

1999 Supplement

This supplement (hereinafter Supp.) updates Chapters 1 through 5 of the North Carolina Public Defender Manual (hereinafter Main Volume or Main Vol.). It includes cases decided by the North Carolina appellate courts through the end of August 1999 and legislation enacted by the North Carolina General Assembly through the end of the 1999 session.

Chapter 1: Pretrial Release

1.3 Eligibility for Pretrial Release

(The following replaces Domestic Violence Offenses, Ch. 1, p. 6)

During the first 48 hours after arrest for certain domestic violence offenses, only a judge (not a magistrate or clerk of court) may set conditions of pretrial release. *See* G.S. 15A-534.1(b). A judge may briefly delay setting pretrial release conditions if the defendant's immediate release would pose a danger to a domestic violence victim. *See* G.S. 15A-534.1(a). If release is improperly delayed or denied, grounds may exist for dismissal of the charges. *See infra* Supp., pp. 3–4.

(The following supplements Juveniles, Ch. 1, p. 7)

Effective for acts committed on or after July 1, 1999, the new Juvenile Code governs the right of a juvenile to obtain release from custody while the case is pending in district court. *See* G.S. 7B-1900 through -1907. Once a case is transferred to superior court, a juvenile has the right to pretrial release as provided in G.S. 15A-533 and -534. *See* G.S. 7B-2204, -2603(b) (release order also must specify person or persons to whom juvenile may be released).

(The following supplements Preventive Detention, Ch. 1, p. 7)

Effective for offenses committed on or after Jan. 1, 1999, G.S. 15A-533(d) creates a form of preventive detention in a limited class of drug-trafficking cases. In essence, the amended statute bars a magistrate from setting any pretrial release conditions if the defendant meets certain criteria (for example, the defendant must have been on pretrial release for another offense at the time he or she committed the drug-trafficking offense). If the defendant meets the statutory criteria, a district or superior court judge still may set pretrial release conditions upon making certain findings. The statute potentially affects very few defendants, so its constitutionality may not soon be tested.

1.8 Post-Release Issues

(The following supplements Consequences of Failure to Appear, Ch. 1, p. 15)

If a defendant's license is revoked for failing to appear, the revocation lasts until one of four listed events occurs—for example, the defendant disposes of the criminal charges for which he or she failed to appear. *See* G.S. 20-24.1(b). Once the defendant appears, the court must afford him or her an opportunity for a trial within a reasonable time; the prosecutor may not refuse to calendar the case or require the defendant to plead guilty as a condition of placing the case on the calendar. *See* G.S. 20-24.1(b1).

(The following supplements Obtaining Refund after Execution, Ch. 1, p. 17)

A defendant or surety may move to remit a judgment forfeiting a bond, even after execution, on a showing of extraordinary cause. There is no statute of limitations on such a motion; a moving party who satisfies the extraordinary cause standard is entitled to relief regardless of when the motion is filed. *See State v. Harkness*, ___ N.C. App. ___, 516 S.E.2d 166 (1999).

(The following is a new section after Return of Security, Ch. 1, pp. 17–18)

G. Custody During Trial

The appellate courts have held that once a trial commences in superior court, the trial judge has the discretionary power to order the defendant into custody during the progress of the trial. The appellate courts have admonished, however, that this power should be used sparingly. Before taking this step, the trial judge must consider, at a minimum, whether there is some indication that the defendant will not reappear, whether there is a danger of injury to or intimidation of witnesses if the defendant remains free, whether there are less restrictive alternatives to incarceration, and whether incarceration would unduly interfere with the defendant's ability to consult with counsel or prepare a defense. The trial judge must state for the record the reasons for the action. *See State v. Suggs*, 130 N.C. App. 140, 502 S.E.2d 383 (1998).

1.10 Dismissal as Remedy for Violations

(The following supplements Impaired Driving Cases, Ch. 1, p. 19)

In *State v. Haas*, 131 N.C. App. 113, 505 S.E.2d 311 (1998), the defendant moved to dismiss the impaired driving charges against him, alleging that the magistrate failed to follow required pretrial release procedures. The court upheld the denial of the motion (commonly known as a *Knoll* motion), finding that the magistrate sufficiently informed the defendant of the right to communicate with counsel and friends, that a \$500 secured bond was warranted on the facts presented, and that the magistrate was not required to release the defendant into the custody of a friend, who was extremely intoxicated.

(The following is a new section after Impaired Driving Cases, Ch. 1, p. 19)

C. Domestic Violence Cases

In *State v. Thompson*, 349 N.C. 483, 508 S.E.2d 277 (1998), the court addressed the constitutionality of G.S. 15A-534.1(b) (known as the “48-hour law”), which provides that only a judge, not a magistrate or clerk of court, may determine pretrial release conditions within the first 48 hours of a person’s arrest for certain domestic violence offenses. The court found that on its face the statute did not violate the U.S. Constitution. (The court did not address the state constitution so the facial validity of the statute remains subject to challenge on that ground.) The court found, however, that the statute as applied in this case violated the defendant’s Due Process rights. The defendant was arrested at 3:45 p.m. on Saturday, and the magistrate ordered that the defendant be committed to jail and brought before a judge 48 hours later, at 3:45 p.m. on Monday, even though both district and superior court were in session on Monday beginning at approximately 9:00 a.m.

