Chapter 4
Discovery

A defendant's right to discovery is based primarily on statute and due process. The main statutory provisions appear in Sections 15A-901 through 15A-910 of the North Carolina General Statutes (hereinafter G.S.). In 2004, the General Assembly significantly rewrote those provisions

to give criminal defendants the right to "open-file" discovery. Since then, the General Assembly has made minor revisions to the defendant's discovery rights but has maintained the commitment to open-file discovery for the defense.

This chapter discusses discovery in cases within the original jurisdiction of the superior court—that is, felonies and misdemeanors initiated in superior court. Discovery in misdemeanor cases tried in district court or for trial de novo in superior court is limited and is discussed only briefly. *See infra* § 4.1E, Discovery in Misdemeanor Cases. For a brief discussion of discovery in other types of cases, see *infra* § 4.1F, Postconviction Cases, and § 4.1G, Juvenile Delinquency Cases.

Sample discovery motions can be found in the Adult Criminal Motions section of the website of the Office of Indigent Defense Services (IDS). Selected motions are identified in the discussion below. For additional motions, see MAITRI "MIKE" KLINKOSUM, CRIMINAL DEFENSE MOTIONS Ch. 4 (Motions for Discovery), at 127–320, and Ch. 5 (Preventing and Litigating the Illegal Destruction of Evidence), at 321–448 (4th ed. 2018) [hereinafter KLINKOSUM].

4.1 Types of Defense Discovery

A. Statutory Right to Open-File Discovery

Principal statutes. The principal discovery statutes in North Carolina are G.S. 15A-901 through G.S. 15A-910. They were first enacted in 1973 as part of Chapter 15A, the Criminal Procedure Act, and the basic approach remained largely the same until 2004, when the General Assembly significantly revised the statutes.

Before the 2004 changes, North Carolina law gave the defendant the right to discovery of specific categories of evidence only, such as statements made by the defendant and documents that were material to the preparation of the defense, intended for use by the State at trial, or obtained from or belonging to the defendant. These categories were comparable to the discovery available in federal criminal cases. *See State v. Cunningham*, 108 N.C. App. 185 (1992) (noting similarities). Some prosecutors voluntarily provided broader, "open-file" discovery, allowing the defendant to review materials the prosecutor had received from law enforcement, such as investigative reports. But, the extent to which prosecutors actually opened their files, and whether they opened their files at all, varied with each district and each prosecutor. *See generally State v. Moore*, 335 N.C. 567 (1994) (under previous discovery statutes, prosecutor in one district was not bound by open-file policy of prosecutor in another district).

In 2004, the North Carolina General Assembly effectively made open-file discovery mandatory, giving defendants the right to discovery of the complete files of the investigation and prosecution of their cases. *See* S.L. 2004-154 (S 52). The procedures for a defendant to obtain discovery, beginning with a formal, written request to the prosecutor, remained largely the same. *See infra* § 4.2, Procedure to Obtain Discovery. But, the 2004 changes greatly expanded the information to which defendants are entitled in all cases. *See infra* § 4.3, Discovery Rights under G.S. 15A-903.

In reviewing discovery decisions issued by the North Carolina courts, readers should take care to note whether the decisions were decided under the former discovery statutes or the current ones. The discussion below includes cases decided before enactment of the 2004 changes if the cases remain good law or provide a useful contrast to the law now in effect.

Other statutes. In addition to the discovery provisions in G.S. 15A-901 through G.S. 15A-910, additional North Carolina statutes give a criminal defendant the right to obtain information from the State about his or her case, such as information about plea agreements. *See infra* § 4.4, Other Discovery Categories and Mechanisms. Counsel should include requests for other statutory discovery in their discovery requests and motions.

Legislative summaries. For a summary of the main changes made by the General Assembly to North Carolina's discovery requirements, see the following:

- John Rubin, *2004 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2004/06, at 2–8 (Oct. 2004), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200406.pdf.
- John Rubin, *2007 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/01, at 14–19 (Jan. 2008), *available at* https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/aojb0801.pdf.

B. Constitutional Rights

U.S. Constitution. The U.S. Supreme Court has identified "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). The most well-known evidence of this type is *Brady* evidence—that is, favorable and material evidence. The defendant's right of access to *Brady* and other evidence is based primarily on the Due Process Clause. Sixth Amendment rights (right to effective assistance of counsel, to compulsory process, to confrontation, and to present a defense) also may support defense discovery.

State constitution. The North Carolina courts have recognized that a defendant has discovery rights under article I, section 19 of the North Carolina Constitution (law of land clause). *See State v. Cunningham*, 108 N.C. App. 185 (1992) (recognizing constitutional right to data underlying tests of evidence). Article I, section 23 (rights of accused, including right to counsel and confrontation) also may support defense discovery. *See State v. Canady*, 355 N.C. 242, 253–54 (2002) (relying on article I, sections 19 and 23 of the state constitution as well as the Sixth Amendment in finding a discovery violation).

C. Court's Inherent Authority

The North Carolina Supreme Court has indicated that trial courts have the inherent authority to order discovery in the interests of justice. *See State v. Hardy*, 293 N.C. 105 (1977) (case analyzed under former G.S. 15A-903 and G.S. 15A-904). A trial court does

not have the authority, however, to order discovery if a statute specifically restricts it. *Id.*, 293 N.C. at 125. Now that the defense is entitled to the State's complete files, this theory of discovery is less significant.

The courts have held that a trial court has greater authority to order disclosure of information once the trial commences. *Id.* (holding that after witness for State testified, trial court had authority to conduct in camera review of witness statements and disclose material, favorable evidence). Because of the breadth of the current discovery statutes, the defendant should have pretrial access to all information in the State's files.

D. Other "Discovery" Devices

Several other devices are available to the defense that technically do not constitute discovery but still may provide access to information.

Bill of particulars. The defense may request a bill of particulars in felony cases to flesh out the allegations in the indictment. *See* G.S. 15A-925; *see also infra* "Bill of particulars" in § 8.4B, Types of Pleadings and Related Documents.

Pretrial hearings. Several pretrial proceedings may provide the defense with discovery, including hearings on bail (*see supra* Chapter 1, Pretrial Release (2d ed. 2013)), probable cause (*see supra* Chapter 3, Probable Cause Hearings), and motions to suppress (*see infra* Chapter 14, Suppression Motions (2d ed. 2013)).

Subpoenas. *See infra* § 4.7, Subpoenas.

Public records. Counsel may make a public records request for information that would be useful generally in handling criminal cases as well as in specific cases. For example, counsel may obtain operations manuals, policies, and standard operating procedures developed by police and sheriffs' departments. *See* DAVID M. LAWRENCE, PUBLIC RECORDS LAW FOR NORTH CAROLINA LOCAL GOVERNMENTS at 204 (UNC School of Government, 2d ed. 2009) (unless within an exception, such material "appears to be standard public record, fully open to public access"). The Lawrence book addresses the coverage of public records laws and the procedures for obtaining public records.

Law enforcement agency recordings. Obtaining audio and video recordings early in a case may require steps outside the usual discovery process. *See infra* § 4.4A, Law Enforcement Agency Recordings.

E. Discovery in Misdemeanor Cases

Discovery in misdemeanor cases is limited. A defendant tried initially in district court does not have a right to statutory discovery under G.S. 15A-901 through G.S. 15A-910, whether the case is for trial in district court or for trial de novo in superior court. *See, e.g.*, *State v. Cornett*, 177 N.C. App. 452 (2006) (no statutory right to discovery in cases originating in the district court); *State v. Fuller*, 176 N.C. App. 104 (2006) (same).

Certain statutes give defendants limited discovery in particular types of misdemeanor cases. *See, e.g.,* G.S. 20-139.1(e) (right to copy of chemical analysis in impaired driving case). In the interest of fairness and efficiency, a prosecutor may voluntarily provide additional discovery in misdemeanor cases in district court. The arresting officer also may be willing to disclose pertinent evidence, such as police reports, videotapes of stops, and other information about the case. In district court implied consent prosecutions, G.S. 20-38.6 dictates a specific procedure for suppression motions. A suppression motion in these cases must be made before trial unless the defendant discovers grounds for the motion not previously known during trial. Many prosecutors provide discovery in district court implied consent offenses to avoid "surprise" motions to suppress during trial.

Although statutory rights to discovery are limited in misdemeanor cases, defendants have the same constitutional discovery rights as in other cases. They have a constitutional right to obtain exculpatory evidence, discussed *infra* in § 4.5, *Brady* Material, and § 4.6A, Evidence in Possession of Third Parties. *See also Cornett*, 177 N.C. App. 452, 456 (recognizing right to exculpatory evidence in cases originating in district court but finding that defendant made no argument that he was denied *Brady* material). They also have a constitutional right to compulsory process to obtain evidence for their defense, discussed *infra* in § 4.7, Subpoenas. For violations of the defendant's constitutional rights in district court, the court may impose sanctions, including dismissal in egregious cases. *See State v. Absher*, 207 N.C. App. 377 (2010) (unpublished) (destruction of evidence).

