UNC SCHOOL OF GOVERNMENT

2017 New Felony Defender Training

April 3-5, 2017 / Chapel Hill, NC

ELECTRONIC PROGRAM MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.

UNC SCHOOL OF GOVERNMENT

2017 New Felony Defender Training

April 3-5
UNC School of Government, Chapel Hill, NC
Co-sponsored by the UNC School of Government &
Office of Indigent Defense Services

Monday, April 3

9:15 to 9:50a	*Check-in*
9:50 to 10:00	Welcome Phil Dixon, Jr., Defender Educator UNC School of Government, Chapel Hill, NC
10:00 to 10:45	**What's in the Felony File; Organizing a Trial Notebook and Exhibits** (45 mins) Keith A. Williams, Attorney Law Offices of Keith Williams, Greenville, NC
10:45 to 12:00	**Developing an Investigative and Discovery Strategy** (75 mins) Vince F. Rabil, Assistant Capital Defender Forsyth County Capital Defender's Office, Winston-Salem, NC
12:00 to 1:00	*Lunch (provided in the building)*
1:00 to 2:30	**WORKSHOP: Developing an Investigative and Discovery Strategy** (90 mins)
2:30 to 2:45	*Break (snack provided)*
2:45 to 3:45	**Motions Practice in Superior Court** (60 mins) Phil Dixon, Jr., Defender Educator UNC School of Government, Chapel Hill, NC
3:45 to 5:00	**Ethics for Felony Defenders** (75 mins) Tom Maher, Executive Director Office of Indigent Defense Services, Durham NC
5:00p	*Adjourn*

**IDS employees may not claim reimbursement for lunch*

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Tuesday, April 4

9:00 to 10:15a	**Sentencing in Superior Court** (75 mins) Jamie Markham, Professor of Public Law and Policy UNC School of Government, Chapel Hill, NC
10:15 to 10:30	*Break*
10:30 to 11:45	**Voir Dire and Demonstration** (75 mins) Kelley DeAngelus, Assistant Public Defender Wake County Public Defender's Office, Raleigh NC
11:45-12:30	**Evidence Blocking** (45 mins) John Rubin, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
12:30-1:30	*Lunch (provided in the building)*
1:30-2:30	**Motions to Suppress: Statements, Property and Identification** (60 mins) Jan Elliot Pritchett, Attorney Schlosser & Pritchett, Greensboro, NC
2:30-4:00	**WORKSHOP: Evidence Blocking and Motions to Suppress** (90 mins)
4:00-4:15	*Break (snack provided)*
4:15-5:15	**Preserving the Record** (60 mins) Glenn Gerding, Appellate Defender Office of the Appellate Defender, Durham NC
5:15p	*Adjourn*

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Wednesday, April 5

9:00 to 9:45a	**Sentencing Advocacy-A View from the Bench** (45 mins) Honorable G. Bryan Collins, Resident Superior Court Judge Raleigh, NC
10:00-10:45	**Jury Instructions** (45 mins) Phoebe W. Dee, Assistant Public Defender Chatham County Public Defender's Office, Pittsboro NC
10:45 to 11:00	*Break*
11:00-12:00	**Lab Reports and Issues Surrounding Them** (60 mins) Sarah R. Olson, Forensic Resource Counsel Office of Indigent Defense Services, Durham, NC
12:00p	*Adjourn*

CLE HOURS: 15.0
*Includes 1.25 hour of ethics/professional responsibility

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ONLINE RESOURCES FOR INDIGENT DEFENDERS

ORGANIZATIONS

NC Office of Indigent Defense Services
http://www.ncids.org/

UNC School of Government
http://www.sog.unc.edu/

Indigent Defense Education at the UNC School of Government
https://www.sog.unc.edu/resources/microsites/indigent-defense-education

TRAINING

Calendar of Live Training Events
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/calendar-live-events

Online Training
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/online-training-cles

MANUALS

Orientation Manual for Assistant Public Defenders
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/orientation-manual-assistant-public-defenders-introduction

Indigent Defense Manual Series (collection of reference manuals addressing law and practice in areas in which indigent defendants and respondents are entitled to representation of counsel at state expense)
http://defendermanuals.sog.unc.edu/

UPDATES

On the Civil Side Blog
http://civil.sog.unc.edu/

NC Criminal Law Blog
https://www.sog.unc.edu/resources/microsites/criminal-law-north-carolina/criminal-law-blog

Criminal Law in North Carolina Listserv (to receive summaries of criminal cases as well as alerts regarding new NC criminal legislation)
http://www.sog.unc.edu/crimlawlistserv

TOOLS and RESOURCES

Collateral Consequences Assessment Tool (centralizes collateral consequences imposed under NC law and helps defenders advise clients about the impact of a criminal conviction)
http://ccat.sog.unc.edu/

Motions, Forms, and Briefs Bank
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/motions-forms-and-briefs

Training and Reference Materials Index (includes manuscripts and materials from past trainings co-sponsored by IDS and SOG)
http://www.ncids.org/Defender%20Training/Training%20Index.htm

WHAT'S IN THE FELONY FILE

What's in the Felony File:
Organizing a Trial Notebook and Exhibits

Keith Williams
Greenville, North Carolina
Telephone: 252-931-9362
Email: keith@williamslawonline.com

1) Intro
   a) The Vanishing Trial
      i) How it used to be
         (1) Various numbers
            (a) 1962: 15% of all federal criminal cases went to trial
            (b) 1976: 9% of all state criminal cases went to trial
            (c) 1980: 18% of all federal criminal cases went to trial
         (2) Sources
            (a) *A World without Trials,* Journal of Dispute Resolution, Volume 2006, Issue I,http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1640&context=jdr
            (b) *The Vanishing Trial,* Journal of Empirical Legal Studies, November 2004, Volume I, Issue 3
      ii) How it is now
         (1) 2013: 3% of federal criminal cases went to trial
            (a) https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html?_r=0
      iii) Most recent numbers for North Carolina
         (1) From July 1, 2015, through June 30, 2016
         (2) "Overall, 2% of convictions statewide resulted from jury trials"
            (a) 28,593 total convictions
            (b) 28,021 resulted from plea
            (c) 572 resulted from jury trial
         (3) did not break it down by county
            (a) will vary based on population
            (b) but rough number: 572 jury trials over 100 counties is 5.72 jury trials per year in each county: average 6 in a year; one every 2 months
               (i) some more
               (ii) some **less**
         (4) January 2017 report from NC Sentencing and Policy Advisory Commission
            (a) http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt_fy15-16.pdf

b) Causes?
   i) Harsher sentences b/c of structured sentencing
      (1) I would agree re federal court
      (2) But probably not agree re state court
   ii) Vicious cycle
      (1) We are exposed to fewer jury trials
      (2) Which deprives us of the opportunity to learn about them and become familiar with them
      (3) Which makes us less likely to have the courage to engage in them
      (4) Which means there are fewer jury trials
   iii) Hard but honest assessment (opinions from me, not from the School of Government)
      (1) Overworked lawyers
      (2) Lazy lawyers
      (3) Scared lawyers

c) Question for me and for each one of us:
   i) Am I a poser?
      (1) A poser says they are a trial lawyer, but actually lacks the stomach for it
   ii) Sometimes hard for us to know ourselves; easy for the prosecutors to tell
      (1) They know who talks about going to trial – and almost always pleads
      (2) They also know who talks about going to trial – and actually goes to trial
      (3) One guess as to who gets the better plea offers
   iii) Wade Smith: you need to be sure you are anything other than a "tasty morsel" for the prosecutors
      (1) You want to be thick and grisly and unpleasant

d) Is it OK to be a lawyer and avoid jury trials?
   i) Yes, but not if you represent people charged with felonies in Superior Court
   ii) <u>We are not mediators; we are trial lawyers</u>
      (1) Even a civilized society needs a place to brawl
      (2) No jousting; no bullfighting; no street fighting
      (3) All replaced by trial lawyering

e) Three steps to taking more cases to trial
   i) Know the facts of your case
   ii) Know the law that applies
   iii) Prepare
      (1) Buying a house: location, location, location
      (2) Going to jury trial in a felony case: preparation, preparation, preparation

f) Purpose of today is the third step: preparation
   i) Demystify the process
   ii) Makes us more likely to engage in the process
   iii) One caveat: you will never feel 100% prepared
      (1) There is also something more you can do
      (2) But if you wait until you feel 100% prepared b/4 you try a case, you will never try a case

2) Order of preparation
   a) Disclaimer: what I know, I have learned from others; hard for me to identify / recall all of the sources, but it would especially be from attorneys Roger Pozner and Chris Dodd
   b) Decide on your theory of the case
      i) Before you start the road trip, know your destination
      ii) Example: rape case
         (1) My client was not at the party: alibi
         (2) My client was at the party but did not go in the room with her: mistaken identity
         (3) My client was at the party and did go in the room with her, but they did not have sex: untruthful prosecuting witness
         (4) My client was at the party and did go in the room and did have sex with her, but she was a willing participant: consent
   c) Then think about your closing argument: your best points for winning the case
      i) Shows you the points you need to make during trial
   d) Cross-examination: try to make most of your points on cross of expected State's witnesses
   e) Direct examination: call your own witnesses and possibly your client to testify if you have points you need to make that you cannot get from the State's witnesses
   f) Opening statement: how best will you forecast the important points to the jury
   g) Jury selection: what are the key points that you need to raise with the jury during voir dire

3) Trial Notebook
   a) Tried a jury trial one time from folders
      i) Never again
   b) Take your materials and put them into a three-ring notebook with tabs
      i) Jury selection (voir dire)
      ii) Opening statement
      iii) Cross-ex of State's witnesses
         (1) One tab for each witness
      iv) Motions at close of State's evidence
      v) Presentation of Defense witnesses
         (1) One tab for each witness
      vi) Motions at close of all evidence
      vii) Jury instructions / charge conference
         (1) Available for free on School of Govt website
         (2) Print the instructions you want
         (3) Four copies: one for you, one for the judge, one for the clerk, one for the State
      viii) Closing argument
      ix) Sentencing
   c) Inside front folder
      i) My outline
      ii) Index to trial notebook
      iii) Spreadsheet of exhibits
   d) Cover sheet: "TRIAL NOTEBOOK"
      i) Let the client see that you are ready

e) Forces you to go through the file and prune it
    i) Keep what you need
    ii) Get rid of the rest
        (1) "A major preparation attribute that separates great trial lawyers from lesser advocates is the ability to streamline their cases. Highly effective trial lawyers jettison redundant witnesses, unnecessary exhibits, repetitive questions, causes of action, or defenses that detract from the principal theory of the case. All of this is critical to success at trial."
        (2) *Eight Traits of Great Trial Lawyers*, Judge Mark Bennett, Voir Dire, Summer 2014, http://bit.ly/2n4JO3v

4) Preparation for cross-examination
    a) The most important skill of a criminal defense attorney
        i) A skill that can be learned
    b) Youtube: Terry McCarthy on Cross-Examination
        i) https://youtu.be/QcOkG9-TpEo
    c) Pozner and Dodd, Masters of Cross-Examination DVD
        i) pozneranddodd.com
        ii) chapter method of cross-examination
            (1) break your questions down into smaller sub-questions
            (2) each of the smaller questions is a chapter
            (3) have a spreadsheet for each smaller question, and move through them in the order you believe most effective
            (4) you are making statements, and the witness is saying yes or no
            (5) you are using them to make your points; they are there to serve your purpose
                (a) preparation: you know in advance the points you need to cover

5) Preparation for direct examination
    a) If your client is going to testify, do a practice direct examination with them
        i) Record it
        ii) Give it to them to watch
    b) Will make them a much better witness at trial

6) Exhibits
    a) Decide what you need to admit through the various witnesses
        i) You are allowed to admit your exhibits through the State's witnesses if you can get a sufficient foundation
    b) Decide how you want to display them
        i) On the screen
            (1) From your computer using something like Apple TV
            (2) Note: you will still need a printed copy to give to the clerk for the court file
        ii) In hard copy to be handed to the jury
        iii) On an easel, blown up and displayed on foam board

c) Have them marked and ready to go
    i) In your trial notebook, in the tab for the witness through whom you plan to introduce the exhibit
    ii) Defense Exhibit stickers – in the bottom right corner
        (1) 1, 2, 3, 4, etc
    iii) you need three copies of each
        (1) one for you
        (2) one for the court
        (3) one for the prosecutor
    iv) spreadsheet of exhibits will have the number the exhibit
d) How you keep them for your own use: in paper form or electronic form?
    i) Yes
    ii) In paper – as part of trial notebook
    iii) On computer
        (1) Documents in PDF format so you can search as needed to find specific words or phrases on the fly in trial
            (a) Tip: make all of your PDF documents word searchable by using the OCR process
                (i) Optical character recognition; turns the scanned page into searchable text
                (ii) Windows: Document – OCR text recognition
                (iii)Mac: Tools – Text recognition
        (2) Other exhibits – as backup on computer
e) How to introduce them: don't make this harder than it has to be
    i) The steps
        (1) Identify the exhibit by number
        (2) Have the witness describe it and lay the foundation for it
        (3) Move to admit it
    ii) Example for admitting a photo:
        (1) I hand you what has been marked as Defense Exhibit number 1 for identification purposes
        (2) Do you recognize it
        (3) Can you tell us what it is
        (4) Does it fairly and accurately depict the scene
        (5) You honor, I move to admit Defense Exhibit number 1
    iii) be familiar with the legal standards for laying a foundation for that type of exhibit
f) With witnesses you present on direct examination, using exhibits opens the possibility of allowing your witness to testify twice in the same direct
    i) First time through: without exhibits
    ii) Second time through: with exhibits
g) If possible, use key exhibits during opening
    i) Will need to get judge's permission in advance

7) Conclusion

DEVELOPING AN INVESTIGATIVE AND DISCOVERY STRATEGY

STRATEGIES FOR DISCOVERY AND INVESTIGATION IN DEFENSE OF FELONY CASES

A PRESENTATION TO NEW FELONY DEFENDERS TRAINING
UNC SCHOOL OF GOVERNMENT
CHAPEL HILL, N.C.

April 3, 2017

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I. GETTING STARTED: THE DUTY TO INVESTIGATE[1]

The America Bar Association has published standards for the criminal defense attorney to follow concerning their duties regarding investigation and discovery and **duties owed to clients regarding their "discovery rights" and their rights to be informed and to share decisions about "strategies" for discovery and investigation**. Every new felony defense attorney should read, and periodically re-read, these standards. They are updated regularly and available online.[2] The duties and responsibilities of a criminal defense attorney regarding discovery and investigation are among the most complex and varied in the law. Mastery and knowledge of discovery statutes, constitutional law affecting discovery, and ethical duties surrounding discovery and

[1] This paper is meant to supplement, not duplicate, the very thorough discussions of ***Discovery in Criminal***

[2] AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS DEFENSE FUNCTION, Fourth Edition, viewable at: http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html .

investigation **can make or break a case** and will determine and shape the effectiveness and reputation of the criminal defense lawyer as an advocate for every client.

Issues surrounding discovery and investigation can literally be a matter of life or death for a client. The potential consequences to every client of any felony conviction or acquittal cannot be overestimated. The stakes involved in getting or not getting discovery, in enforcing or not enforcing discovery rights, cannot be any higher. Frequently overlooked defense obligations, such as t**he need to get orders to preserve evidence, to interview state witnesses, to view physical evidence, and to inspect the original state files,** are discussed herein. Sometimes fighting for discovery and discovering exculpatory evidence or weaknesses in the State's case may be your client's only good defense. Your client's liberty, citizenship, job, family, freedom, immigration or refugee status may be at stake depending on whether or not the attorney gets all the discovery to which the defendant is entitled.

Because discovery and investigation is akin to "an infinite regress," post conviction discovery can be considered a continuation of the discovery process that was cut off pretrial due to either prosecutorial concealment or suppression of *Brady* material, by deliberate or negligent misrepresentation of the prosecutor, or due to professional negligence of defense counsel.

This paper is intended to assist the new felony criminal defense attorney in identifying the "due diligence" required to effectively represent those charged with felony offenses by identifying many of the tools available under Article 48; through the use of other methods and motions that can be filed under the defendant's state and federal constitutional rights to discovery; and, through the use of an investigator or expert to get

as much information as possible concerning the State's case, its strengths and weaknesses. The defense attorney should also make efforts to identify and obtain information about relevant individual mental health and medical history of the client in appropriate cases which may be utilized to defend the client at trial and/or utilized in plea negotiations to minimize that client's risk of loss of life, liberty, property, citizenship, or possible deportation. Most of a defendant's prison, hospital, school, disability and mental health records can be easily obtained with a release, HIPPA release, and subpoena to produce records to the attorney's office. Sometimes it will take a court order to get these.

Every defense attorney, no matter how old or experienced they may be, will often need assistance from others in specialized forensic or legal matters. The new felony defense attorney should seek to maintain professional association memberships in groups such as the American Bar Association (ABA), the National Association of Criminal Defense Lawyers (NACDL), the North Carolina Advocates for Justice (NCAJ), the National Association for Public Defense (NAPD), and the N.C. Bar Association. Each of these organizations has monthly publications often concerning discovery issues. Be on the look-out for important annual trainings and CLE programs relevant to discovery and investigation of specialized matters such as forensics, drug testing, digital discovery, or intellectual disability. The new felony defender should not be afraid to reach out to colleagues or experts to find out what kind of specialized discovery may be needed to properly investigate and evaluate a case. This is especially true in cases involving digital or cell phone evidence, cell tower hits, DNA and serological evidence, and any case involving tool mark, trace evidence, or other technical matters.

N.C.I.D.S. maintains a database of experts, sample motions, and a wealth of advice on discovery of forensic issues. Its listed experts can be consulted as work product experts to find out what specific items of evidence not routinely turned over in discovery by the State need to be specifically requested in a written request and motion to compel discovery. These experts can remain "work product" to assist the attorney in cross examination of State experts, or be asked to evaluate or test evidence themselves, and/or be retained to testify for the defense.[3] Many of these experts will speak with you before being appointed about what they can actually do for the defens in a particular case. As with every expert, each expert will need to be properly vetted by the defense attorney before getting funds for their services to be sure they are credible and appropriate for the case.

II. THE ABA GUIDELINES AND CRIMINAL DEFENSE STANDARDS.

The key ABA standards relevant to discovery and investigation are:

Standard 4-3.7 Prompt and Thorough Actions to Protect the Client

(a) Many important rights of a criminal client can be protected and preserved only by prompt legal action. Defense counsel should inform the client of his or her rights in the criminal process at the earliest opportunity, and timely plan and take necessary actions to vindicate such rights within the scope of the representation.

(b) **Defense counsel should promptly seek to obtain and review all information relevant to the criminal matter, including but not limited to requesting materials from the prosecution.[4] Defense counsel should, when relevant, take prompt steps to ensure that the government's physical**

[3]http://www.ncids.com/forensic/index.shtml?c=Training%20%20and%20%20Resources,%20Forensic%20Resources .

[4] See: N.C. G.S. 15A-902, the need to file a written request/motion for voluntary discovery to trigger the State's obligations under G.S. 15A-903:
http://www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter_15a/gs_15a-902.html .

evidence is preserved at least until the defense can examine or evaluate it.[5]

(c) **Defense counsel should work diligently to develop, in consultation with the client, an investigative and legal defense strategy, including a theory of the case. As the matter progresses, counsel should refine or alter the theory of the case as necessary, and similarly adjust the investigative or defense strategy.**

(d) Not all defense actions need to be taken immediately. If counsel has evidence of innocence, mitigation, or other favorable information, defense counsel should discuss with the client and decide whether, going to the prosecution with such evidence is in the client's best interest, and if so, when and how.

(e) Defense counsel should consider whether an opportunity to benefit from cooperation with the prosecution will be lost if not pursued quickly, and if so, promptly discuss with the client and decide whether such cooperation is in the client's interest. Counsel should timely act in accordance with such decisions.

(f) For each matter, defense counsel should consider what procedural and investigative steps to take and motions to file, and not simply follow rote procedures learned from prior matters. Defense counsel should not be deterred from sensible action merely because counsel has not previously seen a tactic used, **or because such action might incur criticism or disfavor**. **Before acting, defense counsel should discuss novel or unfamiliar matters or issues with colleagues or other experienced counsel, employing safeguards to protect confidentiality and avoid conflicts of interest.**

(g) Whenever defense counsel is confronted with specialized factual or legal issues with which counsel is unfamiliar, counsel should, in addition to researching and learning about the issue personally, **consider engaging or consulting with an expert in the specialized area.**[6]

(h) Defense counsel should always consider interlocutory appeals or other collateral proceedings as one option in response to any materially adverse ruling.

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[5] See sample defense motions for discovery and to preserve evidence here: http://ncids.org/MotionsBankNonCap/TriaMotionsLinks.htm; and here: https://ncforensics.wordpress.com/2015/07/09/sample-motion-for-preservation-of-forensic-evidence/.

[6] *State v. Ballard*, 333 N.C. 515 (1993) - Sixth Amendment right to assistance of counsel entitles defendant to apply ***ex parte for appointment of expert***. An indigent defendant is entitled to any form of expert assistance necessary to his or her defense, not just the assistance of a psychiatrist.

Standard 4-4.1 Duty to Investigate and Engage Investigators

(a) **Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.**

(b) **The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.**

(c) Defense counsel's investigative efforts should **commence promptly** and should explore appropriate avenues that **reasonably might lead to information relevant to the merits of the matter,** consequences of the criminal proceedings, and potential dispositions and penalties. **Although investigation will vary depending on the circumstances**, **it should always be shaped by what is in the client's best interests, after consultation with the client**. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

(d) Defense counsel should determine whether the client's interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. **Counsel should regularly re-evaluate the need for such services throughout the representation.**

(e) If the client lacks sufficient resources to pay for necessary investigation, counsel should seek resources from the court, the government, or donors. **Application to the court should be made *ex parte* if appropriate to protect the client's confidentiality.**[7] Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a

[7] Guidelines of N.C. IDS and policies of the Office of the Capital Defender regarding when and how to engage experts, especially mental health experts can be very helpful when applying to a Superior Court judge for expert assistance, as well as, when to employ the expert and how to craft "referral questions" for the expert. See: http://www.ncids.com/forensic/experts/experts.shtml; Mechanics of Getting an Expert, by Cait Fenhagen, http://www.ncids.com/forensic/experts/Mechanics_of_Getting_Expert.pdf; http://www.ncids.org/Rules%20&%20Procedures/Policies%20By%20Case%20Type/CapCases/MentalHealthExperts.pdf.

regular basis. If adequate investigative funding is not provided, counsel may advise the court that the lack of resources for investigation may render legal representation ineffective. (emphasis added). ABA Guidelines for Defense Function. Standard 4-4.1.

The ABA Standards also provide guidance with respect to witnesses and expert witnesses, how to deal with witnesses to avoid becoming a witness in your own case; and, how to manage work product and confidentiality in dealing with expert witnesses:

Standard 4-4.3 Relationship With Witnesses

(a) "Witness" in this Standard means any person who has or might have information about a matter, including victims and the client.

(b) Defense counsel should know and follow the law and rules of the jurisdiction regarding victims and witnesses. In communicating with witnesses, counsel should know and abide by law and ethics rules regarding the use of deceit and engaging in communications with represented, unrepresented, and organizational persons.[8]

(c) **Defense counsel or counsel's agents should seek to interview all witnesses, including seeking to interview the victim or victims, and should not act to intimidate or unduly influence any witness.**

(d) **Defense counsel should not use means that have no substantial purpose other than to embarrass, delay, or burden, and not use methods of obtaining evidence that violate legal rights. Defense counsel and their agents should not misrepresent their status, identity or interests when communicating with a witness.**

(e) Defense counsel should be permitted to compensate a witness for reasonable expenses such as costs of attending court, depositions pursuant to statute or court rule, and pretrial interviews, including transportation and loss of income. No other benefits should be provided to witnesses, other than expert witnesses, unless authorized by law, regulation, or well-accepted practice. All benefits provided to witnesses should be documented so that they may be disclosed if required by law or court order. **Defense counsel should not pay or provide a benefit to a witness in order to, or in an amount that is likely to, affect the substance or truthfulness of the witness's testimony.**

(f) **Defense counsel should avoid the prospect of having to testify**

[8] Rule 7.4(a) of the N.C. Rules of Professional Conduct only prohibits communication with a person known to be represented by counsel in regard to the matter in question.

personally about the content of a witness interview. An interview of routine witnesses (for example, custodians of records) should not require a third-party observer. But when the need for corroboration of an interview is reasonably anticipated, counsel should be accompanied by another trusted and credible person during the interview. Defense counsel should avoid being alone with foreseeably hostile witnesses.

(g) **It is not necessary for defense counsel or defense counsel's agents, when interviewing a witness, to caution the witness concerning possible self-incrimination or a right to independent counsel. Defense counsel should, however, follow applicable ethical rules that address dealing with unrepresented persons. Defense counsel should not discuss or exaggerate the potential criminal liability of a witness with a purpose, or in a manner likely, to intimidate the witness, to intimidate the witness, or to influence the truthfulness or completeness of the witness's testimony, or to change the witness's decision about whether to provide information.**

(h) **Defense counsel should not discourage or obstruct communication between witnesses and the prosecution, other than a client's employees, agents or relatives if consistent with applicable ethical rules. Defense counsel should not advise any person, or cause any person to be advised, to decline to provide the prosecution with information which such person has a right to give. Defense counsel may, however, fairly and accurately advise witnesses as to the likely consequences of their providing information, but only if done in a manner that does not discourage communication.**

(i) **Defense counsel should give their witnesses reasonable notice of when their testimony at a proceeding is expected, and should not require witnesses to attend judicial proceedings unless their testimony is reasonably expected at that time, or their presence is required by law. When witnesses' attendance is required, defense counsel should seek to reduce to a minimum the time witnesses must spend waiting at the proceedings. Defense counsel should ensure that defense witnesses are given notice as soon as practicable of scheduling changes which will affect their required attendance at judicial proceedings.**

(j) **Defense counsel should not engage in any inappropriate personal relationship with any victim or other witness.**

Standard 4-4.4 Relationship With Expert Witnesses

(a) **An expert may be engaged to prepare an evidentiary report or testimony, or for consultation only. Defense counsel should know relevant rules governing expert witnesses, including possibly different disclosure rules governing experts who are engaged for consultation only.**

(b) **Defense counsel should evaluate all expert advice, opinions, or testimony independently, and not simply accept the opinion of an expert based on employer, affiliation or prominence alone.**

(c) **Before engaging an expert, defense counsel should investigate the expert's credentials, relevant professional experience, and reputation in the field. Defense counsel should also examine a testifying expert's background and credentials for potential impeachment issues. Before offering an expert as a witness, defense counsel should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify.**

(d) **Defense counsel who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert's opinion on the relevant subject.**

(e) **Before offering an expert as a witness, defense counsel should seek to learn enough about the substantive area of the expert's expertise, including ethical rules that may be applicable in the expert's field, to enable effective preparation of the expert, as well as to cross-examine any prosecution expert on the same topic. Defense counsel should explain to the expert that the expert's role in the proceeding will be as an impartial witness called to aid the fact-finders, explain the manner in which the examination of the expert is likely to be conducted, and suggest likely impeachment questions the expert may be asked.**

(f) **Defense counsel should not pay or withhold a fee, or provide or withhold a benefit, for the purpose of influencing an expert's testimony. Defense counsel should not fix the amount of the fee contingent upon the substance of an expert's testimony or the result in the case. Nor should defense counsel promise or imply the prospect of future work for the expert based on the expert's testimony.**

(g) **Subject to client confidentiality interests, defense counsel should provide the expert with all information reasonably necessary to support a full and fair opinion. Defense counsel should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. Defense counsel should be aware of expert discovery rules and act to protect confidentiality, for example by not sharing with the expert client confidences and work product that counsel does not want disclosed. (emphasis added).**

III. GENERAL CONSIDERATIONS

The term "discovery" generally refers to documents and evidence made available by the prosecutor to the defendant through "informal" and "formal" means, under N.C. General Statutes, Article 48, either voluntarily or by court order, while the case is in District or Superior Court. The term "investigation" generally refers to all other matters of evidence or information not obtainable from the prosecutor. Investigation occurs through the efforts of counsel for defendant using computer search engines; *subpoenas*[9]; *ex parte* motions or other motions for records from third parties;[10] i.e.: motions and court orders for *in camera* review and production of DSS records, drug treatment, medical or psychiatric records of witnesses. These motions and orders are not filed pursuant to Article 48 and 15A-902, *et seq*. Specific other statutes may govern each kind of third party records or evidence.[11] They should be filed *ex parte* to protect confidential work product strategies and tactics of the defense.[12]

Investigation can occur through efforts of an investigator or an expert working on behalf of the defendant. As a general rule, once investigation and discovery turns up one set of documents or records these usually lead to the need to obtain other records and to interview other witnesses. In a complex felony case, such as a capital murder, multiple sex offense case involving multiple victims over a long period of time, historical drug conspiracies, complex "white collar" crimes with hundreds or thousands of pages of financial records and email accounts, the process of discovery and investigation may

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[9] SUBPOENA DUCES TECUM. --Documents not subject to [the discovery statute] may still be subject to a *subpoena duces tecum*. *State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).*

[10] See: https://benchbook.sog.unc.edu/criminal/defs-right-3rd-party-confidential-records.

[11] See generally: re medical records, G.S. 8-53 and 8-53.3: http://nccriminallaw.sog.unc.edu/obtaining-medical-records-under-gs-8-53/; obtaining DSS records: https://dcoba.memberclicks.net/assets/CLE2015/2%20moore%20how%20to%20obtain%20records%20from%20dss.pdf.

[12] http://www.ncids.com/forensic/experts/Mechanics_of_Getting_Expert.pdf.

never be complete. However, due to various deadlines, looming motion and trial dates, discovery and investigation eventually comes to an end before trial or plea resolution.

IV. WAIVER OF *BRADY* AND DISCOVERY RIGHTS BY PLEA OR FAILURE TO REQUEST/MOVE FOR DISCOVERY.

Because approximately 90 percent of all felony cases are resolved by plea, ABA Defense Guidelines, Standard 4-3.7 (b), requires that **prompt and zealous efforts to obtain discovery and investigate must occur *before* a plea resolution**. **Once a guilty plea is entered, the defendant *waives all outstanding discovery rights, including the right to DNA testing and the right to impeachment or Brady material.***[13]

If the defense has not *requested in writing* and ***filed* written motions to compel all discovery** required from the State under the provisions of G.S. 15A-903, the defendant may forfeit or waive their statutorily entitled right to a dismissal or other sanction, under G.S. 15A-910, to strike or suppress evidence during the trial as a result of the State's discovery violation. THIS IS VERY IMPORTANT BECAUSE many cases have been dismissed or resolved due to the discovery of "lost" or "misplaced" State's evidence which only comes to light when a State's witness is on the stand or otherwise ***discovered during a trial***; i.e.: when it is discovered by the prosecution or defense during a trial that a lead detective overlooked or lost a "supplement report," or the DA's office "misfiled" a report in the wrong filing cabinet.

V. THE MOTION TO PRESERVE ALL EVIDENCE, NOTES, AND REPORTS.

Consistent with ABA Defense Guidelines, Standard 4-3.7(b), *supra,* once an attorney is appointed to a case, or retained, they should consider immediately filing a

[13] See: http://nccriminallaw.sog.unc.edu/waivers-in-plea-agreements/; *United States v. Ruiz*, 536 U.S. 622 (2002) (no constitutional right to receive impeachment material prior to entering guilty plea).

Motion to Preserve All Evidence, including specific items that are suspected to have been seized or in the possession or control of the State and its investigators: all reports, notes, physical evidence; i.e.: all controlled substances, gunshot residue tests, projectiles and shell casings, weapons, blood swabs, DNA swabs, 911 recorded calls, radio dispatch traffic, police body cam records, security and surveillance camera recordings, weapons, tool mark evidence, hair and fiber samples, trace evidence, latent fingerprint lifts, digital evidence (both cell phone and computer) and documentary evidence, notebooks and personal papers located in the pockets or wallet of a victim or the defendant.

The defense attorney should get an order to inspect and preserve this evidence entered in District Court as soon as possible.[14] The defense attorney should serve the filed Order in person or by First Class Mail on the prosecutor, the Medical Examiner, the State Crime Lab, and all involved law enforcement agencies: police, sheriff, medical examiner, and SBI. The certificates of service should be filed with the Clerk of Court in the case file. The Motion and Order to Inspect and Preserve should be renewed in Superior Court so it more likely will be enforced. This is to protect the defendant's right to inspect and copy or test this evidence before trial and before it is lost, misplaced, destroyed, "consumed" or "damaged" by State testing before the defense or defense experts have had a chance to view or test the evidence as required under N.C.G.S. 15A-903. The defendant has state and federal constitutional rights to inspect

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[14] DESTRUCTION OF CARTRIDGE CASINGS NOT ERROR WHERE DISCOVERY REQUEST NOT FILED. -- Court properly allowed a police officer to testify concerning the type of pistol used in assault as the officer's testimony regarding the location of shell casings when a bullet was fired from two different weapons was based not upon any specialized expertise or training, but merely upon his own personal experience and observations in firing different kinds of weapons; defendant's due process rights were not violated by the destruction of the shell casings as the police had no duty to preserve the casings when defendant did not file a discovery request for the casings. *State v. Fisher, 171 N.C. App. 201, 614 S.E.2d 428 (2005),* cert. denied, *361 N.C. 223, 642 S.E.2d 711 (2007).*

and preserve evidence: Due Process and Effective Assistance of Counsel rights, and the Right to Confront and Cross Examine Witnesses, especially State experts. If the evidence is later destroyed in violation of the Order to Allow Inspection and to Preserve Evidence, the defense can seek appropriate sanctions ranging from suppression to dismissal of charges under 15A-910.

The defense attorney may wish to immediately subpoena facebook, cell phone service provider records of calls made and text messages, and cable and internet provider records of the defendant or other key witnesses or co-defendants before these records are lost or destroyed in the course of business. Email account evidence may not be around after 30 to 90 days without an order to preserve, subpoena, or release and request to produce. Information is usually available online as to how to obtain these records from each provider.

VI. GETTING INFORMAL DISCOVERY.

Although there is no statutory discovery in District Court under Article 48, there is nothing to prevent a prosecutor from allowing, or the defense attorney from asking, to see the State file or police reports in District Court. There are certain tactics that can be employed to get early disclosures or informal discovery in District Court. The defendant may agree not to request a bond motion or a probable cause hearing, or the defendant may agree to *waive* a probable cause hearing, in return for being allowed to see or obtain a copy of the State's file or "prosecution booklet" in District Court.[15]

[15] CAUTION: If the defendant is represented by counsel and has or waives a probable cause hearing, the defendant is required to serve a written request for discovery on the State within ten days of that waiver or hearing under G.S. 15A-902(d).

A bond motion may allow the defense to learn about the State's case and theory of guilt. This can have the double advantage of allowing the client to see that you are willing to fight for them by challenging the State's case, and by allowing the client to hear for themselves what the State contends its major evidence is all about. This can build your credibility with your client and earn their trust later on when advising the client about a plea or their chances at trial. A bond motion is not without risks unless the State and the defendant agree on a bond amount or conditions of pretrial release. Your client may be better off in custody in some cases and you may inadvertently force the State to adopt a less conciliatory stance to the defendant regarding plea negotiations by antagonizing victims and family members or law enforcement in a highly contested bond motion.

Therefore, you should use your professional discretion and discuss the pros and cons of having a bond motion or probable cause hearing with the defendant before asking to be heard on bond or moving for a probable cause hearing. **Sometimes a bond motion or a probable cause hearing, if a state's witness is placed under oath, can have the unforeseen consequence of inadvertently *preserving state's evidence* for a later jury trial if that witness later dies, refuses to testify under the Fifth Amendment, or is otherwise "unavailable."** This is because testimony under oath at any hearing in the case at which the defendant or his or her attorney had the "opportunity" to cross examine the witness, will preserve that testimony for the State by turning it into prior or recorded testimony admissible at trial under the N.C. Rules of Evidence, Rule 804(b)(1).[16] *Crawford v. Washington,* and the client's Sixth Amendment Rights to Confront

[16] http://nccriminallaw.sog.unc.edu/hearsay-exceptions-former-testimony-and-dying-declarations/. *See:* N.C. Rules of Evid., Rule 804(b)(1); *Crawford v. Washington,* 541 U.S. 36 (2004).

Witnesses *WILL NOT KEEP THIS PRIOR HEARING TESTIMONY OUT at A LATER TRIAL.* Conversely, if the defendant wishes to have a probable cause hearing and the State goes forward on one, the defense should always have it recorded and transcribed for later use at trial, especially if the defendant calls an alibi or other witness to an affirmative defense at the probable cause hearing. This will preserve that testimony in a credible way for defense use at a later trial, if the defense witness becomes unavailable, and allow a vehicle to impeach a State witness's inconsistent trial testimony.

GET ENFORCIBLE STATUTORY DISCOVERY: HAVE THE COURT SET SPECIFIC DEADLINES.

Even if you have obtained voluntary informal discovery from the State in District Court, or there is "an open file policy" in your prosecutorial district, once the case is in Superior Court by way of having or waiving a probable cause hearing if represented by counsel, or "no later than ten working days after appointment of counsel or service of the indictment (or consent to a bill of information), **the defendant MUST comply with 15A-902 by serving (and filing) a written request for voluntary discovery within the time limits imposed by 15A-902** so that the defendant can continue to request, file, AND ENFORCE motions to compel discovery and obtain additional discovery in Superior Court.[17] These steps are necessary to obtain sanctions against the State if it fails to comply with providing everything it should under 15A-903. The only statutory exception

[17] Before filing a motion for discovery before a judge, a defendant must make a written request for voluntary discovery from the State of North Carolina pursuant to *G.S. 15A-902(a)*. If the State voluntarily complies with the discovery request, the discovery is deemed to have been made under an order of the court, under *G.S. 15A-902(b)*, and the State then has a continuing duty to disclose additional evidence or witnesses. *State v. Cook, 362 N.C. 285, 661 S.E.2d 874 (2008).* **STATE DID NOT WAIVE ITS RIGHT TO RECEIVE A WRITTEN REQUEST FOR DEFENDANT'S ORAL STATEMENT by voluntarily producing defendant's written Statement pursuant to an informal oral agreement between the prosecutor and defense counsel**. *State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821,* rev'd on other grounds, *301 N.C. 508, 272 S.E.2d 123 (1980).*

to this rule is if the defendant and the State enter into a written agreement to be bound by Article 48 discovery. So if you miss the written request deadline, seek AND FILE a written agreement with the State for both sides to be bound by Article 48 discovery; i.e., GS-15A-902, 903, 904 (reciprocal discovery), *et seq.*

AT EVERY MOTION FOR DISCOVERY HEARING YOU MUST HAVE THE STATE PUT UNDER COURT-IMPOSED DEADLINES, AS REQUIRED BY G.S. 15A-909, to provide all discovery and/or certain items of evidence, such as forensic lab reports or access to physical evidence or digital recordings at a place, date, and time certain. Discovery must usually be litigated in contested cases, often after multiple requests in writing by letter or motion. Keep a log of your discovery requests and motions and when you received each item of discovery and refer to these efforts in your motions to compel.

BE VIGILANT: PAY ATTENTION TO DETAILS AND OMISSIONS IN REPORTS. There is a real risk that the court may not honor motions to compel the State to produce evidence or impose sanctions for failure to comply with discovery required under 15A-903, if the defendant does not first serve a written request for voluntary discovery on the State as required by 15A-902.[18] If the defendant fails to notice and seek remedies early on for obvious omissions or missing reports of which the defendant had notice early on, it will become difficult to enforce sanctions later when the omitted or lost reports turn up at trial. When a defendant may not have a clear statutory "right to be heard on a motion to compel discovery," due to failure to serve a timely written request

[18] *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.)

on the State, a trial court may still hear a motion to compel discovery by stipulation of the parties or "for good cause shown," G.S. 15A-902(f).

If the defendant files a written request for discovery or obtains an order compelling the State to provide discovery under G.S. 15A-903, the State must make available to the defendant "**the complete files of all law enforcement agencies, investigatory agencies, and prosecutor's offices involved in the investigation of the crimes committed or the prosecution of the defendant."** G.S. 15A-903(a)(1).

G.S. 15A-903(c) requires, under threat of criminal penalities for non-disclosure, that law enforcement and all investigatory agencies, public or private, turn over a copy of their complete files to the prosecutor on a timely basis. The defense may need to seek separate court orders to compel "assisting agencies" to provide the State and the defendant with complete sets of all supplements, notes, and reports created by officers called in to "assist" a lead agency. EMS and fire departments are notorious for not turning over to the prosecutor on a timely basis, everything required under 15A-903. EMS may require a special order as they are typically considered a "prosecutorial or investigative agency."

The defense attorney cannot assume that a copy of a "complete SBI file" will necessarily contain within it the complete files of a police or sheriff's department who requested assistance from the SBI, even if the SBI reports says it contains the complete files of another agency, and even if the "lead SBI agent" says the SBI received a complete copy of the local agency's file, notes, and documents generated in the case. The only way to "know" is to request an opportunity to inspect the original actual files of each agency involved in the prosecution of a case. Historically, the SBI has also used a

practice of turning over "typed interview summaries" from field notes which were then destroyed. This is a method practiced and taught by the FBI. Under the new G.S. 15A-903, this practice may has largely stopped, especially in light of the requirement to record custodial or police station interviews of defendants and witnesses in serious felony cases.[19] However, the vigilant attorney must determine whether or not all field notes corresponding to written reports and summaries have been preserved and produced. The vigilant attorney will also make a list of all officers or other investigators logged in at a crime scene or mentioned in any report of any other officer to see if those investigators and officers turned in reports or other written accounting of their role, activities and observations at a crime scene or in some other aspect of the investigation.

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.[20] **THE DEFENDANT MUST OBTAIN A RULING ON THE MOTION TO COMPEL OR RISK WAIVER.**[21]

If the State agrees to provide discovery pursuant to a written request for statutory discovery or the court orders discovery, the State has a continuing duty to disclose information (as does the defendant in providing reciprocal discovery to the State). G.S. 15A-907. The State always has a continuing constitutional duty to disclose material favorable or exculpatory evidence, with or without a request or court order, under *Brady v. Maryland,* 373 U.S. 83, 87 (1963). **However, without a defense request or motion**

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[19] See: G.S. 15A-211: viewable at: http://www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter_15a/gs_15a-211.html.

[20] *State v. Keaton*, 61 N.C. App. 279, 282 (1983)(defendant has burden to make motion to compel before State's duty to provide statutory discovery arises.)

[21] *State v. Jones*, 295 N.C. 345, 356-58 (1978).

being filed, this "continuing constitutional duty," has little practical relevance outside post conviction proceedings.

WITHOUT AN ACTUAL MOTION HEARING RESULTING IN AN ORDER ON DISCOVERY, **THERE ARE VERY FEW DEFAULT STATUTORY DEADLINES FOR THE STATE TO COMPLY WITH ITS DISCOVERY OBLIGATIONS**. This is why it may be important to have hearings on your motions to compel in which you seek to have the trial court impose deadlines on the State. In fact, G.S. 15A-909 **REQUIRES the court to set a specific time, place and manner for the State to provide discovery whenever the Court grants a party's motion to compel discovery.** The few statutory deadlines the State operates under are G.S. 15A-903(a)(2) (State must give notice of expert witness and furnish report and CV within a reasonable time before trial); G.S. 15A-903(a)(3)(State must give notice of other witnesses at beginning of jury selection); and G.S. 15A-905(c)(1) a, (if ordered by court on showing of good cause and motion of defendant, State must give notice of rebuttal alibi witnesses no later than one week before trial unless parties and court agree to different times).

VII. INVESTIGATION AND DISCOVERY BY OTHER MEANS.

If the defense cannot get discovery under Article 48 and 15A-903 due to missed deadlines for filing a written request, the defense attorney should still file a written request, as soon as practical, followed by a motion to have the court find the written request or motion to compel discovery "deemed timely filed" in the discretion of the court by setting out reasons for the late request and/or motion: i.e. you were given early voluntary discovery by the State or you mistakenly believed you could rely on an "open file policy," or were relying on a negotiated plea in District or Superior Court which fell

through.[22] You do not want the court to find that the defendant has "waived" their rights to complete discovery by failure to request it and for failure to move to compel it when you are suddenly confronted with "surprise" evidence at trial.[23]

Even if you cannot compel discovery and obtain sanctions under Article 48 under 15A-910, you still have the chance to file motions and requests for "constitutional discovery" under *Brady v. Maryland* , *Kyles v. Whitley;* under N.C. Constitutional requirements under art. I, §19, the "Law of the Land Clause" and §23, the Right to Effective Assistance of Counsel, and general N.C. case law decided under N.C.G.S. 15A-903 before 2004, when the General Assembly passed the "open file" scheme we have now.

The defense attorney or investigator can seek to interview detectives and State witnesses, however they cannot be compelled to give pretrial interviews to the defense.[24] There is no legal or ethical reason why the defense cannot attempt to interview *any* State witness before trial. If the witness is represented by private counsel or a guardian *ad litem,* you can request permission of them to interview the victim or witness. In most cases there is an ethical duty to interview or attempt to interview important

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[22] G.S. 15A-902 (f): A motion for discovery made at any time prior to trial may be entertained if the parties so stipulate ***or if the judge for good cause shown*** determines that the motion should be allowed in whole or in part. (emphasis).

[23] **BURDEN IS ON DEFENDANT TO REQUEST DISCOVERY**. --Subdivision (a)(2) of this section makes it clear that the burden is on defendant to request discovery in writing prior to a motion to compel discovery. *State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821,* rev'd on other grounds, *301 N.C. 508, 272 S.E.2d 123 (1980).*

[24]**A prosecutor has an implicit duty not to obstruct defense attempts** to conduct interviews with any witnesses; however, a reversal for this kind of professional misconduct is only warranted when it is clearly demonstrated that the prosecutor affirmatively instructed a witness not to cooperate with the defense. *State v. Pinch, 306 N.C. 1, 292 S.E.2d 203,* cert. denied, *459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982),* rehearing denied, *459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983),* overruled on other grounds, *State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994***). Nothing in this Article compels State witnesses to subject themselves to questioning by the defense before tri**al. *State v. Phillips, 328 N.C. 1, 399 S.E.2d 293,* cert. denied, *501 U.S. 1208, 111 S. Ct. 2804, 115 L. Ed. 2d 977 (1991).* Pursuant to *G.S. 15A-903(a)(1)*, the detective was not required to submit to a pretrial interview with defense counsel against the detective's wishes. *State v. Taylor, 178 N.C. App. 395, 632 S.E.2d 218 (2006).*

witnesses before trial or plea,[25] especially if you have learned a key witness has recanted or admitted to a third party their intent to perjure themselves on the stand. This kind of pretrial interview can also be seen as part of the defense attorney's duty to zealously represent the defendant under the N. C. Rules of Professional Conduct, Rule 0.1; to provide Effective Assistance of counsel under the Fifth and Sixth Amendments; and, to effectively Confront and Cross Examine witnesses against the defendant under the Sixth Amendment. However, be careful to ascertain whether or not a victim or witness is represented by an attorney or guardian *ad litem*, especially if the victim/witness is a minor.[26] It is highly advisable that the defense attorney send an investigator or have an investigator or third party present during any defense interview of a victim or witness to prevent the attorney from becoming a witness in the case and to preserve the defendant's right and ability to impeach that victim or witness if necessary at trial. If the witness consents, a recording of the interview may be helpful; consent is advisable but not necessary in this state for you or your investigator to record the interview or statement so long as one party to the conversation is aware it is being recorded.[27] If the witness recants, a copy of the recording or an affidavit of recantation from a material witness can

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[25] See: supra at p. 6, : ABA Guidelines and Standards for the Defense Function, 4-4.3 (c) **Defense counsel or counsel's agents should seek to interview all witnesses, including seeking to interview the victim or victims, and should not act to intimidate or unduly influence any witness.**

[26] Rule 7.4(a) of the Rules of Professional Conduct only prohibits communication with a person known to be represented by counsel in regard to the matter in question. The prosecuting witness in a criminal case is not represented, for the purposes of the rule, by the district attorney. For that reason, the lawyer for the defendant need not obtain the consent of the district attorney to interview the prosecuting witness. Nor may the district attorney instruct the witness not to communicate with the defense lawyer.

[27] *See*: http://www.dmlp.org/legal-guide/recording-phone-calls-and-conversations.

be presented to the State's attorney to negotiate a plea or dismissal of the case. The recording can be used to impeach or corroborate at trial.

VIII. RECIPROCAL DISCOVERY TO THE STATE.

Under G.S. 902 (e):

> The State may as a matter of right request voluntary discovery from the defendant, when authorized under this Article, at any time not later than the tenth working day after disclosure by the State with respect to the category of discovery in question.

The prosecution is entitled to reciprocal discovery from the defendant if the prosecution provides discovery to the defendant, either voluntarily or by court order, upon the defendant's written request or motion. Statutory reciprocal discovery duties of the defense are governed by G.S. 15A-905.[28] As part of the defendant's reciprocal discovery duties, the defense must give notice to the State of certain defenses and affirmative defenses once the case is set for trial.

G.S. 15A-905 requires the following notices of defenses and experts:

> (c) Notice of Defenses, Expert Witnesses, and Witness Lists. - If the court grants any relief sought by the defendant under G.S. 15A-903, or if disclosure is voluntarily made by the State pursuant to G.S. 15A-902(a), the court must, upon

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[28] G.S. 15A-905, provides: (a) Documents and Tangible Objects. - If the court grants any relief sought by the defendant under G.S. 15A-903, the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the defendant and which the defendant intends to introduce in evidence at the trial.
(b) Reports of Examinations and Tests. - If the court grants any relief sought by the defendant under G.S. 15A-903, the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession and control of the defendant which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial, when the results or reports relate to his testimony. In addition, upon motion of the State, the court must order the defendant to permit the State to inspect, examine, and test, subject to appropriate safeguards, any physical evidence or a sample of it available to the defendant if the defendant intends to offer such evidence, or tests or experiments made in connection with such evidence, as an exhibit or evidence in the case.

motion of the State, order the defendant to:

(1) Give notice to the State of the intent to offer at trial a defense of **alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication.** Notice of defense as described in this subdivision is inadmissible against the defendant. Notice of defense must be given **within 20 working days after the date the case is set for trial pursuant to G.S. 7A-49.4, or such other later time as set by the court.**

a. As to the defense of alibi, the court may order, upon motion by the State, the disclosure of the identity of alibi witnesses no later than two weeks before trial. If disclosure is ordered, upon a showing of good cause, the court shall order the State to disclose any rebuttal alibi witnesses no later than one week before trial. If the parties agree, the court may specify different time periods for this exchange so long as the exchange occurs within a reasonable time prior to trial.

b. **As to only the defenses of duress, entrapment, insanity, automatism, or involuntary intoxication, notice by the defendant shall contain specific information as to the nature and extent of the defense.**

(2) Give notice to the State of **any expert witnesses that the defendant reasonably expects to call as a witness at trial**. Each such witness shall prepare, and the defendant shall furnish to the State, a report of the results of the examinations or tests conducted by the expert. The defendant shall also furnish to the State the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. **The defendant shall give the notice and furnish the materials required by this subdivision within a reasonable time prior to trial, as specified by the court**. Standardized fee scales shall be developed by the Administrative Office of the Courts and Indigent Defense Services for all expert witnesses and private investigators who are compensated with State funds. (emphasis).

IX. PROTECTIVE ORDERS

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 or embarrassment. A defendant may want to consent to a protective order not to disseminate sensitive information such as medical, psychological or DSS records of a State victim or witness. If either party obtains an *ex parte* protective order they must serve notice of the

existence of the protective order on the other side, but the subject matter of the order does not have to be disclosed to the other side. G.S. 15A-908(b).

X. MISCELLANEOUS DISCOVERY ISSUES.

Criminal Records of the Defendant or State Witnesses: A former version of of G.S. 15A-903 gave defendant's the right to their criminal record. Current G.S. 15A-903 does not state so explicitly. However, as a practical matter, most prosecutors will run complete criminal histories of defendants and co-defendants and these must be provided in discovery if they end up in the State's file. G.S. 15A-1340.14(f) requires the State to produce a copy of the defendant's record upon request in all felony cases. **Witness criminal records are not required to be run, however, if the State has them in their file they must be turned over. Under *Brady*, the defendant should argue that he has a Due Process and Confrontation Clause right to significant criminal record information about all state witnesses as relevant impeachment information.**

The State cannot be compelled to do scientific testing for the defendant **under formal discovery pursuant to 15A-903**;[29] however, the defense may seek an order compelling the State to perform DNA or other testing upon making a showing that the testing is reasonably likely to lead to exculpatory evidence under federal and State

[29] STATUTE DID NOT COMPEL DNA TEST BY STATE. --*G.S. 15A-903(e)* did not compel the State to perform a deoxyribonucleic acid test on a cap found at the scene of a crime. *State v. Ryals, 179 N.C. App. 733, 635 S.E.2d 470 (2006),* review denied, *362 N.C. 91, 657 S.E.2d 27 (2007). See: STATE V. DARRYL HUNT; STATE V. GELL, AND OTHER N.C. AND NATIONAL EXONERATION CASES for anecdotal evidence about exculpatory forensic testing in post-conviction cases.* DISCOVERY OF PROCEDURES USED TO CONDUCT LABORATORY TESTS. --State not required to provide defendant with information concerning peer review of procedures an analyst used to test substances police bought from defendant for the presence of drugs, but it did permit defendant to discover information about procedures the analyst used, and the trial court erred when it denied defendant's written request for an order requiring the State to provide discovery of data collection procedures. *State v. Fair, 164 N.C. App. 770, 596 S.E.2d 871 (2004).* TESTS AND PROCEDURES USED TO CREATE REPORTS --Under *G.S. 15A-903(e)*, the State was required, pursuant to defendant's request in a drug case, to produce not only conclusory lab reports, but also tests and procedures used to reach those results. *State v. Dunn, 154 N.C. App. 1, 571 S.E.2d 650 (2002).*

constitutional principles. If the State will not agree to test certain items of seized evidence and the court will not order *the State,* or the N.C. State Crime Lab, to so test the items, the defendant is nevertheless entitled to have his or her own expert or lab test the items.[30]

N.C.G.S. §15A-903 entitles the defendant to "everything" **in the prosecutor's file unless it is considered "work product."[31]** There is a wide range in actual practice across the State in terms of how and when a prosecutor's office will make this "file" available: whether you must copy or scan it yourself, whether you will be given a "copy" of it online in the N.C. AOC DAS system, on paper, or in a digital CD or DVD format.

You are entitled to ALL Statements of the defendant and witnesses known to law enforcement or in the possession of the prosecutor from sources other than law enforcement. All such Statements must be reduced to writing for the use of the defense. *But see*: *State v. Shannon,* 182 N.C. App. 350 (2007)(prosecutor not required to reduce witness interview to writing unless it is ***significantly different*** from previously recorded Statement disclosed to defense).[32] N.C.G.S. §15A-904(a)(1).

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[30] INDEPENDENT CHEMICAL ANALYSIS OF SEIZED SUBSTANCES. --Due process requires that defendants have the opportunity to have an independent chemical analysis performed upon seized substances. *State v. Jones, 85 N.C. App. 56, 354 S.E.2d 251,* cert. denied, *320 N.C. 173, 358 S.E.2d 61,* cert. denied, *484 U.S. 969, 108 S. Ct. 465, 98 L. Ed. 2d 404 (1987),* holding that the trial court's refusal to allow defendants further access to drugs did not violate that due process requirement. A defendant enjoys a concomitant statutory right to inspect the crime scene and to independently analyze seized substances. *State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992).*

[31] STATEMENTS THAT ARE NOT WORK PRODUCT ARE DISCOVERABLE. --General Assembly expressly contemplated in *G.S. 15A-904(a)* that trial preparation interview notes might be discoverable except where they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or the prosecuting attorney's legal staff; accordingly, *G.S. 15A-904(a)* comports with *G.S. 15A-903(a)(1)*'s mandate that oral witness Statements shall be in written or recorded form because every writing evidencing a witness's assertions to a prosecutor will not necessarily include opinions, theories, strategies, or conclusions that are protected as work product under *G.S. 15A-904(a)*. *State v. Shannon, 182 N.C. App. 350, 642 S.E.2d 516 (2007),* review denied, *361 N.C. 436, 649 S.E.2d 893 (2007).*

[32] DISCLOSURE OF STATEMENTS MADE IN PRETRIAL INTERVIEWS REQUIRED. --*G.S. 15A-903(a)(1)* requires prosecutors to disclose, in written or recorded form, Statements made to them by witnesses during pretrial interviews; accordingly, where the trial court erred in denying defendant's motion to compel discovery of notes of pretrial interviews that the prosecutor had with a witness, and it could not be determined whether the error prejudiced the outcome of the case under *G.S. 15A-1443(a)*, a motion for appropriate relief was remanded for an evidentiary

Under Brady v. Maryland, and, Kyles v. Whitley, 514 U.S. 419 (1995), the 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. The defense may file a motion, upon stating sufficient grounds to believe additional statements or exculpatory evidence is "out there," for an order requiring the prosecutor to make additional inquiries of the police or others about specific matters the defense cannot otherwise learn on its own. Under *Brady, Kyles*, and *Davis v. Alaska*, 415 U.S. 308 (1974), the defendant may file a **motion for an *in camera* inspection of a witness's complete adult or JUVENILE probation and parole file** for evidence of bias, substance abuse, mental infirmities affecting perception and memory, or lack of credibility or hope of reward or sentencing concessions in return for testimony favorable to the State.[33]

The defense is entitled to notice and disclosure of all State expert witnesses **(whether or not the State intends to call that expert as required by 15A-903(a)). The defense is entitled to a detailed report[34] setting out all opinions the expert is expected**

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hearing. *State v. Shannon, 182 N.C. App. 350, 642 S.E.2d 516 (2007),* review denied, *361 N.C. 436, 649 S.E.2d 893 (2007).* Trial court did not abuse its discretion in granting defendant a recess to review a witness's Statement and in allowing defendant to cross-examine the witness to expose inconsistencies in the witness's Statement after it was revealed that the State failed to provide defendant with additional discovery after a meeting with the witness gleaned new information crucial to the *State's case. State v. Pender, 218 N.C. App. 233, 720 S.E.2d 836 (2012).*

[33] *Davis v. Alaska held:* Petitioner was denied his right of confrontation of witnesses under the Sixth and Fourteenth Amendments. Pp. 415 U. S. 315-321((a) The defense was entitled to attempt to show that Green was biased because of his vulnerable status as a probationer and his concern that he might be a suspect in the burglary charged against petitioner, and limiting the cross-examination of Green precluded the defense from showing his possible bias. Pp. 415 U. S. 315-318. (b) Petitioner's right of confrontation is paramount to the State's policy of protecting juvenile offenders, and any temporary embarrassment to Green by disclosure of his juvenile court record and probation status is outweighed by petitioner's right effectively to cross-examine a witness. Pp. 415 U. S. 319-320).

[34] EXPERT WITNESS OPINIONS SHOULD HAVE BEEN DISCLOSED. --State failed to comply with the statute when responding to defendant's motion for discovery because two expert witnesses gave expert opinions that should have been disclosed in discovery; the experts offered expert opinion testimony about the characteristics of child sexual abuse victims, and the testimony went beyond the facts of the case and relied on inferences to reach the conclusion that certain characteristics were common among child sexual assault victims. *State v. Davis, -- N.C. --, 785 S.E.2d 312*

to offer at trial, and to the expert's curriculum vita. See: N.C.G.S. 15A-903(a)(2). You are also entitled to request/move for copies of the State expert's interview notes, psychological or neuropsychological test data, all records and other data or State discovery reviewed and relied upon by the State expert, prior payments and fee schedules for the State expert, bench notes, lab notes and equipment calibration and maintenance data, known error rates for the State lab expert, prior proficiency testing and scores of the expert, test data, photos of aspects of physical evidence upon which that expert's observations and opinions are based, e.g.: fingerprint close-up photos, photos of toolmark images and striations, ballistics and firearms shell casing and projectile markings, reagent papers in drug identification cases, luminol or BlueStar testing for presumptive blood results along with photo documentation of test results, DNA allele sheets and probability and statistics databases used and calculations employed.

