

*Creative Litigation:*  
Defending the Run-of-the-Mill Case

Tim Curry, National Juvenile Defender Center

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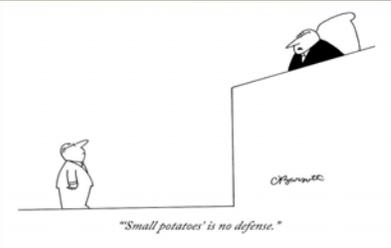
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What are the cases that are the hardest to defend?



*"Small potatoes" is no defense.*

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Common Drug Case Scenarios



- "Dropsy" Case
- Undercover Buy-Bust
- Drug Raid (warrant)
- Observation Post
- Anonymous Tip
- Informant Cases
- Simple Possession
- Drug Sniff Dog
- Constructive Possession
- Distribution
- Possession w/ Intent to Distribute
- Traffic Stop
- Locker Search
- Ongoing Conspiracy

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## Discovery

### MS Rules of Youth Court Practice, Rule 15

(a) Discovery:

- (1) Request for Discovery - any party may make a *written* request for discovery.
- (2) Application for Discovery Order - if request is denied, party may file for a court order directing disclosure.
  - Must file no later than 7 days prior to adjudicatory hearing
  - Must certify opposing party has refused the request

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## Discovery

### MS Rules of Youth Court Practice, Rule 15

(a) Discovery:

- (2) Court may refuse discovery if granting it:
  - jeopardize the safety of a party, witness, or confidential informant,
  - result in the production of perjured testimony or evidence,
  - endanger the existence of physical evidence,
  - violate a privileged communication,
  - disclose confidential information, or
  - impede the criminal prosecution of a minor as an adult or of an adult charged with an offense arising from the same transaction or occurrence




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## Discovery

### NEW (2017) Criminal Rule 17.2

Disclosure by the Prosecution:

- material that "is in the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecution:
  - (4) Any reports, statements, or opinions of experts (written, recorded or otherwise preserved) made in connection with the particular case and the substance of any oral statement made by any such expert;

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### Warren v. State, 187 So.3d 616 (MS 2016)

#### You MUST Ask for It!

In *Warren*:

- The "curriculum vitae and the crime lab's certification and protocols were not within the scope of Warren's discovery requests or required "discovery under [adult rule] Rule 9.04(A).
- It it's not *Brady* evidence, it must be part of the discovery request or you're not entitled to it under the rules.

\* Don't let the state misuse this case. \*

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### Discovery

#### Standard Drug Reports

- Police Drug Evidence Form
- Drug Analysis Report
- Officer Notes
- Police Logs (arrest and evidence)
- Evidence Bag (but notes or forms)
- Arrest Reports (all you know of)
- Pretrial access to drugs/money
- Radio/911 Recordings




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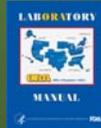
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### Discovery

#### Requests Related to Drug Lab

- Protocols for Testing - SOP/Employee manual for each method of testing used
- Chain of Custody Records




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**Discovery**



**Quality Assurance Documentation**

- Quality Assurance Manuals
- Schedule of internal and external audits during relevant time of testing
- Standard Operating Procedures (SOPs)
- Results of contamination control tests done in this case (corrective action in this case?)
- Internal/External proficiency testing for the chemist(s) who performed test (Different from CV)

State v. Blenden, 748 So.2d 77 (MS 1999)

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**Discovery**



**Lab Accreditation?**

- American National Standards Institute (ANSI)
- ANSI National Accreditation Board (ANAB)

<http://search.anab.org>

Gulf Coast Regional Laboratory - MS Department of Public Safety

ANAB Certified in:	NOT Certified in:
<ul style="list-style-type: none"> <li>• Biology</li> <li>• Document Examination</li> <li>• Firearms and Toolmarks</li> <li>• Footwear and Tire</li> <li>• Friction Ridge</li> <li>• Seized Drugs</li> <li>• Toxicology</li> </ul>	<ul style="list-style-type: none"> <li>• Gunshot Residue</li> <li>• Materials (Trace)</li> </ul>

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**Discovery**



Discipline: Seized Drugs			
Component/Parameter or Characteristic Tested	Test Method	Items Tested	Key Equipment or Technology
Qualitative Determination	Flexible Scope <sup>1</sup>	Solid, Liquid, Botanical	Macroscopic and Microscopic Exam, Gas Chromatography, Mass Spectrometry, Ultraviolet and Infrared Spectroscopy.
Quantitative Measurement (Ethanol Only)	Toxicology SOP (DOC 776)	Liquid	Gas and Liquid Chromatography
Weight Measurement	Drug SOP (DOC 774)	Solid, Botanical	Balance
Volume Measurement	Drug SOP (DOC 774)	Liquid	Volumetric Glassware

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## Discovery



### Validation Studies

- For each method used
- Details of standard calibration or parameters for instruments
- If none, any documentation or policies to ensure standardization of machinery
  - With respect to certified industry standards
  - In each test

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## Discovery

- Defense Inspection of Testing Lab
- Field Test?



