4.8 Prosecution's Discovery Rights

The prosecution's discovery rights in North Carolina, as in most other jurisdictions, are more limited than defense discovery rights. The prosecution's discovery rights rest almost entirely on North Carolina statute, specifically G.S. 15A-905 and G.S. 15A-906. North Carolina's statutes essentially give the prosecution the right to discover evidence, defenses, and witnesses that the defendant intends to offer at trial. The statutes bar the prosecution from discovering information that the defendant does not intend to offer. This approach protects defendants' Fifth Amendment right against self-incrimination and Sixth Amendment right to have counsel effectively and confidentially investigate and develop a defense against the charges.

A. Procedures for Reciprocal Discovery

Requirement of initial request by defense for discovery. The defendant effectively controls whether the prosecution has any statutory discovery rights. If the defendant does not request discovery, the prosecution is not entitled to reciprocal discovery and the defendant may refuse to provide any discovery requested by the State.[1] In most instances, however, the advantages of obtaining discovery from the State far outweigh the disadvantages of providing the statutory categories of information to the State. Counsel, therefore, should request discovery in all cases except in unusual circumstances.

Under the previous version of the statutes, the defendant controlled the categories of information the State could obtain in discovery. Former G.S. 15A-905 allowed discovery of particular categories of evidence in the defendant's possession only if the defendant requested discovery of those categories from the State. *See State v. Clark*, 128 N.C. App. 87 (1997) (defendant had no obligation to provide reciprocal discovery of its expert's report under previous version of statute because defendant had not requested discovery of report of State's expert). The current discovery statute gives the State the right to obtain discovery if the defendant obtains "any" relief under G.S. 15A-903. This change eliminates the ability of the defense to pick and choose the statutory categories of discovery to provide to the State. (As a practical matter, because the defense is entitled to the complete files of the State, it would be difficult to have a rule under which the defense could designate particular categories for discovery.)

1. This result follows from G.S. 15A-905(a), (b), and (c), the statutes authorizing prosecutorial discovery, which all provide that the prosecution is entitled to discovery only if the defendant requests discovery under G.S. 15A-903 and the court grants any relief (or the State voluntary provides discovery in response to the defendant's written request or the parties have a written agreement to exchange discovery, which G.S. 15A-902(a) deems to be equivalent to a court order). G.S. 15A-905(d) is somewhat ambiguous about the effect of a defendant's voluntary disclosure of witnesses and defenses in response to a written request for discovery from the prosecution. It states that if the defendant voluntarily complies with a prosecution request for discovery as provided in G.S. 15A-902(a), the disclosure must be to the full extent required by G.S. 15A-905(c), the subsection on disclosure of witnesses and defenses. G.S. 15A-905(d) does not explicitly require as a prerequisite that the defense first make a request for discovery from the prosecution. Even under this interpretation, however, the prosecution has no right to discovery unless the defense decides to voluntarily comply with the prosecution's discovery request.

Requirement of timely request by State. The State, like the defendant, must make a written discovery request to activate its discovery rights. The State must make its discovery request within ten working days after it provides discovery in response to a discovery request by the defendant. G.S. 15A-902(e).

If the State fails to make a written request and the parties do not have a written agreement to exchange discovery, the State does not have enforceable discovery rights. *See State v. Anderson*, 303 N.C. 185, 191 (1981) ("Before either the state or defendant is entitled to an order requiring the other to disclose, it or he must first 'request in writing that the other party comply voluntarily with the discovery request.'" [citing former version of G.S. 15A-902(a), which was not materially changed]), *overruled in part on other grounds by State v. Shank*, 322 N.C. 243 (1988). A court may excuse the failure to make a written request, however. *See* G.S. 15A-902(f) (court may hear a discovery motion for good cause without a written request); *see also supra* § 4.2D, Requests for Discovery (discussing circumstances in which court may forgive party's failure to make written request where opposing party has voluntarily provided discovery).

Requirement of motion. As with the procedure for defense discovery, the State must make a motion to enforce its discovery obligations if the defendant does not voluntarily comply with the State's discovery request. Voluntary discovery by the defendant in response to a written request, or pursuant to a written agreement by the parties to exchange discovery, is deemed to have been made under a court order.

Continuing duty to disclose. If the defendant agrees to provide discovery in response to a request for statutory discovery, or the court orders discovery, the defendant has a continuing duty to disclose the information. *See* G.S. 15A-907. This obligation mirrors the State's continuing duty to disclose.