You will have to conduct your own investigation into collateral matters affecting an expert's credibility such as a Google or Lexis search for prior testimony in appellate cases. Google or Lexis searches will help you locate copies of transcripts of that experts' prior testimony from court reporters or prior appellate or post conviction attorneys. You may wish to locate copies of prior talks, presentations, trainings, professional and other publications and pamphlets written by the expert. These may appear on their CV. Sometimes what is OMITTED from the CV is more important than what is on there. It is also a good idea to check out social media posts, Facebook friends,

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(2016). STATE FAILED TO COMPLY WITH DISCLOSURE REQUIREMENTS FOR EXPERT WITNESS. --SBI agent, who was better qualified than the jury to determine if the substance in defendant's shoe was marijuana, was erroneously allowed to testify as an expert where the State did not comply with discovery requirements in *G.S. 15A-902(a)(2)*. *State v. Moncree, 188 N.C. App. 221, 655 S.E.2d 464 (2008).*

and other contacts of the expert to identify bias. Former colleagues of the expert at prior employments may have information. N.C. AOC may have payment records for State experts which will tell you where to look for prior testimony and other defense attorneys who may have previously cross examined or vetted the State expert.

The defense is entitled to "everything" in the prosecutor's file: what the prosecutor's "file" consists of is set out in detail in 15A-903(a). Once you are given a copy of this file, often called a "prosecution book," you can examine it in detail for omissions: missing officers' field notes, illegible or poorly copied pages, documents seized and placed in "property control" or the evidence locker, etc. You should then file additional requests for voluntary discovery pointing out in detail what you are missing and follow that up with letters to the prosecutor and with additional motions to compel if you have not received the missing discovery. If you are running into trouble getting discovery you should try to schedule a hearing on your motions to compel and seek to have the Court impose discovery deadlines on the State to comply. Many discovery hearings or status conferences may be necessary in complex cases.

If the FBI is involved in a State criminal case and does a crime scene search or takes evidence to the FBI Crime Lab in Quantico, Va., or does any interviews in your case, state discovery statutes will not apply directly to the FBI. You will not without great difficulty be able to obtain copies of "every report" in the possession or control of the FBI because the FBI does not keep all reports filed in one place or even in one city. There are often many documents, such as Department of Justice or Homeland Security "review documents" which will not be turned over in State Court without a fight. However, you can seek to gain access to physical evidence in the possession of the FBI or seek to get

copies of FBI reports and interviews by seeking a State court order directing the State's attorney or prosecutor to obtain those items from the FBI, or other federal or "out-of-state" agency, by certain deadlines for disclosure to the defense, or suffer the consequences of dismissal of the State's case or suppression of the FBI or "out-of-state" lab results as appropriate sanctions under N.C.G.S. 15A-210 or general constitutional rights to Due Process. You will need to cite all your client's rights under the Fifth, Sixth, and Fourteenth Amendments to Due Process and to Present a Defense when litigating these extra-jurisdictional discovery motions.

State's Witness List The defense is entitled to a copy of the State's witness list including name, address, published phone number, and date of birth under 15A-904(a)(2); but ***only if*** the defendant requests it in writing. The best practice is to file the request/motion for a witness list with your initial request/motion for discovery with the Clerk of Court to enforce or preserve violation of this right on appeal if the State is allowed to call someone not on the list.

No Authority To Order Examination Of A State's Witness By Defense Expert. Under *State v. Horn*, 337 N.C. 449 (1994), the State will likely argue this cannot be done. In that case the defendant can request his own expert to evaluate the State's evidence and the State's expert's evaluation of a State witness for rebuttal purposes. If the defense is denied an opportunity for an examination of the State witness who was previously examined or evaluated by a State expert, or if the defense is denied its own expert to respond to or rebut the State expert, then move to dismiss the charges, or exclude the State's evidence under *Horn,* and under the defendant's Rights to Due Process, to Effective Assistance of Counsel, and to Present a Defense, under the Fifth,

Sixth, and Fourteenth Amendments; and, THE LAW OF THE LAND CLAUSE, art. I, Section 19, of the N.C. Constitution.

Missing , Lost, Or "Hidden" Discovery

Once the defendant has obtained disclosure of what may appear to be the State's "entire file," either prior to indictment or after, most cursory reviews of that file, especially copies of that file, will reveal that pages are missing or illegible, that many officers at the scene of a crime may not have turned in reports, or turned them in ***after*** a lead detective has submitted his initial copies of the "prosecution book" to the prosecutor. Sometimes typed supplements or summaries of a defendant or witness's interview is provided without the original field notes for those interviews. Ask your client if he saw an investigator taking notes and on what; i.e., a "007 pad," or "legal pad." Then see if those handwritten notes appear in the discovery. Be sure to look at all search warrant affidavits for information not disclosed in discovery, and seek to obtain disclosure of confidential informants.

Discovering Identity Of Confidential Informants

If the State has not moved to "seal" the identity of an informant, it is discoverable under G.S. 15A-903(a)(1); however, the State is not required to disclose the identity of a confidential informant unless required by law. G.S. 15A-904(a1). If the State has successfully moved to seal the identity of the informant, you cannot discover the informant's identity under the statute once the warrant has issued or if the existence (not truthfulness or reliability) of the informant is established. G.S. 15A-978(b)(1) and (b)(2). The provision that the State is not required to disclose the identity of a confidential informant unless it is "otherwise required by law," refers to "constitutional law." In that

case, you can make a constitutional argument that "disclosure is essential to a fair determination of a defendant's rights under the Fourth and Fifth Amendments." See: *Rovario v. United States*, 353 U.S. 53, 60-61 (1957). The defendant has the burden to show why they need the informant's identity. Factors the Court looks at include:

1) the crime charged
2) whether the informant was an actual participant. (*State v. Ketchie*, 286 N.C. 387, 390 (1975)(disclosure is where informer directly participates in the alleged crime so as to make him a material witness on the issue of guilt or innocence.) The defendant is not required to present proof of his need for the participant/informant's testimony; such a requirement would "place an unjustifiable burden on the defense." *McLawhorn v. North Carolina*, 484 F.2d 1, 7 (4th Cir.1973)
3) possible defenses. *Rovario*, 353 U.S. at 64 (informant played a prominent role in the offense; his testimony might have disclosed an entrapment issue), and
4) the significance of the informant's testimony. *Id.*

The whereabouts of the informant is subject to the same constitutional principles described above.[35]

Plea Arrangements, "Wink And Nod Deals," Immunity Agreements, Sentencing Concessions

One of the most difficult things to discover is the existence of plea arrangements, sentencing and charging concessions, bond reductions, and other "inducements" by the prosecutor or investigators for the State for the testimony of co-defendants, uncharged "co-defendants," jailhouse snitches, and other State witnesses for their testimony against the defendant. Sometimes the prosecutor will verbally communicate the hope of a deal to

[35] See: *United States v. Aguirre*, 716 F.2d 293 (5th Cir. 1983); *United States v. Tenorio-Angel*, 756 F.2d 1505 (11th Cir. 1985); *State v. Brockenborough*, 45 N.C. App. 121, 122 (1980); *Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957),* sets forth the test to be applied when the disclosure of an informant's identity is requested. The trial court must balance the government's need to protect an informant's identity (to promote disclosure of crimes) with the defendant's right to present his case. *State v. Jackson, 103 N.C. App. 239, 405 S.E.2d 354 (1991),* aff'd, *331 N.C. 114, 413 S.E.2d 798 (1992).*

the attorney of a co-defendant in return for their client's testimony without putting that "hope of an offer" into writing. The attorney for that witness may or may not communicate that "hope" or "implied promise" to their client. Cross examination may or may not uncover it. Of course if any of the above is reduced to writing it must be disclosed pursuant to G.S. 15A-903. G.S. 15A-1054(a) complicates this because it 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. This arrangement can be entered into without a formal grant of immunity under G.S. 15A-1054(c), and it requires written notice to the defense of any such arrangement within a reasonable time prior to that witness's testimony. State v. Spicer, 50 N.C. App. 214, 217 (1981); and, *State v. Brooks,* 83 N.C. App/ 179, 188 (1986), may be cited by the defense as authority for the State to disclose ALL plea arrangements and sentencing concessions whether *formal or informal, including, so-called "wink and nod" deals.* The defendant can also argue that "the complete files" provision of 15A-903 AND the constitutional duty to disclose exculpatory and impeachment evidence under *Brady, Giglio v. United States, 405 U.S. 150, 155 (1972)(evidence of ANY understanding or agreement as to future prosecution must be disclosed),* and their progeny, requires disclosure of all "informal deals or concessions" for testimony. See also: *Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir. 1976)(North Carolina conviction vacated for failure to disclose promise of leniency by police officer). G.S. 15A-1052(a) requires not only disclosure to the defense, but that the trial court must inform the jury of any formal grant of immunity to a witness BEFORE the witness testifies.

Black Box Data from Automobiles

In **car crash cases** you may wish to obtain **black box data from airbag sensors** and retain an accident reconstructionist to interpret the data: see if it is consistent with eye-witness accounts.

Lost or Misplaced Reports

In some police and sheriff's departments, **late reports** can be scanned into a department's computerized case information system without a lead detective's or prosecutor's knowledge. Sometimes reports are turned into the "wrong detectives" or are simply lost. Sometimes documents are placed into "property control" or the evidence room without being copied or scanned into the prosecutor's file. A felony defense attorney cannot assume they have "everything" the defendant is entitled to simply because a law enforcement officer or lead investigator, even a prosecutor, certifies that "everything has been turned into the prosecutor." If more than one agency is involved in a felony investigation, additional motions and court orders directed to each agency are almost always necessary to insure that all reports and evidence collected by that agency are provided to the prosecutor and in turn to the defense.

Discovery Hearings to Voir Dire Each Investigator

Sometimes you need to be able to review and look at the agency's actual case file to be sure it's all be turned over to the prosecutor. If there are questions about what's been turned over, you may need to file a motion requesting a "pretrial discovery hearing" and *subpoena* lead agents and lead detectives along with all other investigators and examine them under oath about the discovery which has been turned over to identify

what may have been "misfiled" or "lost," and to commit the State to the discovery provided as a matter of record.

Review and Inspect the Original Files of DA and Law Enforcement

Before entering into a plea agreement on a serious felony, and especially before going to trial, the felony defense attorney should always request/move for a chance to review the actual case file of the prosecutor and lead detective as well as to look at the physical evidence seized and kept in property control or the evidence room. §15A-903 requires this upon request or motion of the defense. A "copy" does not suffice under the statute.

Sanctions Under §15A-910

Vigilance and repeat requests specifying as exactly as you can what is still missing are almost always required before the defense can expect to get sanctions for noncompliance by the State. Getting all the discovery from the State that the defendant is entitled to is extremely important because failure of the prosecutor to seek, find, and turn over what is required by §15A-903 entitles the defendant to sanctions under §15A-910. Depending on the materiality, unfair surprise, magnitude, and complexity of the late or non-disclosures, the Court may order anything from a continuance, a brief recess to review the new evidence, suppression of the late evidence, all the way up to dismissal of the charges or limitations on penalties or sentences available to be sought by the State.[36]

If discovery is not forthcoming on all or some items by a court-ordered deadline,

[36] STATE SPECIAL AGENT'S TESTIMONY MUST COMPLY WITH SECTION. --Trial court abused its discretion in allowing a State Bureau of Investigation special agent to testify without requiring the State to comply with the discovery requirements of *G.S. 15A-903*; although the State may not have known the specific witness it would be calling, the State did know it would be calling someone to testify concerning the process of manufacturing methamphetamine. *State v. Blankenship, 178 N.C. App. 351, 631 S.E.2d 208 (2006).*

the defendant must file a motion under 15A-910 for sanctions for failure to comply or be deemed to waive the available remedies. Be sure to pray the Court for **all remedies** which may be reasonably called for as sanctions depending on the severity, untimeliness, or prejudice to the defense for not being given this discovery. Be sure to ask for all or some of the remedies for noncompliance with discovery including: a continuance or recess to review late discovery; exclusion of the lately disclosed State's evidence, preclusion of the State trying your client on greater charges or for aggravated penalties at sentencing as a remedial sanction for last minute discovery if the State is allowed to use the late-disclosed evidence; and, ALWAYS seek dismissal of the charges. You will need to document for the Court all your timely requests and motions for discovery, the time of the State's responses or lack thereof, case law supporting your requests for sanctions and references to 15A-902, 903, and 910. It is advisable to attach an affidavit verifying your motion for sanctions which outlines all defense efforts to obtain the discovery, prior orders to compel discovery, and ***the prejudice*** resulting to the defense for late or non-disclosure.

It is a good idea to attach case law holding that the defense is entitled under Due Process to receive the discovery in a timely fashion, including exculpatory discovery, ***in time to make effective use of the discovery at trial, or that the State should face sanctions to protect those rights.*** That means the defendant must have time to not only read the late discovery but also time to investigate it and follow up on it and locate admissible evidence and witnesses to counter it or corroborate it before the jury at trial.[37]

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[37] *See State v. Canady* (2002)(viewable at: http://cases.justia.com/north-carolina/supreme-court/115a00-9.pdf?ts=1396137515.)(In *Brady v. Maryland*, the United States Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good

Sanctions for Loss or Destruction of Evidence by the State

Absent a violation of a previously entered court order to preserve evidence in the defendant's case, in order to establish a Due Process Clause violation by the State for the loss or destruction of evidence, the defendant must show that an officer or state agent acted in bad faith in failing to preserve potentially useful evidence for trial. The burden is on the defendant to show that the lost or destroyed evidence was potentially exculpatory AND was lost or destroyed by the State in bad faith. See generally: *Illinois v. Fisher*, 540 U.S. 544, 547-48(2004)(evidence destroyed 11 years after traffic stop not a Due Process violation); *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (2004)(due process not violated by failure to refrigerate clothing with semen samples and no bad faith demonstrated); and State v. Williams, 362 N.C. 628, 638-39 (2008)(assault on officer properly dismissed when prosecutor flagrantly prejudiced defendant's due process rights to preparation of a defense by destroying material evidence favorable to defendant consisting of before and after time of offense photographs of defendant); and other cases collected on, pp 25-26, of the ***North Carolina Superior Court Judge's Benchbook***, *supra* at p. 1.

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faith or bad faith of the prosecution." 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963). "Favorable evidence is material if there is a 'reasonable probability' that its disclosure to the defense would result in a different outcome in the jury's deliberation." *State v. Strickland*, 346 N.C. 443, 456, 488 S.E.2d 194, 202 (1997), cert. denied, 522 U.S. 1078, 118 S.Ct. 858, 139 L.Ed.2d 757 (1998). The determination of the materiality of evidence must be made by examining the record as a whole. *State v. Howard,* 334 N.C. 602, 605, 433 S.E.2d 742, 744 (1993).***The State has not satisfied its duty to disclose unless the information was provided in a manner allowing defendant "to make effective use of the evidence."). See also State v. Taylor, 344 N.C. 31, 50, 473 S.E.2d 596, 607 (1996).***

Sanctions for State Constitutional Violations under G.S. 15A-954.

A dismissal of criminal charges for a state or federal constitutional violation involving loss or destruction of exculpatory evidence may lie under G.S, 15A-954(a)(4), when the defendant's constitutional rights have been so flagrantly violated that there is such irreparable prejudice to the defendant's preparation of his or her case that no other remedy is adequate but dismissal. *State v. Joyner*, 295 N.C. 55,59 (1978)(this is a drastic remedy that should be granted sparingly).

Motion For Bill Of Particulars

Under the new "open file" provisions of 15A-903, Motions for Bills of Particular are largely a thing of the past. However, under G.S. §15A-925 the defendant can still move for a Bill of Particulars. The court has discretion to order one under certain conditions: you must request specific items of factual information not recited in the pleading and you must allege that you cannot adequately prepare or conduct a defense without it. Under *State v. Easterling*, 300 N.C. 594, 601 (1980), the court MUST order it disclosed if the items requested are necessary to an adequate defense. The defendant should State in the motion that without the court ordering the State to respond to a motion for bill of particulars, the defendant does not have the NOTICE required by the Fourteenth Amendment of the charges against him, and that the defendant is deprived of effective assistance of counsel required by the Sixth Amendment. *State v. Parker,* 350 N.C. 411, 516 S.E.2d 106 (1999). You may try to get the State to disclose theories of guilt, i.e., aggravating factors in a capital case or whether the State will proceed on felony murder or premeditation and deliberation or both. If the State responds to a motion or order to answer a Bill of Particulars it is bound by its answers at trial.

However, the court cannot order the State to "recite matters of evidence." This language is prior to the current "open file" language of 15A-903 and is open to interpretation. If the court orders the State to respond to the Bill of Particulars the State must recite every item of information required under the order. Proceedings are stayed until the State responds with filing and service on the defendant or defense attorney. If the State answers, it IS LIMITED at trial to the items set out in the bill of particulars. *State v. Stallings*, 107 N.C. App. 241, 245 (1992)(however, the court may permit the State to amend its response to a bill of particulars anytime prior to trial, but not afterwards). An oral recitation by the prosecutor in open court to the motion for a bill of particulars DOES NOT limit the State's evidence at trial, *Stallings, Id*.

Always File A Motion For Brady Materials & Constitutionalize All Motions

Under *Brady v. Maryland,* 373 U.S. 83,87 (1963), the prosecution has a general 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. See the ***North Carolina Superior Court Judge's Benchbook***, pp. 16-22, for a complete discussion and list of over thirty cases granting relief for specific kinds of *Brady* violations.[38] Although the U.S. Supreme has now held under *Kyles v. Whitley,* 514 U.S. 419, 433 (1995), that the prosecution has a duty to disclose favorable, material evidence whether or not the defendant makes a motion or files a request for it, there is no way to effectively litigate this issue pretrial or at trial without making and filing such request. The better practice then, is to file a motion for exculpatory evidence under *Brady*

[38] ***North Carolina Superior Court Judge's Benchbook (2015), pp 16-17,*** available online at **http://benchbook.sog.unc.edu/criminal/discovery.**

v. Maryland, and get the State under a deadline to reduce all such information to writing and provide it to the defense. Under *Kyles*, everything known to police investigators is imputed to the prosecutor, so the defense can seek an order requiring a prosecutor (for his or her own protection) to make further inquiries of all the investigators in the case for any remaining unreported exculpatory or impeaching information prior to trial. *Kyles* also held that a prosecutor has an ***affirmative duty*** to investigate and learn of any favorable evidence known to others acting on the government's behalf in a case. The prosecutor's duty to make inquiries of DSS, social workers, or mental health facilities depends on the degree these agencies have reported to or been involved in the investigation of the case, as they frequently are when the case involves child sexual abuse or child victims.

Don't forget to further "constitutionalize" all discovery and *Brady* motions by citing the right to Due Process, the Right to Effective Assistance of Counsel, and the Right to Confront and Cross Examine Witnesses under the Fifth, Sixth, and Fourteenth Amendments and parallel provisions of the North Carolina Constitution, art. I, §§ 19 & 23.

Continuing Duty to Disclose

Both the defendant and the State have a continuing duty to disclose information of a type that was ordered by the court to be provided or was voluntarily provided. N.C.G.S. §15A-907.

Special Rules for Treating or Examining Psychologists and Doctors in Sex Abuse Cases[39]

There appears to be a very hard to understand rule for "professional" testimony in sex abuse cases which exempts these witnesses from having to provide written reports under 15A-903 when testifying about "their own observations." My advice is to litigate this issue if you are aware of any "professional" counselor or medical provider on the witness list and the defense is not being provided with a detailed written report in discovery setting out all the opinions to be testified to at trial by that witness in order to preserve this issue under the defendant's right to Due Process, a Fair Trial, Effective Assistance of Counsel, and the Right to Confront and Cross Examine a Witness as well as under 15A-903, and the Law of the Land Clause of the N.C. Constitution.

XI. DEVELOPING A "REASONABLE" INVESTIGATION AND DISCOVERY STRATEGY

"Infinite reasonability" is not possible in the real world. The defense attorney does not have the luxury of inexhaustible time and unlimited resources to investigate every conceivable avenue of inquiry in every case. Indeed, not to narrow down, identify, and prioritize fruitful areas of discovery and investigation will compromise the attorney's ability to focus on necessary and material aspects of the defense case. The effective felony defense attorney, in addition to pursuing discovery and investigation, must also build client rapport, do legal research, engage in plea negotiations and trial preparation.

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[39] DISCLOSURE NOT REQUIRED. --Since the psychologist did not testify there was a specific set of characteristics of sexual abuse victims and did not opine on whether the victim met such a profile, but testified as to his own observations on sexual abuse, he did not offer an expert opinion requiring disclosure under this section. *State v. Davis, -- N.C. App. --, 768 S.E.2d 903 (2015).* Because the mental health counselor's testimony about sexual abuse victims was limited to her own observations and experience, it did not constitute expert opinion that had to be disclosed in advance of trial and the trial court did not abuse its discretion by admitting her testimony *State v. Davis, -- N.C. App. --, 768 S.E.2d 903 (2015).*

Therefore, the defense attorney must make effective and efficient use of time and resources to better serve each client by focusing on what matters most in each case. Being careful to draft detailed evidence specific discovery motions will save time in the long run and make your motions practice more effective.

Doing more with less is the very nature of contemporary criminal defense work. Therefore, the defense attorney must do everything they can to obtain and review as quickly and thoroughly as possible all information and reports available to the prosecutor through informal and formal means of discovery, as provided by Chapter 15A-902 through 903, through a vigorous, CASE SPECIFIC, and prompt motions practice.

The point here is that the defense attorney must be reasonably thorough, given limited time and limited funds, in deciding upon what is needed and required in the defense of each case, pursuing what is constitutionally required to provide effective assistance of counsel under the Fifth and Sixth Amendments, within the bounds of the law, and in a way that provides each client with the zealous and effective representation they deserve. You should not waste time or resources on matters that are not material or not reasonably likely to matter in the trial or disposition of each case.

On the other hand if you have a client who insists on your pursuing matters of investigation which are not likely to bear fruit, to maintain your relationship with the client, you must either attempt to locate those witnesses or evidence the client insists on finding, and after a reasonable inquiry or search you need to meet with the client to report on your efforts and come to an understanding about those matters to maintain your attorney/client relationship. There are specific ethical guidelines promulgated by the State Bar concerning impasses like this and how to resolve them.

With initial discovery requests and motions underway you should prioritize and design an appropriate investigation and additional discovery strategy for each case. Digital programs, such as "CaseMap" and internet-based "AirTable," and other available commercial programs, can help you organize and identify needed discovery.

Many discovery motions should be filed routinely, such as: filing a motion and obtaining an order to preserve all evidence while still in District Court and renewing that motion in Superior Court, or applying for statutory discovery and seeking required constitutional discovery of exculpatory and impeachment evidence under *Brady v. Maryland, et al*. Beyond these initial requests and motions, discovery and investigation strategies can and will be dramatically different depending on the nature of the offense: discovery needed in a drug trafficking case will differ from discovery and investigation in a sex offense case and from the extensive life history, records, and mitigation evidence needed in a murder case.

Some cases will require more investigation about your client's mental health records in a murder case than what you may need in a felony breaking or entering case. Where guilt is not an issue, you may need school records or Social Security Disability records to show the State that your client is "***not deserving"*** of a felony conviction or lengthy sentence due to mental impairments or intellectual disabilities or family hardships.

Not seeking out with a simple subpoena easy-to-obtain school and mental health records that may be used in plea negotiations or sentencing is probably the most neglected or overlooked aspect of investigation in defense of felony cases. This is often true of the 25 percent or more of all felony defendants who are statistically likely to be

intellectually disabled or seriously mentally ill. Obviously the State ***is not*** the source of "all information" about your client, especially in these kinds of cases. But what discovery the State has, it must turn it over to the defense or face sanctions under 15A-910.

After evaluating the legal issues in the case, which requires immediate assessment of whether or not the State has sufficient evidence to prove each and every element required to convict the defendant of every felony with which they are charged, the felony defense attorney is advised to sit down and evaluate what further investigation and discovery is needed or likely to lead to important admissible evidence.

If an obvious fatal defect is found in an indictment or fatal absence of proof is discovered with the State's case, then one is faced with the choice of using that information to negotiate a plea, or holding that defect in an indictment close to your vest until after State's evidence at trial. The degree of needed additional investigation and extraordinary efforts to obtain additional discovery may be limited in the case where you already know the State's case is dead on arrival.

In a case where the State's proof will be mainly through civilian witnesses you may need a private investigator appointed to attempt to interview these witnesses. Jailhouse snitches or civilian witnesses may recant or make exculpatory disclosures which an investigator may record or reduce to an affidavit which can then be presented to a prosecutor to negotiate a plea or dismissal.

Impeaching Jailhouse Snitches

Information that the defense attorney needs to discover, investigate, and collect to impeach jailhouse snitches can be found on the IDS website in an encyclopedic guide prepared by attorney, Mike Howell.[40]

Preserving Testimony Of Potentially Unavailable, Infirm Or Dying Witnesses

If your case involves a mental health expert, such as a forensic psychiatrist or psychologist, you may be able to preserve potentially unavailable exculpatory evidence by having your expert, with or without the help of your investigator, interview hard-to-locate witnesses and, if they can, base their opinions on information from that witness if the expert would normally rely upon it in forming their opinions under N.C. Rules of Evidence, Rules 702 and 703. This is especially useful if the witness is an infirm family member, an elderly schoolteacher, retired employer, co-worker, or supervisor. Consideration should also be given to the use of court-ordered depositions of infirm or dying witnesses in criminal cases under certain limited circumstances under G.S. 8-74.[41]

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[40] "Preparation for Cross Examining the Snitch," Michael Howell, viewable at: http://ncids.org/Defender%20Training/Drug%20Case%20Training/Cross%20Exam%20the%20Snitch.pdf.

[41] See: G.S. § 8-74. Depositions for defendant in criminal actions: In all criminal actions, hearings and investigations it shall be lawful for the defendant in any such action to make affidavit before the clerk of the superior court of the county in which said action is pending, that it is important for the defense that he have the testimony of any person, whose name must be given, and that such person is so infirm, or otherwise physically incapacitated, or nonresident of this State, that he cannot procure his attendance at the trial or hearing of said cause. Upon the filing of such affidavit, it shall be the duty of the clerk to appoint some responsible person to take the deposition of such witness, which deposition may be read in the trial of such criminal action under the same rules as now apply by law to depositions in civil actions: **provided, that the district attorney or prosecuting attorney of the district, county or town in which such action is pending have 10 days' notice of the taking of such deposition, who may appear in person or by representative to conduct the cross-examination of such witness. (emphasis).**

Getting an Investigator or Expert for the Defendant

In a first degree murder case you would apply to the Office of the Capital Defender for funding of private investigators, mitigation specialists, or other expert using a request form on the N.C. I.D.S. website. In all other cases you would apply to a District or Superior Court Judge for funding by filing an *ex parte* motion for funds setting out a particularized need for the investigator or expert. Sample *ex parte* motions are available on the N.C. IDS Defender website and are discussed in footnote 6, *supra*.[42]

Once you get an investigator provide them with a copy of *relevant* parts of the State's discovery. Don't waste their limited funds having them review things that don't matter to them. Go over with the investigator exactly what you are asking them to do. Their time and funds are limited so you must monitor them and use their time wisely. It is up to you to keep up with their funding and apply for additional funds BEFORE the case is disposed of. Don't send the investigator on obvious "wild goose chases." Tell the investigator how you wish them to write or summarize reports or summaries of witness interviews. For example, tell your expert whether or not to include "work product" comments in their reports to you as the attorney, or whether you wish them to provide "just the facts" of an interview for possible use or disclosure to the State or jury at trial for corroboration or impeachment purposes.

The investigation of exculpatory evidence that cannot be obtained with the simple use of a release, *subpoena* and/or court order and which is not in the possession of the State almost always requires the services of a private investigator; however, much can be learned from family and friends of the defendant and of course from the defendant.

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[42] http://www.ncids.com/forensic/experts/Mechanics_of_Getting_Expert.pdf.

Discovery of Forensic Evidence and Data

In a case which involves lots of forensic evidence you will need to seek additional discovery by way of *subpoena* or request for voluntary additional discovery and/or a motion to compel discovery of things such as State Crime lab protocols, test data and results,[43] individual forensic examiner proficiency testing results, expiration and quality control reports on lab equipment and testing chemicals, electronic copies of hard disc drives, or cell phone data contained in a seized cell phone. These matters of forensic evidence are not routinely produced without additional requests for more than the usual three page "lab report." Sarah Olson maintains sample motions for this kind of discovery on the Forensic Science section of the N.C.I.D.S. website discussed above.

Referral Questions for Experts

When using experts to generate evidence for the defendant, the attorney must identify exactly what the expert is being asked to look at and form an opinion about. Below are some examples of referral questions used with mental health experts to guide the formation of relevant defense evidence. It is a complete waste of time and resources to hire any expert and simply tell them to "examine the defendant" or "look at the evidence" and "tell the defense attorney what's there." The defense should also attempt to wait until all relevant mental health or other records and discovery necessary for the

[43] DISCOVERY OF PROCEDURES USED TO CONDUCT LABORATORY TESTS. --State not required to provide defendant with information concerning peer review of procedures an analyst used to test substances police bought from defendant for the presence of drugs, but it did permit defendant to discover information about procedures the analyst used, and the trial court erred when it denied defendant's written request for an order requiring the State to provide discovery of data collection procedures. *State v. Fair, 164 N.C. App. 770, 596 S.E.2d 871 (2004).* TESTS AND PROCEDURES USED TO CREATE REPORTS --Under *G.S. 15A-903(e)*, the State was required, pursuant to defendant's request in a drug case, to produce not only conclusory lab reports, but also tests and procedures used to reach those results. *State v. Dunn, 154 N.C. App. 1, 571 S.E.2d 650 (2002).*

expert to review are collected and reviewed by the attorney before the expert is retained. The exception would be if a defendant is floridly psychotic, for example, at the time of arrest, and time is of the essence for the expert to examine or recommend treatment for the defendant near the time of the offense.

Mental Health Evaluation – Potential Referral Questions:

- Is the client competent to assist in his defense?
    - Is the client aware of the charges he/she is facing?
    - Does the client seem to understand the court process?
    - Can the client help me defend him/her in this case?
- Does the client have mental retardation?
    - What is my client's IQ?
    - Does my client have significant adaptive deficits?
- Was the client's capacity to commit the crime diminished by alcohol intoxication/withdrawal, drug intoxication/withdrawal, mental illness, or some combination of these?
    - What symptoms, if any, of intoxication, withdrawal, or mental illness was the client experiencing at the time of the crime?
    - Did those symptoms impact his/her actions in any way?
    - Was the client able to make and carry out plans?
    - Was the client able to from the specific intent necessary to commit this crime?
- Was the client suffering from a mental or emotional disturbance at the time of the crime?
- Does the client have a neurological impairment that affected him or her at the time of the crime?
- Was the client insane at the time of the crime?
    - Did the client have mental health symptoms at the time of the crime?
    - If yes, did those symptoms prevent him/her from recognizing the nature and quality of his/her acts?
    - Even if the client understood the nature and quality of his/her acts, was he/she incapable of understanding the wrongfulness of his/her behavior as a result of mental health symptoms?
    - Does the client's mental health symptoms explain why he/she did what he/she did?
- Does the client have mental health or cognitive issues which might have caused him/her to be easily led by co-defendants?
- Does this client's history reveal other potential mitigation issues such as abuse history, neglect, low cognitive functioning, fear, etc? What treatment history has my client had?

After retaining a mental health expert, be sure to discuss exactly what testing the defense attorney does and DOES NOT want done.

CASES ON PRESERVING DISCOVERY RIGHTS FOR TRIAL & ON APPEAL

WHERE DEFENDANT DID NOT MOVE FOR DISCOVERY, RELYING ON WHAT HE CONSIDERED TO BE AN OPEN FILE POLICY of the district attorney, he could not complain that he did not know in advance of trial of the Statement of a certain witness which had not been reduced to writing. *State v. Abbott, 320 N.C. 475, 358 S.E.2d 365 (1987).*

DEFENDANT DENIED CONTINUANCE AFTER FAILURE TO MOVE FOR ADDITIONAL PRETRIAL DISCOVERY. --In a conviction of obtaining property by false pretenses and financial card fraud, defendant was properly denied a continuance because he failed to move for additional pretrial discovery, as required by *G.S. 15A-903(a)(1). State v. Flint, 199 N.C. App. 709, 682 S.E.2d 443 (2009).*

PRESERVATION OF DISCOVERY ISSUE FOR APPEAL. --While this section requires the trial judge on proper motion to order the prosecutor to permit certain kinds of discovery, the right must be asserted and the issue raised before the trial court. Further, the issue must be passed upon by the trial court in order for the right to be asserted in the appellate courts. *State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).*

FELONY CRIMINAL CASE CHECKLIST

INITIAL CLIENT CONTACT

- **Counsel shall make personal contact with an incarcerated client within three working days of being appointed to the case**

- Ascertain whether a conflict or apparent conflict of interest exists which would prevent you from ethically representing the client

- Identify yourself by name and affiliation

- Inform the client of his/her legal rights

- Explain the charges to the client including possible penalties, registration requirements and enhancements

- Determine if the client has a history of any issues which could impair attorney-client communications

  - Language, literacy, chemicals, mental health, medications

- Make an initial determination regarding the client's mental competency
- Determine citizenship and identify relevant federal criminal law or immigration consequences

- **You must advise your client regarding federal or immigration consequences associated with state criminal law proceedings**

- Right to remain silent: Explain the right to remain silent

❖ Warn client regarding recorded calls, correspondence, visitors, jailers, other inmates, etc.

- Explain the attorney-client privilege

- Determine if the client has made any written or oral statements to anyone concerning the offense

❖ If the client has made such statements, get details, names, etc.

- Identify witnesses

- Obtain as complete a history from the client as possible, including criminal history
- Explain the bail process and identify how a meaningful bail argument can be made

PRETRIAL

- Obtain and carefully review the charging documents
- Develop a theory of the case with your client's input
- Conduct a meaningful investigation
- Identify affirmative defenses and file appropriate notice with the court ▪ Research all issues that may produce viable motions

- Prepare and file witness lists as soon as you determine that the witness will testify
- **The following decisions belong exclusively to the client:**

o Decision to plead guilty or not guilty
o Decision whether or not to testify at any point in the case o Decisionwhethertowaiveajury
o Decision whether to file an appeal if convicted

- All other decisions belong to counsel, although the client should be consulted and fully informed

FOR CASES RESULTING IN GUILTY PLEA

- Advocate for dismissal of as many charges as possible

- Advocate for reduction of charges
- Make sure disposition agreement is reduced to writing

- Make sure client is fully informed about all aspects of the plea and any plea agreement, and that the client understands the consequences of pleading guilty

  - Explain to client difference between binding vs. nonbinding plea agreement as to sentencing
  - Role of prosecutor, judge, probation officer, and victim in sentencing process
  - Determine whether grounds can be presented to secure release of client pending sentencing hearing

DISCOVERY AND INVESTIGATION

- **File a motion to preserve and to inspect all evidence including specific named items of physical evidence where possible**
- **Make sure you file a written timely request for voluntary discovery per G.S. 15A-902**
- **File a motion to compel production of *Brady* and impeachment materials, including a request for copies of criminal records of state witnesses**

- **File a request/motion for all lab reports including test data, lab protocols, bench notes, photographs of tested evidence, DNA allele runs, CV's of lab experts, any other items or documents identified as needed by defense experts**
- **File a timely written motion to compel discovery under G.S. 15A-902**
- **Review all discovery produced by State for missing documents**
- **File additional requests/motions to compel discovery as needed**
- **Be sure to have the court order State compliance by a date or dates certain**
- **File a written motion for sanctions for noncompliance by the State as required and ask for all available remedies under G.S. 15A-910**
- **File any necessary *ex parte* motions for investigator or experts**
- **File any necessary *ex parte* motions for third party records of defendant or witnesses, including possible DSS, SSI, medical, school, or mental health records**
- **Locate documents needed to impeach and cross examine co-defendants and jailhouse snitches**
- **Make sure you have ALL statements (including written statements and audio-video statements) which your client has provided to law enforcement or anyone else**
- **Interview all prosecution witnesses**
- **Inspect all physical evidence and request to inspect and view all original investigator's and prosecution files before trial to insure you have all discovery**
- **Visit crime scene, if possible**
- **Obtain prosecution expert reports and interview experts in advance of trial**

- **Demand and file written motion to compel discovery update immediately prior to trial**
- **Carefully review prosecution's likely jury instructions**
- **Make sure you have provided the prosecution with your expert's report prior to commencement of trial in a timely manner**

- **Prepare demonstrative exhibits prior to trial**

FOR CASES RESULTING IN A JUDGE/JURY TRIAL

- File Motions in Limine in advance of trial (per local court rule or practice)

- Brief and request oral argument for any viable pretrial legal motions

- Develop a witness list and keep it up to date

- Carefully review all prosecution trial material

JURY SELECTION

- Voir dire

    - Elicit attitudes of jurors to critical facts and issues for defense
    - Convey legal principles critical to case
    - Preview damaging information
    - Present client in favorable and appropriate light

    - Establish a positive relationship with jury

        - Outline opening and closing statements in advance of trial

        - Jury instructions

    - Reply to objectionable prosecution instructions

    - Submit written supportive pattern defense instructions

    - Be creative!!

- Prepare and keep handy a trial notebook

- statutes
- rules of evidence
- case law supporting anticipated trial issues

SENTENCING

- Ensure client is fully informed about likely and possible outcomes
- Prepare and present Witnesses / Letters / Sentencing options
- Ensure court has all other relevant information
- Inform client of the right to speak at sentencing, including effects of testimony on appeal, retrial, etc.

- Inform client of right of appeal

Chapter 4
Discovery

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A defendant's right to discovery is based primarily on statute and due process. The main statutory provisions appear in Sections 15A-901 through 15A-910 of the North Carolina General Statutes (hereinafter G.S.). In 2004, the General Assembly significantly rewrote those provisions to give criminal defendants the right to "open-file" discovery. Since then, the General Assembly

has made minor revisions to the defendant's discovery rights but has maintained the commitment to open-file discovery for the defense.

This chapter discusses discovery in cases within the original jurisdiction of the superior court—that is, felonies and misdemeanors initiated in superior court. Discovery in misdemeanor cases tried in district court or for trial de novo in superior court is limited and is discussed only briefly. *See infra* § 4.1F, Discovery in Misdemeanor Cases. For a brief discussion of discovery in other types of cases, see *infra* § 4.1G, Postconviction Cases, and § 4.1H, Juvenile Delinquency Cases.

Sample discovery motions can be found in several places on the website of the Office of Indigent Defense Services (IDS), www.ncids.org: in the non-capital motions bank (select "Training and Resources," then "Motions Bank, Non-Capital"), in the juvenile motions bank (follow the same steps), and in the capital motions bank (select "Training & Resources," then "Capital Trial Motions"). These motions also can be accessed at www.sog.unc.edu/node/657. Whether denominated as non-capital, juvenile, or capital, the motions may be useful in a range of cases. Selected motions currently on the IDS website are identified in the discussion below. For additional motions, see MAITRI "MIKE" KLINKOSUM, NORTH CAROLINA CRIMINAL DEFENSE Ch. 4 (Motions for Discovery), at 180–298, and Ch. 5 (Preventing and Litigating the Illegal Destruction of Evidence), at 349–425 (2d ed. 2012) [hereinafter KLINKOSUM].

4.1 Types of Defense Discovery

A. Statutory Right to Open-File Discovery

Principal statutes. The principal discovery statutes in North Carolina are G.S. 15A-901 through G.S. 15A-910. 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.

Before the 2004 changes, North Carolina law gave the defendant the right to discovery of specific categories of evidence only, such as statements made by the defendant and documents that were material to the preparation of the defense, intended for use by the State at trial, or obtained from or belonging to the defendant. These categories were comparable to the discovery available in federal criminal cases. *See State v. Cunningham*, 108 N.C. App. 185 (1992) (noting similarities). Some prosecutors voluntarily provided broader, "open-file" discovery, allowing the defendant to review materials the prosecutor had received from law enforcement, such as investigative reports. But, the extent to which prosecutors actually opened their files, and whether they opened their files at all, varied with each district and each prosecutor. *See generally State v. Moore*, 335 N.C. 567 (1994) (under previous discovery statutes, prosecutor in one district was not bound by open-file policy of prosecutor in another district).

In 2004, the North Carolina General Assembly effectively made open-file discovery mandatory, giving defendants the right to discovery of the complete files of the investigation and prosecution of their cases. The procedures for a defendant to obtain

discovery, beginning with a formal, written request to the prosecutor, remained largely the same. *See infra* § 4.2, Procedure to Obtain Discovery. But, the 2004 changes greatly expanded the information to which defendants are entitled in all cases. *See infra* § 4.3, Discovery Rights under G.S. 15A-903.

In reviewing discovery decisions issued by the North Carolina courts, readers should take care to note whether the decisions were decided under the former discovery statutes or the current ones. The discussion below includes 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.

Other statutes. In addition to the discovery provisions in G.S. 15A-901 through G.S. 15A-910, additional North Carolina statutes give a criminal defendant the right to obtain information from the State about his or her case, such as information about plea agreements. *See infra* § 4.4, Other Discovery Categories and Mechanisms. Counsel should include requests for other statutory discovery in their discovery requests and motions.

Legislative summaries. For a summary of the main changes made by the General Assembly to North Carolina's discovery requirements, see the following:

- John Rubin, *2004 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2004/06, at 2–8 (Oct. 2004), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200406.pdf.
- John Rubin, *2007 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/01, at 14–19 (Jan. 2008), *available at* http://sogpubs.unc.edu//electronicversions/pdfs/aojb0801.pdf.

B. Constitutional Rights

U.S. Constitution. The U.S. Supreme Court has identified "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). The most well-known evidence of this type is *Brady* evidence—that is, favorable and material evidence. The defendant's right of access to *Brady* and other evidence is based primarily on the Due Process Clause. Sixth Amendment rights (right to effective assistance of counsel, to compulsory process, to confrontation, and to present a defense) also may support defense discovery.

State constitution. The North Carolina courts have recognized that a defendant has discovery rights under article I, section 19 of the North Carolina Constitution (law of land clause). *See State v. Cunningham*, 108 N.C. App. 185 (1992) (recognizing constitutional right to data underlying tests of evidence). Article I, section 23 (rights of accused, including right to counsel and confrontation) also may support defense discovery. *See State v. Canaday*, 355 N.C. 242, 253–54 (2002) (relying on article I, sections 19 and 23 of the state constitution as well as the Sixth Amendment in finding a discovery violation).

C. Court's Inherent Authority

The North Carolina Supreme Court has indicated that trial courts have the inherent authority to order discovery in the interests of justice. *See State v. Hardy*, 293 N.C. 105 (1977) (case analyzed under former G.S. 15A-903 and G.S. 15A-904). A trial court does not have the authority, however, to order discovery if a statute specifically restricts it. *Id.*, 293 N.C. at 125. Now that the defense is entitled to the State's complete files, this theory of discovery is less significant.

The courts have held that a trial court has greater authority to order disclosure of information once the trial commences. *Id.* (holding that after witness for State testified, trial court had authority to conduct in camera review of witness statements and disclose material, favorable evidence). Because of the breadth of the current discovery statutes, the defendant should have pretrial access to all information in the State's files.

D. Other "Discovery" Devices

Several other devices are available to the defense that technically do not constitute discovery but still may provide access to information.

Bill of particulars. The defense may request a bill of particulars in felony cases to flesh out the allegations in the indictment. *See* G.S. 15A-925; *see also infra* "Bill of particulars" in § 8.4B, Types of Pleadings and Related Documents.

Pretrial hearings. Several pretrial proceedings may provide the defense with discovery, including hearings on bail (*see supra* Chapter 1, Pretrial Release), probable cause (*see supra* Chapter 3, Probable Cause Hearings), and motions to suppress (*see infra* Chapter 14, Suppression Motions).

Subpoenas. *See infra* § 4.7, Subpoenas.

Public records. Counsel may make a public records request for information that would be useful generally in handling criminal cases as well as in specific cases. For example, counsel may obtain operations manuals, policies, and standard operating procedures developed by police and sheriffs' departments. *See* DAVID M. LAWRENCE, PUBLIC RECORDS LAW FOR NORTH CAROLINA LOCAL GOVERNMENTS at 204 (UNC School of Government, 2d ed. 2009) (unless within an exception, such material "appears to be standard public record, fully open to public access"). The Lawrence book addresses the coverage of public records laws and the procedures for obtaining public records.

E. Discovery in Misdemeanor Cases

Discovery in misdemeanor cases is limited. A defendant tried initially in district court does not have a right to statutory discovery under G.S. 15A-901 through G.S. 15A-910, whether the case is for trial in district court or for trial de novo in superior court. *See, e.g.*, *State v. Cornett*, 177 N.C. App. 452 (2006) (no statutory right to discovery in cases

originating in the district court); *State v. Fuller*, 176 N.C. App. 104 (2006) (same). Certain statutes give defendants limited discovery in particular types of misdemeanor cases. *See, e.g.,* G.S. 20-139.1(e) (right to copy of chemical analysis in impaired driving case). In the interest of fairness and efficiency, a prosecutor may voluntarily provide additional discovery in misdemeanor cases in district court. The arresting officer also may be willing to disclose pertinent evidence, such as police reports, videotapes of stops, and other information about the case.

Although statutory rights to discovery are limited in misdemeanor cases, defendants have the same constitutional discovery rights as in other cases. They have a constitutional right to obtain exculpatory evidence, discussed *infra* in § 4.5, *Brady* Material, and § 4.6A, Evidence in Possession of Third Parties. *See also Cornett*, 177 N.C. App. 452, 456 (recognizing right to exculpatory evidence in cases originating in district court but finding that defendant made no argument that he was denied *Brady* material). They also have a constitutional right to compulsory process to obtain evidence for their defense, discussed *infra* in § 4.7, Subpoenas. For violations of the defendant's constitutional rights in district court, the court may impose sanctions, including dismissal in egregious cases. *See State v. Absher*, 207 N.C. App. 377 (2010) (unpublished) (destruction of evidence).

A misdemeanor trial in district court also may provide considerable discovery for a later trial de novo. *See generally State v. Brooks*, 287 N.C. 392, 406 (1975) ("The purpose of our de novo procedure is to provide all criminal defendants charged with misdemeanor violations the right to a 'speedy trial' in the District Court and to offer them an opportunity to learn about the State's case without revealing their own. In the latter sense, this procedure can be viewed as a method of 'free' criminal discovery.") In preparing a criminal case (misdemeanor or felony), it is ordinarily permissible for defense counsel to talk with victims and other witnesses as long as they are not represented by counsel. (Special rules apply to child victims under the age of 14 in physical or sexual abuse cases.) Defense counsel should identify the client he or she represents to ensure that the witness understands that counsel does not represent the witness's interests. *See* N.C. State Bar R. Professional Conduct 4.2, 4.3. Interviews are voluntary. Defense counsel generally cannot compel a person to submit to an interview; nor may a prosecutor forbid a witness from submitting to an interview. For a further discussion of interviews, see *infra* § 4.4C, Examinations and Interviews of Witnesses.

For misdemeanors within the superior court's original jurisdiction—that is, misdemeanors joined with or initiated in superior court—the defendant has the same statutory discovery rights as in felony cases in superior court. *See* G.S. 15A-901 (stating that discovery statutes apply to cases within the original jurisdiction of superior court); G.S. 7A-271(a) (listing misdemeanors within superior court's original jurisdiction).

F. Postconviction Cases

Defendants in postconviction cases have discovery rights comparable to open-file discovery rights in criminal cases at the trial level.

Capital cases. In 1996, the General Assembly made statutory changes authorizing open-file discovery in capital postconviction cases—that is, cases in which the defendant is convicted of a capital offense and sentenced to death. These discovery rights, in G.S. 15A-1415(f), were a precursor to the later changes to discovery in criminal cases at the trial level, but they are not identical. *See* John Rubin, *1996 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 96/03, at 5 (UNC School of Government, Aug. 1996), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb9603.pdf. The statute gives postconviction counsel the right to (1) the complete files of the defendant's prior trial and appellate counsel relating to the case, and (2) the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant.

Before enactment of the statute, a defendant had the right to the files of his or her previous counsel under the North Carolina Rules of Professional Conduct. *See* N.C. State Bar R. Professional Conduct 1.16(d) & Comment 10 (so stating). The statute codifies the right and, to the extent the rules allowed prior counsel to withhold some materials (namely, personal notes and incomplete work product), the statute overrides any such limitations.

The obligation of the State to turn over its files broke new ground. *See State v. Bates*, 348 N.C. 29 (1998) (interpreting statute as requiring State to disclose complete files unless disclosure is prohibited by other laws or State obtains protective order; court recognizes that statute does not protect work product at postconviction stage). Other cases interpreting the statute include: *State v. Sexton*, 352 N.C. 336 (2000) (defendant not entitled to files of Attorney General's office when office did not participate in prosecution of capital case); *State v. Williams*, 351 N.C. 465 (2000) (describing requirements and deadlines for making motion for postconviction discovery).

As part of the 1996 changes, the General Assembly expressly provided that if a defendant alleges ineffective assistance of counsel as a ground for relief, he or she waives the attorney-client privilege with respect to communications with counsel to the extent reasonably necessary to the defense of an ineffectiveness claim. G.S. 15A-1415(e); *State v. Buckner,* 351 N.C. 401 (2000) (holding that court ultimately determines extent to which communications are discoverable and may enter appropriate orders for disclosure; finding that granting of State's request for ex parte interview of trial counsel was improper); *State v. Taylor*, 327 N.C. 147 (1990) (in case before statutory revisions, court recognized that defendant waives attorney-client and work-product privileges to extent relevant to allegations of ineffective assistance of counsel).

Noncapital cases. In 2009, the General Assembly extended G.S. 15A-1415(f) to noncapital defendants, giving them the right to discover 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 right to discovery is subject to the requirement that the defendant be "represented by counsel in postconviction proceedings in superior court." *Id.* In noncapital postconviction cases the requirement is significant because prisoners often proceed pro se, at least initially. The requirement serves as a

proxy for a determination that the case meets a minimum threshold of merit. Thus, counsel must agree to represent the defendant on a retained basis; Prisoners Legal Services must decide to take the case; or a court must appoint counsel under G.S. 7A-451(a)(3) and G.S. 15A-1420(b1)(2), which are generally interpreted as requiring appointment of counsel for an indigent defendant when the claim is not frivolous. *See infra* "MAR in noncapital case" in § 12.4C, Particular Proceedings (discussing right to counsel). Until the defendant meets this threshold, the State is not put to the burden of producing its files.

G.S. 15A-1415(f) also states that a defendant represented by counsel in superior court is entitled to the files of prior trial and appellate counsel. An unrepresented defendant is likely entitled to those files in any event. *See* N.C. State Bar R. Professional Conduct 1.16(d) & Comment 10 (so stating).

Postconviction DNA testing of biological evidence. *See* G.S. 15A-269 through G.S. 15A-270.1 (post-conviction procedures); G.S. 15A-268 (requirements and procedures for preservation of biological evidence); *State v. Gardner*, ___ N.C. App. ___, 742 S.E.2d 352 (2013) (discussing required showing); *see also* Jessica Smith, *Post-Conviction: Motions for DNA Testing and Early Disposal of Biological Evidence, in* THE SURVIVAL GUIDE: SUPERIOR COURT JUDGES' BENCHBOOK (UNC School of Government, Feb. 2010), *available at* www.sog.unc.edu/node/2168. For a discussion of a defendant's right to counsel for such matters, see *infra* "DNA testing and biological evidence" in § 12.4C, Particular Proceedings.

For a discussion of pretrial discovery and testing of biological evidence, see *infra* § 4.4E, Biological Evidence.

Innocence Commission Cases. On receiving notice from the N.C. Innocence Inquiry Commission that it is conducting an investigation into a claim of factual innocence, the State must preserve all files and evidence in the case subject to disclosure under G.S. 15A-903, the principal statute governing the defendant's right to discovery in felony cases at the trial level. *See* G.S. 15A-1471(a). The Commission is entitled to a copy of the preserved records and to inspect, examine, and test physical evidence. G.S. 15A-1471.

G. Juvenile Delinquency Cases

The right to discovery in juvenile delinquency proceedings is governed by G.S. 7B-2300 through G.S. 7B-2303. A juvenile respondent's discovery rights in those proceedings are comparable to the limited discovery rights that adult criminal defendants had before the 2004 rewrite of the adult criminal discovery statutes. For a discussion of discovery in delinquency cases, see NORTH CAROLINA JUVENILE DEFENDER MANUAL Ch. 10 (UNC School of Government, 2008), *available at* www.ncids.org (select "Training & Resources," then "References Manuals"). Cases interpreting the comparable adult provisions before the 2004 changes to the discovery statutes are discussed in the first edition of this volume of the North Carolina Defender Manual.

4.2 Procedure to Obtain Discovery

This section lays out in roughly chronological order the procedures for obtaining discovery from the State. (For a discussion of discovery of records from third parties, see *infra* § 4.6A, Evidence in Possession of Third Parties.) Discovery is necessarily a fluid process, however, and may vary in each case.

A. Goals of Discovery

Defense counsel should keep two goals in mind in pursuing discovery. The foremost goal, of course, is to obtain information. Among other things, information gained in discovery may provide leads for further investigation, support motions to suppress or for expert assistance, help counsel develop a coherent theory of defense, and eliminate unwelcome surprises at trial. In rare instances, defense counsel may not want to pursue discovery to avoid educating the prosecution or triggering reciprocal discovery rights. *See infra* § 4.8, Prosecution's Discovery Rights. Generally, however, the benefits of aggressive discovery outweigh any drawbacks.

A second, but equally important, goal is to make a record of the discovery process that will provide a basis at trial for requesting sanctions for violations. Although informal communications with the prosecutor or law enforcement officers may be effective in obtaining information, they may not support sanctions should the State fail to reveal discoverable information.

B. Preliminary Investigation

Discovery begins with investigation (study of charging documents and other materials in the court file, interviews of witnesses and officers, visits to crime scene, etc.). Preliminary investigation enables counsel to request specific information relevant to the case in addition to making a general request for discovery.

C. Preserving Evidence for Discovery

As a matter of course, counsel may want to make a motion to preserve evidence that the State may routinely destroy or use up in testing. The motion would request generally that the State preserve all evidence obtained in the investigation of the case and would request specifically that the State preserve items of particular significance to the case. Such a motion not only helps assure access to evidence but also may put the defendant in a better position to establish a due process violation and to seek sanctions if the State loses or destroys evidence. *See infra* § 4.6C, Lost or Destroyed Evidence. A sample motion for preservation of evidence is available in the non-capital motions bank on the IDS website, www.ncids.org.

Types of evidence that may be a useful object of a motion to preserve, with statutory support, include:

- Rough notes of interviews by law-enforcement officers, tapes of 911 calls, and other materials that may be routinely destroyed. (G.S. 15A-903(a)(1)a. requires the State to provide the defense with investigating officers' notes, suggesting 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).)
- Drugs, blood, and other substances that may be consumed in testing by the State. (G.S. 15A-268 requires the State to preserve "biological evidence," including blood and other fluids. *See infra* § 4.4E, Biological Evidence.) [*Legislative note:* Effective June 19, 2013, S.L. 2013-171 (S 630) adds G.S. 20-139.1(h) to require preservation of blood and urine samples subject to a chemical analysis for the period of time specified in that statute and, if a motion to preserve has been filed, until entry of a court order about disposition of the evidence.]
- Other physical evidence. (G.S. 15-11and G.S. 15-11.1 require law enforcement to maintain a log of and "safely keep" seized property.)

Counsel may make a motion to preserve even before requesting discovery of the evidence. If time is of the essence in a felony case, counsel may need to make the motion in district court, before transfer of the case to superior court. *See State v. Jones*, 133 N.C. App. 448 (1999) (district court has jurisdiction to rule on preliminary matters before transfer of a felony case to superior court; court could rule on motion for medical records), *aff'd in part and rev'd in part on other grounds*, 353 N.C. 159 (2000). The superior court also may have the authority to hear the motion in a felony case that is still pending in district court. *See State v. Jackson*, 77 N.C. App. 491 (1985) (court notes jurisdiction of superior court before indictment to enter commitment order to determine defendant's capacity to stand trial).

D. Requests for Discovery

Need for request for statutory discovery. To obtain discovery of the information covered under G.S. 15A-903, the defendant first must serve the prosecutor with a written request for voluntary discovery. A written request is ordinarily a prerequisite to a motion to compel discovery, discussed in E., below. *See* G.S. 15A-902(a); *State v. Anderson*, 303 N.C. 185 (1981), *overruled in part on other grounds by State v. Shank*, 322 N.C. 243 (1988). The court may hear a motion to compel discovery by stipulation of the parties or for good cause (G.S. 15A-903(f)), but the defendant does not have the right to be heard on a motion to compel without a written request.

Practice note: File your request for voluntary discovery with the court, with a certificate of service showing that you served it on the prosecutor within the required time period for requesting voluntary discovery. Doing so may prevent later disputes over whether you complied with the statutory requirements. *See* KLINKOSUM at 139–40 (recommending this approach). Some attorneys submit a combined discovery request and motion for discovery, requesting that the prosecution voluntarily comply with the request and, if the prosecution fails to do so, asking the court to issue an order compelling production. *Id.* at 140, A sample combined request and motion is available in the non-capital motions bank

on the IDS website, www.ncids.org. Separate requests and motions are also available in the capital trial motions bank.

In some counties, the prosecutor's office may have a standing policy of providing discovery to the defense without a written request. Even if a prosecutor has such a policy, defense counsel still should make a formal request for statutory discovery. If the defendant does not make a formal request, 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 (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 (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 notes that some decisions have held prosecution to requirements for court-ordered disclosure where prosecution voluntarily provides witness list to defense); *United States v. Cole*, 857 F.2d 971 (4th Cir. 1988) (prosecutors must honor informal discovery arrangement and, for violation of arrangement, trial court may exclude evidence under Federal Rule of Evidence 403 [comparable to North Carolina's Evidence Rule 403] on the ground of unfair prejudice and surprise); *see also Strickler v. Greene*, 527 U.S. 263 (1999) (defendant established cause for failing to raise *Brady* violation in earlier proceedings where, among other things, defendant reasonably relied on prosecution's open-file policy); *United States v. Spikes,* 158 F.3d 913 (6th Cir. 1998) (court may impose sanctions, including suppression of evidence and dismissal of charges in egregious cases, for prosecution's failure to honor agreement not to introduce certain evidence).

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. *See* 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 (2009) (recognizing that written agreement may obviate need for motion for discovery but finding no evidence of agreement); John Rubin, *2004 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2004/06, at 3–4 (Oct. 2004) (noting that one of purposes of provision was to clarify enforceability of standing agreements such as in Mecklenburg County, where public defender's office and prosecutor's office entered into agreement to exchange discovery without a written request), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200406.pdf. If counsel has any doubts about whether an agreement adequately protects the client's rights, counsel should generate and serve on the prosecutor a written request for discovery.

If the defendant makes a written request for discovery (and thereafter the prosecution either voluntarily provides discovery or the court orders discovery), the prosecution is entitled on written request to discovery of the materials described in G.S. 15A-905. *See* G.S. 15A-905(a), (b), (c) (providing that prosecution has right to discovery of listed materials if the defense obtains "any relief sought by the defendant under G.S. 15A-

903"). Ordinarily, the advantages of obtaining discovery from the State will far outweigh any disadvantages of providing discovery to the State. For a further discussion of reciprocal discovery, see *infra* § 4.8, Prosecution's Discovery Rights.

Practice note: The defendant is not required to submit a request for *Brady* materials before making a motion to compel discovery. Requests for statutory discovery commonly include such requests, however, and judges may be more receptive to discovery motions when defense counsel first attempts to obtain the discovery voluntarily. The discovery request therefore should include all discoverable categories of information, including the State's complete files under G.S. 15A-903, other statutory categories of information, and constitutional categories of information. The discovery request should specify the items within each category, described further in subsequent sections of this chapter.