The court held that the failure to provide the defendant with a pretrial release hearing before a judge at the first opportunity on Monday morning, and the defendant’s continued detention into the afternoon, was constitutionally unreasonable. The improper detention harmed the defendant’s fundamental right to liberty and required dismissal of the charges.

Note: In finding dismissal to be the appropriate remedy for violation of the defendant’s constitutional rights, the court did not require any showing of prejudice beyond the improper detention. Also, all of the charges against the defendant were dismissed, both those subject to the “48-hour law” and other charges.

The extent to which *Thompson* warrants dismissal of charges in other circumstances is not yet clear. In *State v. Malette*, 350 N.C. 52, 509 S.E.2d 776 (1999), the court found that the setting of pretrial release conditions was not arbitrarily or unreasonably delayed and so *Thompson* did not require dismissal of the charges. The *Malette* opinion contains little detail, however, on the length of the defendant’s detention, stating only that the defendant was arrested on Sunday and was brought before a judge on Monday.

The following are some issues that remain open after *Thompson* and *Malette*:

- If court is in session, how long and under what circumstances is it constitutionally reasonable to delay bringing the defendant before a judge for the setting of pretrial release conditions?
- If court is not in session but a judge is available—for example, a judge is in his or her chambers—is it constitutionally reasonable to delay the setting of release conditions until court is in session?
- If judges are routinely unavailable when court is not in session—for example, on nights, weekends or, in districts that do not hold court the entire week, some

- weekdays—is it constitutionally reasonable to delay the setting of release conditions until court is in session?
- Does the reasoning of *Thompson* apply to improper delays or denials of pretrial release conditions in cases in which the “48-hour law” does not apply to any of the charges?

Chapter 2: Capacity to Proceed

2.3 Deciding Whether to Question Capacity

(The following supplements Need for Protective Action, Ch. 2, p. 7)

Rule 1.14(b) of the Revised Rules of Professional Conduct of the N.C. State Bar, which did not have an express counterpart in previous professional responsibility rules, confirms that a lawyer may take action to protect a client “when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.” This rule provides additional support for the proposition that defense counsel may raise the question of a client’s competency without the client’s consent. *See also United States v. Boigegrain*, 155 F.3d 1181 (10th Cir. 1998) (majority recognizes that defense counsel, as officer of court, may raise issue of competency over client’s wishes; dissent concurs with general principle but argues that if defendant elects to defend competence and oppose commitment order, defendant may be entitled to assistance of new counsel to present his or her position).

2.5 Examination by State Facility or Local Examiner

(The following supplements Motion for Examination by Prosecutor, Ch. 2, p. 11)

In *State v. Davis*, 349 N.C. 1, 506 S.E.2d 455 (1998), the trial court modified a previous order for a competency examination by directing that the examination take place at Dorothea Dix Hospital rather than at Central Prison and by assigning a different Dix examiner to do the examination than the one initially designated. The defendant argued that the trial court improperly made this modification after an *ex parte* hearing with the prosecutor. The court found, however, that the hospital, not the prosecutor, asked for the modification of the order; that the defendant was represented by counsel at the hearing at which the earlier order for a competency examination was entered; and that entry of the modified order did not affect the defendant’s right to a fair trial. In light of the unusual circumstances presented in *Davis*, the decision should not affect trial courts’ customary practice of hearing motions for competency examinations only upon notice to the defendant.

(The following supplements Presence of Counsel [at Examination], Ch. 2, p. 13)

In *State v. Davis*, 349 N.C. 1, 506 S.E.2d 455 (1998), the court held that the trial court did not violate the defendant's Sixth Amendment right to counsel by refusing to allow defense counsel to be present at a competency examination. Compare *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (post-indictment lineup is critical stage of criminal proceeding, and presence of counsel is necessary to preserve defendant's right to fair trial).

The decision does not foreclose counsel from being present in all circumstances, however. Examiners still may allow counsel to be present during the examination of the defendant. Trial courts also may have the discretion to allow counsel to be present. See Timothy E. Travers, *Right of Accused in Criminal Prosecution to Presence of Counsel at Court-Appointed or -Approved Psychiatric Examination*, 3 A.L.R.4th 910 (1981) (some cases have held that although defendant did not have absolute right to presence of counsel, trial court had discretion to allow counsel to be present).

(The following supplements Report of Examination, Ch. 2, pp. 13–14)

Generally, a competency examination at a state or local facility is treated as confidential, although a prosecutor may obtain the report of examination in some circumstances. For a discussion of the general confidentiality rule and exceptions, see Main Vol., Ch. 2, p. 12. A recent decision—*State v. Williams*, 350 N.C. 1, 510 S.E.2d 626 (1999), *petition for cert. filed* (June 25, 1999)—raises the specter of greater disclosure to the prosecution and highlights some of the risks of a competency examination.

In *Williams*, the trial court ordered Dorothea Dix Hospital to provide the prosecution with a copy of its entire file concerning the defendant, not just its report, and also ordered the Dix examiners to confer with the prosecutor to the same extent that they had conferred with defense counsel. The supreme court rejected the defendant's arguments that the trial court lacked the authority to order such broad disclosure. The court's ultimate holding was a narrow one, however. It found that even if the prosecution did not have a right to the entire Dix file, the trial court properly allowed the prosecution to use some of the information to rebut evidence offered by the defendant. (Also, the information used at trial by the prosecution was relatively limited in nature; the prosecution sought to show that the defendant had threatened to fight two Dix staff members.) Thus, the broad access permitted by the trial court in *Williams* may still be inappropriate in most circumstances.

