

DISCOVERY

(1) No Discovery Violation Because Victim’s Statement To Prosecutor, Which Was Not Disclosed to Defendant, Did Not Offer Any Significantly New or Different Information From Victim’s Prior Statement to Law Enforcement That Had Already Been Provided to Defendant

(2) Trial Court Did Not Err in Using Transferred Intent Instruction in Trial of Discharging Firearm into Occupied Property

(3) Muzzle Velocity Provision in G.S. 14-34.1 (Discharging Firearm or Barreled Weapon into Occupied Property) Does Not Apply to Firearms

State v. Small, ___ N.C. App. ___, 689 S.E.2d 444 (8 December 2009).

The defendant was convicted of discharging a firearm into occupied property and assault with a deadly weapon inflicting serious injury. (1) The court ruled that there was no discovery violation under G.S. 15A-903(a)(1) because the assault victim’s statement to the prosecutor, which was not disclosed to the defendant, did not offer any significantly new or different information from the victim’s prior statement to law enforcement that had already been provided to the defendant. (2) The state presented evidence that the defendant intentionally fired a weapon toward the assault victim, who was outside a home, and some projectiles penetrated the home’s exterior. Evidence was also introduced that the defendant knew people other than the victim were present inside the home. The court ruled that the trial court did not err in using a transferred intent instruction to transfer the intent to shoot a particular person to the offense of discharging a firearm into occupied property. (3) The court ruled that the provision in G.S. 14-34.1 (discharging firearm or barreled weapon into occupied property) requiring a muzzle velocity of at least 600 feet per second does not apply to firearms.

Trial Judge Abused Discretion in Failing to Grant Continuance When State Had Failed to Provide Timely Discovery to Defendant—Ruling of Court of Appeals Is Reversed in Part

State v. Cook, 362 N.C. 285, 661 S.E.2d 874 (12 June 2008), reversing in part, 184 N.C. App. 401 (3 July 2007).

The defendant was convicted of second-degree murder and two counts of felonious assault resulting from a vehicle crash in which the defendant was impaired and had also committed other traffic violations. Although the state expert’s report on the defendant’s blood alcohol retrograde extrapolation was completed five weeks before the trial was scheduled to begin, the state failed to provide notice that it planned to call the expert as a witness until five days before trial. Even then, the state only provided the expert’s curriculum vitae, which was insufficient to put the defendant on notice of the state’s intent to use extrapolation evidence at trial. The report was provided only three days before trial, giving the defendant just the weekend to find his own expert and to decide whether to call such a witness to counter the state’s evidence. The court concluded that the state’s last-minute piecemeal disclosures were not “within a reasonable time prior to trial” as required by G.S. 15A-903(a)(2). The court ruled that

the trial judge abused his discretion in failing to grant the defendant's motion for a continuance. The court stated, however, that it was not establishing a bright line rule automatically mandating a continuance whenever a party is untimely in providing discovery. The court also ruled that any assumed violation of the defendant's constitutional rights by denial of the continuance was harmless beyond a reasonable doubt.

Trial Judge Erred Under G.S. 15A-910 In Sanctioning Defendant By Excluding Testimony of Two of Defendant's Mental Health Experts—Ruling of Court of Appeals Is Modified and Affirmed

State v. Gillespie, 362 N.C. 150, 655 S.E.2d 355 (25 January 2008), modifying and affirming, 180 N.C. 514, 638 S.E.2d 481 (19 December 2006).

The court ruled that the trial judge erred under G.S. 15A-910 (sanctions for failing to comply with discovery) in sanctioning the defendant by excluding the testimony of two of the defendant's mental health experts. The court reviewed the facts in this case and concluded that it was readily apparent that the trial judge based his ruling to sanction the defendant solely on the conduct of the defendant's expert witnesses, thus acting under a misapprehension of law that the actions of a non-party in a criminal proceeding can trigger a trial judge's authority under G.S. 15A-910 to sanction a party.

Trial Judge Did Not Abuse Discretion in Allowing Two State's Witnesses to Testify and Rejecting Defendant's Objections That State Failed to Comply With Discovery Requirements for Expert Witnesses

State v. Hall, ___ N.C. App. ___, 650 S.E.2d 666 (2 October 2007).

The defendant was convicted of common law robbery. The court ruled, distinguishing *State v. Blankenship*, 178 N.C. App. 351 (2006), that the trial judge did not abuse his discretion in allowing two state's witnesses to testify and rejecting the defendant's objections that the state failed to comply with discovery requirements for expert witnesses (for example, providing a curriculum vitae). One witness was a physician's assistant, who the trial judge determined was a fact witness, not an expert witness, in testifying about the victim's injuries. Also, any opinion testimony by the physician's assistant was not germane to any issue before the jury. The other witness testified to lifting latent fingerprints from a car and did not offer any expert opinion.

(2) Trial Judge Did Not Err in Denying Defendant's Motion to Compel Disclosure of Attorney-Client Communications of Co-Defendants

State v. McLean, 183 N.C. App. 429, 645 S.E.2d 162 (5 June 2007).

The defendant was convicted of first-degree murder, three counts of armed robbery, and other offenses. (2) The court ruled, distinguishing *In re Investigation of Eric Miller, 357 N.C. 316, 584 S.E.2d 772 (2003)*, and *In re Investigation of Eric Miller, 358 N.C. 364, 595 S.E.2d 120 (2004)*, that the trial judge did not err in denying the defendant's motion to compel the disclosure of attorney-client communications of the co-defendants. The court noted that the Miller rulings were limited to deceased clients.

(2) Discovery Statute Did Not Require State to Obtain DNA from State's Witness and Compare It with DNA From Hair on Cap

State v. Ryals, 179 N.C. App. 733, 635 S.E.2d 470 (17 October 2006).

The defendant was convicted of second-degree murder. State's witness Lee testified that she saw the defendant beat the victim with his fists and kick and stomp him. State's witness Winstead also testified about the defendant's beating of the victim. A police department crime technician recovered a black knit cap and other items from the crime scene. Negroid hair was found on the cap, but a state's witness testified it was not suitable for further analysis. A defense expert witness compared a DNA sample from the hair on the cap with the defendant's DNA sample and concluded that it could not have originated from the defendant. Before trial, a judge denied the defendant's motion for a nontestimonial identification order to collect a DNA sample from Winstead to compare it with DNA from the hair on the cap; the defendant contended that Winstead had a motive to commit the murder, was present at the scene, and could have committed the murder. (2) The court ruled that the discovery provisions in G.S. 15A-903(e) did not require the state to obtain a DNA sample from Winstead for comparison with DNA from the hair on the cap.

2. Criminal Law-Diminished capacity defense-Information required to be provided

State v. Gillespie 180 NCA 514 (2006) On appeal

The **trial erred in entering a sanction totally excluding evidence of defendant's mental health experts in a first-degree murder prosecution**, and this error was **prejudicial**. A defendant must provide notice of intent to offer a defense of insanity or diminished capacity, and must provide specific information about the nature and extent of the insanity defense, but is not required to provide specific information about diminished capacity.

4. Criminal Law-Discovery-Mental health defense--Cooperation of defense experts with State experts

State v Gillespie 180 NCA 514 (2006) On appeal

The trial court acted under a misapprehension of the law regarding the role of and the requirements of defense expert witnesses when it found that defense experts in a murder case intentionally and inexcusably refused to cooperate with Dorothea Dix staff and excluded his mental health defense. **The only responsibility imposed by N.C.G.S. § 15A-905(c)(2) is to prepare a report, which must be supplied to the State; nothing requires that defendant's experts supply other information or records directly to the State, much to less a state agency.**

3. Discovery-Failure to disclose exculpatory information--Identification of another person in photographs--No knowledge of information until trial

State v Junious 180 NCA 656 (2006)

The trial court did not err in a possession of a firearm by a felon, discharging a firearm into an occupied vehicle, and first-degree murder case by denying defendant's motion to dismiss based upon the State's failure to provide him with exculpatory information that a witness identified another man as the shooter in the photographic array presented to her shortly after the shooting, because: (1) the prosecutor disclosed during a hearing outside the jury's presence that he did not know the witness had identified another man from the photographic array as the shooter until she so testified at trial; (2) the hearing revealed that the detective who presented the photographic array to the witness did not recall her pointing to any picture in the photographic array, and if she had, it would have been standard practice for the witness to circle the photograph she chose and initial and date the card, which had not been done; and (3) the State cannot reasonably be expected to relate a statement to defendant which it has no knowledge of such as in the case at hand.

