# DISCOVERY IN DISTRICT COURT

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In the eyes of many criminal defense attorneys, criminal trials in district courts in North Carolina remain trials by ambush, a tactic that was abandoned years ago in civil cases with the adoption of the North Carolina Rules of Civil Procedure, and in Superior Court criminal cases by the enactment of rules governing discovery. In fairness, prosecutors may also feel sandbagged by district court practices where there is no reciprocal discovery or disclosure of affirmative defenses, and where there is limited or no statutory requirement for the filing of pretrial motions.

Many times, the criminal defense attorney feels that a District Court trial is nothing more than a practice trial, with the real game being played in a Superior Court jury trial. However, even when a case is appealed for trial *de novo*, the defendant continues to be hamstrung by the lack of discovery.

As defense attorneys, we have all heard the mantra "there is no discovery in District Court." This simply is not true. Discovery is alive and well in District Court. You simply have to know how to get it. This paper reviews various avenues to obtain discovery in misdemeanor cases where original jurisdiction lies in District Court. It is beyond the scope of this paper to address the type of material subject to constitutional discovery, or the sanctions for not providing discovery.

## I. NO COMMON LAW RIGHT TO DISCOVERY

In North Carolina, there is no common law right to discovery in criminal cases. *State v. Hardy*, 293 N.C. 105 (1977). Discovery must therefore be obtained by other methods.

## II. DISCOVERY STATUTES

North Carolina's discovery statutes, N.C. Gen. Stat. § 15A-901 *et seq.*, apply only to cases having original jurisdiction in Superior Court. These statutes therefore do not apply to misdemeanor cases with original jurisdiction in District Court, or to appeal of misdemeanor cases from District Court to Superior Court. *State v. Fuller*, 176 N.C. App. 104, 107-108 (2006).

An important distinction between statutory discovery and constitutional discovery, as discussed below, is that statutory discovery must be provided pretrial, while constitutional discovery may usually be provided during trial. For those of you expecting pretrial discovery in District Court, forget it. Don't get spoiled by statutory discovery and expect similar treatment in District Court.

## III. OPEN FILE DISCOVERY

Although there is no statutory right to discovery in District Court, many prosecutors have open file discovery. Such open file discovery does not obviate the need

to make the necessary request for discovery in order to preserve any rights that would be lost by not making a formal request for discovery. *State v. Abbott*, 320 N.C. 475 (1987).

In Mecklenburg County, open file in district court encompasses far less information than would be found in the prosecutor's file for a felony case. For example, police reports are often not included in the district attorney's files, but are instead brought to court by the police officer.

The prosecutors in Mecklenburg County also treat domestic violence and non-domestic violence cases differently with respect to an open file policy. If the defendant indicates he wishes to plead not guilty to a domestic violence charge, the policy is to "close" the file at that time.

Open file discovery should be distinguished from access to the court file itself, which contains the warrant, arrest affidavit and other information that by law must be filed with the court. There is a continuing issue with domestic violence cases in Mecklenburg County where the District Attorney will move arrest affidavits from the court file into the district attorneys' file.

## IV. FEDERAL CONSTITUTIONAL RIGHT TO DISCOVERY

There is no general constitutional right to discovery in criminal cases. *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L.Ed.2d 30 (1977); *State v. Brown*, 306 N.C. 151 (1982). However, the State has a constitutional duty under the Due Process Clause of the United States Constitution to disclose to the defendant any material evidence that is favorable to the defense for trial or a sentencing hearing. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963); *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976); *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985); *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d. 490 (1995).

In *Agurs*, the Court found that due process is concerned with the effect which the suppressed evidence might have on the outcome of the trial rather than with aiding the defense in preparation of its case; therefore, the prosecutor is constitutionally required to reveal the evidence only at trial. Favorable evidence includes evidence that tends to negate guilt, mitigate an offense or sentence, *or* impeach the truthfulness of a witness or reliability of evidence. The requirement that evidence be disclosed which is material and favorable to the defendant is based on the fact that nondisclosure undermines confidence in the outcome of the trial. *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985), This standard of materiality applies regardless of whether the defense makes a specific request for certain material, a general request for discoverable material, or no request at all for the disclosure of favorable evidence. Although the Court's opinion in *Bagley* was a plurality opinion, a majority adopted this approach in *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d. 490 (1995).