A misdemeanor trial in district court also may provide considerable discovery for a later trial de novo. *See generally State v. Brooks*, 287 N.C. 392, 406 (1975) ("The purpose of our de novo procedure is to provide all criminal defendants charged with misdemeanor violations the right to a 'speedy trial' in the District Court and to offer them an opportunity to learn about the State's case without revealing their own. In the latter sense, this procedure can be viewed as a method of 'free' criminal discovery.") In preparing a criminal case (misdemeanor or felony), it is ordinarily permissible for defense counsel to talk with victims and other witnesses as long as they are not represented by counsel. (Special rules apply to child victims under the age of 16 in physical or sexual abuse cases.) Defense counsel should identify the client he or she represents to ensure that the witness understands that counsel does not represent the witness's interests. *See* N.C. State Bar R. Professional Conduct 4.2, 4.3; North Carolina State Bar, 2009 Formal Ethics Opinion 7 (2012) (setting age limit based on G.S. 7B-2101, which is now 16 years of age). Interviews are voluntary. Defense counsel generally cannot compel a person to submit to an interview; nor may a prosecutor forbid a witness from submitting to an interview. For a further discussion of interviews, see *infra* § 4.4D, Examinations and Interviews of Witnesses.

For misdemeanors within the superior court's original jurisdiction—that is, misdemeanors joined with or initiated in superior court—the defendant has the same statutory discovery rights as in felony cases in superior court. *See* G.S. 15A-901 (stating that discovery statutes apply to cases within the original jurisdiction of superior court); G.S. 7A-271(a) (listing misdemeanors within superior court's original jurisdiction).

F. Postconviction Cases

Defendants in postconviction cases have discovery rights comparable to open-file discovery rights in criminal cases at the trial level.

Capital cases. In 1996, the General Assembly made statutory changes authorizing open-file discovery in capital postconviction cases—that is, cases in which the defendant is convicted of a capital offense and sentenced to death. These discovery rights, in G.S. 15A-1415(f), were a precursor to the later changes to discovery in criminal cases at the trial level, but they are not identical. *See* John Rubin, *1996 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 96/03, at 5 (UNC School of Government, Aug. 1996). The statute gives postconviction counsel the right to (1) the complete files of the defendant's prior trial and appellate counsel relating to the case, and (2) the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant.

Before enactment of the statute, a defendant had the right to the files of his or her previous counsel under the North Carolina Rules of Professional Conduct. *See* N.C. State Bar R. Professional Conduct 1.16(d) & Comment 10 (so stating). The statute codifies the right and, to the extent the rules allowed prior counsel to withhold some materials (namely, personal notes and incomplete work product), the statute overrides any such limitations.

The obligation of the State to turn over its files broke new ground. *See State v. Bates*, 348 N.C. 29 (1998) (interpreting statute as requiring State to disclose complete files unless disclosure is prohibited by other laws or State obtains protective order; court recognizes that statute does not protect work product at postconviction stage). Other cases interpreting the statute include: *State v. Sexton*, 352 N.C. 336 (2000) (defendant not entitled to files of Attorney General's office when office did not participate in prosecution of capital case); *State v. Williams*, 351 N.C. 465 (2000) (describing requirements and deadlines for making motion for postconviction discovery).

As part of the 1996 changes, the General Assembly expressly provided that if a defendant alleges ineffective assistance of counsel as a ground for relief, he or she waives the attorney-client privilege with respect to communications with counsel to the extent reasonably necessary to the defense of an ineffectiveness claim. G.S. 15A-1415(e); *State v. Buckner,* 351 N.C. 401 (2000) (holding that court ultimately determines extent to which communications are discoverable and may enter appropriate orders for disclosure; finding that granting of State's request for ex parte interview of trial counsel was improper); *State v. Taylor*, 327 N.C. 147 (1990) (in case before statutory revisions, court recognized that defendant waives attorney-client and work-product privileges to extent relevant to allegations of ineffective assistance of counsel).

Noncapital cases. In 2009, the General Assembly extended G.S. 15A-1415(f) to noncapital defendants, giving them the right to discover the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes

committed or the prosecution of the defendant. The right to discovery is subject to the requirement that the defendant be "represented by counsel in postconviction proceedings in superior court." *Id.* In noncapital postconviction cases the requirement is significant because prisoners often proceed pro se, at least initially. The requirement serves as a proxy for a determination that the case meets a minimum threshold of merit. Thus, counsel must agree to represent the defendant on a retained basis; Prisoners Legal Services must decide to take the case; or a court must appoint counsel under G.S. 7A-451(a)(3) and G.S. 15A-1420(b1)(3), which are generally interpreted as requiring appointment of counsel for an indigent defendant when the claim is not frivolous. *See infra* "MAR in noncapital case" in § 12.4C, Particular Proceedings (2d ed. 2013) (discussing right to counsel). Until the defendant meets this threshold, the State is not put to the burden of producing its files.

G.S. 15A-1415(f) also states that a defendant represented by counsel in superior court is entitled to the files of prior trial and appellate counsel. An unrepresented defendant is likely entitled to those files in any event. *See* N.C. State Bar R. Professional Conduct 1.16(d) & Comment 10 (so stating).

Postconviction DNA testing of biological evidence. *See* G.S. 15A-269 through G.S. 15A-270.1 (post-conviction procedures); G.S. 15A-268 (requirements and procedures for preservation of biological evidence); *State v. Gardner*, 227 N.C. App. 364 (2013) (discussing required showing); *see also* Jessica Smith, *Post-Conviction DNA Testing*, SUPERIOR COURT JUDGES' BENCHBOOK (UNC School of Government, Apr. 2015). For a discussion of a defendant's right to counsel for such matters, see *infra* "DNA testing and biological evidence" in § 12.4C, Particular Proceedings (2d ed. 2013).

For a discussion of pretrial discovery and testing of biological evidence, see *infra* § 4.4F, Biological Evidence.

Innocence Commission Cases. On receiving notice from the N.C. Innocence Inquiry Commission that it is conducting an investigation into a claim of factual innocence, the State must preserve all files and evidence in the case subject to disclosure under G.S. 15A-903, the principal statute governing the defendant's right to discovery in felony cases at the trial level. *See* G.S. 15A-1471(a). The Commission is entitled to a copy of the preserved records and to inspect, examine, and test physical evidence. G.S. 15A-1471.

G. Juvenile Delinquency Cases

The right to discovery in juvenile delinquency proceedings is governed by G.S. 7B-2300 through G.S. 7B-2303. A juvenile respondent's discovery rights in those proceedings are comparable to the limited discovery rights that adult criminal defendants had before the 2004 rewrite of the adult criminal discovery statutes. For a discussion of discovery in delinquency cases, see NORTH CAROLINA JUVENILE DEFENDER MANUAL Ch. 10 (UNC School of Government, 2017). Cases interpreting the comparable adult provisions before

the 2004 changes to the discovery statutes are discussed in the first edition of this volume of the North Carolina Defender Manual.

4.2 Procedure to Obtain Discovery

This section lays out in roughly chronological order the procedures for obtaining discovery from the State. (For a discussion of discovery of records from third parties, see *infra* § 4.6A, Evidence in Possession of Third Parties.) Discovery is necessarily a fluid process, however, and may vary in each case.

A. Goals of Discovery

Defense counsel should keep two goals in mind in pursuing discovery. The foremost goal, of course, is to obtain information. Among other things, information gained in discovery may provide leads for further investigation, support motions to suppress or for expert assistance, help counsel develop a coherent theory of defense, and eliminate unwelcome surprises at trial. In extremely rare instances, defense counsel may not want to pursue discovery to avoid educating the prosecution or triggering reciprocal discovery rights. *See infra* § 4.8, Prosecution's Discovery Rights. In the vast majority of cases, however, the benefits of aggressive discovery outweigh any drawbacks.

A second, but equally important, goal is to make a record of the discovery process that will provide a basis at trial for requesting sanctions for violations. Although informal communications with the prosecutor or law enforcement officers may be effective in obtaining information, they may not support sanctions should the State fail to reveal discoverable information.

B. Preliminary Investigation

Discovery begins with investigation (study of charging documents and other materials in the court file, interviews of the client, witnesses, and officers, visits to crime scene, etc.). Preliminary investigation enables counsel to request specific information relevant to the case in addition to making a general request for discovery.

