

NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO.

STATE OF NORTH CAROLINA

vs.

**DEFENDANT'S MOTION FOR
DISCOVERY PURSUANT TO
CONSTITUTIONAL GUARANTEES
(DWI)**

Defendant.

NOW COMES the defendant, above named, by and through counsel, pursuant to G.S. 1§20-381., G.S. § 20.68-6, Article 1, Section 19 and 23 of the North Carolina Constitution, the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, the confrontation and cross-examination clause of the North Carolina Constitution and the United States Constitution, the due process clause of the North Carolina Constitution and the United States Constitution, and North Carolina Rule of Professional Conduct 3.4(d), and 8.4(d) and respectfully requests that the Office of the District Attorney for the above enumerated Judicial District be ordered to provide all relevant information within its possession, custody and control that relates to, supports, contradicts or negates changes against defendant, and to immediately take affirmative steps to preserve all such evidence. In support thereof, the defendant respectfully shows unto the Court as follows:

AFFIRMATIVE OBLIGATION TO DISCOVER

The State, acting by and through the District Attorney for the above enumerated Judicial District, has an affirmative constitutional and ethical duty and obligation as mandated by the Rules of Professional Conduct to exercise reasonable due diligence to make inquiry and learn of any favorable evidence known to others acting on the state's behalf in this case, including all participating law enforcement agencies and law enforcement officers. This constitutional and ethical duty and obligation is not satisfied by what the District Attorney or his designated Assistant District Attorney may know, but rather imposes an affirmative duty and obligation to discover what is known

by all law enforcement agencies and law enforcement officers acting on the state's behalf in this action. *Kyles v. Whitley*, 514 U.S. 419 (1995); *Banks v. Dretke*, 540 U.S. 668 (2004), *Smith v. Cain*, 132 S.Ct. 627 (2012), and *Rule 3.4(d), 3.8(d) of the North Carolina Rules of Professional Conduct*.

1. Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitley*, 514 U.S. 419 (1995), defendant requests the State to divulge any evidence known by the State, and any of its officers and agents, which could be favorable to the defendant in that it could tend to exculpate the defendant, reduce the penalty assessed the defendant, or otherwise mitigate the alleged offense. This evidence can be of either a direct or impeaching nature. Defendant also requests the State to divulge information that could in any way effect the judgement of the Court, to ensure the defendant receives a fair trial with a verdict worthy of confidence, irrespective of the good faith or the bad faith of the prosecution. This material must be presented in a timely fashion to the defendant, no later than the court setting in which motions are heard or a trial is held.

2. Pursuant to *Giles v. Maryland*, 386 U.S. 66 (1967) and *Kyles v. Whitley*, 514 U.S. 419 (1995), defendant moves the Court to order that the State produce any information known to the State, and any of its agents and officers, that reflects on the credibility of any witness to be called by the State. Such information could include, but not be limited to the following:

- any statements made by a witness who is expected to testify including, but not limited to, those that might differ from other statements made by the same witness;
- statements made by a witness who is NOT expected to testify, including, but not limited to, those that differ from the expected testimony of the same witness;

- * Statements from any persons including, but not limited to, those that could tend to conflict with or which do not support the prosecution's theory of guilt in this cause;
- the criminal record of any witness;
- psychiatric or psychological afflictions of a witness;
- examination and/or treatment of the witness for the abuse of alcohol or controlled substances;
- evidence that a witness had consumed alcohol or a controlled substance within a reasonable time before the time of any relevant events which the witness claims to have observed;
- evidence that a witness's ability to observe events generally is restricted or limited (e. g. the witness's vision or hearing is impaired or that from the vantage point his or her claimed sight or hearing would have been compromised);
- evidence that a witness's ability to observe relevant events was restricted or limited at the time of the observation (e.g. it was dark, the witness was far away, etc);
- evidence that a witness's memory is impaired or limited;
- evidence that a witness's cognitive ability is impaired or limited;
- evidence that the witness harbored a bias or prejudice against the defendant; and
- any other information relating to a witness's bias, credibility or ability to observe or recall events.

MOTION FOR DISCOVERY AND PRODUCTION OF BRADY MATERIALS IN ORDER TO

PROCEED UNDER G.S. § 20-38.6

1. Defendant is charged with an implied-consent offense as defined in G.S. § 20-16.2.
2. On July 27, 2006, the North Carolina General Assembly enacted "*The Motor Vehicle Driver Protection Act 2006*". This Act applies to all implied-consent offenses committed on or after December 1, 2006. Particularly, G.S. § 20-38.6 mandates that defendant may move to suppress evidence or dismiss charges only prior to trial, except the defendant may move to dismiss all charges for insufficient evidence at the close of the state's evidence and at the close of all of the evidence without prior notice. Further, G.S. § 20-38.6 provides that the Trial Court may summarily deny a motion to suppress evidence if defendant failed to make the motion pretrial when all material facts were known to defendant.
3. Neither defendant nor defendant's counsel can reasonably and adequately make pre-trial motions as mandated under G.S. § 20-38.6 absent full discovery and the provision of all Brady materials from the state acting by and through the Assistant District Attorney and the charging officer/chemical analyst in this matter.
4. Defendant cannot adequately exercise his/her state and federal constitutional rights of confrontation and cross-examination absent full and complete discovery and provision of all Brady materials from the state acting by and through the District Attorney and the charging officer/chemical analyst of all evidence relevant and necessary to the prosecution and/or defense of this implied-consent offense.
5. Due process of law and fundamental fairness dictate that defendant be provided with all discovery and Brady materials requested below in order to prepare and

file the appropriate motions as mandated by the North Carolina General Assembly in *The Motor Vehicle Driver Protection Act of 2006*.

