

IN THE SUPERIOR COURT OF DEKALB COUNTY  
STATE OF GEORGIA

\_\_\_\_\_) )  
WILLIE PALMER, )  
 )  
Plaintiff, )  
 )  
vs. )  
 ) CIVIL ACTION NO: 02-CV-4861  
MILTON E. "BUDDY" NIX, JR., )  
in his official capacity as )  
Director of the Georgia )  
Bureau of Investigation, )  
 )  
Defendants, )  
\_\_\_\_\_) )

**PLAINTIFF'S BRIEF IN SUPPORT OF EQUITABLE INJUNCTION**

Pursuant to the Georgia Open Records Act, Plaintiff WILLIE PALMER seeks access to public records pertaining to the use of a confidential informant during his murder trial that resulted in his conviction and receiving the death penalty.

**STATEMENT OF FACTS**

Plaintiff is on death row. He currently has a pending habeas corpus action, Willie Palmer v. Head, No. 200-v-474 (Butts County Superior Court, filed August 4, 2000). A confidential informant (hereinafter "CI 7-319") provided the Georgia Bureau of Investigation (hereinafter "GBI") with statements that he saw Plaintiff's car near the scene of the murders at the time of the murders. Though all direct appeals have ceased and plaintiff is incarcerated, CI 7-319's identity and all records of his involvement with this case have remained secret. Because there were no witnesses

to the murder other than a co-defendant, CI 7-319's observations were crucial to the outcome of the case and to the pending habeas corpus petition.

There is a virtual certainty that CI 7-319 testified at the trial without revealing his identity as the informant based upon a comparison of GBI reports from the confidential informant and the testimony of a witness at trial. Complaint ¶ 9. CI 7-319 stated in the GBI reports that he saw plaintiff's car in a specific intersection at 10:21 pm while using a payphone. He left the scene at 10:26 pm and learned of the murders the next day. Exhibit 37, page 2. He knew the exact time of his sighting because he checked his beeper while using the telephone. Trial Exhibit 37, page 3. At trial, witness Randy Jerome Waltower to the exact same facts as the confidential informant report. Waltower testified that Plaintiff's car parked in the same location on the same night at 10:21, before leaving the scene at 10:26. He also claims to have been using a payphone and knew the exact time because he checked his beeper. Transcript 13426-1327. He claims to have been accompanied by a Mr. Thomas Parrish. Transcript 1327. CI 7-319 was told that he was seen with the same. Thomas Parrish on the night of the murders. Trial Exhibit 37, page 2.

In August 2001, in conjunction with the habeas petition, Plaintiff requested documents regarding CI 7-319's involvement. Plaintiff's request was not honored, and he filed a motion to compel. Superior Court Judge John Lee Parrott decided to stay that motion pending Plaintiff's attempt to seek the records under the Georgia Open Records Act. Complaint ¶ 6. Plaintiff then requested access from the GBI to

the files, records, and documents by a letter dated April 15, 2001. The request reads:

I am requesting an opportunity to review and, if necessary, copy, all of the following files and records pertaining to any cases involving Willie Palmer (date of birth 10/19/52) in which information was provided to the GBI pursuant to capital trial proceedings in Burke County during 1995-1997. In addition, this request includes all other investigations, prosecutions or any other matters (regardless of who the investigation involved) that refer in any way to CI 7-319, wither by CI 7-319 or by the informant's real name. If plea bargains were made with CI 7-319 in exchange for assistance and/or if CI 7-319 was ever provided any time of monetary or other form of compensation for his assistance or cooperation, I request all records of any such transaction. Complaint Exhibit A.

Defendant's response suggests that the government would not provide such records, redacted or otherwise. Theisen Letter, April 19, 2002 ("In accordance with O.C.G.A. §50-18-72(a)(3), any record or related material which identifies or tends to identify any confidential source is exempt from dissemination"). Defendant's objection to disclosure is based solely upon O.C.G.A. §50-18-72(a)(3). Answer ¶ 7, 17, 18, 19. However, defendant fails to demonstrate that such records are wholly and completely exempt from disclosure, in toto, under O.C.G.A. §50-18-72(a)(3).

## **OPEN RECORDS ACT VIOLATIONS**

Under Georgia's Open Records Act (hereinafter referred to as "Act"), any citizen of the State of Georgia can gain access to "all documents, papers, letters, maps, books, tapes, photographs or similar material prepared and maintained or received in the course of operation of a public office or agency." O.C.G.A. § 50-18-70(a). See also O.C.G.A. § 50-18-70(6) ("all state...records...shall be open for public inspection by any citizen of this state...and those in charge of such records shall not refuse this privilege to any citizen").