Timing of request. Under G.S. 15A-902(d), defense counsel must serve on the prosecutor a request for statutory discovery no later than ten working days after one of the following events:

- If the defendant is represented by counsel at the time of a probable cause hearing, the request must be made no later than ten working days after the hearing is held or waived.
- If the defendant is not represented by counsel at the probable cause hearing, or is indicted (or consents to a bill of information) before a probable cause hearing occurs, the request must be made no later than ten working days after appointment of counsel or service of the indictment (or consent to a bill of information), whichever is later.

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

Practice note: Because the deadlines for requesting statutory discovery are relatively early, counsel should set up a system for automatically generating and serving statutory discovery requests in every case.

E. Motions for Discovery

Motion for statutory discovery. On receiving a negative or unsatisfactory response to a request for statutory discovery, or after seven days following service of the request on the prosecution without a response, the defendant may file a motion to compel discovery. *See* G.S. 15A-902(a). 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 by a superior court judge only. *See* G.S. 15A-902(c).

If the prosecution refuses to provide voluntary discovery, or does not respond at all, the defendant must move for a court order to trigger the State's discovery obligations. *See*

State v. Keaton, 61 N.C. App. 279 (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 an order of the court, and the defendant may obtain sanctions if the State fails to disclose discoverable evidence. *See* G.S. 15A-902(b); 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); *see also State v. Castrejon*, 179 N.C. App. 685 (2006) (defendant apparently requested discovery pursuant to prosecutor's open-file policy and did not make written request for discovery and motion; defendant therefore was not entitled to discovery); *State v. Brown*, 177 N.C. App. 177 (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 notes that some decisions have held prosecution to requirements for court-ordered disclosure where prosecution voluntarily provides witness list to defense).

Nevertheless, counsel may want to follow up with a motion for discovery. Obtaining a court order may avoid disputes over whether the prosecution agreed to provide discovery and thereby assumed the obligation to comply with a discovery request. The hearing on a discovery motion also may give counsel an opportunity to explore on the record the prosecution's compliance.

A motion for statutory discovery should attest to the defendant's previous request for discovery and ask that the court order the prosecution to comply in full with its statutory obligations. *See State v. Drewyore*, 95 N.C. App. 283 (1989) (suggesting that defendant may not have been entitled to sanctions for prosecution's failure to disclose photographs that were discoverable under statute because motion did not track statutory language of former G.S. 15A-903(d)). If counsel learns of additional materials not covered by the motion, counsel should file a supplemental written motion asking the court to compel production. *See generally State v. Fair*, 164 N.C. App. 770 (2004) (finding under former statute that oral request for materials not sought in earlier written discovery motion was insufficient). [In *Fair,* counsel learned of additional materials and made an oral request for them only after a voir dire of a State's witness at a hearing on counsel's written discovery motion, held by the trial court immediately before trial. The appellate court's requiring of a written motion in these circumstances seems questionable, but the basic point remains that counsel should fashion a broad request for relief in the written motion and, when feasible, should follow up with a supplemental written motion on learning of materials not covered by the motion.] For additional types of relief, see *infra* § 4.2G, Forms of Relief, and § 4.2J, Sanctions.

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 (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).

Practice note: Motions for statutory discovery commonly include a request for *Brady* evidence. Although the prosecution has the obligation to disclose *Brady* evidence without a request or motion (*see infra* § 4.5G, Need for Request), the motion reinforces the prosecution's obligation. As with motions for statutory discovery, as you learn more about the case, you may want to file additional motions specifying additional information you need and have not received.

Be sure to state all constitutional as well as statutory grounds for discovery in your motion. *See State v. Golphin*, 352 N.C. 364, 403–04 (2000) (defendant's discovery motion did not allege and trial court did not rule on possible constitutional violations; court therefore declines to rule on whether denial of motion was violation of federal or state constitutional rights). For an overview of the constitutional grounds for discovery, see *supra* § 4.1B, Constitutional Rights.

F. Hearing on Motion

Hearings on discovery motions often consist of oral argument only. Defense counsel should use this opportunity to explore on the record the prosecution's compliance with its discovery obligations. In some instances, counsel may want to subpoena witnesses and documents to the motion hearing. Examination of witnesses (such as law-enforcement officers) may reveal discoverable evidence that the State has not yet disclosed. For a discussion of the use of subpoenas for pretrial proceedings, see *infra* § 4.7, Subpoenas.

G. Forms of Relief

In addition to asking the court to order the prosecution to provide the desired discovery, defense counsel may want to seek the following types of relief.

Deadline for production. The discovery statutes set some deadlines for the State to produce discovery. *See* G.S. 15A-903(a)(2) (State must give notice of expert witness and furnish required expert materials 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).

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, but the judge may be willing to set a deadline for the prosecution to provide discovery. *See* G.S. 15A-909 (order granting discovery must specify time, place, and manner of making discovery). When setting a discovery deadline, the judge also may be willing to enter an order precluding the

prosecution from introducing discoverable evidence not produced by the deadline. *See, e.g., State v. Coward*, 296 N.C. 719 (1979) (trial court imposed such a deadline), *overruled in part on other grounds by State v. Adcock*, 310 N.C. 1 (1984); *State v. James*, 182 N.C. App. 698, 702 (2007) (trial court set deadline for State to produce discovery and excluded evidence produced after deadline).

Defense counsel also may file a motion in limine before trial requesting that the judge exclude any evidence that has not yet been produced. *See, e.g., State v. McCormick*, 36 N.C. App. 521 (1978) (trial court granted in limine motion excluding evidence not produced in discovery unless prosecution obtained court's permission).

Retrieve and produce information from other agencies involved in investigation or prosecution of defendant. If defense counsel believes that discoverable evidence is in the possession of other agencies involved in the investigation or prosecution of the defendant, such as law enforcement, counsel can ask the court to require the prosecutor to retrieve and produce the evidence. Although the prosecutor may not have actual possession of the evidence, he or she is obligated under the discovery statutes and potentially constitutional requirements to obtain the evidence. For a further discussion of the prosecution's obligation to obtain information from affiliated entities, see *infra* § 4.3B, Agencies Subject to Disclosure Requirements (statutory grounds) and § 4.5H, Prosecutor's Duty to Investigate (constitutional grounds).

If it is unclear to counsel whether the prosecution has the obligation to obtain the information from another entity, counsel may make a motion to require the entity to produce the records or may make a motion in the alternative—that is, counsel can move for an order requiring the prosecution to obtain and turn over the records or, in the alternative, for an order directing the agency to produce the records. *See infra* § 4.6A, Evidence in Possession of Third Parties.

Item-by-item response. The judge may be willing to require the prosecution to respond in writing to each discovery item in the motion, compelling the prosecution to examine each item individually and creating a clearer record.

In camera review. If counsel believes that the prosecution has failed to produce discoverable material, counsel may ask the judge to review the material in camera and determine the portions that must be disclosed. *See, e.g.*, *infra* § 4.5J, In Camera Review and Other Remedies (discussing such a procedure to ensure compliance with *Brady*).

H. Written Inventory

In providing discovery, the prosecution may just turn over documents without a written response and without identifying the materials produced. To avoid disputes at trial over what the prosecution has and has not turned over, counsel should review the materials, create a written inventory of everything provided, and serve on the prosecutor (and file with the court) the inventory documenting the evidence produced. The inventory also

should recite the prosecutor's representations about the nonexistence or unavailability of requested evidence. Supplemental inventories may become necessary as the prosecution discloses additional evidence or makes additional representations. A sample inventory is available in the non-capital motions bank on the IDS website, www.ncids.org.

I. 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 the information. *See* G.S. 15A-907; *State v. Cook*, 362 N.C. 285 (2008) (recognizing duty and finding violation by State's failure to timely disclose identity and report of expert witness); *State v. Jones*, 296 N.C. 75 (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 (2010 (recognizing duty). The prosecution always has a duty to disclose *Brady* evidence, with or without a request or court order. *See infra* § 4.5G, Need for Request.

J. Sanctions

Generally. Under G.S. 15A-910, the trial court may impose sanctions for the failure to disclose or belated disclosure of discoverable evidence. The sanctions, in increasing order of severity, are:

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

G.S. 15A-910(a) also allows the court to issue any "other appropriate orders," including an order citing the noncomplying party for contempt. *See also* "Personal sanctions," below, in this subsection J. The court must make specific findings if it imposes any sanction. *See* G.S. 15A-910(d); *cf. State v. Ellis*, 205 N.C. App. 650 (2010) (noting that trial court is not required to make specific findings that it considered sanctions in denying sanctions; transcript indicated that trial court considered defendant's request for continuance and that denial of continuance was not abuse of discretion).

Showing necessary for sanctions. At a minimum, the defendant must do the following to obtain sanctions: (1) show that the prosecution was obligated to disclose the evidence (thus, the importance of making formal discovery requests and motions); (2) show that the prosecution violated its obligations (thus, the importance of making a record of the evidence disclosed by the prosecution); and (3) request sanctions. *See State v. Alston*, 307 N.C. 321 (1983) (defendant failed to advise trial court of violation and request sanctions; no abuse of discretion in trial court's failure to impose sanctions).

G.S. 15A-910(b) requires the court, in determining whether sanctions are appropriate, to consider (1) the materiality of the subject matter and (2) 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 (2013) (reversing order excluding State's evidence because order did not indicate court's consideration of these two factors), *review dismissed*, ___ N.C. ___, 743 S.E.2d 205 (2013) and *appeal dismissed, review denied*, ___ N.C. ___, 743 S.E.2d 206 (2013).

Appellate decisions (both before and after the enactment of G.S. 15A-910(b) in 2011) indicate that various factors may strengthen an argument for sanctions, although none are absolute prerequisites. Factors include:

- Importance of the evidence. *See State v. Walter Lee Jones*, 296 N.C. 75 (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.*, ___ N.C. App. ___, 724 S.E.2d 651 (2012) (ordering new trial for trial court's failure 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. *See 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. *See State v. King*, 311 N.C. 603 (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*, ___ N.C. App. ___, 724 S.E.2d 117 (2012) (defendant conceded that he anticipated that State would offer expert testimony, although he could not anticipate precise testimony).
- Prejudice to preparation for trial, including ability to investigate information, prepare motions to suppress, obtain expert witnesses, subpoena witnesses, and engage in plea bargaining. *See State v. Williams,* 362 N.C. 628 (2008) (photos destroyed by State were material evidence favorable to defense, which defendant never possessed, could not reproduce, and could not prove through testimony); *State v. Warren Harden Jones*, 295 N.C. 345 (1978) (defendants failed to suggest how nondisclosure hindered preparation for trial and failed to specify any items of evidence that they could have excluded or rebutted more effectively had they learned of evidence before trial).
- Prejudice to presentation at trial, such as ability to question prospective jurors, prepare opening argument and cross-examination, and determine whether the client should testify. *See State v. Pigott*, 320 N.C. 96 (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 (1984) (no abuse of discretion in denial of mistrial; no suggestion that defendant would not have testified had prosecution disclosed prior conviction).

Practice note: In addition to citing the statutory basis for sanctions, be sure to constitutionalize your request for sanctions for nondisclosure of evidence. Failure to do so may constitute a waiver of constitutional claims. *See State v. Castrejon*, 179 N.C. App. 685 (2006).

Choice of sanction. The choice of sanction for a discovery violation is within the trial court's discretion and is rarely reversed. *See State v. Jaaber*, 176 N.C. App. 752 (2006) (finding that statute does not require that trial court impose sanctions and leaves choice of sanction, if any, in trial court's discretion).

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*, ___ N.C. App. ___, 720 S.E.2d 836 (2012) (trial court did not abuse discretion in denying defendant's request for mistrial for State's failure to disclose new information provided by codefendant to State; 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 (2009) (trial court did not abuse discretion in refusing to dismiss case or exclude evidence for State's disclosure of incriminating statement of defendant on second day of trial; granting of recess was adequate remedy where 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. *See 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.*, ___ N.C. App. ___, 724 S.E.2d 651 (2012) (ordering new trial for trial court's failure to allow juvenile continuance; State disclosed new witness, the only eyewitness to alleged arson, on day of adjudicatory hearing); *see also infra* § 13.4A, Motion for Continuance (discussing constitutional basis for continuance).

Trial and appellate courts have imposed other, stiffer sanctions. They have imposed sanctions specifically identified in the statute, 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. Canaday*, 355 N.C. 242, 253–54 (2002) (ordering new trial for trial court's failure to exclude expert's testimony or order retesting of evidence where State could not produce underlying data from earlier test); *State v. Mills*, 332 N.C. 392 (1992) (trial court offered defendant mistrial for State's discovery violation); *State v. Taylor*, 311 N.C. 266 (1984) (trial court prohibited State from introducing photographs and physical evidence it had failed to produce in discovery); *State v. Barnes*, ___ N.C. App. ___, 741 S.E.2d 457 (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. Icard*, 190 N.C. App. 76, 87 (2008) (trial

court allowed defendant right to final argument), *aff'd in part and rev'd in part on other grounds*, 363 N.C. 303 (2009); *State v. Moncree*, 188 N.C. App. 221 (2008) (finding that trial court should have excluded testimony of State's expert about identity of substance found in defendant's shoe where State failed to notify defendant of subject matter of expert's testimony; 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 (2006) (finding that trial court abused discretion in failing to preclude expert witness not on State's witness list from testifying); *State v. Banks*, 125 N.C. App. 681 (1997) (as sanction for failure to preserve evidence, trial court prohibited State from calling witness to testify about evidence, stripped prosecution of two peremptory challenges, and allowed defendant right to final argument before jury), *aff'd per curiam*, 347 N.C. 390 (1997); *State v. Hall*, 93 N.C. App. 236 (1989) (for belated disclosure of evidence, trial court ordered State's witness to confer with defense counsel and submit to questioning under oath before testifying); *State v. Adams*, 67 N.C. App. 116 (1984) (trial court acted within discretion in dismissing charges for prosecution's failure to comply with court order requiring statutory discovery); *see also United States v. Bundy*, 472 F.2d 1266 (D.C. Cir. 1972) (Levanthal, J., concurring) (concurring opinion suggests that, as sanction for law-enforcement officer's failure to preserve notes, trial court could instruct jury that it was free to infer that missing evidence would have been different from testimony at trial and would have been helpful to defendant).

Mistrial or dismissal as sanction. Counsel may need to make additional arguments to obtain a mistrial or dismissal for a discovery violation.

Some cases have applied the general mistrial standard to the granting of a mistrial as a sanction for a discovery violation. *See State v. Jaaber*, 176 N.C. App. 752, 756 (2006) ("mistrial 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*, ___ N.C. App. ___, 720 S.E.2d 836 (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 (2013) (reversing order dismissing charge as sanction for State's discovery violation because trial court did not explain prejudice to defendant that warranted dismissal), *review dismissed*, ___ N.C. ___, 743 S.E.2d 205 (2013) and *appeal dismissed, review denied*, ___ N.C. ___, 743 S.E.2d 206 (2013); *State v. Allen*, ___ N.C. App. ___, 731 S.E.2d 510 (2012) (noting that dismissal is extreme sanction and reversing court's order of dismissal in circumstances of case); *State v. Adams*, 67 N.C. App. 116 (1984) (recognizing that dismissal is extreme sanction and upholding dismissal; because prejudice was apparent, trial court's failure to make findings did not warrant reversal or remand).

Personal sanctions. When determining whether to impose personal sanctions for untimely disclosure of law enforcement and investigatory agencies' files, the court must presume that prosecuting attorneys and their staff acted in good faith if they made a

reasonably diligent inquiry of those agencies and disclosed the responsive materials. *See* G.S. 15A-910(c).

Criminal penalties. In 2011, the General Assembly amended G.S. 15A-903 to impose criminal penalties for the failure to comply with statutory disclosure requirements. 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.

Sanctions for constitutional violations. A court has the discretion to impose sanctions under G.S. 15A-910 for failure to disclose exculpatory evidence. *See, e.g., State v. Silhan*, 302 N.C. 223 (1981) (trial court had authority to grant recess under G.S. 15A-910 for prosecution's failure to disclose exculpatory evidence), *abrogated in part on other grounds by State v. Sanderson*, 346 N.C. 669 (1997).

Stronger measures, including dismissal, may be necessary for constitutional violations. *See State v. Williams*, 362 N.C. 628 (2008) (upholding dismissal of charge of felony assault on government officer; destruction of evidence flagrantly violated defendant's constitutional rights and irreparably prejudiced preparation of defense under G.S. 15A-954).

Preservation of record. If the trial court denies the requested sanctions for a discovery violation, counsel should be sure to include the materials at issue in the record for a potential appeal. *See State v. Mitchell*, 194 N.C. App. 705, 710 (2009) (because defendant did not include any of discovery materials in record, court finds that it could not determine prejudice by trial court's denial of continuance for allegedly late disclosure by State); *see also State v. Hall*, 187 N.C. App. 308 (2007) (in finding that materials were not discoverable, trial court stated that it would place materials under seal for appellate review, but materials were not made part of the record and court of appeals rejected defendant's argument for that reason alone).

Sanctions against defendant for discovery violation. *See infra* "Sanctions" in § 4.8A, Procedures for Reciprocal Discovery by Prosecution.

K. Protective Orders

G.S. 15A-908(a) allows either party to apply to the court, by written motion, for a protective order protecting information from disclosure for good cause. Generally, the State is more likely than the defense to seek a protective order. *See infra* "Protective orders" in § 4.3E, Work Product and Other Exceptions. 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.

See infra "In camera review and alternatives" in § 4.6A, Evidence in Possession of Third Parties.

L. Importance of Objection at Trial

If the State offers evidence at trial that was not produced in discovery, the defendant must object and state the grounds for the objection to preserve the issue for appellate review. *See State v. Mack*, 188 N.C. App. 365 (2008) (defendant cannot argue on appeal that trial court abused its discretion in failing to sanction the State for discovery violation when defense counsel did not properly object at trial to previously undisclosed evidence).

Practice note: The State has argued in some cases that if the defendant has moved before trial for exclusion of evidence based on a discovery violation and the trial court denies relief, the defendant must renew the objection when the evidence is offered at trial. *State v. Herrera*, 195 N.C. App. 181 (2009) (assuming, arguendo, that objection requirement applies but not ruling on argument), *abrogation on other grounds recognized by State v. Flaugher*, ___ N.C. App. ___, 713 S.E.2d 576 (2011). Accordingly, counsel should always object at trial when the State offers evidence that has been the subject of a pretrial motion to suppress or exclude.

4.3 Discovery Rights under G.S. 15A-903

Before the 2004 revisions to the discovery statutes, the defendant's right to statutory discovery was limited to specific categories of information. The defendant was entitled to discovery of the defendant's own statements, statements of codefendants, the defendant's prior criminal record, certain documents and physical objects, reports of examinations and tests, and a witness's statement after the witness testified. The defendant's obligation to disclose information to the State was also limited. Under the revised discovery statutes, both the defendant and the prosecution are entitled to broader discovery. This section discusses the defendant's discovery rights under G.S. 15A-903. For further background on the changes in North Carolina's discovery laws, see *supra* § 4.1A, Statutory Right to Open-File Discovery. To the extent relevant, the discussion below includes a discussion of the statutory discovery provisions in effect before 2004.

A. Obligation to Provide Complete Files

The most significant provision in the discovery statute 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). The statute defines "file" broadly, stating that it includes "the defendant's statements, 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*" (emphasis added). Specific aspects of this definition are discussed below.

B. Agencies Subject to Disclosure Requirements

Generally. 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-501(6), adopted in 2004, provides that following an arrest for a felony, a law enforcement officer must make available to the State all materials and information obtained in the course of the investigation. Because this obligation appears in the statutes on law enforcement, it was easy to overlook. G.S. 15A-903 was therefore amended in 2007 to reinforce the obligation of law enforcement agencies to provide discoverable material to the prosecutor. *See* G.S. 15A-903(c) (law enforcement and investigatory agencies must on a timely basis provide to the prosecutor a copy of their complete files related to a criminal investigation or prosecution).

G.S. 15A-903(a)(1)b1., also added in 2007 and revised in 2011, further clarifies the State's discovery obligation to turn over information obtained by investigatory agencies by defining such 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 labs that do testing as part of the investigation or prosecution.

Duty to investigate and obtain. Prosecutors, on behalf of the State, have a duty to investigate 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").

The State has a comparable constitutional obligation to investigate, obtain, and disclose records of others acting on the State's behalf. *See infra* § 4.5G, Prosecutor's Duty to Investigate.

Particular agencies. Clearly, files within the prosecuting district attorney's own office are subject to the obligation to produce. The 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 would still be entitled to the information in several instances.

- *Information 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 must obtain a protective order under G.S. 15A-908 to limit disclosure.
- *Information in prosecutor's custody or control*. The State's obligation to disclose applies to materials "within the possession, custody or control of the prosecutor." *State v. Pigott*, 320 N.C. 96, 102 (1987) (citation omitted). "Custody" or "control" mean a right of access to the materials; the prosecutor need not have taken actual possession of the materials. *See State v. Crews*, 296 N.C. 607 (1979) (materials within possession of mental health center and social services department not discoverable because prosecution had neither authority nor power to release information and was denied access to it). A prosecutor may not simply leave materials in another entity's possession as a means of avoiding disclosure. *See generally Martinez v. Wainwright*, 621 F.2d 184, 188 (5th Cir. 1980) (prosecutor may not "avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial" (citation omitted)).
- *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. *Compare State v. Pendleton*, 175 N.C. App. 230 (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), *with State v. Morell*,

108 N.C. App. 465 (1993) (social worker in child abuse case acted as law-enforcement agent in interviewing defendant, rendering inadmissible custodial statements made to social worker without *Miranda* warnings).

A defendant also may obtain information directly from an agency or entity by subpoena or motion to the court. If counsel is uncertain whether the State is obligated to produce the information as part of its discovery obligations, counsel can move for an order compelling production by the State on the grounds described above or, in the alternative, compelling the agency to produce the materials. *See infra* § 4.6A, Evidence in Possession of Third Parties.

C. Categories of Information

The discussion below addresses categories of information potentially covered by G.S. 15A-903(a)(1). For a discussion of additional categories of information discoverable on statutory or constitutional grounds, see *infra* § 4.4, Other Discovery Categories and Mechanisms; § 4.5, *Brady* Material; and § 4.6, Other Constitutional Rights. Counsel should include in discovery requests and motions all pertinent categories of information.

Generally. G.S. 15A-903(a)(1) requires the State to disclose its complete files to the defense. The term "file" should not be construed in its everyday sense as the mere paper file kept by the prosecutor in a particular case. G.S. 15A-903(a)(1)a. defines the term to include several specific types of evidence, discussed below. It also includes a catch-all category of "any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant." (The term "file" also covers every agency involved in the investigation and prosecution of the offenses. *See supra* § 4.3B, Agencies Subject to Disclosure Requirements). The disclosure requirements are considerably broader than under the pre-2004 discovery statutes.

Practice note: The defendant has the right to inspect the original of any discoverable item and to obtain a copy. G.S. 15A-903(a)(1)d. Defense counsel should not accept a copy if he or she needs to review the originals, e.g., examine photographs; nor should counsel accept the mere opportunity to review materials if he or she needs a copy for further study.

Statements of defendant. G.S. 15A-903(a)(1)a. requires the State to disclose all statements made by the defendant. *See also Clewis v. Texas*, 386 U.S. 707, 712 n.8 (1967) (suggesting that due process may require disclosure of a defendant's statements). 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.

For a discussion of the State's obligation to record interrogations of defendants, see *infra* § 14.3G, Recording of Statements.

Statements of codefendants. 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 codefendant'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. (G.S. 15A-927(c)(3) continues to authorize the court to order the prosecutor to disclose the statements of all defendants in ruling on an objection to joinder or on a motion to sever; while the State has the general obligation to disclose such statements, a hearing on joinder or severance may provide additional discovery opportunities. *See infra* § 6.2, Joinder and Severance of Defendants.)

Written or recorded statements of witnesses. G.S. 15A-903(a)(1)a. requires the State to disclose all statements made by witnesses. The statute contains no limitation on this obligation, in contrast to the pre-2004 statute, which required disclosure of witness statements only after the witness testified and only if the statement met certain formal requirements (for example, the statement was signed or otherwise adopted or approved by the witness). The current statutes require the State to turn over, as part of pretrial discovery, any writing or recording evidencing a witness's statement. *See State v. Shannon*, 182 N.C. App. 350 (2007) (trial court committed prejudicial error by denying discovery motion for notes of pretrial conversations between prosecutor's office and witnesses; General Assembly intended to eliminate more formal requirements for witness statements by completely omitting such language from revised statute), *notice of appeal and petition for review withdrawn*, 361 N.C. 702 (2007), *superseded by statute in part on other grounds as recognized in State v. Zamora-Ramos*, 190 N.C. App. 420 (2008) (recognizing that discovery statutes, as amended, do not require prosecutor to reduce to writing oral witness statements if the statements do not significantly differ from previous statements given to law enforcement [court does not question holding of *Shannon* about elimination of formal requirements for witness statements]); *accord State v. Milligan*, 192 N.C. App. 677 (2008) (prosecutor's notes of witness interview were discoverable); *see also Palermo v. United States*, 360 U.S. 343, 362 (1959) (Brennan, J., concurring) (right to witness's statement rests in part on confrontation and compulsory process rights in Sixth Amendment).

The State also must disclose witness statements it may use for impeachment of defense witnesses. *See State v. Tuck*, 191 N.C. App. 768, 772–73 (2008) (holding that such statements are part of State's "file" and must be disclosed).

That notes and other materials reflect statements by witnesses and are therefore discoverable does not necessarily mean that the statements are admissible against the witness. *See Milligan*, 192 N.C. App. 677, 680–81 (defense counsel could ask witness on

cross-examination whether she made certain statements but could not impeach witness with prosecutor's notes of witness's statements, which were not signed or adopted by witness; court also holds that trial court did not err in precluding defense counsel from calling prosecutor as witness and offering notes, apparently on the ground that the notes constituted extrinsic evidence on a collateral matter).

Practice note: To determine whether the prosecution has disclosed the statements of a witness who testifies at trial, defense counsel may cross-examine the witness or request a voir dire outside the presence of the jury. Counsel also may ask the court to order the witness to turn over any materials he or she reviewed before taking the stand. *See* N.C. R. EVID. 612(b).

Oral statements of witnesses. G.S. 15A-903(a)(1)a. 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. This obligation is broader than under the pre-2004 discovery statutes, which required the State to disclose oral statements of the defendant and codefendants only.

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) (court of appeals notes that 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 (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 (2013) (holding that 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 [decision appears to be inconsistent with statutory requirement and cases interpreting it and may be limited to circumstances of case]), *review dismissed*, ___ N.C. ___, 743 S.E.2d 205 (2013) and *appeal dismissed, review denied*, ___ N.C. ___, 743 S.E.2d 206 (2013).

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

Practice note: The statute does not require the State to provide a description of the facts and circumstances surrounding a witness's statement. *State v. Rainey*, 198 N.C. App. 427, 438. *But see infra* § 14.4B, Statutory Requirements for Lineups (describing documentation that law enforcement must keep of lineups); *see also State v. Hall*, 134

N.C. App. 417 (1999) (hypnotically refreshed testimony is inadmissible, but witness may testify to facts he or she recounted before being hypnotized; State must disclose whether witness had been hypnotized before witness testifies).

If the State fails to provide sufficient context for counsel to understand the statement—for example, the State discloses a statement made by a witness without providing information about the circumstances of the conversation—counsel should consider filing a motion to compel the additional information. *Rainey*, 198 N.C. App. 427, 438 ("purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate" (citation omitted)); *State v. Patterson*, 335 N.C. 437 (1994) (under previous version of discovery statute, under which State was required to disclose substance of defendant's oral statements, prosecution violated statute by first producing written statement made by defendant to officer and later producing defendant's oral statement without disclosing that statement was made to officer at time of written statement); *see also supra* § 4.1C, Court's Inherent Authority (discussing authority to compel disclosure if not prohibited by discovery statutes).

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. An officer's report, prepared from his or her notes, is not a substitute for the notes themselves. *See State v. Icard,* 190 N.C. App. 76, 87 (2008) (State conceded that failure to turn over officer's handwritten notes violated discovery requirements), *aff'd in part and rev'd in part on other grounds*, 363 N.C. 303 (2009).

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); *United States v. Harris*, 543 F.2d 1247 (9th Cir. 1976) (recognizing under narrower federal discovery rules that officers must preserve rough notes); *United States v. Harrison*, 524 F.2d 421 (D.C. Cir. 1975) (to same effect). To be safe, counsel should file a motion to preserve early in the case. *See supra* § 4.2C, Preserving Evidence for Discovery.

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 *infra* in § 4.4E, Biological Evidence]).

As amended in 2011, 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." If the State cannot provide the underlying data, the court may order the State to retest the evidence. *State v. Canaday*, 355 N.C. 242, 253–54 (2002).

The requirement to produce underlying data is consistent with earlier cases, which recognized that the defendant has the right not only to conclusory reports but also to any tests performed, procedures used, calculations and notes, and other data underlying the

report. *State v. Cunningham*, 108 N.C. App. 185 (1992) (defendant has right to data underlying lab report on controlled substance); *accord State v. Dunn*, 154 N.C. App. 1 (2002) (relying on *Cunningham* and interpreting former G.S. 15A-903 as requiring that State disclose information pertaining to laboratory protocols, false positive results, quality control and assurance, and lab proficiency tests in drug prosecution); *cf. State v. Fair*, 164 N.C. App. 770 (2004) (finding under former G.S. 15A-903 that defendant was entitled to data collection procedures and manner in which tests were performed but that State did not have obligation to provide information about peer review of the testing procedure, whether the procedure had been submitted to scrutiny of scientific community, or is generally accepted in scientific community).

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. *Cunningham*, 108 N.C. App. 185, 195–96 (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"); *see also State v. Canady*, 355 N.C. 242, 253–54 (2002) (relying in part on N.C. Const., art. 1, sec. 19 and 23, in finding that trial court erred in allowing an expert for State to testify without allowing defendant an opportunity to examine the expert's testing procedure and data).

In cases decided under the former discovery statute, the defendant was not entitled to polygraph tests and results. *See State v. Brewington*, 352 N.C. 489 (2000) (finding that polygraph did not fall into category of physical or mental examinations discoverable under pre-2004 discovery statute); *accord State v. Allen*, ___ N.C. App. ___, 731 S.E.2d 510 (2012) (reaching same conclusion under pre-2004 statute, which court found applicable because discovery hearing was held in 1999). Polygraphs also have been found not to constitute *Brady* material. *Wood v. Bartholomew*, 516 U.S. 1 (1995). Under the current discovery statute, the defendant should be entitled to polygraph tests and results, either because they constitute tests or examinations under the statute or because they are part of the file in the investigation of the case.

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 infra* § 4.3D, Notice of Witnesses and Preparation of Reports.

Practice note: Under the former statute, a defendant may have needed to make a specific motion, sometimes called a *Cunningham* motion, asking specifically for both the test results or reports and the underlying data. Such a motion is not required under the current statute, which expressly requires the State to produce underlying data. If, however, counsel believes that the State has not produced the required information or counsel wants additional information about tests or examinations, counsel should specifically identify the information in the discovery request and motion. *See generally State v. Payne*, 327 N.C. 194, 201–02 (1990) (finding that discovery motion was not sufficiently explicit to inform either the trial court or the prosecutor that the defendant sought the underlying data). A sample motion for discovery of fingerprint evidence, including the

underlying data, is available in the non-capital motions bank on the IDS website, www.ncids.org.

Physical evidence. The defendant has the right, with appropriate safeguards, to inspect, examine, and test any physical evidence or sample. *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 *infra* in § 4.4E, Biological Evidence]).

In addition to the statutory right to test evidence, a defendant has a due process right to "examine a piece of critical evidence whose nature is subject to varying expert opinion." *State v. Jones*, 85 N.C. App. 56, 65 (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. *Id.* Defense counsel should file a motion to preserve if he or she believes that the State may destroy evidence or use it up in testing. *See supra* § 4.2C, Preserving Evidence for Discovery.

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 (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 (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 has now 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); *see also infra* § 4.4E, Biological Evidence. If the defense wants to conduct its own DNA tests (or for evidence for which the defendant does not have a right to require the State to conduct testing), the defendant may seek funds for an expert to conduct testing of the evidence. *See infra* Ch. 5, Experts and Other Assistance. If the defendant decides not to use the test results at trial, the defendant generally does not have an obligation to disclose the test results to the State. *See infra* "Nontestifying experts" in § 4.8C, Results of Examinations and Tests.

A defendant may have greater difficulty in obtaining physical evidence that the State has not already collected, such as physical samples from a witness. *See infra* § 4.4F, Nontestimonial Identification Orders.

Crime scenes. 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.

The North Carolina courts also have recognized that the defendant has a constitutional right to inspect a crime scene. *See State v. Brown*, 306 N.C. 151 (1982) (violation of due process to deny defense counsel access to crime scene, which police had secured for extended time).

The State may not have an obligation to preserve a crime scene. *Id.,* 306 N.C. at 164 (stating that its 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"). Counsel therefore should request access to secured crime scenes and investigate unsecured scenes early in the case. If counsel cannot obtain access to a crime scene controlled by a third party, counsel may be able to obtain a court order allowing inspection of the scene under appropriate limitations. *See Henshaw v. Commonwealth*, 451 S.E.2d 415 (Va. Ct. App. 1994) (relying on North Carolina Supreme Court's opinion in *Brown* and finding state constitutional right to inspect crime scene controlled by private person—in this instance, apartment of alleged victim in self-defense case); *State v. Lee*, 461 N.W.2d 245 (Minn. Ct. App. 1990) (finding that prosecution had possession or control of premises where it had previously processed premises for evidence and could arrange for similar access by defense; noting that such access was not unduly intrusive); *United States v. Armstrong*, 621 F.2d 951 (9th Cir. 1980) (noting that court could base order authorizing inspection of third-party premises on its inherent authority).

A sample motion for entry and inspection of the premises of the alleged offense (based on legal authority applicable to delinquency cases) is available in the juvenile motions bank (under "Motions, Non-Capital") on the IDS website, www.ncids.org.

Prior criminal record of defendant and witnesses. Former 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 Division of Criminal Information (DCI). G.S. 114-10.1(c). Defense attorneys do not have access to DCI and must request local law enforcement to run the search. *See State v. Thomas*, 350 N.C. 315, 340 (1999) (upholding trial court's denial of defense motion for access to Police Information Network [predecessor to DCI]; lack of access did not prejudice defendant); *accord State v. Williams*, 355 N.C. 501, 543–44 (2002).

The discovery statutes do not explicitly cover criminal record information of witnesses. *See also State v. Brown*, 306 N.C. 151 (1982) (finding under former discovery statute that

State was not obligated to provide criminal records 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 has an obligation to disclose a witness's criminal record under *Brady*, which requires disclosure of impeachment evidence. *See infra* "Prior convictions and other misconduct" in § 4.5C, Favorable to Defense.

Defense counsel also can obtain a person's North Carolina criminal record through the Criminal Information System (CIS), a database of all North Carolina criminal judgments entered by court clerks. A terminal should be located in all public defender offices in North Carolina. Terminals are also located in the clerk of court's office. An attorney who has entered an appearance in a criminal case also has the right to obtain "relevant" information from DCI. G.S. 114-10.1(c). Some local agencies may not be willing, however, to run a criminal history search about anyone other than the defendant. (The cases have not specifically addressed whether this statute grants a defendant's attorney a broader right to information.)

D. Notice of Witnesses and Preparation of Reports

Requirement of request. 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 up with a written motion if the State does not comply. *See State v. Brown*, 177 N.C. App. 177 (2006) (not error for trial court to allow victim's father to testify although not included on State's witness list where 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). For a further discussion of the requirement of a request and motion, see *supra* § 4.2D, Requests for Discovery, and § 4.2E, Motions for Discovery.

Notice of expert witnesses, including report of results of examinations or tests, credentials, opinion, and basis of opinion. 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." Each such 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. The State also must provide the expert's credentials, opinion, and underlying basis for that opinion. *See* G.S. 15A-903(a)(2); *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*, ___ N.C. App. ___, 724 S.E.2d 117 (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 during the stop, 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 (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 and new trial ordered).

Practice note: The courts sometimes classify a witness as a lay or fact witness not subject to the expert witness discovery requirements (or the standards for admissibility of expert opinion). *See State v. Hall*, 186 N.C. App. 267, 273 (2007) (distinguishing *Blankenship*, court finds that physician assistant testified as fact witness, not as expert witness). If the testimony depends on specialized training or experience, counsel should argue that the testimony is subject to the standards on notice (and admissibility) of the testimony. *Cf.* ROBERT P. MOSTELLER ET AL., NORTH CAROLINA EVIDENTIARY FOUNDATIONS § 10-2(B), at 10-5 (2d ed. 2006) (expressing concern that offering of expert testimony "in lay witness clothing" evades disclosure and reliability requirements for expert testimony).

Before the 2004 revisions to the discovery statute, trial courts had the discretion to require a party's expert witness to prepare a written report of examinations or tests and provide it to the opposing party if the party intended to call the expert as a witness. *See State v. East*, 345 N.C. 535 (1997). The current statute mandates notice, including preparation of a written report of test and examination results, if a party reasonably expects to call an expert to testify (and the requesting party has complied with the requirements for requesting discovery).

Notice of other witnesses. At the beginning of jury selection, the prosecutor must provide the defendant 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. 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. The court also may permit, in the interest of justice, any undisclosed witness to testify. *See* G.S. 15A-903(a)(3); *State v. Brown*, 177 N.C. App. 177 (2006) (relying, in part, on good faith exception to allow State to call witness not on witness list where 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.; *see also infra* § 4.8E, Notice of Defenses.

Before the 2004 revisions, trial courts had the discretion to require the parties to disclose their witnesses during jury selection. *See, e.g., State v. Godwin*, 336 N.C. 499 (1994). The current statute makes disclosure mandatory (assuming the requesting party has complied with the requirements for requesting discovery).

E. Work Product and Other Exceptions

G.S. 15A-904 limits the discovery obligations of the prosecution in specified respects. Subsection (c) of G.S. 15A-904 makes clear that the statutory limits do not override the State's duty to comply with federal or state constitutional disclosure requirements.

Prosecutor work product. G.S. 15A-904(a) provides that the State is not required to disclose to the defendant "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." *Id.* 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.* This formulation of "work product" is considerably narrower than the former statute's provisions. The rationale for the change is as follows.

The attorney work-product doctrine is "designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client's case." *State v. Hardy*, 293 N.C. 105, 126 (1977). At its broadest, the doctrine has been interpreted as protecting information collected by an attorney and his or her agents in preparing the case, including witness statements and other factual information. *See Hickman v. Taylor*, 329 U.S. 495 (1947) (discussing doctrine in civil cases). At its core, however, the doctrine is concerned with protecting the attorney's mental impressions, opinions, conclusions, theories, and strategies. *See Hardy*, 293 N.C. 105, 126. Former G.S. 15A-904 reflected the broader version of the work-product doctrine, although the statute did not specifically mention the term. *Id.* (discussing statute and doctrine). It allowed the State to withhold from the defendant internal documents made by the prosecutor, law enforcement, or others acting on the State's behalf in investigating or prosecuting the case unless the documents fell within certain discoverable categories (for example, a document contained the defendant's statement).

Current G.S. 15A-904 reflects the narrower version of the doctrine. It continues to protect the prosecuting attorney's mental processes while allowing the defendant access to factual information collected by the State. The revised 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 current 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.

Cases interpreting the current version of G.S. 15A-904 reflect the narrower scope of the statute. *See State v. Shannon*, 182 N.C. App. 350, 361–62 (2007) (recognizing narrow scope of statute), *notice of appeal and petition for review withdrawn*, 361 N.C. 702 (2007), *superseded by statute in part on other grounds as recognized in State v. Zamora-Ramos*, 190 N.C. App. 420 (2008) (recognizing that discovery statutes, as amended, do not require prosecutor to reduce to writing oral witness statements if the statements do not significantly differ from previous statements given to law enforcement [court does not question holding of *Shannon* about narrower scope of work product protection]).

Work product principles are not the same throughout criminal proceedings. Protections for the defendant's "work product" are considerably broader. *See infra* § 4.8, Prosecution's Discovery Rights. In post-conviction proceedings, there is no protection for a prosecutor's work product related to the investigation and prosecution of the case. *See supra* § 4.1F, Postconviction Proceedings.

Practice note: If the trial court finds that materials are work product and are not discoverable, defense counsel must confirm that the materials are placed under seal and included as part of the record on appeal. *See State v. Hall*, 187 N.C. App. 308 (2007) (prosecutor prepared work product inventory and filed it with trial court; in finding that materials were not discoverable, trial court stated that it would place materials under seal for appellate review, but materials were not made part of the record and court of appeals rejected defendant's argument for that reason alone).

Confidential informants. Under 2007 amendments to the discovery law, the State is not required to disclose the identity of a confidential informant unless otherwise required by law. G.S. 15A-904(a1). The amended 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 disclosure of an informant's identity. *See infra* § 4.6D, Identity of Informants.

Under a former provision of the discovery statute, the State could withhold a statement of the defendant to a confidential informant if the informant's identity was a prosecution secret, the informant was not going to testify for the prosecution, and the statement was not exculpatory. If the State withheld a statement on that ground, the informant could not

testify at trial. *See State v. Batchelor*, 157 N.C. App. 421 (2003). The current statute does not contain any exception for statements to confidential informants. Accordingly, the State would appear to need a protective order to withhold such statements (presumably on the ground that disclosure of the statements would disclose the informant's identity) and also could not call the informant to testify at trial.

Personal identifying information of witnesses. Under 2007 amendments to the discovery law, 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. G.S. 15A-904(a2).

Under 2011 amendments, 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.

Protective orders. G.S. 15A-908(a) allows either party to apply 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.

The State (or the defendant) may apply ex parte for a protective order. 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.

4.4 Other Discovery Categories and Mechanisms

The discussion below covers categories of information that may be discoverable under North Carolina law but are not specifically identified in G.S. 15A-903(a)(1) (right to complete files) or G.S. 15A-903(a)(2) (notice of expert and other witnesses). For a discussion of categories of information discoverable under those statutes, see *supra* § 4.3, Discovery Rights under G.S. 15A-903. *See also* § 4.5, *Brady* Material, and § 4.6, Other Constitutional Rights. Counsel should include in discovery requests and motions all pertinent categories of information.

A. 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 opinions 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 (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 (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 opinions take a narrower view. *See, e.g., State v. Crandell*, 322 N.C. 487 (1988) (finding that 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 (1986) (statute did not require disclosure because prosecutor had not entered into formal agreement with defendant).

Defense counsel therefore should draft a broad discovery request and motion for such information, including all evidence, documents, and other information concerning all deals, concessions, inducements, and incentives offered to any witness in the case. Counsel should base the request on: (1) the prosecutor's obligation under G.S. 15A-1054(c) to disclose such arrangements; (2) the prosecutor's obligation under G.S. 15A-903(a) to disclose the complete files of the investigation and prosecution of the offenses allegedly committed by the defendant, including oral statements by witnesses (*see supra "*Oral statements of witness" in § 4.3C, Categories of Information); and (3) the prosecutor's obligation under *Brady* to disclose impeachment evidence. *See 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 (4th Cir. 1976) (North Carolina conviction vacated on habeas for failure to disclose promise of leniency made by police officer); *see also infra* § 4.5C, Favorable to Defense (discussing *Brady* material). In addition to obtaining complete information, a discovery request and motion based on these additional grounds may provide for a greater remedy than specified in G.S. 15A-1054(c)—a recess—if the State fails to turn over the required information. A sample motion to reveal deals or concessions is available in the non-capital motions bank on the IDS website, www.ncids.org.

B. 404(b) Evidence

North Carolina Rule of Evidence 404(b) provides that a defendant's prior "bad acts" are admissible if offered for a purpose other than to prove his or her character. The prior acts need not have resulted in a conviction.

Before 2004, the discovery statutes did not give defendants the right to discover 404(b) evidence. Defendants argued that North Carolina Rule of Evidence Rule 404(b) mandated that the prosecution give notice of "bad acts" evidence before trial, an argument the

courts rejected. *See State v. Payne*, 337 N.C. 505 (1994). The revised discovery statutes and other grounds provide a basis for disclosure, however:

- If the prosecution intends to use 404(b) evidence against the defendant, the evidence is presumably part of the complete files of the investigation and prosecution of the defendant and so is subject to the State's general discovery obligations under G.S. 15A-903(a)(1).
- The trial court likely has the inherent authority to require disclosure in the interests of justice. *See generally* FED. R. EVID. 404(b) & Commentary to 1991 Amendment (recognizing that pretrial notice of such evidence serves to "reduce surprise and promote early resolution on the issue of admissibility").
- In addition to or in lieu of moving for disclosure of Rule 404(b) evidence, defense counsel may file a motion in limine to preclude admission of such evidence, which may reveal the existence of such evidence as well as limit its use.

A sample motion to disclose evidence of prior bad acts is available in the capital trial motions bank on the IDS website, www.ncids.org.

C. Examinations and Interviews of Witnesses

Examinations. In *State v. Horn*, 337 N.C. 449 (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*, ___ N.C. App. ___, 718 S.E.2d 687 (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*, ___ N.C. ___, 739 S.E.2d 548 (2013).

Horn held further that a trial judge may grant other relief if the person refuses to submit to a voluntary examination. A judge may appoint an expert for the defense to interpret examinations already performed on the person, deny admission of the State's evidence about the person's condition, and dismiss the case if the defendant's right to present a defense is imperiled. Accordingly, counsel should consider filing a motion requesting that the person submit to an examination. If the person refuses, defense counsel may have grounds for asking for the relief described in *Horn.*

Additional decisions 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 (1989) (trial judge may order physical examination only if victim or victim's guardian consents). *But see People v. Chard*, 808 P.2d 351 (Colo. 1991) (reviewing *Hewitt* and finding that majority of courts have recognized the authority of trial courts to order a physical examination of the victim on a showing of compelling need).

The defendant's ability to require the State to obtain physical evidence from a victim or witness is also limited. *See supra* "Physical evidence" in § 4.3C, Categories of Information, and § 4.4F, Nontestimonial Identification Orders. Defendants may inspect

and, under appropriate safeguards, test physical evidence already collected by the State. The defendant also may request that the State conduct DNA tests of biological evidence collected by the State. *See infra* § 4.4E, Biological Evidence.

For a discussion of the State's ability to obtain an examination of a defendant who intends to introduce expert testimony on his or her mental condition, see *infra* "Insanity and other mental conditions" in § 4.8E, Defenses.

Interviews. The defendant generally does not have the right to compel a witness to submit to an interview. *See State v. Phillips*, 328 N.C. 1 (1991); *State v. Taylor*, 178 N.C. App. 395 (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); *see also* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3(h), at 399–401 (3d ed. 2007) [hereinafter LAFAVE, CRIMINAL PROCEDURE] (interpreting *Webb v. Texas*, 409 U.S. 95 (1972), and other decisions as making it a due process violation for prosecutor to discourage prospective witnesses from testifying for defense).

In limited circumstances, defense counsel may have the right to depose a witness. *See infra* § 4.4D, Depositions. Courts also have compelled witness interviews for discovery violations. *See State v. Hall*, 93 N.C. App. 236 (1989) (as sanction for discovery violation, court ordered State's witness to confer with defense counsel and submit to questioning under oath before testifying).

Ethical rules may constrain the ability of defense counsel to interview a child in the absence of a parent or guardian. *See* KELLA W. HATCHER, JANET MASON & JOHN RUBIN, ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA § 1.4.C.3 (Access to Information and People) (UNC School of Government, 2011) (discussing ethics opinions prohibiting attorney from communicating with child represented by guardian ad litem and from communicating with prosecuting witness who is less than 14 years old in physical or sexual abuse case without consent of parent or guardian), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/andtpr.pdf; *see also* N.C. State Bar R. Professional Conduct 4.2, 4.3 (interviewing represented and unrepresented witnesses).

D. Depositions

A defendant in a criminal case may take depositions for the purpose of preserving testimony of a person who is infirm, physically incapacitated, or a nonresident of this state. *See* G.S. 8-74; *State v. Barfield*, 298 N.C. 306 (1979), *disavowed in part on other grounds by State v. Johnson*, 317 N.C. 193 (1986).

A defendant may have a further right to take a deposition of a person residing in a state or U.S. territory outside North Carolina. In 2011, the General Assembly added G.S. Chapter

1F, the North Carolina Interstate Depositions and Discovery Act. Its principal purpose was to simplify the procedure for the parties in a civil case in one state to take depositions of witnesses in another state. The pertinent legislation also amended N.C. Rule of Civil Procedure 45, which applies to criminal cases pursuant to G.S. 15A-801 and G.S. 15A-802. Rule 45(f) sets forth the procedure for obtaining discovery, including depositions of a person residing outside North Carolina, and does not exclude criminal cases. If Rule 45(f) applies to criminal cases, a party in a North Carolina criminal case would be able to obtain a deposition (or other discovery) in another state if the state allows such discovery in criminal cases. *See* N.C. R. CIV. P. 45(f) (requiring party to follow available processes and procedures of jurisdiction where person resides). Rule 45(f) describes the procedure for obtaining a deposition, including obtaining a commission (an order) from a North Carolina court before seeking discovery in the other state.

E. 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
    [the punctuation in the statute makes it 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. Therefore, counsel should request the above in his or her discovery request and follow up with a motion as necessary. *See also* G.S. 15A-266.12(d) (State Bureau of Investigation not required to provide the state DNA database for criminal discovery purposes; request to access a person's DNA record must comply with G.S. 15A-902).

On motion of the defendant, the court must order the State 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). In 2009, the General Assembly amended G.S. 15A-269(c) to make testing mandatory, not discretionary, if the defendant makes the required showing.

In lieu of or in addition to asking for the SBI to conduct DNA testing, the defendant may seek funds for an expert to conduct testing of the evidence. *See infra* Chapter 5, Experts and Other Assistance. If the defendant does not intend to offer the tests at trial, the defendant generally does not have an obligation to disclose the test results to the State. *See infra* "Nontestifying experts" in § 4.8C, Results of Examinations and Tests.

Legislative note: G.S. 15A-268 requires agencies with custody of biological evidence to retain the evidence according to the schedule in that statute. Effective June 19, 2013, S.L. 2013-171 (S 630) adds G.S. 20-139.1(h) to require preservation of blood and urine samples subject to a chemical analysis for the period of time specified in that statute and, if a motion to preserve has been filed, until entry of a court order about disposition of the evidence.

F. Nontestimonial Identification Orders

G.S. 15A-271 through G.S. 15A-282 allow the prosecution in some circumstances to obtain a nontestimonial identification order for physical evidence (fingerprints, hair samples, saliva, etc.) from a person suspected of committing a crime. *See generally* ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 433–36 (UNC School of Government, 4th ed. 2011). The defendant has the right to any report of nontestimonial identification procedures conducted on him or her. *See* G.S. 15A-282.

In some circumstances a defendant also has the right to request that nontestimonial identification procedures be conducted on himself or herself. *See* G.S. 15A-281 (specifying conditions for issuance of order). The defendant generally does not have the right to a nontestimonial identification order to obtain physical samples from a third party. *See State v. Tucker*, 329 N.C. 709 (1991) (defendant could not use nontestimonial identification order to obtain hair sample of possible suspect). *But cf. Fathke v. State*, 951 P.2d 1226 (Alaska Ct. App. 1998) (court had authority to issue subpoena compelling witness to produce fingerprints, which constitute objects subject to subpoena).

A sample motion for nontestimonial identification procedures to be conducted is in the non-capital motions bank on the IDS website, www.ncids.org.

G. Potential Suppression Issues

Generally. To enable defense counsel to determine whether to file a motion to suppress evidence (under G.S. 15A-971 through G.S. 15-980), counsel should seek discovery of the following (some of which may be in the court file and thus already accessible to counsel and some of which may be a part of the State's investigative and prosecutorial files and thus subject to the State's general discovery obligations under G.S. 15A-903(a)(1)):

- search warrants, arrest warrants, and nontestimonial identification orders issued in connection with the case;
- a description of any property seized from the defendant and the circumstances of the seizure;
- the circumstances of any pretrial identification procedures employed in connection with the alleged crimes (lineups, photo arrays, etc.);
- a description of any communications between the defendant and law-enforcement officers; and

- a description of any surveillance (electronic, visual, or otherwise) conducted of the defendant or others resulting in the interception of any information about the defendant and the offense with which he or she is charged.

Innocence initiatives. In the last several years, the General Assembly has enacted requirements for recording interrogations (G.S. 15A-211) and conducting lineups (G.S. 15A-284.52) as part of an effort to increase the reliability of convictions. For a discussion of these requirements, see *infra* § 14.3G, Recording of Statements, and § 14.4B, Statutory Requirements for Lineups.

The statutes containing these requirements do not contain specific procedures for discovery, but interrogations and lineups are part of the complete files of the investigation and prosecution and are therefore subject to discovery under G.S. 15A-903(a)(1). Counsel should specifically request the information as part of his or her discovery requests and motions.

Electronic surveillance. G.S. 15A-294(d) through (f) describe a defendant's rights to obtain information about electronic surveillance of him or her. For a further discussion of electronic surveillance and related investigative methods, which is regulated by both state and federal law, see ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 187–96 (UNC School of Government, 4th ed. 2011) and Jeff Welty, *Prosecution and Law Enforcement Access to Information about Electronic Communications*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/05 (Oct. 2009), *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0905.pdf.

Chemical analysis results. A person charged with an implied consent offense has a right to a copy of the chemical analysis results the State intends to offer into evidence, whether in district or superior court. The statute, G.S. 20-139.1(e), provides that failure to provide a copy to the defendant before trial is grounds for a continuance but not grounds to suppress the chemical analysis results or dismiss the charges.

H. Other Categories

Joinder and severance. *See* G.S. 15A-927(c)(3) (right to codefendant's statements, discussed *supra* in " Statements of codefendants" in § 4.3C, Categories of Information).

Transcript of testimony before drug trafficking grand jury. *See* G.S. 15A-623(b)(2), discussed *infra* in "Discovery of testimony" in § 9.5, Drug Trafficking Grand Jury).

4.5 *Brady* Material

A. Duty to Disclose

Constitutional requirements. 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 (1963). Several U.S. 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 (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 (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 (2004) (failure to disclose that one of 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 (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);
- *Kyles v. Whitley*, 514 U.S. 419 (1995) (cumulative effect of undisclosed evidence favorable to defendant required reversal of conviction and new trial);
- *United States v. Bagley*, 473 U.S. 667 (1985) (favorable evidence includes impeachment evidence, in this instance, agreements by government to pay informants for information; remanded to determine whether nondisclosure warranted relief);
- *United States v. Agurs*, 427 U.S. 97 (1976) (nondisclosure of victim's criminal record to defense did not meet materiality standard and did not require relief in circumstances of case); and
- *Brady v. Maryland*, 373 U.S. 83 (1963) (violation of due process by failure of prosecutor 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 (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 (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 (2010) (unpublished) (dismissing case for destruction of evidence); *State v. Barber*, 147 N.C. App. 69 (2001) (finding *Brady* violation for State's failure to disclose cell phone records showing that

person made several calls to decedent's house the night of his death, which would have bolstered defense theory that person had threatened decedent with arrest shortly before his death and that defendant committed suicide); *see also infra* § 4.6A, Evidence in Possession of Third Parties (discussing cases in which North Carolina courts found that evidence in possession of third parties was favorable and material and nondisclosure violated due process).

North Carolina also recognizes that prosecutors have an ethical obligation to disclose exculpatory evidence to the defense. N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 3.8(d) (prosecutor has duty to make timely disclosure to defense of all evidence that tends to negate guilt or mitigate offense or sentence); *see also* N.C. CONST. art 1, sec. 19 (Law of Land Clause), sec. 23 (rights of accused).

Sample motions for *Brady*/exculpatory material are available in the non-capital, juvenile, and capital trial motions banks on the IDS website, www.ncids.org.

B. Applicable Proceedings

The due process right to disclosure of favorable, material evidence applies to 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"); *see also Cone v. Bell*, 556 U.S. 449 (2009) (applying *Brady* to capital sentencing); *Basden v. Lee*, 290 F.3d 602 (4th Cir. 2002) (confirming that *Brady* applies to sentencing phase).

Brady may give defendants the right to exculpatory evidence for suppression hearings. *See United States v. Barton*, 995 F.2d 931 (9th Cir. 1993) (holding that *Brady* applies to suppression hearing involving challenge to truthfulness of allegations in affidavit for search warrant). *But cf. United States v. Stott*, 245 F.3d 890 (7th Cir. 2001) (noting that there is not a consensus among federal circuit courts as to whether *Brady* applies to suppression hearings), *amended on rehearing in part on other grounds*, 15 F. App'x 355 (7th Cir. 2001).

A constitutional violation also may result from nondisclosure when the defendant pleads guilty or pleads not guilty by reason of insanity. *See White v. United States*, 858 F.2d 416 (8th Cir. 1988) (violation may affect whether *Alford* guilty plea was knowing and voluntary); *Miller v. Angliker*, 848 F.2d 1312 (2d Cir. 1988) (to same effect for plea of not guilty by reason of insanity); *Campbell v. Marshall*, 769 F.2d 314 (6th Cir. 1985) (to same effect for guilty plea); *see also* 6 LAFAVE, CRIMINAL PROCEDURE § 24.3(b), at 368–70 (discussing split in authority among courts). The U.S. Supreme Court has held, however, 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 (2002) (stating that impeachment information relates to the fairness of a trial, not to the voluntariness of a plea); *State v. Allen*, ___ N.C. App. ___, 731 S.E.2d 510 (2012) (following *Ruiz*).

The U.S. Supreme Court has said that "*Brady* is the wrong framework" for analyzing whether a defendant in postconviction 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 postconviction procedures, including the right to postconviction 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). For a discussion of North Carolina's post-conviction discovery procedures, see *supra* § 4.1F, Postconviction Cases, and §4.4E, Biological Evidence.

C. Favorable to Defense

To trigger the prosecution's duty under the Due Process Clause, the evidence first must be favorable to the defense. The right is broad. 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. Some generally-recognized categories of favorable evidence are discussed below.

Impeachment evidence. The courts have recognized that favorable evidence includes several different types of impeachment evidence, including:

- False statements of a witness. *See United States v. Minsky*, 963 F.2d 870 (6th Cir. 1992).
- Prior inconsistent statements. *See Jacobs v. Singletary*, 952 F.2d 1282 (11th Cir. 1992); *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980); *see also United States v. Service Deli Inc.*, 151 F.3d 938 (9th Cir. 1998) (attorney's handwritten notes taken during interview with key witness constituted *Brady* evidence and new trial required where government provided typewritten summary instead of notes).
- Bias of a witness. *See Reutter v. Solem*, 888 F.2d 578 (8th Cir. 1989) (State's witness had applied for sentence commutation); *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976) (threat of prosecution if witness did not testify); *see also State v. Prevatte*, 346 N.C. 162 (1997) (reversible error to preclude defendant from cross-examining witness about pending criminal charges, which gave State leverage over witness).
- Witness's capacity to observe, perceive, or recollect. *See Jean v. Rice*, 945 F.2d 82 (4th Cir. 1991) (failure to disclose that State's witnesses had been hypnotized); *see also State v. Williams*, 330 N.C. 711 (1992) (defendant had right to cross-examine witness about drug habit and mental problems to cast doubt on witness's capacity to observe and recollect).
- Psychiatric evaluations of witness. *See State v. Thompson*, 187 N.C. App. 341 (2007) (impeachment information may include prior psychiatric treatment of witness; records that were made part of record on appeal did not contain material, favorable evidence); *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980) (evaluation of witness); *see also United States v. Spagnoulo*, 960 F.2d 990 (11th Cir. 1992) (evaluation of defendant). *But cf. State v. Lynn*, 157 N.C. App. 217, 219–23 (2003)

(upholding denial of motion to require State to determine identity of any mental health professionals who had treated witness).

