

IN THE SUPERIOR COURT OF WALKER COUNTY  
STATE OF GEORGIA

FILED IN OFFICE

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STATE OF GEORGIA, )  
)  
vs. )  
)  
TOMMY RAY-BRENT MARSH, )  
Defendant )

SEP 23 2003

CASE #'s  
03-CR-20884; 03-CR-~~00885~~<sup>00885</sup>;  
03-CR-20886; & 03-CR-20887

**MOTION FOR LEAVE TO PROCEED ex parte  
IN CAMERA, AND ON A SEALED RECORD WITH REGARD TO  
APPLICATIONS FOR EXPERTS**

COMES NOW the Defendant, and hereby moves for leave to proceed ex parte, in camera and on a sealed record with regard to any applications for expert and investigative assistance which may be necessary for him to adequately defend the charges against him. This motion is made pursuant to the decision of the Georgia Supreme Court in Brooks v. State, 259 Ga. 562, 385 S.E.2d 81 (1989); the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Section I, Paragraphs 1, 2, 12, 14, 17, and 24 of the Georgia Constitution; Article 6, Section 1, Paragraph 5 of the Georgia Constitution; O.C.G.A. Sections 17-12-31, 17-12-44, 24-9-20, and 24-9-21; and other applicable law.

In support of his motion, the accused shows the following:

1.

The accused has been indicted and charged with a total of seven hundred and eighty-seven felony counts contained in the above numbered four indictments, to wit: #03CR20884 "Burial Service Fraud" (122 counts); #03CR20885 "False Statement" (47 counts); #03CR20886 "Abuse of a Dead Body" (179 counts); and #03CR20887 "Theft by Taking" (437 counts), "Criminal Attempt - Theft by Taking" (2 counts).

Leave to Proceed Ex Parte, In Camera, Sealed Record

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2.

The defendant is indigent. He does not have the money to obtain the expert assistance necessary for his defense. His family hired counsel for the Defendant but any and all available funds for other needs of the defense, and much of those funds have been diverted and exhausted in preliminary matters defending this action, actions concerning the arrests of Defendant's family, and in defending over two hundred civil lawsuits. The Defendant has contributed the entirety of his assets toward criminal and civil case legal expenses, and today stands totally indigent.

3.

Where a sufficient showing of need is made, a defendant is entitled to expert assistance at the expense of the county so that he may have "a fair opportunity to present his defense" and "the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." Brooks v. State, 385 S.E.2d at 83-84, quoting Ake v. Oklahoma, 470 U.S. 68, 76 (1985). See also, Thornton v. State, 255 Ga. 434, 339 S.E.2d 240 (1986). This right is not limited to mental health experts. In Thornton, for example, the Georgia Supreme Court held that the defendant was entitled to funds for appointment of a forensic dental expert.

4.

In making a showing of need for assistance, the defendant of necessity may have to reveal to the Court his theory of defense, attorney-client confidences, work-product material and other information. In Brooks, the Georgia Supreme Court found that in making a showing of need for funds the "defendant could be placed in a position of revealing his theory of the case." and, therefore, "has a legitimate interest in making that showing ex parte." 385 S.E.2d at 84.

5.

A solvent defendant would be able to hire experts without disclosing any of this information

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to his adversary, the state. To require an indigent defendant to disclose his defense to the state at an earlier time than a solvent defendant and to disclose attorney-client confidences and work-product material at any time would violate equal protection, due process, and the right to counsel.

6.

The defendant has no voice in the selection of expert witnesses by the State or the law enforcement officials who assist the prosecution in preparing the case against him. To allow the prosecution to have a voice in preparation of the defendant's case would violate principles of fundamental fairness.

7.

Therefore, the defendant is entitled to make any application for funds to this Court ex parte in order to protect his rights to counsel, to present a defense, to due process, and to equal protection, and his privilege against self-incrimination guaranteed by the United States and Georgia Constitutions.

8.

In order to protect these rights, the Georgia Supreme Court held in Brooks that an indigent defendant is entitled to present applications for funds ex parte. Ex parte means outside the presence of the other party. Brooks, 385 S.E.2d at 83, citing United States v. Meriwether, 486 F.2d 498 (5th Cir. 1973), cert. denied, 417 U.S. 948 (1974). The Georgia Supreme Court held that such proceeding "shall be sealed in the same manner as are those items examined in camera." Brooks, 385 S.E.2d at 84.

9.

In order to protect the confidentiality of these communications to the court, the motions for

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assistance should be file stamped by the clerk and then placed in sealed envelopes clearly marked "SEALED PLEADING – ACCESS BY COURT ORDER ONLY;" any hearings on the applications should be conducted in camera, excluding the District Attorney, the news media and the public; and transcripts and orders resulting from the proceedings should be placed under seal until such time as the Court orders that they be made available.

10.

The Court also recognized in Brooks, the interest of the State in determining whether the defendant is actually indigent -- that is whether he is without funds to pay the costs of his defense -- and held that the State may always be represented when the defendant is examined as to his indigence.

WHEREFORE, the defendant moves that this Court enter an order granting his right to proceed ex parte, in camera, on a sealed record with regard to applications for funds and establishing procedures which protect him against disclosures of any information revealed in making such applications.

A proposed order accompanies this Motion.

Respectfully submitted, this 23<sup>rd</sup> day of September, 2003.



McCracken Poston  
Attorney for Tommy Ray-Brent Marsh  
GB 585606

  
Ron Cordova

P. O. Box 1130  
Ringgold, Georgia 30736  
(706) 965-8300

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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 23 day of Sept., 2003



McCracken Poston