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Chapter 4: Discovery

A defendant's right to discovery is based primarily on statute, due process, and the court's inherent authority. The main statutory provisions appear in G.S. 15A-901 through 15A-910.

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* § 4.1F, p. 6. The chapter does not address discovery in juvenile proceedings (*see* G.S. 7A-618 *et seq.*) or in postconviction proceedings. *See* G.S. 15A-1415(f); *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276 (1998); *State v. Taylor*, 327 N.C. 147, 393 S.E.2d 801 (1990).

Several theories and procedures for obtaining discovery are reviewed here, but defense counsel should not feel constrained by the discussion. Trial courts may be willing to grant greater discovery when shown the need for it.

4.1 Types of Defense Discovery

A. Open-File Discovery

In many jurisdictions, prosecutors have an “open-file” policy and allow defense counsel to look at materials the prosecutor has received from law enforcement (investigative reports, witness statements, etc.). The extent to which prosecutors actually open their files, and whether they open their files at all, may vary with each district and each prosecutor. *See State v. Moore*, 335 N.C. 567, 440 S.E.2d 797 (1994) (prosecutor in one district not bound by open-file policy of prosecutor in another district); 15A-904(b) (prosecutor may provide greater discovery than statutes require). In exchange for open-file discovery, a prosecutor may request some concession from the defendant, such as waiver of the probable cause hearing. Generally, the additional evidence available through open-file discovery will warrant some concession.

Even though a prosecutor has an open-file policy, the defendant ordinarily should make a formal request for statutory discovery (discussed *infra* § 4.2D, p. 7). If the defendant does not do so, 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, 358 S.E.2d 365 (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). To avoid alienating an otherwise cooperative prosecutor, defense counsel may want to explain that the formal procedures are necessary to protect the record.

B. Statutory Rights

North Carolina enacted its discovery statutes in 1973 as part of Chapter 15A. Substantive changes were made to the statutes in 1983, so some cases decided before then may no longer be good law.

The North Carolina discovery statutes are similar in many respects to federal discovery statutes and rules. *See State v. Cunningham*, 108 N.C. App. 185, 423 S.E.2d 802 (1992) (noting similarities). Consequently, cases and commentary interpreting federal law are often helpful in pressing for discovery under North Carolina law. *See* FED. R. CRIM. P. 16 (containing bulk of federal discovery rules); 18 U.S.C. 3500, known as the Jencks Act (governing disclosure of witness statements); FED. R. CRIM. P. 26.2 (essentially duplicating the Jencks Act).

C. 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, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (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, but other constitutional rights (effective assistance of counsel, compulsory process, and confrontation) also may support defense discovery.

State Constitution. The North Carolina courts have recognized that a defendant has discovery rights under Art. I, § 19 of the North Carolina Constitution (law of land clause). *See State v. Cunningham*, 108 N.C. App. 185, 423 S.E.2d 802 (1992) (right to data underlying tests of evidence). Art. I, § 23 (right to counsel and confrontation) also may support defense discovery.

D. Court’s Inherent Authority

Before Trial. The North Carolina Supreme Court has indicated that trial courts have the inherent authority to order pretrial discovery in the interests of justice. *See State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977); *see also State v. Warren*, 347 N.C. 309, 492 S.E.2d 609 (1997) (recognizing trial court’s inherent authority to order pretrial discovery in some instances); *State v. Crews*, 296 N.C. 607, 252 S.E.2d 745 (1979) (although documents in third party’s possession were not discoverable as matter of right, court had authority to require disclosure in interests of justice). This reservation of authority is consistent with the interpretation of federal discovery law. *See* FED. R. CRIM. P. 16 commentary to 1974 amendment (“The rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge’s discretion to order broader discovery in appropriate cases.”).

Hardy and other cases have limited this basis for discovery by holding that judges do not have the inherent authority to order pretrial discovery if a statute prohibits discovery. Relying on this qualification, the courts have held that a judge does not have the inherent authority to order pretrial disclosure of evidence restricted by G.S. 15A-904, which deals with certain internal documents prepared by the state. *See infra* § 4.3H, p. 21 (discussing limits on pretrial disclosure of witness statements); § 4.5D, p. 27 (discussing limits on pretrial disclosure of officer reports). The courts also have restricted some forms of discovery even though not expressly prohibited by statute. *See infra* § 4.5B, p. 26 (physical and psychiatric examinations of witnesses).

In light of these limitations, the inherent authority theory is most likely useful to bolster an argument for

- fleshing out categories of discovery covered by the discovery statutes (for example, oral statements of the defendant, which the discovery statutes require to be disclosed, and the facts and circumstances surrounding the oral statements, which the statutes do not specifically address); and
- obtaining evidence not covered by the discovery statutes (for example, evidence of prior bad acts by the defendant that the state intends to introduce under Evidence Rule 404(b)).

During Trial. *Hardy* held that even if pretrial discovery is prohibited, the trial court has the inherent authority to order disclosure once trial commences. *See also United States v. Nobles*, 422 U.S. 225, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975) (federal discovery rules apply only to pretrial discovery; once trial commences a court may order disclosure of materials specifically exempted from pretrial discovery).

E. 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.

Pretrial Hearings. Several pretrial proceedings may provide the defense with discovery, including hearings on bail (*see supra* Chapter 1), probable cause (*see supra* Chapter 3), and motions to suppress.

Subpoenas. *See infra* § 4.8, p. 42.

Public Records. *See generally* DAVID M. LAWRENCE, PUBLIC RECORDS LAW FOR NORTH CAROLINA LOCAL GOVERNMENTS (Institute of Government, 1997).

F. 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, whether the case is for trial in district court or for trial *de novo* in superior court.

Defendants charged with misdemeanors have some discovery rights, however. They have the same constitutional discovery rights as in other cases and have statutory discovery rights with respect to misdemeanors within the superior court's original jurisdiction—that is, misdemeanors initiated in superior court. *See* G.S. 15A-901; G.S. 7A-271(a) (listing misdemeanors within superior court's original jurisdiction). A misdemeanor trial in district court also may provide considerable discovery for a later trial *de novo*.

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* § 4.7A, p. 35.) 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 the case, and eliminate unwelcome surprises at trial. Further, the burden on the prosecution of providing discovery, and the potential for disclosing sensitive information, may facilitate plea negotiations. In some instances, defense counsel may not want to pursue certain lines of discovery to avoid educating the prosecution or triggering reciprocal discovery rights. *See infra* § 4.9, p. 44. Generally, however, the benefits of aggressive discovery outweigh its drawbacks.

A second, but equally important, goal is to make enough of a record of the discovery process to provide a basis at trial for requesting sanctions for violations. Although informal measures (such as open-file discovery) may be effective in obtaining information, they may not support sanctions should the prosecution 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 witnesses and officers, visits to crime scene, etc.).

Preliminary investigation enables counsel to target specific information relevant to the case in addition to the usual categories of discoverable evidence.

C. Preserving Evidence for Discovery

If counsel believes that the state may destroy or use up in testing evidence significant to the case, counsel should make a motion to preserve. The motion not only helps assure access to evidence but also places the defendant in a better position to seek sanctions if the state loses or destroys evidence. *See People v. Newberry*, 652 N.E.2d 288 (Ill. 1995) (motion to preserve puts state on notice of exculpatory value of evidence); *see also infra* § 4.7C, p. 39 (discussing constitutional issues concerning destroyed evidence). Types of evidence that may be a useful object of a motion to preserve include

- rough notes of interviews by law-enforcement officers, tapes of 911 calls, and other materials that are routinely destroyed;
- drugs, blood, and other substances that may be consumed in testing by the state; and
- other physical evidence.

Counsel may make a motion to preserve even before requesting discovery of the evidence. The motion asks that the prosecution and allied agencies, such as law enforcement, preserve evidence in the event it is discoverable. 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. A sample motion to preserve appears at the end of this chapter.

D. Requests for Discovery

Request for Statutory Discovery. To obtain statutory discovery, the defendant first must serve the prosecutor with a written request for voluntary discovery. A written request ordinarily is a prerequisite to a motion to compel discovery. *See* G.S. 15A-902(a); *State v. Anderson*, 303 N.C. 185, 278 S.E.2d 238 (1981). In some counties, the prosecutor's office may have a standing policy that the defendant need not make a request for discovery as a prerequisite to making a discovery motion or requesting sanctions for nondisclosure; if reduced to a written agreement or stipulation, such a policy may obviate the need for making a written request for statutory discovery.

The request ordinarily should include all of the statutory categories of discovery. In some instances, counsel may not want to ask for a particular category of evidence, such as experts' reports, to avoid triggering the prosecution's reciprocal right to discovery. *See infra* § 4.9, p. 44. Sample requests for statutory discovery appear at the end of this chapter.

Under G.S. 15A-902(d), counsel must serve on the prosecutor a request for statutory discovery no later than ten 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 upon stipulation of the parties or upon a finding of good cause.

Significance of Open-File Discovery Policy. An open-file discovery policy ordinarily does not eliminate the need for a request for statutory discovery. *See State v. Abbott*, 320 N.C. 475, 358 S.E.2d 365 (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).

Requests for Other Discovery. The defendant is not required to submit a request for *Brady* or other nonstatutory discovery before making a motion to compel discovery. Requests for statutory discovery commonly include requests for nonstatutory information, however, and judges may be more receptive to discovery motions when defense counsel first attempts to obtain the discovery voluntarily.