Prior convictions and other misconduct. A significant subcategory of impeachment evidence is evidence of a witness's criminal convictions or other misconduct. *See, e.g., 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); *State v. Ford*, 297 N.C. 144 (1979) (no showing by defense that witness had any criminal record); *see also Crivens v. Roth*, 172 F.3d 991 (7th Cir. 1999) (failure to provide criminal records of State's witnesses required new trial); *United States v. Stroop*, 121 F.R.D. 269, 274 (E.D.N.C. 1988) ("the law requires that . . . the defendants shall be provided the complete prior criminal record of the witness as well as information regarding all prior material acts of misconduct of the witness"); N.C. R. EVID. 609(d) (allowing impeachment of witness by juvenile adjudication).

If a witness's criminal record would be admissible for substantive as well as impeachment purposes, the defendant may have an even stronger claim to disclosure under *Brady*. For example, in cases in which the defendant intends to claim self-defense, the victim's criminal record (and other misconduct) may be relevant to why the defendant believed it necessary to use force to defend himself or herself. *See Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980) (requiring disclosure of victim's rap sheet, which confirmed defendant's fear of victim and supported self-defense claim).

Evidence discrediting police investigation and credibility, including prior misconduct by officers. Information discrediting "the thoroughness and even the good faith" of an investigation are appropriate subjects of inquiry for the defense. *Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (information discrediting caliber of police investigation and methods employed in assembling case).

Personnel files of law enforcement officers may contain evidence that bears on an officer's credibility or discredits the investigation into the alleged offense, including prior misconduct by officers. Several cases have addressed the issue, in which the courts followed the usual procedure of conducting an in camera review to determine whether the files contained material, exculpatory information. *See 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 where defendant shot and killed officer as officer was walking around police car); *Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013) (granting habeas relief where defendant was denied access to detective's personnel records, which indicated that detective had lied under oath to secure convictions in other cases and engaged in other misconduct); *United States v. Veras*, 51 F.3d 1365 (7th Cir. 1995) (personnel information bearing on officer's credibility was favorable but was not sufficiently material to require new trial for failure to disclose); *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991) (requiring in camera review of personnel files of officers for impeachment evidence); *United States v. Kiszewski*, 877 F.2d 210 (2d Cir.

1989) (to same effect); *see also* Jeff Welty, *Must Officers' Prior Misconduct Be Disclosed in Discovery?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 8, 2012) (recognizing that officer's prior dishonesty or misconduct may be material, impeachment evidence in the pending case), http://nccriminallaw.sog.unc.edu/?p=3575.

To avoid disputes over the proper recipient, counsel should consider directing a motion to produce the files to the applicable law-enforcement agency as well as to the prosecution. *See State v. Golphin*, 352 N.C. 364, 403–05 (2000) (finding no violation of State's statutory discovery obligations because, among other reasons, officer's personnel files were not in possession, custody, or control of prosecutor); *State v. Smith*, 337 N.C. 658, 663–64 (1994) (defense requested documentation of any internal investigation of any law enforcement officer whom the State intended to call to testify at trial; court finds that motion was fishing expedition and that State was not required to conduct independent investigation to determine possible deficiencies in case).

Sample motions for police personnel records are available in the non-capital motions bank on the IDS website, www.ncids.org.

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

- Evidence undermining identification of defendant. *See Kyles v. Whitley*, 514 U.S. 419, 444 (1995) (evolution over time of eyewitness's description); *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988) (witnesses' testimony differed from previous accounts); *Lindsey v. King*, 769 F.2d 1034 (5th Cir. 1985) (eyewitness stated he could not identify person in initial police report and later identified defendant at trial); *Cannon v. Alabama*, 558 F.2d 1211 (5th Cir. 1977) (witness identified another).
- Evidence tending to show guilt of another. *See Barbee v. Warden,* 331 F.2d 842 (4th Cir. 1964) (forensic reports indicated that defendant was not assailant).
- Physical evidence. *See United States ex rel. Smith v. Fairman,* 769 F.2d 386 (7th Cir. 1985) (evidence that gun used in shooting was inoperable).
- "Negative" exculpatory evidence. *See Jones v. Jago,* 575 F.2d 1164 (6th Cir. 1978) (statement of codefendant did not mention that defendant was present or participated).
- Identity of favorable witnesses. *See United States v. Cadet,* 727 F.2d 1453 (9th Cir. 1984) (witnesses to crime that State does not intend to call); *Freeman v. Georgia,* 599 F.2d 65 (5th Cir. 1979) (whereabouts of witness); *Collins v. State,* 642 S.W.2d 80 (Tex. App. 1982) (failure to disclose correct name of witness who had favorable evidence).

D. Material to Outcome

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

Impact of *Kyles v. Whitley*. To reinforce the prosecution's duty to disclose, the U.S. Supreme Court in *Kyles*, 514 U.S. 419 (1995), 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.

Application before and after trial. 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 ("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) ("if a substantial basis for claiming materiality exists, it is reasonable to require the prosecution to respond either by furnishing the information or by submitting the problem to the trial judge"); *Lewis v. United States*, 408 A.2d 303 (D.C. 1979) (court recognizes difficulty in applying material-to-outcome standard before outcome is known and therefore holds that on pretrial motion defendant is entitled to disclosure if "substantial basis" for claiming materiality exists).

E. Time of Disclosure

The prosecution must disclose favorable, material evidence in time for the defendant to make effective use of it at trial. *See State v. Canady*, 355 N.C. 242 (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* obligations satisfied "so long as disclosure is made in time for the defendants to make effective use of the evidence"); *State v. Spivey*, 102 N.C. App. 640, 646 (1991) (finding

no violation on facts but noting that courts "strongly disapprove of delayed disclosure of *Brady* materials" (citation omitted)); *see also Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001) (disclosure of key witness nine days before opening arguments and 23 days before defense began case afforded defense insufficient opportunity to use information); *United States v. Starusko*, 729 F.2d 256, 261 (3d Cir. 1984) ("longstanding policy of encouraging early production"); *United States v. Campagnuolo*, 592 F.2d 852, 859 (5th Cir. 1979) ("It should be obvious to anyone involved with criminal trials that exculpatory information may come too late if it is only given at trial . . . ." (citation omitted)); *Grant v. Alldredge*, 498 F.2d 376 (2d Cir. 1974) (failure to disclose before trial required new trial). Consequently, trial courts often require the prosecution to disclose *Brady* evidence before trial.

Several appellate decisions have found that disclosure at trial satisfied the prosecution's *Brady* obligations. These rulings rest on the materiality requirement, however, under which the court assesses whether there was a reasonable probability of a different result had the defendant learned of the particular information earlier. The rulings do not create a rule that the prosecution may delay disclosure until trial; nor do they necessarily reflect the actual practice of trial courts.

F. Admissibility of Evidence

The prosecution must disclose favorable, material evidence even if it would be inadmissible at trial. *See State v. Potts*, 334 N.C. 575 (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); *see also* 6 LAFAVE, CRIMINAL PROCEDURE § 24.3(b), at 356–57 (discussing approaches taken by courts on this issue).

G. Need for Request

At one time, different standards of materiality applied depending on whether the defendant made a general request for *Brady* evidence, a request for specific evidence, or no request at all. In *United States v. Bagley*, 473 U.S. 667 (1985), and then *Kyles v. Whitley*, 514 U.S. 419 (1995), the U.S. Supreme Court confirmed that a single standard of materiality exists and that the prosecution has an obligation to disclose favorable, material evidence whether or not the defendant makes a request.

Defense counsel still should make a request for *Brady* evidence, which should include all generally recognized categories of favorable information and to the extent possible specific evidence pertinent to the case and the basis for believing the evidence exists. (Counsel may need to make follow-up requests and motions as counsel learns more about the case.) Specific requests may be viewed more favorably by the courts. *See Bagley*, 473 U.S. 667, 682–83 ("the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and

trial decisions on the basis of this assumption"; reviewing court may consider "any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case"); *State v. Smith*, 337 N.C. 658, 664 (1994) ("State is not required to conduct an independent investigation to determine possible deficiencies suggested by defendant in State's evidence").

H. Prosecutor's Duty to Investigate

Law-enforcement files. Numerous cases have held that favorable, material evidence within law-enforcement files, or known to law-enforcement officers, is imputed to the prosecution and must be disclosed. *See, e.g., Kyles 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 (1998) (*Brady* obligates prosecution to obtain information from SBI and various sheriffs' departments involved in investigation); *State v. Smith*, 337 N.C. 658 (1994) (prosecution deemed to have knowledge of information in possession of law enforcement); *see also Youngblood v. West Virginia*, 547 U.S. 867 (2006) (per curiam) (remanding to allow state court to address *Brady* issue where officer suppressed a note that contradicted State's account of events and directly supported defendant's version); *United States v. Perdomo*, 929 F.2d 967 (3d Cir. 1991) (prosecutors have obligation to make thorough inquiry of all law enforcement agencies that had potential connection with the witnesses); *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964) (prosecutor's lack of knowledge did not excuse failure by police to reveal information).

Files of other agencies. The prosecution's obligation to obtain and disclose evidence in the possession of other agencies (such as mental health facilities or social services departments) depends on the extent of the agency's involvement in the investigation and the prosecution's knowledge of and access to the evidence. *See supra* § 4.3B, Agencies Subject to Disclosure Requirements (discussing similar issue under discovery statute); *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980) (prosecution obligated to disclose evidence in medical examiner's possession; although not a law-enforcement agency, medical examiner's office was participating in investigation); *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973) (prosecution obligated to obtain personnel file of postal employee who was State's principal witness), *overruled in part on other grounds by United States v. Henry*, 749 F.2d 203 (5th Cir. 1984); *United States v. Hankins*, 872 F. Supp. 170, 173 (D.N.J. 1995) ("when the government is pursuing both a civil and criminal prosecution against a defendant stemming from the same underlying activity, the government must search both the civil and criminal files in search of exculpatory material"; prosecution obligated to search related files in civil forfeiture action).

If the prosecution's access to the evidence is unclear, defense counsel may want to make a motion to require the entity to produce the records or make a motion in the alternative—that is, counsel can move for an order requiring the prosecution to obtain the records and review them for *Brady* material or, in the alternative, for an order directing

the agency to produce the records. *See infra* § 4.6A, Evidence in Possession of Third Parties.

I. Defendant's Knowledge of Evidence

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, the courts have held that nondisclosure does not violate *Brady* if the defendant knows of the evidence and has access to it. *See State v. Wise*, 326 N.C. 421 (1990) (defendant knew of examination of rape victim and results; prosecution's failure to provide report therefore not *Brady* violation); *see also Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001) (declining to find that any information known to a defense witness is imputed to the defense for *Brady* purposes); 6 LAFAVE, CRIMINAL PROCEDURE § 24.3(b), at 362 (defendant must know not only of existence of evidence but also of its potentially exculpatory value).

J. In Camera Review and Other Remedies

If defense counsel doubts the adequacy of disclosure by the prosecution, counsel may request that the trial court conduct an in camera review of the evidence in question. *See State v. Hardy*, 293 N.C. 105 (1977) (stating general right to in camera review); *State v. Kelly*, 118 N.C. App. 589 (1995) (new trial for failure of trial court to conduct in camera review); *State v. Jones*, 85 N.C. App. 56 (1987) (new trial). To obtain an in camera review, counsel must make some showing that the evidence may contain favorable, material information. *See State v. Soyars*, 332 N.C. 47 (1992) (court characterized general request as "fishing expedition" and found no error in trial court's denial of in camera review).

If the court refuses to review the documents, or after review refuses to require production of some or all of the documents, counsel should move to have the documents sealed and included in the record in the event of appeal. *See Hardy*, 293 N.C. 105, 128. If the judge refuses to require production of the documents for inclusion in the record, make an offer of proof about the anticipated contents of the documents.

In some instances, counsel may want to subpoena witnesses and documents to the motion hearing. Examination of witnesses (such as law-enforcement officers) may reveal discoverable evidence that the State has not yet disclosed. *See infra* § 4.7, Subpoenas.

4.6 Other Constitutional Rights

A. Evidence in Possession of Third Parties

This section focuses on records in a third party's possession concerning a victim or witness. Records concerning the defendant are discussed briefly at the end of this section.

Right to obtain confidential records. Due process gives the defendant the right to obtain from third parties records containing favorable, material evidence even if the records are confidential under state or federal law. This right is an offshoot of the right to favorable, material evidence in the possession of the prosecution. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (records in possession of child protective agency); *Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995) (North Carolina state courts erred in failing to review records in possession of county medical center, mental health department, and department of social services).

Other grounds, including the right to compulsory process, the court's inherent authority, and state constitutional and statutory requirements, may support disclosure of confidential records in the hands of third parties. *See State v. Crews*, 296 N.C. 607 (1979) (recognizing court's inherent authority to order disclosure); *In re Martin Marietta Corp.*, 856 F.2d 619, 621 (4th Cir. 1988) (federal rule allowing defendant to obtain court order for records in advance of trial "implements the Sixth Amendment guarantee that an accused have compulsory process to secure evidence in his favor"); G.S. 8-53 (under this statute, which is representative of several on privileged communications, court may compel disclosure of communications between doctor and patient when necessary to proper administration of justice).

Right to obtain DSS 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.

In numerous instances, the North Carolina courts have found error in the failure to disclose DSS records to the defendant. *See State v. Martinez*, 212 N.C. App. 661 (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 (2009) (error for trial court not to disclose information in DSS file to defendant; new trial); *State v. Johnson*, 165 N.C. App. 854 (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 (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 (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 (1988) (same).

Right to school records. *See State v. Taylor*, 178 N.C. App. 395 (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 (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).

Right to mental health records. *See 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); *see also supra* "Impeachment evidence," in § 4.5C, Favorable to Defense (discussing right under *Brady* to mental health records that impeach witness's credibility).

Right to medical records. *See State v. Thompson*, 139 N.C. App. 299 (2000) (finding that trial court did not err in failing to conduct in camera review of victim's medical records where defense counsel conceded that he was not specifically aware of any exculpatory information in the records); *State v. Jarrett*, 137 N.C. App. 256 (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).

Directing production of records. Three main avenues exist for compelling production of materials from third parties before trial.

- Counsel may move for a judge to issue an order requiring the third party to produce the records in court so the judge may review them and determine those portions subject to disclosure.
- Rather than asking the judge to issue an order, counsel may issue a subpoena directing the third party to produce the records in court for the judge to review and rule on the propriety of disclosure. Often, a custodian of confidential records will object to or move to quash a subpoena so defense counsel may be better off seeking an order initially from a judge.
- In some instances (discussed below), counsel may move for a judge to issue an order requiring the third party to provide the records directly to counsel.

Defense counsel also may have the right to subpoena documents directly to his or her office. This approach is *not* recommended for records that contain confidential information because it may run afoul of restrictions on the disclosure of such information. *See infra* § 4.7D, Production of Documents in Response to Subpoena Duces Tecum. Counsel should obtain a court order directing production or should subpoena the records to be produced in court, leaving to a judge the determination whether the defendant is entitled to obtain the information.

Specific procedures may need to be followed to obtain disclosure of some records. Consult the statute governing the records at issue. For example, some statutes require that notice be given to the person who is the subject of the records being sought (as well as to the custodian of the records). *See infra* § 4.7F, Specific Types of Confidential Records (listing reference sources on health department, mental health, and school records).

Sample motions for the production of various types of records are available in the non-capital, juvenile, and capital trial motions bank on the IDS website, www.ncids.org.

Who hears a motion for an order for records. In felony cases still pending in district court, a defendant may move for an order from a district court judge. *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); *see also 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).

A superior court also may have authority in a felony case to hear the motion while the case is pending in district court. *See State v. Jackson*, 77 N.C. App. 491 (1985) (superior court had jurisdiction before indictment to enter order to determine defendant's capacity to stand trial because G.S. 7A-21 gives superior court exclusive, original jurisdiction over criminal actions in which a felony is charged).

In camera review and alternatives. Under *Ritchie*, a defendant may obtain an in camera review of confidential records in the possession of a third party and, to the extent the records contain favorable, material evidence, the judge must order the records disclosed to the defendant.

The in camera procedure has some disadvantages, however, and may not always be required. Principally, the court may not know the facts of the case well enough to recognize evidence important to the defense. Some alternatives are as follows:

- If the evidence is part of the files of a law enforcement agency, investigatory agency, or prosecutor's office, defense counsel may move to compel the prosecution to disclose the evidence, without an in camera review, based on the State's general obligation to disclose the complete files in the case under G.S. 15A-903. Because it may be unclear whether the prosecution has access to the records, counsel may need to move for an order requiring the prosecution to disclose the records or, in the alternative, requiring the third party to provide the records to the court for an in camera review.
- Some judges may be willing to order disclosure of records in the possession of third parties without conducting an in camera review. Defense counsel can argue that the interest in confidentiality does not warrant restricting the defendant's access to potentially helpful information or imposing the burden on the judge of conducting an in camera review. *See Ritchie*, 480 U.S. 39, 60 (authorizing in camera review if

necessary to avoid compromising interest in confidentiality).
- Defense counsel can move to participate in any review of the records under a protective order. Such an order might provide that counsel may not disclose the materials unless permitted by the court. *See* G.S. 15A-908 (authorizing protective orders); *Zaal v. State*, 602 A.2d 1247 (Md. 1992) (court may conduct review of records in presence of counsel or permit review by counsel alone, as officer of court, subject to restrictions protecting confidentiality).

In camera review of DSS records. In 2009, the General Assembly added G.S. 7B-302(a1)(4) to require the court in a criminal or delinquency case to conduct an in camera review before releasing confidential DSS records to a defendant or juvenile respondent. *See also* G.S. 7B-2901(b)(4) (imposing same requirement for court records in abuse, neglect, and dependency cases). While the statutes mandate an in camera procedure for DSS records, it does not affect the applicable standard for release of records under *Ritchie. See also In re J.L.*, 199 N.C. App. 605 (2009) (under G.S. 7B-2901(b), trial court abused discretion by denying juvenile right to review own court records in abuse, neglect, and dependency case).

If a defendant is also a respondent parent in an abuse, neglect, and dependency proceeding, counsel for the client in that proceeding may be able to obtain DSS records in discovery and, with the client's consent, provide them to criminal defense counsel without court involvement.

Required showing. The 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 defendants 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 (4th Cir. 1995) (defendant made "plausible showing"); *State v. Thompson*, 139 N.C. App. 299, 307 (2000) ("although 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. King*, 628 F.3d 693 (4th Cir. 2011) (remanding for in camera review because defendant gave required plausible showing); *United States v. Trevino*, 89 F.3d 187 (4th Cir. 1996) (defendant must "plainly articulate" how the information in the presentence investigation report is material and favorable).

If the court refuses to require the third party to produce the documents, or after reviewing the documents refuses to require disclosure of some or all of them, counsel should move to have the documents sealed and included in the record in the event of appeal. *See State v. Hardy*, 293 N.C. 105 (1977); *State v. McGill*, 141 N.C. App. 98, 101 (2000); *see also State v. Burr*, 341 N.C. 263 (1995) (court states that it could not review trial court's denial of motion to require production of witness's medical records because defendant failed to make documents part of record on appeal). If the court refuses to require

production of the documents for inclusion in the record, make an offer of proof about the anticipated contents of the documents.

Ex parte application. In some circumstances, counsel seeking records in the possession of third parties may want to apply to the court ex parte. Although the North Carolina courts have not specifically addressed this procedure in the context of third-party records, they have allowed defendants to apply ex parte for funds for an expert (*see infra* § 5.5, Obtaining an Expert Ex Parte in Noncapital Cases). Some of the same reasons and authority for allowing ex parte applications for experts support ex parte motions for records in the possession of third parties (that is, need to develop trial strategy, protections for confidential attorney-client communications, etc.). In view of these considerations, some courts have held that a defendant may move ex parte for an order requiring pretrial production of documents from a third party. *See United States v. Tomison*, 969 F. Supp. 587 (E.D. Cal. 1997) (court reviews Federal Rule of Criminal Procedure 17(c), which authorizes court to issue subpoena duces tecum for pretrial production of documents, and rules that defendant may move ex parte for issuance of subpoena duces tecum to third party); *United States v. Daniels*, 95 F. Supp. 2d 1160 (D. Kan. 2000) (following *Tomison*); *United States v. Beckford*, 964 F. Supp. 1010 (E.D. Va. 1997) (allowing ex parte application for subpoena for third-party records but noting conflicting authority). These authorities should give counsel a sufficient basis to request to be heard ex parte. *See* North Carolina State Bar, 2001 Formal Ethics Opinion 15 (2002) (ex parte communications not permissible unless authorized by statute or case law), *available at* www.ncbar.gov/ethics/.

A separate question is whether the prosecution has standing to object to a motion to compel production of records from a third party or to obtain copies of records ordered to be disclosed to the defendant. *See Tomison*, 969 F. Supp. 587 (prosecution lacked standing to move to quash subpoena to third party because prosecution had no claim of privilege, proprietary right, or other interest in subpoenaed documents; prosecution also did not have right to receive copies of the documents unless defendant intended to introduce them at trial). *But cf. State v. Clark*, 128 N.C. App. 87 (1997) (court had discretion to require Department of Correction to provide to prosecution records that it had provided to defendant). For a discussion of these issues in connection with subpoenas, see *infra* "Notice of receipt and opportunity to inspect; potential applicability to criminal cases" in § 4.7D, Production of Documents in Response to Subpoena Duces Tecum; and § 4.7E, Objections to and Motions to Modify or Quash Subpoena Duces Tecum.

Records concerning defendant. When records in a third party's possession concern the defendant (for example, the defendant's medical records), defense counsel often can obtain them without court involvement by submitting a release from the defendant to the custodian of records. If you are seeking your client's medical records and know the hospital or other facility that has the records, obtain the form release used by the facility to avoid potential objections by the facility that the form does not comply with HIPAA or other laws. Other entities also may have their own release forms, which will facilitate obtaining client records. Notwithstanding the submission of a release, some agencies may

be unwilling to release the records without a court order or payment of copying costs. In these instances, applying to the court ex parte for an order requiring production of the records would seem particularly appropriate.

Sample motions for defendants' records are available in the non-capital motions bank on the IDS website, www.ncids.org.

B. False Testimony or Evidence

Prosecutor's duty. The prosecution has a constitutional duty to correct false testimony as a matter of due process. A conviction must be set aside if

- the prosecutor knowingly uses false testimony; and
- the evidence meets the required standard of materiality—that is, there is any reasonable likelihood that the false testimony or evidence could have affected the verdict.

Knowing use. The U.S. Supreme Court has steadily broadened the meaning of knowing use of false testimony. A prosecutor may not

- knowingly and intentionally use false testimony (*Mooney v. Holohan*, 294 U.S. 103 (1935));
- knowingly allow false testimony to go uncorrected on a material fact (*Alcorta v. Texas*, 355 U.S. 28 (1957) (testimony left false impression on jury);
- knowingly allow false testimony to go uncorrected on a witness's credibility (*Napue v. Illinois*, 360 U.S. 264 (1959) (witness lied about promise of lenient treatment)); or
- use false testimony that the prosecution knew or should have known was false (*Giglio v. United States*, 405 U.S. 150 (1972) (prosecutor who was not trying case had promised immunity to witness); *United States v. Agurs*, 427 U.S. 97, 103 (1976) ("should have known" test applies to duty to correct false testimony)).

See also State v. Wilkerson, 363 N.C. 382 (2009) (recognizing above principles but finding no violation in circumstances of case); *State v. Boykin*, 298 N.C. 687 (1979); *see also State v. Dorman*, ___ N.C. App. ___, 737 S.E.2d 452 (2013) (on State's appeal of dismissal of charges by court, holding that *Napue* did not require dismissal for pretrial misrepresentations by State), *review dismissed*, ___ N.C. ___, 743 S.E.2d 205 (2013) and *appeal dismissed, review denied*, ___ N.C. ___, 743 S.E.2d 206 (2013); *State v. Morgan*, 60 N.C. App. 614 (1983) (conviction vacated for failure of prosecutor to correct witness's denial of immunity); *Campbell v. Reed*, 594 F.2d 4 (4th Cir. 1979) (North Carolina conviction vacated on habeas for false testimony about plea arrangement).

Materiality. The State's knowing use of false testimony must meet the "reasonable likelihood" standard stated above. That standard is equivalent to the traditional, harmless-beyond-a-reasonable-doubt standard for constitutional violations, which is less demanding than the materiality standard for *Brady* violations. *See United States v. Bagley*, 473 U.S. 667 (1985) (discussing standards).

C. Lost or Destroyed Evidence

Constitutional standards. The courts have applied two basic standards when the State loses or destroys evidence. Earlier cases (and the first edition of this manual) intermingled the standards, but North Carolina case law now appears to draw a distinction between the two. *See generally* Teresa N. Chin, *The* Youngblood *Success Stories: Overcoming the "Bad Faith" Destruction of Evidence Standard*, 109 W.VA. L. REV. 421 (Winter 2007) (discussing the different approaches courts have taken and cases in which defendants prevailed on claims related to lost or destroyed evidence); *see also* KLINKOSUM at 308–36 (discussing cases reviewed in Chin article and their potential applicability to claims in North Carolina).

First, if evidence is favorable and material under *Brady*, its loss or destruction by the State violates due process under the Sixth Amendment of the U.S. Constitution and article I, sections 19 and 23, of the North Carolina Constitution. *See State v. Taylor*, 362 N.C. 514 (2008). When the evidence meets this standard, the loss or destruction of the evidence violates the defendant's constitutional rights "irrespective of the good or bad faith of the state." *Id.*, 362 N.C. at 525. Some cases have assessed further whether the defendant's constitutional rights have been flagrantly violated and the defendant irreparably prejudiced—the standard for dismissal as a remedy under G.S. 15A-954(4)—and whether the evidence had an exculpatory value that was apparent before its destruction and was of such a nature that the defendant would not be able to obtain comparable evidence by other reasonably available means, the standard announced in the U.S. Supreme Court's decision in *California v. Trombetta*, 467 U.S. 479 (1984). These additional inquiries may relate to the appropriate remedy for a violation. *See Trombetta*, 467 U.S. 479, 487 (when evidence has been destroyed in violation of constitutional requirements, court must choose between barring further prosecution or suppressing evidence); *State v. Lewis*, 365 N.C. 488 (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. Williams,* 362 N.C. 628 (2008) (photos and poster of photos were material, favorable evidence, which defendant never possessed, could not reproduce, and could not prove through testimony; destruction of evidence by State was flagrant violation of defendant's constitutional results, resulted in irreparable prejudice, and warranted dismissal); *see also* 6 LAFAVE, CRIMINAL PROCEDURE § 24.3(e), at 386–88 (discussing other remedies that courts have imposed for lost or destroyed evidence).

Second, "when the evidence is only 'potentially useful' or when 'no more can be said [of the evidence] than that it could have been subjected to tests, the results of which might have exonerated the defendant,' the state's failure to preserve the evidence does not violate the defendant's constitutional rights unless the defendant shows bad faith on the part of the state." *Taylor*, 362 N.C. at 525 (citations omitted). This standard is drawn from the U.S. Supreme Court's decision in *Arizona v. Youngblood*, 488 U.S. 51 (1988); *see also State v. Dorman.* ___ N.C. App. ___, 737 S.E.2d 452 (2013) (trial court found that State destroyed decedent's remains in bad faith; court of appeals finds it unnecessary to review court's findings, concluding that pretrial dismissal was premature because

record did not establish irreparable prejudice; case remanded), *review dismissed*, ___ N.C. ___, 743 S.E.2d 205 (2013) and *appeal dismissed, review denied*, ___ N.C. ___, 743 S.E.2d 206 (2013).

Bad faith requirement. Most North Carolina decisions have addressed the second standard—whether the evidence was potentially useful to the defense and lost or destroyed by the State in bad faith—because it is difficult for the defendant to show that lost or destroyed evidence was actually exculpatory. The "bad faith" standard is difficult to meet. *See Dorman*, ___ N.C. App. ___, 737 S.E.2d 452 (trial court found bad faith). *But see, e.g., State v. Taylor*, 362 N.C. 514 (loss of certain physical evidence from crime scene 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 (2002) (not error to admit testimony regarding rape kit lost before trial where exculpatory value of tests the defendant wanted to perform was speculative and there was no showing of bad faith); *State v. Graham*, 200 N.C. App. 204 (2009) (testimony about defendant's car and soil samples from car admissible; although police lost car before trial, no evidence of bad faith, and defendant had access to and tested soil samples).

In *Youngblood*, which adopted the bad faith requirement, the U.S. Supreme Court did not determine what conduct amounts to bad faith. Noting that the majority had left the question open, the dissenters in *Youngblood* suggested that bad faith could be made out by recklessness and other conduct short of actual malice. 488 U.S. 51, 66–67, 73 n.10; *see also United States v. Lovasco*, 431 U.S. 783, 795 n.17 (1977) (government conceded that due process violation may be made out by reckless disregard of circumstances).

Some cases found after *Youngblood* that the U.S. Supreme Court did not intend for the bad faith requirement to apply in all cases. *See United States v. Belcher*, 762 F. Supp. 666 (W.D.Va. 1991) (where state officials intentionally destroy evidence that is crucial to outcome of prosecution, defendant need not show bad faith). The Court has since indicated that the applicability of the bad faith requirement of *Youngblood* does not depend on the centrality of the evidence but on the distinction between "material exculpatory" evidence and "potentially useful" evidence; the bad faith standard applies to the latter category. *Illinois v. Fisher*, 540 U.S. 544, 549 (2004) (per curiam). Nevertheless, if the State loses or destroys evidence that was plainly material to the case, the defendant may be in a stronger position to argue that the State's acts or omissions constituted bad faith. *See* KLINKOSUM at 331–33.

Based on their state constitutions, several state courts have rejected the bad faith standard of *Youngblood* and have adopted an all-the-circumstances test to determine whether the destruction of evidence denied the defendant a fair trial. *See, e.g., State v. Morales*, 657 A.2d 585 (Conn. 1995) (collecting cases); *State v. Osakalumi*, 461 S.E.2d 504 (W.Va. 1995) (collecting cases); 6 LAFAVE, CRIMINAL PROCEDURE § 24.3, at 388 & n. 136. The North Carolina courts have generally followed the *Youngblood* "bad faith" standard without distinguishing between the federal and state constitutions. *See, e.g., State v. Taylor*, 362 N.C. 514, 525 (2008). *But cf. State v. Anderson*, 57 N.C. App. 602 (1982) (holding before *Youngblood* that State's good faith not dispositive).

A request to the State to preserve evidence may put the State on notice of the exculpatory value of evidence and may strengthen an argument that its destruction violates due process. *See People v. Newberry*, 652 N.E.2d 288 (Ill. 1995) (motion to preserve puts State on notice of exculpatory value of evidence). But, the State's loss or destruction of evidence after such a request does not automatically constitute a due process violation. *See Illinois v. Fisher*, 540 U.S. 544 (2004) (per curiam) (dismissal not automatically required where potentially useful evidence (alleged cocaine) was destroyed by police according to established procedures almost eleven years after defendant's discovery request for all physical evidence).

Statutory sanctions and other remedies. G.S. 15-11.1(a) requires that the State safely keep evidence pending trial, and G.S. 15A-903(a)(1)d. gives the defendant the right to test physical evidence. *See also supra* § 4.4E, Biological Evidence. The State's destruction of evidence, whether or not in bad faith, may violate these statutes and warrant sanctions. *See State v. Banks*, 125 N.C. App. 681 (1997) (as sanction for failure to preserve evidence, trial court prohibited State from calling witness to testify about evidence, stripped prosecution of two peremptory challenges, and allowed defendant right to final argument before jury), *aff'd per curiam*, 347 N.C. 390 (1997); *see also United States v. Bundy*, 472 F.2d 1266 (D.C. Cir. 1972) (Levanthal, J., concurring) (concurring opinion suggests that, as sanction for law-enforcement officer's failure to preserve notes, trial court could instruct jury that it was free to infer that missing evidence would have been different from testimony at trial and would have been helpful to defendant); KLINKOSUM at 347–48 (suggesting that counsel request jury instruction on evidence spoliation, under which jury may infer that missing evidence would have been damaging to State's case).

D. Identity of Informants

Generally. Due process gives the defendant the right to discover a confidential informant's identity when relevant and helpful to the defense or essential to a fair determination of the case. *See Roviaro v. United States*, 353 U.S. 53 (1957) (establishing general rule). Numerous North Carolina cases have addressed the issue and are not reviewed exhaustively here. Cases that may be of particular interest to the defense include: *State v. McEachern*, 114 N.C. App. 218 (1994) (upholding dismissal of charges for prosecutor's failure to comply with order requiring disclosure); *State v. Johnson*, 81 N.C. App. 454 (1986) (requiring disclosure where informant could testify to details surrounding crime); *State v. Parker*, 61 N.C. App. 585, 587 (1983) (disclosure should have been ordered, but error was harmless because defendant already knew informant's identity); *State v. Hodges*, 51 N.C. App. 229 (1981) (informant introduced undercover officer to defendant, who sold marijuana to officer in informant's presence; name of informant should have been disclosed to defendant in advance of trial and in time for defendant to interview informant and determine whether his or her testimony would have been beneficial); *State v. Brockenborough*, 45 N.C. App. 121 (1980) (State must furnish defendant with best available information about informant's whereabouts); *State v. Orr*, 28 N.C. App. 317 (1976) (disclosure required where informant engineered events leading to offense; new trial); *United States v. Price*, 783 F.2d 1132, 1137–39 (4th Cir. 1986)

(informant set up deal and was active participant; disclosure required); *McLawhorn v. North Carolina*, 484 F.2d 1 (4th Cir. 1973) (vacating North Carolina conviction on habeas for failure to disclose identity of informant); *see also* 6 LAFAVE, CRIMINAL PROCEDURE § 24.3(g), at 397–98 (noting that some courts have found that defendants also have a due process right to disclosure of information about the identity and whereabouts of crucial eyewitnesses).

Roviaro instructs that in determining whether fundamental fairness requires disclosure, courts should use a multi-factor approach, taking into consideration the crime charged, possible defenses, the potential significance of the informant's testimony, and other relevant factors. *Roviaro*, 353 U.S. 53, 62; *accord State v. Stokely*, 184 N.C. App. 336, 341–42 (2007) (recognizing that *Roviaro* did not establish fixed rule on when disclosure is required). In practice, courts often focus on whether the informant was a "participant" in the crime or a "mere tipster," requiring disclosure of the former but not the latter. *See, e.g., State v. Mack*, ___ N.C. App. ___, 718 S.E.2d 637 (2011); *Stokely*, 184 N.C. App. 336. One who takes some active part in the offense, arranges for its commission, or is otherwise a percipient or material witness may be viewed as a "participant." One who only provides an investigative lead for law enforcement personnel, in contrast, is often characterized as a "tipster."

The North Carolina courts have stated further that two factors that weigh in favor of disclosure are "if the informant directly participated in the offense being tried (for example, by actually buying the drugs or watching an undercover officer buy the drugs) or if the informant is a material witness to the facts about the defendant's guilt or innocence." ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA at 565 (UNC School of Government, 4th ed. 2011) [hereinafter FARB]; *see also State v. Avent*, ___ N.C. App. ___, 729 S.E.2d 708 (2012) (so stating). Factors weighing against disclosure are whether the defendant admits culpability, offers no defense on the merits, or the evidence independent of the informant's testimony establishes the accused's guilt. These factors seem more pertinent on appeal, however, when the appellate court is able to review the trial transcript and determine whether the trial judge erred in refusing to order disclosure. *See, e.g., State v. Dark*, 204 N.C. App. 591 (2010) (reviewing trial of case and finding that these factors weighed against disclosure).

Roviaro does not require this inquiry if disclosure of information about the informant is necessary to satisfy the State's obligation to disclose exculpatory information. *See Banks v. Dretke*, 540 U.S. 668, 698 (2004) ("Nothing in *Roviaro*, or any other decision of this Court, suggests that the State can examine an informant at trial, withholding acknowledgment of his informant status in the hope that defendant will not catch on, so will make no disclosure motion.").

For summaries of selected cases involving requests to disclose the identity of a confidential informant, see FARB at 481–83. For a discussion of the issue in entrapment cases, see JOHN RUBIN, THE ENTRAPMENT DEFENSE IN NORTH CAROLINA at 49–51 (UNC School of Government, 2001).

A sample motion to reveal a witness's identity is available in the non-capital motions bank on the IDS website, www.ncids.org.

Procedural issues. G.S. 15A-904(a1) gives the prosecution the right to withhold the identity of a confidential informant unless otherwise required by law. The statute does not require the State to seek a protective order. Therefore, the defendant ordinarily must make a motion for disclosure of the identity of a confidential informant. *Cf. State v. Leyva*, 181 N.C. App. 491 (2007) (trial court not required to seal confidential informant's file for appellate review under G.S. 15A-908(b), which concerns protective orders, where State withheld name of confidential informant under G.S. 15A-904 and did not request a protective order).

In *State v. Moctezuma*, 141 N.C. App. 90, 97 (2000), the court set out the proper procedure for hearing a motion to disclose the identity of a confidential informant. The court found the trial court erred in excluding defendant and his counsel from the hearing on the defendant's motion without (1) hearing evidence from the defense, and (2) finding facts as to the necessity for their exclusion.

Suppression of evidence. In some circumstances, the defendant has a right to disclosure of an informant's identity in challenging probable cause for a search or arrest. *See* G.S. 15A-978(b) (when defendant on motion to suppress contests truthfulness of testimony to establish probable cause and testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, defendant is entitled to be informed of informant's identity except in circumstances described in statute); *State v. Ellison*, ___ N.C. App. ___, 713 S.E.2d 228 (2011) (disclosure not required; defendant did not contest informant's existence at trial or on appeal and informant's existence was independently corroborated, one of two circumstances in which disclosure is not required under statute), *aff'd*, ___ N.C. ___, 738 S.E.2d 161 (2013); *see also McCray v. Illinois*, 386 U.S. 300 (1967).

In *State v. Gaither*, 148 N.C. App. 534 (2002), the court of appeals stated that G.S. 15A-978(b) authorizes disclosure only when a search is pursuant to a warrant, but the statute actually applies when a search is without a warrant (either a search warrant or incident to arrest on an arrest warrant). *See* G.S. 15A-978(b) (identifying existence of warrant as one of two circumstances in which disclosure requirement does not apply); *see also* FARB at 564–65 (describing when statute applies).

***Brady* request for additional information about informant.** If defense counsel obtains an informant's identity, counsel should seek discovery of the informant's criminal record, any promises of immunity, and other information bearing on bias and credibility. The State is obligated to disclose *Brady* material about informants. *United States v. Blanco*, 392 F.3d 382 (9th Cir. 2004) (defendant entitled to information about informant's special treatment by Immigration and Naturalization Service for his work with Drug Enforcement Administration (DEA); *United States v. Brumel-Alvarez*, 991 F.2d 1452 (9th Cir. 1992) (defendant entitled to evidence that informant controlled investigation and was in position to manipulate it); *United States v. Bernal-Obeso*, 989 F.2d 331 (9th Cir.

1993) (defendant entitled to evidence that informant lied to law enforcement about prior record).

E. Equal Protection and Selective Prosecution

Equal protection principles may provide a defendant with the right to discovery about selective prosecution. *See United States v. Armstrong*, 517 U.S. 456 (1996) (in some circumstances, equal protection affords defendant right to discover evidence in support of claim of selective prosecution based on race); *State v. Rudolph*, 39 N.C. App. 293 (1979) (defendant not entitled to discover district attorney's internal policies regarding prosecution of career criminals; defendant presented no evidence that he was selected for more vigorous prosecution based on race, religion, or other constitutionally-impermissible reason); *United States v. Jones*, 159 F.3d 969 (6th Cir. 1998) (defendant produced sufficient evidence to warrant discovery); *United States v. Olvis*, 97 F.3d 739, 743 (4th Cir. 1996) (reviewing law and finding, contrary to district court, that defendant did not meet threshold requirement for discovery) *United States v. Tuitt*, 68 F. Supp. 2d 4 (D. Mass. 1999) (defendant produced sufficient evidence to warrant discovery).

This topic is beyond the scope of this manual and is discussed in more detail in the forthcoming indigent defense manual on litigating issues of race in North Carolina criminal cases, due to be released in 2014.

4.7 Subpoenas

Although not a formal discovery device, subpoenas (particularly subpoenas duces tecum) may be a useful tool for obtaining information material to the case. *See State v. Burr*, 341 N.C. 263, 302 (1995) (subpoena duces tecum is permissible method for obtaining records not in possession, custody, or control of State); *State v. Newell*, 82 N.C. App. 707, 708 (1986) (although discovery is not proper purpose for subpoena duces tecum, subpoena duces tecum is proper process for obtaining documents material to the inquiry in the case).

The mechanics of subpoenas are discussed in detail in Chapter 29 (Witnesses) of Volume 2 of the North Carolina Defender Manual (UNC School of Government, 2d ed. 2012). The discussion below briefly reviews the pretrial use of subpoenas, particularly for documents.

A. Constitutional Right to Subpoena Witnesses and Documents

A defendant has a constitutional right to subpoena witnesses and documents, based primarily on the Sixth Amendment right to compulsory process. *See Washington v. Texas*, 388 U.S. 14, 19 (1967) (right to compel attendance of witnesses is "in plain terms the right to present a defense"); *State v. Rankin*, 312 N.C. 592 (1985) (recognizing Sixth Amendment basis of subpoena power). Due process also gives a defendant the right to obtain material, favorable evidence in the possession of third parties (*see supra* § 4.6A,

Evidence in Possession of Third Parties); and article 1, section 23 of the North Carolina Constitution guarantees a criminal defendant the right to confront one's accusers and witnesses with other testimony.

The right to compulsory process is not absolute. Although the defendant does not have to make any showing to obtain a subpoena, the court on proper objection or motion may deny, limit, or quash a subpoena. *See infra* § 4.7E, Objections to and Motions to Modify or Quash Subpoena Duces Tecum (discussing permissible scope of subpoena duces tecum); *see generally* 2 NORTH CAROLINA DEFENDER MANUAL § 29.1A (Constitutional Basis of Right to Compulsory Process).

B. Reach of Subpoena

A subpoena may be directed to any person within North Carolina who is capable of being a witness, including law-enforcement officers, custodians of records of public agencies, and private businesses and individuals.

To obtain witnesses or documents located outside of North Carolina, defense counsel must use the Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings. *See* G.S. 15A-811 through G.S. 15A-816 The uniform act has been interpreted as authorizing subpoenas for the production of documents. *See* Jay M. Zitter, Annotation, *Availability under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings of Subpoena Duces Tecum*, 7 A.L.R.4th 836 (1981) (uniform act has been interpreted as allowing subpoena to out-of-state witness to produce documents). Counsel may not use an ordinary subpoena to compel an out-of-state witness to produce records. *See* North Carolina State Bar, 2010 Formal Ethics Opinion 2 (2010), *available at* www.ncbar.gov/ethics/. For a discussion of the mechanics of the Uniform Act, see 2 NORTH CAROLINA DEFENDER MANUAL § 29.1E (Securing the Attendance of Nonresident Witnesses).

C. Issuance and Service of Subpoena

Rule 45 of the North Carolina Rules of Civil Procedure governs the issuance and service of subpoenas. *See* G.S. 15A-801 (subpoenas to testify in criminal cases governed by Rule 45, subject to limited exceptions); G.S. 15A-802 (to same effect for subpoenas for documents); G.S. 8-59 (so stating for subpoenas to testify); G.S. 8-61 (so stating for subpoenas for documents). The court need not be involved in the issuance of a subpoena to testify or to produce documents; defense counsel may issue either. *See* AOC Form AOC-G-100, "Subpoena" (May 2013), *available at* www.nccourts.org/Forms/Documents/556.pdf. The AOC form subpoena may be used to subpoena a witness to testify, produce documents, or do both.

The sheriff, sheriff's deputy, coroner, or any person over age 18 who is not a party, may serve a subpoena. Service may be by personal delivery to the person named in the subpoena, by registered or certified mail, return receipt requested, or by telephone

communication by law enforcement for subpoenas to testify (but not for subpoenas for documents). *See* N.C. R. CIV. P. 45(b)(1); G.S. 8-59.

Practice note: Because the court may not be able to issue a show cause order re contempt (with an order for arrest) to enforce a subpoena served by telephone communication (*see* G.S. 8-59), and because disputes may arise about whether a person named in a subpoena signed for and received a subpoena served by mail, counsel should consider serving all subpoenas by personal delivery on the person whose attendance is sought.

The defendant need not tender any witness fee at the time of service. *See* G.S. 6-51 (witness not entitled to receive fees in advance). Rather, the witness must apply to the clerk after attendance for payment of the daily witness fee and reimbursement of allowable travel expenses. G.S. 6-53; G.S. 7A-316. Generally, the court may assess witness fees against the defendant only on completion of the case. *See* G.S. 7A-304 (costs may be assessed against defendant on conviction or entry of plea of guilty or no contest).

A copy of the subpoena need not be served on other parties in a criminal case. *See* G.S. 15A-801 (exempting criminal cases from service requirement for witness subpoenas in N.C. R. Civ. P. 45(b)(2)), G.S. 15A-802 (to same effect for document subpoenas).

For a further discussion of issuance and service of subpoenas to testify, see 2 NORTH CAROLINA DEFENDER MANUAL § 29.1B (Securing the Attendance of In-State Witnesses). For a further discussion of issuance and service of subpoenas for documents, see 2 NORTH CAROLINA DEFENDER MANUAL § 29.2A (Statutory Authorization) and § 29.2B (Statutory Requirements).

For reference sources on obtaining particular types of records, see *infra* § 4.7F, Specific Types of Confidential Records (health department, mental health, and school records).

D. Production of Documents in Response to Subpoena Duces Tecum

The person named in a subpoena duces tecum ordinarily must appear on the date and at the place designated in the subpoena and must produce the requested documents.

Place of production. Typically, a subpoena duces tecum requires production at some sort of proceeding in the case to which the recipient is subpoenaed, such as a pretrial hearing, deposition (rare in criminal cases but common in civil cases), or trial. In 2003, the General Assembly amended Rule 45 of the N.C. Rules of Civil Procedure to modify this requirement for subpoenas for documents (but not subpoenas to testify). Thus, before the amendment, a party in a civil case would have to schedule a deposition, to which the party would subpoena the records custodian, even if the party merely wanted to inspect records in the custodian's possession and did not want to take any testimony. Under the revised rule, a party may use a subpoena in a pending case to direct the recipient to

produce documents at a designated time and place, such as at the issuing party's office, even though no deposition or other proceeding is scheduled for that time and place. Because G.S. 15A-802 makes Rule 45 applicable to criminal cases, this use of a subpoena appears to be permissible in a criminal case.

The change in Rule 45 authorizing an "office" subpoena may not be readily apparent. It is reflected in the following italicized portion of revised Rule 45(a)(2): "A command to produce evidence may be joined with a command to appear at trial or hearing or at a deposition, *or any subpoena may be issued separately.*" *See* North Carolina State Bar, 2008 Formal Ethics Opinion 4 (2008) (so interpreting quoted language), *available at* www.ncbar.gov/ethics/; Bill Analysis, H.B. 785: Rules of Civil Proc/Rewrite Rule 45 (S.L. 2003-276), from Trina Griffin, Research. Div., N.C. General Assembly (June 27, 2003) (same); Memorandum to Superior Court Judges et al. re: Subpoena Form Revised (AOC-G-100) & S.L. 2003-276 (HB 785), from Pamela Weaver Best, Assoc. Counsel, Div. of Legal & Legislative Servs., N.C. Admin. Office of the Courts (Sept. 29, 2003) (same). The latter two memos are available from the authors of this manual. The revised language is comparable to Rule 45(a)(1) of the Federal Rules of Civil Procedure, which has authorized a similar procedure in federal cases. *See* 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 45.02[3], at 45-21 (3d ed. 2011).

Practice note: When seeking sensitive records, defense counsel may not want to use an "office" subpoena or a subpoena at all and instead may want to seek an order of the court compelling production. Because a subpoena is generally insufficient to authorize a custodian of confidential records to disclose records, the custodian will often contest the subpoena, necessitating a court order in any event. Further, if a records custodian who is subpoenaed discloses confidential information to defense counsel without proper authorization (typically, consent by the subject of the records or a court order, not just a subpoena), defense counsel may be subject to sanctions. *See* North Carolina State Bar Ethics Opinion RPC 252 (1997) (attorneys should refrain from reviewing confidential materials inadvertently sent to them by opposing party), *available at* www.ncbar.gov/ethics/; *Susan S. v. Israels*, 67 Cal. Rptr. 2d 42 (Cal. Ct. App. 1997) (attorney read and disseminated patient's confidential mental health records that treatment facility mistakenly sent directly to him in response to subpoena; court allowed patient's suit against attorney for violation of state constitutional right of privacy); *see also Bass v. Sides*, 120 N.C. App. 485 (1995) (before obtaining judge's permission, plaintiff's attorney reviewed confidential medical records of defendant that records custodian had sealed and provided to clerk of court in response to subpoena; judge ordered plaintiff's attorney to pay defendant's attorney fees, totaling approximately $7,000, and prohibited plaintiff from using the records at trial).

Notice of receipt and opportunity to inspect; potential applicability to criminal cases. Rule 45(d1) of the N.C. Rules of Civil Procedure states that within five business days of receipt of materials produced in compliance with a subpoena duces tecum, the party who was responsible for issuing the subpoena must serve all other parties with notice of receipt. On request, the party receiving the material must provide the other parties a reasonable opportunity to copy and inspect such material at the inspecting party's expense.

The applicability of this requirement to criminal cases is not entirely clear, particularly when the defendant is the subpoenaing party. In 2007, the General Assembly revised Rule 45 to add the notice and inspection requirements in subsection (d1) of Rule 45. This change appears to have been prompted by concerns from civil practitioners after the 2003 changes to Rule 45. The earlier changes, discussed above under "Place of production" in this subsection D., authorized a party to issue a subpoena for the production of documents without also scheduling a deposition, at which the opposing party would be present and would have an opportunity to review and obtain copies of the subpoenaed records.

Criminal cases are not specifically exempted from the notice and inspection requirements enacted in 2007, although somewhat paradoxically the subpoenaing party in a criminal case is not required to give notice of the service of a subpoena (discussed above under subsection C., Issuance and Service of Subpoena). The 2007 subpoena provisions also are in tension with G.S. 15A-905 and G.S. 15A-906, which essentially provide that a criminal defendant is only obligated to disclose to the State evidence that he or she intends to use at trial. (If the State is the subpoenaing party, the records become part of the State's file and are subject to the State's general discovery obligations under G.S. 15A-903.)

If the notice and inspection requirements in Rule 45(d1) apply in criminal cases, a defendant may have grounds to seek a protective order under G.S. 15A-908 to withhold records from disclosure. Alternatively, instead of using a subpoena, a defendant may move for a court order for production of records, which is not governed by Rule 45. *See supra* "Ex parte application" in § 4.6A, Evidence in Possession of Third Parties.

Public and hospital medical records. If a custodian of public records or hospital medical records (as defined in G.S. 8-44.1) has been subpoenaed to appear for the sole purpose of producing records in his or her custody and not also to testify, the custodian may elect to tender the records to the court in which the action is pending instead of making a personal appearance. N.C. R. CIV. P. 45(c)(2). For a discussion of these procedures, see 2 NORTH CAROLINA DEFENDER MANUAL § 29.2C (Production of Public Records and Hospital Medical Records).

E. Objections to and Motions to Modify or Quash Subpoena Duces Tecum

N.C. Rule of Civil Procedure 45(c)(3) and (c)(5) set forth the procedures for a person to serve a written objection on the subpoenaing party or file a motion to modify or quash a subpoena. The mechanics of these procedures are discussed in detail in 2 NORTH CAROLINA DEFENDER MANUAL § 29.2D (Objections to a Subpoena Duces Tecum) and § 29.2E (Motions to Modify or Quash a Subpoena Duces Tecum).

If an objection rather than a motion is made, the party serving the subpoena is not entitled to inspect or copy the designated materials unless the court enters an order permitting him or her to do so. N.C. R. CIV. P. 45(c)(4). In some instances, the subpoenaed party will appear in court at the time designated in the subpoena and make an objection to disclosure. If this procedure is followed, the defendant will have an opportunity to obtain

a ruling from the court then and there. In other instances, the subpoenaed party will object before the scheduled proceeding. The subpoenaing party then will have to file a motion to compel production, with notice to the subpoenaed person, in the court of the county where the production is to occur. *Id.*

In reviewing an objection or motion to quash or modify, "the trial judge should consider the relevancy and materiality of the items called for [by the subpoena], the right of the subpoenaed person to withhold production on other grounds, such as privilege, and also the policy against 'fishing expeditions.'" *State v. Newell*, 82 N.C. App. 707, 709 (1986). The subpoena should "specify with as much precision as fair and feasible the particular items desired." *Id.*, 82 N.C. App. at 708. Otherwise, the court may view the subpoena as a "fishing or ransacking expedition." *Vaughan v. Broadfoot*, 267 N.C. 691, 699 (1966) (quashing subpoena for production of mass of records on first day of trial); *see also Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995) (finding that North Carolina trial judge violated defendant's due process rights by quashing subpoena on overbreadth grounds without requiring that records be produced for review by court after defendant made a plausible showing that records contained information material and favorable to his defense). On finding that a subpoena is overbroad, a trial court may modify rather than quash it. *State v. Richardson*, 59 N.C. App. 558 (1982).

In some North Carolina cases, trial courts have granted motions by the prosecution to quash a subpoena duces tecum directed to a third party, but the decisions do not explicitly address whether the prosecution had standing to do so. *See, e.g., State v. Love*, 100 N.C. App. 226 (1990), *conviction vacated on habeas sub. nom.*, *Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995). Because prosecutors do not represent third parties and do not have a legally recognized interest in their records, they may not have standing to object or move to quash. *See United States v. Tomison*, 969 F. Supp. 587 (E.D. Cal. 1997) (prosecution lacked standing to move to quash subpoena to third party because prosecution had no claim of privilege, proprietary right, or other interest in subpoenaed documents); 2 G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE § 45-4, at 45-14 (3d ed. 2007) ("A party does not have standing to challenge a subpoena duces tecum issued to a nonparty witness unless he can claim some privilege in the documents sought."). Some cases have taken a more expansive view of prosecutor standing because of the prosecutor's overall interest in the handling of the prosecution. *See Commonwealth v. Lam*, 827 N.E.2d 209, 228–29 & n.8 (Mass. 2005) (finding that prosecutor had standing to object to issuance of summons [subpoena] because prosecutor may be able to assist judge in determining whether subpoena is improper fishing expedition and in preventing harassment of witnesses by burdensome, frivolous, or improper subpoenas; court notes without deciding that there may be occasions "in which a defendant seeks leave from the court to move ex parte for the issuance of a summons [subpoena]").

Practice note: If the judge quashes a subpoena requiring the production of documents, counsel should move to have the documents sealed and included in the record in the event of appeal. *See State v. Hardy*, 293 N.C. 105 (1977); *see also State v. Burr*, 341 N.C. 263 (1995) (court states that it could not review trial judge's denial of motion to require production of witness's medical records because defendant failed to make documents part

of record). If the judge refuses to require production of the documents for inclusion in the record, make an offer of proof about the anticipated contents of the documents.

Rather than quash or modify a subpoena, a judge may order the subpoenaed person to be "reasonably compensated" for the cost, if "significant," of producing the designated material. N.C. R. CIV. P. 45(c)(6). Typically, judges do not order reimbursement of document production expenses because compliance with a subpoena is an ordinary, not significant, expense of responding to court proceedings. If the court orders payment, defense counsel for an indigent defendant may request the court to authorize payment from state funds as a necessary expense of representation. *See* G.S. 7A-450(b); G.S. 7A-454.

F. Specific Types of Confidential Records

Specific procedures may need to be followed to obtain disclosure of some records. Consult the statute governing the records at issue. For example, some statutes require that notice be given to the person who is the subject of the records being sought (as well as to the custodian of records). For a discussion of subpoenas for particular types of records from the perspective of the recipient, see the following:

- John Rubin & Aimee Wall, *Responding to Subpoenas for Health Department Records*, HEALTH LAW BULLETIN No. 82 (Sept. 2005), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/hlb82.pdf.
- John Rubin, *Subpoenas and School Records: A School Employee's Guide*, SCHOOL LAW BULLETIN No. 30/2 (Spring 1999), *available at* http://ncinfo.iog.unc.edu/pubs/electronicversions/slb/sp990111.pdf.
- John Rubin & Mark Botts, *Responding to Subpoenas: A Guide for Mental Health Facilities*, POPULAR GOVERNMENT No. 64/4 (Summer 1999), *available at* http://ncinfo.iog.unc.edu/pubs/electronicversions/pg/botts.pdf.

4.8 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 statute, specifically G.S. 15A-905 and G.S. 15A-906. North Carolina's statutes essentially give the prosecution the right to discover evidence, defenses, and witnesses that the defendant intends to offer at trial. The statutes bar the prosecution from discovering information that the defendant does not intend to offer. This approach protects defendants' Fifth Amendment right against self-incrimination and Sixth Amendment right to have counsel effectively and confidentially investigate and develop a defense against the charges.

A. Procedures for Reciprocal Discovery

Requirement of initial request by defense for discovery. 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.[1] In most instances, however, the advantages of obtaining discovery from the State far outweigh the disadvantages of providing the statutory categories of information to the State. Counsel, therefore, should request discovery in all cases except in unusual circumstances.

Under the previous version of the statutes, the defendant controlled the categories of information the State could obtain in discovery. Former G.S. 15A-905 allowed discovery of particular categories of evidence in the defendant's possession only if the defendant requested discovery of those categories from the State. *See State v. Clark*, 128 N.C. App. 87 (1997) (defendant had no obligation to provide reciprocal discovery of its expert's report under previous version of statute because defendant had not requested discovery of report of State's expert). The current discovery statute gives the State the right to obtain discovery if the defendant obtains "any" relief under G.S. 15A-903. This change eliminates the ability of the defense to pick and choose the statutory categories of discovery to provide to the State. (As a practical matter, because the defense is entitled to the complete files of the State, it would be difficult to have a rule under which the defense could designate particular categories for discovery.)

Requirement of timely request by State. 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); *see also supra* § 4.2D, Requests for Discovery (discussing circumstances in which court may forgive party's failure to make written request where opposing party has voluntarily provided discovery).

1. 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 voluntary 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(a) 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.

Requirement of motion. 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. 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.

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.

Deadline for production. The discovery statutes set some deadlines for the defendant to provide discovery. *See* 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 a reasonable time before trial); G.S. 15A-905(c)(3) (defendant must give notice of other 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 (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).

Written inventory. To avoid disputes over the materials produced, defense counsel may want to provide the prosecutor with a written listing of the materials provided.

Sanctions. The general principles on sanctions, discussed *supra* in § 4.2J, Sanctions, apply to violations by the defense of its discovery obligations. G.S. 15A-910(a) authorizes a range of sanctions. G.S. 15A-910(b) requires the trial court to consider the materiality of the subject matter and the totality of the circumstances surrounding the failure to comply. G.S. 15A-910(d) requires the trial court to make findings in support of any sanctions.

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. Most of these cases involve an appeal by the defendant of a trial court 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 expert before expert testified if

expert does not produce written report). Appellate decisions 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 (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*. In a later decision, however, the court upheld a preclusion sanction for the failure to provide an expert's report to the State. *State v. Lane*, 365 N.C. 7 (2011); *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 timely turn over expert report in its possession). The state of the law on this issue is therefore uncertain.

In addition to statutory considerations, constitutional concerns may limit 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").

As of this writing, North Carolina decisions have not closely examined the constitutional limits on sanctions against the defense. Some cases have required serious violations to justify preclusion. *See State v. Lane*, 365 N.C. 7 (2011) (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); *State v. McDonald*, 191 N.C. App. 782 (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); *see also State v. Nelson*, 76 N.C. App. 371 (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). In *State v. Gillespie,* the court of appeals found that the trial court violated the defendant's Sixth Amendment and state constitutional rights by excluding all evidence from the defendant's mental health experts, but the supreme court found that the trial court exceeded its statutory authority in imposing this sanction for the experts' alleged actions and that it was unnecessary for the court of appeals to address the defendant's constitutional arguments. 180 N.C. App. 514 (2006), *aff'd as modified*, 362 N.C. 150 (2008).

