bENo. 2015-2260-C2

THE STATE OF TEXAS,	)	**54TH DISTRICT COURT**
	)	
Plaintiff,	)	**MCLENNAN COUNTY, TEXAS**
	)	
v.	)	
	)	
XXXX XXXX,	)	
	)	
Defendant.	)	
	)	

MOTION TO IDENTIFY THE NEEDLE IN THE HAYSTACK

Defendant, XXXX XXXX, hereby moves this Court to compel the State to identify the discovery material that it intends to use at trial in its case-in-chief. In support of this motion, Mr. XXXX sets forth the following facts and argument:

The State in this case has engaged in what is known as a "document dump." Indeed, it has produced approximately three terabytes of discovery in this case almost all of which appears to have absolutely no relation to Mr. XXXX.

While the State certainly cannot be faulted for complying with the Michael Morton Act (Tex. Code. Crim. P. Art. 39.14), due process requires it to go further. Indeed, this Court should "not endorse a method of document production that merely gives the requesting party access to a 'document dump,' with an instruction to the party to 'go fish.'" *In re Adelphia*, 338 Bankr. 546 551 (S.D.N.Y. 2005) (citations omitted).

Mr. XXXX submits that due process requires that discovery materials must be sufficiently identified so as not to burden the defense with an unnecessary, time-consuming and costly review of irrelevant materials. *See United States v. Bortnovsky*, 820 F.2d 572, 574 (2nd Cir. 1987) (reversing convictions where "Government did not fulfill its obligation merely by providing

mountains of documents to defense counsel who were left unguided as to which documents" would be relied upon by government at trial); *United States v. Anderson*, 416 F. Supp. 2d 110 (D.D.C. 2006) (government must identify documents it intends to use in its case-in-chief because "[g]iven the enormous volume of material produced...and defendant's limited resources, it is apparent that requiring defendant's counsel to peruse each page of the materials at issue...would materially impede defendant's counsel's ability to prepare an adequate defense."); *United States v. Upton*, 856 F. Supp. 727, 746-47 (E.D.N.Y. 1994) (government must identify specific documents it will use at trial); *United States v. Hsia*, 24 F. Supp. 2d 14, 29-30 (D.D.C. 1998) ("the government cannot meet its Brady obligations by providing [the defendant] with access to 600,000 documents and then claiming that she should have been able to find the exculpatory information in the haystack"), *rev'd in part on other grounds*, 176 F.3d 517 (D.C. Cir. 1999); *United States v. Poindexter*, 727 F. Supp. 1470, 1484 (D.D.C. 1989) ("many reasons grounded in fairness" why government must specify documents it will rely on at trial, rather than simply "identify several thousand pages, any of which it 'may' rely on at trial"); *United States v. Locascio*, 2006 WL 2796320 at *7 (D.S.C. 2006) (defense should not be put to the expense of reviewing thousands of files while hoping to "stumble across" which ones government would use at trial, and "basic fairness, an opportunity for adequate preparation for trial, avoidance of surprise or unfair advantage, as well as the elimination of possible mid-trial recesses" required pretrial identification of government trial exhibits).

Recently, a Texas Court of Appeals considered the case of *In re State ex rel. Skurka,* 512 S.W.3d 344 (Tex. Ct. App.–Corpus Christi 2016). The facts of *Skurka* are as follows:

> On March 24, 2016, the case was set for docket call in preparation for trial; however, Aguilera's counsel requested a continuance of the trial date. At that hearing, Aguilera's counsel asserted that she had listened to approximately five hours of the

