

Getting Started: Developing an Investigation and Discovery Plan

New Felony Defender Training
February 26 – 27, 2009
Mike Klinkosum
Assistant Public Defender – 10th District
(Wake County)
227 Fayetteville Street, Suite 500
Raleigh, NC 27602
(919) 715-1514



District Court

- No right to “formal” discovery until case goes to Superior Court
- Sources of “informal” discovery:
 - Client
 - Client’s family or friends
 - Law enforcement, if they will talk to you
 - Motions filed in District Court
 - Motion to Modify Bond
 - Demand for Probable Cause Hearing




District Court **Bond Hearings: Motion to Modify Bond**

- Can be good source for discovery
- Article 26; 15A-531 – 547.1
- State will likely lay out some facts about the case in opposition
- Good opportunity to show your clients you are on their side
- Also shows them the criminal justice system is not on their side




District Court
Bond Hearings: Motion to Modify Bond

- **Considerations:**
 - Client better off in custody (drug use, mental health issues, etc.)
 - Prior record issues (more time in, better chance for special probation, DA more willing to deal on credit for time served)
 - Access to client
 - Client out of jail better able to assist
 - Client out of jail better able to make a living (restitution issues)




District Court
Demand for Probable Cause Hearing

- Filed in District Court
- Governed by Article 30 (15A-611 through 615)
- Also 15A-606 addresses demand and waiver of PC
- **If you can get one:**
 - Excellent source of discovery
 - Opportunity to cross-examine state's witnesses
 - File motion for recordation of PC hearing
 - Get order for transcription of hearing
- Motion to continue PC hearing is not timely unless made 48 hours prior to PC hearing – after that, must have "extraordinary cause." 15A-606(f)



District Court
Demand for Probable Cause Hearing

- Trade off PC hearing for some discovery?
- May force a better plea



Superior Court Statutory Discovery

- Request for Voluntary Discovery (Article 48; 15A-901 through 910)
 - After indictment/PC hearing/waiver of PC hearing
 - No later than 10 working days after
 - If negative/no response or 7 days pass after request you may then file motion for discovery
 - Tip: File Request for/Alternative Motion for Voluntary Discovery
 - Prevents you from having to file motion after filing Request
 - File the Request/Alternative Motion! (protect record)



Superior Court Statutory Discovery

- 15A-903 governs what you get
- You get everything!!!
 - “complete files of all law enforcement and prosecutorial agencies”
 - Defendant’s statements
 - Co-defendant’s statements
 - Witness Statements
 - Investigating officers’ notes
 - Results of tests and examinations
 - “*or any other matter obtained during the investigation of the offenses...*”



What is Discovery? ”...any other matter or evidence obtained...”

- Photographs
- Physical evidence
- Videos
- Weapons
- Biological evidence
- Polygraph results
- Fingerprint cards
- Anything collected in the course of the investigation!!!



Superior Court Statutory Discovery

- Request for Discovery should include everything (see handout)
- Cite NC Statutes, and federal and state constitutions (protect record)
- Follow up with letters to ADA if no response
 - Always follow up with letters if you can
 - Shows a timeline of requests and “good faith” effort to work with ADA



Superior Court Statutory Discovery

- Discovery from requests are the 1st layer
- Review original packet for other items missing
 - Example: Police report mentions surveillance tape, but not tape in 1st discovery packet – where’s the tape?
 - Example: Police report mentions “substance” sent to SBI lab for testing – where’s the lab report and accompanying documents?
 - *Always assume you DON’T have everything*
- Follow up with professional request (letter) – if no response, file motions to compel additional discovery



Sanctions for Noncompliance with Discovery Rules

- 15A – 910(a)
 - Order the offending party to produce the discovery or permit inspection.
 - Grant a continuance or recess.
 - Prohibit the party from introducing evidence not disclosed.
 - Declare a mistrial.
 - Dismiss the charge, with or without prejudice.
 - Enter other appropriate orders.



Brady v. Maryland

All Requests for Voluntary Discovery and follow-up motions to compel discovery should also request *Brady* material (i.e., any evidence in hands of prosecution that is both favorable and material to the accused either to the issue of guilt or sentencing). ***Brady v. Maryland***, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963).