Some decisions have upheld preclusion sanctions for what appear to be lesser violations, but the results may be explainable by other aspects of those cases. *See State v. Pender*, ___ N.C. App. ___, 720 S.E.2d 836 (2012) (defendant not entitled to jury instruction on involuntary 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); *see also State v Leyva*, 181 N.C. App. 491 (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).

Practice note: If the trial court is considering sanctions against the defense, counsel must object on both statutory and constitutional grounds to preserve the constitutional issue for appeal. *See State v. McDonald*, 191 N.C. App. 782, 785 (2008) (constitutional question about sanctions waived because not raised at trial). The principal constitutional grounds are due process under the 14th Amendment, the right to present a defense under the Sixth Amendment, and article 1, sections 19 and 23, of the North Carolina Constitution.

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 (1997) (trial court properly declined to compel defendant to disclose evidence before trial); *State v. White*, 331 N.C. 604 (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 further below). *See also* 5 LAFAVE, CRIMINAL PROCEDURE § 20.5(a), at 475 ("The failure of the state's discovery provisions to specifically authorize a particular type of disclosure is taken as indicating the draftsmen did not intend to allow the prosecution such discovery.").

Once the trial commences, the trial court has greater authority to order disclosure (*see supra* § 4.1D, Court's Inherent Authority), 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 (1975) (finding waiver

of work product privilege for statements taken by defense investigator where investigator testified about statement at trial to impeach witness's testimony); *State v. Smith*, 320 N.C. 404, 414–15 (1987) (holding under previous version of discovery statute that at the beginning of jury selection trial court could order defense to provide list of witnesses it intended to call at trial even though disclosure not statutorily required before trial); *see also State v. Gray*, 347 N.C. 143 (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), *aff'd in part, rev'd in part sub nom. Gray v. Branker*, 529 F.3d 220 (4th Cir. 2008). 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 infra* "Nontestifying experts" in § 4.8C, Results of Examinations and Tests.

B. Documents and Tangible Objects

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

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.

C. Results of Examinations and Tests

Discoverable materials. 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.

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 (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 (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 (1995) (State entitled to discovery of test results, even if inconclusive, that went into formation of opinion of expert who testified). *But see United States v. Dennison*, 937 F.2d 559 (10th Cir. 1991) (defense psychiatrist's notes of his interviews with defendant did not constitute "results or reports" within meaning of federal discovery provision [comparable to G.S. 15A-905(b)]; notes contained no results, conclusions, diagnoses, or summations); *United States v. Layton*, 90 F.R.D. 520 (N.D Cal. 1981) (bare tapes of psychiatrist's interviews cannot be considered "results or reports" of mental examination).

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) (ordering 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 meaning of *Warren* is somewhat unclear because the court also rested its holding on the ground that disclosure was ordered at a capital sentencing proceeding, after the defendant had admitted guilt. In light of other decisions, however, the authors believe that *Warren* does not authorize compelled disclosure of a nontestifying expert's report, either at the guilt-innocence or sentencing phase of a case, unless a defense witness reviews or otherwise makes use of it in his or her testimony.]

Practice note: Although discovery of information generated and reviewed by testifying experts is broad, counsel should not be deterred in providing an expert with all materials

necessary for the expert to render an opinion. Failure to do so may weaken the expert's opinion and subject him or her to damaging cross-examination about materials the expert did not consider. Counsel also should err on the side of disclosing information about the expert's work to the State to guard against any possibility of the expert's testimony being precluded for a discovery violation.

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.*, 350 N.C. 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); *see also infra* "Notice of defenses" and "Insanity and other mental conditions" in § 4.8E, Defenses (notice of defense is not admissible at trial when defendant does not rely on defense; also noting that prosecution may use results of court-ordered mental health examination to rebut mental health issues raised by defendant but may not be able to do so to establish guilt).

The 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).

For a discussion of the obligation of testifying experts to prepare a report of the results of examinations and tests and provide other information, see *infra* § 4.8D, Witnesses.

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 (1997); *State v. White*, 331 N.C. 604 (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 (1985) (trial court had no authority to order disclosure of ballistics report to State where record did not show defendant ever intended to introduce report or put preparer of report on stand); *Van White v. State*, 990 P.2d 253, 269–71 (Ok. Ct. Crim. App. 1999) (finding report of nontestifying psychiatric expert protected by attorney-client privilege); *State v. Thompson*, 495 S.E.2d 437 (S.C. 1998) (attorney-client privilege protects defendant's communications to psychiatrist retained to aid in preparation of case; privilege not waived by disclosure of information during plea negotiations); *People v. Knuckles*, 650 N.E.2d 974 (Ill. 1995) (attorney-client privilege protects communications between defendant and nontestifying psychiatrist retained by defense); ABA STANDARDS FOR CRIMINAL JUSTICE: MENTAL HEALTH, Standard 7-3.3 & Commentary (1989) (discussing cases upholding attorney-client privilege), *available at* www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html.

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 (1997) (also basing decision on ground that disclosure was ordered at capital sentencing proceeding, after defendant had pled guilty [see discussion of this part of *Warren* holding under "Testifying experts" above]).

Sanctions. For a discussion of sanctions for the failure of the defendant to provide expert reports, *see supra* "Sanctions" in § 4.8A, Procedures for Reciprocal Discovery.

D. Witnesses

Notice of expert witnesses, including report of results of examinations or tests, credentials, opinion, and basis of opinion. 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.* The report requirement is consistent with opinions under the previous version of the statute recognizing the trial court's authority to compel testifying experts to reduce the results of examinations and tests to writing and provide them to the State. *See, e.g., State v. Davis,* 353 N.C. 1, 45–46 (2000); *State v. East*, 345 N.C. 535, 544–46 (1997); *State v. Bacon,* 337 N.C. 66, 83–85 (1994).

If the defendant intends to introduce expert testimony about the defendant's mental condition, the State may obtain an examination of the defendant. *See infra* "Insanity and other mental conditions," in § 4.8E, Defenses.

For a discussion of sanctions for the failure of the defense to identify a testifying expert witness or produce a written report, see *supra* "Sanctions" in § 4.8A, Procedures for Reciprocal Discovery.

Notice of 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. *Id.*; *see also* 6 LAFAVE, CRIMINAL PROCEDURE § 24.3(h), at 399–401 (interpreting *Webb v. Texas*, 409 U.S. 95 (1972), and other decisions as making it a due process violation for prosecutor to discourage prospective witnesses from testifying for defense).

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. The court also may permit any undisclosed witness to testify in the interest of justice. *See* G.S. 15A-905(c)(3).

E. Defenses

Notice of defenses. 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*, ___ N.C. App. ___, 720 S.E.2d 836 (2012) (defendant not entitled to jury instruction on involuntary 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 preluding 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 (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 (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. 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. The parties can agree to different, reasonable time periods for the exchange of information. *See* G.S. 15A-905(c)(1)a.

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).

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 (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 (1997) (relying on *Huff,* court of appeals finds that trial court did nor 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 where 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 supra* "Sanctions," in § 4.8A, Procedures for Reciprocal Discovery. 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 (1985), *aff'd as modified*, 316 N.C. 350 (1986); *State v. Johnson*, 35 N.C. App. 729 (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, but the defendant should still have the right to offer lay testimony in support of the defense. *See*

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-6.4 (1989), *available at* www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html.

Courts have held that if the defendant relies on a mental health defense at trial, the prosecution may only offer evidence from a compelled mental health examination to rebut the mental condition raised by the defendant; to protect the defendant's privilege against self-incrimination, the evidence cannot be offered on the issue of guilt. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-3.2 & Commentary (1989) (citing cases); 5 LAFAVE, CRIMINAL PROCEDURE § 20.5(c), at 481.

Legislative note: Effective for offenses committed on or after December 1, 2013, S.L. 2013-18 (S 45) adds G.S. 15A-1002(b)(4), which requires a judge who enters an order for an examination of the defendant's capacity to proceed to order release of relevant confidential information to the examiner, including medical and mental health records of the defendant. The defendant is entitled to notice and an opportunity to be heard before release of the records. *See supra* Appendix 2-1, Summary of 2013 Legislation.

Although this statute applies to capacity examinations, the same examiners (Central Regional Hospital staff) often perform both capacity examinations and examinations related to a defendant's mental health defense. *See generally supra* § 2.9, Admissibility at Trial of Results of Capacity Evaluation; *see also State v. Gillespie*, 180 N.C. App. 514 (2006) (indicating that if State's examiners are unable to evaluate a defendant's mental state at the time of the offense without reviewing additional medical records, they may obtain court order for production of the records; however, no statutory or case law requires defendant's mental health experts to cooperate with the State or state agencies or provide information to them beyond the defendant's discovery obligations), *aff'd as modified*, 362 N.C. 150 (2008) (resolving case on different grounds).

F. 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, e.g., supra* "Particular agencies" in § 4.3B, Agencies Subject to Disclosure Requirements. 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.

Before the filing of charges. The 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 ("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) (Sept. 2005), *available at* http://sogpubs.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.

After the filing of charges. After the filing of charges, 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 supra* "Who hears a motion for an order for records" in § 4.6A, Evidence in Possession of Third Parties.

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), *available at* http://ncinfo.iog.unc.edu/pubs/electronicversions/pg/botts.pdf. *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) (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), *available at* http://nccriminallaw.sog.unc.edu/?p=656. 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 (1997), *abrogated in part on other grounds by State v. Long*, 354 N.C. 534 (2001), *aff'd in part, rev'd in part sub nom. Gray v. Branker*, 529 F.3d 220 (4th Cir. 2008). 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 *supra* "Ex parte application" in § 4.6A, Evidence in Possession of Third Parties.

MOTIONS IN SUPERIOR COURT

LAB REPORTS

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5.8 Right to Other Assistance **5-19**

A. Interpreters

B. Transcripts
C. Other Expenses

This chapter focuses on motions for funds for the assistance of an expert (including the assistance of an investigator). Such motions are most appropriate in felony cases. Other forms of state-funded assistance (such as interpreters) are discussed briefly at the end of this chapter.

Experts can assist the defense in various ways, including among other things:

- reviewing the discovery relevant to their expertise, including any materials prepared by the State's experts,
- identifying gaps in the discovery that has been produced and additional discovery that should be requested,
- evaluating the client's mental state for purposes of suppression motions, trial defenses, and sentencing,
- preparing for any hearing to exclude testimony by the State's expert witnesses,
- helping defense counsel prepare for cross-examination of the State's experts, and
- testifying before the jury.

5.1 Right to Expert

A. Basis of Right

Due process. An indigent defendant's right to expert assistance rests primarily on the due process guarantee of fundamental fairness. The leading case is *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985), in which the United States Supreme Court held that the failure to provide an expert to an indigent defendant deprived him of a fair opportunity to present his defense and violated due process. North Carolina cases, both before and after *Ake,* recognize that fundamental fairness requires the appointment of an expert at state expense on a proper showing of need. *See, e.g., State v. Tatum*, 291 N.C. 73 (1976).

Other constitutional grounds. Other constitutional rights also may support appointment of an expert for an indigent defendant, including equal protection and the Sixth Amendment right to effective assistance of counsel. *See Ake*, 470 U.S. at 87 n.13 (because its ruling was based on due process, court declined to consider applicability of equal protection clause and Sixth Amendment); *State v. Ballard*, 333 N.C. 515 (1993) (Sixth Amendment right to assistance of counsel entitles defendant to apply ex parte for appointment of expert).

State constitutional provisions, such as article I, section 19 (law of the land) and article I, section 23 (rights of accused), also may support appointment of an expert. *See generally State v. Trolley,* 290 N.C. 349, 364 (1976) (law of the land clause requires that

administration of justice "be consistent with the fundamental principles of liberty and justice"); *State v. Hill*, 277 N.C. 547, 552 (1971) (under article I, section 23, "accused has the right to have counsel for his defense and to obtain witnesses in his behalf").

Statutory grounds. Section 7A-450(b) of the North Carolina General Statutes (hereinafter G.S.) provides that an indigent defendant is entitled to the assistance of counsel and other "necessary expenses of representation." Necessary expenses include expert assistance. *See State v. Tatum*, 291 N.C. 73 (1976); G.S. 7A-454 (authorizing payment of fees and other expenses for expert witnesses and other witnesses for an indigent person).

IDS rules. The Rules of the N.C. Commission on Indigent Defense Services (IDS Rules) recognize the right of an indigent defendant to expert assistance when needed and incorporate procedures for obtaining funding, discussed throughout this chapter. The IDS Rules reinforce a defendant's constitutional and statutory rights to an expert; they do not alter them.

B. Breadth of Right

The North Carolina courts have recognized that a defendant's right to expert assistance extends well beyond the specific circumstances presented in *Ake*, a capital case in which the defendant requested the assistance of a psychiatrist for the purpose of raising an insanity defense and contesting aggravating factors at sentencing.

Type of case. On a proper showing of need, an indigent defendant is entitled to expert assistance in both capital and noncapital cases. *See State v. Ballard*, 333 N.C. 515 (1993) (right to expert in noncapital murder case); *State v. Parks*, 331 N.C. 649 (1992) (right to expert in non-murder case).

Type of expert. An indigent defendant is entitled to any form of expert assistance necessary to his or her defense, not just the assistance of a psychiatrist. *See Ballard*, 333 N.C. 515, 518 (listing some of the experts considered by the North Carolina courts); *State v. Moore*, 321 N.C. 327 (1988) (defendant entitled to appointment of psychiatrist and fingerprint expert in same case).

Stage of case. A defendant has the right to the services of an expert on pretrial issues, such as suppression of a confession, as well as on issues that may arise in the guilt-innocence and sentencing phases of a trial or in post-conviction proceedings. *See State v. Taylor*, 327 N.C. 147 (1990) (recognizing right to expert assistance in post-conviction proceedings); *Moore*, 321 N.C. 327 (right to psychiatrist for purpose of assisting in preparation and presentation of motion to suppress confession); *State v. Gambrell*, 318 N.C. 249 (1986) (right to psychiatrist for both guilt and sentencing phases); *see also United States v. Cropp*, 127 F.3d 354 (4th Cir. 1997) (indigent defendant has right to gather psychiatric evidence relevant to sentencing, and trial judge may authorize psychiatric evaluation for this purpose).

Other cases in which a defendant has the right to expert assistance. For a discussion of the right to expert assistance in abuse, neglect, and dependency cases, see KELLA W. HATCHER, JANET MASON & JOHN RUBIN, ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA § 2.5E, at 44–45 (Funds for Experts and Other Expenses) (UNC School of Government, 2011), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/andtpr.pdf.

C. Right to Own Expert

Under *Ake* and North Carolina case law, a defendant has the right to an expert *for the defense*, not merely an independent expert employed by the court. *See Ake*, 470 U.S. at 83 (defendant has right to psychiatrist to "assist in evaluation, preparation, and presentation of the defense"); *Gambrell*, 318 N.C. 249 (recognizing requirements of majority opinion in *Ake*); *see also Smith v. McCormick*, 914 F.2d 1153, 1157 (9th Cir. 1990) (stating the "right to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate"). Thus, the defense determines the work to be performed by the expert (although not, of course, the expert's conclusions).

The courts have stopped short of holding that a defendant has a constitutional right to choose the individual who will serve as his or her expert. *See Ake*, 470 U.S. at 83 (defendant does not have constitutional right to choose particular psychiatrist or to receive funds to hire his or her own expert); *State v. Campbell*, 340 N.C. 612 (1995) (on defendant's motion for psychiatric assistance, no error where trial court appointed state psychiatrist who had performed earlier capacity examination); *see also Marshall v. United States*, 423 F.2d 1315 (10th Cir. 1970) (error to appoint FBI as investigator for defendant, as FBI had inescapable conflict of interest). However, trial judges generally allow the defendant to hire an expert of his or her choosing.

5.2 Required Showing for Expert

To obtain the services of an expert at state expense, a defendant must be (1) indigent and (2) in need of an expert's assistance. The procedure for applying for an expert differs in noncapital and capital cases, discussed *infra* in § 5.3, Applying for Funding, but the basic showing is the same.

A. Indigency

To qualify for a state-funded expert, the defendant must be indigent or at least partially indigent. Defendants represented by a public defender or other appointed counsel easily meet this requirement, as the court already has determined their indigency. A defendant able to retain counsel also may be considered indigent for the purpose of obtaining an expert if he or she cannot afford an expert's services. *See State v. Boyd*, 332 N.C. 101 (1992) (trial court erred in refusing to consider providing expert to defendant who was

able to retain counsel); *see also State v. Hoffman*, 281 N.C. 727, 738 (1972) (an indigent person is "one who does not have available, at the time they are required, adequate funds to pay a necessary cost of his defense").

A third party, such as a family member, may contribute funds for support services, such as the assistance of an expert, for an indigent defendant. *See* IDS Rule 1.9(e) & Commentary (prohibiting outside compensation for appointed attorneys beyond fees awarded in case, but permitting outside funds for support services).

B. Preliminary but Particularized Showing of Need

An indigent defendant must make a "threshold showing of specific necessity" to obtain the services of an expert. A defendant meets this standard by showing either that:

- he or she will be deprived of a fair trial without the expert's assistance; or
- there is a reasonable likelihood that the expert will materially assist the defendant in the preparation of his or her case. *See State v. Parks*, 331 N.C. 649 (1992) (finding that formulation satisfies requirements of *Ake*); *State v. Moore*, 321 N.C. 327 (1988) (defendant must show either of above two factors).

The cases emphasize both the preliminary *and* particularized nature of this showing. Thus, a defendant need not make a "prima facie" showing of what he or she intends to prove at trial; nor must the defendant's evidence be uncontradicted. *See, e.g.*, *Parks*, 331 N.C. 649 (defendant need not make prima facie showing of insanity to obtain expert's assistance; defendant need only show that insanity likely will be a significant factor at trial); *State v. Gambrell*, 318 N.C. 249, 256 (1986) (court should not base denial of psychiatric assistance on opinion of one psychiatrist "if there are other facts and circumstances casting doubt on that opinion"); *Moore*, 321 N.C. 327, 345 (defendant need not "discredit the state's expert witness before gaining access to his own").

A defendant must do more, however, than offer "undeveloped assertions that the requested assistance would be beneficial." *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985); *see also State v. Mills*, 332 N.C. 392, 400 (1992) (explaining that "[m]ere hope or suspicion that favorable evidence is available" is insufficient to support motion for expert assistance (citation omitted)); *State v. Speight*, 166 N.C. App. 106 (2004) (trial court did not err in denying funds for medical expert and accident reconstruction expert where defendant made unsupported and admittedly speculative assertions), *aff'd as modified*, 359 N.C. 602 (2005), *vacated on other grounds*, *North Carolina v. Speight*, 548 U.S. 923 (2006). In short, defense counsel may need to make a fairly detailed, but not conclusive, showing of need.

5.3. Applying for Funding

Since the creation of the Office of Indigent Defense Services (IDS) in 2000, the procedures for applying for funding have become more regularized. IDS has adopted

form applications for funding, rates of compensation, and procedures for payment. This section reviews the basic procedures for applying for funding. Additional resources are available on the IDS website (www.ncids.org) under the links for "Information for Counsel" and "Information for Experts."

A. Noncapital Cases

In non-capital cases (as well as non-criminal cases, such as juvenile delinquency cases), application for funding for expert assistance, investigators, and other related services is to the court. Compensation rates for expert witnesses paid from funds managed by the Office of Indigent Defense Services may not be higher than the rates set by the Administrative Office of the Courts (AOC) for expert witnesses paid from AOC funds. *See* G.S. 7A-498.5(f).

Two form applications for funding are available. A more detailed supporting motion should accompany the application. One form application contains standard compensation rates; the other requests a deviation from the standard rate. *See* AOC Form AOC-G-309, "Application and Order for Defense Expert Witness Funding in Non-Capital Criminal and Non-Criminal Cases at the Trial Level" (June 2012), *available at* www.nccourts.org/Forms/Documents/1265.pdf; AOC Form AOC-G-310, "Defense Petition for Expert Hourly Rate Deviation in Non-Capital Criminal and Non-Criminal Cases at the Trial Level and IDS Approval or Denial (June 2012), *available at* www.nccourts.org/Forms/Documents/1266.pdf. The forms state that they should be used in noncapital cases for all requests for funding for expert services except for certain flat fee services, such as lab tests. Counsel still must obtain prior approval from the court for funding for such services.

Because of the detail that counsel may need to provide, counsel should ordinarily ask to be heard ex parte on a motion for expert funding. *See infra* § 5.5, Obtaining an Expert Ex Parte in Noncapital Cases.

B. Capital Cases

In capital cases, requests for expert funding are governed by Part 2D of the IDS Rules. A "capital" case is defined as any case that includes a charge of first-degree murder or an undesignated degree of murder, except cases in which the defendant was under 18 years of age at the time of the offense and therefore ineligible for the death penalty. *See* IDS Rule 2A.1. Counsel first must apply to the Director of IDS or his or her designee for authorization to retain and pay for an expert. The director's designee for requests for expert funding in capital cases is the Capital Defender. Counsel must apply in writing, and the request should be as specific as the motion required under *Ake* and G.S. 7A-450(a). Applications to IDS for funding in capital cases are automatically ex parte and confidential. *See* IDS Rule 2D.2. Counsel should use the form request developed by IDS. *See* Form IDS-028, "Ex Parte Request for Expert Funding: Potentially Capital Cases at the Trial Level" (June 2012), *available at*

www.ncids.org/Forms&Applications/Capital_Trial_Forms/%28ids28%29ExpertRequest.pdf.

If IDS does not approve a request for expert funding in a capital case, counsel then may apply to the court in which the case is pending; counsel must attach to the application a copy of IDS's notice of disapproval and a copy of counsel's original request. If application to the court is necessary, counsel should apply ex parte. Counsel must send to IDS a copy of any court order approving expert funds. If counsel discovers new or additional information relevant to the request, counsel should submit a new application to IDS before submitting a request to the court.

C. Inmate Cases

In cases in which IDS provides counsel in cases pursuant to the State's obligation to provide inmates with legal assistance and access to the courts (*see infra* § 12.1A, Right to Appointed Counsel), requests for funds for experts go to IDS. The procedure is similar to the procedure for obtaining funds in capital cases, discussed above. *See* IDS Rule 4.6.

5.4 Components of Request for Funding

A. Generally

This section discusses potential ingredients of a motion for funds for an expert. Many of these ingredients are now included in the form applications for expert funding, referenced *supra* in § 5.3, Applying for Funding. Some of these components, such as a more detailed description of and justification for the work to be performed, should be included in the supporting motion.

In motions to a judge in a noncapital case, some defense attorneys make a detailed showing in the motion itself; others make a relatively general showing in the motion and present the supporting reasons and evidence (documents, affidavits, counsel's own observations, etc.) when making the motion to the judge. In either event, counsel should be prepared to present all of the supporting evidence to make the request as persuasive as possible and to preserve the record for appeal.

The exact showing will vary with the type of expert sought. For a discussion of different types of experts, see *infra* § 5.6, Specific Types of Experts. Sample motions for experts are available on the IDS website, www.ncids.org (select "Training & Resources," then "Motions Bank, Non-Capital").

B. Area of Expertise

Defense counsel should specify the particular kind of expert needed (e.g., psychiatrist, pathologist, fingerprint expert, etc.). A general description of a vague area of expertise may not be sufficient. *See, e.g.*, *State v. Johnson*, 317 N.C. 193 (1986) (trial court did not

err in denying general request for "medical expert" to review medical records, autopsy reports, and scientific data). Although a defendant may obtain more than one type of expert on a proper showing, a blunderbuss request for several experts is unlikely to succeed. *See, e.g.*, *State v. Mills*, 332 N.C. 392 (1992) (characterizing motion as fanciful "wish list" and denying in entirety motion for experts in psychiatry, forensic serology, DNA identification testing, forensic chemistry, statistics, genetics, metallurgy, pathology, private investigation, and canine tracking).

C. Name of Expert

Counsel should determine the expert he or she wants to use before applying for funding. Identifying the expert (and describing his or her qualifications) not only authorizes payment to the expert if the motion is granted but also helps substantiate the need for expert assistance. A curriculum vitae can be included with the motion. Counsel should interview the prospective expert before making the motion, both to determine his or her and suitability and availability for the case (before and during trial) and to obtain information in support of the motion.

Several sources may be helpful in locating suitable experts. Often the best sources of referrals are other criminal lawyers. In addition to public defender offices and private criminal lawyers, it may be useful to contact the Forensic Resource Counsel Office of IDS, www.ncids.com/forensic/experts/experts.shtml, which maintains a database of forensics experts; the Trial Resource Unit of IDS, www.ncids.org, and the Center for Death Penalty Litigation, www.cdpl.org, which work on capital cases but may have information about experts who would be helpful in noncapital cases; and organizations of criminal lawyers (such as the National Association of Criminal Defense Lawyers, www.nacdl.org, and National Legal Aid & Defender Association, www.nlada100years.org). Counsel also can look at university faculty directories, membership lists of professional associations, and professional journals for potential experts.

D. Amount of Funds

The actual relief requested in a motion for expert assistance is authorization to expend state funds to retain an expert. Counsel should specify the amount of money needed (based on compensation rate, number of hours required to do the work, costs of testing or other procedures, travel expenses, etc.) and should be prepared to explain the reasonableness of the amount. Counsel may reapply for additional funds as needed. The expert may not be paid if his or her time exceeds the preapproved amount.

Compensation rates for expert witnesses paid from IDS funds may not be higher than the rates set by the Administrative Office of the Courts (AOC) for expert witnesses paid from AOC funds under G.S. 7A-314(d). *See* G.S. 7A-498.5(f). Counsel therefore should find out from the potential expert whether he or she is willing to work within state rates. IDS may authorize a deviation from the standard rates when justified. The applicable form applications, referenced *supra* in § 5.3, Applying for Funding, contain the standard rates

and grounds for requesting a deviation. *See also* "Information for Experts" on the IDS website, www.ncids.org.

Practice note: The form application for funding in noncapital cases includes an order by the court authorizing a specified amount of money for the expert's services as well as a compensation calculator to be filled out by the expert on completion of the work. The expert submits the entire form to IDS for payment on completion of the work and provides a copy, along with an itemized time sheet, to defense counsel.

E. What Expert Will Do

Counsel should specifically describe the work to be performed by the expert—review of records, examination of defendant, interview of particular witnesses, testifying at trial, etc. Failure to explain what the expert will do may hurt the motion. *Compare State v. Parks*, 331 N.C. 649 (1992) (trial court erred in denying motion for psychiatric assistance where defendant intended to raise insanity defense and needed psychiatrist to evaluate his condition, testify at trial, and counter opinion of State's expert), *with State v. Wilson*, 322 N.C. 117 (1988) (motion denied where defendant indicated only that assistance of psychologist might be helpful to him in preparing his defense).

F. Why Expert's Work Is Necessary

This part is the most fluid—and by far the most critical—part of a showing of need. *See generally State v. Jones*, 344 N.C. 722, 726 (1996) (to determine the requisite showing, the "court should consider all the facts and circumstances known to it at the time the motion" is made (citation omitted)). Although there are no rigid rules on what to present, consider doing the following:

- Identify the issues that you intend to pursue and that you need expert assistance to develop. To the extent then available, provide specific facts supporting your position on those issues. For example, if you are considering a mental health defense, describe the evidence supporting the defense. *See, e.g.*, *Parks*, 331 N.C. 649 (court found persuasive the nine circumstances provided in support of request, including previous diagnosis of defendant and counsel's own observations of and conversations with defendant).
- Emphasize the significance of the issues: the more central the issue, the more persuasive the assertion of need may be. *See, e.g.*, *Jones*, 344 N.C. 722 (1996) (defendant entitled to psychiatric expert because only possible defense to charges was mental health defense); *State v. Moore*, 321 N.C. 327 (1988) (defendant entitled to fingerprint expert where contested palm print was only physical evidence connecting defendant to crime scene).
- Deal with contrary findings by the State's experts. For example, if the State already has conducted an analysis of blood or other physical evidence, explain what a defense expert may be able to add. Although the cases state that the defendant need not show that the State's expert is wrong (*see Moore*, 321 N.C. 327), you can strengthen your

motion by pointing out areas of weakness in the State's analysis or at least areas where reasonable people might differ. Before making the motion, try to interview the State's expert and obtain any reports, test results, or other information that may support the motion. If the State's expert is uncooperative, that fact may bolster your showing.

- Explain why you cannot perform the tasks with existing resources and why you require special expertise or assistance. In some instances, the point is self-evident. *See, e.g.*, *Moore*, 321 N.C. 327 (defense could not challenge fingerprint evidence without fingerprint expert). In other instances, you may need to convince the court that the expert would bring unique abilities to the case. *See, e.g.*, *State v. Kilpatrick*, 343 N.C. 466 (1996) (defense failed to present any specific evidence or argument on why counsel needed assistance of jury selection expert in conducting voir dire).

G. Documentation

Counsel should provide documentary support for the motion—affidavits of counsel and prospective experts, information obtained through discovery, scientific articles, etc. How to present this evidence to minimize the risk of disclosure to the prosecution is discussed further in the next section.

5.5 Obtaining an Expert Ex Parte in Noncapital Cases

A. Importance of Ex Parte Hearing

Grounds to obtain ex parte hearing. In noncapital cases, the court hears requests for expert funding. Regardless of the type of expert sought, defense counsel should always ask that the court hear the motion ex parte—that is, without notice to the prosecutor and without the prosecutor present. In capital cases, applications for funding are made to IDS and are always ex parte; however, if IDS denies the application and the defendant requests funding from the court, the defendant should ask the court to hear the request ex parte. *See supra* § 5.3, Applying for Funding.

North Carolina first recognized the defendant's right to an ex parte hearing in *State v. Ballard*, 333 N.C. 515 (1993), and *State v. Bates*, 333 N.C. 523 (1993), which held that an indigent defendant is entitled to an ex parte hearing when moving for the assistance of a mental health expert. The court found that a hearing open to the prosecution would jeopardize a defendant's right to effective assistance of counsel under the Sixth Amendment because it would expose defense strategy to the prosecution and inhibit defense counsel from putting forward his or her best evidence. An open hearing also could expose privileged communications between lawyer and client (which the court found to be an essential part of the Sixth Amendment right to counsel) and force the defendant to reveal incriminating information (in violation of the Fifth Amendment privilege against self-incrimination). *See also State v. Greene*, 335 N.C. 548 (1994) (error to deny ex parte hearing on motion for mental health expert).

Although *Ballard* and *Bates* involved mental health experts, the reasoning of those cases supports ex parte hearings for all types of experts. Most judges now proceed ex parte as a matter of course if requested by the defendant. (Although earlier appellate cases in North Carolina found that the trial court did not abuse its discretion in refusing to hold an ex parte hearing (*see State v. White*, 340 N.C. 264 (1995); *State v. Garner*, 136 N.C. App. 1 (1999)), no reported appellate decision has addressed the issue recently.) If counsel must argue the point, he or she should emphasize the factors identified in *Ballard* and *Bates*—namely, that an open hearing could expose defense strategy and confidential attorney-client communications and impinge on the privilege against self-incrimination. The defendant need not meet the threshold for obtaining funding for an expert to justify the holding of an ex parte hearing. *See State v. White*, 340 N.C. 264, 277 (so stating); *see also State v. Phipps*, 331 N.C. 427, 451 (1992) (although the court denied defendant's motion for an ex parte hearing on a fingerprint identification expert, the court stated that there are "strong reasons" to hold all hearings for expert assistance ex parte); *United States v. Sutton*, 464 F.2d 552 (5th Cir. 1972) (per curiam) (trial court erred by failing to hold hearing ex parte, as required by federal law, on motion for investigator); *Marshall v. United States*, 423 F.2d 1315 (10th Cir. 1970) (use of adversarial rather than ex parte hearing to explore defendant's need for investigator was error).

If request for ex parte hearing denied. If counsel cannot obtain an ex parte hearing, he or she must decide whether to make the motion for expert assistance in open court (and expose potentially damaging information to the prosecution) or forego the motion altogether (and give up the chance of obtaining funds for an expert). Some of the implications for appeal are discussed below. These principles may make it riskier for a trial court to refuse to hear a request for funding ex parte.

- If the defendant makes the motion in open court and the trial judge refuses to fund an expert, the defendant can argue on appeal that he or she could have made a stronger showing if allowed to do so ex parte. *See Bates*, 333 N.C. 523 (court finds it impossible to determine what evidence defendant might have offered had he been allowed to do so out of prosecutor's presence).
- If the defendant decides not to pursue the motion in open court, *Ballard* indicates that the defendant may not need to make an offer of proof to preserve for appellate review the trial judge's refusal to hold an ex parte hearing (*Ballard*, 333 N.C. 515, 523 n.2); nevertheless, counsel should ask to submit the supporting evidence to the trial court under seal.

Regardless of which way you proceed, make a record of the trial court's decision not to hear the motion ex parte.

B. Who Hears the Motion

After transfer of case to superior court. An ex parte motion for expert assistance in a noncapital case ordinarily may be heard by any superior court judge of the judicial district in which the case is pending. *Compare* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 25(2) (for capital motions for appropriate relief (MARs), rule requires that expert funding

requests made before filing of MAR and after denial of funding by IDS [discussed *supra* in § 5.3, Applying for Funding] be ruled on by senior resident judge or designee). Thus, any superior court judge assigned to hold court in the district ordinarily has authority to hear the motion, whether or not actually holding court at the time. *See* G.S. 7A-47 (in-chambers jurisdiction extends until adjournment or expiration of session to which judge is assigned). Any resident superior court judge also has authority to hear the motion, whether or not currently assigned to hold court in the district. *See* G.S. 7A-47.1 (resident superior court judge has concurrent jurisdiction with judges holding court in district to hear and pass on matters not requiring jury).

Before transfer of case to superior court. In some felony cases, a defendant may need an expert before the case is transferred to superior court. For example, in a case involving a mental health defense such as diminished capacity or insanity, which turns on the defendant's state of mind at the time of the offense, counsel may want to retain a mental health expert as soon after the offense as possible. Counsel should be able to obtain authorization for funding for an expert from a district court judge in that instance. *See State v. Jones*, 133 N.C. App. 448, 463 (1999), *aff'd in part and rev'd in part on other grounds*, 353 N.C. 159 (2000) (holding that before transfer of a felony case to superior court, the district court has jurisdiction to rule on preliminary matters, in this instance, production of certain medical records). The superior court also may have authority to hear the motion. *See State v. Jackson*, 77 N.C. App. 491 (1985) (court notes jurisdiction of superior court before indictment to enter commitment order to determine defendant's capacity to stand trial).

C. Filing, Hearing, and Disposition of Motion

In moving ex parte for funds for an expert in a noncapital case, counsel should keep in mind maintaining the confidentiality of the proceedings as well as preserving the record for appeal.

The motion papers and any other materials should be presented directly to the judge who will hear the matter. Ordinarily, a separate written motion requesting to be heard ex parte (in addition to the motion for funds for an expert) is unnecessary. The request to be heard ex parte and request for funding for an expert can be combined into a single motion. Sample motions can be found on the IDS website, www.ncids.org (select "Training & Resources," then "Motions Bank, Non-Capital").

If the judge hears the motion ex parte but denies funds for an expert, counsel may renew the motion upon obtaining additional supporting evidence. *See generally State v. Jones*, 344 N.C. 722 (1996) (after court initially denied motion for psychiatrist, counsel renewed motion and attached own affidavit that related his conversations with defendant and included medical notes of defendant's previous doctor; court erred in denying motion). If the motion ultimately is denied, obtain a court reporter and ask the judge to hear and rule on the motion on the record (but still in chambers). For purposes of appeal, it is imperative to present on the record all of the evidence and arguments supporting the motion. You should ask the judge to order that the motion, supporting materials, and

order denying the motion be sealed and that the court reporter not transcribe or disclose the proceedings except on the defendant's request.

If the motion is granted, counsel likewise should ask that the order and motion papers be sealed and preserved for the record. Be sure to keep a copy of the motion and order for your own files. Also provide a copy of the signed order to the expert, which is necessary for the expert to obtain payment for his or her work.

D. Other Procedural Issues

There is no time limit on a motion for expert assistance. *But cf. State v. Jones*, 342 N.C. 523 (1996) (defendant requested expert day before trial; belated nature of request and other factors demonstrated lack of need).

The defendant ordinarily does not need to be present at the hearing on the motion. *See State v. Seaberry*, 97 N.C. App. 203 (1990) (finding on facts that motion hearing was not critical stage of proceedings and that defendant did not have right to be present; court finds in alternative that noncapital defendants may waive right to be present and that this defendant waived right by not requesting to be present). For a further discussion of the right to presence, see 2 NORTH CAROLINA DEFENDER MANUAL § 21.1 (Right to Be Present) (UNC School of Government, 2d ed. 2012).

5.6 Specific Types of Experts

The legal standard for obtaining an expert is the same in all cases—that is, the defendant must make a preliminary showing of specific need—but application of the standard may vary with the type of expert sought. For example, in some cases the courts have found that the defendant did not make a sufficient showing of need for a jury consultant; however, these cases may have little bearing on the required showing for other types of assistance. The discussion below reviews cases involving requests for funding for different types of experts. For additional case summaries, see JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK at 44–48 (UNC School of Government, 3d ed. 2013).

A. Mental Health Experts

Case law. North Carolina case law is generally favorable to the defense on motions for mental health experts. On a number of occasions, the N.C. Supreme Court has reversed convictions for failure to grant the defense a mental health expert. *See, e.g., State v. Jones*, 344 N.C. 722 (1996); *State v. Parks*, 331 N.C. 649 (1992); *State v. Moore*, 321 N.C. 327 (1988); *State v. Gambrell*, 318 N.C. 249 (1986). *Compare, e.g., State v. Anderson*, 350 N.C. 152, 160–63 (1999) (defendant claimed that she needed a psychiatric expert to respond to the State's evidence and did not claim that her sanity at the time of the offense or apparently any other mental health issue was a significant factor in the case; court found that the request "was based on mere speculation of what trial tactic the

State would employ rather than the requisite showing of specific need"); *State v. Sokolowski*, 344 N.C. 428 (1996) (upholding denial of funding for psychiatric expert to develop insanity defense where defendant testified he did not want to plead insanity and relied on self-defense). These cases illustrate the kinds of information that counsel can and should marshal when moving for mental health experts (e.g., counsel's observations of and conversations with the client; treatment, social services, school, and other records bearing on client's mental health; etc.). *See also* Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Psychiatrist or Psychologist*, 85 A.L.R.4th 19 (1991).

If the defendant already has a psychological or psychiatric expert, he or she may need to make an additional showing to obtain funds for a more specialized mental health expert. *See State v. Page*, 346 N.C. 689 (1997) (upholding denial of funds for forensic psychiatrist when defendant had assistance of both a psychiatric and psychological expert and failed to make showing of need for more specialized expert); *State v. Rose*, 339 N.C. 172 (1994) (upholding denial of funds for neuropsychologist where defendant had already been examined by two psychiatrists); *State v. Reeves*, 337 N.C. 700 (1994) (upholding denial of funds for sexual disorder expert when defendant had assistance of psychiatric expert, who consulted with sexual disorder expert, and failed to show how specialized expert would have added to defense of case).

Impact of capacity examination. Cases involving mental health issues also may involve issues about the client's capacity to stand trial. In such cases, counsel should consider moving for funds for a mental health expert on all applicable mental health issues (defenses, mitigating factors, etc.), including capacity. *See supra* § 2.4, Obtaining an Expert Evaluation (discussing options for obtaining capacity evaluation). Once the expert has evaluated the client, counsel will be in a better position to determine whether there are grounds for questioning capacity.

Once counsel questions a client's capacity, the court may order a capacity examination at a state facility (i.e., Central Regional Hospital) or at a local mental health facility depending on the offense. *See supra* § 2.5, Examination by State Facility or Local Examiner. The impact of such an examination may vary.

- A state-conducted capacity examination may have no impact on a later motion for expert assistance. The courts have held that a capacity examination does not satisfy the State's obligation to provide the defendant with a mental health expert to assist with preparation of a defense. *See Moore*, 321 N.C. 327 (examination to determine capacity not substitute for mental health expert's assistance in preparing for trial); *see also Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) (psychiatry is "not . . . an exact science, and psychiatrists disagree widely and frequently").
- A capacity examination may lend support to a motion for a mental health expert, as it could show that the defendant, even if capable to proceed, suffers from some mental health problems.
- A capacity examination may undermine a later motion for a mental health expert as well as presentation of the defense in general. *See State v. Pierce*, 346 N.C. 471

(1997) (in finding that defendant had not made sufficient showing of need, court relied in part on findings from earlier capacity examination); *State v. Campbell*, 340 N.C. 612 (1995) (on motion for assistance of mental health expert, trial court appointed same psychiatrist who had earlier found defendant capable of standing trial); *see also supra* § 2.9, Admissibility at Trial of Results of Capacity Evaluation (evidence from capacity examination may be admissible to rebut mental health defense).

Victim's mental health. A defendant does not have the right to compel a victim to submit to a mental health examination; however, a defendant may be able to obtain funds for an expert to review mental health evaluations and records of the victim. *See State v. Horn*, 337 N.C. 449, 453–54 (1994). For a discussion of obtaining information about the victim's mental health, including the potential importance of first making a motion for a mental health examination of the victim, see *supra* § 4.4C, Examinations and Interviews of Witnesses.

B. Experts on Physical Evidence

Some favorable case law exists on obtaining experts on physical evidence. *See, e.g., State v. Bridges*, 325 N.C. 529 (1989); *State v. Moore*, 321 N.C. 327 (1988). In both cases, the only direct evidence connecting the defendant to the crime scene was physical evidence (fingerprints), and the only expert testimony was from witnesses for the State, not independent experts. In those circumstances, the defendants were entitled to their own fingerprint experts without any further showing of need. When physical evidence is not as vital to the State's case, counsel may need to make an additional showing of need for an expert. *See, e.g.*, *State v. Seaberry*, 97 N.C. App. 203 (1990) (ballistics evidence was important to State's case but was not only evidence connecting defendant to crime; defendant made insufficient showing of need for own ballistics expert).

If the defense needs more than one expert on physical evidence, counsel should make a showing of need as to each expert. *See, e.g., State v. McNeill*, 349 N.C. 634, 649–50 (1998) (finding that the defendant failed to make a sufficient showing for funds for a forensic crime-scene expert in addition to funds already authorized for investigator, fingerprint expert, and audiologist), *vacated sub nom. on other grounds*, *McNeill v. Branker*, 601 F. Supp. 2d 694 (E.D.N.C. 2009); *see also* Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Chemist, Toxicologist, Technician, Narcotics Expert, or Similar Nonmedical Specialist in Substance Analysis*, 74 A.L.R.4th 388 (1989); Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Fingerprint Expert*, 72 A.L.R.4th 874 (1989); Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Ballistics Experts*, 71 A.L.R.4th 638 (1989).

Concerns about the reliability of particular forensic tests and crime lab procedures in general may bolster a defense request for an expert on physical evidence. *See, e.g.*, State Crime Laboratory—Reports, Forms and Legislation, www.ncids.com/forensic/sbi/reports.shtml

(collecting documents indicating concerns about forensic tests and procedures in North Carolina). For additional assistance in identifying areas in which an expert on physical evidence would be useful as well as information about possible experts, defense counsel should contact IDS's Forensic Resource Counsel. For additional information about the resources available through the Forensic Resource Counsel's office, see www.ncids.com/forensic/index.shtml.

C. Investigators

Case law. The courts have adhered to the general legal standard for appointment of an expert when ruling on a motion for an investigator—that is, the defendant must make a preliminary showing of specific need. But, defendants sometimes have had difficulty meeting the standard because, until they get an investigator, they may not know what evidence is available or helpful. *See, e.g.*, *State v. McCullers*, 341 N.C. 19 (1995) (motion for investigator denied where defense presented no specific evidence indicating how witnesses may have been necessary to his defense or in what manner their testimony could assist defendant); *State v. Tatum*, 291 N.C. 73 (1976) (court states that defendants almost always would benefit from services of investigator; court therefore concludes that defendant must make clear showing that specific evidence is reasonably available and necessary for a proper defense). *See also State v. Potts*, 334 N.C. 575 (1993) (defendant entitled to funds for investigator on proper showing); Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Investigators*, 81 A.L.R.4th 259 (1990).

Points of emphasis. To the extent possible, counsel should forecast for the court the information that an investigator may be able to obtain. Thus, counsel should identify the witnesses to be interviewed, the information that the witnesses may have, and why the information is important to the defense. If the witness's name or location is unknown and the witness must be tracked down, indicate that problem. Identify any other tasks that an investigator would perform (obtaining documents, photographing locations, etc.).

Counsel also should indicate why he or she cannot do the investigative work. General assertions that counsel is too busy or lacks the necessary skills may not suffice. *See, e.g.*, *State v. Phipps*, 331 N.C. 427 (1992). Identify the obligations (case load, trial schedule, etc.) that prevent you from doing the investigative work. If you are an attorney in a public defender's office, indicate why your office's investigator is unable to do the investigation (e.g., investigator is unavailable, investigation requires additional resources, etc.). If the investigation requires special skills, indicate that as well. *See generally State v. Zuniga*, 320 N.C. 233 (1987) (defendant did not demonstrate language barrier requiring appointment of investigator). Remind the court that counsel ordinarily should not testify at trial to impeach a witness who has changed his or her story. *See* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 3.7 (2003) (disapproving of lawyer acting as witness except in certain circumstances). Private counsel appointed to represent an indigent defendant also can point out that an investigator would cost the State less than if appointed counsel did the investigative work.

D. Other Experts

Selected appellate opinions on other types of expert assistance are cited below, but opinions upholding the denial of funds may not reflect the actual practice of trial courts, which may be more favorable to the defense. In addition to those listed below, trial courts have authorized funds for mitigation specialists, social workers, eyewitness identification experts, polygraph experts, DNA experts, handwriting experts, and others.

Medical experts. *See, e.g.*, *State v. Brown*, 357 N.C. 382 (2003) (trial court approved defendant's initial request for mental health expert; defendant not entitled to additional expert on physiology of substance induced mood disorder); *State v. Cummings*, 353 N.C. 281, 293–94 (2001) (upholding denial of funds for optometrist to demonstrate that defendant could not read *Miranda* waiver form); *State v. Penley*, 318 N.C. 30, 50–52 (1986) (defendant "arguably made a threshold showing" for medical expert, but for other reasons court finds no error in denial of funds).

Pathologists. *See, e.g.*, *Penley*, 318 N.C. 30, 50–52 (defendant "arguably made a threshold showing" for pathologist); *see also Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980) (error to deny pathologist).

Jury consultants. *See, e.g.*, *State v. Zuniga*, 320 N.C. 233 (1987) (jury selection expert denied; requested expert lacked skills for stated purpose); *State v. Watson*, 310 N.C. 384 (1984) (denial of expert to evaluate effect of pretrial publicity for purposes of moving to change venue and selecting jury; insufficient showing of need). *See also* Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Expert in Social Attitudes*, 74 A.L.R.4th 330 (1989).

Statisticians. *See, e.g.*, *State v. Moore*, 100 N.C. App. 217 (1990) (initial motion for statistical expert to analyze race discrimination in grand and petit juries granted; motion for funds for additional study denied), *rev'd on other grounds*, 329 N.C. 245 (1991).

5.7 Confidentiality of Expert's Work

If counsel obtains funds for expert assistance, counsel will need to meet with the expert and provide the expert with information on those aspects of the case with which the expert will be involved. Depending on the type of expert, counsel may need to provide the expert with witness statements, reports, photographs, physical evidence, and other information obtained through discovery and investigation; in cases in which the defendant's state of mind is at issue, the expert may need to meet with and interview the client. To make the most effective use of the funds authorized for the expert's work, counsel may not want to provide the expert with all of the discovery in the case, particularly if voluminous, but counsel should provide the expert with all pertinent information. The failure to do so may make it more difficult for the expert to form an opinion and expose him or her to damaging cross-examination.

Counsel should anticipate that the information reviewed and work generated by an expert will be discoverable by the prosecution, including statements by the defendant and correspondence between the expert and counsel. Some protections exist, however.

- If the defense does not call the expert as a witness, the prosecution generally does *not* have a right to discover the expert's work, including materials on which the expert relied if not otherwise discoverable. *See supra* "Nontestifying experts" in § 4.8C, Results of Examinations and Tests (discussing restrictions on discovery of expert's work and circumstances when work may be discoverable).
- If the defense intends to call the expert as a witness, the prosecution generally is entitled to pretrial discovery about the expert and his or her findings. *See supra* § 4.8C, Results of Examinations and Tests. The expert also must prepare a written report and provide it to the prosecution. *See supra* § 4.8D, Witnesses.
- Once on the stand, an expert may be required to disclose the basis of his or her opinion, including materials he or she reviewed and communications with the defendant, if not revealed earlier in discovery. *See supra* "Testifying experts" in § 4.8C, Results of Examinations and Tests; *see also generally* N.C. R. EVID. 705 (disclosure of basis of opinion); 2 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 188, at 736-47 (7th ed. 2011) (discussing application of Rule 705).

To prevent disclosure of the expert's work until required, counsel may want to have the expert enter into a nondisclosure agreement. A sample agreement is available on the IDS website, www.ncids.org (select "Training & Resources," then "Motions Bank, Non-Capital"). *See also* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 3.4(f) (2006) (lawyer may request person other than client to refrain from voluntarily giving relevant information to another party if person is agent of client and the lawyer reasonably believes that person's interests will not be adversely affected by refraining from giving the information).

In *Crist v. Moffatt*, 326 N.C. 326 (1990), the Supreme Court held in a civil case that the defendant's lawyer could not interview the plaintiff's physician without the plaintiff's consent and could obtain information from the plaintiff's physician only through statutorily recognized methods of discovery. In *State v. Jones*, 133 N.C. App. 448, 463 (1999), *aff'd in part and rev'd in part on other grounds*, 353 N.C. 159 (2000), the Court of Appeals questioned whether this prohibition applies in criminal cases but did not decide the issue because it was not properly preserved. Regardless of whether a prosecutor may contact a defense expert without the defendant's consent, defense counsel still may instruct a defense expert not to discuss the case without the defendant's consent or unless otherwise ordered to do so.

5.8 Right to Other Assistance

A. Interpreters

For deaf clients. Under G.S. Ch. 8B, a deaf person is entitled to a qualified interpreter for any interrogation, arraignment, bail hearing, preliminary proceeding, or trial. *See also* G.S. 8B-2(d) (no statement by a deaf person without a qualified interpreter present is admissible for any purpose); G.S. 8B-5 (if a communication made by a deaf person through an interpreter is privileged, the privilege extends to the interpreter).

Obtaining an interpreter is a routine matter, not subject to the requirements on appointment of experts discussed above. An AOC form for appointment of a deaf interpreter (AOC-G-116, "Motion, Appointment and Order Authorizing Payment of Deaf Interpreter or Other Accommodation" (Mar. 2007)) is available at www.nccourts.org/Forms/Documents/1020.pdf. The superior court clerk should have a list of qualified interpreters. *See* G.S. 8B-6.

For clients with limited English proficiency (LEP). An indigent criminal defendant with limited English proficiency is entitled to a foreign language interpreter for in-court proceedings (such as trials, hearings, and other appearances) and out-of-court matters (such as interviews of the defendant and of LEP witnesses). Obtaining an interpreter is a routine matter, not subject to the requirements on appointment of experts discussed above. The AOC is responsible for administering the foreign language interpreter program, and an AOC form for appointment of a foreign language interpreter (AOC-G-107, "Motion and Appointment Authorizing Foreign Language Interpreter/Translator" (Mar. 2007)) is available at www.nccourts.org/Forms/Documents/833.pdf. The form covers both in-court and out-of-court services. Under an agreement between IDS and AOC, IDS funds out-of-court interpreter services for defendants and AOC funds in-court services, but the procedure for obtaining an interpreter is the same. *See* Office of Indigent Defense Services, Out-of-Court Foreign Language Interpretation and Translation for Indigent Defendants and Respondents (Oct. 11, 2012), *available at* www.ncids.org/Rules%20&%20Procedures/Other%20Policies/foreign%20language%20interpreter%20policy.pdf.

No North Carolina statute specifically addresses the right to a foreign language interpreter. *See generally* G.S. 7A-343(9c) (AOC director's duties include prescribing policies and procedures for appointment and payment of foreign language interpreters); *see also State v. Torres*, 322 N.C. 440 (1988) (recognizing court's inherent authority to appoint foreign language interpreter). G.S. 7A-314(f), which dealt specifically with interpreters for indigent defendants, was repealed in 2012 and was replaced by an uncodified provision directing the Judicial Department to provide assistance to LEP individuals, assist the courts in the fair, efficient, and accurate transaction of business, and provide more meaningful access to the courts. *See* 2012 N.C. Sess. Laws Ch. 142, § 16.3(c) (H 950). The 2012 legislative change was intended to expand services. *See* John W. Smith, Memorandum: Notice of Expansion and Enhancement of Foreign Language Interpreting Services (Admin. Office of the Courts, Aug. 8, 2012), *available at*

www.nccourts.org/Citizens/CPrograms/Foreign/Documents/Foreign_Language_Access_and_Interpreting_Services_Memo.pdf. The change was prompted by a March 2012 report from the U.S. Department of Justice finding that North Carolina's provision of interpreter services was unduly limited and did not comply with federal law. *See* Report of Findings (U.S. Dep't. of Justice, Mar. 8, 2012), *available at* www.justice.gov/crt/about/cor/TitleVI/030812_DOJ_Letter_to_NC_AOC.pdf.

An indigent defendant also may obtain necessary translation services. (Translation refers to converting written text from one language to another, while interpretation refers to rendering statements spoken in one language into statements spoken in another language.) For a discussion of obtaining translation services, see Office of Indigent Defense Services, Out-of-Court Foreign Language Interpretation and Translation for Indigent Defendants and Respondents at 4 (Oct. 11, 2012) (describing procedure for obtaining translation of attorney-client correspondence and circumstances in which translation of discovery may be appropriate), *available at* www.ncids.org/Rules%20&%20Procedures/Other%20Policies/foreign%20language%20interpreter%20policy.pdf.

For others. An interpreter may be appointed whenever the defendant's normal communication is unintelligible. *See State v. McLellan*, 56 N.C. App. 101 (1982) (defendant had speech impediment).

B. Transcripts

As a matter of equal protection, an indigent defendant is entitled to a transcript of prior proceedings when the transcript is needed for an effective defense or appeal. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971); *see also* G.S. 7A-450(b) (indigent defendant entitled to "counsel and the other necessary expenses of representation"). The test is "(1) whether a transcript is necessary for preparing an effective defense and (2) whether there are alternative devices available to the defendant which are substantially equivalent to a transcript." *State v. Rankin*, 306 N.C. 712, 716 (1982). Under this test, an indigent defendant may be entitled to a transcript of prior proceedings in the case, such as the transcript of a probable cause hearing or other evidentiary proceeding. *See generally State v. Reid*, 312 N.C. 322, 323 (1984) (per curiam) (defendant entitled to new trial where not provided with transcript of prior trial before retrial); *State v. Tyson*, ___ N.C. App. ___, 725 S.E.2d 97 (2012) (same). A sample motion for production of transcript of a probable cause hearing in a juvenile case is available on the IDS website, www.ncids.org (select "Training & Resources," then "Motions Bank, Non-Capital").

C. Other Expenses

Under G.S. 7A-450(b), the State has the responsibility to provide an indigent defendant with counsel and "the other necessary expenses of representation." This general authorization may provide the basis for payment of various expenses incident to representation, such as suitable clothing for the defendant.

GUIDE TO WORKING WITH EXPERTS

- **PRELIMINARY CONSIDERATIONS**

    - Review your case, client's records (medical, educational, etc.), and discovery prior to contacting experts. This will help you determine exactly what type of expert assistance is needed and have a more productive conversation with an expert.
    - Do not engage a mental health expert before obtaining substantial social history records unless the client is floridly psychotic upon you entry into the case. See IDS Policy on the Effective Use of Mental Health Experts in Potentially Capital Cases.
    - Educate yourself on the issues. Consult the IDS Forensics website for information on topics of forensic science, such as DNA, firearms, fingerprints, death investigation, etc. Scholarly articles are available such as Google Scholar and PubMed.
    - Do you need an expert?
        - Is the forensic evidence adverse to the defense theory of the case?
        - Do you need evidence re-tested?
        - Are you critiquing the state's testing of the evidence?
        - Even if the State is not using an expert, consider whether there are affirmative uses of experts that would support your theory of the case, such as crime scene experts, use of force experts, or mental health experts.

- **FINDING AN EXPERT:**

    - Don't wait until the last minute – your desired expert may not be available. Any expert will need time to review your case prior to forming an opinion.
    - Consider consulting with Sarah Olson, Forensic Resource Counsel or the Elaine Gordon, Trial Resource Counsel for additional ideas about what type of expert to use.
    - Know what particular expertise you need before you start making phone calls: i.e., rather than looking for a "DNA expert," consider whether you need an expert on DNA mixtures, an expert who can challenge contamination, or an expert who can challenge the statistical computation.
    - Consider the role of the expert: Do you need an expert to assist in evaluating the quality of the evidence? To explain the science to you or to the jury? Do you need an expert to develop mitigation evidence or to establish a defense such as self-defense or diminished capacity? Will assistance require access to a laboratory? Can a professor or academic fulfill the role or do you need a practicing analyst or scientist? Is the expert willing to testify?

- **RESEARCH THE EXPERT:**

    - You should research your potential expert as thoroughly as you would research a State's witness that you are preparing to cross-examine.
    - Review their CV. Do not assume that just because the expert has been used frequently that he/she has been properly vetted.
    - Utilize disciplinary boards if available. If an expert lists a particular license or certification, see if that organization posts disciplinary information online.
    - Ask the expert about any certifications or professional qualifications attempted—has the expert taken any certification exams or other professional exams that he/she has not passed? This website can be used to check to see whether an MD is certified in a particular specialty.
    - Seek references on listserves, with the IDS Forensic Resource Counsel, NACDL Resource Center, American Academy of Forensic Sciences (AAFS), other lawyers, other experts and competitors, universities, and publicly-funded laboratories.
    - Search LexisNexis and/or Westlaw for cases in which the expert testified.
    - Additional information on how to research an expert online is available here.

- **GUIDE TO YOUR FIRST CONVERSATION WITH EXPERT**

    - Be able to explain to the expert what work you need performed, including specific referral questions you would like addressed if working with a mental health expert. Never ask a mental health expert simply to "evaluate" your client without providing specific guidance. Do not assume that the expert already knows what constitutes a potential defense or mitigating factor. Sometimes an expert who has not received proper guidance will tell an attorney that his or her evaluation has turned up nothing useful, when in fact the expert simply does not have the legal expertise to know what is useful and what is not.
    - Get the expert to provide you with a copy of his/her CV.
    - Discuss with the expert anticipated hours of work needed, any re-testing needed, any travel required in order to prepare a request for adequate funding. Discuss AOC's rate schedule (see p. 2) and prepare justification if the expert requires a deviation from the rate schedule.
    - Discuss any potential conflicts with the expert due to co-defendants, scheduling, or any other professional or personal matter that would adversely affect the expert's work/testimony in the case.
    - Verify that your expert will be able to testify. Do not assume that testimony will not be needed or promise your expert that testimony will not be needed.
    - Your expert will need lab reports and the underlying data in order to analyze the evidence.
    - Communication

- Can they explain their conclusions clearly and understandably?
- Consider non-verbal communication: arrogance, bias, appearing defensive, organized, prepared, etc.

- Considerations to discuss with expert(s)
  - Position currently held.
  - Description of the subject matter of the expert's specialty.
  - Specializations within that field.
  - What academic degrees are held and from where and when obtained.
  - Specialized degrees and training.
  - Licensing in field, and in which state(s).
  - Length of time licensed.
  - Length of time practicing in this field.
  - Board certified as a specialist in this field.
  - Length of time certified as a specialist.
  - If certifications/proficiency tests/etc have been attempted, history of results.
  - Positions held since completion of formal education, and length of time in each position.
  - Duties and function of current position.
  - Length of time at current position.
  - Specific employment, duties, and experiences (optional).
  - Teaching or lecturing in the relevant field, dates and location of teaching.
  - Publications in this field and titles.
  - Membership in professional societies/associations/organizations, and special positions in them.
  - Requirements for membership and advancement within each of these organizations.
  - Honors, acknowledgments, and awards received by expert in the field.
  - Who is considered "the best" in the field?
  - Number of times testimony has been given in court as an expert witness in this field. (Case names and transcripts, if available.)
  - How has the expert's testimony been treated in the past? Did the expert appear balanced, knowledgeable, and credible? Has the expert ever not been qualified as an expert? Why?
  - Availability for consulting to any party, state agencies, law enforcement agencies, defense attorneys.

