

DISCOVERY IN CRIMINAL CASES

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I. **Related Materials.** The NORTH CAROLINA DEFENDER MANUAL, Ch. 4, Discovery (2d ed. 2013), available online at <http://defendermanuals.sog.unc.edu/pretrial/4-discovery> provides a comprehensive resource on discovery. I gratefully acknowledge the incorporation in whole or in part of excerpts from this publication. Additional information about discovery is provided in [Defendant's Right to Third-Party Confidential Records](#) in this Benchbook.

II. Defendant's Discovery Rights.

A. Statutory Rights Under Article 48.

1. **Generally.** The principal discovery statutes in North Carolina are G.S. 15A-901 through G.S. 15A-910 of Article 48 (Discovery in Superior Court), Chapter 15A. They were first enacted in 1973 as part of Chapter 15A, the Criminal Procedure Act, and the basic approach remained largely the same until 2004, when the General Assembly significantly revised the statutes. In reviewing North Carolina cases on discovery, readers should be careful to note whether they were decided under the former discovery statutes or the current ones. The sections below include cases decided before enactment of the 2004 changes if the cases remain good law or provide a useful contrast to the law now in effect.

The statutes in Article 48 only apply to cases within the original jurisdiction of superior court (typically, felonies and misdemeanors joined to felonies for trial under G.S. 7A-271(a)(3)). They do not apply to misdemeanors appealed from district court to superior court for trial de novo. G.S. 15A-901; *State v. Cornett*, 177 N.C. App. 452, 455 (2006).

2. **Procedural Issues.**

- a. **Written Request Generally Required.** To obtain discovery of the information covered by Article 48, see Sections II.A.3. (discussing covered files) and II.A.IV. (discussing covered information), both below, the defendant must serve the prosecutor with a written request for voluntary discovery, unless an exception, discussed below, applies. G.S. 15A-902(a).

Also, a written request is ordinarily a prerequisite to a motion to compel discovery. See Section II.A.2.d., below (discussing motions to compel). A trial court may hear a motion to compel discovery by stipulation of the parties or for good cause

shown, G.S. 15A-902(f), but the defendant does not have the right to be heard on a motion to compel discovery without a written request. G.S. 15A-902(a).

In some counties, the prosecutor's office may have a standing policy of providing discovery to the defense without a written request. However, if the defendant does not make a written request for discovery and the prosecution fails to turn over materials to which the defendant is entitled, the defendant may not be able to complain at trial. See *State v. Abbott*, 320 N.C. 475, 482 (1987) (prosecutor not barred from using defendant's statement at trial even though it was discoverable under statute and not produced before trial; open-file policy no substitute for formal request and motion). *But cf.* *State v. Brown*, 177 N.C. App. 177, 183-87 (2006) (in absence of written request by defense or written agreement, voluntary disclosure by prosecution is not deemed to be under court order; however, court noted that some cases have applied requirements for court-ordered disclosure when prosecution voluntarily had provided witness list to defense).

- b. When Written Request Not Required.** If the parties have entered into a written agreement or written stipulation to exchange discovery, counsel need not make a formal written request for statutory discovery. G.S. 15A-902(a) (written request not required if parties agree in writing to comply voluntarily with discovery provisions); see also *State v. Flint*, 199 N.C. App. 709, 714-15 (2009) (recognizing that written agreement may obviate need for motion for discovery but finding no evidence of agreement). When this statutory provision was enacted in 2004, one of its purposes was to clarify the enforceability of standing agreements, such as in Mecklenburg County, where the public defender's office and the prosecutor's office entered into an agreement to exchange discovery without a written request. John Rubin, *2004 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2004/06, at 3-4 (Oct. 2004), available at <http://www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200406.pdf>.

If a defendant makes a written request for discovery (and thereafter the prosecution either voluntarily provides discovery or it is ordered by the court), the prosecution is entitled on written request to reciprocal discovery. See Section III., below (discussing the State's right to discovery under Article 48).

- c. Timing of Request.** Under G.S. 15A-902(d), a defendant must serve on the prosecutor a request for statutory discovery as follows:
- If the defendant is represented by counsel at the time of a probable cause hearing, no later than ten working days after the hearing is held or waived.
 - If the defendant is not represented by counsel at the probable cause hearing, or is indicted (or consents to a bill of information) before a probable cause hearing occurs,

the request must be made no later than ten working days after appointment of counsel or service of the indictment (or consent to a bill of information), whichever is later.

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

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

If the prosecution refuses to provide voluntary discovery, or does not respond at all, the defendant must move for a court order to trigger the State's discovery obligations. *State v. Keaton*, 61 N.C. App. 279, 282 (1983) (when voluntary discovery does not occur, defendant has burden to make motion to compel before State's duty to provide statutory discovery arises).

If the prosecution has agreed to comply with a discovery request, a defendant is not statutorily required to file a motion for discovery. Once the prosecution agrees to a discovery request, discovery pursuant to that agreement is deemed to have been made under a court order, and the defendant may obtain sanctions if the State fails to disclose discoverable evidence. See G.S. 15A-902(b); G.S. 15A-903(b); *State v. Anderson*, 303 N.C. 185, 192 (1981) (under previous statutory procedures, which are largely the same, if prosecution agrees to provide discovery in response to request for statutory discovery, prosecution assumes "the duty fully to disclose all of those items which could be obtained by court order"), *overruled in part on other grounds by State v. Shank*, 322 N.C. 243 (1988).

As with other motions, the defendant must obtain a ruling on a discovery motion or risk waiver. See *State v. Jones*, 295 N.C. 345, 356-58 (1978) (defendant waived statutory right to discovery by not making any showing in support of motion, not objecting when court found motion abandoned, and not obtaining a ruling on motion).

- e. Time for Production.** The statutes set deadlines for the State to produce certain discovery, including:

- G.S. 15A-903(a)(2) (State must give notice of expert witness and furnish required expert materials within a reasonable time before trial).
- G.S. 15A-903(a)(3) (State must give notice of other witnesses at beginning of jury selection).
- G.S. 15A-905(c)(1)a. (if ordered by court on showing of good cause, State must give notice of rebuttal alibi)

witnesses no later than one week before trial unless parties and court agree to different time frames).

Although the statutes do not set a specific deadline for the State to produce its complete files, which is the bulk of discovery due the defendant, the judge who issues an order granting discovery must set a deadline for a party to provide discovery. G.S. 15A-909 (order granting discovery must specify time, place, and manner of making discovery).

- f. **State's Continuing Duty to Disclose.** If the State agrees to provide discovery in response to a request for statutory discovery or the court orders discovery, the prosecution has a continuing duty to disclose information (as does the defendant in providing discovery to the State). See G.S. 15A-907; *State v. Cook*, 362 N.C. 285, 292 (2008) (recognizing duty and finding violation when State failed to disclose timely the identity and report of expert witness); *State v. Jones*, 296 N.C. 75, 79-80 (1978) (recognizing that prosecution was under continuing duty to disclose once it agreed to provide discovery in response to request, and ordering new trial for violation); *State v. Ellis*, 205 N.C. App. 650, 655 (2010) (recognizing duty).

The prosecution always has a continuing constitutional duty to disclose materially favorable evidence, with or without a request or court order. See discussion in Section II.C.

- g. **Protective Orders.** G.S. 15A-908(a) allows either party to apply ex parte to the court, by written motion, for a protective order protecting information from disclosure for good cause, such as substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment. As a general rule, the State is more likely than the defense to seek a protective order. However, in some circumstances, a defendant may want to consent to a protective order limiting the use or dissemination of information as a condition of obtaining access to the information.

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

3. **Covered Files.** The most significant provision in the discovery statutes is the requirement that the State make available to the defendant "the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant." G.S. 15A-903(a)(1). This section discusses the covered agencies and offices. Section II.A.4. below discusses the information that must be turned over.
- a. **Law Enforcement & Investigatory Agencies.** General discovery principles have obligated prosecutors to provide to the defense discoverable material in their possession *and* to obtain and turn over discoverable material from other agencies involved in the investigation and prosecution of the defendant. The 2004 changes

and subsequent amendments to the discovery statutes not only broadened the materials subject to discovery but also made clearer the obligation of prosecutors to obtain, and involved agencies to provide to prosecutors, information gathered in the investigation and prosecution of the defendant.

G.S. 15A-903(c) provides that law enforcement and investigatory agencies on a timely basis must provide to the prosecutor a copy of their complete files related to a criminal investigation or prosecution. G.S. 15A-903(a)(1)b1., added in 2007 and revised in 2011, further clarified the State's discovery obligation to turn over information obtained by investigatory agencies by defining these agencies as including any entity, "public or private," that obtains information on behalf of a law enforcement agency or prosecutor's office in connection with the investigation or prosecution of the defendant. This provision includes, for example, private laboratories that conduct testing as part of the investigation or prosecution.

For criminal penalties for willful nondisclosure of discovery under certain provisions of G.S. 15A-903, see Section IV.A.3.f., below.

- b. Other Agencies.** In addition to files within the prosecuting attorney's own office that are subject to the obligation to produce, files include any materials obtained from other entities—they need not be generated by the prosecutor's office. The files of state and local law enforcement offices, public and private entities, and other district attorney's offices involved in the investigation or prosecution are likewise subject to the obligation to produce.

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

- *Information that is part of State's file.* Because of sharing arrangements, law enforcement and prosecutorial agencies may have received a broad range of information from other agencies, which are then part of the State's files and must be disclosed. See, e.g., G.S. 7B-307 (requiring that social services departments provide child abuse report to prosecutor's office and that local law enforcement coordinate its investigation with protective services assessment by social services department); G.S. 7B-3100 (authorizing sharing of information about juveniles by various agencies, including departments of social services, schools, and mental health facilities); 10A N.C. ADMIN. CODE 70A.0107 (requiring social services department to allow prosecutor access to case record as needed for prosecutor to carry out responsibilities). If the materials contain confidential information that the prosecutor believes should not be disclosed, the prosecutor may obtain a protective order under G.S. 15A-908 to limit disclosure. See Section II.A.2.g. above (discussing protective orders).

- *Information obtained on behalf of law enforcement or prosecutorial agency.* The State's obligation to disclose applies to materials of an outside agency if that agency obtains information on behalf of a law enforcement or prosecutorial agency and thus meets the definition of "investigatory agency" in G.S. 15A-903(a)(1)b1. *State v. Pendleton*, 175 N.C. App. 230, 232 (2005) (finding that social services department did not act in prosecutorial capacity when it referred matter to police and department employee sat in on interview between defendant and officer).
- c. **State's Duty to Investigate & Obtain Discoverable Information.** Prosecutors must use due diligence to determine whether entities involved in the investigation and prosecution of the defendant have discoverable information. See G.S. 15A-903(a)(1) (making "State" responsible for providing complete files to defendant); *State v. Tuck*, 191 N.C. App. 768, 772–73 (2008) (rejecting argument that prosecutor complied with discovery statute by providing defense with evidence once prosecutor received it; State violates discovery statute if "(1) the law enforcement agency or prosecuting agency was aware of the statement or through due diligence should have been aware of it; and (2) while aware of the statement, the law enforcement agency or prosecuting agency should have reasonably known that the statement related to the charges against defendant yet failed to disclose it"); see also G.S. 15A-910(c) (personal sanctions against prosecutor inappropriate for untimely disclosure of discoverable information in law enforcement and investigatory agency files if prosecutor made reasonably diligent inquiry of agencies and disclosed the responsive materials). *But cf.* *State v. James*, 182 N.C. App. 698, 702 (2007) (State's discovery obligation applies to "all existing evidence known by the State but does not apply to evidence yet-to-be discovered by the State"); *State v. Foushee*, ___ N.C. App. ___, 758 S.E.2d 47, 53 (2014) (State did not violate G.S. 15A-903 by failing to obtain and preserve pawn shop surveillance video of alleged transaction, and video was never in State's possession; statute imposes no duty on the State to create or continue to develop additional documentation regarding an investigation).
4. **Covered Information.** G.S. 15A-903(a)(1)a. defines "file" broadly to include "the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant." This section explores the scope of that definition.
- a. **Defendant's Statements.**
G.S. 15A-903(a)(1)a. requires the State to disclose all statements made by the defendant. In contrast to the pre-2004 statute, which required disclosure of the defendant's statements if relevant, the current statute contains no limitation on the obligation to disclose.
- b. **Codefendants' Statements.**

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

The statutory language requiring disclosure of a codefendant's statements applies whether the co-defendant's statements are kept in the file in the defendant's case or are kept separately. G.S. 15A-903(a)(1)a. expressly defines the term "file" as including "codefendants' statements." The statute also includes "any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant," which presumably includes statements of codefendants obtained in the investigation of the defendant.

