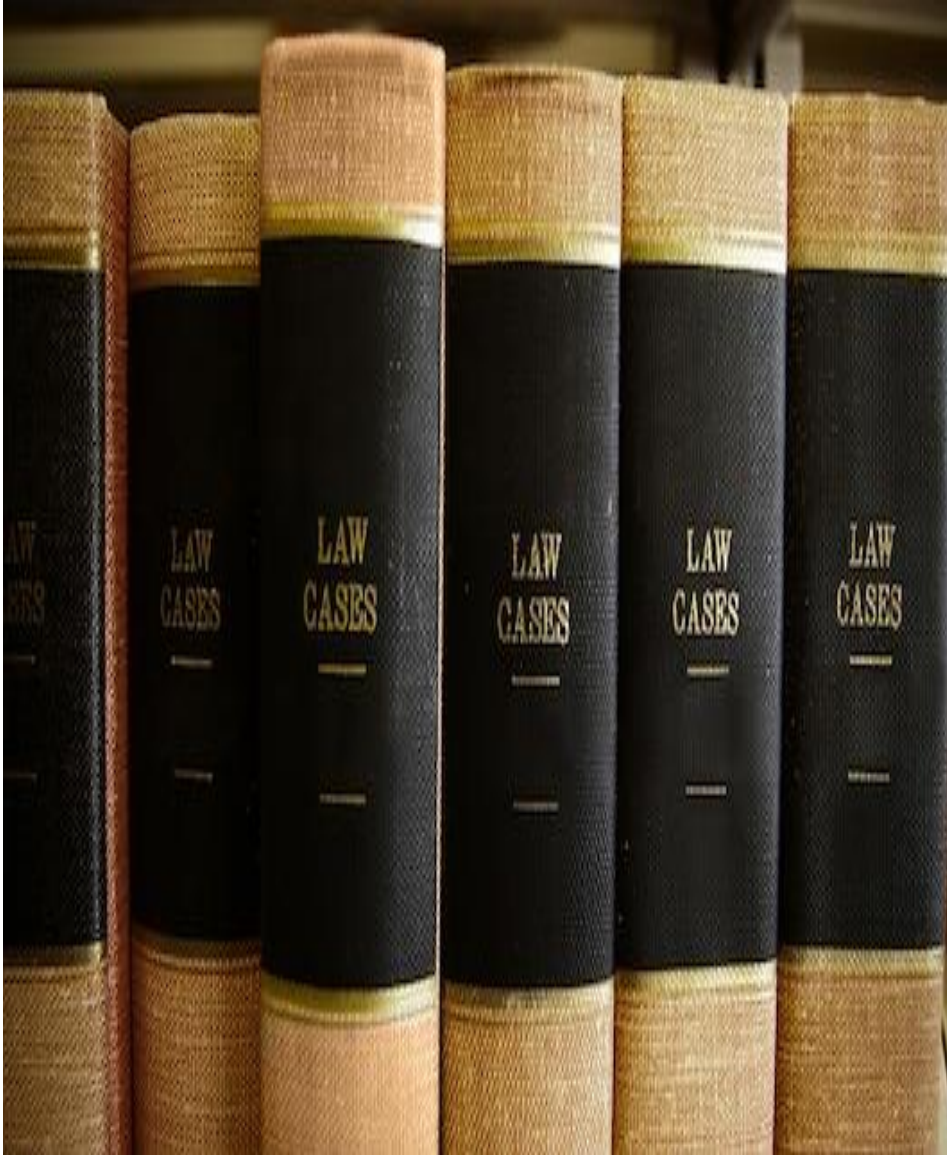


Discovery



What is it?

- Florida Rules of Criminal Procedure 3.220
 - There is not constitutional right to discovery.
 - FRCP sets forth the obligation for the State and the Defense.



It says it in the books...

The purpose of discovery is to avail the defense of evidence known to the State so that convictions will not be obtained by suppression of evidence favorable to the Defendant or by surprise tactics in the courtroom.