Deadline for production. The discovery statutes set some deadlines for the defendant to provide discovery. *See* G.S. 15A-905(c)(1) (defendant must give notice of defenses within 20 working days after date case set for trial or such later time as set by court; defendant also must disclose identity of alibi witnesses no later than two weeks before trial unless parties and court agree to differ time period); G.S. 15A-905(c)(2) (defendant must give notice of expert witnesses and furnish required expert materials a reasonable time before trial); G.S. 15A-905(c)(3) (defendant must give notice of other witnesses at beginning of jury selection).

The statutes do not set a specific deadline for the defendant to produce other materials. On a motion to compel discovery, the judge may set a deadline to produce. *See* G.S. 15A-909 (order granting discovery must specify time, place, and manner of making discovery); *see also State v. Braxton*, 352 N.C. 158, 211 (2000) (trial court has inherent authority to set deadline for defense to turn over expert's report to State). Presumably, for discoverable information for which the statutes do not set a specific deadline, any deadline set by the court for the defense to provide discovery should be *after* the State meets its deadline to provide discovery to the defense. *See State v. Godwin*, 336 N.C. 499 (1994) (trial court had authority to order defendant to provide reciprocal discovery within

two weeks after State met its deadline to provide discovery to defendant).

Written inventory. To avoid disputes over the materials produced, defense counsel may want to provide the prosecutor with a written listing of the materials provided.

Sanctions. The general principles on sanctions, discussed *supra* in § 4.2J, Sanctions, apply to violations by the defense of its discovery obligations. G.S. 15A-910(a) authorizes a range of sanctions. G.S. 15A-910(b) requires the trial court to consider the materiality of the subject matter and the totality of the circumstances surrounding the failure to comply. G.S. 15A-910(d) requires the trial court to make findings in support of any sanctions.

Most cases imposing sanctions against the defense involve the failure to disclose expert witnesses and expert reports and the failure to give notice of defenses. Most of these cases involve an appeal by the defendant of a trial court order precluding use of the undisclosed information. *But cf. State v. Morganherring*, 350 N.C. 701, 723 (1999) (trial court has authority to allow State to conduct voir dire of expert before expert testified if expert does not produce written report). Appellate decisions involving preclusion of evidence—generally, the most serious sanction against the defense—may not be representative of the sanctions typically imposed by trial courts. When the court imposes lesser sanctions or remedies for a violation—for example, a recess or continuance for the State to prepare to meet the evidence—the order is less likely to be an issue on appeal.

In *State v. Gillespie*, 362 N.C. 150 (2008), the court held that G.S. 15A-910 did not give the trial court the authority to sanction the defendant by precluding the testimony of an expert witness for the failure of the expert to comply with the discovery statutes. According to the court, sanctions may be imposed against the parties for their actions, not for the actions of nonparties such as the expert in *Gillespie*. In a later decision, however, the court upheld a preclusion sanction for the failure to provide an expert's report to the State. *State v. Lane*, 365 N.C. 7 (2011); *see also State v. Braxton*, 352 N.C. 158, 209–12 (2000) (upholding exclusion of expert testimony at capital sentencing hearing because defendant failed to timely turn over expert report in its possession). The state of the law on this issue is therefore uncertain.

In addition to statutory considerations, constitutional concerns may limit sanctions against the defense. *See Taylor v. Illinois*, 484 U.S. 400, 417 (1988) (court recognizes that Compulsory Process Clause of Sixth Amendment protects defendant's right to present defense, but finds on facts that trial court could preclude testimony of defense witness as sanction for deliberate violation of discovery rule; "case fits into the category of willful misconduct in which the severest sanction is appropriate").

As of this writing, North Carolina decisions have not closely examined the constitutional limits on sanctions against the defense. Some cases have required serious violations to justify preclusion. *See State v. Lane*, 365 N.C. 7 (2011) (defense failed to provide expert reports to State despite repeated requests by State, orders by court, and continuances of deadlines; precluded testimony by expert was also irrelevant); *State v. McDonald*, 191

N.C. App. 782 (2008) (excluding two of four defenses to be offered by defense for failure to give any notice of defenses until day of trial despite repeated motions by State for disclosure; defense counsel, who had substituted into the case, professed not to have been served with motions, but State produced four or five motions, some of which had been served on that attorney; excluded defenses would have required substantial, unanticipated preparation by State); *see also State v. Nelson*, 76 N.C. App. 371 (1985) (finding that trial court did not have authority to preclude defense from offering evidence of insanity under not guilty plea despite failure to give notice of insanity defense as required by G.S. 15A-959 [decision issued before 2004 changes to discovery statutes]), *aff'd as modified*, 316 N.C. 350 (1986). In *State v. Gillespie*, the court of appeals found that the trial court violated the defendant's Sixth Amendment and state constitutional rights by excluding all evidence from the defendant's mental health experts, but the supreme court found that the trial court exceeded its statutory authority in imposing this sanction for the experts' alleged actions and that it was unnecessary for the court of appeals to address the defendant's constitutional arguments. 180 N.C. App. 514 (2006), *aff'd as modified*, 362 N.C. 150 (2008).