E. Motions for Discovery

Motion for Statutory Discovery. Upon 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). 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, 300 S.E.2d 471 (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, does the defendant still need 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); *State v. Anderson*, 303 N.C. 185, 191, 278 S.E.2d 238, 242 (1981) (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”). Nevertheless, counsel may want to follow up with a motion for discovery. Obtaining a court order may avoid disputes over whether the prosecution has 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 prior 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, 382 S.E.2d 825 (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). For additional types of relief, *see infra* § 4.2G, p. 10. Sample motions for statutory discovery appear at the end of this chapter (one for all the statutory categories, one for statements of the defendant, and one for evidence identified but not yet produced).

As with any other motion, the defendant must obtain a ruling on a discovery motion or risk waiver. *See State v. Jones*, 295 N.C. 345, 245 S.E.2d 711 (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).

Motions for Other Discovery. Motions for statutory discovery commonly include a standard request for *Brady* evidence. Although the prosecution has the obligation to disclose *Brady* evidence without a court order (*see infra* § 4.6F, p. 33), the motion tends to reinforce the prosecution’s obligation.

A separate motion is usually advisable for more specialized information, such as specific types of *Brady* information. Sample *Brady* motions appear at the end of this chapter.

F. Hearing on Motion

Hearings on discovery motions usually 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 subpoenas, *see infra* § 4.8, p. 42.

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 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). At the time of 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, 252 S.E.2d 712 (1979) (trial court imposed such a 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, 244 S.E.2d 433 (1978) (trial court granted in limine motion excluding evidence not produced in discovery unless prosecution obtained court's permission). Such a motion may ask for exclusion of all discoverable evidence not yet produced or specific categories of discoverable evidence. At the end of this chapter is a motion in limine to exclude statements by the defendant not produced by the statutory deadline.

Retrieve and Produce. If defense counsel believes that discoverable evidence is in the possession of other agencies, such as law enforcement, counsel should consider asking 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 may be obligated (under both the discovery statutes and the Constitution) to obtain the evidence. *See infra* § 4.3A, p. 14 (discussing meaning of possession, custody, or control under statute); § 4.6G, p. 34 (discussing similar issue under *Brady*).

Item-By-Item Response. The judge may be willing to require the prosecution to respond in writing to each discovery item in the motion, forcing 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* § 4.6I, p. 35 (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. To avoid disputes at trial over what the prosecution has and has not turned over, counsel should consider serving on the prosecutor (and filing with the court) a written inventory of the evidence produced. The inventory also can be used to 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. Sample inventories appear at the end of this chapter.

I. Continuing Duty to Disclose

If the prosecution 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. Jones*, 296 N.C. 75, 248 S.E.2d 858 (1978) (prosecution under continuing duty to disclose once it agrees to provide discovery in response to request). The prosecution always has a duty to disclose *Brady* evidence, with or without a request or court order. *See infra* § 4.6F, p. 33.

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:

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

G.S. 15A-910 also allows the court to issue any “other appropriate orders,” including an order citing the noncomplying party for contempt.

Choice of Sanction. The choice of sanction for a discovery violation is within the trial court’s discretion and is rarely reversed. Probably the most common sanction is an order requiring disclosure of the evidence and the granting of a recess or continuance, but trial courts also may impose stiffer sanctions. *See, e.g., State v. Mills*, 332 N.C. 392, 420 S.E.2d 114 (1992) (trial court offered defendant mistrial for state’s discovery violation); *State v. Taylor*, 311 N.C. 266, 316 S.E.2d 225 (1984) (trial court prohibited state from introducing photographs and physical evidence it had failed to produce in discovery); *State v. Banks*, 125 N.C. App. 681, 482 S.E.2d 41 (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, 493 S.E.2d 58 (1997); *State v. Hall*, 93 N.C. App. 236, 377 S.E.2d 280 (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, 312 S.E.2d 498 (1984) (trial court acted within discretion in dismissing charges for prosecution’s failure to comply with court order requiring statutory discovery); *United States v. Bundy*, 472 F.2d

1266 (D.C. Cir. 1972) (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).

Showing Necessary for Sanctions. At a minimum, the defendant must do the following to obtain sanctions: (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, 298 S.E.2d 631 (1983) (defendant failed to advise trial court of violation and request sanctions; no abuse of discretion in trial court's failure to impose sanction).

Several factors may strengthen an argument for sanctions (although none are absolute prerequisites), including the following:

- Importance of evidence. *See State v. Walter Lee Jones*, 296 N.C. 75, 248 S.E.2d 858 (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).
- Existence of bad faith. *See State v. McClintick*, 315 N.C. 649, 340 S.E.2d 41 (1986) (suggesting that some sanction is required if state acts in bad faith).
- Unfair surprise. *See State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984) (no abuse of discretion in denial of mistrial, as defendant was aware of statements that prosecution had failed to disclose).
- 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. Warren Hardin Jones*, 295 N.C. 345, 245 S.E.2d 711 (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, 357 S.E.2d 631 (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, 320 S.E.2d 1 (1984) (no abuse of discretion in denial of mistrial; no suggestion that defendant would not have testified had prosecution disclosed prior conviction).

Mandatory Sanctions. The discovery statutes provide for mandatory sanctions for certain discovery violations. Thus, if the prosecution refuses to disclose a witness's statement after he or she testifies, the court must strike the witness's testimony. *See G.S.*

15A-903(f)(4) (court also may order mistrial). An informant may not testify at trial if during discovery the prosecution has refused to produce an oral statement made by the defendant to the informant on the ground that the informant's identity is secret. *See* G.S. 15A-903(a)(2). The court also may impose any of the discretionary sanctions described above.

Sanctions for Constitutional Violations. Once the court orders the prosecution to disclose evidence, the court has the discretion to impose sanctions under G.S. 15A-910 for failure to comply with the order. *See, e.g., State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981) (prosecution subject to sanctions under G.S. 15A-910 for failure to disclose exculpatory evidence).

If the nondisclosure amounts to a constitutional violation as well as a violation of the court's order, stronger measures (such as a new trial or dismissal) may be necessary. Such measures are not to sanction the prosecution for a discovery violation, but rather to protect the defendant's right to a fair trial under the due process clause. *See, e.g., infra* § 4.7B, p. 38 (failure to disclose false testimony); § 4.7C, p. 39 (loss or destruction of evidence).

4.3 Rights under 15A-903

A. Written or Recorded Statements by Defendant

Generally. G.S. 15A-903(a)(1) gives the defendant the right to

- inspect and copy
- any written or recorded statements by the defendant
- that are relevant and
- are within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecutor.

In addition to the above statutory requirement, due process may require the prosecution to disclose the defendant's statements. *See Clewis v. Texas*, 386 U.S. 707, 712 n.8, 87 S. Ct. 1338, 18 L. Ed. 2d 423 (1967).

Inspection. The statute gives defense counsel the right to inspect and copy the statements. Counsel need not accept a mere summary.

Expansive Definition of "Statement." North Carolina cases have not closely analyzed the meaning of "written or recorded statement by the defendant," but several federal cases have broadly interpreted the term under identical provisions in FED. R. CRIM. P. 16. *See, e.g., United States v. McElroy*, 697 F.2d 459 (2d Cir. 1982) (statement includes response

to *Miranda* warnings); *United States v. Harris*, 543 F.2d 1247 (9th Cir. 1976) (summary of defendant's statements, in report or rough notes, is a written statement and must be turned over); *United States v. Johnson*, 525 F.2d 999 (2d Cir. 1975) (to same effect); *United States v. Lewis*, 511 F.2d 798 (D.C. Cir. 1975) (officer's notes constitute written statement of defendant although they were made after interview and contained substance, not exact words, of defendant).

Relevance. To be discoverable, a written or recorded statement by the defendant need only be relevant. It need not be one that the state intends to use at trial. *See* G.S. 15A-903 commentary.

Possession, Custody, or Control. The North Carolina courts have construed the terms "possession, custody, or control" within G.S. 15A-903 to mean "within the possession, custody, or control of the prosecutor *or those working in conjunction with him and his office.*" *State v. Pigott*, 320 N.C. 96, 102, 357 S.E.2d 631, 635 (1987) (emphasis in original). Thus, the prosecution's discovery obligations clearly extend beyond records and information in its actual possession. The prosecution is obligated to obtain and disclose materials within the possession of law-enforcement agencies involved in the investigation of the defendant. *See id.*; *see also United States v. Bryan*, 868 F.2d 1032 (9th Cir. 1989) (prosecutor deemed to have knowledge of and access to anything in the possession, custody, or control of any agency participating in the same investigation of the defendant).

The prosecution's obligation to obtain and disclose materials within the possession of agencies other than law enforcement (such as mental health facilities or social services departments) depends on the extent of the agency's involvement in the investigation and the prosecutor's knowledge of and access to the materials. *See State v. Crews*, 296 N.C. 607, 252 S.E.2d 745 (1979) (materials within possession of mental health center and social services department not discoverable because prosecution was denied access to and had no power to obtain information). *But see* G.S. 7A-548 (social services departments must provide child abuse reports to prosecutor's office, and local law enforcement must coordinate its investigation with protective services investigation); G.S. 7A-675(h) (chief district court judge may enter standing order allowing agencies to share confidential information with prosecutor); N.C. ADMIN. CODE tit. 10 § 41I.0313 (social services departments shall allow prosecutor access to case record as needed for prosecutor to carry out responsibilities); *State v. Adams*, 122 N.C. App. 538, 470 S.E.2d 838 (1996) (recognizing that social services and law enforcement investigations are "intertwined"), *rev'd on other grounds*, 345 N.C. 745, 483 S.E.2d 156 (1997); *State v. Morrell*, 108 N.C. App. 465, 424 S.E.2d 147 (1993) (holding that a social worker representing abused child acted as law enforcement agent, thereby rendering defendant's custodial statements to worker inadmissible).

Similar issues involving possession, custody, and control arise in the context of the prosecution's obligation to disclose *Brady* material. *See infra* § 4.6G, p. 34.