The Open Records Act is enforced through the O.C.G.A. §50-18-73(a) which grants any citizen the right to bring an action to enforce compliance with the statute. A court may award reasonable attorneys' fees and other litigation expenses reasonably incurred in the bringing of an action to enforce compliance with the statute. O.C.G.A. §50-18-73(b). See Howard v. Sumter Free Press, Inc., 272 Ga. 521 (2000) (affirming award of fees and costs where Sheriff denied access and overcharged for public records). As stated by the Georgia Supreme Court:

[T]he public policy of this state has been clearly expressed by the legislature in adopting the Open Records Act. The purpose is not only to encourage public access to such information in order that the public can evaluate the expenditure of public funds and the efficient and proper functioning of its institutions, but also to foster confidence in government through openness to the public. That the information may comment upon certain public officials' performance of their official duties does not warrant suppression by the courts.

Athens Observer, Inc. v. Anderson, 245 Ga. 63, 66 (1980). See also Harris v. Cox Enterprises, Inc., 256 Ga. 299, 302 (1986) ("the language of the code shows a public

policy in favor of open government”). “[T]he Act was enacted in the public purpose to protect the public—both individuals and the public generally—from ‘closed door’ politics and the potential abuse of individuals and the misuse of power such policies entail.” The Atlanta Journal v. Hill, 257 Ga 398, 399 (1987). For this reason, “the Act must be broadly construed to effect its remedial and protective purposes.” Id.

Under the Act, courts have repeatedly held that there is a presumption that access should be allowed unless the public official or agency clearly articulates and supports a prohibition. Otherwise, opening inspection to the general public is mandated. O.C.G.A. §50-18-70(b). Cf. O.C.G.A. §50-18-72(f) (exceptions to the Act “shall be interpreted narrowly”). The burden of proof for any exemption lays squarely on the government’s shoulders. Napper v. Georgia Television Co., 257 Ga. 156, 161 (1987). Even if an exemption applies, the government must provide such documents redacted. Napper, 257 Ga. at 159. The Act mandates that “this Code sections shall be interpreted narrowly so as to exclude from disclosure only that portion of a public record to which an exclusion is directly applicable.”<sup>1</sup> O.C.G.A. §50-18-72(g); See Parker v. Lee, 259 Ga. 195, 197 (1989) (“[T]he final relevant provision of the Open Records Act is §50-18-72(g). It provides that the exceptions to

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<sup>1</sup>The court may conduct an in camera review of documents to determine if they are correctly withheld. See United States v. Tenorio-Angel, 756 F.2d 1505, 1509 (1985) (“[t]he Supreme Court has indicated that an in camera hearing is one way to aid the trial court in its application of the Rovario test”); Napper, 257 Ga. at 158-159 (mandating that the court should conduct an in camera proceeding to determine whether records should be disclosed).

disclosure created by §50-18-72 should be interpreted narrowly”).

I. **BECAUSE THIS EXEMPTION HAS NEVER BEEN INTERPRETED, THIS COURT SHOULD RELY UPON THE NARROW INTERPRETATIONS OF SIMILAR EXEMPTIONS AND NARROW SCOPE OF THE CONFIDENTIAL INFORMANT PRIVILEGE.**

A. **The Confidential Informant Exemption Has Never Been Interpreted.**

O.C.G.A. §50-18-72 (a)(3) provides that “Except as otherwise provided by law, records compiled for law enforcement or prosecution purposes to the extent that production of such records would disclose the identity of a confidential source, disclose confidential investigative or prosecution material which would endanger the life or physical safety of any person or persons, or disclose the existence of a confidential surveillance or investigate....” O.C.G.A. §50-18-72(a)(3).

Plaintiff is aware of no case that has directly ruled on the scope of O.C.G.A. §50-18-72(a)(3). However, interpretations of O.C.G.A. §50-18-72(a)(4), which deals with the criminal investigation exemption, are instructive in determining the scope of this exemption. Napper, 257 Ga. at 158. See also Parker v. Lee, 259 Ga. 195, 198 (1989) (“courts should construe statutes in connection and harmony with existing judicial decisions where possible”). Also helpful are interpretations of the confidential informant privilege. Rovario v. United States, 353 U.S. (1957). Each will be discussed below.

B. **Although §50-18-72(a)(3) has Not Been Interpreted, the Supreme Court of Georgia has Employed a Narrow Interpretation of**

### **Companion Exemptions That Should Also be Applied Here.**

Like this case, Napper involved the disclosure of confidential records dealing with a convicted murderer who had a pending habeas corpus action. The defendant attempted to apply the criminal investigation exception, which reads:

“[r]ecords of law enforcement, prosecution, or regulatory agencies in any pending investigation or prosecution of criminal or unlawful activity, other than initial police arrest reports and initial incident reports; provided, however, that an investigation or prosecution shall be no longer deemed to be pending when all direct litigation involving said investigation and prosecution has become final or otherwise terminated.” O.C.G.A. §50-18-72(a)(4)<sup>2</sup>.

