

IN THE SUPERIOR COURT OF THOMAS COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, :
v. : Case No. 12 CR 213
_____, :
Defendant. :

NOTICE OF DEFENDANT'S ELECTION TO PROCEED UNDER O.C.G.A. §
17-16-1 et seq.

Comes Now, the Defendant in the above-styled case, by and through her counsel of record, and hereby provides written notice pursuant to O.C.G.A. § 17-16-2(a) of his election to have the provisions of O.C.G.A. § 17-16-1 et seq. apply to Defendant's case.

In his concurring opinion in *Hammitt v. State*, 225 Ga. App. 21, 482 S.E.2d 437 (1997), Judge Blackburn elucidated the purposes, contours and remedies in the Georgia discovery statutory scheme:

A primary purpose of requiring disclosure of evidence and witnesses well in advance of trial is to allow counsel time to reflect with deliberation upon such evidence, to consider how it could best be presented at trial and how it affects his overall trial strategy, and to seek to develop other evidence to corroborate or impeach the discovered evidence. When wrongfully withheld evidence is disclosed for the first time in the middle of a trial, the defendant may be presumed to have been prejudiced, as his attorney has not had the opportunity to reflect upon such evidence and to determine what other investigation may be required as a result of its use and how it impacts the existing trial strategy and the subpoena and call of witnesses.

The burden is on the state to produce any witness statements and to make available for inspection all discoverable items in its possession, including any items in the possession of the police. The burden is not on the defense counsel to ply such items from the grip of the state based on clues to their existence found in the state's file. The defendant is entitled to presume that items not produced do not exist and to plan his trial strategy accordingly. A finding of bad faith in failing to produce required

evidence cannot be avoided by the practice of leaving referenced to the existence of such evidence in the state's file rather than producing the same. The obligation is to produce the evidence, and it's presence on a list in the state's file simply establishes that the state is aware of its existence.

As the burden is on the prosecution to produce or assemble for review all discoverable evidence, it has an affirmative obligation to keep apprized of all discoverable items in its possession or in the possession of the police. The prosecution cannot avoid a finding of bad faith by merely claiming ignorance of the contents of the police file. Where the prosecution fails to produce discoverable items, and does not provide an adequate explanation for its failure, these facts alone would be sufficient to authorize the trial court to infer bad faith. This is particularly so where the state attempts to use such evidence at trial without having disclosed it to the defense.

OCCA § 17-16-6 clearly reflects two principal goals. First, and most important, any remedy fashioned by the trial court must be designed to restore to defendant all those rights which the legislature intended for the defendant to have had the state met its burden under the statute, and to correct the prejudice to the defendant caused by the state's failure to perform its mandatory discovery obligations, regardless of whether the state acted in bad faith. Second, the statute clearly contemplates the imposition of punitive sanctions, including the exclusion of evidence, to deter the state from violating its discovery obligations. This deterrent goal is important because, if the most serious consequence of a failure to perform is the mere grant of a continuance, the state would have little incentive to ensure that it fully complies with its discovery obligations.

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

(Certificate of Service follows on the next page)

CERTIFICATE OF SERVICE

This is to certify that I have this day served the Thomas County District Attorney's Office with a true and accurate copy of the foregoing pleading by mailing a copy of same via United States Mail, with adequate postage affixed thereon, addressed as follows:

Thomas County District Attorney's Office
Ms. _____ M. Smith
P.O. Box 2596
Thomasville, Georgia 31799

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

STATE OF GEORGIA, :
v. : Case No. 12 CR 213
_____, :
Defendant. :

Comes Now, the above-named Defendant, by and through the undersigned counsel, and demands a copy of the indictment, included therein the names of grand jurors, and list of witnesses on whose testimony the charges against him are founded, and a complete list of witnesses whom the District Attorney may call to testify at trial.

The following information regarding said witnesses: (a) the name of said witnesses, including all known aliases; (b) current location of said witnesses; (c) date of birth of said witness; (d) social security number of said witness; and (e) current telephone number of said witness. See, OCGA § 17-16-8.

In the event such information is not provided, Defendant herein moves in limine to prohibit the State from using said witness; or, in the alternative, for a confidential interview of said witness and/or a

continuance until such time as this Defendant has had a reasonable time to interview and investigate the information provided by said witness. See OCGA §§ 17-16-6, 17-16-8; USCR 30.3; Workman v. State, 198 Ga. App. 455, 402 S.E.2d 75 (1991); Cunningham v. State, 137 Ga. App. 758, 225 S.E.2d 98 (1976).

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

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D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

IN THE SUPERIOR COURT OF THOMAS COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, :
v. : Case No. 12 CR 213
_____, :
Defendant. :

DEMAND FOR STATEMENTS OF DEFENDANT

Comes Now, the above-named Defendant, by and through the undersigned counsel, and pursuant to OCGA § 17-16-4(a)(1), demands copies of any and all statements made by him, whether written or oral, incriminating or exculpatory, to any law enforcement officer, or to any other person at the behest or demand, direct or indirect, of any law enforcement officer.

1. This demand includes any relevant written or recorded statements or oral statements made by the defendant within the possession, custody, or control of the state or prosecution and that portion of any written record containing the substance of any relevant oral statement made by the defendant, whether before or after arrest, in response to interrogation by any person then known to the defendant to be a law enforcement officer or member of the prosecuting attorney's staff. See, OCGA § 17-16-4(a)(1).
2. This request specifically includes but is not limited to, statements to relevant third parties (*Walraven v. State*, 250 Ga. 401, 297 S.E.2d 278 (1982), *aff'd*, 255 Ga. 276, 336 S.E.2d 798 (1985); statements previously made in custody in other proceedings (*Byers v. State*, 198 Ga. App. 793, 403 S.E.2d 321 (1986)); and all statements standing upon the same footing as the above-referenced statements, including all "transactional statements" made to law enforcement officers or others.
3. The Defendant further demands a true and correct copy of the Defendant's Georgia Crime Information Center criminal history pursuant to OCGA § 17-16-4(a)(2).
4. The Defendant demands disclosure of any such statements no later than 10 days prior to the trial of this matter.

5. In the event that said statements are not provided timely to the Defendant, Defendant requests that the State be prohibited at trial from introducing the evidence not disclosed or presenting the witness not disclosed pursuant to OCGA § 17-16-6. See, OCGA § 17-16-6; United States v. Noe, 821 F.2d 604 (11th Cir. 1987); McKenney v. State, 204 Ga. App. 411, 419 S.E.2d 731 (1992).

