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## 4.5 *Brady* Material

### A. Duty to Disclose

**Constitutional requirements.** The prosecution has a constitutional duty under the Due Process Clause to disclose evidence if it is:

- favorable to the defense and
- material to the outcome of either the guilt-innocence or sentencing phase of a trial.

*Brady v. Maryland,* 373 U.S. 83 (1963). Several U.S. Supreme Court cases have addressed the prosecution's obligation to disclose what is known as *Brady* material, including:

- *Turner v. U.S.*, ___ U.S. ___, 137 S. Ct. 1885 (2017) (no *Brady* violation where undisclosed evidence did not show reasonable possibility of different result at trial);
- *Wearry v. Cain*, 577 U.S. 385 (2016) (ordering new trial based on *Brady* violations for failure to disclose evidence casting doubt on the credibility of essential prosecution witness, including deal-seeking conduct by the witness);
- *Smith v. Cain*, 565 U.S. 73 (2012) (reversing defendant's conviction for *Brady* violation; eyewitness's undisclosed statements to police that he could not identify defendant contradicted his trial testimony identifying defendant as perpetrator);
- *Cone v. Bell*, 556 U.S. 449 (2009) (undisclosed documents strengthened inference that defendant was impaired by drugs around the time his crimes were committed; remanded for further consideration of potential impact on sentencing);
- *Banks v. Dretke*, 540 U.S. 668 (2004) (failure to disclose that one of witnesses was paid police informant and that another witness's trial testimony had been intensively coached by prosecutors and law enforcement officers; evidence met materiality standard and therefore established sufficient prejudice to overcome procedural default in state postconviction proceedings);

- *Strickler v. Greene*, 527 U.S. 263 (1999) (contrast between witness's trial testimony of terrifying circumstances she observed and initial statement to detective describing incident as trivial established impeaching character of initial statement, which was not disclosed; evidence was not sufficiently material to outcome of proceedings and therefore did not establish sufficient prejudice to overcome procedural default);
- *Kyles v. Whitley*, 514 U.S. 419 (1995) (cumulative effect of undisclosed evidence favorable to defendant required reversal of conviction and new trial);
- *United States v. Bagley*, 473 U.S. 667 (1985) (favorable evidence includes impeachment evidence, in this instance, agreements by government to pay informants for information; remanded to determine whether nondisclosure warranted relief);
- *United States v. Agurs*, 427 U.S. 97 (1976) (nondisclosure of victim's criminal record to defense did not meet materiality standard and did not require relief in circumstances of case); and
- *Brady v. Maryland*, 373 U.S. 83 (1963) (violation of due process by failure of prosecutor to disclose statement that codefendant did actual killing; because statement would only have had impact on capital sentencing proceeding and not on guilt-innocence determination, case remanded for resentencing).

**North Carolina cases.** North Carolina cases granting *Brady* relief include: *State v. Best,* 376 N.C. 340 (2020) (undisclosed evidence of key witness statements and forensic reports contradicting the prosecution theory required new trial); *State v. Williams*, 362 N.C. 628 (2008) (dismissal upheld where State created and then destroyed a poster that was favorable to the defense, was material, and could have been used to impeach State's witness); *State v. Canady*, 355 N.C. 242 (2002) (defendant had right to know about informants in a timely manner so he could interview individuals and develop leads; new trial ordered); *State v. Sandy,* 248 N.C. App. 92 (2016) (finding *Brady* and due process violations for failure to disclose criminal activity of victim and failure to correct false testimony); *State v. Absher*, 207 N.C. App. 377 (2010) (unpublished) (dismissing case for destruction of evidence); *State v. Barber*, 147 N.C. App. 69 (2001) (finding *Brady* violation for State's failure to disclose cell phone records showing that person made several calls to decedent's house the night of his death, which would have bolstered defense theory that person had threatened decedent with arrest shortly before his death and that defendant committed suicide); *see also infra* § 4.6A, Evidence in Possession of Third Parties (discussing cases in which North Carolina courts found that evidence in possession of third parties was favorable and material and nondisclosure violated due process).

