

Discovery and Investigation in Felony Cases

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Credits

- 2016 Power Point from Glenn Gerding
- 2017 Power Point from Vince Rabil
- Phil Dixon, Jr., School of Government Faculty Member

Three Points

1. What They Give You
2. What You Give Them
3. What You Get on Your Own

1. What They Give You

1. What They Give You

- Constitutional (due process)
 - Exculpatory Material
 - *Brady v Maryland*, 373 US 83 (1963)
 - Information relevant to guilt or punishment that is favorable to the defendant

1. What They Give You

- Impeachment Material
 - *Giglio v United States*, 405 US 150 (1972)
- Prosecutor has the duty to find any exculpatory or impeachment material known to law enforcement
 - *Kyles v. Whitley*, 514 US 419 (1995)

1. What They Give You

- Old Rule
 - Prosecutor decides what is exculpatory or impeaching and gives it to you
 - Or if s/he wanted to, they could give you open file discovery

1. What They Give You

- New Rule: mandatory open file discovery
 - Fox should not guard henhouse
 - They give you everything they have, per 15A-903
 - More than just exculpatory or impeaching; everything

1. What They Give You

- Procedure
 - File Request for Discovery 15A-902
 - Generally within 10 working days after being notified of the indictment

1. What They Give You

- After 7 days, make motion for discovery 15A-902
 - If State has not provided it
 - And even if State has provided it
 - “This motion is made for the record, to assert fully the Defendant’s rights to discovery”

1. What They Give You

- After you get the discovery
 - Read it and make note of anything mentioned but not provided
 - Example: “Officer A took pictures of the scene” – but no pictures provided
 - Example: “Officer B sent items to the State Crime Lab for analysis” – but no lab report provided

1. What They Give You

- Then file a motion for additional discovery
 - Citing Brady, Giglio, and the open file discovery statutes
 - Ask the court to order production of the missing items
 - Most prosecutors will work with you

1. What They Give You

- If the State is playing games, file a motion for sanctions
 - 15A-910: asking for a continuance, a mistrial, a dismissal, or “other appropriate orders”
 - Cross the offending officer with the issue at trial

1. What They Give You

- In a drug case in which the State used a confidential informant (CI), include in your motion a request for the CI file
 - most agencies maintain files on their CI's, showing the CI's history with the agents, payments made to the CI, and other information concerning the CI

1. What They Give You

- Especially if the agency is certified by CALEA (the Commission on Accreditation for Law Enforcement Agencies)
- Argue as part of open file discovery because "the complete files of all law enforcement agencies . . . involved in the investigation of the crimes committed or the prosecution of the defendant." 15A-903(a1)

1. What They Give You

- From Greenville Police Department Manual:
 - directs that GPD maintain a file on all informants that includes a record of payments made to the informant and a copy of the informant's criminal record.

1. What They Give You

- provides that “[a]ll meetings with informants in which information is obtained or investigative progress is made shall be documented and included in the investigation file related to the case.”
- has a section headed “Guidelines for Paying Informants.” It directs the officer to meet with a supervisor “to determine [the] value” of information provided by an informant. It requires that payments to informants “be documented on Report of Special Expenditures.”

2. What You Give Them

2. What You Give Them

- Constitutional
 - No, because State has no constitutional rights
- Statutory
 - Yes per statute, 15A-905
 - State's Motion for Reciprocal Discovery

2. What You Give Them

- Within 20 working days after final administrative setting (“within 20 working days after the date the case is set for trial” 15A-905(c)(1))
- Notice of Defenses: if you are going to rely on alibi, duress, entrapment, insanity, mental

2. What You Give Them

- infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication
- If alibi, State can ask for disclosure of alibi witnesses no later than 2 weeks before trial

2. What You Give Them

- More detailed notice required for duress, entrapment, insanity, automatism, or involuntary intoxication: “specific information as to the nature and extent of the defense”
- OK to give the notice and later change your mind; giving the notice is “inadmissible against the defendant.” 15A-905(c)(1)

