

Excerpts from NC Defender Manual on Third-Party Discovery

1. Excerpt from Volume 1, Pretrial, of NC Defender Manual:
Discusses procedures for obtaining records from third parties and rules governing subpoenas
2. Excerpt from 1999 Supplement to NC Defender Manual:
Summarizes cases and materials since issuance of manual
3. Form motions for obtaining records from third parties

The full manual is online at www.ncids.org (under Defender Manual)

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~~

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

~~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.~~

for the prospect of sexual abuse in Orange County in 1989.

c) Evidence which would tend to discredit any of the childrens' statements regarding the alleged abuse by the defendant, Thomas Thornton.

d) Evidence that the childrens' versions of the abuse changed in any manner over time.

e) Any other evidence which tends to exculpate the defendant; which tends to mitigate the degree of the offense; or which tends to point to third part guilt, or which could be used to impeach any of the State's witnesses.

6. To place all information contained in the Durham County Social Services' file on the above named children in the court files on this case, whether revealed to counsel or not, for later appellate review.

In support of this motion, counsel attaches the following affidavit.

This _____ day of _____, 1993.

Elaine M. Gordon

DURHAM PUBLIC DEFENDER OFFICE
Suite 500, Durham Judicial Building
201 E. Main Street
Durham, North Carolina 27701
(919) 560-3300

Certificate of Service

I hereby certify that a copy of the foregoing motion has been personally served upon the Office of the District Attorney for the 14th Judicial District, 6th Floor, Durham Judicial Building, 201 E. Main Street, Durham, North Carolina 27701 this _____ day of _____, 1993.

Elaine M. Gordon

records to the defendant.

This _____ day of _____, 1993.

Elaine M. Gordon

Sworn to and subscribed before me
this _____ day of _____, 1993.

Notary Public

My commission expires: _____

STATE OF NORTH CAROLINA
DURHAM COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.

STATE OF NORTH CAROLINA

v.

THOMAS THORNTON

ORDER

Upon consideration of the Defendant's Motion for the Production of Confidential Records and Inspection Thereof by the Court in Camera, the points offered in support thereof, it is hereby

ORDERED that this Motion be and hereby is GRANTED that the Durham Department of Social Services shall produce the requested materials for the in camera inspection of the Court, and that copies of any materials not then revealed to the Defendant shall be placed under seal for appellate review.

This ____ day of _____, 1993.

JUDGE PRESIDING

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA)
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 V)
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 Defendant)

MOTION FOR PHONE BILL RECORDS

NOW COMES the defendant by and through counsel Jean B. Lawson and Susan J. Weigand and moves this court to order Southern Bell to release copies of all phone records and phone bills concerning customer [REDACTED], telephone number [REDACTED], customer code, [REDACTED], [REDACTED], Charlotte, North Carolina to Attorneys Lawson and Weigand. In support of this motion, counsel shows unto the court the following:

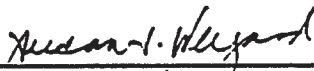
1. That the defendant has been indicted on the charge of first degree murder and felonious child abuse;
2. That the defendant has been accused of abusing [REDACTED];
3. That the state intends to try defendant [REDACTED] for his life;
4. That during the time of the alleged child abuse incident, the defendant was living at [REDACTED], [REDACTED], Charlotte, N.C. with the child and the child's mother, [REDACTED];
5. That based upon the investigation conducted in this case, [REDACTED] will be an essential witness in the trial of this matter;
6. That counsel for the defendant has requested Southern Bell to provide them with copies of [REDACTED] phone bills and records and they were told that they would need a court order to obtain said records;
7. That in order to provide effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, counsel for the defendant needs access to the phone bills and records of [REDACTED].

WHEREFORE, counsel for the defendant prays that the court order Southern Bell to release copies of all phone bills and records concerning [REDACTED].

This the 21 day of September, 1992.



Jean Lawson



Susan J. Weigand
Assistant Public Defender
720 East Fourth Street., Suite 308
Charlotte, NC 28202
Phone: (704) 342-6830

ATTORNEYS FOR [REDACTED]

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
[REDACTED]

STATE OF NORTH CAROLINA)

v)

ORDER

[REDACTED]
Defendant)

THIS CAUSE coming on to be heard and being heard by the undersigned Superior Court Judge; and for good cause shown as detailed in defendant's "Motion for Phone Bill Records;"

IT IS HEREBY ORDERED that:

1. South Bell release copies of phone bills and records concerning [REDACTED], [REDACTED], Customer code [REDACTED] Charlotte, N.C. to attorneys Jean B. Lawson and Susan J. Weigand.

