

Getting Started: Developing an Investigation and Discovery Plan

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District Court

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- **No right to “formal” discovery until case goes to Superior Court**
- **Sources of “informal” discovery:**
  - **Client**
  - **Client’s family or friends**
  - **Law enforcement, if they will talk to you**
  - **Motions filed in District Court**
    - × **Motion to Modify Bond**
    - × **Demand for Probable Cause Hearing**

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District Court  
 Bond Hearings: Motion to Modify Bond

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- **Can be good source for discovery**
- **Article 26; 15A-531 – 547.1**
- **State will likely lay out some facts about the case in opposition**
- **Good opportunity to show your clients you are on their side**
- **Also shows them the criminal justice system is not on their side**

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District Court  
Bond Hearings: Motion to Modify Bond

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- **Considerations:**
  - Client better off in custody (drug use, mental health issues, etc.)
  - Prior record issues (more time in, better chance for special probation, DA more willing to deal on credit for time served)
  - Access to client
  - Client out of jail better able to assist
  - Client out of jail better able to make a living (restitution issues)

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District Court  
Demand for Probable Cause Hearing

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- Filed in District Court
- Governed by Article 30 (15A-611 through 615)
- Also 15A-606 addresses demand and waiver of PC
- If you can get one:
  - Excellent source of discovery
  - Opportunity to cross-examine state's witnesses
  - File motion for recordation of PC hearing
  - Get order for transcription of hearing
- Motion to continue PC hearing is not timely unless made 48 hours prior to PC hearing – after that, must have “extraordinary cause.” 15A-606(f)

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District Court  
Demand for Probable Cause Hearing

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- Trade off PC hearing for some discovery?
- May force a better plea

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Superior Court  
Statutory Discovery

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- **Request for Voluntary Discovery (Article 48; 15A-901 through 910)**
  - After indictment/PC hearing/waiver of PC hearing
  - No later than 10 working days after
  - If negative/no response or 7 days pass after request you may then file motion for discovery
  - **Tip: File Request for/Alternative Motion for Voluntary Discovery**
    - × Prevents you from having to file motion after filing Request
  - **File the Request/Alternative Motion! (protect record)**

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Superior Court  
Statutory Discovery

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- 15A-903 governs what you get
- **You get everything!!!**
  - “complete files of all law enforcement and prosecutorial agencies”
    - × Defendant’s statements
    - × Co-defendant’s statements
    - × Witness Statements
    - × Investigating officers’ notes
    - × Results of tests and examinations
    - × “*or any other matter obtained during the investigation of the offenses....*”

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What is Discovery?  
“...any other matter or evidence obtained...”

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- **Photographs**
- **Physical evidence**
- **Videos**
- **Weapons**
- **Biological evidence**
- **Polygraph results**
- **Fingerprint cards**
- **Anything collected in the course of the investigation!!!**

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Superior Court  
Statutory Discovery

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- **Request for Discovery should include everything (see handout)**
- **Cite NC Statutes, and federal and state constitutions (protect record)**
- **Follow up with letters to ADA if no response**
  - Always follow up with letters if you can
  - Shows a timeline of requests and "good faith" effort to work with ADA

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Superior Court  
Statutory Discovery

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- **Discovery from requests are the 1<sup>st</sup> layer of discovery**
- **Review original packet for other items missing**
  - Example: Police report mentions surveillance tape, but not tape in 1<sup>st</sup> discovery packet – where's the tape?
  - Example: Police report mentions "substance" sent to SBI lab for testing – where's the lab report and accompanying documents?
  - *Always assume you DON'T have everything*
- **Follow up with professional request (letter) – if no response, file motions to compel additional discovery**

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**Sanctions for Noncompliance with Discovery Rules**

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- **15A – 910(a)**
  - Order the offending party to produce the discovery or permit inspection.
  - Grant a continuance or recess.
  - Prohibit the party from introducing evidence not disclosed.
  - Declare a mistrial.
  - Dismiss the charge, with or without prejudice.
  - Enter other appropriate orders.