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

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Thomasville, Georgia 31799

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D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

IN THE SUPERIOR COURT OF THOMAS COUNTY

STATE OF GEORGIA

STATE OF GEORGIA, :
v. : Case No. 12 CR 213
_____, :
Defendant. :

PRELIMINARY MOTION TO SUPPRESS
STATEMENTS OF THE DEFENDANT

Comes Now, the above-named Defendant, by and through the undersigned counsel, and respectfully moves this Honorable Court prior to trial to suppress any and all statements made by him to law enforcement officers after his arrest in violation of the Constitution and laws of the United States and the State of Georgia and applicable case law, including but not limited to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States; Articles I, II, XIII, XIV, and XVI of the Constitution of the State of Georgia (1983); OCGA § 24-3-50, et seq.; and *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed.2d 682 (1936), *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and their progeny (see, e.g., *Edwards v. Arizona*, 451 U.S. 477 (1981); *Davis v. United States*, 512 U.S. 452 (1994)); and in support states:

1. Defendant is charged with a criminal felony violation of the laws of Georgia. The State, by and through the District Attorney, will attempt to introduce into evidence at trial oral admissions, written statements, and audio- or video-taped recordings of statements made by the Defendant to law enforcement officers or agents of the State while in custody;
2. Those statements which may incriminate the Defendant were made in the absence of counsel and without an intelligent or knowing waiver of counsel and were not voluntary. See, e.g., *State v. Ritter*, 268 Ga. 108, 485 S.E.2d 492 (1997); *Adcock v. State*, 263 Ga. 759, 438 S.E.2d 910 (1994); *In re: J.C.*, 210 Ga. App. 186, 435 S.E.2d 759 (1993);

WHEREFORE, the Defendant respectfully prays for a *Jackson v. Denno* hearing prior to trial to determine the voluntariness of the statements in the totality of circumstances and to determine the validity of any waiver of counsel prior to the Defendant's interrogation. Defendant requests the suppression of any such

statements. See, Peinado v. State, 223 Ga. App. 271, 477 S.E.2d 408; Hall v. State, 176 Ga. App. 498, 336 S.E.2d 604.

Defendant further requests that he be granted permission by this Honorable Court to amend and supplement this motion upon receipt of discovery from the State.

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

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Thomasville, Georgia 31799

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D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

IN THE SUPERIOR COURT OF THOMAS COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, :

v. : Case No. 12 CR 213

_____, :
Defendant. :

DEMAND FOR THE PRODUCTION OF DISCOVERABLE MATERIAL
PURSUANT TO OCGA § 17-16-1, et seq.

Comes Now, the above-named Defendant, by and through the undersigned counsel, having elected to have the provisions of OCGA § 17-16-1, et seq., apply to Defendant's case and hereby formally requests in writing that the State disclose to the Defense or produce to the Defendant for inspection, copying, photographing, examination, testing or analysis all material required pursuant to OCGA § 17-16-1, including the following:

1. Any and all books, papers, documents, photographs, tangible objects, audio and visual tapes or films, recordings, buildings, and other places controlled by the State and any other items as described or contemplated in OCGA § 17-16-4(a)(3), including any information stored by the State on computer.
2. A true and correct copy of Defendant's Georgia Criminal Information Center criminal history pursuant to OCGA § 17-16-4(a)(2).

____In the event that said evidence is not provided timely to the Defendant, and at the latest ten (10) days prior to trial or prior to any post-indictment/post-accusation pretrial evidentiary hearing. Defendant moves that the State be prohibited from introducing the evidence not disclosed or presenting the witness not disclosed pursuant to OCGA § 17-16-6.

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

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Thomas County District Attorney's Office
Ms. _____ M. Smith
P.O. Box 2596
Thomasville, Georgia 31799

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

IN THE SUPERIOR COURT OF THOMAS COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,

:

v.

:

Case No. 12 CR 213

_____,
Defendant.

:

:

MOTION FOR DISCOVERY, INSPECTION, PRODUCTION AND COPYING OF
EVIDENCE FAVORABLE TO THE ACCUSED PURSUANT TO BRADY v.
MARYLAND

Comes Now, the above-named Defendant, by and through the undersigned counsel, and respectfully moves this Court, pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article 1, § 1, Paragraphs 1, 11, and 14 of the Georgia Constitution, as construed and applied in the case of *Brady v. Maryland*, 373 U.S. 83 (1970), and its progeny including, *Giles v. Maryland*, 386 U.S. 66 (1967); *Giglio v. United States*, 405 U.S. 105 (1972); and *Hicks v. State*, 232 Ga. 393 (1974), to order the Prosecution to permit Defense Counsel to inspect and copy all evidence in the possession and control of the State which may be favorable to the Defendant and material to the issues of guilt or punishment or could reasonably weaken or affect any evidence proposed to be introduced against the Defendant at trial or at sentencing. The evidence sought is to include, but not be limited to:

1. All evidence, including statements of individuals, physical evidence or test results indicating or tending to indicate that the Defendant is not guilty of the offense charged or mitigating on the issue of sentence.
2. All statements of any witness which contradict in any way the statements of other witnesses or which contradict other statements made by that witness.
3. _All reports, memoranda or other information in possession of the State which contain information exculpatory, helpful, favorable or arguably favorable to the Defendant on guilt or innocence or as to sentence.
4. _A complete and detailed list of the arrests and convictions of all State witnesses, whether the State will actually call these witnesses at the trial or not, including any and all charges currently pending against said witnesses which have not yet been officially disposed of by plea, trial or otherwise. See, *Strong v. State*, 232 Ga. 294, 299-300, citing *Brady v. Maryland*, 373 U.S. 83 (1968).
5. _Memoranda, documents or reports of any scientific tests or experiments or studies made in connection with the above-styled case, including any photograph examinations of any witnesses, which may be arguably favorable to the defense.