North Carolina also recognizes that prosecutors have an ethical obligation to disclose exculpatory evidence to the defense. N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 3.8(d) (prosecutor has duty to make timely disclosure to defense of all evidence that tends to negate guilt or mitigate offense or sentence); *see also* N.C. CONST. art 1, sec. 19 (Law of Land Clause), sec. 23 (rights of accused).

Sample motions for *Brady*/exculpatory material are available in the Adult Criminal Motions section of the IDS website.

## B. Applicable Proceedings

The due process right to disclosure of favorable, material evidence applies to guilt-innocence determinations and sentencing. *See Brady v. Maryland,* 373 U.S. 83, 87 (1963) (nondisclosure "violates due process where the evidence is material either to guilt or to punishment"); *see also Cone v. Bell*, 556 U.S. 449 (2009) (applying *Brady* to capital sentencing); *Basden v. Lee*, 290 F.3d 602 (4th Cir. 2002) (confirming that *Brady* applies to sentencing phase).

*Brady* may give defendants the right to exculpatory evidence for suppression hearings. *See United States v. Barton*, 995 F.2d 931 (9th Cir. 1993) (holding that *Brady* applies to suppression hearing involving challenge to truthfulness of allegations in affidavit for search warrant). *But cf. United States v. Stott*, 245 F.3d 890 (7th Cir. 2001) (noting that there is not a consensus among federal circuit courts as to whether *Brady* applies to suppression hearings), *amended on rehearing in part on other grounds*, 15 F. App'x 355 (7th Cir. 2001).

A constitutional violation also may result from nondisclosure when the defendant pleads guilty or pleads not guilty by reason of insanity. *See White v. United States*, 858 F.2d 416 (8th Cir. 1988) (violation may affect whether *Alford* guilty plea was knowing and voluntary); *Miller v. Angliker*, 848 F.2d 1312 (2d Cir. 1988) (to same effect for plea of not guilty by reason of insanity); *Campbell v. Marshall*, 769 F.2d 314 (6th Cir. 1985) (to same effect for guilty plea); *see also* 6 LAFAVE, CRIMINAL PROCEDURE § 24.3(b), at 449–55 (discussing split in authority among courts). The U.S. Supreme Court has held, however, that *Brady* does not require disclosure of impeachment information before a defendant enters into a plea arrangement. *See United States v. Ruiz*, 536 U.S. 622 (2002) (stating that impeachment information relates to the fairness of a trial, not to the voluntariness of a plea); *State v. Allen*, 222 N.C. App. 707 (2012) (following *Ruiz*).

The U.S. Supreme Court has said that "*Brady* is the wrong framework" for analyzing whether a defendant in postconviction proceedings has the right to obtain physical evidence from the State for DNA testing. *Dist. Attorney's Office for Third Judicial Dist. v. Osbourne*, 557 U.S. 52, 69 (2009). Rather, in assessing the adequacy of a state's postconviction procedures, including the right to postconviction discovery, the question is whether the procedures are "fundamentally inadequate to vindicate the substantive rights provided." *Id.* (finding that Alaska's procedures were not inadequate). For a discussion of North Carolina's post-conviction discovery procedures, see *supra* § 4.1F, Postconviction Cases, and §4.4F, Biological Evidence.

## C. Favorable to Defense

To trigger the prosecution's duty under the Due Process Clause, the evidence first must be favorable to the defense. The right is broad. Favorable evidence includes evidence that tends to negate guilt, mitigate an offense or sentence, *or* impeach the truthfulness of a witness or reliability of evidence. The defendant does not have a constitutional right to

discovery of inculpatory evidence. Some generally-recognized categories of favorable evidence are discussed below.

