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IN THE SUPERIOR COURT OF IRWIN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
v.	)	CRIMINAL ACTION
	)	CASE NO. 2017CR027
RYAN ALEXANDER DUKE,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S RENEWED MOTION FOR CONTINUANCE OF TRIAL DATE

COMES NOW Defendant, Ryan Duke ("Mr. Duke" or "Defendant"), by and through his undersigned counsel, and hereby respectfully renews his prior motions to continue this case, and in further support of this motion, Mr. Duke shows the Court further as follows:

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Mr. Duke was arrested in February of 2017 and following his arrest, Mr. John Mobley, the Public Defender for the Tifton Judicial Circuit, was appointed to represent Mr. Duke. While represented by Mr. Mobley, Mr. Duke received some of the State's discovery materials, but little else happened in the case.

In September of 2018, Mr. Duke retained The Merchant Law Firm, P.C. to represent him *pro bono* in this matter and since that time undersigned counsel, including Mr. Evan Gibbs, with the law firm of Troutman Sanders LLP (who is also working *pro bono* on this matter), have worked diligently to prepare the case for trial. Numerous motions were filed in the fall of 2018, and the Court held a motions hearing in November of 2018. During that hearing, Mr. Duke argued a number of different, but significant, motions related to his right to obtain a fair trial, including a Motion To Transfer Venue,

which the State originally consented to, but following the "leak" of a GBI summary of Mr. Duke's statement to the GBI, the State withdrew its consent.

In addition, Mr. Duke requested that the Court order Irwin County appropriate funds for Mr. Duke's defense since he was indigent and could not afford, among other things, an investigator to assist the defense in reviewing the GBI's file, contacting potential witnesses, and gathering information pertinent to Mr. Duke's Motion To Transfer Venue. After the Court denied those motions on the ground that the funds were the responsibility of the State of Georgia, not Irwin County, in early December of 2018 Mr. Duke filed motions requesting that the Court order the State of Georgia to appropriate funds for Mr. Duke's defense.

The Court denied those requests at the Court's last hearing in February of 2019 and also denied the defense's Motion to Transfer Venue. The defense requested a certificate of immediate review of the Court's decisions, but the request was denied. During that hearing, the Court also entered a Scheduling Order requiring the State to provide its discovery on or before February 22, 2019 and requiring the defense to provide its discovery on or before March 8, 2019.[1]

The defense then filed a Consolidated Motion for Motion for State Funding for Defense Experts and Investigator on February 28, 2019 during an *ex parte* hearing scheduled that same day. This Motion consolidated and incorporated his previously filed Motion for State Funding for Defense Experts and Investigator which had been pending since December 2018. On March 11, 2019, the Court informed counsel via e-mail that it

[1] It is important to note that, to show complete transparency, the undersigned counsel advised the State, in writing and prior to the State's deadline to serve its discovery on Mr. Duke, that Mr. Duke would be seeking a continuance. In no way is the seeking of this continuance a tactical maneuver to obtain the State's discovery and then delay Mr. Duke's reciprocal obligation.

would be denying Mr. Duke's Consolidated Motion. On March 14, 2019, the Court entered an Order denying Mr. Duke's Consolidated Motion in its entirety. On March 15, 2019, defense counsel filed a Motion for Certification for Interlocutory Appeal of the Court's March 14, 2019 Order Denying Defendant's *Ex Parte* Consolidated Motion For State Funding For Defense Experts and Investigator.