Some decisions have upheld preclusion sanctions for what appear to be lesser violations, but the results may be explainable by other aspects of those cases. *See State v. Pender*, ___ N.C. App. ___, 720 S.E.2d 836 (2012) (defendant not entitled to jury instruction on involuntary manslaughter based on imperfect self-defense when defendant did not provide State with required notice of intent to assert theory of self-defense in response to State's request; court finds in alternative that evidence was insufficient to support the instruction so any error in imposing sanction was harmless); *see also State v Leyva*, 181 N.C. App. 491 (2007) (trial court did not abuse discretion in denying defendant's request to allow him to call expert on reliability of confidential informants whom defendant failed to include on witness list; appellate court rejected defendant's claim that he needed expert because of officers' testimony about reliability of informant, finding that potential testimony was not required by interest of justice).

Practice note: If the trial court is considering sanctions against the defense, counsel must object on both statutory and constitutional grounds to preserve the constitutional issue for appeal. *See State v. McDonald*, 191 N.C. App. 782, 785 (2008) (constitutional question about sanctions waived because not raised at trial). The principal constitutional grounds are due process under the 14th Amendment, the right to present a defense under the Sixth Amendment, and article 1, sections 19 and 23, of the North Carolina Constitution.

Court's inherent authority. The discovery statutes appear to leave little room for trial courts to order the defense to provide discovery of materials not authorized by the statutes. The trial court does not have the authority to order the defense (or the prosecution) to provide discovery if the discovery statutes restrict disclosure. *See State v. Warren*, 347 N.C. 309 (1997) (trial court properly declined to compel defendant to disclose evidence before trial); *State v. White*, 331 N.C. 604 (1992) (order requiring pretrial discovery beyond trial court's authority). The discovery statutes contain implicit and explicit prohibitions on discovery by the State beyond the specifically authorized categories. G.S. 15A-905, which describes the categories of information discoverable by

the State, essentially authorizes discovery only of information the defense intends to use at trial. G.S. 15A-906 reinforces the limits on prosecution discovery through a broad "work product" protection. It states that the discovery statutes do not authorize discovery by the State of reports, memoranda, witness statements, and other internal defense documents except as provided in G.S. 15A-905(b), the statute on reports of examinations and tests (discussed further below). *See also* 5 LAFAVE, CRIMINAL PROCEDURE § 20.5(a), at 475 ("The failure of the state's discovery provisions to specifically authorize a particular type of disclosure is taken as indicating the draftsmen did not intend to allow the prosecution such discovery.").

Once the trial commences, the trial court has greater authority to order disclosure (*see supra* § 4.1D, Court's Inherent Authority), but few North Carolina cases have considered the circumstances that would justify compelled disclosure from the defense. The essence of the theory for compelling disclosure by the defense at trial is waiver—that through the use or planned use of evidence at trial, the defendant waives the protections that otherwise would apply. *See United States v. Nobles*, 422 U.S. 225 (1975) (finding waiver of work product privilege for statements taken by defense investigator where investigator testified about statement at trial to impeach witness's testimony); *State v. Smith*, 320 N.C. 404, 414–15 (1987) (holding under previous version of discovery statute that at the beginning of jury selection trial court could order defense to provide list of witnesses it intended to call at trial even though disclosure not statutorily required before trial); *see also State v. Gray*, 347 N.C. 143 (1997) (trial court did not err in requiring defense to produce affidavit executed by defense witness; defendant waived his right not to produce it when defense counsel read entire affidavit aloud at earlier bond hearing), *abrogated in part on other grounds by State v. Long*, 354 N.C. 534 (2001), *aff'd in part, rev'd in part sub nom. Gray v. Branker*, 529 F.3d 220 (4th Cir. 2008). This theory does not justify compelled disclosure of evidence that the defense does not use or intend to use at trial, such as the report of a nontestifying expert. *See infra* "Nontestifying experts" in § 4.8C, Results of Examinations and Tests.

