



# DISCOVERY ISSUES

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Advanced Criminal Procedure Course  
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May 2014

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## DISCOVERY ISSUES OUTLINE

### I. Objective

During this session we will review and discuss the current criminal discovery law, issues, and practice in North Carolina as established by constitutional and statutory law.

### II. Why do we have discovery?

“enhance the likelihood of honorable and realistic plea negotiations, avoiding trial altogether”

“trials will be more orderly and that ultimately the truth will prevail if the parties are prepared to meet the case that the other side will present”

*Official Commentary, Article 48 of Chapter 15A NCGS*

### III. Key Considerations

When dealing with discovery issues it is always important for the trial court to consider Constitutional rights and guarantees and statutory rules.

### IV. Constitutional Right to Discovery

Brady v. Maryland 373 U.S. 83, 10 L. Ed. 2d 215 (1963) is the cornerstone case. “..the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”.

Brady, 373 U.S. at 87, State v. Cornett, 177 N.C. App. 452, 456 (2006)

“The Brady rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.”

U.S. v. Bagley, 473 U.S. 667, 675, 87 L. Ed. 2d 481, 489-90.

(1985)

Does every nondisclosure automatically constitute reversible error? NO.

“Prejudicial error must be determined by examining the materiality of the evidence.’ U.S. v. Agurs, 427 U.S. 97, 49 L. Ed. 2d 342 (1976) State v. Tirado, 358 N.C. 551, 589 (2004)

What is “material”?

The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome” Bagley 473 U.S. at 682

Yet.....

The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial does not establish ‘materiality’ in the constitutional sense. Agurs 427 U.S. at 109-10

## **V. Statutory Discovery**

Governed by N. C. Gen. Stat. § 15A-901 through 910.

## **VI. Procedural Considerations and Requirements**

- Statutory discovery only applies to cases within the original jurisdiction of the superior court. NCGS 15A-901
- How? A party seeking discovery must first file a written request for discovery, or enter into a written agreement to voluntarily comply. NCGS 15A-902(a)
- When? Requests for discovery are to be filed within 10 days of finding of probable cause, or the date the defendant waives probable cause. If unrepresented, the 10 days starts when defendant consents to proceeding on an information, or service of true bill upon defendant, or appointment of counsel. NCGS 15A-902 (d)
- If a party is required to provide discovery, or voluntarily provides discovery, and they discover additional evidence or witnesses, they must supplement discovery. There is a continuing duty to disclose. NCGS 15A-907
- Recourse? After getting no response, or getting an unsatisfactory response, or after 7 days with no response the party seeking the discovery may file a motion for discovery. NCGS 15A-902 (a)
- Reciprocal
- Compare to NCGS 1A-1 Rule 37 (a)(2) which requires “The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort in an effort to secure the information or material without court action.”
- Note: frequently attorneys file a written REQUEST FOR VOLUNTARY DISCOVERY/ALTERNATIVE MOTION FOR DISCOVERY. This seems to eliminate a step or simplify the process.

## **VII. What is discoverable?**

From the State....

The State must make available.....

- Complete files of all law enforcement agencies, investigative agencies, and the DA's office. NCGS 15A-903(a)(1)
- "file" = statements by the defendant, co-defendant, witnesses, law enforcement officers notes, test results and examinations, and "any other matter" NCGS 15A-903(a)(1)(a)
- Notice of expert witnesses, reports, CV, opinion, and underlying basis within a reasonable time prior to trial. NCGS 15A-903(a)(2)
- Witness list at the beginning of jury selection. NCGS 15A-903(a)(3)

The State does not have to disclose:

- Work product (notes, strategies, theories, memos) NCGS 15A-904(a)
- Confidential informants unless required by law. NCGS 15A-904(a1)
- Personal identifying information of witnesses beyond name, address, d/o/b, published phone number unless required by the court to properly identify the witness NCGS 15A-904(a2)
- Crimestopper information obtained with a promise of anonymity unless required by the court. NCGS 15A-904(a3)
- Victim Impact Statements. NCGS 15a-904(a4)

From the defendant:

Again....its reciprocal. If the court grants any relief sought by the defendant under G.S. 15A-903, the court must, upon motion by the State, order the defendant to permit the State to inspect and copy or photograph:

