. NEWMAN, JR., JUDGE

APPEARANCES:

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

MARGARET L. EASTMAN, ESQ.
Deputy Commonwealth's Attorney
LISA B. TINGLE, ESQ.
Assistant Commonwealth's Attorney
1425 N. Courthouse Road
Suite 5200
Arlington, VA 22201
(703) 228-4410

ON BEHALF OF DEFENDANT BERHANE:

BRADLEY HAYWOOD, ESQ.
Chief Public Defender
RACHEL COLLINS, ESQ.
SUSANNAH C. LOUMIET, ESQ.
JAMES ROBINSON, ESQ.
Assistant Public Defender
Office of the Public Defender
2300 Clarendon Boulevard
Suite 201
Arlington, VA 22201
(703) 875-1111

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

2 9:44 a.m.

3 THE CLERK: Adiam Berhane.

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

6 THE COURT: Good morning. Good
7 morning.

8 MR. ROBINSON: James Robinson,
9 Susannah Loumiet, Brad Haywood and Rachel Collins
10 on behalf of Adiam Berhane.

11 THE COURT: All right.

12 MR. ROBINSON: May it please the
13 court, Judge?

14 THE COURT: Yes, you may have a seat.

15 MR. ROBINSON: Thank you, Your Honor.
16 This comes before the court on several motions
17 filed by the defense on behalf of Mr. Berhane.

18 I'm asking the court at this time to
19 take up the motion for a forensic expert, a
20 motion for appointment of a digital forensic
21 expert, and then Ms. Loumiet will argue the
22 motion for appointment of a forensic accountant,

1 and we'll move on from there, Judge, if that's
2 okay with the court.

3 THE COURT: All right.

4 MR. ROBINSON: Your Honor, we are
5 asking for a forensic expert to be appointed in
6 this case. I have consulted with Lars Daniels
7 and Larry Daniels. They run a firm, Envista,
8 that does this kind of work.

9 As Your Honor is likely aware, the
10 evidence in this case consists of a huge amount
11 of digital data -- much of it pulled from devices
12 with some connection to the defendant or the co-
13 defendant, or both.

14 And essentially, Judge, we are at the
15 point where the volume of data alone, the
16 assistance of a digital forensic expert just to
17 help catalog and categorize this data to where we
18 can access it in a way that's efficient for
19 trial.

20 Right now, we kind of have everything
21 sort of poured into a big bucket, and a digital
22 forensic expert can help organize this data,

1 provide links to the data, and get it organized
2 so it's actually useful for us in a way that --
3 without --

4 I don't have the technical expertise
5 to manipulate the files in this way, Judge, but
6 that alone, I think, would be a sufficient task
7 for the court to appoint an expert just so we can
8 actually have command over all of this data.

9 But in addition to that, Judge, you
10 know, there are methods that the police use to
11 get this data off of the devices and I'd like --
12 I'm not capable. I don't have the technical
13 expertise to determine whether or not those
14 methods are prone to defect or any other
15 mistakes.

16 I haven't been really provided any
17 information about those specific methodologies,
18 Judge, but if I had, I could tell the court that
19 I wouldn't know the difference between a
20 description of a method that works and the
21 description of a method that would not
22 necessarily produce accurate data.

1 So that is another factor for which I
2 believe it's necessary to have a forensic expert,
3 Judge. All of this data, the reliability of this
4 data, I'd like an expert to be able to consult
5 with.

6 And, you know, at a later time, Judge,
7 we might ask for testimony if that's appropriate,
8 but at this point, we're seeking funds to have an
9 expert help us review and catalog this data into
10 a method that's usable and also help review the
11 methods and the manners in which this data was
12 gathered to make sure that they are, in fact,
13 reliable, and look for any potential avenues
14 there where - well, essentially, Judge, just to
15 help us get an idea for the weight of these
16 methods and whether they should be coming into
17 evidence or not.

18 THE COURT: All right.

19 MS. EASTMAN: Judge, may I respond to
20 all of the motions at the end?

21 THE COURT: No, I'd like to just deal
22 with these individually.

1 MS. EASTMAN: I don't have a
2 particular position with respect to the
3 appointment of a forensic expert, Judge.

4 THE COURT: Okay, all right, the court
5 will grant your motion for appointment of an
6 expert.

7 MR. ROBINSON: We will, once I've
8 gotten some additional information from the
9 expert as far as the funds, I'll ask for another
10 hearing, Judge.