3. Discovery--alleged violations--motion to dismiss--failure to provide lab report

State v Castrejon 179 NCA 685 (2006)

The trial court did not err in a trafficking in cocaine case by denying defendant's motion to dismiss based on alleged discovery violations on the ground that the State had not provided the lab report identifying the package seized as cocaine prior to trial, because: (1) the trial judge ordered the lab report to be copied and provided to all defense counsel; (2) the trial judge gave all defense counsel the lunch break to review the report and also stated he would deal with the fact that more time was needed to deal with the lab report if necessary; and (3) defense counsel made no further motions on the matter and failed to object when the lab report was entered into evidence.

1. Constitutional Law-Due process-Brady decision-Failure to conduct DNA test

State v Ryals 179 NCA 733 (2006)

The **State's failure to conduct a DNA test on hair found on a knit cap discovered at a murder scene did not violate defendant's federal due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963)**. The trial court gave defendant access to the State's physical evidence, including the knit cap, and defendant obtained a DNA analysis on a hair from the knit cap and presented the results at trial.

2. Criminal Law-Discovery-Performance of DNA test

State v Ryals 179 NCA 733 (2006)

The discovery statute that required the State to disclose, upon request by defendant, test results and the procedures utilized to reach those results, N.C.G.S. § 15A-903(e), **did not compel the State to perform a DNA test on hair found on a knit cap discovered at a murder scene.**

1. Sexual Offenses--Motion for bill of particulars--Exact date and times of offenses

State v Whitman 179 NCA 657 (2006)

The trial court did not abuse its discretion in a statutory rape, statutory sex offense, indecent liberties with a child, and incest case by **denying defendant's motion for a bill of particulars** providing the exact dates and times of the alleged offenses, because: (1) defendant was provided with open-file discovery; (2) defendant has not pointed to any factual information introduced at trial that he was not provided in discovery and was necessary to prepare his defense; and (3) defendant failed to argue that the victim's testimony or any of the other evidence at trial was more specific regarding dates, times, and places than the information made available in the course of discovery.

2. Discovery-Privileged communications--Sealed documents--In camera inspection

State v Bradley 179 NCA 551 (2006)

Although the trial court did not err in a double indecent liberties with a child and statutory sex offense case by refusing to conduct an in camera inspection of sealed documents that defendant wanted to use to impeach the credibility of a witness by showing she made statements in project records that were at odds with her trial testimony or failed to make statements which would have shown abuse at the hands of defendant, the trial court erred by ordering their production to defense counsel in its order of 3 May 2005 and the order is vacated, because: (1) defendant was not entitled to production or in camera review of the documents when defendant failed to satisfy the threshold requirement of materiality; (2) although a witness may be impeached on cross-examination regarding her prior inconsistent statements, her answers are

deemed conclusive and may not be attacked with direct evidence; and (3) the witness was only one of three N.C.G.S. § 8C-1, Rule 404(b) witnesses who provided 404(b) testimony, she was subject to cross examination, and considered in that context, the contents of the records are at best tangential to the aggregate case and cannot meet even the relatively permissive Phillips criteria for materiality let alone the more stringent Tirado test.

6. Discovery-Identity of confidential informant-Not disclosed

State v Withers 179 NCA 249 (2006)

Defendant's motion to disclose the identity of a confidential informant was properly denied in an action remanded on other grounds. The factors favoring nondisclosure outweigh those favoring disclosure.

1. Discovery-Criminal-Statutory only--Interviewing prosecution witnesses-Not included in statute

State v Taylor 178 NCA 395 (2006)

A detective was not required to submit to an interview with defense counsel against his wishes before trial. Pretrial discovery is statutory rather than a constitutional or common law right, and the General Assembly has not included the right to interview the State's witnesses in a criminal trial in the discovery statute. N.C.G.S. § 15A-903(a)(1).

6. Discovery-School records of witness-Reviewed in camera-Not discoverable

State v Taylor 178 NCA 395 (2006)

The school records of a tenth grader (an accomplice to first-degree kidnapping and murder) who testified in defendant's trial pursuant to a plea agreement were reviewed in camera on appeal and held to contain no information favorable and material to defendant's guilt and punishment, nor any evidence adversely affecting the witness's credibility. Therefore, the trial court properly denied defendant's motion to be allowed to review those records for impeachment purposes.

9. Witnesses-Last-minute-Not abuse of discretion

State v Taylor 178 NCA 395 (2006)

The trial court did not abuse its discretion in a first-degree murder prosecution by admitting testimony from a "surprise witness," a telephone company manager who retrieved text messages between the victim's telephone number and one assigned to defendant.

Discovery-SBI agent on methamphetamine production-Not listed as expert

State v Blankenship 178 NCA 351 (2006)

Defendant was granted a **new trial** on charges of possessing precursor chemicals where an SBI agent purportedly testified as a lay witness, but in fact was more qualified than the jury and testified as an expert witness, even though the **State had not listed any experts in its response to defendant's discovery request**. N.C.G.S. § 15A-903(a)(2).

2. Evidence-Attempted bribe by defendant-Door opened by defendant – no discovery violation

State v. Farmer 177 NCA 710 (2006).

An assault victim's testimony that defendant tried to bribe him was properly admitted. Defendant opened the door on cross-examination by asking the victim about conversations with defendant; the **State was entitled to chase the rabbit released by defendant**.

3. Criminal Law-Discovery-DWI case

State v. Cornett 177 NCA 452 (2006).

The trial court did not err by denying a DWI defendant's pretrial motion to compel discovery from the State of written protocols regarding Intoxylizer operation, calibration, and measures. **No statutory right to discovery exists for criminal cases originating in district court and there is no constitutional right to discovery other than for exculpatory evidence.**

3. Discovery--voluntary witness list--failure to disclose witness prior to trial--voir dire- -good faith

State v Brown 177 NCA 177 (2006)

The trial **court did not err** in a common law robbery and assault inflicting serious bodily injury case by allowing the victim's father to testify at trial when his name did not appear on the witness list disclosed by the State prior to trial, because: (1) the record does not disclose that either defendant made a motion requesting the trial court to order the State to provide a list of witnesses, and thus, the State was not required under N.C.G.S. § 15A-903(a)(3) to provide defendants with a list of the witnesses it intended to call during trial; (2) there was no indication from the record that either defendant made a request for voluntary discovery by the State, nor was there evidence of a written agreement between the State and either defendant to voluntarily comply with the provisions of Article 48; (3) absent a request or written agreement, the State's witness list is not deemed to have been made under an order of the trial court, and thus, such voluntary discovery would not need to be to the same extent as required by N.C.G.S. § 15A- 902(a); (4) the trial court conducted a voir dire of the jury to determine whether any juror knew the witness personally or knew anything about him, and this voir dire disproved any bad faith on the part

of the State in calling the witness; (5) defendants were not unfairly prejudiced by the witness's testimony which the jury was instructed to consider solely for the purpose of corroboration; and (6) the State made the requisite good faith showing and was permitted under N.C.G.S. § 15A-903(a)(3) to call the witness.

Criminal Law-Lost witness Statements-Mistrial denied

State v. Jaaber 176 NCA 752 (2006)

The **denial of a mistrial was not an abuse of discretion** in a prosecution for armed robbery and breaking and entering where the **State lost one or two pretrial witness statements**. Defendant had the opportunity to cross-examine both witnesses, one of whom was not present during the robbery; that witness testified that she had never before seen defendant and the other did not identify defendant as a participant in the robbery during a pretrial photographic line-up or in court; and the State presented substantial evidence of defendant's guilt from other witnesses. N.C.G.S. § 15A-501(6); N.C.G.S. § 15A-903(a).

2. Criminal Law_DSS not a prosecutorial agency_continuance and review of notes_denied

State v Pendleton, 175 NCA 230 (2005)

The Department of Social Services was not a prosecutorial agency in the circumstances of this prosecution for statutory rape and other charges. **The Department was thus not required to turn over its notes to defendant** pursuant to N.C.G.S. § 15A-903(a)(1), and the court did not abuse its discretion by denying defendant a continuance to review the notes and interview witnesses.