6. _Copies of any and all arrest warrants relating to this case pursuant to OCGA § 17-4-41.
7. _Copies of any and all search warrants and warrant returns relating to this case pursuant to OCGA § 17-5-25.
8. _Copies of any and all police or sheriff's reports relating to this case pursuant to OCGA § 24-10-26; Henderson v. State, 255 Ga. 687 (1986); OCGA § 50-18-70; Cox Enterprises, Inc. v. Harris, 256 Ga. 299 (1986).
9. _The criminal and/or probation records or any lists or summaries reflecting the criminal and/or probation records of all alleged un-indicted co-conspirators in this matter.
10. _A copy of Defendant's prior criminal record, if any.
11. _The name, identity and whereabouts of any informant, confidential participant, or undercover or secret agent who gave information during the investigation of or leading to the indictment or accusation and arrest of the Defendant, whether said person was paid by or received any promise of other remuneration of any sort from the State for such information.
12. _Furnish a list of all disbursements and/or consideration and/or favors or promises of any sort given to any one or all informants, confidential participants, or undercover or secret agents in this case.
13. _Give a full and complete list of all disbursements of the State or any agent or officer in connection with the investigation or prosecution of this case.
14. _Grand Jury exhibits, pages and transcripts of Grand Jury testimony in that Defendant, upon information and belief, states that such testimony will be exculpatory, lead to the discovery of impeaching information and/or will furnish the basis for impeaching information.
15. _Access to, copies, or printouts of any information stored by the State on any computer; including, but not limited to, evidence categories, file menus, suspect lists, officer details, incident reports, telephone logs and/or reports, pay records, etc.

16. Any statements made by any witness regarding this matter which may be favorable to Defendant's defense.
17. Any written reports, documents, or other physical evidence that may tend to be favorable to Defendant.
18. The results of any chemical tests, scientific tests, analyses or experiments performed by the arresting officer, other officers, the State Crime Lab, the Department of Public Safety, or the manufacturer of the blood and urine testing machine, for this case or any other purpose, which may tend to show in any way the evidence of unreliability of said testing machine or of the operator thereof, the innocence of Defendant, or other evidence favorable to Defendant's case.
19. All tape recordings, whether audio or video, which show Defendant's physical condition at or about the time of arrest or detention, and would arguably tend to show innocence or lack of intoxication, or which would tend to show the extent of Defendant's ability to speak and respond to questions and directions by the police officers involved in this case; and if any such tape recordings are allegedly unavailable due to malfunctioning equipment or faulty tape(s), Defendant demands that the State produce repair or replacement orders, or other evidence supporting their unavailability.
20. All booking slips, prisoner intake forms or other processing sheets used to obtain or record information about Defendant, including any photographs taken of Defendant.
21. Any information regarding Defendant's request to take an additional or independent test, including any advice or notification by the officer concerning the right to have such tests made, with specific mention of when, where and by whom such notice was given.
22. All material now known to the State or which may become known which is exculpatory in nature or favorable to the accused or which may lead to exculpatory material. This request includes reports of any investigations conducted by the State or its agents, or individuals other than the Defendant.
23. The State is required to reveal to the defense not only information "in its file", but should also be ordered to make inquiry of all law enforcement or other agencies involved in this prosecution and to require those agencies to review their files and to provide to the prosecution any information arguably favorable to the

- defendant, including information specifically described above. At a minimum, inquiry should be made of the police investigatory files. See, e.g., *Pennsylvania v. Ritchie*, 480 U.S. 54, 57-61 (1987); *Freeman v. Georgia*, 599 F.2d 64, 69 (5th Cir. 1975)(State held accountable for information known only to investigating police detective); *Brown v. State*, 261 Ga. 66, 401 S.E.2d 492 (1992); *Isaacs v. State*, 259 Ga. 717, 386 S.E.2d 316 (1989).
24. In *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995), the Court emphasized the prosecutor's personal duty to become aware of, and disclose, material exculpatory information:

The prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.
Id., at ____, 115 S. Ct. at 1567.

As one Court has noted, this means that a prosecutor "[m]ust employ whatever means are necessary to discharge her obligation". *United States v. Alvarez*, 86 F.3d 901, 905 (9th Cir. 1996). Thus, the "better practice" is "for the prosecutor herself to review such materials", Id., as it is "particularly important for the prosecutor to ensure that a careful and proper Brady review is done." *Alvarez*, 86 F.2d at 905;¹ see also, *McMillan v. Johnson*, 88 F.3d 1554, 1567-68 (11th Cir. 1996)("The Constitution imposed the duty to disclose exculpatory and impeachment evidence to the defense on the prosecutor...Investigators satisfy their obligations under Brady when they turn over to the prosecutor ... Our case law clearly established that an accused's due process rights are violated when the police conceal exculpatory or impeachment evidence.") *West v. State*, 213 Ga. App. 362, 444 S.E.2d 398 (1994)(reversal for failure to provide exculpatory evidence is withheld; and that late disclosure "deprive[s] [an accused] of a fair trial".); *Holland v. State*, 221 Ga. App. 821, 472 S.E.2d 711 (1996)(reversal where discovery provided was not accurate and complete and was therefore misleading).

25. Likewise, to the extent that a review may create uncertainty about the materiality and/or producibility of any evidence, the "prudent prosecutor will resolve doubtful questions in favor of disclosure." *United States v. Agura*, 427

¹ The *Alvarez* court noted that delegating the responsibility to a non-attorney police officer to review his own and/or others' notes is "clearly problematic", recommending that, as noted, the prosecutor herself undertake the task. Id.

U.S. 97, 108 (1976). Thus:

¶It is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false.

Alvarez, *supra*, at 905.

26. There may be other items and matters of evidence, information and data in existence that are not enumerated aforesaid and of which Defendant is unaware, Defendant now requests and demands Defendant be afforded with any and all evidence and information, whether specifically delineated and listed herein or not, which is known or may become known, or which through due diligence may be learned from the investigating officers of the witnesses or persons having knowledge of this case, which is exculpatory in nature or favorable to the accused or which might serve to mitigate punishment. This includes any evidence impeaching or contradicting the testimony of prosecution witness, or instructions to prosecution witnesses not to speak with or disclose the facts of the case with defense counsel. See, *Agurs v. United States*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1968); *United States v. Giglio*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Sellers v. Estelle*, 651 F.2d 1074, 1077, n.6 (5th Cir. 1981); *Banks v. State*, 235 Ga. 121 (1975); *Rini v. State*, 235 Ga. 218 (1975); *Holbrook v. State*, 162 Ga. App. 400, 401 (1982).

WHEREFORE, the Defendant prays as follows:

- (a) That a hearing be held on this motion in order that the proper foundation may be laid as to what evidence, information and data is in the possession of the State and prosecution and that the State be directed to make such disclosures immediately;
- (b) That if any part of said documentary evidence is not made available to the Defendant prior to trial, he respectfully moves the Court for an order directing the District Attorney to produce all such documents and evidence and to submit the same to her counsel at the close of the State's evidence;
- (c) Without waiving the foregoing, the Defendant requests that an exact copy be made of each item which is not presented to Defense counsel and that the same be sealed and included in the record of this case for the purpose of

insuring effective review of the Court's denial of the Defendant's previous request for disclosure; and

- (d) That the duty of the District Attorney to disclose pursuant to this motion be considered as continuing up until and through the trial and post-judgment proceedings.

