
4.4 Other Discovery Categories and Mechanisms

The discussion below covers categories of information that may be discoverable under North Carolina law but are not specifically identified in G.S. 15A-903(a)(1) (right to complete files) or G.S. 15A-903(a)(2) (notice of expert and other witnesses). For a discussion of categories of information discoverable under those statutes, see *supra* § 4.3, Discovery Rights under G.S. 15A-903. *See also* § 4.5, *Brady* Material, and § 4.6, Other Constitutional Rights. Counsel should include in discovery requests and motions all pertinent categories of information.

A. Law Enforcement Agency Recordings

In 2016, the General Assembly enacted G.S. 132-1.4A, governing the disclosure of law enforcement recordings including any audio or visual recordings operated by law enforcement in the course of their official duties. The law specifically includes body-worn camera and dash-camera recordings. Interviews and interrogations of suspects are excluded from the reach of the statute. The statute describes categories of people to whom a law enforcement recording may be released and creates a process by which a person may petition a superior court judge for release in the event that the law enforcement agency refuses a request to provide the recording. The petition is a separate civil superior court action. If a person is authorized to obtain the recording, including any person depicted in the recording, there is no filing fee for institution of the action.

While subsection (c) of the statute states that law enforcement recordings are only to be released pursuant to the law, subsection (h) of the statute creates an exception for release of recordings to comply with criminal discovery requests or for use in district court criminal proceedings. A defendant's statutory and constitutional discovery rights to a law enforcement recording relevant to the prosecution are therefore unaffected by the law. However, because a defendant is not entitled to statutory discovery before indictment (or in a district court case), it can be useful for defense counsel to pursue the recording by way of the petition process laid out in G.S. 132-1.4A. This allows defense counsel to obtain the recording earlier in the case, rather than waiting for indictment and transfer to

superior court (or waiting for a district court trial).

Although defense counsel should have the right to subpoena a law enforcement recording in a district court case, some law enforcement agencies and judges take the position that defense counsel must use the statutory procedure to obtain the recording. Although this position is questionable, defense counsel may find it easier to petition for release pursuant to the statute. The Administrative Office of the Courts has created a form to assist with the process, AOC-CV-270 (Apr. 2017).

For more information on the law enforcement recording law, see John Rubin, *The Andrew Brown Body Cam Rulings*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 11, 2021); Frayda Bluestein, *Answers to Questions About North Carolina's Body-Worn Camera Law*, Coates' Cannons: N.C. Local Gov't Law, UNC SCH. OF GOV'T BLOG (July 20, 2016); *see also* Jeff Welty, *Body Camera Footage May Now Be Released for "Suspect Identification or Apprehension"*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 26, 2019).

B. Plea Arrangements and Immunity Agreements

G.S. 15A-1054(a) authorizes prosecutors to agree not to try a suspect, to reduce the charges, and to recommend sentence concessions on the condition that the suspect will provide truthful testimony in a criminal proceeding. Prosecutors may enter into such plea arrangements without formally granting immunity to the suspect. G.S. 15A-1054(c) requires the prosecution to give written notice to the defense of the terms of any such arrangement within a reasonable time before any proceeding in which the person is expected to testify.

Some opinions have interpreted the statute to require the State to disclose all plea arrangements with witnesses, regardless with whom made and whether formal or informal. *See, e.g., State v. Brooks*, 83 N.C. App. 179 (1986) (law enforcement officer told witness he would talk to prosecutor and see about sentence reduction if witness testified against defendant; violation found for failure to disclose this information); *State v. Spicer*, 50 N.C. App. 214 (1981) (although prosecutor stated there was no agreement, witness stated that he expected prosecutor to drop felonies to misdemeanors; violation found for failure to disclose this information). Other opinions take a narrower view. *See, e.g., State v. Crandell*, 322 N.C. 487 (1988) (finding that State did not violate statute by failing to disclose plea arrangement with law enforcement agency; statute requires disclosure of plea arrangements entered into by prosecutors); *State v. Lowery*, 318 N.C. 54 (1986) (statute did not require disclosure because prosecutor had not entered into formal agreement with defendant).