1. Discovery-_motion for production--laboratory protocols associated with DNA testing

State v Edwards, 174 NCA 490 (2005)

The trial court did not commit prejudicial error in a prosecution for first-degree murder, first-degree rape, and other crimes by **denying defendant's written motion to allow into evidence the laboratory protocols associated with DNA testing that would be presented at trial, because the error was harmless beyond a reasonable doubt** when the question of defendant's identity was not at issue during this trial based on defendant's choice of defense. Thus, the State did not need the DNA evidence to link defendant to the crimes. N.C.G.S. § 15A-903(e). *Youngblood v. West Virginia*, (June 19, 2006) US Sup Ct. **The United States Supreme Court granted the defendant's petition for certiorari, vacate the judgment of the state appellate court, and remanded the case for the state appellate court to examine the defendant's claims**

that the state failed its federal constitutional duty to provide exculpatory evidence to the defendant.

8. Discovery_failure to disclose information_defendant not at a disadvantage_no Brady violation

State v Elliott, 360 NC 400 (2006)

There was no *Brady v. Maryland* violation in a murder prosecution where it was learned at trial that the State had not disclosed to defendant that a witness who had identified defendant in a photo lineup and testified that she had seen a man in the victim's truck could not identify defendant in court. The State reopened its case and recalled the witness, who testified on cross-examination that she was unable to make the in-court identification. Defendant was able to use the information during trial to his advantage, and it is clear from the jury's verdicts that defendant was not adversely affected by the initial nondisclosure.

6. Discovery--destruction of shell casing prior to trial--failure to request evidence--failure to show bad faith

State v. Fisher 171 NCA 201 (2005)

A defendant's due process rights were not violated in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and multiple assaults with a deadly weapon with intent to kill by the destruction of shell casings prior to his trial, because: (1) there is no indication in the record that defendant filed a discovery request for the shell casings; and (2) defendant has neither alleged nor demonstrated any bad faith on the part of the prosecutor or police department in the destruction of the shell casings.

State's Withholding of Materially Favorable Evidence from Defendant and Knowingly Allowing

Banks v. Dretke February 24, 2004:

State's Witness to Offer False Testimony Entitled Defendant to Habeas Corpus Review and Relief

Banks v. Dretke February 24, 2004:

The plaintiff (criminal defendant in state court) was convicted in state court of first-degree murder and sentenced to death. He filed a federal habeas petition, alleging that the state withheld materially favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and other cases, and knowingly allowed a state's witness to offer false testimony in violation of *Giglio v. United States*, 405

U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), and other cases. He sought a reversal of his conviction and death sentence. The Court ruled that the plaintiff was entitled to a reversal of his death sentence based on the effect of the state's suppression of materially exculpatory evidence on the fairness of the death penalty phase of the trial (suppression of evidence that a key state's witness was an informant paid for information in this case). The Court also ruled that the plaintiff was entitled to a certificate of appealability from the federal district court's denial of his petition for a new trial, based on the state's suppression of materially favorable evidence (the pretrial coaching by prosecutors and law enforcement of a key state's witness) and knowingly allowing a state's witness to offer false testimony (the witness's denying that he had talked with anyone about his trial testimony). [Author's note: This case also contains rulings concerning various procedural aspects of federal habeas law, which are not summarized here.]

5. Discovery—child abuse—sealed DSS file—no exculpatory evidence

State v. Allen 166 NCA 139 (2004)

The trial court did not err in a prosecution for felonious child abuse by ruling that a DSS file did not contain exculpatory evidence. The Court of Appeals reviewed the sealed records and found nothing favorable to the accused or material to the charges at issue in this case.

Discovery--foundation of expert opinion--laboratory results--data collection procedures

State v. Fair 164 NCA 770 (2004)

The trial **court erred** in a sale and delivery of cocaine and possession with intent to sell or deliver cocaine case **by denying defendant's motion for further discovery from the State concerning the foundation of its expert's opinion as to the testing by the SBI laboratory** to determine the nature of the substance submitted, because: (1) although defendant's oral discovery requests made at the conclusion of the voir dire hearing were not embodied in his earlier written motion and were properly denied since they did not comply with N.C.G.S. § 15A-903, defendant's written discovery motion did comply with this statute; (2) **defendant is entitled to more than just the naked results of the State's laboratory analysis;** and (3) although it is beyond the discovery provisions of N.C.G.S. § 15A-903 to require the State to provide defendant with information concerning peer review of the testing procedure, whether the procedure has been submitted to the scrutiny of the scientific community or is generally accepted in the scientific community, citations to empirical studies supporting the opinion, or citations to articles in scientific treatises or journals supporting the opinion, the State is required to provide discovery of data collection procedures requested by defendant.

1. Homicide--first-degree murder--short-form indictment--bill of particulars--notice

State v. Garcia 358 NC 382 (2004)

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder under the felony murder rule with attempted rape as the underlying felony, or in the alternative, by denying his motion for a bill of particulars even though defendant contends the short-form indictment used to charge him lacked adequate notice of the underlying felony, because: (1) murder indictments that comply with N.C.G.S. § 15-144 are sufficient to charge first-degree murder on the basis of any theory set forth in N.C.G.S. § 14-17, and therefore, a short-form indictment is sufficient to charge first-degree murder on the basis of felony murder committed during an attempted rape; (2) **defendant was not entitled to learn the State's theory of the case by a bill of particulars** when the State is not required to choose its theory of prosecution prior to trial; and (3) there was no palpable or gross abuse in this case based on the denial of a bill of particulars when the State's legal theory was not factual information within the meaning of N.C.G.S. § 15A-925(b) and defendant was not denied any information necessary to adequately prepare or conduct his defense.

1. Discovery - medical records - State's witness - request that State investigate

State v. Lynn, 157 N.C. App. 217 (2003)

An attempted murder defendant's right to due process was not violated by the **denial of his motion to require the State to investigate to learn the identities of any mental health professionals from whom an accomplice (and State's witness) had sought treatment**. The motion did not suggest that the witness's ability to observe and to testify to events was impaired by a mental defect or by any medication used to treat a mental illness; defendant did not allege that information about the witness's mental health was in the possession of the State; and the denial of the motion did not prevent defendant from exploring the issue at trial.

2. Discovery - sealed medical records - in camera review - no exculpatory evidence

State v. Lynn, 157 N.C. App. 217 (2003)

The trial court correctly ruled that the sealed medical records of a witness did not contain exculpatory evidence, even though the court said that certain medical terms were hard to understand. The court did not say that the records were incomprehensible, as defendant contended, and defendant did not preserve that issue for appeal. Moreover, the Court of Appeals conducted an independent review of the records.

1. Discovery - defendant's statements to informant - not timely disclosed

State v. Batchelor, 157 N.C. App. 421 (2003)

The prosecutor's failure to timely disclose the substance of defendant's statements to a confidential informant **did not compel suppression of the evidence where the substance of the statements was disclosed prior to trial.** However, the trial court retained the discretion to issue a sanction for the State's failure to comply with the discovery rules. N.C.G.S. § 15A-903(a)(2).

2. Discovery - no unfair surprise - confidential informant's statement admitted

State v. Batchelor, 157 N.C. App. 421 (2003)

The purpose of discovery was achieved, and the trial court did not abuse its discretion by **denying a motion in limine to suppress** the testimony of a confidential informant about statements made to her by defendant **although the substance of the statements were not timely disclosed to defendant,** where the court held a voir dire, made findings supported by the evidence, and concluded that defendant was not unfairly surprised. **Given Orally (see Farb. P. 14)**

8. Evidence--prior crimes or bad acts--cross-examination

State v. Walters 357 NC 68 (2003)

The trial court did not err in a case involving two first-degree murders and nine other felonies by denying defendant's motion for disclosure of N.C.G.S. § 8C-1, Rule 404(b) evidence to be introduced by the State and by allowing cross-examination of defendant about certain prior bad acts, because: (1) there is no requirement that the State must provide a defendant with Rule 404(b) evidence that it intends to use at trial; (2) the state cross-examined defendant about the acts and did not directly introduce or use evidence of prior crimes or bad acts committed by defendant; (3) the trial court specifically asked defense counsel whether he wanted to object, and defense counsel stated that he had no problem with the questioning at that point in time; and (4) there was no plain error since defendant has not established any alleged prejudicial error on the part of the trial court that was so fundamental that the jury would have reached a different result absent the foregoing testimony.

