4.3 Discovery Rights under G.S. 15A-903

Before the 2004 revisions to the discovery statutes, the defendant's right to statutory discovery was limited to specific categories of information. The defendant was entitled to discovery of the defendant's own statements, statements of codefendants, the defendant's prior criminal record, certain documents and physical objects, reports of examinations and tests, and a witness's statement after the witness testified. The defendant's obligation to disclose information to the State was also limited. Under the revised discovery statutes, both the defendant and the prosecution are entitled to broader discovery. This section discusses the defendant's discovery rights under G.S. 15A-903. For further background on the changes in North Carolina's discovery laws, see *supra* § 4.1A, Statutory Right to Open-File Discovery. To the extent relevant, the discussion below includes a discussion of the statutory discovery provisions in effect before 2004.

A. Obligation to Provide Complete Files

The most significant provision in the discovery statute is the requirement that the State make available to the defendant "the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant." G.S. 15A-903(a)(1). The statute defines "file" broadly, stating that it includes "the defendant's statements, codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or *any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant*" (emphasis added). Specific aspects of this definition are discussed below.

B. Agencies Subject to Disclosure Requirements

Generally. General discovery principles have obligated prosecutors to provide to the defense discoverable material in their possession *and* to obtain and turn over discoverable material from other agencies involved in the investigation and prosecution of the defendant. The 2004 changes and subsequent amendments to the discovery statutes not only broadened the materials subject to discovery but also made clearer the obligation of prosecutors to obtain, and involved agencies to provide to prosecutors, information gathered in the investigation and prosecution of the defendant.

G.S. 15A-501(6), adopted in 2004, provides that following an arrest for a felony, a law enforcement officer must make available to the State all materials and information obtained in the course of the investigation. *See* S.L. 2004-154, s. 11 (S 52). Because this obligation appears in the statutes on law enforcement, it was easy to overlook. G.S. 15A-903 was therefore amended in 2007 to reinforce the obligation of law enforcement agencies to provide discoverable material to the prosecutor. *See* S.L. 2007-183 (H 786); G.S. 15A-903(c) (law enforcement and investigatory agencies must on a timely basis provide to the prosecutor a copy of their complete files related to a criminal investigation or prosecution).

G.S. 15A-903(a)(1)b1., also added in 2007 and revised in 2011, further clarifies the State's discovery obligation to turn over information obtained by investigatory agencies by defining such agencies as including any entity, "public or private," that obtains information on behalf of a law enforcement agency or prosecutor's office in connection with the investigation or prosecution of the defendant. *See* S.L. 2007-393, s. 1 (S 1130); 2011-250, s. 1 (H 408). This provision includes, for example, private labs that do testing as part of the investigation or prosecution.

Duty to investigate and obtain. Prosecutors, on behalf of the State, have a duty to investigate whether entities involved in the investigation and prosecution of the defendant have discoverable information. *See* G.S. 15A-903(a)(1) (making "State" responsible for providing complete files to defendant); *State v. Tuck*, 191 N.C. App. 768, 772–73 (2008) (rejecting argument that prosecutor complied with discovery statute by providing defense with evidence once prosecutor received it; State violates discovery statute if "(1) the law enforcement agency or prosecuting agency was aware of the statement or through due diligence should have been aware of it; and (2) while aware of the statement, the law enforcement agency or prosecuting agency should have reasonably known that the statement related to the charges against defendant yet failed to disclose it"); *see also* G.S. 15A-910(c) (personal sanctions against prosecutor inappropriate for untimely disclosure of discoverable information in law enforcement and investigatory agency files if prosecutor made reasonably diligent inquiry of agencies and disclosed the responsive materials). *But cf. State v. James*, 182 N.C. App. 698, 702 (2007) (State's discovery obligation applies to "all existing evidence known by the State but does not apply to evidence yet-to-be discovered by the State").

The State has a comparable constitutional obligation to investigate, obtain, and disclose records of others acting on the State's behalf. *See infra* § 4.5H, Prosecutor's Duty to Investigate.

Particular agencies. Clearly, files within the prosecuting district attorney's own office are subject to the obligation to produce. The files include any materials obtained from other entities; they need not be generated by the prosecutor's office.

The files of state and local law-enforcement offices, public and private entities, and other district attorney's offices involved in the investigation or prosecution are likewise subject to the obligation to produce.

The files of state and local agencies that are not law-enforcement or prosecutorial agencies, such as schools and social services departments, are not automatically subject to the State's obligation to produce. A defendant would still be entitled to the information in several instances.