Williams also did not address the potential applicability of the Fifth Amendment privilege against self-incrimination. Subject to limited exceptions, the Fifth Amendment protects information obtained from a defendant during a competency examination. See Main Vol., Ch. 2, pp. 22–24; see also *infra* Supp., pp. 6–7. The Fifth Amendment may give defense counsel grounds both to oppose disclosure of the underlying file from a competency examination and to ask the court to excise potentially incriminating information from the report of examination if disclosed to the prosecution.

2.9 Admissibility at Trial of Results of Competency Evaluation

(The following supplements *Rebuttal of Mental Health Defense*, Ch. 2, p. 23)

Three recent cases further highlight the potential risks of competency examinations, particularly in capital or other serious cases in which the prosecution may go to greater lengths to obtain and use the results of the examination.

Mental Health Defense Involving Expert Testimony. In *State v. Davis*, 349 N.C. 1, 506 S.E.2d 455 (1998), a capital case, the court found that the defendant sought to rely on the defenses of insanity and diminished capacity. The court also found that the mental health expert who testified on the defendant's behalf relied on the competency evaluation in forming his opinion. The court concluded that the Fifth Amendment privilege against self-incrimination did not bar the prosecution from using the competency evaluation for the purpose of rebutting the expert testimony presented by the defense. (The prosecution used certain statements that the defendant made during the competency examination to cross-examine the defendant's mental health expert during the sentencing phase of the trial.)

The court in *Davis* also found no violation of the defendant's Sixth Amendment right to counsel, which requires at a minimum that the defendant have an opportunity to discuss with counsel the nature and scope of a competency examination. The court stated that defense counsel should have anticipated that the competency examination could be used by the prosecution to rebut any defense raised by the defendant involving his mental status; therefore, defense counsel was in a position to advise the defendant about the examination before it occurred. (The court reached this conclusion notwithstanding that the trial court apparently limited the scope of the competency examination to a determination of competency only. If counsel is able to obtain one, an order limiting the scope, disclosure, *and* use of a competency examination may still be effective in preventing the results from being used at trial. *See* Main Vol., Ch. 2, p. 13.)

In *State v. Atkins*, 349 N.C. 62, 505 S.E.2d 97 (1998), another capital case, the court likewise found no violation of the Fifth Amendment by the prosecution's use of a competency examination against the defendant at the sentencing phase of trial. The court found that the defendant presented a defense strategy alleging a learning disorder, an adjustment disorder, and disturbances of emotion and conduct; and the defendant introduced expert testimony on his mental status. The court apparently did not consider it significant that the defendant did not present a mental health defense in the traditional sense. The court also found that the mental health expert who testified on the defendant's behalf relied on the competency report as a basis for his opinion.

Atkins also held that the trial court did not err in allowing the prosecution to cross-examine the defendant's mental health expert concerning the expert's testimony at a previous competency hearing. The court held that G.S. 15A-959(c), which provides that evidence from a pretrial hearing on a defendant's sanity is not admissible at trial, does not bar the use of evidence from a pretrial competency hearing. The court also stated that the

defendant's expert first brought up the competency evaluation and hearing in his testimony.

Rebuttal of Other Evidence. In *State v. Williams*, 350 N.C. 1, 510 S.E.2d 626 (1999), a capital case as well, the defendant ultimately decided not to put on any expert mental health testimony during either the guilt-innocence or sentencing phase of the trial. The court held, however, that the defendant opened the door in another way to the prosecution's use of evidence from a competency evaluation. Finding that the defendant introduced evidence during sentencing that he had acted respectfully while in jail awaiting trial, the court held that the trial court did not err in allowing the prosecution to bring out evidence that the defendant had threatened to fight two staff members while committed to Dorothea Dix Hospital. (The prosecution learned of the incident because the trial court ordered Dix to provide the prosecution with its entire file concerning the defendant. *See supra* Supp., p. 5.)

(The following supplements Waiver, Ch. 2, pp. 23–24)

Estelle suggested that a defendant might be able to waive his or her Fifth Amendment rights concerning use of a competency examination after proper *Miranda*-style warnings. For several reasons (discussed in the Main Volume), such a waiver would appear to be ineffective to override Fifth Amendment protections. Most cases (such as those discussed immediately above) have found that the prosecution may use evidence from a competency examination only when necessary to rebut psychiatric testimony offered by the defendant. *See also* Robert P. Mosteller, *Discovery against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567, 1615 n.159 (1986) (suggesting that more reasonable reading of *Estelle* is that prosecution's use of psychiatric examination is limited to responding to mental health defense raised by defendant); *Collins v. Auger*, 428 F. Supp. 1079 (S.D. Iowa 1977) (defendant is entitled to examination to determine competency to stand trial; if the giving of a *Miranda* warning made the defendant's statements admissible, the defendant would be placed in a situation where he must sacrifice one constitutional right to claim another), *rev'd on other grounds*, 577 F.2d 1107 (8th Cir. 1978) (agreeing with principle and finding further, contrary to lower court, that use of defendant's statements to psychiatrist to establish guilt was not harmless error and warranted vacating of conviction).

