

FILED

APR 15 2016

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
5TH CIRCUIT CLERK OF COURT

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

06 CRI. 16-383

Plaintiff,

vs.

PROTECTIVE ORDER
REGARDING DISCOVERY

JOOP BOLLEN,

Defendant.

Upon the foregoing Stipulation and for good cause shown, it is hereby
ORDERED that any discovery materials, including but not limited to
statements and summaries of witnesses furnished by the prosecution to the
defense, shall not be used by the defendant or the defendant's attorney for any
purpose other than in direct relationship to this case. Without the Court's
permission, defense counsel and the defendant shall not photocopy the
materials or provide them to any third party, except to make copies for use of
defense counsel, an investigator, or expert witness. No further dissemination
of discovery material shall be made. Any and all copies of discovery materials
shall be returned to defense counsel at the completion of the case so that they
can be destroyed by defense counsel. Defense counsel shall otherwise keep the
items furnished in the defense counsel's possession, and the materials shall
not be given to anyone else without the Court's permission. Defense counsel
may allow the Defendant to read the discovery materials, but only in the

presence of defense counsel, the defense investigator, or a defense expert. It is further

ORDERED that all discovery materials not previously destroyed shall be returned to attorneys of the State of South Dakota immediately upon final disposition of the case.

BY THE COURT:



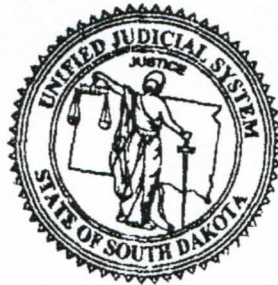
Magistrate/Circuit Court Judge

Attest:

Maria R. Zashow, Clerk

Beth Schmidt

Deputy Clerk



STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	: ss.	
COUNTY OF BROWN)	FIFTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,)	06 Cri 16-383
Plaintiff,)	
)	
v.)	RESPONSE TO DEFENDANT'S
)	REQUEST FOR DISCOVERY
JOOP BOLLEN,)	
)	
Defendant.)	

The State of South Dakota, by and through the undersigned Assistant Attorney General, files the State's Response to Defendant's Request for Discovery:

1. SDCL Chapter 23A-13 (Federal Rule 16) governs the disclosure of evidence by the State to a defendant in a criminal case. If a timely request is made by a defendant, the State shall, in this case, provide Defendant with:

a. Statements of Defendants:

- (1) Any relevant written or recorded statements or confessions made by Defendant;
- (2) Oral statements made by Defendant in response to interrogation to State agents either before or after his arrest.

b. Books, papers, documents, photographs, tangible objects, buildings, or places within the custody or control of the State which are:

- (1) Material to the preparation of Defendant's defense or;

- (2) Are intended for use as evidence in the State's case in chief at trial; or
 - (3) Are obtained from or belong to Defendant.
- c. Copies of Defendant's prior criminal record, if any, as is within the possession of the State.

2. Additionally, the State is required and will provide a Defendant with *Brady* material, which is evidence favorable to the accused, either on the question of innocence or punishment. *See Brady v. Maryland*, 373 U.S. 83 (1963).

3. SDCL 23A-13-5 (Rule 16(a)(2)) specifically excludes from pretrial discovery:

Reports, memoranda, or other internal prosecution documents made by the prosecuting attorney or other employees of law enforcement agencies in connection with the investigation or prosecution of this case, or statements made by the prosecution witnesses or prospective prosecution witnesses except as provided in SDCL 23A-13-7 to 23A-13-10.

4. SDCL Chapter 23A-13 (Rule 16) does not mandate disclosure of a list with the names and addresses of prosecution witnesses. *See United States v. Dark*, 597 F.2d 1097 (6th Cir. 1979), *cert. denied*, 444 U.S. 927 (1979); *United States v. Dreitzler*, 577 F.2d 539, 553 (9th Cir. 1978), *cert. denied*, 440 U.S. 921 (1979); *United States v. Little*, 562 F.2d 578 (8th Cir. 1978).

Attempts at the federal level to amend Rule 16 to compel the disclosure of the names of prospective witnesses, by either side, have been rejected by

Congress. See H.R. Conf. Rep. No. 414, 94th Cong. 1st Sess. 12 (1975). The Conference Report accompanying the 1975 Amendment to the Rules of Criminal Procedure notes:

A majority of the conferees believe that it is not in the interest of the effective administration of criminal justice to require that the Government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the information of this policy.

Notwithstanding the above, the State is willing, 7 days before trial, to provide Defendant with a list of the State's witnesses if Defendant is willing to reciprocate and provide a list of Defendant's witnesses to the Court and prosecution at the same time. This reciprocal discovery will certainly be helpful to the Court and parties to ascertain during voir dire, if any of the witnesses are related to, or know, any of the prospective jurors.

In responding to Defendant's specific requests in his numbered paragraphs of his Motion, the State would respond as follows:

1. Statements of the Defendant:

The State will provide as discovery.

2. Oral statement by Defendant:

The State will provide as discovery.

3. Transcript of Defendant's testimony before the Grand Jury:

The Defendant has not testified before the Grand Jury.

4. Defendant's criminal record:

If within the State's possession, the State will provide as discovery.

5. Books, papers, document, photographs and tangible objects:

See paragraph 1(b.) of State's Response. If the tangible objects cannot be copied, the State will allow Defendant to inspect or review upon a mutually agreeable time prior to trial.

6. Reports of scientific test and mental examinations:

The State will provide as discovery.

