

VIRGINIA:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

COMMONWEALTH OF VIRGINIA

V.

HERMAN LEE BLACK,
Black male; DOB 11/1/58

Defendant

PLEA AGREEMENT

1. My name is Herman Lee Black and my age is 47 years.
2. I am represented by counsel whose name is Allen F. Bareford, Public Defender, and I am satisfied with his services as an attorney.
3. I have received a copy of the warrant(s) or indictment(s) before being called upon to plea, and I have read and discussed it with my attorney, and I fully understand the charges against me in this case. I am the person named in the indictment. I have told my attorney all the facts and circumstances, as known to me, concerning the case against me. My attorney has discussed with me the nature of the charge, has explained to me the elements of the offense, and has advised me as to any possible defense I might have in this case. I have had ample time to discuss the case and all possible defenses with my attorney.
4. **STIPULATION OF FACTS:** I agree to the following summary of the Commonwealth's evidence against me (which I stipulate can all be proven by the Commonwealth) in the foregoing case, and I request that the Court accept this summary in lieu of presentation of any evidence by the Commonwealth. I further

stipulate that the Commonwealth's evidence constitutes a *prima facie* case in the instance of the crime with which I am charged.

SUMMARY:

Linette Davis of Caroline County Virginia would testify she and her 4 children, Rontray, Alexandria, Khayree & Tyreek, who was age 3 & who weighed 35 pounds, all resided with Herman Black for about 1 year until 9/29/04. Black was a self-employed woodcutter and she assisted him as his secretary and helper. For several months this family resided together at a motel in Caroline County. (A photo of Tyreek Davis is attached as **Exhibit 1**)

On the morning of 9/29/04 Ms. Davis got the 3 older children ready for school and she intended to take Tyreek with her to court in Stafford, where her brother was to appear as a defendant. She fed and dressed Tyreek, but she then learned that Black wanted to take Tyreek with him to cut wood that day. Although Black had never kept Tyreek by himself before, she assented because Tyreek wanted to go with Black. Black was dressed in a white tee shirt and jeans, which she had laundered just a day or two before. Tyreek was healthy and completely uninjured when he left with Black in his van about 7:45 AM on 9/29/04. It was the last time she saw Tyreek.

Around 11:30 AM Ms. Davis left court in Stafford and then traveled to her aunt's house in Caroline County, where she called Black on his cell phone. When Black answered around 12:30 PM, he claimed to be in Culpeper, but promised to come and get her. When he hadn't arrived by 1:45 PM, she called him again. At this point Black nervously told her that he had lost Tyreek at Wal-Mart in Fredericksburg. Black claimed that he left Tyreek asleep in his pick-up truck when he went in Wal-Mart and that when he came out, Tyreek was gone. Ms. Davis then told Black to come and get her at her aunt's house in Caroline. Black did not call 911 nor did he otherwise report the child missing in any way.

Black did not arrive in his pick-up until about 4:30 PM, at which point Davis rode with him to Wal-Mart in Fredericksburg, where she promptly reported her son missing to store security personnel. The Fredericksburg police were immediately dispatched, at which point Ms. Davis was nearly hysterical.

Ms. Davis would testify that she was happy living with Black and their her children regarded him as a father figure. Her only concern had been that Black had little patience with Tyreek's potty training accidents. When these accidents occurred, Black would become angry and spank Tyreek with his belt. However, Ms. Davis testified at the 1/26/05 preliminary hearing in this case, that before 9/29/04 she never considered Black's treatment of Tyreek to be excessive or abusive.

After Black's arrest on 9/29/04, Ms. Davis met with him several times during police questioning. No matter how much she cried or collapsed over Tyreek's disappearance, Black never wavered in saying that he didn't harm Tyreek and that he didn't know where he was.

Detective Doug Perkins of the Fredericksburg Police Dept. would testify that after Black was taken in to custody at Wal-Mart around 5:30 PM on 9/29/04, he questioned him. After waiving his Miranda rights, Black told Perkins that morning he and Tyreek rode together in his van to the site on his brother's property on Granite Springs Rd. in Spotsylvania County where Black stored and split the wood that he cut. Black said that he split wood there for awhile while Tyreek sat on the tailgate of his pick-up truck, which was parked on the property. Black stated that around mid-day he figured he would ride to Fredericksburg so he could meet Linette Davis when she telephoned him that she was out of court. Herman Black then said that when he arrived at Wal-mart in his pick-up truck, that Tyreek was asleep. Black claimed that he went in Wal-mart seeking a spark-plug for his wood splitter, but he left Tyreek asleep in the truck. After 7-8 minutes in Wal-Mart, Black returned to his truck and he found Tyreek gone, he claimed. However, Black did not then report Tyreek missing, but rather drove around Wal-Mart and the shopping center looking for him, he told police. Despite lengthy and repeated questioning by Fredericksburg police officers, Black always contended that he had not hurt Tyreek nor did he know his whereabouts.