For similar reasons, a defendant should not lose constitutional protections by being the one who moves for the competency examination. A defendant cannot be said to have waived such rights by asserting the right not to be tried while incompetent; and, defense counsel may be obligated to raise competency even without the client's consent. *See also United States v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984) (en banc) (Scalia, J.) (decision analyzes why trial judge may order psychiatric examination and prosecution may use results to rebut insanity defense; court finds that it is at best fiction to say that defendant knowingly and voluntarily waives Fifth Amendment rights by pleading insanity).

Chapter 4: Discovery

4.1 Types of Defense Discovery

(The following supplements Open-File Discovery, Ch. 4, p. 3)

Even though a prosecutor has an open-file discovery policy, defense counsel ordinarily should make a written request for statutory discovery. This practice is advisable because the North Carolina courts have generally held that, notwithstanding an open-file policy, a formal request is a prerequisite to obtaining sanctions for the prosecution's failure to provide statutory discovery.

This general rule does not necessarily mean, however, that all informal discovery agreements are unenforceable. In *United States v. Cole*, 857 F.2d 971 (4th Cir. 1988), the prosecution agreed to provide the defendant with certain statements, and in reliance on this agreement the defense believed it had obtained all such statements; yet, at trial the prosecution sought to introduce a statement that it had not previously produced. The Fourth Circuit held that prosecutors must honor their informal discovery agreements; to allow otherwise would subvert the ends of justice. The court also held that the statement should have been excluded under Federal Rule of Evidence 403, which like North Carolina's Rule 403 allows a trial court to exclude evidence on the ground of unfair prejudice and surprise. *See also United States v. Spikes*, 158 F.3d 913 (6th Cir. 1998) (court states that prosecution must honor informal discovery agreements and that for violations judge may impose discovery sanctions, such as suppression of evidence or dismissal of charges).

4.2 Procedure to Obtain Discovery

(The following supplements Preserving Evidence for Discovery, Ch. 4, p. 7)

In a felony case, defense counsel may want to make a motion in district court, before transfer of the case to superior court, to preserve potentially useful evidence. A district court's authority to hear such a motion is supported by *State v. Jones*, ___ N.C. App. ___, 516 S.E.2d 405 (1999), which held that before transfer of a felony case to superior court, the district court has jurisdiction to rule on preliminary matters (in that instance, production of certain medical records).

4.3 Rights under 15A-903

(The following supplements Possession, Custody, or Control, Ch. 4, p. 14)

Under North Carolina's discovery statutes, the prosecution must produce discoverable materials that are within its possession, custody, or control. This obligation may extend to materials within the possession of other agencies, including agencies other than law enforcement. *See United States v. Santiago*, 46 F.3d 885 (9th Cir. 1995) (prosecution is considered to have possession and control of information in possession of any agency

that participated in investigation; prosecution also considered to have possession and control of information in possession of agencies not involved in investigation if prosecution has knowledge of and access to information); *see also* G.S. 7B-3100 (effective July 1, 1999, this statute replaces G.S. 7A-675(h) and permits information sharing among agencies such as social services departments, law-enforcement agencies, and prosecutors' offices pursuant to rules adopted by Office of Juvenile Justice); 9 NCAC 5G.0101–.0104 (temporary rules on information sharing, adopted July 7, 1999).

(The following supplements Crime Scenes, Ch. 4, p. 20)

Does a defendant have the right to inspect a crime scene that is not under the control of the state? Some courts have found that, under appropriate limitations, a defendant may inspect a crime scene controlled by a private person. *See, e.g., Henshaw v. Commonwealth*, 451 S.E.2d 415 (Va. Ct. App. 1994) (relying on general principles stated by North Carolina Supreme Court in *State v. Brown*, discussed in Main Vol.); *People v. Nicholas*, 599 N.Y.S.2d 779 (N.Y. Crim. Ct. 1993); *State v. Lee*, 461 N.W.2d 245 (Minn. Ct. App. 1990). Defense counsel will likely have to show a particular need for such an inspection, such as how it would yield information different from that available from crime scene photographs and reports.

(The following supplements Examination Reports and Testing of Evidence, Ch. 4, p. 20)

In *State v. Bartlett*, 130 N.C. App. 79, 502 S.E.2d 53 (1998), the defendant submitted a timely request for statutory discovery under G.S. 15A-903(e), seeking any tests or experiments made in connection with the case. The court held that the prosecutor violated the discovery rules by failing to provide defense counsel with the results of an alcohol sensor test conducted on the defendant. For this and other reasons, the court found that the trial judge erred in allowing the prosecutor to introduce the test at trial and ordered a new trial.

(The following supplements Time of Disclosure [of Witness Statements], Ch. 4, p. 23)

G.S. 15A-903(f) gives the defendant the right to examine a witness's statement after the witness has testified on direct examination in "the trial of the case." In *State v. Jean*, 310 N.C. 157, 311 S.E.2d 266 (1984), a majority of the court held that this right arises only after the witness has testified at a trial *before a jury*. The defendant therefore was not entitled to obtain the statement of a witness after she testified at a hearing on a motion to suppress her pretrial identification of the defendant.

