
4.6 Other Constitutional Rights

A. Evidence in Possession of Third Parties

This section focuses on records in a third party's possession concerning a victim or witness. Records concerning the defendant are discussed briefly at the end of this section.

Right to obtain confidential records. Due process gives the defendant the right to obtain from third parties records containing favorable, material evidence even if the records are confidential under state or federal law. This right is an offshoot of the right to favorable, material evidence in the possession of the prosecution. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (records in possession of child protective agency); *Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995) (North Carolina state courts erred in failing to review records in possession of county medical center, mental health department, and department of social services).

Other grounds, including the right to compulsory process, the court's inherent authority, and state constitutional and statutory requirements, may support disclosure of confidential records in the hands of third parties. *See State v. Crews*, 296 N.C. 607 (1979) (recognizing court's inherent authority to order disclosure); *In re Martin Marietta Corp.*, 856 F.2d 619, 621 (4th Cir. 1988) (federal rule allowing defendant to obtain court order for records in advance of trial "implements the Sixth Amendment guarantee that an accused have compulsory process to secure evidence in his favor"); G.S. 8-53 (under this statute, which is representative of several on privileged communications, court may compel disclosure of communications between doctor and patient when necessary to proper administration of justice).

Right to obtain DSS records. Several cases have addressed a defendant's right under *Ritchie* to department of social services (DSS) records that contain favorable, material evidence in the criminal case against the defendant. The North Carolina courts have recognized the defendant's right of access. For example, in *State v. McGill*, 141 N.C. App. 98, 101 (2000), the court stated:

> A defendant who is charged with sexual abuse of a minor has a constitutional right to have the records of the child abuse agency that is charged with investigating cases of suspected child abuse, as they

> pertain to the prosecuting witness, turned over to the trial court for an in camera review to determine whether the records contain information favorable to the accused and material to guilt or punishment.

In numerous instances, the North Carolina courts have found error in the failure to disclose DSS records to the defendant. *See State v. Martinez*, 212 N.C. App. 661 (2011) (DSS files contained exculpatory impeachment information; court reverses conviction for other reasons and directs trial court on remand to make information available to defendant); *State v. Webb*, 197 N.C. App. 619 (2009) (error for trial court not to disclose information in DSS file to defendant; new trial); *State v. Johnson*, 165 N.C. App. 854 (2004) (child victim's DSS file contained information favorable and material to defendant's case, reviewed at length in court's opinion, and should have been disclosed; new trial); *McGill*, 141 N.C. App. 98 (error in failing to require disclosure of evidence bearing on credibility of State's witnesses; new trial). *Cf. State v. Tadeja*, 191 N.C. App. 439 (2008) (following *Ritchie* but finding that disclosure of DSS records was not required because they did not contain favorable evidence; contents of sealed records not described in opinion); *State v. Bailey*, 89 N.C. App. 212 (1988) (same).

Right to school records. *See State v. Taylor*, 178 N.C. App. 395 (2006) (following *Ritchie* but finding that disclosure of accomplice's school records was not required because they did not contain evidence favorable to defendant); *State v. Johnson*, 145 N.C. App. 51 (2001) (in case involving charges of multiple sex offenses against students by defendant, who was a middle school teacher and coach, court finds that trial judge erred in quashing subpoena duces tecum for school board documents without conducting in camera review for exculpatory evidence; some of documents were from witnesses who would testify at trial).

Right to mental health records. *See State v. Chavis*, 141 N.C. App. 553, 561 (2003) (recognizing right to impeachment information that may be in mental health records of witness, but finding that record did not show that State had information in its possession or that information was favorable to defendant); *see also supra* "Impeachment evidence," in § 4.5C, Favorable to Defense (discussing right under *Brady* to mental health records that impeach witness's credibility).

Right to medical records. *See State v. Thompson*, 139 N.C. App. 299 (2000) (finding that trial court did not err in failing to conduct in camera review of victim's medical records where defense counsel conceded that he was not specifically aware of any exculpatory information in the records); *State v. Jarrett*, 137 N.C. App. 256 (2000) (trial court reviewed hospital records and disclosed some and withheld others; appellate court reviewed remaining records, which were sealed for appellate review, and found they did not contain favorable, material evidence). *See also* Shea Denning, *Obtaining Medical Records in DWI Cases*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 27, 2020).