**Impeachment evidence.** The courts have recognized that favorable evidence includes several different types of impeachment evidence, including:

- False statements of a witness. *See United States v. Minsky*, 963 F.2d 870 (6th Cir. 1992).
- Prior inconsistent statements. *See Jacobs v. Singletary*, 952 F.2d 1282 (11th Cir. 1992); *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980); *see also United States v. Service Deli Inc.*, 151 F.3d 938 (9th Cir. 1998) (attorney's handwritten notes taken during interview with key witness constituted *Brady* evidence and new trial required where government provided typewritten summary instead of notes).
- Bias of a witness. *See Reutter v. Solem*, 888 F.2d 578 (8th Cir. 1989) (State's witness had applied for sentence commutation); *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976) (threat of prosecution if witness did not testify); *see also State v. Prevatte*, 346 N.C. 162 (1997) (reversible error to preclude defendant from cross-examining witness about pending criminal charges, which gave State leverage over witness).
- Witness's capacity to observe, perceive, or recollect. *See Jean v. Rice*, 945 F.2d 82 (4th Cir. 1991) (failure to disclose that State's witnesses had been hypnotized); *see also State v. Williams*, 330 N.C. 711 (1992) (defendant had right to cross-examine witness about drug habit and mental problems to cast doubt on witness's capacity to observe and recollect).
- Psychiatric evaluations of witness. *See State v. Thompson*, 187 N.C. App. 341 (2007) (impeachment information may include prior psychiatric treatment of witness; records that were made part of record on appeal did not contain material, favorable evidence); *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980) (evaluation of witness); *see also United States v. Spagnoulo*, 960 F.2d 990 (11th Cir. 1992) (evaluation of defendant). *But cf. State v. Lynn*, 157 N.C. App. 217, 219–23 (2003) (upholding denial of motion to require State to determine identity of any mental health professionals who had treated witness).

**Prior convictions and other misconduct.** A significant subcategory of impeachment evidence is evidence of a witness's criminal convictions or other misconduct. *See, e.g., State v. Kilpatrick*, 343 N.C. 466, 471–72 (1996) (witnesses did not have significant criminal record so nondisclosure was not material to outcome of case); *State v. Ford*, 297 N.C. 144 (1979) (no showing by defense that witness had any criminal record); *see also Crivens v. Roth*, 172 F.3d 991 (7th Cir. 1999) (failure to provide criminal records of State's witnesses required new trial); *United States v. Stroop*, 121 F.R.D. 269, 274 (E.D.N.C. 1988) ("the law requires that . . . the defendants shall be provided the complete prior criminal record of the witness as well as information regarding all prior material acts of misconduct of the witness"); N.C. R. EVID. 609(d) (allowing impeachment of witness by juvenile adjudication).

If a witness's criminal record would be admissible for substantive as well as impeachment purposes, the defendant may have an even stronger claim to disclosure

under *Brady*. For example, in cases in which the defendant intends to claim self-defense, the victim's criminal record (and other misconduct) may be relevant to why the defendant believed it necessary to use force to defend himself or herself. *See Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980) (requiring disclosure of victim's rap sheet, which confirmed defendant's fear of victim and supported self-defense claim).

**Evidence discrediting police investigation and credibility, including prior misconduct by officers.** Information discrediting "the thoroughness and even the good faith" of an investigation are appropriate subjects of inquiry for the defense. *Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (information discrediting caliber of police investigation and methods employed in assembling case).

Personnel files of law enforcement officers may contain evidence that bears on an officer's credibility or discredits the investigation into the alleged offense, including prior misconduct by officers. Several cases have addressed the issue, in which the courts followed the usual procedure of conducting an in camera review to determine whether the files contained material, exculpatory information. *See State v. Raines*, 362 N.C. 1, 9–10 (2007) (reviewing officer's personnel file, which trial court had placed under seal, and finding that it did not contain exculpatory information to which the defendant was entitled); *State v. Cunningham*, 344 N.C. 341, 352–53 (1996) (finding that officer's personnel file was not relevant where defendant shot and killed officer as officer was walking around police car); *Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013) (granting habeas relief where defendant was denied access to detective's personnel records, which indicated that detective had lied under oath to secure convictions in other cases and engaged in other misconduct); *United States v. Veras*, 51 F.3d 1365 (7th Cir. 1995) (personnel information bearing on officer's credibility was favorable but was not sufficiently material to require new trial for failure to disclose); *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991) (requiring in camera review of personnel files of officers for impeachment evidence); *United States v. Kiszewski*, 877 F.2d 210 (2d Cir. 1989) (to same effect); *see also* Jeff Welty, *Must Officers' Prior Misconduct Be Disclosed in Discovery?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 8, 2012) (recognizing that officer's prior dishonesty or misconduct may be material, impeachment evidence in the pending case).

