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BY: 
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1 **FOR PUBLICATION**

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5 **IN THE SUPERIOR COURT**
6 **FOR THE**
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

8 **COMMONWEALTH OF THE**
9 **NORTHERN MARIANA ISLANDS,**

CRIMINAL CASE NO. 10-0197C

10 **Plaintiff,**

ORDER UNSEALING

11 **v.**

EX PARTE ORDER

12
13 **MICHAEL ANTHONY JACKSON,**

14 **Defendant.**

15 **PLEASE TAKE NOTICE** that an order was issued ex parte in this case on July 6,
16 2012. On May 15, 2013, the Court issued a notice of its intent to unseal the ex parte order,
17 and gave the parties an opportunity to object. No objection was filed. The Court finds there
18 is no basis for keeping the order sealed because the justification for the ex parte status of the
19 order no longer applies. Rather, the value of the order adds to the body of decisional law in
20 the Commonwealth. Therefore, the Court hereby unseals the original Order and Opinion
21 Granting Defendant's Request for DNA Expert, originally issued ex parte on July 6, 2012.
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24 **IT IS SO ORDERED** this 24th day of May, 2013.

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28 **Joseph N. Camacho, Associate Judge**

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3 **IN THE SUPERIOR COURT**
4 **FOR THE**
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

5 **COMMONWEALTH OF THE**
6 **NORTHERN MARIANA ISLANDS,**

7 **Plaintiff,**

8 **v.**

9
10 **MICHAEL ANTHONY JACKSON,**
11 **Defendant.**

CRIMINAL CASE NO. 10-0197C

**ORDER AND OPINION GRANTING
DEFENDANT'S REQUEST
FOR DNA EXPERT**

(under seal)

12
13 **I. INTRODUCTION**

14 **THIS MATTER** came before the Court June 21, 2012, ex parte, on Defendant's Ex
15 Parte Motion for Appointment of a Forensic DNA Expert ("Motion.") Michael A. Jackson
16 ("Defendant") was represented by Chief Public Defender, Adam Hardwicke. Based on a
17 careful review of the motion, exhibits and oral argument the Court now renders this written
18 decision.
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20 **II. FACTUAL AND PROCEDURAL BACKGROUND**

21 On October 15, 2010 the Commonwealth charged Defendant Michael A. Jackson
22 ("Defendant") with Kidnapping, Sexual Assault in the First Degree, and Assault, based on
23 events which reportedly took place October, 9, 2010. The arrest warrant was based on the
24 victim's account of the rape; her identification of the Defendant, a stranger to her; and the
25 identification of Defendant's car, consistent with the victim's account. Subsequently,
26 evidence retrieved from a search warrant was sent to the FBI lab in Quantico, Virginia to be
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1 tested to determine if Defendant's DNA was on the victim, her clothing or in Defendant's
2 vehicle. The items tested included: (1) a cotton swab containing DNA from Defendant; (2)
3 clothing items from the victim; (3) the victim's blood; (4) vaginal smears from the victim;
4 and (5) pieces of the seat cover from Defendant's vehicle. The FBI lab received these items
5 October 26, 2010, and in July, 2011 issued a report with the testing results, ("2011 Report")
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7 The lab also tested hair samples taken from Defendant's car and issued a report based on the
8 results on May 24, 2012 ("2012 Report"). Both reports were provided to Defendant in
9 discovery.¹ The reports indicate:² no blood was detected on materials taken from the car
10 (Ex. A 1,2); the presence of semen on material taken from the front seat cover of
11 Defendant's car (Ex. A 1,2,4); the presence of Defendant's DNA on the same material (Ex.
12 A 1, 3); the presence of male and female DNA on the victim's panties (Ex A 1, 2); a hair
13 found on the rear floor mat of Defendant's car matched a sample of the victim's DNA (Ex.
14 C 1,2,3).
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16 Up until May 18, 2012, Defendant's counsel believed, based on representations from
17 the Commonwealth that the case would be dismissed (Aff. 2). On May 16, 2012 the
18 Commonwealth orally moved the Court to dismiss the case, and the Court reserved ruling
19 until the Commonwealth put its request in writing (*Id.*). However, on May 18, 2012 the
20 Commonwealth communicated to Defendant's counsel its intent to pursue the case (*Id.*), and
21 on May 21, 2012 filed a Motion to Withdraw Oral Motion to Dismiss and Set Pre-Trial
22 Conference. In response, on May 22, 2012, the Court put the matter back on calendar for a
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26 ¹ The 2011 Report was provided to Defendant in January of 2012, and attached to the Motion as "Exhibit A."
27 Defendant's Motion was filed May 22, 2012, before the 2012 Report issued. Counsel provided the Court with
28 a copy of the 2012 Report at the hearing on the Motion, which was marked as "Exhibit C."