- Giving the notice does **not** waive the Defendant's Fifth Amendment right to remain silent
 - *State v. Shuler*, 378 N.C. 337 (2021)
 - Defense gave pretrial 15A-905 notice of being under duress from third party; during its case-in-chief, State asked officer, "did she say anything about that when you stopped her," and officer said "no"

- Defendant: that violated my Fifth Amendment right to remain silent
- State: you waived that right when you gave the pretrial notice of duress under 15A-905; the notice clearly showed you were going to testify

- NC Supreme Court ruled in favor of defense
- "Giving pre-trial notice of [an affirmative defense] does not compel a defendant to testify on her own behalf, nor does it clearly show she intended to do so. A criminal defendant retains the right to choose whether or not to testify at all times up until she actually takes the stand."

2. What You Give Them

- Around two to three weeks before trial (“reasonable time prior to trial”) 15A-905(c)
 - Any exhibits or other materials you plan to admit
 - Results of any examinations or tests you plan to admit
 - Expert witness reports and curricula vitae for experts you will call

2. What You Give Them

- Caveats
 - Only what you plan to admit
 - Not your whole file
 - No reciprocal open file discovery

2. What You Give Them

- At beginning of jury selection
 - Your witness list per 15A-905(c)(3)
 - “a written list of the names of all other witnesses whom the defendant reasonably expects to call during the trial”

2. What You Give Them

- If you play games with them: they can move for sanctions
- Do not claim you had to wait until trial to see what you planned to offer into evidence
- 15A-910

3. What You Get on Your Own

3. What You Get on Your Own

- Anybody can pick up a rock
- It takes imagination, effort, and discipline to dig and find the gemstones hidden underground
 - That's where the good stuff is

3. What You Get on Your Own

- Imagination
 - Think beyond what is there
 - To what *could* be there
 - And how you can make it be there

3. What You Get on Your Own

- Sometimes your investigation changes everything
- Sometimes you win because you did more investigation than the State

3. What You Get on Your Own

- Imagination at work
 - My Cousin Vinny
 - https://www.youtube.com/watch?v=_T24lHnB7N8

3. What You Get on Your Own

- Sky is the limit. Think creatively. Be optimistic.
- Spend your time on what is needed for the theory of your case
 - Example: bank robbery; your client is alleged to be driver of the getaway car

3. What You Get on Your Own

- If your theory is mistaken identity, spend your time getting evidence of his whereabouts on the offense date
- But if your theory is that he acted under duress b/c threatened by codefendant, spend your time going into codefendant's background

3. What You Get on Your Own

- Some common examples
 - Social media
 - Video and audio recordings
 - Medical records and other material from third parties
 - Personnel file information

3. What You Get on Your Own

- Social media

- Facebook, twitter, instagram, VSCO, Venmo

- Get it if public

- But do not “friend” them to get it

3. What You Get on Your Own

- Video and audio recordings
 - Audio: especially 911 call recordings
 - 2 issues: routing and retention

3. What You Get on Your Own

- Routing: when a person calls 911, does it go to a central call center for the county, which then routes the call to the relevant agency (police, sheriff, etc)
 - If so, issue two subpoenas
 - One to the 911 call center, the other to the agency
 - Learn how your county works

3. What You Get on Your Own

- Retention: how long does the 911 call center and/or the law enforcement agency keep the records
 - Examples
 - Pitt County 911 call center 60 days
 - Pitt County Sheriff approximately one year, depending on space
 - Know your retention periods; set reminders in your calendar to check, especially in new cases
 - Do not wait until day 61 . . .

