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OVERVIEW OF CRIMINAL DISCOVERY IN NORTH CAROLINA

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This memorandum focuses upon the particular problems of interpreting and implementing constitutional and statutory law in the area of criminal discovery. It is not a comprehensive discussion of all aspects of criminal discovery in North Carolina.

I. CONSTITUTIONAL DUTY TO DISCLOSE

In United States v. Agurs,[1] the United States Supreme Court reviewed its prior case law, particularly Brady v. Maryland,[2] to determine the constitutional duty of the prosecutor to disclose evidence favorable to the defendant. The Court concluded that this duty was defined according to the factual situation from which the nondisclosure arose: (1) prosecutor's use of perjured testimony; (2) nondisclosure of evidence materially favorable to the defendant after a specific defense request; or (3) nondisclosure of evidence favorable to the defendant when there is a general request or no request at all.

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1. 96 S.Ct. 2392 (1976). Although Agurs was a federal prosecution dealing with the defendant's right to a fair trial under the due process clause of the Fifth Amendment, the Supreme Court stated that its construction of that clause will apply equally to the due process clause in the Fourteenth Amendment applicable to trials in state courts.

2. 373 U.S. 83 (1963).

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1. Use of Perjured Testimony

The constitutional standard in cases involving the prosecutor's use of perjured testimony is that a conviction must be set aside if there is any reasonable likelihood that the perjured testimony could have affected the verdict.

This standard applies not only to a prosecutor who knowingly uses perjured testimony[3] but also, even though he did not solicit the testimony, to a prosecutor who allows perjured testimony to go uncorrected.[4] For example, the prosecutor may know that a police officer recovered a gun from the victim immediately after an assault occurred. If in response to a defense question the victim denies having a gun when the assault took place, the prosecutor may not allow the false testimony to go uncorrected and must inform defense counsel.

The constitutional standard may apply even when the trial prosecutor is unaware that the testimony is false. In Giglio v. United States,[5] the trial prosecutor did not know of a promise made by another prosecutor to a prosecution witness. At trial the witness falsely denied the existence of this promise made in return for his testimony. The Supreme Court held that the prosecutor's office is an entity and a promise made by one attorney must be attributed to the prosecution. It overturned Giglio's conviction because the government's case rested primarily on the credibility of the prosecution witness.

The Court's reasoning would likely apply to a promise made by a law enforcement officer to a prosecuting witness, even though the prosecutor was unaware of the promise. A law enforcement officer is an integral part of the prosecution, and the fact that the prosecutor was unaware of the promise does not lessen the impact of the false testimony upon the defendant's right to a fair trial.[6]

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3. Mooney v. Holohan, 294 U.S. 103 (1935); Pyle v. Kansas, 317 U.S. 213 (1942); Alcorta v. Texas, 355 U.S. 28 (1957); Miller v. Pate, 386 U.S. 1 (1967). Although the word "perjured" is used in the text, the cases clearly apply the standard to false testimony or false evidence.

4. Napue v. Illinois, 360 U.S. 264 (1959).

5. 405 U.S. 150 (1972).

6. See Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964). The court deemed it irrelevant whether the prosecuting attorney knew of a materially favorable police ballistics laboratory report in the police files.

Cf. Moore v. Illinois, 408 U.S. 786 (1972), in which the majority opinion did not directly address the prosecutor's accountability for information in police files. The dissenting opinion stated at 810 that "[w]hen the prosecutor consciously uses police officers as part of the prosecutorial team, those officers may not conceal evidence that the prosecutor himself would have a duty to disclose."

The prosecutor providing written notice of plea arrangements to defense counsel pursuant to G.S. 15A-1054(c) should talk to each prosecutor and law enforcement officer who has been involved with the prosecuting witness to determine whether all promises made to the witness have been revealed to defense counsel.