11 THE COURT: All right.

12 MS. LOUMIET: Good morning, Your
13 Honor, Susanna Loumiet on behalf of Adiam
14 Berhane. This is the motion for an appointment
15 of a forensic accountant. Your Honor, under the
16 case law, I believe the case law establishes that
17 we are entitled to a forensic accountant in this
18 case because of the nature of the allegations.

19 It really -- we can -- it is -- it
20 would be -- it's a basic tool for us to present
21 an adequate defense because this case is going to
22 be based on following where the funds went, how

1 they were channeled into the business account, if
2 they were channeled into the business account,
3 and it involves multiple transactions.

4 We are not equipped ourselves to do an
5 independent investigation of that, nor are we
6 equipped to explain that to the jury should it
7 get to that point.

8 We would need an expert to testify, an
9 expert who is educated in accounting principles
10 and who can explain to a jury what has been
11 found. So, Your Honor, we are asking for a
12 forensic accountant in this case.

13 THE COURT: All right.

14 MS. EASTMAN: Can I ask who the
15 accountant is, please?

16 MR. ROBINSON: Sorry, I have been
17 consulting several accountants, Judge. We
18 haven't been able -- I've spoken to one. He felt
19 that the volume would interfere too much with his
20 other matters, so I've been referred to several
21 others.

22 Again, Judge, we would ask if this

1 motion is granted, for a status so we have time
2 to finish our consultations and get a figure
3 before the court before we ask for the funds to
4 be dispersed.

5 MS. EASTMAN: I'd ask the court to
6 hold your ruling in abeyance until somebody is
7 identified.

8 THE COURT: All right, let me see, I
9 will tentatively grant your motion, but pending,
10 you know, verification as to who and what and,
11 you know, approximate cost and so forth.

12 MR. ROBINSON: Yes, Your Honor.

13 MS. LOUMIET: Yes, Your Honor.

14 THE COURT: All right.

15 MR. HAYWOOD: Good morning, Your
16 Honor.

17 THE COURT: Good morning.

18 MR. HAYWOOD: Your Honor, we filed a
19 motion, as the court's aware, for discovery,
20 production of discovery, mainly hard copies of
21 the discovery that's been provided for our
22 review. I understand this is an issue of some

1 significance, both to my office and to the
2 Commonwealth. I haven't received a response to
3 the pleading.

4 I do realize that we filed this a few
5 days ago, but in light of the issues that we are
6 confronting, I do think that it's important for
7 me to have notice of the Commonwealth's position
8 so that I can be prepared to argue this in light
9 of whatever their position is.

10 I'll just be honest with you. That's
11 never been articulated to me. Although I've had
12 conversations with the Commonwealth, including
13 Ms. Stamos, it's not been articulated to me why
14 my request can't be granted in limited
15 circumstances such as these, and I'd like to know
16 that before I'm here presenting a legal argument
17 to the court even if it was just, it was just put
18 off, the hearing was just put off for a few days,
19 and perhaps the Commonwealth could provide me
20 something to give us a sense of where they're
21 going with this. That would be extremely
22 helpful.

1 We're entitled to notice just as they
2 are, and I think at this point, they have a 12-
3 page or a 14-page pleading from me that's
4 detailed and researched with a statement of facts
5 and our position and our request, and I really
6 don't know where they're coming from on this.

7 So just in terms of parity, I would
8 ask the court to declare a responsive pleading
9 and consider hearing this on a different day.

10 THE COURT: Does the Commonwealth have
11 a --

12 MS. EASTMAN: Are you finished?

13 MR. HAYWOOD: Yes, ma'am.

14 MS. EASTMAN: I'm sorry. I just
15 didn't want to interrupt if you weren't. Judge,
16 this case was indicted in April of last year.
17 Mr. Ellis, who was originally retained counsel in
18 this case, withdrew from representation, and this
19 court appointed the Public Defender's Office in
20 June of 2017.