- *Information part of State's file*. Because of sharing arrangements, law enforcement and prosecutorial agencies may have received a broad range of information from other agencies, which are then part of the State's files and must be disclosed. *See, e.g.,* G.S. 7B-307 (requiring that social services departments provide child abuse report to prosecutor's office and that local law enforcement coordinate its investigation with protective services assessment by social services department); G.S. 7B-3100 (authorizing sharing of information about juveniles by various agencies, including departments of social services, schools, and mental health facilities); 10A N.C. ADMIN. CODE 70A .0107 (requiring social services department to report to prosecutor about criminal violations by a person other than a parent, guardian, or caretaker). If the materials contain confidential information that the prosecutor believes should not be disclosed, the prosecutor must obtain a protective order under G.S. 15A-908 to limit disclosure.
- *Information in prosecutor's custody or control*. The State's obligation to disclose applies to materials "within the possession, custody or control of the prosecutor." *State v. Pigott*, 320 N.C. 96, 102 (1987) (citation omitted). "Custody" or "control" mean a right of access to the materials; the prosecutor need not have taken actual possession of the materials. *See State v. Crews*, 296 N.C. 607 (1979) (materials within possession of mental health center and social services department not discoverable because prosecution had neither authority nor power to release information and was denied access to it). A prosecutor may not simply leave materials in another entity's possession as a means of avoiding disclosure. *See generally Martinez v. Wainwright*, 621 F.2d 184, 188 (5th Cir. 1980) (prosecutor may not "avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial" (citation omitted)).
- *Information obtained on behalf of law enforcement or prosecutorial agency.* The State's obligation to disclose applies to materials of an outside agency if that agency obtains information on behalf of a law enforcement or prosecutorial agency and thus meets the definition of "investigatory agency" in G.S. 15A-903(a)(1)b1. *Compare State v. Pendleton*, 175 N.C. App. 230 (2005) (finding that social services department did not act in prosecutorial capacity when it referred matter to police and department employee sat in on interview between defendant and officer), *with State v. Morell*, 108 N.C. App. 465 (1993) (social worker in child abuse case acted as law-enforcement agent in interviewing defendant, rendering inadmissible custodial statements made to social worker without *Miranda* warnings).

A defendant also may obtain information directly from an agency or entity by subpoena or motion to the court. If counsel is uncertain whether the State is obligated to produce the information as part of its discovery obligations, counsel can move for an order compelling production by the State on the grounds described above or, in the alternative,

compelling the agency to produce the materials. *See infra* § 4.6A, Evidence in Possession of Third Parties.

C. Categories of Information

The discussion below addresses categories of information potentially covered by G.S. 15A-903(a)(1). For a discussion of additional categories of information discoverable on statutory or constitutional grounds, see *infra* § 4.4, Other Discovery Categories and Mechanisms; § 4.5, *Brady* Material; and § 4.6, Other Constitutional Rights. Counsel should include in discovery requests and motions all pertinent categories of information.

Generally. G.S. 15A-903(a)(1) requires the State to disclose its complete files to the defense. The term "file" should not be construed in its everyday sense as the mere paper file kept by the prosecutor in a particular case. G.S. 15A-903(a)(1)a. defines the term to include several specific types of evidence, discussed below. It also includes a catch-all category of "any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant." (The term "file" also covers every agency involved in the investigation and prosecution of the offenses. *See supra* § 4.3B, Agencies Subject to Disclosure Requirements). The disclosure requirements are considerably broader than under the pre-2004 discovery statutes.

Practice note: The defendant has the right to inspect the original of any discoverable item and to obtain a copy. G.S. 15A-903(a)(1)d. Defense counsel should not accept a copy if he or she needs to review the originals, e.g., examine photographs; nor should counsel accept the mere opportunity to review materials if he or she needs a copy for further study.

Statements of defendant. G.S. 15A-903(a)(1)a. requires the State to disclose all statements made by the defendant. *See also Clewis v. Texas*, 386 U.S. 707, 712 n.8 (1967) (suggesting that due process may require disclosure of a defendant's statements). In contrast to the pre-2004 statute, which required disclosure of the defendant's statements if relevant, the current statute contains no limitation on the obligation to disclose.

For a discussion of the State's obligation to record interrogations of defendants, see *infra* § 14.3G, Recording of Statements (2d ed. 2013).

Statements of codefendants. G.S. 15A-903(a)(1)a. requires the State to disclose all statements made by codefendants. In contrast to the pre-2004 statute, which required disclosure if the State intended to offer a codefendant's statement at a joint trial, the statute contains no limitation on the obligation to disclose.

The statutory language requiring disclosure of a codefendant's statements applies whether the codefendant's statements are kept in the file in the defendant's case or are kept separately. G.S. 15A-903(a)(1)a. expressly defines the term "file" as including "codefendants' statements." The statute also includes "any other matter or evidence

obtained during the investigation of the offenses alleged to have been committed by the defendant," which presumably includes statements of codefendants obtained in the investigation of the defendant. (G.S. 15A-927(c)(3) continues to authorize the court to order the prosecutor to disclose the statements of all defendants in ruling on an objection to joinder or on a motion to sever; while the State has the general obligation to disclose such statements, a hearing on joinder or severance may provide additional discovery opportunities. *See infra* § 6.2, Joinder and Severance of Defendants.)