Defense counsel therefore should draft a broad discovery request and motion for such information, including all evidence, documents, and other information concerning all deals, concessions, inducements, and incentives offered to any witness in the case. Counsel should base the request on: (1) the prosecutor's obligation under G.S. 15A-1054(c) to disclose such arrangements; (2) the prosecutor's obligation under G.S. 15A-

903(a) to disclose the complete files of the investigation and prosecution of the offenses allegedly committed by the defendant, including oral statements by witnesses (*see supra* "Oral statements of witness" in § 4.3C, Categories of Information); and (3) the prosecutor's obligation under *Brady* to disclose impeachment evidence. *See Giglio v. United States*, 405 U.S. 150, 155 (1972) ("evidence of any understanding or agreement as to a future prosecution would be relevant to . . . credibility"); *Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976) (North Carolina conviction vacated on habeas for failure to disclose promise of leniency made by police officer); *see also infra* § 4.5C, Favorable to Defense (discussing *Brady* material). In addition to obtaining complete information, a discovery request and motion based on these additional grounds may provide for a greater remedy than specified in G.S. 15A-1054(c)—a recess—if the State fails to turn over the required information. A sample motion to reveal deals or concessions is available in the Adult Criminal Motions section of the IDS website.

C. 404(b) Evidence

North Carolina Rule of Evidence 404(b) provides that a defendant's prior "bad acts" are admissible if offered for a purpose other than to prove his or her character. The prior acts need not have resulted in a conviction.

Before 2004, the discovery statutes did not give defendants the right to discover 404(b) evidence. Defendants argued that North Carolina Rule of Evidence Rule 404(b) mandated that the prosecution give notice of "bad acts" evidence before trial, an argument the courts rejected. *See State v. Payne*, 337 N.C. 505 (1994). The revised discovery statutes and other grounds provide a basis for disclosure, however:

- If the prosecution intends to use 404(b) evidence against the defendant, the evidence is presumably part of the complete files of the investigation and prosecution of the defendant and so is subject to the State's general discovery obligations under G.S. 15A-903(a)(1).
- The trial court likely has the inherent authority to require disclosure in the interests of justice and as a matter of judicial efficiency. *See generally* FED. R. EVID. 404(b) & Commentary to 1991 Amendment (recognizing that pretrial notice of such evidence serves to "reduce surprise and promote early resolution on the issue of admissibility").
- In addition to or in lieu of moving for disclosure of Rule 404(b) evidence, defense counsel may file a motion in limine to preclude admission of such evidence, which may reveal the existence of such evidence as well as limit its use.

A sample motion to disclose evidence of prior bad acts is available in the Adult Criminal Motions section of the IDS website.

D. Examinations and Interviews of Witnesses

Examinations. In *State v. Horn*, 337 N.C. 449 (1994), the court held that a trial judge may not compel a victim or witness to submit to a psychological examination without his

or her consent. *See also State v. Carter*, 216 N.C. App. 453 (2011) (mentioning *Horn* and finding that defendant presented no authority for argument on appeal that trial court violated his federal and state constitutional rights by refusing to order examination of victim), *rev'd on other grounds*, 366 N.C. 496 (2013).

Horn held further that a trial judge may grant other relief if the person refuses to submit to a voluntary examination. A judge may appoint an expert for the defense to interpret examinations already performed on the person, deny admission of the State's evidence about the person's condition, and dismiss the case if the defendant's right to present a defense is imperiled. Accordingly, counsel should consider filing a motion requesting that the person submit to an examination. If the person refuses, defense counsel may have grounds for asking for the relief described in *Horn.*

Additional decisions hold that a judge does not have the authority to order a victim or witness to submit to a physical examination without consent. *See State v. Hewitt*, 93 N.C. App. 1 (1989) (trial judge may order physical examination only if victim or victim's guardian consents). *But see People v. Chard*, 808 P.2d 351 (Colo. 1991) (reviewing *Hewitt* and finding that majority of courts have recognized the authority of trial courts to order a physical examination of the victim on a showing of compelling need).

The defendant's ability to require the State to obtain physical evidence from a victim or witness is also limited. *See supra* "Physical evidence" in § 4.3C, Categories of Information, and § 4.4G, Nontestimonial Identification Orders. Defendants may inspect and, under appropriate safeguards, test physical evidence already collected by the State. The defendant also may request that the State conduct DNA tests of biological evidence collected by the State. *See infra* § 4.4F, Biological Evidence.

For a discussion of the State's ability to obtain an examination of a defendant who intends to introduce expert testimony on his or her mental condition, see *infra* "Insanity and other mental conditions" in § 4.8E, Defenses.

Interviews. The defendant generally does not have the right to compel a witness to submit to an interview. *See State v. Phillips*, 328 N.C. 1 (1991); *State v. Taylor*, 178 N.C. App. 395 (2006) (holding under revised discovery statutes that police detective was not required to submit to interview by defense counsel). The State may not, however, instruct witnesses not to talk with the defense. *See State v. Pinch*, 306 N.C. 1, 11–12 (1982) (obstructing defense access to witnesses may be grounds for reversal of conviction), *overruled in part on other grounds by State v. Robinson*, 336 N.C. 78 (1994); *see also* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3(h), at 501–05 (4th ed. 2015) [hereinafter LAFAVE, CRIMINAL PROCEDURE] (interpreting *Webb v. Texas*, 409 U.S. 95 (1972), and other decisions as making it a due process violation for prosecutor to discourage prospective witnesses from testifying for defense).