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## Discovery

### Expert Notice

- Actual expert's CV
  - *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011)
  - Include all formal and continuing education in this field
- Basis for expert's opinion *in this case*, including citing reference to all outside sources relied about for the opinion
- Copies of validation studies this chemist used to develop opinion



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## Discovery

### Reports of Examinations and Test

- Not just final report
- Unambiguous list of tests conducted, not simply those reported on
- All "bench notes" or writings relevant to each individual test conducted.




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## Discovery



### Informant Cases:

if an informant is **with a participant in the crime** or **an eye witness to the offense**, then the confidential informant is a material witness and the trial court must require the prosecution to identify the informant, if the defendant so requests.

*Middlebrook v. State*, 555 So.2d 1009, 1010 (Miss. 1990)

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## Discovery



### Known Informant Cases:

- Any deals or promises *discussed* with informant
- Prior arrests/convictions
- All previous tips (cases/docket nos.) and results of those tips
- Length of time as informant
- Total amount of \$\$ expended to THIS informant
- Any past deals/advantage to informant
- Information about drug use

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## Discovery

### Constructive Possession:

- **Car:**
  - Evidence client didn't own car.
  - Any evidence client wasn't driver.
  - Any evidence others had access.
- **Stash:**
  - Crime scene photos of stash
  - Crime scene photos of area



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## Discovery

### Observation Posts:

- Location of post (may require motion)
- Video or audio tapes
- Photographs
- Officer notes
- Go to scene - understand perspective



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## Discovery

### Undercover Buy-Bust:

- Undercover officers' report
- Arresting officers' reports
- Video or audio tapes
- Photo of client at time of arrest
- Any and all reports/notes/description of seller or buyer (including actual times)
- Go to scene - understand perspective



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## Discovery

### Search Warrant Cases:

- Affidavit in support of warrant
- Search warrant
- Return report
- Forced Entry Report
- Seizure lists (narcotic and non-narcotic)
- Photos of search area
- Asset forfeiture reports
- Mail / identity evidence seized




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## Discovery

### Drug Sniffing Case:

- Manuals for training and maintaining dog
- Certification records of dog
- Documentation relating to reliability (success/failure rates) of *this* dog
- Any police reports/recordings produced in connection with dog sniff

*Florida v. Harris*, 568 U.S. 237 (2013)

- Positive sniff is presumptive PC, but defender must challenge the reliability of the dog to attempt to rebut the presumption




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## Police Forms/Procedures

### Police Reports

- Develop comprehensive list of possible police reports (FOIA, subpoena).
- Request full discovery and litigate what you don't get.
- What hasn't been completed in this case?

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## Police Forms/Procedures

### Local Police Department General Orders

- How to execute warrants
- Conduct in undercover drug buys
- Observation post operations
- DNA/Fingerprint Collection
- Chain of custody
- Crime scene photos
- Marked Money
- Use of Force
- Informants
- ID procedures (line ups, photo arrays, show ups)
- Taking statements from suspects




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## Digging in to Defenses

### Drug Cases

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## Entrapment

- It's an affirmative defense and **must be proved by the defendant.**
- If the state's action **merely gave the defendant the opportunity** to commit what he or she was already predisposed to do, **there's no entrapment.**
- Requires that defense show:
  1. evidence of **government inducement** to commit the criminal act *and*
  2. a **lack of predisposition to engage in the criminal act prior to contact** with government agents.

*Walls v. State*, 672 So.2d 1227 (MS 1996)

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### Fabrication / Plant by Police

- This is tough - document, document, document
- Identify realistic motives fabricate or exaggerate



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### Fabrication by Informant

- Identify realistic motives fabricate or exaggerate
  - Money
  - Influence
  - Competition
  - Attention
- Demonstrate facts that make this possible
  - Time as informant
  - Total money in all cases
  - Relationship to client



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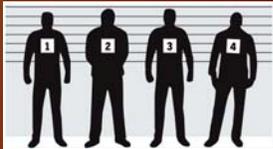
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### Misidentification

- Drop and run case
- Observed exchanges
- Undercover operations



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### No Corroboration

**Officer-Involved Buy Cases:**

- No second officer saw interaction between UC and youth
- No pre-recorded money
- No evidence of other buyers
- No recording of incident
- No fingerprint evidence
- Evidence that packaging is common/universal
- Arrest team stopped wrong person / many people




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### Not Mine!