21 The original trial date that was set
22 in this case was October 23, 2017. On the

1 defendant's motion, the trial date was continued
2 to January 9. Part of the reason, and I didn't
3 disagree, you know, certainly was that there was
4 a compelling amount of information in this case
5 to investigate.

6 On January 4, there was a motion, a
7 bill of particulars, argued in front of Judge
8 DiMatteo requesting more information from the
9 Commonwealth in an, in fact, more responsive
10 information from the Commonwealth regarding the
11 charges at hand.

12 And during that motion and in my
13 response of pleading that I filed in that case, I
14 pointed out several things, and I would like to
15 point them out again.

16 In the summer of 2017 when this case
17 was -- first of all, the preliminary hearing in
18 this case was March of 2017, and at that time,
19 Mr. Ellis and Mr. Bugg, who represented the co-
20 defendant, were asking lots of questions about
21 the case.

22 In response to that, I invited counsel

1 for the defendants to come to my office, which
2 they did, and I sat down in my office and I
3 prepared an extensive PowerPoint presentation for
4 them describing the evidence that we had
5 recovered in the case.

6 We showed them pictures, circles and
7 arrows, an explanation of how our pieces of
8 evidence fit together, what we believed was
9 occurring in this particular case, and that two-
10 hour presentation was done in the presence of Mr.
11 Bugg and Mr. Ellis at the time.

12 You got a taste of a little bit of
13 that presentation during the sentencing of the
14 co-defendant in this case when I gave Your Honor
15 a one-hour presentation. I think it took one
16 hour, and I apologize for that, but about a one-
17 hour presentation of how this case evolved and
18 what the evidence in the case was.

19 Double that information was provided
20 at least to counsel during that first meeting.
21 Shortly thereafter, Mr. Ellis, after a plea
22 disposition case, sort of fell to the wayside.

1 The Public Defender's Office was
2 appointed in June of 2017, and shortly
3 thereafter, I invited the Public Defender's
4 Office to my office where I repeated the
5 performance, sat them down in our conference room
6 in our office and for two hours went through the
7 whole litany of evidence, what we believed was
8 occurring, and again, went out of our way to
9 explain the case to counsel for the defendant.

10 Based on the motion for the bill of
11 particulars after explaining these very same
12 facts to Judge DiMatteo, that in combination with
13 some of the information I did respond to for the
14 bill of particulars, Judge DiMatteo denied the
15 bill of particulars, but she also granted the
16 motion to continue. Again, there's an extensive
17 volume of information involved in this case, and
18 we picked a trial date of May 21.

19 So at this point in time, Judge, we've
20 had three trial dates, several continuances, and
21 these dates were selected each time by counsel
22 for the defendant.

1 Each time these cases were continued,
2 the Commonwealth subpoenaed scores, and I'm
3 talking scores of witnesses, to appear from all
4 over the country and locally, including multiple
5 agencies, the Attorney General's office, the FBI,
6 the Arlington Police, et cetera, to appear on the
7 chosen trial dates.

8 Now, I may not be reading the true
9 filing information in my Access as well as I
10 should, and so I apologize, but I did not see any
11 subpoenas from the defense -- subpoenas duces
12 tecum, subpoenas for witnesses, or any such
13 thing.

14 I will tell the court that there are
15 so many search warrants, it's hard to count them,
16 that we issued from our office and the police
17 department, including scores and scores of
18 subpoenas duces tecum for financial information
19 that began when we were in the General District
20 Court, and that continued up until the last
21 several months when we issued additional
22 subpoenas duces tecum for additional financial

1 information.

2 So we have been diligently prosecuting
3 this case, Judge, for -- since a year-and-a-half
4 now this case has been pending in the Arlington
5 court system.

6 Notwithstanding the failure to
7 subpoena anything themselves, as far as I can
8 tell, and in addition to all of the PowerPoint
9 presentations -- and I might point out I think
10 the public defender was here during the
11 sentencing argument in the last case when I went
12 yet through another hour-long presentation of the
13 evidence with you -- we have been unable to
14 discern much progress on the part of the Public
15 Defender's Office in this case in terms of
16 getting this case ready for trial.

