# STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

**SUPERIOR COURT DIVISION**

**COUNTY OF WAKE 10 CRS 0000000**

**STATE OF NORTH CAROLINA )**

**)**

**vs. ) MOTION FOR DISCLOSURE OF ALL**

**) ATTORNEY FILES & RECORDS**

**JOHN DOE, ) RELATED TO *SMITH vs. JOHNSON***

# ) (10 CVS 00000 – WAKE COUNTY)

**)**

**Defendant. )**

**NOW COMES**, the Defendant, ***John Doe***, by and through his undersigned counsel, Maitri “Mike” Klinkosum, Attorney at Law, and hereby moves this Honorable Court, pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I §§ 19 and 23 of the North Carolina Constitution, N.C.Gen.Stat. § 15A-903, ***Brady v. Maryland***, 373 U.S. 83 (1963) and its progeny, or, in the alternative, ***Pennsylvania v. Ritchie***, 480

U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), for an Order commanding the production of the files and records held by the law firm of Money & Cash, related to the civil action filed against the Defendant captioned Smith vs. Johnson – 10 CVS 00000. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

* 1. John Doe is charged with one count of Second Degree Rape and one count of Second Degree Sexual Offense. The indictment alleges that on or about the September 26th, 2009, Mr. Doe committed the alleged acts against S.A.U.
	2. The trial of this matter is scheduled to begin on January 7th, 2013.
	3. Although Mr. Doe is alleged to have committed the acts on September 26th, 2009, the alleged acts were not reported to law enforcement until January 30th, 2010.
	4. On March 2nd, 2010, 2010, the alleged victim and her husband filed a civil lawsuit in Wake County Superior Court against “John Does,” claiming damages for the criminal acts allegedly committed by Mr. Doe, as well as other alleged tortuous conduct. On May 26, 2010 the alleged victim and her husband filed an amended complaint, under the same civil case number (10 CVS 0000), naming Mr. Doe, as well as his brothers, Mr. Jay and Mr. Joy, as defendants in the civil action.

# The Court Should Order the Files and Records of the Civil Action Lawyers Be Disclosed to the Defense for Preparation for the Criminal Trial

* 1. The original civil complaint was filed before an indictment was issued against Mr. Doe. The original complaint in the civil action has a filing date of March 2nd, 2010. The indictment in the criminal matter is dated as being issued on April 6, 2010.
	2. Upon information and belief, while the criminal investigation was still in process, and before an indictment had been obtained against Mr. Doe, the lawyers for the plaintiffs in the civil action, of the firm Money & Cash, spoke with, and may have investigated, the allegations made by the plaintiffs against Mr. Doe.
	3. Based upon undersigned counsel’s prior experience in litigation involving criminal matters with accompanying civil tort claims, undersigned counsel believes that the civil action lawyers may have been allowed access to the investigative files and evidence in the possession of law enforcement and the Wake County District Attorney’s office.
	4. Further, based upon the fact that undersigned counsel received discovery from the prosecution, which contained documents from the civil action, it is apparent that the civil action lawyers spoke to, and shared information with, the Wake County District Attorney’s Office. It would stand to reason that the civil action lawyers and the prosecution spoke and shared information with each other, as both parties share a common goal: the civil and criminal prosecution of Mr. Doe.
	5. The sharing of information, between the prosecution and the civil action lawyers, is such that the interests and work between the two parties have become entwined and comingled, sufficient for this Court to conclude that the actions of the civil action lawyers fall within the purview of a “private entity that obtains information on behalf of a law enforcement agency or prosecutor in connection with the investigation of the crimes committed or the prosecution of the defendant.”[3](#_bookmark0)
	6. Because the actions of the civil lawyers fall within the purview of a “private entity that obtains information on behalf of a law enforcement agency or prosecutor in connection with the investigation of the crimes committed or the prosecution of the defendant,”[4](#_bookmark1) the Court should order the civil action lawyers to provide any and all files and records regarding their efforts and investigation in the civil matter to the defense, for review pursuant to the criminal discovery statutes of North Carolina.[5](#_bookmark2)
	7. Further, if the prosecution intends to call either of the civil action lawyers to testify at Mr. Doe’s criminal trial, or if the prosecution intends to delve into the issue of the aforementioned civil action during Mr. Doe’s criminal trial, such attempts place the credibility of the civil action lawyers before the jury. As such, in order to ensure that Mr. Doe is afforded his right to confrontation and opportunity for effective cross-examination, the Court should order the civil action lawyers to provide any and all files and records regarding their efforts and investigation to the defense for review.

