STRATEGIES FOR DISCOVERY AND INVESTIGATION IN DEFENSE OF FELONY CASES

A PRESENTATION TO NEW FELONY DEFENDERS TRAINING
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I. GETTING STARTED: THE DUTY TO INVESTIGATE[1]

The America Bar Association has published standards for the criminal defense attorney to follow concerning their duties regarding investigation and discovery and **duties owed to clients regarding their "discovery rights" and their rights to be informed and to share decisions about "strategies" for discovery and investigation**. Every new felony defense attorney should read, and periodically re-read, these standards.

[1] This paper is meant to supplement, not duplicate, the very thorough discussions of ***Discovery in Criminal Cases in North Carolina,*** written by John Rubin, in **The North Carolina Defender Manual, Ch. 4, Discovery (2d ed. 2013),** available online at **http://defendermanuals.sog.unc.edu/pretrial/4-discovery**; by Bob Farb, in the ***North Carolina Superior Court Judge's Benchbook (2015),*** available online at **http://benchbook.sog.unc.edu/criminal/discovery;** and, ***Pennsylvania v. Ritchie: the Defendant's Right to Third Party Confidential Records***, by Jessica Smith, Id., viewable at: **https://benchbook.sog.unc.edu/sites/benchbook.sog.unc.edu/files/pdf/Pennsylvania%20vs%20Ritchie_Defendant's%20Right%20to%203rd%20Party%20Confidential%20Records_0.pdf.** I gratefully acknowledge use of material from these publications. Another excellent source on this topic is the ***North Carolina Criminal Defense Motions Manual***, 3d Ed.(2016), by Maitri "Mike" Klinkosum, edited by Sarah Jessica Farber, published by LexisNexis.

They are updated regularly and available online.[2] The duties and responsibilities of a criminal defense attorney regarding discovery and investigation are among the most complex and varied in the law. Mastery and knowledge of discovery statutes, constitutional law affecting discovery, and ethical duties surrounding discovery and investigation **can make or break a case** and will determine and shape the effectiveness and reputation of the criminal defense lawyer as an advocate for every client.

Issues surrounding discovery and investigation can literally be a matter of life or death for a client. The potential consequences to every client of any felony conviction or acquittal cannot be overestimated. The stakes involved in getting or not getting discovery, in enforcing or not enforcing discovery rights, cannot be any higher. Frequently overlooked defense obligations, such as t**he need to get orders to preserve evidence, to interview state witnesses, to view physical evidence, and to inspect the original state files,** are discussed herein. Sometimes fighting for discovery and discovering exculpatory evidence or weaknesses in the State's case may be your client's only good defense. Your client's liberty, citizenship, job, family, freedom, immigration or refugee status may be at stake depending on whether or not the attorney gets all the discovery to which the defendant is entitled.

Because discovery and investigation is akin to "an infinite regress," post-conviction discovery can be considered a continuation of the discovery process that was cut off pretrial due to either prosecutorial concealment or suppression of *Brady* material,

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[2]AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS DEFENSE FUNCTION, Fourth Edition, viewable at: http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html .

by deliberate or negligent misrepresentation of the prosecutor, or due to professional negligence of defense counsel.

This paper is intended to assist the new felony criminal defense attorney in identifying the "due diligence" required to effectively represent those charged with felony offenses by identifying many of the tools available under Article 48; through the use of other methods and motions that can be filed under the defendant's state and federal constitutional rights to discovery; and, through the use of an investigator or expert to get as much information as possible concerning the State's case, its strengths and weaknesses. The defense attorney should also make efforts to identify and obtain information about relevant individual mental health and medical history of the client in appropriate cases which may be utilized to defend the client at trial and/or utilized in plea negotiations to minimize that client's risk of loss of life, liberty, property, citizenship, or possible deportation. Most of a defendant's prison, hospital, school, disability and mental health records can be easily obtained with a release, HIPPA release, and subpoena to produce records to the attorney's office. Sometimes it will take a court order to get these.

Every defense attorney, no matter how old or experienced they may be, will often need assistance from others in specialized forensic or legal matters. The new felony defense attorney should seek to maintain professional association memberships in groups such as the American Bar Association (ABA), the National Association of Criminal Defense Lawyers (NACDL), the North Carolina Advocates for Justice (NCAJ), the National Association for Public Defense (NAPD), and the N.C. Bar Association. Each of these organizations has monthly publications often concerning discovery issues. Be on the look-out for important annual trainings and CLE programs relevant to discovery and

investigation of specialized matters such as forensics, drug testing, digital discovery, or intellectual disability. The new felony defender should not be afraid to reach out to colleagues or experts to find out what kind of specialized discovery may be needed to properly investigate and evaluate a case. This is especially true in cases involving digital or cell phone evidence, cell tower hits, DNA and serological evidence, and any case involving tool mark, trace evidence, or other technical matters.

N.C.I.D.S. maintains a database of experts, sample motions, and a wealth of advice on discovery of forensic issues. Its listed experts can be consulted as work product experts to find out what specific items of evidence not routinely turned over in discovery by the State need to be specifically requested in a written request and motion to compel discovery. These experts can remain "work product" to assist the attorney in cross examination of State experts, or be asked to evaluate or test evidence themselves, and/or be retained to testify for the defense.[3] Many of these experts will speak with you before being appointed about what they can actually do for the defense in a particular case. As with every expert, each expert will need to be properly vetted by the defense attorney before getting funds for their services to be sure they are credible and appropriate for the case.

II. THE ABA GUIDELINES AND CRIMINAL DEFENSE STANDARDS.

The key ABA standards relevant to discovery and investigation are:

Standard 4-3.7 Prompt and Thorough Actions to Protect the Client

(a) Many important rights of a criminal client can be protected and preserved only by prompt legal action. Defense counsel should inform the client of his or

[3]http://www.ncids.com/forensic/index.shtml?c=Training%20%20and%20%20Resources,%20Forensic%20Resources .

her rights in the criminal process at the earliest opportunity, and timely plan and take necessary actions to vindicate such rights within the scope of the representation.

(b) **Defense counsel should promptly seek to obtain and review all information relevant to the criminal matter, including but not limited to requesting materials from the prosecution.[4] Defense counsel should, when relevant, take prompt steps to ensure that the government's physical evidence is preserved at least until the defense can examine or evaluate it.[5]**

(c) **Defense counsel should work diligently to develop, in consultation with the client, an investigative and legal defense strategy, including a theory of the case. As the matter progresses, counsel should refine or alter the theory of the case as necessary, and similarly adjust the investigative or defense strategy.**

(d) Not all defense actions need to be taken immediately. If counsel has evidence of innocence, mitigation, or other favorable information, defense counsel should discuss with the client and decide whether, going to the prosecution with such evidence is in the client's best interest, and if so, when and how.

(e) Defense counsel should consider whether an opportunity to benefit from cooperation with the prosecution will be lost if not pursued quickly, and if so, promptly discuss with the client and decide whether such cooperation is in the client's interest. Counsel should timely act in accordance with such decisions.

(f) For each matter, defense counsel should consider what procedural and investigative steps to take and motions to file, and not simply follow rote procedures learned from prior matters. Defense counsel should not be deterred from sensible action merely because counsel has not previously seen a tactic used, **or because such action might incur criticism or disfavor**. **Before acting, defense counsel should discuss novel or unfamiliar matters or issues with colleagues or other experienced counsel, employing safeguards to protect confidentiality and avoid conflicts of interest.**

(g) Whenever defense counsel is confronted with specialized factual or legal issues with which counsel is unfamiliar, counsel should, in addition to researching and learning about the issue personally, **consider engaging or consulting with**

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[4] See: N.C. G.S. 15A-902, the need to file a written request/motion for voluntary discovery to trigger the State's obligations under G.S. 15A-903:
http://www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter_15a/gs_15a-902.html .

[5] See sample defense motions for discovery and to preserve evidence here: http://ncids.org/MotionsBankNonCap/TriaMotionsLinks.htm; and here: https://ncforensics.wordpress.com/2015/07/09/sample-motion-for-preservation-of-forensic-evidence/.

an expert in the specialized area.[6]

(h) Defense counsel should always consider interlocutory appeals or other collateral proceedings as one option in response to any materially adverse ruling.

Standard 4-4.1 Duty to Investigate and Engage Investigators

(a**) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.**

(b) **The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.**

(c) Defense counsel's investigative efforts should **commence promptly** and should explore appropriate avenues that **reasonably might lead to information relevant to the merits of the matter,** consequences of the criminal proceedings, and potential dispositions and penalties. **Although investigation will vary depending on the circumstances**, **it should always be shaped by what is in the client's best interests, after consultation with the client**. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

(d) Defense counsel should determine whether the client's interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. **Counsel should regularly re-evaluate the need for such services throughout the representation.**

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[6] *State v. Ballard*, 333 N.C. 515 (1993) - Sixth Amendment right to assistance of counsel entitles defendant to apply ***ex parte for appointment of expert***. An indigent defendant is entitled to any form of expert assistance necessary to his or her defense, not just the assistance of a psychiatrist.

(e) If the client lacks sufficient resources to pay for necessary investigation, counsel should seek resources from the court, the government, or donors. **Application to the court should be made *ex parte* if appropriate to protect the client's confidentiality.**[7] Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a regular basis. If adequate investigative funding is not provided, counsel may advise the court that the lack of resources for investigation may render legal representation ineffective. (emphasis added). ABA Guidelines for Defense Function. Standard 4-4.1.

The ABA Standards also provide guidance with respect to witnesses and expert witnesses, how to deal with witnesses to avoid becoming a witness in your own case; and, how to manage work product and confidentiality in dealing with expert witnesses:

Standard 4-4.3 Relationship With Witnesses

(a) "Witness" in this Standard means any person who has or might have information about a matter, including victims and the client.

(b) Defense counsel should know and follow the law and rules of the jurisdiction regarding victims and witnesses. In communicating with witnesses, counsel should know and abide by law and ethics rules regarding the use of deceit and engaging in communications with represented, unrepresented, and organizational persons.[8]

(c) **Defense counsel or counsel's agents should seek to interview all witnesses, including seeking to interview the victim or victims, and should not act to intimidate or unduly influence any witness.**

(d) **Defense counsel should not use means that have no substantial purpose other than to embarrass, delay, or burden, and not use methods of obtaining evidence that violate legal rights. Defense counsel and their agents should not misrepresent their status, identity or interests when communicating with a witness.**

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[7] Guidelines of N.C. IDS and policies of the Office of the Capital Defender regarding when and how to engage experts, especially mental health experts can be very helpful when applying to a Superior Court judge for expert assistance, as well as, when to employ the expert and how to craft "referral questions" for the expert. See: http://www.ncids.com/forensic/experts/experts.shtml; Mechanics of Getting an Expert, by Cait Fenhagen, http://www.ncids.com/forensic/experts/Mechanics_of_Getting_Expert.pdf; http://www.ncids.org/Rules%20&%20Procedures/Policies%20By%20Case%20Type/CapCases/MentalHealthExperts.pdf.