2. Nondisclosure After a Specific Defense Request

Brady v. Maryland held that the prosecution's failure to disclose evidence favorable to the defendant after a request for such evidence violates due process when the defendant proves that the evidence is material to the determination of either guilt or punishment, whether or not the prosecutor acted in good faith.

In Brady, defense counsel asked before trial to examine the murder accomplice's extrajudicial statements. Several of those statements were shown to him; but the prosecutor withheld the one in which the accomplice admitted the actual killing. The accomplice did not testify at Brady's trial. Brady testified and admitted participation in the crime but said that the accomplice did the actual killing. Brady's lawyer argued that he was guilty of first-degree murder but should not be sentenced to death. Brady was convicted of first degree murder and sentenced to death. The Supreme Court held that the suppressed evidence was material on the issue of punishment and affirmed the Maryland Court of Appeals' judgment, which had ordered a new trial on the issue of punishment only.

Need for Specific Request. Federal and state courts had been divided on whether a request for evidence by the defendant was a prerequisite for the application of the Brady standard.[7] Agurs decided that the Brady standard was limited to cases in which the defendant requested specific evidence. The Court stated that a request for "anything exculpatory" or "all Brady material" was not sufficiently specific. It reasoned that since the prosecutor is not constitutionally required to disclose his entire case, a request for specific evidence alerts him to a particular part of his case to determine whether any evidence exists that is materially favorable to the defendant. A general request thus serves no more function in this regard than no request at all, and this request belongs to the third standard discussed in this memorandum.

Difficulties may arise in drawing a line between a specific request and a general request. When the State has thirty witnesses, a request for "statements of all witnesses" may not fulfill the Agurs notion of giving the prosecutor notice of exactly what the defense counsel desires. On the other hand, the request does alert the prosecutor to a particular aspect of the evidence, and he only need examine the statements in his file to determine whether any contain materially exculpatory evidence and then furnish such statements to the defense.

Meaning of "Materiality". The lower courts have interpreted the Brady standard of "materiality" of the favorable evidence in various ways.[8] The only Supreme Court case that determined materiality under

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7. See Comment, Brady v. Maryland and the Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112, 115-17 (1972); Comment, Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure, 59 Iowa L. Rev. 433, 446-47 (1973); Comment, Disclosure and Discovery in Criminal Cases: Where Are We Headed, 6 Duquesne U.L. Rev. 41, 47 (1967-68).

8. See 40 U. Chi. L. Rev., supra, n. 7, at 125-31; 59 Iowa L. Rev., supra, n. 7, at 441-44.

Brady is Moore v. Illinois,[9] but the Court did not define "materiality."

Agurs stated that "implicit in the requirement of materiality is a concern that [in Brady] the suppressed evidence might have affected the outcome of the trial."[10] The Court further stated that the excluded extrajudicial statement of the accomplice "could have affected Brady's punishment."[11] Although its language is not particularly clear, the Court appears to define "materiality" in terms of whether the nondisclosed evidence, considered with all the evidence produced at trial, could have affected the determination of guilt or punishment.[12]

Excluded Factors. The Court excluded two factors from consideration in applying both the Brady standard and the third standard discussed in this memorandum. One factor is whether the prosecutor acted in good faith in not disclosing the favorable evidence to the defendant:

> If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.[13]

The other factor is the impact of the nondisclosed evidence on the defendant's ability to prepare for trial. The Court excluded this factor for two reasons:

> First, [this factor] would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense. Second, such an approach would primarily involve an analysis of the adequacy of the notice given to the defendant by the State, and it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge.[14]

Judge's Role After Brady Request. When the defendant asks for specific evidence before trial and the prosecutor does not disclose the evidence because he determines that it is not materially favorable to the defendant, should the judge review the prosecutor's determination by examining the evidence in camera?

