

# Criminal Discovery

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Advanced Criminal Procedure 2025

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## References

- **Benchbook: Discovery in Criminal Cases**
  - <https://benchbook.sog.unc.edu/sites/default/files/pdf/Discovery.pdf>
- **Benchbook: *Pennsylvania v. Ritchie*: Defendant's Right to Third Party Confidential Records**
  - <https://benchbook.sog.unc.edu/criminal/defs-right-3rd-party-confidential-records>
- **Defender Manual, Vol. I, Ch. 4**
  - <https://defendermanuals.sog.unc.edu/sites/default/files/pdf/Ch%204%20Discovery%20Apr%202021.pdf>
- **Materials from Past Conferences: Discovery Issues in Criminal Cases, Bryan Collins**
  - <https://www.sog.unc.edu/resource-series/2018-advanced-criminal-procedure-superior-court-judges>

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# Roadmap

## 1. Discovery Devices

- a. Statute
- b. Constitution
- c. Other

## 2. Sanctions

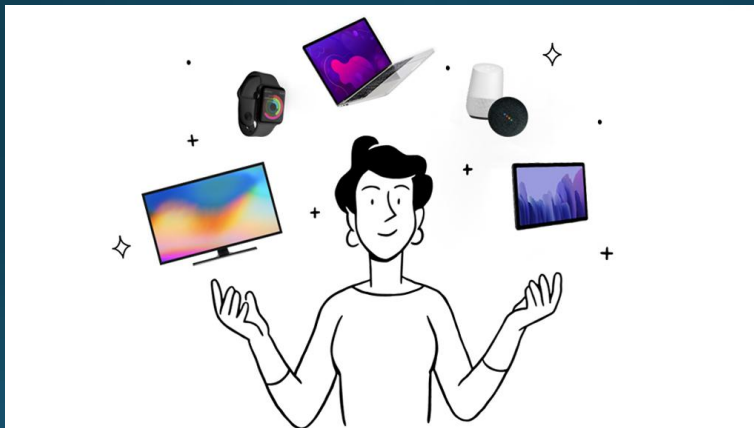
## 3. Reversal

## 4. Special Topics



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# Discovery Devices



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The year is circa 2004. Two distinguished policy makers meet in the hallway of the NC General Assembly...\*



\*Believe it or not, this conversation is drawn from the Official Commentary to Article 48.

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## Statutory Discovery



- 2004: mandatory **OPEN FILE DISCOVERY for Ds**
  - Defense right to complete files of investigation and prosecution of case
  - Article 48: G.S. 15A-901-910
- Applies to cases in original jurisdiction of Superior Court

**True or False:** There is a right to discovery for misdemeanor appeals

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## Statutory Discovery: What D Gets

- **Defendant's Discovery Rights (15A-903)**
  - **All files** involved in investigation or prosecution (open to defense exam)
    - Onus on officers to timely provide complete files to DA
    - Includes private entities like a private lab
    - DA's "Due diligence" to investigate/obtain discoverable info
- **Expert witnesses List** (with report, data, CV...)
- **Witnesses List**

What is the deadline for State to produce its complete file?

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## Statutory Discovery: How D Obtains

- **Written request to DA**
  - Required before making motion to compel
    - Unless 1) both parties agree in writing to comply voluntarily, or 2) good cause shown
  - Timing of Request: 10 working days after...
    - GS 15A-902(f)
- **Motion:**
  - D may file motion to compel if no/ unsatisfactory response to request, or after 7 work days
  - Trial Court may also hear:
    - On stipulation of parties
    - On finding of good cause
  - Relief: order party to produce it, or to respond in writing for each item, or do in camera review



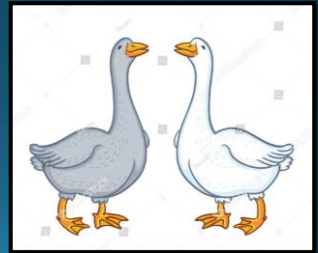
G.S. 15A-902

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## Statutory Discovery: What State Gets

- **State's Discovery Rights:** more limited (15A-905, 906)
  - **Evidence D intends to offer** at trial
    - Documents, files, tangible objects (open to exam)
  - **Testifying Experts** (with accompanying documentation)
  - **Witness List**
  - **Defenses**

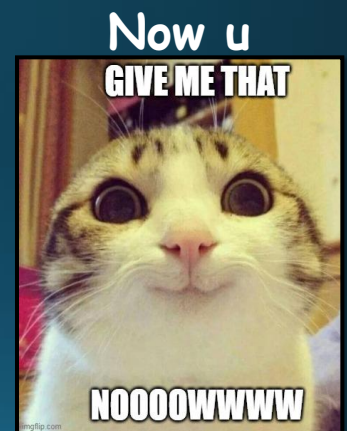
What's good for the goose?