In dissent, Justice Exum, joined by Justice Frye, argued that the impeachment value of a witness's statement may be nearly as great at a suppression hearing before a judge as during a trial before a jury. The dissent also recognized that the rationale for withholding a witness's statement before trial—namely, to avoid unnecessary disclosure of the witness's identity—does not apply once the witness has testified, whether before a judge or jury. The dissent concluded that the construction of G.S. 15A-903(f) that best accords with legislative intent is that testifying "in the trial of the case" means testifying during

any public judicial proceeding. This construction also accords with federal practice. *See* FED. R. CRIM. P. 26.2(g) (defendant may obtain witness statement after witness has testified at suppression hearing); *see also State v. Davis*, 349 N.C. 1, 506 S.E.2d 455 (1998) (court upholds trial judge’s order requiring defense witness to provide prosecution with his notes after he testified at pretrial competency hearing).

Ultimately, the conviction in *Jean* was vacated on *Brady* grounds because the prosecutor did not disclose until the middle of trial that the witness had been hypnotized and did not turn over tape recordings and reports relating to the hypnosis. *See Jean v. Rice*, 945 F.2d 82 (4th Cir. 1991); *see also State v. Hall*, ___ N.C. App. ___, 517 S.E.2d 907 (1999) (party offering testimony of previously hypnotized witness must disclose fact of hypnosis before witness testifies). Other grounds also may exist for disclosure of witness statements although the witness has not yet testified before the jury. For example, if a witness reviews a statement before testifying at a hearing (whether the witness is the one who made the statement or is someone else, such as a law-enforcement officer), the statement may be subject to disclosure under N.C. Evidence Rule 612, which authorizes disclosure of materials used to refresh recollection. For a further discussion of potential grounds for disclosure of witness statements before trial, *see* Main Vol., Ch. 4, pp. 23–24 (other discovery avenues).

4.6 **Brady Material**

(The following supplements Duty to Disclose, Ch. 4, p. 29)

The U.S. Supreme Court issued another in a long line of decisions on the defendant’s right to exculpatory evidence. The decision—*Strickler v. Greene*, ___ U.S. ___, 119 S. Ct. 1936, ___ L.Ed.2d ___ (1999)—does not appear to break much new ground. Applying traditional *Brady* principles, the court found that the prosecution withheld evidence that was favorable to the defense, but the evidence was not material to the outcome of the case and so the nondisclosure did not amount to a *Brady* violation.

Perhaps of greater legal significance is the court’s preliminary ruling in *Strickler*—namely, that defense counsel’s failure in earlier proceedings to assert a *Brady* violation did not bar the claim in post-conviction proceedings. The court found cause for the earlier failure to raise the claim because (a) the prosecution withheld the evidence, (b) defense counsel reasonably relied on the prosecution’s open-file discovery policy as fulfilling the prosecution’s duty to disclose such evidence, and (c) the prosecution asserted during earlier proceedings that it had produced everything known to it.

(The following supplements “Favorable to Defense,” Ch. 4, pp. 29–31)

In *United States v. Service Deli Inc.*, 151 F.3d 938 (9th Cir. 1998), the court held that handwritten notes by the government’s attorney of interviews with a key prosecution witness constituted *Brady* material, and the government’s failure to produce the notes required a new trial. Although the government had produced a written report

summarizing the interviews, the handwritten notes revealed significant information not contained in the written report.

4.7 Other Constitutional Rights

(The following supplements Directing Production of Records [in Possession of Third Parties], Ch. 4, p. 36)

In seeking an order for production of confidential records in the possession of a third party, counsel may need to apply to the level of court in which the case is then pending. *See State v. Rich*, ___ N.C. App. ___, 512 S.E.2d 441 (1999) (court holds that district court should not have entered order overriding doctor-patient privilege because G.S. 8-53 provides that once case is in superior court, as in this instance, the judge ruling on the privilege must be a superior court judge), *review granted*, ___ N.C. ___, ___ S.E.2d ___ (July 22, 1999); *see also State v. Jones*, ___ N.C. App. ___, 516 S.E.2d 405 (1999) (until case is transferred to superior court, district court has jurisdiction to rule on preliminary matters such as production of medical records).

4.8 Subpoenas

(The following is a new section after Motions to Quash, Ch. 4, pp. 43–44)

F. Specific Types of Records

For a discussion of subpoenas for mental health records, *see* John Rubin & Mark Botts, *Responding to Subpoenas: A Guide for Mental Health Professionals*, POPULAR GOVERNMENT, Summer 1999, at 27 <<http://ncinfo.iog.unc.edu/pubs/pg/rubin2.htm>>.

For a discussion of subpoenas for school records, *see* John Rubin, *Subpoenas and School Records: A School Employee's Guide*, SCHOOL LAW BULLETIN, Spring 1999, at 1 <<http://ncinfo.iog.unc.edu/pubs/slb/slbrubin.htm>>.

4.9 Prosecution's Discovery Rights

(The following supplements Reciprocal Statutory Rights, Ch. 4, pp. 44–45)

Statutory discovery by the prosecution is subject to two key limitations. First, a defendant may avoid discovery of a particular statutory category of evidence, such as the results or reports of examinations or tests, by not seeking discovery of that category from the prosecution. G.S. 15A-905 contains this limitation for each category of statutory discovery by the prosecution. *See also Wardius v. Oregon*, 412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed. 2d. 82 (1973) (reciprocal discovery required by fundamental fairness). Foregoing discovery of the prosecution's evidence will often be too high a price to pay for avoiding discovery by the prosecution, but defense counsel may wish to consider this option in some circumstances.