3 N.C. Gen. Stat. § 15A-903

4 Id.

5 Id.

* 1. Further, in order for the defense to determine whether it should call either of the civil action lawyers to testify at Mr. Doe’s criminal trial, and thereby insuring that Mr. Doe is afforded his right to due process and the ability to present a defense, the Court should order the civil action lawyers to provide any and all files and records regarding their efforts and investigation to the defense for review.

# Alternative Theory of Disclosure: The Sharing of Information Between Attorneys in the Civil Lawsuit and the Prosecution

**Require the Files of the Attorneys in the Civil Lawsuit to Be Provided to the Court for an In Camera Inspection**

* 1. Upon information and belief, the civil action lawyers, prior to filing the Complaint, were ethically required to conduct an investigation into the grounds for filing the complaint in the civil matter.
	2. Upon information and belief, such an investigation by the civil action lawyers may have included interviews with witnesses involved in the criminal investigation and/or witnesses not located and/or interviewed in the criminal investigation.
	3. If the investigation by the civil action lawyers includes interviews with witnesses, whether or not said witnesses were interviewed as part of the criminal investigation, such interviews may contain statements and/or evidence which could be exculpatory to Mr. Doe either through actual exculpatory means or through information that could be used to impeach the testimony and credibility of said witnesses.
	4. Because the files of the civil action lawyers may contain information that is exculpatory to Mr. Doe, if the Court does not agree that the files should be provided directly to the defense in the criminal matter, the Court should conduct an in camera inspection of the entire files of the civil action lawyers and provide any exculpatory material found in said files to the defense.[6](#_bookmark3)
	5. Further, if the prosecution intends to call one or both of the civil action lawyers to testify at the trial of the criminal matter, or if the prosecution intends to delve into the issue of the aforementioned civil action, such action places the credibility of the civil action lawyers before the jury. As such, in order to ensure that Mr. Doe is afforded his right to confrontation and opportunity for effective cross-examination, the Court should conduct an in camera inspection of the entire files of the civil action lawyers and provide any exculpatory material found in said files to the defense.[7](#_bookmark4)

6 See *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); *State v. Love*, 57 F.3d 1305 (4th

Cir. 1995); *State v. Bailey*, 89 N.C.App. 212, 365 S.E.2d 651 (1988), and *State v. Hardy*, 293 N.C. 105, 235 S.E.2d

828 (1977).

7 Id.

* 1. Further, in order for the defense to determine whether it should call either of the civil action lawyers to testify at Mr. Doe’s criminal trial, and thereby insuring that Mr. Doe is afforded his right to due process and the ability to present a defense, the Court conduct an in camera inspection of the entire files of the civil action lawyers and provide any exculpatory material found in said files to the defense.
	2. Based upon the assertions as set forth above, the defense would assert that the communication and sharing of information between the lawyers in the civil action and the criminal prosecution provide sufficient foundation for this Court to order that the civil action lawyers provide the entire files related to the civil action of Smith vs. Johnson – 10 CVS 0000 to the Court for an in camera inspection.