B. Documents and Tangible Objects

G.S. 15A-905(a) gives the State the right to inspect and copy or photograph documents and tangible objects within the possession, custody, or control of the defendant if the defendant intends to introduce the evidence at trial.

Because G.S. 15A-905(a) allows discovery only of documents that the defendant intends to introduce at trial, it is far narrower than the defendant's right to discover information from the State. G.S. 15A-906 reinforces the limit on prosecution discovery. Except as otherwise provided by G.S. 15A-905(b), which addresses reports of examinations and tests the defendant intends to use at trial, G.S. 15A-906 protects reports, memoranda, witness statements, and other internal defense documents made by the defendant and his or her attorneys or agents in investigating or defending the case.

If the defense intends to impeach a witness with a statement it has taken, it may have an obligation to disclose it before trial. In *State v. Tuck*, 191 N.C. App. 768, 772–73 (2008),

the court held that the State had to produce a witness statement from a codefendant that it intended to use to impeach a defense witness. The ground for the court's holding, however, was that the statement was part of the State's files and therefore was subject to the State's general discovery obligations, not that the State was obligated to turn over impeachment evidence that it intended to use at trial. The applicability of *Tuck* to the defense's discovery obligations is therefore uncertain.

C. Results of Examinations and Tests

Discoverable materials. G.S. 15A-905(b) gives the State the right to inspect and copy or photograph results or reports of examinations or tests made in connection with the case within the possession and control of the defendant if the defendant intends to introduce the results or reports at trial or the results or reports were prepared by a witness whom the defendant intends to call at trial and the results or reports relate to his or her testimony.

G.S. 15A-905(b) also gives the State the right to inspect, examine, and test, with appropriate safeguards, any physical evidence available to the defendant if the defendant intends to offer the evidence, or related tests or experiments, at trial.

Testifying experts. Because G.S. 15A-905(b) allows discovery only of results or reports the defendant intends to use at trial (either by introducing them or by calling the witness who prepared and will testify about them), it essentially requires discovery only of materials from testifying experts. It is therefore narrower than the defendant's right to discover information from the State, which encompasses all results or reports of examinations or tests in the State's files.

The courts have interpreted the term "results or reports" broadly, however. In addition to the final results and reports of examinations or tests prepared by an expert, the court may order the defense to disclose incomplete tests conducted by the expert as well as the expert's notes and raw data. *See State v. Miller*, 357 N.C. 583 (2003) (trial court did not err in denying protective order for raw psychological data); *State v. Davis*, 353 N.C. 1, 45–46 (2000) (requiring production of handwritten notes taken by mental health expert of interview with defendant); *State v. Cummings*, 352 N.C. 600 (2000) (State entitled to "raw data" from defense psychologists' interviews with defendant despite experts' concerns about ethics of disclosure); *State v. Atkins*, 349 N.C. 62, 92–94 (1998) (upholding discovery order requiring psychiatric expert to turn over notes of interviews and conversations with defendant); *State v. McCarver*, 341 N.C. 364 (1995) (State entitled to discovery of test results, even if inconclusive, that went into formation of opinion of expert who testified). *But see United States v. Dennison*, 937 F.2d 559 (10th Cir. 1991) (defense psychiatrist's notes of his interviews with defendant did not constitute "results or reports" within meaning of federal discovery provision [comparable to G.S. 15A-905(b)]; notes contained no results, conclusions, diagnoses, or summations); *United States v. Layton*, 90 F.R.D. 520 (N.D Cal. 1981) (bare tapes of psychiatrist's interviews cannot be considered "results or reports" of mental examination).

The court also may have the authority to order disclosure of reports prepared by

nontestifying experts if reviewed by a testifying expert in forming his or her opinion. A court may not have the authority to order such disclosure, however, until the testifying expert testifies to such information. *See State v. Warren*, 347 N.C. 309, 323–26 (1997) (ordering disclosure after witness testified at sentencing); *State v. Holston*, 134 N.C. App. 599, 605–06 (1999) (defense attorney's summary of defendant's medical records, which he provided to defense expert and which expert relied on in testifying, not protected by work-product privilege). [The meaning of *Warren* is somewhat unclear because the court also rested its holding on the ground that disclosure was ordered at a capital sentencing proceeding, after the defendant had admitted guilt. In light of other decisions, however, the authors believe that *Warren* does not authorize compelled disclosure of a nontestifying expert's report, either at the guilt-innocence or sentencing phase of a case, unless a defense witness reviews or otherwise makes use of it in his or her testimony.]