Knowledge of materially favorable evidence in law enforcement files or known to law enforcement officers is imputed to the prosecutor. Therefore, a constitutional violation can occur even when the prosecutor is unaware of evidence in law enforcement files. *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d. 490 (1995); *State v. Smith*, 337 N.C. 658 (1994). This situation often arises where the District Attorney has not had adequate time to prepare a case prior to trial in District Court. An officer may testify at trial that a second officer was also present at the crime scene and interviewed

witnesses. Or a civilian witness may testify that he or she talked to an officer who was not subpoenaed to testify at trial. Finally, an officer may testify that he or she talked to a witness who was not subpoenaed by the State to testify at trial. In such cases, an immediate objection should be made for the court to consider whether the evidence whose existence is being disclosed at trial is exculpatory and material.

favorable material evidence must only be disclosed in time for its effective use at trial. *State v. Taylor*, 344 N.C. 31 (1996). This may include disclosure at trial. *State v. Shedd*, 117 N.C. App. 122 (1994) (no *Brady* violation when state provided evidence at trial). Because no request must be made for disclosure of favorable evidence, the State cannot be heard to complain that the defendant did not ask for the information prior to trial. On the other hand, the defendant cannot be heard to complain when such material is provided at trial.

There is no requirement that the evidence be actually admissible at trial where such information may lead to discovery of admissible exculpatory evidence. *State v. Potts*, 334 N.C. 575 (1993). This requirement may be of little value in District Court where the evidence will often be uncovered during trial, and the chances of getting a continuance to use the discovery to obtain additional evidence for trial are slim. However, additional investigation based upon the newly discovered information may be useful if the matter is appealed for trial *de novo* in Superior Court.

The defendant is entitled to material exculpatory evidence, but is not constitutionally entitled to inculpatory evidence, even when specifically requested. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), *State v. Adcock*, 310 N.C. 1 (1984). For this reason, there is no constitutional requirement that the State disclose the evidence against the defendant, even when such disclosure would help resolve the case by way of plea.

The obligation to disclose exculpatory evidence applies only to evidence that is unknown to the defendant or evidence to which the defendant does not have access. *State v. Wise*, 326 N.C. 421 (1990) (no *Brady* violation where defendant knew of medical examination of rape victim and the results of the examination, and could have subpoenaed the examining physician to testify). The ability to interview potential witnesses therefore has a bearing on whether information is subject to discovery. If a police officer or witness refuses to talk with the defense attorney or investigator, such information is clearly not accessible to a defendant. However, the failure of the defense attorney to attempt to speak to or subpoena a witness probably does not by itself render such witnesses inaccessible. Likewise, the problem of seeing the client for the first time on the day of trial, by itself, would not render witnesses about which the defendant has actual knowledge inaccessible. In cases where the defense attorney has been unable to gain access to witnesses, the attorney should document the reason for not having such information at the time of trial. This documentation may provide a basis for a subsequent motion for discovery, as well as protect the defense counsel from claims of ineffective assistance of counsel for failing to locate *Brady* material.

The constitutional right to discovery applies to District Court criminal trials in North Carolina. *State v. Cornett*, 177 N.C. App. 452, 455-456 (2006) *disc. rev. denied*, 361 N.C. 172 (2006). In *Cornett*, the defendant was convicted of driving while impaired. Defendant filed a pre-trial motion for discovery concerning the operation of the Intoxilyzer in Superior Court. The motion was denied. The Court noted that there was

no statutory right to discovery in this case. However, there was a Constitutional right to discovery of exculpatory evidence. In this case, defendant had failed to argue that he was denied access to exculpatory information under *Brady*.

