

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
(BLOOD CASES)**

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 the implied-consent offense issued against defendant, and to immediately take affirmative steps to preserve all such evidence, and in support thereof, respectfully shows unto the Trial 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 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 the 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 such pre-trial motion 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 power 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, and 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, 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, cross-examination and confrontation as allowed to him/her 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) North Carolina Rule 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 request 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 paragraph (8), 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 paragraph (8) above 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, the North Carolina Court of Appeals, 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. Pursuant to Brady v. Maryland et seq., the defendant moves the Court to order the State to provide any recordings be they video, audio, photos, or mixed, that may prove to be exculpatory or that may provide material for cross examination of the States witnesses or

that may inform the defendant of a defense that is available, or in any way may be useful in the defense of the charges pending against the defendant.

4. 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).
5. 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
6. 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).
7. 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, and person who wrote the report are available to testify at trial.
8. 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.
9. 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.

10. 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.
11. The "Forensic Sciences Act" passed by the North Carolina Legislature in 2011 mandates under subsection #4 as follows: "Forensic science professionals of the State Crime Laboratory shall be required to obtain individual certification consistent with international and ISO standards as soon as possible, but no later than June 1, 2012, unless no certification is available. ..."
12. Upon information and belief, a significant number of the State Crime Lab science professionals took certification testing at various times and that a "number" of said persons did not pass the certification testing.
14. For each and every individual employed by the State Crime Lab (formerly SBI Lab) who have conducted any testing and/or conducted any form of a review of testing performed by others in this matter (inclusive of "report" reviews) the Defendant requests:
 - a. The date each individual attempted certification testing;
 - b. The name, address of the person and/or agency that performed/administered the test;
 - c. The name and address of professional association for whom certification was sought (inclusive of the name of the association's contact person for certification/membership).
 - d. The test results (inclusive of the individual's test "score" and the "passing score");
 - e. If the individual did not "pass" or achieve certification upon completion of said testing, the date for which said individual is scheduled to "retake" said test;
 - f. If a science professional has not attempted certification, then for each, documentation of when they are scheduled for said testing and/or if they are not required to be so tested (and thereby certified) documentation explaining the exemption;

- g. If the individual has taken the certification test more than once, then for each attempt the information requested in subsections A-F of this paragraph; and the defendant requests documentation supporting all requested information in Paragraph 46 of this motion.

Under Brady et. seq., the defendant requests that the State provide all documents, in whatever form and whatever form and by whatever name known, whether maintained in paper form or electronically, containing the information listed below in relation to tests done in the hospital laboratory on the defendant's blood to determine alcohol or drug preserve or concentration:

- a. The manufacturer's manuals, protocols, standard operating procedure, instructions, product inserts, expiration dates, or other such documents or information for:
 - I. The laboratory, generally;
 - ii. Drawing blood for purposes of blood alcohol testing;
 - iii. The specific test(s) used in this case;
 - iv. Marking, storing and transporting, and delivering the specimen from the location where it was drawn to the laboratory;
 - v. The preparation and quality control of all solutions, reagents, mixtures, or other substances used as, as part or, or in relation to the internal standards, controls, miztures, or standards in the bath in which the sample in this case was tested;
 - vi. The inspection, maintenance, and repair of the machine used to analyze any specimen in this case;
 - vii. The tubes used to collect any specimen in the instant case;
 - viii. Any and all equipment, chemicals, reagents and solvents used to draw, store, and analyze the specimen in this case.

- b. Any memorandum, statements, logs, reports, spreadsheets, notes, records or other documents in any way indicating, reflecting, or evidencing:
 - I. That the protocol or standard operating procedure for drawing blood was followed in the blood draw at issue in this case;
 - ii. The bodily location from which the blood in this case was drawn;
 - iii. The method used to draw the blood in this case (i.e. direct venipuncture vs. indwelling IV line);
 - iv. The use of any IV solutions and/or medications given to the patient prior to blood being drawn;
 - v. The condition of the sample tube, the condition of the blood within the tube, and any abnormality or other descriptive condition noted at the time the sample was collected or received in the lab;
 - vi. The internal testing, quality assurance, or quality control testing of all solutions, reagents, mixtures, or other substances, used as, as part of, or in relation to internal standards, controls, mixtures, or standards in the bath in which the sample in this case was tested;
 - vii. Proficiency testing for the section of the laboratory testing the sample in this case, whether by outside organization or in-house blind testing, for the