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

(Certificate of Service follows on the next page)

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Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

STATE OF GEORGIA, :
v. : Case No. 12 CR 213
_____, :
Defendant. :

Comes Now, the above-named Defendant, by and through the undersigned counsel, and pursuant to OCGA §§ 17-16-7 and 17-16-8 demands the production at the earliest opportunity of the names, current locations, dates of birth, social security numbers, and telephone numbers of the State's witnesses in this matter; the Defendant further demands the production at the earliest opportunity the statement(s) of any witness that is in the possession, custody, or control of the State or prosecution that relates to the subject matter concerning the testimony of a witness that the State intends to call as a witness at trial or at any post-indictment/accusation pretrial evidentiary hearing.

Further, Defendant is entitled to such statements in that same are now substantive evidence which may go to the jury. E.g., *Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717 (1982); *Cuzzort v. State*, 254 Ga. 745, 334 S.E.2d 661 (1985); *Waldrup v. Baker*, 180 Ga. App. 121, 348 S.E.2d 566 (1986).

The Defendant anticipates that the prosecution will call a number of witnesses in the trial. To ensure the Defendant's adequate and proper rights of cross-examination and confrontation and the Defendant's right to effective representation of counsel as provided for in the Constitution and laws of the United States and the State of Georgia and applicable caselaw, these statements and information are demanded at the earliest opportunity but no later than ten (10) days prior to trial and five (5) days prior to any post-indictment/accusation pretrial evidentiary hearing.

In the event that said evidence is not provided timely to the Defendant, and at the latest ten (10) days prior to trial or five (5) days prior to any post-indictment/accusation pretrial evidentiary hearing, Defendant moves that the State be prohibited from introducing the evidence not disclosed or presenting the witness not disclosed

pursuant to OCGA § 17-16-6; and/or for a continuance for a reasonable time to investigate the same. See, Marshall v. State, 320 Ga. App. 116, 495 S.E.2d 585 (1998).

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

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D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

IN THE SUPERIOR COURT OF THOMAS COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, :
v. : Case No. 12 CR 213
_____, :
Defendant. :

GENERAL DEMURRERS, SPECIAL DEMURRERS,
AND MOTION TO QUASH INDICTMENT

Comes Now, the above-named Defendant, by and through the undersigned counsel, and generally demurrers to the accusatory documents and challenges each count thereof. None of the accusatory allegations sufficiently identifies a crime and each count totally fails to inform the defendant of the specific alleged improper conduct that is alleged to have been committed.

Further, the Defendant specially demurrers to each count of the indictment based upon defective form and demands that the defects be removed to allow the document to be perfect in form.

Based on the foregoing, the Defendant respectfully requests that the indictment pending against the Defendant in this case be quashed.

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

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D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

STATE OF GEORGIA, :
v. : Case No. 12 CR 213
_____, :
Defendant. :

Comes Now, the above-named Defendant, by and through the undersigned counsel, and respectfully moves this Court for the entry of an Order directing the State to investigate and disclose all of the following within the possession, custody or control or the existence of which is known or by the exercise of due diligence could become known, to the State:

- 22-

6. Any and all inconsistent statements made by any witness about the alleged crime.

Due process requires that the State not suppress evidence favorable to the accused or discrediting its own case and, upon request, that it disclose to the Defendant all such information. *United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963). This request encompasses information which bears upon the credibility of its witnesses as well as matters more directly material to guilt or innocence. *Giglio v. United States*, 404 U.S. 250 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959). Georgia courts have also held that such information must be provided to the accused upon request. See, e.g., *Smith v. State*, 221 Ga. App. 306, 471 S.E.2d 227 (1996) (failure to fully “reveal deal” with informant requires reversal); *Carroll v. State*, 222 Ga. App. 560, 474 S.E.2d 737 (1996); *Dinning v. State*, 266 Ga. 694, 470 S.E.2d 431 (1996) (officers who investigated case were “part of the prosecution team” for purposes of *Giglio*; and failure to “reveal deal” is reversible error).

7. Courts have held various types of information to be covered under rubric of *Brady* and its progeny:

- i. Testimony about deals:

- a. *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986)
- b. *United States v. Foster*, 874 F.3d 491 (8th Cir. 1988)

- ii. Prior statements of witnesses:

- a. *United States v. Minsky*, 963 F.2d 870 (6th Cir. 1992)
- b. *Lindsay v. King*, 769 F. 2d 1034 (5th Cir. 1985)

- iii. Prior misidentification:

- a. *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988)

- iv. Hesitancy in Identification:

- a. *United States v. Sheehan*, 442 F. Supp. 1003 (D. Mass. 1977)
- b. *People v. Wright*, 480 N.Y.S.2d 259 (Sup. Ct. 1984)

v. Revealing the deal:

- a. United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993)
- b. Ovimetete v. Moran, 942 F.2d 1 (1st Cir. 1991)
- c. Singh v. Prunty, 142 F.3d 1157 (9th Cir. 1998)

vi. Police reports, lab reports, etc.:

- a. Williams v. Whitley, 940 F.2d 132 (5th Cir. 1991)
- b. U.S. ex rel Smith v. Fairman, 769 F.2d 386 (7th Cir. 1985)
- c. Anderson v. South Carolina, 709 F.2d 887 (4th Cir. 1983)
- d. United States v. Spagnuolo, 960 F.2d 990 (11th Cir. 1992)

vii. Motive to testify:

- a. Bagley v. Lumpkin, 798 F.2d 1297 (9th Cir. 1986)
- b. Hughes v. Bowers, 711 F. Supp. 1574 (N.D. Ga. 1989)

viii. Criminal records:

- a. Moore v. Kemp, 824 F.2d 847 (11th Cir. 1987)

Indeed, Courts have recognized that an “open file” policy is not sufficient to discharge these types of Brady issues. See, *Smith v. Secretary, Dep’t of Corrections*, 50 F.3d 801 (5th Cir. 1995). In short, “[t]he Brady rule is one of the methods for seeking to ensure due process – a fair trial.” *Wilson v. Whitley*, 28 F.3d 433, 433 (5th Cir. 1994).