*Cornett* does not specifically address discovery in District Court. Instead, this case addresses discovery in Superior Court where statutory discovery does not apply because the matter was in Superior Court for trial *de novo* of a misdemeanor. However, the reasoning of *Cornett* should apply to district court cases which also are misdemeanors that are not covered by the statutory discovery.

The Due Process right to discovery includes access to the defendant's own statements. *Clewis v. Texas*, 386 U.S. 707, 712 n.8, 87 S. Ct. 1338, 18 L. Ed. 2d 423 (1967). On the other hand access to statements of other witnesses that falls outside the purview of *Brady* rests on the sixth amendment right of confrontation and compulsory process. *Palermo v. United States*, 360 U.S. 343, 79 S. Ct. 1217, 3 L.Ed.2d 1287 (1959). However, a defendant does not have a constitutional right to access to the statements of a witness before trial. *State v. Harris*, 323 N.C. 112 (1988).

## V. DISCOVERY UNDER NORTH CAROLINA CONSTITUTION

*Brady* applies only to exculpatory evidence. Therefore, failure to disclose evidence that is not apparently exculpatory would not violate due process. *Weatherford v. Bursey*, 429 U.S. 545, 51 L.Ed.2d 30 (1977). Nevertheless, our State Courts have recognized that such evidence may be subject to discovery under N.C. Const. Art I, § 19. *State v. Cunningham*, 108 N.C. App. 185 (1992). As a result, the defendant has the right to an independent analysis of controlled substances where question may arise as to whether such information would be inculpatory or exculpatory. *See also State v. Canady*, 355 N.C. 242, 253-254 (2002) (defendant had right under N.C. Const. Art. I §§ 19, 23 to prepare a valid defense, which ensures the reliability of evidence against the defendant by having access to underlying data concluding the bullets were from a gun recovered after the crime had occurred where the original test fired bullets were lost and the gun was not retested); *State v. Brown*, 306 N.C. 151, 163-64, *cert. denied*, 459 U.S. 1080, 74 L.Ed.2d 642 (1982) (denial of access to crime scene that was sealed off from the time the crime was committed until the time of trial where State relied heavily on evidence obtained from crime scene violated due process); *State v. Jones*, 85 N.C. App. 56, 65-66, *disc. rev. denied*, 320 N.C. 173 (1987) (due process requires access to independent testing of drugs). The fact that the defendant now has the right to independent testing of a gun and controlled substances under N.C. Gen. Stat. § 15A-903(a)(1) does not negate these constitutional protections, especially in district court where statutory discovery does not apply.

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, 254S.E.2d 14 (1979); *see also* N.C. Gen. Stat. § 8C-1, Rule 609 (allowing impeachment of witness by prior conviction or juvenile adjudication). 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 was necessary to use force to defend himself or herself.

Because our courts have given greater rights under the State Constitution than are required under the Federal Constitution, it is important to base any request for discovery on both the State and Federal Constitutions, especially when the information sought may not be clearly exculpatory.

## VI. THE DEFENSE ATTORNEY'S DUTY TO INVESTIGATE

There is no constitutional duty to disclose evidence when the defendant knows the existence of the evidence. *State v. Wise*, 326 N.C. 421 (1986) (defendant knew of doctor who had first examined state's witness and could have subpoenaed doctor for trial to determine if there was evidence favorable to defendant). Although no North Carolina cases specifically address the issue, this rule also would probably apply to information the defense counsel could have obtained upon reasonable investigation.

This rule has special implications in Superior Court trials *de novo* of misdemeanor appeals. In such cases, the attorney is imputed to have knowledge of the evidence presented in the district court trial. *State v. Simmons*, 59 N.C. App. 287 (1982). Because the defense attorney is imputed to have knowledge of what occurred in District Court, it is important for the attorney handling the case in Superior Court to discuss the matter with the attorney who handled the case in District Court. In the appropriate case the attorney handling the case in Superior Court may wish to file a motion *in limine* giving notice of what evidence was presented in District Court in order preserve and arguments for *Brady* discovery in Superior Court.