SPECIFIC GROUNDS FOR CONTINUANCE OF THE TRIAL

1. The State has failed to provide contact information for 12 of its witnesses.

While the State supplied discovery and a witness list to the defense by the deadline, several issues within the discovery have caused the defense to require a continuance. First, the State has provided either no address or outdated addresses for at least 10 of their listed witness. Additionally, the State has failed to provide phone numbers for at least 12 of their witnesses. Many of the other phone numbers that were provided are outdated. Defense counsel has attempted to run searches to locate these individuals so that they could be interviewed prior to trial but has been unable to locate the majority of them. Since counsel will be trying the case without the aid of an investigator, counsel must complete all investigation and trial preparation *prior* to the start of this case. Normally, defense has the ability to interview and locate witnesses during the trial but without the assistance of an investigator defense counsel cannot advocate in the courtroom while at the same time following up on the State's last-minute witness information. This is precisely why the statute requires this information be provided 10 days in advance of trial and why this court enacted a scheduling order. Newly discovered evidence can be ongoing but these are witnesses that the State has known about for quite some time and, with the resources of several different law

enforcement agencies working on this case, providing the legally required contact information for witnesses by the Court's date should not have been a problem. Despite all of this, the State has still, 10 days prior to trial, failed to provide this information. Defense counsel has had to spend an inordinate amount of time investigating the State's own witnesses just to locate the information that the State was required by statute and court order to provide by February 22, 2019.

2. The State has failed to provide witness date of births and the Court has not ruled on Defendant's motion to compel production of GCIC's for the State's witnesses.

Without dates of birth for the State's witnesses, defense counsel is unable to request Georgia criminal history information ("GCIC"). Additionally, the Georgia Bureau of Investigations charges a $15 per person fee to perform a GCIC for defendants. The State has the ability to run these searches without any cost whatsoever. The Court has not ruled yet on defendant's motion for GCIC's from the State but these GCIC's must be provided in advance of trial so that counsel can obtain certified copies of any and all convictions to use for impeachment.

3. The State has insisted on being present for any and all calls with any GBI crime lab witnesses that are on the State's witness list.

The State of Georgia's Division of Forensic Sciences "Crime Lab" is a taxpayer-funded agency designed to support the Criminal Justice System of Georgia. Many of the State's designated "expert witnesses" are employed by the GBI crime lab. Defense counsel has attempted to reach out to these witnesses to interview them prior to trial and discuss their work in this case and the basis for their expert opinions. The District Attorney's Office has instituted a policy that the GBI crime lab employees listed on the State's witness list are not allowed to speak with defense counsel without a member of

the District Attorney's office present. This has caused a *significant* hindrance to defense counsel being able to interview the State's GBI witnesses since the defense has been forced to coordinate with the schedules not only of the GBI witnesses but also with the District Attorney's Office who has insisted on being a party to all interviews by defense counsel with GBI witnesses. And, of course, two of the district attorneys in this case spent much of last week and this week preparing for and trying the case against Bo Dukes in Wilcox County. As a result, defense counsel has been forced to work around the schedules of these district attorneys in order to talk with many of the important GBI witnesses.

Furthermore, several of the State's witnesses, including expert witnesses and important factual witnesses like Bill Barrs, have refused to talk with the defense without the district attorneys present for the call. The defense has made clear that it has no objection to the district attorneys being present, but, again, due to the district attorneys not being available, this has delayed the defense's ability to talk with important fact witnesses and the State's experts. One of the State's proposed expert witnesses, Lt. Joshua Chancey, originally agreed to talk with the defense about his opinions, but following a conversation with Ms. Hart, now is refusing to talk with the defense at all about his opinions.

Finally, several of the witnesses on the State's witness list, including one who has been designed as an expert and for whom a summary of opinion has been provided by the State, had no idea why they were being called for trial. In this vein, several witnesses had been told they were not being called to trial or the State did not believe they would be called as witnesses at trial. The State has not advised defense counsel of this, and the

State specifically said anyone is subject to being called as a witness if they appear on the witness list, so defense counsel are forced to interview all of the witnesses. In one instance, the defense even had to forward the reports authored by a former employee of the GBI (who the State has identified as an expert) just so the defense could learn her knowledge and opinions.

All of this has contributed to incredible difficulty in scheduling calls and learning the knowledge of important witnesses who will testify at trial. Again, normally, the defense would have the assistance of an investigator to interview witnesses and follow up with the district attorneys to get current contact information, but since the defense has not been provided resources to balance those of the State, the State strategically has the defense sending email after email requesting times for conference calls all the while claiming the district attorneys are unavailable for calls due to another trial.