- c. **Witnesses' Written or Recorded Statements.** G.S. 15A-903(a)(1)a. requires the State to disclose all statements made by witnesses. The State is required to provide, as part of pretrial discovery, any writing or recording evidencing a witness's statement. *See, e.g., State v. Milligan*, 192 N.C. App. 677, 680 (2008) (recognizing that prosecutor's notes of witness interview are discoverable).
- d. **Witnesses' Oral Statements.** G.S. 15A-903(a)(1)c. requires the State to reduce all oral statements made by witnesses to written or recorded form and disclose them to the defendant except in limited circumstances, described below.

The State meets its discovery obligation by providing to the defense the substance of oral statements made by witnesses. *State v. Rainey*, 198 N.C. App. 427, 438–39 (2009) (G.S. 15A-903 does not have an express substance requirement in its current form, but "case law continues to use a form of the substance requirement for determining the sufficiency of disclosures to a defendant"); *State v. Zamora-Ramos*, 190 N.C. App. 420, 423-24 (2008) (State met its obligation to provide oral statements of informant to defense by providing reports from the dates of each offense, which included notations of officer's meetings with informant after each controlled buy and summary of information told to officer during each meeting). *But cf. State v. Dorman*, ___ N.C. App. ___, 737 S.E.2d 452, 471 (2013) (discovery statutes did not require State to document and disclose conversations between police, prosecutor's office, other agencies, and the victim's family regarding return of victim's remains to family; note that this case appears to be inconsistent with statutory requirement and cases interpreting it and may be limited to circumstances of case).

G.S. 15A-903(a)(1)c. exempts oral statements made to a prosecuting attorney outside an officer's presence from the requirement of being reduced to writing if they do not contain significantly new or different information than the witness's prior statements. *See State v. Small*, 201 N.C. App. 331, 336 (2009) (State did not violate discovery statute by failing to disclose victim's pretrial statement to prosecutor when State disclosed

victim's statement to officers, given on the night of the offense, and victim's subsequent statement to prosecutor did not contain significantly new or different information).

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

The specific inclusion of officer's notes in the discovery statute suggests that the State must preserve the notes for production. See also G.S. 15A-903(c) (requiring law enforcement agencies to provide the prosecutor with their complete files); G.S. 15A-501(6) (to same effect).

- f. **Results of Tests and Examinations and Underlying Data.** G.S. 15A-903(a)(1)a. requires the State to disclose the results of all tests and examinations. See also G.S. 15A-267(a)(1) (right to DNA analysis), discussed below in Section II.B.5.

The statute explicitly requires the State to produce, in addition to the test or examination results, "all other data, calculations, or writings of any kind . . . , including, but not limited to, preliminary test or screening results and bench notes." *Id.* A defendant's right to underlying data and information also rests on the Law of the Land Clause (article 1, section 19) of the North Carolina Constitution. See *State v. Cunningham*, 108 N.C. App. 185, 195–96 (1992) (recognizing state constitutional right so that defendant is in position to meet scientific evidence; ultimate test results did not "enable defendant's counsel to determine what tests were performed and whether the testing was appropriate, or to become familiar with the test procedures").

If the State intends to call an expert to testify to the results of a test or examination, the State must provide the defense with a written report of the expert's opinion. See Section II.A.4.K., below.

- g. **Physical Evidence.** The defendant has the right, with appropriate safeguards, to inspect, examine, and test any physical evidence or sample in the State's possession. See G.S. 15A-903(a)(1)d.; see also G.S. 15A-267(a)(2), (3) (right to certain biological material and complete inventory of physical evidence, discussed below in Section II.B.5.).

In addition to the statutory right to test evidence, a defendant has a due process right to "examine a piece of critical evidence whose nature is subject to varying expert opinion." *State v. Jones*, 85 N.C. App. 56, 65 (1987) (citation omitted). In drug cases, this requirement means that the defendant has a constitutional as well as statutory right to conduct an independent chemical analysis of controlled substances.

Although the defendant has the right to inspect, examine, and test any physical evidence or sample in the State's file, the State may not have an obligation to seek out particular evidence

for testing or perform any particular test. The North Carolina courts have held, for example, that defendants do not have a *constitutional* right to require the State to conduct DNA tests on evidence at the defendant's request. See *State v. Wright*, 210 N.C. App. 52, 59 (2011) (defendant not entitled to a new trial when SBI Crime Lab tested only DNA from toboggan found at crime scene and not hair and fiber lifts; defendant did not argue that State failed to make the lifts available for testing, and one of defendant's previous attorneys requested and received an independent test of the toboggan; no constitutional duty to perform particular tests on evidence); *State v. Ryals*, 179 N.C. App. 733, 737 (2006) (court finds that former discovery statute did not require State to obtain DNA from State's witness and compare it with DNA from hair found on evidence; court also finds no constitutional duty to perform test).

For DNA testing, the North Carolina General Assembly now has mandated that the State conduct DNA tests of biological evidence collected by the State if the defendant requests testing and meets certain conditions. See G.S. 15A-267(c) and Section II.B.5., below.

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

North Carolina courts also have recognized that the defendant under certain circumstances has a constitutional right to inspect a crime scene. See *State v. Brown*, 306 N.C. 151, 163-64 (1982) (violation of due process to deny defense counsel access to crime scene, which police had secured for extended time). However, the State may not have an obligation to preserve a crime scene. *Id.* at 164 (holding that defense has right of access to crime scene should not "be construed to mean that police or prosecution have any obligation to preserve a crime scene for the benefit of a defendant's inspection").

- i. **Defendant's Criminal Record.** A former version of G.S. 15A-903 gave defendants the right to their criminal record. Current G.S. 15A-903 does not contain an explicit provision to that effect. However, G.S. 15A-1340.14(f) retains the right, stating that if a defendant in a felony case requests his or her criminal record as part of a discovery request under G.S. 15A-903, the prosecutor must furnish the defendant's prior criminal record within sufficient time to allow the defendant to determine its accuracy. An attorney who has entered an appearance in a criminal case also has the right to obtain the client's criminal history through the Criminal Information Network of the Department of Public Safety. G.S. 143B-905(c). Defense attorneys do not have access to the network and must request local law enforcement to run the search.

- j. **Witness's Criminal Record.** The discovery statutes do not explicitly cover criminal record information of witnesses. If the State has obtained criminal records, however, they are part of the State's file and must be disclosed to the defense as part of the State's general obligation to disclose its complete files in the case. The State also generally has a constitutional obligation to disclose a witness's criminal record as impeachment evidence. See Section II.C., below (discussing *Brady* material).
- k. **Notice of Witnesses & Expert Reports.** The discovery statutes entitle the defendant to notice of the State's witnesses, both expert and lay. As with obtaining discovery of the State's files, the defendant must make a written request for discovery under G.S. 15A-903 and follow with a written motion if the State does not comply. See *State v. Brown*, 177 N.C. App. 177, 183-86 (2006) (not error for trial court to allow victim's father to testify although not included on State's witness list when defendant did not make request for witness list; court also holds that although some cases require State to abide by witness list it has provided without written request, State may call witness not on list if it has acted in good faith and defendant is not prejudiced); see *generally* Section II.A.2.a., above (discussing the requirement of written notice).
- i. **Expert Witnesses.** Within a reasonable time before trial, the prosecutor must give notice "of any expert witnesses that the State reasonably expects to call as a witness at trial." G.S. 15A-903(a)(2). Each witness must prepare and the State must provide to the defendant a report of the results of any examinations or tests conducted by the expert. *Id.* The State also must provide the expert's credentials, opinion, and underlying basis for that opinion. *Id.*; see also *State v. Cook*, 362 N.C. 285, 292, 294 (2008) (State violated G.S. 15A-903(a)(2) when it gave notice of expert witness five days before trial and provided the witness's report three days before trial; "State's last-minute piecemeal disclosure . . . was not 'within a reasonable time prior to trial'"; trial court abused discretion in denying defendant's request for continuance); *State v. Aguilar-Ocampo*, 219 N.C. App. 417, 421-23 (2012) (State violated discovery statute by failing to disclose identity of translator and State's intent to offer his testimony; because defendant anticipated testimony and fully cross-examined expert, trial court did not abuse discretion in failing to strike testimony); *State v. Moncree*, 188 N.C. App. 221, 227 (2008) (State violated G.S. 15A-903(a)(2) when SBI agent testified as expert witness concerning substance found in defendant's shoe and State did not notify defendant before trial; although State notified defendant about intent to introduce lab reports for substances found elsewhere, substance from defendant's shoe was never sent to lab; harmless error because defendant could have anticipated the evidence); *State v. Blankenship*, 178 N.C. App. 351, 353-56 (2006) (State failed to comply with discovery

statutes when it did not provide sufficient notice to defendant that an SBI agent would testify about methamphetamine manufacture; trial court permitted agent to testify, over defendant's objection, as a fact witness, but State tendered agent as an expert and court of appeals held that agent was an expert; trial court should not have allowed testimony; new trial ordered).

- ii. **Other Witnesses.** At the beginning of jury selection, the prosecutor must provide the defense with a list of the names of all other witnesses that the State reasonably expects to call during trial unless the prosecutor certifies in writing and under seal that disclosure may subject the witnesses or others to harm or coercion or another compelling need exists. G.S. 15A-903(a)(3). The court may allow the State to call lay witnesses not included on the list if the State, in good faith, did not reasonably expect to call them. *Id.* The court also may permit, in the interest of justice, any undisclosed witness to testify. *Id.*; *State v. Brown*, 177 N.C. App. 177, 183-86 (2006) (relying, in part, on good faith exception to allow State to call witness not on witness list when State was unaware of witness until witness approached State on morning of trial and on voir dire witness confirmed State's representation).

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

- 5. **Exceptions.** G.S. 15A-904 limits the State's discovery obligations in certain circumstances. G.S. 15A-904(c) makes clear that the statutory limits do not override the State's duty to comply with federal or state constitutional disclosure requirements. See Sections II.C., II.D., and II.E., below (discussing constitutional discovery rights).
 - a. **Prosecutor's Work Product.** G.S. 15A-904(a) provides that the State is not required to disclose "written materials drafted by the prosecuting attorney or the prosecuting attorney's legal staff for their own use at trial, including witness examinations, voir dire questions, opening statements, and closing arguments." The State also is not required to disclose legal research, records, correspondence, reports, memoranda, or trial preparation interview notes prepared by the prosecuting attorney or by the prosecuting attorney's legal staff if such documents contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or legal staff. *Id.*

G.S. 15A-904(a) protects the prosecuting attorney's mental processes while allowing the defendant access to factual information collected by the State. The statute provides that the State may withhold written materials drafted by the prosecuting attorney or legal staff for their own use at trial, such as opening statements and witness examinations, which inherently contain

the prosecuting attorney's mental processes; and legal research, records, correspondence, memoranda, and trial preparation notes to the extent they reflect such mental processes. The statute does not protect materials prepared by non-legal staff or by personnel not employed by the prosecutor's office, such as law enforcement officers. It also does not protect evidence or information obtained by a prosecutor's office. For example, interview notes reflecting a witness's statements, whether prepared by a law enforcement officer or a member of the prosecutor's office, are not protected under the work-product provision; however, interview notes made by prosecutors or legal staff reflecting their theories, strategies, and the like are protected.

Work product principles are not the same throughout criminal proceedings. Protections for the defendant's "work product" are considerably broader. See Section III., below. In post-conviction proceedings, there is no protection for a prosecutor's work product related to the investigation and prosecution of the case. See Section II.B.8., below.

- b. Confidential Informants.** The State is not required to disclose the identity of a confidential informant unless otherwise required by law. G.S. 15A-904(a1). The statute does not require the State to obtain a protective order to withhold the identity of a confidential informant. See *State v. Leyva*, 181 N.C. App. 491, 496 (2007) (State did not request a protective order because the discovery statutes did not require the State to disclose information about a confidential informant, who was not testifying at trial). A defendant may have a constitutional and statutory right in some circumstances to the disclosure of an informant's identity. See ROBERT L. FARB, *ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA* 562-65 (UNC School of Government, 4th ed. 2011).