C. Preserving Evidence for Discovery

As a matter of course, counsel may want to make a motion to preserve evidence that the State may routinely destroy or use up in testing. The motion would request generally that the State preserve all evidence obtained in the investigation of the case and would request specifically that the State preserve items of particular significance to the case. Such a motion not only helps assure access to evidence but also may put the defendant in a better position to establish a due process violation and to seek sanctions if the State loses or destroys evidence. *See infra* § 4.6C, Lost or Destroyed Evidence. Sample motions for preservation of evidence can be found on IDS's Forensic Resources website.

Types of evidence that may be a useful object of a motion to preserve, with statutory support, include:

- Rough notes of interviews by law-enforcement officers, tapes of 911 calls, and other materials that may be routinely destroyed. (G.S. 15A-903(a)(1)a. requires the State to provide the defense with investigating officers' notes, suggesting that the State must preserve the notes for production. *See also* G.S. 15A-903(c) (requiring law enforcement agencies to provide the prosecutor with their complete files); G.S. 15A-501(6) (to same effect).)
- Drugs, blood, and other substances that may be consumed in testing by the State. (G.S. 15A-268 requires the State to preserve "biological evidence," including blood and other fluids. *See infra* § 4.4F, Biological Evidence.)
- G.S. 20-139.1(h) requires preservation of blood and urine samples subject to a chemical analysis for the period of time specified in that statute and, if a motion to preserve has been filed, until entry of a court order about disposition of the evidence.
- Other physical evidence. (G.S. 15-11and G.S. 15-11.1 require law enforcement to maintain a log of and "safely keep" seized property.)

Counsel may make a motion to preserve evidence even before requesting discovery of the evidence, and in many cases good reason will exist to do so. If time is of the essence in a felony case, counsel may need to make the motion in district court, before transfer of the case to superior court. *See State v. Jones*, 133 N.C. App. 448 (1999) (district court has jurisdiction to rule on preliminary matters before transfer of a felony case to superior court; court could rule on motion for medical records), *aff'd in part and rev'd in part on other grounds*, 353 N.C. 159 (2000). The superior court also may have the authority to hear the motion in a felony case that is still pending in district court. *See State v. Jackson*, 77 N.C. App. 491 (1985) (court notes jurisdiction of superior court before indictment to enter commitment order to determine defendant's capacity to stand trial).

D. Requests for Discovery

Need for request for statutory discovery. To obtain discovery of the information covered under G.S. 15A-903, the defendant first must serve the prosecutor with a written request for voluntary discovery. A written request is ordinarily a prerequisite to a motion to compel discovery, discussed in E., below. *See* G.S. 15A-902(a); *State v. Anderson*, 303 N.C. 185 (1981), *overruled in part on other grounds by State v. Shank*, 322 N.C. 243 (1988). The court may hear a motion to compel discovery by stipulation of the parties or for good cause (G.S. 15A-902(f)), but the defendant does not have the right to be heard on a motion to compel without a written request.

Practice note: File your request for voluntary discovery with the court, with a certificate of service showing that you served it on the prosecutor within the required time period for requesting voluntary discovery. Doing so may prevent later disputes over whether you complied with the statutory requirements. *See* KLINKOSUM at 154–55 (recommending this approach). Some attorneys submit a combined discovery request and motion for discovery, requesting that the prosecution voluntarily comply with the request and, if the

prosecution fails to do so, asking the court to issue an order compelling production. *Id.* at 155, A sample combined request and motion may be available on the IDS website, www.ncids.org.

In some counties, the prosecutor's office may have a standing policy of providing discovery to the defense without a written request. Even if a prosecutor has such a policy, defense counsel still should make a formal request for statutory discovery. If the defendant does not make a formal request, and the prosecution fails to turn over materials to which the defendant is entitled, the defendant may not be able to complain at trial. *See State v. Abbott*, 320 N.C. 475 (1987) (prosecutor not barred from using defendant's statement at trial even though it was discoverable under statute and not produced before trial; open-file policy no substitute for formal request and motion). *But cf. State v. Brown*, 177 N.C. App. 177 (2006) (in absence of written request by defense or written agreement, voluntary disclosure by prosecution is not deemed to be under court order; however, court notes that some decisions have held prosecution to requirements for court-ordered disclosure where prosecution voluntarily provides witness list to defense); *United States v. Cole*, 857 F.2d 971 (4th Cir. 1988) (prosecutors must honor informal discovery arrangement and, for violation of arrangement, trial court may exclude evidence under Federal Rule of Evidence 403 [comparable to North Carolina's Evidence Rule 403] on the ground of unfair prejudice and surprise); *see also Strickler v. Greene*, 527 U.S. 263 (1999) (defendant established cause for failing to raise *Brady* violation in earlier proceedings where, among other things, defendant reasonably relied on prosecution's open-file policy); *United States v. Spikes,* 158 F.3d 913 (6th Cir. 1998) (court may impose sanctions, including suppression of evidence and dismissal of charges in egregious cases, for prosecution's failure to honor agreement not to introduce certain evidence).

If the parties have entered into a written agreement or written stipulation to exchange discovery, counsel need not make a formal written request for statutory discovery. *See* G.S. 15A-902 (a) (written request not required if parties agree in writing to comply voluntarily with discovery provisions); *see also State v. Flint*, 199 N.C. App. 709 (2009) (recognizing that written agreement may obviate need for motion for discovery but finding no evidence of agreement); John Rubin, *2004 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2004/06, at 3–4 (Oct. 2004) (noting that one of purposes of provision was to clarify enforceability of standing agreements such as in Mecklenburg County, where public defender's office and prosecutor's office entered into agreement to exchange discovery without a written request). Generally, as a matter of best practice, counsel should generate and serve on the prosecutor a written request for discovery in all cases.

If the defendant makes a written request for discovery (and thereafter the prosecution either voluntarily provides discovery or the court orders discovery), the prosecution is entitled on written request to discovery of the materials described in G.S. 15A-905. *See* G.S. 15A-905(a), (b), (c) (providing that prosecution has right to discovery of listed materials if the defense obtains "any relief sought by the defendant under G.S. 15A-903"). Ordinarily, the advantages of obtaining discovery from the State will far outweigh

any disadvantages of providing discovery to the State. For a further discussion of reciprocal discovery, see *infra* § 4.8, Prosecution's Discovery Rights.

Practice note: The defendant is not required to submit a request for *Brady* materials before making a motion to compel discovery. Requests for statutory discovery commonly include such requests, however, and judges may be more receptive to discovery motions when defense counsel first attempts to obtain the discovery voluntarily. The discovery request therefore should include all discoverable categories of information, including the State's complete files under G.S. 15A-903, other statutory categories of information, and constitutional categories of information. The discovery request should specify the items within each category, described further in subsequent sections of this chapter.

Timing of request. Under G.S. 15A-902(d), defense counsel must serve on the prosecutor a request for statutory discovery no later than ten working days after one of the following events:

- If the defendant is represented by counsel at the time of a probable cause hearing, the request must be made no later than ten working days after the hearing is held or waived.
- If the defendant is not represented by counsel at the probable cause hearing, or is indicted (or consents to a bill of information) before a probable cause hearing occurs, the request must be made no later than ten working days after appointment of counsel or service of the indictment (or consent to a bill of information), whichever is later.

G.S. 15A-902(f) may provide a safety valve if defense counsel fails to comply with the time limits for statutory discovery. It allows the court to hear a motion for discovery on stipulation of the parties or upon a finding of good cause.

Practice note: Because the deadlines for requesting statutory discovery are relatively early, counsel should set up a system for automatically generating and serving statutory discovery requests in every case.

E. Motions for Discovery

Motion for statutory discovery. On receiving a negative or unsatisfactory response to a request for statutory discovery, or after seven days following service of the request on the prosecution without a response, the defendant may file a motion to compel discovery. *See* G.S. 15A-902(a). Ordinarily, a written request for voluntary discovery or written agreement to exchange discovery is a prerequisite to the filing of a motion. *Id.* The motion may be heard by a superior court judge only. *See* G.S. 15A-902(c).

If the prosecution refuses to provide voluntary discovery, or does not respond at all, the defendant must move for a court order to trigger the State's discovery obligations. *See State v. Keaton*, 61 N.C. App. 279 (1983) (when voluntary discovery does not occur, defendant has burden to make motion to compel before State's duty to provide statutory discovery arises).