B. Oral Statements by Defendant

Generally. G.S. 15A-903(a)(2) gives the defendant the right to the

- substance of
- any oral statements by the defendant
- that are relevant and
- are within the possession, custody, or control of the state, the existence of which is known or becomes known to the prosecutor before or during trial.

Definition of Oral Statement. The North Carolina provision on discovery of the defendant's oral statements, as amended in 1983, is significantly broader than the comparable federal provision. G.S. 15A-903(a)(2) includes oral statements by the defendant to anyone, not just to government agents.

An "oral statement" includes statements by the defendant within a witness's statement. Such statements by the defendant are not limited by the provisions on production of witness statements at trial. Rather, pursuant to G.S. 15A-903(a)(2) the prosecution must produce, in advance of trial, a summary of the portion of the witness's statement that refers to the defendant's statement. *See State v. Harris*, 323 N.C. 112, 371 S.E.2d 689 (1988) (state required to divulge substance of defendant's oral statement mentioned in investigator's report); *State v. Detter*, 298 N.C. 604, 260 S.E.2d 567 (1979) (state must disclose witness's statement to extent it contains discoverable statements of defendant; prosecution was not required to disclose witness's statement because, at time of decision, oral statements of defendant were discoverable only if made to person acting on behalf of state).

Substance of Statement. The prosecution must provide defense counsel with a written or recorded summary of the substance of the defendant's oral statements. "Substance" means the essential or material part of the statement. *See State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

Some cases hold that the statute does not require the prosecution to describe the circumstances surrounding the giving of the statement (although the court may have the inherent authority to order disclosure). *See, e.g., State v. Harris*, 323 N.C. 112, 371 S.E.2d 689 (1988) (prosecutor not required to identify civilian jailer to whom defendant made statement). The prosecution may have a greater obligation, however, to disclose the circumstances of oral statements made to law-enforcement officers. *See State v. Patterson*, 335 N.C. 437, 439 S.E.2d 578 (1994) (prosecution violated discovery 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). *Patterson* also can be read as requiring the prosecution to describe the circumstances of an oral statement whenever failure to do so would be misleading.

Relevance. To be discoverable, an oral statement by the defendant need only be relevant. The statute, as amended in 1983, does not require that the prosecution intend to use the statement at trial.

Possession, Custody, or Control. For a discussion of the meaning of these terms, *see supra* § 4.3A, p. 14 on written and recorded statements by the defendant.

Time of Disclosure. If an oral statement was made to someone who is *not* a law-enforcement officer, the defendant is entitled to discovery of the statement by noon on the Wednesday before the beginning of the week when the case is calendared for trial. *See* G.S. 15A-903(a)(2). It follows from this provision that the prosecution may *not* delay until the Wednesday before trial disclosing oral statements made to law-enforcement officers.

Exception for Informants. G.S. 15A-903(a)(2) provides a narrow exception for oral (but not written or recorded) statements by the defendant to an informant. The statute provides that the prosecution may withhold an oral statement that the defendant made to an informant only if

- the informant's identity is a prosecution secret,
- the informant will not testify for the prosecution, and
- the statement is not exculpatory.

Thus, if the state withholds an oral statement of the defendant to an informant, the informant may not testify at trial.

Notwithstanding the above provisions, the defendant may have a constitutional and statutory right in some circumstances to disclosure of an informant's identity. *See infra* § 4.7D, p. 41.

C. Statements by Codefendants

Generally. G.S. 15A-903(b) gives the defendant the right to

- inspect and copy any written or recorded statement by a codefendant and
- obtain the substance of any oral statement by a codefendant if
- the defendant and codefendant are being tried jointly and
- the state intends to offer the codefendant's statement in evidence.

Joint Trial. The statute requires disclosure before trial only if the defendant and codefendant are being tried jointly. *See State v. Carson*, 320 N.C. 328, 357 S.E.2d 662 (1987) (criticizing state's failure to produce codefendant's statement before joint trial began); *State v. Lake*, 305 N.C. 143, 286 S.E.2d 541 (1982) (defendant not entitled to

statement of codefendant who is not being tried jointly with defendant). *See also* G.S. 15A-927(c)(3) (on objection to joinder of defendants for trial, or on motion to sever, court may order prosecutor to disclose any statements of defendants that prosecutor intends to introduce in evidence at trial).

Intent to Use. The North Carolina appellate courts have not considered the intent-to-use condition in this part of the discovery statute. Under similar provisions in other parts of the statute, the courts have interpreted the requirement as favoring disclosure. *See State v. Stevens*, 295 N.C. 21, 243 S.E.2d 771 (1978) (under intent-to-use requirement from earlier version of statute, prosecution should resolve doubts in favor of disclosure); *State v. Hill*, 45 N.C. App. 136, 263 S.E.2d 14 (1980) (documents are intended for use at trial even if prosecution intends to use them only on cross-examination or rebuttal).

Other Discovery Avenues. A defendant may be able to obtain a codefendant's or coconspirator's statement in other ways.

- Codefendant's counsel, who is entitled to discover his or her own client's statements, may be willing to provide them to defense counsel.
- If a written, recorded, or oral statement by a codefendant refers to a statement by the defendant, G.S. 15A-903(a)(2) requires the prosecutor to provide the defendant with a written summary of that portion of the codefendant's statement. *See State v. Cuevas*, 121 N.C. App. 553, 468 S.E.2d 425 (1996).
- Defense counsel may have the right to a coconspirator's statements that the prosecution intends to introduce at the defendant's trial (even if there is not a joint trial). A coconspirator's statement may be discoverable as the defendant's statement on the ground that coconspirator statements are imputed to the defendant under North Carolina Evidence Rule 801(d)(E). Some federal courts have accepted this argument, although others have rejected it. *See United States v. Thevis*, 84 F.R.D. 47 (N.D. Ga. 1979) (allowing discovery); *see also United States v. Roberts*, 793 F.2d 580 (4th Cir. 1986) (explaining importance of allowing discovery of coconspirator statements imputable to defendant), *rev'd en banc*, 811 F.2d 257 (4th Cir. 1987) (refusing discovery). The North Carolina appellate courts have not addressed the issue. A sample motion appears at the end of this chapter.
- Defense counsel may be able to discover coconspirator statements through a motion in limine to determine the admissibility of the statements under the coconspirator hearsay exception. *See* Evidence Rule 801(d)(E) (statement must be made during course of conspiracy to be admissible).
- To the extent the statements contain material, favorable evidence, they would be discoverable as *Brady* material.

D. Criminal Record

Generally. G.S. 15A-903(c) gives the defendant the right to

- a copy of his or her prior criminal record
- as is available to the prosecutor.

See also G.S. 15A-1340.14(f) (in felony cases, prosecutor must furnish to defendant prior criminal record within sufficient time to allow defendant to determine accuracy of record).

Criminal Record of Witnesses. The North Carolina courts have held that the discovery statutes do not give the defendant the right to obtain the criminal records of the state's witnesses. *See State v. Brown*, 306 N.C. 151, 293 S.E.2d 569 (1982). The prosecution may be obligated to disclose a witness's criminal record under *Brady*, however, which requires disclosure of impeachment evidence. *See infra* § 4.6B, p. 30.

Access to Databases. Defense counsel often can obtain the criminal record of the defendant and the state's witnesses without a discovery request. The best source is the Criminal Information System (CIS), a database of all North Carolina criminal judgments entered by court clerks. A terminal should be located in the public defender's office or the clerk of court's office. Counsel may search the county in which the charges are pending *or* conduct a statewide search.

Counsel also may obtain criminal records through the Division of Criminal Information (DCI), formerly known as the Police Information Network (PIN). DCI consists of a national database (through the National Criminal Information Center or NCIC) and a state database. DCI is both broader and narrower than CIS. Thus, DCI includes information on arrests but does not include convictions for "nonserious" offenses. Defense counsel ordinarily does not have direct access to DCI and must request a local agency (police or sheriff's department) to conduct the search.

What is counsel entitled to obtain from DCI? State and federal regulations recognize that the defendant has the right to obtain his or her own criminal record. *See* N.C. ADMIN. CODE tit. 12 § 4F.0404 (right to own criminal history), § 4F.0700(a)(3) (right to own driver's record); 28 C.F.R. 20.21(g) (right to own criminal history). Further, under G.S. 114-10.1, an attorney who has entered an appearance in a criminal case has the right to obtain "relevant" information from DCI. Notwithstanding this seemingly broad language, however, local agencies may be unwilling to provide the criminal history of anyone but the defendant. *See generally State v. Carter*, 326 N.C. 243, 388 S.E.2d 111 (1990) (discovery statutes do not require prosecutor to share access to DCI; court does not address whether G.S. 114-10.1 gives defendants broader right).

E. Documents and Tangible Objects

Generally. G.S. 15A-903(d) gives the defendant the right to

- inspect and copy or photograph
- documents and other tangible objects
- that are within the possession, custody, or control of the state, and
- are material to preparation of the defense, are intended for use by the state at trial, or were obtained from or belong to the defendant

Definition of Document. The statute broadly defines “documents and tangible objects.” The term includes papers, documents, photographs, motion pictures, mechanical or electronic recordings, buildings and places, crime scenes (discussed in the next section), and any other tangible objects.

Possession, Custody, or Control. For a discussion of the meaning of these terms, *see supra* § 4.3A. p. 14 on written and recorded statements of the defendant.

Preconditions for Discovery. Documents and tangible objects are discoverable if they meet any one of the three conditions stated in the statute (evidence is material, is intended for use at trial, or was obtained from or belongs to defendant). For a discussion of the intent-to-use requirement, *see supra* § 4.3C, p. 17 on codefendant statements.

