

CONSTITUTIONAL & STATUTORY DISCOVERY REQUIREMENTS

New Prosecutors School
November 2022

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FOUR PRIMARY SOURCES

- United States Constitution
- North Carolina Constitution
- Rules of Professional Conduct (NC State Bar)
- N.C. Gen. Stat. Chapter 15A, Article 48

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CONSTITUTIONAL REQUIREMENTS

- A prosecutor must disclose evidence that is **materially** favorable to the defendant.
- Evidence is **material** if there is any reasonable likelihood that it could have affected the verdict.
 - *Brady v. Maryland*, 373 U.S. 83 (1963)

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**INADVERTENT
NONDISCLOSURE**

- Inadvertent nondisclosure has same impact on fairness of proceedings as deliberate concealment
- *Strickler v. Greene*, 527 U.S. 263, 288 (1999)

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DUTY TO LEARN

- Prosecutor has duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including law enforcement officers
- *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)

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**CONSTITUTIONAL
REQUIREMENTS**

- Evidence favorable to the accused includes impeachment evidence.
- *Giglio v. United States*, 405 U.S. 150 (1972)

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**TIMING
CONSIDERATIONS**

- No constitutional requirement to disclose impeachment information before entering into plea agreement
 - *United States v. Ruiz*, 536 U.S. 622 (2002)
- Unclear whether *Brady* right to exculpatory information applies to pleas
 - *United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010)
 - *State v. Allen*, 222 N.C. App. 707 (2012)

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**STATUTORY
REQUIREMENTS**

Apply only to cases within the original jurisdiction of superior court

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**STATUTORY
REQUIREMENTS**

- Discovery may be ordered by judge
- Moving party must make request in writing first
- No written request required if parties agree to voluntarily comply

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<p>TIMING CONSIDERATIONS</p>	<p>If defendant is represented by counsel, request must be made no later than 10th working day after probable cause hearing or waiver of hearing</p> <ul style="list-style-type: none"> • N.C. Gen. Stat. § 15A-902
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<p>WHAT MUST BE DISCLOSED?</p>	<p>The complete files of . . .</p> <ul style="list-style-type: none"> • All law enforcement agencies, • Investigatory agencies, • And prosecutors' offices . . . <p>Involved in the investigation of the crimes committed or the prosecution of the defendant.</p> <ul style="list-style-type: none"> • N.C. Gen. Stat. § 15A-903(a)(1)
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<p>WHAT IS "THE FILE"?</p>	<p>Any and all statements from:</p> <ul style="list-style-type: none"> • Defendant • Co-Defendant • Victim • Witness <p>Officers' notes</p> <p>Results of examinations / tests</p> <p>Any other matter or evidence obtained in the investigation</p> <p>Basically, EVERYTHING.</p>
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ORAL STATEMENTS

Write it down.

- See N.C. Gen. Stat. § 15A-903(a)(1)c.

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LAW ENFORCEMENT AGENCY DUTIES

Law enforcement and investigatory agencies must make a copy of the complete files related to the investigation and prosecution available to prosecutor's office

- N.C. Gen. Stat. § 15A-903(c)

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CRIMINAL RECORDS

Are you required to disclose the criminal record of:

- Defendant?
- Victim?
- Witness?

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RIGHT TO INSPECT AND COPY	Defendant has the right to inspect and copy or photograph any materials in the file and to inspect, examine and test any physical evidence
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EXPERT WITNESSES	<ul style="list-style-type: none">• State must give notice to defendant of any expert witness it reasonably expects to call as a witness at trial• Expert must prepare report of results of any examinations or tests he/she conducted• State must give defendant expert's CV, opinion, and basis for opinion• State must give notice and furnish required materials within a reasonable time before trial or as specified by the court<ul style="list-style-type: none">• N.C. Gen. Stat. § 15A-903(a)(2)
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WITNESS LIST	<p>State must give defendant written list of names of all witnesses it reasonably expects to call at trial prior to beginning jury selection</p> <ul style="list-style-type: none">• N.C. Gen. Stat. § 15A-903(a)(3)
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**TRUTHFUL
TESTIMONY**

- Prosecutor must disclose any grants on immunity, sentencing concessions, or charge reductions offered in return for witness' truthful testimony
- Disclosure must be given in writing to defendant and made within a reasonable time prior to proceeding
- N.C. Gen. Stat. § 15A-1054

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**CRIMINAL
PROSECUTION**

- Class H Felony.
 - Willfully omit or misrepresent evidence required to be disclosed pursuant to G.S. 15A-903(a)(1) (requiring disclosure of complete file)
- Class 1 Misdemeanor.
 - Willfully omit or misrepresent evidence or information required to be disclosed pursuant to any other provision of G.S. 15A-903.

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**DO NOT
DISCLOSE ...**

- Attorney Work Product
- Personal Identifying Information
- Victim Impact Statement

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SANCTIONS	<p>If court determines party has failed to comply with disclosure obligations, it may exercise contempt powers and:</p> <ul style="list-style-type: none">• Order compliance• Grant continuance/recess• Exclude evidence• Declare mistrial• Dismiss charge; or• Enter other appropriate orders
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OTHER CONSEQUENCES	<ul style="list-style-type: none">• Reversal of conviction<ul style="list-style-type: none">• See <i>Weary v. Cain</i>, 136 S. Ct. 1002 (2016)• Discipline by NC State Bar<ul style="list-style-type: none">• <i>North Carolina State Bar v. Nifong</i>, 06 DHC 35 (2007)
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ETHICAL REQUIREMENTS
<p>Rule 3.8(d) of the NC Rules of Professional Conduct requires:</p> <ol style="list-style-type: none">1. Reasonably diligent inquiry2. Timely disclosure to defense of all evidence or information3. Known to prosecutor that tends to negate the guilt of accused or mitigate the offense

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COMMENT TO RULE 3.8

Every prosecutor should be aware of the discovery requirements established by statutory law and case law

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COMMENT TO RULE 3.8

A prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.

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POST CONVICTION DISCLOSURE

Prosecutors must disclose new, credible evidence or information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted

To whom must you disclose?

- In your jurisdiction
- Outside your jurisdiction

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ETHICAL REQUIREMENTS

A lawyer shall not fail to disclose evidence or information that the lawyer knew, or reasonably should have known, was subject to disclosure under applicable laws, rules of procedure or evidence, or court opinions

- Rule 3.4(d)(3)

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CONCLUDING THOUGHTS

“My job as a prosecutor is to do justice, and justice is served when a guilty man is convicted and an innocent man is not.”

Sonia Sotomayor

Associate Justice of the Supreme Court
of the United States

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CONTACT INFORMATION

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