Practice note: Although discovery of information generated and reviewed by testifying experts is broad, counsel should not be deterred in providing an expert with all materials necessary for the expert to render an opinion. Failure to do so may weaken the expert's opinion and subject him or her to damaging cross-examination about materials the expert did not consider. Counsel also should err on the side of disclosing information about the expert's work to the State to guard against any possibility of the expert's testimony being precluded for a discovery violation.

The defense's intent to use expert testimony at trial is determined as of the time disclosure is required. A defendant's rights therefore are not violated by requiring disclosure of an expert report before trial even though the defendant does not call the expert as a witness or introduce his or her report at trial. *See State v. Williams*, 350 N.C. 1, 15–18 (1999) ("The term 'intent' as used in the statute is not synonymous with a defendant's final decision to call an expert witness or present the expert's report."). If the defendant does not call the expert or use the expert's report, the defense may have grounds for restricting the prosecution's use of the information. *See id.*, 350 N.C. at 21 (when defendant advised trial court he was not going to call mental health expert, trial court precluded State from using information it had obtained from defendant's expert); *see also infra* "Notice of defenses" and "Insanity and other mental conditions" in § 4.8E, Defenses (notice of defense is not admissible at trial when defendant does not rely on defense; also noting that prosecution may use results of court-ordered mental health examination to rebut mental health issues raised by defendant but may not be able to do so to establish guilt).

The courts also have held that the defendant's intent relates to both the guilt-innocence and sentencing portions of trial. Thus, the prosecution may obtain discovery of an expert's report if the defendant intends to offer it in either phase. *See State v. White*, 331 N.C. 604, 619 (1992).

For a discussion of the obligation of testifying experts to prepare a report of the results of examinations and tests and provide other information, see *infra* § 4.8D, Witnesses.

Nontestifying experts. The State is not entitled to discovery of the results or reports of

examinations or tests prepared by an expert if the defendant does not intend to introduce them at trial or call the expert as a witness at trial. *See State v. Warren*, 347 N.C. 309 (1997); *State v. White*, 331 N.C. 604 (1992).

The prohibition on disclosure also applies after the trial commences. In *State v. Dunn*, 154 N.C. App. 1, 9 (2002), the court analyzed at length the protections for the work of a nontestifying expert, both before and during trial, In *Dunn*, the defendant did not intend to call the employees of an independent drug test facility to testify about the results of a lab test obtained by the defendant. The court found that the information was not discoverable under the discovery statute then in effect, which is comparable to the current version. The court further found a violation of the defendant's right to effective assistance of counsel and a breach of the work product privilege by the trial court's order compelling the employees to testify about the results of the lab test. *Dunn* is consistent with other court decisions, cited in the opinion, finding the work of a nontestifying expert protected from disclosure before and during trial. *See also State v. King*, 75 N.C. App. 618 (1985) (trial court had no authority to order disclosure of ballistics report to State where record did not show defendant ever intended to introduce report or put preparer of report on stand); *Van White v. State*, 990 P.2d 253, 269–71 (Ok. Ct. Crim. App. 1999) (finding report of nontestifying psychiatric expert protected by attorney-client privilege); *State v. Thompson*, 495 S.E.2d 437 (S.C. 1998) (attorney-client privilege protects defendant's communications to psychiatrist retained to aid in preparation of case; privilege not waived by disclosure of information during plea negotiations); *People v. Knuckles*, 650 N.E.2d 974 (Ill. 1995) (attorney-client privilege protects communications between defendant and nontestifying psychiatrist retained by defense); ABA STANDARDS FOR CRIMINAL JUSTICE: MENTAL HEALTH, Standard 7-3.3 & Commentary (1989) (discussing cases upholding attorney-client privilege), *available at* www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html.

The results or reports of a nontestifying expert may be subject to disclosure, however, if a testifying expert reviews the work of the nontestifying expert in forming his or her opinion. *See, e.g., State v. Warren*, 347 N.C. 309 (1997) (also basing decision on ground that disclosure was ordered at capital sentencing proceeding, after defendant had pled guilty [see discussion of this part of *Warren* holding under "Testifying experts" above]).

Sanctions. For a discussion of sanctions for the failure of the defendant to provide expert reports, *see supra* "Sanctions" in § 4.8A, Procedures for Reciprocal Discovery.