Later during the questioning of Black on 9/29/04, Det. Perkins noticed what appeared to be blood stains on Black's tee shirt and jeans. Although Black claimed the markings were stains from work, Det. Perkins seized Black's clothing for evidence. That clothing was then submitted by police to the FBI lab for forensic testing. Although it was discovered that the tee shirt did indeed have several red stains which are not blood and which appear to be paint or the like, it was also determined that the tee shirt and jeans did contain several very small contact spots of blood. This blood was then determined by the FBI DNA lab to be consistent with Tyreek Davis' DNA within a 1 to 2.8 million probability. (See certificates of analysis dated 3/22/05 and 12/29/05 attached as **Exhibit's 2 & 3** ; See also attached police photographs of Black's clothing with the blood stain locations marked as **Exhibit 4**).

Lt. Roger Harris & Detective Troy Skebo of the Spotsylvania Sheriff's Dept. would testify that they took over this investigation around mid-night on 9/29/04 when police determined that Black was not being truthful about losing Tyreek at the Fredericksburg Wal-Mart, since store security video tapes showed Black and his truck at the store, but Tyreek Davis is no where to be seen in the security videos. (See prints from Wal-Mart security video attached as **Exhibit 5**). The Spotsylvania Sheriff's Dept. then mounted a multi-day, extensive ground and air search for Tyreek centered around Black's woodpile location on Granite Springs Road in Spotsylvania County. While this fruitless search went on, these two detectives continued to question Black about Tyreek's disappearance.

On 9/30/04 both officers questioned Black extensively after he again waived his Miranda rights. Black continued to insist that he had lost Tyreek at the Wal-Mart store on 9/29/04. Black also continued to insist that he had not even accidentally hurt Tyreek in any way and that he did not know Tyreek's location.

(Between 9/30/04 & 10/4/04 police were unable to question Black because his court appointed attorney on unrelated charges had advised him to remain

silent, however, those unrelated charges were dropped on 10/3/04). On 10/4/04 Detectives Harris and Skebo again questioned Black after he again waived his Miranda rights. This time Black was confronted with the fact of the Wal-Mart surveillance tapes, at which point Black tearfully conceded that he was high on marijuana on 9/29/04 and that he must have forgotten Tyreek when he left his woodpile at it's remote location in rural Spotsylvania County. Black said that he discovered Tyreek's absence when he got to Wal-Mart, but that he lied to police thinking he could find Tyreek on his own. The detectives then promptly took Black to the Granite Springs location in an effort to have Black assist them in locating Tyreek, to no avail.

On 10/13/04 after Black had been charged with Tyreek's murder, Detectives Harris and Skebo questioned Black again. Once again Black waived his Miranda rights. During this questioning Black conceded that Tyreek had twice fallen out of his seat in the van as they rode to the woodpile on the morning of 9/29/04. Black said that both times a car cut in front of him forcing him to slam on the brakes and that Tyreek fell out of his seat each time. Black asserted that Tyreek appeared normal and unhurt by these falls and that Tyreek was playing normally on a trailer at the woodpile when he saw him last. Black did admit that Tyreek had a potty accident that day and had urinated either in his van or truck, but he denied hurting the child. Black later stated that it was possible that Tyreek may have pricked his finger that day and bled a little, but that if he did Black never noticed it.

Black's belt was missing from his clothing when police seized it on 9/29/04. A search of Black's brother's garage at the Granite Springs woodpile location revealed that a moving blanket was missing and that the first aid kit appeared to have been moved. However, neither detectable DNA nor fingerprints were found on the first aid kit. Police cadaver dogs searched Black's van and pick-up, but detected no such scent. FBI forensic officers searched both vehicles, but also failed to detect any blood or other incriminating evidence. The detectives would testify that to this day Tyreek's body has never been found despite the best efforts of their department.