If the prosecution has agreed to comply with a discovery request, a defendant is not statutorily required to file a motion for discovery. Once the prosecution agrees to a discovery request, discovery pursuant to that agreement is deemed to have been made under an order of the court, and the defendant may obtain sanctions if the State fails to disclose discoverable evidence. *See* G.S. 15A-902(b); G.S. 15A-903(b); *State v. Anderson*, 303 N.C. 185, 192 (1981) (under previous statutory procedures, which are largely the same, if prosecution agrees to provide discovery in response to request for statutory discovery, prosecution assumes "the duty fully to disclose all of those items which could be obtained by court order"), *overruled in part on other grounds by State v. Shank*, 322 N.C. 243 (1988); *see also State v. Castrejon*, 179 N.C. App. 685 (2006) (defendant apparently requested discovery pursuant to prosecutor's open-file policy and did not make written request for discovery and motion; defendant therefore was not entitled to discovery); *State v. Brown*, 177 N.C. App. 177 (2006) (in absence of written request by defense or written agreement, voluntary disclosure by prosecution is not deemed to be under court order; however, court notes that some decisions have held prosecution to requirements for court-ordered disclosure where prosecution voluntarily provides witness list to defense).

Nevertheless, counsel may want to follow up with a motion for discovery. Obtaining a court order may avoid disputes over whether the prosecution agreed to provide discovery and thereby assumed the obligation to comply with a discovery request. The hearing on a discovery motion also may give counsel an opportunity to explore on the record the prosecution's compliance.

A motion for statutory discovery should attest to the defendant's previous request for discovery and ask that the court order the prosecution to comply in full with its statutory obligations. *See State v. Drewyore*, 95 N.C. App. 283 (1989) (suggesting that defendant may not have been entitled to sanctions for prosecution's failure to disclose photographs that were discoverable under statute because motion did not track statutory language of former G.S. 15A-903(d)). If counsel learns of additional materials not covered by the motion, counsel should file a supplemental written motion asking the court to compel production. *See generally State v. Fair*, 164 N.C. App. 770 (2004) (finding under former statute that oral request for materials not sought in earlier written discovery motion was insufficient). [In *Fair,* counsel learned of additional materials and made an oral request for them only after a voir dire of a State's witness at a hearing on counsel's written discovery motion, held by the trial court immediately before trial. The appellate court's requiring of a written motion in these circumstances seems questionable, but the basic point remains that counsel should fashion a broad request for relief in the written motion and, when feasible, should follow up with a supplemental written motion upon learning of materials not covered by the motion.] For additional types of relief, see *infra* § 4.2G, Forms of Relief, and § 4.2J, Sanctions.

As with other motions, the defendant must obtain a ruling on a discovery motion or risk waiver. *See State v. Jones*, 295 N.C. 345 (1978) (defendant waived statutory right to discovery by not making any showing in support of motion, not objecting when court found motion abandoned, and not obtaining a ruling on motion).

Practice note: Motions for statutory discovery commonly include a request for *Brady* evidence. Although the prosecution has the obligation to disclose *Brady* evidence without a request or motion (*see infra* § 4.5G, Need for Request), the motion reinforces the prosecution's obligation. As with motions for statutory discovery, as you learn more about the case, you may want to file additional motions specifying additional information you need and have not received.

Be sure to state all constitutional as well as statutory grounds for discovery in your motion. *See State v. Golphin*, 352 N.C. 364, 403–04 (2000) (defendant's discovery motion did not allege and trial court did not rule on possible constitutional violations; court therefore declines to rule on whether denial of motion was violation of federal or state constitutional rights). For an overview of the constitutional grounds for discovery, see *supra* § 4.1B, Constitutional Rights.

F. Hearing on Motion

Hearings on discovery motions often consist of oral argument only. Defense counsel should use this opportunity to explore on the record the prosecution's compliance with its discovery obligations. 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. For a discussion of the use of subpoenas for pretrial proceedings, see *infra* § 4.7, Subpoenas.

G. Forms of Relief

In addition to asking the court to order the prosecution to provide the desired discovery, defense counsel may want to seek the following types of relief.

Deadline for production. The discovery statutes set some deadlines for the State to produce discovery. *See* G.S. 15A-903(a)(2) (State must give notice of expert witness and furnish required expert materials a reasonable time before trial); G.S. 15A-903(a)(3) (State must give notice of other witnesses at beginning of jury selection); G.S. 15A-905(c)(1)a. (if ordered by court on showing of good cause, State must give notice of rebuttal alibi witnesses no later than one week before trial unless parties and court agree to different time frames).

The statutes do not set a specific deadline for the State to produce its complete files, which is the bulk of discovery due the defendant, but the judge may be willing to set a deadline for the prosecution to provide discovery. *See* G.S. 15A-909 (order granting discovery must specify time, place, and manner of making discovery). When setting a discovery deadline, the judge also may be willing to enter an order precluding the prosecution from introducing discoverable evidence not produced by the deadline. *See, e.g., State v. Coward*, 296 N.C. 719 (1979) (trial court imposed such a deadline), *overruled in part on other grounds by State v. Adcock*, 310 N.C. 1 (1984); *State v. James*, 182 N.C. App. 698, 702 (2007) (trial court set deadline for State to produce discovery and excluded evidence produced after deadline).

Defense counsel also may file a motion in limine before trial requesting that the judge exclude any evidence that has not yet been produced. *See, e.g., State v. McCormick*, 36 N.C. App. 521 (1978) (trial court granted in limine motion excluding evidence not produced in discovery unless prosecution obtained court's permission).

Retrieve and produce information from other agencies involved in investigation or prosecution of defendant. If defense counsel believes that discoverable evidence is in the possession of other agencies involved in the investigation or prosecution of the defendant, such as law enforcement, counsel can ask the court to require the prosecutor to retrieve and produce the evidence. Although the prosecutor may not have actual possession of the evidence, he or she is obligated under the discovery statutes and constitutional requirements to obtain the evidence. For a further discussion of the prosecution's obligation to obtain information from affiliated entities, see *infra* § 4.3B, Agencies Subject to Disclosure Requirements (statutory grounds) and § 4.5H, Prosecutor's Duty to Investigate (constitutional grounds).

If it is unclear to counsel whether the prosecution has the obligation to obtain the information from another entity, counsel may make a motion to require the entity to produce the records or may make a motion in the alternative—that is, counsel can move for an order requiring the prosecution to obtain and turn over the records or, in the alternative, for an order directing the agency to produce the records. *See infra* § 4.6A, Evidence in Possession of Third Parties.

Item-by-item response. The judge may be willing to require the prosecution to respond in writing to each discovery item in the motion, compelling the prosecution to examine each item individually and creating a clearer record.

In camera review. If counsel believes that the prosecution has failed to produce discoverable material, counsel may ask the judge to review the material in camera and determine the portions that must be disclosed. *See, e.g.*, *infra* § 4.5J, In Camera Review and Other Remedies (discussing such a procedure to ensure compliance with *Brady*).

H. Written Inventory

In providing discovery, the prosecution may just turn over documents without a written response and without identifying the materials produced. To avoid disputes at trial over what the prosecution has and has not turned over, counsel should review the materials, create a written inventory of everything provided, and serve on the prosecutor (and file with the court) the inventory documenting the evidence produced. The inventory also should recite the prosecutor's representations about the nonexistence or unavailability of requested evidence. Supplemental inventories may become necessary as the prosecution discloses additional evidence or makes additional representations. A sample inventory is available in the Adult Criminal Motions section of the IDS website..

I. Continuing Duty to Disclose

If the State agrees to provide discovery in response to a request for statutory discovery, or the court orders discovery, the prosecution has a continuing duty to disclose the information. *See* G.S. 15A-907; *State v. Cook*, 362 N.C. 285 (2008) (recognizing duty and finding violation by State's failure to timely disclose identity and report of expert witness); *State v. Jones*, 296 N.C. 75 (1978) (recognizing that prosecution was under continuing duty to disclose once it agreed to provide discovery in response to request, and ordering new trial for violation); *State v. Ellis*, 205 N.C. App. 650 (2010 (recognizing duty). The prosecution always has a duty to disclose *Brady* evidence, with or without a request or court order. *See infra* § 4.5G, Need for Request.

J. Sanctions

Generally. Under G.S. 15A-910, the trial court may impose sanctions for the failure to disclose or belated disclosure of discoverable evidence. The sanctions, in increasing order of severity, are:

- an order permitting discovery or inspection,
- a continuance or recess,
- exclusion of evidence,
- mistrial, and
- dismissal of charge, with or without prejudice.

G.S. 15A-910(a) also allows the court to issue any "other appropriate orders," including an order citing the noncomplying party for contempt. *See also* "Personal sanctions," below, in this subsection J. The court must make specific findings if it imposes any sanction. *See* G.S. 15A-910(d); *cf. State v. Ellis*, 205 N.C. App. 650 (2010) (noting that trial court is not required to make specific findings that it considered sanctions in denying sanctions; transcript indicated that trial court considered defendant's request for continuance and that denial of continuance was not abuse of discretion).

