STATE OF NORTH CAROLINA COUNTY OF ROBESON		IN THI	E GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
	2018 SEP -	5 P 4: 50	93 CRS 15291-15293
STATE OF NORTH CAROLINA	OBESON	CO., C.S.C	*
v.	BY)		MOTION FOR
DANIEL ANDRE GREEN, Defendant.)))	The second secon	POSTCONVICTION DISCOVERY

NOW COMES the Defendant, Daniel Andre Green, by and through undersigned counsel, and hereby moves this Court for an order granting discovery pursuant to N.C. Gen. Stat. § 15A-1415(f). In support of this motion, the Defendant shows the Court the following:

Procedural History and Factual Background

- The procedural history and factual background as laid out in Daniel Green's (Mr. Green)
 Motion for Appropriate Relief and First Amended Motion for Appropriate Relief is
 incorporated hereto.
- 2. Although considerable pre-trial discovery has been provided by the State, the defense has not received discovery from any information received or any investigative efforts conducted postconviction by or at the direction of the North Carolina Department of Justice (AG's Office) or the District Attorney's Office.
 - a. As described below, this includes information provided to them by witnesses and outside parties, regardless of whether the information was specifically sought by the State.
- 3. On August 10, 2018, the undersigned sent an email to the AG's Office requesting clarification as to whether it had provided "all documents obtained or generated by the Attorney General's Office that would be discoverable had they been obtained or generated by a district attorney's office representing the State."
- 4. In a letter dated August 15, 2018, the AG's Office replied that "while N.C. Gen. Stat. § 15A-1415(f) applies to this case, the statute does not apply to any files at the Attorney General's Office."

The Supreme Court of North Carolina and N.C. Gen. Stat. § 15A-1415(f) Impose Upon the State the Duty to Disclose Discovery Material When Operating in an Investigatory or Prosecutorial Capacity During Postconviction Proceedings.

- 5. When a defendant "is represented by counsel in postconviction proceedings in superior court," the State "shall make available to the defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant." N.C. Gen. Stat. § 15A-1415(f).
- 6. The Supreme Court of North Carolina has stated that § 15A-1415(f) "limits the files available to defendants in a postconviction discovery phase to those that relate specifically to the investigation of the crimes committed or to the prosecution of the defendant." *State v. Sexton*, 352 N.C. 336, 341-42, 532 S.E.2d 179, 182 (2000).
- 7. In *Sexton*, the Supreme Court held that the AG's Office is immune from the discovery requirements of § 15A-1415(f) "[b]ecause the Attorney General does not generally 'prosecute' but instead *only* defends the State's conviction when on appeal." *Sexton*, 352 N.C. at 342, 532 S.E.2d at 182 (emphasis added). The Attorney General thus "has no voice in the preparation of the record on appeal but must take it as he finds it." *Id.* (quoting *State v. Hickman*, 2 N.C. App 627, 630, 163 S.E.2d 632, 633 (1968)).
- 8. However, the Court also outlined an exception to the AG's Office's immunity from § 15A-1415(f) when it stated:

The possible exception to this rule would exist when the Special Prosecutions Division of the Attorney General's Office did, in fact, prosecute or participate in the actual prosecution. This occurs only when attorneys assigned to that division are "requested to [assist in the prosecution] by a district attorney and the Attorney General approves."

Sexton, 352 N.C. at 342, 532 S.E.2d at 182 (quoting N.C. Gen. Stat. § 114-11.6).

- 9. When read in context, the analysis by the Court in *Sexton* shows that it intended the limitation of the AG's Office's responsibility to extend only when the AG's Office was acting in its traditional role of defending a case on appeal.
- 10. It is important to note that *Sexton* was decided prior to the enactment of open file pre-trial discovery in 2004 and complete postconviction discovery in 2009.
 - a. It was also decided prior to the AG's Office's policy in recent years of providing district attorney offices with the "special expertise" of the Capital Litigation and Federal

¹ Wording used by the AG's Office in response to inquiry by the undersigned regarding the contradiction between AG Office resources being used to assist district attorneys in their funded responsibilities and the highly publicized claim that the AG's Office has resource issues because of funding cuts.

Habeas Section attorneys to assist in non-capital postconviction proceedings in cases where defendants have raised credible claims of innocence.

In the Current Proceedings, the AG's Office is Operating in an Investigatory and Prosecutorial Capacity and is Subject to the Duty to Disclose Under § 15A-1415(f).