[8] Rule 7.4(a) of the N.C. Rules of Professional Conduct only prohibits communication with a person known to be represented by counsel in regard to the matter in question.

(e) Defense counsel should be permitted to compensate a witness for reasonable expenses such as costs of attending court, depositions pursuant to statute or court rule, and pretrial interviews, including transportation and loss of income. No other benefits should be provided to witnesses, other than expert witnesses, unless authorized by law, regulation, or well-accepted practice. All benefits provided to witnesses should be documented so that they may be disclosed if required by law or court order. **Defense counsel should not pay or provide a benefit to a witness in order to, or in an amount that is likely to, affect the substance or truthfulness of the witness's testimony.**

(f**) Defense counsel should avoid the prospect of having to testify personally about the content of a witness interview. An interview of routine witnesses (for example, custodians of records) should not require a third-party observer. But when the need for corroboration of an interview is reasonably anticipated, counsel should be accompanied by another trusted and credible person during the interview. Defense counsel should avoid being alone with foreseeably hostile witnesses.**

(g) **It is not necessary for defense counsel or defense counsel's agents, when interviewing a witness, to caution the witness concerning possible self-incrimination or a right to independent counsel. Defense counsel should, however, follow applicable ethical rules that address dealing with unrepresented persons. Defense counsel should not discuss or exaggerate the potential criminal liability of a witness with a purpose, or in a manner likely, to intimidate the witness, to intimidate the witness, or to influence the truthfulness or completeness of the witness's testimony, or to change the witness's decision about whether to provide information.**

(h) **Defense counsel should not discourage or obstruct communication between witnesses and the prosecution, other than a client's employees, agents or relatives if consistent with applicable ethical rules. Defense counsel should not advise any person, or cause any person to be advised, to decline to provide the prosecution with information which such person has a right to give. Defense counsel may, however, fairly and accurately advise witnesses as to the likely consequences of their providing information, but only if done in a manner that does not discourage communication.**

(i) **Defense counsel should give their witnesses reasonable notice of when their testimony at a proceeding is expected, and should not require witnesses to attend judicial proceedings unless their testimony is reasonably expected at that time, or their presence is required by law. When witnesses' attendance is required, defense counsel should seek to reduce to a minimum the time witnesses must spend waiting at the proceedings. Defense counsel should ensure that defense witnesses are given notice as soon as practicable of scheduling changes which will affect their required attendance at judicial proceedings.**

(j) **Defense counsel should not engage in any inappropriate personal relationship with any victim or other witness.**

Standard 4-4.4 Relationship With Expert Witnesses

(a) **An expert may be engaged to prepare an evidentiary report or testimony, or for consultation only. Defense counsel should know relevant rules governing expert witnesses, including possibly different disclosure rules governing experts who are engaged for consultation only.**

(b) **Defense counsel should evaluate all expert advice, opinions, or testimony independently, and not simply accept the opinion of an expert based on employer, affiliation or prominence alone.**

(c) **Before engaging an expert, defense counsel should investigate the expert's credentials, relevant professional experience, and reputation in the field. Defense counsel should also examine a testifying expert's background and credentials for potential impeachment issues. Before offering an expert as a witness, defense counsel should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify.**

(d) **Defense counsel who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert's opinion on the relevant subject.**

(e) **Before offering an expert as a witness, defense counsel should seek to learn enough about the substantive area of the expert's expertise, including ethical rules that may be applicable in the expert's field, to enable effective preparation of the expert, as well as to cross-examine any prosecution expert on the same topic. Defense counsel should explain to the expert that the expert's role in the proceeding will be as an impartial witness called to aid the fact-finders, explain the manner in which the examination of the expert is likely to be conducted, and suggest likely impeachment questions the expert may be asked.**

(f) **Defense counsel should not pay or withhold a fee, or provide or withhold a benefit, for the purpose of influencing an expert's testimony. Defense counsel should not fix the amount of the fee contingent upon the substance of an expert's testimony or the result in the case. Nor should defense counsel promise or imply the prospect of future work for the expert based on the expert's testimony.**

(g) **Subject to client confidentiality interests, defense counsel should**

provide the expert with all information reasonably necessary to support a full and fair opinion. Defense counsel should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. Defense counsel should be aware of expert discovery rules and act to protect confidentiality, for example by not sharing with the expert client confidences and work product that counsel does not want disclosed. (emphasis added).

III. GENERAL CONSIDERATIONS

The term "discovery" generally refers to documents and evidence made available by the prosecutor to the defendant through "informal" and "formal" means, under N.C. General Statutes, Article 48, either voluntarily or by court order, while the case is in District or Superior Court. The term "investigation" generally refers to all other matters of evidence or information not obtainable from the prosecutor. Investigation occurs through the efforts of counsel for defendant using computer search engines; *subpoenas*[9]; *ex parte* motions or other motions for records from third parties;[10] i.e.: motions and court orders for *in camera* review and production of DSS records, drug treatment, medical or psychiatric records of witnesses. These motions and orders are not filed pursuant to Article 48 and 15A-902, *et seq*. Specific other statutes may govern each kind of third party records or evidence.[11] They should be filed *ex parte* to protect confidential work product strategies and tactics of the defense.[12]

Investigation can occur through efforts of an investigator or an expert working on behalf of the defendant. As a general rule, once investigation and discovery turns up one

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[9] SUBPOENA DUCES TECUM. --Documents not subject to [the discovery statute] may still be subject to a *subpoena duces tecum. State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).*

[10] See: https://benchbook.sog.unc.edu/criminal/defs-right-3rd-party-confidential-records.

[11] See generally: re medical records, G.S. 8-53 and 8-53.3: http://nccriminallaw.sog.unc.edu/obtaining-medical-records-under-gs-8-53/; obtaining DSS records: https://dcoba.memberclicks.net/assets/CLE2015/2%20moore%20how%20to%20obtain%20records%20from%20dss.pdf.

[12] http://www.ncids.com/forensic/experts/Mechanics_of_Getting_Expert.pdf.

set of documents or records these usually lead to the need to obtain other records and to interview other witnesses. In a complex felony case, such as a capital murder, multiple sex offense case involving multiple victims over a long period of time, historical drug conspiracies, complex "white collar" crimes with hundreds or thousands of pages of financial records and email accounts, the process of discovery and investigation may never be complete. However, due to various deadlines, looming motion and trial dates, discovery and investigation eventually comes to an end before trial or plea resolution.

IV. WAIVER OF *BRADY* AND DISCOVERY RIGHTS BY PLEA OR FAILURE TO REQUEST/MOVE FOR DISCOVERY.

Because approximately 90 percent of all felony cases are resolved by plea, ABA Defense Guidelines, Standard 4-3.7 (b), requires that **prompt and zealous efforts to obtain discovery and investigate must occur *before* a plea resolution**. **Once a guilty plea is entered, the defendant *waives all outstanding discovery rights, including the right to DNA testing and the right to impeachment or Brady material.*[13]**

If the defense has not *requested in writing* and ***filed* written motions to compel all discovery** required from the State under the provisions of G.S. 15A-903, the defendant may forfeit or waive their statutorily entitled right to a dismissal or other sanction, under G.S. 15A-910, to strike or suppress evidence during the trial as a result of the State's discovery violation. THIS IS VERY IMPORTANT BECAUSE many cases have been dismissed or resolved due to the discovery of "lost" or "misplaced" State's evidence which only comes to light when a State's witness is on the stand or otherwise ***discovered during a trial***; i.e.: when it is discovered by the prosecution or defense during

[13] See: http://nccriminallaw.sog.unc.edu/waivers-in-plea-agreements/; *United States v. Ruiz*, 536 U.S. 622 (2002) (no constitutional right to receive impeachment material prior to entering guilty plea).

a trial that a lead detective overlooked or lost a "supplement report," or the DA's office "misfiled" a report in the wrong filing cabinet.

V. THE MOTION TO PRESERVE ALL EVIDENCE, NOTES, AND REPORTS.

Consistent with ABA Defense Guidelines, Standard 4-3.7(b), *supra,* once an attorney is appointed to a case, or retained, they should consider immediately filing a **Motion to Preserve All Evidence**, including specific items that are suspected to have been seized or in the possession or control of the State and its investigators: all reports, notes, physical evidence; i.e.: all controlled substances, gunshot residue tests, projectiles and shell casings, weapons, blood swabs, DNA swabs, 911 recorded calls, radio dispatch traffic, police body cam records, security and surveillance camera recordings, weapons, tool mark evidence, hair and fiber samples, trace evidence, latent fingerprint lifts, digital evidence (both cell phone and computer) and documentary evidence, notebooks and personal papers located in the pockets or wallet of a victim or the defendant.

The defense attorney should get an order to inspect and preserve this evidence entered in District Court as soon as possible.[14] The defense attorney should serve the filed Order in person or by First Class Mail on the prosecutor, the Medical Examiner, the State Crime Lab, and all involved law enforcement agencies: police, sheriff, medical examiner, and SBI. The certificates of service should be filed with the Clerk of Court in the case file. The Motion and Order to Inspect and Preserve should be

[14] DESTRUCTION OF CARTRIDGE CASINGS NOT ERROR WHERE DISCOVERY REQUEST NOT FILED. -- Court properly allowed a police officer to testify concerning the type of pistol used in assault as the officer's testimony regarding the location of shell casings when a bullet was fired from two different weapons was based not upon any specialized expertise or training, but merely upon his own personal experience and observations in firing different kinds of weapons; defendant's due process rights were not violated by the destruction of the shell casings as the police had no duty to preserve the casings when defendant did not file a discovery request for the casings. *State v. Fisher, 171 N.C. App. 201, 614 S.E.2d 428 (2005),* cert. denied, *361 N.C. 223, 642 S.E.2d 711 (2007).*

renewed in Superior Court so it more likely will be enforced. This is to protect the defendant's right to inspect and copy or test this evidence before trial and before it is lost, misplaced, destroyed, "consumed" or "damaged" by State testing before the defense or defense experts have had a chance to view or test the evidence as required under N.C.G.S. 15A-903. The defendant has state and federal constitutional rights to inspect and preserve evidence: Due Process and Effective Assistance of Counsel rights, and the Right to Confront and Cross Examine Witnesses, especially State experts. If the evidence is later destroyed in violation of the Order to Allow Inspection and to Preserve Evidence, the defense can seek appropriate sanctions ranging from suppression to dismissal of charges under 15A-910.

The defense attorney may wish to immediately subpoena facebook, cell phone service provider records of calls made and text messages, and cable and internet provider records of the defendant or other key witnesses or co-defendants before these records are lost or destroyed in the course of business. Email account evidence may not be around after 30 to 90 days without an order to preserve, subpoena, or release and request to produce. Information is usually available online as to how to obtain these records from each provider.