Showing necessary for sanctions. At a minimum, the defendant must do the following to obtain sanctions against the prosecution: (1) show that the prosecution was obligated to disclose the evidence (thus, the importance of making formal discovery requests and motions); (2) show that the prosecution violated its obligations (thus, the importance of making a record of the evidence disclosed by the prosecution); and (3) request sanctions. *See State v. Alston*, 307 N.C. 321 (1983) (defendant failed to advise trial court of violation and request sanctions; no abuse of discretion in trial court's failure to impose sanctions).

G.S. 15A-910(b) requires the court, in determining whether sanctions are appropriate, to consider (1) the materiality of the subject matter and (2) the totality of circumstances surrounding the alleged failure to comply with the discovery request or order. *See also State v. Dorman*, 225 N.C. App. 599 (2013) (reversing order excluding State's evidence because order did not indicate court's consideration of these two factors).

Appellate decisions (both before and after the enactment of G.S. 15A-910(b) in 2011) indicate that various factors may strengthen an argument for sanctions, although none are absolute prerequisites. Factors include:

- Importance of the evidence. *See State v. Walter Lee Jones*, 296 N.C. 75 (1978) (motion for appropriate relief granted and new trial ordered for prosecution's failure to turn over laboratory report bearing directly on guilt or innocence of defendant); *In re A.M.*, 220 N.C. App. 136 (2012) (ordering new trial for trial court's failure to allow continuance or grant other relief; State disclosed new witness, the only eyewitness to alleged arson, on day of adjudicatory hearing).
- Existence of bad faith. *See State v. McClintick*, 315 N.C. 649, 662 (1986) (trial judge "expressed his displeasure with state's tactics" and took several curative actions); *State v. Jaaber*, 176 N.C. App. 752, 756 (2006) (State took "appreciable action" to locate missing witness statements; trial court did not abuse discretion in denying mistrial).
- Unfair surprise. *See State v. King*, 311 N.C. 603 (1984) (no abuse of discretion in denial of mistrial, as defendant was aware of statements that prosecution had failed to disclose); *State v. Aguilar-Ocampo*, 219 N.C. App. 417 (2012) (defendant conceded that he anticipated that State would offer expert testimony, although he could not anticipate precise testimony).
- Prejudice to preparation for trial, including ability to investigate information, prepare motions to suppress, obtain expert witnesses, subpoena witnesses, and engage in plea bargaining. *See State v. Williams,* 362 N.C. 628 (2008) (photos destroyed by State were material evidence favorable to defense, which defendant never possessed, could not reproduce, and could not prove through testimony); *State v. Warren Harden Jones*, 295 N.C. 345 (1978) (defendants failed to suggest how nondisclosure hindered preparation for trial and failed to specify any items of evidence that they could have excluded or rebutted more effectively had they learned of evidence before trial).
- Prejudice to presentation at trial, such as ability to question prospective jurors, prepare opening argument and cross-examination, and determine whether the client should testify. *See State v. Pigott*, 320 N.C. 96 (1987) (no abuse of discretion in denial of mistrial; court finds that prosecution's failure to disclose discoverable photographs did not lead defense counsel to commit to theory undermined by photographs); *State v. King*, 311 N.C. 603 (1984) (no abuse of discretion in denial of mistrial; no suggestion that defendant would not have testified had prosecution disclosed prior conviction).

Practice note: In addition to citing the statutory basis for sanctions, be sure to constitutionalize your request for sanctions for nondisclosure of evidence. Failure to do so may constitute a waiver of constitutional claims. *See State v. Castrejon*, 179 N.C. App. 685 (2006).

Choice of sanction. The choice of sanction for a discovery violation is within the trial court's discretion and is rarely reversed. *See State v. Jaaber*, 176 N.C. App. 752 (2006) (finding that statute does not require that trial court impose sanctions and leaves choice of sanction, if any, in trial court's discretion).

Probably the most common sanction is an order requiring disclosure of the evidence and the granting of a recess or continuance. *See, e.g., State v. Pender*, 218 N.C. App. 233 (2012) (trial court did not abuse discretion in denying defendant's request for mistrial for State's failure to disclose new information provided by codefendant to State; trial court's order, in which court instructed defense counsel to uncover discrepancies on cross-examination and allowed defense recess thereafter to delve into matter, was permissible remedy); *State v. Remley*, 201 N.C. App. 146 (2009) (trial court did not abuse discretion in refusing to dismiss case or exclude evidence for State's disclosure of incriminating statement of defendant on second day of trial; granting of recess was adequate remedy where court said it would consider any additional request other than dismissal or exclusion of evidence and defendant did not request other sanction or remedy).

The failure of a trial court to grant a continuance may constitute an abuse of discretion when the defendant requires additional time to respond to previously undisclosed evidence. *See State v. Cook*, 362 N.C. 285, 295 (2008) (so holding but concluding that denial of continuance was harmless beyond reasonable doubt because other evidence against defendant was overwhelming); *In re A.M.*, 220 N.C. App. 136 (2012) (ordering new trial for trial court's failure to allow juvenile continuance; State disclosed new witness, the only eyewitness to alleged arson, on day of adjudicatory hearing); *see also infra* § 13.4A, Motion for Continuance (discussing constitutional basis for continuance).

Trial and appellate courts have imposed other, stiffer sanctions. They have imposed sanctions specifically identified in the statute, such as exclusion of evidence, preclusion of witness testimony, mistrial, and dismissal; and they have fashioned other sanctions to remedy the prejudice caused by the violation and deter future violations. *See, e.g., State v. Canady*, 355 N.C. 242, 253–54 (2002) (ordering new trial for trial court's failure to exclude expert's testimony or order retesting of evidence where State could not produce underlying data from earlier test); *State v. Mills*, 332 N.C. 392 (1992) (trial court offered defendant mistrial for State's discovery violation); *State v. Taylor*, 311 N.C. 266 (1984) (trial court prohibited State from introducing photographs and physical evidence it had failed to produce in discovery); *State v. Barnes*, 226 N.C. App. 318 (2013) (trial court refused to exclude testimony for alleged untimely disclosure of State's intent to use expert but allowed defense counsel to meet privately with State's expert for over an hour before voir dire hearing); *State v. Icard*, 190 N.C. App. 76, 87 (2008) (trial court allowed defendant right to final argument), *aff'd in part and rev'd in part on other grounds*, 363 N.C. 303 (2009); *State v. Moncree*, 188 N.C. App. 221 (2008) (finding that trial court should have excluded testimony of State's expert about identity of substance found in defendant's shoe where State failed to notify defendant of subject matter of expert's testimony; error not prejudicial); *State v. James*, 182 N.C. App. 698, 702 (2007) (trial court excluded witness statement produced by State after discovery deadline set by trial court); *State v. Blankenship*, 178 N.C. App. 351 (2006) (finding that trial court abused discretion in failing to preclude expert witness not on State's witness list from testifying); *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); *State v. Hall*, 93 N.C. App. 236

(1989) (for belated disclosure of evidence, trial court ordered State's witness to confer with defense counsel and submit to questioning under oath before testifying); *State v. Adams*, 67 N.C. App. 116 (1984) (trial court acted within discretion in dismissing charges for prosecution's failure to comply with court order requiring statutory discovery); *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).

Mistrial or dismissal as sanction. Counsel may need to make additional arguments to obtain a mistrial or dismissal for a discovery violation.

Some cases have applied the general mistrial standard to the granting of a mistrial as a sanction for a discovery violation. *See State v. Jaaber*, 176 N.C. App. 752, 756 (2006) ("mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law" (citation omitted)); *accord State v. Pender*, 218 N.C. App. 233 (2012).

Dismissal has been characterized as an extreme sanction, which should not be routinely imposed and which requires findings detailing the prejudice warranting dismissal. *State v. Dorman*, 225 N.C. App. 599 (2013) (reversing order dismissing charge as sanction for State's discovery violation because trial court did not explain prejudice to defendant that warranted dismissal); *State v. Allen*, 222 N.C. App. 707 (2012) (noting that dismissal is extreme sanction and reversing court's order of dismissal in circumstances of case); *State v. Adams*, 67 N.C. App. 116 (1984) (recognizing that dismissal is extreme sanction and upholding dismissal; because prejudice was apparent, trial court's failure to make findings did not warrant reversal or remand).

Personal sanctions. When determining whether to impose personal sanctions for untimely disclosure of law enforcement and investigatory agencies' files, the court must presume that prosecuting attorneys and their staff acted in good faith if they made a reasonably diligent inquiry of those agencies and disclosed the responsive materials. *See* G.S. 15A-910(c).