Further, the right of counsel for the Defendant to confront, cross-examine and impeach witnesses is cherished and remains “the principal means by which the believability of a witness and the trust of this testimony are tested.” *Davis v. Alaska*, 415 U.S. 308, 316 (1974); see also, *Pointer v. Texas*, 380 U.S. 400 (1965); Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Defendant respectfully prays that a hearing be held on this matter; that the Court grant this Motion and Order disclosure as requested herein; and that the Defendant be allowed to

amend this Motion as disclosure of evidence provides and warrants further basis for relief, both legal and equitable, as the Court may deem just and proper.

Respectfully Submitted, this 22nd day of May, 2012.

(Signature to follow on page below)

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

CERTIFICATE OF SERVICE

This is to certify that I have this day served the Thomas County District Attorney's Office with a true and accurate copy of the foregoing pleading by mailing a copy of same via United States Mail, with adequate postage affixed thereon, addressed as follows:

Thomas County District Attorney's Office
Ms. _____ M. Smith
P.O. Box 2596
Thomasville, Georgia 31799

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

STATE OF GEORGIA, :
v. : Case No. 12 CR 213
_____, :
Defendant. :

COMES NOW, the above-named Defendant and hereby requests and demands that the information identified below be provided no later than ten (10) days prior to any motion hearing or trial. Upon best information and belief, the Defendant submitted to the requested state-administered blood and urine tests on or about October 8, 2010. The Defendant demands that the State produce the following information regarding those tests:

- 26-

- (5) All logs, reports, spreadsheets, or other documents, in whatever form, reflecting the calibration of all flasks, containers, pipettes, or other equipment used in testing the samples at issue in this case;
- (6) All logs, reports, reports, spreadsheets, or other documents in whatever form, reflecting quality control testing of all flasks, containers, pipettes, or other equipment used in testing the samples at issue in this case;
- (7) All refrigeration logs, reports, or other documents in whatever form, for all refrigerated compartments in which the samples, internal standards, controls, mixtures, standards, and reagents used in or in relation to the analyses in this case were stored or kept at any time;
- (8) The general laboratory protocol or standard operating procedures manual, by whatever name it is known;
- (9) The protocol or standard operating procedure, by whatever name it is known, specific to the tests used in this case;
- (10) The protocol or operator's manual for whatever machine and attached or integrated components were used to test the samples in this case. For example, if this test was done by gas chromatography (GC), then this requests the protocol or operator's manual of the GC, the auto sampler, if one was used, the flame ionization detector, if one was used, and the mass spectrometer, if one was used -- all of which would be considered attached or integrated components of the machine used to conduct the tests;
- (11) The protocol for calibration of all flasks, containers, pipettes, or other equipment used in testing the sample at issue in this case;
- (12) The protocol for the preparation of all solutions, reagents, mixtures, or other substances used as, as part of, or in relation to or as internal standards, controls, mixtures, or standards in the batch in which the samples in this case were run;

- (13) The quality control protocol for all solutions, reagents, mixtures, or other substances used as, as part of, or in relation to internal standards, controls, mixtures, or standards in the batch in which the samples in this case were run;
- (14) All records reflecting internal testing or quality control testing of all solutions, reagents, or mixtures used as, as part of, or in relation to internal standards, controls, mixtures, or standards in the batch in which the samples in this case were run;
- (15) If any solution used in any sample, internal standard, control, mixture, or standard in the batch in which the samples in this case was run was purchased from an outside supplier, any quality control certificate provided by the supplier or manufacturer with or applicable to such solution;
- (16) Documents reflecting the expiration date of all externally purchased solutions or reagents used in the batch in which the samples in this case were tested;
- (17) Documents reflecting the brand and model number of the machine, and all attached or integrated components, that was used for testing in this case. For example, if this test was done by gas chromatography (GC), then this requests the brand and model of the GC, the auto sampler, if one was used, the flame ionization detector, if one was used, and the mass spectrometer, if one was used -- all of which would be considered attached or integrated components of the machines used to conduct the test;
- (18) All proficiency testing results for the section of the laboratory testing the sample in this case as well as for the person who conducted the testing in this case -- both for the three years preceding the test and for any such testing since the testing in this case. This specifically includes the summary report of expected results for the proficiency testing (and the manufacturers information sheet) against which the proficiency test results are judged;
- (19) All internally generated maintenance or repair records or logs for the machines and all attached or integrated

components for the two years preceding the tests in this case and since the tests in this case;

- (20) All documents, apart from those in the prior item, evidencing or concerning maintenance for or repair of the machine, and all attached or integrated components, by any outside repair facility or source -- for two years preceding the test in this case and at any time since the test in this case;
- (21) All records, other than those responsive to the prior two items, evidencing or concerning the return of the machines to the manufacturer or supplier for maintenance or repair -- for two years before the testing in this case and at any time since the tests in this case;
- (22) Documents evidencing the purchase of parts to be used in the operation or maintenance of the machines, and all attached or integrated components, used in the testing in this case -- for two years before the tests in this case and at any time since the tests in this case;
- (23) All lab notes, case files, case reports, or bench notes, by whatever name known, and in whatever form, as well as all documents contained in the testing folder specific to the tests in this case. This includes a copy of the case or testing folder itself if it contains any notations or entries;
- (24) All chain of custody documents and records, whether maintained manually or electronically generated, specific to the specimen(s) in this case;
- (25) All documents, whether manually maintained or electronically recorded, reflecting, evidencing, or concerning, the identity of any person(s) involved in the acquisition, transportation, transmittal, storage, analysis, disposal, or other possession or manipulation of the specimen(s) from which the analyses in this case were performed;
- (26) All documents, including emails, reflecting communications within the lab or between lab personnel and others outside the lab regarding the

drafting or editing of any audit or quality control report or related to the analyses or specimens in this case;

- (27) All warranties for all machines, and all attached or integrated components, used for testing the samples or any standards or controls used in the batch in which these samples were tested;
- (28) All reports of internal audits for the last three years or since the time of the tests in this case of the section of the laboratory performing the tests used in this case as well as the report of any overall lab audit that includes machines, components, chemicals, reagents, storage facilities, or anything else used in connection with the testing of the samples, internal standards, controls, mixtures, or standards in the batch in these tests;
- (29) All reports of external audits for the three years preceding the tests in this case and at any time since the tests in this case of the section of the laboratory performing the tests used in this case as well as the report of any overall lab audit that includes machines, components, chemicals, storage facilities, or anything else used in connection with the testing of the sample, internal standard, mixtures, standards, and controls in the batch in these tests;
- (30) All documents reflecting lab accreditation (for forensic labs, this specifically includes, without limitation ASCLD and GBI accreditation) and all reports to or of, or communications to and from, any accrediting entity in the three years prior to the tests in this case and at any time since the tests in this case. This specifically requests not only the accreditation certificate, but also the evaluation and report generated as part of the accreditation process. The documents should include any accreditation in effect at the time of the tests in this case as well as any accreditation subsequent to the time of the tests in this case;
- (31) All annual accreditation audit reports prepared for ASCLD or any other accreditation since the labs last complete accreditation;