**State must prove:**

- *Actual* possession or intent to sell
- *Constructive* possession or transfer
- Aiding and abetting
- Client knew it a controlled substance



**Indicia it wasn't client's drugs or intent:**

- Not on client
  - ✓ Found in high-drug area
- Not client's bag, coat, car, etc.
- Didn't engage in sales talk or action (mere presence)

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### Failure to Meet All the Elements of the Crime

**MS ST § 41-29-139 - Prohibited Acts and Penalties (Controlled Substances)**

- **Transfer and Possession with Intent to Transfer** requires
  - Knowingly or intentionally
  - Sell, barter, transfer, manufacture, distribute, dispense, or possess with intent to do those
  - It must be a controlled substance
- **Simple Possession**
  - Knowingly or intentionally possess;
  - A controlled substance

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**No Controlled Substance**

**Block the evidence**

- Chain of custody
- Discovery violations
- Failure of chemist to testify

**Cast doubt on the testing procedures**

**Had a prescription** (§ 41-29-137)  
**Burden of Exception is on defense** (§ 41-29-148)




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**Suppression & Evidence Blocking**

Drugs and other Tangible Objects

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**Continuance for a Discovery Violation**

**Ramos v. State, 710 So.2d 380 (1998)**

"fact that the prosecution fails to unearth certain evidence until the last minute does not eviscerate the prejudice to a defendant caught unaware."

- Defense must have time to review documents or interview witnesses just disclosed.
- If Defense believes it is prejudiced by lack of opportunity to prepare to a defense to this new evidence, must request a continuance.
- The State may choose to proceed with trial and forego using the undisclosed evidence, but if not, *"the trial court must grant the requested continuance."*

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### Other Sanctions for Discovery Violations

#### State v. Blenden, 748 So.2d 77 (1999)

- Mistrial
- Exclusion of evidence
- Monetary sanctions against the state




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### Common Ground for Suppression

#### Fourth Amendment

- Stop without RAS
- Frisk without RAS of armed and dangerous
- Frisk that exceeds the scope – *Minnesota v. Dickerson*, 508 US 366 (1993)
- Arrest without probable cause
- Invalid Search Warrant



Suppress any fruit of the violation, *Wong Sun v. US*, 371 US 471 (1963)

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### Common Challenges to Warrants

- Affidavit was bare-bones, *US v. Leon*
- Affidavit is so lacking in indicia of PC, belief in it is unreasonable, *Leon*
- Particularized to the proper unit of a multi-unit building. *Maryland v. Garrison*, *dictum*
- Police used deliberate falsehood to get warrant, *Franks v. Delaware*
- Affidavit based on evidence from invalid search/seizure, *US v. Karo*, *dictum*
- Warrant didn't ID premises with particularity, *Leon*
- Execution exceeded scope of warrant, *Garrison*




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### Suppression in Dog Cases

Sniffs of luggage, vehicles are not searches for Fourth Amendment purpose

- BUT the dog and officer must lawfully be there.
- You can challenge reliability of the dog



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### Drugs as Fruit of Coerced Statement

• While *Miranda* violations won't lead to suppression of physical evidence...

Due Process violations will

- If police overbear the client's will so that his statement is involuntary, under the 14<sup>th</sup> Am., NO evidence derived from it may be used.



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### Evidentiary and Procedural Challenges

#### Drug Analysis Report

- Cannot come in without LIVE testimony - *Melendez-Diaz v. Mass.*, 129 S.Ct. 2527 (2009)
- Live testimony MUST be by actual person who conducted test, supervisor does not count *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011)
- Confrontation Clause of Fifth Amendment to U.S. Constitution



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### Evidentiary and Procedural Challenges

**Stipulations**  
are waiving your client's right to confrontation under the U.S. & MS Constitutions. Use with caution!

**Assert right to confrontation early and often**

- While not constitutionally required, puts everyone on notice and defense won't be accused of delay tactics.



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### Evidentiary and Procedural Challenges

**Drug Analysis Report**

- Drug analyzed must match drug on petition



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### Evidentiary and Procedural Challenges

**Chain of Custody**

- Drugs, paraphernalia, money are all fungible
- Evidence admitted must be same evidence seized
- Must not be tampered with
- The more officers who touch it, the harder for the state to establish chain
- What's the defense burden here??



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Evidentiary and Procedural Challenges

**Field Test**

- May be sufficient for PC under Fourth Amendment
- Is not scientifically reliable for admissibility on guilt.
- Make a *Daubert* challenge!



