

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION

UNITED STATES OF AMERICA, :  
 :  
vs. : Case No. \_\_\_\_\_  
 :  
\_\_\_\_\_, :  
 :  
Defendant. :

MOTION FOR DISCOVERY  
AND INSPECTION WITH MEMORANDUM OF AUTHORITIES

COMES NOW the Defendant, Gregg Scott Skinner, by and through his counsel of record and moves this Honorable Court, pursuant to Rule 16 of the Federal Rules of Criminal Procedure, the “due process” clause of the Fifth Amendment to the Constitution of the United States, and Brady v. Maryland, 373 U.S. 83 (1963), for an Order requiring the Government to produce for inspection and copying, all material which is either in the possession of the Government or any of its agents, or which, through due diligence, would become known from the investigating officers or witnesses or persons having knowledge of this case which is subject to the mandates of Rule 16 of the Federal Rules of Criminal Procedure.

In addition to same, Defendant now requests all 26.1 information prior to any witness giving testimony in this case for which the court will consider relevant to any issue raised by defendant.

Defendant now also requests all transcript portions of any audio or video tapes concerning any alleged impaired driving.

For specific reference as to items sought see defendant's "Motion for Discovery Under Brady v. Maryland" filed concurrently herewith. If an itemized accounting is requested, please advise and the list shall be provided within five days of request.

Respectfully submitted, this \_\_\_\_ day of November, 2012.

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D. Benjamin Sessions  
State Bar No. 141280  
Attorney for Defendant

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FOR THE MIDDLE DISTRICT OF GEORGIA  
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UNITED STATES OF AMERICA, :  
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vs. : Case No. \_\_\_\_\_  
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\_\_\_\_\_, :  
 :  
Defendant. :

NOTICE OF EVIDENCE SUBJECT TO SUPPRESSION

COMES NOW Defendant Greg Scott Skinner, by and through undersigned counsel, and respectfully moves this Court to order the attorney for the United States of America to give notice as follows:

Notice of the Government's intention to use any evidence (in its case in chief at trial), which the Defendant may be entitled to suppress under Rule 4(a)(12) or (41) of the Federal Rules of Evidence, the Fourth, Fifth or Sixth Amendments of the United States Constitution, 18 U.S.C. Statute 25, 10-20 and 3504 (Title 3 of the Omni Bus Crime Control Act), and if state agents were involved, Article 1, Section 1, 10, 11 and 13 of the Georgia Constitution.

Rule 12(d) of the Federal Rules of Criminal Procedure, provides for notice of Evidence "at arraignment or as soon thereafter as is practicable.... in order to afford an opportunity to move to suppress evidence...". Defendant now requests such notice to be provided with exhibit numbers in order to comply with Rule 12(b)(3), Federal Rules of Criminal Procedure Requirement that Motions to Suppress be raised prior to trial.

Respectfully submitted, this \_\_\_\_ day of November, 2012.

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D. Benjamin Sessions  
State Bar No. 141280  
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|---------------------------|---|----------------|
| UNITED STATES OF AMERICA, | : |                |
|                           | : |                |
| vs.                       | : | Case No. _____ |
|                           | : |                |
| _____                     | : |                |
|                           | : |                |
| Defendant.                | : |                |

DEFENDANT’S STATEMENTS

COMES NOW Defendant Gregg Scott Skinner, by and through undersigned counsel, and moves this court to direct counsel for the United States of America to provide timely, the following:

Any and all written or recorded statements made by or purported to have been made by the Defendant, together with the substance of any statement attributed to any co-defendant, which the Government intends to offer in evidence at the trial in this case.

Statements of the Defendant are discoverable pursuant to express provisions of Rule 16(a)(1), Federal Rules of Civil Procedure. Disclosure by the Government, of the contents of any statement attributable to the Defendant is necessary in order for the Defendant to adequately prepare for trial and for Defendant’s counsel to intelligently advise said Defendant as to whether Defendant should testify or invoke Defendant’s privilege under the Fifth Amendment to the Constitution. Johnson v. United States, 344 F. 2d. 163(d)(c), (Cir. 1964), Aff’d 352 F. 2d. 639 (1965); Ing v. United States, 365 F. 2d., (D.C. Cir. 1966).

Discovery of statements or confessions of the Defendant under Rule 16(a)(1) of the Federal Rules of Civil Procedure should not only include written or recorded statements made by

the Defendant to the Government agencies, but to other individuals as well. United States v. Baker, 262 F. Sup. 657, (D.C. Cir. 1966), at P. P. 671-72; Davis v. United States, 413 F. 2d. 1226 (5<sup>th</sup> Cir. 1969), at P. P. 1230-31; United States v. Lumboski, 277 F. Sup. 713 (N.D. Ill. 1967), at P. P. 719-22.