The defendant generally does not have the right to compel a witness to submit to an interview as part of a pretrial investigation. *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). Therefore, the defendant may have the constitutional right to a witness statement on the ground the witness has failed to submit to an interview, making such information inaccessible to the defendant.

There also is no right to disclosure of the identity of witnesses pretrial. *State v. Alston*, 307 N.C. 321 (1983). However, if such evidence is material and favorable to the defendant, due process requires the State to disclose it to defense counsel at trial. *State v. Jackson*, 309 N.C. 26, 33-34 (N.C. 1983) *citing State v. Hardy*, 293 N.C. 105, (1977); *United States v. Agurs*, 427 U.S. 97, 49 L.Ed. 2d 342 (1976); *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215 (1963). Again, if such information is not disclosed pretrial, the ability of the defense attorney to obtain such information may be impaired. This would give additional grounds to obtain exculpatory information concerning statements of the witnesses under *Brady*.

## VII. DISTRICT COURT TRIAL

In *State v. Cornett*, 177 N.C. App. 452, 455-456 (2006) *disc. rev. denied*, 361 N.C. 172 (2006), the defendant contended that the failure of the trial court to grant a pretrial motion to compel discovery violated his rights under the North Carolina

Constitution to confront adverse witnesses and prepare his defense. The Court first noted that there was no statutory right to discovery in criminal cases originating in district court. N.C. Gen. Stat. § 15A-901 *et seq.*. The court noted that the Official Commentary to this section states:

> As cases in district court are tried before the judge, and usually on a fairly expeditious basis, the Commission decided there was no need at present to provide for discovery procedures prior to trial in district court. As misdemeanors tried in superior court on trial de novo have already had a full trial in district court, there is little reason for requiring discovery after that trial and prior to the new trial in superior court.

The Court noted however, that while the constitutional right to discovery of exculpatory evidence would apply, the defendant had not alleged he was denied any such material. *Id.*, at 455-456.

Our Supreme Court has held that a trial in District Court is itself a form of discovery. In *State v. Brooks,* 287 N.C. 392 (1975), the Court considered whether a transcript of a District Court proceeding is needed for an effective appeal for trial *de novo* in Superior Court. The Court noted that trial *de novo* is not an appeal on the record, but a completely new determination of guilt or innocence. At a proceeding in District Court, the defendant has the opportunity to learn about the prosecution's case and need not reveal his own, while a finding of guilty in District Court amounts to nothing more than an offer of settlement in the case or the chance to have the matter considered anew by a judge and jury on the record. The Court further noted that a District Court trial amounts to "free" criminal discovery. *State v. Brooks*, 287 N.C. 392, 406 (1975).

The flaw in the use of a District Court trial for discovery is that the State is not bound to the evidence presented in District Court or even the same theory of the case when the matter is tried *de novo* in Superior Court. For this reason, the defendant may be confronted with a new battery of witnesses or new evidence for which the District Court trial did provide discovery. In, because District Court is not a court of record, witnesses can fashion their testimony in Superior Court based upon what occurred in district court and not be subject to impeachment based upon prior inconsistent statements made in District Court. Finally, even though the testimony in District Court is under oath, it is not on the record, and therefore is not admissible for substantive purposes under Rule 804 as former testimony under oath in the event the witness is not available at the time of trial in Superior Court.

On the other hand, trial counsel is imputed with knowledge based upon the District Court proceeding as to what evidence the State can legally introduce at trial in Superior Court. In *State v. Fuller*, 176 N.C. App. 104, 107-108 (2006), the defendant plead guilty to the offense of impaired driving in district court, and appealed to superior court. The statutory right to pretrial discovery therefore did not apply. Upon conviction in Superior Court following a jury trial, the defendant claimed the trial court erred by denying her motion to prevent the state from calling an expert witness. In addition to noting all statutory requirements for introduction of such evidence were met, the court noted that the defendant was on notice that such evidence might be presented at trial (in

this case extrapolation evidence), because such evidence had previously been accepted as admissible at trial.