4. The majority of the State's experts did not actually render the opinions listed in the State's expert witness summaries and they are unprepared to discuss these opinions with defense counsel.

The State was required to disclose the opinions including summaries of all opinions that were orally provided in writing to defense counsel by the February 22, 2019 deadline. **Apparently the District Attorney's Office authored expert opinions without actually speaking with a number of these experts.** For example, the District Attorney's Office provided an "expert summary" for the opinion of a "drug recognition expert." The expert opinion summary was authored by the District Attorney's Office and not by any "expert." In fact, when defense counsel contacted the State's designated "expert" this expert, Lt. Joshua Chancey, he had not even reviewed any case materials or provided the State with any opinions.

This hinders defense counsel's ability to prepare for trial since the State's experts have not actually performed any expert review and are unprepared to discuss their opinions with defense counsel in advance of trial. Furthermore, this creates a potential trial issue because apparently the District Attorney's Office is generating the opinions it wishes its experts to render before they have reviewed any materials in this case.

5. The denial of funds for expert assistance has caused defense counsel to, in essence, become its own expert in very complex scientific areas.

This case includes some very complex, novel scientific theories and what could be classified as "fringe science." For example, it includes "touch DNA" that was analyzed by a software called TrueAllele, which was performed for the first time in Georgia only recently. Therefore, defense counsel, without an expert to assist, has been forced to interview all of the State's "experts" and review all of the testing that was performed by those experts while at the same time having to learn the science so as to be able to understand what defense counsel was reviewing. Normally, defense counsel would give copies of the State's expert's opinions and testing to the defense expert and the defense expert would review, consult and explain the scientific testing. Without an expert, defense counsel has been forced to spend countless hours of review and research, which would normally have been done quickly by an experienced defense expert witness in touch DNA.

Defense counsel has interviewed several of the State's forensic biologists including several that the State intends to offer as experts at trial. Defense counsel needs additional time to learn the science that these witnesses use everyday in the jobs and which they have been studying since their undergraduate studies. Undersigned counsel has only been counsel for the defendant for roughly 6 months. The GBI and the State,

and, in turn, their proposed experts, have had much of the GBI's evidence for years. This puts the defense at a significant disadvantage, particularly since the Court has denied the defense request for funds for an investigator and an expert in this novel DNA evidence.

6. The jury questionnaires that have been received need to be compiled and analyzed for a renewed venue challenge which is an even greater issue after the State decided to try Bo Dukes this week in a nearby county.

Originally the State did not object to Mr. Duke's Motion for a Change of Venue. After the State changed its position on this motion, the Court gave defense counsel an opportunity to present evidence in support of the change of venue. Without funds for an investigator to prepare a venue study, defense counsel was unable to proceed. Since that time, hundreds of jury summons with questionnaires have been completed and many returned to defense counsel. Defense counsel, in the limited time left for trial faced with the difficulties outlined above, has and will be unable to compile a venue study for the Court so that the Court can make an informed decision on the change of venue prior to the start of voir dire.

Additionally, since these questioners were mailed and returned, the State of Georgia chose to try Bo Dukes in a related case in a nearby county that shares the same news outlets as the jury pool in Irwin County. This has likely increased the need for a change of venue since the majority of the testimony at the trial of Bo Dukes was unchallenged and would be inadmissible hearsay if the State sought to introduce it against Mr. Duke. In addition, though the State in that case told the jury it was not about Tara Grinstead's murder, the State strategically used that trial to introduce evidence that likely will be addressed in Mr. Duke's trial.

Therefore, the jury pool received intense news coverage including prejudicial and inadmissible evidence allegedly implicating Mr. Duke. The State's decision to try Bo Dukes immediately prior to Mr. Duke's trial, coupled with the lack of a venue study or any data compilation for the Court to rely on in deciding whether a change of venue is warranted, will likely cause a great deal of time and expense in attempting to select a jury only to discover that venue should have been changed in the first place. Indeed, several of the jurors have indicated in their questionnaires that they do not believe Mr. Duke can get a fair trial in Irwin County, Georgia. If defense counsel is provided with the time needed to compile the data from these jury questioners, the court can make an informed decision and ensure that this case is tried in an appropriate venue so Mr. Duke receives a fair trial.