D. Witnesses

Notice of expert witnesses, including report of results of examinations or tests, credentials, opinion, and basis of opinion. G.S. 15A-905(c)(2) gives the State the right to notice of expert witnesses that the defendant reasonably expects to call at trial. G.S. 15A-905(c)(2) also provides that within a reasonable time before trial, each expert witness that the defendant reasonably expects to call at trial must prepare a report of the results of any tests or examinations conducted by the expert. *See* G.S. 15A-905(c)(2). The

defendant also must provide to the State the expert's credentials, opinion, and the underlying basis for that opinion. *Id.* The report requirement is consistent with opinions under the previous version of the statute recognizing the trial court's authority to compel testifying experts to reduce the results of examinations and tests to writing and provide them to the State. *See, e.g., State v. Davis,* 353 N.C. 1, 45–46 (2000); *State v. East*, 345 N.C. 535, 544–46 (1997); *State v. Bacon*, 337 N.C. 66, 83–85 (1994).

If the defendant intends to introduce expert testimony about the defendant's mental condition, the State may obtain an examination of the defendant. *See infra* "Insanity and other mental conditions," in § 4.8E, Defenses.

For a discussion of sanctions for the failure of the defense to identify a testifying expert witness or produce a written report, see *supra* "Sanctions" in § 4.8A, Procedures for Reciprocal Discovery.

Notice of other witnesses. G.S. 15A-905(c)(3) gives the State the right, at the beginning of jury selection, to a written list of the names of all other witnesses that the defendant reasonably expects to call during trial.

The defendant is not required to disclose witnesses' names if the defendant certifies in writing and under seal that disclosure may subject the witnesses or others to physical or substantial economic harm or coercion or that there is another compelling argument against disclosure. *Id.*; *see also* 6 LAFAVE, CRIMINAL PROCEDURE § 24.3(h), at 399–401 (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).

The court may allow the defendant to call witnesses not included on the list if the defendant, in good faith, did not reasonably expect to call them. The court also may permit any undisclosed witness to testify in the interest of justice. *See* G.S. 15A-905(c)(3).

E. Defenses

Notice of defenses. G.S. 15A-905(c)(1) gives the State the right to notice of the defendant's intent to offer the defenses specified in the statute. The defendant must give notice of these defenses within twenty working days after the case is set for trial pursuant to G.S. 7A-49.4 or as otherwise ordered by the court. The defendant must provide notice of the intent to offer any of the following defenses: alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication.

Self-defense includes related defenses, including imperfect self-defense and most likely other defensive-force defenses such as defense of habitation and defense of others. *See State v. Pender*, ___ N.C. App. ___, 720 S.E.2d 836 (2012) (defendant not entitled to jury instruction on involuntary manslaughter based on imperfect self-defense when defendant

did not provide State with the notice of self-defense; court also finds that evidence at trial was insufficient to support such an instruction and any error in preluding defense was harmless).

If the defendant plans to offer the defense of duress, entrapment, insanity, automatism, or involuntary intoxication—defenses for which the defendant bears the burden of persuasion before the jury—the notice must include specific information as to the nature and extent of the defense. *See* G.S. 15A-905(c)(1)b. *Cf. State v. Gillespie*, 180 N.C. App. 514 (2006) (finding that the defendant was not required to provide such information for defense of diminished capacity), *aff'd as modified*, 362 N.C. 150 (2008) (finding it unnecessary for court of appeals to have reached this issue).

If the defendant provides notice of an alibi defense, the court may order the defendant to disclose the identity of alibi witnesses no later than two weeks before trial. If the court orders the defendant to disclose the identity of the witnesses, the court must order, on a showing of good cause, the State to disclose any rebuttal alibi witnesses no later than one week before trial. The parties can agree to different, reasonable time periods for the exchange of information. *See* G.S. 15A-905(c)(1)a.

G.S. 15A-905(c)(1) states that any notice of defense is inadmissible against the defendant at trial. Thus, if the defendant decides not to rely on the defense at trial, the State may not offer the notice against him or her. Another statute, G.S. 15A-1213, states that the trial judge must inform prospective jurors of any affirmative defense of which the defendant has given pretrial notice. The revisions to G.S. 15A-905(c)(1), enacted after G.S. 15A-1213, appear to override this provision. If the defendant advises the trial judge that he or she does not intend to pursue a defense for which he or she has given notice as part of discovery, the trial judge would appear to be prohibited from informing the jury of the defense under G.S. 15A-905(c)(1).