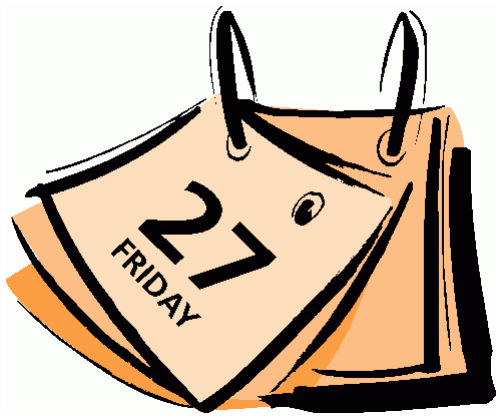
However, not intended to provide Defendants with an opportunity to build their cases during discovery process by creating evidence. *KUNTSMAN v. STATE*, 643 SO.2D 1172 (FLA. 3D DCA 1994)

Discovery Rules were drafted to balance the scales, to require disclosure of material not otherwise available to the defense.

However, not meant to supplant the Defendant's obligation to investigate case and prepare a defense. *MATHESON v. STATE*, 468 So.2D 1011 (Fla. 4th DCA 1985)

How does it work?

- Once an information is filed, a Defendant (pro-se or through counsel) may choose to participate in discovery.
 - Formally – done by filing a notice of discovery
 - Informally – requesting discovery in court or participating in the discovery process (i.e. taking deposition)
 - No deposition in Misdemeanor court but stay tuned!



How does it work?

- Within 15 days after service of the Notice of Discovery, the prosecutor shall serve a written Discovery Exhibit which shall disclose to the defendant and permit the defendant to inspect, copy, test, and/or photograph the following information and material within the state's **possession or control**, except that any property or material that portrays sexual performance by a child or constitutes child pornography may not be copied, photographed, duplicated, or otherwise reproduced so long as the state attorney makes the property or material reasonably available to the defendant or the defendant's attorney.
 - Possession or Control ... This gets tricky
 - Actual Possession – in the State's "file"
 - Constructive Possession – in the possession of an entity that acts on behalf of the state... police reports your officer has not given to you, lab/dna/fingerprint reports by the MDPD Lab or Lab hired by the agency,

What must be turned over?

See Florida Rules of Criminal Procedure 3.220(b)

1. Names & Address of all witness known to have information that may be relevant to the crime charged or to any defense or any similar fact evidence. (No phone numbers or SSN – make sure you redact those)
2. Statements of any person listed as a witness.
(Audio/video/written/within an officers report)
3. Priors for your witnesses.
4. Written or recorded statements made by D or Co-D.
5. Reports or statements of experts. (Lab reports/results)
6. Tangible papers or objects obtained from D that do not D but will be used in trial or hearing and evidence that can be tested for DNA.
- ~~7. Grand Jury minutes that contain D's testimony.~~
8. Any material or information provided by a confidential informant.
(not the person, just the substance - more on that soon.)
9. Brady Evidence.
10. Benefits provided to any witness.
11. Any electronic surveillance, including wiretapping
12. Search and seizure and documents related to search and seizure.
(warrants, consent forms, property receipt)

BREAKDOWN

1. Witnesses...

Who are they & where do you find them ?

- Read your reports. Review reports, statements, property receipts. Do not turn over reports without reading them first and making sure all sensitive information is redacted.
 - Practice tip: Make a copy, redact copy, make a copy of redacted report and send that to defense counsel. You always want to ensure you have a clean copy and a copy of what you send.
- List everyone that appears in your reports. Talk to your witnesses (police officers and civilians) and find out if they know of someone else who was present or has information about the case.
 - It is your responsibility to keep your witnesses information up to date. If your vic/wit tells you they have lost contact, request an Accurint and have your officer help you locate them.

CATEGORIES OF WITNESSES

CATEGORY A – Majority of witnesses will fall into this category.