Discovery of the Defendant's statements under Rule 16(a)(1) should include not only verbatim statements made by the Defendant, but also any summaries or government reports setting out the substance of the Defendant's statement or statements attributable to the Defendant. United States v. Federman, 41 F.R.D. 339 (S.D.Y. 1967); United States v. Scharf, 267 F. Supp. 19 (S.D. N.Y. 1967); United States v. Hasidwa, 299 F. Supp. 1053 (S.D. N.Y. 1969); United States v. Jefferson, 445 F. 2d. 247 (D.C. Cir. 1971), (including notes of names and dates of interviews with alibi witnesses); United States v. Curry, 278 F. Supp. 508 (N.D. Ill. 1967); United States v. Morrison, 43 F. R.D. 5167 (N.D. Ill. 1967); United States v. Pilinck, 267 F. Supp. 791 (S.D.N.Y. 1967), at P. 801; United States v. Reid, 43 F. R.D. 320 (N.D. Ill. 1967); United States v. Kageyana, 252 F. Supp. 254 (D. HI, 1966), at P. 285; United States v. Fernbert, 371 F. Supp. 1205, (N.D. Ill. 1974); Davis v. United States, 413 F. 2d. 107 (2<sup>nd</sup> Cir. 1969), at P.P. 112-114, cert. denied, 296 U.S. 961. And the Court, pursuant to Rule 16(e), of the Disclosure of only those portions of the Government's reports or summaries which relate to a summary of Defendant's oral statements. Moore's Federal Practice, Section 16.03(2); Wright Federal Practice Rules and Procedure Criminal, Section 253, at page 506l; United States v. Garrett, 305 F. Supp. 367 (S.D.N.Y. 1969); AVA Standards Discovery and Procedure Before Trial, approved 1970, at P. 62.

Respectfully submitted, this \_\_\_\_ day of November, 2012.

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D. Benjamin Sessions  
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Attorney for Defendant

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| _____                     | : |                |
|                           | : |                |
| Defendant.                | : |                |

CATCH ALL HEARSAY EXCEPTIONS

COMES NOW Defendant Greg Scott Skinner, by and through undersigned counsel, and moves this court to order counsel for the United States of America to provide the following:

The substance of any hearsay statement the Government intends to offer under Rules 803(24), or 804(b)(5), of the Federal Rules of Evidence.

The Defendant intends to object to the proffer of hearsay testimony offered at Defendant's trial, and intends to move to suppress such testimony at a hearing under Rule 104(a) of the Federal Rules of Evidence. Where the Government seeks to offer such hearsay testimony under the catch all "other exceptions" of Rules 803(24) and 804(b)(5), these rules expressly require notice of same prior to trial.

A statement may not be admitted under this exception unless the proponent of it makes known the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it. His intention to offer the statement and the particulars of it, including the name and address of the declarant. Rules 803(24); 804(b)(5), Federal Rules of Evidence.

Thus, pursuant to the advance notice requirement included in each rule, the Government is required to disclose the substance of any statement and intends to offer and Defendant hereby makes demand for same.

Respectfully submitted, this \_\_\_\_ day of November, 2012.

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Defendant. :

DEFENDANT'S PRIOR RECORD

COMES NOW the Defendant Greg Scott Skinner, by and through undersigned counsel  
and requests the following:

A copy of the Defendant's prior criminal record, if any [Rule 16(a)(1)(b),  
Federal Rules of Civil Procedure].

Rule 16(a)(1)(b) mandates reproduction by the Government of Defendant's prior criminal  
record, if any. The undersigned hereby requests production of same prior to trial.

Respectfully submitted, this \_\_\_\_ day of November, 2012.

\_\_\_\_\_  
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Defendant. :

DOCUMENTS AND TANGIBLE OBJECTS

COMES NOW Defendant Greg Scott Skinner, by and through undersigned counsel, and  
moves this court to order counsel for the United States of America to provide the following:

Any and all books, papers, documents and other tangible objects  
which the Government may intend to use as evidence in their case in  
chief at trial, or which obtained from an alleged or alleged to belong  
to or were made of the Defendant or to any co-conspirator, indicted  
or not, for which the Government plans to offer in evidence in this  
case, or which are material to the preparation of Defendant's defense.

Rule 16(a)(1)(b), Federal Rules of Criminal Procedure authorizes the discovery of all  
books, papers, documents and tangible objects in the possession or control of the Government.

