

requests of any kind in a pre-trial death penalty case may compromise a defendant's right and ability to receive a fair trial at the hands of an impartial jury in his community. In light of the language designated in "Paragraph two (2)," of the Gwinnett County Superior Court's order undersigned counsel does not read the Court's February 13 order as requiring the Council to disclose any information relating to expert funding requests. Out of an abundance of caution and in the event that this interpretation is in error, however, Jerry W. Jones hereby notes his further objection to disclosure of any such information to any party or the Gwinnett County Superior Court.

Under established Georgia law, the right of parties in criminal actions to obtain the names of experts retained by the other side is limited to experts who will testify at trial. Any order circumventing this established rule would accordingly intrude impermissibly on Jerry W. Jones's Sixth Amendment rights and would overrun the orderly administration of justice in proceedings in other Superior Courts across this state. Senior Superior Court Judge Hilton Fuller, who is presiding over the trial of Brian Nichols in Fulton County, issued an order prohibiting Mr. Mears from disclosing funding records relating to that case on February 26th, 2007 in order to protect Mr. Nichols' rights. (Exhibit B)

FACTUAL AND PROCEDURAL BACKGROUND

On January 25, 2007, Mr. Walt Britt, counsel for Mr. Sanders, served subpoenas upon Michael Mears, the Council's Director, Sarah Haskin, the Council's Deputy Director of Administration, Christopher Adams, Director of the Office of the Georgia Capital Defender; and Marques Smith, the Council's Budget Manager. All four subpoenas sought the exact same documents to be produced at a hearing before the Court on February 2, 2007. That hearing was

continued until March 5th, 2007. On March 5th, 2007, the hearing was continued indefinitely, however Mr. Britt's subpoenas remain valid and enforceable. The Gwinnett County Superior Court issued an order stating that the Council must turn over

Any and all records and documents relating to the expenditure of funds by the Georgia Public Defender Standards Council and/or the Office of the Georgia Capital Defender to any outside counsel and/or contract counsel defending any indigent person accused of a capital felony for which the death penalty was or is being sought from January 1, 2005 to the present.

While the Gwinnett County Superior Court stated that "[t]he Council may redact information from those records that it believes to be covered by the attorney client privilege and work product doctrine" it specifically excluded from those doctrines "the number of hours worked, rate of pay, total fees paid, expert's name, expert's fees and rate of pay."

Mr. Jones is being prosecuted for capital murder in this court in case no. 16471. Mr. Jones has pled guilty to the charges against him and is awaiting a sentencing trial. At no time has Mr. Jones opted in to the reciprocal discovery provisions of O.C.G.A. 16-16-1 et.seq. Mr. Jones's case is currently before the Georgia Supreme Court on interim review case number S07R0573.

ARGUMENT AND CITATION OF AUTHORITY

The Gwinnett County Superior Court has ordered disclosure of information that could compromise the trials of dozens of defendants throughout this state, including Jerry W. Jones. The Gwinnett County Superior Court's unilateral action in the above-captioned matter deprives not only parties of their say in court but also ignores the interest of other judges who are presiding over the cases in question and are familiar with the issues. The release of funding information can poison a jury pool against criminal defendants, especially in higher profile

homicide cases in smaller counties. Jerry W. Jones submits that release and dissemination of funding information in his case could prejudice potential jurors against him by virtue of resentment of the expenditure of specific sums of public money on his behalf. This type of prejudice may rise to the level where Jerry W. Jones is forced to move his judge for a change of venue and hence occasion considerable additional expenses to be borne by the citizens of Gordon County.

Moreover, certain documents that could be deemed to fall within the Court's order contain privileged information concerning expert witnesses engaged in every indigent death penalty case since January 1, 2005 involving appointed or contract counsel. Were the Council to produce these documents, it would violate Jerry W. Jones's right to work freely with consulting experts in his case.

