

5) any and all firearms, bullets, bullet fragments, cartridges, cartridge casings or other ballistic evidence in the possession of the State.

6) any and all autopsy photographs, videotapes, coroner's reports, medical examiner investigator reports, and any other reports containing information about the status of the bodies at the time they were found, the way in which the bodies were handled, transported, stored, and processed by law enforcement.

7) a list of any and all physical evidence in the possession of any state or private agency in connection with this case, as well as any and all documentation regarding the collection, transport, storage and processing of such evidence. This documentation should include field notes and lab notes made during the course of the collection, collection, transport, storage and processing of such evidence, as well as any and all chain of custody documentation.

1. In 1975, the Fifth Circuit held that, "Fundamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of critical evidence whose nature is subject to varying expert opinion." Barnard v. Henderson, 514 F. 2d 744 (1975).¹ This standard was formally adopted under state law in Georgia in Sabel v. State, 248 Ga. 10, 19 (1981) *overruled on other grounds by Rower v. State*, 264 Ga, 323 (1994). Each type of evidence outlined in this motion is subject to inspection and examination pursuant to Mr. Jones's due process rights. "[T]he question is

¹ In the appellate context, courts have undertaken to evaluate whether requested evidence was "critical." This is an appellate standard, not one which can be use to determine whether evidence should be disclosed in advance of trial. The Georgia Supreme Court recognized the impossibility of evaluating the criticality of evidence pre-trial in Brooks v. State, 259 Ga. 562, 566 (1989), writing, "In Sabel this court found that where evidence of guilt is overwhelming, scientific evidence is not critical and not subject to independent examination. Sabel, *supra* deals with the defendant's right to complain on appeal.... Since the weight of the evidence of defendant's guilt cannot be known before the trial, Sabel is not applicable to the present situation." It would be grossly premature for the Court to pass on the strength of the State's guilt phase case without having taken evidence from either side in this matter. Moreover, because this is a death penalty case, any and all evidence is critical insofar as it may bear on the jury's consideration of aggravation, mitigation, and appropriate punishment. See Bright v. State 265 Ga. 265 (1995) ("the determination of whether expert assistance is required at the penalty phase requires consideration of a different set of factors than the determination of whether expert assistance is necessary at the guilt phase.") See also White vs. Maggio, 556 F.2d 1352, 1358-1359, making clear that whether particular evidence is critical must be examined in light of all the facts of the case and should not be assessed pretrial.

not one of discovery, but rather the defendant's right to the means necessary to conduct his defense." Barnard at 746.

2. *Any physical evidence* seized in this case could potentially be used to establish a physical link between Mr. Jones and the crimes he is alleged to have committed. Hence, such evidence is subject to disclosure, inspection and testing. The evidence subject to disclosure, examination, and testing clearly includes any physical items seized from the scene where the bodies were located, any items seized from the vehicle or location where Mr. Jones was arrested, and any items allegedly seized from Mr. Jones's person at the time of his arrest or in the hospital where he was taken after arrest. Such physical evidence is subject to varying expert opinions with respect to whether it can, in fact, be used to establish a physical link between Mr. Jones and the crimes with which he is charged.

3. The inability of physical evidence to establish a meaningful link between Mr. Jones and the crimes charged in this case would be critical to Mr. Jones's defense. Obviously, if physical evidence cannot tie Mr. Jones to the offenses charged, this lack of evidence could be used to establish reasonable doubt at the guilt phase. Even if such reasonable doubt cannot be established at the guilt phase, however, a lack of physical evidence could be used to establish residual doubt at sentencing. Residual doubt is a well recognized mitigating factor in Georgia. See Head v. Ferrell, 274 Ga. 399, 405 (2001) (mitigating evidence consists of "anything," including "residual doubt," that might persuade a jury to impose a sentence less than death).

4. There are numerous ways in which experts can evaluate physical evidence to determine if such evidence establishes a link between the alleged offender and the alleged