Such objects requested are discoverable since any such items upon which the  
Government relied in obtaining an indictment against the Defendant are of necessity "material"  
to the cause and the preparation of an adequate defense. United States v. Pilinick, Supra; United  
States v. Wolfson, (Del. 1968), 294 F. Supp. 267, at p. 277. United States v. Tanner, (N.D. Ill.  
1967), 279 F. Supp. 457, at page 468-471. United States v. Reid, (N.D.Ill. 1967), 43 F. R. D.  
520 at P. 522; United States v. A dal, (S.D.N.Y. 1967), 280 F. Supp. 859, A.T.P. 861, United  
States v. Hughes, (5<sup>th</sup> Cir. 1969), 413 F. 2d. 1244, at P. 1254; United States v. Condor, (6<sup>th</sup> Cir.

1970), 423 F. 2d. 904, at P. 911, and any that are “intended for use by the government as evidence in chief at trial” or were obtained from [will be alleged to] belong to the Defendant; are required to be produced to the mandatory terms of Rule 16(a)(1)(c), F.R.C.R. P.

Respectfully submitted, this \_\_\_\_ day of November, 2012.

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D. Benjamin Sessions  
State Bar No. 141280  
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Defendant. :

WITNESSES NAME AND ADDRESSES

COMES NOW Defendant Greg Scott Skinner, by and through undersigned counsel, and  
moves this court to order counsel for the United States of America to provide the following:

The names and addresses of persons who have knowledge pertaining  
to this case or who have been contacted by the government or their  
agents in connection with this case.

The names of persons with knowledge of the facts relevant to this case is the most critical  
information obtainable for the preparation of an adequate defense and to ensure a fair trial. In  
light of the authority given the Courts under Rule 16(d)(1), Federal Rules of Criminal Procedure  
to impose protective orders against any intimidation of government witnesses, it would appear  
unconscionable to deny the Defendant the names of persons known to the government who have  
knowledge of the facts relevant to this case. Accordingly, the names of government witnesses or  
other persons having knowledge of facts regarding the case should be discoverable by the  
Defense prior to trial. United States v. Leichtfuss, (N.D. 1971), 331 F. Supp. 723; United States  
v. Palmisano, (E.D. OH, 1973), 359 F. Supp. 431; United States v. Baum, (2<sup>nd</sup> Cir. 1973), 482 F.  
2d. 1325; Gregory v. United States, (D.C. Cir. 1966), 369 F. 2d. 185.

Witnesses, particularly eye-witnesses to a crime, are both the property of neither the prosecution nor the defense. Both sides have equal right and should have an equal opportunity to interview them. Gregory v. United States, (D.C. Cir. 1966), 369 F. 2d. 185.

And, where the Government has knowledge of individuals whose testimony might be of benefit to the Defense, either in exculpation or mitigation, the Government is under a constitutional obligation to disclose the names of such individuals. United States, ex. rel. Memier v. Wilkins, (2<sup>nd</sup> Cir. 1964), 326 F. 2d. 135; United States v. Houston, (N.D.G.A. 1972), 339 F. Supp. 762; Brady v. Maryland, 1963, 373 U.S. 83.

The names and addresses of individuals who the Government intends to call as witnesses at trial is necessary in order to afford the Defendant and Defendant's counsel effective confrontation and cross-examination of these witnesses, as guaranteed by the Sixth Amendment to the United States Constitution. Pointer v. Texas, 380 U.S. 400 (1965). Since effective confrontation and cross-examination requires that a government witness

“... be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood... that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment... and the facts may be brought out tending to discredit the witnesses by showing his testimony in chief, was untrue or biased”. Alford v. United States, 282 U.S. 287 at P.P. 691-92 (1931).

It is critical, therefore, in order to effectuate meaningful confrontation and cross-examination that the identity of the witnesses be disclosed well in advance of trial. When “... the credibility of a witness is in issue, the very starting point in exposing a falsehood and bringing out the truth through cross-examination must necessarily begin with the witness's name and addresses”. Smith v. Illinois, 690 U.S. 129 (1968). It is the “witnesses name and address which opens countless avenues of in-court examination and out-of-court investigation cannot be

conducted unless the names and addresses of these witnesses are furnished well in advance of trial.

Respectfully submitted, this \_\_\_\_ day of November, 2012.

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Attorney for Defendant

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REPORTS OR CONCLUSIONS OF SCIENTIFIC TESTS OR ANALYSIS

COMES NOW Defendant Greg Scott Skinner, by and through undersigned counsel, and moves this court to order counsel for the United States of America to provide the following:

Any and all written reports of any scientific analysis or chemical analysis conducted by its agents or anyone at its direction.

