

Getting Started: Developing an Investigation and Discovery Plan

New Felony Defender Training

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District Court

- 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



District Court **Bond Hearings: Motion to Modify Bond**

- 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



District Court **Bond Hearings: Motion to Modify Bond**

■ **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)



District Court

Demand for Probable Cause Hearing

- 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)



District Court Demand for Probable Cause Hearing

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



Superior Court Statutory Discovery

- 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)



Superior Court Statutory Discovery

- 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....”



What is Discovery?

"...any other matter or evidence obtained..."

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



Superior Court Statutory Discovery

- 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



Superior Court Statutory Discovery

- Discovery from requests are the 1st layer
- Review original packet for other items missing
 - Example: Police report mentions surveillance tape, but not tape in 1st 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



Sanctions for Noncompliance with Discovery Rules

- 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.



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, 10 L.Ed. 2d 215 (1963).



Third Party Discovery

Getting Discovery from Sources Other than the Prosecutors and LEOs

- 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.



Third Party Discovery

Getting Discovery from Sources Other than the Prosecutors and LEOs

■ 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, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), *State v. Bailey*, 89 N.C. 212, 365 S.E.2d 651 (1988), *State v. Kelly*, 118 N.C.App. 589, 456 S.E.2d 861 (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).



Third Party Discovery

Getting Discovery from Sources Other than the Prosecutors and LEOs

- ***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).



Investigators

- 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



Investigators

- Think about which investigators you want for a particular case
 - Female victim of sexual assault (female 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 info. than you are
 - Different kind of relationship
 - Can help “talk sense” into client re: pleading when necessary