Exclusion of “Work Product.” G.S. 15A-904(a) limits the discovery of documents under G.S. 15A-903(d). It provides that, subject to exceptions that do not include G.S. 15A-903(d), the state need not produce reports, memoranda, or other internal documents prepared in connection with the case by the prosecution, law-enforcement officers, or others acting on the prosecution’s behalf. G.S. 15A-904(a) is sometimes described as protecting attorney work product. *See State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977) (comparing statute with work product doctrine); *see also State v. Brewer*, 325 N.C. 550, 386 S.E.2d 569 (1989) (statute protects investigative files of prosecutor and law-enforcement agencies). Of course, if the prosecution has documents or tangible objects that do not constitute work product, such as materials obtained from the defendant, they remain discoverable under G.S. 15A-903(d).

Even materials that constitute “work product” are not absolutely protected.

- The state must produce the materials if they fall within the purview of G.S. 15A-903(a), (b), (c), or (e). *See* G.S. 15A-904(a) (state may withhold internal documents except when required by designated sections of discovery statute).
- The statute does not restrict the defendant’s access to evidence on *Brady* grounds. *See State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985) (work product doctrine only protects information not required to be disclosed under *Brady*); FED. R. CRIM. P. 16

commentary to 1974 amendment (the “work product” provision in Rule 16(a)(2) does not change rule that government must disclose evidence favorable to defendant).

- If the state makes testimonial use of work product at trial—for example, an officer testifies about interviews of witnesses—the state waives any protection with respect to matters covered in the testimony. *See United States v. Nobles*, 422 U.S. 225, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975); *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977); *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980).

Prosecution’s Reciprocal Right. Discovery of documents and tangible objects under G.S. 15A-903(d) may give the state the right to obtain discovery of similar evidence from the defendant. *See infra* § 4.9B, p. 46.

F. Crime Scenes

G.S. 15A-903(d), as amended in 1983, includes “crime scenes” within the defendant’s right to discover documents and other tangible objects. The North Carolina courts also have recognized that the defendant has a constitutional right in some circumstances to inspect a crime scene. *See State v. Brown*, 306 N.C. 151, 293 S.E.2d 569 (1982) (violation of due process to deny defense counsel access to crime scene, which police had secured for extended time).

G. Examination Reports and Testing of Evidence

Generally. G.S. 15A-903(e) gives the defendant two rights. First, the defendant has the right to

- inspect and copy or photograph
- results or reports of examinations or tests
- made in connection with the case that
- are within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecutor.

Second, the defendant has the right to

- inspect, examine, and test
- physical evidence or a sample
- available to the prosecutor if
- the state intends to offer the evidence or tests of the evidence as evidence in the case.

Right to Results, Reports, and Underlying Data. The defendant has a constitutional and statutory right to obtain not only conclusory reports, but also any tests performed, procedures used, and other data underlying the report. *State v. Cunningham*, 108 N.C.

App. 185, 423 S.E.2d 802 (1992) (defendant entitled to data underlying lab report on controlled substance); *see also State v. Jones*, 296 N.C. 75, 248 S.E.2d 858 (1978) (new trial for failure to disclose lab report). The defendant should specifically ask for both the results or reports *and* the underlying data. *See, e.g., State v. Payne*, 327 N.C. 194, 394 S.E.2d 158 (1990) (motion seeking polygraph results not deemed to cover underlying physiological measurements). A sample motion based on *Cunningham* appears at the end of this chapter.

The court also appears to have the authority to order the person who conducted the examination or test for the state to prepare a written report and provide it to the defense. *See infra* § 4.9C, p. 47 (discussing authority of court to order defense expert to prepare written report and provide it to prosecution).

Right to Test Physical 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, 354 S.E.2d 251, 256 (1987). 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. *See id.* Defense counsel also should consider filing a motion to preserve if he or she believes that the state may destroy the evidence or use it up in testing. A sample motion to allow testing appears at the end of this chapter.

Prosecution’s Reciprocal Right. Discovery of tests or examinations under G.S. 15A-903(e) may give the state the right to obtain discovery of similar evidence from the defendant. *See infra* § 4.9C, p. 46 and § 4.9D, p. 47.

H. Statements by Witnesses

Generally. G.S. 15A-903(f) gives the defendant the right to

- any statement or report of a state’s witness
- in the possession of the state
- relating to the subject matter of the witness’s direct testimony
- after the witness testifies on direct examination.

See also Palermo v. United States, 360 U.S. 343, 79 S. Ct. 1217, 3 L. Ed. 2d 1287 (1959) (right to witness’s statements rests in part on confrontation and compulsory process rights in Sixth Amendment).

Definition of Report and Statement. G.S. 15A-903(f)(5) does not define “report of a witness.” The statute defines “statement of a witness” as either:

- a written statement signed or otherwise adopted or approved by the witness; or

- an oral statement that is recorded or transcribed substantially verbatim or that is recorded contemporaneously with the making of the statement.

Only two reported North Carolina cases have interpreted the definition of witness statement. *See State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988) (officer's narrative summary of interviews of three witnesses, without identifying which witness provided which information, is not witness statement within meaning of statute); *State v. Shedd*, 117 N.C. App. 122, 450 S.E.2d 13 (1994) (oral statement of witness, which officer wrote down in log book, is not written witness statement because witness did not sign, adopt, or approve it; court does not consider whether statement was oral statement).

Comparison to Federal Law. Construing the Jencks Act (18 U.S.C. 3500), which contains similar provisions on witness statements, the federal courts have held that the definition of "statement of a witness" is more restrictive than the definition of "statement by the defendant" (*see supra* § 4.3A, p. 13). Thus, an officer's or prosecutor's notes of a witness interview are discoverable as the witness's statement only if (1) the witness signed, adopted, or approved the notes or (2) the notes were a substantially verbatim recital of the witness's oral statements and were recorded contemporaneously.

As for the first requirement (which applies to written statements of a witness), adoption or approval may be relatively informal. *See, e.g., Goldberg v. United States*, 425 U.S. 94, 96 S. Ct. 1338, 47 L. Ed. 2d 603 (1976) (prosecutor's notes taken during witness interview may qualify as witness's written statement if the notes are read back to witness for corrections; remand for further review of materials); *United States v. Boshell*, 952 F.2d 1101 (9th Cir. 1991) (officer's reading of his notes to witness and witness's confirmation of accuracy made notes the witness's written statement).

As for the second requirement (which applies to oral statements of a witness), the language of the North Carolina statute appears broader than the wording of the federal statute and therefore may require greater disclosure. *Compare* G.S. 15A-903(f)(5)b. (oral statement must be recorded substantially verbatim *or* contemporaneously) *with* 18 U.S.C. 3500 (oral statement must be recorded substantially verbatim *and* contemporaneously). *See also* IRVING JOYNER, CRIMINAL PROCEDURE IN NORTH CAROLINA 358 (Michie Co., 1989) (under North Carolina statute, contemporaneous notes of a witness's statement are discoverable even if the notes are not a word-for-word rendition).

Note: Although an officer's report or notes of a witness interview may not constitute the statement of the witness, they may constitute the statement of the officer. Under G.S. 15A-903(f), the defendant would be entitled to the writings once the officer testifies. *See infra* § 4.5D, p. 27. Or, if a witness uses an officer's report or notes to refresh recollection, North Carolina Evidence Rule 612 provides for disclosure regardless of whether the writing constitutes a statement under G.S. 15A-903(f).

Time of Disclosure. On motion of the defendant, the prosecution must produce any statement or report of a witness after the witness testifies on direct examination. The

defendant does not have a right to the witness's statement before then unless it falls within another category of discoverable evidence (discussed below). *See* G.S. 15A-904(a); *State v. Harris*, 323 N.C. 112, 371 S.E.2d 689 (1988); *see also* FED. R. CRIM. P. 26.2(g) (defendant may obtain witness statement after witness has testified at suppression hearing).

The defendant is entitled to sufficient time during trial, however, to review the witness's statement. *See* G.S. 15A-903(f)(3) (upon request, court may grant recess to allow defense counsel reasonable amount of time to examine statement and prepare to use it); *United States v. Holmes*, 722 F.2d 37 (4th Cir. 1983) (defendant entitled to continuance where prosecution waited until trial to produce witness statements); *United States v. Hinton*, 631 F.2d 769 (D.C. Cir. 1980) (defendant denied effective assistance of counsel where counsel had insufficient time to review witness statements). The prospect of delay may persuade the court to require (or at least press) the prosecutor to make earlier disclosure. A sample motion appears at the end of this chapter.

Voir Dire. To determine whether the prosecution has disclosed all of a witness's statements, defense counsel may cross-examine the witness or request a voir dire outside the presence of the jury.

In Camera Review. If the prosecution claims that a witness's statement does not relate to the subject matter of the case, the court must review the statement *in camera*. *See* G.S. 15A-903(f)(3). The court must conduct this review, and provide the defendant with any portions of the statement that relate to the subject matter of the proceeding, before requiring the defendant to cross-examine. *See State v. Baker*, 112 N.C. App. 410, 435 S.E.2d 812 (1993).

If the court refuses to order production of all or part of a statement, defense counsel should move to have the statement sealed and included in the record in the event of appeal. *See State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

Sanctions. If the court orders production and the state refuses, the court must strike the witness's testimony and direct the jury to disregard the testimony. *See* G.S. 15A-903(f)(4); *State v. Fernandez*, 346 N.C. 1, 484 S.E.2d 350 (1997) (sanction of striking witness's testimony is required where state refuses to comply with court order but is not mandatory where state has lost witness's statement and is unable to comply with order). The court may impose other sanctions for noncompliance, including a mistrial. *See* G.S. 15A-903(f)(4); *United States v. Kasouris*, 474 F.2d 689 (5th Cir. 1973) (trial court erred in failing to declare mistrial for nondisclosure).