Second, the prosecution is entitled to evidence within a particular statutory category only if the defendant intends to introduce the evidence at trial. Again, this limitation applies to each category of statutory discovery. *See* G.S. 15A-905; *see also Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970) (requiring defendant to give notice before trial of alibi defense did not violate defendant’s Fifth Amendment privilege against self-incrimination; rule at most accelerated timing of disclosure of alibi defense).

What happens if the defendant turns over evidence intending to use it at trial but ultimately does not use the evidence? G.S. 15A-905 does not expressly limit the prosecution’s use of such evidence, but some limitations may exist. *See* 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 514 (West Pub. Co., 1984) (under rule requiring advance notice of alibi defense, prosecution may not be able to comment on defendant’s decision not to rely on alibi defense at trial); Robert P. Mosteller, *Discovery against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567 (1986) (prosecution should not be able to use in its case-in-chief evidence containing statements of defendant); *see also supra* Supp., pp. 6–7 (prosecution may use results of court-ordered psychiatric examination to rebut mental health defense but not to establish guilt).

Defense counsel obviously should avoid disclosing evidence until certain that he or she intends to use it. But, counsel also should avoid “tacking too close to the wind” in determining what is discoverable. A court may impose sanctions against the defense for not producing discoverable evidence, including precluding use of the evidence at trial—a result that may be far more harmful than allowing the prosecution pretrial access to the evidence.

The court’s authority to impose sanctions against the defendant is subject to both statutory and constitutional limitations. A court may not impose sanctions unless the state has made a formal request for discovery and the court has ordered or the defendant has agreed to provide discovery. *See* Main Vol., Ch. 4, pp. 44–45. The prosecution also would have to establish that the defendant intended to use particular evidence and still failed to disclose it. *See generally State v. Godwin*, 336 N.C. 499, 444 S.E.2d 206 (1994) (although trial court acted within discretion in setting deadline for defendant to comply with reciprocal discovery obligations, defendant was not precluded from reassessing after deadline what evidence he or she intended to use at trial). To satisfy constitutional concerns, courts generally have required a willful violation, motivated by a desire to obtain a tactical advantage, before considering the ultimate sanction against the defendant of precluding use of the evidence. *See* 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 177 (West Pub. Co., Supp. 1991).

(The following supplements Limits on Disclosure [of Reports and Results of Examinations or Tests], Ch. 4, pp. 46–47)

Most of the recent cases on prosecution discovery of reports and results of examinations or tests have dealt with psychiatric experts, so the following discussion focuses on those types of experts; however, the discussion also may apply to other experts as well.

As with any expert, defense counsel may need to provide considerable information to a psychiatric expert to enable him or her to form a meaningful opinion. The failure to provide sufficient information to an expert may expose him or her to damaging cross-examination. Counsel should anticipate, however, that information provided to an expert may eventually be disclosed to the prosecution, including statements by the client to the expert.

Nontestifying Experts. The rules concerning disclosure of materials prepared by a nontestifying or consulting expert—that is, one whom the defense does not intend to call as a witness—are fairly well established and afford the defense the greatest protection. Before trial, the court cannot require a nontestifying expert to prepare, or the defense to turn over, reports or results of examinations that the defendant does not intend to introduce at trial. *See* Main Vol., Ch. 4, pp. 46–47. This bar exists whether or not the defense requests discovery of the prosecution’s experts.

Many cases from other jurisdictions recognize the same general rule once the trial commences, finding that the work of a nontestifying expert is protected by various privileges. In addition to the cases cited in the Main Volume, *see White v. State*, 1999 WL 124310 (Okla. Crim. App. 1999) (finding report of nontestifying psychiatric expert to be protected by attorney-client privilege); *see also* 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 526 (West Pub. Co., 1984). The logic of these cases is compelling, although so far no appellate case in North Carolina has directly addressed the issue.

Counsel should beware, however, that material prepared by a nontestifying expert may be subject to disclosure if an expert who testifies for the defense has reviewed the materials in forming his or her opinion. 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 order disclosure at trial of a nontestifying expert’s report where, among other things, the report had been reviewed by an expert who testified for the defense; the court noted, however, that the defendant did not make any claim of privilege. For a further discussion of this case, *see* Main Vol., Ch. 4, p. 47.

Experts Intended to Be Called at Trial. The following discussion concerns the prosecution’s pretrial discovery rights if the defense requests discovery of the prosecution’s experts. If the defense does not make such a request, the prosecution should not be able to obtain pretrial discovery even of those experts that the defense intends to call at trial.

Results or reports of examinations or tests are subject to disclosure before trial if (1) the defendant intends to introduce those materials at trial or (2) the defendant intends to call the expert that prepared those materials and the materials relate to the expert’s testimony. Further, the trial court may order an expert whom the defendant intends to call at trial to prepare a written report. *See* Main Vol., Ch. 4, pp. 46–47. (If the defendant is indigent, however, the trial court may need to allocate additional funds for the expert’s time in preparing a written report.)

Applying these rules in *State v. Williams*, 350 N.C. 1, 510 S.E.2d 626 (1999), the court held that the trial court did not err in requiring the defendant to turn over an expert's report to the prosecution even though the expert ultimately did not testify. The court found that at the time the trial court entered its order, the defense had indicated that it intended to call the expert as a witness.