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**Sanctions for Noncompliance with Discovery Rules**

• **15A – 910 (b) and (c)**

- (b) Prior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article or an order issued pursuant to this Article.
- (c) For purposes of determining whether to impose personal sanctions for untimely disclosure of law enforcement and investigatory agencies' files, courts and State agencies shall presume that prosecuting attorneys and their staffs have acted in good faith if they have made a reasonably diligent inquiry of those agencies under G.S. 15A-903(c) and disclosed the responsive materials.

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**What Is Brady Material?**

- Any Information or Material That Is:
- Relevant to Guilt or Punishment (and)
- Favorable to the Accused (and)
- Within the Knowledge of Anyone Acting on
- Behalf of the State (and)
- Is Legally "Material"

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**Brady v. Maryland**

All Requests for Voluntary Discovery and follow-up motions to compel discovery should also request Brady material (i.e., any evidence in hands of prosecution that is both favorable and material to the accused either to the issue of guilt or sentencing). Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

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Brady v. Maryland



- Even Though North Carolina has an Open File Discovery Statute:
  - The Prosecutor still must seek out and disclose all exculpatory information.
  - The Brady material must be in the "open file" or statutory discovery package the State gives defense counsel; Or
  - The Brady material must be separately turned over to the defense –
  - **EVEN IF IT DOESN'T COME UNDER THE STATUTE**

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Brady v. Maryland



- "We certainly do not criticize the prosecution's use of the open file policy...We merely note that, if a prosecutor asserts that he complies with Brady through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under Brady."  
Strickler v. Greene, 527 U.S. 263 (1999), fn. 23

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What Is "Favorable to the Accused?"



- Anything That is Relevant to Either Guilt or Punishment and
- Is Exculpatory or
- May Mitigate Sentence or
- Can Be Used to Impeach a State's Witness

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**Does Brady Include Impeachment Material?**

- “The due process duty of the prosecution under Brady . . . encompasses impeachment evidence as well as exculpatory evidence.” Strickler v. Greene, 527 U.S. 263 (1999)
- “Our cases make clear that Brady’s disclosure requirements extend to material that, whatever their other characteristics, may be used to impeach a witness.” United States v. Bagley, 473 U.S. 667 (1985)
- “the duty to disclose [Brady] evidence encompasses impeachment evidence.” State v. Mack, 188 N.C. App. 365 (2008)

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**What is “within the knowledge of anyone acting on behalf of the State”**

- Actually known to the prosecutor’s office.
- Actually known by the police, even if the prosecutor doesn’t know about it.
- Known to anyone else acting on behalf of the State, even if the prosecutor doesn’t know about it.

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**What if the prosecutor says “I didn’t know about that?”**

- “The individual prosecutor has a duty to learn of any favorable evidence known to the other acting on the government’s behalf in the case, including the police.” Kyles v. Whitley, 514 U.S. 419 (1995)

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What if the prosecutor says,  
"I was acting in good faith?"

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- "The failure to disclose evidence favorable to the defense violates due process irrespective of the good faith or bad faith of the prosecution. . . . The prosecutor's motive for withholding exculpatory evidence is immaterial."  
- Brady; Kyles; Bagley

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Evidence Subject to Disclosure Under Brady

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- **Evidence lessening defendant's degree of guilt**  
U.S. v. Bagley, 473 U.S. 667 (1985);
- **Evidence undermining the identification of defendant**  
Kyles v. Whitley, 514 U.S. 419 (1995);
- **Evidence tending to show guilt of another**  
Barbee v. Warden, 331 F.2d 842 (4th Cir. 1988);
- **Promise of leniency to prosecution witness**  
Giglio v. U.S., 405 U.S. 150 (1972);
- **Investigator's notes/letters on witness interviews useful for impeachment**  
Strickler v. Greene, 527 U.S. 263 (1999);
- **"Negative" impeachment evidence**  
Ring v. U.S., 419 U.S. 18 (1995);
- **Exculpatory information in Social Services files**  
PA v. Ritchie, 480 U.S. 39 (1987).