Written or recorded statements of witnesses. G.S. 15A-903(a)(1)a. requires the State to disclose all statements made by witnesses. The statute contains no limitation on this obligation, in contrast to the pre-2004 statute, which required disclosure of witness statements only after the witness testified and only if the statement met certain formal requirements (for example, the statement was signed or otherwise adopted or approved by the witness). The current statutes require the State to turn over, as part of pretrial discovery, any writing or recording evidencing a witness's statement. *See State v. Shannon*, 182 N.C. App. 350 (2007) (trial court committed prejudicial error by denying discovery motion for notes of pretrial conversations between prosecutor's office and witnesses; General Assembly intended to eliminate more formal requirements for witness statements by completely omitting such language from revised statute), *superseded by statute in part on other grounds as recognized in State v. Zamora-Ramos*, 190 N.C. App. 420 (2008) (recognizing that discovery statutes, as amended, do not require prosecutor to reduce to writing oral witness statements if the statements do not significantly differ from previous statements given to law enforcement [court does not question holding of *Shannon* about elimination of formal requirements for witness statements]); *accord State v. Milligan*, 192 N.C. App. 677 (2008) (prosecutor's notes of witness interview were discoverable); *see also Palermo v. United States*, 360 U.S. 343, 362 (1959) (Brennan, J., concurring) (right to witness's statement rests in part on confrontation and compulsory process rights in Sixth Amendment).

The State also must disclose witness statements it may use for impeachment of defense witnesses. *See State v. Tuck*, 191 N.C. App. 768, 772–73 (2008) (holding that such statements are part of State's "file" and must be disclosed).

That notes and other materials reflect statements by witnesses and are therefore discoverable does not necessarily mean that the statements are admissible against the witness. *See Milligan*, 192 N.C. App. 677, 680–81 (defense counsel could ask witness on cross-examination whether she made certain statements but could not impeach witness with prosecutor's notes of witness's statements, which were not signed or adopted by witness; court also holds that trial court did not err in precluding defense counsel from calling prosecutor as witness and offering notes, apparently on the ground that the notes constituted extrinsic evidence on a collateral matter).

Practice note: To determine whether the prosecution has disclosed the statements of a witness who testifies at trial, defense counsel may cross-examine the witness or request a voir dire outside the presence of the jury. Counsel also may ask the court to order the

witness to turn over any materials he or she reviewed before taking the stand. *See* N.C. R. EVID. 612(b).

Oral statements of witnesses. G.S. 15A-903(a)(1)c. requires the State to reduce all oral statements made by witnesses to written or recorded form and disclose them to the defendant except in limited circumstances, described below. This obligation is broader than under the pre-2004 discovery statutes, which required the State to disclose oral statements of the defendant and codefendants only.

The State meets its discovery obligation by providing to the defense the substance of oral statements made by witnesses. *State v. Rainey*, 198 N.C. App. 427, 438–39 (2009) (court of appeals notes that G.S. 15A-903 does not have an express substance requirement in its current form, but "case law continues to use a form of the substance requirement for determining the sufficiency of disclosures to a defendant"); *State v. Zamora-Ramos*, 190 N.C. App. 420 (2008) (State met its obligation to provide oral statements of informant to defense by providing reports from the dates of each offense, which included notations of officer's meetings with informant after each controlled buy and summary of information told to officer during each meeting). *But cf. State v. Dorman*, 225 N.C. App. 599 (2013) (holding that discovery statutes did not require State to document and disclose conversations between police, prosecutor's office, other agencies, and the victim's family regarding return of victim's remains to family [decision appears to be inconsistent with statutory requirement and cases interpreting it and may be limited to circumstances of case]).

G.S. 15A-903(a)(1)c. exempts oral statements made to a prosecuting attorney outside an officer's presence if they do not contain significantly new or different information than the witness's prior statements. *See also State v. Small*, 201 N.C. App. 331 (2009) (State did not violate discovery statute by failing to disclose victim's pretrial statement to prosecutor where State disclosed victim's statement to officers, given on the night of the offense, and victim's subsequent statement to prosecutor did not contain significantly new or different information).

Practice note: The statute does not require the State to provide a description of the facts and circumstances surrounding a witness's statement. *State v. Rainey*, 198 N.C. App. 427, 438. *But see infra* § 14.4B, Statutory Requirements for Lineups (2d ed. 2013) (describing documentation that law enforcement must keep of lineups); *see also State v. Hall*, 134 N.C. App. 417 (1999) (hypnotically refreshed testimony is inadmissible, but witness may testify to facts he or she recounted before being hypnotized; State must disclose whether witness had been hypnotized before witness testifies).