Directing production of records. Three main avenues exist for compelling production of materials from third parties before trial.

- Counsel may move for a judge to issue an order requiring the third party to produce the records in court so the judge may review them and determine those portions subject to disclosure.
- Rather than asking the judge to issue an order, counsel may issue a subpoena directing the third party to produce the records in court for the judge to review and rule on the propriety of disclosure. Often, a custodian of confidential records will object to or move to quash a subpoena so defense counsel may be better off seeking an order initially from a judge.
- In some instances (discussed below), counsel may move for a judge to issue an order requiring the third party to provide the records directly to counsel.

Defense counsel also may have the right to subpoena documents directly to his or her office. This approach is *not* recommended for records that contain confidential information because it may run afoul of restrictions on the disclosure of such information. *See infra* § 4.7D, Production of Documents in Response to Subpoena Duces Tecum. Counsel should obtain a court order directing production or should subpoena the records to be produced in court, leaving to a judge the determination whether the defendant is entitled to obtain the information.

Specific procedures may need to be followed to obtain disclosure of some records. Consult the statute governing the records at issue. For example, some statutes require that notice be given to the person who is the subject of the records being sought (as well as to the custodian of the records). *See infra* § 4.7F, Specific Types of Confidential Records (listing reference sources on health department, mental health, and school records). For out-of-state records, various options are available. *See* John Rubin, *How O.J. Got the Furman Tapes (and You Can Get Out-of-State Materials)*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Apr. 4, 2017).

Sample motions for the production of various types of records are available in the Adult Criminal Motions section of the IDS website.

Who hears a motion for an order for records. In felony cases still pending in district court, a defendant may move for an order from a district court judge. *See State v. Jones*, 133 N.C. App. 448, 463 (1999) (before transfer of felony case to superior court, district court has jurisdiction to rule on preliminary matters, in this instance, production of certain medical records), *aff'd in part and rev'd in part on other grounds*, 353 N.C. 159 (2000); *see also State v. Rich*, 132 N.C. App. 440, 451 (1999) (once case was in superior court, district court should not have entered order overriding doctor-patient privilege; district court's entry of order compelling disclosure was not prejudicial, however).

A superior court also may have authority in a felony case to hear the motion while the case is pending in district court. *See State v. Jackson*, 77 N.C. App. 491 (1985) (superior court had jurisdiction before indictment to enter order to determine defendant's capacity to stand trial because G.S. 7A-271 gives superior court exclusive, original jurisdiction over criminal actions in which a felony is charged).

In camera review and alternatives. Under *Ritchie*, a defendant may obtain an in camera review of confidential records in the possession of a third party and, to the extent the records contain favorable, material evidence, the judge must order the records disclosed to the defendant.

The in camera procedure has some disadvantages, however, and may not always be required. Principally, the court may not know the facts of the case well enough to recognize evidence important to the defense. Some alternatives are as follows:

- If the evidence is part of the files of a law enforcement agency, investigatory agency, or prosecutor's office, defense counsel may move to compel the prosecution to disclose the evidence, without an in camera review, based on the State's general obligation to disclose the complete files in the case under G.S. 15A-903. Because it may be unclear whether the prosecution has access to the records, counsel may need to move for an order requiring the prosecution to disclose the records or, in the alternative, requiring the third party to provide the records to the court for an in camera review.
- Some judges may be willing to order disclosure of records in the possession of third parties without conducting an in camera review. Defense counsel can argue that the interest in confidentiality does not warrant restricting the defendant's access to potentially helpful information or imposing the burden on the judge of conducting an in camera review. *See Ritchie*, 480 U.S. 39, 60 (authorizing in camera review if necessary to avoid compromising interest in confidentiality).
- Defense counsel can move to participate in any review of the records under a protective order. Such an order might provide that counsel may not disclose the materials unless permitted by the court. *See* G.S. 15A-908 (authorizing protective orders); *Zaal v. State*, 602 A.2d 1247 (Md. 1992) (court may conduct review of records in presence of counsel or permit review by counsel alone, as officer of court, subject to restrictions protecting confidentiality).