7. Grand Jury transcript:

The State will not oppose Defendant's request for an order for the Grand Jury transcript under the same conditions listed in the Protective Order Regarding Discovery Filed herein.

8. Written statements made by potential witnesses:

The State will provide as discovery any written statements of any actual witnesses the State intends to call at trial.

9. Recorded statements of potential witnesses:

The State will provide as discovery a copy any stenographic, mechanical, electrical, or other recording, or transcripts of verbatim recitals of oral statements made by any *actual* witness the State intends to call at trial.

10. Witness statements and law enforcement investigation reports:

Although not required to be disclosed until the witness testifies on direct examination, the State will provide Defendant witness statements and law enforcement reports as discovery.

11. Brady material:

Pursuant to *Brady*, the State is obligated to turn over evidence that is both favorable to the accused and material to Defendant's guilt or punishment. According to the Supreme Court, "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

United States v. Bagley, 473 U.S. 667, 682 (1985); *see also* *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). The Defendant simply does not have the unfettered right to obtain everything in the possession of the prosecuting attorney. *See State v. Sahlie*, 245 N.W.2d 476 (S.D. 1976); *United States v. Argus*, 427 U.S. 97 (S.D. 1976); *United States v. Piatt*, 679 F.2d 1228 (8th Cir. 1982); *United States v. Smith*, 552 F.2d 257 (8th Cir. 1977). As the South Dakota Supreme Court said in *State v. Muetze*, 368 N.W.2d 575 (1985), "*Brady* . . . is not a fishing license; it does not permit defense counsel to ransack prosecution files and law enforcement agencies' filing cabinets." (citations omitted).

The State will provide as discovery all witness statements and investigation reports as outlined above. Defendant will have to make the determination as to what is favorable to him and what is impeaching information.

12. Photographs:

The State will provide as discovery all photographs taken in connection with the charges against the Defendant.

13. Criminal records of any potential witnesses:

The Defendant has provided no basis for this discovery request.

Clearly, the federal case of *Brady v. Maryland* does not require the State to provide prosecution witness criminal records as discovery or the Eighth Circuit Court of Appeals, in *United States v. Taylor*, 542 F.2d 1023 (1976), would not have held that such requests are inappropriate. In discussing this issue in *Taylor*, the Eighth Circuit Court of Appeals stated:

This contention is without merit since this court has ruled that the criminal records of such witnesses are not discoverable. *Hemphill v. United States*, 392 F.2d 45, 48 (8th Cir.), *cert. denied*, 393 U.S. 877, 89 S.Ct. 176, 21 L.Ed.2d 149 (1968). The legislative history accompanying the recently amended Federal Rules of Criminal Procedure indicates that the Hemphill rule is intact. The House of Representatives, in considering the proposed amendments to the Federal Rules of Criminal Procedure, approved proposed Rule 16(a)(1)(E) which would have entitled defendants to discover all criminal convictions of the Government witnesses. H. Rep. No. 94-247, 94th

Cong., 1st Sess. 15 (1975), reprinted in 2 U.S. Code Cong. & Admin. News, p. 687 (1975). However, the Senate rejected this provision and the House and Senate conferees adopted the Senate position and deleted proposed Rule 16(a)(1)(E). H.Conf.Rep. No. 94-414, 94th Cong., 1st Sess. 12 (1975), reprinted in 2 U.S. Code Cong. & Admin. News, p. 716 (1975).

United States v. Taylor, id. at 1026. Therefore, based on the above, the State will not provide as discovery of any criminal records of the State's witnesses.

14. Names, addresses and telephones numbers of all persons with knowledge whatsoever concerning the charges against the Defendant:

The Defendant has provided no basis for this discovery request and is overly broad.

15. Names, addresses and telephones numbers of all persons interviewed by law enforcement:

The State will provide as discovery all witness statements and investigation reports as outlined above. The Defendant has provide no basis for his request for addresses and telephones numbers for all persons interviewed by law enforcement.

16. A list of all physical evidence:

As outlined above, the State will provide all physical evidence or tangible objects in the possession of the State. The State is under no obligation to provide a list of the same.

17. Names, addresses and curriculum vitae of experts:

The State will provide the names and curriculum vitae of its experts. The State is under no obligation to provide the addresses of the same.

18. Names, addresses and telephone number of all witnesses at the trial:

See paragraph 4 of the State's Response to Defendant's Discovery Motion.


19. Copies of all press releases:

The Defendant has provided no basis for this discovery request.

In sum, the State is willing to provide all statutory discovery materials as well as any *Brady* materials to the attorney for the above named Defendant.

Dated this 15th day of April, 2016.

Respectfully submitted,


Brent K. Kempema
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 15, 2016, a true and correct copy of the Response to Defendant's Request for Discovery in the matter of *State of South Dakota v. Joop Bollen* was served via Odyssey File & Serve upon Reed Rasmussen at rrasmussen@sbslaw.net.



Brent K. Kempema
Assistant Attorney General

OFFICIAL RECEIPT
CUSTER COUNTY CLERK OF COURT
420 MT. RUSHMORE ROAD, SUITE 6
CUSTER, SD 57730
605-673-4816

Payor
COUNTER

Receipt No.
16-08222

Transaction Date
04/26/2016

Description	Amount Paid
Miscellaneous Payment	
Copies - \$.20 per page	2.20
SUBTOTAL	2.20

PAYMENT TOTAL **2.20**

Cash Tendered	2.20
Total Tendered	2.20
Change	0.00

04/26/2016
10:16 AM

Cashier
Station JSCU1TILL1

Audit
15735616

OFFICIAL RECEIPT