- three year period proceeding the test in this case and since the testing in this case (including but not limited to both pre and post test documentation of target values, mean reported values, values obtained by all persons submitting analysis reports and summaries or reports indicating whether the test was passed or failed, results were satisfactory or unsatisfactory, or testing had to be repeated);
- viii. Proficiency testing for the person who conducted the testing in this case, whether by outside or in-house blind testing, for the three year period proceeding the test in this case and since the testing in this case (including but not limited to both pre and post test documentation of target values, mean reported values, values obtained by all persons submitting analysis results and summaries or reports indicating whether the test was passed or failed, results were satisfactory or unsatisfactory, or testing had to be repeated);
 - ix. Internal or external audits for the three years proceeding the test in this case and since the time of the test in this case of the overall lab and the section of the laboratory performing the test used in the case. Including: machines, components, chemicals, reagents, storage facilities, or anything else used in connection with the testing of the sample, internal standards, controls, mixtures, or standards in the batch in this test;
 - x. The identity of any person involved in the acquisition, transportation, transmittal, storage, analysis, disposal, or other possession or manipulation of the specimen from which any analysis in this case was performed;
 - xi. Lab, technique, or discipline accreditation in effect at the time of the testing in this case;
 - xii. Any communication to, from, or with any accrediting entity regarding accreditation of the lab or any technique or discipline used in relation to the testing in this case for the three years prior to the test in this case and since the test in this case;
 - xiii. Inspection, calibration, maintenance, and repair of the equipment used to analyze any specimen in this case—for the three years prior to the test in this case to the present;
 - xiv. Parts purchased for the machine used to analyze any specimen in this case -for the three years prior to the test in this case to the present;
 - xv. Any recall of the machine, any component of the machine, or any solution used in testing any specimen in the machine—for the three years prior to the test in this case to the present;
 - xvi. Quality control testing of the tubes used to collect any specimen in the instant case;
 - xvii. Information provided by the supplier or manufacturer of the tubes used to collect any specimen in the instant case;
 - xviii. Communications between the laboratory and the medical director for the period of three years prior to the test in this case to the present.
- c. Any written memorandum, notes, statements and reports by the person who drew the defendant's blood, the person who analyzed the defendant's blood, persons in the chain of custody of the defendant's blood, and persons who performed quality

control tests, and repair on the equipment used in the test of the defendant's blood for the period of three years prior to the test in this case to the present concerning the tests on the defendant's blood to run in this case and concerning the equipment used in this case.

- d. Any and all documents identifying the commercial names of the machine and test kit used to prepare and/or analyze the specimen in this case.
- e. Any and all documents reflecting the dates purchase and the expiration dates of all equipment, chemicals, reagents and solvents used to draw, store, and analyze the specimen in this case. Including all externally purchased solutions or reagents used in the batch in which the sample in this case was tested.
- f. Any lab notes, case files, case reports, or bench notes, by whatever names known specific to the test in this case.
- g. All documents contained in the case or testing folder specific to the test performed in this case (including a copy of the case or testing folder itself if it contains any notations or entries).
- h. Any and all documents reflecting communication within the lab or between lab personnel and others outside the lab mentioning acquisition, transportation, transmittal, storage, analysis or disposal of the specimen from which any analysis in this case was performed.
- I. Any and all documents or records pertaining to the quantity of vials or containers of blood originally submitted for analysis in this case.
- j. A copy of the operator's manual for the machine used to analyze the specimen in this case.
- k. The invoice of all services provided to the patient.
- l. The name of the person who performed the analysis of the specimen in this case, required qualifications to perform the analysis, and the analyst's qualifications.
- m. Any documents or records pertaining to the chain of custody of the specimen(s) in this case.
- n. With respect to each person involved in the chain of custody of the specimen(s) in this case, please provide:
 - I. The person's name and times relevant to chain of custody;
 - ii. The person's employment application and/or qualifications;
 - iii. CV or resume;
 - iv. Performance reviews for three years prior to the test in this case to the present;
 - v. Any and all records of any specialized training, certification, or accreditation
 - vi. Records of any disciplinary actions or measures taken.

WHEREFORE, the defendant moves the Court to order that the State provide all information required under applicable statutory and constitutional law, and that the Court enter appropriate sanctions if the State fails to provide all of the required data to the defendant, including dismissing the case or limiting the State in its presentation where appropriate.

This the _____ day of _____, 20_____.

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