Defendant further requests that the Defendant be provided with the actual object, items or substances tested, in order to obtain Defendant's own expert analysis of same.

Discovery of the examinations, tests, and experiments requested herein is also authorized by Rule 16(a)(1)(d), Federal Rules of Criminal Procedure. While no specific showing of materiality or reasonableness is required under the mandatory provisions of Rule 16(a), United States v. Hughes, (5<sup>th</sup> Cir. 1969), 413 F. 2d. 244, at page 246-47, the disclosure of such scientific material is particularly appropriate for the following reasons:

- 1) Any danger of intimidation of witnesses concerning these material matters is so slight as to be for all purposes, non-existent.
- 2) Expert testimony cannot be effectively subjected to cross-examination or rebuttal

without ample opportunity prior to trial, to prepare appropriate materials for that purpose.

- 3) Expert testimony generally has, in the eyes of a jury, unusually high probative value, coming as it does, for a supposedly disinterested party and concerning matters generally beyond the realm of ordinary lay information.

This Defendant, therefore, may wish to obtain his own expert witnesses to conduct appropriate tests and to give expert testimony at the trial, Criminal Justice Act of 1964, 18 U.S.C. 3006(a)(e); Federal Rules of Criminal Procedure 28(a), and accordingly, such specimens, experts, tests and scientific reports and comparisons should be discoverable prior to trial. United States v. Dildy, (D.C. 1966), 39 F. R. D. 340 [prior to new discovery rules], copies of fingerprints and expert analysis of same. United States v. Kminsky, (N.Y. 1967), 275 F. Supp. 365, chemical analysis of narcotics; United States v. Cobb (S.D. N.Y. 1967), 271 F. Supp. 159, United States v. Killey, (2<sup>nd</sup> Cir. 1969), 420 F. 2d. 26.

Respectfully submitted, this \_\_\_\_ day of November, 2012.

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Attorney for Defendant

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Defendant. :

DEMAND FOR EXCULPATORY EVIDENCE

COMES NOW Defendant Greg Scott Skinner, by and through undersigned counsel, and  
moves this court to order counsel for the United States of America to provide the following:

Any and all material known to the Government or which may become known, or which through due diligence may be learned from the investigating officers or the witnesses or persons having knowledge of the case, which is exculpatory in nature or favorable to the accused, or which may lead to the exculpatory or favorable of the accused, which might serve to mitigate punishment, including any evidence impeaching or contradicting testimony of Government witnesses, i.e., prior convictions or prior inconsistent statements of Government witnesses or instructions to government witnesses not to speak with or discuss the facts with defense counsel.

The exculpatory or favorable evidence requested herein, is discoverable pursuant to the Due Process clause of the Fifth Amendment to the Constitution of the United States of America. Brady v. Maryland, 373 U.S. 83 (1963).

The right of Defendant to disclosure of “favorable evidence” exists whether such evidence is material to the Defendant’s guilt or mitigation of Defendant’s punishment. Brady v. Maryland, supra, and regardless of whether such exculpatory evidence would be admissible in

defendant's behalf or trial "...or in obtaining further evidence". Giles v. Maryland, 386 U.S. 66 (1967) at page 74.

The evidence need not be competent evidence or admissible at trial. United States v. Gleason, (S.D.N.Y. 1967), 264 F. Supp. 850, at page 886.

This right to disclosure under Brady, should include the right to pre-trial discovery by the Defendant. United States v. Gleason, (S.D.N.Y. 1967), 265 F. Supp. 880, at page 884-885; United States v. Morrison, (N.D.Ill. 1967), 43 F.R.D. 266, United States v. Ahmad, (M.D. P.A., 1971), 53 F. R. D. 186 at page 193-194. United States v. Partain, (E.D.L.A. 1973), 20 F. Supp. 275, at page 284-285. United States, ex rel. Drew v. Myers, (3<sup>rd</sup> Cir. 1964), 327 F. 2d. 174; ABA Standards Discovery and Procedure Before Trial, approved 1977, Section 2.1.

Evidence which may serve to impeach the testimony or credibility of a Government witness is discoverable under Brady, since the duty upon the Government to disclose evidence favorable to a Defendant under Brady, applies to any information "...favorable to the accused, either as direct or impeaching evidence". (emphasis added). Williams v. Dutton, (5<sup>th</sup> Cir. 1968), 384 F. 2d. 886 [fact that eye-witness to crime initially failed to identify Defendant at lineup; Powell v. Wiman, (5<sup>th</sup> Cir. 1961), 287 F. 2d. 275, mental instability on part of key witness. Giles v. Maryland, 385 U.S. 66, evidence of prior unchastity and mental condition of complaining witness.