17 I will point out that we have
18 discovery logs in our office which indicate when
19 you want to come in and look at a file or to look
20 at evidence in a case. Counsel needs to sign in
21 before they remove the file and sign out when
22 they leave, and so I took a look at those from

1 June of 2017 through the last couple of days of
2 April.

3 In 2017, 16 hours in 2017 was spent in
4 our office examining the discovery provided in
5 the Adiam Berhane case. In 2018, 26 hours was
6 listed in our logs, and that's being generous
7 because on several of these occasions, multiple
8 files for unrelated co-defendants were also
9 pulled out at the same time.

10 So to give them full credit, 26 or so
11 hours, that means 42 hours since they've been
12 appointed, have been spent on discovery in this
13 case, which amounts to about 4.2 hours a month
14 between two attorneys for the Public Defender's
15 Office committed to doing discovery in this case.

16 Now, I appreciate that there's a lot
17 of information. Ms. Tingle and I are faced with
18 the same volume of information that the Public
19 Defender's Office is faced with. We agree
20 there's a lot of information here. There's no
21 doubt, Judge, that this is a gargantuan task by
22 either side of this equation.

1 I guess my position in this case is
2 going to be a little surprising to the court, but
3 let me just say this, that in the pleadings on
4 page three of the motion to continue filed by Mr.
5 Haywood, he has indicated that the --

6 MR. HAYWOOD: Your Honor, just a
7 correction, I didn't draft or file the motion to
8 continue.

9 MS. EASTMAN: Your motion is --

10 MR. ROBINSON: The discovery motion,
11 not the motion to continue.

12 MS. EASTMAN: The discovery, oh,
13 excuse me, the discovery motion, my apologies.

14 Mr. Haywood represents that the
15 defense has, and I quote, "barely made a dent in
16 the discovery materials provided by the
17 Commonwealth and has done anything but
18 demonstrate that it is capably navigating
19 discovery in the case."

20 I couldn't agree with him more. I
21 think they have fallen down on their
22 responsibilities to effectively investigate the

1 discovery in this case, and I believe that
2 they've been given an ample amount of time and
3 resources to do so.

4 I understand the position Mr. Haywood
5 takes in this case as somehow the agreement
6 reached by the Public Defender's Office and the
7 Commonwealth as in respect to the discovery in
8 this case was some type of - I almost --

9 I don't want to put these words in his
10 mouth because I don't believe he intended this,
11 but it strikes me as almost about bait and
12 switch, that, you know, they signed this open
13 file discovery, which we have afforded in this
14 case, and somehow they were overwhelmed and they
15 would not perhaps have signed this agreement had
16 they known the volume of information.

17 I take issue with that, Judge, but
18 what is concerning to the Commonwealth, frankly,
19 is the lack of effective investigation in this
20 case, the failure to file any subpoenas for their
21 own financial information, the failure to detect
22 and identify and request of the court for experts

1 in this case prior to three weeks before trial,
2 which of course would occasion a continuance, the
3 utter failure to present any of these issues to
4 the court in a timely way that could be resolved
5 without requiring a continuance.

6 But having said that, Judge, I want to
7 preserve, if we get a conviction in this case, I
8 would like to preserve it, and I believe that
9 these representations in this discovery request
10 are making a compelling case for ineffective
11 assistance of counsel, and that is very
12 disturbing to me, and I believe by saying to this
13 court that, "We haven't done our job," they are
14 prejudicing any success that the prosecution
15 might have in this case on appeal.

16 And I regretfully stand here and say
17 to this court that I think you have to continue
18 this case based on the representations made in
19 these pleadings, and that pains me greatly
20 because no benefit is going to come to the
21 Commonwealth as a result of this continuance
22 other than upsetting quite a lot of people in

1 this case, but having said that, I think there's
2 a compelling argument in this case that to date,
3 there has been ineffective assistance of counsel.

4 And with that in mind, and the fact
5 that we've been going on for almost a year now
6 since the Public Defender's Office has been
7 appointed, and we are no further along in this
8 investigation of the case by the defense, we are
9 respectfully asking you to remove them and
10 appoint somebody else.

11 MR. HAYWOOD: Your Honor, if I may, I
12 might have to bite my tongue a bit. I'm not
13 accustomed to low blows of that nature in a
14 criminal courtroom.