In limited circumstances, defense counsel may have the right to depose a witness. *See infra* § 4.4E, Depositions; G.S. 8-74. Courts also have compelled witness interviews for discovery violations. *See State v. Hall*, 93 N.C. App. 236 (1989) (as sanction for

discovery violation, court ordered State's witness to confer with defense counsel and submit to questioning under oath before testifying).

Ethical rules also constrain the ability of defense counsel to interview a child in the absence of a parent or guardian. Under the North Carolina State Bar's 2009 Formal Ethics Opinion 7, a criminal defense lawyer or prosecutor may not interview an unrepresented child alleged to be the victim in a criminal case involving allegations of physical or sexual abuse without the consent of the child's parent or guardian if the child is under the age at which a parent or guardian is required for interrogation of a juvenile under G.S. 7B-2101(b). That statute formerly set the age at 14 years old; in 2015, the statute was amended to increase the age to 16. *See* S.L. 2015-58, s.1.1 (H 879). Thus, defense counsel cannot interview a child under the age of 16 without the consent of the child's parent or guardian in the circumstances described in the rule. For children 16 years or older, defense counsel is permitted to interview a child alleged to be the victim of physical or sexual abuse as a part of a criminal prosecution "provided the lawyer complies with Rule 4.3, reasonably determines that the child is sufficiently mature to understand the lawyer's role and purpose, and avoids any conduct designed to coerce or intimidate the child." 2009 FEO 7; N.C. State Bar R. Professional Conduct 4.2, 4.3 (interviewing represented and unrepresented witnesses).

E. Depositions

A defendant in a criminal case may take depositions for the purpose of preserving testimony of a person who is infirm, physically incapacitated, or a nonresident of this state. *See* G.S. 8-74; *State v. Barfield*, 298 N.C. 306 (1979), *disavowed in part on other grounds by State v. Johnson*, 317 N.C. 193 (1986).

A defendant may have a further right to take a deposition of a person residing in a state or U.S. territory outside North Carolina. In 2011, the General Assembly added G.S. Chapter 1F, the North Carolina Interstate Depositions and Discovery Act. Its principal purpose was to simplify the procedure for the parties in a civil case in one state to take depositions of witnesses in another state. The pertinent legislation also amended N.C. Rule of Civil Procedure 45, which applies to criminal cases pursuant to G.S. 15A-801 and G.S. 15A-802. *See* S.L. 2011-247 (H 379). Rule 45(f) sets forth the procedure for obtaining discovery, including depositions of a person residing outside North Carolina, and does not exclude criminal cases. If Rule 45(f) applies to criminal cases, a party in a North Carolina criminal case would be able to obtain a deposition (or other discovery) in another state if the state allows such discovery in criminal cases. *See* N.C. R. CIV. P. 45(f) (requiring party to follow available processes and procedures of jurisdiction where person resides). Rule 45(f) describes the procedure for obtaining a deposition, including obtaining a commission (an order) from a North Carolina court before seeking discovery in the other state.

F. Biological Evidence

G.S. 15A-267(a) gives the defendant a right of access before trial to the following:

- any DNA analysis in the case;
- any biological material that
  - has not been DNA tested
  - was collected from the crime scene, the defendant's residence, or the defendant's property
    [the punctuation in the statute makes it unclear whether both of the above conditions must be met or only one]; and
- a complete inventory of all physical evidence connected to the investigation.

G.S. 15A-267(b) states that access to the above is as provided in G.S. 15A-902, the statute on requesting discovery, and as provided in G.S. 15A-952, the statute on pretrial motions. Therefore, counsel should request the above in his or her discovery request and follow up with a motion as necessary. *See also* G.S. 15A-266.12(d) (State Bureau of Investigation not required to provide the state DNA database for criminal discovery purposes; request to access a person's DNA record must comply with G.S. 15A-902).

On motion of the defendant, the court must order the State to conduct DNA testing of biological evidence it has collected and run a comparison with CODIS (the FBI's combined DNA index system) if the defendant meets the conditions specified in G.S. 15A-267(c). In 2009, the General Assembly amended G.S. 15A-269(c) to make testing mandatory, not discretionary, if the defendant makes the required showing. *See* S.L. 2009-203, s. 3 (H 1190).