G.S. 15A-904(a1) does not contain any exception for statements to confidential informants. Thus, it appears that the State would require a protective order to withhold such statements, presumably on the ground that disclosure of the statements would disclose the informant's identity.

- c. Witnesses' Personal Identifying Information.** G.S. 15A-904(a2) provides that the State is not required to provide a witness's personal identifying information other than the witness's name, address, date of birth, and published phone number unless the court determines, on motion by the defendant, that additional information is required to identify and locate the witness.

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

B. Other State Law Rights. The discussion below covers categories of information that may be discoverable under North Carolina law but are not specifically covered by Article 48.

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

Some cases have interpreted the statute to require the State to disclose all plea arrangements with witnesses, regardless with whom made and whether formal or informal. *See, e.g., State v. Brooks*, 83 N.C. App. 179, 188 (1986) (law enforcement officer told witness he would talk to prosecutor and see about sentence reduction if witness testified against defendant; violation found for failure to disclose this information); *State v. Spicer*, 50 N.C. App. 214, 217 (1981) (although prosecutor stated there was no agreement, witness stated that he expected prosecutor to drop felonies to misdemeanors; violation found for failure to disclose this information). Other cases take a narrower view. *See, e.g., State v. Crandell*, 322 N.C. 487, 498-99 (1988) (State did not violate statute by failing to disclose plea arrangement with law enforcement agency; statute requires disclosure of plea arrangements entered into by prosecutors); *State v. Lowery*, 318 N.C. 54, 65 (1986) (statute did not require disclosure because prosecutor had not entered into formal agreement with defendant).

Even if disclosure by the State is not required by G.S. 15A-1054(c), it may be required by the “complete files” provision in G.S. 15A-903(a). *see* Section II.A.3. above, or the constitutional duty to disclose exculpatory evidence, which includes impeachment evidence. *See* Section II.C. below; *see also* *Giglio v. United States*, 405 U.S. 150, 155 (1972) (“evidence of any understanding or agreement as to a future prosecution would be relevant to . . . credibility”); *Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir. 1976) (North Carolina conviction vacated on habeas corpus for failure to disclose promise of leniency made by police officer).

Note that when there is a formal grant of immunity to a witness under G.S. 15A-1052(a), the trial judge must inform the jury of the grant of immunity before the witness testifies. G.S. 15A-1052(c). *See generally* [Fifth Amendment Privilege and Grant of Immunity](#) in this Benchbook.

2. Compelled Mental and Physical Examinations of State’s Witnesses. In *State v. Horn*, 337 N.C. 449, 453 (1994), the court held that a trial judge may not compel a victim or witness to submit to a psychological examination without his or her consent. *See also* *State v. Carter*, 216 N.C. App. 453, 465 (2011) (mentioning *Horn* and finding that defendant presented no authority for argument on appeal that trial court violated his federal and state constitutional rights by refusing to order examination of victim), *rev’d on other grounds*, 366 N.C. 496 (2013).

Horn held further that a trial judge may grant other relief if the person refuses to submit to a voluntary examination. Specifically, a judge may appoint an expert for the defense to interpret examinations already performed on the person, deny admission of the State's evidence about the person's condition, or dismiss the case if the defendant's right to present a defense is imperiled. *Id.* at 453-54.

Other cases hold that a judge does not have the authority to order a victim or witness to submit to a physical examination without consent. See *State v. Hewitt*, 93 N.C. App. 1, 9 (1989) (trial judge may order physical examination only if victim or victim's guardian consents and additional factors justify such an examination).

3. **Compelled Interviews of State's Witnesses.** The defendant generally does not have the right to compel a witness to submit to an interview. See *State v. Phillips*, 328 N.C. 1, 12 (1991) (defendant had no right to interview child witnesses without consent); *State v. Taylor*, 178 N.C. App. 395, 401-402 (2006) (holding under revised discovery statutes that police detective was not required to submit to interview by defense counsel). The State may not, however, instruct witnesses not to talk with the defense. See *State v. Pinch*, 306 N.C. 1, 11-12 (1982) (obstructing defense access to witnesses may be grounds for reversal of conviction), *overruled in part on other grounds by State v. Robinson*, 336 N.C. 78 (1994).
4. **Depositions.** A defendant in a criminal case is authorized under G.S. 8-74 to take a deposition for the purpose of preserving testimony of a person who is infirm, physically incapacitated, or a nonresident of this state. See *State v. Barfield*, 298 N.C. 306, 322 (1979) (trial court did not abuse discretion in denying defendant's motion for continuance when defendant was able to take deposition of hospitalized witness and introduce it at trial), *disavowed in part on other grounds by State v. Johnson*, 317 N.C. 193 (1986).
5. **Biological Evidence.** G.S. 15A-267(a) gives the defendant a right of access before trial to the following:
 - any DNA analysis in the case;
 - any biological material that
 - has not been DNA tested
 - was collected from the crime scene, the defendant's residence, or the defendant's property (note: the punctuation in the statute makes unclear whether both of the above conditions must be met or only one); and
 - a complete inventory of all physical evidence connected to the investigation.

G.S. 15A-267(b) states that access to the above is as provided in G.S. 15A-902, the statute on requesting discovery, and as provided in G.S. 15A-952, the statute on pretrial motions. On motion of the defendant, the court must order the State Crime Laboratory or approved vendor to conduct DNA testing of biological evidence it has collected and run a comparison with CODIS (the FBI's combined DNA index system) if the defendant meets the conditions specified in G.S. 15A-267(c).

6. **Electronic Surveillance Information.** G.S. 15A-294(d) through (f) describe a defendant's right to obtain information about electronic surveillance of the defendant. Subsection (f) provides that the contents of any intercepted wire, oral, or electronic communication, or evidence derived from such communication, may not be received into evidence unless each party, not less than twenty working days before the trial, hearing, or other proceeding, has been furnished with a copy of the order and accompanying application under which the interception was authorized.
7. **Chemical Analysis Results.** G.S. 20-139.1(e) provides that a defendant charged with an implied consent offense who has not received before trial a copy of the chemical analysis results the State intends to offer into evidence may request in writing a copy of the results. The statute also provides that a failure to provide a copy before trial is a ground for a continuance of the case but is not a ground to suppress the results or to dismiss the criminal charges.
8. **Discovery Concerning Post-Trial Motion for Appropriate Relief.** G.S. 15A-1415(f) provides that in a case of a defendant who is represented by counsel and has filed a motion for appropriate relief, the State must make available (to the extent allowed by law) to the defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The State may, however, submit any portion of its files to a judge for in camera inspection to determine if it would not be in the interest of justice to reveal information to the defendant's counsel. *State v. Atkins*, 349 N.C. 62, 110 (1998) (court upheld the trial court's conclusion that certain State documents would not assist the defendant).

C. Constitutional Right to “*Brady* Material.”

1. **Generally.** The prosecution has a constitutional duty under the Due Process Clause to disclose evidence if it is
 - favorable to the defense and
 - material to the outcome of either the guilt-innocence or sentencing phase of a trial.

Brady v. Maryland, 373 U.S. 83, 87 (1963). Evidence that meets this test is commonly referred to as “*Brady* material.” The sections that follow explore the scope of the defendant's right to *Brady* material.

Several United States Supreme Court cases have addressed the prosecution's obligation to disclose what is known as *Brady* material, including:

- *Smith v. Cain*, ___ U.S. ___, 132 S. Ct. 627, 630-31 (2012) (reversing defendant's conviction for *Brady* violation; eyewitness's undisclosed statements to police that he could not identify defendant contradicted his trial testimony identifying defendant as perpetrator);
- *Cone v. Bell*, 556 U.S. 449, 474-75 (2009) (undisclosed documents strengthened inference that defendant was impaired by drugs around the

time his crimes were committed; remanded for further consideration of potential impact on sentencing);

- *Banks v. Dretke*, 540 U.S. 668, 702-03 (2004) (failure to disclose that one of the witnesses was paid police informant and that another witness's trial testimony had been intensively coached by prosecutors and law enforcement officers; evidence met materiality standard and therefore established sufficient prejudice to overcome procedural default in state postconviction proceedings);
- *Strickler v. Greene*, 527 U.S. 263, 282 (1999) (contrast between witness's trial testimony of terrifying circumstances she observed and initial statement to detective describing incident as trivial established impeaching character of initial statement, which was not disclosed; evidence was not sufficiently material to outcome of proceedings and therefore did not establish sufficient prejudice to overcome procedural default);
- *Wood v. Bartholomew*, 516 U.S. 1, 8 (1995) (state's failure to disclose fact that witness had failed polygraph test did not deprive defendant of material evidence under *Brady*, absent reasonable likelihood that disclosure of polygraph results would have resulted in different outcome at trial).
- *Kyles v. Whitley*, 514 U.S. 419, 454 (1995) (cumulative effect of undisclosed evidence favorable to defendant required reversal of conviction and new trial);
- *United States v. Bagley*, 473 U.S. 667, 676 (1985) (favorable evidence includes impeachment evidence, in this instance, nondisclosed agreements by government to pay informants for information; remanded to determine whether nondisclosure warranted relief);
- *United States v. Agurs*, 427 U.S. 97, 114 (1976) (nondisclosure of victim's criminal record to defense did not meet materiality standard and did not require relief under circumstances of case); and
- *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (violation of due process when prosecutor failed to disclose statement that codefendant did actual killing; because statement would only have had impact on capital sentencing proceeding and not on guilt-innocence determination, case remanded for resentencing).

North Carolina Cases. North Carolina cases granting *Brady* relief include: *State v. Williams*, 362 N.C. 628, 638-39 (2008) (dismissal upheld where State created and then destroyed a poster that was favorable to the defense, was material, and could have been used to impeach State's witness); *State v. Canady*, 355 N.C. 242, 252 (2002) (defendant had right to know about informants in a timely manner so he could interview individuals and develop leads; new trial ordered); *State v. Absher*, 207 N.C. App. 377, *12 (2010) (unpublished) (dismissing case for destruction of evidence); *State v. Barber*, 147 N.C. App. 69, 75 (2001) (finding *Brady* violation for State's failure to disclose cell phone records showing that person other than defendant made several calls to decedent's house the night of his death, which would have bolstered defense theory that this person had threatened decedent with arrest shortly before his death and that decedent committed suicide).

North Carolina cases denying *Brady* relief include: *State v. Marino*, ___ N.C. App. ___, 747 S.E.2d 633, 638 (2013) (trial court did not err by denying defendant's motion to examine Intoximeter source code as *Brady* evidence when defendant failed to show it was favorable and material; court stated that defendant sought to examine the source code in hope that it would be exculpatory or would lead to exculpatory material); *State v. McCoy*, ___ N.C. App. ___, 745 S.E.2d 367, 371 (2013) (evidence of lead detective's internal affairs report, which was reviewed in camera by trial court and not supplied to defense, was not materially favorable under *Brady* because it involved detective's personal problems not related to investigation; lead detective did not testify at trial); *State v. Campbell*, 133 N.C. App. 531, 541-42 (1999) (hair samples taken from scene of rape and burglary were not material under *Brady*, and thus prosecution's failure to disclose evidence to defendant did not violate due process; inculpatory or exculpatory nature of hairs was unknown because DNA testing was not conducted, and even if hairs provided some support for theoretical possibility that another individual was perpetrator, overwhelming evidence, including defendant's confession, established his guilt); *State v. Johnson*, 128 N.C. App. 361, 367 (1998) (State complied with *Kyles v. Whitley* in attempting to locate evidence of alleged second photographic lineup shown to State's witness); *State v. Smith*, 337 N.C. 658, 663 (1994) (State's failure to specifically disclose State witness's previous failure to identify knife as belonging to defendant did not constitute prejudicial error because there was no reasonable probability that disclosure would have affected outcome of defendant's trial); *State v. Howard*, 334 N.C. 602, 605 (1993) (failure to disclose eyewitness's inability to positively identify defendant was not constitutional error); *State v. Potts*, 334 N.C. 575, 585 (1993) (fact that witness had seen note naming third parties as people who had killed victim was not material exculpatory evidence that required new trial; witness's testimony was largely hearsay and did not point directly to guilt of another party); *State v. Hodge*, 118 N.C. App. 655, 657 (1995) (because no meaningful fingerprint analysis on a bottle could be conducted, there was no exculpatory evidence for State to suppress).