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9. 408 U.S. 786 (1972). Moore was an extremely complex murder case in which the most significant nondisclosed evidence was a pretrial statement of a prosecution witness that impeached his identification of the defendant. A sharply divided Court (5-4) held that the pretrial statement was not material under Brady because it did not sufficiently impeach the testimony of the witness, and it did not "destroy" the testimony of that witness and the four other eyewitnesses who identified the defendant. A reading of the case is required because of its complexity.

10. 96 S. Ct. at 2398.

11. Id.

12. The Court intended to place a lighter burden of proof upon the defendant when a specific request for exculpatory evidence had been made.

13. 96 S.Ct. at 2400.

14. 96 S.Ct. at 2401, n. 20. Although the Court specifically excluded this factor in its discussion of the third standard, the reasons for exclusion would apply equally to the Brady standard.

Apparently there is no constitutional or statutory impediment that prevents the judge from reviewing the prosecutor's determination and ordering the evidence to be disclosed to the defendant if he finds that it is constitutionally required to be disclosed under the Brady standard.[15] However, most commentators have cautioned against judicial intervention. The judge may be in no better position than the prosecutor in evaluating the evidence. The review may be laborious, time-consuming, and a waste of scarce judicial resources. Even though North Carolina does not have bench trials in superior court, review of evidence that may not be admitted at trial may create judicial bias for or against the defendant at sentencing.[16]

3. Nondisclosure After General Request or No Request

Agurs held that when exculpatory evidence was available to the prosecutor and not submitted to the defense, constitutional error requiring a new trial exists if the defendant proves that the omitted evidence, evaluated by the reviewing judge in the context of the entire trial, creates a reasonable doubt that did not otherwise exist. Unlike the situation in regard to the prosecutor's use of perjured testimony, the reviewing judge[17] evaluates not what effect the omitted evidence would have had on the jury, but whether the omitted evidence creates a reasonable doubt in his mind that did not otherwise exist.

In Agurs, the defendant was convicted by a jury of second-degree murder for repeatedly stabbing her male victim to death in a motel room after an apparent sexual encounter for hire. The evidence at trial indicated that a violent struggle occurred when the victim found money missing from his pants pocket after he had returned from the bathroom down the hall. Motel employees came running in response to the defendant's screams, and saw the victim on top of her struggling for the knife she held in her hand. The employees separated them. The victim was dead on arrival at the hospital. The autopsy showed several deep stab wounds in his chest and abdomen and slashes on his arms and hands characterized by the pathologist as "defensive wounds." A physical examination of the defendant revealed no cuts or bruises of any kind. The evidence at trial revealed that the victim was carrying two knives when he and the defendant entered the motel room. The defendant offered no evidence but argued that the homicide was justified by reason of self-defense.

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15. See 40 U. Chi. L. Rev., supra, n. 7, at 120-21; 5 Iowa L. Rev., supra n. 7, at 434; Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. 136, at 148-49 (1964); Nakell, Criminal Discovery for the Defense and the Prosecution--The Developing Constitutional Considerations, 50 N.C.L. Rev. 437, at 460-61 (1972).

16. In district court cases, review of such evidence may improperly affect the determination of guilt or innocence.

17. It would be preferable, although not constitutionally required, for the trial judge to conduct the hearing on the motion for a new trial because his evaluation would benefit from personal observation and memory, and he would not have to rely solely on a cold transcript. However, the rotation system may make this impossible because a post-conviction hearing may be held years after trial.

After the conviction, the defendant moved for a new trial on the ground that the prosecutor had failed to disclose the victim's prior criminal record of convictions for assault and carrying a dangerous weapon, which would have supported her contention of self-defense. In the District of Columbia such evidence is admissible on the issue of who was the aggressor in a case of self-defense. The defense counsel had never made a request to the prosecutor for the victim's criminal record.