First, an attorney's strategic decisions regarding funding (particularly expert funding) constitutes protected attorney work product. See McKinnon v. Smock, 264 Ga. 375, 376 & n.2, 445 S.E.2d 526 (1994). Parties to a criminal action have the right to obtain names of experts consulted by the opposing party *only if* the party intends to use the expert at trial, and only if the defendant has opted in to the reciprocal discovery statute. See O.C.G.A. § 17-16-4(b)(2)(emphasis added). It is error for a trial court to require a party to disclose the names of experts who have been consulted, but are not going to testify at trial. Wellons v. State, 266 Ga. 77, 81, 463 S.E.2d 868 (1995) (finding that trial court's order for defendant to disclose "the identities and reports of all experts consulted by the defense, whether or not those experts would be called to testify," was error); Rower v. State, 264 Ga. 323, 325, 443 S.E.2d 839 (1994) (holding that the prosecution was entitled to discover only those scientific reports that the defense intended to use at trial).

Moreover, disclosure of this information would violate the Fifth and Sixth Amendment rights of Jerry W. Jones, and violate his attorney client privilege. See Brooks v. State, 259 Ga. 562, 563-64, 385 S.E.2d 81 (1989) (affirming trial court's determination that requiring indigent defendant to reveal his theory of the case would violate defendant's Fifth and Sixth Amendment rights); Cf. Stargel v. State, 210 Ga. App. 619, 621, 436 S.E.2d 786 (1993) (suggesting that, unless waived, Fifth Amendment protections prohibit a court from requiring a defendant to disclose the name of consultation-only, non-testifying experts). Defense counsel's decision to hire an expert on behalf of his client arises from interactions with his client that are covered by the attorney client privilege. Forcing the Council to reveal the names of consulting experts is akin to revealing a virtual roadmap of conversations protected by the privilege. Furthermore, the disclosure of the names of experts, along with their fees and number of hours spent working on the case to the prosecution is tantamount to the defense being ordered to produce defense theory memoranda. Such a disclosure is in clear violation of Brooks.

Defense counsel has an independent obligation to fully investigate his client's case, including, in a capital case, his life history and background in preparation for the sentencing phase. Williams v. Taylor, 529 U.S. 362 (2000)(counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision). The defense's investigation is afforded the same secrecy protections as a grand jury proceeding. See United States v. Timothy McVeigh, 918 F.Supp 1452 (W.D. Okla. 1996)([a]ll of the reasons supporting grand jury secrecy are equally applicable to the pre-trial investigation and preparation of the defense of capital charges). Just as strategic decisions made by police investigators while investigating an alleged crime are not available to the defense and are kept secret, the names,

rates, etc. of consulting experts are privileged work product and should not be subject to review by any other party.

An additional reason for preventing disclosure of this information is to protect defendants represented by appointed counsel from "vilification and accusations of improper motivations" in the conduct of their responsibilities in representing indigent capital defendants. McVeigh, at 1465. Mr. Jones has a right to a defense unencumbered by public debate over the expense of his defense *during his trial*. There is no doubt that "the cost of the legal defense paid for from public funds will become public information at some time." Id. However, revelation of these expenditures prior to the conclusion of trial is highly prejudicial to Jerry W. Jones and would constitute reversible error in his case.

The threat posed by disclosure of this information is grave. If the defense has retained an expert that is unhelpful to the defense or confirms the state's findings, the defense is under no obligation to disclose the witness to the prosecution. If, however, this information is disclosed as a result of the Court's order, the adverse party could then seek to call the defense expert as its witness at trial. The resulting prejudice to Jerry W. Jones would be potentially catastrophic and could compromise the result of any ensuing trial.

Mr. Jones has not opted in to the reciprocal discovery provisions of O.C.G.A. 17-16-1. He is under no obligation to turn over any information covered by the discovery statute to the prosecution. The State will remain unaware of the identities of Mr. Jones's witnesses unless and until such witnesses are called to the witness stand. Were the prosecution in Mr. Jones's case made privy to the information sought in Mr. Sanders' subpoena and The Gwinnett County Superior Court's order, Mr. Jones' decision to opt out would be effectively nullified. This result would be highly prejudicial to Mr. Jones and constitute a clear violation of his due process rights.