This the 21st day of September, 1992..

[REDACTED]
Superior Court Judge

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
[REDACTED]

STATE OF NORTH CAROLINA)
)
 v.)
)
 [REDACTED])
 _____)

EX PARTE MOTION FOR ORDER
FOR PRODUCTION OF RECORDS
OF DOROTHEA DIX HOSPITAL

NOW COMES the Defendant, by and through counsel, and respectfully requests that the Court order that all records of and pertaining to the Defendant in the possession of Dorothea Dix Hospital, Raleigh, North Carolina, be sent to the Defendant's attorney and that the State of North Carolina be required in the order for production of records to pay the costs of copying the records.

In support of this Motion, the undersigned shows unto the Court as follows:

1. The Defendant is an indigent citizen who is charged in this case with First Degree Murder.
2. Based upon interviews with the Defendant and upon information gathered in investigation of his prior history, the undersigned has determined that the Defendant may have been examined and/or treated at Dorothea Dix Hospital at some time in the past. The information in those records, if such exist, is critical to determination of the defendant's mental status, both prior to trial and at the time of the offense.
3. The undersigned attorney is informed, and believes, that Dorothea Dix Hospital has a policy that its staff not copy records of patients unless payment is made in advance for the copying. The defendant is an indigent citizen, represented by court-appointed counsel, who does not have the means to accommodate the hospital's policy. The only way the Defendant can assure that the Hospital provides the records is to have the Court order that the bill for copying will be paid by the State.

This Motion is made pursuant to the authority of Ake v. Oklahoma, 470 U.S. 68, 84 L. Ed. 2d. 53 (1985), State v. Ballard, 333 NC 515 (1993), State v. Bates, 333 NC 523 (1993), and NCGS Section 7A-450(b), 451 and 454.

This the _____ day of October, 1994.

Jean B. Lawson
PO Box 472691
Charlotte, NC 28247
(704) 543-1785

ATTORNEY FOR THE DEFENDANT

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
[REDACTED]

STATE OF NORTH CAROLINA)
)
 v.)
)
 [REDACTED])
 _____)

EX PARTE ORDER
FOR PRODUCTION OF RECORDS
OF DOROTHEA DIX HOSPITAL

THIS MATTER came on before the undersigned Judge presiding in the Superior Court for Mecklenburg County on the written ex parte Motion of the Defendant for funds to assist in the defense of this case. Based upon matters of record and upon the Motion, the Court finds as fact:

1. The Defendant is indigent and is charged in this case with First Degree Murder. The Defendant's date of birth is 1/1/60. His attorney is Jean B. Lawson, PO Box 472691, Charlotte, NC 28247, (704) 543-1785.
2. The Defendant's attorney is entitled to copies of all records of Dorothea Dix Hospital pertaining to the defendant in order to prepare her defense.
3. Any costs of copying records of Dorothea Dix Hospital pertaining to the Defendant should be paid by the State of North Carolina.

Based upon the foregoing Findings of Fact, the Court finds as fact and concludes, as a matter of law, [pursuant to the authority of Ake v. Oklahoma, 470 U.S. 68, 84 L. Ed. 2d. 53 (1985), State v. Ballard, 333 NC 515 (1993), State v. Bates, 333 NC 523 (1993), and NCGS Section 7A-450(b), 451 and 454)], that the defendant's counsel is entitled to have copies of the records of Dorothea Dix Hospital pertaining to the Defendant, at the expense of the State. The Court further concludes that the Defendant's Motion for copies of the Dorothea Dix Hospital records and this Order should be sealed in the file and preserved for appellate review.

It is therefore ORDERED, ADJUDGED and DECREED that:

1. Dorothea Dix Hospital, its employees and agents, will furnish a copy of the entire record of the hospital, including but not limited to all nursing notes, progress records, reports of evaluations, bills, correspondence, and test results, to the Defendant's attorney whose name and address is listed in this order.
2. The State of North Carolina will pay the costs of the

2. The State of North Carolina will pay the costs of the copying these records inasmuch as they are a reasonably necessary cost of the defense of this case.

3. The Defendant's ex parte Motion for these records and funds and this Order will be sealed in the Court file and retained for appellate review.

This the _____ day of October, 1994.

Superior Court Judge Presiding