Information that would otherwise be privileged as work product may become discoverable under *Brady* where a witness has testified. *State v. Bruce*, 315 N.C. 273 (1985). For example, if an officer testifies about interviews of witnesses, the State waives any work product privilege with respect to the matters covered in the testimony. *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 (1977). Likewise, a police officer's notes may become discoverable during trial if they contain statements adopted by a testifying witness. *Goldberg v. United States*, 425 U.S. 94, 96 S. Ct. 1338, 47 L. Ed. 2d 603 (1976) (statements taken during investigation that were read back to witness for correction are adopted statement); *State v. Shedd*, 117 N.C. App. 122 (1994) (oral statement of witness written by police but not adopted by witness does not constitute written statement; court did not address whether statement constituted oral statement of witness). For this reason, a District Court trial may be a useful means to obtain evidence that would otherwise only be subject to discovery during a Superior Court trial.

## VIII. RULES OF EVIDENCE

If a case is going to trial in District Court, the Rules of Evidence, N.C. Gen. Stat. § 8C-1, apply. These Rules of Evidence provide limited situations where evidence must be disclosed before or during trial. The following is a list of some means for obtaining information during trial under the Rules of Evidence.

If part of a writing or recorded statement is admitted into evidence, the rest of the document may be admitted where justice requires. Rule 106. This rule applies not only to when the writing itself is being introduced into evidence, but also to when parts of the writing are read in court This rule of completeness also applies when the other writing contains a contradictory statement. See Rule 102(a) (interpretation of rules for evidence to insure fairness of the administration of the law of evidence to the end that the truth may be ascertained). Under the language of this rule, the State must disclose to the defendant the entire content of the writing when it is attempting to introduce a portion of the writing into evidence, in order for the defendant to determine if other parts of the writing should also be introduced into evidence.

When a police officer testifies, he must have personal knowledge of the facts about which he or she testifies. Rule 602. The police report is evidence of such knowledge, but is not admissible as substantive evidence pursuant to Rule 803(8). If the police report differs from the live testimony, this may lead to questions as to personal knowledge. This rule may be used as a discovery tool in conjunction with Rule 612(a). Basically, if the officer refreshed his memory with the police report, the defendant is entitled to see the report. In addition, the defendant and can attack the officer's personal knowledge by showing that the content of the report varies from the testimony given at trial.

The officer and civilian witnesses often use police reports to refresh their memory. If used at trial under Rule 612(a), the opposing party is entitled to have the document produced at trial. If the witness uses a document to refresh his memory before trial, the court may at its discretion order the documents produced in court. Rule 612(b). If the witness' memory is refreshed, opposing counsel had the right to cross examine

from the document and to introduce into evidence portions of the document that relate to the testimony of the witness. For this reason, the document must be available for inspection. Rule 612(c). If the document is not produced in a criminal trial, the trial court must strike the testimony or declare a mistrial. The easiest way to invoke this rule is to simply ask the witness if they reviewed any documents in preparation for trial, and if so what documents they reviewed.

If a prior statement of a witness is used for examination, it must be made available to opposing counsel. Rule 613. This is a common issue when there is a recanting witness the State seeks to impeach with a prior statement. The best way to address this issue is simply to ask if the witness made any prior statements, and whether she read these statements prior to trial.

A prior inconsistent statement that is otherwise inadmissible as being obtained in violation of the criminal defendant's constitutional rights can be used to impeach a testifying criminal defendant. *Harris v. New York*, 401 U.S. 222, 226, 91 S.Ct. 643, 646, 28 L. Ed. 2d 1, 5 (1971). Such statements are not substantive evidence, but impeachment evidence. *Michigan v. Harvey*, 494 U.S. 344, 110 S. Ct. 1176, 108 L.Ed. 2d 293 (1990).