If the State fails to provide sufficient context for counsel to understand the statement—for example, the State discloses a statement made by a witness without providing information about the circumstances of the conversation—counsel should consider filing a motion to compel the additional information. *Rainey*, 198 N.C. App. 427, 438 ("purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate" (citation omitted)); *State v.*

Patterson, 335 N.C. 437 (1994) (under previous version of discovery statute, under which State was required to disclose substance of defendant's oral statements, prosecution violated statute by first producing written statement made by defendant to officer and later producing defendant's oral statement without disclosing that statement was made to officer at time of written statement); *see also supra* § 4.1C, Court's Inherent Authority (discussing authority to compel disclosure if not prohibited by discovery statutes).

Investigating officer's notes. The State must disclose any notes made by investigating law-enforcement officers. This item is specifically identified as discoverable in G.S. 15A-903(a)(1)a. An officer's report, prepared from his or her notes, is not a substitute for the notes themselves. *See State v. Icard,* 190 N.C. App. 76, 87 (2008) (State conceded that failure to turn over officer's handwritten notes violated discovery requirements), *aff'd in part and rev'd in part on other grounds*, 363 N.C. 303 (2009).

The specific inclusion of officer's notes in the discovery statute suggests that the State must preserve the notes for production. *See also* G.S. 15A-903(c) (requiring law enforcement agencies to provide the prosecutor with their complete files); G.S. 15A-501(6) (to same effect); *United States v. Harris*, 543 F.2d 1247 (9th Cir. 1976) (recognizing under narrower federal discovery rules that officers must preserve rough notes); *United States v. Harrison*, 524 F.2d 421 (D.C. Cir. 1975) (to same effect). To be safe, counsel should file a motion to preserve early in the case. *See supra* § 4.2C, Preserving Evidence for Discovery.

Results of tests and examinations and underlying data. G.S. 15A-903(a)(1)a. requires the State to disclose the results of all tests and examinations. *See also* G.S. 15A-267(a)(1) (right to DNA analysis [discussed *infra* in § 4.4F, Biological Evidence]).

As amended in 2011, the statute explicitly requires the State to produce, in addition to the test or examination results, "all other data, calculations, or writings of any kind . . ., including but not limited to, preliminary test or screening results and bench notes." If the State cannot provide the underlying data, the court may order the State to retest the evidence. *State v. Canady*, 355 N.C. 242, 253–54 (2002).

The requirement to produce underlying data is consistent with earlier cases, which recognized that the defendant has the right not only to conclusory reports but also to any tests performed, procedures used, calculations and notes, and other data underlying the report. *State v. Cunningham*, 108 N.C. App. 185 (1992) (defendant has right to data underlying lab report on controlled substance); *accord State v. Dunn*, 154 N.C. App. 1 (2002) (relying on *Cunningham* and interpreting former G.S. 15A-903 as requiring that State disclose information pertaining to laboratory protocols, false positive results, quality control and assurance, and lab proficiency tests in drug prosecution); *cf. State v. Fair*, 164 N.C. App. 770 (2004) (finding under former G.S. 15A-903 that defendant was entitled to data collection procedures and manner in which tests were performed but that State did not have obligation to provide information about peer review of the testing procedure, whether the procedure had been submitted to scrutiny of scientific community, or is generally accepted in scientific community).

A defendant's right to underlying data and information also rests on the Law of the Land Clause (article 1, section 19) of the North Carolina Constitution. *Cunningham*, 108 N.C. App. 185, 195–96 (recognizing state constitutional right so that defendant is in position to meet scientific evidence; ultimate test results did not "enable defendant's counsel to determine what tests were performed and whether the testing was appropriate, or to become familiar with the test procedures"); *see also State v. Canady*, 355 N.C. 242, 253–54 (2002) (relying in part on N.C. Const., art. 1, sec. 19 and 23, in finding that trial court erred in allowing an expert for State to testify without allowing defendant an opportunity to examine the expert's testing procedure and data).

In cases decided under the former discovery statute, the defendant was not entitled to polygraph tests and results. *See State v. Brewington*, 352 N.C. 489 (2000) (finding that polygraph did not fall into category of physical or mental examinations discoverable under pre-2004 discovery statute); *accord State v. Allen*, 222 N.C. App. 707 (2012) (reaching same conclusion under pre-2004 statute, which court found applicable because discovery hearing was held in 1999). Polygraphs also have been found not to constitute *Brady* material. *Wood v. Bartholomew*, 516 U.S. 1 (1995). Under the current discovery statute, the defendant should be entitled to polygraph tests and results, either because they constitute tests or examinations under the statute or because they are part of the file in the investigation of the case.