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Evidence Subject to Disclosure Under Brady

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- **False statements of witnesses;**  
U.S. v. Minsky, 963 F.2d 879 (6th Cir. 1992);
- **Prior inconsistent statements of witnesses;**  
Chavis v. NC, 637 F.2d 870 (4th Cir. 1980);
- **Bias of witnesses, specific threats of prosecution if witness does not testify;**  
Banks v. Dretke, 540 U.S. 668 (2004), State v. Prevatte, 346 N.C. 162 (1977);
- **Information affecting a witness' capacity to observe, perceive, or recollect;**  
Jean v. Rice, 945 F.2d 82 (4th Cir. 1976); State v. Williams, 330 N.C. 711 (1992);
- **Psychiatric evaluation of witnesses;**  
Chavis v. NC, 637 F.2d 870 (4th Cir. 1980);
- **Criminal convictions or other bad acts of state's witnesses;**  
State v. Kilpatrick, 343 N.C. 466 (1996);
- **Evidence discrediting police investigation;**  
Kyles v. Whitley, 514 U.S. 419 (1995);
- **Evidence of defendant's mental illness/drug use;**  
Cone v. Bell, 129 S. Ct. 1769 (2009).

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**Third Party Discovery: Getting Discovery from Sources Other than the Prosecutors and LEOs**

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- **Statutory Basis - 15A-903(a)(1) - "Prosecutorial Agency"**
  - "Any public or private entity that obtains information on behalf of a law enforcement agency or prosecutor in connection with the crimes committed or the prosecution of the defendant." (i.e. - DSS, private labs)
  - Language added in 2007 in part because of Duke Lacrosse case issue with private DNA lab.
  - Makes moot *State v. Pendleton*, 175 N.C. App. 230, 622 S.E.2d 708 (2005) where NC Court of Appeals held DSS files in statutory rape cases were off limits because DSS not a prosecutorial agency.

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**Third Party Discovery: Getting Discovery from Sources Other than the Prosecutors and LEOs**

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- **Constitutional Third Party Discovery**
  - 14th Amendment Due Process Clause gives defendants the right to obtain from third parties records that contain favorable, material evidence, even if the records are confidential under state and/or federal law.  
*See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), *State v. Bailey*, 89 N.C. 212 (1988), *State v. Kelly*, 118 N.C. App. 589 (1995).
  - *Ritchie* allows for *in camera* review of third party discovery to preserve confidentiality. If records contain favorable & material evidence the court must disclose those parts of the records to the defense.
  - Must show that records may contain favorable, material evidence.  
*Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995).

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**Third Party Discovery: Getting Discovery from Sources Other than the Prosecutors and LEOs**

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- ***In camera* review alternatives:**
  - If the third party discovery comes into the hands of the prosecution, statutory discovery applies and the defense should get everything (remember "complete file" & "any other matter or evidence obtained").
  - Request *in camera* review as an alternative to giving defense all the records. The judge does not know the case like you do and will not be the most able reviewer to determine what is favorable and material to your case.
  - Move to participate in the review of the records pursuant to a protective order that does not allow disclosure of records by counsel unless permitted by court. (15A-909 authorizes protective orders).

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**Investigators**

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- **Give them a plan of action:**
  - What to do
  - Who to interview
  - What locations to view (photograph)
- **Sit down with them and go over case**
- **Give them the discovery that you have been given so they will understand the case**
- **Ask for their input and advice!**
  - They like it
  - They have more experience than you in getting information
  - They can help you streamline an investigation

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**Investigators**

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- **Think about which investigators you want for a particular case**
  - Alleged sexual assault of woman (woman investigator to interview her)
  - Interview of snitch (maybe former law enforcement)
  - Investigators with special backgrounds (military, arson investigation, sex assault investigation, homicide investigation, forensic training)
- **Let investigators meet with client**
  - They are often better at getting information than you are
  - Different kind of relationship
  - Can help "talk sense" into client about pleading when necessary

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