- (32) If the lab received more than one vial or container of blood or other substance, records reflecting which vial was tested in this case;
- (33) Log Book records for two years prior to the tests in this case to the present for:
 - A. The GC log book, by whatever name known, reflecting all maintenance and repair.
 - B. The log books for all equipment ancillary to the GC (e.g., auto sampler, FID, etc.).
 - C. The balance log book for any balance used for any equipment used in blood and urine testing.
 - D. All Stock solutions.
 - E. Volatile Mixture standard.
- (34) Quarterly Balance quality control records on any balance instrument related to or used in blood and urine testing in this case;
- (35) Records reflecting the calibration of weights on any balance or instrument related to or used in blood and urine testing in this case;
- (36) Linearity plots for the GC used in this case from two years prior to the tests in this case to the present;
- (37) All evaluation forms for any person listed on chain of custody documents in this case from two years prior to the tests in this case to the present;
- (38) All quality assurance plans for or regarding blood and urine testing in this case to the present;
- (39) Annual self assessment reports for from two years prior to the tests in this case to the present;
- (40) All deviation request forms regarding blood and urine testing from two years prior to the tests in this case to the present;
- (41) All client complaints and client complaint logs regarding blood and urine testing or persons involved in blood and urine testing from two years prior to the tests in this case to the present;

- (42) Client survey results regarding blood and testing from two years prior to the tests in this case to the present;
- (43) Annual vault inspection reports and records from two years prior to the tests in this case to the present;
- (44) Regarding any person listed on chain of custody documents in this case:
 - A. Employee training record.
 - B. Employment application.
 - C. All CV's and resumes.
 - D. Performance reviews for two years prior to the tests in this case to the present.
- (45) Laboratory staff and meeting documentation two years prior to the tests in this case to the present;
- (46) Critical supply and service list for two years prior to the tests in this case to the present;
- (47) Approved vendor list including for the critical supply and services list for two years prior to the tests in this case to the present;
- (48) Copies of the periodic inspection certificates issued pursuant to O.C.G.A. § 40-6-392(f) for the machine(s) used to test Defendant's blood and urine, including the last certificates issued before Defendant's test and the first certificates issued after Defendant's test;
- (49) Copies of the methods or procedures approved by the Division of Forensic Sciences, effective on the date of Defendant's test, for (i) the administration of state-administered blood and urine tests, and (ii) the periodic inspection of blood and urine-testing devices and the issuance of inspection certificates;
- (50) Copies of the permit(s) issued by the Division of Forensic Sciences to the operator(s) or person(s) who performed the blood and urine tests in this case;

Defendant seeks production of the requested information under the authority of O.C.G.A. § 40-6-392(a)(4), see, Price v. State, 269 Ga. 222 (1998), and, to the extent that any of the requested information constitutes a scientific report, under the authority of O.C.G.A. § 17-16-23.

DEFENDANT HEREBY MOVES THE COURT TO ORDER PRODUCTION OF THE DOCUMENTS AND FULL INFORMATION REQUESTED ABOVE. IF THE REQUESTED INFORMATION IS NOT PROVIDED TEN (10) DAYS BEFORE TRIAL, OR ANY HEARING CONTESTING THE ADMISSIBILITY OF DEFENDANT'S TEST RESULTS, DEFENDANT WILL SEEK EXCLUSION OF THE TEST RESULTS THEMSELVES. See, Birdsall v. State, 254 Ga. App. 555 (2002).

Absent all of the requested discovery, Defendant's rights under O.C.G.A. § 40-6-392(a)(4), the Fourth, Fifth and Sixth Amendments to the United States Constitution, and Article I, Section I, Paragraphs XIII, XIV and XVI of the Georgia Constitution will be violated to his irreparable injury and thus deprive the Defendant of a fair trial.

WHEREFORE, Defendant respectfully prays that this motion be granted in its entirety.

Respectfully Submitted, this 22nd day of May, 2012.

(Signature to follow on page below)

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

CERTIFICATE OF SERVICE

This is to certify that I have this day served the Thomas County District Attorney's Office with a true and accurate copy of the foregoing pleading by mailing a copy of same via United States Mail, with adequate postage affixed thereon, addressed as follows:

Thomas County District Attorney's Office
Ms. _____ M. Smith
P.O. Box 2596
Thomasville, Georgia 31799

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

IN THE SUPERIOR COURT OF THOMAS COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, :
v. : Case No. 12 CR 213
_____, :
Defendant. :

MOTION IN LIMINE TO EXCLUDE BLOOD AND URINE TESTS RESULTS ON
STATUTORY GROUNDS

COMES NOW, Defendant in the above-styled case and moves this Court in limine to exclude from evidence the results of the blood and urine tests that were administered to Defendant in connection with the charges in this case. The Defendant submitted to the state-

administered test of his blood and urine in connection with his arrest on October 8, 2010. The results of the blood and urine tests that were administered upon the Defendant should be excluded from evidence based upon the following grounds and reasons:

- (1) The state cannot show that the request for Defendant's breath test was preceded by a valid DUI arrest supported by probable cause;
- (2) The state cannot show that Defendant was properly and timely advised of implied consent rights as required under O.C.G.A. § 40-6-392(a)(4);
- (3) The state cannot show that Defendant was given a reasonable opportunity to have an additional independent test performed by a person of Defendant's own choosing, as required by O.C.G.A. § 40-6-392(a)(3);
- (4) The state cannot show that Defendant's blood and urine tests were performed, or the machine inspected, according to the methods approved by the Division of Forensic Sciences of the Georgia Bureau of Investigation ("DFS") as required by O.C.G.A. § 40-6-392(a)(1)(A);
- (5) The state cannot show that Defendant's blood and urine test was performed on a machine operating with all its electronic and operating components attached and in good working order by an individual possessing valid permit issued by the DFS for this purpose as required by O.C.G.A. § 40-6-392(a)(1)(A);
- (6) The state cannot show that Defendant's blood and urine tests were administered as soon as possible as required by O.C.G.A. § 40-5-67.1(a);
- (7) The state cannot show that the drawer of the Defendant's blood was adequately qualified as required by O.C.G.A. § 40-6-392;
- (8) The state cannot show that DFS has approved "requirements for properly operating and maintaining" the testing instruments used in this case. O.C.G.A. § 40-6-392(a)(1)(A), as amended; and
- (9) Defendant was misled into submitting to testing by an improperly read implied consent notice which changed the

substance of the implied consent warning. Maurer v. State,
240 Ga. App. 145 (1999).