To avoid disputes over the proper recipient, counsel should consider directing a motion to produce the files to the applicable law-enforcement agency as well as to the prosecution. *See State v. Golphin*, 352 N.C. 364, 403–05 (2000) (finding no violation of State's statutory discovery obligations because, among other reasons, officer's personnel files were not in possession, custody, or control of prosecutor); *State v. Smith*, 337 N.C. 658, 663–64 (1994) (defense requested documentation of any internal investigation of any law enforcement officer whom the State intended to call to testify at trial; court finds that motion was fishing expedition and that State was not required to conduct independent investigation to determine possible deficiencies in case).

Sample motions for police personnel records are available in the Adult Criminal Motions section of the IDS website.

**Other favorable evidence.** Listed below are several other categories of evidence potentially subject to disclosure.

- Evidence undermining identification of defendant. *See Kyles v. Whitley*, 514 U.S. 419, 444 (1995) (evolution over time of eyewitness's description); *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988) (witnesses' testimony differed from previous accounts); *Lindsey v. King*, 769 F.2d 1034 (5th Cir. 1985) (eyewitness stated he could not identify person in initial police report and later identified defendant at trial); *Cannon v. Alabama*, 558 F.2d 1211 (5th Cir. 1977) (witness identified another).
- Evidence tending to show guilt of another. *See Barbee v. Warden,* 331 F.2d 842 (4th Cir. 1964) (forensic reports indicated that defendant was not assailant).
- Physical evidence. *See United States ex rel. Smith v. Fairman,* 769 F.2d 386 (7th Cir. 1985) (evidence that gun used in shooting was inoperable).
- "Negative" exculpatory evidence. *See Jones v. Jago,* 575 F.2d 1164 (6th Cir. 1978) (statement of codefendant did not mention that defendant was present or participated).
- Identity of favorable witnesses. *See United States v. Cadet,* 727 F.2d 1453 (9th Cir. 1984) (witnesses to crime that State does not intend to call); *Freeman v. Georgia,* 599 F.2d 65 (5th Cir. 1979) (whereabouts of witness); *Collins v. State,* 642 S.W.2d 80 (Tex. App. 1982) (failure to disclose correct name of witness who had favorable evidence).

### D. Material to Outcome

**Standard.** In addition to being "favorable" to the defense, evidence must be material to the outcome of the case. Evidence is material, and constitutional error results from its nondisclosure, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

**Impact of *Kyles v. Whitley*.** To reinforce the prosecution's duty to disclose, the U.S. Supreme Court in *Kyles*, 514 U.S. 419 (1995), emphasized four aspects of the materiality standard.

- The defendant does not need to show that more likely than not (i.e., by a preponderance of evidence) he or she would have received a different verdict with the undisclosed evidence, but whether in its absence the defendant received a fair trial—that is, "a trial resulting in a verdict worthy of confidence." A "reasonable probability" of a different verdict is shown when suppression of the evidence "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434 (citation omitted).
- The materiality standard is not a sufficiency-of-evidence test. The defendant need not prove that, after discounting inculpatory evidence in light of the undisclosed favorable evidence, there would not have been enough left to convict. Instead, the defendant must show only that favorable evidence could reasonably place the whole case in such a different light as to undermine confidence in the verdict. *Id.* at 434–35.

- Once a reviewing court finds constitutional error, there is no harmless error analysis. A new trial is required. *Id.*
- The suppressed favorable evidence must be considered collectively, not item-by-item. The reviewing court must consider the net effect of all undisclosed favorable evidence in deciding whether the point of "reasonable probability" is reached. *Id.* at 436–37.