² This is not an exhaustive list of all that is contained in the reports. The facts taken from the reports are based on the Court's plain reading of those reports, and do not explain the relative scientific certainty, error rate, methods etc.

1 pretrial conference. *CNMI v. Michael A. Jackson*, Crim. Case No. 10-0197E (Super. Ct.
2 May 22, 2012) (Order To Set Pre-Trial Conference).

3 On May 22, 2012, Defendant filed documents under seal including the instant
4 Motion. In support of the Motion Defendant offers: the 2011 Report; an Affidavit of Adam
5 C. Hardwicke in Support of Defendant's Ex Parte Motion For Appointment of a Forensic
6 DNA Expert ("Affidavit"); and the 2012 Report (Ex. A; Ex B; Ex C). In the Affidavit Mr.
7 Hardwicke declares among other things that: Defendant did not seek an expert earlier
8 because counsel believed the Commonwealth was planning to dismiss the case; the 2011
9 Report is highly technical and requires an expert; Defendant intends to subpoena the data
10 underlying those results which will be even more technical; and on information and belief
11 the DNA results in the 2011 Report are exculpatory (Ex B 2-3).
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14 Defendant requested an ex parte proceeding arguing that such a proceeding is
15 necessary to protect the attorney-client relationship, counsel's work product, and
16 Defendant's right to effective counsel. The Court allowed the documents to be filed under
17 seal³ and subsequently set the matter for a confidential, on the record ex parte hearing.⁴
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23 ³ *CNMI v. Michael A. Jackson*, Crim. Case No. 10-0197E (Super. Ct. May 23, 2012) (Order Permitting
Defendant to File Documents Under Seal).

24 ⁴ The Court is persuaded that an ex parte proceeding is appropriate. First, such a proceeding is not new in this
25 jurisdiction. See *Commonwealth v. Perez*, 2006 MP 24. Second, federal courts allow for ex parte proceedings
26 for expert assistance for the same reasons advanced by Defendant. See USC § 3006A; *United States v. Sutton*,
464 F.2d 552, 553 (5th Cir. Ga. 1972) ("The manifest purpose of requiring that the inquiry be ex parte is to
27 insure that the defendant will not have to make a premature disclosure of his case."). Third, many jurisdictions
28 require such a proceeding or give the trial court discretion for the same reasons advanced by Defendant. See
Moore v. State, 390 Md. 343, 370-371 (Md. 2005) (describing jurisdiction split and adopting ex parte
procedure). Thus, to protect confidential communication and attorney work product, including trial strategy,
this order will remain under seal to the extent necessary to protect Defendant's rights.

1 On June 21, 2012, the matter was heard, ex parte, before the undersigned,⁵ and the
2 Court took the matter under advisement.

3 **III. APPOINTMENT OF DEFENSE EXPERT**

4 The issue is whether the Court must authorize funds⁶ for Defendant to secure a
5 forensic DNA expert to assist Defendant with his case.