WHEREFORE, Defendant moves the Court to suppress the results of any blood and urine test obtained in connection with the charges in the above-styled case from use as evidence in the trial of the above-styled case or any other legal proceeding.

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant
CERTIFICATE OF SERVICE

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Thomas County District Attorney's Office
Ms. _____ M. Smith
P.O. Box 2596
Thomasville, Georgia 31799

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

STATE OF GEORGIA, :
v. : Case No. 12 CR 213
_____, :
Defendant. :

Comes now, Defendant and moves this Court to exclude from evidence any and all statements, acts or responses allegedly made by Defendant, which statements, acts or responses are incriminating as to guilt or impeachment, including Defendant's acts in response to instructions from the arresting officer to perform "field sobriety tests." Upon best information and belief, the Defendant was detained on October 8, 2010 at approximately 6:40 p.m. by Trooper R. Thomas of the Georgia State Patrol and other members of the Georgia State Patrol and Thomas County Sheriff's Office. The officers proceeded to interrogate him and search his person and property without a warrant of any kind. In support of this motion, the Defendant shows the Court as follows:

- WHEREFORE, Defendant prays that the Court exclude from the trial of this case the evidence obtained illegally as set forth above.

(Signature to follow on page below)

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

CERTIFICATE OF SERVICE

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Thomas County District Attorney's Office
Ms. _____ M. Smith
P.O. Box 2596
Thomasville, Georgia 31799

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

IN THE SUPERIOR COURT OF THOMAS COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, :
v. : Case No. 12 CR 213
_____, :
Defendant. :

MOTION IN LIMINE TO EXCLUDE ALL EVIDENCE GATHERED AS A
RESULT OF AN UNLAWFUL SEIZURE

Comes now, Defendant in the above-styled case and moves the Court to exclude from use at trial any evidence gathered after the initial detention of the Defendant. Upon best information and belief, the Defendant was detained on October 8, 2010 at approximately 6:40 p.m. by Trooper R. Thomas of the Georgia State Patrol and other members of the Georgia State Patrol and Thomas County Sheriff's Office. The officers proceeded to interrogate him and search his person and property without a warrant of any kind. Any evidence gathered after the initial stop and detention of Defendant should be excluded from use at trial based upon the following grounds and reasons:

- (1) At the time of Defendant's initial detention by the police, sufficient facts did not exist to support even an articulable suspicion that Defendant was under the influence of alcohol or drugs, or that any other criminal activity was underfoot; and
- (2) Defendant further shows that this initial detention was an unlawful warrantless seizure, not supported by probable cause or suspicion, violating Defendant's rights under the Fourth Amendment to the Constitution of the United States, and Article I, Section I, Paragraph XIII of the Constitution of the State of Georgia of 1982.

WHEREFORE, Defendant moves the Court to exclude the evidence illegally obtained as set forth above, and to direct the prosecutor and the state's witnesses to not use, mention or otherwise refer to such evidence at the trial or other proceeding in this case.

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,

State Bar No. 141280
Attorney for Defendant

CERTIFICATE OF SERVICE

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Thomas County District Attorney's Office
Ms. _____ M. Smith
P.O. Box 2596
Thomasville, Georgia 31799

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

IN THE SUPERIOR COURT OF THOMAS COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,

:

v.

:

Case No. 12 CR 213

_____,
Defendant.

:

:

MOTION TO SUPPRESS EVIDENCE AND STATEMENTS OBTAINED
UNLAWFULLY BY POLICE

Comes Now, the above-named Defendant, by and through counsel and hereby files her Motion to Suppress, showing this Honorable Court the following:

-1-

Upon best information and belief, the Defendant was detained on October 8, 2010 at approximately 6:40 p.m. by Trooper R. Thomas of the Georgia State Patrol and other members of the Georgia State Patrol and Thomas County Sheriff's Office whose names are not known to the Defendant. The officers proceeded to interrogate him and search his person and property without a warrant of any kind.

-2-

As a result of the aforesaid warrantless acts by police, Defendant was arrested and is now charged in the above styled action with the offenses of homicide by vehicle in the first degree, driving under the influence, and reckless driving.

-3-

With regard to the warrantless stop of the vehicle and the detention and search of Defendant's person and property by police at the above time and place, Defendant shows as follows:

(a) The police detained Defendant without probable cause, without consent and without reasonable and articulable suspicion that the Defendant was engaged in or about to be engaged in criminal activity.

(b) The police detained Defendant beyond the time necessary and for purposes unrelated to the initial stop, and such prolonged detention was without probable cause, without consent and without reasonable articulable suspicion of criminal activity.

(c) The police searched the Defendant's person and property without probable cause, without consent, without lawful arrest, without exigent circumstances and without authority under any other

recognized exception to the warrant requirement embodied in the State and Federal Constitutions.

(d) The police interrogated Defendant while he was unlawfully detained, handcuffed and held in police custody and without giving the required Miranda warnings to Defendant prior to such interrogation.

-4-

For the foregoing reasons, the warrantless stop, detention, search and interrogation by police at the above time and place was unreasonable and violated the Defendant's rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution, Article I, Section I, Paragraph XIII, XIV and XVI of the Georgia Constitution, and the provisions of O.C.G.A. § 17-5-30.

Consequently, any and all evidence gathered, observed, and seized by police as a result of such unlawful actions should be suppressed by the Court, and no testimony, statements, conclusions or other references concerning such matters should be allowed or considered as evidence in the trial of this case.

WHEREFORE, the Defendant prays as follows:

(a) That the Court hold evidentiary hearings on this motion outside the presence of the jury and as otherwise deemed appropriate; and,

(b) That the Court allow Defendant to submit written briefs and argument in support of this motion subsequent to any hearing;

(c) That the Court grant the within motion to suppress and prohibit the State from offering evidence concerning any observation of the Defendant made during the illegal stop and detention, any observation of the Defendant made during the Defendant's performance of field sobriety tests, and the results of the state-administered chemical tests, as well as any statement obtained by police in violation of the Defendant's Constitutional and statutory rights enumerated above; and

(d) That the Court grant Defendant such other and further relief deemed just and proper in this case.