2. **Applicable Proceedings.** The due process right to disclosure of *Brady* material applies to both guilt-innocence determinations and sentencing. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (nondisclosure "violates due process where the evidence is material either to guilt or to punishment"). However, the United States Supreme Court has held that *Brady* does not require disclosure of impeachment information before a defendant enters into a plea arrangement. See *United States v. Ruiz*, 536 U.S. 622, 633 (2002) (stating that impeachment information relates to the fairness of a trial, not to the voluntariness of a plea); *State v. Allen*, 222 N.C. App. 707, 723-24 (2012) (following *Ruiz*).

The United States Supreme Court has said that "*Brady* is the wrong framework" for analyzing whether a defendant in post-conviction proceedings has the right to obtain physical evidence from the State for DNA testing. *Dist. Attorney's Office for Third Judicial Dist. v. Osbourne*, 557 U.S. 52, 69 (2009). Rather, in assessing the adequacy of a state's post-conviction procedures, including the right to post-conviction discovery, the question is whether the procedures are "fundamentally

inadequate to vindicate the substantive rights provided.” *Id.* (finding that Alaska’s procedures were not inadequate).

3. **Favorable to Defense.** To trigger the prosecution’s duty under the Due Process Clause, the evidence must be favorable to the defense. Favorable evidence includes evidence that tends to negate guilt, mitigate an offense or sentence, or impeach the truthfulness of a witness or reliability of evidence.

The defendant does not have a constitutional right to discovery of inculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963), *State v. Adcock*, 310 N.C. 1, 14 (1984).

Some generally-recognized categories of favorable evidence are discussed below.

- a. **Impeachment Evidence.** This category can include

- a witness’s prior false statements,
- a witness’s prior inconsistent statements,
- evidence of a witness’s bias,
- evidence of a witness’s capacity to observe, perceive, or recollect,
- a witness’s prior convictions or other misconduct; and
- a psychiatric evaluation of a witness.

See, e.g., Spicer v. Roxbury Correctional Institute, 194 F.3d 547, 556 (4th Cir. 1999) (failure to disclose State witness’s statement to his lawyer that impeached his eyewitness identification testimony); *Chavis v. North Carolina*, 637 F.2d 213, 223-24 (4th Cir. 1980) (prosecutor’s nondisclosure of key witness’s corrected prior statement violated Due Process); *Jean v. Rice*, 945 F.2d 82, 87 (4th Cir. 1991) (failure to disclose recordings and accompanying reports of hypnotized rape victim and investigating officer violated Due Process); *State v. Kilpatrick*, 343 N.C. 466, 471–72 (1996) (witnesses did not have significant criminal record so nondisclosure was not material to outcome of case).

Another category constituting impeachment evidence favorable to the defense is evidence discrediting the police investigation and officers’ credibility, including prior misconduct by officers. *Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (information discrediting caliber of police investigation and methods employed in assembling case); *State v. Raines*, 362 N.C. 1, 9–10 (2007) (reviewing officer’s personnel file, which trial court had placed under seal, and finding that it did not contain exculpatory information to which the defendant was entitled); *State v. Cunningham*, 344 N.C. 341, 352–53 (1996) (finding that officer’s personnel file was not relevant when defendant shot and killed officer as officer was walking around police car).

- b. **Other Evidence.** Other categories of potentially favorable evidence include:

- evidence undermining the identification of the defendant, *Kyles v. Whitley*, 514 U.S. 419, 444 (1995) (evolution over time of eyewitness's description);
- evidence tending to show guilt of another, *Barbee v. Maryland*, 331 F.2d 842, 844 (4th Cir. 1964) (forensic reports indicated that defendant was not assailant); and
- physical evidence contradicting the State's case, *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985) (evidence that gun used in shooting was inoperable).

4. **Material.** In addition to being favorable to the defense, evidence must be material to the outcome of the case. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

To reinforce the prosecution's duty to disclose, the U.S. Supreme Court has emphasized four aspects of the materiality standard.

- The defendant does not need to show that more likely than not (i.e., by a preponderance of evidence) he or she would have received a different verdict with the undisclosed evidence, but whether in its absence the defendant received a fair trial—that is, "a trial resulting in a verdict worthy of confidence." A "reasonable probability" of a different verdict is shown when suppression of the evidence "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434 (citation omitted).
- The materiality standard is not a sufficiency-of-evidence test. The defendant need not prove that, after discounting inculpatory evidence in light of the undisclosed favorable evidence, there would not have been enough left to convict. Instead, the defendant must show only that favorable evidence could reasonably place the whole case in such a different light as to undermine confidence in the verdict. *Id.* at 434–35.
- Once a reviewing court finds constitutional error, there is no harmless error analysis. A new trial is required. *Id.*
- The suppressed favorable evidence must be considered collectively, not item-by-item. The reviewing court must consider the net effect of all undisclosed favorable evidence in deciding whether the point of "reasonable probability" is reached. *Id.* at 436–37.

The standard of materiality is essentially a retrospective standard—one that appellate courts apply after conviction in viewing the impact of undisclosed evidence on the outcome of the case. How does the materiality standard apply prospectively, when prosecutors and trial courts determine what must be disclosed? As a practical matter, the materiality standard may be lower before trial because the judge and prosecutor must speculate about how evidence will affect the outcome of the case. See *Kyles*, 514 U.S. 419, 439 ("[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.");

United States v. Agurs, 427 U.S. 97, 106 (1976) (“[I]f a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge.”).

5. **Timing of Disclosure.** The prosecution must provide *Brady* material in time for the defendant to make effective use of it at trial. See *State v. Canady*, 355 N.C. 242, 252-53 (2002) (defendant had right to know of informants in timely manner so he could interview individuals and develop leads; new trial ordered); *State v. Taylor*, 344 N.C. 31, 50 (1996) (*Brady* satisfied “so long as disclosure is made in time for the defendants to make effective use of the evidence”); *State v. Elliott*, 360 N.C. 400, 415 (2006) (similar); *State v. Spivey*, 102 N.C. App. 640, 646 (1991) (finding no violation on facts but noting that courts “strongly disapprove of delayed disclosure of *Brady* materials” (citation omitted)).
6. **Evidence Need Not Be Admissible.** The prosecution must disclose favorable, material evidence even if it would be inadmissible at trial. See *State v. Potts*, 334 N.C. 575, 585 (1993) (evidence need not be admissible if it would lead to admissible exculpatory evidence (citing *Maynard v. Dixon*, 943 F.2d 407, 418 (4th Cir. 1991) (indicating that evidence must be disclosed if it would assist the defendant in discovering other evidence or preparing for trial))).
7. **Defendant’s Request For Evidence.** At one time, different standards of materiality applied depending on whether the defendant made a general request for *Brady* evidence, a request for specific evidence, or no request at all. In *United States v. Bagley*, 473 U.S. 667, 682 (1985), and *Kyles v. Whitley*, 514 U.S. 419, 433 (1995), the United States Supreme Court confirmed that a single standard of materiality exists and that the prosecution has an obligation to disclose favorable, material evidence whether or not the defendant makes a request.
8. **Prosecutor’s Duty to Investigate.** Material evidence within law enforcement files, or known to law enforcement officers, is imputed to the prosecution and must be disclosed. See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (“individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”; good or bad faith of individual prosecutor is irrelevant to obligation to disclose); *State v. Bates*, 348 N.C. 29, 38 (1998) (*Brady* obligates prosecution to obtain information from SBI and various sheriffs’ departments involved in investigation); *State v. Smith*, 337 N.C. 658, 662 (1994) (prosecution deemed to have knowledge of information in possession of law enforcement); *Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir. 1964) (prosecutor’s lack of knowledge did not excuse failure by police to reveal information).

The prosecution’s obligation to obtain and disclose evidence in the possession of other agencies (such as mental health facilities or social services departments) depends on the extent of the agency’s involvement in the investigation and the prosecution’s knowledge of and access to the evidence. See Section II.A.3., above, concerning similar statutory obligations.

9. **Defendant’s Knowledge of Evidence.** The United States Supreme Court in *United States v. Agurs*, 427 U.S. 97 (1976), held that the prosecution violates its *Brady* obligations by failing to disclose favorable,

material evidence known to the prosecution but unknown to the defense. As a result, 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, 429-30 (1990) (defendant knew of examination of rape victim and results; prosecution's failure to provide report therefore not *Brady* violation).

10. **In Camera Review.** 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, 127-28 (1977) (stating general right to in camera review); *State v. Kelly*, 118 N.C. App. 589, 593-94 (1995) (new trial because trial court failed to conduct in camera review); *State v. Jones*, 85 N.C. App. 56, 61-63 (1987) (new trial). To obtain an in camera review, counsel must make a showing that the evidence may contain favorable, material information. See *State v. Soyars*, 332 N.C. 47, 62-63 (1992) (court characterized general request as "fishing expedition" and found no error in trial court's denial of in camera review; defendant made "no showing" that he was deprived of a statement by State's witness). Other cases have described the showing as a "possibility" of materially favorable evidence, *State v. Phillips*, 328 N.C. 1, 18 (1991), or a "substantial basis," *State v. Thompson*, 139 N.C. App. 299, 307 (2000). Given the various standards set out in the cases, a cautious trial court should consider conducting an in camera hearing unless it is clear that the defendant has not satisfied any of these standards.

If the trial court declines to review the documents or after review declines to require production of some or all of the documents, the court on the motion of a party or on its own motion should order the nondisclosed documents to be sealed so they will be available for appellate review.

- D. **Constitutional Right to Evidence in Possession of Third Parties.** The Due Process Clause gives a 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, 58 (1987) (records in possession of child protective agency); *Love v. Johnson*, 57 F.3d 1305, 1312 (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); *but see* the conflicting state appellate ruling, *State v. Love*, 100 N.C. App. 226, 230 (1990) (court ruled that trial judge properly quashed overly broad subpoenas duces tecum on medical and mental health centers, public school, and social services department; judge had no duty to conduct *in camera* review of records, which were not in State's possession, based on facts in this case).

Typically this issue gets to the trial court in a defense motion for an order requiring the third party to produce the records for review. Whether defense counsel may file this motion *ex parte* has not been decided by North Carolina appellate courts.

Courts have used various formulations to describe the showing that a defendant must make in support of a motion for confidential records from a third party. They have said that a defendant must make some plausible showing that

the records might contain favorable, material evidence; have a substantial basis for believing that the records contain such evidence; or show that a possibility exists that the records contain such evidence. All of these formulations emphasize the threshold nature of the showing required of the defendant. See *Love v. Johnson*, 57 F.3d 1305, 1307 (4th Cir. 1995) (defendant made “plausible showing”); *State v. Thompson*, 139 N.C. App. 299, 307 (2000) (“[A]lthough asking defendant to affirmatively establish that a piece of evidence not in his possession is material might be a circular impossibility, we at least require him to have a substantial basis for believing such evidence is material”); see also *United States v. Trevino*, 89 F.3d 187, 192-93 (4th Cir. 1996) (defendant must “plainly articulate” how the information in the presentence investigation report is material and favorable). See [Defendant’s Right to Third Party Confidential Records](#) in this Benchbook.

1. **Department of Social Services Records.** Several cases have addressed a defendant’s right under *Ritchie* to department of social services (DSS) records that contain favorable, material evidence in the criminal case against the defendant. The North Carolina courts have recognized the defendant’s right of access. For example, in *State v. McGill*, 141 N.C. App. 98, 101 (2000), the court stated:

A defendant who is charged with sexual abuse of a minor has a constitutional right to have the records of the child abuse agency that is charged with investigating cases of suspected child abuse, as they pertain to the prosecuting witness, turned over to the trial court for an in camera review to determine whether the records contain information favorable to the accused and material to guilt or punishment.