Insanity and other mental conditions. Under G.S. 15A-959(a), the defendant must give notice of intent to rely on an insanity defense as provided under G.S. 15A-905(c). This provision basically repeats the defense obligation to give notice of defenses.

In cases not subject to the requirements of G.S. 15A-905(c)—that is, in cases in which the prosecution does not have reciprocal discovery rights—the defendant still must give notice within a reasonable time before trial of the intent to introduce expert testimony on a mental disease, defect, or other condition bearing on the state of mind required for the offense. *See* G.S. 15A-959(b).

If the defendant intends to rely on expert testimony in support of an insanity defense, the State has the right to have the defendant examined concerning his or her state of mind at the time of the offense. *See State v. Huff*, 325 N.C. 1 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990). In cases in which the defendant relies on expert testimony to support a diminished capacity defense, a trial court also may order the defendant to undergo a psychiatric examination by a state expert. *See State v. Clark*, 128 N.C. App. 87 (1997) (relying on *Huff*, court of appeals finds that trial court did nor err in allowing State

to obtain psychiatric examination of defendant who intended to use expert testimony in support of diminished capacity defense); *cf. State v. Boggess*, 358 N.C. 676, 684–85 (2004) (finding that trial court had authority to order examination where defendant gave notice of both insanity and diminished capacity defenses).

If the defendant fails to give the required notice, the court may impose sanctions. *See supra* "Sanctions," in § 4.8A, Procedures for Reciprocal Discovery. Earlier cases held that the trial court could not preclude a defendant from offering an insanity defense under a general plea of not guilty despite the failure to give timely notice, but these decisions were issued before the 2004 discovery changes. *See State v. Nelson*, 76 N.C. App. 371 (1985), *aff'd as modified*, 316 N.C. 350 (1986); *State v. Johnson*, 35 N.C. App. 729 (1978). If the defendant refuses to cooperate in the examination, the prosecution may have grounds to argue for exclusion of the defendant's expert testimony on the defendant's mental condition, but the defendant should still have the right to offer lay testimony in support of the defense. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-6.4 (1989), *available at* www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html.

Courts have held that if the defendant relies on a mental health defense at trial, the prosecution may only offer evidence from a compelled mental health examination to rebut the mental condition raised by the defendant; to protect the defendant's privilege against self-incrimination, the evidence cannot be offered on the issue of guilt. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-3.2 & Commentary (1989) (citing cases); 5 LAFAVE, CRIMINAL PROCEDURE § 20.5(c), at 481.

Legislative note: Effective for offenses committed on or after December 1, 2013, S.L. 2013-18 (S 45) adds G.S. 15A-1002(b)(4), which requires a judge who enters an order for an examination of the defendant's capacity to proceed to order release of relevant confidential information to the examiner, including medical and mental health records of the defendant. The defendant is entitled to notice and an opportunity to be heard before release of the records. *See supra* Appendix 2-1, Summary of 2013 Legislation.

Although this statute applies to capacity examinations, the same examiners (Central Regional Hospital staff) often perform both capacity examinations and examinations related to a defendant's mental health defense. *See generally supra* § 2.9, Admissibility at Trial of Results of Capacity Evaluation; *see also State v. Gillespie*, 180 N.C. App. 514 (2006) (indicating that if State's examiners are unable to evaluate a defendant's mental state at the time of the offense without reviewing additional medical records, they may obtain court order for production of the records; however, no statutory or case law requires defendant's mental health experts to cooperate with the State or state agencies or provide information to them beyond the defendant's discovery obligations), *aff'd as modified*, 362 N.C. 150 (2008) (resolving case on different grounds).

F. Obtaining Records from Third Parties

The prosecution generally has a greater ability than the defense to obtain information

from third parties without court assistance. Various statutes authorize the sharing of confidential information without an order of the court. *See, e.g., supra* "Particular agencies" in § 4.3B, Agencies Subject to Disclosure Requirements. In some instances, however, the prosecution must make a motion to the court for the production of confidential records held by a third party, such as a health care provider, school, or employer.