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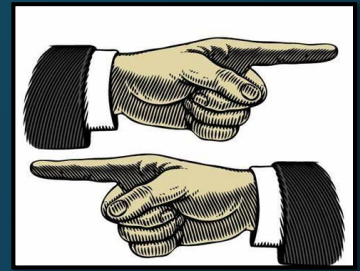
## Statutory Discovery: How State Obtains

- **Reciprocal Discovery** (GS 15A-902)
  - State only gets if D requests discovery, parties have written agreement to exchange, or court orders relief
  - **Timely request** required
    - 10 working days after State provides discovery
  - **Motion**
    - If D does not voluntarily comply with request



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# Statutory Discovery



## • Both Parties

- Continuing duty to disclose (15A-907)
- Work Product Protected (15A-904, 906)
  - Mental processes, eg, voir dire questions, witness questions, opening and closing, legal research
- Protective Orders (15A-908(a))
  - May apply ex parte for order to protect info from disclosure for good cause, like risk of harm
    - If Court grants, must seal materials submitted in record

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# Additional Statutes

## • Law Enforcement Recordings: GS 132-1.4A

- BWC, Dash-cam
- Petition SCJ to obtain in civil action (AOC-CV-270)

STATE OF NORTH CAROLINA		File No.
County		In The General Court Of Justice Superior Court Division
IN THE MATTER OF CUSTODIAL LAW ENFORCEMENT AGENCY RECORDING SOUGHT BY:		<b>PETITION FOR RELEASE OF CUSTODIAL LAW ENFORCEMENT AGENCY RECORDING</b>  G.S. 132-1.4A(f) – petition by person authorized to receive disclosure or custodial law enforcement agency (no filing fee applies)
Name Of Petitioner		
Address		
City, State, Zip		
Phone No.	Fax No.	
Email Address		
I, the above-named petitioner, request the release of a custodial law enforcement agency recording to _____ state that at least some portion of the law enforcement agency recording was made in this county, and I further state the following:  <div style="border: 1px solid black; height: 40px; width: 100%;"></div> <div style="border: 1px solid black; height: 40px; width: 100%;"></div> <div style="border: 1px solid black; height: 40px; width: 100%;"></div> <div style="border: 1px solid black; height: 40px; width: 100%;"></div> <div style="border: 1px solid black; height: 40px; width: 100%;"></div>		
<small>(Include date and approximate time of activity captured in the recording, or otherwise identify the activity with particularity sufficient to identify the recording at issue.)</small>		
<b>NOTICE TO HEAD OF CUSTODIAL LAW ENFORCEMENT AGENCY</b>		

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## Additional Statutes

- **Prior Bad Acts: Rule 404(b)**
- **Biological Evidence: GS 15A-267-268**
  - Gives D access to DNA, crime scene evidence...
  - D may move to have State conduct test or seek funds to test
  - Mandates testing if D requests and certain conditions met
- **Nontestimonial ID Orders: GS 15A-271-282**
  - Eg, State may seek saliva sample of suspect
  - D may request test on self
- **Bill of Particulars: GS 15A-925**
- **Deals, Concessions, Immunity Agreements: GS 15A-1054**
- **Depositions (preserve testimony of infirm...): GS 8-74**

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## Defendant's Constitutional Right to Discovery

- **US Constitution**
  - Due Process
  - Sixth Amendment rights to effective assistance of counsel, compulsory process, confrontation, and present a defense
- **NC Constitution**
  - Article I, Sec 19 (law of land)
  - Article I, Sec 23 (right to counsel, confrontation)

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## D's Constitutional Right to Discovery

- ***Brady Material***, 363 US 83 (1963)
  - State has Due Process duty to disclose evidence:
    - Favorable to defense
      - Tends to negate guilt, mitigate an offense or sentence, or impeach States witness or evidence
  - AND
  - "Material to guilt or punishment"
    - A reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different (less than PPE)
- Applies to guilt/innocence stage and sentencing
- DA must provide in time for D to make effective use of it at trial
- New trial required if error found