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Evidentiary and Procedural Challenges

**Fingerprint Evidence**

- Do the police fingerprint guns or drugs?
- What do we say about this?
- Point out that there is little nexus to client without fingerprints



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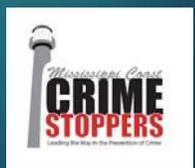
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Evidentiary and Procedural Challenges

**Anonymous and Informant Tips**

At Trial:

- If tipster (anonymous or otherwise) is not available to testify, tip (even recorded) is hearsay.
- Separately violates Confrontation Clause



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## Evidentiary and Procedural Challenges

### Anonymous Tips

#### At Suppression:

- Anonymous tip does not create RAS, let alone probable cause for a search or seizure
- Police must have some verifiable corroboration of wrongdoing

*Florida v. J.L.*, 529 US 266 (2000)



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## Evidentiary and Procedural Challenges

### Informant Tips

#### At Suppression:

- Police must be able to "rely" on an informant's information, based on the "totality of the circumstances." - *Breckenridge v. State*, 472 So.2d 373 (MS 1985)
- Circumstances include:
  - Prior reliability
  - No history of false information
  - Informant in a verifiable position to know



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## Drug Experts

### What kinds of Experts does the Government Use?:

- Chemist
- Police officer expert on drug operations
- Police expert on amounts, packaging, street value
- Police expert on dog sniff (handler)



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## Drug Experts

### Expert Discovery?

- Expert Notice
- Written summary of opinions
- Bases of opinions
- Qualification of Expert
- CV
- Copy of all documents reviewed by expert
- Lab/testing reports

Interview the Government's Expert!




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## Drug Experts

### Challenging Admissibility of Expert

- Lack of adequate notice to prepare cross
- Limit scope of testimony to specific qualification as expert
- Only allowed to testify about what's beyond the ken of the trier of fact.
- File pretrial motions *in limine* to block experts as
  - Irrelevant / not beyond the ken
  - Not qualified
  - Limit scope




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## Drug Experts

### Mississippi Rule of Evidence, 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:

- (1) the testimony is based upon sufficient facts or data,
- (2) the testimony is the product of reliable principles and methods, and
- (3) the witness has applied the principles and methods reliably to the facts of the case.

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## Drug Experts

### Challenging Admissibility of Expert

- Object to testimony by non-experts about trafficking or general drug practices
- What's the basis of training and reliability?
- What, specifically, is their "training and experience"?
- Lack of sufficient expert discovery




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## Ramos v. State, 710 So.2d 380 (1998)

### Police Testifying as "Experts" Must Be Qualified As Such if Offering an Opinion.

- "Training and Experience" must be part of the expert qualification under Rule 702.
- Officer's testimony about things like
  - Street Value
  - Transportation, packaging
  - Common hiding spaces and behaviors of smugglers (or dealers)
  - "freshness" or other characteristics of a drug

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## Crossing the Chemist

### Challenging Lab Reliability

- Lab out of date
- Lab not accredited
- Lab hasn't been audited recently
- Lab has no internal quality controls
- Evidence of cross-contamination of drug sample
- Failure to follow acceptable testing methods
  - In general for a specific drug
  - In this case




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## Crossing the Chemist

### Challenging Chemist's Reliability

- Unqualified, untrained
- Stale credentials; no continuing education
- Chemist notes inconsistent with final report
- Chemist wasn't at scene; can't opine on contamination
- Failure to follow lab procedure
- Failure to conform to quality controls



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## Defense Use of State Expert

### Elicit Helpful Defense Facts from Expert:

- If client has \$\$ on him; elicit that drug dealers typically use intermediaries so they won't have cash on them.
- All the reasonable explanations your client may have small bills.
- Things the investigating officer did NOT do that are expected.
- Inconsistencies between what police report and what drug lab received.
- Explain why drugs on ground in high-drug area.



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## Disposition

In Drug Cases

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## Disposition Planning

### Contextualize the Offense

- Causal Exchange
- Addiction = Public Health Problem
- Already in treatment
- Cost-effectiveness of sanction?
- 1<sup>st</sup> offense?



### Provide Alternative Plan

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## Drug Treatment



- Is drug treatment in lieu of formal adjudication an option (probation without judgment)?
- Explore underlying causes of drug use - is client amenable to mental health treatment, grief counseling, etc.?
- Develop a DEFENSE list of community resources on a continuum of out-patient to in-patient
- Will in-patient treatment stave off secure detention?
- Can you secure an option that you can work with outside of the court-system?

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## Forensic Exercise



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