The Georgia Supreme Court’s interpretation of Georgia’s criminal investigations exemption informs this Court on the scope of the instant exception. First, the Napper court examined the reasoning set forth in Houston v. Rutledge, 237 Ga. 764 (1976):

Statements, memoranda, narrative reports, etc. made and maintained in the course of a pending investigation should not in most instances, in the public interest, be available for inspection by the public. However, once an investigation is concluded and the file closed, either with or without the prosecution by the state, such public records in most instances should be available for public inspection. When a controversy of this nature arises between a citizen and a public

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<sup>2</sup> “The appellant refused to produce the remainder of the investigative files from the ‘conviction’ and ‘pattern’ cases, on the ground that these files were related to open investigations during the pendency of a habeas-corpus petition filed by Wayne Williams in the Butts Superior Court.” Napper, 257 Ga. at 158.

official, the judiciary has the rather important duty of determining whether inspection or non-inspection of the public record is in the public interest. In short, the judiciary must balance the interest of the public in favor of inspection against the interest of the public in favor of non-inspection in deciding this issue.

Generally, the public records that are prepared and maintained in a current and continuing investigation of possible criminal activity should not be open for public inspection. On the other hand, and again generally, public records prepared and maintained in a concluded investigation of alleged or actual criminal activity should be available for public inspection.

Napper, 257 Ga. at 162. The Napper plaintiffs argued:

The appellees argues that if closed investigatory files in criminal cases are held not to be open to public inspection because of the possibility of post-conviction relief, the Public Records Act in this area of criminal investigations will be completely eviscerated. The appellees also argue that the public has a very strong interest in the disclosure of files on cases which were not prosecuted, and '[t]his public concern has been evidenced by the continued interest in the questions left unanswered by the closing of the Task Force investigation five years ago. Were the investigations conducted properly? Why did the investigations of so many murders result in the prosecution of only one suspect? What evidence supports the Task Force's conclusions that Wayne Williams committed all of the 'cleared' murders? The answers to these questions lie, if anywhere, in these closed investigative files.'

Napper, 257 Ga. at 164. The Georgia Supreme Court agreed that the public interest in disclosure outweighed the government's interest. Id. at 170. The Napper court found that the rationale for exempting the confidential investigation records had ceased and that the records must be disclosed. Id.

Again, in Parker, the court faced a similar decision in which a convicted

murderer on death row requested investigation documents from the Sheriff and District Attorney for his pending habeas corpus action. The Parker court used the Napper reasoning and similarly employed a narrow approach to the criminal investigation exemption. The court construed §50-18-72(a)(4) to indicate that exemptions for pending cases were only allowed where all direct litigation was not final or terminated. Parker, 259 Ga. at 197 (“we adopted the federal rule that a law-enforcement proceeding, to justify non-disclosure of a public record, must be an imminent adjudicatory proceeding of finite duration”). Thus, the sheriff and district attorney were required to disclose confidential records regarding an investigation that was complete. Id.

Because the underlying rationales for both §50-18-72(a)(4) and §50-18-72(a)(3) are similar, this Court should employ similar reasoning. Because all direct litigation is complete and the plaintiff is now incarcerated, like Napper and Parker, the reason for non-disclosure has ceased.

Moreover, given the acute factual similarities between the GBI report and testimony at trial, the confidential informant’s identity is almost certainly known. With his identity public, any justification for non-disclosure ceases.

Furthermore, because the language of §50-18-72(a)(3) explicitly limits the non-disclosure of records to cases in which the life or physical safety of the informant is in danger, the exemption clearly does not apply. Here, Mr. Palmer is confined, therefore he does not pose a threat to any person or the life of the

informant. The State does not contend otherwise. Thus, there is no exemption available on the grounds of safety pursuant to §50-18-72(a)(3).

Finally, the legitimacy of Plaintiff's conviction is called into question if the proceedings in which he was convicted are shrouded in secrecy. The United States Supreme Court has ruled that open trials safeguard the integrity of criminal proceedings. Globe Newspapers Co. v. Superior Court, 457 U.S. 596, 606 (1982) ("public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendants and society as a whole"). Additionally, the right to an open trial works as a check on the judicial process and heightens respect for its fairness. Globe, 457 U.S. at 606 ("public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self government"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 570-71 (1980) ("the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion"). Plaintiff is on death row. He is challenging his conviction. The state should not be permitted to employ star-chamber tactics and secrecy to impair the search for truth. The records must be disclosed.