If the State intends to call an expert to testify to the results of a test or examination, the State must provide the defense with a written report of the expert's opinion. *See infra* § 4.3D, Notice of Witnesses and Preparation of Reports.

Practice note: Under the former statute, a defendant may have needed to make a specific motion, sometimes called a *Cunningham* motion, asking specifically for both the test results or reports and the underlying data. Such a motion is not required under the current statute, which expressly requires the State to produce underlying data. If, however, counsel believes that the State has not produced the required information or counsel wants additional information about tests or examinations, counsel should specifically identify the information in the discovery request and motion. *See generally State v. Payne*, 327 N.C. 194, 201–02 (1990) (finding that discovery motion was not sufficiently explicit to inform either the trial court or the prosecutor that the defendant sought the underlying data). Sample discovery motions for fingerprint evidence, including underlying data, and other requests for laboratory testing data can be found on IDS's Forensic Resources website.

Physical evidence. The defendant has the right, with appropriate safeguards, to inspect, examine, and test any physical evidence or sample. *See* G.S. 15A-903(a)(1)d.; *see also* G.S. 15A-267(a)(2), (3) (right to certain biological material and complete inventory of physical evidence [discussed *infra* in § 4.4F, Biological Evidence]).

In addition to the statutory right to test evidence, a defendant has a due process right to "examine a piece of critical evidence whose nature is subject to varying expert opinion." *State v. Jones*, 85 N.C. App. 56, 65 (1987) (citation omitted). In drug cases, this

requirement means that the defendant has a constitutional as well as statutory right to conduct an independent chemical analysis of controlled substances. *Id.* Defense counsel should file a motion to preserve if he or she believes that the State may destroy evidence or use it up in testing. *See supra* § 4.2C, Preserving Evidence for Discovery.

Although the defendant has the right to inspect, examine, and test any physical evidence or sample in the State's file, the State may not have an obligation to seek out particular evidence for testing or perform any particular test. The North Carolina courts have held, for example, that defendants do not have a *constitutional* right to require the State to conduct DNA tests on evidence at the defendant's request. *See State v. Wright*, 210 N.C. App. 52 (2011) (defendant not entitled to a new trial when SBI Crime Lab tested only DNA from toboggan found at crime scene and not hair and fiber lifts; defendant did not argue that State failed to make the lifts available for testing, and one of defendant's previous attorneys requested and received an independent test of the toboggan; no constitutional duty to perform particular tests on evidence); *State v. Ryals*, 179 N.C. App. 733 (2006) (court finds that former discovery statute did not require State to obtain DNA from State's witness and compare it with DNA from hair found on evidence; court also finds no constitutional duty to perform test).

For DNA testing, the North Carolina General Assembly has now mandated that the State conduct DNA tests of biological evidence collected by the State if the defendant requests testing and meets certain conditions. *See* G.S. 15A-267(c); *see also infra* § 4.4E, Biological Evidence. If the defense wants to conduct its own DNA tests (or for evidence for which the defendant does not have a right to require the State to conduct testing), the defendant may seek funds for an expert to conduct testing of the evidence. *See infra* Ch. 5, Experts and Other Assistance. If the defendant decides not to use the test results at trial, the defendant generally does not have an obligation to disclose the test results to the State. *See infra* "Nontestifying experts" in § 4.8C, Results of Examinations and Tests.

A defendant may have greater difficulty in obtaining physical evidence that the State has not already collected, such as physical samples from a witness. *See infra* § 4.4G, Nontestimonial Identification Orders.

Crime scenes. The former discovery statutes explicitly gave defendants the right to inspect crime scenes under the State's control. If a crime scene is under the State's control, crime scenes likely remain subject to inspection and discovery as "physical evidence," discussed immediately above, and as "any other matter or evidence" under the catch-all discovery language in G.S. 15A-903(a)(1)a.

The North Carolina courts also have recognized that the defendant has a constitutional right to inspect a crime scene. *See State v. Brown*, 306 N.C. 151 (1982) (violation of due process to deny defense counsel access to crime scene, which police had secured for an extended period of time).

The State may not have an obligation to preserve a crime scene. *Id.,* 306 N.C. at 164 (stating that its holding that defense has right of access to crime scene should not "be

construed to mean that police or prosecution have any obligation to preserve a crime scene for the benefit of a defendant's inspection"). Counsel therefore should request access to secured crime scenes and investigate unsecured scenes as early as possible in the case. If counsel cannot obtain access to a crime scene controlled by a third party, counsel may be able to obtain a court order allowing inspection of the scene under appropriate limitations. *See Henshaw v. Commonwealth*, 451 S.E.2d 415 (Va. Ct. App. 1994) (relying on North Carolina Supreme Court's opinion in *Brown* and finding state constitutional right to inspect crime scene controlled by private person—in this instance, apartment of alleged victim in self-defense case); *State v. Lee*, 461 N.W.2d 245 (Minn. Ct. App. 1990) (finding that prosecution had possession or control of premises where it had previously processed premises for evidence and could arrange for similar access by defense; noting that such access was not unduly intrusive), *distinguished and overruled by State v. Lee*, 929 N.W.2d 432 (2019); *United States v. Armstrong*, 621 F.2d 951 (9th Cir. 1980) (noting that court could base order authorizing inspection of third-party premises on its inherent authority).