- Eye witnesses – saw or heard anything
- Alibi witnesses
- Rebuttal witnesses
- Witnesses present when statement made by D or Co-D (list as AS)
- Investigating officers
- Brady witnesses – have material information that tends to negate Def's guilt
- Child Hearsay Witnesses
- Expert witnesses who have not provided a CV and report *or* who will be testifying
- Informant Witnesses (in and out of custody) who offer testimony concerning D's statements



Categories continued...

CATEGORY AS – An A witness who heard or took a statement.

CATEGORY B – Anyone not A or C.

CATEGORY C - Witnesses who perform a MINISTERIAL FUNCTION *or* who you do NOT intend to call at trial and their involvement and knowledge of the case is laid out in police report or statement provided to defense.

- Examples of C witnesses include: transport officer (who did not speak to D), some impounding officers, 911 records custodian.

CATEGORY – E - Expert

2. Statements of Witnesses

- Includes:
 - Written statements made by witness and signed or adopted by witness
 - Statement of any kind made by witness and written or recorded or summarized in a writing or recording
 - Police reports and investigative reports of any kind in preparation or in connection with the case
 - Don't forget to redact!
- Does NOT include:
 - Officers notes from which the reports are compiled of – (beware of Brady)
 - Confidential oral and unrecorded statements made by a witness to a prosecutor (PFCs & PTCs), *unless* the oral statement material alters a prior statement by the witness (recanting).

Priors Contd.

- NCIC/FCIC -
 - Defendant's: Based on Administrative Order NO.00-13, if the State Attorney has FCIC/NCIC records pertaining to the defendant, and, if requested, the State Attorney should provide those NCIC/FCIC records to the Court, to the Public Defender, to court appointed counsel, or to private counsel.
 - However, under no circumstances is this information to be transmitted electronically to anyone (no email, no text), including to or from your staff, and it should never be saved into vCase.
 - If you have in your possession an FCIC/NCIC record of a witness or victim which would have to be turned over in discovery because it is relevant or Brady material, then **you must get a separate court order before turning it over.** (Your chief/AC can send it to you)
 - Here, we should first look to see whether there were any convictions that could be used for impeachment or if there are prior arrests that may be relevant. If you do not see any, then argue to the judge that the defense is not entitled to it because it is not Brady and give it to the judge for an in camera review. Likewise, under no circumstances is this information to be transmitted electronically to anyone, including to or from your staff, and it should never be saved into vCase. In this situation, you always need a separate court order each time you are required to turn these records over to the defense and you can use the draft order that is attached.



4. Defendant's & Co-Defendant's Statements

- Any written or recorded statements made by D or Co-D.
- Listen to them!
 - Make sure you know what's in the statement. You may get more information than you expect.
 - Post-Miranda? Card or Form? Make sure you review and request what you need.



Trial tip: Think twice before you hit 'play'!

If Defendant's statement is self-serving, you may be putting on the defense case for them.


$$\begin{array}{cc} 5 & 6 \\ + & \\ 7 & 8 \end{array}$$

- 5. Reports or Statements of Experts – PROVIDE IT!
- 6. Tangible papers... PROVIDE IT!
- 7. Grand jury.... Don't worry about this right now.
- 8. Confidential Informant...
 - You DO NOT have to disclose the name of the CI unless,
 - CI is testifying in court, or
 - Failure to disclose infringes upon the constitutional right of the D.
 - **Ask before you tell!**
 - If you have a CI, speak to a supervisor before you disclose the name.
 - To compel disclosure, D has the burden of showing that disclosure is necessary to a specific defense. Court conducts in camera hearing to determine whether disclosure is relevant or helpful to D.