**C. The Balancing Test Employed By Both Federal and Georgia Court Allows the Release of Information Where the Benefits of Disclosure Outweighs the Benefits of Secrecy.**

Federal and Georgia courts have addressed the scope of non-disclosure

privileges that permit the defendant to view confidential informant information in a variety of circumstances. These courts have examined the confidential informant privilege in accordance with the United States Supreme Court's decision in Rovario v. United States, which directs a balancing test between the public interest in protecting the flow information and the individual's interest in its disclosure. 353 U.S. 53, 62 (1957). This privilege too should be reviewed to assess whether information must be divulged independent of and in addition to the Georgia Open Records Law.

Rovario establishes the balancing test applied by Georgia Courts. Rovario first examined the rationale behind informer's privilege, finding that "[t]he purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement." 353 U.S. at 59. Thus, the privilege encourages citizens to report criminal activity that they may have knowledge of. However, the court limits its scope:

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure, and if the Government withholds the information, dismiss the action.

Id. at 60-61. In the interest of protecting the fairness of the proceedings with regards to confidential information, the court decided:

The problem is one that calls for balancing the public interest in

protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Id. at 62. Rovario ultimately decided that where a confidential informant was the only person to witness the events, and was the only person to support or refute the testimonies of government witnesses, the evidence was crucial in shaping the defendant's case and could not be withheld. Id. at 65.

The United States Supreme Court similarly ruled that the suppression of any evidence that could be favorable to the defendant's case violated due process in Brady v. Maryland. 373 U.S. 83, 87 (1963). Similar to Rovario, the Brady court kept in mind the fairness of the proceedings, stating that “[s]ociety wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused are treated unfairly.” Id. at 87. There, failure to release a co-defendant's confession violated due process and constituted an error at trial. Id. at 88.

Georgia cases have incorporated the Rovario and Brady rationales in ruling on the release of information pertaining the confidential informants. The court in Thornton v. State allowed a defendant to employ the Brady rationale in requesting the identity of a confidential informant, claiming that “an absolute privilege against disclosure in every case involving an informer is impermissible where a Brady motion is made.” 238 Ga. 160, 163 (1977). The Court also acknowledged that:

The Georgia Court of Appeals recognized this principle and expressly abandoned the absolute approach in favor of a case-by-case determination by the trial judge in all cases where a decoy, an informer-witness or informer-participant, is involved who may be able to provide evidence material to the defense....This court approved the adoption of the Rovario rule in Connally v. State, 237 Ga. 203, 227 S.E.2d 352 (1976), and it is now well established as the law of

Georgia. Id. at 164.

The Georgia Court of Appeals similarly applied the Rovario balancing test in Moore v. State, 187 Ga. App 387, 391(1988). There, where the only other witness to a cocaine sale was missing, “the informer is ‘the only witness in a position to amplify or contradict the testimony’ of the appellant and the police officer.” Id. at 391. Thus, in light of the Rovario test, the defendant’s ability to present his case outweighed the public interest in protecting the information, and the court did not allow the withholding of information and ordered an in camera proceeding to determine which information would be disclosed. Id.at 393.

Because they are accepted as the laws of Georgia, this Court should find instruction in the Brady and Rovario rationales. Thus, both the balancing test and the fairness of the proceedings should be taken into account along with interpretations of similar Open Records Act exemptions. Because other than a co-defendant, CI 7-319 was the only known witness to Plaintiff’s whereabouts at the time of the crime, his records are crucial to Plaintiff’s habeas petition. Like the Thornton and Moore defendants, Plaintiff’s need for access to all pertinent information significantly outweighs the public interest in retaining confidential information, especially when coupled with Plaintiff’s incarceration and the obvious similarities between CI 7-319’s testimony and the testimony of Randy Jerome Waltower at trial. According to the Rovario court, “once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.” Rovario, 353 U.S. at 60. Because Plaintiff is

aware of the certainty that Waltower was the informant, an exemption no longer exists.

**CONCLUSION**

For all of the above reasons, Plaintiff respectfully requests that all requested records be divulged and that attorneys' fees and expenses be granted as set out in the Georgia Open Records Act.

DATED: This the 30th day of May, 2003.

Respectfully submitted,

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**EXHIBIT A**

**GBI Confidential Informant Report 9/21/1995**

**Trial Testimony Excerpts 3/23/1998**

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CIVIL ACTION NO:  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served PLAINTIFF'S BRIEF IN SUPPORT OF EQUITABLE INJUNCTION by United States Mail upon the following:

Thurbert E. Baker  
Mary Beth Westmoreland  
Christopher S. Brasher  
J. Jayson Phillips  
Office of Attorney General  
40 Capitol Square, S.W.  
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DATED: This the 30th, day of May, 2003.

\_\_\_\_\_  
Gerald Weber  
(Georgia Bar No. 744878)