Because a prior inconsistent statement is not substantive evidence, the State cannot call a recanting witness solely for the purpose of impeachment with the inconsistent statement. However, the State may attempt to claim surprise as to the testimony, and therefore attempt to impeach the witness on this ground. The best way around this is to announce prior to the witness testifying any basis to believe the witness has recanted, so that the State cannot claim surprise.

If a police officer is not testifying as an expert witness, inferences from his testimony must be based upon his own perception. Rule 702. The lay witness cannot rely upon the observations of other officers, or even the statement of the victim in concluding what has occurred.

Domestic violence officers have special training to recognize domestic violence and to handle such cases. They are arguably experts in this area, and the testimony they give as to whether an act of domestic violence occurred is arguably expert testimony to that effect. Under Rule 703, the basis of the opinion of an expert must be disclosed at or before trial upon request of the opposing part. The expert must be subject to cross examination about the facts that the opinion is based upon, which would include police reports, witness statements, etc. Therefore, when the officer testifies that in his opinion an assault occurred, the State must disclose the evidence that is the basis for that statement.

If a witness gives a statement to the police and initialed it, it is arguably an adopted statement. If the witness now testifies she cannot fully and accurately about the incident, the statement may be read into evidence. Rule 803(5). If the State uses this rule to get the statement before the factfinder, the rule of completeness requires other relevant portions of the adopted sections of the writing also be admitted.

While matters observed and recorded by police are not admissible as a public record exception to the hearsay rule, Rule 803(8)(B) nor are the conclusions of the police pursuant to Rule 803(8)(C), this applies only to police or law enforcement officers. Statements made by a complaining witness in obtaining a warrant are not subject to this limitation. Also, if the statement in the police report is introduced by the defendant to be used against the State, it is admissible. Rule 803(8)(C). This rule does not create a

discovery exception. However, if the police report contains statements inconsistent with live testimony, the rule provides a basis for impeachment using the report as an inconsistent statement.

The Rules of Evidence in certain cases require the exclusion of evidence that has not been disclosed pretrial. When the State seeks to impeach its own witness with a prior inconsistent statement pursuant to Rule 607, the better practice is for the trial court to make preliminary inquiry as to whether the prosecutor was taken by surprise before allowing the State to impeach a recanting witness with a prior inconsistent statement. *State v. Bell*, 87 N.C. App. 626 (1987). Therefore, disclosure to the State that the witness is recanting will serve to limit the introduction of such evidence. The State must give sufficient written notice of intent to use convictions more than 10 years old to impeach a witness pursuant to Rule 609 in order to allow the adverse party a fair opportunity to contest the use of such evidence. Finally, where the State seeks to introduce hearsay evidence under the residual hearsay rules, Rule 803(24) or 804(b)(5), the State must give written notice. *State v. Smith*, 315 N.C. 76 (1985); *State v. Triplett*, 316 N.C. 1 (1986). On the other hand, there is no advance notice required for admission of 404(b) evidence. *State v. Walters*, 357 N.C. 68 (2003).

## IX. TRIAL COURT'S INHERENT AUTHORITY TO ORDER DISCOVERY

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 a third party's possession were not discoverable as a matter of right, the court had authority to require disclosure in interests of justice). However, a judge has no inherent authority order pretrial discovery of evidence where the disclosure such evidence is specifically prohibited by law. *State v. Hardy*, 293 N.C. 105, 125 (1977).

The inherent authority to order discovery may change as a trial progresses. For example, information that is not subject to discovery pretrial may become subject to discovery during trial. Therefore, while a trial court has no inherent authority to order disclosure of statements of a state's witnesses before trial when such disclosure is not mandated by N.C. Gen. Stat. §§ 15A-904 and 15A-903(f)(1), such statements may be discoverable upon testimony of the witness at trial. *State v. Harris*, 323 N.C. 112 (1988).