6
7 Article I, Section 4 of the Constitution of the Commonwealth provides that “[i]n all
8 criminal prosecutions, certain fundamental rights shall obtain.” Among these rights is that
9 “[t]he accused has the right to assistance of counsel” NMI Const. art. I, § 4(a). This section
10 is based on the Sixth Amendment to the United States Constitution. *Commonwealth v.*
11 *Suda*, 1999 MP 17 ¶ 10. The Sixth Amendment to the United States Constitution⁷ provides
12 that “in all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance
13 of Counsel for his defense.” U.S. Const. amend. VI. The right to counsel means the right
14 to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 685
15 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). This right includes
16 the appointment of investigative and other expert services where necessary for a
17 fundamentally fair trial. *Commonwealth v. Perez*, 2006 MP 24 ¶ 11(citing *Ake v. Oklahoma*,
18 470 U.S. 68, 78 (1985)); *see also Williams v. Stewart*, 441 F.3d 1030, 1053 (9th Cir. 2006)
19 (citation omitted).
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24 ⁵ On June 8, 2012 Defendant’s Motion to Recuse Judge David A. Wiseman Under 1 § 3308(a) was filed, on
25 June 11, 2012 Judge Wiseman recused himself, and on June 12, 2012 the matter was reassigned to the
26 undersigned Judge.

27 ⁶ Although the Motion is styled a Motion for “Appointment,” Defendant made clear at oral argument, that they
28 were seeking funds from which to secure an expert.

⁷ The Sixth Amendment applies to the Commonwealth pursuant to 18 USC § 1801, commonly referred to as
the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United
States.

1 In *Perez*, the Commonwealth Supreme Court adopted a two-part test to determine
2 when expert services for indigent defendants are constitutionally required. *Perez*, 2006 MP
3 24 at ¶ 14. Expert assistance⁸ is required where defendant establishes that “(1) an expert
4 would be of assistance to the defense and (2) the denial of expert assistance would result in a
5 fundamentally unfair trial.” *Id.*

6 **A. PARTICULARIZED SHOWING OF NEED**

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8 Following *Perez*, first, the Court must determine whether the Defendant has
9 adequately demonstrated that an expert would be of assistance to the preparation of his
10 defense. To be adequate, the defendant must make a “particularized showing of need.” *Id.* ¶
11 24. Generalized requests are insufficient. *See e.g. Husske v Commonwealth*, 476 S.E.2d
12 920, 926 (Va. 1996) (finding no particularized showing of need for a DNA expert where
13 defendant’s assertion of need was too general, and the court had already appointed co-
14 counsel who was a knowledgeable member of the bar in the area of forensic DNA
15 applications).
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18 Although defense counsel may be unfamiliar with the specific scientific theories, it is
19 nonetheless their obligation to educate themselves enough to “provide the court with as
20 much information as possible concerning the usefulness of the requested expert to the
21 defense’s case.” *Moore v. Kemp*, 809 F. 2d 702, 712 (11th Cir. 1987).
22

23 Here, Defendant argues that an expert is necessary to interpret the results of the two
24 DNA reports and underlying data. Defendant also indicates that an expert is necessary to
25 educate counsel for further investigation and cross-examination of the Commonwealth’s
26

27 ⁸ The legal standard for determining when an indigent defendant is entitled to court funds to hire an expert is
28 the same as the standard for determining when expert assistance is required generally. *See e.g., State v. Touchet*, 642 So. 2d 1213, 1216 (La. 1994) (holding that Defendant must show a “reasonable probability both that an expert would be of assistance to the defense and that the denial of expert assistance would result in a fundamentally unfair trial,” and applying standard to motion for expert funding)

1 expert(s). Defendant particularly represents that: the lab results from Quantico are technical
2 and not comprehensible to a layperson; Defendant believes the results are exculpatory e.g.
3 that Defendant's DNA was not present on the victim or her clothing; Defendant intends to
4 subpoena the raw data which will be even more technical; and information learned from the
5 reports and underlying data, depending on an expert's interpretation of it, may well form the
6 basis of Defendant's trial strategy. Counsel further represents that the reports are
7 unintelligible to him, and that even with research, he would be unable to make meaningful
8 sense of them, without the assistance of a forensic DNA expert.

