

476

IN THE SUPERIOR COURT OF WALKER COUNTY  
STATE OF GEORGIA

STATE OF GEORGIA,

FILED IN OFFICE

vs.

SEP 23 2003

CASE #'s

03-CR-20884; 03-CR-00885;

03-CR-20886; & 03-CR-20887

TOMMY RAY-BRENT MARSH,

Defendant made by Clerk

MOTION TO PRESERVE EVIDENCE

COMES NOW the Defendant, through counsel, and respectfully moves the Court for entry of an Order directing the prosecution and all law enforcement agencies involved in the investigation and prosecution of this case, to preserve and keep intact any investigative reports (including rough drafts), witness statements, documents, papers, rough notes (interview, surveillance, or otherwise), tapes (audio and video), objects, biological material, or other physical evidence which is in their possession, custody, or control, or through the exercise of due diligence could be so possessed or controlled.

This includes any material(s) which could conceivably be viewed as being exculpatory to the Defendant. See, California v. Trombetta, 467 U.S. 479 (1984) (the government violates the defendant's right to due process if the unavailable evidence possessed "exculpatory value that was apparent before the evidence was destroyed....").

Defendant has filed a discovery motion which, in part, asks the Court to review such materials and determine if the defendant's counsel is entitled to review, examine, inspect or test said items pre-trial. In addition, the defendant has filed a Notice to Produce which requires the state to produce certain items at pretrial hearings or at the trial of this case. Obviously, the Court cannot make a determination of entitlement nor can the defendant obtain the production of documents unless they are preserved.

This request for preservation of evidence is made pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section I,

477

Paragraphs I, II, XII, XIV of the Constitution of the State of Georgia. See also, Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975)<sup>1</sup> (reversal of a denial of habeas relief where petitioner's pretrial motion to allow an expert of his choosing to inspect murder weapon and bullet denied - based on "Fundamental Fairness" and "means necessary to conduct defense rather than discovery"); Patterson v. State, 238 Ga. 204, 232 S.E.2d 233 (1977) (right to independent analysis of alleged narcotic); Sabel v. State, 248 Ga. 10 (1981) (Due Process requirements of Patterson and Barnard not limited to narcotics cases); Jordan v. State, 247 Ga. 328, 276 S.E.2d 224 (1981) [citing, United States v. Bryant, 439 F.2d 642 (D.C.Cir. 1971) "Only if evidence is carefully preserved during the early stages of investigation will disclosure be possible later"]; Kendrix v. State, 206 Ga. App. 627, 426 S.E.2d 251 (1992), (indigent defendant may move for independent DNA analysis).

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



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<sup>1</sup> Bonner v. City of Prichard, Alabama, 661 F.2d 1206, 1207 (11th Cir. 1981), the court held "that the decisions of the ...Fifth Circuit...as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit."

478

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