North Carolina courts have found error in several cases when there was a failure to disclose DSS records to the defendant. See *State v. Martinez*, 212 N.C. App. 661, 666 (2011) (DSS files contained exculpatory impeachment information; court reverses conviction for other reasons and directs trial court on remand to make information available to defendant); *State v. Webb*, 197 N.C. App. 619, 622 (2009) (error for trial court not to disclose information in DSS file to defendant; new trial); *State v. Johnson*, 165 N.C. App. 854, 856 (2004) (child victim’s DSS file contained information favorable and material to defendant’s case, reviewed at length in court’s opinion, and should have been disclosed; new trial); *McGill*, 141 N.C. App. 98, 101-04 (error in failing to require disclosure of evidence bearing on credibility of State’s witnesses; new trial). *Cf.* *State v. Tadeja*, 191 N.C. App. 439, 449-50 (2008) (following *Ritchie* but finding that disclosure of DSS records was not required because they did not contain favorable evidence; contents of sealed records not described in opinion); *State v. Bailey*, 89 N.C. App. 212, 222 (1988) (court concurred with trial court, which had conducted in camera review of DSS records, that all records material to preparation of defendant’s defense were made available to defendant and remaining records were not material to his case).

2. **School Records.** Cases typically involve a defendant’s motion under *Ritchie* to disclose school records to discover exculpatory impeachment evidence involving students who are the State’s victims or witnesses.

State v. Taylor, 178 N.C. App. 395, 408 (2006) (following *Ritchie* but finding that disclosure of accomplice's school records was not required because they did not contain evidence favorable to defendant); State v. Johnson, 145 N.C. App. 51, 55-56 (2001) (in case involving charges of multiple sex offenses against students by defendant, who was a middle school teacher and coach, court finds that trial judge erred in quashing subpoena duces tecum for school board documents without conducting in camera review for exculpatory evidence; some of documents were from witnesses who would testify at trial).

3. **Mental Health Records.** Cases typically involve a defendant's motion under *Ritchie* for the victim's mental health records to discover exculpatory evidence. State v. Chavis, 141 N.C. App. 553, 561 (2003) (recognizing right to impeachment information that may be in mental health records of witness, but finding that record did not show that State had information in its possession or that information was favorable to defendant).
4. **Medical Records.** Cases typically involve a defendant's motion under *Ritchie* for the medical records of the State's victims to discover exculpatory evidence. State v. Thompson, 139 N.C. App. 299, 306-07 (2000) (finding that trial court did not err in failing to conduct in camera review of victim's medical records when defense counsel conceded that he was not specifically aware of any exculpatory information in the records); State v. Jarrett, 137 N.C. App. 256, 266-67 (2000) (trial court reviewed hospital records and disclosed some and withheld others; appellate court reviewed remaining records, which were sealed for appellate review, and found they did not contain favorable, material evidence).

E. **Constitutional Right Protecting Against Knowing Use of False Evidence.**

Although not strictly a discovery issue, under the Due Process Clause, a conviction must be set aside if the prosecutor knowingly used false testimony or evidence; and the testimony or evidence met the required standard of materiality—that is, there was a reasonable likelihood that the false testimony or evidence could have affected the verdict.

- Mooney v. Holohan, 294 U.S. 103, 110-11 (1935) (prosecution knowingly and intentionally used perjured testimony);
- Alcorta v. Texas, 355 U.S. 28, 31-32 (1957) (knowingly allow false testimony to go uncorrected concerning material fact; testimony left false impression on jury);
- Napue v. Illinois, 360 U.S. 264, 269-71 (1959) (knowingly allow false testimony to go uncorrected concerning witness's credibility; witness lied about promise of lenient treatment);
- Giglio v. United States, 405 U.S. 150, 153-54 (1972) (use of false testimony that the prosecutor knew or should have known was false; another prosecutor in same office of trial prosecutor had promised immunity to witness if he testified);
- United States v. Agurs, 427 U.S. 97, 103 (1976) (prosecution "should have known" test applies to duty to correct false testimony).

See also *State v. Wilkerson*, 363 N.C. 382, 402-03 (2009) (recognizing above principles but finding no violation under circumstances of case); *State v. Phillips*, 365 N.C. 103, 126-27 (2011) (even if State's witness perjured herself, there was no indication that State knew her testimony was false); *State v. Sanders*, 327 N.C. 319, 336-37 (1990) (defendant failed to establish that witness's false testimony was material or that prosecutor knew it was false and intentionally used it to defendant's prejudice); *State v. Boykin*, 298 N.C. 687, 694 (1979) (no constitutional violation when State simply presented a witness whose testimony was inconsistent in non-substantive respects with that given at the preliminary hearing); *State v. Dorman*, ___ N.C. App. ___, 737 S.E.2d 452, 468-69 (2013) (on State's appeal of dismissal of charges by court, holding that *Napue* did not require dismissal for pretrial misrepresentations by State); *State v. Morgan*, 60 N.C. App. 614, 622-23 (1983) (conviction vacated based on prosecutor's failure to correct witness's denial of immunity); *Campbell v. Reed*, 594 F.2d 4, 7-8 (4th Cir. 1979) (North Carolina conviction vacated on habeas corpus for false testimony about plea arrangement).

- F. State's Loss or Destruction of Evidence.** A Due Process Clause violation is not committed unless an officer acts in bad faith in failing to preserve potentially useful evidence for trial. As can be determined by the holdings in the case summaries provided below, it is difficult for a defendant to show that the evidence was potentially exculpatory and was lost or destroyed by the State in bad faith.

Cases: *Illinois v. Fisher*, 540 U.S. 544, 547-48 (2004) (due process did not require dismissal of the charges on ground that police, nearly 11 years after defendant was charged, destroyed the alleged cocaine seized in the course of a traffic stop); *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988) (defendant was not denied due process by officers' failure, in investigating sexual assault of ten-year-old boy, to refrigerate boy's clothing and to perform tests on semen samples, thereby preserving potentially useful evidence for defendant, when there was no suggestion of bad faith by officers; none of this information was concealed from defendant at trial, and evidence—such as it was—was made available to defendant's expert who declined to perform any tests on samples); *State v. Graham*, 200 N.C. App. 204, 209-10 (2009) (defendant did not show bad faith by State in losing car, and defendant was able to test soil samples collected from car and present exculpatory evidence at trial to rebut State's evidence); *State v. Lewis*, 365 N.C. 488, 501-02 (2012) (in absence of allegation that evidence was destroyed in bad faith, State's failure to preserve knife for defendant's retrial did not violate defendant's right to due process); *State v. Taylor*, 362 N.C. 514, 526 (2008) (loss of certain physical evidence from crime scene was not due process violation; speculative whether evidence would have been helpful to defense and no evidence of bad faith); *State v. Hyatt*, 355 N.C. 642, 663 (2002) (not error to admit testimony regarding rape kit lost before trial when exculpatory value of tests the defendant wanted to conduct was speculative; no showing of bad faith); *State v. Drdak*, 330 N.C. 587, 593-94 (1992) (admission of results of blood alcohol test performed by hospital on blood sample that hospital later destroyed did not violate defendant's rights; State is not held responsible for actions of hospital in destroying blood sample in regular course of its hospital procedures); *State v. Mlo*, 335 N.C. 353, 372-73 (1994) (State improperly relinquished victim's car so it was unavailable to defendant to examine; no denial of due process because exculpatory value of any tests was speculative); *State v. Graham*, 118 N.C. App. 231, 235-36 (1995) (suppression of

testimony by State's experts on testing of bodily fluids and hair samples from rape kit was not required because police inadvertently destroyed rape kit); *State v. Anderson*, 57 N.C. App. 602, 610 (1982) (destruction of large amount of marijuana, while keeping random samples, was done in good faith); *State v. Hudson*, 56 N.C. App. 172, 176-78 (1982) (police destruction of paper towels, on which tests had been performed, was inadvertent; if defendant had made timely motion to examine towels, he would have had opportunity to have independent analysis done); *State v. Banks*, 125 N.C. App. 681, 684 (1997) (police accidental destruction of rape kit was not due process violation), *aff'd per curiam*, 347 N.C. 390 (1997).

But see *State v. Williams*, 362 N.C. 628, 638-39 (2008) (trial judge properly dismissed a charge of felony assault on a government officer when defendant established that State flagrantly violated his constitutional rights and irreparably prejudiced preparation of his defense; State willfully destroyed material evidence favorable to the defense; destroyed evidence consisted of two photographs of defendant that were displayed in prosecutor's office, one taken of defendant before the events in question, another taken after the events in question).

The State must preserve only evidence that might be expected to play a role in the suspect's defense—evidence having apparent exculpatory value and of such a nature that comparable evidence is not reasonably available. *California v. Trombetta*, 467 U.S. 479, 488-89 (1984) (Due Process Clause does not require that law enforcement agencies preserve breath samples of suspected impaired drivers for results of breath-analysis tests to be admissible in criminal prosecutions); *State v. Lewis*, 365 N.C. 488, 501-02 (2012) (reversing decision by court of appeals that destruction of knife met *Trombetta* standard and that trial court erred in not excluding knife; supreme court finds that defendant was able to contest State's evidence without knife); *State v. Jones*, 106 N.C. App. 214, 216-17 (1992) (officer's disposal of sample and test ampules used in Breathalyzer test in accordance with standard test procedures did not violate federal or state constitutions).

Note that a custodial agency under certain circumstances has a statutory duty to preserve biological evidence pursuant to G.S. 15A-268. See Section II.B.5., above.

III. Prosecution's Discovery Rights. The prosecution's discovery rights in North Carolina, as in most other jurisdictions, are more limited than defense discovery rights. The prosecution's discovery rights rest almost entirely on North Carolina statutes, specifically G.S. 15A-905 and G.S. 15A-906, which essentially give the prosecution the right to discover evidence, defenses, and witnesses that the defendant intends to offer at trial.

A. Procedural Issues.

1. Generally. The defendant effectively controls whether the prosecution has any statutory discovery rights. If the defendant does not request discovery, the prosecution is not entitled to reciprocal discovery and the defendant may refuse to provide any discovery requested by the State. This result follows from G.S. 15A-905(a), (b), and (c), the statutes authorizing prosecutorial discovery, which all provide that the prosecution is entitled to discovery only if the defendant requests discovery under G.S. 15A-903 and the court grants any relief (or the State voluntarily provides discovery in response to the defendant's written request or the

parties have a written agreement to exchange discovery, which G.S. 15A-902(b) deems to be equivalent to a court order). G.S. 15A-905(d) is somewhat ambiguous about the effect of a defendant's voluntary disclosure of witnesses and defenses in response to a written request for discovery from the prosecution. It states that if the defendant voluntarily complies with a prosecution request for discovery as provided in G.S. 15A-902(a), the disclosure must be to the full extent required by G.S. 15A-905(c), the subsection on disclosure of witnesses and defenses. G.S. 15A-905(d) does not explicitly require as a prerequisite that the defense first make a request for discovery from the prosecution. Even under this interpretation, however, the prosecution has no right to discovery unless the defense decides to voluntarily comply with the prosecution's discovery request.

2. **Timely Request Required.** The State, like the defendant, must make a written discovery request to activate its discovery rights. The State must make its discovery request within ten working days after it provides discovery in response to a discovery request by the defendant. G.S. 15A-902(e).

If the State fails to make a written request and the parties do not have a written agreement to exchange discovery, the State does not have enforceable discovery rights. See *State v. Anderson*, 303 N.C. 185, 191 (1981) ("Before either the state or defendant is entitled to an order requiring the other to disclose, it or he must first 'request in writing that the other party comply voluntarily with the discovery request.'" [citing former version of G.S. 15A-902(a), which was not materially changed]), *overruled in part on other grounds by State v. Shank*, 322 N.C. 243 (1988). A court may excuse the failure to make a written request, however. See G.S. 15A-902(f) (court may hear a discovery motion for good cause without a written request).

3. **Motion to Compel.** As with the procedure for defense discovery, the State must make a motion to enforce its discovery obligations if the defendant does not voluntarily comply with the State's discovery request. G.S. 15A-905. Voluntary discovery by the defendant in response to a written request, or pursuant to a written agreement by the parties to exchange discovery, is deemed to have been made under a court order. G.S. 15A-902(b).
4. **Defendant's Continuing Duty to Disclose.** If the defendant agrees to provide discovery in response to a request for statutory discovery, or the court orders discovery, the defendant has a continuing duty to disclose the information. See G.S. 15A-907. This obligation mirrors the State's continuing duty to disclose. See Section II.A.2.f. above.
5. **Time for Production.** The discovery statutes set some deadlines for the defendant to provide discovery, including:
 - G.S. 15A-905(c)(1) (defendant must give notice of defenses within 20 working days after date case set for trial or such later time as set by court; defendant also must disclose identity of alibi witnesses no later than two weeks before trial unless parties and court agree to differ time period).