10 Here, a DNA expert would clearly be useful to Defendant's case. Having reviewed
11 the two DNA reports, the Court finds some of the results to be so technical as to require
12 expert assistance. For example, during oral argument, counsel pointed to the following
13 language from one report reading "The amelogenin typing results from specimen Q8 [the
14 alleged victims panties], indicate a mixture of male and female DNA." (Ex. A 1, 2).
15 Further, "The STR typing results foreign to specimen KI [the alleged victim] obtained for
16 specimen Q8 are not suitable for matching purposes; however, they may be utilized for
17 exclusionary purposes." (Ex. A 2). Counsel argued that an expert could meaningfully
18 explain these results. For example, counsel would wish to ask an expert whether this result
19 indicates that further testing may specifically exclude Defendant as the donor of the DNA on
20 the panties, exonerating him. Another inscrutable, but significant part of the report deals
21 with the issue of whether there is semen on the panties and other materials. The Court notes
22 that the difference between semen being "identified," and "indicated," and the relative
23 scientific certainty or value of either is unclear. Footnotes in the report describe what
24 "indicated" and "identified mean," but the scientific language used make it impossible to
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1 gauge the accuracy of the findings—particularly in a way that would be useful to a trial
2 attorney attempting to understand and potentially challenge such evidence. (See Ex. A 3,4,
3 n. 1, 2.) Further, an expert would be useful to challenge evidence which is probative of
4 guilt, such as the hair of the victim found in the backseat of defendant’s car. For example, in
5 constructing a trial strategy, counsel may wish to know if the random match probability
6 explained in the report would be higher in an area where there is a smaller pool of DNA.
7 Moreover, the underlying data promises to be even more scientific. Defendant here has
8 offered more than a generalized showing of need. Based on counsel’s representation and
9 review of the reports, a forensic DNA would likely be of assistance to Defendant in making
10 sense of the reports and underlying data, in order to prepare a defense.
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13 Counsel also argued that resorting to using the Commonwealth’s resources, by
14 questioning Commonwealth expert(s) or technicians at Quantico, would improperly reveal
15 Defendant’s trial strategy, which would be extremely damaging to Defendant’s case if the
16 results were in fact, probative of guilt. Based on this concern, the Court finds that access to
17 the Commonwealth’s expert(s) would not obviate the need for Defendant to have his own
18 expert.
19

20 Given the complexity of the DNA evidence, the potential exculpatory value of such
21 evidence and the unlikelihood that counsel—even with reasonable effort—will have the
22 expertise to challenge the Commonwealth’s DNA evidence, the Court finds that Defendant
23 has demonstrated a particularized showing of need for an expert’s assistance.
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25 **B. FUNDAMENTAL FAIRNESS**

26 *Second*, the Court must determine whether denial of a court appointed expert would
27 result in a fundamentally unfair trial. “The state need not provide indigent defendants all the
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1 assistance their wealthier counterparts might buy; rather, fundamental fairness requires that
2 the state not deny them ‘an adequate opportunity to present their claims fairly within the
3 adversary system.’” *Kemp*, 809 F. 2d at 709 (quoting *Ross v. Moffitt*, 417 U.S. 600, 612
4 (1974)).

5 In *Ake v. Oklahoma*, the Supreme Court held that “when a defendant demonstrates to
6 the trial judge that his sanity at the time of the offense is to be a *significant factor at trial*,
7 the State must, at a minimum, assure the defendant access to a competent psychiatrist who
8 will conduct an appropriate examination and assist in evaluation, preparation, and
9 presentation of the defense.” *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (emphasis added).

11 In determining whether the denial of an expert will result in a fundamentally unfair
12 trial, “[t]he question in each case must be not what field of science or expert knowledge is
13 involved, but rather how important the scientific issue is in the case, and how much help a
14 defense expert could have given. *Little v. Armontrout*, 835 F.2d 1240, 1243-44 (8th Cir.
15 1987). Thus, where expert assistance bears on a significant issue in the case, the denial of
16 expert assistance may well result in a fundamentally unfair trial. *See e.g., Ake*, 470 U.S. at
17 82, 83, 86; *Little*, 835 F.2d at 1245 (holding that an expert in hypnosis was necessary for a
18 fair trial where the only issue at trial was identification, the state’s strongest witness had
19 undergone hypnosis, and the state had presented expert testimony to get the hypnotically
20 enhanced testimony admitted); *Cade v. State*, 658 So. 2d 550, 555 (Fla. Dist. Ct. App. 1995)
21 (“[G]iven the central importance of the DNA evidence to the state’s case (and hence the
22 defendant’s defense) . . . we conclude the lower court abused its discretion in denying the
23 expert’s appointment.”).