The North Carolina appellate courts have not closely analyzed the discoverability of other materials prepared by an expert whom the defendant intends to call at trial. In *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995), the court held that test results, which included the defendant's answers, were subject to pretrial discovery because the test results were prepared by an expert whom the defendant intended to call as a witness and the expert gleaned some information from the test results. Some courts, however, have balked at requiring disclosure of the defendant's statements before the expert actually testifies. See *Andrade v. Superior Court*, 46 Cal. App. 4th 1609 (Cal. Ct. App. 1996) (defense counsel permitted to redact defendant's statements from psychologist's report before providing it to prosecution; statements were protected by attorney-client privilege).

In *State v. Atkins*, 349 N.C. 62, 505 S.E.2d 97 (1998), the court upheld an order requiring a psychiatric expert to turn over to the prosecution his notes of interviews and conversations with the defendant. The decision does not appear to authorize discovery of an expert's notes in general, however. The trial court required disclosure only after the expert testified at a competency hearing, and the supreme court found that the expert relied on the notes at that hearing and at a later sentencing hearing. Thus, the decision appears to stand more for the proposition that a trial court has some authority to order disclosure of information once a witness testifies, whether at trial or at a pretrial hearing.

A number of cases that have explicitly considered the discoverability of a defense expert's notes have found them not subject to discovery. See *United States v. Dennison*, 937 F.2d 559 (10th Cir. 1991) (defense psychiatrist's notes of his interviews with defendant did not constitute "report or result" within meaning of federal discovery provision comparable to G.S. 15A-905; notes contained no results, conclusions, diagnoses, or summations); *United States v. Layton*, 90 F.R.D. 520 (N.D. Cal. 1981) (bare tapes of psychiatrist's interviews cannot be considered "results or reports" of mental examination); *Hines v. Superior Court*, 20 Cal. App. 4th 1818 (Cal. Ct. App. 1993) (discovery not required of preliminary drafts of reports, interview notes reflecting defendant's statements, or expert's notes to himself reflecting his opinions or interim conclusions).

An expert's notes also may be protected by the attorney work-product privilege and, if the notes reflect the defendant's statements, by the attorney-client privilege and Fifth Amendment privilege against self-incrimination. See generally Vitauts M. Gulbis, Annotation, *Right of Prosecution to Discovery of Case-Related Notes, Statements, and Reports—State Cases*, 23 A.L.R.4th 799 (1981); see also *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178 (1993) (finding generally that attorney-client privilege is essential part of Sixth Amendment right to counsel).

Testifying Experts. If a defense expert actually testifies, broader disclosure may occur. Thus, under N.C. Evidence Rule 705, the prosecution may explore the basis of an expert's opinion through cross-examination. *See State v. White*, 343 N.C. 378, 471 S.E.2d 593 (1996) (prosecution could cross-examine defendant's expert on report of another expert on which expert relied, even though expert disagreed with report); *State v. Lyons*, 343 N.C. 1, 468 S.E.2d 204 (1996) (prosecution could cross-examine expert about defendant's prison records, which expert had relied on in forming opinion); *State v. Lynch*, 340 N.C. 435, 459 S.E.2d 679 (1995) (prosecution could cross-examine defendant's expert about statements defendant made to expert). *See also State v. Morganherring*, ___ N.C. ___, 517 S.E.2d 622 (1999) (court did not err in notifying defendant that if defense expert did not produce written report, it would allow prosecution to conduct voir dire of expert before expert presented evidence to jury).

The scope of cross-examination concerning the basis of an expert's opinion, while broad, is not unlimited. *See State v. Coffey*, 336 N.C. 412, 444 S.E.2d 431 (1994) (under N.C. Evidence Rule 403, trial court may limit such cross-examination if prejudice outweighs probative value); *see also United States v. Nobles*, 422 U.S. 225, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975) (cross-examination on matters subject to Fifth Amendment must be reasonably related to those brought out on direct examination); 1 JOHN W. STRONG, MCCORMICK ON EVIDENCE 496 (West Pub. Co., 4th ed. 1992) (increasing number of courts apply this standard to cross-examination of defendant who takes stand).

Rule 705 does not give the prosecution the right to obtain and inspect materials. It is a rule of cross-examination, requiring disclosure from the witness stand to the trier of fact, and "has nothing to do with disclosure to the adverse party through discovery or otherwise." WALKER JAMESON BLAKEY ET AL., NORTH CAROLINA EVIDENCE: 1998 COURTROOM MANUAL 199 (Anderson Pub. Co., 1998); *compare* N.C. EVID. R. 612 (authorizing disclosure of materials only if witness has used them to refresh recollection).

Once the trial commences, however, a judge has the inherent authority in some circumstances to allow the prosecution access to materials that otherwise would not be discoverable. The limits on this authority are unclear. *See* cases cited in Main Vol., Ch. 4, pp. 45–47; *see also State v. Atkins*, 349 N.C. 62, 505 S.E.2d 97 (1998) (court required production of notes that defense expert relied on in testifying); *State v. Holston*, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 17, 1999) (court required production of defense attorney's summary of defendant's medical records, which attorney had provided to expert and expert relied on in testifying).

