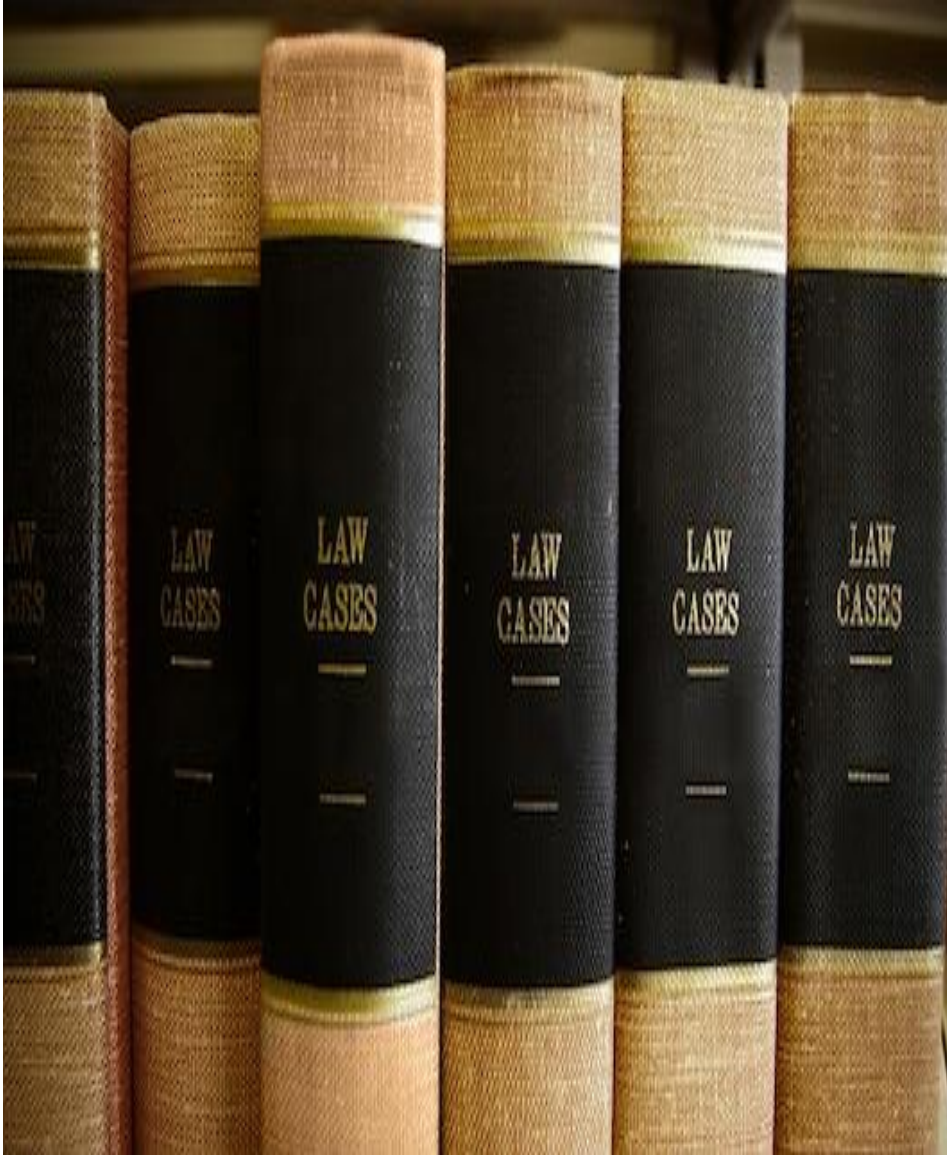


Discovery



## **What is it?**

- Florida Rules of Criminal Procedure 3.220
  - There is no constitutional right to discovery.
  - FRCP sets forth the obligation for the State and the Defense.



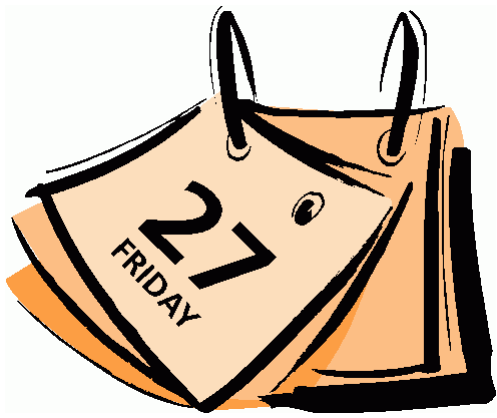
It says it in the books...

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?

- 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 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 can include items in your file or in the possession of an entity that acts on behalf of the state, i.e. the police agency.