7. Defense counsel was just provided, on February 22, 2019, without hours of interviews conducted by law enforcement that had only previously been summarized by law enforcement.

Initial discovery included primarily typed "summaries" of interviews that law enforcement had conducted in this case. While defense counsel reviewed these summaries and used them to prepare for trial, when the State served discovery at the end of February, the recordings of these interviews were also provided. Defense counsel has been reviewing these audio recordings and they differ in significant ways from the information that law enforcement chose to put in their summaries. Based on this, defense counsel must now listen to hours and hours of witness interviews in order to obtain important information from these interviews that law enforcement chose not to list in their summaries.

8. Defense counsel has been forced to litigate funding issues, which has required a great amount of time to litigate which has taken away from the ability to prepare for trial.

Since entering an appearance in this case, defense counsel has been constantly litigating Mr. Duke's constitutional right to have expert and investigative assistance in his defense. This matter has been extensively briefed, extensively litigated in court, and defense counsel has tried to ensure that Mr. Duke has the resources necessary to prepare his defense. Defense counsel has spent considerable time and effort researching, briefing and arguing these issues to the Court since December. This has hampered defense counsel's ability to prepare this case for trial since, to date, the primary litigation in this case has centered on this funding question. Defense counsel believes this issue is of such constitutional importance and that, without adequate funding Mr. Duke will receive a trial that lacks due process, lacks fundamental fairness and lacks a constitutionally adequate defense.

ARGUMENT AND CITATION OF AUTHORITIES

Georgia law requires that, "[i]n all cases, the party making an application for a continuance must show that he has used due diligence." O.C.G.A. § 17-8-20. It has long been the policy in Georgia that "[i]n a criminal case, a motion for continuance should be granted whenever the principles of justice appear to demand a postponement." *Hobbs v. State*, 8 Ga. App. 53 (1910) (finding error for trial court to have denied continuance).

As the above facts demonstrate, Mr. Duke and his undersigned counsel have acted diligently in working to prepare for trial in this very complex and voluminous case. Given the obstacles outlines above and the extreme diligence shown by counsel, a continuance is appropriate and warranted. The State and GBI have had the reports and

testimony of many trial witnesses, including the State's experts, for years. Undersigned counsel has only had 6 months to get this case ready for trial. It is not enough time in a murder case where the evidence spans more than 13 years and the State intends to introduce novel DNA evidence. There is no harm in allowing the defense a few more months to prepare this case for trial. On the other hand, the harm to Mr. Duke in pressing this case forward on April 1st will be significant and, indeed, prevent him from obtaining a fair trial.

CONCLUSION

For each of the foregoing reasons, Defendant Ryan Duke respectfully requests that the Court GRANT the instant motion.

Respectfully submitted this 22nd day of March, 2019.

THE MERCHANT LAW FIRM, P.C.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the foregoing ***DEFENDANT'S RENEWED MOTION TO CONTINUE TRIAL DATE*** on counsel of record by United States Mail with adequate postage affixed thereon and addressed to:

C. Paul Bowden
District Attorney, Tift Judicial Circuit
P.O. Box 1252
Tifton, Georgia 31793-1252

In addition, undersigned counsel has delivered a true and correct .pdf copy the foregoing motion by e-mail to *pbowden@pacga.org, jhart@pacga.org,* and *brigby@pacga.org*.

This 22nd day of March, 2019.

THE MERCHANT LAW FIRM, P.C.

JOHN B. MERCHANT, III
Georgia Bar No. 533511
Counsel for Defendant Ryan Duke

Filed in Office
This 25 day of March 2019
Time 4:40 A.M. P.M.
Deputy Cynthia Hargle
Clerk Superior Court, Irwin County