- Books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the defendant, which the defendant intends to use at trial. NCGS 15A-905(a)
- Reports of exams and tests. Physical or mental examinations, or tests measurements and experiments must be disclosed. Physical

evidence the defense intends to offer must be disclosed. NCGS 15A-905(b)

- Defenses: alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, voluntary intoxication. NCGS 15A-905(c)(1)
- Disclosure of alibi witness two weeks before trial, States alibi rebuttal witness within one week of trial upon a showing of good cause. NCGS 15A-905(c)(1)(a)
- Duress, entrapment, insanity, automatism, involuntary intoxication notice must provide specifics. NCGS 15A-905 (c)(1)(b).
- Expert Witnesses NCGS 15A-905(c)(2)
- Witness Lists NCGS 15A-905(c)(3)

The Defendant does not have to disclose:

- Reports,
- Memoranda,
- Other internal documents made by the defendant or counsel in connection with the investigation or defense
- Statements made by defendant, prosecution or defense witnesses, prospective prosecution or defense witnesses to the defendant or his counsel. NCGS 15A-906

Also referred to as the work product doctrine. The work product doctrine was designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client's case, those things done on behalf of the client in anticipation of litigation. *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977)

## **VIII. Regulation of Discovery**

Protective Orders may be granted if:

- Upon written motion showing good cause,
- Finding that there is substantial risk of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment. NCGS 15A-908(a)

#### Scope of Protective Orders:

- Discovery may be denied,
- Restricted,
- Deferred,
- Or other appropriate orders.

May be made ex-parte. If granted, notice to opposing side, but not the subject matter.

*In Camera* inspection may be made in appropriate cases. NCGS 15A-908(b)

Time, Place, and Manner of discovery permitted must be specified by the court. Terms and conditions may be specified. NCGS 15A-909

### **IX. What do you do when someone fails to comply?**

“Although the court has the authority to impose such discovery violation sanctions, it is not required to do so.” *State v. Hodge*, 118 N.C. App. 655, 657, 456 S.E.2d 855, 856 (1995)

“The sanction for failure to make discovery when required is within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion.” *State v. Herring*, 322 N.C. 733, 747-48, 370 S.E.2d 363, 372 (1988)).

If sanctions are imposed the court must consider:

- the materiality of the subject matter, and
- the totality of the circumstances surrounding the alleged failure to comply. NCGS 15A-910(b)

The court must make specific findings justifying the imposed sanction, if one is imposed. NCGS 15A-910,

but.....

“N.C. Gen. Stat. § 15A-910 . . . does not require the trial court to make specific findings on the record that it considered sanctions before determining not to impose sanctions.” *State v. Jones*, 151 N.C. App. 317, 325, 566 S.E.2d 112, 117(2002), *appeal dismissed and disc. review denied*, 356 N.C. 687,578 S.E.2d 320, *cert. denied*, 540 U.S. 842, 157 L. Ed. 2d 76(2003).

Sanctions available to the court:

- Contempt powers
- Order the party to permit discovery, or
- Continuance or recess, or
- Exclude the evidence, or
- Declare a mistrial,
- Dismissal, with or without prejudice, or
- Other appropriate orders. NCGS 15A-910(a)

Note: if you are asked to impose personal sanctions for untimely disclosure, there is a presumption that DA’s and their staffs have acted in good faith if they have made a reasonably diligent inquiry of law enforcement and investigative agencies and disclosed responsive materials. NCGS 15A-910 (c).



## DISCOVERY SCENARIOS

1. Defendant has appealed his conviction of DWI in District Court to Superior Court. Counsel timely files a written request and motion for discovery seeking the Intoxilyzer source codes. The trial court denied the motion for discovery. The learned trial judge submits a verdict sheet to the jury that requires the jury to indicate which theory a guilty verdict is based on, appreciable impairment or BAC in excess of 0.08. The jury indicates that they find the defendant guilty under both theories. Defendant appeals.

Is the defendant entitled to the discovery sought under North Carolina statutory law?

Is there a Brady violation?

2. Defendant is charged with murder. The only evidence linking defendant to the crime is an eyewitness who testifies that he was "face to face" with the defendant when the incident began. No other witnesses or physical evidence link the defendant to the crime. Defendant is convicted. During post-conviction proceedings, counsel for defendant obtains detectives notes which say defendant "could not ID defendant", "could not see faces", and "would not know them if he saw them again".

Is there a Brady violation?