- G.S. 15A-905(c)(2) (defendant must give notice of expert witnesses and furnish required expert materials within a reasonable time before trial).
- G.S. 15A-905(c)(3) (defendant must give notice of other (that is, non-expert) witnesses at beginning of jury selection).

The statutes do not set a specific deadline for the defendant to produce other materials. On a motion to compel discovery, the judge may set a deadline to produce. See G.S. 15A-909 (order granting discovery must specify time, place, and manner of making discovery); see *also* *State v. Braxton*, 352 N.C. 158, 211 (2000) (trial court has inherent authority to set deadline for defense to turn over expert's report to State). Presumably, for discoverable information for which the statutes do not set a specific deadline, any deadline set by the court for the defense to provide discovery should be *after* the State meets its deadline to provide discovery to the defense. See *State v. Godwin*, 336 N.C. 499, 507 (1994) (trial court had authority to order defendant to provide reciprocal discovery within two weeks after State met its deadline to provide discovery to defendant).

6. **Protective Orders.** The law regarding protective orders discussed in Section II.A.2.g. above applies equally to protective orders sought by the defendant.
7. **Court's Inherent Authority.** The discovery statutes appear to leave little room for trial courts to order the defense to provide discovery of materials not authorized by the statutes. The trial court does not have the authority to order the defense (or the prosecution) to provide discovery if the discovery statutes restrict disclosure. See *State v. Warren*, 347 N.C. 309, 323-24 (1997) (trial court properly declined to compel defendant to disclose evidence before trial); *State v. White*, 331 N.C. 604, 617-18 (1992) (order requiring pretrial discovery beyond trial court's authority). The discovery statutes contain implicit and explicit prohibitions on discovery by the State beyond the specifically authorized categories. G.S. 15A-905, which describes the categories of information discoverable by the State, essentially authorizes discovery only of information the defense intends to use at trial. G.S. 15A-906 reinforces the limits on prosecution discovery through a broad "work product" protection. It states that the discovery statutes do not authorize discovery by the State of reports, memoranda, witness statements, and other internal defense documents except as provided in G.S. 15A-905(b), the statute on reports of examinations and tests (discussed in Section III.B.2., below).

Once the trial commences, the trial court has greater authority to order disclosure, but few North Carolina cases have considered the circumstances that would justify compelled disclosure from the defense. The essence of the theory for compelling disclosure by the defense at trial is waiver—that through the use or planned use of evidence at trial, the defendant waives the protections that otherwise would apply. See *United States v. Nobles*, 422 U.S. 225, 239-40 (1975) (finding waiver of work product privilege for statements taken by defense investigator when investigator testified about statement at trial to impeach witness's testimony); *State v. Gray*, 347 N.C. 143, 170 (1997) (trial court did not err in requiring defense to produce affidavit executed by defense witness;

defendant waived his right not to produce it when defense counsel read entire affidavit aloud at earlier bond hearing), *abrogated in part on other grounds by* State v. Long, 354 N.C. 534 (2001). This theory does not justify compelled disclosure of evidence that the defense does not use or intend to use at trial, such as the report of a nontestifying expert. See Section III.B.2.c., below.

B. Information Covered.

1. **Documents and Tangible Objects.** Under G.S. 15A-905(a) the State has the right to inspect and copy or photograph documents and tangible objects within the possession, custody, or control of the defendant if the defendant intends to introduce the evidence at trial.

Because G.S. 15A-905(a) allows discovery only of documents that the defendant intends to introduce at trial, it is far narrower than the defendant's right to discover information from the State. G.S. 15A-906 reinforces the limit on prosecution discovery. Except as otherwise provided by G.S. 15A-905(b), which addresses reports of examinations and tests the defendant intends to use at trial, G.S. 15A-906 protects reports, memoranda, witness statements, and other internal defense documents made by the defendant and his or her attorneys or agents in investigating or defending the case.

If the defense intends to impeach a witness with a statement it has taken, it may have an obligation to disclose it before trial. In *State v. Tuck*, 191 N.C. App. 768, 772–73 (2008), the court held that the State had to produce a witness statement from a codefendant that it intended to use to impeach a defense witness. The ground for the court's holding, however, was that the statement was part of the State's files and therefore was subject to the State's general discovery obligations, not that the State was obligated to turn over impeachment evidence that it intended to use at trial. The applicability of *Tuck* to the defense's discovery obligations is therefore uncertain.

2. **Results of Examinations and Tests.**

- a. **Discoverable Information.** G.S. 15A-905(b) gives the State the right to inspect and copy or photograph results or reports of examinations or tests made in connection with the case within the possession and control of the defendant if the defendant intends to introduce the results or reports at trial or the results or reports were prepared by a witness whom the defendant intends to call at trial and the results or reports relate to his or her testimony.

G.S. 15A-905(b) also gives the State the right to inspect, examine, and test, with appropriate safeguards, any physical evidence available to the defendant if the defendant intends to offer the evidence, or related tests or experiments, at trial.

- b. **Testifying Experts.** Because G.S. 15A-905(b) allows discovery only of results or reports the defendant intends to use at trial (either by introducing them or by calling the witness who prepared and will testify about them), it essentially requires discovery only of materials from testifying experts. It is therefore narrower than the defendant's right to discover information from the State, which encompasses all results or reports of examinations or tests in the State's files.

The courts have interpreted the term “results or reports” broadly, however. In addition to the final results and reports of examinations or tests prepared by an expert, the court may order the defense to disclose incomplete tests conducted by the expert as well as the expert’s notes and raw data. See *State v. Miller*, 357 N.C. 583, 591-92 (2003) (trial court did not err in denying protective order for raw psychological data); *State v. Davis*, 353 N.C. 1, 45-46 (2000) (requiring production of handwritten notes taken by mental health expert of interview with defendant); *State v. Cummings*, 352 N.C. 600, 615 (2000) (State entitled to “raw data” from defense psychologists’ interviews with defendant despite experts’ concerns about ethics of disclosure); *State v. Atkins*, 349 N.C. 62, 92-94 (1998) (upholding discovery order requiring psychiatric expert to turn over notes of interviews and conversations with defendant); *State v. McCarver*, 341 N.C. 364, 397-98 (1995) (State entitled to discovery of test results, even if inconclusive, that went into formation of opinion of expert who testified).

The court also may have the authority to order disclosure of reports prepared by nontestifying experts if reviewed by a testifying expert in forming his or her opinion. A court may not have the authority to order such disclosure, however, until the testifying expert testifies to such information. See *State v. Warren*, 347 N.C. 309, 323-26 (1997) (trial court had inherent authority to order disclosure after witness testified at sentencing); *State v. Holston*, 134 N.C. App. 599, 605-06 (1999) (defense attorney’s summary of defendant’s medical records, which he provided to defense expert and which expert relied on in testifying, not protected by work-product privilege).

The defense’s intent to use expert testimony at trial is determined as of the time disclosure is required. A defendant’s rights therefore are not violated by requiring disclosure of an expert report before trial even though the defendant does not call the expert as a witness or introduce his or her report at trial. See *State v. Williams*, 350 N.C. 1, 15-18 (1999) (“The term ‘intent’ as used in the statute is not synonymous with a defendant’s final decision to call an expert witness or present the expert’s report.”). If the defendant does not call the expert or use the expert’s report, the defense may have grounds for restricting the prosecution’s use of the information. See *id.* at 21 (when defendant advised trial court he was not going to call mental health expert, trial court precluded State from using information it had obtained from defendant’s expert).

Courts also have held that the defendant’s intent relates to both the guilt-innocence and sentencing portions of trial. Thus, the prosecution may obtain discovery of an expert’s report if the defendant intends to offer it in either phase. See *State v. White*, 331 N.C. 604, 619 (1992) (“The term ‘trial,’ as used in N.C.G.S. § 15A-905(b), is not restricted to the guilt-innocence phase but encompasses all portions of the defendant’s trial, including the sentencing phase.”).

- c. **Nontestifying Experts.** The State is not entitled to discovery of the results or reports of examinations or tests prepared by an expert if the defendant does not intend to introduce them at trial or call the expert as a witness at trial. See *State v. Warren*, 347 N.C. 309, 324 (1997); *State v. White*, 331 N.C. 604, 619 (1992).

The prohibition on disclosure also applies after the trial commences. In *State v. Dunn*, 154 N.C. App. 1, 9 (2002), the court analyzed at length the protections for the work of a nontestifying expert, both before and during trial. In *Dunn*, the defendant did not intend to call the employees of an independent drug test facility to testify about the results of a lab test obtained by the defendant. The court found that the information was not discoverable under the discovery statute then in effect, which is comparable to the current version. The court further found a violation of the defendant's right to effective assistance of counsel and a breach of the work product privilege by the trial court's order compelling the employees to testify about the results of the lab test. *Dunn* is consistent with other court decisions, cited in the opinion, finding the work of a nontestifying expert protected from disclosure before and during trial. See also *State v. King*, 75 N.C. App. 618, 620 (1985) (trial court had no authority to order disclosure of ballistics report to State when record did not show defendant ever intended to introduce report or put preparer of report on stand).

The results or reports of a nontestifying expert may be subject to disclosure, however, if a testifying expert reviews the work of the nontestifying expert in forming his or her opinion. See, e.g., *State v. Warren*, 347 N.C. 309, 323-26 (1997).

3. **Notice of Defense Witnesses.**

- a. **Expert Witnesses.** G.S. 15A-905(c)(2) gives the State the right to notice of expert witnesses that the defendant reasonably expects to call at trial. G.S. 15A-905(c)(2) also provides that within a reasonable time before trial, each expert witness that the defendant reasonably expects to call at trial must prepare a report of the results of any tests or examinations conducted by the expert. See G.S. 15A-905(c)(2). The defendant also must provide to the State the expert's credentials, opinion, and the underlying basis for that opinion. *Id.*

If the defendant intends to introduce expert testimony about the defendant's mental condition, the State may obtain an examination of the defendant. See Section III.B.4.b., below.

For a discussion of sanctions for the failure of the defense to identify a testifying expert witness or produce a written report, see Section IV., below.

- b. **Other Witnesses.** G.S. 15A-905(c)(3) gives the State the right, at the beginning of jury selection, to a written list of the names of all other witnesses that the defendant reasonably expects to call during trial.

The defendant is not required to disclose witnesses' names if the defendant certifies in writing and under seal that disclosure may subject the witnesses or others to physical or

substantial economic harm or coercion or that there is another compelling argument against disclosure. G.S. 15A-905(c)(3).

The court may allow the defendant to call witnesses not included on the list if the defendant, in good faith, did not reasonably expect to call them. *Id.* The court also may permit any undisclosed witness to testify in the interest of justice. *Id.*

4. Defenses.

- a. **Notice.** G.S. 15A-905(c)(1) gives the State the right to notice of the defendant's intent to offer the defenses specified in the statute. The defendant must give notice of these defenses within twenty working days after the case is set for trial pursuant to G.S. 7A-49.4 or as otherwise ordered by the court. The defendant must provide notice of the intent to offer any of the following defenses: alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication.

Self-defense includes related defenses, including imperfect self-defense and most likely other defensive-force defenses such as defense of habitation and defense of others. *See State v. Pender*, 218 N.C. App. 233, 243-44 (2012) (defendant not entitled to jury instruction on voluntary manslaughter based on imperfect self-defense when defendant did not provide State with the notice of self-defense; court also finds that evidence at trial was insufficient to support such an instruction and any error in precluding defense was harmless).

If the defendant plans to offer the defense of duress, entrapment, insanity, automatism, or involuntary intoxication—defenses for which the defendant bears the burden of persuasion before the jury—the notice must include specific information as to the nature and extent of the defense. *See G.S. 15A-905(c)(1)b.* *Cf. State v. Gillespie*, 180 N.C. App. 514, 520 (2006) (finding that the defendant was not required to provide such information for defense of diminished capacity), *aff'd as modified*, 362 N.C. 150, 156 (2008) (finding it unnecessary for court of appeals to have reached this issue).

If the defendant provides notice of an alibi defense, the court may order the defendant to disclose the identity of alibi witnesses no later than two weeks before trial. G.S. 15A-905(c)(1)a. If the court orders the defendant to disclose the identity of the witnesses, the court must order, on a showing of good cause, the State to disclose any rebuttal alibi witnesses no later than one week before trial. *Id.* The parties can agree to different, reasonable time periods for the exchange of information. *Id.*

G.S. 15A-905(c)(1) states that any notice of defense is inadmissible against the defendant at trial. Thus, if the defendant decides not to rely on the defense at trial, the State may not offer the notice against him or her. Another statute, G.S. 15A-1213, states that the trial judge must inform prospective jurors of any affirmative defense of which the defendant has given pretrial notice. The revisions to G.S. 15A-905(c)(1), enacted after G.S.