Criminal penalties. In 2011, the General Assembly amended G.S. 15A-903 to impose criminal penalties for the failure to comply with statutory disclosure requirements. G.S. 15A-903(d) provides that a person is guilty of a Class H felony if he or she willfully omits or misrepresents evidence or information required to be disclosed under G.S. 15A-903(a)(1), the provision requiring the State to disclose its complete files to the defense. The same penalty applies to law enforcement and investigative agencies that fail to disclose required information to the prosecutor's office under G.S. 15A-903(c). A person is guilty of a Class 1 misdemeanor if he or she willfully omits or misrepresents evidence or information required to be disclosed under any other provision of G.S. 15A-903.

Sanctions for constitutional violations. A court has the discretion to impose sanctions under G.S. 15A-910 for failure to disclose exculpatory evidence. *See, e.g., State v. Silhan*, 302 N.C. 223 (1981) (trial court had authority to grant recess under G.S. 15A-910 for prosecution's failure to disclose exculpatory evidence), *abrogated in part on other grounds by State v. Sanderson*, 346 N.C. 669 (1997).

Stronger measures, including dismissal, may be necessary for constitutional violations. *See State v. Williams*, 362 N.C. 628 (2008) (upholding dismissal of charge of felony assault on government officer; destruction of evidence flagrantly violated defendant's constitutional rights and irreparably prejudiced preparation of defense under G.S. 15A-954).

Preservation of record. If the trial court denies the requested sanctions for a discovery violation, counsel should be sure to include the materials at issue in the record for a potential appeal. *See State v. Mitchell*, 194 N.C. App. 705, 710 (2009) (because defendant did not include any of discovery materials in record, court finds that it could not determine prejudice by trial court's denial of continuance for allegedly late disclosure by State); *see also State v. Hall*, 187 N.C. App. 308 (2007) (in finding that materials were not discoverable, trial court stated that it would place materials under seal for appellate review, but materials were not made part of the record and court of appeals rejected defendant's argument for that reason alone).

Sanctions against defendant for discovery violation. *See infra* "Sanctions" in § 4.8A, Procedures for Reciprocal Discovery.

K. Protective Orders

G.S. 15A-908(a) allows either party to apply to the court, by written motion, for a protective order protecting information from disclosure for good cause. Generally, the State is more likely than the defense to seek a protective order. *See infra* "Protective orders" in § 4.3E, Work Product and Other Exceptions. In some circumstances, a defendant may want to consent to a protective order limiting the use or dissemination of information as a condition of obtaining access to the information. *See infra* "In camera review and alternatives" in § 4.6A, Evidence in Possession of Third Parties.

L. Importance of Objection at Trial

If the State offers evidence at trial that was not produced in discovery, the defendant must object and state the grounds for the objection to preserve the issue for appellate review. *See State v. Mack*, 188 N.C. App. 365 (2008) (defendant cannot argue on appeal that trial court abused its discretion in failing to sanction the State for discovery violation when defense counsel did not properly object at trial to previously undisclosed evidence).

Practice note: The State has argued in some cases that if the defendant has moved before trial for exclusion of evidence based on a discovery violation and the trial court denies

relief, the defendant must renew the objection when the evidence is offered at trial. *State v. Herrera*, 195 N.C. App. 181 (2009) (assuming, arguendo, that objection requirement applies but not ruling on argument), *abrogation on other grounds recognized by State v. Flaugher*, 214 N.C. App. 370 (2011). Accordingly, counsel should always object at trial when the State offers evidence that has been the subject of a pretrial motion to suppress or exclude.

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

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

A. Obligation to Provide Complete Files

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

B. Agencies Subject to Disclosure Requirements

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

G.S. 15A-501(6), adopted in 2004, provides that following an arrest for a felony, a law enforcement officer must make available to the State all materials and information

obtained in the course of the investigation. *See* S.L. 2004-154, s. 11 (S 52). Because this obligation appears in the statutes on law enforcement, it was easy to overlook. G.S. 15A-903 was therefore amended in 2007 to reinforce the obligation of law enforcement agencies to provide discoverable material to the prosecutor. *See* S.L. 2007-183 (H 786); G.S. 15A-903(c) (law enforcement and investigatory agencies must on a timely basis provide to the prosecutor a copy of their complete files related to a criminal investigation or prosecution).

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

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

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

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

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

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

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

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

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

C. Categories of Information

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Notice of Witnesses and Preparation of Reports

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

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

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

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

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

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

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

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

E. Work Product and Other Exceptions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.4 Other Discovery Categories and Mechanisms

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

A. Law Enforcement Agency Recordings

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

While subsection (c) of the statute states that law enforcement recordings are only to be released pursuant to the law, subsection (h) of the statute creates an exception for release

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

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

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

B. Plea Arrangements and Immunity Agreements

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

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

54 (1986) (statute did not require disclosure because prosecutor had not entered into formal agreement with defendant).

Defense counsel therefore should draft a broad discovery request and motion for such information, including all evidence, documents, and other information concerning all deals, concessions, inducements, and incentives offered to any witness in the case. Counsel should base the request on: (1) the prosecutor's obligation under G.S. 15A-1054(c) to disclose such arrangements; (2) the prosecutor's obligation under G.S. 15A-903(a) to disclose the complete files of the investigation and prosecution of the offenses allegedly committed by the defendant, including oral statements by witnesses (*see supra "*Oral statements of witness" in § 4.3C, Categories of Information); and (3) the prosecutor's obligation under *Brady* to disclose impeachment evidence. *See Giglio v. United States*, 405 U.S. 150, 155 (1972) ("evidence of any understanding or agreement as to a future prosecution would be relevant to . . . credibility"); *Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976) (North Carolina conviction vacated on habeas for failure to disclose promise of leniency made by police officer); *see also infra* § 4.5C, Favorable to Defense (discussing *Brady* material). In addition to obtaining complete information, a discovery request and motion based on these additional grounds may provide for a greater remedy than specified in G.S. 15A-1054(c)—a recess—if the State fails to turn over the required information. A sample motion to reveal deals or concessions is available in the Adult Criminal Motions section of the IDS website.

C. 404(b) Evidence

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

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

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

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

D. Examinations and Interviews of Witnesses

Examinations. In *State v. Horn*, 337 N.C. 449 (1994), the court held that a trial judge may not compel a victim or witness to submit to a psychological examination without his or her consent. *See also State v. Carter*, 216 N.C. App. 453 (2011) (mentioning *Horn* and finding that defendant presented no authority for argument on appeal that trial court violated his federal and state constitutional rights by refusing to order examination of victim), *rev'd on other grounds*, 366 N.C. 496 (2013).

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

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

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

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

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

[hereinafter LAFAVE, CRIMINAL PROCEDURE] (interpreting *Webb v. Texas*, 409 U.S. 95 (1972), and other decisions as making it a due process violation for prosecutor to discourage prospective witnesses from testifying for defense).

In limited circumstances, defense counsel may have the right to depose a witness. *See infra* § 4.4E, Depositions; G.S. 8-74. Courts also have compelled witness interviews for discovery violations. *See State v. Hall*, 93 N.C. App. 236 (1989) (as sanction for discovery violation, court ordered State's witness to confer with defense counsel and submit to questioning under oath before testifying).

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

E. Depositions

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

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

resides). Rule 45(f) describes the procedure for obtaining a deposition, including obtaining a commission (an order) from a North Carolina court before seeking discovery in the other state.

F. Biological Evidence

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

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

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

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

In lieu of or in addition to asking for the SBI to conduct DNA testing, the defendant may seek funds for an expert to conduct testing of the evidence. *See infra* Chapter 5, Experts and Other Assistance. If the defendant does not intend to offer the tests at trial, the defendant generally does not have an obligation to disclose the test results to the State. *See infra* "Nontestifying experts" in § 4.8C, Results of Examinations and Tests.

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

G. Nontestimonial Identification Orders

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

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

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

H. Potential Suppression Issues

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

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

Innocence initiatives. The General Assembly has enacted requirements for recording interrogations (G.S. 15A-211) and conducting lineups (G.S. 15A-284.52) as part of an

effort to increase the reliability of convictions. For a discussion of these requirements, see *infra* § 14.3G, Recording of Statements (2d ed. 2013), and § 14.4B, Statutory Requirements for Lineups (2d ed. 2013).

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

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

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

I. Other Categories

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

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

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.

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).

4.7 Subpoenas

Although not a formal discovery device, subpoenas (particularly subpoenas duces tecum) may be a useful tool for obtaining information material to the case. *See State v. Burr*, 341 N.C. 263, 302 (1995) (subpoena duces tecum is permissible method for obtaining records not in possession, custody, or control of State); *State v. Newell*, 82 N.C. App. 707, 708 (1986) (although discovery is not proper purpose for subpoena duces tecum, subpoena duces tecum is proper process for obtaining documents material to the inquiry in the case).