In camera review of DSS records. In 2009, the General Assembly added G.S. 7B-302(a1)(4) to require the court in a criminal or delinquency case to conduct an in camera review before releasing confidential DSS records to a defendant or juvenile respondent. *See* S.L. 2009-311, s. 1 (H 1449). *See also* G.S. 7B-2901(b)(3) (imposing same requirement for court records in abuse, neglect, and dependency cases). While the statutes mandate an in camera procedure for DSS records, it does not affect the applicable standard for release of records under *Ritchie. See also In re J.L.*, 199 N.C. App. 605 (2009) (under G.S. 7B-2901(b), trial court abused discretion by denying juvenile right to review own court records in abuse, neglect, and dependency case).

If a defendant is also a respondent parent in an abuse, neglect, and dependency proceeding, counsel for the client in that proceeding may be able to obtain DSS records in discovery and, with the client's consent, provide them to criminal defense counsel without court involvement. For a discussion on the sharing of client information between defense counsel and a parent attorney, see Timothy Heinle, *The Social Services' Records*

Labyrinth: When Can Criminal Defense and Abuse, Neglect, and Dependency Attorneys Share DSS Records? (UNC School of Government, 2021) (forthcoming).

Required showing. The courts have used various formulations to describe the showing that a defendant must make in support of a motion for confidential records from a third party. They have said that defendants must make some plausible showing that the records might contain favorable, material evidence; have a substantial basis for believing that the records contain such evidence; or show that a possibility exists that the records contain such evidence. All of these formulations emphasize the threshold nature of the showing required of the defendant. *See Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995) (defendant made "plausible showing"); *State v. Thompson*, 139 N.C. App. 299, 307 (2000) ("although asking defendant to affirmatively establish that a piece of evidence not in his possession is material might be a circular impossibility, we at least require him to have a substantial basis for believing such evidence is material"); *see also United States v. King*, 628 F.3d 693 (4th Cir. 2011) (remanding for in camera review because defendant gave required plausible showing); *United States v. Trevino*, 89 F.3d 187 (4th Cir. 1996) (defendant must "plainly articulate" how the information in the presentence investigation report is material and favorable).

If the court refuses to require the third party to produce the documents, or after reviewing the documents refuses to require disclosure of some or all of them, counsel should move to have the documents sealed and included in the record in the event of appeal. *See State v. Hardy*, 293 N.C. 105 (1977); *State v. McGill*, 141 N.C. App. 98, 101 (2000); *see also State v. Burr*, 341 N.C. 263 (1995) (court states that it could not review trial court's denial of motion to require production of witness's medical records because defendant failed to make documents part of record on appeal). If the court refuses to require production of the documents for inclusion in the record, make an offer of proof about the anticipated contents of the documents.

Ex parte application. In some circumstances, counsel seeking records in the possession of third parties may want to apply to the court ex parte. Although the North Carolina courts have not specifically addressed this procedure in the context of third-party records, they have allowed defendants to apply ex parte for funds for an expert (*see infra* § 5.5, Obtaining an Expert Ex Parte in Noncapital Cases). Some of the same reasons and authority for allowing ex parte applications for experts support ex parte motions for records in the possession of third parties (that is, the need to develop trial strategy, protections for confidential attorney-client communications, etc.). In view of these considerations, some courts have held that a defendant may move ex parte for an order requiring pretrial production of documents from a third party. *See United States v. Tomison*, 969 F. Supp. 587 (E.D. Cal. 1997) (court reviews Federal Rule of Criminal Procedure 17(c), which authorizes court to issue subpoena duces tecum for pretrial production of documents, and rules that defendant may move ex parte for issuance of subpoena duces tecum to third party); *United States v. Daniels*, 95 F. Supp. 2d 1160 (D. Kan. 2000) (following *Tomison*); *United States v. Beckford*, 964 F. Supp. 1010 (E.D. Va. 1997) (allowing ex parte application for subpoena for third-party records but noting conflicting authority). These authorities should give counsel a sufficient basis to request

to be heard ex parte. *See* North Carolina State Bar, 2001 Formal Ethics Opinion 15 (2002) (ex parte communications not permissible unless authorized by statute or case law).