5. Discovery--records not in State's possession

State v. Morris 156 NCA 335 (2003)

A defendant in a prosecution for larceny by employee was not entitled to discovery of financial records which the State did not possess. The State provided defendant with copies of the accounting and banking records it intended to offer at trial.

3. Discovery--motion for protective order--psychological test data

State v. Miller 357 NC 583 (2003)

The trial court did not err during a capital sentencing proceeding by denying defendant's motion for a protective order requiring raw psychological test data pertaining to defendant to be released only to qualified professionals retained by the State, because the trial court's order did nothing more than employ the provisions of N.C.G.S. § 15A-905(b) which requires this data to be disclosed to the State during discovery.

4. Evidence--psychological test data--discovery--cross-examination

State v. Miller 357 NC 583 (2003)

The trial court did not commit plain error during a capital sentencing proceeding by failing to intervene ex mero motu to prevent alleged misuse of raw psychological test data pertaining to defendant during the State's cross-examination of defendant's expert, because: (1) an expert may be required to disclose the underlying facts or data on cross-examination; and (2) if an expert obtained any information from a psychological test administered to a defendant which related to the expert's testimony, then the test is both discoverable and within the proper scope of cross-examination.

1. Discovery--laboratory protocols--drug testing

State v. Dunn 154 NCA 1 (2002)

The trial court erred in a selling heroin, delivering heroin, and possessing heroin with intent to sell and deliver case by failing to require the State to provide defendant discovery information under N.C.G.S. § 15A-903(e) pertaining to laboratory protocols, incidences of false positive results, quality control and quality assurance, and proficiency tests of the State Bureau of Investigation (SBI) laboratory when SBI chemists tested the substance that the State alleged to be heroin four times and only two of those tests returned a positive result for heroin, because allowing the discovery would enhance preparation for cross-examination and permit both sides to assess the strengths and weaknesses of this aspect of the evidence.

2. Constitutional Law; Discovery--testimony of defendant's consulting experts—effective assistance of counsel--work product privilege * See Farb p11 ******

State v. Dunn 154 NCA 1 (2002)

The trial court violated a defendant's right to effective assistance of counsel and the related work product privilege in a selling heroin, delivering heroin, and possessing heroin with intent to sell and deliver case by admitting testimony concerning laboratory tests and results of a

testing facility retained by defendant to independently test the substance at issue and defendant is entitled to a new trial, because: (1) the results and reports of tests performed by the witnesses are protected from pretrial discovery if defendant does not intend to introduce results of the testing facility's tests or to call the testers as witnesses at trial, N.C.G.S. § 15A-905(b); (2) the work product doctrine operates not only to protect the reports and potential testimony of nontestifying consulting experts, but also to increase the information available to the trier of fact by encouraging the attorney to seek, on his own, information about the case that he could not obtain from his adversary through the discovery process; (3) although the work product doctrine is a qualified privilege, not an absolute one, the State may defeat the privilege by showing a special need for the testimony of defendant's consultative expert; (4) in regard to defendant's right to effective assistance of counsel, the attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness; and (5) even when the defense waives its Sixth Amendment protection of the report of a consultative expert by announcing its intention to use the report at trial, it does not waive its right to control the testimonial use of the expert and the expert remains unavailable to the State as a witness.

3. Discovery - names of informants - information someone other than defendant committed offenses

State v. Canady, 355 N.C. 242 (2002)

The trial **court erred** in a double first-degree murder case by **failing to require the State to disclose names of informants with material exculpatory information** that someone other than defendant committed the offenses, because: (1) defendant could not effectively use the information at trial; (2) defendant needed access to these individuals to interview them and develop leads; and (3) there is a reasonable probability that if defendant had access to informants who had names of others involved in the murders, such information could have swayed the jury to reach a different outcome.

7. Discovery--prosecutor's investigative files--other suspects

State v. Williams 355 NC 501 (2002)

The trial court did not err in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, and assault with a deadly weapon with intent to kill case involving seven different victims over a fifteen-month span by denying defendant's written motions for pretrial discovery relating to other suspects and to other offenses with which defendant was not charged, because: (1) no statutory provision or constitutional principle requires the trial court to

order the State to make available to a defendant all of its investigative files relating to his case, and defendant has not cited any statute that would give the trial court the authority to grant defendant's motions; (2) defendant is not entitled to the granting of his motion for a fishing expedition; and (3) defendant has not shown any violation of the Due Process Clause when the United States Supreme Court has held that due process does not require the State to make complete disclosure to defendant of all of the investigative work on a case. N.C.G.S. § 15A-904(a).

12. Discovery--criminal records of witnesses and victims--oral request for access to Police Information Network

State v. Williams 355 NC 501 (2002)

The trial court did not err in a first-degree murder, first-degree rape, first-degree sexual offense, assault with a deadly weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape, and assault with a deadly weapon with intent to kill case involving seven different victims over a fifteen-month span by denying defendant's pretrial motions for disclosure of the criminal records of the witnesses and victims involved in the case against defendant and by denying defendant's oral request for an order allowing his investigator to have access to the Police Information Network from which the criminal records could be obtained, because: (1) no statutory or constitutional principle requires a trial court to order the State to make a general disclosure of criminal records of the State's witnesses; and (2) the prosecution witnesses were cross-examined rigorously and no additional impeaching evidence gleaned from the criminal records of these witnesses would have created a reasonable doubt of defendant's guilt which did not otherwise exist.

5. Discovery--medical and psychological records--failure to object

State v. Prevatte 356 NC 178 (2002)

The trial court did not err in a first-degree murder and second-degree kidnapping case by granting the State's request for discovery of defendant's medical and psychological records and by requiring the defense's psychology experts to issue written reports allegedly in violation of N.C.G.S. § 15A-905, because: (1) defendant never objected to the trial court's grant of the relevant discovery to the State; and (2) defendant agreed that the law gave the State the right to obtain the materials requested.

2. Discovery--witness interview--timely disclosure to defendant--due process

State v. Rhue 150 NCA 280 (2002)

A detective's interview with a witness was timely disclosed to defendant so that the detective was properly allowed to read from the interview transcript, although the State did not disclose the interview promptly after it was conducted, because (1) under N.C.G.S. § 15A-903(f)(1) the State was not required to disclose a witness's statement in advance of trial, and (2) the due process requirements of *Brady v. Maryland*, 373 U.S. 83, were satisfied where defense counsel had possession of the interview before the trial commenced, he made effective use of the transcript at trial by extensively cross-examining the witness with the interview transcript, and the State did not introduce the detective's testimony regarding the interview until after defense counsel had already vigorously cross-examined the witness about the content of the interview.

2. Constitutional Law—State's failure to disclose exculpatory evidence—prejudicial

State v. Barber 147 NCA 69 (2001)

The State violated a first-degree murders defendant's due process rights by failing to disclose cellular telephone records to defendant until after the trial where the trial court found that the records merely corroborated other evidence, but the records also lent crucial support to a witness whose credibility was questioned by the State. Given the court's finding at the motion for appropriate relief hearing that "very little additional evidence" could have changed the verdict and the jury's obvious difficulties in resolving the issues, it cannot be said that the State's failure to disclose exculpatory evidence did not create a reasonable probability of a different verdict.

2. Discovery—testimony about excluded evidence—permissible

State v. Stitt 147 NCA 77 (2001)

The trial court did not err in a cocaine prosecution by allowing testimony about the hat in which the cocaine was found after excluding the hat because the State had failed to produce it during discovery. The decision of whether to impose sanctions and which sanctions to impose is within the sound discretion of the trial court. Presuming that defendant realized that he had lost his hat while escaping, he must have known that the charge against him could only have resulted from discovery of the cocaine in the hat, and he had ample reason to know that the hat was an integral part of the incident and that the deputy would likely testify about the hat. The court's decision not to sanction the State by prohibiting that testimony was not an abuse of discretion. N.C.G.S. § 15A-910.

