

titled "Motions 31(a)-31(d)" that the Defendant would have "10 days from the date of this Court's Order on these motions in which to elect to opt in."

2. On October 14, 2005, this Court issued an Order denying Defendant's Motions 31(a) and 31(b) and reserving ruling on 31(c).

3. Accordingly, it is the understanding of counsel that a decision regarding whether to opt in must be made by November 3, 2005 (ten days from the date of the Court's October 24 ruling on Defendant's Motions 31(b) and (c)).¹

4. Lead counsel for Mr. Jones, Jack Martin, began a federal trial in Atlanta and has been in trial continuously since October 17, 2005. That trial concluded on October 27, 2005. Mr. Martin is scheduled to begin a federal trial in Birmingham, Alabama on November 2, 2005. That trial is expected to last for at least three weeks.

5. Mr. Martin has been unable to make any assessment of the wisdom of opting in pursuant to the reciprocal discovery provisions in this case. In order to make this assessment, Mr. Martin will need to review documents received from the State in this case, documents generated and received during the course of the ongoing defense investigation, and legal pleadings and rulings in this matter. He will further need consult with Mr. Jones about this critical decision. Mr. Martin will also need to assess the potential strategic and practical consequences of this decision for Mr. Jones's case.

6. As of the date of this filing, Mr. Martin has not had an opportunity to review any of the aforementioned documents. Nor has he had an opportunity to meet with Mr. Jones to

¹ In its October 24, 2005 Order, the Court refers to the June 13, 2005 Order as granting the Defendant "10 days from the receipt of the Court's ruling on Defendant's Motion #31(a) to elect to either opt in or out of reciprocal discovery." The language of the June 13 Order clearly grants the Defendant ten days from the date of the Court's order on "these motions," referring to Defendant's Motions 31(a)-31(d), not just Defendant's Motion #31(a).

Because no ruling on Defendant's Motion 31(b) was issued until October 24, 2005, counsel for Mr. Jones interprets the Court's June 13, 2005 Order to allow Mr. Jones ten days from the issuance of the October 24, 2005 Order to decide whether to opt in.

consult with him about this crucial decision. Moreover, the defense investigation is incomplete.

7. The decision as to whether to opt in under the reciprocal discovery provisions is a critical one, requiring great thought and insight. Requiring Mr. Jones to make this decision without allowing counsel adequate time to thoroughly consider its potential implications would deprive Mr. Jones of his right to the effective assistance of counsel, as well as other rights guaranteed to him under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

8. The situation presented here is squarely analogous to that presented in the landmark case of Powell v Alabama, 287 U.S. 45 (1932). In Powell, the accused were given counsel "so close upon the trial as to amount to a denial of effective and substantial aid." The court noted that the duty to assign counsel is not "discharged by an assignment at such time or under such circumstances as to preclude the effective giving of aid in the preparation and trial of the case." Powell at 65. Here, as in Powell, the schedule imposed upon the litigation forecloses the attorney's ability to provide meaningful representation.

9. The position of counsel and Mr. Jones is also similar to the position of the defense in Brooks v. Tennessee, 406 U.S. 605 (1972). In Brooks, the court considered Tennessee's procedural rule which required that if the defendant were to testify he would be required to do so prior to the introduction of any other evidence by the defense. The court struck down the rule, holding that it violated the defendant's privilege against self-incrimination as well as due process in that it infringed the defendant's constitutional rights by depriving him of the guiding hand of counsel in deciding not only whether the defendant would testify but, if so, at what stage of the trial. In this case, counsel and the defendant were required to make a decision regarding a defendant's constitutional right without being given access to the necessary factual predicates to

making a meaningful decision.

10. Mr. Jones's position, like that of the accused in Powell and Brooks, is one of constitutional significance. Without having had adequate time or opportunity to undertake a full and meaningful investigation of the facts which will be relevant at both the guilt phase and a potential sentencing phase of this case, counsel cannot possibly provide meaningful advice regarding the strategic decision of whether to opt in to the reciprocal discovery provisions.

11. O.C.G.A. 17-16-1 *et seq.* require both the prosecution and the defense to produce numerous items which they would not be required to produce in the absence of a defense decision to "opt in" under the discovery statutes. The defense decision regarding whether to voluntarily participate in a discovery scheme which requires the production of otherwise privileged documents requires that counsel decide whether to waive a panoply of constitutional protections. Two rights that are clearly implicated are the right to remain free from unreasonable searches and seizures and the right not to be forced to incriminate oneself. In Boyd v. U.S., 1661 U.S. 616 (1886) the Court held that requiring the production of a citizen's papers to be used in evidence against him violated not only the Fifth Amendment right against self incrimination, but also the Fourth Amendment right to be free from unreasonable searches and seizures. Justices Scalia and Thomas recently recognized Boyd's landmark status in their opinion in U.S. v. Hubbell, 530 U.S. 27 (2000), noting Boyd's deep common law foundation.