15 In responding to the Commonwealth's
16 last request, I would note that -- I would ask of
17 the Commonwealth how many hours they've spent in
18 a room outside of their office taking words that
19 have already been typed by another human being,
20 and then typing them on their own keyboard, how
21 many hours on this case, how many hours on any
22 other case, how many hours in their lives they've

1 done that.

2 My attorneys have been doing that for
3 42 hours. That's just the 42 hours that both of
4 them have been there, and usually they'll go
5 there together, so you can probably add another
6 23 hours to that, 25, who knows? 60 some, maybe
7 70 some hours of attorney time have been spent
8 keyboarding. That's what's been going on here.

9 What the Commonwealth did when the
10 Commonwealth needed to make copies, because they
11 did, I'm sure they have more than one copy, they
12 asked somebody to click "print" on a computer.
13 They asked an administrative aide to take a stack
14 of papers and put them through a copier. That's
15 what they did.

16 In a case like this, having done
17 serious cases before, very frequently you can
18 litigate a whole case before you go to trial in
19 less than 100 hours. That's a lot, and a court-
20 appointed attorney wouldn't even get paid on
21 those hours.

22 So to suggest that this is any,

1 there's any amount of dilatory conduct by my
2 office is plainly offensive. These people are
3 incredibly hardworking. I've watched it.

4 It is perhaps, having personal
5 experience sitting in those rooms manually
6 transcribing discovery, I don't know that there's
7 any more demeaning a task that I've done as a
8 defense attorney.

9 We're going to be ready for this case,
10 but the fact of the matter is we haven't had the
11 time yet. If our task is, if our duty is, our
12 obligation as attorneys is to have all the
13 material that's been provided to us that has been
14 deemed material by the Commonwealth, that's been
15 deemed important to this case, if our duty is to
16 have all of this, we've got to copy all of it and
17 we're going to copy all of it.

18 The fact of the matter is I think if
19 there was any error that was made by my staff
20 here, it was not asking for a longer extension of
21 time because the first continuance should have
22 probably asked for two years because that's

1 exactly how much time it's going to take anyone
2 to manually transcribe the absolutely
3 overwhelming quantity of discovery that's present
4 that the Commonwealth has provided to us and for
5 some reason won't just give it to us in the form
6 that anybody else would expect in any kind of
7 case in the world.

8 Why is it that we can't get copies of
9 spreadsheets for example? Are spreadsheets going
10 to land in the hands of somebody who is going to
11 harm somebody else as their common justification
12 goes? Why can't we get copies of photographs,
13 pages of text with photographs? Is there even a
14 way for us to manually copy those things down?

15 The reason that we aren't ready now is
16 because of the Commonwealth's discovery policies,
17 and that's the reason they have put this motion
18 on because it's absolutely absurd to expect
19 anyone in our position to be ready for a case of
20 this nature with these minimal accommodations
21 without any reason that's been given to us as to
22 why that is the case.

1 It doesn't happen anywhere else. It
2 doesn't happen anywhere else. That's all I did
3 in private practice was large family matters.

4 In jurisdictions where there are
5 completely closed file discovery in large cases,
6 they give you stacks of paper because they're
7 concerned about the fairness of the process.
8 They're actually concerned about defense counsel
9 being ready for court. They're concerned about
10 protecting their record, as Ms. Eastman
11 mentioned, and you get it because that's the way
12 this is supposed to work.

13 In Federal Court, and I cited many
14 cases like this, in Federal Court, that's exactly
15 what you get. In Federal Court where you have
16 large financial fraud schemes, you have stacks of
17 financial documents, what they do -- because it's
18 considered unreasonable, it's unreasonable to
19 have those sitting in someone else's office.
20 It's unreasonable not to have the defendant have
21 a copy of those.

22 They give them copies because that's

1 what you need to be prepared. That's really all
2 I have to say. I mean, I guess I concur in their
3 request for a continuance. I strongly, strongly
4 object to their request to have my office removed
5 from this case.

6 We can adequately provide incredibly
7 competent representation. I'm very confident of
8 that. I think that, frankly, the discovery
9 matter might be something I would like to
10 understand a little bit more about the
11 Commonwealth's position.