Other Discovery Avenues. G.S. 15A-904(a) restricts discovery of statements of state witnesses before trial, but the prohibition is far from absolute.

- G.S. 15A-904(a) requires the state to produce witness statements in advance of trial to the extent they contain material covered by G.S. 15A-903(a), (b), (c), or (e). For

example, a statement of the defendant or codefendant, contained in a witness statement, is discoverable before trial under G.S. 15A-903(a) and (b). *See supra* § 4.3B, p. 15 and § 4.3C, p. 16. Likewise, a physical or psychological examination that includes statements of the witness to the examiner should be discoverable before trial as a report of examination under G.S. 15A-903(e).

- The restriction on discovery in G.S. 15A-904(a) applies to statements of a state’s witness made to a person acting on behalf of the state. Other writings by or about a witness (for example, diaries, correspondence, etc.) may not fall within this restriction and may be discoverable under G.S. 15A-903(d), which requires production of all “material” documents. *See generally State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).
- To the extent witness statements include favorable evidence, they may be discoverable under *Brady*. *See United States v. Starusko*, 729 F.2d 256 (3d Cir. 1984) (order to disclose impeachment evidence before trial); *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980) (*Brady* obligations supersede limitations on production of witness statements); FED. R. CRIM. P. 16 commentary to 1974 amendment (the “work product” provision in Rule 16(a)(2) does not change rule that government must disclose evidence favorable to defendant).

4.4 Other Statutory Rights

A. Immunity

G.S. 15A-1054(c) requires the prosecution to give written notice of any grant of immunity and the terms of the arrangement within a reasonable time before any proceeding in which the person granted immunity is expected to testify. Because some cases have narrowly construed this statute (*see* annotations to G.S. 15A-1054), the defendant also should rely on *Brady* grounds in seeking immunity information. *See Giglio v. United States*, 405 U.S. 150, 155, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) (“evidence of any understanding or agreement as to 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* § 4.6B, p. 29. A sample motion to require the prosecution to disclose immunity and “trust me” agreements appears at the end of this chapter.

B. 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, which is regulated by both state and federal law, *see* ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 83–84 (Institute of Government, 2d ed. 1992) & 16–17 (Supp. 1997).

C. 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, 259 S.E.2d 510 (1979).

D. Nontestimonial Identification Orders

G.S. 15A-271 through 15A-282 allows 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 186–90 (Institute of Government, 2d ed. 1992) & 24–25 (Supp. 1997). 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 prerequisites 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, 407 S.E.2d 805 (1991) (defendant could not use nontestimonial identification order to obtain hair sample of possible suspect). The defendant may be able to obtain such samples by subpoena. *See 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). For a discussion of obtaining medical examinations of victims and witnesses, *see infra* § 4.5B, p. 26.

4.5 Nonstatutory Categories

This section discusses categories of information that may be helpful to the defense but that do not explicitly fall within a statutory category of discovery.

A. Identity of Witnesses

Several North Carolina cases hold that the defendant is not entitled under the discovery statutes to pretrial disclosure of the identity of the state's witnesses. *See, e.g., State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985); *State v. Alston*, 307 N.C. 321, 298 S.E.2d 631 (1983). *But see United States v. Jackson*, 508 F.2d 1001 (7th Cir. 1975) (finding under similar federal discovery provisions that trial courts have the discretion to order pretrial disclosure of the prosecution's witnesses); *United States v. Jordan*, 466 F.2d 99 (4th Cir. 1972) (to same effect).

Nevertheless, some grounds exist for discovery of the identity of the state's witnesses.

- The trial court may order the prosecution to disclose its witnesses at the time of jury selection. *See State v. Godwin*, 336 N.C. 499, 444 S.E.2d 206 (1994); *State v. Covington*, 317 N.C. 127, 343 S.E.2d 524 (1986). Disclosure at jury selection makes it possible for the judge and attorneys to inquire whether jurors know any of the witnesses. Defense counsel who asks for such relief may be required to disclose his or her witnesses in return. A sample motion appears at the end of this chapter.
- Under *Brady*, the state must disclose the identity of witnesses who have favorable, material information. *See infra* § 4.6B, p. 31.
- Although the state may not have to disclose the *identity* of its witnesses before trial, a judge may be willing to require the prosecution to disclose the *availability* of its witnesses. A motion to that effect appears at the end of this chapter.

If the prosecution does furnish a list of witnesses before trial, the trial court has the discretion to exclude witnesses not on the list. *See State v. Smith*, 291 N.C. 505, 231 S.E.2d 663 (1977) (prosecutor purported to comply with order requiring pretrial disclosure of witnesses; trial court had discretion to exclude witnesses not on list); *State v. Carter*, 289 N.C. 35, 220 S.E.2d 313 (1975) (to same effect), *vacated on other grounds*, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

B. Examinations and Interviews of Witnesses

Examinations. In *State v. Horn*, 337 N.C. 449, 446 S.E.2d 52 (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. *Horn* held further, however, that a trial judge may grant other relief if the person refuses to submit to a voluntary examination. Thus, 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 file a motion requesting that the person submit to an examination. If the person refuses, defense counsel then has grounds for asking for the relief discussed in *Horn*. A sample motion for a psychological examination appears at the end of this chapter.

Decisions of the court of appeals indicate that a judge does not have the authority to order a victim or witness to submit to a *physical examination*, but the supreme court has not considered the question. *See State v. Hewett*, 93 N.C. App. 1, 376 S.E.2d 467 (1989) (trial judge may order physical examination only if victim or victim's guardian consents); *People v. Chard*, 808 P.2d 351 (Colo. 1991) (majority of courts have found that trial court has power to order physical examination of victim upon balancing defendant's right to exculpatory evidence and victim's interest in privacy); *see also supra* § 4.4D, p. 25.

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, 399 S.E.2d 293 (1991). The state may not, however, instruct witnesses not to talk with the defense. *See State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203 (1982) (obstructing defense access to witnesses may be grounds for reversal of conviction); *see also State v. Hall*, 93 N.C. App. 236, 377 S.E.2d 280 (1989) (as sanction for discovery violation, court ordered state’s witness to confer with defense counsel and submit to questioning under oath before testifying). In limited circumstances, defense counsel may have the right to depose a witness. *See supra* § 4.4C, p. 25.

C. 404(b) Evidence

Evidence Rule 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 so defense counsel may not learn of them merely by requesting discovery of the defendant’s criminal record under G.S. 15A-903. A sample motion for disclosure of “bad acts” evidence appears at the end of this chapter.

The North Carolina courts have held that North Carolina Evidence Rule 404(b) does not require the prosecution to give notice of “bad acts” evidence in advance of trial. *See State v. Payne*, 337 N.C. 505, 448 S.E.2d 93 (1994). The cases do not preclude trial courts, however, from exercising their inherent authority to require disclosure in the interests of justice. *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 help flesh out the evidence as well as limit its use.

D. Officer Reports and Notes

The defendant does not have a general right to an officer’s investigative report or notes. *See* G.S. 15A-904(a) (protecting internal reports prepared by law-enforcement officers in connection with case); *State v. Alston*, 307 N.C. 321, 298 S.E.2d 631 (1983). Officer reports and notes are discoverable in several circumstances, however.

Before Trial. Officer reports and notes are discoverable before trial to the extent they contain information discoverable under G.S. 15A-903(a), (b), (c), or (e). *See* G.S. 15A-904(a) (state may withhold internal documents except when required by designated sections of discovery statute). They also may be discoverable on *Brady* or other constitutional grounds.

During Trial. The following grounds may warrant disclosure during trial.

- If the report or notes contain the statement of a state's witness within the meaning of G.S. 15A-903(f), the statement is discoverable after the witness testifies on direct examination. *See supra* § 4.3H, p. 21.
- Reports or notes prepared by an officer may constitute the statement of the officer within the meaning of G.S. 15A-903(f) and so be discoverable in their entirety after the direct testimony of the officer. *See, e.g., United States v. Harris*, 543 F.2d 1247 (9th Cir. 1976); David B. Harrison, Annotation, *What Is "Statement" under Provisions of Jencks Act (18 U.S.C. § 3500) and Rule 26.2 of Federal Rules of Criminal Procedure Providing for Production of Statement of Witness Following Witness' Direct Examination*, 125 A.L.R. FED. 1 (1995).
- North Carolina Evidence Rule 612 provides for disclosure of writings that a witness uses to refresh recollection before or while testifying.

Motion to Preserve. Because of the potential importance of officers' rough notes, defense counsel should consider making a motion to preserve. The motion does not necessarily seek immediate disclosure, but rather asks that the notes be preserved in the event they are discoverable. Destruction of the notes may provide grounds for sanctions, including striking of the officer's testimony. *See United States v. Harris*, 543 F.2d 1247 (9th Cir. 1976); *United States v. Harrison*, 524 F.2d 421 (D.C. Cir. 1975).

E. Potential Suppression Issues

To enable defense counsel to determine whether to file a motion to suppress evidence (under G.S. 15A-971 *et seq.*), counsel may wish to seek discovery of the following (some of which may be in the court file and thus already accessible to counsel):

- 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.);
- a description of any communications between the defendant and any 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.

To the extent the discovery statutes and U.S. and North Carolina Constitutions do not require disclosure of this information, the court may have the inherent authority to order

disclosure in the interests of justice. *See, e.g., Rowe v. State*, 314 N.E.2d 745 (Ind. 1974) (error not to order disclosure of circumstances of photographic array). Sample motions regarding identification procedures appear at the end of this chapter.

4.6 *Brady* Material

A. Duty to Disclose

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.