Third Party Discovery Getting Discovery from Sources Other than the Prosecutors and LEOs

- Statutory Basis (15A-903(a)(1)- "Prosecutorial Agency"
 - "Any public or private entity that obtains information on behalf of a law enforcement agency or prosecutor in connection with the crimes committed or the prosecution of the defendant." (i.e. – DSS, private labs)
 - Language added in 2007 in part because of Duke Lacrosse case issue with private DNA lab.
 - Makes moot *State v. Pendleton*, 175 N.C.App. 230, 622 S.E.2d 708 (2005) where NC Court of Appeals held DSS files in statutory rape cases were off limits because DSS not a prosecutorial agency.

Third Party Discovery Getting Discovery from Sources Other than the Prosecutors and LEOs

- Constitutional Third Party Discovery
 - 14th Amendment Due Process Clause gives defendants the right to obtain from third parties records that contain favorable, material evidence, even if the records are confidential under state and/or federal law. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), *State v. Bailey*, 89 N.C. 212, 365 S.E.2d 651 (1988), *State v. Kelly*, 118 N.C.App. 589, 456 S.E.2d 861 (1995).
 - *Ritchie* allows for *in camera* review of third party discovery to preserve confidentiality. If records contain favorable & material evidence the court must disclose those parts of the records to the defense.
 - Must show that records may contain favorable, material evidence, *Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995).

Third Party Discovery Getting Discovery from Sources Other than the Prosecutors and LEOs

- *In camera* review alternatives:
 - If the third party discovery comes into the hands of the prosecution, statutory discovery applies and the defense should get everything (remember "*complete file*" & "*any other matter or evidence obtained*").
 - Request *in camera* review as an alternative to giving defense all the records. The judge does not know the case like you do and will not be the most able reviewer to determine what is favorable and material to your case.
 - Move to participate in the review of the records pursuant to a protective order that does not allow disclosure of records by counsel unless permitted by court. (15A-909 authorizes protective orders).



Investigators

- Give them a plan of action:
 - What to do
 - Who to interview
 - What locations to view (photograph)
- Sit down with them and go over case
- Give them the discovery that you have been given so they will understand the case
- Ask for their input and advice!
 - They like it
 - They have more experience than you in getting information
 - They can help you streamline an investigation



Investigators

- Think about which investigators you want for a particular case
 - Female victim of sexual assault (female investigator to interview her)
 - Interview of snitch (maybe former law enforcement)
 - Investigators with special backgrounds (military, arson investigation, sex assault investigation, homicide investigation, forensic training)
- Let investigators meet with client
 - They are often better at getting info. than you are
 - Different kind of relationship
 - Can help "talk sense" into client re: pleading when necessary



NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY



STATE OF NORTH CAROLINA


VS.



Defendant.

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**REQUEST FOR
VOLUNTARY DISCOVERY
(ALTERNATIVE MOTION FOR
DISCOVERY)**

NOW COMES the Defendant,  by and through the undersigned counsel, Maitri “Mike” Klinkosum, Assistant Public Defender, and hereby requests voluntary discovery from the prosecution in this case, pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 19 and 23 of the North Carolina Constitution, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and its progeny, and N.C.Gen.Stat. §§ 15A-902, 903, and 904.

1. Pursuant to N.C. Gen. Stat. § 15A-903(a)(1), the Defendant requests the following materials in discovery:

. . . the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term “file” includes the defendant’s statements, the co-defendant’s statements, witness statements, investigating officers’ notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. Oral statements shall be in written or recorded form. The Defendant shall have the right to inspect and copy or photograph any materials contained therein and, under appropriate safeguards, to inspect, and test any physical evidence or sample contained therein.

2. Pursuant to N.C. Gen. Stat. § 15A-903(a)(2), the Defendant requests the following materials in discovery:

. . . notice to the defendant of any expert witness that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert’s curriculum vitae, the expert’s opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time

prior to trial, as specified by the court.