12 This is something that needs to be
13 more fully briefed. The court needs to be more
14 fully briefed on it, and we need to have an
15 opportunity to really hash out why it is they
16 elected this, what I view as an arbitrary
17 procedure.

18 So along those lines, we would ask --
19 we would agree with the -- well, obviously we
20 made the motion for a continuance, so we'd ask
21 for a continuance, and we'd also ask, again, as I
22 mentioned before, to delay the proceedings on the

1 motion for discovery. Thank you.

2 THE COURT: Well, I'll say a couple of
3 things. I am not going to, first of all, remove
4 the Public Defender's Office because I think
5 that, first of all, we're almost starting from
6 scratch again with them, and the length of time
7 that may be to get any other attorneys up to
8 speed would occasion a delay of an even greater
9 amount of time than I think that we could, than
10 what the court is willing to do.

11 I agree with Ms. Eastman in the fact
12 that if the court didn't grant one, it would be
13 akin to -- I'm just saying right now --
14 ineffective assistance because of the volume and
15 so forth, and it wouldn't - so the court has to
16 in this case, as much as it pains it to have to,
17 continue it again because it has been at this
18 point continued.

19 Perhaps at the time that this date was
20 requested, it was not done -- it should have been
21 a longer delay. The court will -- I will not
22 comment about the discovery process. I will

1 agree with whatever is filed and at another time
2 listen to whatever arguments may be made about
3 it.

4 Obviously there is a very voluminous
5 amount of material here. I think that it did not
6 bode well when -- I think that the -- your office
7 could have done a little -- filed some of these
8 motions earlier. I mean, I think there is a
9 delay here because -- and these motions should
10 have been filed earlier.

11 But without further comment, the court
12 will grant a continuance in this matter, and I
13 think that this next one has to be hard and fast.
14 The new date, whatever it is, must be one that
15 everybody agrees is a legitimate date because the
16 court will be very loathe to consider any further
17 continuance beyond this -- very loathe to do
18 that. I just think that, so whatever we agree, a
19 date that's agreed upon, must be hard and in
20 stone.

21 MS. EASTMAN: Can the Public Defender's
22 Office make a representation as to how much time

1 they're actually going to need to be ready?

2 MR. HAYWOOD: Is it possible to set
3 this for status maybe Thursday or next week so we
4 can consult about that? I think that's something
5 that requires a little more discussion. I do
6 think, honestly, if I was to ask right now, I'd
7 ask for 18 months, but I don't think the court
8 would be open to that.

9 THE COURT: Nope, nope, that's beyond
10 the pale. This case is -- I mean, I appreciate
11 the volume and everything else, but it's over a
12 year, year-and-a-half old now. It's not going to
13 -- 18 months at the time when it was set
14 initially, that might have been reasonable, but
15 not now, not now. All right, we can set it for
16 status. Is Thursday -- next Thursday good?

17 MS. TINGLE: Your Honor, if I may,
18 we're going to need to consult with, I want to
19 say somewhere in the ballpark of 60 witnesses to
20 be able to set dates.

21 MS. EASTMAN: More than that.

22 MS. TINGLE: More than that?

1 MS. EASTMAN: 85.

2 MS. TINGLE: 85, I think, is what we're
3 up to now, so, I mean, trying to get all of those
4 folks by dates is going to be tricky to do in a
5 week.

6 THE COURT: All right, well, starting
7 next week, I move to the criminal docket, so any
8 day would probably -- how much -- what would be
9 reasonable for the Commonwealth?

10 MS. TINGLE: Judge, we have a trial
11 date of May 21 already, which is only three weeks
12 away, so I don't know whether it makes sense to
13 just keep that date.

14 THE COURT: Why don't we just keep that
15 date as the status date at this point, and we'll
16 go from there?

17 MS. EASTMAN: Thank you, Your Honor.

18 THE COURT: All right.

19 MR. ROBINSON: Thank you, Judge.

20 (WHEREUPON, AT 10:14 A.M., THE
21 PROCEEDINGS IN THE ABOVE-ENTITLED MANNER WERE
22 CONCLUDED.)

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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: 05-01-18

Place: Arlington, VA

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