5. Discovery - prospective jurors - personal information

State v. Ward, 354 N.C. 231 (2001)

The trial court did not err in a first-degree murder trial by denying defendant's pretrial motion for disclosure of jury information known to the State concerning the prospective jurors' previous jury service and the verdicts rendered by the juries on which they served, because personal information about prospective jurors is not subject to disclosure by the State. N.C.G.S. § 15A-903.

2. Discovery--evidence admissible under Rules 803, 804 and 404

State v. Anthony, 354 NC 372 (2001)

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by denying defendant's motion to compel disclosure of evidence the State intended to offer pursuant to N.C.G.S. ' 8C-1, Rules 803(24), 804(b)(5), and 404(b). Rules 803(24) and 804(b)(5) contain notice requirements and an order compelling disclosure would be redundant; moreover, the State here provided the particulars of the hearsay statements to defendant and defendant did not move to continue or assert surprise. Rule (404)(b) is not a discovery statute and there is no support for the assertion that disclosure of Rule (404)(b) evidence is required.

1. Discovery--motion to quash subpoenas duces tecum--in camera inspection

State v. Johnson 145 NCA 51 (2001)

The trial court erred in a first-degree rape and indecent liberties case by granting the motion to quash subpoenas duces tecum issued by defendant teacher to the attorneys for the board of education and to an individual of the board of education seeking records compiled during the board's investigation of the charges against defendant, because: (1) there is no indication the trial court made the proper inquiry into the requested documents; and (2) the trial court must conduct an in camera inspection of the requested documents to determine whether documents exist containing information material to defendant's guilt or innocence.

3. Discovery--trigger pull test--no notice

State v. Nolen, 144 N.C. App. 172 (2001)

The trial court did not abuse its discretion in a first-degree murder and armed robbery prosecution by admitting evidence of a trigger pull test conducted by an S.B.I. agent where defendant contended that he was not notified that the agent would testify about trigger pull tests. The prosecutor fulfilled his duty by providing defendant with a copy of the agent's report, even though it did not contain the trigger pull information. Moreover, even if the prosecutor's actions constituted a discovery violation, the court retained discretion to determine whether sanctions were appropriate, defendant never made a motion for discovery of test results but relied on the State's "open file" policy, and there was no unfair surprise or bad faith.

2. Discovery--prior criminal records of non-law enforcement witnesses of the State--not required

State v. Haywood, 144 N.C. App. 223 (2001)

The trial court did not err by denying defendant's motion to require the State to furnish the prior criminal records of non-law enforcement witnesses for the State, because our Supreme Court has held that the State is not required to produce such information in discovery.

1. Discovery--medical and psychiatric history of witness--State not required to provide when not in State's possession

State v. Chavis, 141 N.C. App. 553 (2000)

The State was under no obligation to provide a defendant with medical and psychiatric history of a witness in a prosecution for statutory sexual offense and attempted statutory rape, because defendant presented no evidence the State actually had the witness's medical and psychiatric history in its possession, or that such history would have been favorable to defendant.

2. Discovery--criminal--identity of confidential informant--procedure

State v. Moctezume, 141 N.C. App. 90 (2000)

In a case reversed on other grounds, the Court of Appeals held that the trial court erred in a cocaine trafficking prosecution by excluding defendant and his counsel from a hearing on defendant's motion to reveal the identity of a confidential informant without hearing evidence and finding facts as to the necessity of the exclusion. Upon a motion by defendant that the identity of a confidential informant be revealed, the trial court should first hold a hearing on the motion outside the presence of the jury at which defendant must present supporting evidence and at which the State may present opposing evidence. The court may then grant or deny the motion, making the necessary findings and conclusions, and if the court needs to know the identity of the informant, it may exclude defendant if it first makes appropriate findings and conclusions, taking into account the serious due process questions raised by the exclusion of defendant or his counsel. The court should take any action necessary to protect defendant's rights to a fair trial.

Discovery--child abuse--social services records

State v. McGill, 141 N.C. App. 98 (2000)

There was prejudicial error in a prosecution for first-degree sexual offense and indecent liberties where defendant was denied access to social services records concerning prior allegations of abuse. Upon review of the sealed records, the Court of Appeals determined that defendant was denied evidence favorable to him which could have been used to impeach the credibility of key witnesses for the State; that the evidence was material because there is a reasonable probability that the result would have been different had the records been disclosed; and that there was prejudice because a defendant charged with sexual abuse of a minor has a constitutional right to have the records of the child abuse agency pertaining to the prosecuting witness reviewed, with disclosure of favorable and material evidence, and the State here did not argue that the error was harmless and thus failed to meet its burden of showing that the constitutional error was harmless beyond a reasonable doubt.

7. Discovery--copies of State's photographs--testing performed by SBI

State v. McKeithan, 140 N.C. App. 422 (2000)

The trial court did not err in a double first-degree murder case by denying defendant's request for copies of the State's photographs and for information and data related to testing performed by the SBI, because: (1) N.C.G.S. § 15A-903(d) requires only that the State make the photographs available to defendant for inspection and copying, and defendant does not point to anything in the record to show the State failed to comply with the statute; and (2) any error in failing to give defendant the information concerning the SBI lab results revealing the presence of gasoline on most of the items tested was harmless beyond a reasonable doubt based on the overwhelming evidence of defendant's guilt and defendant's confession that he doused the beds in gasoline.

2. Discovery--tapes of interview--transcript provided

State v. Ferguson, 140 N.C. App. 699 (2000)

The trial court did not err in a first-degree murder and assault prosecution by denying defendant's request to review tapes of an interview between a prosecutor and a State's witness pursuant to N.C.G.S. § 15A-903(f)(2) where defendant was provided with a transcript which was a "substantially verbatim" copy of the recording.

3. Discovery--criminal--other act of misconduct **Rule 404(b) evidence*******

State v. Parker, 140 NC App 169 (2000)

The **denial of pretrial disclosure of N.C.G.S. § 8C-1, Rule 404(b) evidence** did not deprive a first-degree murder defendant of a fair trial. Under N.C.G.S. § 15A-903(f)(1), no statement made by a State's witness

or prospective witness is required to be disclosed until after that witness has testified on directed examination.

2.Discovery--failure to comply--assertion of privilege against self-incrimination

Sugg v. Field, 139 N.C. App. 160, (2000)

The trial court did not err by striking the pleadings and dismissing all claims for trespass upon plaintiff's property and chattels, conversion, invasion of privacy by intrusion upon seclusion, intentional and/or negligent infliction of emotional distress, and civil conspiracy, because the trial court balanced plaintiff's right to assert his privilege against self-incrimination as opposed to defendants' due process rights to defend against his allegations and determined that defendants' rights were unduly prejudiced without access to the information concerning the location of certain tapes during the pendency of this action which plaintiff refused to divulge during discovery.

3.Discovery--exculpatory evidence not disclosed--DSS and medical records--in camera review by trial court

State v. Thompson, 139 N.C. App. 299 (2000)

The trial court did not violate *Brady v. Maryland*, 373 U.S. 83, in a prosecution for first-degree statutory rape, indecent liberties, and other offenses by failing to require the State to disclose to defendant DSS and medical records as exculpatory evidence where the trial court followed procedural mandates for in camera review and sealing the DSS records, the only potentially exculpatory information in those records had already been introduced, and, with respect to the medical records, defendant did not show a substantial basis for claiming materiality so as to warrant an in camera review. Asking a defendant to affirmatively establish that a piece of evidence not in his possession is material might be a circular impossibility, but a substantial basis for believing such evidence is material is required to prevent unwarranted fishing expeditions.

9. Witness - Statements - not disclosed

State v. Griffin, 136 N.C. App. 531 (2000)

The trial court did not abuse its discretion in a first-degree murder prosecution by not ordering the disclosure of witness statements after the witnesses testified or by failing to order the disclosure of notes used to refresh the recollection of witnesses.

30.Discovery--capital sentencing--written statement and copies of notes by defense expert

State v. Davis, 353 N.C. 1 (2000)

The trial court did not err in a capital sentencing proceeding by ordering defendant's mental health expert to prepare a written report of his findings and to produce handwritten notes for the State's perusal pursuant to N.C.G.S. § 15A-905(b) where defendant was given access to the State's files. **31. Discovery--attorney-client privilege--self-incrimination--notes and report from defense expert** A trial court order in a capital sentencing proceeding requiring defendant's mental health expert to prepare a written report of his findings and to produce for the State handwritten notes did not violate defendant's attorney-client privilege and privilege against self-incrimination. Nothing indicates that the expert examined or communicated with defendant in the course of seeking or giving legal advice and, even if the expert was an agent of defendant's attorneys, he clearly lost that privilege once he was placed on the witness stand. Moreover, the court is always at liberty to compel disclosure of privileged communications if necessary to a proper administration of justice.