3. Pursuant to N.C. Gen. Stat. § 15A-903(a)(3), the Defendant requests the following materials in discovery:

. . . at the beginning of jury selection, a written list of the names of all other witnesses whom the State reasonably expects to call during the trial.
4. A complete copy of the Defendant's prior criminal record, if any, including but not necessarily limited to:
 - a. All juvenile and adult detention, jail, prison, parole, probation, and pre-sentence investigation records and reports;
 - b. All arrest, conviction, and adult and juvenile criminal offense records and reports;
 - c. All records and reports of any law enforcement authority as that term is defined in paragraph 5(a) above;
 - d. All records and reports of any detention or court authority;
 - e. All records and reports of any prosecuting authority as that term is defined in paragraph 5(b) above;
5. An opportunity to inspect and copy or photograph any and all books, papers, documents, photographs, motion pictures, videotapes, mechanical or electronic recordings, buildings and places, or any other crime scene, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the State and which are material to the preparation of the defense, or are intended for use by the State as evidence at the trial or were obtained from or allegedly belonged to the Defendant, as provided for by N.C. Gen. Stat. § 15A-903(a);
6. An opportunity to inspect and copy or photograph results or reports of physical or mental examinations, or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the District Attorney, as provided for by N.C. Gen. Stat. § 15A-903(a), including but not limited to DNA analysis, fingerprints, handwriting, ballistics, chemical or other scientific or medical tests or analyses; this requested information includes any and all testing procedures and all underlying data related to the above-described evidence; *State v. Cunningham*, 108 N.C. App. 185, 423 S.E.2d 802 (1992); *State v. Canady*, 355 N.C. 242, 559 S.E.2d 762 (2002);

7. An opportunity to inspect, examine and test, subject to appropriated safeguards, any physical evidence, or a sample thereof, which is in the possession, custody or control of the State, as provided for by N.C. Gen. Stat. § 15A-903(a), including but not limited to any and all controlled substances allegedly sold by the Defendant or seized from his person;
8. A copy of any and all search warrants, arrest warrants and non-testimonial identification orders issued in connection with the case, as well as any supporting affidavits, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. §15A-971 *et seq.*;
9. A description of any and all pre-trial identification procedures conducted by the State or any of its agents in connection with the alleged crimes, and the date, time, place and persons present at such procedure, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. § 15A-971, *et seq.*;
10. A description of any conversation between the Defendant and any law-enforcement officer, official or agent, and the date, time, place, and persons present at such time, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. § 15A-971, *et seq.*;
11. A description of any and all property or contraband seized from the Defendant, Defendant's home, or an area under Defendant's control that the State intends to offer as evidence at trial, or which led to any other evidence the State intends to use at trial, and the time, place, and manner of any such seizure, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. § 15A-971, *et seq.*;
12. A description of any and all electronic, mechanical, visual or photographic surveillance of the Defendant conducted by State or federal law-enforcement officers, officials or agents, and the date, time, place and persons present at such surveillance, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. § 15A-971, *et seq.*;
13. A description of any electronic, mechanical, visual, or photographic surveillance of other persons, places or organizations conducted by State or federal law-enforcement officers, officials or agents which resulted in the interception and/or recording of any of the Defendant's conversations, photographs of the Defendant, or other information relating to the Defendant, and the date, time, location and manner of any such surveillance, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. § 15A-971, *et seq.*;
14. The nature of any other criminal acts allegedly committed by the Defendant

which the State intends to introduce as evidence in its case-in-chief, and the particulars of those acts, including but not limited to the time and place the acts were allegedly committed, whether the acts were the subject of any court proceedings, and the results of any such proceedings, in the interests of justice as provided for by N.C. Gen. Stat. 15A-904(b);