A sample motion for entry and inspection of the premises of the alleged offense is available in the Adult Criminal Motions section of the IDS website.

Prior criminal record of defendant and witnesses. Former G.S. 15A-903 gave defendants the right to their criminal record. Current G.S. 15A-903 does not contain an explicit provision to that effect. However, G.S. 15A-1340.14(f) retains the right, stating that if a defendant in a felony case requests his or her criminal record as part of a discovery request under G.S. 15A-903, the prosecutor must furnish the defendant's prior criminal record within sufficient time to allow the defendant to determine its accuracy. An attorney who has entered an appearance in a criminal case also has the right to obtain the client's criminal history through the Department of Public Safety. G.S. 143B-905(c). Defense attorneys do not have access to the Criminal Information Network (CIN) and must request local law enforcement to run the search. *See State v. Thomas*, 350 N.C. 315, 340 (1999) (upholding trial court's denial of defense motion for access to Police Information Network [predecessor to CIN]; lack of access did not prejudice defendant); *accord State v. Williams*, 355 N.C. 501, 543–44 (2002).

The discovery statutes do not explicitly cover criminal record information of witnesses. *See also State v. Brown*, 306 N.C. 151 (1982) (finding under former discovery statute that State was not obligated to provide criminal records of witnesses). If the State has obtained criminal records, however, they are part of the State's file and must be disclosed to the defense as part of the State's general obligation to disclose its complete files in the case. The State also has an obligation to disclose a witness's criminal record under *Brady*, which requires disclosure of impeachment evidence. *See infra* "Prior convictions and other misconduct" in § 4.5C, Favorable to Defense.

Defense counsel also can obtain a person's North Carolina criminal record through the Automated Criminal/Infractions System (ACIS) or the Court Information Public Records Search (CIPRS), databases of all North Carolina criminal judgments maintained by court clerks. A terminal should be located in all public defender offices in North Carolina.

Terminals are also located in the clerk of court's office. An attorney who has entered an appearance in a criminal case also has the right to obtain "relevant" information from CIN. G.S. 143B-905(c). Some local agencies may not be willing, however, to run a criminal history search about anyone other than the defendant. (The cases have not specifically addressed whether this statute grants a defendant's attorney a broader right to information.)

D. Notice of Witnesses and Preparation of Reports

Requirement of request. The discovery statutes entitle the defendant to notice of the State's witnesses, both expert and lay. As with obtaining discovery of the State's files, the defendant must make a written request for discovery under G.S. 15A-903 and follow up with a written motion if the State does not comply. *See State v. Brown*, 177 N.C. App. 177 (2006) (not error for trial court to allow victim's father to testify although not included on State's witness list where defendant did not make request for witness list; court also holds that although some cases require State to abide by witness list it has provided without written request, State may call witness not on list if it has acted in good faith and defendant is not prejudiced). For a further discussion of the requirement of a request and motion, see *supra* § 4.2D, Requests for Discovery, and § 4.2E, Motions for Discovery.

Notice of expert witnesses, including report of results of examinations or tests, credentials, opinion, and basis of opinion. Within a reasonable time before trial, the prosecutor must give notice "of any expert witnesses that the State reasonably expects to call as a witness at trial." Each such witness must prepare and the State must provide to the defendant a report of the results of any examinations or tests conducted by the expert. The State also must provide the expert's credentials, opinion, and underlying basis for that opinion. *See* G.S. 15A-903(a)(2); *see also State v. Cook*, 362 N.C. 285, 292, 294 (2008) (State violated G.S. 15A-903(a)(2) when it gave notice of expert witness five days before trial and provided the witness's report three days before trial; "State's last-minute piecemeal disclosure . . . was not 'within a reasonable time prior to trial'"; trial court abused discretion in denying defendant's request for continuance); *State v. Aguilar-Ocampo*, 219 N.C. App. 417 (2012) (State violated discovery statute by failing to disclose identity of translator and State's intent to offer his testimony; because defendant anticipated testimony and fully cross-examined expert, trial court did not abuse discretion in failing to strike testimony); *State v. Moncree*, 188 N.C. App. 221, 227 (2008) (State violated G.S. 15A-903(a)(2) when SBI agent testified as expert witness concerning substance found in defendant's shoe and State did not notify defendant before trial; although State notified defendant about intent to introduce lab reports for substances found elsewhere during the stop, substance from defendant's shoe was never sent to lab; harmless error because defendant could have anticipated the evidence); *State v. Blankenship*, 178 N.C. App. 351 (2006) (State failed to comply with discovery statutes when it did not provide sufficient notice to defendant that an SBI agent would testify about methamphetamine manufacture; trial court permitted agent to testify, over defendant's objection, as a fact witness, but State tendered agent as an expert and court of

appeals held that agent was an expert; trial court should not have allowed testimony and new trial ordered).