The trial judge denied the motion for a new trial. The court of appeals reversed.[18] The Supreme Court held that the trial judge applied the proper standard of review in the hearing on the motion for a new trial. He evaluated the omitted evidence of the victim's assault convictions in the context of the entire case. The assault convictions did not contradict the prosecutor's evidence and were merely cumulative, since the evidence at trial showed that the victim was carrying two knives at the motel. In addition, the victim's physical wounds and the defendant's unscathed condition belied the contention that the victim was the aggressor. The trial judge remained convinced of the defendant's guilt beyond a reasonable doubt. The Supreme Court found that the trial judge's findings were reasonable.

Duty to Disclose. A prosecutor may have difficulty deciding whether to disclose favorable evidence under the Agurs standard, since he may not know until all the evidence has been presented at trial whether including it would create a reasonable doubt that would otherwise not exist.

A duty to disclose would clearly exist if the description of the robber given to police by the only eyewitness to an armed robbery materially varies from the physical characteristics of the defendant and there is no other corroborating evidence in the case. The duty to disclose a statement of an eyewitness would not exist in an armed robbery case in which there are three positive eyewitness identifications of the defendant, fingerprints of the defendant on the store counter, a confession by the defendant, but another eyewitness told the police that he believes the defendant may look like the robber but he is not sure.

Most cases will fit somewhere between the two examples given above. A prosecutor may well heed the Supreme Court in Agurs:

> Because we are dealing with an inevitably inprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.[19]

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18. United States v. Agurs, 510 F.2d 1249 (D.C. Cir. 1975).
19. 96 S.Ct. at 2399.

II. THE SCOPE OF STATUTORY DISCOVERY IN NORTH CAROLINA

Article 48 of Chapter 15A of the General Statutes of North Carolina, sets forth the discovery provisions for the defendant and the State.[20] Because Article 48 applies only to cases within the original jurisdiction of superior court,[21] a defendant whose case is docketed in superior court for trial de novo is not entitled to its discovery procedures.

This memorandum will not discuss in detail the statutory procedures that the defendant and the State must follow in obtaining information or what information is subject to disclosure under the statutes. Instead it will focus on the problem areas of interpretation and implementation, particularly the relationship between statutory discovery and judges' inherent power to order discovery.

1. Defendant's Statements to Witnesses

G.S. 15A-903(a)(2) provides that upon the defendant's motion, the prosecutor must provide, "in written or recorded form, the substance of any oral statement made by the defendant which the State intends to offer in evidence at the trial." Read literally, the section would require the prosecutor to reduce to writing the substance of any oral statement by the defendant to each witness the State intends intends to call to testify at trial about such oral statement. For example, the substance of all conversations of the defendant with a kidnapping victim over a period of hours or days would have to be reduced to writing as well as the substance of his oral statement to law enforcement officers after being taken into custody.

The Attorney General was asked for an opinion on the following question:

> Does the requirement that the State provide the defense with copies of statements made by the defendant which the State intends to offer at trial (G.S. 15A-903(a)) extend to remarks made by the defendant to witnesses who have subsequently been interviewed by persons acting on behalf of the State?[22]

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20. Before Article 48 of Chapter 15A was enacted, the only discovery statutes were former G.S. 15-155.4 (Pretrial Examination of Witnesses and Exhibits of the State) and former G.S. 15-143 (Bill of Particulars), now G.S. 15A-925. A bill of particulars is specifically limited to factual information pertaining to the charge, and G.S. 15A-925(c) provides that "[n]othing contained in this section authorizes an order for a bill of particulars which requires the State to recite matters of evidence."

21. The most common category of misdemeanors within the original jurisdiction of superior court are those joinable with felonies pursuant to G.S. 15A-926(a) (replacing former G.S. 15-152). See N.C. Gen. Stat. § 7A-271(a)(3); State v. Karbas, 28 N.C. App. 372, 221 S.E.2d 98, cert. denied 289 N.C. 618, 223 S.E.2d 394 (1976).

22. 45 Op. N.C. Att'y Gen. 60, 60-61 (1975).