Dr. Frederic A. Phillips, the local medical examiner who is also a pediatrician, would testify that in his medical opinion, a healthy 35 lb. child, who was fed breakfast and lunch and who was dressed as Tyreek was, if abandoned in the woods at such a remote location on 9/29/04 would have gone into irreversible shock within 48 hours, if not further fed and sheltered. Further, in his opinion, such a child would have died from exposure and shock within 72 hours from abandonment. Dr. Phillips would further opine that the small spots of blood found on Black's clothing are consistent with bleeding from either a child's pricked finger or nosebleed, but could also have come from a child with internal injuries who was bleeding only slightly from the nose or mouth.

Mark Eggeman of the Virginia Dept. of Emergency Management, would testify that at Sheriff Smith's request, he coordinated an exhaustive 7-day ground and air search for Tyreek from 9/30/04 through 10/7/04. The search centered

around the last sighting of Tyreek at the woodpile on Granite Springs Rd. and it spanned out for 1 concentric mile. During the height of the search, there were over 175 law enforcement officers and other searchers on the ground, plus there were multiple aircraft utilizing thermal and infrared technology searching from above. The entire area was also searched repeatedly with both bloodhounds and cadaver dogs. The search area was divided into grids and each grid was searched repeatedly - all to no avail. However, Mr. Eggemen would concede that even though the search was as exhaustive as humanly possible, given the heavy forest and underbrush in that area of the county, the overall possibility of detecting a small, dead child was about 60%.

Deputy Kevin Kocher, an expert bloodhound tracker, would testify that he searched the Granite Springs Rd. woodpile area with his bloodhound on 9/30/04. There had been a heavy rain of nearly 1 3/4 inches the night before. His dog did detect Tyreek's scent in the area of the woodpile and the trailer where Black said he had left him. Tyreek's scent track was detected in the vicinity of the woodpile and also near the parked and abandoned vehicles adjacent to it, but the track led nowhere else. All aspects of the track were searched to no avail and Tyreek's scent was never detected anywhere else during the 7 day search for him.

5. My attorney has advised me that the offense charges, as follows:

- **1 count of felony child abuse, in violation of Virginia Code Section 18.2-371.1 and 1 count of felony 2d. degree murder in violation of Code section 18.2-33.**

Punishment: 2-10 years for felony child abuse and 5-40 years imprisonment for felony 2d. degree murder.

6. I understand that I may, if I so choose, plead "not guilty" to any charge against me, and that if I do plead "not guilty" the Constitution guarantees me (a) the right to a speedy and public trial by jury; (b) the process of the Court to compel the production of any evidence and attendance of witnesses in my behalf; (c) the right to have the assistance of a lawyer at all stages of the proceedings; (d) the right against self-incrimination; and (e) the right to be confronted by my accuser.

7. I understand that by entering an "Alford plea", which is a form of a guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), I waive my right to an appeal and, although I am not conceding factual guilt, I am admitting the Commonwealth has sufficient evidence to convict me, and that it is in my best interest to enter this plea. The only remaining issue to be decided by the Court is punishment.

8. I understand that the Commonwealth's Attorney has agreed to recommend to the Court the following specific punishment as the appropriate disposition in this case, as follows:

A. Although the circumstantial evidence combined with Black's actions gives rise to probable cause to believe that Black lost his temper after Tyreek's potty accident in his vehicle on 9/29/04 and that Black then in an attempt to discipline Tyreek hit him so hard that he unintentionally, fatally injured the child. Further, given the moved first aid kit and the missing moving blanket, plus the unaccounted for 2 hours Black was missing that day, further gives some support to the initial belief that Black, after fatally injuring Tyreek, then panicked and hid the child's body in some remote location.

However, after a closer review of all of the evidence, including the very few small spots of Tyreek's blood on Black's clothing, the fact that that no forensic evidence consistent with Black injuring Tyreek or transporting his body was recovered from Black's vehicles, and that the massive search for Tyreek could only be 60% sure of finding his body, it must also be conceded that the circumstantial evidence also supports Black's contention that he simply forgot Tyreek, while under the influence of drugs, in effect abandoning him at the edge of a remote and dense forest. Black's explanation that Tyreek may have pricked his finger or the possibility that Tyreek had a bloody nose could also account for the small specks and smears of Tyreek's blood on Black's clothes. The circumstantial evidence also supports the possibility that Tyreek, after being abandoned, simply became lost in the woods and died of exposure in the dense underbrush where his body remains unfound.