The mechanics of subpoenas are discussed in detail in Chapter 29 (Witnesses) of Volume 2 of the North Carolina Defender Manual (UNC School of Government, Oct. 2018). The discussion below briefly reviews the pretrial use of subpoenas, particularly for documents.

A. Constitutional Right to Subpoena Witnesses and Documents

A defendant has a constitutional right to subpoena witnesses and documents, based primarily on the Sixth Amendment right to compulsory process. *See Washington v. Texas*, 388 U.S. 14, 19 (1967) (right to compel attendance of witnesses is "in plain terms the right to present a defense"); *State v. Rankin*, 312 N.C. 592 (1985) (recognizing Sixth Amendment basis of subpoena power). Due process also gives a defendant the right to obtain material, favorable evidence in the possession of third parties (*see supra* § 4.6A, Evidence in Possession of Third Parties); and article 1, section 23 of the North Carolina Constitution guarantees a criminal defendant the right to confront one's accusers and witnesses with other testimony.

The right to compulsory process is not absolute. Although the defendant does not have to make any showing to obtain a subpoena, the court on proper objection or motion may deny, limit, or quash a subpoena. *See infra* § 4.7E, Objections to and Motions to Modify or Quash Subpoena Duces Tecum (discussing permissible scope of subpoena duces tecum); *see generally* 2 NORTH CAROLINA DEFENDER MANUAL § 29.1A, Constitutional Basis of Right to Compulsory Process.

B. Reach of Subpoena

A subpoena may be directed to any person within North Carolina who is capable of being a witness, including law-enforcement officers, custodians of records of public agencies, and private businesses and individuals.

To obtain witnesses or documents located outside of North Carolina, defense counsel can use the Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings. *See* G.S. 15A-811 through G.S. 15A-816. The uniform act to secure witnesses has been interpreted as authorizing subpoenas for the production of documents. *See* Jay M. Zitter, Annotation, *Availability under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings of Subpoena Duces Tecum*, 7 A.L.R.4th 836 (1981). Counsel may not use an ordinary subpoena to compel an out-of-state witness to produce records unless the recipient consents. *See* North Carolina State Bar, 2010 Formal Ethics Opinion 2 (2010). For a discussion of the mechanics of the Uniform Act, see 2 NORTH CAROLINA DEFENDER MANUAL § 29.1E, Securing the Attendance of Nonresident Witnesses.

For a discussion of additional ways to obtain out-of-state materials, 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) (discussing various mechanisms for obtaining out-of-state records, including service on registered agents located in North Carolina and a different uniform act, the Uniform Interstate Depositions and Discovery Act in G.S. 1F-1 through 1F-7).

C. Issuance and Service of Subpoena

Rule 45 of the North Carolina Rules of Civil Procedure governs the issuance and service of subpoenas. *See* G.S. 15A-801 (subpoenas to testify in criminal cases governed by Rule 45, subject to limited exceptions); G.S. 15A-802 (to same effect for subpoenas for documents); G.S. 8-59 (so stating for subpoenas to testify); G.S. 8-61 (so stating for subpoenas for documents). The court need not be involved in the issuance of a subpoena to testify or to produce documents; defense counsel may issue either. *See* AOC Form AOC-G-100, "Subpoena" (Feb. 2018). The AOC form subpoena may be used to subpoena a witness to testify, produce documents, or do both.

The sheriff, sheriff's deputy, coroner, or any person over age 18 who is not a party, may serve a subpoena. Service may be by personal delivery to the person named in the subpoena, by registered or certified mail, return receipt requested, or by telephone communication by law enforcement for subpoenas to testify (but not for subpoenas for documents). *See* N.C. R. CIV. P. 45(b)(1); G.S. 8-59.

Practice note: Because the court may not be able to issue a show cause order re: contempt (with an order for arrest) to enforce a subpoena served by telephone communication (*see* G.S. 8-59), and because disputes may arise about whether a person named in a subpoena signed for and received a subpoena served by mail, counsel should consider serving all subpoenas by personal delivery on the person whose attendance is sought.

The defendant need not tender any witness fee at the time of service. *See* G.S. 6-51 (witness not entitled to receive fees in advance). Rather, the witness must apply to the clerk after attendance for payment of the daily witness fee and reimbursement of allowable travel expenses. G.S. 6-53; G.S. 7A-316. Generally, the court may assess witness fees against the defendant only on completion of the case. *See* G.S. 7A-304 (costs may be assessed against defendant on conviction or entry of plea of guilty or no contest).

A copy of the subpoena need not be served on other parties in a criminal case. *See* G.S. 15A-801 (exempting criminal cases from service requirement for witness subpoenas in N.C. R. Civ. P. 45(b)(2)), G.S. 15A-802 (to same effect for document subpoenas).

For a further discussion of issuance and service of subpoenas to testify, see 2 NORTH CAROLINA DEFENDER MANUAL § 29.1B, Securing the Attendance of In-State Witnesses. For a further discussion of issuance and service of subpoenas for documents, see 2 NORTH CAROLINA DEFENDER MANUAL § 29.2A, Statutory Authorization, and § 29.2B, Statutory Requirements.

For reference sources on obtaining particular types of records, see *infra* § 4.7F, Specific Types of Confidential Records (health department, mental health, and school records).

D. Production of Documents in Response to Subpoena Duces Tecum

The person named in a subpoena duces tecum ordinarily must appear on the date and at the place designated in the subpoena and must produce the requested documents.

Place of production. Typically, a subpoena duces tecum requires production at some sort of proceeding in the case to which the recipient is subpoenaed, such as a pretrial hearing, deposition (rare in criminal cases but common in civil cases), or trial. In 2003, the General Assembly amended Rule 45 of the N.C. Rules of Civil Procedure to modify this requirement for subpoenas for documents (but not subpoenas to testify). *See* S.L. 2003-276, s. 1 (H 785). Under the revised rule, a party may use a subpoena in a pending case to direct the recipient to produce documents at a designated time and place, such as at the issuing party's office, even though no deposition or other proceeding is scheduled for that time and place. Because G.S. 15A-802 makes Rule 45 applicable to criminal cases, this use of a subpoena is permissible in a criminal case. *See* North Carolina State Bar, 2008 Formal Ethics Opinion 4 (2008).. The revised language of the rule is comparable to Rule 45(a)(1) of the Federal Rules of Civil Procedure, which authorizes a similar procedure in federal cases. *See* 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 45.02[3] (3d ed. 2018).

Practice note: When seeking sensitive records, defense counsel may not want to use an "office" subpoena or a subpoena at all and instead may want to seek an order of the court compelling production. Because a subpoena is generally insufficient to authorize a custodian of confidential records to disclose records, the custodian will often contest the subpoena, necessitating a court order in any event. Further, if a records custodian who is subpoenaed discloses confidential information to defense counsel without proper authorization (typically, consent by the subject of the records or a court order, not just a subpoena), defense counsel may be subject to sanctions. *See* North Carolina State Bar Ethics Opinion RPC 252 (1997) (attorneys should refrain from reviewing confidential materials inadvertently sent to them by opposing party); *Susan S. v. Israels*, 67 Cal. Rptr. 2d 42 (Cal. Ct. App. 1997) (attorney read and disseminated patient's confidential mental health records that treatment facility mistakenly sent directly to him in response to subpoena; court allowed patient's suit against attorney for violation of state constitutional right of privacy); *see also Bass v. Sides*, 120 N.C. App. 485 (1995) (before obtaining judge's permission, plaintiff's attorney reviewed confidential medical records of defendant that records custodian had sealed and provided to clerk of court in response to subpoena; judge ordered plaintiff's attorney to pay defendant's attorney fees, totaling approximately $7,000, and prohibited plaintiff from using the records at trial).

Notice of receipt and opportunity to inspect; potential applicability to criminal cases. Rule 45(d1) of the N.C. Rules of Civil Procedure states that within five business days of receipt of materials produced in compliance with a subpoena duces tecum, the party who was responsible for issuing the subpoena must serve all other parties with notice of receipt. On request, the party receiving the material must provide the other parties a reasonable opportunity to copy and inspect such material at the inspecting party's expense.

The applicability of this requirement to criminal cases is not entirely clear, particularly when the defendant is the subpoenaing party. In 2007, the General Assembly revised Rule 45 to add the notice and inspection requirements in subsection (d1) of Rule 45. *See* 2007-514, s. 1 (H 316). This change appears to have been prompted by concerns from civil practitioners after the 2003 changes to Rule 45. The earlier changes, discussed above under "Place of production" in this subsection D., authorized a party to issue a subpoena for the production of documents without also scheduling a deposition, at which the opposing party would be present and would have an opportunity to review and obtain copies of the subpoenaed records.