He concluded that statements made by the defendant to witnesses who are not law enforcement officers are not discoverable under G.S. 15A-903(a).[23] His opinion reasoned that the section served a dual purpose of providing discovery and also facilitating pretrial disposition of motions to suppress under G.S. Ch. 15A, Art. 53. Thus, "statements" are those that raise Miranda and related questions that are subject to suppression motions, and such "statements" are ordinarily made to law enforcement officers. Reading G.S. 15A-903(a) in conjunction with G.S. 15A-904(a), which excludes from discovery "statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State," and considering the General Assembly's deletion of the names and addresses of witnesses from the original bill, the Attorney General's opinion concluded that the defendant's statements to non-law enforcement officers are not discoverable.

This opinion appears to be a reasonable interpretation[24] of G.S. 15A-903(a) in the context of other provisions of Articles 48 and 53. However, when the defendant alleges that a witness who is not a law enforcement officer coerced a statement from him, the policy considerations cited by the Attorney General would appear to require disclosure of the substance of such oral statement so that the defendant may consider whether to make a motion to suppress.[25]

2. Judge's Inherent Power to Order Discovery

When neither constitutional law nor statutory law provides a right to discovery, does a North Carolina trial judge have any inherent power to order pretrial discovery or discovery during trial?

There was no right to discovery at common law,[26] and one can argue that this common law principle prohibits the trial judge from ordering pretrial discovery. On the other hand, one can argue that the absence of discovery as a matter of right does not preclude the trial judge from ordering discovery in his discretion. Such discretion could be defined in various ways: (1) broad discretion, subject to review only for abuse of discretion; (2) limited to cases in which a party makes a showing of materiality and reasonableness; (3) limited to extraordinary cases in which a party makes a clear showing of materiality and reasonableness.

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23. Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure specifically limits the discovery of an oral statement to "the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent."

24. But cf. United States v. Feinberg, 502 F.2d 1180 (7th Cir. 1974), cert. denied, 420 U.S. 926 (1975), in which the Court's analysis of Rule 16(a)(1)(A) supra, n. 23, and the Jencks Act concludes that a rule providing disclosure of "any written or recorded statements and the substance of any oral statements made by the accused" would require the prosecutor to disclose the substance of any oral statements made by the defendant to a prospective prosecution witness.

25. In such a case, the State need show only that the statement was made voluntarily; Miranda warnings are not required.

26. State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334, cert. denied, 377 U.S. 978 (1964).

If one views discovery as applicable only to pretrial procedures, the common law principle would not limit a trial judge's discretion to compel the production of evidence during trial in order to promote the administration of justice and the search for the truth.

Federal courts and some state courts have recognized the trial judge's inherent power to compel pretrial discovery in criminal cases in the interest of the fair administration of justice even though neither statute nor court rule authorized the discovery order.[27] No North Carolina case has held that a trial judge has such power, although the State Supreme Court has[28] noted without comment discovery orders entered by trial judges.

A preliminary draft of proposed amendments to Rule 16 of the Federal Rules of Criminal Procedure was the model[29] used in drafting the discovery statutes of Article 48 of Chapter 15A. Because present Rule 16 and Article 48 are in many respects similar in style and substance, it may be useful to discuss[30] the role of the federal courts in implementing and interpreting Rule 16.

Rule 16 and Pretrial Discovery. Federal courts have recognized the judiciary's inherent power to compel pretrial discovery unless their authority is restricted by Rule 16. Therefore, the trial judge may invoke his inherent authority to order the prosecutor to disclose the names and addresses of prospective witnesses, since neither Rule 16 nor any statute prohibits such[31] disclosure. However, the trial judge must have a rational basis[32] for his order, and his ruling is subject to review for abuse of discretion. On the other hand, the trial judge has no authority to order the pretrial disclosure of statements of prosecution witnesses