Where exculpatory evidence is obtained in a statement of a Government witness, discoverable under Rule 26.2, Federal Rule of Criminal Procedure, only the witness has testified, then the rules ... "statutory restrictions must be accommodated to demands for due process", and the relevant portion of the statement disclosed prior to trial. United States v. Gleason, (S.D.N.Y. 1967), 265 F. Supp. 880, at page 887 [discussing Rule 26.2, as predecessor to the Jencks Act].

Under Brady, a particularized request is a practical impossibility, since the “due process” requirements of Brady, require that the government provide the Defendant with exculpatory mitigating or favorable evidence, not in the possession of the Defense. Consequently, if the Defense is unaware of such evidence, it would be hard-pressed to request same with any particularity.

“If the Defense does not know the existence of evidence, it may not be able to request its production. A murder trial, indeed, in any criminal proceeding, is not a sporting event Giles v. Maryland, 386 U.S. 66, (1967).”

The United States Attorney or other agents of the United States Government involved in the investigation and preparation of this case, have in their possession, custody and control of each of the above-requested items and information, through exercise of reasonable diligence, would be able to obtain such possession or locate the whereabouts of such items or information. Each of these items is material to the preparation of an adequate defense and is reasonable in light of the facts set out herein.

The defendant is seeking all evidence that the machine used in this case has not been properly maintained or inspected. The defendant is seeking all logs, certificates and inspection or repair records.

Respectfully submitted, this \_\_\_\_ day of November, 2012.

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D. Benjamin Sessions  
State Bar No. 141280  
Attorney for Defendant

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MOTION TO SUPPRESS STATEMENTS

COMES NOW the Defendant Greg Scott Skinner, by and through his undersigned counsel and moves this Court to hold a pre-trial hearing to determine the voluntariness of any and all statements allegedly made by the Defendant to government agents. In order to use any statements attributed to Defendant, the government must first prove that the statements were made voluntarily and not in violation of Miranda. Jackson v. Denno, 378 U.S. 368 (1984), and Miranda v. Arizona, 384 U.S. 436, 468, 469 (1966).

WHEREFORE, Defendant respectfully requests that his motion be granted.

Respectfully submitted, this \_\_\_\_ day of November, 2012.

\_\_\_\_\_  
D. Benjamin Sessions  
State Bar No. 141280  
Attorney for Defendant

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 Defendant. :

MOTION FOR DISCLOSURE OF INFORMANTS, SPECIAL EMPLOYEES AND SPECIAL  
INVESTIGATORS

NOW COMES Greg Scott Skinner, the defendant herein, by and through undersigned  
counsel, and demands disclosure of whether the prosecution used informants, special employees,  
or special investigators in the investigation or prosecution of this case; and if so, identify them  
pursuant to Roviaro v. United States, 353 U.S. 52 (1957).

This \_\_\_\_ day of January, 2003.

McDONALD & CODY, L.L.C.

By: \_\_\_\_\_  
Gus McDonald  
Georgia State Bar No. 488795  
Attorney for Defendant

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(706) 778-7178

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**PRELIMINARY MOTION TO SUPPRESS AND AUTHORITY THEREFORE**

The above-named Defendant moves this Court, pursuant to Federal Rules Criminal Procedure 12(b)(3), for entry of an order suppressing all evidence which is obtained in violation of the Defendant's Fourth, Fifth, or Sixth Amendment Rights, 18 U.S.C. 2510, et seq., or Federal Criminal Rule Procedure 41.

Since discovery and defense investigation are still incomplete and the Defendant files this Motion in general form to preserve his right to challenge the legality of any search or seizure of evidence that the Government might introduce against him at trial. Although the Defendant has not received from the government, a notice of intent, pursuant to Rule 12(d)(2), FRCP, indicating its intention to use at the time of trial, any and all evidence, including but not limited to physical evidence, statements, photographs and the like, seized from the Defendant, it is assumed that the government intends to do so. Based upon this assumption that the government intends to use the items in its case in chief, the Defendant moves to suppress all such items on the grounds hereinafter stated. Defendant requests that the government serve forthwith, a notice of intent,

pursuant to Rule 12(d)(2), delineating any and all evidence it intends to use in its case in chief at trial.

A) Defendant seeks exclusion of any results from State-administered chemical sobriety tests because:

(1) The arresting officer lacked

(a) articulable suspicion to confront or detain Defendant;

(b) reasonable suspicion to detain Defendant for more than a brief time for purposes of issuing a non-custodial traffic citation, based upon unreasonable requests for performance by Defendant of optional field sobriety evaluations and agility exercises;

(c) probable cause to effect a custodial arrest of the Defendant or to request an official State chemical sobriety test from her.