15A-1213, appear to override this provision. If the defendant advises the trial judge that he or she does not intend to pursue a defense for which he or she has given notice as part of discovery, the trial judge would appear to be prohibited from informing the jury of the defense under G.S. 15A-905(c)(1).

- b. Insanity and Other Mental Conditions.** Under G.S. 15A-959(a), the defendant must give notice of intent to rely on an insanity defense as provided under G.S. 15A-905(c). This provision basically repeats the defense obligation to give notice of defenses.

In cases not subject to the requirements of G.S. 15A-905(c)—that is, in cases in which the prosecution does not have reciprocal discovery rights—the defendant still must give notice within a reasonable time before trial of the intent to introduce expert testimony on a mental disease, defect, or other condition bearing on the state of mind required for the offense. See G.S. 15A-959(b).

If the defendant intends to rely on expert testimony in support of an insanity defense, the State has the right to have the defendant examined concerning his or her state of mind at the time of the offense. See *State v. Huff*, 325 N.C. 1, 36-37 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990). In cases in which the defendant relies on expert testimony to support a diminished capacity defense, a trial court also may order the defendant to undergo a psychiatric examination by a state expert. See *State v. Clark*, 128 N.C. App. 87, 94-95 (1997) (relying on *Huff*, court finds that trial court did not err in allowing State to obtain psychiatric examination of defendant who intended to use expert testimony in support of diminished capacity defense). Cf. *State v. Boggess*, 358 N.C. 676, 684-85 (2004) (finding that trial court had authority to order examination when defendant gave notice of both insanity and diminished capacity defenses).

If the defendant fails to give the required notice, the court may impose sanctions. See Section IV., below. Earlier cases held that the trial court could not preclude a defendant from offering an insanity defense under a general plea of not guilty despite the failure to give timely notice, but these decisions were issued before the 2004 discovery changes. See *State v. Nelson*, 76 N.C. App. 371, 374 (1985), *aff'd as modified*, 316 N.C. 350 (1986); *State v. Johnson*, 35 N.C. App. 729, 731-32 (1978). If the defendant refuses to cooperate in the examination, the prosecution may have grounds to argue for exclusion of the defendant's expert testimony on the defendant's mental condition. Whether the defendant would still have the right to offer lay testimony in support of the defense has not been decided by appellate case law.

- C. Obtaining Records From Third Parties.** The prosecution generally has a greater ability than the defense to obtain information from third parties without court assistance. Various statutes authorize the sharing of confidential information without an order of the court. See Section II.A.3.b., above. In some instances, however, the prosecution must make a motion to the court for the

production of confidential records held by a third party, such as a health care provider, school, or employer.

1. **Before Charges Have Been Brought.** North Carolina courts have held that a prosecutor may apply to the court for an order requiring the production of confidential records before the filing of criminal charges. The court has the inherent authority to order production if in the interest of justice. The prosecutor must present, "by affidavit or similar evidence, sufficient facts or circumstances to show reasonable grounds to suspect that a crime has been committed, and that the records sought are likely to bear upon the investigation of that crime." See *In re Superior Court Order*, 315 N.C. 378, 381-82 (1986) (prosecution must establish factual basis of need for customer's bank records; bare allegations of need insufficient). The prosecutor also must show that the interests of justice require disclosure of confidential information. *In re Brooks*, 143 N.C. App. 601, 611 (2001) (also holding that petition must state statutory grounds regarding disclosure of the records at issue); *In re Albemarle Mental Health Center*, 42 N.C. App. 292, 299 (1979) (remanding to trial court for determination whether disclosure of mental health records before filing of charges was necessary to proper administration of justice "such that the shield provided by G.S. 8-53.3 [psychologist-patient privilege] should be withdrawn").

The cases suggest additional restrictions on this procedure. Because a motion for production of records before the filing of charges is a special proceeding, it must be heard in superior court. See *Brooks*, 143 N.C. App. 601, 609; *Albemarle Mental Health Center*, 41 N.C. App. 292, 296 ("The superior court is the proper trial division for an extraordinary proceeding of this nature."). Because no case is pending, a subpoena is ordinarily not a proper mechanism for obtaining the records. See John Rubin & Aimee Wall, *Responding to Subpoenas for Health Department Records*, HEALTH LAW BULLETIN No. 82, at 3 & n.4 (question no. 3) (2005), available at <http://soqpubs.unc.edu/electronicversions/pdfs/hlb82.pdf>.

Because there is no pending case and no opposing party, the action may be filed ex parte unless notice is required by federal or state statutes regulating the records. If charges are brought, the defendant would be entitled to discovery of records obtained by the State because they are part of the State's files in the case.

2. **After Charges Have Been Brought.** After charges have been brought, a prosecutor also may file a motion for an order compelling production of confidential records from a third party. As with defense motions for the production of records from a third party, the motion may be heard in district court if the case is then pending in district court or, if the case is a felony, potentially in superior court whether or not the case is then pending in superior court. See *State v. Jones*, 133 N.C. App. 448, 463 (1999) (before transfer of felony case to superior court, district court has jurisdiction to rule on preliminary matters, in this instance, production of certain medical records), *aff'd in part and rev'd in part on other grounds*, 353 N.C. 159 (2000); *State v. Rich*, 132 N.C. App. 440, 451 (1999) (once case was in superior court, district court should not have entered order overriding doctor-patient privilege; district court's entry of order compelling disclosure was not prejudicial, however), *aff'd on other*

grounds, 351 N.C. 386; *State v. Jackson*, 77 N.C. App. 491, 496 (1985) (superior court had jurisdiction before indictment to enter order to determine defendant's capacity to stand trial because G.S. 7A-271 gives superior court exclusive, original jurisdiction over criminal actions in which a felony is charged).

A subpoena is generally insufficient to authorize disclosure of confidential records. While a subpoena requires a custodian of records to produce the records, most confidentiality statutes require a court order overriding the interest in confidentiality before a custodian may disclose the contents. See, e.g., G.S. 8-53 (court must find disclosure necessary to proper administration of justice to override physician-patient privilege); John Rubin & Mark Botts, *Responding to Subpoenas: A Guide for Mental Health Facilities*, POPULAR GOVERNMENT No. 64/4, at 33 (question no. 22) (Summer 1999) (discussing requirements for disclosure of mental health records). Cf. *State v. Cummings*, 352 N.C. 600, 611 (2000) (prison disclosed defendant's prison records in response to subpoena by prosecutor; court finds that terms of G.S. 148-76 permitted prison to make records available to prosecution in this manner).

Once a case is pending, a prosecutor ordinarily would not appear to have grounds to apply *ex parte* for a court order to compel production of records. The defendant, as a party to the proceeding, would have to be given notice. See Jeff Welty, *Obtaining Medical Records under G.S. 8-53*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 25, 2009), <http://nccriminalaw.sog.unc.edu/?p=656> (discussing N.C. R. Prof'l Conduct 3.5(a)(3), which prohibits *ex parte* communications unless otherwise permitted by law, and North Carolina State Bar, 2001 Formal Ethics Opinion 15 (2002), available at www.ncbar.gov/ethics/, which recognized applicability of ethics rule to *ex parte* communications by prosecutors). In one case, the court found no violation of the defendant's constitutional right to presence by the prosecution's *ex parte* application for an order requiring the North Carolina Department of Revenue to produce the defendant's tax records. *State v. Gray*, 347 N.C. 143, 166 (1997), *abrogated in part on other grounds by State v. Long*, 354 N.C. 534 (2001). However, the decision does not constitute authorization for prosecutors to make *ex parte* motions. See also *State v. Jackson*, 77 N.C. App. 491, 496 (1985) ("With respect to the entry of the order without notice to defendant or his counsel, we observe that while G.S. 15A-1002 expressly permits the prosecutor to question a defendant's capacity to proceed and contains no express provision for notice of such a motion, the requirement that the question of capacity to proceed may only be raised by a motion, setting forth the reasons for questioning capacity, implies that some notice must be given."). For a discussion of the grounds for the defense to move *ex parte* for the production of records, see Section II.D., above.

IV. Sanctions for Discovery Violations.

- A. **Sanctions for State's Statutory Violations.** G.S. 15A-910 authorizes a trial court to impose sanctions when a party has failed to comply with statutory

discovery, but it is not required to do so. *State v. Ellis*, 205 N.C. App. 650, 655 (2010).

1. **Required Showing.** At a minimum, a party must show the following to obtain sanctions:

- the other party was obligated to disclose the evidence;
- the other party violated its obligations; and
- the party seeking sanctions requested sanctions.

See *State v. Alston*, 307 N.C. 321, 330-31 (1983) (defendant failed to advise trial court of violation and request sanctions; no abuse of discretion in trial court's failure to impose sanctions).

2. **Factors Considered by the Court.** G.S. 15A-910(b) requires the court, in determining whether sanctions are appropriate, to consider

- the materiality of the subject matter, and
- the totality of circumstances surrounding the alleged failure to comply with the discovery request or order.

See also *State v. Dorman*, ___ N.C. App. ___, 737 S.E.2d 452, 471-72 (2013) (reversing order excluding State's evidence because order did not indicate court's consideration of these two factors).

In addition to these statutory factors, various other factors have been held to support the imposition of sanctions, although none are dispositive, including:

- *Importance of the evidence.* *State v. Jones*, 296 N.C. 75, 80 (1978) (motion for appropriate relief granted and new trial ordered for prosecution's failure to turn over laboratory report bearing directly on guilt or innocence of defendant); *In re A.M.*, 220 N.C. App. 136, 138 (2012) (ordering new trial when trial court failed to allow continuance or grant other relief; State disclosed new witness, the only eyewitness to alleged arson, on day of adjudicatory hearing).
- *Existence of bad faith.* *State v. McClintick*, 315 N.C. 649, 662 (1986) (trial judge "expressed his displeasure with state's tactics" and took several curative actions); *State v. Jaaber*, 176 N.C. App. 752, 756 (2006) (State took "appreciable action" to locate missing witness statements; trial court did not abuse discretion in denying mistrial).
- *Unfair surprise.* *State v. King*, 311 N.C. 603, 619 (1984) (no abuse of discretion in denial of mistrial, as defendant was aware of statements that prosecution had failed to disclose); *State v. Aguilar-Ocampo*, 219 N.C. App. 417, 423 (2012) (defendant conceded that he anticipated that State would offer expert testimony, although he could not anticipate precise testimony).
- *Prejudice to preparation for trial.* *State v. Williams*, 362 N.C. 628, 639 (2008) (photos destroyed by State were material evidence favorable to defense, which defendant never possessed, could not reproduce, and could not prove through testimony; case decided

under G.S. 15A-954(a)(4)); *State v. Jones*, 295 N.C. 345, 359 (1978) (defendants failed to suggest how nondisclosure hindered preparation for trial and failed to specify any items of evidence that they could have excluded or rebutted more effectively had they learned of evidence before trial); *State v. Pigott*, 320 N.C. 96, 103-104 (1987) (no abuse of discretion in denial of mistrial; court finds that prosecution's failure to disclose discoverable photographs did not lead defense counsel to commit to theory undermined by photographs); *State v. King*, 311 N.C. 603, 619-20 (1984) (no abuse of discretion in denial of mistrial; no suggestion that defendant would not have testified had prosecution disclosed oral statement to officer).

A trial court's decision whether to impose sanctions for a violation is within its sound discretion and will be reversed on appeal only if an abuse of discretion is shown. *State v. Ellis*, 205 N.C. App. 650, 655 (2010).