**WHEREFORE,** the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That should the Court require further evidence regarding this Motion, that the Court schedule an evidentiary hearing in this matter, providing both sides with sufficient time to subpoena the necessary witnesses and documentation for said hearing;
2. That the Court enter an Order requiring the disclosure of any and all files and documents held by the law firm of Money & Cash in connection with the case of Smith vs. Johnson – 10 CVS 0000 to the defense; or
3. In the alternative, that the Court order the disclosure of the any and all files and documents held by the law firm of Money & Cash, in connection with the case of Smith vs. Johnson – 10 CVS 0000, to the Court for review by the Court, that the Court disclose to the defense any favorable and material evidence that is gleaned from said review, and that the Court place copies of the files and documents disclosed, under seal, in the court file of this matter for potential appellate review; and
4. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the 18th day of December, 2012.

***TIN FULTON WALKER & OWEN, PLLC***

**STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**

**COUNTY OF WAKE 10 CRS 000000**

**STATE OF NORTH CAROLINA )**

**)**

**vs. ) ORDER ON DEFENDANT’S MOTION**

**) FOR DISCLOSURE OF ALL FILES &**

**JOHN DOE, ) RECORDS RELATED TO**

**) *SMITH V. JOHNSON***

**Defendant. ) (10 CVS 00000 – WAKE COUNTY)**

**THIS MATTER,** having come on to be heard before the Honorable James J. Judge, presiding Superior Court Judge, at the January 2012 session of Criminal Superior Court for the County of Wake; and

**IT APPEARING TO THE COURT** that at the time this matter was called for trial, the Defendant was present and represented by Maitri “Mike” Klinkosum, Attorney at Law, and the State of North Carolina was present and represented by , Assistant District Attorney; and

**IT APPEARING TO THE COURT** that this matter was called for trial and that, prior the commencement of jury selection, the Court engaged in a hearing on pre-trial motions filed by the Defendant, and that one of the motions filed by the Defendant was a ***Motion for Disclosure of All Attorney Files & Records Related to Smith vs. Johnson (10 CVS 0000 – Wake County)***; and

**IT APPEARING TO THE COURT** that Attorneys from the law form of Cash & Money, attorneys for the plaintiffs in 10 CVS 00000, were present for the hearing on said Motion; and

**IT APPEARING TO THE COURT** that one of the named plaintiffs in Smith vs. Johnson, is the alleged victim in the matter before the Court, and the other named plaintiff in Smith vs. Johnson, is the husband of the alleged victim in the matter before the Court; and

**IT FURTHER APPEARING TO THE COURT** that Attorneys for the plaintiffs, Cash & Money, objected to the Court conducting an *in camera* inspection of their files related to the civil action; and

**IT FURTHER APPEARING TO THE COURT**, after conducting said *in camera* inspection of the plaintiffs’ attorneys’ files, that the plaintiffs’ attorneys’ notes fall within the protections of the attorney-client privilege, and that the plaintiffs’ attorneys’ notes, while not appearing to be exculpatory at the time of the *in camera* review, could prove to be exculpatory depending upon the testimony and evidence presented during the course of the trial; and

**IT FURTHER APPEARING TO THE COURT**, after conducting said *in camera* inspection of the plaintiffs’ attorneys’ files, that a particular document appearing to be some form of a settlement agreement dating to 2005, while not appearing to be exculpatory at the time of the *in camera* review, could prove to be exculpatory depending upon the testimony and evidence presented during the course of the trial;

**IT IS, THEREFORE, ORDERED, ADJUDGED, and DECREED** that the Court shall, maintain copies of the notes of the plaintiffs’ attorneys and the document appearing to be a settlement agreement dating to 2005, that the copies shall be maintained by the Court throughout the course of the trial, and that should the plaintiffs’ attorneys’ notes or the aforementioned document become exculpatory, the Court shall revisit the issue of disclosing said notes and documents to the defense and the prosecution.

**IT IS FURTHER ORDERED, ADJUDGED, and DECREED** that this order shall remain in full force and effect for the trial of this matter.

This the 31st day of January, 2012.

The Honorable James J. Judge Presiding Superior Court Judge