(2) The arresting officer gave Defendant inaccurate, insufficient and confusing implied consent warnings. In particular, the arresting officer failed to properly and timely inform the Defendant of his right to an independent chemical test of his blood, breath, urine or other bodily substances by qualified personnel of his own choosing, as identified and specified in House Bill 610 and O.C.G.A. § 40-6-392 (a)(3). Further, the arresting officer failed to comply with the O.C.G.A. § 40-5-67.1. Moreover, any inaccurate late warnings given by the officer used coercive and inaccurate language indicating that the Defendant had no choice but to submit to the State's chemical test.

(3) The Defendant seeks exclusion of the State's chemical sobriety tests because the arresting officer did not timely advise him of his statutory rights under Georgia's implied consent law at the time of his arrest. In particular, the officer did not read the correct and complete implied consent warnings to the Defendant at the scene of the arrest, as required by the three applicable statutes (§§ 40-6-392, 40-5-67.1 and 40-5-55). See *State v. Leviner*, 213 Ga. App. 99 (1994). By the officer's failure to give the warnings at the scene of the arrest, such warnings were not timely, truthfully and properly given in accordance with Georgia statutory and case law. There existed no exigent circumstances

to warrant the officer's failure to read the required implied consent warnings at the scene of the arrest.

(4) The warnings given were misleading, coercive and deceptive, inasmuch as the warnings **inferred** that the Defendant was required to take the State's chemical test, when in fact the test was not required to be taken by him. Furthermore, the officer made additional comments that were misleading and impaired the Defendant's opportunity to make an informed implied consent decision. Therefore, the results of the state-administered blood and urine tests are not admissible. **State v. Terry**, 236 Ga.App. 248, 511 S.E.2d 608 (1999); see also **State v. Leviner**, 213 Ga.App. 99, 443 S.E.2d 688 (1994).

(5) The Defendant seeks exclusion of the State's chemical sobriety test because the state applies certain internal policies, procedures, rules and regulations to the maintenance, operation, and calibration of the Intoxilyzer 5000 sobriety test machine. These policies, procedures and rules are unpublished, unwritten, non-binding maintenance standards which do not assure the motoring public of an accurate and reliable chemical sobriety test, from the standpoint of due process of law. It is, therefore, impossible to determine (from the cursory published regulations found in GBI/DFS Implied Consent Regs. 92-3), whether the State takes mandated steps to prevent fundamentally inaccurate readings on the Intoxilyzer 5000. Minimal due process requires that the State publish at least minimal objective administrative internal rules, regulations, and standards; otherwise, those standards are not binding upon the government and offer no protection to the general public.

(6) The limited calibration checks which are done, (e.g., partial interference detection checks, annual RFI radio frequency interference) check and cursory inspection and maintenance of the machine is deficient and not reasonably calculated to assure that the breath machine was in

proper working order at the time of Defendant's tests. As presently established, all service and maintenance of the Intoxilyzer 5000 machine used in this case is insufficient to accomplish its intended purpose of assuring the device is being operated reliably.

(7) The Defendant seeks to exclude any and all test results obtained from the Intoxilyzer 5000 machine used in this case, based upon non-compliance with O.C.G.A. §§ 40-6-392 (a) (1) (A), 40-6-392 (a) (1) (B), and 40-6-392 (f), for each of the following separate and distinct reasons, any one of which will support exclusion of all tests:

(a) The State has not maintained the complete and accurate log records for the machine, so as to assure that all component parts were in working order, thereby violating Defendant's due process and equal protection guarantees under the United States Constitution (Fifth and Fourteenth Amendments of the United States Constitution).

(b) The State has opted to not provide the public (including Defendant) with assurance of non-tampering with the logs or omission of reports of failed or aborted tests for the Intoxilyzer 5000, which may occur at the hands of the testing or arresting officer, who have access to the records, inasmuch as the State has never utilized the Intoxilyzer 5000's on-board computer database program which (when combined with readily-available A.D.A.M.S. or C.O.B.R.A. software) maintains detailed, accurate reports of every test done, every calibration check performed, every maintenance function utilized on the machine. The on-board computer is a component part, prescribed by the manufacturer, which is NOT in working order, as required by O.C.G.A. § 40-6-392 (a) (1) (A). Absent the attachment, activation and use of such component part, so as to eliminate the possibility of tampering or non-reporting of favorable data for use by the defense, Defendants rights under equal protection and due process of law (Fifth and Fourteenth Amendments of the United States Constitution) are violated. Hence, the Defendant cannot be assured that the handwritten log records are accurate and complete.