# What must be turned over?

See Florida Rules of Criminal Procedure 3.220(b)(1)

- (A) Witness list – Names & Addresses of all witnesses 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!)
- (B) Any statements by witnesses
- (C) Any statements made by the Defendant
- (D) Any statements made by a Co-Defendant
- (E) Grand jury minutes that contain the Defendant's testimony
- (F) Tangible papers or objects obtained from the Defendant
- (G) Any material or information provided by a confidential informant
  - \*No requirement to disclose a CI unless he/she will be used in trial or failure to disclose will violate the Defendant's rights
- (H) Any electronic surveillance, including wiretapping, of the premises of the defendant or of conversations to which the defendant was a party and any documents relating to such surveillance
- (I) Documents related to any search and seizure (Search Warrants, etc.)
- (J) Reports or statements by Experts
- (K) Any tangible papers or objects that we intend to use and that were not obtained from or that did not belong to the Defendant
- (L) Any tangible paper, objects, or substances in the possession of law enforcement that could be tested for DNA;
- (M) Any material or information provided by an informant witness

**BREAKDOWN**

## 3.220(b)(1)(A) 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.
- List everyone that appears in your reports. Talk to your witnesses (police officers and civilians) and find out if they know someone else who was present or has information about the case.
  - It is your responsibility to keep the contact information of witnesses up to date. If your vic/wit tells you they have lost contact, request an Accurint and have your officer help you locate them.
- This list is ongoing and will likely continue to grow as you continue investigating your case.

# CATEGORIES OF WITNESSES

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

- Eyewitnesses – 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





# Categories continued...

**CATEGORY B** – Anyone not listed as an 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), 911 records custodian.

**CATEGORY – E - Expert**

## 3.220(b)(1)(B) 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
- Does NOT include:
  - Officer 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.

# 3.220(b)(1)(C)-(D)

## 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.

# BRADY EVIDENCE

- Under *Brady v. Maryland*, 373 U.S. 83 (1963), and Rule 3.220 (b)(4), the State MUST disclose any material information in its possession or control that is favorable to the Defense,
  - that tends to negate guilt of the Defendant, and
  - *Impeachment evidence – (material impeachment of any fact or witness)*
- A Defendant's right to discovery of exculpatory evidence is constitutional in nature, grounded in the Due Process Clauses of the 5<sup>th</sup> and 14<sup>th</sup> amendments. Therefore, a Defendant has the right to *Brady* material independent of the terms of 3.220 – meaning regardless of whether they have chosen to participate in the discovery process.
- THIS IS AN ONGOING OBLIGATION! Duty applies during guilt portion of trial and sentencing.
- Examples include recanting statements, officers with pending and open investigations (COP Search), statements by a Co-D that may negate D's guilt; but can also be GPS records and DNA reports. Review your evidence thoroughly.

# Applying *Brady*

- Evidence tending to show an attack on credibility of the witness to be called or evidence to be presented can be *Brady* evidence if it meets the materiality standard. US V. Agurs, 427 US 97 (1976)
  - State has to turn over information that is so significant to the case it puts it in an entirely different light and raises about any verdict without its disclosure
  - Mere possibility that item of undisclosed information might have aided defense or might have affected outcome of trial, does not establish materiality
- When in doubt, GIVE IT OUT! Send witness prior records, any inconsistent statements!

# “The prosecutor alone...

bears the responsibility of gauging the likely effect of all favorable evidence and makes disclosure when the point of reasonable probability is reached, even if the police have failed to make the favorable evidence known to the prosecutor.” *Frierson v. State*, 677 So.2d 381 (4<sup>th</sup> DCA 1996)

IT IS YOUR DUTY AND YOUR DUTY ALONE! Reminder that this duty is ongoing – before, during or after trial.

BUT...

Knowledge in the possession of law enforcement is **imputed to the prosecution**. *Antone v. State*, 355 So.2d 777 (Fla. 1978)

So again, this is YOUR duty!



# *GIGLIO* Evidence

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)

- For instance, in *Giglio*, Defendant was convicted of passing forged checks and while appeal was pending defense discovered evidence that the Government failed to disclose alleged promise made to its key witness that he would not be prosecuted if he testified for the Government.



# 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 clerk’s 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 Violations
  - If Defense 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
- 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 Defendant 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 Defendant's nails
  - Permit the taking of specimens of material under the Defendant's nails
  - Permit taking sampled of D blood, hair, other material of the Defendant's not involving unreasonable intrusion
  - Provide specimens of Defendant's handwriting
  - Submit to a reasonable physical or medical inspection of the Defendant's body.

# Defense Motions to Compel Discovery

- Rule 3.220(f)
  - On a showing of materiality the court may require such other discovery to the parties as justice may require.

The Defendant must first determine materiality of the information sought that it is reasonably calculated to lead to admissible evidence. It is their burden.



# 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





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