Mindful of possible privileges and constitutional limitations, some courts have narrowly construed their authority to allow discovery by the prosecution in the absence of an express statute. *See generally* Gulbis, 23 A.L.R.4th 799; *see also State v. Taylor*, 327 N.C. 147, 393 S.E.2d 801 (1990) (defendant waived benefits of attorney-client privilege and work-product doctrine only with respect to matters relevant to allegations; trial court's order directing defendant to provide state with access to all files relating to case was improper); *Dennison*, 937 F.2d at 566 (production of expert's notes was not necessary to enable meaningful cross-examination; prosecutor did not use notes to

challenge expert's opinion of defendant's mental condition but rather merely quoted defendant's statements to jury in questioning expert).

(The following supplements Insanity and Other Mental Conditions, Ch. 4, p. 48)

A 1997 North Carolina court of appeals decision, *State v. Clark*, 128 N.C. App. 87, 493 S.E.2d 770 (1997) (discussed in Main Vol.), upheld an order requiring a defendant who raised a diminished capacity defense to undergo a psychiatric examination by a state expert. The court of appeals' decision did not give the prosecution an automatic right to an examination, however; it found only that the trial court had the authority to order one. *See also United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996) (court finds that mental condition, disease, or defect other than insanity requires case-by-case analysis to determine whether psychiatric examination of defendant is necessary for government to rebut defendant's expert testimony; court also finds that it lacked authority to order in-custody examination of defendant).

If the state obtains a psychiatric examination (concerning either insanity or diminished capacity), the examination results may be used only to rebut the defendant's mental health defense, not to establish guilt. *See Clark*; 2 WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 517 (West Pub. Co., 1984); Robert P. Mosteller, *Discovery against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567, 1614–15 (1986).

(The following is a new section after Defenses, Ch. 4, p. 48)

F. Defense Witnesses

The defendant is not obligated before trial to provide a list of its witnesses; but, the court may order the defendant to do so once the trial commences if the court also requires the prosecution to identify its witnesses. *See State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987). If the defendant provides the prosecution with a witness list, the court apparently has the discretion to exclude witnesses not on the list. *See State v. McMahon*, 67 N.C. App. 181, 312 S.E.2d 526 (1984) (court not required to exclude defense witnesses).

There is no statutory authority for requiring the defendant to produce witness statements, either before or during trial. Such statements constitute work product, protected by G.S. 15A-906, and North Carolina has no "reverse" Jencks Act overriding this privilege. *Compare* FED. R. CRIM. P. 26.2 (rule duplicates Jencks Act, which requires government to produce witness's statement after he or she testifies, and imposes same obligations on defense for witnesses other than the defendant). Nevertheless, a court may have the inherent authority in some circumstances to require production. *See United States v. Nobles*, 422 U.S. 225, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975) (requiring disclosure of witness's statement after defense investigator testified at trial concerning statement); *State v. Gray*, 347 N.C. 143, 491 S.E.2d 538 (1997) (trial court did not err in requiring defense to produce witness's affidavit after witness testified; defense counsel had read entire affidavit aloud at earlier bond hearing).

Chapter 5: Experts and Other Assistance

5.1 Right to Expert

(The following supplements Breadth of Right, Ch. 5, p. 4)

In *State v. Anderson*, 350 N.C. 153, 513 S.E.2d 296 (1999), the court held that the defendant was not entitled to a psychiatric expert because, among other things, she failed to make a threshold showing that her sanity at the time of the offense was a significant factor in the case. The decision should not be read, however, as limiting psychiatric assistance to those cases involving an insanity defense. The defendant in *Anderson* claimed that she needed a psychiatric expert to respond to the state's evidence. The court rejected this claim not because it was unrelated to an insanity defense, but rather because it was based on mere speculation about what trial tactics the state would employ. Also, as recently as 1996, the court reversed a conviction for the trial court's failure to provide funds for a psychiatrist to assist the defendant in presenting a diminished capacity defense. See *State v. Jones*, 344 N.C. 722, 477 S.E.2d 147 (1996).

5.4 Obtaining an Expert *Ex Parte*

(The following supplements Who Hears the Motion, Ch. 5, p. 10)

In some felony cases, counsel may want to make a motion in district court, before the case is transferred to superior court, for funds for an expert. The authority of a district court to hear such a motion is supported by *State v. Jones*, ___ N.C. App. ___, 516 S.E.2d 405 (1999), which held that before transfer of a felony case to superior court, the district court has jurisdiction to rule on preliminary matters (in that instance, production of certain medical records).

5.5 Specific Types of Experts

(The following supplements Other Experts, Ch. 5, p. 14)

In *State v. McNeil*, 349 N.C. 634, 509 S.E.2d 415 (1998), *petition for cert. filed* (May 20, 1999), the court found that the defendant had failed to make a sufficient showing for funds for a forensic crime-scene expert. The opinion notes, however, that the trial court granted the defendant's motions for funds for an investigator, fingerprint expert, and audiologist.

5.6 Confidentiality of Expert's Work

(The following supplements Confidentiality of Expert's Work, Ch. 5, pp. 14–15)

In *State v. Jones*, ___ N.C. App. ___, 516 S.E.2d 405 (1999), the court suggested in dicta that the rule of *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990)—namely, that a lawyer in a civil case may not communicate with another party's health care provider

without that party's consent—may not apply in criminal cases. The court ultimately did not decide that issue, however, finding that it was not properly preserved for appeal. Regardless of whether a prosecutor may contact a defense expert without the defendant's consent, defense counsel still may instruct the expert, who is the defendant's agent, not to discuss the case with the prosecution.

For other recent cases on the discoverability of information in the possession of defense experts, *see supra* Supp., pp. 12–16.