A separate question is whether the prosecution has standing to object to a motion to compel production of records from a third party or to obtain copies of records ordered to be disclosed to the defendant. *See Tomison*, 969 F. Supp. 587 (prosecution lacked standing to move to quash subpoena to third party because prosecution had no claim of privilege, proprietary right, or other interest in subpoenaed documents; prosecution also did not have right to receive copies of the documents unless defendant intended to introduce them at trial). *But cf. State v. Clark*, 128 N.C. App. 87 (1997) (court had discretion to require Department of Correction to provide to prosecution records that it had provided to defendant). For a discussion of these issues in connection with subpoenas, see *infra* "Notice of receipt and opportunity to inspect; potential applicability to criminal cases" in § 4.7D, Production of Documents in Response to Subpoena Duces Tecum; and § 4.7E, Objections to and Motions to Modify or Quash Subpoena Duces Tecum.

Records concerning defendant. When records in a third party's possession concern the defendant (for example, the defendant's medical records), defense counsel often can obtain them without court involvement by submitting a release from the defendant to the custodian of records. If you are seeking your client's medical records and know the hospital or other facility that has the records, obtain the form release used by the facility to avoid potential objections by the facility that the form does not comply with HIPAA or other laws. Other entities also may have their own release forms, which will facilitate obtaining client records. Notwithstanding the submission of a release, some agencies may be unwilling to release the records without a court order or payment of copying costs. In these instances, applying to the court ex parte for an order requiring production of the records would seem particularly appropriate.

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

B. False Testimony or Evidence

Prosecutor's duty. The prosecution has a constitutional duty to correct false testimony as a matter of due process. A conviction must be set aside if

- the prosecutor knowingly uses false testimony; and
- the evidence meets the required standard of materiality—that is, there is any reasonable likelihood that the false testimony or evidence could have affected the verdict.

Knowing use. The U.S. Supreme Court has steadily broadened the meaning of knowing use of false testimony. A prosecutor may not:

- knowingly and intentionally use false testimony (*Mooney v. Holohan*, 294 U.S. 103 (1935));
- knowingly allow false testimony to go uncorrected on a material fact (*Alcorta v. Texas*, 355 U.S. 28 (1957) (testimony left false impression on jury);
- knowingly allow false testimony to go uncorrected on a witness's credibility (*Napue v. Illinois*, 360 U.S. 264 (1959) (witness lied about promise of lenient treatment)); or
- use false testimony that the prosecution knew or should have known was false (*Giglio v. United States*, 405 U.S. 150 (1972) (prosecutor who was not trying case had promised immunity to witness); *United States v. Agurs*, 427 U.S. 97, 103 (1976) ("should have known" test applies to duty to correct false testimony)).

See also State v. Wilkerson, 363 N.C. 382 (2009) (recognizing above principles but finding no violation in circumstances of case); *State v. Boykin*, 298 N.C. 687 (1979); *see also State v. Dorman*, 225 N.C. App. 599 (2013) (on State's appeal of dismissal of charges by court, holding that *Napue* did not require dismissal for pretrial misrepresentations by State); *State v. Morgan*, 60 N.C. App. 614 (1983) (conviction vacated for failure of prosecutor to correct witness's denial of immunity); *Campbell v. Reed*, 594 F.2d 4 (4th Cir. 1979) (North Carolina conviction vacated on habeas for false testimony about plea arrangement).

Materiality. The State's knowing use of false testimony must meet the "reasonable likelihood" standard stated above. That standard is equivalent to the traditional, harmless-beyond-a-reasonable-doubt standard for constitutional violations, which is less demanding than the materiality standard for *Brady* violations. *See United States v. Bagley*, 473 U.S. 667 (1985) (discussing standards).