12. O.C.G.A. 17-16-1 *et. seq.* also potentially requires the production of work product contained in an attorney's file, thereby implicating the sixth amendment right to the effective assistance of counsel and the due process right to present a defense. In Waldrip v. Head, 272 Ga. 572 (2000), the court noted that the attorney client privilege survives direct appeal and state post-conviction proceedings. Waldrip stands clearly for the proposition that a defendant may make a

limited waiver of the attorney-client privilege and that any such waiver is limited to nature of any claim or allegation necessitating waiver. Without some such waiver, however, requiring a defendant to produce otherwise privileged materials is contrary to the Fifth and Sixth Amendments. This is so with respect to the guilt phase of a case. U.S. v. Nobles, 422 U.S. 225 (1975) (compelled disclosure of defense investigator's report constitutional only after counsel elected to call defense investigator as a witness). It is equally so for the penalty phase of a capital case. Estelle v. Smith, 451 U.S. 454 (1981) (fruits of government's mental exam of defendant admissible at penalty phase if and only if there was a knowing and intelligent waiver of Fifth and Sixth Amendment rights). The discovery statutes require a limited waiver of this right, accordingly, this waiver must be made in the presence of counsel's guiding hand.

13. In addition to implicating Mr. Jones's Fourth and Fifth Amendment rights, at their core, the reciprocal discovery statutes lessen the State's burden of proving its case beyond a reasonable doubt at each phase of the proceeding. The discovery statutes make no distinction between materials that tend to inculcate the accused and those that tend to exculpate him. Accordingly, counsel could be in a position of having to produce documents for the State that actually support the State's theory, either as to guilt or as to punishment. While discoverable materials may not make it easier for the State to prove the accused's legal culpability, they may serve to tip the scales in favor of a death sentence as opposed to a sentence of life or life without parole, and *vice versa*. Accordingly, a decision to opt in runs a very real risk of placing counsel in the conflicted position of being required to produce evidence which has the effect of lessening the burden of the State to prove its case beyond a reasonable doubt. This places counsel in a position where she is torn between her legal duties under the reciprocal discovery act and her ethical duty to remain a zealous and faithful advocate on her client's behalf.

14. There is a serious and real danger that a defense decision to opt in may require that the defense engage in an act of production which, absent its voluntary nature, would otherwise be constitutionally prohibited. Refusal to produce documents required by the discovery provisions might lead to their eventual exclusion from evidence. Counsel's decision regarding whether to undertake to participate in reciprocal discovery requires that counsel weigh the benefits of disclosure by the State against the potential costs of disclosure by the defense. See Wiggins v. Smith, 539 U.S. 510 (2003) (failure to pursue and present mitigating evidence must be based on adequate investigation, strategic considerations and tactical choices).

15. In order to be valid, any waiver of a constitutional right must be knowing, intelligent and voluntary. See Johnson v. Zerbst, 304 U.S. 458 (1938); Miranda v. Arizona 384 U.S. 436 (1966); Schneekloth v. Bustamonte, 412 U.S. 218 (1973). Mr. Jones and his counsel cannot possibly engage in a knowing, intelligent, and voluntary decision to opt in to the provisions of the reciprocal discovery statute without a detailed understanding of what particular kinds of items they may ultimately be required to produce, and a working projection of the nature of the items that they would receive in exchange. Powell v. Alabama.

16. By requiring counsel to make a decision with such far-reaching constitutional implications at a time when lead counsel has not been able to review any documents pertaining to the case is clearly constitutionally problematic. Moreover, even if Mr. Martin had been able to review the case in its current, form, the defense investigation is still incomplete, making a fully informed decision impossible at this point.

17. By denying Mr. Jones a full opportunity to independently investigate the predicate facts upon which such a decision must rely, the current timing of the Court's discovery orders structurally denies Mr. Jones his right to the effective assistance of counsel. "Counsel cannot

responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case." Commentary to Guideline 10.7 of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Accord Powell v. Alabama.

18. Independent investigation is counsel's paramount duty in a capital case. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.7 (A). See also Williams v. Taylor, 529 U.S. 362 (2000) (counsel may not constitutionally make a strategic decision to forego investigation of potentially mitigating facts), Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) (at heart of effective representation is independent duty to investigate and prepare); see also McQueen v. Swenson, 498 F.2d 207, 217 (8th Cir. 1974) (attorney who does not seek out all facts relevant to client's case will not be prepared at trial). Where investigative and other services are necessary to the preparation and presentation of an adequate defense, the denial of access to those services may also deprive a defendant of the minimally effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments. Blake v. Kemp, 758 F.2d 523, 531 (11th Cir. 1985); Pedrero v. Wainwright, 590 F.2d 1383, 1396 (5th Cir. 1979); United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976); see also Mason v. Arizona, 504 F.2d 1345, 1352 (9th Cir. 1974) (failure to provide investigative assistance when necessary to defense constitutes ineffective performance).