The main U.S. Supreme Court cases on what is known as *Brady* material are: *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). *See also* N.C. REVISED RULES OF PROFESSIONAL CONDUCT Rule 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).

Kyles v. Whitley is a particularly helpful case for the defense, as it reemphasizes constitutional disclosure requirements. The decision contains several examples of evidence that the Court considered favorable and a detailed explanation of why disclosure was required.

B. “Favorable to Defense”

To trigger the prosecution’s duty under the due process clause, the evidence first must be favorable to the defense. 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. *See also United States v. Barton*, 995 F.2d 931 (9th Cir. 1993) (*Brady* applies to suppression hearing involving challenge to truthfulness of allegations in affidavit for search warrant). 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).
- 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, 484 S.E.2d 377 (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, 412 S.E.2d 359 (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 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).

Prior Convictions and Other Misconduct. A significant subcategory of impeachment evidence is evidence of a witness's criminal convictions or other misconduct. Although the discovery statutes may not require disclosure, the North Carolina courts have held that *Brady* requires disclosure of a witness's criminal record if significant. *See, e.g., State v. Kilpatrick*, 343 N.C. 466, 471 S.E.2d 624 (1996); *State v. Ford*, 297 N.C. 144, 254 S.E.2d 14 (1979). *See also* Jeffrey F. Ghent, Annotation, *Accused's Right to Discovery or Inspection of "Rap Sheets" or Similar Police Records about Prosecution Witnesses*, 95 A.L.R.3d 832 (1980); *United States v. Stroop*, 121 F.R.D. 269 (E.D.N.C. 1988) (requiring disclosure of prior convictions and material acts of misconduct); N.C. EVID. RULE 609(d) (allowing impeachment of witness by juvenile adjudication).

Defense counsel should be prepared to meet any concerns the court may have about disclosure of a witness's criminal record before trial—for example, that disclosure would reveal the identity of the state's witnesses, impose an undue burden on the prosecution, or infringe on the privacy of witnesses. *See, e.g., In re Subpoena and Order Directing Probation Officer to Produce Records*, 737 F. Supp. 30 (W.D.N.C. 1990) (to protect confidentiality, court conducted *in camera* review of witness's probation records and ordered disclosure of witness's arrest record but not other information); *United States v. Ahmad*, 53 F.R.D. 186 (M.D. Pa. 1971) (court ordered disclosure of indicted coconspirator's criminal record since his identity had already been revealed); *United States v. Mocerri*, 359 F. Supp. 431 (N.D. Ohio, 1973) (court required disclosure of criminal record of witnesses but ordered defense not to divulge information except for impeachment purposes at trial); *United States v. Leichtfuss*, 331 F. Supp. 723 (N.D. Illinois, 1971) (court required prosecution to disclose criminal record of witnesses thirty

days before trial, when prosecution would be in better position to know who its witnesses would be).

If a witness's criminal record would be admissible for substantive as well as impeachment purposes, the defendant may have a 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).

For a discussion of obtaining criminal record information from state and national databases, *see supra* § 4.3D, p. 18.

Evidence Discrediting Police Investigation and Credibility. *See Kyles*, 514 U.S. at 445–46 and cases cited therein (information discrediting caliber of police investigation and methods employed in assembling case); *United States v. Veras*, 51 F.3d 1365 (7th Cir. 1995) (personnel information bearing on officer's credibility); *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) (personnel information).

Other Favorable Evidence. Listed below are several other categories of evidence potentially subject to disclosure.

- Evidence undermining identification of defendant. *See Kyles*, 514 U.S. at 444 (evolution over time of eyewitness's description); *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988); *Lindsay v. King*, 769 F.2d 1034 (5th Cir. 1985); *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).

C. “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.” *Bagley*, 473 U.S. at 682.

The prosecution must disclose evidence that is material to the guilt-innocence or sentencing phase. A constitutional violation 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 plea knowing and voluntary); *Miller v. Angliker*, 848 F.2d 1312 (2d Cir. 1988) (to same effect); *Campbell v. Marshall*, 769 F.2d 314 (6th Cir. 1985) (to same effect).

Impact of *Kyles v. Whitley*. In an effort to reinforce the prosecution’s duty to disclose, the U.S. Supreme Court in *Kyles* 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.”
- 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.
- Once a reviewing court finds constitutional error, there is no harmless error analysis. A new trial is required.
- 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.

Application Before and After Trial. The above 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. at 439 (“prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence”); *Agurs*, 427 U.S. at 106 (“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).

D. 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. Taylor*, 344 N.C. 31, 50, 473 S.E.2d 596, 607 (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, 404 S.E.2d 23, 26 (1991) (finding no violation on facts but noting that courts “strongly disapprove of delayed disclosure of *Brady* materials”); *United States v. Starusko*, 729 F.2d 256 (3d Cir. 1984) (“longstanding policy of encouraging early production”); *United States v. Campagnuolo*, 592 F.2d 852 (5th Cir. 1979) (disclosure before trial required in some circumstances); *Grant v. Alldrege*, 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 hard-and-fast rule that the prosecution may delay disclosure until trial; nor do they necessarily reflect the actual practice of trial courts.

E. 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, 433 S.E.2d 736 (1993) (evidence need not be admissible if it would lead to admissible exculpatory evidence); *Maynard v. Dixon*, 943 F.2d 407 (4th Cir. 1991) (indicating that evidence must be disclosed if it would assist the defendant in discovering other evidence or preparing for trial).

F. 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 *Bagley* and then *Kyles* the 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 and to the extent possible specify the evidence sought and the basis for believing the evidence exists. Specific

requests are viewed more favorably by the courts. *See State v. Smith*, 337 N.C. 658, 447 S.E.2d 376 (1994) (refusing to require state to conduct “fishing expedition” for potential *Brady* material); *see also Bagley*, 473 U.S. at 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”).

G. 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*, 514 U.S. at 437 (“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, 497 S.E.2d 276 (1998) (*Brady* obligates prosecution to obtain information from SBI and various sheriffs’ departments involved in investigation); *State v. Smith*, 337 N.C. 658, 447 S.E.2d 376 (1994) (prosecution deemed to have knowledge of information in possession of law enforcement); *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). Thus, defense counsel may move for a court order requiring the prosecution to obtain materials within law enforcement’s possession and review them for *Brady* evidence.

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* § 4.3A, p. 14 (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).

Because the prosecution’s access to the evidence may be unclear, defense counsel should consider making the motion in the alternative—that is, counsel could 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. *See infra* § 4.7A, p. 35 for a discussion of obtaining records from third parties.

H. Defendant's Knowledge of Evidence

Agurs held that the prosecution violates its *Brady* obligations by failing to disclose favorable, material evidence known to it 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, 390 S.E.2d 142 (1990) (defendant knew of examination of rape victim and results and could have subpoenaed doctor to testify; prosecution's failure to provide report therefore not *Brady* violation); *see also* 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 546-47 (West Pub. Co., 1984) (defendant must know not only of existence of evidence but also of its potentially exculpatory value).

I. 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, 235 S.E.2d 828 (1977) (stating general right to *in camera* review); *State v. Kelly*, 118 N.C. App. 589, 456 S.E.2d 861 (1995) (new trial for failure of trial court to conduct *in camera* review); *State v. Jones*, 85 N.C. App. 56, 354 S.E.2d 251 (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, 418 S.E.2d 480 (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 State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

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 subpoenas, *see infra* § 4.8, p. 42.

4.7 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.** 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, 107 S. Ct.

989, 94 L. Ed. 2d 40 (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); *State v. Bailey*, 89 N.C. App. 212, 365 S.E.2d 651 (1988) (following *Ritchie*).

Other grounds also may support disclosure of confidential records in the hands of a third party. *See State v. Crews*, 296 N.C. 607, 252 S.E.2d 745 (1979) (recognizing court's inherent authority to order disclosure); 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); *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").

Directing Production of Records. In federal court, a judge may issue a subpoena requiring a witness to produce records in advance of trial or in advance of other proceedings at which the records are needed. *See* FED. R. CRIM. P. 17(c). North Carolina does not have an explicit statute or rule to this effect, but defense counsel should be able to obtain similar relief here.

- Counsel may move for a judge to issue an order or a subpoena 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 the order or subpoena, counsel may issue a subpoena directing the third party to produce the records in court for the judge to review. This procedure has the advantage of requiring only one hearing, but it may not be feasible in all cases.
- 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.

Sample motions to require third parties to produce records appear at the end of this chapter. *See also infra* § 4.8D, p. 43 (discussing production of records in response to subpoena).

***In Camera* Review and Alternatives.** Under *Ritchie*, a defendant may obtain an *in camera* review of confidential records in the hands 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 is not always 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 within the prosecution's possession, custody, or control, defense counsel may move for disclosure without an *in camera* review on the ground that the records come within some discoverable category of information (for example, reports of examinations). Because it may be unclear whether the prosecution has access to the records, counsel may need to move for an order requiring the prosecutor 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 hands of third parties without conducting an *in camera* review. Defense counsel can argue that the interest in confidentiality warrants neither restricting the defendant's access to potentially helpful information nor imposing the burden on the judge of conducting an *in camera* review. See *Ritchie*, 480 U.S. at 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); *Commonwealth v. Lloyd*, 567 A.2d 1357 (Pa. 1989) (requiring trial court to allow defense counsel to participate in *in camera* review under appropriate orders assuring confidentiality).

Required Showing. In support of a motion for records from a third party, the defendant must make some plausible showing that the records may contain favorable, material evidence. See *Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995).

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, 235 S.E.2d 828 (1977); see also *State v. Burr*, 341 N.C. 263, 461 S.E.2d 602 (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).