15. A statement indicating whether or not any informants were involved in the investigation or preparation of the cases against the Defendant, in the interests of justice as provided for by N.C. Gen. Stat. § 15A-904(b);
16. Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976), *United States v. Bagley*, 374 U.S. 667 (1985) and *Kyles v. Whitley*, 514 U.S. 419 (1995) any and all documents, reports, facts or other information in whatever form which would tend to exculpate the Defendant, mitigate the degree of the offense or the appropriate punishment, weaken or overcome testimony adverse to the Defendant given by a State's witness, impeach the credibility of a State's witness, or would otherwise tend to be favorable to the Defendant in any way, including but not limited to:
 - a. Any notes or reports, in whatever form, which were prepared by any law-enforcement officer, official or agent and which would tend to refute, impeach or contradict any of the evidence the State intends to introduce at trial, or which tends to show or indicate in any way that the Defendant did not commit the crimes charged in the indictment or that he may have a legal defense to such crimes;
 - b. Any evidence or information which would tend to indicate in any way that someone other than the Defendant committed the crimes charged, including but not limited to any reports concerning any investigation of suspects other than the Defendant carried out in connection with this case or containing a description of the alleged perpetrator that is inconsistent with the physical characteristics of the Defendant;
 - c. The facts and circumstances surrounding any pretrial identification procedure conducted by any law-enforcement officer, official or agent in connection with this case in which any alleged witness failed to identify the Defendant or identified someone other than the Defendant;
 - d. Any written, recorded or oral statements made by any person which would tend to exculpate the Defendant or indicate in any way that Defendant may not have committed the alleged crimes or that Defendant may have a legal defense to such crimes;
 - e. The names and addresses of any witnesses who may have knowledge of

facts which might be favorable to the Defendant, or who were interviewed by any law-enforcement officer, official or agent and failed to provide inculpatory information concerning the Defendant;

- f. Any statements previously made by a prospective witness for the State, whether written or oral and whether made under oath or otherwise, which are inconsistent or at variance in any way with what the witness is anticipated to testify to at trial;
 - g. The complete prior criminal and juvenile records of all witnesses who may testify for the State, the nature of any criminal charges under investigation or pending against such witnesses in any jurisdiction, and a description of any prior bad acts engaged in by any such witnesses;
 - h. The details of any promises or indications of actual or possible immunity, leniency, favorable treatment or any other consideration whatsoever, or of any inducements or threats, made or suggested by any State or federal employee or agent to any person who has provided information to or will testify for the State in this case, or to anyone representing such a person;
 - i. Any information suggesting any bias or hostility by any prospective witness for the State toward the Defendant, or any other factor bearing on the credibility of any prospective witness for the State, including but not limited to any mental illness or condition, or dependence on or use of alcohol or drugs of any kind, whether or not received legally; and
17. All additional information of the type requested above that comes to the attention of the State or its agents after initial compliance with this request.
18. If the State intends to redact any portions of any discovery required to be provided to the Defendant under the N.C. Gen. Stat. § 15A-903 *et seq.*, then the Defendant specifically requests that the State first seek a protective order, with notice to the Defendant, from the Superior Court before any redacting is performed.

TIME OF REQUEST

This request for voluntary discovery is made not later than the tenth working day after the undersigned counsel received notice of the return of True Bills in the above-referenced charges. Undersigned counsel received notice of the return of True Bills on October 31, 2007.

WHEREFORE the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That the State voluntarily provide the aforementioned items of discovery within seven (7)

days of the service of this Request upon the State, pursuant to N.C.Gen.Stat. § 15A-902(a);

2. That if the State fails or refuses to provide the requested voluntary discovery herein, within the time period prescribed by law, that the Court treat this voluntary discovery request as a motion for the Court to issue an Order compelling the Office of the District Attorney to provide the required discovery pursuant to Article 48 of the North Carolina General Statutes; and
3. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the 1st day of November 2007

By: _____

Maitri "Mike" Klinkosum
Assistant Public Defender
Attorney for the Defendant
227 Fayetteville St. Mall, Suite 500
Raleigh, NC 27601
Telephone: (919) 715-1514
Facsimile: (919) 715-1510
Email: mlinkosum@yahoo.com

Certificate of Service

This shall certify that a copy of the foregoing ***Request for Voluntary Discovery (Alternative Motion for Discovery)*** was this day served upon the District Attorney by the following method:

- _____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;
- X by personally serving the Office of the District Attorney via hand delivery (***Assistant District Attorney*** [REDACTED]);
- _____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or
- _____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the 1st day of November 2007.

By: _____
Maitri "Mike" Klinkosum
Assistant Public Defender
Attorney for the Defendant
227 Fayetteville St. Mall, Suite 500
Raleigh, NC 27601
Telephone: (919) 715-1514
Facsimile: (919) 715-1510
Email: mlinkosum@yahoo.com