What analysis do you use? Favorable? Material?

3. Defendant is charged with RWDW. The case is called for trial. Defense counsel makes a motion to continue alleging that videotapes of the robbery were provided to the defense only three weeks prior. Counsel alleges that the defendant does not "feel comfortable" proceeding. Defendant had not filed a written request or motion for discovery. Motion to continue denied.

Did the trial court abuse its discretion by denying the continuance?

4. Defendant is charged with murder. A full report of the autopsy conducted by the ME is provided to the defense. Defense files a motion to compel discovery, specifically seeking "Dr. Butts opinion as to whether there was swelling of the tissue around the hyoid and if that impacts his opinions with respect to time of death", and "Dr. Butt's opinion as to the significance of caffeine in the victim's system and whether that impacts his opinion as to the time of death", and "Dr. Butt's opinion as to the significance of alcohol in the victim's system and whether that impacts his opinion as to the time of death".

Should the motion to compel discovery be granted?

5. Defendant is charged with rape and murder. The defendant discarded a cigarette butt that was seized and analyzed by the NC SBI lab. The DNA on the cigarette butt matches the DNA left at the scene. In an effort to short circuit any criticism of the SBI, the State has a second analysis/comparison conducted by a private lab. Defendant files a motion to compel the State to provide copies of all tests, bench notes, protocols, etc. The material sought is reported to be several boxes of reports.

Is this material from a private lab discoverable?

Is the State required to provide copies?

6. Defendant is charged with controlled substance violations. During the trial the State learns that one of the detectives is under investigation by the police department's internal affairs unit. The State does not call the detective as a witness. Defendant seeks to compel the discovery of the IAU report.

Is the IAU report discoverable?

What may the trial court do?

7. Defendant is charged with capital murder. Defendant seeks to offer an expert witness to testify about the effects of alcohol and drugs on the brain, which the defense contends is relevant to the reliability of the defendant's confession. The State objects to the testimony and cites the defendant's repeated failure to provide expert reports in spite of requests and prior court orders. The State had only received a two page, double spaced letter from the expert witness, and that arrived via e-mail during the trial. The trial court excludes the testimony of the expert witness.

Did the trial court err?

8. Defendant is charged with RWDW. Victim provided police with a suspect description on the date of the incident and she assisted in the preparation of a composite sketch, all of which was provided in discovery. On the morning of trial the victim informed the DA when she arrived in the courtroom that she recognized the defendant and could identify him as the robber. The State did not disclose the in-court revelation to the defense. Victim identified the defendant. Defendant moved for a continuance in order to obtain an eyewitness identification expert. Motion to continue is denied.

Did the State violate the continuing duty to disclose?

Was it an abuse of discretion to deny the continuance?

## TABLE OF AUTHORITIES

United States Constitution, 5<sup>th</sup>, 6<sup>th</sup> & 14<sup>th</sup> Amendments

North Carolina Constitution, Article 1, Section 19

N.C. Gen. Stat. §15A, Article 48

Brady v. Maryland, 373 U.S. 83, 10 L. ed. 2d 215 (1963)

U.S. v. Bagley, 473 U.S. 667, 87 L. Ed. 2d 481 (1985)

U.S. v. Agurs, 427 U.S. 97, 49 L. Ed. 2d 342 (1976)

Pennsylvania v. Ritchie, 480 U.S. 39, 94 L. Ed. 2d 40 (1987)

State v. Cornett, 177 N.C. App. 452, 629 S. E. 2d 851 (2006)

State v. Tirado, 358 N.C. 551 (2004)

State v. Herring, 322 N.C. 733, 370 S. E. 2d 363 (1988)

State v. Ellis, 205 N.C. App 650 (2010)

State v. Hodge, 118 N.C. App 655, 456 S.E. 2d 855 (1995)

State v. Marino, \_\_\_ N.C. App. \_\_\_, 747 S. E. 2d. 633 (2013)

Smith v. Cain, 565 U.S. \_\_\_, 132 S. Ct. 627 (2012)

State v. Flint, 199 N.C. App. 709 (2009)

State v. Miller, 61 N. C. App. 1, (1983)

State v. Lane, 365 N.C. 7, (2011)

State v. Wright, 210 N.C. App. 52, (2011)

State v. McCoy, \_\_\_ N.C. App \_\_\_, 745 S. E. 2d 367 (1987)