C. Lost or Destroyed Evidence

Constitutional standards. The courts have applied two basic standards when the State loses or destroys evidence. Earlier cases (and the first edition of this manual) intermingled the standards, but North Carolina case law now appears to draw a distinction between the two. *See generally* Teresa N. Chen, *The* Youngblood *Success Stories: Overcoming the "Bad Faith" Destruction of Evidence Standard*, 109 W.VA. L. REV. 421 (Winter 2007) (discussing the different approaches courts have taken and cases in which defendants prevailed on claims related to lost or destroyed evidence); *see also* KLINKOSUM at 331–54 (discussing cases reviewed in Chen article and their potential applicability to claims in North Carolina).

First, if evidence is favorable and material under *Brady*, its loss or destruction by the State violates due process under the Sixth Amendment of the U.S. Constitution and article I, sections 19 and 23, of the North Carolina Constitution. *See State v. Taylor*, 362 N.C. 514 (2008). When the evidence meets this standard, the loss or destruction of the evidence violates the defendant's constitutional rights "irrespective of the good or bad faith of the state." *Id.*, 362 N.C. at 525. Some cases have assessed further whether the defendant's constitutional rights have been flagrantly violated and the defendant irreparably prejudiced—the standard for dismissal as a remedy under G.S. 15A-

954(a)(4)—and whether the evidence had an exculpatory value that was apparent before its destruction and was of such a nature that the defendant would not be able to obtain comparable evidence by other reasonably available means, the standard announced in the U.S. Supreme Court's decision in *California v. Trombetta*, 467 U.S. 479 (1984). These additional inquiries may relate to the appropriate remedy for a violation. *See Trombetta*, 467 U.S. 479, 487 (when evidence has been destroyed in violation of constitutional requirements, court must choose between barring further prosecution or suppressing evidence); *State v. Lewis*, 365 N.C. 488 (2012) (reversing decision by court of appeals that destruction of knife met *Trombetta* standard and that trial court erred in not excluding knife; supreme court finds that defendant was able to contest State's evidence without knife); *State v. Williams,* 362 N.C. 628 (2008) (photos and poster of photos were material, favorable evidence, which defendant never possessed, could not reproduce, and could not prove through testimony; destruction of evidence by State was flagrant violation of defendant's constitutional results, resulted in irreparable prejudice, and warranted dismissal); *see also* 6 LAFAVE, CRIMINAL PROCEDURE § 24.3(e), at 480–82 (discussing other remedies that courts have imposed for lost or destroyed evidence).

Second, "when the evidence is only 'potentially useful' or when 'no more can be said [of the evidence] than that it could have been subjected to tests, the results of which might have exonerated the defendant,' the state's failure to preserve the evidence does not violate the defendant's constitutional rights unless the defendant shows bad faith on the part of the state." *Taylor*, 362 N.C. at 525 (citations omitted). This standard is drawn from the U.S. Supreme Court's decision in *Arizona v. Youngblood*, 488 U.S. 51 (1988); *see also State v. Dorman.* 225 N.C. App. 599 (2013) (trial court found that State destroyed decedent's remains in bad faith; court of appeals finds it unnecessary to review court's findings, concluding that pretrial dismissal was premature because record did not establish irreparable prejudice; case remanded).

Bad faith requirement. Most North Carolina decisions have addressed the second standard—whether the evidence was potentially useful to the defense and lost or destroyed by the State in bad faith—because it is difficult for the defendant to show that lost or destroyed evidence was actually exculpatory. The "bad faith" standard is difficult to meet. *See State v. Dorman*, 225 N.C. App. 599 (2013) (trial court found bad faith). *But see, e.g., State v. Taylor*, 362 N.C. 514 (2008) (loss of certain physical evidence from crime scene not due process violation; speculative whether evidence would have been helpful to defense and no evidence of bad faith); *State v. Hyatt*, 355 N.C. 642 (2002) (not error to admit testimony regarding rape kit lost before trial where exculpatory value of tests the defendant wanted to perform was speculative and there was no showing of bad faith); *State v. Taylor,* 268 N.C. App. 455 (2019) (error to dismiss for *Brady* violation for destruction of dash camera video; evidence was only potentially useful and there was no finding that the evidence was destroyed in bad faith); *State v. Graham*, 200 N.C. App. 204 (2009) (testimony about defendant's car and soil samples from car admissible; although police lost car before trial, no evidence of bad faith, and defendant had access to and tested soil samples).