offenses. Each of these methodologies is subject to varying expert opinions. Georgia courts have held that virtually all physical evidence falls into the category of “subject to varying expert opinion.” See e.g., Sabel supra (paint chips); Thornton v. State, 255 Ga. 434 (1986) (dental impressions); McKinney v. State, 218 Ga. App. 633 (1995)(DNA bands); Sisson v. State, 181 Ga. App. 784 (1987) (results of a lie detector test); Pervis v. State, 181 Ga. App. 613 (1987)(physical evidence potentially indicating arson); Williams v. State, 251 Ga. 749 (1983) (cloth fibers). Autopsy and crime scene photos and videos are subject to varying expert opinion. Coroners, medical examiners, and crime scene experts routinely rely on photographic and videographic evidence to determine the manner of death of the alleged victims in homicide cases. Experts also routinely disagree about the import of particular details found in a photograph or videotape. A defendant is not required to show, in advance of his gaining access to evidence, that his expert will arrive at a conclusion which is contrary to the state’s theory. See Barnard at 746 (“due process cannot be sidestepped” by collapsing the distinction between exculpatory evidence the defendant is entitled to under Brady and evidence the defendant is entitled to test because it is subject to varying expert opinion). All the defendant must show is that the type of evidence to which he seeks access is a type about which experts can have varying opinions. Photographs and videos of the crime scene are clearly a subgroup of this larger category of evidence. See Coleman v. State, 257 Ga. 313, 314 (1987) (crime scene expert allowed to offer opinion as to how crime occurred based on videotape of crime scene). Ballistics and fingerprints fall into this category as well.²

5. Any photographic or videographic evidence of the location where the bodies were

² Defendant’s previously filed Motions #124 and #125 include numerous examples of cases in which experts have disagreed about fingerprints and ballistics evidence. These motions are incorporated herein by reference.

found on Pack Road and from subsequent autopsies could be used by the State to try to establish both guilt and statutory aggravation. The photographic and videographic evidence from the scene at Pack Road will likely be used by the state to attempt establish Mr. Jones's *mens rea*, and to establish the manner and time of death of the victims. Both of these are critical aspects of the State's guilt phase case, and the meaning of this kind of photographic and videographic evidence is subject to varying expert opinions.

6. Photographic and videographic evidence can be used at the sentencing phase. The State has alleged that the murder of Jeri Harley Jones involved "depravity of mind" pursuant to O.C.G.A. 17-10-30 (b)(7). The State has also alleged that the murder of Georgia Bradley was "outrageously and wantonly vile, horrible and inhuman in that it involved torture to said named victim" pursuant to O.C.G.A. 17-10-30(b)(7). The official autopsy conclusions with respect to both of these victims are that they died as a result of strangulation. Of course, these autopsy reports are subject to challenge based on varying expert opinions with respect to the medical examiner's conclusions.

7. Even if the medical examiner's conclusions with regard to manner of death are correct, Georgia courts have repeatedly held that a finding of strangulation alone does not, as a matter of law, establish torture of the victim or depravity of mind of the defendant. Baxter v. State, 254 Ga. 538 (1985). It is also true that post-mortem injuries to the body do not constitute torture. Mulligan v. State, 245 Ga. 266 (1980). The victim's apprehension of death does not, as a matter of law, establish aggravation under (b)(7). Phillips v. State, 250 Ga. 336 (1982). Accordingly, in order to find a (b)(7) aggravating circumstance beyond a reasonable doubt in this case, jurors will have to make findings and conclusions about the manner in which the deaths occurred--over what period of time

the victims were killed; whether injuries to the bodies were inflicted *ante* or *post mortem*, what caused the deaths, etc... Autopsy and crime scene photos and videos will be critical evidence regarding the manner of death of these two victims, in particular. Crimes scene reconstruction experts and medical examiners frequently disagree about whether and how particular injuries were inflicted.

8. In addition to statutory aggravation, the manner of death of all the victims will likely be used by the State in support of its theory of non-statutory aggravation. Conversely, the defense may seek to use these photos and videos as evidence of a non-painful death, or a death which did not involve torture, in mitigation and as part of the defense's broader argument that these killings were not the "worst of the worst." Zant v. Stephens, 462 U.S. 862 (1983).

9. Mr. Jones is entitled to a list of all the physical evidence gathered in this case, as well as to documentation regarding where the evidence was collected and how it was transported, processed, and stored. It is evident that Mr. Jones has a constitutional right to have an expert examine and test any evidence related to this case which is subject to varying expert opinion. Certainly, Mr. Jones's ability to exercise this constitutional right cannot be made contingent on his willingness to give up the constitutional rights he abandons if he opts in to Georgia's reciprocal discovery scheme. Mr. Jones cannot be expected to know what physical evidence is in the possession of the State. The information which has henceforth been provided to the defense does not include a comprehensive list of such information. Nor does the information heretofore provided contain any indication of the locations from which evidence was collected, by whom it was collected, how it was collected, transported, stored, tested, or how it was processed.

Mr. Jones cannot be expected to hypothesize about these things. In order to arrive at meaningful conclusions about the import of the evidence collected in this case, defense experts must have access to information about where the evidence came from and how it was handled after it was collected.

10. WHEREFORE, Mr. Jones respectfully requests that this Court order the State to make the evidence outlined herein available to the defense for inspection and examination.

Respectfully Submitted,

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