(c) By not opting to utilize a "calibration" mode for each test subject, and by failing to utilize a simulator containing an alcohol/water mixture of known alcohol concentration, the State has violated Defendant's due process rights and equal protection rights law (Fifth and Fourteenth Amendments of the United States Constitution). Absent the simulator being utilized for calibration checks, activation and use of such component part, so as to eliminate the possibility of Defendant's test having been inaccurate due to machine error, Defendants rights under equal protection and due process of law (Fifth and Fourteenth Amendments of the United States Constitution) are violated.

(d) The Intoxilyzer 5000 is also capable of being fitted with a device to collect and capture an aliquot portion of the breath sample. Yet, the State has opted not to purchase and utilize this important attachment. Absent the use of such a device, Defendant's breath sample was destroyed without her consent or permission after the test was finished. Such actions by the State deny Defendant her rights to equal protection and due process of law (Fifth and

Fourteenth Amendments of the United States Constitution). In addition, the destruction of Defendant's breath sample violates her right of confrontation of this essential part of the State's evidence against her. Sixth Amendment of the U.S. Constitution.

(e) The Intoxilyzer 5000, as presently patented and configured, improperly gives the illusion to the Defendant and the breath test operator that the air blank sequence of the machine is accurately analyzing and displaying the sample chamber's true alcohol content at .000 each time a test is run (except where ambient fail occurs from contaminated room air being drawn into the port of the breath machine.) In truth, the .000 reading is the result of a "floating" zero point, and always reports .000 even if alcohol remains in the sample chamber. Because this floating zero will fail to report alcohol in the chamber, and will not notify the operator of the machine of this fact, Defendant cannot be assured that the two tests obtained did not differ by an alcohol concentration of greater than 0.020 grams, as mandated by O.C.G.A. § 40-6-392 (a) (1) (B).

(B) The Defendant seeks exclusion of the State's breath test because

(a) the test was not performed on a machine which was operated with all its electronic and operating components prescribed by its manufacturer properly attached and in good working order and by an individual possessing a valid permit as required by House Bill 610 [as codified in O.C.G.A. §§ 40-6-392 (a) (1) (A), and 40-6-392 (a) (1) (B)];

(b) No breath testing device has ever been approved through the Administrative Procedure Act for use by the State of Georgia pursuant to Georgia's implied consent regulations. (GBI Rule 92-3); *Corner v. State*, 223 Ga. App. 353, 477 S.E.2d 592 (1996);

(c) Only a single sample of breath was tested, not duplicate testing;

(d) The method of testing breath from the sample is flawed and subject to producing sampling variability and other errors;

(C) O.C.G.A. § 35-3-155 violates the U.S. and Georgia Constitution's separation of powers provision, and Defendant's right to due process.

The Defendant seeks exclusion any field sobriety tests given to the Defendant because the Defendant was in custody and not warned of his right against self-incrimination under O.C.G.A. § 24-9-20, prior to performing all or part of the field evaluations, and had not received

Miranda advisements prior to being required to perform these optional evaluations. *State v. O'Donnell*, 225 Ga. App. 502, 484 S.E.2d 313 (1997).

(E) Defendant further seeks to exclude any and all non-Mirandized field sobriety exercises confessions or incriminatory statements made by Defendant in response to the arresting officer's questions which occurred after Defendant was "in custody" as defined by Georgia case and statutory authority. Defendant was not warned of his right against self-incrimination once in custody as mandated by O.C.G.A. § 24-9-20.

(F) Defendant seeks exclusion of any evidence seized when the officers improperly and illegally searched the Defendant's vehicle.

1. The Defendant moves to suppress all field sobriety tests on the grounds that such tests violated his right against self incrimination under the U.S. Constitution. In addition, because (in complying with the officer's directions to "act") Defendant is being required to perform volitional acts, such procedure by the officer violates Ga. Const., Art I, § I, ¶ XVI and O.C.G.A. § 17-5-30.

2. Defendant moves to suppress the use of any statements made by Defendant and any field sobriety tests given to the Defendant after he was in custody and had been deprived of him freedom of movement, without having been given *Miranda* rights. Such statements were not voluntary and were illegally obtained after the officer had deprived her of his freedom of movement and therefore must be excluded. Use of such statements violates the Defendant's rights under Ga. Const., Art I, § I, ¶ VII, right to be free from unlawful seizure and detention, and to due process of law under Ga. Const., Art I, § I, ¶ I.