Criminal cases are not specifically exempted from the notice and inspection requirements enacted in 2007, although somewhat paradoxically the subpoenaing party in a criminal case is not required to give notice of the service of a subpoena (discussed above under subsection C., Issuance and Service of Subpoena). The 2007 subpoena provisions also are in tension with G.S. 15A-905 and G.S. 15A-906, which essentially provide that a criminal defendant is only obligated to disclose to the State evidence that he or she intends to use at trial. (If the State is the subpoenaing party, the records become part of the State's file and are subject to the State's general discovery obligations under G.S. 15A-903.)

If the notice and inspection requirements in Rule 45(d1) apply in criminal cases, a defendant may have grounds to seek a protective order under G.S. 15A-908 to withhold records from disclosure. Alternatively, instead of using a subpoena, a defendant may move for a court order for production of records, which is not governed by Rule 45. *See supra* "Ex parte application" in § 4.6A, Evidence in Possession of Third Parties.

Public and hospital medical records. If a custodian of public records or hospital medical records (as defined in G.S. 8-44.1) has been subpoenaed to appear for the sole purpose of producing records in his or her custody and not also to testify, the custodian may elect to tender the records to the court in which the action is pending instead of making a personal appearance. N.C. R. CIV. P. 45(c)(2). For a discussion of these procedures, see 2 NORTH CAROLINA DEFENDER MANUAL § 29.2C, Production of Public, Hospital Medical, and Nonparty Business Records.

E. Objections to and Motions to Modify or Quash Subpoena Duces Tecum

N.C. Rule of Civil Procedure 45(c)(3) and (c)(5) set forth the procedures for a person to serve a written objection on the subpoenaing party or file a motion to modify or quash a subpoena. The mechanics of these procedures are discussed in detail in 2 NORTH CAROLINA DEFENDER MANUAL § 29.2D, Objections to a Subpoena Duces Tecum, and § 29.2E, Motions to Modify or Quash a Subpoena Duces Tecum.

If an objection rather than a motion is made, the party serving the subpoena is not entitled to inspect or copy the designated materials unless the court enters an order permitting him or her to do so. N.C. R. CIV. P. 45(c)(4). In some instances, the subpoenaed party will appear in court at the time designated in the subpoena and make an objection to disclosure. If this procedure is followed, the defendant will have an opportunity to obtain

a ruling from the court then and there. In other instances, the subpoenaed party will object before the scheduled proceeding. The subpoenaing party then will have to file a motion to compel production, with notice to the subpoenaed person, in the court of the county where the production is to occur. *Id.*

In reviewing an objection or motion to quash or modify, "the trial judge should consider the relevancy and materiality of the items called for [by the subpoena], the right of the subpoenaed person to withhold production on other grounds, such as privilege, and also the policy against 'fishing expeditions.'" *State v. Newell*, 82 N.C. App. 707, 709 (1986). The subpoena should "specify with as much precision as fair and feasible the particular items desired." *Id.*, 82 N.C. App. at 708. Otherwise, the court may view the subpoena as a "fishing or ransacking expedition." *Vaughan v. Broadfoot*, 267 N.C. 691, 699 (1966) (quashing subpoena for production of mass of records on first day of trial); *see also Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995) (finding that North Carolina trial judge violated defendant's due process rights by quashing subpoena on overbreadth grounds without requiring that records be produced for review by court after defendant made a plausible showing that records contained information material and favorable to his defense). On finding that a subpoena is overbroad, a trial court may modify rather than quash it. *State v. Richardson*, 59 N.C. App. 558 (1982).

In some North Carolina cases, trial courts have granted motions by the prosecution to quash a subpoena duces tecum directed to a third party, but the decisions do not explicitly address whether the prosecution had standing to do so. *See, e.g., State v. Love*, 100 N.C. App. 226 (1990), *conviction vacated on habeas sub. nom.*, *Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995). Because prosecutors do not represent third parties and do not have a legally recognized interest in their records, they may not have standing to object or move to quash. *See United States v. Tomison*, 969 F. Supp. 587 (E.D. Cal. 1997) (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); 2 G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE § 45-4, at 45-12–13 (4th ed. 2020) ("A party does not have standing to challenge a subpoena duces tecum issued to a nonparty witness unless he can claim some privilege in the documents sought."). Some cases have taken a more expansive view of prosecutor standing because of the prosecutor's overall interest in the handling of the prosecution. *See Commonwealth v. Lam*, 827 N.E.2d 209, 228–29 & n.8 (Mass. 2005) (finding that prosecutor had standing to object to issuance of summons [subpoena] because prosecutor may be able to assist judge in determining whether subpoena is improper fishing expedition and in preventing harassment of witnesses by burdensome, frivolous, or improper subpoenas; court notes without deciding that there may be occasions "in which a defendant seeks leave from the court to move ex parte for the issuance of a summons [subpoena]").

Practice note: If the judge quashes a subpoena requiring the production of documents, 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); *see also State v. Burr*, 341 N.C. 263 (1995) (court states that it could not review trial judge's denial of motion to require production of witness's medical records because defendant failed to make documents part

of record). 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.

Rather than quash or modify a subpoena, a judge may order the subpoenaed person to be "reasonably compensated" for the cost, if "significant," of producing the designated material. N.C. R. CIV. P. 45(c)(6). Typically, judges do not order reimbursement of document production expenses because compliance with a subpoena is an ordinary, not significant, expense of responding to court proceedings. If the court orders payment, defense counsel for an indigent defendant may request the court to authorize payment from state funds as a necessary expense of representation. *See* G.S. 7A-450(b); G.S. 7A-454.

F. Specific Types of Confidential Records

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 records). For a discussion of subpoenas for particular types of records from the perspective of the recipient, see the following:

- John Rubin & Aimee Wall, *Responding to Subpoenas for Health Department Records*, HEALTH LAW BULLETIN No. 82 (Sept. 2005).
- John Rubin, *Subpoenas and School Records: A School Employee's Guide*, SCHOOL LAW BULLETIN No. 30/2 (Spring 1999).
- John Rubin & Mark Botts, *Responding to Subpoenas: A Guide for Mental Health Facilities*, POPULAR GOVERNMENT No. 64/4 (Summer 1999).

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 statutes, 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.)

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).

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 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.

In *State v. Foster*, 235 N.C. App. 365 (2014), the court of appeals noted five factors relevant to the inquiry. These include:

- the reason for the discovery violation by the defense, including whether the violation was willful or meant to secure a tactical advantage;

- the State's role, if any, in the violation;
- prejudice to the State resulting from the violation;
- prejudice to the defendant and the defendant's rights that would arise from the sanction; and
- whether a lesser sanction would be appropriate.

In *Foster*, the trial court precluded the defendant's entrapment defense based on the defendant's failure to give the State specific information about the nature of the defense. The State was on notice for eight months before trial that the defendant planned to argue entrapment and did not demonstrate prejudice from the lack of detail about the defense. Further, the trial court failed to make findings justifying the sanction. The court of appeals determined that even if the defendant committed a discovery violation, the preclusion of the defense as a sanction was an abuse of discretion and required a new trial.

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"). In *State v. Cooper*, 229 N.C. App. 442 (2013), the court of appeals recognized that the sanction of precluding defense witnesses from testifying at trial affected the defendant's ability to present a defense and required a new trial. The *Cooper* court's ruling acknowledged the

defendant's right to present a defense as grounded in the Due Process Clause under the Fifth Amendment, along with the rights of confrontation and compulsory process under the Sixth Amendment. In finding the sanction imposed to be an abuse of discretion, the court considered its impact on the defendant's right to present a defense. Defenders should always make constitutional arguments alongside other arguments when opposing a motion for sanctions against the defense. For more on defense sanctions and constitutional concerns, see John Rubin, *What Are Permissible Discovery Sanctions Against the Defendant?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sep. 12, 2013).

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*, 218 N.C. App. 233 (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 565 ("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* § 4.1C, 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).

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.

Neither the defendant nor the State is required to disclose witnesses' names if the party 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 501–03 (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*, 218 N.C. App. 233 (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 (2016).

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* 5 LAFAVE, CRIMINAL PROCEDURE § 20.5(c), at 572.

Practice note: For offenses committed on or after December 1, 2013, G.S. 15A-1002(b)(4) 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. *See* S.L. 2013-18, s. 1 (S 45). 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); *State v. Santifort*, 257 N.C. App. 211 (2017) (ex parte orders compelling production of law enforcement personnel and educational records were void ab initio; request was not supported by affidavit or similar evidence and was not filed as a special proceeding, civil action, or as part of a criminal case). 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). 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). *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), which recognized applicability of ethics rule to ex parte communications by prosecutors). 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.