6. Discovery - Homicide victim's hospital records - not exculpatory

State v. Jarrett, 137 N.C. App. 256 (2000)

The trial court did not err in refusing to give defendant access to a homicide victim's entire hospital records where the records were subpoenaed by defendant, the hospital declined to produce the records, they were reviewed by the trial court in camera, some were provided to defendant with the remainder sealed, and the sealed records were examined by the Court of Appeals and found to contain no exculpatory information.

5. Discovery - Reciprocal - expert's raw data

State v. Cummings, 352 N.C. 600 (2000)

The trial court did not err by ordering reciprocal discovery of raw data from defendant's expert witnesses in a capital sentencing proceeding.

34. Discovery - Expert testimony - exclusion - failure to comply with discovery order

State v. Braxton, 352 N.C. 158 (2000)

The trial court did not err in a capital sentencing proceeding by excluding the testimony of an expert witness at the sentencing hearing concerning defendant's mental condition at the time of the offense, because defendant violated a discovery order.

7. Discovery--victims' personnel files--not discoverable

State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (S. Ct. 2000)

The trial court did not err in a capital trial by denying one defendant's pretrial motion for discovery of the two law enforcement victims' personnel files because: (1) defendant did not preserve his constitutional issue since it was not raised and determined by the trial court, N.C. R. App. P. 10(b)(1); and (2) the list of discoverable items in N.C.G.S. § 15A-903(d) does not include victims' personnel files, and the personnel files were not in the possession, custody, or control of the prosecutor in this case.

4. Discovery--polygraph--results not discoverable

State v. Brewington, 352 N.C. 489 (2000)

The trial court did not err in a capital first-degree murder prosecution by denying defendant's motion to discover polygrams (produced by a polygraph test) under N.C.G.S. § 15A-903(e) where defendant asserted that he wanted to submit the polygrams to his own expert to determine whether the examiner had misrepresented the results to defendant. Polygraphs do not fall within the category of examinations contemplated by the statute; furthermore, the issue of whether the examiner correctly interpreted or commented upon the test results is merely one factor bearing upon the total circumstances.

1. Criminal Law 106 (NCI4th) murder- discovery - list of State's witnesses

State v. Godwin, 336 N.C. 499 (1994)

The trial court did not err in a first-degree murder prosecution by denying defendant's request for a list of the State's witnesses prior to jury selection. *State v. Covington, 317 N.C. 127*, did not alter the longstanding rule that a defendant has no right to pretrial discovery of potential State's witnesses but at most recognized that during jury selection the trial court has the discretion to order either side to furnish the other with a list of witnesses.

3. Criminal Law 109 (NCI4th) first-degree murder - reciprocal discovery - no error

State v. Godwin, 336 N.C. 499 (1994)

The trial court did not err in a first-degree murder prosecution by ordering reciprocal discovery by defendant within two weeks after the State met its discovery deadline where the State sought to obtain from defendant any psychiatric evidence which defendant intended to offer. N.C.G.S. § 15A-905(b) requires defendant to produce psychiatric evidence if he intends to use such evidence and sets no time limitation by which defendant must furnish the State with discovery. Defendant has made no showing that the time set by the trial court was unreasonable, defendant still had flexibility in determining his trial strategy and in assessing what evidence he would actually introduce, and any evidence obtained after the deadline would be available as long as defendant complied with the continuing duty to disclose.

4. Criminal Law 105 (NCI4th) - discovery - unavailability of blood samples for testing by defendants -admissibility of grouping tests

State v. Barnes, 333 N.C. 666 (1993)

Criminal Law 101 (NCI4th) - statements by defendant - absence of timely disclosure - failure to inform court

State v. Taylor, 332 N.C. 372 (1992)

The trial court did not err in admitting defendant's statements to a cellmate on the ground that the State failed to produce these statements within the time frame required by N.C.G.S. 15A-903

5. Criminal Law 104 (NCI4th) measurement of knife blade- not test result subject to discovery

State v. Moseley, 336 N.C. 710 (1994)

1. Criminal Law 109 (NCI4th) - first-degree murder- defense psychiatrist - written report – required to be disclosed to prosecutor

State v. Bacon, 337 N.C. 66 (1994)

16. Constitutional Law 252 (NCI4th) furnishing of medical and psychological records motion properly denied

State v. Burr, 341 N.C. 263 (1995)

Defendant's motion for an order requiring that all medical and psychological records of an infant murder victim's mother be made available to defendant by five entities and any other persons providing medical and psychological services to the mother amounted to a fishing expedition and was properly denied by the trial court where defendant contended that DSS files indicated that the mother suffered from depression and her records might reveal abuse toward her children, but the DSS records contained no evidence that the mother physically abused or acted violently toward her children.

13. Criminal Law 109 (NCI4th) personality test defendant's inability to complete expert's use in formulating opinion discovery and cross-examination

State v. McCarver, 341 N.C. 364 (1995)

Although defendant's expert did not score a personality test administered to defendant or interpret the entire test because defendant wasn't able to

perform at a level that was scorable, the State was entitled to pretrial discovery of the test and to cross-examine defendant's expert about the test where the expert considered the answers defendant gave on the test and his inability to complete the test in formulating her opinion on defendant's psychological makeup. N.C.G.S. 15A-905(b).

7. Criminal Law 105, 113 (NCI4th) discovery bloodstain pattern tests notice four days before trial recesses to research and locate expert

State v. Goode, 341 N.C. 513 (1995)

The State did not violate the discovery statute, N.C.G.S. 15A-903(e), when it informed defense counsel four days prior to trial of its intention to have certain evidence examined by a bloodstain pattern interpretation expert and provided the expert's report to defense counsel during the trial on the same day the State received it.

2. Criminal Law 107 first-degree murder criminal records of State's witnesses not subject to disclosure

State v. Walls, 342 N.C. 1 (1995)

6. Criminal Law 107 (NCI4th) jury selection potential jurors criminal records not subject to disclosure by state

State v. Kandies, 342 N.C. 419 (1996)

2. Criminal Law § 106 (NCI4th) accomplice's statement not provided during discovery admission not error

State v. Cuevas, 121 N.C. App. 553 (1996)

The trial court did not err by admitting a statement made by an accomplice which had not been provided to defendant in discovery, since a defendant is not entitled to receive a copy of a statement by a co-perpetrator unless defendant is tried jointly with the co-perpetrator, and since the State provided defendant with the substance of the statements that he made to the co-perpetrator when it provided him with a copy of the co-perpetrator's subsequent statement. N.C.G.S. §§ 15A-903(b)(1), 903(a)(2)

2. Criminal Law § 107 (NCI4th) first-degree murder discovery criminal records of State's witnesses motion to compel disclosure denied Rules of Professional Conduct

State v. Kilpatrick, 343 N.C. 466 (1996)

The refusal of the trial court in a first-degree murder prosecution to compel the State to supply defendant with the criminal records of witnesses did not violate Rule 7.3 of the North Carolina Rules of

Professional Conduct, which requires the prosecutor to make timely disclosure of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. Defendant has not shown that the prosecutor failed to make timely disclosure of material evidence with respect to the criminal history of any witness in this case.

15. Criminal Law § 107 (NCI4th) capital sentencing prosecutor's notes from interview with witness defendant's not allowed to review

State v. Heatwole, 344 N.C. 1 (1996)

The trial court did not err during a capital resentencing proceeding by denying defendant's request to view notes the prosecutor took during an interview with a witness who was defendant's stepbrother and the son of a victim. The notes were sealed for appellate review and were devoid of information beneficial to defendant.

19. Criminal Law § 112 (NCI4th) noncapital first-degree murder officer's notes provided during rather than before trial no Brady violation

State v. Taylor, 344 N.C. 31 (1996)

The prosecution in a noncapital first-degree murder prosecution did not fail to comply with *Brady v. Maryland*, 373 U.S. 83, by giving defendants an officer's notes during trial instead of before trial. Due process and Brady are satisfied by the disclosure of the evidence at trial so long as disclosure is made in time for the defendants to make effective use of the evidence. Here the State provided defendants with the notes four days before the State rested, the State also provided defendants with telephone numbers by which the defendant could contact the witness, and defendants did not ask for a continuance or in any way indicate that they were having trouble locating the witness.