Ex Parte Application. In seeking third-party records, counsel should consider making any application 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* § 5.4, p. 8). Some of the same reasons for allowing *ex parte* applications for experts apply to motions for third-party records (that is, need to protect trial strategy, 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. Beckford*, 964 F. Supp. 1010 (E.D. Va. 1997) (to same effect). *See also State v. Gray*, 347 N.C. 143, 491 S.E.2d 538 (1997) (court finds that it was permissible for prosecution to obtain *ex parte* order requiring North Carolina Department of Revenue to produce defendant's tax records in advance of trial, although court did not address whether defendant's interest in confidentiality of records gave him right to notice of and opportunity to oppose application for order).

If the prosecution receives notice of a motion or order for production of records from a third party, it may not have a right to object or to obtain copies of the records. *See Tomison* (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); *State v. Clark*, 128 N.C. App. 87, 493 S.E.2d 770 (1997) (court had discretion to require Department of Correction to provide to prosecution records that it had provided to defendant). *See also infra* § 4.8E, p. 43 (discussing standing to move to 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 to the custodian of records. Some agencies may be unwilling to release the records without a court order or payment of copying costs. In such instances, counsel may be able to apply to the court *ex parte* for an order requiring production of the records. A sample motion appears at the end of this chapter.

B. False Testimony or Evidence

Prosecutor's Duty. The prosecution has a constitutional duty under the due process clause to correct false testimony. This duty is the forerunner of the duty to disclose favorable, material evidence. 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, 55 S. Ct. 340, 79 L. Ed. 791 (1935));
- knowingly allow false testimony to go uncorrected on a material fact (*Alcorta v. Texas*, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (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, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (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, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) (prosecutor who was not trying case had promised immunity to witness); *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (“should have known” test applies to duty to correct false testimony)).

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 somewhat less demanding than the materiality standard for *Brady* violations. See *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); see also *State v. Morgan*, 60 N.C. App. 614, 299 S.E.2d 823 (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).

C. Lost or Destroyed Evidence

Standard. The courts apply a variant of *Brady* when the state loses or destroys evidence. The loss or destruction of evidence violates due process if

- the state acted in bad faith in failing to preserve the evidence; and
- the evidence meets the required standard of materiality—that is, 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.

See Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988) (inadvertent destruction of rape kit not in bad faith); *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) (no duty to preserve breath samples of defendant charged with impaired driving; materiality standard not met).

When evidence has been lost or destroyed in violation of the Constitution, the court may dismiss the case or suppress all evidence related to the lost or destroyed evidence, effectively barring further prosecution. *See Trombetta*, 467 U.S. at 487.

Bad Faith Requirement. In *Youngblood*, which adopted the bad faith requirement, the 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. at 66-67, 73 n.10; *see also United States v. Lovasco*, 431 U.S. 783, 795 n.17, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977) (government conceded that due process violation may be made out by reckless disregard of circumstances).

Some cases have found that the 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); *see also State v. Jones*, 85 N.C. App. 56, 354 S.E.2d 251 (1987) (defendant has due process right to “examine a piece of critical evidence whose nature is subject to varying expert opinion”).

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). The North Carolina courts have generally followed the *Youngblood* “bad faith” standard but have not specifically addressed the potential differences between the federal and state constitutions. *See State v. Hunt*, 345 N.C. 720, 483 S.E.2d 417 (1997); *State v. Banks*, 125 N.C. App. 681, 482 S.E.2d 41, *aff’d per curiam*, 347 N.C. 390, 493 S.E.2d 58 (1997). *But see State v. Anderson*, 57 N.C. App. 602, 292 S.E.2d 163 (1982) (holding before *Youngblood* that state’s good faith not dispositive).

Statutory Sanctions. G.S. 15-11.1(a) requires that the state safely keep evidence pending trial, and G.S. 15A-903(e) gives the defendant the right to test physical evidence. The state’s destruction of evidence, whether or not in bad faith, may violate these statutes and warrant sanctions. *See Banks*, 125 N.C. App. 681, 482 S.E.2d 41 (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).

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 Roviato v. United States*, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957) (establishing general rule); *State v. McEachern*, 114 N.C. App. 218, 441 S.E.2d 574 (1994) (upholding dismissal of charges for prosecutor's failure to comply with order requiring disclosure); *State v. Hodges*, 51 N.C. App. 229, 275 S.E.2d 533 (1981) (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, 262 S.E.2d 330 (1980) (state must furnish defendant with best available information about informant's whereabouts); *State v. Orr*, 28 N.C. App. 317, 220 S.E.2d 848 (1976) (disclosure required when informant is participant in offense or sets up its commission); *McLawhorn v. North Carolina*, 484 F.2d 1 (4th Cir. 1973) (vacating North Carolina conviction on habeas for failure to disclose identity of informant).

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); *see also McCray v. Illinois*, 386 U.S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967).

Brady Request. If defense counsel obtains an informant's identity, counsel should seek discovery of the informant's criminal record, any promises of immunity, and other *Brady* information bearing on bias and credibility. *See, e.g., United States v. Brumel-Alvarez*, 991 F.2d 1452 (9th Cir. 1993) (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

See United States v. Armstrong, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (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, 250 S.E.2d 318 (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); *see also United States v. Adams*, 870 F.2d 1140 (6th Cir. 1989) (defendant made sufficient showing of vindictive prosecution in violation of due process to justify discovery).

4.8 Subpoenas

Although not a formal discovery device, subpoenas (particularly subpoenas duces tecum) may be a useful tool for obtaining information.

A. Right to Subpoena Witnesses and Documents

A subpoena may be used to compel a witness to testify, produce documents and other tangible things, or do both at any court proceeding. Thus, a subpoena may compel a witness to appear and produce documents for when the case is calendared for trial. It also may compel a witness to appear and produce documents at pretrial proceedings, such as a probable cause hearing, suppression hearing, or hearing on a discovery motion.

A defendant's right to subpoena witnesses and documents is based primarily on the Sixth Amendment right to compulsory process. *See Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (right to compel attendance of witnesses is "in plain terms the right to present a defense"); *State v. Rankin*, 312 N.C. 592, 324 S.E.2d 224 (1985) (recognizing Sixth Amendment basis of subpoena power). *See also* N.C. CONST. art. 1, § 23 (right to confront accusers and witnesses with other testimony). Other grounds also may support the use of a subpoena. *See supra* § 4.7A, p. 36 (right to obtain favorable, material evidence in possession of third party).

B. Permissible Scope 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 must use the Uniform Act to Secure Attendance of Witnesses. *See* G.S. 15A-811; 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) (uniform act has been interpreted as allowing subpoena to out-of-state witness to produce documents).

Documents not subject to discovery may be subpoenaed as long as they are material to the proceedings. The subpoena must specify with some precision the documents to be produced. Otherwise, the court may view the subpoena as an effort to circumvent the discovery statutes and quash it as a "fishing expedition."

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-802 (subpoenas in criminal cases governed by Rule 45); G.S. 8-61 (to same effect). 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-G-100 (blank subpoena form available from clerk).

The sheriff, or any person over age 18 who is not a party, may serve a subpoena. Service is best effected by personal delivery to the person named in the subpoena but also may be by certified mail or, in some instances, by telephone. *See* N.C. R. CIV. P. 45(e); G.S. 8-59.

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); G.S. 7A-316 (witness must apply to clerk of court for fees after appearance). 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).

D. Time and Method of Production of Records

The person named in a subpoena duces tecum ordinarily must appear in court on the date designated in the subpoena and must produce the requested documents. If the subpoena is to a records custodian of a public entity or hospital, and does not direct the custodian to appear, the custodian may be able to mail the records to the clerk of court in lieu of appearing. *See* N.C. R. CIV. P. 45(c).

When the subpoena requires a records custodian to appear and produce documents, he or she may be willing to provide the documents directly to defense counsel to avoid appearing in court. If the subpoena seeks confidential records of a victim or witness, however, the custodian likely will be unwilling to disclose the records in advance of the proceeding. Defense counsel also may need to be wary of reviewing confidential records of a victim or witness without the protection of a court order (or release or other authorization). *See generally* *Bass v. Sides*, 120 N.C. App. 485, 462 S.E.2d 838 (1995) (judge imposed monetary sanctions against attorney who reviewed confidential records that had been mailed to clerk in response to subpoena but had not yet been ordered to be disclosed by judge); *Susan S. v. Israels*, 67 Cal. Rptr. 2d 42 (Cal. Ct. App. 1997) (defense attorney read and disseminated patient's confidential mental health records that treatment facility mistakenly sent directly to him in response to subpoena; court allows patient's suit against attorney for violation of state constitutional right of privacy); N.C. RULES OF PROFESSIONAL CONDUCT, Ethics Opinion 236 (1997) (discussing misuse of subpoena).

If defense counsel needs to obtain confidential records concerning a victim or witness, counsel should consider filing a motion requesting the court to order disclosure of the records. *See supra* § 4.7A, p. 35 for a discussion of this procedure.

E. Motions to Quash

The person named in the subpoena, or a person who has some right or other protected interest in the documents sought, may move to quash the subpoena on or before the date set for appearance. In response, the court may quash the subpoena or modify it to narrow

its scope. *See Vaughn v. Barefoot*, 267 N.C. 691, 149 S.E.2d 37 (1966) (discussing subpoenas in general); *State v. Newell*, 82 N.C. App. 707, 348 S.E.2d 158 (1986) (quashing subpoena); *State v. Little*, 67 N.C. App. 128, 312 S.E.2d 695 (1984) (in opposing motion to quash subpoena duces tecum, defendant need only make threshold showing of claim or defense); *State v. Richardson*, 59 N.C. App. 558, 297 S.E.2d 921 (1982) (court may modify subpoena duces tecum rather than quash it), *aff'd in part and rev'd in part*, 308 N.C. 470, 302 S.E.2d 799 (1983).