3. What You Get on Your Own

- Video recordings
 - From a gas station, restaurant, etc. (non-law enforcement cameras)
 - Act as soon as possible; could be gone in 30 days or less
 - Issue and serve a subpoena

3. What You Get on Your Own

- Get the business contact information from your tax office records online and/or the North Carolina Secretary of State
 - send the subpoena by certified mail to the Registered Agent
- And also: try to send it via fax with cover letter asking them to preserve the recordings
- And also: take the subpoena to the business and hand to a clerk and ask them to give to a manager

3. What You Get on Your Own

- Subpoena can direct production of the recordings to the courthouse on the court date
- Or better: subpoena can direct production to your office prior to the court date so you can get it ASAP
 - Permitted by 2008 Formal Ethics Opinion 4

3. What You Get on Your Own

- Recordings from law enforcement (dash cams, body cams, etc.)
 - In a felony case, you can get them eventually as part of open file discovery in Superior Court
 - But can be helpful to get them much sooner; for plea and/or trial planning

3. What You Get on Your Own

- Cannot use a subpoena to get law enforcement recordings
 - *State v. Chemuti*, 920 SE2d 810 (2025)
- Must file a petition under NCGS § 132-1.4A
- File in civil Superior Court (no filing fee)

3. What You Get on Your Own

- Not as bad as it sounds; really just a subpoena using a different form
 - AOC-CV-270
- File it with Notice of Hearing
 - Set on next available civil Superior Court term

3. What You Get on Your Own

- Mail to the Chief of Police (or Sheriff)
- As a courtesy, copy to the city attorney or county attorney who will handle it for them
- They will likely agree to a consent order that can be signed before the court date
 - AOC form for the order: AOC-CV-271

3. What You Get on Your Own

- Medical records and other records held by third parties (doctors, counselors, schools, etc.)
 - Example: mental health treatment records concerning the prosecuting witness
 - Sometimes called “third party discovery” or “Ritchie records”

3. What You Get on Your Own

- *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987):
criminal defendant entitled to receive portions of
state social service agency files that contain material
information
- You file the motion requesting the records

3. What You Get on Your Own

- On court date, ask for a motions hearing
 - Ask the judge to order the records be given to you outright
 - If not, then ask for the judge to review *in camera* and give to you after reviewing; or to seal for appellate review if withheld

3. What You Get on Your Own

- If you are not sure where the prosecuting witness received treatment, then just file the motion
 - Stating what you know about the prosecuting witness potentially having treatment records out there
 - At least asking for the prosecutor to provide any such records in their possession (putting it on the record)

3. What You Get on Your Own

- Personnel file information
 - Personnel files are generally confidential
 - Except as to law enforcement officers, a portion of the file is public
 - Public records statutes

3. What You Get on Your Own

- Police officers: city employees: 160A-168(c)(5)
- Deputies: county employees: 153A-98(b)
- Highway Patrol: state employees: 126-23(a)

3. What You Get on Your Own

- What is public:
 - Standard items like name, age, and salary
 - Are they still employed by the agency
 - Interesting items like:
 - “Date and type of each promotion, demotion, transfer, suspension, separation, or other change in position classification with that municipality.”

3. What You Get on Your Own

- “Date and type of each dismissal, suspension, or demotion for disciplinary reasons taken by the municipality.”
- “If the disciplinary action was a dismissal, a copy of the written notice of the final decision of the municipality setting forth the specific acts or omissions that are the basis of the dismissal.”

3. What You Get on Your Own

- Use the records to support a motion to get information from the non-public portion of the personnel file
- Common objection from the State to a motion for an officer's personnel file: this is just speculation, a fishing expedition that is wasting everyone's time
- Not if you have a specific date of a demotion or suspension; you have a rock solid basis to say at least the Court must review the personnel file *in camera*

3. What You Get on Your Own

- How to make the request
 - Send an email to the attorney for the law enforcement agency
 - “Dear Mr. Attorney for the Agency – I write to request production of the public portion of the personnel file of Officer John Doe. This request is made under NCGS § 160A-168(b). Thank you.”
 - That’s it. No special form or procedure

Conclusion