Moreover, the Gwinnett County Superior Court's order will have a "chilling effect" on individual defendants' decisions to opt-in, effectively nullifying the rights granted to them by the Georgia Legislature under the discovery statute. Under Childress v. State, 266 Ga. 425 (1996) the Georgia Supreme Court reversed the conviction because the trial court ordered the defense to "have all expert reports reduced to writing and made available to the state whether or not he intended to call the experts and trial and whether or not their opinions were favorable to the defense." The Court held that the trial court's order "chilled" the defendant's use of experts, requiring the reversal. Id. While The Gwinnett County Superior Court did not require the Council to reduce every expert opinion to writing, the net effect is the same. The mere knowledge of the experts with which the defense consults prejudices Jerry W. Jones to an extent that violates the spirit of Childress.

Finally, The Gwinnett County Superior Court's order violates Jerry W. Jones's due process and equal protection rights. Criminal defendants with retained counsel are not subject to the same public dissemination of their defense strategy or funding because of their ability to retain private counsel. The United States Supreme Court has consistently held that indigent defendants must be able to "participate meaningfully" in his trial. See Ake v. Oklahoma, 470 U.S. 68, 76 (1985) ("[J]ustice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."). The Gwinnett County Superior Court's order severely prejudices the rights of Jerry W. Jones, and all other indigent defendants while leaving those of adequate means unscathed. Such a violation of Jerry W. Jones's rights under the equal protection and due process clauses of the United States and Georgia Constitutions cannot be permitted by this court.

WHEREFORE, for the foregoing reasons and any other that this Court sees fit, Jerry W. Jones respectfully requests that this Court:

- 1) Order Michael Mears refrain from disclosing to Judge Ray or to any other persons outside the offices of the Council, any and all documents and information regarding defense funding matters in the case of State of Georgia v. Jerry William Jones, Indictment No. 16471

Respectfully submitted this 2nd day of March, 2007.



Joseph A. Romond State Bar No.159014
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(404) 739-5172

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Emergency Motion to Prohibit upon the persons listed below by hand or by United States mail:

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Buford, Georgia 30518

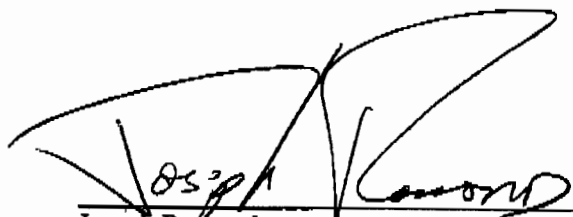
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Laura Murphree
Prosecuting Attorneys Council
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Atlanta, GA 30303

This 2nd day of March, 2007.



Joseph Romond
Office of the Georgia Capital Defender

IN THE SUPERIOR COURT OF GORDON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,)
)
)
v.)
)
JERRY WILLIAM JONES,)
)
)

Indictment No. 16471

ORDER

Upon consideration of Jerry Jones's *Emergency Motion to Prohibit Michael Mears, Director of the Georgia Public Defender Standards Council to Refrain From Disclosing to Judge Ray or to Any Other Persons Outside the Offices of the Council, Any and All Documents and Information Regarding Defense Funding Matters in the Case of State of Georgia v. Jerry William Jones*, the Court being otherwise sufficiently advised, and good grounds appearing therefore,

IT IS HEREBY ORDERED AND DECREED, that the motion is **GRANTED**..

SO ORDERED this ____ day of _____, 20 ____.

The Honorable G. Carey Nelson
Judge, Gordon County Superior Court
State of Georgia

Prepared by:
John Richard (Jack) Martin, State Bar No. 473325
E. Michelle Drake, State Bar No. 229202
Joseph Romond, State Bar No. 159014
Counsel for Jerry Jones

Feb. 15. 2007 2:56PM

EXHIBIT "A"

No. 1474 P. 2

C

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

STATE OF GEORGIA

INDICTMENT NO.:
04-B-04516-1

VS.

DONALD STEVE SANDERS,

Defendant.