2. Criminal Law § 106 (NCI4th) noncapital murder defendant's prior bad acts statement of State's witness discovery

State v. Ocasio, 344 N.C. 568 (1996)

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's pretrial motion to disclose evidence of prior crimes or bad acts by defendant that the State intended to introduce where a witness for the State testified about his written statement on redirect examination, the statement was read into evidence, and the statement contained an assertion that defendant had burglarized other homes. The State complied with the requirements of N.C.G.S. § 15A-903 by providing defendant with the substance of the statement; nothing in the discovery

statute or N.C.G.S. § 8C-1, Rule 404 (b) obligated the State to provide defendant with the written statement prior to trial.

1. Criminal Law § 115 (NCI4th Rev.) - discovery - psychiatric examination of defendant - preparation of written report for State

State v. East, 345 N.C. 535 (1997)

The trial court did not err by ordering defendant's psychiatrist, who had delivered an oral report of his examination of defendant to defense counsel, to prepare a written report of his findings for the State pursuant to N.C.G.S. § 15A-905(b). There is nothing in the statute that limits the trial court to production of existing written reports, and it would be unacceptable to allow the defense to keep secret critical evidence solely because that evidence was never placed in written form.

2. Evidence and Witnesses § 2675 (NCI4th) - psychiatric examination of defendant - evaluation for trial - not privileged

State v. East, 345 N.C. 535 (1997)

A psychiatrist's report of the results of his examination of defendant was not protected by the psychologist-client privilege of N.C.G.S. § 8-53.3 where the psychiatrist was appointed by the trial court at the request of defense counsel to evaluate defendant's mental status rather than to treat defendant. Moreover, even if the examination results were privileged, the trial court could properly compel their disclosure on the ground that it was necessary to the administration of justice.

8. Criminal Law § 103 (NCI4th Rev.) - discovery - statements by defendant - substance of planned testimony revealed - testimony admissible

State v. East, 345 N.C. 535 (1997)

Where the prosecutor informed defense counsel pursuant to a discovery request that a witness planned to testify that defendant had called a murder victim a "bitch" and had stated that he "hated" the victim, the trial court did not err by permitting the witness to testify that defendant also stated that he wished the victim was dead since the essence of the witness's testimony was that defendant had a hatred for the victim, and the substance of the planned testimony of the witness was conveyed to defense counsel as required by N.C.G.S. § 15A-903(a)(2).

6. Criminal Law § 120 (NCI4th Rev.) - discovery - failure to produce written statement – statement lost - refusal to strike testimony

State v. Fernandez, 346 N.C. 1 (1997)

The trial court did not err by refusing to strike the testimony of a witness in a kidnapping and murder trial as a sanction for the State's failure to

produce the written statement of the witness pursuant to a court order where the record shows that the State diligently attempted to locate the written statement but that it was lost, and the State thus did not "elect" not to comply with the court's order in violation of N.C.G.S. § 16A-903 (f)(4) Moreover, defendant was not prejudiced by the loss of the statement where the witness's testimony related only to her discovery of the crime scene upon arriving at work and seeing the male victim's car heading in a direction away from the scene; notes taken by an officer on the morning of the crimes show that the witness made statements consistent with the trial testimony; and defendant could not have shown that the witness made a prior inconsistent statement.

4. Evidence and Witnesses § 284 (NCI4th) - prior assault by victim - irrelevancy to show fear by defendant

State v. Strickland, 346 N.C. 443 (1997)

Testimony that a murder victim had assaulted his wife a few months prior to the murder and that defendant knew of this assault was not admissible under Rule 404(b) to show that defendant was fearful of the victim at the time of the killing where there was no allegation or evidence that defendant shot the victim in self-defense, defendant's theory of the case was that defendant pointed a gun at the victim to persuade him to leave defendant's home and that the gun accidentally fired, and evidence of the victim's prior assault against his wife was thus not relevant to the killing of the victim. N.C.G.S. § 8C-1, Rule 404(b).

5. Criminal Law § 101 (NCI4th Rev.) - capital murder - defendant's statement at scene - State's good faith failure to discover - statement admitted - no abuse of discretion

State v. Tucker, 347 N.C. 235 (1997)

The trial court did not err in the capital first-degree murder prosecution of a defendant who shot a Kmart security guard who had followed him into a parking lot by denying defendant's renewal of his motion in limine to exclude defendant's statement "Come here, I've got something for you" immediately prior to the shooting. A witness informed the State that he recalled the statement the day before jury selection began on 5 February 1996; the State claims that it informed defense counsel of the recollection within half an hour of learning of it; the witness testified at trial that he first told law enforcement officers of his recollection on 7 December 1995; defendant asked the court to reconsider its ruling; and the witness was again questioned and testified that he first told the State about his recollection on 5 February and that he had gotten confused during his earlier testimony. Defendant made no argument that the State failed to comply with the rules of discovery and contended that good faith by the

State does not relieve it of responsibility for finding facts which can be found with reasonable diligence. However, the choice of sanctions, if any, rests in the discretion of the trial court and defendant failed to make any showing of abuse of discretion.

9. Criminal Law § 115 (NCI4th Rev.) - report of defendant's nontestifying psychologist – no constitutional or statutory right to discovery

State v. Warren, 347 N.C. 309 (1997)

The State had no constitutional or statutory right to discover the report of a clinical psychologist who had examined defendant, at defendant's request, in preparation for his murder trial where defendant did not intend to introduce the report at trial and did not call the psychologist to testify. N.C.G.S. §§ 15A-905(b).

10. Criminal Law § 98 (NCI4th Rev.) - compelling discovery - inherent authority of trial court

State v. Warren, 347 N.C. 309 (1997)

The trial court possesses inherent authority to compel discovery in certain instances in the interest of justice when no statute has placed a limitation on the trial court's authority.

11. Criminal Law § 115 (NCI4th Rev.) - nontestifying psychologist's report - denial of pretrial discovery

State v. Warren, 347 N.C. 309 (1997)

Under the limitation set forth in N.C.G.S. § 15A-906, the trial court properly declined to compel defendant to disclose his non-testifying psychologist's report when the State requested such disclosure prior to trial.

12. Criminal Law § 98 (NCI4th Rev.) - pretrial discovery - limiting statute - discovery at later stage -inherent authority of court

State v. Warren, 347 N.C. 309 (1997)

Even when statutes limit the trial court's authority to compel pretrial discovery, the court may retain inherent authority to compel discovery of the same documents at a later stage of the proceedings.

13. Criminal Law § 115 (NCI4th Rev.) - discovery - report of nontestifying psychologist - use for cross-examining expert

State v. Warren, 347 N.C. 309 (1997)

The trial court had the inherent authority to compel defendant to disclose to the State a nontestifying psychologist's report after defendant admitted

guilt of first-degree murder and after the capital sentencing proceeding was underway where defendant's mental health expert testified that he had studied every mental health report in defendant's medical history, and the State sought to discover the nontestifying psychologist's report for use during its cross-examination of defendant's expert. Assuming that the trial court erred in compelling such discovery, the error was harmless beyond a reasonable doubt where nothing in the record suggests that the State's cross-examination of defendant's expert would not have been equally effective without the use of the report. **Strickler v. Greene**, (17 June 1999). The defendant was convicted of murder and sentenced to death. At trial witness A gave detailed eyewitness testimony about the murder and the defendant's role as one of the perpetrators. The prosecutor failed to disclose exculpatory information contained in police files (although the prosecutor apparently did not know of the information in the files, knowledge is imputed by law to the prosecutor). The information consisted of notes taken by a detective during interviews with witness A and letters written by witness A to the detective. This information cast serious doubt on significant portions of witness A's testimony. The Court first ruled that the defendant had established cause for failing to raise the Brady issue (disclosing materially exculpatory evidence the defense) before the filing of the federal habeas petition because (a) the state had withheld exculpatory evidence; (b) the defendant had reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the state confirmed the defendant's reliance on the open file policy by asserting during state habeas proceedings that the defendant had already received everything known to the government. The Court then ruled, after examining all the evidence introduced at the trial and capital sentencing hearing, that the defendant had failed to meet his burden to show that there was a reasonable probability that the result of the trial or sentencing hearing would have been different if the suppressed evidence had been disclosed to the defense.