Thus, the Commonwealth must concede that it likely cannot prove beyond a reasonable doubt that Black intentionally and fatally abused Tyreek Davis on 9/29/04. Further, given that felony child neglect is not a predicate felony in Virginia for felony murder (Barrett v. Commonwealth, 32 Va. App. 693 (2000)), the Commonwealth moves to amend the felony murder indictment to involuntary manslaughter in violation of Code section 18.2- 36, (a class 5 felony punishable

from 1-10 years imprisonment or up to 12 months in jail &/or a fine of up to \$2500).

The Commonwealth also moves to amend the felony child abuse indictment under 18.2-371.1(A) to felony child neglect under 18.2-371.1(B), a class 6 felony (punishable from 1-5 years in prison or up to 12 months in jail &/or a fine of up to \$2500).

B. Upon Black's guilty pleas to the amended indictments and considering Black's prior criminal record, the likelihood that Black's 3 year suspended Ohio felony assault sentence will be revoked as a result of this conviction, and Virginia's discretionary sentencing guidelines, the Commonwealth agrees to recommend a sentence of **10 years to serve for involuntary manslaughter**.

(This active 10-year sentence plus the 3-year Ohio sentence will likely incarcerate Black until virtually age 60, which is the age for geriatric parole in Virginia. Thus, any effort to seek a longer active sentence would likely amount to mere surplusage. See Virginia Code section 53.1-40.01)

For the **felony child neglect**, the Commonwealth agrees to recommend a sentence of **5 years, all to be suspended** conditioned upon 5 years good behavior commencing upon his release from confinement and indefinite supervised probation also upon release from confinement.

As a condition of the defendant's sentence, the defendant shall forthwith have a biological sample taken for DNA analysis, pursuant to Virginia Code Section 19.2-310.2, et. seq., and shall cooperate fully in such procedure, under the direction and supervision of his or her probation officer and/or the police; and

It is further understood that CBP, EIP, Work Release, or any other form of alternative incarceration will not be sentencing options in this case.

It is further understood and agreed that the defendant, as a condition of this suspended sentence and plea agreement, waives his/her Fourth Amendment rights (as well as any comparable rights which may exist under the Va. Constitution) against unreasonable searches and seizures at any time and by any law enforcement officer during the period of 5 years.

9. I understand that the Court may or may not follow the Commonwealth's Attorney's recommendation and may accept or reject this plea agreement. I understand that if the Court rejects this agreement, I will be permitted to withdraw my "Alford plea" if I so desire, and if I do not withdraw my

"Alford plea" neither side is bound by this agreement and the Court may impose any sentence within the limits set forth in Paragraph 4, which disposition may be less favorable to me than is contained in this agreement.

10. I declare no officer or employee of the State or County or Commonwealth's Attorney's office, or anyone else, has made any promise to me except as contained in this agreement.

11. After having discussed the matter with my attorney, I do freely and voluntarily enter an "Alford plea" to the offenses of **involuntary manslaughter and felony child neglect** and waive my right to a trial by jury and request the Court to hear all matters of law and fact.

Signed by me in the presence of my attorney on this _____ day of January, 2006.

By his signature below, the defendant acknowledges that he is **waiving his Fourth Amendment right** against unreasonable searches and seizures during the period specified hereinabove.

Herman Lee Black, Defendant

CERTIFICATE OF DEFENDANT'S COUNSEL

The undersigned attorney for the above-named defendant, after having made a thorough investigation of the facts relating to this case, do certify that I have explained to the defendant the elements of the charges in this case; and that the defendant's plea of guilty is voluntarily and understandingly made.

Allen F. Bareford, Public Defender
Counsel for the defendant

CERTIFICATE OF COMMONWEALTH'S ATTORNEY

The above accords with my understanding of the facts in this case, and I further certify that, when applicable upon the written request of the victim, I have consulted with such victim(s) and I have notified him/her of the right to be present at this hearing (unless an exception is marked below), pursuant to Section 19.2-11.01 of the Code of Virginia.

Exceptions:

1. Victim unavailable due to incarceration: _____
2. Victim unavailable due to hospitalization: _____
3. Victim unavailable due to failure to appear when subpoenaed: _____
4. Victim unavailable due to change of address without notice: _____
5. Victim unavailable due to other reason as set forth here: _____

COMMONWEALTH OF VIRGINIA

By _____
William F. Neely, Commonwealth's Attorney

The Court, being of the opinion that the plea of guilty and waiver of jury trial are voluntarily made, and that the defendant understands the nature of the charges and the consequences of said plea of guilty, doth accept the same and concur therewith.

Filed and made a part of record this _____ day of January, 2006.

Ann Hunter Simpson, Judge