In *Youngblood*, which adopted the bad faith requirement, the U.S. Supreme Court did not determine what conduct amounts to bad faith. Noting that the majority had left the question open, the dissenters in *Youngblood* suggested that bad faith could be made out by recklessness and other conduct short of actual malice. 488 U.S. 51, 66–67, 73 n.10; *see also United States v. Lovasco*, 431 U.S. 783, 795 n.17 (1977) (government conceded that due process violation may be made out by reckless disregard of circumstances).

Some cases found after *Youngblood* that the U.S. Supreme Court did not intend for the bad faith requirement to apply in all cases. *See United States v. Belcher*, 762 F. Supp. 666 (W.D.Va. 1991) (where state officials intentionally destroy evidence that is crucial to outcome of prosecution, defendant need not show bad faith). The Court has since indicated that the applicability of the bad faith requirement of *Youngblood* does not depend on the centrality of the evidence but on the distinction between "material exculpatory" evidence and "potentially useful" evidence; the bad faith standard applies to the latter category. *Illinois v. Fisher*, 540 U.S. 544, 549 (2004) (per curiam). Nevertheless, if the State loses or destroys evidence that was plainly material to the case, the defendant may be in a stronger position to argue that the State's acts or omissions constituted bad faith. *See* KLINKOSUM at 329–30.

Based on their state constitutions, several state courts have rejected the bad faith standard of *Youngblood* and have adopted an all-the-circumstances test to determine whether the destruction of evidence denied the defendant a fair trial. *See, e.g., State v. Morales*, 657 A.2d 585 (Conn. 1995) (collecting cases); *State v. Osakalumi*, 461 S.E.2d 504 (W.Va. 1995) (collecting cases); 6 LAFAVE, CRIMINAL PROCEDURE § 24.3(e), at 483 & n.188. The North Carolina courts have generally followed the *Youngblood* "bad faith" standard without distinguishing between the federal and state constitutions. *See, e.g., State v. Taylor*, 362 N.C. 514, 525 (2008). *But cf. State v. Anderson*, 57 N.C. App. 602 (1982) (holding before *Youngblood* that State's good faith not dispositive).

A request to the State to preserve evidence may put the State on notice of the exculpatory value of evidence and may strengthen an argument that its destruction violates due process. *See People v. Newberry*, 652 N.E.2d 288 (Ill. 1995) (motion to preserve puts State on notice of exculpatory value of evidence). But, the State's loss or destruction of evidence after such a request does not automatically constitute a due process violation. *See Illinois v. Fisher*, 540 U.S. 544 (2004) (per curiam) (dismissal not automatically required where potentially useful evidence (alleged cocaine) was destroyed by police according to established procedures almost eleven years after defendant's discovery request for all physical evidence).

Statutory sanctions and other remedies. G.S. 15-11.1(a) requires that the State safely keep evidence pending trial, and G.S. 15A-903(a)(1)d. gives the defendant the right to test physical evidence. *See also supra* § 4.4E, Biological Evidence. The State's destruction of evidence, whether or not in bad faith, may violate these statutes and warrant sanctions. *See State v. Banks*, 125 N.C. App. 681 (1997) (as sanction for failure to preserve evidence, trial court prohibited State from calling witness to testify about evidence, stripped prosecution of two peremptory challenges, and allowed defendant

right to final argument before jury), *aff'd per curiam*, 347 N.C. 390 (1997); *see also United States v. Bundy*, 472 F.2d 1266 (D.C. Cir. 1972) (Levanthal, J., concurring) (concurring opinion suggests that, as sanction for law-enforcement officer's failure to preserve notes, trial court could instruct jury that it was free to infer that missing evidence would have been different from testimony at trial and would have been helpful to defendant); KLINKOSUM at 370–71 (suggesting that counsel request jury instruction on evidence spoliation, under which jury may infer that missing evidence would have been damaging to State's case).