In some cases, trial courts have granted motions by the prosecutor to quash a subpoena duces tecum directed to a third party. *See State v. Love*, 100 N.C. App. 226, 395 S.E.2d 429 (1990), *conviction vacated on habeas*, 57 F.3d 1305 (4th Cir. 1995). But those cases did not explicitly address whether the prosecution had standing to object to a subpoena for a third party's records. *See generally* 2 G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE 102 (Michie Co., 2d ed. 1995) ("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"); *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).

4.9 Prosecution's Discovery Rights

A. Reciprocal Statutory Rights

Statutory Requirements. Defense counsel effectively controls whether the prosecution has any statutory discovery rights. G.S. 15A-905 allows discovery of certain categories of evidence in the defendant's possession only if the defendant requests discovery of those categories from the state and the state discloses that category of information, either voluntarily or pursuant to court order. *See* G.S. 15A-902(b) (state's voluntary compliance in response to request is deemed to have been made under court order); *State v. Clark*, 128 N.C. App. 87, 493 S.E.2d 770 (1997) (defendant had no obligation to provide reciprocal discovery of its expert's report because defendant had not requested discovery of report of state's expert).

The state waives its statutory rights if it fails to make a voluntary request for discovery within ten working days after it discloses information in response to a statutory discovery request by the defendant. Only after making a timely request for voluntary discovery may the state file a motion for discovery. *See* G.S. 15A-902(a), (e); *State v. Anderson*, 303 N.C. 185, 191, 278 S.E.2d 238, 242 (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.").

If the defendant agrees to provide discovery in response to the state's request, or the court orders the defendant to provide discovery, the prosecution may seek sanctions for a

discovery violation. *See* G.S. 15A-910. Constitutional concerns may limit sanctions against the defense, however. *See, e.g., Taylor v. Illinois*, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (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).

Court's Inherent Authority. A trial judge apparently has the inherent authority to order the defense to provide pretrial discovery; however, a judge may do so only if the discovery statutes do not prohibit it. *See State v. Warren*, 347 N.C. 309, 492 S.E.2d 609 (1997) (trial court properly declined to compel defendant to disclose evidence before trial); *State v. White*, 331 N.C. 604, 419 S.E.2d 557 (1992) (order requiring pretrial discovery beyond trial court's authority). *See also* 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 511 (West Pub. Co., 1984) (“[i]n the area of prosecution discovery, in contrast to defense discovery, trial courts generally are prohibited from exercising their inherent power to require discovery beyond that specifically noted in the discovery provision”; prosecution discovery is viewed as so controversial that failure of statute to authorize particular type of disclosure is taken to indicate that prosecution is not allowed such discovery).

At trial, the court has greater authority to order the defense to disclose information. *See State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987) (state not entitled to list of defendant's witnesses before trial, but trial court has discretion in some circumstances to require witness list during jury selection); *see also United States v. Nobles*, 422 U.S. 225, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975).

A trial judge also has the inherent authority to order a third party to disclose to the prosecution records concerning the defendant, but the prosecution must establish the need for the records and overcome any confidentiality interest the defendant may have in the records. *See In re Superior Court Order*, 315 N.C. 378, 338 S.E.2d 307 (1986) (prosecution must establish factual basis for need for customer's bank records; bare allegations of need insufficient); *In re Albemarle Mental Health Center*, 42 N.C. App. 292, 256 S.E.2d 818 (1979) (directing trial judge to conduct *in camera* review to determine whether patient's records should be disclosed to prosecution). *See also State v. Gray*, 347 N.C. 143, 491 S.E.2d 538 (1997) (court finds that it was permissible for prosecution to obtain *ex parte* order requiring North Carolina Department of Revenue to produce defendant's tax records before trial; court did not address whether defendant's interest in confidentiality of records gave him right to notice of and opportunity to oppose application for order); *State v. Clark*, 128 N.C. App. 87, 493 S.E.2d 770 (1997) (upholding order requiring Department of Correction to disclose to prosecution documents concerning defendant).

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 and
- the court has granted relief sought by the defendant under G.S. 15A-903(d).

Because G.S. 15A-905(a) allows discovery only of documents the defendant intends to introduce at trial, it is narrower than the defendant's right to discover documents and tangible objects from the prosecution. *See also* G.S. 15A-906 (state not entitled to internal memoranda, reports, witness statements, and work product of defense); *United States v. Nobles*, 422 U.S. 225, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975) (defense may waive work product protections by seeking to make testimonial use of evidence).

C. Results of Examinations and Tests

Right. The prosecution's right to discover examination and test results is more limited than the defendant's discovery rights. 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 if 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, and
- the court has granted relief sought by the defendant under G.S. 15A-903(e).

Limits on Disclosure. The state is not entitled to pretrial discovery of results or reports if the defendant does not intend to introduce them at trial or call the expert who prepared the results or reports. *See State v. Warren*, 347 N.C. 309, 492 S.E.2d 609 (1997); *State v. White*, 331 N.C. 604, 419 S.E.2d 557 (1992); *State v. King*, 75 N.C. App. 618, 331 S.E.2d 291 (1985). Only if the defense intends to call the expert at trial, in either the guilt-innocence *or* sentencing phase, may the state obtain pretrial discovery of the expert's report. *See State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995) (state entitled to discovery of test results, even if inconclusive, that went into formation of opinion of expert who testified); *White* (interpreting trial as encompassing both phases); G.S. 15A-905(b), -906 (prosecution may obtain discovery of reports of expert witnesses who

defendant intends to call at trial but not internal reports prepared by defense attorney or agents).

May the court order disclosure of a nontestifying expert's report once the trial commences? Several cases have held that a nontestifying expert's report is privileged. *See, e.g., United States v. Walker*, 910 F. Supp. 861 (N.D.N.Y. 1995) (attorney work-product doctrine protects nontestifying expert's report prepared for defense); *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); *People v. Knuckles*, 650 N.E.2d 974 (Ill. 1995) (attorney-client privilege protects communications between defendant and nontestifying psychiatrist retained by defense); CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-3.3 commentary (American Bar Association, 1989) (discussing cases upholding attorney-client privilege).

In *State v. Warren*, 347 N.C. 309, 492 S.E.2d 609 (1997), the court held that the trial court had the authority to compel the defense to disclose at trial a report prepared by a nontestifying expert. The court noted, however, that the defendant did not claim that the report was privileged. The court also found that the defendant had admitted guilt, that the capital sentencing proceeding was underway, and that the defendant called another expert during the sentencing phase, who testified that he had reviewed the nontestifying expert's report although he did not rely on it.

Meaning of Results or Report. Federal courts have held under discovery provisions comparable to state rules that the prosecution is not entitled to discovery of the substance of an oral report by a defense expert (*see United States v. Peters*, 937 F.2d 1422 (9th Cir. 1991)) or notes of the expert's interview of the defendant. *See United States v. Dennison*, 937 F.2d 559 (10th Cir. 1991).

Preparation of Written Report. Some trial judges have required the defense's expert to prepare and provide the state with a written report. The North Carolina Supreme Court has held that a judge may enter such an order but only if consistent with G.S. 15A-905(b). *See, e.g., State v. East*, 345 N.C. 535, 481 S.E.2d 652 (1997); *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994). Thus, the defendant would have to request and receive discovery of like information from the state; the state would have to make a timely request for discovery in return; and the defense would have to intend to introduce the results or report or intend to call the expert to testify. *See State v. Clark*, 128 N.C. App. 87, 493 S.E.2d 770 (1997) (trial court erred in requiring defendant's expert to prepare written report since defendant had not requested discovery of report of state's expert).

D. Testing of Physical Evidence

G.S. 15A-905(b) gives the state the right to

- inspect, examine, and test
- physical evidence or a sample

- available to the defendant
- if the defendant intends to introduce the evidence or tests of the evidence and
- the court has granted relief sought by the defendant under G.S. 15A-903(e).

E. Defenses

Insanity and Other Mental Conditions. Under G.S. 15A-959(a), the defendant must give timely notice of the intent to rely on an insanity defense; however, failure to do so does not necessarily preclude the defendant from relying on that defense. *See State v. Nelson*, 76 N.C. App. 371, 333 S.E.2d 499 (1985), *aff'd*, 316 N.C. 350, 341 S.E.2d 561 (1986); *State v. Johnson*, 35 N.C. App. 729, 242 S.E.2d 517 (1978).

Under G.S. 15A-959(b), the defendant must give notice 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. 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, 381 S.E.2d 635 (1989), *vacated on other grounds*, 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990). If the defendant refuses to cooperate in the examination, the prosecution may have grounds to argue for exclusion of the defendant's expert (but probably not lay) testimony on insanity. For a discussion of the admissibility of evidence from a court-ordered examination, *see supra* § 2.9, p. 22.

Although enacted before the North Carolina appellate courts recognized the diminished capacity defense, G.S. 15A-959(b) may require the defense to give notice of an intent to introduce expert testimony in support of that defense. In such cases, a trial court apparently may order the defendant to undergo a psychiatric examination by a state expert. *See State v. Clark*, 128 N.C. App. 87, 493 S.E.2d 770 (1997) (relying on *Huff*, court of appeals finds that trial court did not err in allowing state to obtain psychiatric examination of defendant who intended to use expert testimony in support of diminished capacity defense).

Other Defenses. The defendant need not give notice of defenses other than insanity. *See State v. Ross*, 329 N.C. 108, 405 S.E.2d 158 (1991) (rejecting notice requirement for self-defense). The defendant need not give notice of expert testimony unless the testimony relates to a mental condition bearing on the state of mind required for the offense.