> recorded jail calls, and she was only half-way through the first of four compact discs containing the calls. Aguilera's counsel informed the trial court that she had approached the prosecutor for the State and inquired if the State intended to use the recorded jail calls at trial, but the prosecutor informed her that she was "not quite sure." The prosecutor asserted that she notified Aguilera's counsel that the recorded jail calls were available for retrieval on March 4, 2016, and the State's records showed that Aguilera's counsel picked up the compact discs containing the recordings on March 10, 2016.
>
> On March 28, 2016, the trial court granted Aguilera's motion for continuance regarding the trial, and the parties further addressed the recorded jail calls. Aguilera's counsel requested the prosecutor to "pare down exactly which [jail phone calls] that she is going to think she may want to introduce into testimony." The trial court noted on the record that there "has to be some kind of way to work this," particularly with regard to appointed counsel, "because...the county, the taxpayers, pays for every single second that [Aguilera's counsel] is going to be listening to these things."
>
> At a hearing on April 14, 2016, the parties and trial court revisited the issue of the jail calls. Aguilera's counsel re-urged her request for the prosecutor to notify her as to which jail calls the State was planning to use during its case-in-chief. She estimated that the recorded jail calls constituted "about a month's worth of listening to 24–7." She argued that it would be beneficial to determine, prior to trial, whether any of the calls might be subject to objection. The prosecutor for the State opposed Aguilera's request and contended that forcing the State to designate which calls it intended to use at trial invaded its work product privilege. At the conclusion of the hearing, the trial court ordered the State to produce "any and all jail calls that [it plans] to use in the trial."

Id. at 447-48. The Court of Appeals, in rejecting a mandamus action by the District Attorney, wrote:

> We turn our attention to the trial court's rationale in ordering the State to designate which jail calls it will use at trial from the voluminous number of jail calls that have been produced. The trial court repeatedly stated that it was ordering the State to prepare an exhibit list regarding the jail calls that it intends to use at trial for "the efficiency of the trial" and "judicial economy." *Given the large number of jail calls at issue in this case and the likelihood that the State will utilize only a minor portion of those calls at trial, a pretrial designation of the jail calls best serves Aguilar's right to a fair trial and is likely to aid in the orderly presentation of Aguilar and the State's respective cases at trial*. Further, a pretrial designation of the jail calls will aid in the quick and efficient identification of any objectionable matters that could be resolved pretrial regarding the admissibility of specific jail calls. In this regard, the trial court's order was authorized by rule 611's mandate for the court to "exercise reasonable control" over the mode of "presenting evidence" so as to "make those

> procedures effective for determining the truth" and "avoid wasting time." Tex. R. Evid. 611(a). Moreover, based on this record, the trial court's order constituted an exercise of discretion that was both reasonable and rendered in the pursuit of justice as well as efficiency. *See Dang*, 154 S.W.3d at 619; Packer, 442 S.W.3d at 379.

Id. at 456.

Mr. XXXX urges this Court to engage in the same reasonable actions "rendered in the pursuit of justice as well as efficiency" as the trial judge in *Skurka*. Indeed, the almost three terrabytes of discovery produced in this case, most all of it wholly irrelevant to Mr. XXXX, dwarfs "the more than 1,000 telephone calls" produced in *Skurka*. In the instant case, it would be simply impossible for defense counsel to review the contents of every cell phone seized, every jail call recorded and every police car video (many of which are just hours of looking at an unoccupied area).

In addition to due process, fairness, and the "pursuit of justice," Mr. XXXX submits that simple prudence dictates requiring the State to identify the discovery material it intends to introduce at trial in its case-in-chief. Indeed, absent such a requirement and given the human impossibility of reviewing each item of the almost three terabytes worth of discovery, it is likely that many times when the State seeks to introduce an exhibit at trial, the trial will have to be halted while defense counsel reviews the exhibits. Many of these exhibits, especially video and audio recordings, could take a significant amount of time to review.[1] Of course, such delays would unfairly impact the court's time and the valuable time of the citizens serving on the jury

WHEREFORE, Mr. XXXX respectfully requests that this Court enter an order requiring the State to identify the discovery material it intends to introduce at trial in its case-in-chief at least fourteen days prior to the trial date.

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[1]Without such an opportunity to review an exhibit before determining whether an objection to its admissibility is appropriate, counsel would be providing ineffective assistance of counsel.

Respectfully submitted,

/s/ F. Clinton Broden
F. Clinton Broden
TX Bar 24001495
Broden & Mickelsen
2600 State Street
Dallas, Texas 75204
214-720-9552
214-720-9594 (facsimile)
clint@texascrimlaw.com

Attorney for Defendant
XXXX XXXX

CERTIFICATE OF SERVICE

I, F. Clinton Broden, do hereby certify that, on this 22nd day of December, 2017, I caused a copy of the foregoing document to be served by email on Michael Jarrett of the McLennan County District Attorney's Office at Michael Jarrett <Michael.Jarrett@co.mclennan.tx.us>

/s F. Clinton Broden
F. Clinton Broden