In lieu of or in addition to asking for the SBI to conduct DNA testing, the defendant may seek funds for an expert to conduct testing of the evidence. *See infra* Chapter 5, Experts and Other Assistance. If the defendant does not intend to offer the tests 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.

G.S. 15A-268 requires agencies with custody of biological evidence to retain the evidence according to the schedule in that statute. G.S. 20-139.1(h) requires preservation of blood and urine samples subject to a chemical analysis for the period of time specified in that statute and, if a motion to preserve has been filed, until entry of a court order about disposition of the evidence (for cases on or after June 19, 2013 per S.L. 2013-171, s. 1 (S 630)).

G. Nontestimonial Identification Orders

G.S. 15A-271 through G.S. 15A-282 allow the prosecution in some circumstances to obtain a nontestimonial identification order for physical evidence (fingerprints, hair samples, saliva, etc.) from a person suspected of committing a crime. *See generally* ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 459–64 (UNC School of Government, 5th ed. 2016). The defendant has the right to any report of nontestimonial identification procedures conducted on him or her. *See* G.S. 15A-282.

In some circumstances a defendant also has the right to request that nontestimonial identification procedures be conducted on himself or herself. *See* G.S. 15A-281 (specifying conditions for issuance of order). The defendant generally does not have the right to a nontestimonial identification order to obtain physical samples from a third party. *See State v. Tucker*, 329 N.C. 709 (1991) (defendant could not use nontestimonial identification order to obtain hair sample of possible suspect). *But cf. Fathke v. State*, 951 P.2d 1226 (Alaska Ct. App. 1998) (court had authority to issue subpoena compelling witness to produce fingerprints, which constitute objects subject to subpoena).

A sample motion for nontestimonial identification procedures to be conducted is available in the Adult Criminal Motions section of the IDS website.

H. Potential Suppression Issues

Generally. To enable defense counsel to determine whether to file a motion to suppress evidence (under G.S. 15A-971 through G.S. 15-980), counsel should seek discovery of the following (some of which may be in the court file and thus already accessible to counsel and some of which may be a part of the State's investigative and prosecutorial files and thus subject to the State's general discovery obligations under G.S. 15A-903(a)(1)):

- search warrants, arrest warrants, and nontestimonial identification orders issued in connection with the case;
- a description of any property seized from the defendant and the circumstances of the seizure;
- the circumstances of any pretrial identification procedures employed in connection with the alleged crimes (lineups, photo arrays, etc.), including any recordings of the identification procedures as required under G.S. 15A-284.52 (Eyewitness identification reform);
- a description of any communications between the defendant and law-enforcement officers; and
- a description of any surveillance (electronic, visual, or otherwise) conducted of the defendant or others resulting in the interception of any information about the defendant and the offense with which he or she is charged.

Innocence initiatives. The General Assembly has enacted requirements for recording interrogations (G.S. 15A-211) and conducting lineups (G.S. 15A-284.52) as part of an effort to increase the reliability of convictions. For a discussion of these requirements, see *infra* § 14.3G, Recording of Statements (2d ed. 2013), and § 14.4B, Statutory Requirements for Lineups (2d ed. 2013).

The statutes containing these requirements do not contain specific procedures for discovery, but interrogations and lineups are part of the complete files of the investigation and prosecution and are therefore subject to discovery under G.S. 15A-903(a)(1). Counsel should specifically request the information as part of his or her discovery requests and motions.

Electronic surveillance. G.S. 15A-294(d) through (f) describe a defendant's rights to obtain information about electronic surveillance of him or her. For a further discussion of electronic surveillance and related investigative methods, which is regulated by both state and federal law, see ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 210–21 (UNC School of Government, 5th ed. 2016) and Jeff Welty, *Prosecution and Law Enforcement Access to Information about Electronic Communications*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/05 (Oct. 2009).

Chemical analysis results. A person charged with an implied consent offense has a right to a copy of the chemical analysis results the State intends to offer into evidence, whether in district or superior court. The statute, G.S. 20-139.1(e), provides that failure to provide a copy to the defendant before trial is grounds for a continuance but not grounds to suppress the chemical analysis results or dismiss the charges.

I. Other Categories

Joinder and severance. *See* G.S. 15A-927(c)(3) (right to codefendant's statements, discussed *supra* in " Statements of codefendants" in § 4.3C, Categories of Information).

Transcript of testimony before drug trafficking grand jury. *See* G.S. 15A-623(h)(2), discussed *infra* in "Discovery of testimony" in § 9.5, Drug Trafficking Grand Jury).