VI. GETTING INFORMAL DISCOVERY.

Although there is no statutory discovery in District Court under Article 48, there is nothing to prevent a prosecutor from allowing, or the defense attorney from asking, to see the State file or police reports in District Court. There are certain tactics that can be employed to get early disclosures or informal discovery in District Court. The defendant may agree not to request a bond motion or a probable cause hearing, or the defendant

may agree to *waive* a probable cause hearing, in return for being allowed to see or obtain a copy of the State's file or "prosecution booklet" in District Court.[15]

A bond motion may allow the defense to learn about the State's case and theory of guilt. This can have the double advantage of allowing the client to see that you are willing to fight for them by challenging the State's case, and by allowing the client to hear for themselves what the State contends its major evidence is all about. This can build your credibility with your client and earn their trust later on when advising the client about a plea or their chances at trial. A bond motion is not without risks unless the State and the defendant agree on a bond amount or conditions of pretrial release. Your client may be better off in custody in some cases and you may inadvertently force the State to adopt a less conciliatory stance to the defendant regarding plea negotiations by antagonizing victims and family members or law enforcement in a highly contested bond motion.

Therefore, you should use your professional discretion and discuss the pros and cons of having a bond motion or probable cause hearing with the defendant before asking to be heard on bond or moving for a probable cause hearing. **Sometimes a bond motion or a probable cause hearing, if a state's witness is placed under oath, can have the unforeseen consequence of inadvertently *preserving state's evidence* for a later jury trial if that witness later dies, refuses to testify under the Fifth Amendment, or is otherwise "unavailable."** This is because testimony under oath at any hearing in the case at which the defendant or his or her attorney had the "opportunity" to cross examine the

[15] CAUTION: If the defendant is represented by counsel and has or waives a probable cause hearing, the defendant is required to serve a written request for discovery on the State within ten days of that waiver or hearing under G.S. 15A-902(d).

witness, will preserve that testimony for the State by turning it into prior or recorded testimony admissible at trial under the N.C. Rules of Evidence, Rule 804(b)(1).[16] *Crawford v. Washington,* and the client's Sixth Amendment Rights to Confront Witnesses *WILL NOT KEEP THIS PRIOR HEARING TESTIMONY OUT at A LATER TRIAL*. Conversely, if the defendant wishes to have a probable cause hearing and the State goes forward on one, the defense should always have it recorded and transcribed for later use at trial, especially if the defendant calls an alibi or other witness to an affirmative defense at the probable cause hearing. This will preserve that testimony in a credible way for defense use at a later trial, if the defense witness becomes unavailable, and allow a vehicle to impeach a State witness's inconsistent trial testimony.

GET ENFORCIBLE STATUTORY DISCOVERY: HAVE THE COURT SET SPECIFIC DEADLINES.

Even if you have obtained voluntary informal discovery from the State in District Court, or there is "an open file policy" in your prosecutorial district, once the case is in Superior Court by way of having or waiving a probable cause hearing if represented by counsel, or "no later than ten working days after appointment of counsel or service of the indictment (or consent to a bill of information), **the defendant MUST comply with 15A-902 by serving (and filing) a written request for voluntary discovery within the time limits imposed by 15A-902** so that the defendant can continue to request, file, AND ENFORCE motions to compel discovery and obtain additional discovery in Superior Court.[17] These steps are necessary to obtain sanctions against the State if it fails to

[16] http://nccriminallaw.sog.unc.edu/hearsay-exceptions-former-testimony-and-dying-declarations/. *See:* N.C. Rules of Evid., Rule 804(b)(1); *Crawford v. Washington*, 541 U.S. 36 (2004).

[17] Before filing a motion for discovery before a judge, a defendant must make a written request for voluntary discovery from the State of North Carolina pursuant to *G.S. 15A-902(a)*. If the State voluntarily complies with the discovery request, the discovery is deemed to have been made under an order of the court, under *G.S. 15A-902(b)*, and the State

comply with providing everything it should under 15A-903. The only statutory exception to this rule is if the defendant and the State enter into a written agreement to be bound by Article 48 discovery. So if you miss the written request deadline, seek AND FILE a written agreement with the State for both sides to be bound by Article 48 discovery; i.e., GS-15A-902, 903, 904 (reciprocal discovery), *et seq.*

AT EVERY MOTION FOR DISCOVERY HEARING YOU MUST HAVE THE STATE PUT UNDER COURT-IMPOSED DEADLINES, AS REQUIRED BY G.S. 15A-909, to provide all discovery and/or certain items of evidence, such as forensic lab reports or access to physical evidence or digital recordings at a place, date, and time certain. Discovery must usually be litigated in contested cases, often after multiple requests in writing by letter or motion. Keep a log of your discovery requests and motions and when you received each item of discovery and refer to these efforts in your motions to compel.

BE VIGILANT: PAY ATTENTION TO DETAILS AND OMISSIONS IN REPORTS. There is a real risk that the court may not honor motions to compel the State to produce evidence or impose sanctions for failure to comply with discovery required under 15A-903, if the defendant does not first serve a written request for voluntary discovery on the State as required by 15A-902.[18] If the defendant fails to notice and seek remedies early on for obvious omissions or missing reports of which the defendant had

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then has a continuing duty to disclose additional evidence or witnesses. *State v. Cook, 362 N.C. 285, 661 S.E.2d 874 (2008).* **STATE DID NOT WAIVE ITS RIGHT TO RECEIVE A WRITTEN REQUEST FOR DEFENDANT'S ORAL STATEMENT by voluntarily producing defendant's written Statement pursuant to an informal oral agreement between the prosecutor and defense counsel**. *State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821,* rev'd on other grounds, *301 N.C. 508, 272 S.E.2d 123 (1980).*

[18] *See: State v. Abbott*, 320 N.C. 475, 482 (1987)(prosecutor not barred from using defendant's statement at trial even though it was discoverable under statute and not produced before trial; open-file policy no substitute for formal request and motion.)

notice early on, it will become difficult to enforce sanctions later when the omitted or lost reports turn up at trial. When a defendant may not have a clear statutory "right to be heard on a motion to compel discovery," due to failure to serve a timely written request on the State, a trial court may still hear a motion to compel discovery by stipulation of the parties or "for good cause shown," G.S. 15A-902(f).

If the defendant files a written request for discovery or obtains an order compelling the State to provide discovery under G.S. 15A-903, the State must make available to the defendant "**the complete files of all law enforcement agencies, investigatory agencies, and prosecutor's offices involved in the investigation of the crimes committed or the prosecution of the defendant."** G.S. 15A-903(a)(1).

G.S. 15A-903(c) requires, under threat of criminal penalities for non-disclosure, that law enforcement and all investigatory agencies, public or private, turn over a copy of their complete files to the prosecutor on a timely basis. The defense may need to seek separate court orders to compel "assisting agencies" to provide the State and the defendant with complete sets of all supplements, notes, and reports created by officers called in to "assist" a lead agency. EMS and fire departments are notorious for not turning over to the prosecutor on a timely basis, everything required under 15A-903. EMS may require a special order as they are not typically considered a "prosecutorial or investigative agency."

The defense attorney cannot assume that a copy of a "complete SBI file" will necessarily contain within it the complete files of a police or sheriff's department who requested assistance from the SBI, even if the SBI reports says it contains the complete files of another agency, and even if the "lead SBI agent" says the SBI received a

complete copy of the local agency's file, notes, and documents generated in the case. The only way to "know" is to request an opportunity to inspect the original actual files of each agency involved in the prosecution of a case. Historically, the SBI has also used a practice of turning over "typed interview summaries" from field notes which were then destroyed. This is a method practiced and taught by the FBI. Under the new G.S. 15A-903, this practice has largely stopped, especially in light of the requirement to record custodial or police station interviews of defendants and witnesses in serious felony cases.[19] However, the vigilant attorney must determine whether or not all field notes corresponding to written reports and summaries have been preserved and produced. The vigilant attorney will also make a list of all officers or other investigators logged in at a crime scene or mentioned in any report of any other officer to see if those investigators and officers turned in reports or other written accounting of their role, activities and observations at a crime scene or in some other aspect of the investigation.

If the prosecution refuses to provide voluntary discovery, or does not respond at all, the defendant must move for a court order to trigger the State's discovery obligations.[20] **THE DEFENDANT MUST OBTAIN A RULING ON THE MOTION TO COMPEL OR RISK WAIVER.**[21]

If the State agrees to provide discovery pursuant to a written request for statutory discovery or the court orders discovery, the State has a continuing duty to disclose information (as does the defendant in providing reciprocal discovery to the State). G.S.

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[19] See: G.S. 15A-211: viewable at: http://www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter_15a/gs_15a-211.html.

[20] *State v. Keaton*, 61 N.C. App. 279, 282 (1983)(defendant has burden to make motion to compel before State's duty to provide statutory discovery arises.)

[21] *State v. Jones*, 295 N.C. 345, 356-58 (1978).

15A-907. The State always has a continuing constitutional duty to disclose material favorable or exculpatory evidence, with or without a request or court order, under *Brady v. Maryland,* 373 U.S. 83, 87 (1963). **However, without a defense request or motion being filed, this "continuing constitutional duty," has little practical relevance outside post conviction proceedings.**

WITHOUT AN ACTUAL MOTION HEARING RESULTING IN AN ORDER ON DISCOVERY, **THERE ARE VERY FEW DEFAULT STATUTORY DEADLINES FOR THE STATE TO COMPLY WITH ITS DISCOVERY OBLIGATIONS**. This is why it may be important to have hearings on your motions to compel in which you seek to have the trial court impose deadlines on the State. In fact, G.S. 15A-909 **REQUIRES the court to set a specific time, place and manner for the State to provide discovery whenever the Court grants a party's motion to compel discovery.** The few statutory deadlines the State operates under are G.S. 15A-903(a)(2) (State must give notice of expert witness and furnish report and CV within a reasonable time before trial); G.S. 15A-903(a)(3)(State must give notice of other witnesses at beginning of jury selection); and G.S. 15A-905(c)(1) a, (if ordered by court on showing of good cause and motion of defendant, State must give notice of rebuttal alibi witnesses no later than one week before trial unless parties and court agree to different times).

VII. INVESTIGATION AND DISCOVERY BY OTHER MEANS.

If the defense cannot get discovery under Article 48 and 15A-903 due to missed deadlines for filing a written request, the defense attorney should still file a written request, as soon as practical, followed by a motion to have the court find the written request or motion to compel discovery "deemed timely filed" in the discretion of the

court by setting out reasons for the late request and/or motion: i.e. you were given early voluntary discovery by the State or you mistakenly believed you could rely on an "open file policy," or were relying on a negotiated plea in District or Superior Court which fell through.[22] You do not want the court to find that the defendant has "waived" their rights to complete discovery by failure to request it and for failure to move to compel it when you are suddenly confronted with "surprise" evidence at trial.[23]

Even if you cannot compel discovery and obtain sanctions under Article 48 under 15A-910, you still have the chance to file motions and requests for "constitutional discovery" under *Brady v. Maryland* , *Kyles v. Whitley;* under N.C. Constitutional requirements under art. I, §19, the "Law of the Land Clause" and §23, the Right to Effective Assistance of Counsel, and general N.C. case law decided under N.C.G.S. 15A-903 before 2004, when the General Assembly passed the "open file" scheme we have now.