6. Therefore, in order to proceed under G.S. § 20-38.6, defendant requests the Trial Court to direct that the state acting by and through the Assistant District Attorney and the charging officer/chemical analyst provide the following discovery:

- a. copies of all type-written incident/arrest reports;
- b. copies of all type-written notes of the charging officer/chemical analyst;
- c. copies of all hand-written notes of the charging officer/chemical analyst;
- d. a written summary of the testimony of the charging officer/chemical analyst and any and all witnesses material to the state;
- e. copies of all Alcohol Incident Report Forms (AIR Forms) or Driving While Impaired Report Forms (DWIR Forms);
- f. copies of all in-car video and audio recordings;
- g. copies of all video or audio recordings made outside the vehicle;
- h. copies of all video and audio recordings which document defendant's physical and/or mental functions; whether or not the same directly involve or depict the operation of a motor vehicle;
- i. copies of all video or audio records depicting defendant in any private or public area made by any law enforcement agency or entity, or town, city, county, or university;
- j. copies of all procedures, protocols, directives and/or orders regarding the use and operation of in-car video and audio equipment, collection and presentation of such video/audio, and use of such video/audio identified above;
- k. copies of all notes recording the performance of any field sobriety tests administered to the defendant;
- l. copies of all written summaries recording the performance of any field sobriety test administered to the defendant;
- m. copies of all simulator solution logs and/or preventative maintenance records for any chemical tests administered to the defendant;
- n. copies of all reports, protocols, and records for the collection, sampling, testing and presentation of blood obtained from defendant. This specifically includes all records describing the evidence sample tested, notes on all tests performed, including bench and lab notes, and all preliminary, secondary, confirmation and final lab reports;
- o. all blood samples obtain from defendant pursuant to his consent, to the implied consent procedures for chemical testing, and/or a Search Warrant, and all additional samples of defendant's original blood sample prepared for testing by the chemical analyst;
- p. copies of all dispatch tapes, logs or similar 911 documentation or recordings;
- q. copies of any and all documents, writings, memorandums, or such other evidence of the state's investigation, acting by and through the Assistant

District Attorney and the charging officer/chemical analyst of the implied-consent offense against the defendant; and

- r. copies of State Bureau of Investigation Form 122 (SBI 122) which was completed for the traffic stop in this case which shows the reasons for stop, names, race and sex of occupants of the vehicle, pursuant to G.S. § 114-10.01.
7. Absent the information above, defendant cannot adequately prepare to present his/her case and prepare and file the appropriate motions pre-trial and therefore, will be denied due process of law, the right to adequately cross-examine and confront all witnesses as allowed by the North Carolina Constitution and the United States Constitution.
8. The Trial Court has the inherent authority to order such disclosures in the interests of justice, the search for the truth in this case, and fundamental fairness.
9. Pursuant to Rule 3.4(d), 3.8(d) and 8.4(d) of the North Carolina Rules of Professional Conduct, the State acting by and through the Presiding District Attorney must produce any and all writings, documents, reports, facts or other evidence in whatever form which tends to negate the guilt of defendant or mitigate the offenses, and in connection with the sentencing, disclose to defendant and the Trial Court, all mitigating information which by the exercise of due diligence may become known to the Presiding District Attorney, any law enforcement agency or other person or agency retained by the state. This ethical responsibility and obligation is applicable whether the matter is within the original jurisdiction of the District Court or Superior Court.

NOTICE TO PRESERVE EVIDENCE

9. Pursuant to *California v. Trombetta*, 467 U.S. 479 (1984), *Arizona v. Youngblood*, 488 U.S. 51 (1988), *State v. Cunningham*, 108 N.C. App. 185, 423 S.E. 2d 802(1992), *State v. Jones*, 85 N.C. App. 56, 354 S.E. 2d 251, *disc. rev. denied*,

320 N.C. 173, 358 S.E. 2d 61 (1987), *State v. Taylor*, 362 N.C. 514, 669 S.E. 2d. 239 (2008) the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article 1, Section 19 and 23 of the North Carolina Constitution, defendant hereby gives notice to and requests that the state, acting by and through the Office of the District Attorney for the above enumerated Judicial District to preserve and safeguard the evidence of the type referred to in this motion, including specifically photographic, video, electronic or mechanical recordings of the vehicle allegedly operated by the defendant, and of the defendant prior to, during and subsequent to the alleged operation of any motor vehicle as it relates to defendant's alleged physical and/or mental impairment, and all blood samples.

10. Pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Section 19 and 23 of the North Carolina Constitution, defendant is entitled to examine, inspect, and copy the original of all such evidence and any digital, electronic and/or mechanical recordings. To ensure that defendant can exercise these rights in a meaningful and timely fashion, defendant is entitled to an order from the Trial Court directing the state to preserve and safeguard all such evidence seized and electronic, digital and mechanical recordings conducted pursuant to the investigation by law enforcement agencies and law enforcement officers. The evidence will play a significant role in the preparation and presentation of defendant's defenses and is of such a nature that defendant will be unable to obtain comparable evidence by any other reasonable means unless the same is timely preserved and safeguarded.
11. A concomitant part of this evidence are any notes, memorandums, statements or reports made concurrent therewith.

12. The failure to safeguard the evidence identified in this motion would constitute a substantial violation of defendant's rights under the decided case law of the United States Supreme Court, the Supreme Court of North Carolina, and the North Carolina Court of Appeals, and would constitute a substantial violation of defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Section 19 and 23 of the North Carolina Constitution, and would constitute a substantial violation of defendant's statutory rights under Chapter 20.
13. The preservation and safeguarding of such information would profoundly promote fairness and the protection of defendant's federal and state constitutional rights, would materially assist defendant and defense counsel in preparing to meet the state's proof, confronting and cross-examining his/her accusers, searching for the truth in this case and in being ready to proceed during the cross-examination of the state's witnesses, or defendant's case in chief with evidence which would contradict and/or refute the state's proof.

Pursuant to Brady v. Maryland et seq., the defendant moves the Court to order the prosecutor to affirmatively seek all materials and evidence available in this case from all officers, witnesses, investigators, and from any source, and to review all such materials and determine if any may be exculpatory either directly or indirectly. If such material exists the Court should order it disclosed to the defendant at a time and in a manner so as to allow its use at any motion hearing or trial in this case, and to allow the defendant to review those materials at any reasonable time prior to any hearing in this matter.

3. Defendant respectfully moves the Court to order the prosecution to inquire of its agents, including, but not limited to, law enforcement officers, whether the State intends to call

them as witnesses or not, with regard to the information and evidence that is the subject of this motion. Kyles v. Whitley, 514 U.S. 419 (1995).

4. Defendant moves the Court to order the State to produce any other evidence or information which would guarantee that the defendant enjoys his rights under the Fifth, Sixth and Fourteenth Amendment to a fair trial, due process, assistance of the counsel, and an effective opportunity for cross-examination of witnesses, and any information and evidence which “would tend to exculpate the defendant or reduce the penalty,” Brady v. State of Maryland, 373 U.S. 83, 88 (1963), and
5. Defendant moves the Court to order the State to disclose evidence that is not apparently exculpatory, N.C. Constitution, Article 1, 319, State v. Cunningham, 108 N.C. App. 185 (1992).
6. The defendant moves that the Court suppress any certificate, affidavit, forensic laboratory report or anything resembling the foregoing in any way under the ruling of the United States Supreme Court in Melendez-Diaz, unless the analyst, the person who prepared the report, all persons involved in preparing materials that are the subject of that report, including the person who drew the blood, and the person who wrote the report are available to testify at trial.
7. The defendant moves that the Court suppress any evidence unless the State presents each person involved in the chain of custody, and that the witnesses testify to that chain of custody and as to the handling of the sample.
8. The defendant moves that the Court suppress any analysis or the report thereof unless the court rules that the handling of said sample and the chain of custody is proven to the State’s standards and is without gaps and the sample was tested by a method and with devices approved by the National Laboratory Standards.

9. The Defendant requests a speedy trial, and avers that if this hearing is delayed, he will lose access to evidence, and witnesses and potential testimony helpful to his defense. Delay will violate the Defendant's right to a fair trial and the due process clause in the U.S. and North Carolina Constitution.

WHEREFORE, defendant respectfully prays the Court as follows:

1. If the state fails to voluntarily provide the discovery as requested above, that the Trial Court enter an order directing the state to provide the information requested in a timely manner.
2. If the state fails to comply with the Trial Court's order, that the Trial Court enter an order allowing defendant to make any motion during the course of the trial as may be necessary based upon the facts and evidence that are disclosed or presented during the course of proceedings and the presentation of evidence.
3. That the Trial Court enter an order directing the state by acting by and through the District Attorney for the above enumerated Judicial District, including all law enforcement agencies and law enforcement officers acting on its behalf to preserve, maintain and/or protect the information more particularly described in this motion.
4. Should the state fail to preserve and safeguard the evidence more particularly described above, that the Trial Court enter an order dismissing the charge against the defendant, or in the alternative, enter an order prohibiting the introduction of testimony or evidence as is required by fundamental fairness.
5. The defendant requests that the court enter appropriate orders if the information requested above is not disclosed in an appropriate and timely manner to the

defendant, allowing the defendant a complete argument on sentencing, said orders to include dismissal of the charges or appropriate limitations on the state's ability to present evidence and argue the case to the court.

This the _____ day of _____, 20_____.

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