BY SARAH RACKLEY OLSON | OCTOBER 14, 2014 · 9:22 AM | EDIT

What is in a State Crime Laboratory Lab Report?

Many attorneys have asked me what should be included in a lab report from the State Crime Lab. Often in District Court DWI cases or through discovery, defense attorneys receive only a 1-2 page report called a Lab Report. For each case that is analyzed by the State Crime Laboratory, the lab produces a Case Record in Forensic Advantage (FA), the lab's electronic information management system. The Case Record contains many items, including the lab report, chain of custody information, analyst CV, and information about tests performed. Under N.C. Gen. Stat. 15A-903, the lab provides this Case Record to the prosecution for disclosure to the defendant through discovery. If attorneys do not receive complete lab reports, they should request the items described below through discovery. This information is also available on the IDS Forensic website.

How are reports accessed by the District Attorney's Office?

When the lab has completed its analysis and finalized its report, an email is automatically sent to the District Attorney's office and the law enforcement agency that requested the analysis, notifying them that the Case Record is available. These offices can access the Case Record using a web-based program called FA Web. There are legal assistants or victim-witness coordinators in each DA's office who are trained to use FA Web. They can access the Case Records using the emailed link (which remains active for seven days after the email is sent), or they can search for the report within FA Web even after the email link has expired. Some ADAs and DAs may also be trained in using FA Web, but typically it is a legal assistant who accesses the FA Web and downloads the Case Records.

Many defense attorneys are surprised to learn that a full Case Record is produced by the lab and sent to the DA's office for each case that is worked, including District Court cases. Depending on whether they have been trained in the use of FA Web, ADAs may or may not know that the lab provides complete Case Records for each case worked, but the legal assistant in their office who is trained to use FA Web can access these full reports.

How long has this system been in place?

FA was adopted by the lab in 2008 as the lab's electronic information management system. Since 2011, the lab has been providing Case Records to DA's offices through FA Web. Since June 2013, DA's offices have had the option to download and print partial "Ad Hoc" lab reports instead of printing the full Case Record.

What is included in a Case Record Full Packet?

The "Case Record Full Packet" may be downloaded as one zip file or portions of the Case Record may be

downloaded separately. **The Table of Contents is the most important page for a defense attorney to review in order to determine if the complete packet has been provided through discovery.** If items of evidence were analyzed in more than one section of the lab, each lab section will complete a separate Case Record for its analysis and Case Records will be numbered consecutively (for example, Record #1 may be from Trace Evidence, Record #2 may be from Forensic Biology and DNA, etc.) Some Case Records may not be needed once created, such as when an examination is redundant with another Case Record. These will be listed as "Terminated."

The main PDF in the zip file Case Record Full Packet contains the Table of Contents. The Table of Contents will specify if it is a Case Record (Full), Ad Hoc or Officer. If an attorney sees on the Table of Contents that the packet is an Ad Hoc or Officer packet, the attorney will know that there were additional items provided by the lab that have not been provided to the defense. If the DA's office downloads the Case Record Full Packet the entire packet will be paginated consecutively and state the total number of pages, such as Page 1 of 200. If only a partial Ad Hoc packet is downloaded, the portion that is downloaded will be paginated, such as Page 1 of 10.

The Case Record Full Packet will include the following items (though not necessarily in this order):

- **Table of Contents** – lists all items included in the main PDF file of the "Case Record Full Packet" as well as additional items that are sent as separate files. Every packet (including partial Ad Hoc packets) that is downloaded from FA Web will have a Table of Contents. This Table of Contents has been annotated to describe its various parts. These links show sample Table of Contents for Digital Evidence (Audio Video and Computer), Drug Chemistry, Firearms, Toolmarks, Forensic Biology (Blood, DNA, and Semen) Latent Evidence (Footwear-Tire and Latent), Toxicology, and Trace Evidence (Arson,Explosives, Fiber, Glass, GSR, Hair, Paint, and Trace). Beneath each item listed in the Table of Contents will be an indented description of this item. Often the "description" just repeats the name of the document. Attorneys should know that indented description is not a separate or duplicate item, but is intended to describe the item listed above. The lab plans to remove the descriptions when it upgrades the FA Web program as they are mainly duplicative of the document name.
- **Lab Report** – a 1-2 page document that states the analyst's conclusions. It will not identify what test was performed or how the analyst reached her conclusions. This is the notarized document that is found in the court file in District Court DWI cases. Many attorneys think this is the only report that the lab produces, but it is just one part of the entire Case Record that the lab produces for each case.
- **Case Report** – several pages that list the names of the analysts who performed the analysis and reviewed the case. If any problem is found when the case is reviewed by another analyst, the problem will be briefly described in this section in a written dialogue between the analysts.
- **Chain of Custody** – shows the chain of custody of the item of evidence within the lab.
- **Request for Examination of Physical Evidence** – a copy of the form that law enforcement submits to request that an item be analyzed by the lab.
- **Worksheets** – as the analyst works, she records which test is performed and her observations, measurements, and results using an electronic form on her computer. The Lab Worksheets are printouts of these electronic forms. The Lab Worksheets are one place to look to see what tests were performed.
- **Quality Control/Quality Assurance and sample preparation documentation** – this documentation will vary depending on the type of analysis completed, but many analyses will have documentation of calibration curves, positive and negative controls, instrument set-up, sample

preparation, instrument results, etc. Attorneys can consult with Sarah Olson, their own expert, or the lab analyst for an explanation of these case-specific items.

- **Communication Log** – includes details of case-related phone conversations, including communications from law enforcement, prosecutors, and defense attorneys, if any such communications occurred. If communication has occurred by e-mail or memo, the e-mail or memo will be provided as part of the main PDF file in the Case Record Full Packet.
- **CV of Analyst(s)**
- **Messages Report** – these are messages that can be sent from external users to the State Crime Lab via the FA system, such as rush requests or stop work orders. Analysts can also send messages to each other through the FA system that will be recorded here.
- **Publish History and Packet History** – if this is the first publication of the packet, it will be noted here. If this is a subsequent publication of the packet, any information on previous publications, including downloads by FA Web users, will be listed.

Several additional items also make up the Case Record Full Packet. These items are listed in the Table of Contents but are not paginated with the previous documents.

- **Prior Versions of Worksheets and Lab Reports** – various versions of one Worksheet may be saved during analysis as the analyst progresses through her work. If an analyst has to go back and amend something in a completed Worksheet, the previous and new versions will be saved. If an analyst changes something in a Lab Report, the previous and new versions will be saved. These worksheets and reports are paginated separately from the Case Record Full Packet.
- **Worksheet Resources** – a list of all instruments, equipment, chemicals, reagents, kits, and other standards used in the analysis. The document also contains the maintenance history for the equipment and instruments used. This document is paginated.
- **All other items that cannot be made into PDFs, including images and some data files** – images may be printed by the DA's office, but attorneys should request them on a disc for better image quality. Raw data files cannot be printed and require proprietary software to open. Currently raw data files are being provided only in cases where DNA analysis was performed. These files can be opened by an expert who has the appropriate software to read this data.

How do I know if I received all documents that the lab has produced?

There are a number of steps that defense attorneys can take to ensure that they are receiving compete discovery:

1. **Review the Table of Contents** – Attorneys should look for the Table of Contents in the Case Record Full Packet and check to ensure that the type of Case Record that the DA's office downloaded was Full (rather than Ad Hoc) and that all documents listed in the Table of Contents are provided.
2. **Check pagination** – The FA Web system paginates everything that is downloaded. If, for example, only pages 4 and 5 of 200 are provided, the defense attorney will know that she doesn't have a copy of everything that the DA's office downloaded. However, if the DA's office chooses to only download a portion of the packet (Ad Hoc packet) rather than the Case Record Full Packet, only those downloaded pages will be paginated. For example, if the Case Record Full Packet has 200 pages but the DA's office

only downloads the Lab Report which is 2 pages, those pages will be paginated, 1 and 2 of 2.

3. **Request Forensic Advantage notification emails from the DA's office** – Whenever the lab updates a Case Record that has already been sent to the DA's office, FA will send an email notifying the DA's office that there has been a change and specifying which portion of the record is changed. Defense attorneys should request these emails from the DA's office through discovery. The updated Case Record may appear to be a duplicate of the original Case Record that was provided (and may be hundreds of pages long). These emails can help identify which document was changed.
4. **Meet with the ADA** – Defense attorneys may request to meet with the ADA assigned to the case to view all of the documents available on FA Web to ensure that everything has been downloaded and shared through discovery.
5. **Consult with the lab** – After reviewing the discovery and checking that the DA's office has provided everything available in the FA Web program to the defense, defense attorneys may consider scheduling a pre-trial meeting with the lab analyst if questions remain about reports. State Crime Lab analysts are available to meet with defense attorneys prior to trial and will answer questions about the analysis that was performed and what reports/documents were produced in the case. Defense attorneys may contact Lab Legal Counsel Assistant Attorney General Joy Strickland if there are issues with lab discovery that cannot be resolved with the ADA.

Related

Draft Policy Recommendations by the National Commission on Forensic Science
In "Crime Labs"

Meeting with lab analysts and forensic pathologists prior to trial

Where's my lab report?

In "Crime Labs"

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISON
COUNTY OF XXXX	XX CRS XXXX

STATE OF NORTH CAROLINA	)	
	)	
vs.	)	
	)	MOTION FOR
NAME,	)	INDEPENDENT TESTING
DEFENDANT.	)	
	)	

NOW COMES the Defendant, by and through counsel, and respectfully moves this Honorable Court for the entry of an Order requiring the State to produce for the undersigned the item(s) as described below for independent testing. The Defendant contends that he is entitled to production of the item(s) for independent testing prior to trial pursuant to N.C.G.S. 15A-902, N.C.G.S. 15A-903(a)(1)(d), in sufficient time to enable him to meaningfully examine said items and test them to prepare for trial. Failure to grant the Defendant's motion would violate the Defendant's rights to Due Process of Law under the Fifth and Fourteenth Amendments to the United States Constitution; Article I, Sections 18, 19, and 23, of the Constitution of North Carolina; and effective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution; Article I, Sections 19 and 23 of the Constitution of North Carolina; and his discovery rights under N.C. Gen. Stat. §15A-903. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. The BLOOD SAMPLE [OR OTHER ITEM OF EVIDENCE] was collected from the Defendant on DATE by XXXX POLICE DEPARTMENT OFFICER SMITH.

2. The State has provided discovery that the STATE CRIME LABORATORY [OR OTHER CRIME LABORATORY] has tested TOXICOLOGY evidence in this case [OR THE STATE HAS PROVIDED NOTICE OF ITS INTENTION TO PROCEED TO TRIAL WITHOUT THE TESTING OF THIS ITEM OF EVIDENCE]. The Defendant requests additional independent testing of these items. The Defendant is, by law, presumed to be innocent of these charges.

3. The TOXICOLOGY evidence is material to both the State and the Defendant in this case. The State contends that this evidence is inculpatory, whereas the Defendant contends that his expert should be allowed to inspect, test, and analyze the evidence to determine the accuracy of the State's contention or to determine whether the evidence is in fact exculpatory.

4. The Defendant requests that ONE VIAL [or TWO VIALS or ALL EVIDENCE OR A SPECIFIC PORTION THEREOF] be made available for testing as quickly as possible.

5. The sample shall be mailed to NAME OF THE LAB at the following ADDRESS [INCLUDE COMPLETE MAILING ADDRESS]. Should there be questions regarding this sample, the contact person and phone number or email address from NAME OF LAB is _____.

6. Items must be maintained and shipped under chain of custody control. (Include here any shipping requirements of the independent lab, such as items should be shipped by overnight trackable delivery. Items should be kept chilled but not frozen. Items should be secured and padded so they won't break in shipment. Absorbent material should be placed with the items in a sealed plastic bag. Documents should be in a separate sealed plastic bag. The box should be sealed in a manner so that any tampering will be evident on arrival at the lab.)

7. The Defendant shall be responsible for payment for the testing including the shipping cost. The Defendant shall make arrangements with the shipping company and the independent lab prior to the STATE CRIME LAB/OTHER CRIME LAB shipping the evidence. (After shipping arrangements have been made with UPS, Fed-Ex or other shipping company, provide information about which service will be used to the Crime Lab. At the State Crime Lab, Joy Strickland may be contacted if you have questions.)

8. Upon completion of testing by NAME OF LAB, the remaining portion of the sample shall be returned to SUBMITTING LAW ENFORCEMENT AGENCY. (Find out whether the State Lab or other Crime Lab is going to be doing any testing or further testing. If they are, then have the sample returned to the Crime Lab.)

WHEREFORE, the undersigned prays that this Court will enter such Orders as are just and proper with respect to production of the above-mentioned items and the inspection and independent testing by the experts appointed to assist the defense.

Respectfully submitted this the ____ day of ____, 2013.

_____
Attorney for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an Attorney at Law licensed to practice in the State of North Carolina, that he is the attorney for the Defendant, in the above-entitled action, and that he is a person of such age and discretion as to be competent to serve process.

That on the ____ day of _____, 2013, he served the foregoing **MOTION FOR INDEPENDENT TESTING** upon the Office of the District Attorney, through hand delivery at the following address:

_____
Attorney for Defendant

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISON
COUNTY OF XXXX	XX CRS XXXX

STATE OF NORTH CAROLINA	)	
	)	
vs.	)	ORDER REQUIRING CRIME LAB
	)	TO PRODUCE ITEMS FOR
NAME,	)	INDEPENDENT TESTING
DEFENDANT.	)	
	)	

THIS CAUSE CAME ON TO BE HEARD before the undersigned Superior Court Judge on the __ day of _____, 20__, upon the Defendant's Motion for Independent Testing; the Defendant was represented by his attorney XXXX and the State was represented by District Attorney XXXX; and the Court, having reviewed the Motion, and having considered the arguments of counsel hereby finds and concludes as follows:

1. The BLOOD SAMPLE [OR OTHER ITEM OF EVIDENCE] was collected from the Defendant on DATE by XXXX POLICE DEPARTMENT OFFICER SMITH.

2. The State has provided discovery that the STATE CRIME LABORATORY [OR OTHER CRIME LABORATORY] has tested TOXICOLOGY evidence in this case [OR THE STATE HAS PROVIDED NOTICE OF ITS INTENTION TO PROCEED TO TRIAL WITHOUT THE TESTING OF THIS ITEM OF EVIDENCE]. The Defendant requests additional independent testing of these items. The Defendant is, by law, presumed to be innocent of these charges.

3. The TOXICOLOGY evidence is material to both the State and the Defendant in this case. The State contends that this evidence is inculpatory, whereas the Defendant contends that his expert should be allowed to inspect, test, and analyze the evidence to determine the accuracy of the State's contention or to determine whether the evidence is in fact exculpatory.

4. The Court finds and concludes that the STATE CRIME LABORATORY/OTHER CRIME LAB should be Ordered to produce items for independent testing, subject to the terms and conditions set forth below:

    a. ONE VIAL [or TWO VIALS or ALL EVIDENCE OR A SPECIFIC PORTION THEREOF] be made available for testing as quickly as possible.

    b. The sample shall be mailed to NAME OF THE LAB at the following ADDRESS [INCLUDE COMPLETE MAILING ADDRESS]. Should there be questions

regarding this sample, the contact person and phone number or email address from NAME OF LAB is _____.

c. Items must be maintained and shipped under chain of custody control. (Include here any shipping requirements of the independent lab, such as items should be shipped by overnight trackable delivery. Items should be kept chilled but not frozen. Items should be secured and padded so they won't break in shipment. Absorbent material should be placed with the items in a sealed plastic bag. Documents should be in a separate sealed plastic bag. The box should be sealed in a manner so that any tampering will be evident on arrival at the lab.)

d. The Defendant shall be responsible for payment for the testing including the shipping cost. The Defendant shall make arrangements with the shipping company and the independent lab prior to the STATE CRIME LAB/OTHER CRIME LAB shipping the evidence. (After shipping arrangements have been made with UPS, Fed-Ex or other shipping company, provide information about which service will be used to the Crime Lab. At the State Crime Lab, Joy Strickland may be contacted if you have questions.)

e. Upon completion of testing by NAME OF LAB, the remaining portion of the sample shall be returned to SUBMITTING LAW ENFORCEMENT AGENCY. (Find out whether the State Lab or other Crime Lab is going to be doing any testing or further testing. If they are, then have the sample returned to the Crime Lab.)

This the ____ day of ____, 20__.

_____
Superior Court Judge

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE**
	XXXX COURT DIVISION
COUNTY OF XXXX	**15 CRS 000000**

STATE OF NORTH CAROLINA	)	
	)	
v.	)	**MOTION FOR PRESERVATION**
	)	**OF ANY AND ALL EVIDENCE**
XXXX,	)	
	)	
Defendant.	)	

NOW COMES the Defendant, by and through the undersigned counsel, XXXX, pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article 1 §§ 19 and 23 of the North Carolina Constitution; Article 48 of the North Carolina General Statutes; N.C. Gen. Stat. §§ 15A-501(6), 15A-903, 15A-268, 15A-1415(f); ***Brady v. Maryland***, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) and its progeny, ***Arizona v. Youngblood***, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed. 2d 281 (1988) and its progeny, and ***State v. Williams***, 362 N.C. 628, 669 S.E.2d 290 (2008) and its progeny, and hereby requests that this Honorable Court enter an Order commanding all law enforcement officers, employees, agents and/or attorneys, including laboratories and/or experts conducting forensic testing, involved in the investigation of the above-captioned matters to preserve and retain any and all evidence obtained in the investigation of these matters.

Such evidence shall include, but is not limited to, all files, notes, audio or video recordings, and any and all physical evidence, including but not limited to, hair, fibers, other trace evidence, fingerprints and other latent evidence, biological specimens including the body of any decedent, clothing, firearms and projectiles, other weapons, vehicles, suspected controlled substances and packaging, computer or other digital evidence, and any and all other physical evidence that has been or will be collected in this case.

The Defendant further requests that this Honorable Court order all law enforcement agencies to release to the prosecution all materials and information acquired during the course of the investigation into these matters, pursuant to N.C. Gen. Stat. §15A-501(6). In support of the foregoing Motion, the Defendant states unto the Court as follows:

1. The materials the Defendant seeks to have preserved are discoverable under Article 48 of the North Carolina General Statutes.

2. At the filing of this motion, the defense has not been provided with discovery, as the Defendant has not been indicted for the offenses for which he has been arrested.

3. N.C. Gen. Stat. § 15A-501(6) states:

> Upon the arrest of a person, with or without a warrant, but not necessarily in the order hereinafter listed, a law-enforcement officer…must make available to the State on a timely basis all materials and information acquired in the course of all felony investigations. This responsibility is a continuing and affirmative duty.

4. N.C. Gen. Stat. § 15A-903(a)(1) states:

> Upon motion of the defendant, the court must…make available to the defendant 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 term "file" includes 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. When any matter or evidence is submitted for testing or examination, in addition to any test or examination results, all other data, calculations, or writings of any kind shall be made available to the defendant, including, but not limited to, preliminary test or screening results and bench notes.

5. In order, for the Defendant to be afforded his statutory right to inspect and copy all evidence under N.C. Gen. Stat. § 15A-903(a)(1), the evidence must be available to the Defendant for inspection.

6. N.C. Gen. Stat. § 15A-268 states:

> [A] custodial agency shall preserve any physical evidence, regardless of the date of collection, that is reasonably likely to contain any biological evidence collected in the course of a criminal investigation or prosecution. Evidence shall be preserved in a manner reasonably calculated to prevent contamination or degradation of any biological evidence that might be present, subject to a continuous chain of custody, and securely retained with sufficient official documentation to locate the evidence…The duty to preserve may not be waived knowingly and voluntarily by a defendant, without a court proceeding.

7. N.C .Gen. Stat. § 15A-1415(f), in addressing discovery requirements in post-conviction proceedings in superior court, states in part:

> …The State, to the extent allowed by law, shall make available 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…

8. Upon information and belief, the State may seek forensic analysis/testing of physical evidence. If such testing would entirely consume an item of evidence or consume enough of the evidence so as to preclude additional testing, prior to such testing being conducted, any laboratory or expert conducting such testing should notify both the prosecution and the

Defendant that such testing will consume or preclude additional testing of said evidence. Within 30 days of receiving such notification, the prosecution and the defense shall submit proposals for how such testing should be conducted such that the Defendant's right to view and test such evidence, under the case law cited in the preamble to this Motion, is preserved. The proposals shall be submitted to the Court and a copy shall be served upon the testing laboratory or expert;

9. In order to ensure all evidence is available and not inadvertently destroyed, the Court should enter an Order requiring law enforcement to preserve any and all evidence associated with these matters.

10. The interests of justice and the rights of the Defendant require the preservation of all evidence connected with these matters and, as such, the Court should enter an Order requiring that any and all evidence in these matters be preserved.

11. The defense hereby places the State on notice that the defense is demanding the preservation of any and all evidence in these matters in order that the State will have notice of the defense's demand and will not be able to assert the doctrine of "bad faith,"[1] in the event any unwarranted loss or destruction of documentation or evidence occurs.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That the Court enter an Order commanding all law enforcement agencies, officers, employees, agents and/or attorneys including laboratories and/or experts conducting forensic testing, involved in the investigation of the above-captioned matters to preserve and retain any and all evidence in this case; and

2. That the Court enter an Order commanding the prosecution to provide all law enforcement agencies, officers, employees, agents, and/or attorneys, including laboratories and/or experts conducting forensic testing, involved in the investigation of the above-captioned matters with any orders directing the preservation and retention of any and all evidence in this case; and

3. That the Court order any laboratory or expert conducting any testing on any evidence, which would consume or preclude additional testing, to notify both the prosecution and the Defendant that such testing will consume or preclude additional testing of said evidence using the following contact information;

Defense Attorney (name)
Mailing Address or Email address

Prosecutor (name)
Mailing Address or Email address

[1] See ***Arizona v. Youngblood,*** 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988),

4. That the Court order that within 30 days of receiving such notification as set forth in paragraph three (3) above, the prosecution and the defense shall be required to submit proposals for how such testing should be conducted. The proposals shall be submitted to the Court and a copy shall be served upon the testing laboratory or expert;

   [The State Crime Lab's legal counsel can be served by mail using the following address:
   NC State Crime Laboratory, Lab Legal Counsel
   121 East Tryon Road
   Raleigh NC 27603]

5. That the Court order that within 30 days of receiving the proposals set forth in paragraph four (4) above, any agency that wishes to be heard about the proposals shall submit any comments to the Court with service to the prosecution and defense;

6. That the Court order that upon receipt of the comments referenced in paragraph five (5) above, the Court will hold a hearing to determine what if any further Orders are necessary to facilitate forensic testing. The parties shall ensure that the testing laboratory or expert is notified of the hearing;

7. That the Court order that any destruction, total consumption (or consumption that would preclude additional testing), or loss of any evidence (regardless of the intent or nature of the conduct resulting in the destruction, total consumption, or loss of any evidence), may be deemed a violation of the Court's order to preserve any and all evidence, and such conduct may warrant at least an instruction to any jury, impaneled to try these matters, on the spoliation of evidence, if not dismissal of the charges.

8. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the ____ day of _____.

_____
Attorney Name
Bar Number
Address

The undersigned attorney certifies that this motion and proposed order have been served on the State Crime Lab's legal counsel [or lab director if a lab other than the State Crime Lab is to perform the testing] and

[The State Crime Lab's legal counsel can be served by mailing the motion and proposed order to:
NC State Crime Laboratory, Lab Legal Counsel
121 East Tryon Road
Raleigh NC 27603]

(check one)
___ The State Crime Lab has no objection to the proposed order.
___ The State Crime Lab has concerns about the proposed order as indicated in the attached document from the Crime Lab.

_____
Signed and certified as true

STATE OF NORTH CAROLINA		**IN THE GENERAL COURT OF JUSTICE XXXX COURT DIVISION**
COUNTY OF XXXX		**15 CRS 000000**
STATE OF NORTH CAROLINA	)	
	)	**ORDER ALLOWING**
v.	)	**MOTION FOR PRESERVATION**
	)	**OF ANY AND ALL EVIDENCE**
XXXX,	)	
Defendant.	)	

THIS MATTER having come before the undersigned Judge, presiding at the _____, session of Criminal XXXX Court for the County of XXXX, pursuant to the Defendant's ***Motion for Preservation of Any and All Evidence***, which was filed on _____;

AND THE COURT, finding that at the time this matter was presented to the Court, the State of North Carolina was represented by Assistant District Attorney _____, and the Defendant was represented by _____ and the North Carolina State Crime Laboratory was served with the Motion For Preservation of Any and All Evidence and noted that there was no objection to the Order;

AND THE COURT, after determining that it has jurisdiction over the subject matter and the parties, after considering the Defendant's Motion, and after noting that the prosecution has no objection to granting of the Motion, finds that the Defendant's ***Motion for Preservation of Any and All Evidence*** should be allowed;

IT IS THEREFORE ORDERED that

1. All law enforcement officers, employees, agents, and attorneys, including laboratories and/or experts conducting forensic testing, involved in the investigation of the above-captioned matters shall preserve and retain any and all evidence in this case;

2. The prosecution shall provide all law enforcement agencies, officers, employees, agents, and/or attorneys, including laboratories and/or experts conducting forensic testing, involved in the investigation of the above-captioned matters with any orders directing the preservation and retention of any and all evidence in this case;

3. Any laboratory or expert conducting any testing on any evidence, which would result in consuming or precluding additional testing, shall notify both the prosecution and the Defendant that such testing will consume or preclude additional testing of said evidence using the following contact information;

Defense Attorney (name)
Mailing Address or Email address

Prosecutor (name)

Mailing Address or Email address

4. Within 30 days of receiving such notification as set forth in paragraph three (3) above, the prosecution and the defense shall be required to submit proposals for how such testing should be conducted. The proposals shall be submitted to the Court and a copy shall be served upon the testing laboratory or expert;

   [The State Crime Lab's legal counsel can be served by mail using the following address:
   NC State Crime Laboratory, Lab Legal Counsel
   121 East Tryon Road
   Raleigh NC 27603]

5. Within 30 days of receiving the proposals set forth in paragraph four (4), any agency that wishes to be heard about the proposals shall submit any comments to the Court with service to the prosecution and defense;

6. Upon receipt of the comments referenced in paragraph five (5) the Court will hold a hearing to determine what if any further Orders are necessary to facilitate forensic testing. The parties shall ensure that the testing laboratory or expert is notified of the hearing;

7. Any destruction, total consumption (or consumption that would preclude additional testing), or loss of any evidence (regardless of the intent or nature of the conduct resulting in the destruction, total consumption, or loss of any evidence), may be deemed a violation of the Court's order to preserve any and all evidence, and such conduct may warrant at least an instruction to any jury, impaneled to try these matters, on the spoliation of evidence, if not dismissal of the charges.

This the _____ day of _____.

_____
Presiding Judge

Appendix:

The parties may want to consider using one of more of these options if testing would consume the entire sample:

1. Allow the Defendant (i.e., defense counsel and defense expert(s)) to view the item of evidence and photograph prior to testing. The item shall be viewed and photographed in accordance with any required procedures and policies of the agency in possession of the items at the time of inspection to ensure the integrity of the item(s);
2. Request that the lab analyst or expert photograph the item of evidence prior to testing;
3. Allow the Defendant's expert to observe any testing that is conducted (this option is objectionable to the State Crime Laboratory);
4. Send the item to an agreed-upon independent lab for testing;
5. Allow the State Crime Laboratory to consume portions of the evidence or the evidence items entirely if such consumption is necessary to complete the forensic testing.

FILE NO:

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
_____ COUNTY	SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA)	
)	NOTICE OF OBJECTION
v.)	PURSUANT TO N.C. GEN.
)	STAT. §§ 90-95(g) AND
_____,)	(g1)
Defendant.)	

NOW COMES the defendant by and through undersigned counsel and gives notice to the State that he OBJECTS to the introduction by the State of certain documents entitled "North Carolina Bureau of Investigation Department of Justice Western Laboratory Report" dated _____, "North Carolina State Bureau of Investigation Request for Examination of Physical Evidence," undated, and "Case #W2010____ - Chain of Custody Report," undated, as evidence of the identity, nature and quantity of the matter analyzed in the present case and of the established chain of custody regarding said evidence.

The defendant objects to introduction into evidence of the above-mentioned lab report and chain of custody statement pursuant to the Sixth Amendment to the United States Constitution, Article I, § 23 of the North Carolina Constitution, Melendez-Diaz v. Massachussetts, 129 S. Ct. 2527 (2009), and N.C. Gen Stat. § 90-95(g) and (g1).

This the ____ day of February, 2012.

_____
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on _____ County District Attorney's Office by hand delivery.

This ___ day of February, 2012.

_____
ATTORNEY FOR DEFENDANT

By: _____

http://ncforensics.wordpress.com/2011/08/17/legislative-change-regarding-expert-testimony/

Legislative Change Regarding Expert Testimony

By Alyson Grine, UNC School of Government Defender Educator (August 17, 2011)

In S.L. 2011-283 (H 542), the General Assembly revised North Carolina Evidence Rule 702(a). Rule 702(a) guides the trial court in serving a gatekeeper function with regard to expert testimony; the trial court must make a preliminary determination as to whether a witness has the qualifications to testify as an expert, and if so, whether the expert's testimony is admissible. S.L. 2011-283 was enacted as a part of new limits in civil tort actions; however, the amended rule applies to criminal cases as well as civil. Thus, criminal defenders are asking: to what extent has the framework for determining the admissibility of expert testimony changed?
The amendments to Chapter 8C, Rule 702(a) read:

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

(1) The testimony is based upon sufficient facts or data.
(2) The testimony is the product of reliable principles and methods.
(3) The witness has applied the principles and methods reliably to the facts of the case.

The legislation does not alter the language pertaining to the qualifications of an expert. Instead, the legislation adds the above subparts to impose restrictions on the admissibility of expert testimony. The subparts are lifted verbatim from Federal Rule of Evidence 702 as amended in 2000, which was intended to codify the criteria for the admissibility of expert testimony established in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). *Daubert* established the modern standard for admitting expert testimony in federal trials; the Court set out five factors for trial judges to use as a measure of reliability in making a preliminary determination about the admissibility of scientific evidence:

1. Is the evidence based on a testable theory or technique;
2. Has the theory or technique been subjected to peer review and publication;
3. Does the technique have a known error rate;
4. Are there standards controlling operation of the technique; and
5. To what degree is the theory or technique generally accepted by the scientific community? *Id.* at 593-94.

In *Howerton v. Arai Helmet, Ltc.*, 358 N.C. 440 (2004), the North Carolina Supreme Court rejected the federal standard for determining the admissibility of expert testimony. "North Carolina is not, nor has it ever been a *Daubert*jurisdiction." *Id.* at 469. Instead, North Carolina has used the three-part inquiry set forth in *Howerton*: "(1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Id.* at 458, *relying on State v. Goode*, 341 N.C. 513, 527-29 (1995) (internal citations omitted). The first prong of the *Howerton* test includes a requirement that the expert's method of proof be reliable, much like the second restriction in amended Rule 702(a). Unlike amended Rule 702(a), however, the *Howerton* test does not explicitly require that experts have sufficient facts and data for their opinions, or that they apply their methods reliably to the facts. Arguably, these were implicit requirements under*Howerton* as they are components of reliability. Some North Carolina decisions have recognized that experts should have sufficient facts and data for their opinions and should apply their methods reliably. *See, e.g., State v. Grover,* 142 N.C. App. 411, *aff 'd per curiam,* 354 N.C. 354 (2001). Amended Rule 702(a) makes it clear that trial judges must apply those requirements before allowing expert testimony before the jury.

The approach that North Carolina adopted in *Howerton* was "less mechanistic and rigorous than the exacting standards of reliability demanded by the federal approach." *Howerton,* 358 N.C. at 464 (internal citations omitted); *see also*Robert P. Mosteller et al., North Carolina Evidentiary Foundations at pp. 10-15 to 10-17 (2d ed. 2006). Amended Rule 702(a) may or may not mandate the precise approach required by *Daubert*, but by adopting the language of Federal Rule 702, the General Assembly has raised the bar (or better stated, "the gate"), thereby requiring greater scrutiny of expert testimony than the former North Carolina rule and the cases interpreting it. Court actors should not presume that a method of proof that was deemed sufficiently reliable under the former North Carolina rule and *Howerton* will be admissible under the amended rule. The subparts added by S.L. 2011-283 are not a codification of *Howerton,* and it may no longer be good law. *See Daubert*, 509 U.S. at 586-87 (holding that the "general acceptance test" of *Frye v. United States,*54 App. D.C. 46 (1923) was superseded by the adoption of the Federal Rules of Evidence). In response to the legislative changes, defenders should be prepared to conduct more rigorous scrutiny of experts to determine admissibility, which will require probing discovery, motions, and voir dire practices to determine whether the expert's testimony complies with the amended requirements.

As mentioned above, the amendments to Rule 702(a) are part of the "An Act to Provide Tort Reform for North Carolina Citizens and Businesses." Possibly, the General Assembly did not have an eye to the impact the amendments would have on criminal practice in North Carolina. However, recent cases reveal growing concerns about unreliable expert testimony in criminal cases. *See State v. Ward,* 364 N.C. 133 (2010) (expert's testimony was not based on sufficiently reliable method of proof where expert identified substances based on a visual examination rather than a chemical analysis); *State v. Davis,* __ N.C. App. __, 702 S.E.2d 507 (2010) (expert's testimony was not based on sufficiently reliable method of proof where expert relied on odor analysis to conduct retrograde extrapolation of defendant's blood alcohol concentration at time of accident);*State v. Meadows*, __ N.C. App. __, 687 S.E.2d 305 (2010) (expert's testimony was not based on sufficiently reliable methods of proof where expert relied on the results of the NarTest machine). Thus, amended Rule 702(a) may be viewed as a timely reform in the criminal context.

Note: A later bill (SL 2011-317) makes the revised rule applicable to actions arising on or after October 1, 2011. For criminal cases, the rule likely applies to cases in which the offense occurred on or after that date.

A GUIDE TO *CRAWFORD* AND THE CONFRONTATION CLAUSE

Jessica Smith, UNC School of Government (Aug. 2015)

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I. The New *Crawford* Rule.

The Sixth Amendment's confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[1] This protection applies to the states by way of the Fourteenth Amendment.[2] In *Crawford v. Washington*,[3] the Court radically revamped the analysis that applies to confrontation clause objections. *Crawford* overruled the reliability test for confrontation clause objections and set in place a new, stricter standard for admission of hearsay statements under the confrontation clause. Under the former *Ohio v. Roberts*[4] reliability test, the confrontation clause did not bar admission of an unavailable witness's statement if the statement had an "adequate indicia of reliability."[5] Evidence satisfied that test if it fell within a firmly rooted hearsay exception or had particularized guarantees of trustworthiness.[6] *Crawford* rejected the *Roberts* analysis, concluding that although the ultimate goal of the confrontation clause is to ensure reliability of evidence, "it is a procedural rather than a substantive guarantee."[7] It continued: The confrontation clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[8] *Crawford* went on to hold that testimonial statements by declarants who do not appear at trial may not be admitted unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.[9]

The *Crawford* Rule

Testimonial statements by witnesses who are not subject to cross-examination at trial may not be admitted unless the witness is unavailable and there has been a prior opportunity for cross-examination.

A. When *Crawford* Issues Arise.

Crawford issues arise whenever the State seeks to introduce statements of a witness who is not subject to cross-examination at trial.[10] For example, *Crawford* issues arise when the State seeks to admit:

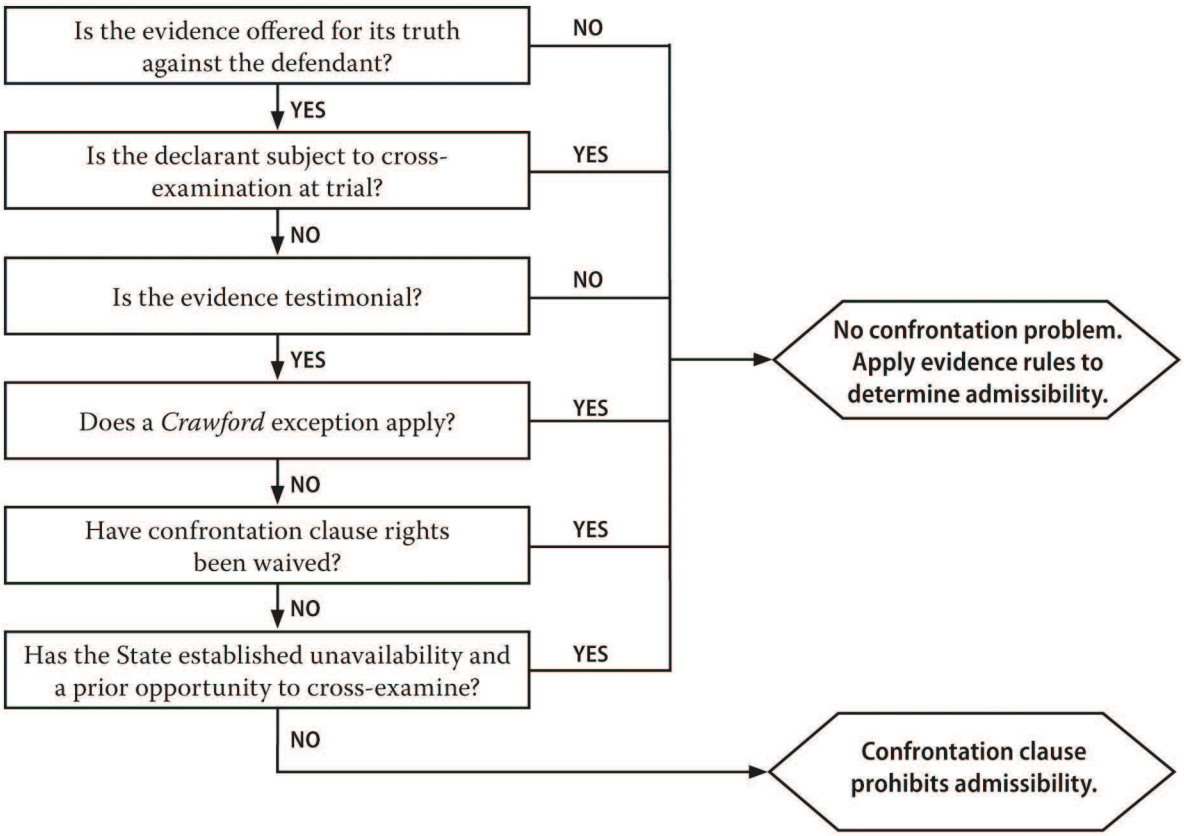
1. U.S. CONST. amend. VI.
2. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009).
3. 541 U.S. 36 (2004).
4. 448 U.S. 56 (1980).
5. *Crawford*, 541 U.S. at 40 (quotation omitted) (describing the *Roberts* test).
6. *Id*.
7. *Id*. at 61.
8. *Id*.
9. *Id.* at 68. For a more detailed discussion and analysis of *Crawford*, see JESSICA SMITH, CRAWFORD V. WASHINGTON: CONFRONTATION ONE YEAR LATER (UNC School of Government 2005), *available at* http://shopping.netsuite.com/s.nl/c.433425/it.A/id.4164/.f.
10. When no out-of-court statement is offered, the confrontation clause is not implicated. State v. Carter, ___ N.C. App. ___, 765 S.E.2d 56, 61 (2014) (where the defendant failed to identify any testimony by the investigating officer

- out-of-court statements of a nontestifying domestic violence victim to first-responding officers or to a 911 operator;
- out-of-court statements of a nontestifying child sexual assault victim to a family member, social worker, or doctor;
- a forensic report, by a nontestifying analyst, identifying a substance as a controlled substance or specifying its weight;
- an autopsy report, by a nontestifying medical examiner, specifying the cause of a victim's death;
- a chemical analyst's affidavit in an impaired driving case, when the analyst is not available at trial;
- a written record prepared by an evidence custodian to establish chain of custody, when the custodian does not testify at trial.

B. Framework for Analysis.

The flowchart in Figure 1 below sets out a framework for analyzing *Crawford* issues. The steps of this analysis are fleshed out in the sections that follow.

Figure 1. *Crawford* flowchart



that repeated an out-of-court statement of the confidential source, the defendant's confrontation clause argument was without merit).

II. Statement Offered For Its Truth Against the Defendant.

A. For Its Truth.

Crawford is implicated only if the out of court statement is offered for its truth.[11]

1. Role of Hearsay Rules.

Hearsay is defined as an out of court statement offered for its truth.[12] Because *Crawford* applies to out of court statements offered for their truth, one might wonder how the *Crawford* analysis relates to the hearsay rules, if at all. Although *Crawford* severed the connection between the confrontation clause and the hearsay rules, more recent cases muddy the waters on this issue.

In *Crawford* Justice Scalia made clear that the confrontation clause analysis is not informed by the hearsay rules.[13] This was an important analytical change. Under the old *Roberts* test, evidence that fell within a firmly rooted hearsay exception was deemed sufficiently reliable for confrontation clause purposes. In this way, under the old test, confrontation clause analysis collapsed into hearsay analysis. In *Crawford* the Court rejected this approach, creating a separate standard for admission under the confrontation clause, and making clear that constitutional confrontation standards cannot be determined by reference to federal or state evidence rules.[14]

Notwithstanding this clear language in *Crawford,*[15] in more recent cases the Court has stated that "in determining whether a statement is testimonial, 'standard rules of hearsay, designed to identify some statements as reliable, will be relevant.'"[16] Whether this language suggests an eventual return to an *Ohio v. Roberts* hearsay-dependent analysis remains to be seen.

2. Offered for a Purpose Other Than the Truth.

If a statement is offered for a purpose other than for its truth, it falls outside of the confrontation clause.[17]

a. Impeachment. If the out of court statement is offered for impeachment, it is offered for a purpose other than its truth and is not covered by the *Crawford* rule.[18]

b. Basis of an Expert's Opinion. Prior to the Court's decision in *Williams v. Illinois*,[19] the North Carolina appellate courts, like many

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11. *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009) (testimonial statements are solemn declarations or affirmations "made for the purpose of establishing or proving some fact" (quoting *Crawford*, 541 U.S. at 51)).
12. N.C. R. EVID. 801(c).
13. *Crawford*, 541 U.S. at 50-51 (rejecting the view that confrontation analysis depends on the law of evidence).
14. *Id.* at 61 (the Framers did not intend to leave the Sixth Amendment protection "to the vagaries of the rules of evidence.").
15. Amplifying this point, in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009), the Court noted that "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because - having been created for the administration of the entity's affairs and not for the purpose of establishing or proving some fact at trial - they are not testimonial." *Id.* at 324.
16. Ohio v. Clark, __ U.S. __, 135 S. Ct. 2173, 2180 (2015) (quoting Michigan v. Bryant, 562 U.S. 344, 358-59 (2011)).
17. *Crawford,* 541 U.S. at 59 n.9 ("The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."). For North Carolina cases, *see, e.g.*, State v. Ross, 216 N.C. App. 337, 346 (2011) (same); State v. Mason, 222 N.C. App. 223, 230 (2012) (same); State v. Rollins, __ N.C. App. __, 738 S.E.2d 440, 446 (2013) (same).
18. Five Justices agreed on this issue in *Williams v. Illinois*, 567 U.S.__, 132 S. Ct. 2221 (2012); *id.* at __, 132 S. Ct. at 2256 (Thomas, J., concurring) (calling this a "*legitimate* nonhearsay purpose"); *id.* at 2269 (Kagan, J., dissenting).

courts around the nation, held that a statement falls outside of the *Crawford* rule when offered as the basis of a testifying expert's opinion.[20] They reasoned that when offered for this purpose, a statement is not offered for its truth. While *Williams* is a fractured opinion of questionable precedential value, it is significant in that five Justices rejected the reasoning of the pre-existing North Carolina cases. Thus, while *Williams* did not overrule North Carolina's decisions on point, they clearly are on shaky ground. *Williams* is discussed in more detail in Section IV.F.3. below.

c. Corroboration. When the evidence is admitted for the purpose of corroboration, cases hold that it is not offered for its truth and therefore falls outside of the scope of the *Crawford* rule.[21] It is not yet clear whether the Court's rejection of the "basis of the expert's opinion" rationale in *Williams* will impact these cases.[22]

d. To Explain the Course of an Investigation. Sometimes statements of a nontestifying declarant are admitted to explain an officer's action or the course of an investigation. Cases have held that such statements are not admitted for their truth and thus present no *Crawford* issue.[23]

e. To Explain a Listener's or Reader's Reaction or Response. Cases hold that when a statement is introduced to show the reaction or response of a listener or reader, it is not offered for its truth and the confrontation clause is not implicated. This issue can arise when the State introduces into evidence an interrogation of the defendant during which the interrogating officer incorporated into his or her questioning statements made to the officer by others.[24] But it can arise in other contexts as well.[25]

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19. 567 U.S. __, 132 S. Ct. 2221 (2012).

20. *See, e.g.*, State v. Mobley, 200 N.C. App. 570, 576 (2009) (no *Crawford* violation occurred when a substitute analyst testified to her own expert opinion, formed after reviewing data and reports prepared by nontestifying expert); State v. Hough, 202 N.C. App. 674, 680-82 (2010) (following *Mobley* and holding that no *Crawford* violation occurred when reports by a nontestifying analyst as to composition and weight of controlled substances were admitted as the basis of a testifying expert's opinion on those matters; the testifying expert performed the peer review of the underlying reports, and the underlying reports were offered not for their truth but as the basis of the testifying expert's opinion), *aff'd per curiam by an equally divided court*, 367 N.C. 79 (2013).

21. *See, e.g.*, State v. Mason, 222 N.C. App. 223, 230 (2012) (the defendant's confrontation rights were not violated when an officer testified to the victim's statements made to him at the scene where the statements were not admitted for the truth of the matter asserted but rather for corroboration); State v. Ross, 216 N.C. App. 337, 346-47 (2011) (*Crawford* does not apply to evidence admitted for purposes of corroboration).

22. See Section II.A.2.b. above.

23. *See, e.g.*, State v. Rollins, __ N.C. App. __, 738 S.E.2d 440, 448-49 (2013) (statements made to an officer were not introduced for their truth but rather to show the course of the investigation, specifically why officers searched a location for evidence); State v. Batchelor, 202 N.C. App. 733, 736-37 (2010) (statements of a nontestifying informant to a police officer were nontestimonial; statements were offered not for their truth but rather to explain the officer's actions); State v. Hodges, 195 N.C. App. 390, 400 (2009) (declarant's consent to search vehicle was admitted to show why the officer believed he could and did search the vehicle); State v. Tate, 187 N.C. App. 593, 600-01 (2007) (declarant's identification of "Fats" as the defendant was not offered for the truth but rather to explain subsequent actions of officers in the investigation); State v. Wiggins, 185 N.C. App. 376, 383-84 (2007) (informant's statements offered not for their truth but to explain how the investigation unfolded, why the defendants were under surveillance, and why an officer followed a vehicle; noting that a limiting instruction was given); State v. Leyva, 181 N.C. App. 491, 500 (2007) (to explain the officers' presence at a location).

24. *See, e.g.*, State v. Castaneda, 215 N.C. App. 144, 148 (2011) (officer's statements during an interrogation repeating what others had told the police were not admitted for their truth but rather to provide context for the defendant's responses); State v. Miller, 197 N.C. App. 78, 87-91 (2009) (purported statements of co-defendants and others contained in the detectives' questions posed to the defendant were not offered to prove the truth of the matters

f. **As Illustrative Evidence.** One unpublished North Carolina case held that when evidence is admitted for illustrative purposes, it is not admitted for its truth and the confrontation clause is not implicated.[26]

g. **Limiting Instructions.** When a statement is admitted for a proper "not for the truth" purpose, a limiting instruction should be given.[27]

B. Against the Defendant.

Because the confrontation clause confers a right to confront witnesses against the accused, the defendant's own statements do not implicate the clause or the *Crawford* rule.[28] Similarly, the confrontation clause has no applicability to evidence presented by the defendant.[29]

III. Subject to Cross-Examination at Trial.

Crawford does not apply when the declarant is subject to cross-examination at trial.[30] Normally, a witness is subject to cross-examination when he or she is placed on the stand, put under oath, and responds willingly to questions.

A. Memory Loss.

Cases both before and after *Crawford* have held that a witness is subject to cross-examination at trial even if the witness testifies to memory loss as to the events in question.[31]

B. Privilege.

When a witness takes the stand but is prevented from testifying on the basis of privilege, the witness has not testified for purposes of the *Crawford* rule. In fact, this is what happened in *Crawford*, where state marital privilege barred the witness from testifying at trial.[32]

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asserted but to show the effect they had on the defendant and his response; the defendant originally denied all knowledge of the events but when confronted with statements from others implicating him, the defendant admitted that he was present at the scene and that he went to the victim's house with the intent of robbing him).

25. State v. Hayes, ___ N.C. App. ___, 768 S.E.2d 636, 640-41 (2015) (the trial court did not err by admitting into evidence a forensic psychologist's report prepared in connection with a custody proceeding regarding the defendant's and the victim's children or by allowing the psychologist to testify about her report; although the psychologist's report and testimony contained third party statements from non-testifying witnesses who were not subject to cross-examination at trial, the evidence was not admitted for the truth of the matter asserted but rather to show the defendant's state of mind with respect to how he felt about the custody dispute with his wife); State v. Byers, 175 N.C. App. 280, 289 (2006) (statement offered to explain why witness ran, sought law enforcement assistance, and declined to confront defendant single-handedly).

26. State v. Larson, 189 N.C. App. 211, *3 (2008) (unpublished) (child sexual assault victim's drawings offered to illustrate and explain the witness's testimony).

27. N.C. R. EVID. 105; *see also Wiggins*, 185 N.C. App. at 384 (noting that a limiting instruction was given).

28. State v. Richardson, 195 N.C. App. 786, *5 (2009) (unpublished) ("*Crawford* is not applicable if the statement is that of the defendant . . . ."); *see also* CONFRONTATION ONE YEAR LATER, *supra* note 9, at 28 & n.156.

29. Giles v. California, 554 U.S. 353, 376 n.7 (2008) (confrontation clause limits the evidence that the state may introduce but does not limit the evidence that a defendant may introduce).

30. *See, e.g.*, *Crawford*, 541 U.S. at 59 n.9 ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."); State v. Burgess, 181 N.C. App. 27, 34 (2007) (no confrontation violation when the victims testified at trial); State v. Harris, 189 N.C. App. 49, 54-55 (2008) (same); State v. Lewis, 172 N.C. App. 97, 103 (2005) (same).

31. *See* CONFRONTATION ONE YEAR LATER, *supra* note 9, at 28–29 & n.159.

32. *Crawford,* 541 U.S. at 40.

C. *Maryland v. Craig* Procedures For Child Abuse Victims.

In *Maryland v. Craig*,[33] the United States Supreme Court upheld a Maryland statute that allowed a judge to receive, through a one-way closed-circuit television system, the testimony of an alleged child abuse victim. Under the one-way system, the child witness, prosecutor, and defense counsel went to a separate room while the judge, jury, and defendant remained in the courtroom. The child witness was examined and cross-examined in the separate room, while a video monitor recorded and displayed the child's testimony to those in the courtroom.[34] The procedure prevented the child witness from seeing the defendant as she testified against the defendant at trial.[35] However, the child witness had to be competent to testify and to testify under oath; the defendant retained full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant were able to view by video monitor the demeanor of the witness as she testified.[36] Throughout the procedure, the defendant remained in electronic communication with defense counsel, and objections were made and ruled on as if the witness were testifying in the courtroom.[37]

Upholding the Maryland procedure, the *Craig* Court reaffirmed the importance of face-to-face confrontation of witnesses appearing at trial but concluded that such confrontation was not an indispensable element of the right to confront one's accusers. It held that while "the Confrontation Clause reflects a preference for face-to-face confrontation . . . that [preference] must occasionally give way to considerations of public policy and the necessities of the case."[38] It went on to explain that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[39]

As to the important public policy, the Court stated: "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."[40] However, the Court made clear that the State must make a case-specific showing of necessity. Specifically, the trial court must (1) "hear evidence and determine whether use of the one-way closed-circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify"; (2) "find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (3) "find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than mere nervousness or excitement or some reluctance to testify."[41]

The Court went on to note that in the case before it, the reliability of the testimony was otherwise assured. Although the Maryland procedure prevented a child witness from seeing the defendant as he or she testified at trial, the procedure required that (1) the child be competent to testify and testify under

33. 497 U.S. 836 (1990).
34. *Id*. at 841–42.
35. *Id.* at 841–42 & 851.
36. *Id.* at 851.
37. *Id.* at 842.
38. *Id*. at 849 (citations and internal quotation marks omitted).
39. *Id.* at 850.
40. *Id*. at 853.
41. *Id.* at 855–56 (citations and internal quotation marks omitted).

oath; (2) the defendant have full opportunity for contemporaneous cross-examination; and (3) the judge, jury, and defendant be able to view the witness's demeanor while he or she testified.[42]

Crawford called into question the continued validity of *Maryland v. Craig* procedures.[43] Although the United States Supreme Court has not yet considered whether the type of procedure sanctioned in *Craig* for child victims survives *Crawford*, the North Carolina courts have held that it does.[44]

D. Remote Testimony.

Relying on *Maryland v. Craig,*[45] some have argued that when a witness testifies remotely through a two-way audio-visual system the witness is subject to cross-examination at trial and the requirements of the confrontation clause are satisfied. To date, courts have been willing to uphold such a procedure only when the prosecution can assert a pressing public policy interest, such as:

- protecting child sexual assault victims from trauma,
- national security in terrorism cases,
- combating international drug smuggling,
- protecting a seriously ill witness's health, and
- protecting witnesses who have been intimidated.

At the same time, courts have either held or suggested that the following rationales are insufficient to justify abridging a defendant's confrontation rights:

- convenience,
- mere unavailability,
- cost savings, and
- general law enforcement.

For a detailed discussion of this issue, see the publication cited in the footnote.[46]

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42. *Id*. at 851.

43. *See Crawford*, 541 U.S. at 67-68 ("By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design."); JESSICA SMITH, EMERGING ISSUES IN CONFRONTATION LITIGATION: A SUPPLEMENT TO *CRAWFORD V. WASHINGTON*: CONFRONTATION ONE YEAR LATER 27 (UNC School of Government 2007), *available at* http://www.sog.unc.edu/sites/www.sog.unc.edu/files/additional_files/crawfordsuppl.pdf

44. State v. Jackson, 216 N.C. App. 238, 244-47 (2011) (in a child sexual assault case, the defendant's confrontation rights were not violated when the trial court permitted the child victim to testify by way of a one-way closed circuit television system; the court held that *Craig* survived *Crawford* and that the procedure satisfied *Craig*'s procedural requirements; the court also held that the child's remote testimony complied with the statutory requirements of G.S. 15A-1225.1); State v. Lanford, 225 N.C. App. 189, 204-08 (2013) (following *Jackson*, the court held that the trial court did not err by removing the defendant from the courtroom and putting him in another room where he could watch the child victim testify on a closed circuit television while staying connected with counsel through a phone line; the trial court's findings of fact about the trauma that the child would suffer and the impairment to his ability to communicate if required to face the defendant in open court were supported by the evidence).

45. *See* Section III.C. above (discussing *Craig*).

46. Jessica Smith, *Remote Testimony and Related Procedures Impacting a Criminal Defendant's Confrontation Rights*, ADMIN. JUST. BULL. No. 2013/02 (UNC School of Government Feb. 2013), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1302.pdf. For a recent North Carolina case decided after publication of that paper, see *State v. Seelig*, __ N.C. App. __, 738 S.E.2d 427, 432-35 (2013) (the trial court did not err by allowing an ill witness to testify by way of a two-way, live, closed-circuit web broadcast; the trial court found that the witness had a history of panic attacks, suffered a severe panic attack on the day he was scheduled to fly to North Carolina for trial, was hospitalized as a result, and was unable to travel because of his medical condition; the court found these findings sufficient to establish that allowing the witness to testify remotely was necessary to meet an

Of course, if confrontation rights are waived, remote testimony is permissible. In 2014, the North Carolina General Assembly enacted legislation allowing for remote testimony by forensic analysts in certain circumstances after a waiver of confrontation rights by the defendant through a notice and demand statute.[47]

E. Making the Witness "Available" to the Defense.

In *Melendez-Diaz v. Massachusetts*,[48] the United States Supreme Court seemed to foreclose any argument that a witness is subject to cross-examination when the prosecution informs the defense that the witness will be made available if called by that side or when the prosecution produces the witness in court but does not call that person to the stand.[49]

IV. Testimonial Statements.

The *Crawford* rule, by its terms, applies only to testimonial evidence; nontestimonial evidence falls outside of the confrontation clause and need only satisfy the Evidence Rules for admissibility.[50] In addition to classifying as testimonial the particular statements at issue (a suspect's statements during police interrogation at the station house), the *Crawford* Court suggested that the term had broader application. Specifically, the Court clarified that the confrontation clause applies to those who "bear testimony" against the accused.[51] "Testimony," it continued, is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[52] Foreshadowing its analysis in *Davis v. Washington*[53] and *Michigan v. Bryant*[54], the Court suggested that "[a]n accuser who makes a formal statement to government officers bears testimony" within the meaning of the confrontation clause.[55] However, the *Crawford* Court expressly declined to comprehensively define the key term, "testimonial."[56] The meaning of that term is explored throughout the remainder of this section.

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important state interest of protecting the witness's ill health and that reliability of the witness's testimony was otherwise assured, noting, among other things that the witness testified under oath and was subjected to cross-examination).

47. S.L. 2014-119 sec 8(a) & 8(b) (enacting G.S. 15A-1225.3 and G.S. 20-139.1(c5) respectively). *See generally* Section VI.B. below, discussing notice and demand statutes.

48. 557 U.S. 305 (2009).

49. *Id*. at 324 ("[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."); *see also* D.G. v. Louisiana, 559 U.S. 967 (2010) (vacating and remanding, in light of *Melendez-Diaz*, a state court decision that found no confrontation violation when the declarant was present in court but not called to the stand by the state).

50. Michigan v. Bryant, 562 U.S. 344, 354 (2011) ("We … limited the Confrontation Clause's reach to testimonial statements . . . ."); Whorton v. Bockting, 549 U.S. 406, 420 (2007) ("Under *Crawford* … the Confrontation Clause has no application to [nontestimonial] statements …."); Ohio v. Clark, 576 U.S. __, 135 S. Ct. 2173, 2180 (2015) (quoting *Bryant*).

51. *Crawford*, 541 U.S. at 51.

52. *Id.* (quotation omitted).

53. 547 U.S. 813, 829-30 (2006) (holding, in part, that a victim's statements to responding officers were testimonial).

54. 562 U.S. 344, 378 (2011) (holding that a shooting victim's statements to first responding officers were nontestimonial).

55. *Crawford*, 541 U.S. at 51.

56. *Id.* at 68; *see also Clark*, 576 U.S. at __,135 S. Ct. at 2179 ("[O]ur decision in *Crawford* did not offer an exhaustive definition of 'testimonial' statements.").

A. Prior Trial, Preliminary Hearing, and Grand Jury Testimony.
Crawford stated: "[w]hatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial."[57] It is thus clear that this type of evidence is testimonial.