The defense attorney or investigator can seek to interview detectives and State witnesses, however they cannot be compelled to give pretrial interviews to the defense.[24] There is no legal or ethical reason why the defense cannot attempt to interview

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[22] G.S. 15A-902 (f): A motion for discovery made at any time prior to trial may be entertained if the parties so stipulate ***or if the judge for good cause shown*** determines that the motion should be allowed in whole or in part. (emphasis).

[23] **BURDEN IS ON DEFENDANT TO REQUEST DISCOVERY**. --Subdivision (a)(2) of this section makes it clear that the burden is on defendant to request discovery in writing prior to a motion to compel discovery. *State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821,* rev'd on other grounds, *301 N.C. 508, 272 S.E.2d 123 (1980).*

[24]**A prosecutor has an implicit duty not to obstruct defense attempts** to conduct interviews with any witnesses; however, a reversal for this kind of professional misconduct is only warranted when it is clearly demonstrated that the prosecutor affirmatively instructed a witness not to cooperate with the defense. *State v. Pinch, 306 N.C. 1, 292 S.E.2d 203,* cert. denied, *459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982),* rehearing denied, *459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983),* overruled on other grounds, *State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994***). Nothing in this Article compels State witnesses to subject themselves to questioning by the defense before tri**al. *State v. Phillips, 328 N.C. 1, 399 S.E.2d 293,* cert. denied, *501 U.S. 1208, 111 S. Ct. 2804, 115 L. Ed. 2d 977 (1991).* Pursuant to *G.S. 15A-903(a)(1),* the detective was not required to submit to a pretrial interview with defense counsel against the detective's wishes. *State v. Taylor, 178 N.C. App. 395, 632 S.E.2d 218 (2006).*

any State witness before trial. If the witness is represented by private counsel or a guardian *ad litem,* you can request permission of them to interview the victim or witness. In most cases there is an ethical duty to interview or attempt to interview important witnesses before trial or plea,[25] especially if you have learned a key witness has recanted or admitted to a third party their intent to perjure themselves on the stand. This kind of pretrial interview can also be seen as part of the defense attorney's duty to zealously represent the defendant under the N. C. Rules of Professional Conduct, Rule 0.1; to provide Effective Assistance of counsel under the Fifth and Sixth Amendments; and, to effectively Confront and Cross Examine witnesses against the defendant under the Sixth Amendment. However, be careful to ascertain whether or not a victim or witness is represented by an attorney or guardian *ad litem*, especially if the victim/witness is a minor.[26] It is highly advisable that the defense attorney send an investigator or have an investigator or third party present during any defense interview of a victim or witness to prevent the attorney from becoming a witness in the case and to preserve the defendant's right and ability to impeach that victim or witness if necessary at trial. If the witness consents, a recording of the interview may be helpful; consent is advisable but not necessary in this state for you or your investigator to record the interview or statement so

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[25] See: supra at p. 6, : ABA Guidelines and Standards for the Defense Function, 4-4.3 (c) **Defense counsel or counsel's agents should seek to interview all witnesses, including seeking to interview the victim or victims, and should not act to intimidate or unduly influence any witness.**

[26] Rule 7.4(a) of the Rules of Professional Conduct only prohibits communication with a person known to be represented by counsel in regard to the matter in question. The prosecuting witness in a criminal case is not represented, for the purposes of the rule, by the district attorney. For that reason, the lawyer for the defendant need not obtain the consent of the district attorney to interview the prosecuting witness. Nor may the district attorney instruct the witness not to communicate with the defense lawyer.

long as one party to the conversation is aware it is being recorded.[27] If the witness recants, a copy of the recording or an affidavit of recantation from a material witness can be presented to the State's attorney to negotiate a plea or dismissal of the case. The recording can be used to impeach or corroborate at trial.

VIII. RECIPROCAL DISCOVERY TO THE STATE.

Under G.S. 902 (e):

> The State may as a matter of right request voluntary discovery from the defendant, when authorized under this Article, at any time not later than the tenth working day after disclosure by the State with respect to the category of discovery in question.

The prosecution is entitled to reciprocal discovery from the defendant if the prosecution provides discovery to the defendant, either voluntarily or by court order, upon the defendant's written request or motion. Statutory reciprocal discovery duties of the defense are governed by G.S. 15A-905.[28] As part of the defendant's reciprocal discovery duties, the defense must give notice to the State of certain defenses and affirmative defenses once the case is set for trial.

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[27] *See*: http://www.dmlp.org/legal-guide/recording-phone-calls-and-conversations.

[28] G.S. 15A-905, provides: (a) Documents and Tangible Objects. - If the court grants any relief sought by the defendant under G.S. 15A-903, the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the defendant and which the defendant intends to introduce in evidence at the trial.
(b) Reports of Examinations and Tests. - If the court grants any relief sought by the defendant under G.S. 15A-903, the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession and control of the defendant which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial, when the results or reports relate to his testimony. In addition, upon motion of the State, the court must order the defendant to permit the State to inspect, examine, and test, subject to appropriate safeguards, any physical evidence or a sample of it available to the defendant if the defendant intends to offer such evidence, or tests or experiments made in connection with such evidence, as an exhibit or evidence in the case.

G.S. 15A-905 requires the following notices of defenses and experts:

> (c) Notice of Defenses, Expert Witnesses, and Witness Lists. - If the court grants any relief sought by the defendant under G.S. 15A-903, or if disclosure is voluntarily made by the State pursuant to G.S. 15A-902(a), the court must, upon motion of the State, order the defendant to:
> (1) Give notice to the State of the intent to offer at trial a defense of **alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication.** Notice of defense as described in this subdivision is inadmissible against the defendant. Notice of defense must be given **within 20 working days after the date the case is set for trial pursuant to G.S. 7A-49.4, or such other later time as set by the court.**
> a. As to the defense of alibi, the court may order, upon motion by the State, the disclosure of the identity of alibi witnesses no later than two weeks before trial. If disclosure is ordered, upon a showing of good cause, the court shall order the State to disclose any rebuttal alibi witnesses no later than one week before trial. If the parties agree, the court may specify different time periods for this exchange so long as the exchange occurs within a reasonable time prior to trial.
> b. **As to only the defenses of duress, entrapment, insanity, automatism, or involuntary intoxication, notice by the defendant shall contain specific information as to the nature and extent of the defense.**
> (2) Give notice to the State of **any expert witnesses that the defendant reasonably expects to call as a witness at trial**. Each such witness shall prepare, and the defendant shall furnish to the State, a report of the results of the examinations or tests conducted by the expert. **The defendant shall also furnish to the State the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The defendant shall give the notice and furnish the materials required by this subdivision within a reasonable time prior to trial, as specified by the court**. Standardized fee scales shall be developed by the Administrative Office of the Courts and Indigent Defense Services for all expert witnesses and private investigators who are compensated with State funds. (emphasis).

IX. PROTECTIVE ORDERS

Protective Orders. G.S. 15A-908(a) allows either party to apply ex parte to the court, by written motion, for a protective order protecting information from disclosure for good cause, such as substantial risk to any person of physical harm, intimidation or embarrassment. A defendant may want to consent to a protective order not to disseminate

sensitive information such as medical, psychological or DSS records of a State victim or witness. If either party obtains an *ex parte* protective order they must serve notice of the existence of the protective order on the other side, but the subject matter of the order does not have to be disclosed to the other side. G.S. 15A-908(b).

X. MISCELLANEOUS DISCOVERY ISSUES.

Criminal Records of the Defendant or State Witnesses: A former version of of G.S. 15A-903 gave defendant's the right to their criminal record. Current G.S. 15A-903 does not state so explicitly. However, as a practical matter, most prosecutors will run complete criminal histories of defendants and co-defendants and these must be provided in discovery if they end up in the State's file. G.S. 15A-1340.14(f) requires the State to produce a copy of the defendant's record upon request in all felony cases. **Witness criminal records are not required to be run, however, if the State has them in their file they must be turned over. Under *Brady*, the defendant should argue that he has a Due Process and Confrontation Clause right to significant criminal record information about all state witnesses as relevant impeachment information.**

The State cannot be compelled to do scientific testing for the defendant **under formal discovery pursuant to 15A-903**;[29] however, the defense may seek an order

[29] STATUTE DID NOT COMPEL DNA TEST BY STATE. --*G.S. 15A-903(e)* did not compel the State to perform a deoxyribonucleic acid test on a cap found at the scene of a crime. *State v. Ryals, 179 N.C. App. 733, 635 S.E.2d 470 (2006),* review denied, *362 N.C. 91, 657 S.E.2d 27 (2007). See: STATE V. DARRYL HUNT; STATE V. GELL, AND OTHER N.C. AND NATIONAL EXONERATION CASES for anecdotal evidence about exculpatory forensic testing in post-conviction cases.* DISCOVERY OF PROCEDURES USED TO CONDUCT LABORATORY TESTS. --State not required to provide defendant with information concerning peer review of procedures an analyst used to test substances police bought from defendant for the presence of drugs, but it did permit defendant to discover information about procedures the analyst used, and the trial court erred when it denied defendant's written request for an order requiring the State to provide discovery of data collection procedures. *State v. Fair, 164 N.C. App. 770, 596 S.E.2d 871 (2004).* TESTS AND PROCEDURES USED TO CREATE REPORTS --Under *G.S. 15A-903(e),* the State was required, pursuant to defendant's request in a drug case, to produce not only conclusory lab reports, but also tests and procedures used to reach those results. *State v. Dunn, 154 N.C. App. 1, 571 S.E.2d 650 (2002).*

compelling the State to perform DNA or other testing upon making a showing that the testing is reasonably likely to lead to exculpatory evidence under federal and State constitutional principles. If the State will not agree to test certain items of seized evidence and the court will not order *the State,* or the N.C. State Crime Lab, to so test the items, the defendant is nevertheless entitled to have his or her own expert or lab test the items.[30]

N.C.G.S. §15A-903 entitles the defendant to "everything" **in the prosecutor's file unless it is considered "work product."[31]** There is a wide range in actual practice across the State in terms of how and when a prosecutor's office will make this "file" available: whether you must copy or scan it yourself, whether you will be given a "copy" of it online in the N.C. AOC DAS system, on paper, or in a digital CD or DVD format.