D. Identity of Informants

Generally. Due process gives the defendant the right to discover a confidential informant's identity when relevant and helpful to the defense or essential to a fair determination of the case. *See Roviaro v. United States*, 353 U.S. 53 (1957) (establishing general rule). Numerous North Carolina cases have addressed the issue and are not reviewed exhaustively here. Cases that may be of particular interest to the defense include: *State v. McEachern*, 114 N.C. App. 218 (1994) (upholding dismissal of charges for prosecutor's failure to comply with order requiring disclosure); *State v. Johnson*, 81 N.C. App. 454 (1986) (requiring disclosure where informant could testify to details surrounding crime); *State v. Parker*, 61 N.C. App. 585, 587 (1983) (disclosure should have been ordered, but error was harmless because defendant already knew informant's identity); *State v. Hodges*, 51 N.C. App. 229 (1981) (informant introduced undercover officer to defendant, who sold marijuana to officer in informant's presence; name of informant should have been disclosed to defendant in advance of trial and in time for defendant to interview informant and determine whether his or her testimony would have been beneficial); *State v. Brockenborough*, 45 N.C. App. 121 (1980) (State must furnish defendant with best available information about informant's whereabouts); *State v. Orr*, 28 N.C. App. 317 (1976) (disclosure required where informant engineered events leading to offense; new trial); *United States v. Price*, 783 F.2d 1132, 1137–39 (4th Cir. 1986) (informant set up deal and was active participant; disclosure required); *McLawhorn v. North Carolina*, 484 F.2d 1 (4th Cir. 1973) (vacating North Carolina conviction on habeas for failure to disclose identity of informant); *see also* 6 LAFAVE, CRIMINAL PROCEDURE § 24.3(g), at 494–96 (noting that some courts have found that defendants also have a due process right to disclosure of information about the identity and whereabouts of crucial eyewitnesses).

Roviaro instructs that in determining whether fundamental fairness requires disclosure, courts should use a multi-factor approach, taking into consideration the crime charged, possible defenses, the potential significance of the informant's testimony, and other relevant factors. *Roviaro*, 353 U.S. 53, 62; *accord State v. Stokely*, 184 N.C. App. 336, 341–42 (2007) (recognizing that *Roviaro* did not establish fixed rule on when disclosure is required). In practice, courts often focus on whether the informant was a "participant" in the crime or a "mere tipster," requiring disclosure of the former but not the latter. *See, e.g., State v. Mack*, 214 N.C. App. 169 (2011); *Stokely*, 184 N.C. App. 336. One who takes some active part in the offense, arranges for its commission, or is otherwise a percipient or material witness may be viewed as a "participant." One who only provides

an investigative lead for law enforcement personnel, in contrast, is often characterized as a "tipster."

The North Carolina courts have stated further that two factors that weigh in favor of disclosure are "if the informant directly participated in the offense being tried (for example, by actually buying the drugs or watching an undercover officer buy the drugs) or if the informant is a material witness to the facts about the defendant's guilt or innocence." ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA at 602 (UNC School of Government, 5th ed. 2016) [hereinafter FARB]; *see also State v. Avent*, 222 N.C. App. 147 (2012) (so stating). Factors weighing against disclosure are whether the defendant admits culpability, offers no defense on the merits, or the evidence independent of the informant's testimony establishes the accused's guilt. These factors seem more pertinent on appeal, however, when the appellate court is able to review the trial transcript and determine whether the trial judge erred in refusing to order disclosure. *See, e.g., State v. Dark*, 204 N.C. App. 591 (2010) (reviewing trial of case and finding that these factors weighed against disclosure).

Roviaro does not require this inquiry if disclosure of information about the informant is necessary to satisfy the State's obligation to disclose exculpatory information. *See Banks v. Dretke*, 540 U.S. 668, 698 (2004) ("Nothing in *Roviaro*, or any other decision of this Court, suggests that the State can examine an informant at trial, withholding acknowledgment of his informant status in the hope that defendant will not catch on, so will make no disclosure motion.").

For summaries of selected cases involving requests to disclose the identity of a confidential informant, see FARB at 513–15. For a discussion of the issue in entrapment cases, see JOHN RUBIN, THE ENTRAPMENT DEFENSE IN NORTH CAROLINA at 49–51 (UNC School of Government, 2001).