1 Here, the DNA evidence bears on a significant issue in the case. The identification
2 of Defendant as the perpetrator promises to be the most significant contested issue at trial, if
3 not the sole issue. To prove its case, the Commonwealth has sought the assistance of two
4 forensic DNA experts. DNA evidence is likely intended to bolster the victim's
5 identification of Defendant. Thus, in order to have an adequate opportunity to present his
6 claims fairly within the adversary system Defendant will at the least need to be prepared to
7 effectively cross examine the Commonwealth's DNA expert(s) by consulting with an expert
8 who understands the science. *Kemp*, 809 F. 2d at 709 (quoting *Ross v. Moffitt*, 417 U.S.
9 600, 612 (1974)).
10

11 Forensic DNA science has a critical role in this case. First, it is a rape case where a
12 significant amount of physical evidence was retrieved and sent for DNA testing. Second,
13 DNA evidence is fallible, although juries may believe it is infallible, and as a result, tend to
14 overvalue it.⁹ Third, the Commonwealth will likely rely on the DNA evidence to meet its
15 burden because there is no confession and one identification witness, the victim, who was
16 not acquainted with Defendant, but picked him out from a photo in 2010.¹⁰ Given the length
17 of time since the attack, the DNA evidence may be more probative than any in-court witness
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21 _____
22 ⁹ Based on the so-called "CSI effect" juries may be overly persuaded by scientific evidence, but such evidence
23 is prone to miscalculation. See generally Symposium, *The CSI Effect: The True Effect of Crime Scene
24 Television on the Justice System: The CSI Effect: Its Impact and Potential Concerns*, NEW ENG. L. REV. 471,
25 475-486 (2007) (citing multiple instances of miscalculation in DNA results).

26 ¹⁰ Eyewitness testimony of a stranger may not be reliable. *United States v. Wade*, 388 U.S. 218, 228 (1967)
27 ("The identification of strangers is proverbially untrustworthy."). Also the time between an event and the
28 identification is critical to the reliability of the identification. In this case, the victim was attacked in the early
morning beginning around 1a.m. and identified Defendant that night around 8:40 p.m. If the victim were asked
to make an in court identification it would be well over a year since the incident. See Suzannah B. Gambell,
Comment, *The Need to Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identifications*,
6 WYO. L. REV. 189, 197. (2006) (suggesting that research shows about 50% of memory is lost within the
hour, 60% within 24-hours and gradually thereafter).

1 identification the Commonwealth presents. Finally, if the 2011 Report in fact contains
2 exculpatory evidence, it will form the basis of Defendant's strategy.

3 A DNA expert's assistance would be unquestionably valuable to Defendant's case.
4 By interpreting the results contained in the two reports and any underlying data an expert
5 could assist with Defendant's evaluation of relevant trial strategies, including whether to
6 seek further DNA testing. An expert could assist Defendant in choosing whether or not
7 to offer expert testimony. The understanding gleaned from such an expert would inform
8 Defendant's preparation of cross-examination questions for the Commonwealth's DNA
9 expert(s). Defendant should not, as a result of his indigence,¹¹ be denied such a basic tool.
10 Here, DNA evidence is likely to be a significant part of the Commonwealth's case; therefore
11 an adequate understanding of the science is necessary for a meaningful defense.
12

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14 Given the importance of DNA evidence in this case, and the probable value of an
15 expert, denial of an expert would be fundamentally unfair.

16 IV. CONCLUSION


17 For the aforementioned reasons the Court finds that Defendant has made a
18 particularized showing of need for funding to procure a forensic DNA expert, and that such
19 an expert is necessary to protect his constitutional rights to the effective assistance of
20 counsel and due process.
21

22 Consistent with this decision the Court will issue a separate order providing
23 \$1500.00 for the Defendant to procure a forensic DNA consultant to assist in his defense.
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28 ¹¹ There is no question here that Defendant is indigent. He is represented by Office of the Public Defender. Further, his Counsel maintains that the Office of the Public Defender does not have sufficient funds to secure an expert for him.

IT IS SO ORDERED this 6th day of July, 2012.

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Joseph N. Camacho, Associate Judge