You are entitled to ALL Statements of the defendant and witnesses known to law enforcement or in the possession of the prosecutor from sources other than law enforcement. All such Statements must be reduced to writing for the use of the defense. *But see*: *State v. Shannon,* 182 N.C. App. 350 (2007)(prosecutor not required to reduce

[30] INDEPENDENT CHEMICAL ANALYSIS OF SEIZED SUBSTANCES. --Due process requires that defendants have the opportunity to have an independent chemical analysis performed upon seized substances. *State v. Jones, 85 N.C. App. 56, 354 S.E.2d 251,* cert. denied, *320 N.C. 173, 358 S.E.2d 61,* cert. denied, *484 U.S. 969, 108 S. Ct. 465, 98 L. Ed. 2d 404 (1987),* holding that the trial court's refusal to allow defendants further access to drugs did not violate that due process requirement. A defendant enjoys a concomitant statutory right to inspect the crime scene and to independently analyze seized substances. *State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992).*

[31] STATEMENTS THAT ARE NOT WORK PRODUCT ARE DISCOVERABLE. --General Assembly expressly contemplated in *G.S. 15A-904(a)* that trial preparation interview notes might be discoverable except where they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or the prosecuting attorney's legal staff; accordingly, *G.S. 15A-904(a)* comports with *G.S. 15A-903(a)(1)*'s mandate that oral witness Statements shall be in written or recorded form because every writing evidencing a witness's assertions to a prosecutor will not necessarily include opinions, theories, strategies, or conclusions that are protected as work product under *G.S. 15A-904(a). State v. Shannon, 182 N.C. App. 350, 642 S.E.2d 516 (2007),* review denied, *361 N.C. 436, 649 S.E.2d 893 (2007).*

witness interview to writing unless it is ***significantly different*** from previously recorded Statement disclosed to defense).[32] N.C.G.S. §15A-904(a)(1).

Under Brady v. Maryland, and, Kyles v. Whitley, 514 U.S. 419 (1995), the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. The defense may file a motion, upon stating sufficient grounds to believe additional statements or exculpatory evidence is "out there," for an order requiring the prosecutor to make additional inquiries of the police or others about specific matters the defense cannot otherwise learn on its own. Under *Brady*, *Kyles*, and *Davis v. Alaska*, 415 U.S. 308 (1974), the defendant may file a **motion for an *in camera* inspection of a witness's complete adult or JUVENILE probation and parole file** for evidence of bias, substance abuse, mental infirmities affecting perception and memory, or lack of credibility or hope of reward or sentencing concessions in return for testimony favorable to the State.[33]

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[32] DISCLOSURE OF STATEMENTS MADE IN PRETRIAL INTERVIEWS REQUIRED. --*G.S. 15A-903(a)(1)* requires prosecutors to disclose, in written or recorded form, Statements made to them by witnesses during pretrial interviews; accordingly, where the trial court erred in denying defendant's motion to compel discovery of notes of pretrial interviews that the prosecutor had with a witness, and it could not be determined whether the error prejudiced the outcome of the case under *G.S. 15A-1443(a)*, a motion for appropriate relief was remanded for an evidentiary hearing. *State v. Shannon, 182 N.C. App. 350, 642 S.E.2d 516 (2007)*, review denied, *361 N.C. 436, 649 S.E.2d 893 (2007).* Trial court did not abuse its discretion in granting defendant a recess to review a witness's Statement and in allowing defendant to cross-examine the witness to expose inconsistencies in the witness's Statement after it was revealed that the State failed to provide defendant with additional discovery after a meeting with the witness gleaned new information crucial to the *State's case. State v. Pender, 218 N.C. App. 233, 720 S.E.2d 836 (2012).*

[33] *Davis v. Alaska held:* Petitioner was denied his right of confrontation of witnesses under the Sixth and Fourteenth Amendments. Pp. 415 U. S. 315-321((a) The defense was entitled to attempt to show that Green was biased because of his vulnerable status as a probationer and his concern that he might be a suspect in the burglary charged against petitioner, and limiting the cross-examination of Green precluded the defense from showing his possible bias. Pp. 415 U. S. 315-318. (b) Petitioner's right of confrontation is paramount to the State's policy of protecting juvenile offenders, and any temporary embarrassment to Green by disclosure of his juvenile court record and probation status is outweighed by petitioner's right effectively to cross-examine a witness. Pp. 415 U. S. 319-320).

The defense is entitled to notice and disclosure of all State expert witnesses

(whether or not the State intends to call that expert as required by 15A-903(a)). The defense is entitled to a detailed report[34] setting out all opinions the expert is expected to offer at trial, and to the expert's curriculum vita. See: N.C.G.S. 15A-903(a)(2). You are also entitled to request/move for copies of the State expert's interview notes, psychological or neuropsychological test data, all records and other data or State discovery reviewed and relied upon by the State expert, prior payments and fee schedules for the State expert, bench notes, lab notes and equipment calibration and maintenance data, known error rates for the State lab expert, prior proficiency testing and scores of the expert, test data, photos of aspects of physical evidence upon which that expert's observations and opinions are based, e.g.: fingerprint close-up photos, photos of toolmark images and striations, ballistics and firearms shell casing and projectile markings, reagent papers in drug identification cases, luminol or BlueStar testing for presumptive blood results along with photo documentation of test results, DNA allele sheets and probability and statistics databases used and calculations employed.

You will have to conduct your own investigation into collateral matters affecting an expert's credibility such as a Google or Lexis search for prior testimony

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[34] EXPERT WITNESS OPINIONS SHOULD HAVE BEEN DISCLOSED. --State failed to comply with the statute when responding to defendant's motion for discovery because two expert witnesses gave expert opinions that should have been disclosed in discovery; the experts offered expert opinion testimony about the characteristics of child sexual abuse victims, and the testimony went beyond the facts of the case and relied on inferences to reach the conclusion that certain characteristics were common among child sexual assault victims. *State v. Davis, -- N.C. --, 785 S.E.2d 312 (2016).* STATE FAILED TO COMPLY WITH DISCLOSURE REQUIREMENTS FOR EXPERT WITNESS. --SBI agent, who was better qualified than the jury to determine if the substance in defendant's shoe was marijuana, was erroneously allowed to testify as an expert where the State did not comply with discovery requirements in *G.S. 15A-902(a)(2). State v. Moncree, 188 N.C. App. 221, 655 S.E.2d 464 (2008).*

in appellate cases. Google or Lexis searches will help you locate copies of transcripts of that experts' prior testimony from court reporters or prior appellate or post conviction attorneys. You may wish to locate copies of prior talks, presentations, trainings, professional and other publications and pamphlets written by the expert. These may appear on their CV. Sometimes what is OMITTED from the CV is more important than what is on there. It is also a good idea to check out social media posts, Facebook friends, and other contacts of the expert to identify bias. Former colleagues of the expert at prior employments may have information. N.C. AOC may have payment records for State experts which will tell you where to look for prior testimony and other defense attorneys who may have previously cross examined or vetted the State expert.

The defense is entitled to "everything" in the prosecutor's file: what the prosecutor's "file" consists of is set out in detail in 15A-903(a). Once you are given a copy of this file, often called a "prosecution book," you can examine it in detail for omissions: missing officers' field notes, illegible or poorly copied pages, documents seized and placed in "property control" or the evidence locker, etc. You should then file additional requests for voluntary discovery pointing out in detail what you are missing and follow that up with letters to the prosecutor and with additional motions to compel if you have not received the missing discovery. If you are running into trouble getting discovery you should try to schedule a hearing on your motions to compel and seek to have the Court impose discovery deadlines on the State to comply. Many discovery hearings or status conferences may be necessary in complex cases.

If the FBI is involved in a State criminal case and does a crime scene search or takes evidence to the FBI Crime Lab in Quantico, Va., or does any interviews in your

case, state discovery statutes will not apply directly to the FBI. You will not without great difficulty be able to obtain copies of "every report" in the possession or control of the FBI because the FBI does not keep all reports filed in one place or even in one city. There are often many documents, such as Department of Justice or Homeland Security "review documents" which will not be turned over in State Court without a fight. However, you can seek to gain access to physical evidence in the possession of the FBI or seek to get copies of FBI reports and interviews by seeking a State court order directing the State's attorney or prosecutor to obtain those items from the FBI, or other federal or "out-of-state" agency, by certain deadlines for disclosure to the defense, or suffer the consequences of dismissal of the State's case or suppression of the FBI or "out-of-state" lab results as appropriate sanctions under N.C.G.S. 15A-210 or general constitutional rights to Due Process. You will need to cite all your client's rights under the Fifth, Sixth, and Fourteenth Amendments to Due Process and to Present a Defense when litigating these extra-jurisdictional discovery motions.

State's Witness List The defense is entitled to a copy of the State's witness list including name, address, published phone number, and date of birth under 15A-904(a)(2); but ***only if*** the defendant requests it in writing. The best practice is to file the request/motion for a witness list with your initial request/motion for discovery with the Clerk of Court to enforce or preserve violation of this right on appeal if the State is allowed to call someone not on the list.

No Authority To Order Examination Of A State's Witness By Defense Expert.

Under *State v. Horn*, 337 N.C. 449 (1994), the State will likely argue this cannot be done. In that case the defendant can request his own expert to evaluate the

State's evidence and the State's expert's evaluation of a State witness for rebuttal purposes. If the defense is denied an opportunity for an examination of the State witness who was previously examined or evaluated by a State expert, or if the defense is denied its own expert to respond to or rebut the State expert, then move to dismiss the charges, or exclude the State's evidence under *Horn,* and under the defendant's Rights to Due Process, to Effective Assistance of Counsel, and to Present a Defense, under the Fifth, Sixth, and Fourteenth Amendments; and, THE LAW OF THE LAND CLAUSE, art. I, Section 19, of the N.C. Constitution.

Missing , Lost, Or "Hidden" Discovery

Once the defendant has obtained disclosure of what may appear to be the State's "entire file," either prior to indictment or after, most cursory reviews of that file, especially copies of that file, will reveal that pages are missing or illegible, that many officers at the scene of a crime may not have turned in reports, or turned them in ***after*** a lead detective has submitted his initial copies of the "prosecution book" to the prosecutor. Sometimes typed supplements or summaries of a defendant or witness's interview is provided without the original field notes for those interviews. Ask your client if he saw an investigator taking notes and on what; i.e., a "007 pad," or "legal pad." Then see if those handwritten notes appear in the discovery. Be sure to look at all search warrant affidavits for information not disclosed in discovery, and seek to obtain disclosure of confidential informants.