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## D's Constitutional Right to Discovery

- ***Giglio v. United States***, 405 US 150 (1972)
  - State must disclose evidence affecting witness credibility
    - Includes law enforcement officers
- ***Pennsylvania v. Ritchie***, 480 US 39 (1987)
  - D has right to obtain records containing favorable, material evidence even if confidential
  - Ex. DSS Records, Mental Health Records of PW
    - Conduct in camera review

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## Other Discovery Devices

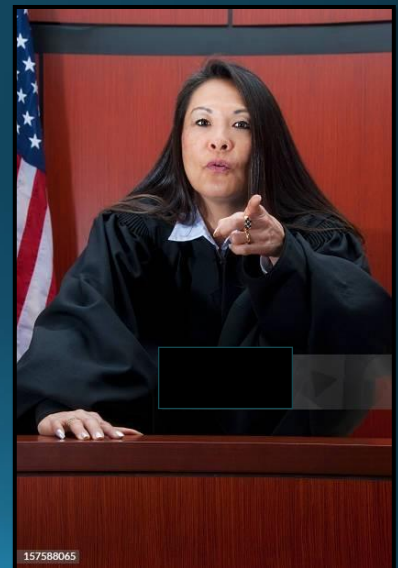
- **Subpoena Duces Tecum**
  - To obtain records not in State custody/control
  - D need not make any showing to obtain, but Court may quash or limit on objection
- **Public Records Request**
  - Eg, for Standard Operating Procedures of Law Enforcement Agency
- **Bill of Particulars**
  - To flesh out indictment
- **Pretrial Hearings**
  - Eg, bond or suppression hearings

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## Other Discovery Devices

- **Court's Inherent Authority**
  - In the interests of justice

Can I order the defense to provide more than statutes require?



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## Sanctions (GS 15A-910)



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## Sanctions

1. Order compliance with request
2. Continuance or recess
3. Prohibit use of undisclosed evidence
  - Beware: unconstitutional if infringes on weighty interest of accused
4. Mistrial
5. Dismiss charge (with or without prejudice)
6. Other appropriate order

**Make specific findings! GS 15A-910(d)**

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## Sanctions

- **Choice of Sanction**-trial court's discretion
- **Considerations:** 1) materiality, and 2) circumstances of failure to comply:
  - Bad faith
  - Unfair surprise
  - Prejudice to trial preparation or presentation of evidence
  - Constitutional violation (may require stronger measure)
- Would a lesser sanction work?
  - Less likely to be found an abuse of discretion
- Remember: D has DPC right to present a defense
  - *State v. Cooper*, 229 N.C. App. 442 (2013) (sanction of precluding defense witness was abuse of discretion requiring new trial)

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## RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

- The prosecutor in a criminal case **shall**:
  - (d) after reasonably diligent inquiry, make timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions including all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order....**ibunal**;

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# Reversal



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# Reversal

## SANCTIONS:

- Preclusion of affirmative defense as sanction. 235 NC 365.
  - D has right to put on defense, and trial court did not detail reasons
- Dismissing charge as a sanction. 225 NCA 599; 222 NCA 707.
  - Extreme sanction, and trial court did not make findings about prejudice warranting
  - 836 SE2d 658: trial court erred by finding destruction of BWC warranted dismissal without determining whether it was done in bad faith.
- Excluding defense expert testimony as a sanction, and failure to conduct in camera review of materials. 229 NCA 442.
- Ordering suppression as sanction for State's failure to document and disclose communications. 225 NCA 599.
  - 15A-903 requires production of existing documents, it doesn't require State to create documentation.

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## Reversal

- Failure to disclose DSS records to D where they contained impeachment information or other favorable, material information. 212 NCA 661; 197 NCA 619; 165 NCA 854.
- Preventing D from cross-examining witness about bias, like witness' deal for sentence commutation, or pending criminal charges. 346 NC 162.
- Failing to preclude expert witness not on State's list from testifying. 178 NCA 351.
- Denying D's request for continuance when State disclosed expert 5 days before trial and produced report 3 days before trial. 362 NC 285.

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## Special Topics

### North Carolina Criminal Law

A UNC School of Government Blog



- Identity of Confidential Informants
- Discovery of Officers' Text Messages
- New Ethics Opinion on Incarcerated Defendants' Right to Review Discovery
- Discovery and Separate Sovereigns
- Discovery in Child Pornography Cases
- Expert Discovery

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