3. Defendant moves to suppress all field sobriety tests on the grounds that once arrested, he was not warned of him right against<sup>1</sup>self-incrimination before being asked to perform

field sobriety tests as required by O.C.G.A. § 24-9-20(a); *State v. O'Donnell*, 225 Ga. App. 502, 484 S.E.2d 313 (1997).

4. Defendant seeks exclusion of any field sobriety evaluation administered to the Defendant, to include the one-leg-stand, walk and turn and HGN on the grounds that the Defendant was not an appropriate subject for such testing due to the injuries he sustained to his head in this accident. Defendant required medical treatment.

5. Defendant moves to exclude the improperly administered, maintained and safeguarded blood test. By improperly administering the test, the Defendant was denied an opportunity to gather exculpatory evidence which constituted a violation of his rights to due process and equal protection under the Georgia and U.S. Constitutions and under O.C.G.A. § 17-5-30.

6. Defendant moves to exclude the improperly administered, maintained, and safeguarded urinalysis. By improperly administering the test, the officer denied Defendant an opportunity to gather exculpatory evidence which constituted a violation of his rights to due process and equal protection under the Georgia and U.S. Constitutions and under O.C.G.A. § 17-5-30.

7. Defendant moves to exclude the improperly administered Intoxilyzer 5000 sobriety test. By improperly administering the test, the officer denied Defendant an opportunity to gather exculpatory evidence which constituted a violation of his rights to due process and equal protection under the Georgia and U.S. Constitutions and under O.C.G.A. § 17-5-30.

8. Defendant seeks to suppress the results of the State's chemical sobriety tests because the arresting officer did not completely and properly advise the Defendant of his right to an independent test of his blood, breath, urine or other bodily substances by qualified personnel

of his own choosing as identified, specified, and required by Georgia law under O.C.G.A. § 40-6-392. Moreover, the warnings given by the officer used coercive and inaccurate language indicating that Defendant had no choice but to perform the state's chemical test. Added to this inaccurate wording was additional coercive and inaccurate language which misstated the true and legitimate consequences of taking a state administered test and yielding a BAC result of .10 % or more. This is conduct which constitutes a violation of his rights to due process and equal protection under the Georgia Constitution, O.C.G.A. § 17-5-30 and under the U.S. Constitution. Therefore, the results of the state-administered blood and urine tests are not admissible. **State v. Terry**, 236 Ga.App. 248, 511 S.E.2d 608 (1999); see also **State v. Leviner**, 213 Ga.App. 99, 443 S.E.2d 688 (1994).

9. Defendant seeks to suppress the results of any and all State-administered chemical tests because the arresting officer refused to allow Defendant to exercise his right to independent chemical tests at his own expense.

10. No manufacturer or specific type of testing device has ever been approved by the GBI Implied Consent Rules. Further, the lack of approval violates the Defendant's right of due process under both the Georgia and U.S. Constitution. Moreover, O.C.G.A. § 35-3-155 violates the U.S. and Georgia Constitution's separation of powers provision, and Defendant's right to due process

11. Defendant seeks to suppress the results of the State's chemical sobriety test because the state's internal policies, procedures, rules, and regulations to the testing of suspects on the Intoxilyzer 5000 sobriety test are meaningless. The few and sketchy regulations utilized by the state are meaningless and constitute a "sham" on the general public, due to the failure to comport with scientific method and fundamentally sound testing procedures and protocol.

Minimal due process requires that the state publish all administrative internal rules, regulations, and standards; otherwise these standards are not applicable to the general public. Applying no meaningful regulations at all deprives Defendant of his right to gather exculpatory evidence, and violates his right to due process and equal protection under the Georgia Constitution, O.C.G.A. § 17-5-30 and under the Sixth and Fourteenth Amendments to the United States Constitution.

12. In each instance where suppression is sought, the Court should consider Defendant's request for relief under the stated constitutional ground, or, in the alternative, under the statutory suppression provision shown therein where appropriate. In addition, these motions may be considered to be motions in limine. *State v. Johnston*, 249 Ga. 413, 414 (3), 291 S.E.2d 543 (1982); *Smith v. State*, 185 Ga. App. 531 (2), 364 S.E.2d 907 (1988).

WHEREFORE, the Defendant prays:

1. That the Defendant be permitted to supplement this motion when more facts become known;
2. That the Court hold an evidentiary hearing on this motion;
3. That the Defendant be permitted to file a brief after said hearing; and
4. That the Court suppress all evidence obtained in violation of the Defendant's rights.

Respectfully submitted, this \_\_\_\_ day of November, 2012.

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