Discovering Identity Of Confidential Informants

If the State has not moved to "seal" the identity of an informant, it is discoverable under G.S. 15A-903(a)(1); however, the State is not required to disclose the identity of a

confidential informant unless required by law. G.S. 15A-904(a1). If the State has successfully moved to seal the identity of the informant, you cannot discover the informant's identity under the statute once the warrant has issued or if the existence (not truthfulness or reliability) of the informant is established. G.S. 15A-978(b)(1) and (b)(2). The provision that the State is not required to disclose the identity of a confidential informant unless it is "otherwise required by law," refers to "constitutional law." In that case, you can make a constitutional argument that "disclosure is essential to a fair determination of a defendant's rights under the Fourth and Fifth Amendments." See: *Rovario v. United States*, 353 U.S. 53, 60-61 (1957). The defendant has the burden to show why they need the informant's identity. Factors the Court looks at include:

1) the crime charged
2) whether the informant was an actual participant. (*State v. Ketchie*, 286 N.C. 387, 390 (1975)(disclosure is where informer directly participates in the alleged crime so as to make him a material witness on the issue of guilt or innocence.) The defendant is not required to present proof of his need for the participant/informant's testimony; such a requirement would "place an unjustifiable burden on the defense." *McLawhorn v. North Carolina*, 484 F.2d 1, 7 (4th Cir.1973)
3) possible defenses. *Rovario*, 353 U.S. at 64 (informant played a prominent role in the offense; his testimony might have disclosed an entrapment issue), and
4) the significance of the informant's testimony. *Id.*

The whereabouts of the informant is subject to the same constitutional principles described above.[35]

[35] See: *United States v. Aguirre*, 716 F.2d 293 (5th Cir. 1983); *United States v. Tenorio-Angel*, 756 F.2d 1505 (11th Cir. 1985); *State v. Brockenborough*, 45 N.C. App. 121, 122 (1980); *Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957),* sets forth the test to be applied when the disclosure of an informant's identity is requested. The trial court must balance the government's need to protect an informant's identity (to promote disclosure of crimes) with the defendant's right to present his case. *State v. Jackson, 103 N.C. App. 239, 405 S.E.2d 354 (1991),* aff'd, *331 N.C. 114, 413 S.E.2d 798 (1992).*

Plea Arrangements, "Wink And Nod Deals," Immunity Agreements, Sentencing Concessions

One of the most difficult things to discover is the existence of plea arrangements, sentencing and charging concessions, bond reductions, and other "inducements" by the prosecutor or investigators for the State for the testimony of co-defendants, uncharged "co-defendants," jailhouse snitches, and other State witnesses for their testimony against the defendant. Sometimes the prosecutor will verbally communicate the hope of a deal to the attorney of a co-defendant in return for their client's testimony without putting that "hope of an offer" into writing. The attorney for that witness may or may not communicate that "hope" or "implied promise" to their client. Cross examination may or may not uncover it. Of course if any of the above is reduced to writing it must be disclosed pursuant to G.S. 15A-903. G.S. 15A-1054(a) complicates this because it authorizes prosecutors to agree not to try a suspect, to reduce the charges, and to recommend sentence concessions on the condition that the suspect will provide truthful testimony. This arrangement can be entered into without a formal grant of immunity under G.S. 15A-1054(c), and it requires written notice to the defense of any such arrangement within a reasonable time prior to that witness's testimony. State v. Spicer, 50 N.C. App. 214, 217 (1981); and, *State v. Brooks,* 83 N.C. App/ 179, 188 (1986), may be cited by the defense as authority for the State to disclose ALL plea arrangements and sentencing concessions whether *formal or informal, including, so-called "wink and nod" deals.* The defendant can also argue that "the complete files" provision of 15A-903 AND the constitutional duty to disclose exculpatory and impeachment evidence under *Brady, Giglio v. United States, 405 U.S. 150, 155 (1972)(evidence of ANY understanding or agreement as to future prosecution must be disclosed),* and their progeny, requires

disclosure of all "informal deals or concessions" for testimony. See also: *Boone v. Paderick,* 541 F.2d 447, 451 (4th Cir. 1976)(North Carolina conviction vacated for failure to disclose promise of leniency by police officer). G.S. 15A-1052(a) requires not only disclosure to the defense, but that the trial court must inform the jury of any formal grant of immunity to a witness BEFORE the witness testifies.

Black Box Data from Automobiles

In **car crash cases** you may wish to obtain **black box data from airbag sensors** and retain an accident reconstructionist to interpret the data: see if it is consistent with eye-witness accounts.

Lost or Misplaced Reports

In some police and sheriff's departments, **late reports** can be scanned into a department's computerized case information system without a lead detective's or prosecutor's knowledge. Sometimes reports are turned into the "wrong detectives" or are simply lost. Sometimes documents are placed into "property control" or the evidence room without being copied or scanned into the prosecutor's file. A felony defense attorney cannot assume they have "everything" the defendant is entitled to simply because a law enforcement officer or lead investigator, even a prosecutor, certifies that "everything has been turned into the prosecutor." If more than one agency is involved in a felony investigation, additional motions and court orders directed to each agency are almost always necessary to insure that all reports and evidence collected by that agency are provided to the prosecutor and in turn to the defense.

Discovery Hearings to Voir Dire Each Investigator

Sometimes you need to be able to review and look at the agency's actual case file to be sure it's all be turned over to the prosecutor. If there are questions about what's been turned over, you may need to file a motion requesting a "pretrial discovery hearing" and *subpoena* lead agents and lead detectives along with all other investigators and examine them under oath about the discovery which has been turned over to identify what may have been "misfiled" or "lost," and to commit the State to the discovery provided as a matter of record.

Review and Inspect the Original Files of DA and Law Enforcement

Before entering into a plea agreement on a serious felony, and especially before going to trial, the felony defense attorney should always request/move for a chance to review the actual case file of the prosecutor and lead detective as well as to look at the physical evidence seized and kept in property control or the evidence room. §15A-903 requires this upon request or motion of the defense. A "copy" does not suffice under the statute.

Sanctions Under §15A-910

Vigilance and repeat requests specifying as exactly as you can what is still missing are almost always required before the defense can expect to get sanctions for noncompliance by the State. Getting all the discovery from the State that the defendant is entitled to is extremely important because failure of the prosecutor to seek, find, and turn over what is required by §15A-903 entitles the defendant to sanctions under §15A-910. Depending on the materiality, unfair surprise, magnitude, and complexity of the late or non-disclosures, the Court may order anything from a continuance, a brief recess to review the new evidence, suppression of the late evidence, all the way up to dismissal of

the charges or limitations on penalties or sentences available to be sought by the State.[36]

If discovery is not forthcoming on all or some items by a court-ordered deadline, the defendant must file a motion under 15A-910 for sanctions for failure to comply or be deemed to waive the available remedies. Be sure to pray the Court for **all remedies** which may be reasonably called for as sanctions depending on the severity, untimeliness, or prejudice to the defense for not being given this discovery. Be sure to ask for all or some of the remedies for noncompliance with discovery including: a continuance or recess to review late discovery; exclusion of the lately disclosed State's evidence, preclusion of the State trying your client on greater charges or for aggravated penalties at sentencing as a remedial sanction for last minute discovery if the State is allowed to use the late-disclosed evidence; and, ALWAYS seek dismissal of the charges. You will need to document for the Court all your timely requests and motions for discovery, the time of the State's responses or lack thereof, case law supporting your requests for sanctions and references to 15A-902, 903, and 910. It is advisable to attach an affidavit verifying your motion for sanctions which outlines all defense efforts to obtain the discovery, prior orders to compel discovery, and ***the prejudice*** resulting to the defense for late or non-disclosure.

It is a good idea to attach case law holding that the defense is entitled under Due Process to receive the discovery in a timely fashion, including exculpatory discovery, ***in time to make effective use of the discovery at trial, or that the State should face***

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[36] STATE SPECIAL AGENT'S TESTIMONY MUST COMPLY WITH SECTION. --Trial court abused its discretion in allowing a State Bureau of Investigation special agent to testify without requiring the State to comply with the discovery requirements of *G.S. 15A-903*; although the State may not have known the specific witness it would be calling, the State did know it would be calling someone to testify concerning the process of manufacturing methamphetamine. *State v. Blankenship, 178 N.C. App. 351, 631 S.E.2d 208 (2006).*

sanctions to protect those rights. That means the defendant must have time to not only read the late discovery but also time to investigate it and follow up on it and locate admissible evidence and witnesses to counter it or corroborate it before the jury at trial.[37]

Sanctions for Loss or Destruction of Evidence by the State

Absent a violation of a previously entered court order to preserve evidence in the defendant's case, in order to establish a Due Process Clause violation by the State for the loss or destruction of evidence, the defendant must show that an officer or state agent acted in bad faith in failing to preserve potentially useful evidence for trial. The burden is on the defendant to show that the lost or destroyed evidence was potentially exculpatory AND was lost or destroyed by the State in bad faith. See generally: *Illinois v. Fisher*, 540 U.S. 544, 547-48(2004)(evidence destroyed 11 years after traffic stop not a Due Process violation); *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (2004)(due process not violated by failure to refrigerate clothing with semen samples and no bad faith demonstrated); and State v. Williams, 362 N.C. 628, 638-39 (2008)(assault on officer properly dismissed when prosecutor flagrantly prejudiced defendant's due process rights to preparation of a defense by destroying material evidence favorable to defendant consisting of before and

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[37] *See State v. Canady* (2002)(viewable at: http://cases.justia.com/north-carolina/supreme-court/115a00-9.pdf?ts=1396137515.)(In *Brady v. Maryland*, the United States Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963). "Favorable evidence is material if there is a 'reasonable probability' that its disclosure to the defense would result in a different outcome in the jury's deliberation." *State v. Strickland*, 346 N.C. 443, 456, 488 S.E.2d 194, 202 (1997), cert. denied, 522 U.S. 1078, 118 S.Ct. 858, 139 L.Ed.2d 757 (1998). The determination of the materiality of evidence must be made by examining the record as a whole. *State v. Howard*, 334 N.C. 602, 605, 433 S.E.2d 742, 744 (1993).***The State has not satisfied its duty to disclose unless the information was provided in a manner allowing defendant "to make effective use of the evidence."). See also State v. Taylor, 344 N.C. 31, 50, 473 S.E.2d 596, 607 (1996).***

after time of offense photographs of defendant); and other cases collected on, pp 25-26, of the ***North Carolina Superior Court Judge's Benchbook***, *supra* at p. 1.

Sanctions for State Constitutional Violations under G.S. 15A-954.

A dismissal of criminal charges for a state or federal constitutional violation involving loss or destruction of exculpatory evidence may lie under G.S, 15A-954(a)(4), when the defendant's constitutional rights have been so flagrantly violated that there is such irreparable prejudice to the defendant's preparation of his or her case that no other remedy is adequate but dismissal. *State v. Joyner*, 295 N.C. 55,59 (1978)(this is a drastic remedy that should be granted sparingly).

Motion For Bill Of Particulars

Under the new "open file" provisions of 15A-903, Motions for Bills of Particular are largely a thing of the past. However, under G.S. §15A-925 the defendant can still move for a Bill of Particulars. The court has discretion to order one under certain conditions: you must request specific items of factual information not recited in the pleading and you must allege that you cannot adequately prepare or conduct a defense without it. Under *State v. Easterling*, 300 N.C. 594, 601 (1980), the court MUST order it disclosed if the items requested are necessary to an adequate defense. The defendant should State in the motion that without the court ordering the State to respond to a motion for bill of particulars, the defendant does not have the NOTICE required by the Fourteenth Amendment of the charges against him, and that the defendant is deprived of effective assistance of counsel required by the Sixth Amendment. *State v. Parker*, 350

N.C. 411, 516 S.E.2d 106 (1999). You may try to get the State to disclose theories of guilt, i.e., aggravating factors in a capital case or whether the State will proceed on felony murder or premeditation and deliberation or both. If the State responds to a motion or order to answer a Bill of Particulars it is bound by its answers at trial.