19. The investigation required to be undertaken by counsel is extensive. It must include the client's "medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage)" ABA Guidelines, Commentary to Guideline 10.7 (A). Counsel must

investigate the client's "family and social history (including physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment, and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities)" ABA Guidelines, Commentary to Guideline 10.7 (A). Counsel must investigate the client's "educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities" ABA Guidelines, Commentary to Guideline 10.7 (A). Counsel must investigate evidence of remorse. ABA guidelines recognize that a defendant showing remorse is possible grounds for seeking an agreed upon disposition. ABA Guidelines, Guideline 10.9.1 (B)(8)(G). Counsel must investigate forensic crime scene evidence and employ relevant experts. "Counsel should make a prompt request to the relevant government agencies for any physical evidence or expert reports relevant to the offense or sentencing, as well as the underlying materials. With the assistance of appropriate experts, counsel should then aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence." ABA Guidelines, Commentary to Guideline 10.7 (A)(1).

20. Counsel's failure to conduct the required investigation may deprive the defendant of effective assistance of counsel. "The failure to conduct a reasonable investigation into possible mitigating circumstances may render counsel's assistance ineffective." Bolender v. Singletary, 16 F.3d 1547 (11th Cir. 1994); see also Middleton v. Dugger, 849 F.2d 491 (11th Cir.

1988) (counsel was ineffective for failing to uncover documentary mitigating evidence including: a child psychiatric discharge summary, an affidavit by a psychiatrist who had evaluated the defendant as a child, and records from the various institutions where the defendant had been confined), Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995) (counsel found ineffective for failing to discover evidence of the defendant's psychiatric problems), Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003) (counsel's failure to investigate the defendant's history of drug and alcohol abuse and the defendant's deprived and abusive upbringing undermines defendant's death sentence).

21. Not opting in out of a fear of being required to divulge constitutionally protected material is equally unacceptable. The benefits of discovery are immense. The ability to gain access to specific information that the prosecution will present is one of the defendant's only means to balance the inherent resource imbalance between the State and the accused.

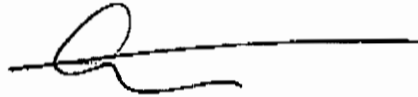
"Besides greater financial and staff resources with which to investigate and scientifically analyze evidence, the prosecutor has a number of tactical advantages. First, he begins his investigation shortly after the crime has been committed when physical evidence is more likely to be found and when witnesses are more apt to remember events. Only after the prosecutor has gathered sufficient evidence is the defendant informed of the charges against him; by the time the defendant or his attorney begins any investigation into the facts of the case, the trail is not only cold, but a diligent prosecutor will have removed much of the evidence from the field. In addition to the advantage of timing, the prosecutor may compel people, including the defendant, to cooperate. The defendant may be questioned within limits, and if arrested his person may be searched. He may also be compelled to participate in various nontestimonial identification procedures. The prosecutor may force third persons to cooperate through the use of grand juries and may issue subpoenas requiring appearance before prosecutorial investigatory boards. With probable cause the police may search private areas and seize evidence and may tap telephone conversations. They may use undercover agents and have access to vast amounts of information in government files. Finally, respect for government authority will cause many people to cooperate with the police or prosecutor voluntarily when the might not cooperate with the defendant." Wardius v. Oregon, 412 U.S. 470, fn 9 (1973).

22. Counsel for Mr. Jones cannot possibly make a decision regarding whether to opt in at this stage of the litigation. To do so would be to abandon their duty to effectively represent

Mr. Jones in this proceeding. Such abandonment cannot be sanctioned in any criminal proceeding, much less one which has as potential outcome the defendant's death. House v. Balkcom, 725 F.2d 608 (11th Cir. 1984).

23. WHEREFORE Mr. Jones respectfully requests that the court a) grant him permission to make a sealed proffer of case specific evidence he would have put in the record had his request for an ex parte evidentiary hearing on the constitutionality of the Discovery Statutes been granted (Defense Motion 111) so that he may show the court what specific investigative tasks must be undertaken by Mr. Jones's defense counsel before they can make a meaningful decision regarding whether to opt in, and b) Extend the deadline for opting in until 60 days prior to the trial of this matter or until such other time as counsel is able to make a meaningful assessment of this critical decision.

Respectfully submitted this 28th day of October, 2005

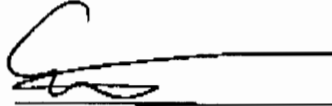


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion has been mailed to The Office of the District Attorney for Gordon County via first-class United States Postal Service this 28 day of October, 20 05. This pleading has also been sent vial email to the District Attorney for Gordon County.



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