B. Plea Allocutions.
Crawford classified plea allocutions as testimonial.[58]

C. Deposition Testimony.
Davis suggests that deposition testimony is testimonial.[59]

D. Police Interrogation.
Crawford held that recorded statements made by a suspect to the police during a custodial interrogation at the station house and after *Miranda* warnings had been given qualified "under any conceivable definition" of the term interrogation.[60] The *Crawford* Court noted that when classifying police interrogations as testimonial it used the term "interrogation" in its "colloquial, rather than any technical, legal sense."[61] Additionally, the term police interrogation includes statements that are volunteered to the police. The Court has stated: "[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation."[62] This language calls into doubt earlier North Carolina decisions holding that the testimonial nature of the statements at issue turned on whether or not they were volunteered to the police.[63]

1. Of Suspects.
As noted, *Crawford* held that recorded statements made by a suspect to the police during a tape-recorded custodial interrogation done after *Miranda* warnings had been given were testimonial.

2. Of Victims.
Crawford did not indicate whether its new rule was limited to police interrogation of suspects or whether it extended to questioning of victims as well. The Court answered that question two years later in *Davis v. Washington*,[64] clarifying that the new *Crawford* rule extends to questioning of victims. In 2011, the Court again addressed the testimonial nature of a victim's statements to law enforcement officers in *Michigan v. Bryant*.[65] The guidance that emerged from those cases is discussed below.

a. *Davis v. Washington* and the Emergence of a "Primary Purpose" Analysis. *Davis* was a consolidation of two separate domestic violence cases, *Davis v. Washington* and *Hammon v. Indiana.* Both cases involved statements by victims to police officers or their agents. The Court held that statements by one of

57. *Id.*; *see also Clark,* 576 U.S. at __, 135 S. Ct. at 2179 (so describing *Crawford*).
58. *Crawford,* 541 U.S. at 64.
59. *Davis*, 547 U.S. at 824 n.3, 825.
60. *Crawford*, 541 U.S. at 53 n.4.
61. *Id*.
62. *Melendez-Diaz*, 557 U.S. at 316 (quoting *Davis*, 547 U.S. at 822–23 n.1).
63. *See, e.g.*, State v. Hall, 177 N.C. App. 463, *2 (2006) (unpublished).
64. 547 U.S. 813 (2006).
65. 562 U.S. 344 (2011).

the domestic violence victims during a 911 call were nontestimonial but that statements by the other domestic violence victim to first-responding officers were testimonial. In so doing the *Davis* Court adopted a "primary purpose" test for determining the testimonial nature of statements made during a police interrogation.[66] Specifically, it articulated a two-part rule for determining the testimonial nature of statements to the police or their agents: (a) statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency; and (b) statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past facts potentially relevant to later criminal prosecution.[67]

The *Davis* Rules:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.

Statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past facts potentially relevant to later criminal prosecution.

b. ***Michigan v. Bryant* and the Ongoing Emergency Factor in the Primary Purpose Analysis.** In *Michigan v. Bryant*,[68] the Court held that a mortally wounded shooting victim's statements to first-responding officers were nontestimonial. The Court noted that unlike *Davis,* the case before it involved a non-domestic dispute, a victim found in a public location suffering from a fatal gunshot wound, and a situation where the perpetrator's location was unknown. These facts required the Court to "confront for the first time circumstances in which the 'ongoing emergency' … extends beyond an initial victim to a potential threat to the responding police and the public at large," and to provide additional clarification on how a court determines whether the primary purpose of the interrogation is to enable police to meet an ongoing

66. Ohio v. Clark, 576 U.S. __, 135 S. Ct. 2173, 2179 (2015) (in *Davis* we "[a]nnounc[ed] what has come to be known as the 'primary purpose' test").
67. In more recent cases the Court has made clear that the *Davis* primary purpose test still reigns. *Id.* at __, 135 S. Ct. at 2181.
68. 562 U.S. 344 (2011).

emergency.[69] It concluded that when determining the primary purpose of an interrogation, a court must objectively evaluate the circumstances of the encounter and the statements and actions of both the declarant and the interrogator.[70] It further explained that the existence of an ongoing emergency "is among the most important circumstances informing the 'primary purpose' of an interrogation."[71]

Applying this analysis, the Court began by examining the circumstances of the interrogation to determine if an ongoing emergency existed. Relying on the fact that the victim said nothing to indicate that the shooting was purely a private dispute or that the threat from the shooter had ended, the Court found that the emergency was broader than those at issue in *Davis*, encompassing a threat to the police and the public.[72] The Court also found it significant that a gun was involved.[73] "At bottom," it concluded, "there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]."[74]

c. Determining Whether an "Ongoing Emergency" Exists. As noted, *Bryant* made clear that the existence of an ongoing emergency is an important circumstance to consider when assessing the primary purpose of an interrogation. However, even after *Bryant,* there are no clear rules on what constitutes an ongoing emergency. The following factors would seem to support the conclusion that an emergency was ongoing:

- The perpetrator remains at the scene and is not in law enforcement custody
- The dispute is a public, not a private one
- The perpetrator is at large
- The perpetrator's location is unknown
- The perpetrator's motive is unknown
- The perpetrator presents a continuing threat
- A gun or other weapon with a "long reach" is involved
- The perpetrator is armed with such a weapon
- Physical violence is occurring
- The location is disorderly
- The location is unsecure
- The victim is seriously injured
- Medical attention is needed or the need for it is not yet determined

69. *Id.* at 359.
70. *Id*. at 367.
71. *Id*. at 361. Whether or not an ongoing emergency exists is not the sole factor to be considered in the testimonial inquiry; rather, it is simply one factor that must be assessed. *Clark*, 576 U.S. at __, 135 S. Ct. at 2180.
72. *Bryant*, 562 U.S. at 372-73.
73. *Id*. at 373.
74. *Id*. at 374.

- The victim or others are in danger
- The questioning occurs close in time to the event
- The victim or others call for assistance
- The victim or others are agitated
- No officers are at the scene

On the other hand, the following factors would seem to support the conclusion that an emergency ended or did not exist:

- The perpetrator has fled and is unlikely to return
- The dispute is a private, not a public one
- The perpetrator is in law enforcement custody
- The perpetrator's location is known
- The perpetrator's motive is known and does not extend beyond the current victim
- The perpetrator presents no continuing threat
- A fist or another weapon with a "short reach" is involved
- The perpetrator is not armed with a "long reach" weapon
- No physical violence is occurring
- The location is calm
- The location is secure
- No one is seriously injured
- No medical attention is needed
- The victim and others are safe
- There is a significant lapse of time between the event and the questioning
- No call for assistance is made
- The victim or others are calm
- Officers are at the scene

d. Other Factors Relevant to the Primary Purpose Analysis. In addition to clarifying that whether an ongoing emergency exists is one of the most important circumstances informing the primary purpose analysis, *Bryant* made clear that the analysis also must examine the statements and actions of both the declarant and the interrogators[75] and the formality of the statement itself.[76] The Court did just that in *Bryant,* determining that given the circumstances of the emergency, it could not say that a person in the victim's situation would have had the primary purpose of establishing past facts relevant to a criminal prosecution.[77] As to the motivations of the police, the Court concluded that they solicited information from the victim to meet the ongoing emergency.[78] Finally, it found that the informality of the situation

75. *Id*. at 367.
76. *Id*. at 377.
77. *Id*. at 374-75.
78. *Id*. at 375-76.

and interrogation further supported the conclusion that the victim's statements were nontestimonial.[79]

Subsequent Supreme Court case law has emphasized that the existence of an ongoing emergency is not the "touchstone" of the analysis; rather it is just one factor in the primary purpose analysis, and courts should consider other factors, such as the informality of the situation and the interrogation.[80] It explained: "A 'formal station-house interrogation,' like the questioning in *Crawford*, is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused."[81] And perhaps suggesting a rolling back of the strict *Crawford* doctrine, the Court recently stated that "in determining whether a statement is testimonial, standard rules of hearsay, designed to identify some statements as reliable, will be relevant."[82] How this language can be squared with *Crawford*'s rejection of the hearsay rules as a basis for interpreting the confrontation clause[83] remains to be seen.

Analysis of statements made by child victims to the police should take into consideration *Ohio v. Clark*, discussed in Sections IV.E.3. and IV.J., below.

e. Equally Weighted or Other Purposes. The primary purpose test requires the decision-maker to determine the primary purpose of the interrogation. It is not clear how the statements should be categorized if the interrogation had a dual, evenly weighted purpose. On the other hand, the Court has clarified "that 'there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony'"; in these instances the statements will be nontestimonial.[84] For example, a business record created for the administration of an entity's affairs and not to establish or prove a fact at trial is nontestimonial.[85]

f. Objective Determination. As the Court stated in *Davis* and reiterated in *Bryant,* when determining the primary purpose of questioning, courts must objectively evaluate the circumstances.[86]

g. Post-*Bryant* North Carolina Cases. To date North Carolina has only one published post-*Bryant* case on point. In *State v. Glenn*,[87] the court of appeals held that a victim's statement to a law enforcement officer was testimonial. The court distinguished *Bryant* and reasoned in part that there was no ongoing emergency when the statement was made.

79. *Id*. at 377.
80. Ohio v. Clark, 576 U.S. __, 135 S. Ct. 2173, 2180 (2015).
81. *Id.*
82. *Id.* (quotation omitted).
83. *See* Section II.A.1 above.
84. *Clark*, 576 U.S. at __, 135 S. Ct. at 2180.
85. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009).
86. *Bryant,* 562 U.S. at 349; *Davis*, 547 U.S. at 822.
87. 220 N.C. App. 23, 29-32 (2012).

3. Of Witnesses.

For confrontation clause purposes, there seems to be no reason to treat police questioning of witnesses any differently from police questioning of victims. Consistent with that suggestion, one North Carolina decision considered the purpose of a private citizen's communication with a police officer and held that the communication at issue was nontestimonial.[88]

Analysis of statements made by child victims to the police should take into consideration *Ohio v. Clark*, discussed in Sections IV.E.3. and IV.J., below.

4. Interrogation by Police Agents.

Crawford clearly applies whenever questioning is done by the police or a police agent (in *Davis,* the Court assumed but did not decide that the 911 operator was a police agent). Factors cited by post-*Davis* decisions when determining that actors were agents of the police include the following:

- The police directed the victim to the interviewer or requested or arranged for the interview
- The interview was forensic
- A law enforcement officer was present during the interview
- A law enforcement officer observed the interview from another room
- A law enforcement officer videotaped the interview
- The interviewer consulted with a prosecution investigator before or during the interview
- The interviewer consulted with a law enforcement officer before or during the interview
- The interviewer asked questions at the behest of a law enforcement officer
- The purpose of the interview was to further a criminal investigation
- The lack of a non-law enforcement purpose to the interview
- The fact that law enforcement was provided with a videotape of the interview after it concluded

E. Statements to People Other Than the Police or Their Agents.

Crawford, Davis, and *Bryant* all involved questioning by the police or their agents. Until its 2015 decision in *Ohio v. Clark,*[89] the Court only had hinted that statements to people other than the police or their agents can be testimonial.[90]

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88. State v. Call, __ N.C. App. __, 748 S.E.2d 185, 188-89 (2013) (in a larceny from a merchant case, any assertions by the store's deceased assistant manager in a receipt for evidence form were nontestimonial; the receipt—a law enforcement document—established ownership of stolen baby formula that had been recovered by the police, as well as its quantity and type; its purpose was to release the property from the police department back to the store after having been seized during a traffic stop).

89 576 U.S. __, 135 S. Ct. 2173 (2015).

90. In *Whorton v. Bockting*, 549 U.S. 406 (2007), the Court held that the new *Crawford* rule did not apply retroactively. In that case, the defendant had asserted that his confrontation clause rights were violated when the trial court admitted statements by a child victim to both an officer and to her mother. In its decision the Court gave no indication that the child's statements to her mother fell outside of the protections of the confrontation clause. Additionally, the *Davis* Court's discussion of an old English case can be read to suggest that statements to family members can be testimonial. *Davis*, 547 U.S. at 828 (noting that the defendant offered *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), as an example of statements by a "witness" in support of his argument that the victim's statements during the 911 call were testimonial; *Brasier* involved statements of a young rape victim to her mother immediately upon coming home; the *Davis* Court suggested that the case might have been helpful to the defendant

In *Clark,* however, the Court was faced with determining whether statements by a child abuse victim, L.P., to his preschool teachers were testimonial. Applying the primary purpose analysis, the Court held that the child's statements were nontestimonial. Significantly, the Court declined to adopt a categorical rule excluding statements made to persons other than law enforcement officers or their agents from the scope of the Sixth Amendment. It did state however that "such statements are much less likely to be testimonial than statements to law enforcement officers."[91] Section IV.E.3. below discusses *Clark* in more detail.

The lower courts have had to consider whether *Crawford* applies to statements made to a variety of people who do not qualify as the police and their agents. The sections below discuss those cases.

1. Statements to Family, Friends, Co-Workers, and Other Private Persons.

As noted below,[92] *Crawford* classified a casual remark to an acquaintance as nontestimonial. Since *Crawford*, courts have had to grapple with classifying statements made to acquaintances, family, and friends that are decidedly not casual,[93] such as a statement by a domestic violence victim to her friends about the defendant's abuse and intimidation. While some cases seem to adopt a *per se* rule that statements to family, friends, and other private persons are nontestimonial, other cases have applied the *Davis* primary purpose test to such remarks. North Carolina courts both before and after *Davis* have, without exception, treated statements made to private persons as nontestimonial.[94] Note that the *per*

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had it involved the girl's scream for aid as she was being chased; the Court noted that "by the time the victim got home, her story was an account of past events"). *But see Davis*, 547 U.S. at 825 (citing *Dutton v. Evans*, 400 U.S. 74, 87-89 (1970), a case involving statements from one prisoner to another, as involving nontestimonial statements); Giles v. California, 554 U.S. 353, 376-353 (2008) (suggesting that "[s]tatements to friends and neighbors about abuse and intimidation" would be nontestimonial).

91 576 U.S. at __, 135 S. Ct. at 2181. It added:

> [A]lthough we decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment, the fact that L.P. was speaking to his teachers remains highly relevant. Courts must evaluate challenged statements in context, and part of that context is the questioner's identity. Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers. It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police. We do not ignore that reality.

Id. at __, 135 S. Ct. at 2182 (citations omitted).

92. *See* Section IV.E.7.

93. *See* CONFRONTATION ONE YEAR LATER, *supra* note 9, at 19 (cataloging cases); EMERGING ISSUES, *supra* note 43, at 22–23 (same).

94. North Carolina cases decided after *Davis* include: State v. Call, __ N.C. App. __, 748 S.E.2d 185, 187-88 (2013) (in a larceny by merchant case, statements made by a deceased Wal-Mart assistant manager to the store's loss prevention coordinator were nontestimonial; the loss prevention coordinator was allowed to testify that the assistant manager had informed him about the loss of property, triggering the loss prevention coordinator's investigation of the matter); State v. Calhoun, 189 N.C. App. 166, 170 (2008) (victim's statement to a homeowner identifying the shooter was a nontestimonial statement to a "private citizen" even though a responding officer was present when the statement was made); State v. Williams, 185 N.C. App. 318, 325 (2007) (applying the *Davis* test and holding that the victim's statement to a friend made during a private conversation before the crime occurred was nontestimonial); *see also* State v. McCoy, 185 N.C. App. 160, *7 (2007) (unpublished) (victim's statements to her mother after being assaulted by the defendant were nontestimonial); State v. Hawkins, 183 N.C. App. 300, *3 (2007) (unpublished) (victim's statements to family members were nontestimonial).

Cases decided before *Davis* include: State v. Scanlon, 176 N.C. App. 410, 426 n.1 (2006) (victim's statements to her sister were nontestimonial); State v. Lawson, 173 N.C. App. 270, 275 (2005) (statement identifying

se rule approach appears inconsistent with the Supreme Court's 2015 *Clark* decision. As discussed in Section IV.E.3 below, in *Clark* the high Court declined to adopt a categorical rule excluding from the scope of the confrontation clause statements to persons who are not law enforcement officers. As that section also notes, however, statements made to people who are not responsible for investigating and prosecuting crimes are less likely to be testimonial than those made to law enforcement officers. When the statements at issue involve those made by children, *Clark's* suggestion that "statements by very young children will rarely, if ever, implicate the Confrontation Clause," should be considered. This issue is discussed in Sections IV.E.3. and IV.J., below.

2. Statements to Medical Personnel.

The United States Supreme Court has indicated that "statements to physicians in the course of receiving treatment" are nontestimonial.[95] Notwithstanding this statement, there has been a significant amount of litigation about the testimonial nature of statements to medical providers such as pediatricians, emergency room doctors, and sexual assault nurse examiners (SANE nurses).[96] Although the law is still developing, recent cases tend to focus on whether the services have a medical purpose (as opposed to, for example, a purely forensic purpose).[97]

Analysis of statements made by children to medical providers should take into consideration *Ohio v. Clark,* discussed in Sections IV.E.3. and IV.J., below.

3. Statements to Teachers.

In *Ohio v. Clark*,[98] the United States Supreme Court held that a child abuse victim's statements to his preschool teachers were nontestimonial. Because *Clark* is likely to impact the testimonial/nontestimonial analysis of statements made by children to a wide variety of individuals, it is discussed in detail here.

The facts of *Clark* were as follows: The defendant, who went by the nickname "Dee," was caring for three-year-old L.P. and his 18-month-old sister A.T. The defendant was the children's mother's boyfriend and her pimp. The defendant was taking care of the children after having sent their mother out of town on prostitution work. After the defendant left L.P. at preschool, L.P.'s teacher, Ramona Whitley, observed that L.P.'s left eye was bloodshot. When Whitley asked him "[w]hat happened," L.P. initially said nothing. Eventually, however, he told Whitley that he "fell." Once in brighter lights, Whitley noticed "[r]ed marks, like whips of some sort," on L.P.'s face. She notified the lead teacher, Debra Jones, who asked L.P., "Who did this? What happened to you?" L.P. "said something like, Dee, Dee." Jones asked L.P. whether Dee is "big or little;" L.P. responded that "Dee is big." Jones then brought L.P. to her supervisor,

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the perpetrator, made by a private person to the victim as he was being transported to the hospital was nontestimonial); State v. Brigman, 171 N.C. App. 305, 313 (2005) (victims' statements to foster parents were nontestimonial); and State v. Blackstock, 165 N.C. App. 50, 62 (2004) (victim's statements to wife and daughter about the crimes were nontestimonial).

95. *Giles*, 554 U.S. at 376.

96. *See e.g.*, CONFRONTATION ONE YEAR LATER, *supra* note 9, at 23-24 (cataloging cases); EMERGING ISSUES, *supra* note 43, at 22 (same).

97. *See, e.g.*, State v. Miller, 264 P.3d 461, 490 (Kan. 2011) (surveying the law on point from around the country and concluding that a child's statements to a SANE nurse were nontestimonial).

98. 576 U.S. __, 135 S. Ct. 2173 (2015).

who lifted the boy's shirt, revealing more injuries. Whitley called a child abuse hotline to alert authorities about suspected abuse.

The defendant was charged with abusing both L.P. and A.T. At trial L.P. did not testify, having been found incompetent to do so. Over the defendant's confrontation clause objection, the State introduced L.P.'s statements to his teachers as evidence of guilt. The defendant was convicted and appealed. The Ohio Supreme Court held that L.P.'s statements were testimonial, reasoning that the primary purpose of the teachers' questioning was not to deal with an emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution. Because Ohio has a mandatory reporting law requiring preschool teachers and others to report suspected child abuse to authorities, the Ohio court concluded that the teachers acted as agents of the State. The U.S. Supreme Court granted review and reversed. It held:

> In this case . . . [w]e are . . . presented with the question we have repeatedly reserved: whether statements to persons other than law enforcement officers are subject to the Confrontation Clause. Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment's reach. Nevertheless, such statements are much less likely to be testimonial than statements to law enforcement officers. And considering all the relevant circumstances here, L.P.'s statements clearly were not made with the primary purpose of creating evidence for [the defendant's] prosecution. Thus, their introduction at trial did not violate the Confrontation Clause.[99]

The Court reasoned that "L.P.'s statements occurred in the context of an ongoing emergency involving suspected child abuse."[100] It explained:

> When L.P.'s teachers noticed his injuries, they rightly became worried that the 3–year–old was the victim of serious violence. Because the teachers needed to know whether it was safe to release L.P. to his guardian at the end of the day, they needed to determine who might be abusing the child. Thus, the immediate concern was to protect a vulnerable child who needed help.…[T]he emergency in this case was ongoing, and the circumstances were not entirely clear. L.P.'s teachers were not sure who had abused him or how best to secure his safety. Nor were they sure whether any other children might be at risk. As a result, their questions and L.P.'s answers were primarily aimed at identifying and ending the threat. Though not as harried, the conversation here was also similar to the 911 call in *Davis*. The teachers'

99. 576 U.S. at __, 135 S. Ct. at 2181.
100. *Id*.

> questions were meant to identify the abuser in order to protect the victim from future attacks. Whether the teachers thought that this would be done by apprehending the abuser or by some other means is irrelevant. And the circumstances in this case were unlike the interrogation in *Hammon*, where the police knew the identity of the assailant and questioned the victim after shielding her from potential harm.[101]

The Court continued, concluding that "[t]here is no indication that the primary purpose of the conversation was to gather evidence for [the defendant's] prosecution. On the contrary, it is clear that the first objective was to protect L.P."[102] The Court noted that L.P.'s teachers never told him that his responses would be used to arrest or punish the person who had hurt him and that L.P. himself never hinted that he intended his statements to be used by police or prosecutors.[103] Additionally, the Court noted, the conversation was "informal and spontaneous."[104]

The Court found that L.P.'s age "fortifie[d]" its conclusion that his statements were nontestimonial, stating: "Statements by very young children will rarely, if ever, implicate the Confrontation Clause."[105] The Court further noted that as a historical matter, there is strong evidence that similar statements were admissible at common law. It continued: "although we decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment, the fact that L.P. was speaking to his teachers remains highly relevant."[106] It explained: "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers."[107]

Finally, the Court rejected the defendant's argument that Ohio's mandatory reporting statutes made L.P.'s statements testimonial, concluding: "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution."[108]

4. Statements to Social Workers.

The testimonial nature of statements by child victims to social workers has been a hotly litigated area of confrontation clause analysis[109] and the law is still evolving. The Fourth Circuit weighed in on the issue in *United States v. DeLeon,*[110] holding that although no ongoing emergency

101. *Id.* (footnote omitted).
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at __, 135 S. Ct. at 2182.
106. *Id.*
107. *Id.*
108. *Id.* at __, 135 S. Ct. at 2183.
109. Jessica Smith, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, ADMIN. JUST. BULL. No. 2008/07 at 14-34 (UNC School of Government Dec. 2008) (cataloging cases), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0807.pdf.
110. 678 F.3d 317 (4th Cir. 2012), *reversed on other grounds*, 133 S. Ct. 2850 (2013).

existed, the child's statements to a social worker were nontestimonial based on an objective analysis of the primary purpose and circumstances of the interview.[111] Note that if the social worker is acting as an agent of the police, the statement will likely be testimonial.[112]

Analysis of statements made by children to social workers should take into consideration *Ohio v. Clark*, discussed in Sections IV.E.3., IV.J.

5. Statements to Informants.

The *Davis* Court indicated that statements made unwittingly to government informants are nontestimonial.[113]

6. Statements in Furtherance of a Conspiracy.

The Supreme Court has indicated that statements in furtherance of a conspiracy are nontestimonial.[114]

7. Casual or Offhand Remarks to An Acquaintance.

Crawford indicated that "off-hand, overheard remark[s]" and "casual remark[s] to an acquaintance" bear little relation to the types of evidence that the confrontation clause was designed to protect and thus are nontestimonial.[115] A casual or offhand remark would include, for example, a victim's statement to a friend: "I'll call you later after I go to the movies with Defendant."

F. Forensic Reports.

Because of the ubiquitous nature of forensic evidence in criminal cases, a tremendous amount of post-*Crawford* litigation has focused on the testimonial nature of forensic reports, such as chemical analysts' affidavits, drug test reports, autopsy reports, DNA reports and the like.[116] The sections that follow explore how *Crawford* applies to this type of evidence.

1. Forensic Reports Are Testimonial.

In a pair of cases, the United States Supreme Court held that forensic reports are testimonial. First, in *Melendez-Diaz v. Massachusetts*[117] the Court held to be testimonial a report, sworn to before a notary by the preparer, stating that the substance at issue was cocaine. The Court further held that the defendant's confrontation clause rights were violated when the report was admitted into evidence to prove that the substance was cocaine without a witness to testify to its contents. Then, in *Bullcoming v. New Mexico,*[118] the Court applied *Melendez-Diaz* and held that the defendant's confrontation clause rights were violated in an impaired driving case when the State's witness read into evidence a forensic report by a non-testifying analyst.

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111. *Id.* at 324-26. For a discussion of this case, see Jessica Smith, *4th Circuit Ruling: Child's Statements to Social Worker Are Non-testimonial*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 13, 2012), http://nccriminallaw.sog.unc.edu/?p=3666.
112. *See* Section IV.D.4. above.
113. *Davis*, 547 U.S. at 825.
114. *Crawford*, 541 U.S. at 56; *see also Giles*, 554 U.S. at 374, n.6 (2008).
115. *Crawford*, 541 U.S. at 51.
116. *See* CONFRONTATION ONE YEAR LATER, *supra* note 9, at 10-11 (cataloging cases); EMERGING ISSUES, *supra* note 43, at 13-17 (same); Jessica Smith, *Understanding the New Confrontation Clause Analysis*: *Crawford*, *Davis*, *and Melendez-Diaz*, ADMIN. OF JUSTICE BULL. 2010/02 (UNC School of Government Apr. 2010) (same), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1002.pdf.
117. 557 U.S. 305 (2009).
118. 564 U.S. __, 131 S. Ct. 2705 (2011).

2. Surrogate Testimony.

Bullcoming makes clear that "surrogate testimony"—when the testifying analyst simply reads into evidence the non-testifying analyst's opinion—is impermissible. In that case, the state's evidence against the defendant included a forensic laboratory report certifying that the defendant's blood-alcohol concentration was above the threshold for aggravated impaired driving. At trial, the prosecution did not call the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on the defendant's blood sample. That witness read the report into evidence. The Court held that this procedure violated the defendant's confrontation rights. North Carolina case law is in accord with *Bullcoming.*[119] At least one North Carolina case has held that the person who directly supervised the report's preparation may testify in lieu of the testing analyst.[120]

3. Substitute Analysts.

a. Guidance from the United States Supreme Court. Neither *Melendez-Diaz* nor *Bullcoming* addressed the issue of whether substitute analyst testimony is consistent with the confrontation clause. Substitute analyst testimony refers to when the state presents an expert witness who testifies to an independent opinion based on information in a non-testifying analyst's forensic report. North Carolina had endorsed the use of substitute analysts, distinguishing *Melendez-Diaz* and *Bullcoming* and reasoning that in this scenario, the underlying report is not being used for its truth but rather as the basis of the testifying expert's opinion. However, the United States Supreme Court's most recent case in this line, *Williams v. Illinois,*[121] calls this reasoning into question. *Williams* held that the defendant's confrontation clause rights were not violated when the State's DNA expert testified to an opinion based on a report done by a non-testifying analyst. However, the *Williams* decision is a fractured one in which no one line of reasoning garnered a five-vote majority. The fractured nature of the decision has resulted in confusion and uncertainty with regard to substitute analyst testimony. Adding to the confusion is the fact that five of the Justices in *Williams* expressly rejected the "not for the truth" rationale that had been used by the North Carolina courts to validate this procedure.[122]

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119. State v. Craven, 367 N.C. 51, 53 (2013) (applying *Bullcoming* and holding that the defendant's confrontation rights were violated when the testifying analyst did not give her own independent opinion, but rather gave "surrogate testimony" that "parroted" the testing analysts' opinions as stated in their lab reports); *see also* State v. Ortiz-Zape, 367 N.C. 1, 9 (2013) ("We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements."); State v. Brewington, 367 N.C. 29, 32 (2013) (another cocaine case; following *Ortiz-Zape* and finding no error where the testifying expert gave an independent opinion, "not mere surrogate testimony").

120. State v. Harris, 221 N.C. App. 548, 556 (2012) (a trainee prepared the DNA report under the testifying expert's direct supervision and the findings in the report were the expert's own).

121. 567 U.S.__132 S. Ct. 2221 (2012).

122. For an extensive discussion of *Williams* and its implications on the admissibility of forensic reports in North Carolina, see Jessica Smith, *Confrontation Clause Update: Williams v. Illinois and What It Means for Forensic Reports,* ADMIN. JUST. BULL. 2012/03 (UNC School of Government Sept. 2012), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1203.pdf.

b. North Carolina Cases. Lower courts have noted that *Williams* did little to clarify the constitutionality of using substitute analysts at trial.[123] However, *Williams* did affirm the conviction on appeal, indicating that at least in the circumstances presented in that case, use of a substitute analyst is permissible. Since *Williams,* the North Carolina Supreme Court has held that substitute analyst testimony is permissible in certain circumstances. Specifically, substitute analyst testimony is permissible if the expert testifies to an independent opinion based on information reasonably relied upon by experts in the field and the state lays a proper foundation for the testimony. This was the holding of *State v. Ortiz-Zape,*[124] a drug case. Over the defendant's objection, the trial court allowed the State's expert witness, Tracey Ray of the CMPD crime lab to testify about the lab's practices and procedures, her review of the testing in the case, and her opinion that the substance at issue was cocaine. Ray was not involved in the actual testing of the substance at issue; her opinion was based on tests done by a non-testifying analyst. The trial court excluded the non-testifying analyst's report under Rule 403. The defendant was convicted and appealed. The North Carolina Supreme Court upheld the conviction, finding that no confrontation clause violation occurred. It explained:

> [W]hen an expert gives an opinion, [i]t is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence. Therefore, when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. Accordingly, admission of an expert's independent opinion based on otherwise inadmissible facts or data of a type reasonably relied upon by experts in the particular field does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert.[125]

The court continued, "[w]e emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements."[126]

123. *See, e.g.*, State v. Michaels, 95 A.3d 648, 665 (N.J. 2014) ("[T]he fractured holdings of *Williams* provide little guidance in understanding when testimony by a laboratory supervisor or co-analyst about a forensic report violates the Confrontation Clause").
124. 367 N.C. 1 (2013).
125. *Id.* at 9 (quotations and citations omitted).
126. *Id.*; *see also* State v. Brewington, 367 N.C. 29, 32 (2013) (another cocaine case; following *Ortiz-Zape* and finding no error where the testifying expert gave an independent opinion, "not mere surrogate testimony"); State v.

Notwithstanding this North Carolina law, judges and litigants should be aware that the issue is likely to be addressed again by the United States Supreme Court, hopefully with more clarity than was provided in *Williams.*

c. Foundational Requirements. While case law from the North Carolina Supreme Court allows substitute analyst testimony post-*Williams,* the prosecution must lay a proper foundation for that evidence. In this regard, *Ortiz-Zape* is instructive. In that case, the court noted that the prosecutor had laid a proper foundation for Ray's testimony. Specifically, that the information she relied upon—the tests done by the non-testifying analyst—was reasonably relied upon by experts in the field and that Ray was asserting her own independent opinion.[127] The court elaborated on the foundational requirements:

> [W]e suggest that prosecutors err on the side of laying a foundation that establishes compliance with Rule of Evidence 703, as well as the lab's standard procedures, whether the testifying analyst observed or participated in the initial laboratory testing, what independent analysis the testifying analyst conducted to reach her opinion, and any assumptions upon which the testifying analyst's testimony relies.[128]

4. Machine Generated Data.

One post-*Williams* North Carolina case suggests that "machine-generated" raw data likely is not testimonial. In *State v. Ortiz-Zape*,[129] the court stated in dicta that "machine-generated raw data," such as a printout from a gas chromatograph, is nontestimonial.[130] As a result, the court suggested, if such data is reasonably relied upon by experts in the field, this information may be disclosed at trial.[131] Note however that a non-testifying analyst's opinion based on machine-generated data is testimonial.[132] Thus, while the raw data may be admissible as a basis of a testifying expert's opinion, the non-testifying analyst's conclusion based on that data is not.

5. Other Options for Proving the State's Case.

Two post-*Williams* North Carolina Supreme Court cases suggest that a defendant's admission that the substance is a controlled substance may be sufficient evidence for conviction. In *State v. Williams*,[133] a drug case, the court held that even if a confrontation clause error occurred with regard to the substitute analyst's testimony, it was harmless beyond a reasonable doubt because the defendant testified that the substance at

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Hurt, 367 N.C. 80 (2013) (per curiam) (applying *Ortiz-Zape* to a case involving substitute analysts in serology and DNA).
127. *Ortiz-Zape*, 367 N.C. 1, 11-12.
128. *Id.* at 13 n.3.
129. 367 N.C. 1 (2013).
130. *Id.* at 9-10.
131. *Id.*
132. *See* Section IV.F.1. above.
133. 367 N.C. 64 (2013).

issue was cocaine.[134] Likewise, in *Ortiz-Zape*, the court found that any possible confrontation error was harmless, noting in part that the defendant told the arresting officer that the substance was cocaine.[135]

G. Medical Reports and Records.

Melendez-Diaz indicated that "medical reports created for treatment purposes . . . would not be testimonial under our decision today."[136] Medical reports prepared for forensic purposes obviously are not prepared for treatment purposes; forensic reports are prepared for the very purpose of establishing or proving some fact at trial.[137]

H. Other Business and Public Records.

Crawford offered business records as an example of nontestimonial evidence.[138] In *Melendez-Diaz*, the Court was careful to clarify: "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial."[139] Also, the Court has suggested that documents created to establish guilt are testimonial, whereas those unrelated to guilt or innocence are nontestimonial.[140]

1. Records Regarding Equipment Maintenance.

Melendez-Diaz stated that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records."[141] Consistent with this statement, a number of cases have held that such records are nontestimonial.[142]

2. Police Reports.

Melendez-Diaz suggests that police reports are testimonial when they are used to establish a fact at trial.[143]

3. Fingerprint Cards.

In one pre-*Melendez-Diaz* case, the North Carolina Court of Appeals held, with little analysis, that a fingerprint card contained in the Automated Fingerprint Identification System (AFIS) database was a nontestimonial

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134. *Id.* at 69.

135. *Ortiz-Zape*, 367 N.C. at 13-14 (noting also that defense counsel elicited testimony from the officer that the substance "appear[ed] to be powder cocaine"). The court's earlier decision in *State v. Nabors*, 365 N.C. 306 (2011), may have hinted at this result. In that case, the court held that the testimony of defendant's witness identifying the substance at issue as cocaine "provided evidence of a controlled substance sufficient to withstand defendant's motion to dismiss." *Id.* at 313.

136. *Melendez-Diaz*, 557 U.S. at 312 n.2; *see also* State v. Smith, 195 N.C. App. 462, *3-4 (2009) (unpublished) (hospital reports and notes prepared for purposes of treating the patient were nontestimonial business records).

137. *See* Section IV.F.1. above (discussing forensic reports).

138. *Crawford*, 541 U.S. at 56 (business records are "by their nature" not testimonial).

139. *Melendez-Diaz*, 557 U.S. at 324.

140. *See Davis,* 547 U.S. at 825 (citing *Dowdell v. United States*, 221 U.S. 325, 330-31 (1911), and describing it as holding that "facts regarding [the] conduct of [a] prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to the defendants' guilt or innocence and hence were not statements of 'witnesses' under the Confrontation Clause"); *Melendez-Diaz*, 557 U.S. at 323 n.8. *Compare Melendez-Diaz*, 557 U.S. 305 (affidavit identifying a substance as a controlled substance in a drug case—a fact that established guilt—is testimonial), *with id.* at 311 n.1 (records of equipment maintenance on testing equipment—which do not go to guilt—are nontestimonial).

141. *Melendez-Diaz*, 557 U.S. at 311 n.1.

142. *See* EMERGING ISSUES, *supra* note 43, at 17–18.

143. *See Melendez-Diaz*, 557 U.S. at 316, 321-22 (suggesting that an officer's investigative report describing the crime scene is testimonial and stating that police reports do not qualify as business records because they are made essentially for use in court).

business record.[144] After *Melendez-Diaz*, a report of a comparison between a fingerprint taken from the crime scene and an AFIS card used to identify the perpetrator is almost certainly testimonial. However, it is not clear how *Melendez-Diaz* applies to the fingerprint card itself.

4. 911 Event Logs.

In a pre-*Melendez-Diaz* case, the North Carolina Court of Appeals cited a now discredited North Carolina Supreme Court case and held that a 911 event log was a nontestimonial business record.[145] The log detailed the timeline of a 911 call and the law enforcement response to it.[146] To the extent that such a log is kept for administrative purposes and not to establish guilt at trial, the logs may be nontestimonial even after *Melendez-Diaz*. However, if such logs are determined to be like police reports, they probably will be held to be testimonial.[147]

5. Private Security Firm Records.

In *State v. Hewson*,[148] relying again on the same discredited North Carolina Supreme Court case, the North Carolina Court of Appeals held that a "pass on information form" used by security guards in the victim's neighborhood was a nontestimonial business record. The forms were used by the guards to stay informed about neighborhood events. Analysis of the testimonial nature of such records after *Melendez-Diaz* likely will proceed as with 911 event logs.

6. Detention Center Incident Reports.

In a pre-*Melendez-Diaz* case, the North Carolina Supreme Court held that detention center incident reports were nontestimonial.[149] The court reasoned that the reports were created as internal documents concerning administration of the detention center, not for use in later legal proceedings. This analysis appears consistent with classifying business records "created for the administration of an entity's affairs" as nontestimonial and those created for the purpose of establishing or proving a fact at trial as testimonial.[150]

7. Certificates of Nonexistence of Records.

Melendez-Diaz indicates that certificates of nonexistence of records are testimonial.[151] An example of a certificate of nonexistence of record (from an identity fraud case involving an allegedly fraudulent driver's license) is a certificate from a DMV employee stating that there is no record of the defendant ever having been issued a North Carolina driver's license.

8. Department of Motor Vehicle (DMV) Records.

The North Carolina Court of Appeals has held, in a driving while license revoked case, that certain DMV records were nontestimonial.[152] In that

144. State v. Windley, 173 N.C. App. 187, 194 (2005).
145. State v. Hewson, 182 N.C. App. 196, 207 (2007). *Hewson* cited *State v. Forte*, 360 N.C. 427, 435-36 (2006), in support of its holding. *Forte* was abrogated by *Melendez-Diaz*, as discussed in *Understanding the New Confrontation Clause Analysis*, *supra* note 116, at 14 n.65, 16 n.74.
146. *Hewson*, 182 N.C. App. at 201.
147. *See Melendez-Diaz*, 557 U.S. at 316, 321-22 (suggesting that an officer's investigative report describing the crime scene is testimonial and stating that police reports do not qualify as business records because they are made essentially for use in court).
148. 182 N.C. App. 196, 208 (2007).
149. State v. Raines, 362 N.C. 1, 16-17 (2007).
150. *Melendez-Diaz*, 557 U.S. at 324.
151. *Id*. at 323.
152. State v. Clark, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015).

case, the documents at issue included a copy of the defendant's driving record, certified by the DMV Commissioner; two orders indefinitely suspending his drivers' license; and a document attached to the suspension orders and signed by a DMV employee and the DMV Commissioner. In the last document, the DMV employee certified that the suspension orders were mailed to the defendant on the dates as stated in the orders, and the DMV Commissioner certified that the orders were accurate copies of the records on file with DMV. The court held that the records, which were created by the DMV during the routine administration of its affairs and in compliance with its statutory obligations to maintain records of drivers' license revocations and to provide notice to motorists whose driving privileges have been revoked, were nontestimonial.

9. GPS Tracking Records of Supervised Defendants.

In a sex offender residential restriction case, the North Carolina Court of Appeals held that GPS tracking reports generated in connection with electronic monitoring of a defendant, who was on post-release supervision for a prior conviction, were nontestimonial business records.[153] The court reasoned: "[T]he GPS evidence … was not generated purely for the purpose of establishing some fact at trial. Instead, it was generated to monitor defendant's compliance with his post-release supervision conditions."[154]

10. Court Records.

The United States Supreme Court has suggested that statements regarding a prior trial that do not relate to the defendant's guilt or innocence are nontestimonial.[155]

I. Chain of Custody Evidence.

Melendez-Diaz indicates that chain of custody information is testimonial.[156] However, the majority took issue with the dissent's assertion that "anyone whose testimony may be relevant in establishing the chain of custody … must appear in person as part of the prosecution's case."[157] It noted that while the state has to establish a chain of custody, gaps go to the weight of the evidence, not its admissibility.[158] It concluded: "It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live."[159] This language calls into question earlier North Carolina cases suggesting that chain of custody information is nontestimonial.[160]

153. State v. Gardner, __ N.C. App. __, 769 S.E.2d 196, 199 (2014).
154. *Id.*
155. *Davis*, 547 U.S. at 825 (citing *Dowdell v. United States*, 221 U.S. 325 (1911), for the proposition that facts regarding the conduct of a prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to the defendant's guilt or innocence and thus were nontestimonial); *Melendez-Diaz*, 557 U.S. at 323 n.8 (same).
156. *Melendez-Diaz*, 557 U.S. at 311 n.1.
157. *Id.*
158. *Id*.
159. *Id.*; *see also* State v. Biggs, __ N.C. App. __, 680 S.E.2d 901, *5 (2009) (unpublished) (the defendant's confrontation clause rights were not violated when the State called only one of two officers who were present when the victim's blood was collected and did not call the nurse who drew the blood; to establish chain of custody, the State called a detective who testified that he was present when the sample was taken, he immediately received the sample from the other detective present and who signed for the sample, he kept the sample securely in a locker, and he transported it to the lab for analysis).
160. State v. Forte, 360 N.C. 427, 435 (2006) (SBI special agent's report identifying fluids collected from the victim was nontestimonial; relying, in part, on the fact that the reports contained chain of custody information); State v.

J. Special Issues Involving Statements by Children

As noted in Section IV.E.3. above, in *Ohio v. Clark,*[161] the United States Supreme Court held that, on the facts presented, statements by a young child to his preschool teachers were nontestimonial. After concluding that the primary purpose of the teachers' questioning of the victim L.P. was to address an ongoing emergency and that his answers were nontestimonial, the Court added:

> L.P.'s age fortifies our conclusion that the statements in question were not testimonial. Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system. Rather, "[r]esearch on children's understanding of the legal system finds that" young children "have little understanding of prosecution." And [the defendant] does not dispute those findings. Thus, it is extremely unlikely that a 3–year–old child in L.P.'s position would intend his statements to be a substitute for trial testimony. On the contrary, a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all.[162]

This language may be relevant to the analysis of the testimonial nature of statements by young children to persons other than teachers.

V. Exceptions to the *Crawford* Rule.

A. Forfeiture by Wrongdoing.

The United States Supreme Court has recognized a forfeiture by wrongdoing exception to the confrontation clause that extinguishes confrontation claims on the equitable grounds that a person should not be able to benefit from his or her wrongdoing.[163] Forfeiture by wrongdoing applies when a defendant engages in a wrongful act designed to prevent the witness from testifying, such as threatening, killing, or bribing the witness.[164] When the doctrine applies, the defendant is deemed to have forfeited his or her confrontation clause rights. Put another way, if the defendant intends to cause the witness's absence at trial, he or she cannot complain of that absence. At least one published North Carolina case has applied the doctrine.[165]

1. Intent to Silence Required.

In *Giles v. California*,[166] the United States Supreme Court held that for forfeiture by wrongdoing to apply, the prosecution must establish that the defendant engaged in the wrongdoing with an intent to make the witness

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Hinchman, 192 N.C. App. 657, 664-65 (2008) (chemical analyst's affidavit was nontestimonial when it was limited to an objective analysis of the evidence and routine chain of custody information).

161. 576 U.S. __, 135 S. Ct. 2173 (2015).

162. *Id*. at __, 135 S. Ct. at 2181-82 (citation omitted).

163. Giles v. California, 554 U.S. 353, 359 (2008); *Crawford*, 541 U.S. at 62 (2004); *Davis*, 547 U.S. at 833; *Clark*, 576 U.S. at __, 135 S. Ct. at 2180 (dicta); *see also* State v. Lewis, 361 N.C. 541, 549-50 (2007) (inviting application of the doctrine on retrial).

164. *Giles*, 554 U.S. at 359, 365.

165. State v. Weathers, 219 N.C. App. 522, 525-26 (2012) (the trial court properly applied the forfeiture by wrongdoing exception where the defendant intimidated the witness).

166. 554 U.S. 353 (2008).

unavailable.[167] It is not enough that the defendant engaged in a wrongful act, for example, killing the witness; the act must have been undertaken with an intent to make the witness unavailable for trial.

2. Conduct Triggering Forfeiture.

Examples of conduct that likely will result in a finding of forfeiture include threatening, killing, or bribing a witness.[168] However, *Giles* suggests that the doctrine has broader reach. Addressing domestic violence, the Court stated:

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the or forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.[169]

3. Wrongdoing by Intermediaries.

The *Giles* Court suggested that forfeiture applies not only when the defendant personally engages in the wrongdoing that brings about the witness's absence but also when the defendant "uses an intermediary for the purpose of making a witness absent."[170]

4. Conspiracy Theory.

A Fourth Circuit case applied traditional principles of conspiracy liability to the forfeiture by wrongdoing analysis, concluding that the exception may apply when the defendant's co-conspirators engage in the wrongdoing that renders the defendant unavailable.[171] The court noted that mere participation in the conspiracy is not enough to trigger liability; rather the defendant must have (1) participated directly in planning or procuring the declarant's unavailability through wrongdoing; or (2) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy.[172]

5. Procedural Issues.

a. Hearing. When the State argues for application of forfeiture by wrongdoing, a hearing may be required. There is some support for the argument that at a hearing, the trial judge may consider hearsay evidence, including the

167. *Id.* at 367.
168. *Id*. at 365.
169. *Id*. at 377.
170. *Id.* at 360.
171. United State v. Dinkins, 691 F.3d 358, 384-85 (4th Cir. 2012) (citing similar holdings from other circuits).
172. *Id.* at 385-86 (finding both prongs of the test met in this case).

unavailable witness's out-of-court statements.[173] One North Carolina case held that forfeiture can be found even if the threatened witness fails to testify at the forfeiture hearing.[174]

b. **Standard**. Although the United States Supreme Court has not ruled on the issue, many courts apply a preponderance of the evidence standard to the forfeiture by wrongdoing inquiry.[175]

B. Dying Declarations.

Although *Crawford* acknowledged cases supporting a dying declaration exception to the confrontation clause, it declined to rule on the issue.[176] However, the North Carolina Court of Appeals has recognized such an exception to the *Crawford* rule.[177]

C. Other Founding-Era Exceptions.

As discussed in Section IV.E.3. above, in *Ohio v. Clark*,[178] the United States Supreme Court held that statements by a child victim, L.P., were nontestimonial when they were made in response to his teachers' questioning, done for the primary purpose of addressing an ongoing emergency. After so holding, Court added:

> As a historical matter … there is strong evidence that statements made in circumstances similar to those facing L.P. and his teachers were admissible at common law. And when 18th-century courts excluded statements of this sort, they appeared to do so because the child should have been ruled competent to testify, not because the statements were otherwise inadmissible. It is thus highly doubtful that statements like L.P.'s ever would have been understood to raise Confrontation Clause concerns. Neither *Crawford* nor any of the cases that it has produced has mounted evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence that was regularly admitted in criminal cases at the time of the founding.[179]

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173. *Davis*, 547 U.S. at 833.

174. State v. Weathers, 219 N.C. App. 522, 526 (2012) (rejecting the defendant's argument that application of the doctrine was improper because the witness never testified that he chose to remain silent out of fear; "It would be nonsensical to require that a witness *testify against a defendant* in order to establish that the defendant has intimidated the witness into *not* testifying. Put simply, if a witness is afraid to testify against a defendant in regard to the crime charged, we believe that witness will surely be afraid to finger the defendant for having threatened the witness, itself a criminal offense.").

175. *Cf. Giles*, 554 U.S. 353, 379 (Souter, J., concurring) (assuming that the preponderance standard governs); *see*, *e.g.*, *Dinkins*, 691 F.3d. at 383 (using the preponderance standard).

176. *Crawford*, 541 U.S. at 56 n.6; *see also Giles*, 554 U.S. at 357-59 (noting that dying declarations were admitted at common law even though unconfronted); *Bryant*, 562 U.S. at 395 (Ginsburg, J., dissenting) ("[W]ere the issue properly tendered here, I would take up the question whether the exception for dying declarations survives our recent Confrontation Clause decisions.").

177. State v. Bodden, 190 N.C. App. 505, 514 (2008); State v. Calhoun, 189 N.C. App. 166, 172 (2008).

178. 576 U.S. __, 135 S. Ct. 2173 (2015).

179. *Id.* at __, 135 S. Ct. at 2182 (citations omitted).

This language can be read to support the argument that other categories of statements that were "regularly admitted in criminal cases at the time of the founding" do not implicate the confrontation clause.

VI. Waiver.

A. Generally.

Confrontation clause rights, like constitutional rights generally, may be waived.[180] To be valid, a waiver of confrontation rights, like a waiver of any constitutional right, must be knowing, voluntary, and intelligent.[181] Waivers may be expressed or implied. The sections below explore waiver of confrontation rights.

B. Notice and Demand Statutes.

1. Generally.

Melendez-Diaz indicated that states are free to adopt procedural rules governing the exercise of confrontation objections.[182] The Court discussed "notice and demand" statutes as one such procedure, noting that in their simplest form these statutes require the prosecution to give the defendant notice that it intends to introduce a testimonial forensic report at trial without the testimony of the preparer. The defendant then has a period of time in which to object to the admission of the evidence absent the analyst's appearance live at trial.[183] The Court went on to note that these simple notice and demand statutes are constitutional.[184]

2. North Carolina Statutes Allowing for Admission of Forensic Reports without Testimony By Analysts.

In 2009, the North Carolina General Assembly responded to *Melendez-Diaz* by passing legislation amending existing notice and demand statutes and enacting others.[185] These statutes set up procedures by which the State may procure a waiver of confrontation rights with regard to forensic laboratory reports, chemical analyst affidavits, and certain chain of custody evidence. Table 1 summarizes North Carolina's notice and demand statutes.

a. Effect of the Statutes. If the State gives proper notice under a notice and demand statute and the defendant fails to timely file an objection, a waiver of the confrontation right occurs.[186] When this occurs, the trial judge is required to admit the report without the presence of the preparer.[187] If the defendant files a timely objection, there is no waiver and *Crawford* applies.[188]

b. Notice. For all of the statutes, the State must give notice to defense counsel or directly to the defendant if he or she is unrepresented.[189] In its notice, the State must provide the defendant with a copy of the relevant report.[190] While the notice need not contain proof of service or a file stamp,[191] following those

180. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 314 n.3 (2009) ("The right to confrontation may, of course, be waived.").
181. Maryland v. Shatzer, 559 U.S. 98, 104 (2010) (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).
182. *Melendez-Diaz*, 557 U.S. at 314 n.3.
183. *Id*. at 326-27.
184. *Id*. at 327 n.12; *see also* State v. Whittington, 367 N.C. 186, 192-93 (2014) (if the defendant fails to object after notice is given under G.S. 90-95(g), a valid waiver of the defendant's constitutional right to confront the analyst occurs); State v. Steele, 201 N.C. App. 689, 696 (2010) (notice and demand statute in G.S. 90-95(g) is constitutional under *Melendez-Diaz*).
185. S.L. 2009-473.

procedures eliminates any question about whether notice was properly received.

c. Constitutionality. As noted above, the United States Supreme Court opined in *Melendez-Diaz* that simple notice and demand statutes are constitutional. Since that case was decided, the North Carolina Court of Appeals has upheld the constitutionality of G.S. 90-95(g), the notice and demand statute that applies in drug cases.[192] That holding is likely to apply to North Carolina's six other similarly worded notice and demand statutes.

3. North Carolina Statutes Allowing for Remote Testimony. In 2014, the North Carolina General Assembly enacted legislation allowing for remote testimony by forensic analysts in certain circumstances after a waiver of confrontation rights by the defendant through a notice and demand statute.[193]

186. *See, e.g.*, G.S. 8-58.20(f); G.S. 8-58.20(g)(5); *see also* State v. Jones, 221 N.C. App. 236, 238-39 (2012) (a report identifying a substance as cocaine was properly admitted; the State gave notice under the G.S. 90-95(g) and the defendant failed to object).

187. In 2013, the notice and demand statutes were amended, providing that when notice is given and no objection is made, the report "shall" be admitted into evidence without the presence of the preparer. S.L. 2013-171. The earlier versions of the statutes provided that upon a finding of waiver the court may, but was not required to, admit the evidence.

188. *See, e.g.*, G.S. 8-58.20(f) (if an objection is filed, the notice and demand provisions do not apply); G.S. 8-58.20(g)(6) (same).

189. State v. Blackwell, 207 N.C. App. 255, 259 (2010) (in a drug case, the trial court erred by admitting reports regarding the identity, nature, and quantity of the controlled substances where the State provided improper notice; instead of sending notice directly to the defendant, who was *pro se*, the State sent notice to a lawyer who was not representing the defendant at the time); *see also* G.S. 8-58.20(d).

190. State v. Whittington, 367 N.C. 186, 192 (2014) (the State's notice was deficient in that it failed to provide the defendant a copy of the report and stated only that "[a] copy of report(s) will be delivered upon request").

191. State v. Burrow, __ N.C. App. __, 742 S.E.2d 619, 620-22 (2013) (notice was properly given under G.S. 90-95(g) even though it did not contain proof of service or a file stamp; the argued-for service and filing requirements were not required by *Melendez-Diaz* or the statute; the notice was stamped "a true copy"; it had a handwritten notation saying "ORIGINAL FILED," "COPY FAXED," and "COPY PLACED IN ATTY'S BOX" and the defendant did not argue that he did not in fact receive the notice).

192. State v. Steele, 201 N.C. App. 689, 696 (2010) (notice and demand statute in G.S. 90-95(g) is constitutional under *Melendez-Diaz*).

193. S.L. 2014-119 sec. 8(a) & (b) (enacting G.S. 15A-1225.3 and G.S. 20-139.1(c5) respectively).

Table 1. North Carolina's Notice and Demand Statutes for Forensic Reports & Chain of Custody Evidence

Statute	Relevant Evidence	Proceedings	Time for State's Notice	Time for Defendant's Objection or Demand	AOC Form
G.S. 8-58.20(a)-(f)	Laboratory report of a written forensic analysis	Any criminal proceeding	No later than 5 business days after receipt or 30 days before the proceeding, whichever is earlier	Within 15 business days of receiving the State's notice	None
G.S. 8-58.20(g)	Chain of custody statement for evidence subject to forensic analysis	Any criminal proceeding	At least 15 business days before the proceeding	At least 5 business day before the proceeding	None
G.S. 20-139.1(c1)	Chemical analysis of blood or urine	Cases tried in district and superior court and adjudicatory hearings in juvenile court	At least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344
G.S. 20-139.1(c3)	Chain of custody statement for tested blood or urine	Cases tried in district and superior court and adjudicatory hearings in juvenile court	At least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344
G.S. 20-139.1(e1)-(e2)	Chemical analyst affidavit	Hearing or trial in district court	At least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344
G.S. 90-95(g)	Chemical analyses in drug cases	All proceedings in district and superior court	At least 15 business days before the proceeding	At least 5 business days before the proceeding	None
G.S. 90-95(g1)	Chain of custody statement in drug cases.	All proceedings in district and superior court	At least 15 business days before trial	At least 5 business days before trial	None

C. Failure to Call or Subpoena Witness.

The *Melendez-Diaz* Court rejected the argument that a confrontation clause objection is waived if the defendant fails to call or subpoena a witness, ruling that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."[194] Any support for a contrary conclusion in earlier North Carolina cases is now questionable.[195]

Some viewed the Court's grant of certiorari in *Briscoe v. Virginia*,[196] issued four days after *Melendez-Diaz* was decided, as an indication that the Court might reconsider its position on this issue. The question presented in that case was as follows: If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the confrontation clause by providing that the accused has a right to call the analyst as his or her own witness? However, in January of 2010, the Court, in a two-sentence *per curiam* decision, vacated and remanded for further proceedings not inconsistent with *Melendez-Diaz*.[197] Since that *per curiam* decision, the Court has taken other action confirming its position on this issue.[198]

D. Stipulations as Waivers.

One North Carolina case held that the defendant waived a confrontation clause challenge to a laboratory report identifying a substance as a controlled substance by "stipulating" to the admission of the report "without further authentication or further testimony."[199] Although the trial judge in that case confirmed the defendant's "stipulation" through "extensive questioning,"[200] it is better practice for the trial court to deal with such a scenario as an express waiver and to make sure that the record reflects a knowing, voluntary and intelligent waiver of confrontation rights. Another North Carolina case can be read to suggest that a defendant's stipulation that the substance at issue is a controlled substance waives any objection to admission of the forensic report concluding that the substance is a controlled substance without the presence of a preparer.[201] However, that case is probably better read as involving an express waiver of confrontation rights,[202] and the better practice is to ensure that the record reflects a knowing, voluntary and intelligent waiver of confrontation rights.

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194. *Melendez-Diaz*, 557 U.S. at 324; *see also* D.G. v. Louisiana, 559 U.S. 967 (2010) (vacating and remanding, in light of *Melendez-Diaz*, a state court decision that found no confrontation violation when the declarant was present in court but not called to the stand by the state).
195. *See, e.g.*, State v. Brigman, 171 N.C. App. 305, 310 (2005).
196. 557 U.S. 933 (2009).
197. Briscoe v. Virginia, __ U.S. __, 130 S. Ct. 1316 (2010).
198. *See D.G.*, 559 U.S. 967 (vacating and remanding in light of *Melendez-Diaz* a state court decision that found no confrontation violation when the declarant was present in court but not called to the stand by the prosecution).
199. State v. English, 171 N.C. App. 277, 282-84 (2005).
200. *Id.*
201. *State v. Ward,* __ N.C. App. __, 742 S.E.2d 550, 554 (2013). *Ward* was a drug case in which the defendant stipulated that the pills at issue were oxycodone and a non-testifying analyst's report was introduced into evidence.
202. The *Ward* court noted that "[t]he trial court was explicit in announcing to Defendant that [the state's expert] would not testify as to [the non-testifying analyst's] report without Defendant's consent." *Ward,* __ N.C. App. at __, 742 S.E.2d at 554. It concluded: "the record belies Defendant's contention that his stipulation was not a 'knowing and intelligent waiver.'" *Id.*

VII. Unavailability.

Under *Crawford*, out of court statements by witnesses who do not testify at trial are not admissible unless the prosecution shows that the witness is unavailable and that the defendant has had a prior opportunity to cross-examine the witness. This section explores what it means for a witness to be unavailable.

A. Good Faith Effort.

A witness is not unavailable unless the State has made a good-faith effort to obtain the witness's presence at trial.[203]

B. Evidence Required.

To make the showing, the State must put on evidence to establish the steps it has taken to procure the witness for trial.[204]

VIII. Prior Opportunity to Cross-Examine.

Under *Crawford*, out of court statements by witnesses who do not testify at trial are not admissible unless the prosecution shows that the witness is unavailable and that the defendant has had a prior opportunity to cross-examine the witness. This section explores what it means to have a prior opportunity for cross-examination.

A. Prior Trial.

If a case is being retried and the witness testified at the first trial, the prior trial provided the defendant with a prior opportunity to cross-examine the witness.[205]

B. Probable Cause Hearing.

At least one North Carolina case has held that defense counsel's cross-examination of a declarant at a probable cause hearing satisfies *Crawford's* requirement of a prior opportunity to cross-examine.[206]

C. Pretrial Deposition.

It is an open issue whether a pretrial deposition constitutes a prior opportunity to cross-examine.[207]

D. Plea Proceeding.

At least one North Carolina case has held that a witness's testimony at a prior plea proceeding afforded the defendant a prior opportunity to cross-examination.[208]

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203. Hardy v. Cross, 565 U.S. __, 132 S. Ct. 490, 494 (2011) (the state court was not unreasonable in determining that the prosecution established the victim's unavailability for purposes of the confrontation clause).
204. *See* CONFRONTATION ONE YEAR LATER, *supra* note 9, at 30; *see also* State v. Ash, 169 N.C. App. 715, 727 (2005) ("Without receiving evidence on or making a finding of unavailability, the trial court erred in admitting [the testimonial evidence].").
205. CONFRONTATION ONE YEAR LATER, *supra* note 9, at 30–31; *see also* State v. Allen, 179 N.C. App. 434, *3-4 (unpublished).
206. State v. Ross, 216 N.C. App. 337, 345-46 (2011).
207. For a discussion of this issue, see REMOTE TESTIMONY, *supra* note 46, at 15-17; CONFRONTATION ONE YEAR LATER, *supra* note 9, at 31; and EMERGING ISSUES, *supra* note 43, at 9–10.
208. State v. Rollins, __ N.C. App. __, 738 S.E.2d 440, 446 (2013) (no violation of the defendant's confrontation rights occurred when the trial court admitted statements made by an unavailable witness at a proceeding in connection with the defendant's *Alford* plea; the court concluded that that the "defendant definitively had a prior opportunity to cross-examine" the witness during the plea hearing and "had a similar motive to cross-examine [the witness] as he would have had at trial").