Practice note: The courts sometimes classify a witness as a lay or fact witness not subject to the expert witness discovery requirements (or the standards for admissibility of expert opinion). *See State v. Hall*, 186 N.C. App. 267, 273 (2007) (distinguishing *Blankenship*, court finds that physician assistant testified as fact witness, not as expert witness). If the testimony depends on specialized training or experience, counsel should argue that the testimony is subject to the standards on notice (and admissibility) of expert testimony under N.C. Evid. R. 702. *Cf.* ROBERT P. MOSTELLER ET AL., NORTH CAROLINA EVIDENTIARY FOUNDATIONS § 10-2(B), at 10-6 (3d ed. 2014) (expressing concern that offering of expert testimony "in lay witness clothing" evades disclosure and reliability requirements for expert testimony). If the testimony constitutes expert opinion, the State must comply with discovery requirements about experts. *See State v. Davis*, 368 N.C. 794 (2016); John Rubin, *A Rare Opinion on Criminal Discovery in North Carolina*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 3, 2016) (discussing impact of *Davis*).

Before the 2004 revisions to the discovery statute, trial courts had the discretion to require a party's expert witness to prepare a written report of examinations or tests and provide it to the opposing party if the party intended to call the expert as a witness. *See State v. East*, 345 N.C. 535 (1997). The current statute mandates notice, including preparation of a written report of test and examination results, if a party reasonably expects to call an expert to testify (and the requesting party has complied with the requirements for requesting discovery).

Notice of other witnesses. At the beginning of jury selection, the prosecutor must provide the defendant with a list of the names of all other witnesses that the State reasonably expects to call during trial unless the prosecutor certifies in writing and under seal that disclosure may subject the witnesses or others to harm or coercion or another compelling need exists. The court may allow the State to call lay witnesses not included on the list if the State, in good faith, did not reasonably expect to call them. The court also may permit, in the interest of justice, any undisclosed witness to testify. *See* G.S. 15A-903(a)(3); *State v. Brown*, 177 N.C. App. 177 (2006) (relying, in part, on good faith exception to allow State to call witness not on witness list where State was unaware of witness until witness approached State on morning of trial and on voir dire witness confirmed State's representation).

If the defendant has given notice of an alibi defense and disclosed the identity of its alibi witnesses, the court may order on a showing of good cause that the State disclose any rebuttal alibi witnesses no later than one week before trial unless the parties and court agree to different time frames. G.S. 15A-905(c)(1)a.; *see also infra* § 4.8E, Defenses.

Before the 2004 revisions, trial courts had the discretion to require the parties to disclose their witnesses during jury selection. *See, e.g., State v. Godwin*, 336 N.C. 499 (1994). The current statute makes disclosure mandatory (assuming the requesting party has complied with the requirements for requesting discovery).

E. Work Product and Other Exceptions

G.S. 15A-904 limits the discovery obligations of the prosecution in specified respects. Subsection (c) of G.S. 15A-904 makes clear that the statutory limits do not override the State's duty to comply with federal or state constitutional disclosure requirements.

Prosecutor work product. G.S. 15A-904(a) provides that the State is not required to disclose to the defendant "written materials drafted by the prosecuting attorney or the prosecuting attorney's legal staff for their own use at trial, including witness examinations, voir dire questions, opening statements, and closing arguments." *Id.* The State also is not required to disclose legal research, records, correspondence, reports, memoranda, or trial preparation interview notes prepared by the prosecuting attorney or by the prosecuting attorney's legal staff if such documents contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or legal staff. *Id.* This formulation of "work product" is considerably narrower than the former statute's provisions. The rationale for the change is as follows.

The attorney work-product doctrine is "designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client's case." *State v. Hardy*, 293 N.C. 105, 126 (1977). At its broadest, the doctrine has been interpreted as protecting information collected by an attorney and his or her agents in preparing the case, including witness statements and other factual information. *See Hickman v. Taylor*, 329 U.S. 495 (1947) (discussing doctrine in civil cases). At its core, however, the doctrine is concerned with protecting the attorney's mental impressions, opinions, conclusions, theories, and strategies. *See Hardy*, 293 N.C. 105, 126. Former G.S. 15A-904 reflected the broader version of the work-product doctrine, although the statute did not specifically mention the term. *Id.* (discussing statute and doctrine). It allowed the State to withhold from the defendant internal documents made by the prosecutor, law enforcement, or others acting on the State's behalf in investigating or prosecuting the case unless the documents fell within certain discoverable categories (for example, a document contained the defendant's statement).