**Application before and after trial.** The standard of materiality is essentially a retrospective standard—one that appellate courts apply after conviction in viewing the impact of undisclosed evidence on the outcome of the case. How does the materiality standard apply prospectively, when prosecutors and trial courts determine what must be disclosed? As a practical matter, the materiality standard may be lower before trial because the judge and prosecutor must speculate about how evidence will affect the outcome of the case. *See Kyles*, 514 U.S. 419, 439 ("prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence"); *United States v. Agurs*, 427 U.S. 97, 106 (1976) ("if a substantial basis for claiming materiality exists, it is reasonable to require the prosecution to respond either by furnishing the information or by submitting the problem to the trial judge"); *Lewis v. United States*, 408 A.2d 303 (D.C. 1979) (court recognizes difficulty in applying material-to-outcome standard before outcome is known and therefore holds that on pretrial motion defendant is entitled to disclosure if "substantial basis" for claiming materiality exists).

### E. Time of Disclosure

The prosecution must disclose favorable, material evidence in time for the defendant to make effective use of it at trial. *See State v. Canady*, 355 N.C. 242 (2002) (defendant had right to know of informants in timely manner so he could interview individuals and develop leads; new trial ordered); *State v. Taylor*, 344 N.C. 31, 50 (1996) (*Brady* obligations satisfied "so long as disclosure is made in time for the defendants to make effective use of the evidence"); *State v. Spivey*, 102 N.C. App. 640, 646 (1991) (finding no violation on facts but noting that courts "strongly disapprove of delayed disclosure of *Brady* materials" (citation omitted)); *see also Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001) (disclosure of key witness nine days before opening arguments and 23 days before defense began case afforded defense insufficient opportunity to use information); *United States v. Starusko*, 729 F.2d 256, 261 (3d Cir. 1984) ("longstanding policy of encouraging early production"); *United States v. Campagnuolo*, 592 F.2d 852, 859 (5th Cir. 1979) ("It should be obvious to anyone involved with criminal trials that exculpatory information may come too late if it is only given at trial . . . ." (citation omitted)); *Grant v. Alldredge*, 498 F.2d 376 (2d Cir. 1974) (failure to disclose before trial required new trial). Consequently, trial courts often require the prosecution to disclose *Brady* evidence before trial.

Several appellate decisions have found that disclosure at trial satisfied the prosecution's *Brady* obligations. These rulings rest on the materiality requirement, however, under which the court assesses whether there was a reasonable probability of a different result had the defendant learned of the particular information earlier. The rulings do not create a

rule that the prosecution may delay disclosure until trial; nor do they necessarily reflect the actual practice of trial courts.

### F. Admissibility of Evidence

The prosecution must disclose favorable, material evidence even if it would be inadmissible at trial. *See State v. Potts*, 334 N.C. 575 (1993) (evidence need not be admissible if it would lead to admissible exculpatory evidence), *citing Maynard v. Dixon*, 943 F.2d 407, 418 (4th Cir. 1991) (indicating that evidence must be disclosed if it would assist the defendant in discovering other evidence or preparing for trial); *see also* 6 LAFAVE, CRIMINAL PROCEDURE § 24.3(b), at 430–31 (discussing approaches taken by courts on this issue).

### G. Need for Request

At one time, different standards of materiality applied depending on whether the defendant made a general request for *Brady* evidence, a request for specific evidence, or no request at all. In *United States v. Bagley*, 473 U.S. 667 (1985), and then *Kyles v. Whitley*, 514 U.S. 419 (1995), the U.S. Supreme Court confirmed that a single standard of materiality exists and that the prosecution has an obligation to disclose favorable, material evidence whether or not the defendant makes a request.

Defense counsel still should make a request for *Brady* evidence, which should include all generally recognized categories of favorable information and to the extent possible specific evidence pertinent to the case and the basis for believing the evidence exists. (Counsel may need to make follow-up requests and motions as counsel learns more about the case.) Specific requests may be viewed more favorably by the courts. *See Bagley*, 473 U.S. 667, 682–83 ("the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption"; reviewing court may consider "any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case"); *State v. Smith*, 337 N.C. 658, 664 (1994) ("State is not required to conduct an independent investigation to determine possible deficiencies suggested by defendant in State's evidence").