3. Criminal Law § 111 (NCI4th Rev.) - assault - photographic line-up - to compel discovery-State's inability to locate

State v. Johnson, 128 N.C. App. 361 (1998)

The trial court did not err in a prosecution for assault and robbery by denying defendant's motion to compel discovery where defendant contended that the State had failed to provide him with a second photographic lineup allegedly presented to a witness at the time she made her identification. The State's effort to learn of the existence of the alleged second lineup complied with the requirements of *Kyles v. Whitely*, 514 U.S. 419.

1. Criminal Law § 112 (NCI4th Rev.) - capital post-conviction review - discovery of State's files -work product included

State v. Bates, 348 N.C. 29 (1998)

The trial court did not err by ordering that a capital defendant have available to him in the post conviction review process the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes or prosecution of defendant, including files regarding the prosecution of codefendants. Although the State contends that it is not required to disclose work product, case law applying the work-product privilege to pretrial discovery and statutes governing pretrial discovery in criminal cases do not control the interpretation or application of N.C.G.S. § 15A-1415 (f), which contains no express provision for withholding work product. The phrase "to the extent allowed by law" allows the State to exclude only specific types of information which the State is elsewhere prohibited by law from disclosing and nothing in existing law prohibits disclosure to a defendant of the State's complete files, including work-product materials.

2. Criminal Law § 98 (NCI4th Rev.) - capital post-conviction review - discovery of all investigative and prosecution files - general discovery rules not applicable

State v. Bates, 348 N.C. 29 (1998)

The only mechanism by which the State may withhold any portion of its complete files on postconviction capital review, apart from information which it is not allowed by law to disclose, is contained within N.C.G.S. § 15A-1415 (f). The general rule governing pretrial discovery is not applicable to that statute because its clear language demands disclosure in post-conviction proceedings. The argument that organizing and producing work product in a capital case would be onerous and time-consuming is unpersuasive, as the effort to remove all work-product materials prior to making files available would be equally time consuming, and allowing the State to unilaterally purge its files of work-product materials would render meaningless the provisions in the statute for in camera review by the court. Although the State contends that disclosure of work product will have a chilling effect on the preparation of capital cases, the clear and unambiguous meaning of the statute contemplates disclosure of the complete files and this argument only challenges the wisdom of the enactment. Finally, the broad and complete discovery required by this statute logically fits into a statutory scheme to expedite the post-conviction process by providing early and full disclosure to counsel for capital defendants so that they may raise all potential claims in a single motion for capital relief.

18. Criminal Law § 115 (NCI4th Rev.) - discovery - written report and notes of defendant's expert

State v. Atkins, 349 N.C. 62 (1998)

The trial court did not err by issuing a discovery order requiring defendant's psychiatric expert to disclose a written report and by ordering the expert, during defendant's competency hearing, to supply to the prosecution "**all of his notes,**" **including those from conversations and interviews with defendant**, where the expert relied on the discovery materials in testifying at defendant's competency hearing and at defendant's capital sentencing proceeding. N.C.G.S. § 15A-905 (b).

9. Constitutional Law § 248 (NCI4th) - discovery - pretrial witness statements - immateriality – no Brady violation

State v. Call, 349 N.C. 382 (1998)

The trial court did not improperly permit prosecutors to withhold pretrial statements made to law officers by two witnesses in violation of Brady v. Maryland, 373 U.S. 83 (1963), where neither statement was material within the purview of Brady. Even if the statements were discoverable, the prosecution satisfied the requirements of Brady by providing the defense with the statements at trial in time for defendant to make effective use of them.

1. Criminal Law § 98 (NCI4th Rev.) - discovery - form of response

State v. Murillo, 349 N.C. 573 (1998)

The trial court did not err in a first-degree murder prosecution by denying defendant's motions for discovery and by failing to sanction the State for its failure to provide discovery. Defendant did not indicate that the prosecution suppressed any evidence, but merely asserted disjointed presentation of the statements. The statements provided complied with the letter and the spirit of the mandate of N.C.G.S. § 15A-903(a)(2), defendant was protected from unfair surprise, and any other evidence of which defendant might have been deprived was not material.

9. Criminal Law - intent to call psychiatrist - discovery of report - psychiatrist not called

State v. Williams, 350 N.C. 1 (1999)

Where counsel for defendant had indicated that they intended to call a psychiatrist to testify at defendant's capital sentencing proceeding at the time the trial court ordered defendant to provide a copy of the psychiatrist's report to the State, the State had a right to discover the report under N.C.G.S. § 15A- 905(b) even though defense counsel ultimately decided not to call the psychiatrist to testify or to introduce his report into evidence.

8. Discovery - crime records of witnesses - provision by State not required

State v. Thomas, 350 N.C. 315 (1999)

Defendant was not denied due process when the trial court denied his motion to require the State to provide him with the criminal records of all of the prosecution witnesses in his first-degree murder trial where the record discloses that defense attorneys successfully elicited testimony from the witnesses on cross-examination about their various criminal convictions, including possession and sale of drugs, breaking and entering, and larceny; and any additional impeaching evidence gleaned from the criminal records of these witnesses would not have created a reasonable doubt of defendant's guilt which did not otherwise exist.

3. Discovery - rape - slides from medical examination - discovered during trial

State v. Jarrell, 133 N.C. App. 264 (1999)

The trial court did not err in a prosecution for the first-degree rape of an eight-year-old child by admitting slides depicting the medical examination of the victim even though the slides had not been provided in response to defendant's discovery request. The State did not know about the slides until defendant elicited the information from a doctor during cross-examination and the court permitted defendant to view the slides during a break.

5. Discovery - written report of expert - not prepared - voir dire prior to testimony

State v. Morganherring, 350 N.C. 701 (1999)

The trial court did not err in a first-degree murder prosecution by ordering that the State could conduct a voir dire of defendant's mental health expert prior to his testimony if the expert failed to provide the State with a report of his findings prior to testifying. Although defendant argued that his expert had not prepared a written report, the court did not order the production of a document that did not exist but ordered that the State would be able to conduct a voir dire if a written report was not produced. Moreover, N.C.G.S. § 15A- 905 has been construed as providing for reciprocity when defendant has obtained discovery under N.C.G.S. § 15A-903.

16. Discovery - pathologist as witness - requirement of written report - provision to defendant -discretion of trial court

State v. Fleming, 350 N.C. 109 (1999)

Although there was no statutory requirement that a written report be prepared by a forensic pathologist who testified for the State in a capital sentencing proceeding, the trial court did not err when, in its discretion, it ordered the State to instruct this witness to prepare a written report,

ordered the State to provide defendant with a copy of that report, and postponed the witness's testimony until the next day so that defendant could adequately prepare. N.C.G.S. § 15A-903(e).

3. Discovery; Criminal Law - duress - diary lost by State - fair trial not denied

State v. Cheek, 351 N.C. 48 (1999)

Defendant was not denied a fair trial on kidnapping and robbery charges because the State lost and could not provide to defendant pursuant to his discovery request the diary of a deceased accomplice which defendant contended supported his defense that he acted under coercion and duress by the accomplice where the record shows that, during the extended course of the crimes against the victim, defendant had several opportunities to report that he had been forced by duress to commit these crimes and to seek help but failed to do so, and the trial court correctly concluded that the diary contained no evidence tending to show that the accomplice exercised active and immediate coercion over defendant at the time they committed any of the crimes against the victim.

7. Discovery - prosecution's failure to disclose exculpatory evidence - no prejudice

State v. Campbell, 133 N.C. App. 531 (1999)

There was no prejudicial error in a prosecution for first-degree burglary and first-degree rape from the State's failure to disclose hair samples taken from the crime scene and photographs of the victim's bathroom window. The district attorney did not have DNA analysis performed on the hair samples, so that their inculpatory or exculpatory nature is unknown and the information that the bathroom window was possibly the point of entry, which contradicts defendant's confession, was in evidence through other testimony. Moreover, defendant's confession and the overwhelming evidence against him vastly diminish the effect of the photographs and hair samples