However, the court cannot order the State to "recite matters of evidence." This language is prior to the current "open file" language of 15A-903 and is open to interpretation. If the court orders the State to respond to the Bill of Particulars the State must recite every item of information required under the order. Proceedings are stayed until the State responds with filing and service on the defendant or defense attorney. If the State answers, it IS LIMITED at trial to the items set out in the bill of particulars. *State v. Stallings*, 107 N.C. App. 241, 245 (1992)(however, the court may permit the State to amend its response to a bill of particulars anytime prior to trial, but not afterwards). An oral recitation by the prosecutor in open court to the motion for a bill of particulars DOES NOT limit the State's evidence at trial, *Stallings, Id.*

Always File A Motion For Brady Materials & Constitutionalize All Motions

Under *Brady v. Maryland*, 373 U.S. 83,87 (1963), the prosecution has a general constitutional duty under the Due Process Clause to disclose evidence if it is favorable to the defense and material to the outcome of either the guilt-innocence or sentencing phase of a trial. See the ***North Carolina Superior Court Judge's Benchbook***, pp. 16-22, for a complete discussion and list of over thirty cases granting relief for specific kinds of *Brady* violations.[38] Although the U.S. Supreme has now held under *Kyles v. Whitley*, 514

[38] ***North Carolina Superior Court Judge's Benchbook (2015), pp 16-17,*** available online at **http://benchbook.sog.unc.edu/criminal/discovery.**

U.S. 419, 433 (1995), that the prosecution has a duty to disclose favorable, material evidence whether or not the defendant makes a motion or files a request for it, there is no way to effectively litigate this issue pretrial or at trial without making and filing such request. The better practice then, is to file a motion for exculpatory evidence under *Brady v. Maryland,* and get the State under a deadline to reduce all such information to writing and provide it to the defense. Under *Kyles,* everything known to police investigators is imputed to the prosecutor, so the defense can seek an order requiring a prosecutor (for his or her own protection) to make further inquiries of all the investigators in the case for any remaining unreported exculpatory or impeaching information prior to trial. *Kyles* also held that a prosecutor has an ***affirmative duty*** to investigate and learn of any favorable evidence known to others acting on the government's behalf in a case. The prosecutor's duty to make inquiries of DSS, social workers, or mental health facilities depends on the degree these agencies have reported to or been involved in the investigation of the case, as they frequently are when the case involves child sexual abuse or child victims.

Don't forget to further "constitutionalize" all discovery and *Brady* motions by citing the right to Due Process, the Right to Effective Assistance of Counsel, and the Right to Confront and Cross Examine Witnesses under the Fifth, Sixth, and Fourteenth Amendments and parallel provisions of the North Carolina Constitution, art. I, §§ 19 & 23.

Continuing Duty to Disclose

Both the defendant and the State have a continuing duty to disclose information of a type that was ordered by the court to be provided or was voluntarily provided. N.C.G.S. §15A-907.

Special Rules for Treating or Examining Psychologists and Doctors in Sex Abuse Cases[39]

There appears to be a very hard to understand rule for "professional" testimony in sex abuse cases which exempts these witnesses from having to provide written reports under 15A-903 when testifying about "their own observations." My advice is to litigate this issue if you are aware of any "professional" counselor or medical provider on the witness list and the defense is not being provided with a detailed written report in discovery setting out all the opinions to be testified to at trial by that witness in order to preserve this issue under the defendant's right to Due Process, a Fair Trial, Effective Assistance of Counsel, and the Right to Confront and Cross Examine a Witness as well as under 15A-903, and the Law of the Land Clause of the N.C. Constitution.

XI. DEVELOPING A "REASONABLE" INVESTIGATION AND DISCOVERY STRATEGY

"Infinite reasonability" is not possible in the real world. The defense attorney does not have the luxury of inexhaustible time and unlimited resources to investigate every conceivable avenue of inquiry in every case. Indeed, not to narrow down, identify, and prioritize fruitful areas of discovery and investigation will compromise the attorney's ability to focus on necessary and material aspects of the defense case. The effective

[39] DISCLOSURE NOT REQUIRED. --Since the psychologist did not testify there was a specific set of characteristics of sexual abuse victims and did not opine on whether the victim met such a profile, but testified as to his own observations on sexual abuse, he did not offer an expert opinion requiring disclosure under this section. *State v. Davis, -- N.C. App. --, 768 S.E.2d 903 (2015).* Because the mental health counselor's testimony about sexual abuse victims was limited to her own observations and experience, it did not constitute expert opinion that had to be disclosed in advance of trial and the trial court did not abuse its discretion by admitting her testimony *State v. Davis, -- N.C. App. --, 768 S.E.2d 903 (2015).*

felony defense attorney, in addition to pursuing discovery and investigation, must also build client rapport, do legal research, engage in plea negotiations and trial preparation. Therefore, the defense attorney must make effective and efficient use of time and resources to better serve each client by focusing on what matters most in each case. Being careful to draft detailed evidence-specific discovery motions will save time in the long run and make your motions practice more effective.

Doing more with less is the very nature of contemporary criminal defense work. Therefore, the defense attorney must do everything they can to obtain and review as quickly and thoroughly as possible all information and reports available to the prosecutor through informal and formal means of discovery, as provided by Chapter 15A-902 through 903, through a vigorous, CASE SPECIFIC, and prompt motions practice.

The point here is that the defense attorney must be reasonably thorough, given limited time and limited funds, in deciding upon what is needed and required in the defense of each case, pursuing what is constitutionally required to provide effective assistance of counsel under the Fifth and Sixth Amendments, within the bounds of the law, and in a way that provides each client with the zealous and effective representation they deserve. You should not waste time or resources on matters that are not material or not reasonably likely to matter in the trial or disposition of each case.

On the other hand if you have a client who insists on your pursuing matters of investigation which are not likely to bear fruit, to maintain your relationship with the client, you must either attempt to locate those witnesses or evidence the client insists on finding, and after a reasonable inquiry or search you need to meet with the client to report on your efforts and come to an understanding about those matters to maintain your

attorney/client relationship. There are specific ethical guidelines promulgated by the State Bar concerning impasses like this and how to resolve them.

With initial discovery requests and motions underway you should prioritize and design an appropriate investigation and additional discovery strategy for each case. Digital programs, such as "CaseMap" and internet-based "AirTable," and other available commercial programs, can help you organize and identify needed discovery.

Many discovery motions should be filed routinely, such as: filing a motion and obtaining an order to preserve all evidence while still in District Court and renewing that motion in Superior Court, or applying for statutory discovery and seeking required constitutional discovery of exculpatory and impeachment evidence under *Brady v. Maryland, et al*. Beyond these initial requests and motions, discovery and investigation strategies can and will be dramatically different depending on the nature of the offense: discovery needed in a drug trafficking case will differ from discovery and investigation in a sex offense case and from the extensive life history, records, and mitigation evidence needed in a murder case.

Some cases will require more investigation about your client's mental health records in a murder case than what you may need in a felony breaking or entering case. Where guilt is not an issue, you may need school records or Social Security Disability records to show the State that your client is "***not deserving"*** of a felony conviction or lengthy sentence due to mental impairments or intellectual disabilities or family hardships.

Not seeking out with a simple subpoena easy-to-obtain school and mental health records that may be used in plea negotiations or sentencing is probably the most

neglected or overlooked aspect of investigation in defense of felony cases. This is often true of the 25 percent or more of all felony defendants who are statistically likely to be intellectually disabled or seriously mentally ill. Obviously the State ***is not*** the source of "all information" about your client, especially in these kinds of cases. But what discovery the State has, it must turn it over to the defense or face sanctions under 15A-910.

After evaluating the legal issues in the case, which requires immediate assessment of whether or not the State has sufficient evidence to prove each and every element required to convict the defendant of every felony with which they are charged, the felony defense attorney is advised to sit down and evaluate what further investigation and discovery is needed or likely to lead to important admissible evidence.

If an obvious fatal defect is found in an indictment or fatal absence of proof is discovered with the State's case, then one is faced with the choice of using that information to negotiate a plea, or holding that defect in an indictment close to your vest until after State's evidence at trial. The degree of needed additional investigation and extraordinary efforts to obtain additional discovery may be limited in the case where you already know the State's case is dead on arrival.

In a case where the State's proof will be mainly through civilian witnesses you may need a private investigator appointed to attempt to interview these witnesses. Jailhouse snitches or civilian witnesses may recant or make exculpatory disclosures which an investigator may record or reduce to an affidavit which can then be presented to a prosecutor to negotiate a plea or dismissal.

Impeaching Jailhouse Snitches

Information that the defense attorney needs to discover, investigate, and collect to impeach jailhouse snitches can be found on the IDS website in an encyclopedic guide prepared by attorney, Mike Howell.[40]

Preserving Testimony Of Potentially Unavailable, Infirm Or Dying Witnesses

If your case involves a mental health expert, such as a forensic psychiatrist or psychologist, you may be able to preserve potentially unavailable exculpatory evidence by having your expert, with or without the help of your investigator, interview hard-to-locate witnesses and, if they can, base their opinions on information from that witness if the expert would normally rely upon it in forming their opinions under N.C. Rules of Evidence, Rules 702 and 703. This is especially useful if the witness is an infirm family member, an elderly schoolteacher, retired employer, co-worker, or supervisor. Consideration should also be given to the use of court-ordered depositions of infirm or dying witnesses in criminal cases under certain limited circumstances under G.S. 8-74.[41]

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[40] "Preparation for Cross Examining the Snitch," Michael Howell, viewable at: http://ncids.org/Defender%20Training/Drug%20Case%20Training/Cross%20Exam%20the%20Snitch.pdf.

[41] See: G.S. § 8-74. Depositions for defendant in criminal actions: In all criminal actions, hearings and investigations it shall be lawful for the defendant in any such action to make affidavit before the clerk of the superior court of the county in which said action is pending, that it is important for the defense that he have the testimony of any person, whose name must be given, and that such person is so infirm, or otherwise physically incapacitated, or nonresident of this State, that he cannot procure his attendance at the trial or hearing of said cause. Upon the filing of such affidavit, it shall be the duty of the clerk to appoint some responsible person to take the deposition of such witness, which deposition may be read in the trial of such criminal action under the same rules as now apply by law to depositions in civil actions: **provided, that the district attorney or prosecuting attorney of the district, county or town in which such action**

Getting an Investigator or Expert for the Defendant

In a first degree murder case you would apply to the Office of the Capital Defender for funding of private investigators, mitigation specialists, or other expert using a request form on the N.C. I.D.S. website. In all other cases you would apply to a District or Superior Court Judge for funding by filing an *ex parte* motion for funds setting out a particularized need for the investigator or expert. Sample *ex parte* motions are available on the N.C. IDS Defender website and are discussed in footnote 6, *supra*.[42]

Once you get an investigator provide them with a copy of *relevant* parts of the State's discovery. Don't waste their limited funds having them review things that don't matter to them. Go over with the investigator exactly what you are asking them to do. Their time and funds are limited so you must monitor them and use their time wisely. It is up to you to keep up with their funding and apply for additional funds BEFORE the case is disposed of. Don't send the investigator on obvious "wild goose chases." Tell the investigator how you wish them to write or summarize reports or summaries of witness interviews. For example, tell your expert whether or not to include "work product" comments in their reports to you as the attorney, or whether you wish them to provide "just the facts" of an interview for possible use or disclosure to the State or jury at trial for corroboration or impeachment purposes.