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27. United States v. Cannone, 528 F.2d 296 (2d Cir. 1975); United States v. Jackson, 508 F.2d 1001 (7th Cir. 1975); State ex rel. Polley v. Superior Court of Santa Cruz County, 81 Ariz. 127, 302 P.2d 263 (1956). See 23 Am. Jur. 2d Depositions and Discovery § 308 (1965); 23 C.J.S. Criminal Law § 955(2)(a) (1961); Annot., Discovery and Inspection of Prosecution Evidence Under Federal Rule 16 of Criminal Procedure, 5 A.L.R.3d 819 (1966); Annot., Right of Accused in State Courts to Inspection or Disclosure of Evidence in Possession of Prosecution, 7 A.L.R.3d 8 (1966); Will v. United States, 389 U.S. 90 (1967).

28. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972); State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975).

29. Official Commentary to N.C. Gen. Stat. Ch. 15A, Art. 48.

30. If the North Carolina Supreme Court rules that trial judges have no inherent power to order either pretrial discovery or discovery during trial, the following discussion is less useful.

31. United States v. Cannone, supra, n. 27; United States v. Jackson, supra, n. 27; United States v. Richter, 488 F.2d 170 (9th Cir. 1973); United States v. Holmes, 343 A.2d 272 (D.C. Ct. App. 1975).

32. A defendant's conclusory claim that disclosure of the prosecution's witnesses was necessary to prepare for trial is insufficient. When the prosecution advances specific grounds for nondisclosure, the defendant must make a specific showing of need for disclosure. United States v. Cannone, supra, n. 27, at 301-02. See United States v. Richter, supra, n. 31; United States v. Holmes, supra n. 31.

because such disclosure is specifically prohibited by Rule 16 and the Jencks Act.[33]

Applying the federal courts' interpretation of Rule 16 and the inherent power to order pretrial discovery to North Carolina's discovery statutes, the trial judge would be prohibited from compelling pretrial disclosure of information excepted from disclosure by G.S. 15A-904(a) and G.S. 15A-906. Otherwise, pretrial discovery would rest in the trial judge's discretion. Such discretion could be defined in various ways, as previously discussed on page 8.

Although the North Carolina Supreme Court may decide that judges have the inherent power to order pretrial discovery, it may exclude from such power the authority to order the disclosure of names and addresses of witnesses because of the General Assembly's action in deleting such a provision from the 1973 Senate Bill 207/House Bill 256.

Congress deleted a similar provision from Rule 16 as proposed by the United States Supreme Court in 1974. In United States v. Cannone,[34] the Second Circuit Court of Appeals found such legislative history unpersuasive in determining the trial court's power to order disclosure of the names of prosecution witnesses. The court reasoned that the congressional action only expressed a policy that the courts not be required to compel disclosure.

Rule 16 and Discovery During Trial. In United States v. Nobles,[35] the United States Supreme Court held that Rule 16 applies only to pretrial discovery, and therefore the trial judge was not precluded from ordering discovery during trial that was specifically excluded from discovery by Rule 16.

In Nobles, the defendant offered his investigator as a defense witness to testify about prior interviews with two prosecution witnesses in order to impeach their trial testimony. The trial judge ordered that the investigator's report be submitted to the court so that he could examine the report in camera, strike everything but the reference to the interviews from the report, and give it to the prosecutor. The defendant refused to submit the report to the judge, who then ruled that the investigator could not testify about his interviews with the witnesses.

The Supreme Court held that former Rule 16(c),[36] identical in substance to G.S. 15A-906, which does not authorize discovery of statements made by prosecution witnesses to agents of the defendant, applies only to pretrial discovery, and the trial judge's order to compel discovery of the statements was within his inherent power to compel production of evidence in order to facilitate full disclosure of all relevant facts at trial. The Court further held that the trial judge's exclusion of the defense investigator's testimony was a proper way to assure compliance with his order.

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33. United States v. McMillen, 489 F.2d 229 (7th Cir. 1972), cert. denied 410 U.S. 955 (1973); United States v. Percevault, 490 F.2d 126 (2d Cir. 1974).