3. Court's Choice of Sanction.

- a. Available Options.** G.S. 15A-910 provides if a court determines that a party has failed to comply with discovery or an order issued by the court, the court in addition to exercising its contempt powers may:
- issue an order permitting discovery or inspection,
 - grant a continuance or recess,
 - prohibit the violating party from introducing the nondisclosed evidence,
 - declare a mistrial
 - dismiss the charge(s), with or without prejudice, or
 - enter other appropriate orders.
- b. Discretionary Decision.** The choice of sanction is within the trial court's discretion and is reversed on appeal only when there is an abuse of discretion. *State v. Jaaber*, 176 N.C. App. 752, 755-56 (2006) (finding that statute does not require that trial court impose sanctions and leaves choice of sanction, if any, in trial court's discretion).
- c. Recess or Continuance.** Probably the most common sanction is an order requiring disclosure of the evidence and the granting of a recess or continuance. See, e.g., *State v. Pender*, 218 N.C. App. 233, 242 (2012) (trial court did not abuse discretion in denying defendant's request for mistrial when State failed to disclose new information provided by codefendant; trial court's order, in which court instructed defense counsel to uncover discrepancies on cross-examination and allowed defense recess thereafter to delve into matter, was permissible remedy); *State v. Remley*, 201 N.C. App. 146, 150-51 (2009) (trial court did not abuse discretion in refusing to dismiss case or exclude evidence when on second day of trial State disclosed incriminating statement of defendant; granting of recess was adequate remedy when court said it would consider any additional request other than dismissal or exclusion

of evidence, and defendant did not request other sanction or remedy).

The failure of a trial court to grant a continuance may constitute an abuse of discretion when the defendant requires additional time to respond to previously undisclosed evidence. *State v. Cook*, 362 N.C. 285, 295 (2008) (so holding but concluding that denial of continuance was harmless beyond reasonable doubt because other evidence against defendant was overwhelming); *In re A.M.*, 220 N.C. App. 136, 138 (2012) (ordering new trial when trial court failed to allow continuance for juvenile; State disclosed new witness, the only eyewitness to alleged arson, on day of adjudicatory hearing).

- d. **More Severe Trial Sanctions.** Appellate and trial courts have imposed other, stiffer sanctions. They have imposed sanctions specifically identified in G.S. 15A-910, such as exclusion of evidence, preclusion of witness testimony, mistrial, and dismissal; and they have fashioned other sanctions to remedy the prejudice caused by the violation and deter future violations. See, e.g., *State v. Taylor*, 311 N.C. 266, 271-72 (1984) (trial court prohibited State from introducing photographs and physical evidence it had failed to produce in discovery, but court held that trial court did not abuse discretion in permitting introduction of another photograph); *State v. Barnes*, ___ N.C. App. ___, 741 S.E.2d 457, 464 (2013) (trial court refused to exclude testimony for alleged untimely disclosure of State's intent to use expert but allowed defense counsel to meet privately with State's expert for over an hour before voir dire hearing); *State v. Moncree*, 188 N.C. App. 221, 227 (2008) (finding that trial court should have excluded testimony of State's expert about identity of substance found in defendant's shoe when State failed to notify defendant of subject matter of expert's testimony; but error not prejudicial); *State v. James*, 182 N.C. App. 698, 702 (2007) (trial court excluded witness statement produced by State after discovery deadline set by trial court); *State v. Blankenship*, 178 N.C. App. 351, 356 (2006) (finding that trial court abused discretion in failing to preclude an expert witness from testifying who was not on State's witness list); *State v. Hall*, 93 N.C. App. 236, 238 (1989) (for belated disclosure of evidence, trial court ordered State's witness to confer with defense counsel and submit to questioning under oath before testifying).

Some cases have applied the general mistrial standard to the granting of a mistrial as a sanction for a discovery violation. *State v. Jaaber*, 176 N.C. App. 752, 756 (2006) ("[M]istrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." (citation omitted)); *accord State v. Pender*, 218 N.C. App. 233, 242 (2012).

Dismissal has been characterized as an extreme sanction, which should not be routinely imposed and which requires findings detailing the prejudice warranting dismissal. *State v. Dorman*, ___ N.C. App. ___, 737 S.E.2d 452, 470 (2013) (reversing order dismissing charge as sanction for State's discovery violation

because trial court did not explain prejudice to defendant that warranted dismissal); *State v. Allen*, 222 N.C. App. 707, 733 (2012) (noting that dismissal is extreme sanction and reversing court's order of dismissal based on circumstances of case); *State v. Adams*, 67 N.C. App. 116, 121 (1984) (recognizing that dismissal is extreme sanction and upholding trial court's dismissal because prejudice was apparent in State's noncompliance with court's discovery order; trial court's failure to make findings did not warrant reversal of trial court or remand); *State v. Mills*, 332 N.C. 392, 406-407 (1992) (trial court offered defendant mistrial for State's discovery violation, which defendant rejected because he requested dismissal of charges; court held that trial court did not abuse discretion in not dismissing charges).

e. **Personal Sanctions.** G.S. 15A-910(c) provides when determining whether to impose personal sanctions for untimely disclosure of law enforcement and investigatory files, a court must presume that prosecuting attorneys and their staffs have acted in good faith if they have made a reasonably diligent inquiry of those agencies under G.S. 15A-903(c) (agencies must provide prosecutor's office with copies of their complete files) and disclosed the responsive materials.

f. **Criminal Penalties.** G.S. 15A-903(d) provides that a person is guilty of a Class H felony if he or she willfully omits or misrepresents evidence or information required to be disclosed under G.S. 15A-903(a)(1), the provision requiring the State to disclose its complete files to the defense. The same penalty applies to law enforcement and investigative agencies that fail to disclose required information to the prosecutor's office under G.S. 15A-903(c). A person is guilty of a Class 1 misdemeanor if he or she willfully omits or misrepresents evidence or information required to be disclosed under any other provision of G.S. 15A-903.

4. **Findings.** The statute does not require the court to make specific findings on the record that it considered sanctions before determining not to do so. See G.S. 15A-910. However, if the court imposes any sanction, it must make specific findings justifying the imposed sanction. G.S. 15A-910(d); *State v. Foster*, ___ N.C. App. ___, 761 S.E.2d 208, 218-19 (2014) (trial court did not make any findings of fact to justify sanction).

B. Sanctions For Defendant's Statutory Discovery Violations. The general principles on sanctions discussed immediately above apply to violations by the defense of its discovery obligations. Additionally, in *State v. Foster*, ___ N.C. App. ___, 761 S.E.2d 208, 219 (2014), the court stated that the relevant factors, among others, for a trial court to consider before imposing sanctions on a defendant are:

- The defendant's explanation for the discovery violation, including whether the violation constituted willful misconduct by the defendant or whether the defendant sought to gain a tactical advantage;
- The State's role, if any, in causing the violation;

- The prejudice to the State resulting from the defendant's discovery violation;
- The prejudice to the defendant resulting from the sanction, including whether the sanction could interfere with any of the defendant's fundamental rights; and
- The possibility of imposing a less severe sanction on the defendant.

Most cases imposing sanctions against the defense involve the failure to disclose expert witnesses and expert reports and the failure to give notice of defenses. These cases typically involve a defendant's appellate assignment of error to a trial court's order precluding use of the undisclosed information. *But cf.* *State v. Morganherring*, 350 N.C. 701, 723 (1999) (trial court has authority to allow State to conduct voir dire of defense expert before expert testified if expert does not produce written report). Appellate cases involving preclusion of evidence—generally, the most serious sanction against the defense—may not be representative of the sanctions typically imposed by trial courts. When the court imposes lesser sanctions or remedies for a violation—for example, a recess or continuance for the State to prepare to meet the evidence—the order is less likely to be an issue on appeal.

In *State v. Gillespie*, 362 N.C. 150, 155-56 (2008), the court held that G.S. 15A-910 did not give the trial court the authority to sanction the defendant by precluding the testimony of an expert witness for the failure of the expert to comply with the discovery statutes. According to the court, sanctions may be imposed against the parties for their actions, not for the actions of nonparties such as the expert in *Gillespie*. However, in later cases, a preclusion sanction was upheld for the failure to provide an expert's report to the State. *State v. Lane*, 365 N.C. 7, 31-37 (2011) (expert testimony excluded as discovery violation sanction upheld when defense failed to provide expert reports to State despite repeated requests by State, orders by court, and continuances of deadlines; precluded testimony by expert was also irrelevant). See also *State v. Braxton*, 352 N.C. 158, 209-12 (2000) (upholding exclusion of expert testimony at capital sentencing hearing because defendant failed to disclose in timely manner expert report in defendant's possession); *State v. Leyva*, 181 N.C. App. 491, 501-02 (2007) (trial court did not abuse discretion in denying defendant's request to allow him to call expert on reliability of confidential informants whom defendant failed to include on witness list; appellate court rejected defendant's claim that he needed expert because of officers' testimony about reliability of informant, finding that potential testimony was not required by interest of justice).

Cases involving the preclusion of a defense as a sanction include: *State v. Foster*, ___ N.C. App. ___, 761 S.E.2d 208, 216-20 (2014) (trial court abused its discretion by denying defendant's request for entrapment instruction as sanction for defendant's failure to provide "specific information as to the nature and extent of the defense" as required by G.S. 15A-905(c)(1)b; court did not make any findings of fact to justify sanction and State did not show prejudice from lack of detail in defense notice filed eight months before trial); *State v. McDonald*, 191 N.C. App. 782, 785-87 (2008) (excluding two of four defenses to be offered by defense for failure to give any notice of defenses until day of trial despite repeated motions by State for disclosure; defense counsel, who had substituted into the case, professed not to have been served with motions, but State produced four or five motions, some of which had been served on that attorney; excluded defenses would have required substantial, unanticipated

preparation by State); *State v. Nelson*, 76 N.C. App. 371, 374 (1985) (finding that trial court did not have authority to preclude defense from offering evidence of insanity under not guilty plea despite failure to give notice of insanity defense as required by G.S. 15A-959 [decision issued before 2004 changes to discovery statutes]), *aff'd as modified*, 316 N.C. 350 (1986); *State v. Pender*, 218 N.C. App. 233, 243-44 (2012) (defendant not entitled to jury instruction on voluntary manslaughter based on imperfect self-defense when defendant did not provide State with required notice of intent to assert theory of self-defense in response to State's request; court finds in alternative that evidence was insufficient to support the instruction so any error in imposing sanction was harmless).

In addition to statutory considerations, there may be constitutional concerns with sanctions against the defense. See *Taylor v. Illinois*, 484 U.S. 400, 417 (1988) (court recognizes that Compulsory Process Clause of Sixth Amendment protects defendant's right to present defense, but finds on facts that trial court could preclude testimony of defense witness as sanction for deliberate violation of discovery rule; "case fits into the category of willful misconduct in which the severest sanction is appropriate"); *State v. Cooper*, ___ N.C. App. ___, 747 S.E.2d 398, 414-15 (2013) (trial court's choice of sanction barring testimony of defense expert witness on key issue in trial, in light of lack of willful misconduct in committing notice-of-expert violation, was abuse of discretion considering alternative choices of continuance or recess as lesser sanction; even if not an abuse of discretion, sanction violated defendant's federal and state constitutional rights to present witnesses in his defense). See generally John Rubin, *What Are Permissible Discovery Sanctions Against the Defendant?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 12, 2013), <http://nccriminallaw.sog.unc.edu/what-are-permissible-discovery-sanctions-against-the-defendant/>

- C. Sanctions for State's Constitutional Violations Under G.S. 15A-954.** A dismissal of a criminal charge for a constitutional violation involving exculpatory evidence may be supported under G.S. 15A-954(a)(4), which provides for a dismissal when the defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his or her case that there is no remedy but to dismiss the prosecution. The court in *State v. Joyner*, 295 N.C. 55, 59 (1978), stated that because this statutory provision contemplates drastic relief, a motion to dismiss under its terms should be granted sparingly.

In *State v. Williams*, 362 N.C. 628, 639-40 (2008), the court upheld the trial court's pretrial dismissal of a charge of felony assault on a government officer when a poster in the district attorney's office that mocked the defendant was apparently deliberately destroyed before trial and thus was unavailable for use by the defendant at trial. The poster, which had been requested by the defendant's attorney during pretrial discovery, was materially favorable to the defendant concerning the pending assault charge. On the other hand, in *State v. Dorman*, ___ N.C. App. ___, 737 S.E.2d 452, 467-68 (2013), the court reversed the trial court's pretrial dismissal of a first-degree murder charge because the defendant failed to demonstrate that the defendant's ability to prepare a defense was so irreparably prejudiced that a dismissal of the charge under G.S. 15A-954(a)(4) was the only appropriate remedy. Although most of the alleged bones of the deceased had been destroyed, it was not established that other partial remains were untestable or the identification of the deceased was somehow flawed or incapable of repetition.

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