- 11. In April 2015, the Robeson County District Attorney's Office requested that the AG's Office take over the responsibilities traditionally entrusted to the DA's Office and represent the State in the investigation and litigation of Mr. Green's postconviction claims. The AG's Office accepted that request and has represented the State in Mr. Green's postconviction proceedings since April 2015.
 - a. Although the AG's Office has represented the State in this proceeding for the past three years, Mr. Green's MAR has been pending since 2000 and he has not received any discovery related to postconviction investigation of his case from any agent of the State, including the District Attorney, as required by law.
- 12. Defending a conviction in this setting requires investigation into the credibility and relevance of new evidence. Through its representation of the State in these proceedings, the AG's Office is now outside of the confines outlined in *Sexton* and, thus, the full duty to disclose postconviction discovery pursuant to § 15A-1415(f) applies.
- 13. During the last three years, the defense has received numerous communications pertaining to the case from outside sources via phone, mail, and email. The defense has also been in the Lumberton area conducting investigation. It is unreasonable to think that the AG's Office has not received relevant correspondence or taken any investigative steps during that time, either through the SBI, local law enforcement, or other investigative resources.
 - a. During a recent meeting between the parties, when undersigned indicated that the defense would certainly accept opposing counsel's word as an officer of the court if no such discovery existed, none of the three attorneys employed by the AG's Office indicated that was the case.
- 14. Mr. Green has filed a Motion for Appropriate Relief, an Amended Motion for Appropriate Relief, and four Supplements which allege, among other things, that new exculpatory evidence exists which establishes his innocence.
- 15. Not only is it contrary to the law for the AG's Office to take the position that its office is not required to provide discovery, the position is contrary to the interest of justice. It defies logic, and the legislative intent, for the Attorney General to contend, or allow, the obligations of a District Attorney's Office to be avoided through transfer of a case to the AG's Office.
- 16. The AG's Office has adopted the position that it is not required to comply with discovery laws in other innocence cases, including Robert Bragg and Johnny Small, clients of the

undersigned.² This pattern of conduct reflects a continual attempt to circumvent the spirit of open discovery embodied in § 15A-1415(f).

- a. It is notable that the division of the AG's Office that has been representing the State on non-capital MARS appears to be limited to claims of innocence.
- b. It is also notable that the AG's Office has a record of not fully understanding its obligations under *Brady*.³
- c. Nor does it seem to appreciate that evidence cannot fairly be evaluated on its face and the defense is in a better position to determine what evidence, with a little investigation, can lead to important exculpatory evidence. It is for exactly this reason that open file discovery laws were passed in North Carolina and other states around the country.
- d. As the AG's Office also represents the State in civil suits brought by exonerated men and women in North Carolina for their wrongful incarceration, there appears to be a conflict of interest which may be impacting its interpretation of the law. The AG's Office has a vested interest in opposing innocence claims outright and limiting access to discovery, rather than attempting to objectively consider the credibility of claims as a minister of justice in our court system.
- 17. Because the AG's Office has declined to disclose documents to which Mr. Green is entitled under § 15A-1415(f) and the full holding in *Sexton*, Mr. Green moves this Court to order that counsel for the State provide counsel for Mr. Green with copies of all notes, reports, and correspondence regarding any investigation conducted by the Robeson County District Attorney's Office, the Robeson County Sheriff's Office, the State Bureau of Investigation, the North Carolina Department of Justice, and/or any other State or local agency, that have not already been provided to Mr. Green.
 - a. Although this request is premised upon the assumption that pre-trial discovery has been fully provided, any documents pre-trial or postconviction that have not been provided are requested at this time.
 - b. Should the AG's Office and District Attorney's Office assert that no such discovery exists, Mr. Green requests that a representative from each office sign an affidavit to that effect.
- 18. As Mr. Green has a deadline to file an amendment to his MAR by October 2, 2018, and has been diligently working to meet that deadline, it is requested that State be given fifteen days to provide the defense with the postconviction discovery or affidavits.

² Johnny Small's conviction was vacated in 2016. Postconviction motions are currently pending in Robert Bragg's case.

³ See NC State Bar v. Hoke and Graves, Order of Discipline (Dec. 2, 2004), http://www.ncbar.gov/orders/Volume%206/06019087.pdf; Chris Swecker and Michael Wolf, An Independent Review of the SBI Forensic Laboratory (2010), http://www.ncids.com/forensic/labs/Swecker_Report.pdf.

19. This motion for postconviction discovery is based upon statutory law, common sense interpretation of case law, and the interest of justice.

WHERFORE, the Defendant respectfully requests that this Court grant this Motion for Postconviction Discovery pursuant to N.C. Gen. Stat. § 15Å-1415(f) and *State v. Sexton*, order the above referenced discovery to be provided within fifteen days of the date of that Order, and order that the Clerk of Superior Court mail a filed true copy of the Court's Order to the following:

Mr. Jonathan Babb and Ms. Danielle Marquis Elder Special Deputy Attorneys General NC Department of Justice P.O. Box 629 Raleigh, NC 27602 Ms. Christine Mumma and Ms. Cheryl Sullivan N.C. Center on Actual Innocence P.O. Box 52446 Shannon Plaza Station Durham, NC 27717

Respectfully submitted, this the 31st day of August, 2018.

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Certificate of Service

I hereby certify that, via First Class Mail of the United States Postal Service, I caused to be served a copy of the above **Motion for Postconviction Discovery** upon the following:

Mr. Jonathan Babb and Ms. Danielle Marquis Elder Special Deputy Attorneys General NC Department of Justice P.O. Box 629 Raleigh, NC 27602

This the 31st day of August, 2018.

Christine C. Mumma

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