34. 528 F.2d 296 (2d Cir. 1975).

35. 422 U.S. 225 (1975).

36. Former Rule 16(c) is now Rule 16(b)(2).

Applying the Supreme Court's interpretation of Rule 16 to the North Carolina discovery statutes, the trial judge would have discretion during trial to compel discovery of evidence from the State and the defendant, subject to constitutional, statutory, and common law privileges.[37]

Appellate Review. A proper case for deciding the issue of the judiciary's inherent power to compel pretrial discovery in criminal cases would arise when a district attorney petitioned for a writ of prohibition[38] in the North Carolina appellate courts to prohibit the enforcement of a pretrial discovery order that required the State to disclose information that was not discoverable by constitutional or statutory law. Such a case may arise when the trial judge orders the prosecutor to disclose information that is specifically excluded from disclosure by statute[39] or information that no statute provides to be discoverable.[40]

Before trial, a defendant could petition the appellate courts for relief from an order denying pretrial discovery. Because a defendant, unlike the state, may assign such an order as error in the record on appeal, an appellate court would probably not hear such a pretrial petition for relief.

Discovery orders during trial that are adverse to the State are more likely to evade appellate review since an appellate court would be reluctant to interrupt a trial except for an extraordinary abuse of judicial authority.

Until the North Carolina Appellate Courts have determined the issue of the inherent power to order pretrial discovery or discovery during trial, the scope of the criminal discovery process will remain for each superior court judge to determine, and the criminal discovery process may not be uniformly applied in this state.

III. ETHICAL OBLIGATION TO DISCLOSE

Ethical Consideration 7-13 of the Code of Professional Responsibility of the North Carolina State Bar provides in part:

> The responsibility of the public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict . . . . With respect to evidence and witnesses, the prosecutor

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37. In Nobles, the Court held that the defendant waived his work-product privilege with respect to the investigator's report when he offered the investigator as a witness at trial. The Court also found no Fifth or Sixth Amendment violations in the trial court's rulings.

38. Sources pertinent to the writ of prohibition: State v. Whitaker, 114 N.C. 818, 19 S.E. 376 (1894); N.C. Gen. Stat. § 7A-32; Rule 22 of the North Carolina Rules of Appellate Procedure.

39. N.C. Gen. Stat. §§ 15A-904(a).

40. E.g., names and addresses of witnesses; statements of co-defendants when they are not to be tried with the defendant; criminal records of prosecution witnesses.

> has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.[41]

Section B of Disciplinary Rule DR7-103 (Performing the Duty of Public Prosecutor or Other Government Lawyer) provides:

> A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.[42]

The Code describes Ethical Considerations as aspirational in character, a body of principles upon which the lawyer can rely for guidance. The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character, and one found guilty of violating a Disciplinary Rule is subject to disciplinary action by the North Carolina State Bar.

It is important to note that Disciplinary Rule DR7-103(B) appears to enlarge the prosecutor's obligation to disclose exculpatory evidence beyond that required by constitutional and statutory law. The words "tends to" indicate that the Rule requires the prosecutor to disclose exculpatory evidence even though the evidence does not satisfy the Brady standard of materiality or the Agurs standard of whether the omitted evidence, considered with all the evidence presented at trial, creates a reasonable doubt that did not otherwise exist. Furthermore, unlike Article 48 of Chapter 15A, the ethical obligation to disclose exculpatory evidence does not explicitly depend upon a request by the defendant.[43]

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41. N.C. Gen. Stat., Vol. 4A, app. VII (1975 Cum. Supp.).

42. Id.

43: Since Disciplinary Rules exist primarily to regulate the conduct of lawyers, it appears reasonable to conclude that they confer authority upon courts to see that they are obeyed. Thus, a trial judge could order the disclosure of exculpatory evidence based on this Disciplinary Rule when the information is not otherwise discoverable.