CLERK SUPERIOR COURT
GWINNETT COUNTY, GA
07 FEB 13 PM 4:35
TOM LAWLER, CLERK

ORDER ON NON-PARTY MOTION TO QUASH SUBPOENA FOR THE PRODUCTION OF EVIDENCE, OR IN THE ALTERNATIVE, MOTION FOR CONTINUANCE

The above-styled case having come before the Court for hearing on Non-Party Motion to Quash Subpoenas on February 2, 2007, and after hearing argument of counsel, the Court finds as follows:

The Georgia Public Defender Standards Council has complied with Defendant Donald Sanders' subpoena and provided documents responsive to the subpoena, with the exception of documents/records contained in paragraph (2) of the Motion to Quash.

Paragraph two (2) of the Motion seeks the following documents:

"Any and all records and documents relating to the expenditure of funds by the Georgia Public Defender Standards Council and/or the Office of the Georgia Capital Defender to any outside counsel and/or contract counsel defending any indigent person accused of a capital felony for which the death penalty was or is being sought from January 1, 2006 through the present."

IT IS HEREBY ORDERED that the Georgia Public Defender Standards Council produce all records responsive to paragraph two (2) as set forth above to Defendant with the exception of records concerning the Brian Nichols case. The Council may redact information from those records that it believes to be covered by the attorney-

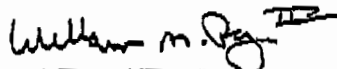
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No. 1474 P. 3

client privilege and work product doctrine; however, this information does not include the number of hours worked, rate of pay, total fees paid, expert's name, expert's fees and rate of pay. Additionally, the Council shall maintain a privilege log listing the information which was redacted from the documents and the reason for the redaction and shall provide a copy of same to Defendant and to the Court.

The Council shall produce all records responsive to paragraph (2) concerning Brian Nichols' case to the Court in un-redacted form.

SO ORDERED, this 15th day of February, 2007.



WILLIAM M. RAY, II, Judge
Gwinnett Superior Court

cc:
Walt Britt
Douglas Ramseur
Robert Remar
Cindy Wang

excludes from such characterization “the numbers of hours worked, rate of pay, total fees paid, expert’s name, expert’s fees and rate of pay.” The order also instructs the Council to maintain a privilege log listing redacted information and the reason for such redaction.

Separately, and importantly for this judge’s concern, Judge Ray’s order requires Mr. Mears to “produce all [such] records ... concerning Brian Nichols’ case to the Court in un-redacted form.”

In his February 21, 2007 letter to the court Mr. Mears noted prior directives of this court regarding disclosure of any information relating to this case. Mr. Mears noted that Judge Ray was informed of this court’s directive, but nevertheless ordered the Council to produce the Nichols documents.

As reflected in Mr. Mears’ February 21, 2007 letter, this court has on several occasions as early as July 2005 ordered Mr. Mears and/or the Council not to disclose information relating to defense funding issues and litigation surrounding such in this case. It is the view of this court that any such disclosure will likely produce violations of privileges and confidentiality restrictions that would impair Mr. Nichols’ right to a fair trial and to effective assistance of counsel as guaranteed under the Sixth and Fourteenth Amendments to the U.S. Constitution. This is of especial concern in the current posture of this case, where more than 1,000 Fulton residents have completed questionnaires and await *voir dire*.

For these reasons, and in response to Mr. Mears’ letter of February 21, 2007, this court hereby orders the Council and/or Mr. Mears to abide by this court’s orders and directives, and to refrain from disclosing to Judge Ray or to any other persons outside the offices of the Council, any and all

documents and information regarding defense funding matters in the case of *State of Georgia v. Brian Nichols*, Fulton County Case No. 05SC29988.

The court recognizes the difficult position a lawyer or anyone else occupies when faced with conflicting court orders of equal dignity. Perhaps Mr. Mears' dilemma will have to be resolved by a higher court.

SO ORDERED, this 26th day of February, 2007.

/S/ Hilton M. Fuller
SENIOR JUDGE HILTON M. FULLER
SUPERIOR COURT OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT
PRESIDING BY DESIGNATION

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