9. Brady Evidence



- Under *Brady v. Maryland*, 373 U.S. 83 (1963), the State MUST disclose to D any evidence in its possession or control that is favorable to D,
 - that tends to negate guilt of D, and
 - Impeachment evidence – (material impeachment of any fact or witness)
- Duty applies during guilt portion of trial and sentencing.
- Examples:
 - Recanting statements.
 - Check COP Search for officers open investigation or cases.
 - Co-D statements that negate the evidence.
- *WHAT ABOUT GIGLIO?*
 - Evidence of an understanding or agreement as to a future prosecution would be relevant to his credibility and the jury is entitled to know it. *Giglio v. State*, 405 U.S. 150 (1972)

What's left...

- 10. Benefits provided to witness.. PROVIDE IT!
 - Victim's compensation
- 11. Electronic surveillance... PROVIDE IT!
- 12. Search and Seizure Documents... warrants, consent forms, property receipt, implied consent... PROVIDE IT!





I know what to do, how do I do it?

- Initial discovery package is prepared for you or you shall input the information in HYDRA. Make sure you check all the appropriate boxes. If the item you want to turn over is not listed, click “others” and type it in.
 - If it’s more than 1 (page, cd), make sure you put how many. (i.e. 5 pages)
- FAQ: *E-File v. E-Service*.
 - If you are serving the discovery or amended discovery through HYDRA/e-file that goes to the clerks office and it is only the notice. You MUST E-Serve the documents to defense counsel.



**I didn't have
it...**

I forgot...

**the last ASA
didn't amend!**

What now?

Amend! Amend! Amend!

- Discovery is an ongoing obligation!
 - Whenever you receive a *new* file, make sure discovery has been provided/amended.
 - When you receive a new piece of evidence, amend immediately!
- Discovery Violation:
 - If D claims a discovery violation, the court **MUST** conduct a Richardson hearing.
 - Richardson Inquiries:
 - 1. Was the Violation INADVERTENT or WILLFUL?
 - 2. Was the violation TRIVIAL or SUBSTANTIAL?
 - 3. What is the procedural PREJUDICE?
 - Appropriate remedy?
 - Court looks at the nature of the prejudice to determine appropriate remedy.
 - Ex. Brief continuance/recess to speak to the witness, continuance charged to the noncompliant party, mistrial, exclusion of witness or evidence not disclosed, dismissal (usually a last resort).
- Don't let the judge move on! Beneficial or not to your case, make sure your judge goes through the Richardson Inquiries.

Types of Discovery – What is in our CCC?

- Police Reports
- BWC/Dash Camera
- DUI Paperwork – Sobriety Exercises, Implied Consent
- Miranda Forms
- DV Supplement
- Recorded Statements – video in holding cell or custody room



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Types of Discovery – NOT CCC

- Video surveillance of a private business/location.
- Photographs that are not taken by law enforcement.
- Medical Records.
- Company Reports.
- Fire Rescue Reports.



* Once you or law enforcement receive it, it's in your CCC = PROVIDE IT!

Mental or Physical Examination

- Rule 3.220 (c) – defendant may be required to submit to certain physical examinations. Under this rule, the State may seek an order from the court compelling the D to:
 - Appear in a lineup
 - Speak for ID by a witness
 - Be fingerprinted
 - Pose for photos not involving reenactment
 - Try on article of clothing (glove, etc.)
 - Permit the taking of specimens of material under the D nails
 - Permit the taking of specimens of material under the D nails
 - Permit taking sampled of D blood, hair, other material of the D not involving unreasonable intrusion
 - Provide specimens of D handwriting
 - Submit to a reasonable physical or medical inspection of the D body.

Defense Discovery Obligation

See Florida Rule of Criminal Procedure 3.220 (d)(1)

- Within 15 days of receipt of State's witness list, D must provide written list of defense witnesses they intend to call as witnesses in trial or hearing.
- Reports or Statements by experts made in connection with a particular case.
- Tangible papers or documents D intends to use during trial or hearing



Final Thoughts

- Do not play games.
 - Be Organized.
- Provide Courtesy Copies.
 - When in Doubt Ask.
 - Any Questions?





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