## X. PUBLIC RECORDS

To the extent that the substance of a pretrial statement is incorporated into affidavits used to support the state's application for search warrants of defendant's residence, which are a public record, a defendant could have examined them before trial to discover the substance of the statements without the need to resort to discovery. *State v. Jackson*, 309 N.C. 26, 33-34 (1983)

## XI. STATUTORY RIGHTS OTHER THAN DISCOVERY STATUTES

Certain statutes create a right to access to certain information. For example, N.C. Gen. Stat. § 15A-282, which addresses nontestimonial identification procedures, states that

> A person who has been the subject of nontestimonial identification procedures or his attorney must be provided with a copy of any reports of test results as soon as the reports are available.

An attorney of record is entitled to obtain a copy of his or her client's own driving and criminal record. N.C. Gen. Stat. § 114-10.1(c). An attorney of record is also entitled to obtain information of relevance to a criminal proceeding. *Id.* This implies that the attorney may obtain the criminal records of adverse witnesses, because such information may be used under Rule 609 to impeach a witness with a prior conviction. Such information is usually not available except through a local law enforcement agency. Because such information is therefore exclusively within the hands of the state, it therefore should be subject to *Brady* discovery.

Records of criminal process must be maintained by the clerk of court N.C. Gen. Stat. § 15A-301(a)(1). While the statute does not define criminal process, it is clear from the language of Chapter 15A, subchapter III Criminal Process, Article 17, that that criminal process encompasses citations (N.C. Gen. Stat. § 15A-302), Criminal Summons (N.C. Gen. Stat. § 15A-303), warrants for arrest (N.C. Gen. Stat. § 15A-304) and orders for arrest (N.C. Gen. Stat. § 15A-305). A citation is a directive issued by a law enforcement officer or other person authorized by statute directing a person to appear in court and answer a misdemeanor or infraction charge. N.C. Gen. Stat. § 15A-302(a). A criminal summons is issued by a person authorized to issue orders for arrest, and directs a person charged with a crime to appear in court. N.C. Gen. Stat. § 15A-303. A criminal summons may be issued only upon a finding of probable cause, and the finding of probable cause must appear in the record. N.C. Gen. Stat. § 15A-303(c). The finding of probable cause must be the same as for an order for arrest. *Id.* A warrant for arrest is an order directing the person accused be arrested based upon a showing of probable cause supported by oath or affirmation. N.C. Gen. Stat. § 15A-304(a). A judicial official may issue a warrant for arrest only upon making an independent judicial determination that there is probable cause to believe a crime has been committed and that the person to be arrested has committed the crime. N.C. Gen. Stat. § 15A-304(d). This information must be one or more of the following: an affidavit, oral testimony under oath or affirmation before the issuing official, or oral testimony under oath or affirmation presented by a sworn law enforcement officer by means of an audio and video transmission. *Id.* An Order for Arrest is issued by a judicial official upon grand jury indictment, failure to appear, violation of probation, or when it is necessary to take the defendant into custody. N.C. Gen. Stat. § 15A-305. Based upon this statute, an affidavit should be in the court file for criminal summons and warrants for arrest.

Statements under oath also exist for search warrants (N.C. Gen. Stat. § 15A-244), and where an individual is arrested without a warrant and brought before a magistrate. N.C. Gen. Stat. § 15A-511(c). When a magistrate finds probable cause to arrest a person, the magistrate's order and supporting affidavits must be filed with the office of the clerk, N.C. Gen. Stat. § 15A-511(e)(4), and are therefore part of the court file.

## XII. RULES OF PROFESSIONAL CONDUCT

N.C.A.C. Title 27, Chapter 2, Rule 3.8. Special Responsibilities of a Prosecutor, states

> The prosecutor in a criminal case shall:
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> . . .
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> (d) after reasonably diligent inquiry, make timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure or court opinions including all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
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> . . .

This rule imposes an affirmative duty on the prosecutor to comply with discovery in District and Superior Court.

**CONCLUSION**

*Cornett* has resurrected constitutional discovery in District Court criminal trials in North Carolina. When combined with other avenues of discovery, the criminal defense attorney now has access to a broad variety of information for District Court trials, and of even broader scope for the trial of misdemeanor appeals in Superior Court.