A sample motion to reveal a witness's identity is available in the Adult Criminal Motions section of the IDS website.

Procedural issues. G.S. 15A-904(a1) gives the prosecution the right to withhold the identity of a confidential informant unless otherwise required by law. The statute does not require the State to seek a protective order. Therefore, the defendant ordinarily must make a motion for disclosure of the identity of a confidential informant. *Cf. State v. Leyva*, 181 N.C. App. 491 (2007) (trial court not required to seal confidential informant's file for appellate review under G.S. 15A-908(b), which concerns protective orders, where State withheld name of confidential informant under G.S. 15A-904 and did not request a protective order).

In *State v. Moctezuma*, 141 N.C. App. 90, 97 (2000), the court set out the proper procedure for hearing a motion to disclose the identity of a confidential informant. The court found the trial court erred in excluding defendant and his counsel from the hearing on the defendant's motion without (1) hearing evidence from the defense, and (2) finding facts as to the necessity for their exclusion.

Suppression of evidence. In some circumstances, the defendant has a right to disclosure of an informant's identity in challenging probable cause for a search or arrest. *See* G.S. 15A-978(b) (when defendant on motion to suppress contests truthfulness of testimony to establish probable cause and testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, defendant is entitled to be informed of informant's identity except in circumstances described in statute); *State v. Ellison*, 213 N.C. App. 300 (2011) (disclosure not required; defendant did not contest informant's existence at trial or on appeal and informant's existence was independently corroborated, one of two circumstances in which disclosure is not required under statute), *aff'd*, 366 N.C. 439 (2013); *see also McCray v. Illinois*, 386 U.S. 300 (1967).

In *State v. Gaither*, 148 N.C. App. 534 (2002), the court of appeals stated that G.S. 15A-978(b) authorizes disclosure only when a search is pursuant to a warrant, but the statute actually applies when a search is without a warrant (either a search warrant or incident to arrest on an arrest warrant). *See* G.S. 15A-978(b) (identifying existence of warrant as one of two circumstances in which disclosure requirement does not apply); *see also* FARB at 601–02 (describing when statute applies).

***Brady* request for additional information about informant.** If defense counsel obtains an informant's identity, counsel should seek discovery of the informant's criminal record, any promises of immunity, and other information bearing on bias and credibility. The State is obligated to disclose *Brady* material about informants. *United States v. Blanco*, 392 F.3d 382 (9th Cir. 2004) (defendant entitled to information about informant's special treatment by Immigration and Naturalization Service for his work with Drug Enforcement Administration (DEA); *United States v. Brumel-Alvarez*, 991 F.2d 1452 (9th Cir. 1992) (defendant entitled to evidence that informant controlled investigation and was in position to manipulate it); *United States v. Bernal-Obeso*, 989 F.2d 331 (9th Cir. 1993) (defendant entitled to evidence that informant lied to law enforcement about prior record).

E. Equal Protection and Selective Prosecution

Equal protection principles may provide a defendant with the right to discovery about selective prosecution. *See United States v. Armstrong*, 517 U.S. 456 (1996) (in some circumstances, equal protection affords defendant right to discover evidence in support of claim of selective prosecution based on race); *State v. Rudolph*, 39 N.C. App. 293 (1979) (defendant not entitled to discover district attorney's internal policies regarding prosecution of career criminals; defendant presented no evidence that he was selected for more vigorous prosecution based on race, religion, or other constitutionally-impermissible reason); *United States v. Jones*, 159 F.3d 969 (6th Cir. 1998) (defendant produced sufficient evidence to warrant discovery); *United States v. Olvis*, 97 F.3d 739, 743 (4th Cir. 1996) (reviewing law and finding, contrary to district court, that defendant did not meet threshold requirement for discovery) *United States v. Tuitt*, 68 F. Supp. 2d 4 (D. Mass. 1999) (defendant produced sufficient evidence to warrant discovery).

This topic is beyond the scope of this manual. For a more detailed discussion, see ALYSON GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES (UNC School of Government, 2014).