Current G.S. 15A-904 reflects the narrower version of the doctrine. It continues to protect the prosecuting attorney's mental processes while allowing the defendant access to factual information collected by the State. The revised statute provides that the State may withhold written materials drafted by the prosecuting attorney or legal staff for their own use at trial, such as opening statements and witness examinations, which inherently contain the prosecuting attorney's mental processes; and legal research, records, correspondence, memoranda, and trial preparation notes to the extent they reflect such mental processes. The current statute does not protect materials prepared by non-legal staff or by personnel not employed by the prosecutor's office, such as law-enforcement officers. It also does not protect evidence or information obtained by a prosecutor's office. For example, interview notes reflecting a witness's statements, whether prepared by a law-enforcement officer or a member of the prosecutor's office, are not protected under the work-product provision; however, interview notes made by prosecutors or legal staff reflecting their theories, strategies, and the like are protected.

Cases interpreting the current version of G.S. 15A-904 reflect the narrower scope of the statute. *See State v. Shannon*, 182 N.C. App. 350, 361–62 (2007) (recognizing narrow scope of statute), *superseded by statute in part on other grounds as recognized in State v. Zamora-Ramos*, 190 N.C. App. 420 (2008) (recognizing that discovery statutes, as amended, do not require prosecutor to reduce to writing oral witness statements if the statements do not significantly differ from previous statements given to law enforcement [court does not question holding of *Shannon* about narrower scope of work product protection]).

Work product principles are not the same throughout criminal proceedings. Protections for the defendant's "work product" are considerably broader. *See infra* § 4.8, Prosecution's Discovery Rights. In post-conviction proceedings, there is no protection for a prosecutor's work product related to the investigation and prosecution of the case. *See supra* § 4.1F, Postconviction Proceedings.

Practice note: If the trial court finds that materials are work product and are not discoverable, defense counsel must confirm that the materials are placed under seal and included as part of the record on appeal. *See State v. Hall*, 187 N.C. App. 308 (2007) (prosecutor prepared work product inventory and filed it with trial court; in finding that materials were not discoverable, trial court stated that it would place materials under seal for appellate review, but materials were not made part of the record and court of appeals rejected defendant's argument for that reason alone).

Confidential informants. Under 2007 amendments to the discovery law, the State is not required to disclose the identity of a confidential informant unless otherwise required by law. G.S. 15A-904(a1). The amended statute does not require the State to obtain a protective order to withhold the identity of a confidential informant. *See State v. Leyva*, 181 N.C. App. 491, 496 (2007) (State did not request a protective order because the discovery statutes did not require the State to disclose information about a confidential informant, who was not testifying at trial). A defendant may have a constitutional and statutory right in some circumstances to disclosure of an informant's identity. *See infra* § 4.6D, Identity of Informants.

Under a former provision of the discovery statute, the State could withhold a statement of the defendant to a confidential informant if the informant's identity was a prosecution secret, the informant was not going to testify for the prosecution, and the statement was not exculpatory. If the State withheld a statement on that ground, the informant could not testify at trial. *See State v. Batchelor*, 157 N.C. App. 421 (2003). The current statute does not contain any exception for statements to confidential informants. Accordingly, the State would appear to need a protective order to withhold such statements (presumably on the ground that disclosure of the statements would disclose the informant's identity) and also could not call the informant to testify at trial.

Personal identifying information of witnesses. Under 2007 amendments to the discovery law, the State is not required to provide a witness's personal identifying information other than the witness's name, address, date of birth, and published phone

number unless the court determines, on motion by the defendant, that additional information is required to identify and locate the witness. G.S. 15A-904(a2).

Under 2011 amendments, the State is not required to disclose the identity of any person who provides information about a crime or criminal conduct to a Crime Stoppers organization under promise of anonymity unless otherwise ordered by a court (G.S. 15A-904(a3)); and the State is not required to disclose a Victim Impact Statement, as defined in G.S. 15A-904(a4), unless otherwise required by law.

Protective orders. G.S. 15A-908(a) allows either party to apply to the court, by written motion, for a protective order protecting information from disclosure for good cause, such as substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment.

The State (or the defendant) may apply ex parte for a protective order. If an ex parte order is granted, the opposing party receives notice of entry of the order but not the subject matter of the order. G.S. 15A-908(a). If the court enters an order granting relief, the court must seal and preserve in the record for appeal any materials submitted to the court for review.