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IN THE SUPERIOR COURT OF WALKER COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,)	
)	
vs.)	CASE #'s
)	03-CR-20884; 03-CR-00885;
TOMMY RAY-BRENT MARSH,)	03-CR-20886; & 03-CR-20887
Defendant)	

EXTRAORDINARY MOTION FOR DISCOVERY FROM THE STATE

NOW COMES the Defendant, through counsel, and hereby makes this extraordinary motion for discovery of any and all discoverable material in the possession of the District Attorney of the Lookout Mountain Judicial Circuit; and further moves that said material be copied in its entirety and submitted to counsel for the Defendant, at the expense of the State, INSTANTER; and said motion is in addition to and in support of previous motions for discovery; and in support of this motion the Defendant shows as follows:

1.

Defendant was arraigned of the above-numbered indictments on Tuesday, September 23, 2003. During said arraignment, the undersigned counsel for the Defendant filed in writing notice under O.C.G.A. § 17-16-1, et seq., pursuant to O.C.G.A. § 17-16-2(a), that the Defendant had elected to "opt in" to Georgia's mutual discovery act. A copy of said notice was hand delivered to the District Attorney in the courtroom. Counsel for Defendant also read into the record the fact that Defendant had made such election, and requested of the Court special consideration to get immediate copies and/or full-time access to the discoverable material in the possession of the State. At the same

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Lisa Madam
Clerk

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hearing, the defense filed and gave notice of the Defendant's indigent status. A copy of those pleadings was also served upon the prosecutor in open court.

2.

In response, the District Attorney suggested to the Court that the undersigned counsel had already received the State discovery through defense counsel's involvement in the hundreds of civil actions pending against the Defendant and other clients. Counsel for Defendant shows he has received *some* material from the investigation through his activity in the civil cases, but this does not relieve the State of its responsibility to ensure full disclosure of discoverable material to the defense. Counsel states in his place that obtaining discovery through the civil litigation has been a frustrating and often incomplete process. Furthermore, counsel for the Defendant shows that such material was received under a federal court order of confidentiality, which was requested by the State Attorney General on behalf of the Georgia Bureau of Investigation, the chief investigating authority in this criminal case. As such, counsel cannot show these materials to any potential witnesses.

3.

Ten days have expired since the said arraignment and the State has offered neither the discovery nor access to it. The deadline for the filing of motions as a matter of right has now passed, with Defendant unable to prepare additional motions in response to a first review of the State discovery. Defendant has pending motions for additional time and for the right to file additional motions.

This case involves an unprecedented amount of State discovery, including but not limited to the documentation of hundreds of alleged "identifications" by certain state

witnesses. Review of this material simply cannot be limited to specific hours of the day, at the whim of the prosecutor. Counsel for the Defendant needs unlimited and complete access to said material, in order to prepare a defense. Defendant cannot afford to copy any of the material.

4.

Counsel for the Defendant has been somewhat involved in the civil litigation, but has been unable to attend all discovery events. More often than not discovery has been scheduled in simultaneous "tracks" in which multiple discovery events are held simultaneously in different places. Counsel has received some computer discs that were purportedly provided by the Georgia Bureau of Investigation, but said method of receipt of material, through a contracted third party, has been fraught with problems of disc recordation and complete distribution to the hundreds of parties subject to the federal order of confidentiality.

The discovery in this case will include *tens of thousands* of notes, documents, photographs, hours of videotape and possibly other media that is critical to the purportedly successful "identifications" of over two hundred dead bodies by the Georgia Bureau of Investigation, DMORT and/or other agencies or individuals. The proper identification of the dead bodies is critical to the indictment counts which specifically allege and infer a proper and accurate identification of certain dead bodies (effectively all counts of the four indictments against the Defendant).

Furthermore, and most importantly, there have been noted *misidentifications* by the authorities in charge of the investigation, resulting in confusion and the wrong bodies being sent to the wrong families. Additionally, several other identifications have already

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been brought into question. The identification issues are merely one area of discovery which counsel would need to explore. There are a vast number of other areas, such as Defendant's alleged statements and other discoverable materials, that counsel for Defendant has still had no access to.

It is therefore *critical* to the notion of fair trial and effective assistance of counsel that the Defendant has full access to the entire State discovery, in a manner which is meaningful in light of the volume of material for counsel to review.

5.

Under the Sixth Amendment to the United States Constitution, a defendant in a criminal case has a right to a lawyer. This right is meaningless unless that lawyer is effective in performing the duties expected of a lawyer. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

6.

Inherent in the adversarial process is the assumption that counsel on both sides have conducted an adequate investigation into the facts of the case. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Rogers v. Zant, 13 F.3d 384, 386 (11th Cir., 1994). Where counsel fails to make a reasonable investigation and this failure is not a result of a tactical choice, counsel's performance falls below the level at which reasonable attorneys have a duty to perform and is ineffective. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991).

7.

Depending on the nature of the information which would have been discovered had a proper investigation been conducted, defense counsel's ineffectiveness may create reversible error. See, i.e., Blanco v. Singletary, supra, where defense counsel's failure to investigate and uncover favorable mitigating evidence required reversal of sentence; accord (on similar facts), Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Smith v. Dugger, 911 F.2d 494 (11th Cir. 1990) (defense counsel's failure to investigate circumstances of confession required reversal of murder conviction).

8.

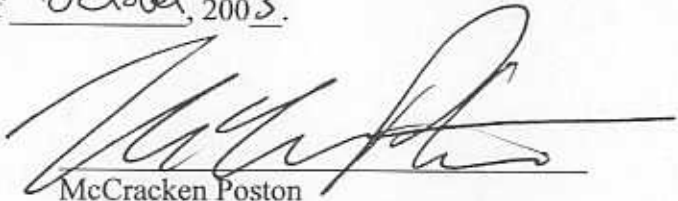
In the present case, the denial of full and complete copies of the State discovery or denial of full-time access (24 hour / 7 days per week, or in a fashion meaningful in light of the volume of material to review) to the State discovery will deny the defendant his rights to effective counsel, as well as his rights to due process, as guaranteed by the Amendments V, VI, VIII, and XIV of the United States Constitution and Article I, Section I, Paragraphs I, XI, and XIV of the Georgia Constitution.

WHEREFORE, DEFENDANT PRAYS:

- (a) For a complete and accurate copy of the entire State discovery in the above cases.
- (b) For a judicial declaration of the indigency of the Defendant, so that copies of said State discovery may be made for the Defendant at no expense to the Defendant.
- (c) For such other relief as the Court deems just.

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Respectfully submitted, this 3rd day of October, 2003.



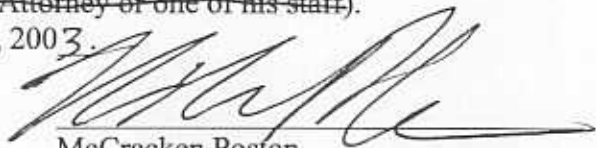
McCracken Poston
Attorney for Tommy Ray-Brent Marsh
GB 585606

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Ringgold, Georgia 30736
(706) 965-8300

CERTIFICATE OF SERVICE

Now comes McCracken Poston, counsel for Defendant, and hereby certifies that a true and accurate copy of the foregoing pleading has been served upon the District Attorney (by posting said copy in the U.S. Mail with sufficient postage attached thereto)(~~by hand delivery to the District Attorney or one of his staff~~).

This 3rd day of Oct, 2003.



McCracken Poston