Before the filing of charges. The North Carolina courts have held that a prosecutor may apply to the court for an order requiring the production of confidential records before the filing of criminal charges. The court has the inherent authority to order production if in the interest of justice. The prosecutor must present, "by affidavit or similar evidence, sufficient facts or circumstances to show reasonable grounds to suspect that a crime has been committed, and that the records sought are likely to bear upon the investigation of that crime." *See In re Superior Court Order*, 315 N.C. 378, 381–82 (1986) (prosecution must establish factual basis of need for customer's bank records; bare allegations of need insufficient). The prosecutor also must show that the interests of justice require disclosure of confidential information. *In re Brooks*, 143 N.C. App. 601, 611 (2001) (also holding that petition must state statutory grounds regarding disclosure of the records at issue); *In re Albemarle Mental Health Center*, 42 N.C. App. 292, 299 (1979) (remanding to trial court for determination whether disclosure of mental health records before filing of charges was necessary to proper administration of justice "such that the shield provided by G.S. 8-53.3 [psychologist-patient privilege] should be withdrawn").

The cases suggest additional restrictions on this procedure. Because a motion for production of records before the filing of charges is a special proceeding, it must be heard in superior court. *See Brooks*, 143 N.C. App. 601, 609; *Albemarle Mental Health Center*, 41 N.C. App. 292, 296 ("superior court is the proper trial division for an extraordinary proceeding of this nature"). Because no case is pending, a subpoena is ordinarily not a proper mechanism for obtaining the records. *See* John Rubin & Aimee Wall, *Responding to Subpoenas for Health Department Records*, HEALTH LAW BULLETIN No. 82, at 3 & n.4 (question no. 3) (Sept. 2005), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/hlb82.pdf. Because there is no pending case and no opposing party, the action may be filed ex parte unless notice is required by federal or state statutes regulating the records. If charges are brought, the defendant would be entitled to discovery of records obtained by the State because they are part of the State's files in the case.

After the filing of charges. After the filing of charges, a prosecutor also may file a motion for an order compelling production of confidential records from a third party. As with defense motions for the production of records from a third party, the motion may be heard in district court if the case is then pending in district court or, if the case is a felony, potentially in superior court whether or not the case is then pending in superior court. *See supra* "Who hears a motion for an order for records" in § 4.6A, Evidence in Possession of Third Parties.

A subpoena is generally insufficient to authorize disclosure of confidential records. While a subpoena requires a custodian of records to produce the records, most

confidentiality statutes require a court order overriding the interest in confidentiality before a custodian may disclose the contents. *See, e.g.*, G.S. 8-53 (court must find disclosure necessary to proper administration of justice to override physician-patient privilege); John Rubin & Mark Botts, *Responding to Subpoenas: A Guide for Mental Health Facilities*, POPULAR GOVERNMENT No. 64/4, at 33 (question no. 22) (Summer 1999) (discussing requirements for disclosure of mental health records), *available at* http://ncinfo.iog.unc.edu/pubs/electronicversions/pg/botts.pdf. *Cf. State v. Cummings*, 352 N.C. 600, 611 (2000) (prison disclosed defendant's prison records in response to subpoena by prosecutor; court finds that terms of G.S. 148-76 permitted prison to make records available to prosecution in this manner).

Once a case is pending, a prosecutor ordinarily would not appear to have grounds to apply ex parte for a court order to compel production of records. The defendant, as a party to the proceeding, would have to be given notice. *See* Jeff Welty, *Obtaining Medical Records under G.S. 8-53*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 25, 2009) (discussing N.C. R. Prof'l Conduct 3.5(a)(3), which prohibits ex parte communications unless otherwise permitted by law, and North Carolina State Bar, 2001 Formal Ethics Opinion 15 (2002), *available at* www.ncbar.gov/ethics/, which recognized applicability of ethics rule to ex parte communications by prosecutors), *available at* http://nccriminallaw.sog.unc.edu/?p=656. In one case, the court found no violation of the defendant's constitutional right to presence by the prosecution's ex parte application for an order requiring the North Carolina Department of Revenue to produce the defendant's tax records. *State v. Gray*, 347 N.C. 143 (1997), *abrogated in part on other grounds by State v. Long*, 354 N.C. 534 (2001), *aff'd in part, rev'd in part sub nom. Gray v. Branker*, 529 F.3d 220 (4th Cir. 2008). However, the decision does not constitute authorization for prosecutors to make ex parte motions. *See also State v. Jackson*, 77 N.C. App. 491, 496 (1985) ("With respect to the entry of the order without notice to defendant or his counsel, we observe that while G.S. 15A-1002 expressly permits the prosecutor to question a defendant's capacity to proceed and contains no express provision for notice of such a motion, the requirement that the question of capacity to proceed may only be raised by a motion, setting forth the reasons for questioning capacity, implies that some notice must be given."). For a discussion of the grounds for the defense to move ex parte for the production of records, see *supra* "Ex parte application" in § 4.6A, Evidence in Possession of Third Parties.