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

CERTIFICATE OF SERVICE

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Thomas County District Attorney's Office
Ms. _____ M. Smith
P.O. Box 2596
Thomasville, Georgia 31799

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

IN THE SUPERIOR COURT OF THOMAS COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, :

v. : Case No. 12 CR 213

_____,
Defendant.

:

:

MOTION IN LIMINE TO EXCLUDE EVIDENCE OF "ROMBERG"
EVALUATION, EYELID TREMORS, BODY TREMORS,
REDDENING OF THE CONJUNCTIVA, AND RAISED TASTEBUDS
FROM THE TRIAL OF THIS CASE

Comes Now, the Defendant, by and through the undersigned counsel of record, and moves this Honorable Court to exclude from trial all evidence regarding the "Romberg" evaluation, eyelid tremors, body tremors, reddening of the conjunctiva, and raised tastebuds as being indicative of the Defendant driving under the influence of drugs to the extent that he was a less safe driver. In furtherance of this motion, the Defendant shows this Court the following:

On October 8, 2010, Trooper Kelly of the Georgia State Patrol requested that the Defendant perform a field sobriety test. The test is referred to as the "Romberg" evaluation. Trooper Kelly stated that he observed that the Defendant improperly estimated 23 seconds to be 30 seconds, and the Defendant allegedly exhibited eyelid tremors, body tremors, reddening of the conjunctiva, and raised tastebuds.

The Defendant challenges the admissibility of the "Romberg" evaluation, eyelid tremors, body tremors, reddening of the conjunctiva, and raised tastebuds as being indicative of the Defendant driving under the influence of drugs to the extent that he was a less safe driver. These evaluations and observations constitute scientific evidence and as such should not be received into evidence without the proper foundation. See *Harper v. State*, 249 Ga. 519 (1982).

LEGAL ARGUMENT

Scientific evidence is evidence based upon principals of science and "shrouded in the mystery of professional skill or knowledge." See, *Metropolitan Life Insurance Company v. Saul*, 189 Ga. 1, 9 (1939). Such evidence is "beyond the ken of the average [person]." See, *Williams v. State*, 254 Ga. 508, 510 (1985). The evaluations and observations described above constitute scientific evidence. The average person would not understand that alleged problems estimating the passage of time, eyelid tremors, body tremors, reddening of the conjunctiva, and raised tastebuds or other such alleged symptoms would be indicative of someone under the influence of drugs. These are not commonsense evaluations and observations.

Trooper Kelly's alleged evaluations and observations are similar to the Horizontal Gaze Nystagmus test that police officers often administer in DUI cases. "The HGN is a test manifesting in an involuntary rapid and then slow jerk of the eye." *Manley v. State*, 206 Ga. App. 281 (1992). That evaluation is a "scientific procedure." *State v. Pastorini*, 222 Ga. App. 316, 319 (1996). On the other _____, field sobriety evaluations that "demonstrate a suspect's dexterity and ability to follow directions do not constitute scientific evidence." *Id.* at 318. For evaluations such as the One Leg Stand test, which was not used in Defendant's case, an average person can have an understanding that such evaluations would generally be performed less skillfully by a person who was under the influence of an intoxicant. This, however, is not the true for evaluations and observations such as HGN, the Rhomberg Evaluation, tremors, and eye symptoms about which the officer reported in Defendant's case. There is not a commonsense conclusion accessible to the average person that these observations are indicative of someone who is under the influence of an intoxicant. These are not "behavioral observations." Rather, the evaluations and observations in question are medical observations that require knowledge of the health sciences, medicine, or perhaps toxicology to fully comprehend. See *Id.* at 319. It is simply not commonsense that a person who is under the influence of an intoxicant, be it marijuana or anything else, would have trouble estimating the passage of thirty seconds, would have tremors, raised taste buds, or other eye symptoms.

Because the evaluation and observations constitute scientific evidence, the State must establish the foundation required by *Harper v. State*, 249 Ga. 519 (1982), before the Court can admit the evidence. *Harper* requires that the court make the determination that the evidence "has reached a scientific stage of verifiable certainty... [and that the] procedure rests upon the laws of nature." *Id.* at 525. The court makes such a determination from "the evidence available to [it];" this may include expert testimony, exhibits, treatises, or the rationale of cases from other jurisdictions. *Id.* at 25-26. Once the evidence is "recognized in a substantial number of courts" the court may take judicial notice that the scientific evidence has reached a stage of verifiable certainty, the way that a court may admit the results of the HGN evaluation. See *Harper*, 249 Ga. at 525.

The Appellate Courts of this State have not considered the evaluation and observations at-issue in this case in the way that the courts have considered the HGN evaluation. Unless the State establishes the foundation required by *Harper*, the evaluations, the observations, and any conclusions drawn from them should not be admitted against the defendant.

Defendant instead contests the science and the validity of using these evaluations and observations to form the basis of an opinion that the Defendant was under the influence of intoxicants at the time of his arrest. Because the officer's investigative technique constituted the gathering of scientific evidence that has not been recognized by a substantial number of courts and has not been utilized for a

significant period of time with expert testimony being offered in case after case, the trial court is not authorized to admit the evidence without the proper foundation. See, *Izer v. State*, 236 Ga. App. 282 (1999).

CONCLUSION

The Defendant respectfully requests that this Honorable Court enter an order that the "Romberg" evaluation, eyelid tremors, body tremors, reddening of the conjunctiva, and raised tastebuds, in the context of being indicia of a person who is under the influence of drugs to the extent that the person is less safe to drive, are scientific evidence. As such, the Court should require the State to meet the foundation required under *Harper* before the Court can receive the evidence in question.

Respectfully Submitted, this 22nd day of May, 2012.

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant
CERTIFICATE OF SERVICE

This is to certify that I have this day served the Thomas County District Attorney's Office with a true and accurate copy of the foregoing pleading by mailing a copy of same via United States Mail, with adequate postage affixed thereon, addressed as follows:

Thomas County District Attorney's Office
Ms. _____ M. Smith
P.O. Box 2596
Thomasville, Georgia 31799

Respectfully Submitted, this 22nd day of May, 2012.

((Signature to follow on page below))

D. BENJAMIN SESSIONS,
State Bar No. 141280
Attorney for Defendant