### H. Prosecutor's Duty to Investigate

**Law-enforcement files.** Numerous cases have held that favorable, material evidence within law-enforcement files, or known to law-enforcement officers, is imputed to the prosecution and must be disclosed. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"; good or bad faith of individual prosecutor is irrelevant to obligation to disclose); *State v. Bates*, 348 N.C. 29 (1998) (*Brady* obligates prosecution to obtain information from SBI and various sheriffs' departments involved in investigation); *State v. Smith*, 337 N.C. 658 (1994) (prosecution

deemed to have knowledge of information in possession of law enforcement); *see also Youngblood v. West Virginia*, 547 U.S. 867 (2006) (per curiam) (remanding to allow state court to address *Brady* issue where officer suppressed a note that contradicted State's account of events and directly supported defendant's version); *United States v. Perdomo*, 929 F.2d 967 (3d Cir. 1991) (prosecutors have obligation to make thorough inquiry of all law enforcement agencies that had potential connection with the witnesses); *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964) (prosecutor's lack of knowledge did not excuse failure by police to reveal information).

**Files of other agencies.** The prosecution's obligation to obtain and disclose evidence in the possession of other agencies (such as mental health facilities or social services departments) depends on the extent of the agency's involvement in the investigation and the prosecution's knowledge of and access to the evidence. *See supra* § 4.3B, Agencies Subject to Disclosure Requirements (discussing similar issue under discovery statute); *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980) (prosecution obligated to disclose evidence in medical examiner's possession; although not a law-enforcement agency, medical examiner's office was participating in investigation); *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973) (prosecution obligated to obtain personnel file of postal employee who was State's principal witness), *overruled in part on other grounds by United States v. Henry*, 749 F.2d 203 (5th Cir. 1984); *United States v. Hankins*, 872 F. Supp. 170, 173 (D.N.J. 1995) ("when the government is pursuing both a civil and criminal prosecution against a defendant stemming from the same underlying activity, the government must search both the civil and criminal files in search of exculpatory material"; prosecution obligated to search related files in civil forfeiture action).

If the prosecution's access to the evidence is unclear, defense counsel may want to make a motion to require the entity to produce the records or make a motion in the alternative—that is, counsel can move for an order requiring the prosecution to obtain the records and review them for *Brady* material or, in the alternative, for an order directing the agency to produce the records. A subpoena directed at the entity may be another option as well. *See infra* § 4.6A, Evidence in Possession of Third Parties.

### I. Defendant's Knowledge of Evidence

*United States v. Agurs*, 427 U.S. 97 (1976), held that the prosecution violates its *Brady* obligations by failing to disclose favorable, material evidence known to the prosecution but unknown to the defense. As a result, the courts have held that nondisclosure does not violate *Brady* if the defendant knows of the evidence and has access to it. *See State v. Wise*, 326 N.C. 421 (1990) (defendant knew of examination of rape victim and results; prosecution's failure to provide report therefore not *Brady* violation); *see also Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001) (declining to find that any information known to a defense witness is imputed to the defense for *Brady* purposes); 6 LAFAVE, CRIMINAL PROCEDURE § 24.3(b), at 438–40 (defendant must know not only of existence of evidence but also of its potentially exculpatory value).

## J. In Camera Review and Other Remedies

If defense counsel doubts the adequacy of disclosure by the prosecution, counsel may request that the trial court conduct an in camera review of the evidence in question. *See State v. Hardy*, 293 N.C. 105 (1977) (stating general right to in camera review); *State v. Kelly*, 118 N.C. App. 589 (1995) (new trial for failure of trial court to conduct in camera review); *State v. Jones*, 85 N.C. App. 56 (1987) (new trial). To obtain an in camera review, counsel must make some showing that the evidence may contain favorable, material information. *See State v. Soyars*, 332 N.C. 47 (1992) (court characterized general request as "fishing expedition" and found no error in trial court's denial of in camera review).

If the court refuses to review the documents, or after review refuses to require production of some or all of the documents, counsel should move to have the documents sealed and included in the record in the event of appeal. *See Hardy*, 293 N.C. 105, 128. If the judge refuses to require production of the documents for inclusion in the record, make an offer of proof about the anticipated contents of the documents.

In some instances, counsel may want to subpoena witnesses and documents to the motion hearing. Examination of witnesses (such as law-enforcement officers) may reveal discoverable evidence that the State has not yet disclosed. *See infra* § 4.7, Subpoenas.