The investigation of exculpatory evidence that cannot be obtained with the simple use of a release, *subpoena* and/or court order and which is not in the possession of the

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is pending have 10 days' notice of the taking of such deposition, who may appear in person or by representative to conduct the cross-examination of such witness. (emphasis).

[42] http://www.ncids.com/forensic/experts/Mechanics_of_Getting_Expert.pdf.

State almost always requires the services of a private investigator; however, much can be learned from family and friends of the defendant and of course from the defendant.

Discovery of Forensic Evidence and Data

In a case which involves lots of forensic evidence you will need to seek additional discovery by way of *subpoena* or request for voluntary additional discovery and/or a motion to compel discovery of things such as State Crime lab protocols, test data and results,[43] individual forensic examiner proficiency testing results, expiration and quality control reports on lab equipment and testing chemicals, electronic copies of hard disc drives, or cell phone data contained in a seized cell phone. These matters of forensic evidence are not routinely produced without additional requests for more than the usual three page "lab report." Sarah Olson maintains sample motions for this kind of discovery on the Forensic Science section of the N.C.I.D.S. website discussed above.

Referral Questions for Experts

When using experts to generate evidence for the defendant, the attorney must identify exactly what the expert is being asked to look at and form an opinion about. Below are some examples of referral questions used with mental health experts to guide the formation of relevant defense evidence. It is a complete waste of time and resources to hire any expert and simply tell them to "examine the defendant" or "look at the

[43] DISCOVERY OF PROCEDURES USED TO CONDUCT LABORATORY TESTS. --State not required to provide defendant with information concerning peer review of procedures an analyst used to test substances police bought from defendant for the presence of drugs, but it did permit defendant to discover information about procedures the analyst used, and the trial court erred when it denied defendant's written request for an order requiring the State to provide discovery of data collection procedures. *State v. Fair, 164 N.C. App. 770, 596 S.E.2d 871 (2004).* TESTS AND PROCEDURES USED TO CREATE REPORTS --Under *G.S. 15A-903(e),* the State was required, pursuant to defendant's request in a drug case, to produce not only conclusory lab reports, but also tests and procedures used to reach those results. *State v. Dunn, 154 N.C. App. 1, 571 S.E.2d 650 (2002).*

evidence" and "tell the defense attorney what's there." The defense should also attempt to wait until all relevant mental health or other records and discovery necessary for the expert to review are collected and reviewed by the attorney before the expert is retained. The exception would be if a defendant is floridly psychotic, for example, at the time of arrest, and time is of the essence for the expert to examine or recommend treatment for the defendant near the time of the offense.

Mental Health Evaluation – Potential Referral Questions:

- Is the client competent to assist in his defense?
    - Is the client aware of the charges he/she is facing?
    - Does the client seem to understand the court process?
    - Can the client help me defend him/her in this case?
- Does the client have mental retardation?
    - What is my client's IQ?
    - Does my client have significant adaptive deficits?
- Was the client's capacity to commit the crime diminished by alcohol intoxication/withdrawal, drug intoxication/withdrawal, mental illness, or some combination of these?
    - What symptoms, if any, of intoxication, withdrawal, or mental illness was the client experiencing at the time of the crime?
    - Did those symptoms impact his/her actions in any way?
    - Was the client able to make and carry out plans?
    - Was the client able to from the specific intent necessary to commit this crime?
- Was the client suffering from a mental or emotional disturbance at the time of the crime?
- Does the client have a neurological impairment that affected him or her at the time of the crime?
- Was the client insane at the time of the crime?
    - Did the client have mental health symptoms at the time of the crime?
    - If yes, did those symptoms prevent him/her from recognizing the nature and quality of his/her acts?
    - Even if the client understood the nature and quality of his/her acts, was he/she incapable of understanding the wrongfulness of his/her behavior as a result of mental health symptoms?
    - Does the client's mental health symptoms explain why he/she did what he/she did?
- Does the client have mental health or cognitive issues which might have caused him/her to be easily led by co-defendants?

- Does this client's history reveal other potential mitigation issues such as abuse history, neglect, low cognitive functioning, fear, etc? What treatment history has my client had?

After retaining a mental health expert, be sure to discuss exactly what testing the defense attorney does and DOES NOT want done.

CASES ON PRESERVING DISCOVERY RIGHTS FOR TRIAL & ON APPEAL

WHERE DEFENDANT DID NOT MOVE FOR DISCOVERY, RELYING ON WHAT HE CONSIDERED TO BE AN OPEN FILE POLICY of the district attorney, he could not complain that he did not know in advance of trial of the Statement of a certain witness which had not been reduced to writing. *State v. Abbott, 320 N.C. 475, 358 S.E.2d 365 (1987).*

DEFENDANT DENIED CONTINUANCE AFTER FAILURE TO MOVE FOR ADDITIONAL PRETRIAL DISCOVERY. --In a conviction of obtaining property by false pretenses and financial card fraud, defendant was properly denied a continuance because he failed to move for additional pretrial discovery, as required by *G.S. 15A-903(a)(1). State v. Flint, 199 N.C. App. 709, 682 S.E.2d 443 (2009).*

PRESERVATION OF DISCOVERY ISSUE FOR APPEAL. --While this section requires the trial judge on proper motion to order the prosecutor to permit certain kinds of discovery, the right must be asserted and the issue raised before the trial court. Further, the issue must be passed upon by the trial court in order for the right to be asserted in the appellate courts. *State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).*

FELONY CRIMINAL CASE CHECKLIST

INITIAL CLIENT CONTACT

- **Counsel shall make personal contact with an incarcerated client within three working days of being appointed to the case**

- ☐ Ascertain whether a conflict or apparent conflict of interest exists which would prevent you from ethically representing the client

- ☐ Identify yourself by name and affiliation

- ☐ Inform the client of his/her legal rights

- ☐ Explain the charges to the client including possible penalties, registration requirements and enhancements

- ☐ Determine if the client has a history of any issues which could impair attorney-client communications

    - Language, literacy, chemicals, mental health, medications

- Make an initial determination regarding the client's mental competency
- ☐ Determine citizenship and identify relevant federal criminal law or immigration consequences

- **You must advise your client regarding federal or immigration consequences associated with state criminal law proceedings**

- ☐ Right to remain silent: Explain the right to remain silent

❖ Warn client regarding recorded calls, correspondence, visitors, jailers, other inmates, etc.

- Explain the attorney-client privilege

o Determine if the client has made any written or oral statements to anyone concerning the offense

❖ If the client has made such statements, get details, names, etc.

- ☐Identify witnesses

- ☐Obtain as complete a history from the client as possible, including criminal history
- ☐Explain the bail process and identify how a meaningful bail argument can be made

PRETRIAL

- Obtain and carefully review the charging documents
- Develop a theory of the case with your client's input
- Conduct a meaningful investigation
- Identify affirmative defenses and file appropriate notice with the court

- Research all issues that may produce viable motions

- Prepare and file witness lists as soon as you determine that the witness will testify
- **The following decisions belong exclusively to the client:**

o Decision to plead guilty or not guilty
o Decision whether or not to testify at any point in the case

o Decision whether to waive a jury
o Decision whether to file an appeal if convicted

- All other decisions belong to counsel, although the client should be consulted and fully informed

FOR CASES RESULTING IN GUILTY PLEA

- Advocate for dismissal of as many charges as possible

- Advocate for reduction of charges
- Make sure disposition agreement is reduced to writing

- ☐Make sure client is fully informed about all aspects of the plea and any plea agreement, and that the client understands the consequences of pleading guilty

  - Explain to client difference between binding vs. nonbinding plea agreement as to sentencing
  - Role of prosecutor, judge, probation officer, and victim in sentencing process
  - Determine whether grounds can be presented to secure release of client pending sentencing hearing

DISCOVERY AND INVESTIGATION

- **File a motion to preserve and to inspect all evidence including specific named items of physical evidence where possible**
- **Make sure you file a written timely request for voluntary discovery per G.S. 15A-902**
- **File a motion to compel production of *Brady* and impeachment materials, including a request for copies of criminal records of state witnesses**
- **File a request/motion for all lab reports including test data, lab protocols, bench notes, photographs of tested evidence, DNA allele runs, CV's of lab experts, any other items or documents identified as needed by defense experts**
- **File a timely written motion to compel discovery under G.S. 15A-902**
- **Review all discovery produced by State for missing documents**
- **File additional requests/motions to compel discovery as needed**
- **Be sure to have the court order State compliance by a date or dates certain**
- **File a written motion for sanctions for noncompliance by the State as required and ask for all available remedies under G.S. 15A-910**
- **File any necessary *ex parte* motions for investigator or experts**
- **File any necessary *ex parte* motions for third party records of defendant or witnesses, including possible DSS, SSI, medical, school, or mental health records**
- **Locate documents needed to impeach and cross examine co-defendants and jailhouse snitches**
- **Make sure you have ALL statements (including written statements and audio-video statements) which your client has provided to law enforcement or anyone else**
- **Interview all prosecution witnesses if possible or necessary**
- **Inspect all physical evidence and request to inspect and view all original investigator's and prosecution files before trial to insure you have all discovery**
- **Visit crime scene, if possible**
- **Obtain prosecution expert reports and interview experts in advance of trial**

- **Demand and file written motion to compel discovery update immediately prior to trial**
- **Carefully review prosecution's likely jury instructions**
- **Make sure you have provided the prosecution with your expert's report prior to commencement of trial in a timely manner**

- ☐ **Prepare demonstrative exhibits prior to trial**

FOR CASES RESULTING IN A JUDGE/JURY TRIAL

- File Motions in Limine in advance of trial (per local court rule or practice)

- ☐Brief and request oral argument for any viable pretrial legal motions
- ☐Develop a witness list and keep it up to date
- ☐Carefully review all prosecution trial material

JURY SELECTION

- ☐Voir dire
    - Elicit attitudes of jurors to critical facts and issues for defense
    - Convey legal principles critical to case
    - Preview damaging information
    - Present client in favorable and appropriate light
    - Establish a positive relationship with jury
    - ☐Outline opening and closing statements in advance of trial
    - ☐Jury instructions
    - Reply to objectionable prosecution instructions
    - Submit written supportive pattern defense instructions
    - Be creative!!

- Prepare and keep handy a trial notebook

- ❖ statutes
- ❖ rules of evidence
- ❖ case law supporting anticipated trial issues

SENTENCING

- Ensure client is fully informed about likely and possible outcomes
- Prepare and present Witnesses / Letters / Sentencing options
- Ensure court has all other relevant information
- Inform client of the right to speak at sentencing, including effects of testimony on appeal, retrial, etc.

- Inform client of right of appeal