IX. Retroactivity.

A. Generally.

Whenever the United States Supreme Court decides a case, its decision applies to all future cases and to those pending and not yet decided on appeal.[209] Whether the decision applies to cases that became final before the new decision was issued is a question of retroactivity.

B. Of *Crawford.*

The United States Supreme Court has held that *Crawford* is not retroactive under the rule of *Teague v. Lane*.[210] Later, in *Danforth v. Minnesota*,[211] the Court held that the federal standard for retroactivity does not constrain the authority of state courts to give broader effect to new rules of criminal procedure than is required under the *Teague* test.

Relying on *Danforth*, some defense lawyers argue that North Carolina judges are now free to disregard *Teague* and apply a more permissive retroactivity standard to new federal rules of criminal procedure—such as *Crawford*—in state court motion for appropriate relief proceedings. However, that argument is not on solid ground in light of the North Carolina Supreme Court's decision in *State v. Zuniga*.[212] In *Zuniga*, the North Carolina Supreme Court expressly adopted the *Teague* test for determining whether new federal rules apply retroactively in state court motion for appropriate relief proceedings. In so ruling it specifically rejected the argument that the state retroactivity rule of *State v. Rivens*[213] should apply in motion for appropriate relief proceedings. Instead, persuaded by concerns of finality, the court adopted the *Teague* rule. Although *Zuniga* is a pre-*Danforth* case, it is the law in North Carolina; although the North Carolina Supreme Court might come to a different conclusion if the issue is raised again, the lower courts are bound by the decision.[214]

C. Of *Melendez-Diaz.*

As noted above, *Melendez-Diaz* held that forensic laboratory reports are testimonial and thus subject to *Crawford.* Some have argued that *Melendez-Diaz* is not a new rule but, rather, was mandated by *Crawford*. If that is correct, *Melendez-Diaz* would apply retroactively at least back to the date *Crawford* was decided, March 8, 2004.[215] For more detail on this issue, see the publication

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209. *See generally* Jessica Smith, *Retroactivity of Judge-Made Rules*, ADMIN. JUST. BULL. No. 2004/10 (UNC School of Government Dec. 2004), *available at* http://www.sog.unc.edu/publications/bulletins/retroactivity-judge-made-rules; *see also* State v. Morgan, 359 N.C. 131, 153-54 (2004) (applying *Crawford* to a case that was pending on appeal when *Crawford* was decided); State v. Champion, 171 N.C. App. 716, 722-723 (2005) (same).

210. 489 U.S. 288 (1989). *See* Whorton v. Bockting, 549 U.S. 406, 416-21 (2007) (*Crawford* was a new procedural rule but not a watershed rule of criminal procedure).

211. 552 U.S. 264 (2008).

212. 336 N.C. 508 (1994).

213. 299 N.C. 385 (1980) (new state rules are presumed to operate retroactively unless there is a compelling reason to make them prospective only).

214. It is worth noting that the United States Supreme Court came to a different conclusion than the *Zuniga* court with regard to application of the *Teague* test to the new federal rule at issue. *Compare Zuniga*, 336 N.C. at 510 *with* Beard v. Banks, 542 U.S. 406, 408 (2004) (*Zuniga* held that the *McKoy* rule applied retroactively under *Teague*; ten years later in *Beard*, the United States Supreme Court concluded otherwise). However, even if that aspect of *Zuniga* is no longer good law, *Danforth* reaffirms the authority of the *Zuniga* court to adopt the *Teague* test for purposes of state post-conviction proceedings. *Danforth*, 552 U.S. at 275.

215. *See Whorton*, 549 U.S. at 416 (old rules apply retroactively).

noted in the footnote.[216] For a discussion of the related issue of whether North Carolina might hold *Melendez-Diaz* to be retroactive in state motion for appropriate relief proceedings under *Danforth*, see the section immediately above.

X. Proceedings to Which *Crawford* Applies.

A. Criminal Trials.

By its terms, the Sixth Amendment applies to "criminal prosecutions." It is thus clear that the confrontation protection applies in criminal trials.[217]

B. Pretrial Proceedings.

Neither *Crawford* nor any of the Court's subsequent cases address the question whether *Crawford* applies to pretrial proceedings. Nor is there a North Carolina post-*Crawford* published case on point. However, a look at post-*Crawford* published cases from other jurisdictions shows that the overwhelming weight of authority holds that *Crawford* does not apply in pretrial proceedings.[218] In fact,

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216. Jessica Smith, *Retroactivity of Melendez-Diaz*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 20, 2009), nccriminallaw.sog.unc.edu/?p=545.

217. *See*, *e.g.*, *Crawford*, 541 U.S. at 43.

218. *Proceedings to determine probable cause:* Peterson v. California, 604 F.3d 1166, 1169-70 (9th Cir. 2010) (in this §1983 case the court held that *Crawford* does not apply in a pretrial probable cause determination; "[T]he United States Supreme Court has repeatedly stated that the right to confrontation is basically a trial right."); State v. Lopez, 314 P.3d 236, 237, 239 (N.M. 2013) (same; "The United States Supreme Court consistently has interpreted confrontation as a right that attaches at the criminal trial, and not before."); Sheriff v. Witzenburg, 145 P.3d 1002, 1005 (Nev. 2006) (same); State v. Timmerman, 218 P.3d 590, 593-594 (Utah 2009) (same); State v. Leshay, 213 P.3d 1071, 1074-76 (Kan. 2009) (same); State v. O'Brien, 850 N.W.2d 8, 16-18 (Wis. 2014) (same); Gresham v. Edwards, 644 S.E.2d 122, 123-24 (Ga. 2007) (same), *overruled on other grounds*, Brown v. Crawford, 715 S.E.2d 132 (Ga. 2011); Com v. Ricker, __ A.3d __, 2015 WL 4381095 (Pa. Super. Ct. July 17, 2015) (same).

Notwithstanding this authority, it is worthwhile to note that in North Carolina, while Evidence Rule 1101(b) provides that the rules of evidence, other than with respect to privileges, do not apply to probable cause hearings, the criminal statutes limit the use of hearsay evidence at those hearings. Specifically, G.S. 15A-611(b) provides that subject to two exceptions, "[t]he State must by nonhearsay evidence, or by evidence that satisfies an exception to the hearsay rule, show that there is probable cause to believe that the offense charged has been committed and that there is probable cause to believe that the defendant committed it." The two exceptions are for (1) reports by experts or technicians and (2) certain categories of reliable hearsay, such as that to prove value or ownership of property. *Id.* at (b)(1) & (2).

Suppression hearings: State v. Rivera, 192 P.3d 1213, 1214, 1215-18 (N.M. 2008) (confrontation rights "do not extend to pretrial hearings on a motion to suppress"); State v. Woinarowicz, 720 N.W.2d 635, 640-41 (N.D. 2006) (same); Oakes v. Com., 320 S.W.3d 50, 55-56 (Ky. 2010) (same); State v. Fortun-Cebada, 241 P.3d 800, 807 (Wash. Ct. App. 2010) (same*);* State v. Williams, 960 A.2d 805, 820 (N.J. Super. Ct. App. Div. 2008) (same), *aff'd on other grounds,* 2013 WL 5808965 (N.J. Super. Ct. App. Div. Oct. 30, 2013) (unpublished); People v. Brink, 818 N.Y.S.2d 374, 374 (N.Y. App. Div. 2006) (same); *People v. Felder*, 129 P.3d 1072, 1073-74 (Colo. App. 2005) (same); Vanmeter v. State, 165 S.W.3d 68, 69-75 (Tex. App. 2005) (same); Ford v. State, 268 S.W.3d 620, 621 (Tex. App. 2008), *rev'd on other grounds,* 305 S.W.3d 530 (Tex. Crim. App. 2009).

Preliminary hearings on the admissibility of evidence: United States v. Morgan, 505 F.3d 332, 339 (5th Cir. 2007) (*Crawford* does not apply to a pretrial hearing on the admissibility of evidence at trial; at the pretrial hearing, grand jury testimony was used to authenticate certain business records); State v. Daly, 775 N.W.2d 47, 66 (Neb. 2009) (same; *Daubert* hearing).

Pretrial release & detention determinations: United States v. Hernandez, 778 F. Supp. 2d 1211, 1219-27 (D.N.M. 2011) (confrontation clause does not apply at a pretrial detention hearing; "[T]he Supreme Court has consistently held that the Sixth Amendment is a trial right . . . ."); United States v. Bibbs, 488 F. Supp.2d 925, 925-26 (N.D. Cal. 2007) ("Nothing in *Crawford* requires or even suggests that it be applied to a detention hearing under the Bail Reform Act, which has never been considered to be part of the trial."); *Godwin v. Johnson*, 957 So. 2d 39, 39-40 (Fla. Dist. Ct. App. 2007) ("The confrontation clause of the Sixth Amendment expressly applies in 'criminal prosecutions.' . . . [T]his does not include proceedings on the issue of pretrial release.")

Proceedings to determine jurisdiction under federal law: United States v. Campbell, 743 F.3d 802, 804, 806-08 (11th Cir. 2014) (holding that *Crawford* does not apply to a pretrial determination of jurisdiction under the Maritime

there appears to be just one published case applying *Crawford* to such proceedings, and that decision creates a split among sister courts in the relevant jurisdiction.[219]

C. Sentencing.

Crawford applies at the punishment phase of a capital trial.[220] The North Carolina Court of Appeals held that *Crawford* applies to *Blakely*-style non-capital sentencing proceedings in which the jury makes a factual determination that increases the defendant's sentence.[221]

D. Termination of Parental Rights.

Crawford does not apply in proceedings to terminate parental rights.[222]

E. Juvenile Delinquency Proceedings.

In an unpublished opinion, the North Carolina Court of Appeals applied *Crawford* in a juvenile adjudication of delinquency.[223] More recently the United States Supreme Court took action indicating that *Crawford* applies in these proceedings.[224]

XI. Harmless Error Analysis.

If a *Crawford* error occurs at trial, the error is not reversible if the State can show that it was harmless beyond a reasonable doubt.[225] This rule applies on appeal as well as in post-conviction proceedings.[226]

Drug Law Enforcement Act; "[T]he Supreme Court has never extended the reach of the Confrontation Clause beyond the confines of a trial."); United States v. Mitchell-Hunter, 663 F.3d 45, 51 (1st Cir. 2011) (same).

219. Curry v. State, 228 S.W.3d 292, 296-298 (Tex. App. 2007) (disagreeing with *Vanmeter,* cited above, and holding that the confrontation clause applies at pretrial suppression hearings).

220. State v. Bell, 359 N.C. 1, 34-35 (2004) (applying *Crawford* to such a proceeding).

221. State v. Hurt, 208 N.C. App. 1, 6 (2010) (*Crawford* applies to all "*Blakely*" sentencing proceedings in which a jury makes the determination of a fact or facts that, if found, increase the defendant's sentence beyond the statutory maximum; here, the trial court's admission of testimonial hearsay evidence during the defendant's non-capital sentencing proceeding violated the defendant's confrontation rights, where at the sentencing hearing the jury found the aggravating factor that the murder was especially heinous, atrocious, or cruel and the trial judge sentenced the defendant in the aggravated range; the court distinguished *State v. Sings*, 182 N.C. App. 162 (2007) (declining to apply the confrontation clause in a non-capital sentencing hearing), on the basis that it involved a sentencing based on the defendant's stipulation to aggravating factors not a *Blakely* sentencing hearing and limited that decision's holding to its facts), *reversed on other grounds* 367 N.C. 80 (2013).

222. *In Re* D.R., 172 N.C. App. 300, 303 (2005); *see also In Re* G.D.H., 186 N.C. App. 304, *4 (2007) (unpublished) (following *In Re* D.R.).

223. *In Re* A.L., 175 N.C. App. 419, *2-3 (2006) (unpublished).

224. *See* D.G. v. Louisiana, 559 U.S. 967 (2010) (reversing and remanding a juvenile delinquency case for consideration in light of *Melendez-Diaz*).

225. *Compare* State v. Lewis, 361 N.C. 541, 549 (2007) (error not harmless), *with* State v. Morgan, 359 N.C. 131, 156 (2004) (error was harmless in light of overwhelming evidence of guilt); *see generally* G.S. 15A-1443(b) (harmless error standard for constitutional errors).

226. *See* G.S. 15A-1420(c)(6) (incorporating into motion for appropriate relief procedure the harmless error standard in G.S. 15A-1443).

VOIR DIRE AND DEMONSTRATION

Jury Selection (or Jury De-selection) (6-29-11)

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Purpose of Jury De-selection: **IDENTIFY the worst jurors and REMOVE them**.

Means for removal

1) Challenge for Cause § 15A-1212…The 3 most common grounds are:

(6) The juror has ***formed or expressed an opinion as to the guilt or innocence*** of the defendant. (You may ***NOT ask what the opinion is***.)

8) As a matter of conscience, ***regardless of the facts and circumstances, the juror would be unable to render a verdict with respect to the charge in accordance with the law*** of North Carolina.

(9) **For any other cause**, the juror is ***unable to render a fair and impartial verdict***.

2) Peremptory Challenges § 15A-1217

Each defendant is allowed ***six (6) challenges*** (in non-capital cases).

Each party is entitled to ***one (1) peremptory challenge for each alternate juror*** in addition to any unused challenges.

Law of Jury Selection

Statutes (read N.C.G.S. 15A-1211 to 1217)
Case law (See outline, Freedman and Howell, *Jury Selection Questions*, 25 pp.)
Jury instructions (applicable to your case)
Recordation (N.C.G.S. 15A-1241)

Two Main Methods of Jury Selection

1) Traditional Approach or "Lecturer" Method

Lecture technique (almost entirely) with leading or closed-ended questions
Purposes…Indoctrinate jury about law and facts of your case, and establish lawyer's authority or credibility with jury
Commonly used by prosecutors (and some civil defense lawyers)
In the "sermon" or lecture, the lawyer does over 95% of the talking
Example…*"Can everyone set aside what if any personal feelings you have about drugs and follow the law and be a fair and impartial juror?"*
Problem…Learn very little (if anything) about jurors

2) The "Listener" Method of Jury Selection

Purpose…Learn about the jurors' experiences and beliefs (instead of trying to change their beliefs)

The premise…Personal experiences shape jurors' views and beliefs, and can help predict how jurors will view facts, law, and each other.

Open-ended questions will get and keep jurors talking and reveal information about
Jurors' life experiences,
Attitudes, opinions, and views, and
Interpersonal relations with each other and their communication styles

Information will allow attorney to achieve GOAL of jury selection…
Identify the worst jurors for your case, and
Remove them (for cause or by peremptory strike)

Basically, a conversation with lawyer doing 10% of talking (the "90/10 rule")

Quote from life-long Anonymous public defender…*"I used to think that jury selection was my chance to educate the jurors about the law or the facts of my case. Now, I realize that jury selection is about the jurors educating me about themselves."*

"Default positions"
Lecturer… "Can you follow the law and be fair and impartial?"
Listener…"Please tell me more about that…"

Command Superlative Analogue Technique (New Mexico Public Defenders)

Effective technique within Listener Method
Ask about significant or memorable life experiences
It will trigger a conversation about jurors' life experiences and views

Three Elements of Command Superlative Analogue Technique
1) Ask about a personal experience relating to the issue, or an experience of a family member or someone close to the juror [*analogue*]
2) Add superlative adjective (best, worst, etc.) to help them recall [*superlative*]
3) Put question in command form (i.e., "Tell us about…) [*command*]

Example…*"Tell me about your closest relationship with a person who has been affected by illegal drugs."*

Caution…Time consuming…Cannot use it for everything…Save it for the key issues

(*For sample questions, see Mickenberg, *Voir Dire and Jury Selection*, pp. 11-13; Trial School Workshop Aids, pp. 5-7).

Listener Method in Practice

Preparation

Know the case and law…Develop theory and theme
Pick the pertinent issues or areas (in that case) that you want jurors to talk about
Cannot do the same voir dire in every case…It varies with the theory of each case
Outline your questions (or offensive plays) for each area
-Superlative memory technique and follow-up (for 3-4 key topics)

-Open-ended questions for each area or topic
-Introductions (*see below)
-Standard group questions (that may lead to open-ended, individual follow-up)
-Key legal concepts (for the most important issues)

***Introductions**…to jury selection overall…and to each issue or topic
It makes the issue relevant
It puts jurors at ease and increases their chances of talking to you
Introductions need to be concise, straightforward, and honest
Example…*"Joe is charged in this case with selling cocaine. For decades, illegal drugs have been a problem for our society. Because of that, many of us have strong feelings about people who use and sell illegal drugs. I want to talk to you all about that."*
For motor-mouths…if you have to talk, do it here…At least it serves a purpose.

Jury selection "playbook"
Questions
Statutes and pertinent jury instructions
Case law outline and copies of key cases
Blank seating chart

<u>Three (3) Rules for the Courtroom</u>

1) Always use **PLAIN LANGUAGE**
Never talk like a lawyer…Be your pre-lawyer self
Talking to communicate with average folks…not to impress with vocabulary

2) **Get the jurors talking**…and keep them talking
Superlative memory questions (for the key issues)
Open-ended questions (who, what, how, why, where, when)
Give up control…let jurors go wherever they want
Follow "the 90/10 rule"…a conversation with lawyer doing 10% of talking
Be empathetic and respectful…encourage them to tell you more
Do NOT argue with, bully, or cross-examine a juror

The "superlative memory technique" example…*"Tell me about your closest relationship with a person who has been affected by illegal drugs."*
Open-ended examples…*"What are your views about illegal drugs? Why do you feel that way? What are your experiences with folks who use or sell drugs? How have you or anyone close to you been affected by people who use or sell drugs?"*

3) **Catch every response**…Both verbal and non-verbal
Must LISTEN to every word…and WATCH every gesture or expression
Essential to catch every response to follow-up and keep them talking

Do NOT ignore a juror or cut off an answer
Use reflective questions in follow-up (*Some people believe "x" and others believe "y"…What do you think?*)

Decision-Making Time

Assess the answers and the jurors…Decide what to do..?
NEVER make decision based on stereotypes or demographics
ALWAYS judge a juror based on individual responses

Challenge for cause…The decision whether to challenge is easy
Do you immediately challenge or search for other areas of bias (?)
The hard part is executing a challenge for cause
See handouts, *Jury Selection: Challenges for Cause* (7-11-10) and Mickenberg, *Voir Dire and Jury Selection*, pp. 13-15)

Peremptory challenges...rank the severity of bad jurors with 6 strikes in mind
Severity issue…"Wymore Method" for capital cases uses a rating system
Need to use your limited number of strikes wisely

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VOIR DIRE AND JURY SELECTION

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Thanks to Ann Roan and many other fine defenders for their advice and input.

LOOKING FOR A DIFFERENT, MORE EFFECTIVE WAY OF CHOOSING A JURY

For more than twenty years, I have been privileged to teach public defenders all over the country. And it pains me to conclude that when it comes to jury selection, almost all of us are doing a lousy job.

What passes for good voir dire is often glibness and a personal style that is comfortable with talking to strangers. The lawyer looks good and feels good but ends up knowing very little that is useful about the jurors.

More typically, voir dire is awkward, and consists of bland questions that tell us virtually nothing about how receptive a juror will be to our theory of defense, or whether the juror harbors some prejudice or belief that will make him deadly to our client.

We ask lots of leading questions about reasonable doubt, or presumption of innocence, or juror unanimity, or self defense, or witness truth-telling. Then when a juror responds positively to one of these questions, we convince ourselves that we have successfully "educated" the juror about our defense or about a principle of law. In reality, the juror is just giving us what she knows we want to hear, and we don't know anything about her.

Because the questions we are comfortable with asking elicit responses that don't help us evaluate the juror, we fall back on stereotypes (race, gender, age, ethnicity, class, employment, hobbies, reading material) to decide which jurors to keep and which to challenge. Or even worse, we go with our "gut feeling" about whether we like the juror or the juror likes us.

And then we are surprised when what seemed like a good jury convicts our client.

This short treatise, and the seminar it is meant to supplement, are a first effort at finding a more effective way of selecting jurors. It draws on:

- Scientific research done over the last decade or two about juror behavior and attitudes.
- Excellent work done by defenders in Colorado in devising a new and very effective method for voir dire in both capital and non-capital cases.
- Some very creative work done by defense lawyers all over the country.
- My own observations of too many trial transcripts from too many jurisdictions, in which good lawyers delude themselves into thinking that a comfortable voir dire has been an effective voir dire.

I. SOME BASIC THINGS ABOUT VOIR DIRE – WHY JURY SELECTION IS HARD. WHY WE FAIL.

A. It is suicidal to just "take the first twelve." It is arrogant and stupid to choose jurors based on stereotypes of race, gender, age, ethnicity, or class.

Every study ever done of jurors and their behavior tells us several things:

- People who come to jury duty bring with them many strong prejudices, biases, and preconceived notions about crime, trials, and criminal justice.
- Jurors are individuals. There is very little correlation between the stereotypical aspects of a juror's makeup (race, gender, age, ethnicity, education, class, hobbies, reading material) and whether a particular juror may have one of those strong biases or preconceived notions in any individual case.
- The prejudices and ideas jurors bring to court affect the way they decide cases – even if they honestly believe they will be fair and even if they honestly believe they can set their preconceived notions aside.
- Jurors will decide cases based on their prejudices and preconceived notions regardless of what the judge may instruct them. Rehabilitation and curative instructions are completely meaningless.
- Many jurors don't realize it, but they have made up their minds about the defendant's guilt before they hear any evidence. In other words . . .
- Many trials are over the minute the jury is seated.

For this reason it is absolutely essential that we do a thorough and meaningful voir dire – not to convince jurors to abandon their biases, but to find out what those biases are and get rid of the jurors who hold them.

The lawyer who waives voir dire, or just asks some perfunctory, meaningless questions, or relies on stereotypes or "gut feelings" to choose jurors is not doing his or her job.

B. Traditional voir dire is structured in a way that makes it very hard to disclose a juror's preconceived notions

The very nature of jury selection forces potential jurors into an artificial setting that is itself an impediment to obtaining honest and meaningful answers to typical voir dire questions. Here is how the voir dire process usually looks from the jurors' perspective:

1. When asked questions about the criminal justice system, prospective jurors know what

the "right," or expected answer is. Sometimes they know this from watching television. Sometimes the trial judge has given them preliminary instructions that contain the "right" answers to voir dire questions. Sometimes the questions are couched in terms of "can you follow the judge's instructions," which tells the jurors that answering "no" means that they are defying the judge. Jurors will almost always give the "right" answer to avoid getting in trouble with the court, to avoid seeming to be a troublemaker, and to avoid looking stupid in front of their peers.

EX: Q: The judge has told you that my client has a right to testify if he wishes and a right not to testify if he so wishes. Can you follow those instructions and not hold it against my client if he chooses not to testify?

A: Yes.

While it would be nice to believe that the juror's answer is true, there is just no way of knowing. The judge has already told the juror what the "correct" answer is, and the way we phrased our question has reinforced that knowledge. All the juror's answer tells us is that he or she knows what we want to hear.

2. Jurors view the judge as a very powerful authority figure. If the judge suggests the answer she would like to hear, most jurors will give that answer.

EX: Q: Despite your belief that anyone who doesn't testify must be hiding something, can you follow the judge's instructions and not take any negative inferences if the defendant does not take the stand?

A: Yes.

The juror may be trying his best to be honest, but does anyone really believe this answer?

3. When asked questions about opinions they might be embarrassed to reveal in public (such as questions about racial bias or sex), jurors will usually avoid the possibility of public humiliation by giving the socially acceptable answer – even if that answer is false.

4. When asked about how they would behave in future situations, jurors will usually give an aspirational answer. This means they will give the answer they hope will be true, or the answer that best comports with their self-image. These jurors are not lying. Their answers simply reflect what they hope (or want to believe or want others to believe) is the truth, even if they may be wrong.

EX: Q: If you are chosen for this jury, and after taking a first vote you find that the vote is 11-1 and you are the lone holdout, would you change your vote simply because the others all agree that you are wrong?

A: No.

We all know that this juror's response is not a lie – the juror may actually believe that he

or she would be able to hold out (or at least would like to believe it). On the other hand, we also know there is nothing in the juror's response that should make us believe he or she actually has the courage to hold out as a minority of one.

C. The judge usually doesn't make it any easier

1. Judges frequently restrict the time for voir dire. Often this is a result of cynicism – their experience tells them that most voir dire is meaningless, so why not cut it short and get on with the trial?

2. Judges almost always want to prevent defense counsel from using voir dire as a means of indoctrinating jurors about the facts of the case or about their theory of defense. And the law says they are allowed to limit us this way.

D. And we often engage in self-defeating behavior by choosing comfort and safety over effectiveness

1. Voir dire is the only place in the trial where we have virtually no control over what happens. Jurors can say anything in response to our questions. We are afraid of "bad" answers to voir dire questions that might taint the rest of the pool or expose weaknesses in our case. We are afraid of the judge cutting us off and making us look bad in front of the jury. We are afraid of saying something that might alienate a juror or even the entire pool of jurors.

2. If a juror gives a "bad" answer we rush to correct or rehabilitate him to make sure the rest of the panel is not infected by the bias.

3. As a result of these fears, we often ask bland meaningless questions that we know the judge will allow and that we know the jurors will give bland, non-threatening answers to.

4. We then fall back on stereotypes of race, age, gender, ethnicity, employment, education, and class to decide who to challenge. Or worse, we persuade ourselves that our "gut feelings" about whether we like a juror or whether the juror likes us are an intelligent basis for exercising our challenges.

Given all these obstacles to effective jury selection, how can we start figuring out how to do it better? My suggestion is to start with some of the things social scientists and students of human behavior have taught us about jurors.

II. THE PRIME DIRECTIVE: VOIR DIRE'S MOST IMPORTANT BEHAVIORAL PRINCIPLE

It is impossible to "educate" or talk a complete stranger out of a strongly held belief in the time available for voir dire.

Think about this for a moment. Everyone in the courtroom tells the juror what the "right" answers are to voir dire questions. Everyone tries hard to lead the juror into giving the "right" answer. And if the juror is honest enough to admit to a bias or preconceived notion about the case, everyone tries to rehabilitate him until he says he can follow the correct path (the judge's instructions, the Constitution, the law). And if we are honest with ourselves, everyone knows this is pure garbage.

Assume a juror says that she would give police testimony more weight than civilian testimony. The judge or a lawyer then "rehabilitates" her by getting her to say she can follow instructions and give testimony equal weight. When this happens, even an honest juror will deliberate, convince herself that she is truly weighing all testimony, and then reach the conclusion that the police were telling the truth. The initial bias, which the juror acknowledged and tried hard to tell us about, determines the outcome every time. It is part of the juror's personality, a product of her upbringing, education, and daily life. And no matter how good a lawyer you are, you can't talk her out of it.

Imagine, though, what would happen if we gave up on the idea of "educating" the juror, or "rehabilitating" her – If we admitted to ourselves that it is impossible to get that juror beyond her bias. We would then be able to completely refocus the goal of our voir dire:

III. THE ONLY PURPOSE OF VOIR DIRE

The only purpose of voir dire is to discover which jurors are going to hurt our client, and to get rid of them.

When a juror tells us something bad, there are only two things we should do:

- Believe them
- Get rid of them

This leads us to the most important revision we must make in our approach to voir dire:

We Are Not Selecting Jurors – We Are De-Selecting Jurors

The purpose of voir dire is not to "establish a rapport," or "educate them about our defense," or "enlighten them about the presumption of innocence or reasonable doubt." It is not to figure out whether we like them or they like us. To repeat:

The only purpose of voir dire is to discover which jurors are going to hurt our client, and to get rid of them.

IV. HOW TO ASK QUESTIONS IN VOIR DIRE

Once we accept that the only purpose of voir dire is to get rid of impaired jurors, we have a clear path to figuring out what questions to ask and how to ask them. The only reason to ask a question on voir dire is to give the juror a chance to reveal a reason for us to challenge him. These reasons fall into two categories:

- The juror is unable or unwilling to accept our theory of defense in this case.

- The juror has some bias that impairs his or her ability to sit on any criminal case.

This leads us to two more principles of human behavior that will guide us in asking the right questions on voir dire:

The best predictor of what a person will do in the future is not what they say they will do, but what they have done in the past in analogous situations.

The more removed a question is from a person's normal, everyday experience, the more likely the person will give an aspirational answer rather than an honest one. Factual questions about personal experiences get factual answers. Theoretical questions about how they will behave in hypothetical courtroom situations get aspirational answers.

A. ***Stop talking and listen*** – the goal of voir dire is to get the juror talking and to listen to his or her answers. You should not be doing most of the talking. You should start by asking open-ended, non-leading questions. Leading questions will get the juror to verbally agree with you but won't let you learn anything about the juror. Voir dire is not cross-examination.

B. Let the jurors do most of the talking. Your job is to listen to them.

C. ***You can't do the same voir dire in every case***

1. Your voir dire must be tailored to your factual theory of defense in each individual case.

2. You must devise questions that will help you understand how each juror will respond to your theory of defense. This means asking questions about how the juror has responded in the

past when faced with an analogous situation.

D. Our tactics should not be aimed at asking the jurors how they would behave if certain situations come up during the trial or during deliberations. That kind of question only gets aspirational answers (how the juror hopes he would behave) or false answers (how the juror would like us to think he would behave). They tell us nothing about how the juror will actually behave. They also invite the judge to shut us down.

E. Out tactics should be aimed at asking jurors about how they behaved in the past when faced with situations analogous to the situation we are dealing with at trial.

1. It is essential that our questions not be about the same situation the juror is going to be considering at trial or about a crime or criminal justice situation – such questions only get aspirational answers.

2. Instead the question should be about an analogous, non-law related situation the juror was actually in. And we must be careful to ask about events that are really analogous to the issues we are interested in learning about.

EX: Your theory of defense is that the police planted evidence to frame your client because the investigating officer is a racist and your client is black. (Remember OJ?)

a. Asking jurors, “are you a racist?” or “do you think it is possible that the police would frame someone because of his race?” will get you nowhere. Most jurors will say “I am not a racist,” and “Of course it’s possible the police are lying. Anything is possible. I will keep an open mind.” And you will have no way of knowing what they are actually thinking.

b. You have a much better chance of learning something useful about the juror by asking an analogous question about the juror’s experience with racial bias.

EX: Asking the juror to, “tell us about the most serious incident you ever saw where someone was treated badly because of their race” will help you learn a lot about whether that juror is willing to believe your theory of defense. If the juror tells you about an incident, you will be able to gauge her response and decide how a similar response would affect her view of your case. If the juror says she has never seen such an incident, you have also learned a lot about her view of race.

F. You must consider and treat every prospective juror as a unique individual. It is your job on voir dire to find out about that unique person.

IV. WHAT SUBJECTS SHOULD YOU ASK ABOUT?

A. Look to Your Theory of Defense --

1. What do you really need a juror to believe or understand in order to win the case?

2. What do you really need to know about the juror to decide whether he or she is a person you want on the jury for this particular case?

B. What kind of life experiences might a juror have that are analogous to the thing you need a juror to understand about your case or to the things you really need to know about the jurors?

EX: Assume that your client is accused of sexually molesting his 9 year old daughter. Your theory of defense is that your client and his wife were in an ugly divorce proceeding, and the wife got the kid to lie about being abused.

The things you really need to get jurors to believe are:

1. A kid can be manipulated into lying about something this serious.

2. The wife would do something this evil to get what she wanted in the divorce.

The kind of questions you might ask the jurors should focus on analogous situations they may have experienced or seen, such as:

1. Situations they know of where someone in a divorce did something unethical to get at their ex-spouse.

2. Situations they know of where someone got really carried away because they became obsessed with holding a grudge.

3. Situations they know of where an adult convinced a kid to do something she probably knew was wrong.

4. Situations they know of where an adult convinced a kid that something that is really wrong is right.

A fact you really need to know about the jurors is whether they have any experience with child sex abuse that might affect their ability to be fair. Therefore, you must ask them:

5. If they or someone close to them had any personal experience with sexual abuse.

C. When you are choosing which question to ask a particular juror, you should build on the answers the juror gave to the standard questions already asked by the judge and the prosecutor. Often the things you learn about the juror from these questions will give you the opening you need to decide how to ask for a life-experience analogy. Areas that are often fertile ground for

seeking analogies are:

1. Does the juror have kids?
2. Does the juror supervise others at work?
3. Is the juror interested in sports?
4. Who does the juror live with?
5. What are the juror's interests?

D. Another reason to pay attention to the court's and prosecutor's voir dire is that it will often lead you to general subjects that may cause the juror to be biased or impaired. Judges and prosecutors always spend a lot of time talking about reasonable doubt, presumption of innocence, elements of crimes, unanimity, etc. It can be very effective to refer back to the answers the juror gave to the court or prosecutor, and follow up with an open-ended question that allows the juror to elaborate on his answer or explain what those principles mean to him.

V. HOW TO ASK THE QUESTIONS

Although the substance of the questions must be individually tailored to your theory of defense and to the individual jurors, there is a pretty simple formula for effectively structuring the form of the questions:

A. Start with an IMPERATIVE COMMAND:

1. "Tell us about"
2. "Share with us"
3. "Describe for us"

The reason we start the question with an imperative command is to make sure that the juror feels it is proper and necessary to give a narrative answer, not just a "yes" or "no."

B. Use a SUPERLATIVE to describe the experience you want them to talk about:

1. "The best"
2. "The worst"
3. "The most serious"

The reason we ask the question in terms of a superlative is to make sure we do not get a trivial experience from the juror.

C. ASK FOR A PERSONAL EXPERIENCE

1. "That you saw"
2. "That happened to you"
3. "That you experienced"

This is the crucial part of the question where you ask the juror to relate a personal experience. Be sure to keep the question open-ended, not leading.

D. ALLOW THEM TO SAVE FACE

1. “That you or someone close to you saw”
2. “That happened to you or someone you know”
3. “That you or a friend or relative experienced”

The reason we ask for the personal experience in this way is:

a. Give the juror the chance to relate an experience that had an effect on their perceptions but may not have directly happened to them.

b. To give the juror the chance to relate an experience that happened to them but to avoid embarrassment by attributing it to someone else.

VI. PUTTING THE QUESTION TOGETHER

EX: Assume we are dealing with the same hypothetical about the child sex case and the divorcing parents. Some of the questions might come out like this:

1. “Tell us about the worst situation you’ve ever seen where someone involved in a divorce went way over the line in trying to hurt their ex.”

2. “Please describe for us the most serious situation when as a child, you or someone you know had an adult try to get you to do something you shouldn’t have done.”

VII. GETTING JURORS TO TALK ABOUT SENSITIVE SUBJECTS

If you are going to ask about sex, race, drugs, alcohol, or anything else that might be a sensitive topic there are several ways of making sure the jurors aren’t offended.

A. Before you introduce the topic, tell the jurors that if any of them would prefer to answer in private or at the bench, they should say so.

B. Explain to them why you have to ask about the subject.

C. It often helps to share a personal experience or observation you have had with the subject you will be asking questions about. By doing so, you legitimize the juror’s willingness to speak, and show that you are not asking them to do anything that you are not willing to do. If you decide to use this kind of self-revelation as a tool, be sure to follow these rules:

1. Keep your story short.

2. Make sure your story is exactly relevant to the point of the voir dire.
3. Keep your story short.

D. If you are going to voir dire on sensitive subjects, prepare those questions in advance, and try them out on others, to make sure you are asking them in a non-offensive way. Don't make this stuff up in the middle of voir dire.

E. If a juror reveals something that is very personal, painful, or embarrassing, it is essential that you immediately say something that acknowledges their pain and thanks them for speaking so honestly. You cannot just go on with the next question, or even worse, ask something meaningless like, "how did that make you feel."

VIII. SOME SAMPLE QUESTIONS ON IMPORTANT SUBJECTS

A. Race

1. "Tell us about the most serious incident you ever saw where someone was treated badly because of their race."

2. "Tell us about the worst experience you or someone close to you ever had because someone stereotyped you because of your (race, gender, religion, etc.).

3. Tell us about the most significant interaction you have ever had with a person of a different race.

4. Tell us about the most difficult situation where you, or someone you know, stereotyped someone, or jumped to a conclusion about them because of their (race, gender, religion) and turned out to be wrong.

B. Alcohol/Alcoholism

1. "Tell us about a person you know who is a wonderful guy when sober, but changes into a different person when they're drunk."

2. "Share with us a situation where you or a person you know of was seriously affected because someone in the family was an alcoholic."

C. Self-Defense

1. Tell me about the most serious situation you have ever seen where someone had no choice but to use violence to defend themselves (or someone else).

2. Tell us about the most frightening experience you or someone close to you had when they were threatened by another person.

3. Tell us about the craziest thing you or someone close to you ever did out of fear.

4. Tell us about the bravest thing you ever saw someone do out of fear.

5. Tell us about the bravest thing you ever saw someone do to protect another person.

D. Jumping to Conclusions

1. Tell us about the most serious mistake you or someone you know has ever made because you jumped to a snap conclusion.

E. False Suspicion or Accusation

1. Tell us about the most serious time when you or someone close to you was accused of doing something bad that you had not done.

2. Tell us about the most difficult situation you were ever in, where it was your word against someone else's, and even though you were telling the truth, you were afraid that no one would believe you.

3. Tell us about the most serious incident where you or someone close to you mistakenly suspected someone else of wrongdoing.

F. Police Officers Lying/Being Abusive

1. Tell us about the worst encounter you or anyone close to you has ever had with a law enforcement officer.

2. Tell us about the most serious experience you or a family member or friend had with a public official who was abusing his authority.

3. Tell us about the most serious incident you know of where someone told a lie, not for personal gain, but because they thought it would ultimately bring about a fair result.

G. Lying

1. Tell us about the worst problem you ever had with someone who was a liar.

2. Tell us about the most serious time that you or someone you know told a lie to get out of trouble.

3. Tell us about the most serious time that you or someone you know told a lie out of fear.

4. Tell us about the most serious time that you or someone you know told a lie to protect someone else.

5. Tell us about the most serious time that you or someone you know told a lie out of greed.

6. Tell us about the most difficult situation you were ever in where you had to decide which of two people were telling the truth.

7. Tell us about the most serious incident where you really believed someone was telling the truth, and it turned out they were lying.

8. Tell us about the most serious incident where you really believed someone was lying, and it turned out they were telling the truth.

H. Prior Convictions/Reputation

1. Tell us about the most inspiring person you have known who had a bad history or reputation and really turned himself around.

2. Tell us about the most serious mistake you or someone close to you every made by judging someone by their reputation, when that reputation turned out to be wrong.

I. Persuasion/Gullibility/Human Nature

1. Tell us about the most important time when you were persuaded to believe that you were responsible for something you really weren't responsible for.

2. Tell us about the most important time when you or someone close to you was persuaded to believe something about a person that wasn't true.

3. Tell us about the most important time when you or someone close to you was persuaded to believe something about yourself that wasn't true.

J. Desperation

1. Tell us about the most dangerous thing you or someone you know did out of hopelessness or desperation.

2. Tell us about the most out-of-character thing you or someone you know ever did out of hopelessness or desperation.

3. Tell us about the worst thing you or someone you know did out of hopelessness or desperation.

IX. HOW TO FOLLOW-UP WHEN A JUROR SHOWS BIAS

This is the crucial moment of voir dire. Having defined the purpose of voir dire as

identifying and challenging biased or impaired jurors, we now have to figure out what to do when our questions have revealed bias or impairment.

The key to success is counter-intuitive. When a juror gives an answer that suggests (or openly states) some prejudice or preconceived notion about the case, our first instinct is to run away from the answer. We don't want the rest of the panel to be tainted by it. We want to show the juror the error of his ways. We want to convince him to be fair. Actually we should do the exact opposite.

- There is no such thing as a bad answer. An answer either displays bias or it doesn't. If it does, we should welcome an opportunity to establish a challenge for cause.

- If an answer displays or hints at bias, we must immediately address and confront it. Colorado defenders have referred to this strategy as "Run to the Bummer."

A. How To "Run to the Bummer"

Steps to take when a juror suggests some bias or impairment:

1. Mirror the juror's answer: "So you believe that . . . ."

    a. Use the juror's exact language
    b. Don't paraphrase
    c. Don't argue

2. Then ask an open-ended question inviting the juror to explain:

    "Tell me more about that"
    "What experiences have you had that make you believe that?"
    "Can you explain that a little more?"

    No leading questions at this point.

3. Normalize the impairment

    a. Get other jurors to acknowledge the same idea, impairment, bias, etc.
    b. Don't be judgmental or condemn it.

4. Now switch to leading questions to lock in the challenge for cause:

    a. Reaffirm where the juror is:

"So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense"

b. If the juror tries to weasel out of his impairment, or tries to qualify his bias, you must strip away the qualifications and force him back into admitting his preconceived notion as it applies to this case:

Q: “So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense.”

A: “Well, if the victim said it might be self-defense, or if there was some scientific evidence that showed it was self-defense, I wouldn’t need your client to testify.”

Q: “How about where there was no scientific evidence at all, and where the supposed victim absolutely insisted that it was not self-defense. Is that the situation where you would need the defendant to testify before finding self-defense?”

c. Reaffirm where the juror is not (i.e., what the law requires).

“And it would be very difficult, if not impossible for you to say this was self-defense unless the defendant testified that he acted in self-defense.”

d. Get the juror to agree that there is a big difference between these two positions.

“And you would agree that there is a big difference between a case where someone testified that he acted in self-defense and one where the defendant didn’t testify at all.”

e. Immunize the juror from rehabilitation

“It sounds to me like you are the kind of person who thinks before they form an opinion, and then won’t change that opinion just because someone might want you to agree with them. Is that correct?”

“You wouldn’t change your opinion just to save a little time and move this process along?”

“You wouldn’t let anyone intimidate you into changing your opinion just to save a little time and move the process along?”

“Are you comfortable swearing an oath to follow a rule 100% even though it’s the opposite of the way you see the world?”

“Did you know that the law is always satisfied when a juror gives an honest opinion, even if that opinion might be different from that of the lawyers or even the judge? All the law asks is that you give your honest opinion and feelings.”

Jury Selection: Challenges for Cause (7-11-10)

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Basis for Challenge for Cause. 15A-1212

(6) The juror has formed or expressed an opinion as to the guilt or innocence of the defendant. (You may NOT ask what the opinion is.)
(8) As a matter of conscience, regardless of the facts and circumstances, the juror would be unable to render a verdict with respect to the charge in accordance with the law of N.C.
(9) For any other cause, the juror is unable to render a fair and impartial verdict.

GOAL for Challenge for Cause…Have the juror agree that the juror:
1) has formed an opinion about guilt (or "expressed" an opinion),
2) would be unable to follow the law about ____, or
3) would be unable to be fair and impartial.

The STEPS to obtain a for cause challenge

1) Repeat the juror's bias or impaired position.
Use their EXACT words
"My son was a cocaine addict…I despise anyone ever remotely involved in it."

2) Follow up with OPEN-ENDED questions to get the juror to further explain views.
Tell me more…What happened…Why…?
NO leading at this point
"Tell us about your son's problem…How did he get into using cocaine…What happened…How is he today…?

3) Acknowledge the validity of the juror's position and compare it to other jurors
Ira calls it…"Normalize the impairment"
Do NOT argue or be judgmental…Some empathy but NOT condescending
Recognize their sharing of a very personal experience
See if other jurors have the same or similar views
"Thank you for your honesty and for sharing your personal experience about your son. It is understandable that you feel the way you do. Does anyone else feel the same way about people charged with selling drugs?"

4) Lock the juror's biased answer into a challenge for cause basis
Switch to LEADING questions from here on
Repeat the juror's biased views and emphasize the strength of the views
If the juror tries to wiggle out or qualify the answer, strip or take away their

qualifier and repeat the essence of their views

"Your son's struggles with cocaine has caused you to have very strong and personal feelings against anyone charged with a drug crime."

5) Suggest how the bias or impairment "might" provide the grounds for challenge

First, just raise the issue…do not go for the kill

The bias may provide more than one basis for challenge [see below examples]

Use leading questions but do not be confrontational

You may have to re-validate the juror's belief and right to hold those beliefs

"Your feelings about someone charged with a drug crime might affect your ability to be a neutral juror in this case?

[or your ability to presume innocence…or may make you lean toward an opinion of guilt before the trial starts…or prevent you from considering all the evidence]"

6) Get the juror to agree that their bias will affect their ability to serve

This may be tricky…you have to go from "might affect" to "would affect"

It might take several closely worded questions quantifying the effect...from "might" to "possible" to "probable" to "likely" to "substantially", etc.

You need to discuss how every case is not a right fit for every juror

Another type of case would be better for that juror…a case not involving that bias

Do not argue with the juror…You need the juror to agree with you

You may need to praise their honesty or right to hold their beliefs

"Your views about someone charged with a drug crime would affect your ability to be a neutral juror in this case?

[or your ability to presume innocence…or may make you lean toward an opinion of guilt before the trial starts…]"

This should provide the basis for a challenge for cause but beware "rehabilitation"

7) Protect your challenged juror's answers from "rehabilitation"

Commend the juror's honesty and willingness to talk about this personal issue

Remind juror of appropriateness of having strong views

Lock juror in on strength of views and views are part of who they are

Reassure juror that there is nothing wrong with having views that differ

from lawyers, other jurors, or judge

from the rules about jury service

Note that the juror does not appear the type who change opinions for convenience

Make your Challenge for CAUSE

JURY SELECTION QUESTIONS

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I. GENERAL PURPOSE OF VOIR DIRE

"Voir dire examination serves the **dual purpose** of enabling the court to **select an impartial jury and assisting counsel in exercising peremptory challenges**." MuMin v Virginia, 500 U.S. 415, 431 (1991). The N.C. Supreme Court explained that a **similar "dual purpose"** was to ascertain whether **grounds exist for cause challenges** and to enable the lawyers to **intelligently exercise their peremptory challenges**. State v. Simpson, 341 N.C. 316, 462 SE2d 191, 202 (1995).

"A defendant is not entitled to any particular juror. His right to challenge is not a right to select but to reject a juror." State v. Harris, 338 N.C. 211, 227 (1994).

The purpose of voir dire and the exercise of challenges "is to eliminate extremes of partiality and to assure both…[parties]…that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial." State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 832 (1994).

Jurors, like all of us, have natural inclinations and favorites, and they sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. So jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror's yesterday or today that would make it difficult for that juror to view the facts, not in an abstract sense, but in a particular case, dispassionately. State v Hedgepath, 66 N.C. App. 390 (1984).

"Where an adversary wishes to exclude a juror because of bias, …it is the adversary seeking exclusion who must demonstrate, ***through questioning***, that the potential juror lacks impartiality." Wainwright v. Witt, 469 U.S. at 423 (1985).

II. PROCEDURAL RULES OF VOIR DIRE

Overall: The trial court has the duty to control and supervise the examination of prospective jurors. Regulation of the extent and manner of questioning during voir dire rests largely in the trial court's discretion. Simpson, 341 N.C. 316, 462 S.E.2d 191, 202 (1995).

Group v. Individual Questions: "The prosecutor and the…defendant…may **personally question prospective jurors individually** concerning their competency to serve as jurors…." NCGS 15A-1214(c).

The trial judge has the discretion to limit individual questioning and require that certain general questions be submitted to the panel as a whole in an effort to expedite jury selection. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

Same or Similar Questions: The defendant may not be prohibited from asking a question merely because the court [or prosecutor] has previously asked the same or similar question. N.C.G.S. 15A-1214(c); State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 832 (1994).

Leading Questions: Leading questions are permitted during jury voir dire [at least by the prosecutor]. State v. Fletcher, 354 N.C. 455, 468, 555 S.E.2d 534, 542 (2001).

Re-Opening Voir Dire: N.C.G.S. 15A-1214(g) permits the trial judge to reopen the examination of a prospective juror if, at any time before the jury has been impaneled, it is discovered that the juror has made an incorrect statement or that some other good reason exists. Whether to reopen the examination of a passed juror is within the judge's discretion. Once the trial court reopens the examination of a juror, each party has the absolute right to use any remaining peremptory challenges to excuse such a juror. State v. Womble, 343 N.C. 667, 678, 473 S.E.2d 291, 297 (1996). For example, in State v. Wiley, 355 N.C. 592, 607-610 (2002), the prosecution passed a "death qualified" jury to the defense. During defense questioning, a juror said that he would automatically vote for LWOP over the death penalty. The trial judge re-opened the State's questioning of this juror and allowed the prosecutor to remove the juror for cause.

Preserving Denial of Challenges for Cause: In order to preserve the denial of a challenge for cause for appeal, the defendant must adhere to the following procedure:
1) The defendant must have exhausted the peremptory challenges available to him;
2) After exhausting his peremptory challenges, the defendant must move (orally or in writing) to renew a challenge for cause that was previously denied if he either:
   a) Had peremptorily challenged the juror in question, or

b) Stated in the motion that he would have peremptorily challenged the juror if he had not already exhausted his peremptory challenges; and

3) The judge denied the defendant's motion for renewal of his cause challenge.

N.C.G.S 15A-1214(h) and (i).

Renewal of Requests for Disallowed Questions: Counsel may renew its requests to ask questions that were previously denied. Occasionally, a trial court may change its mind. See, State v. Polke, 361 N.C. 65, 68-69 (2006); State v. Green, 336 N.C. 142, 164-65 (1994).

III. SUBSTANTIVE AREAS OF INQUIRY

Accomplice Liability: Prosecutor properly asked about jurors' abilities to follow the law regarding acting in concert, aiding and abetting, and the felony murder rule by the following "non-stake-out" questions in State v. Cheek, 351 N.C. 48, 65-68, 520 S.E.2d 545, 555-557 (1999):

"[I]f you were convinced, beyond a reasonable doubt, of the defendant's guilt, even though he didn't actually pull the trigger or strike the match or strike the blow in the murder, but that he was guilty of aiding and abetting and shared the intent that the victim be killed—could you return a verdict of guilty on that?"

"[T]he fact that one person may not have actually struck the blow or pulled the trigger or lit the match, but yet he could be guilty under the felony murder rule if he was jointly acting together with someone else in the kidnapping or committing an armed robbery?"

"[C]ould you follow the law…under the felony murder rule and find someone guilty of first-degree murder, if you were convinced, beyond a reasonable doubt, that they had engaged in the underlying felony of either kidnapping or armed robbery, and find them guilty, even though they didn't actually strike the blow or pull the trigger or light the match…that caused [the victim's] death…?"

Accomplice/Co-Defendant (or Interested Witness) Testimony:

It is proper to ask about prospective jurors' abilities to follow the law with respect to interested witness testimony…When an accomplice is testifying for the State, the accomplice is considered an interested witness, and his testimony is subject to careful [or the highest of] scrutiny. State v. Jones, 347 N.C. 193, 201-204 (1997). See, NCPI-Crim. 104.21, 104.25 and 104.30.

The following were proper questions (asked by the prosecutor) about a **co-defendant/accomplice with a plea arrangement** from State v. Jones, 347 N.C. 193, 201-202, 491 S.E.2d 641, 646 (1997):

a) *There may be a witness who will testify…pursuant to a plea arrangement, plea bargain, or "deal" with the State. Would the mere fact that there is a plea bargain with one of the State's witnesses affect your decision or your verdict in this case?*

b) *Could you listen to the court's instructions of how you are to view accomplice or interested witness testimony, whether it came from the State or the defendant….?*

c) After having listened to that testimony and the court's instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness?

[According to the N.C. Supreme Court, **these 3 questions were proper and not stake-out questions**…They were designed to determine if jurors could follow the law and be impartial and unbiased. Jones, 347 N.C. at 204. The prosecutor accurately stated the law. An accomplice testifying for the State is considered an interested witness and his testimony is subject to careful scrutiny. The jury should analyze such testimony in light of the accomplice's interest in the outcome of the case. If the jury believes the witness, it should give his testimony the same weight as any other credible witness. Jones, 347 N.C. at 203-204.]

You may hear testimony from a witness who is testifying pursuant to a plea agreement. This witness has pled guilty to a lesser degree of murder in exchange for their promise to give truthful testimony in this case. Do you have opinions about plea agreements that would make it difficult or impossible for you to believe the testimony of a witness who might testify under a plea agreement? The prosecutor's inquiry merely (and properly) sought to determine whether a plea agreement would have a negative effect on prospective jurors' ability to believe testimony from such witnesses. State v. Gell, 351 N.C. 192, 200-01 (2000).

Age of Juror and Effects of It: N.C.G.S. 9-6.1 allows jurors age 72 years or older to request excusal or deferral from jury service but it does not prohibit such jurors from serving. In State v. Elliott, 360 N.C. 400, 408 (2006), the Court recognized that it is sensible for trial judges to consider the effects of age on the individual juror since the adverse effects of growing old do not strike all equally or at the same time. [Based on this, it appears that the trial court and the parties should be able to inquire into the effects of aging with older jurors.]

Circumstantial Evidence/Lack of Eyewitnesses:

Prosecutor informed prospective jurors that "*only the three people charged with the crimes know what happened to the victims…and…none of the three would testify against the others and therefore the State had no eyewitness testimony to offer.*" He then asked: "*Knowing that this is a serious case, a first degree murder case, do you feel like you have to say to yourself, well, the case is just too serious…to decide based upon circumstantial evidence and I would require more than circumstantial evidence to return a verdict of first degree murder?*" The court found that these statements properly (1) informed the jury that the state would be relying on circumstantial evidence and (2) inquired as to whether the lack of eyewitnesses would cause them problems. (Also, it was not a stake-out question.) State v. Teague, 134 N.C. App. 702 (1999).

It was proper in first degree murder case for State to tell the jury that they will be relying upon circumstantial evidence with no witnesses to the shooting and then ask them

if that will cause any problems. State v Clark, 319 N.C. 215 (1987).

Child Witnesses: Trial judge erred in not allowing the defendant to ask prospective jurors "*if they thought children were more likely to tell the truth when they allege sexual abuse.*" State v Hatfeld, 128 N.C. App. 294 (1998)

Defendant's Prior Record: In State v Hedgepath, 66 N.C. App. 390 (1984), the trial court erred in refusing to allow counsel to question jurors about their willingness and ability to follow judge's instructions that they are to consider defendant's prior record only for purposes of determining credibility.

Defenses (i.e., Specific Defenses): A prospective juror who is unable to accept a particular defense...recognized by law is prejudiced to such an extent that he can no longer be considered competent. Such jurors should be removed from the jury when challenged for cause. State v Leonard, 295 N.C. 58, 62-63 (1978).

a) Accident: Defense counsel is free to inquire into the potential jurors' attitudes concerning the specific defenses of accident or self-defense. State v. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

b) Insanity: It was reversible error for trial court to fail to dismiss juror who indicated he was not willing to return a verdict of NGRI even though defendant introduced evidence that would satisfy them that the defendant was insane at the time of the offense. State v Leonard, 295 N.C. 58,62-63 (1978); see also Vinson.

c) Mental Health Defense: The defendant has the right to question jurors about their attitudes regarding a potential insanity or lack of mental capacity defense, including questions about: "*courses taken and books read on psychiatry, contacts with psychiatrist or persons interested in psychiatry, members of family receiving treatment, inquiry into feelings on insanity defense and ability to be fair.*" U.S. v Robinson, 475 F.2d 376 (D.C. Cir. 1973); U.S. v Jackson, 542 F.2d 403 (7th Cir. 1976).

d) Self-Defense: Defense counsel is free to inquire into the potential jurors' attitudes concerning the specific defenses of accident or self-defense. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

Drug-Related Context of Non-Drug Offense: In a prosecution for common law robbery and assault, there was no error in allowing prosecutor (after telling prospective jurors that a proposed sale of marijuana was involved) to inquire into whether any of them would be unable to be fair and impartial for that reason. State v Williams, 41 N.C. App. 287, disc. rev. denied, 297 N.C. 699 (1979).

The following was not a "stake-out" question and was a proper inquiry to determine the impartiality of the jurors: "*Do you feel like you will automatically turn off the rest of the case and predicate your verdict of not guilty solely upon the fact that these*

people were out looking for drugs and involved in the drug environment, and became victims as a result of that?" State v Teague, 134 N.C. App. 702 (1999)

Eyewitness Identification: The following prosecutor's question was upheld as proper (and non-stake-out): *"Does anyone have a per se problem with eyewitness identification? Meaning, it is in and of itself going to be insufficient to deem a conviction in your mind, no matter what the judge instructs you as to the law?"* The prosecutor was "simply trying to ensure that the jurors could follow the law with respect to eyewitness testimony…that is treat it no differently that circumstantial evidence." State v. Roberts, 135 N.C. App. 690, 697, 522 S.E.2d 130 (1999).

Expert Witness: *"If someone is offered as an expert in a particular field such as psychiatry, **could** you accept him as an expert, his testimony as an expert in that particular field."* According to State v Smith, 328 N.C. 99, 131 (1991), this was not an attempt to stake out jurors.

It was not an abuse of discretion for the judge to prevent defense counsel from asking jurors "*whether they **would** automatically reject the testimony of mental health professionals."* This was apparently a stake out question. State v. Neal, 346 N.C. 608, 618 (1997).

Focusing on "The Issue":
In a child homicide case, the prosecutor was allowed to ask a prospective juror "*if he could look beyond evidence of the child's poor living conditions and lack of motherly care and focus on the issue of whether the defendant was guilty of killing the child."* The Supreme Court found that this was not a stake-out question. State v. Burr, 341 N.C. 263, 285-86 (1995).

Following the Law: "The right to an impartial jury contemplates that each side will be allowed to make inquiry into the ability of prospective jurors to follow the law. Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection." State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990).

If a juror's answers about a fundamental legal concept (such as the presumption of innocence) demonstrated either **confusion about**, or **a fundamental misunderstanding** of the principles…or **a simple reluctance to apply** those principles, its effect on the juror's inability to give the defendant a fair trial remained the same. State v. Cunningham, 333 N.C. 744, 754-756, 429 S.E.2d 718 (1993).

Hold-Out Jurors During Deliberations: Generally, questions designed to determine how well a prospective juror would stand up to other jurors in the event of a split decision amounts to impermissible "stake-out" questions. State v. Call, 353 N.C. 400, 409-410, 545 S.E.2d 190, 197 (2001).

It is permissible, however, to ask jurors *"if they understand that, while the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, they have the right to stand by their beliefs in the case."* (Note that, if this permissible question is followed by the question, *"And would you do that?,"* this crosses the line into an impermissible stake-out question.) State v. Elliott, 344 N.C. 242, 262-63, 475 S.E.2d 202, 210 (1997); see also, State v. Maness, 363 N.C. 261 (2009).

Where defense counsel had already inquired into whether jurors could follow the law as specified in N.C.G.S. 15A-1235 by asking if they could *"independently weigh the evidence, respect the opinion of other jurors, and be strong enough to ask other jurors to to respect his opinion,"* the trial judge properly limited a redundant question that was based on an Allen jury instruction. (N.C.P.I.-Crim. 101-40). State v. Maness, 363 N.C. 261 (2009).

Identifying Family Members: Not error to allow the prosecutor during jury selection to identify members of the murder victim's family who are in the courtroom. State v Reaves, 337 N.C. 700 (1994).

Intoxication: Proper for Prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. *"If it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to affect your verdict."* State v McKoy, 323 N.C. 1 (1988).

Law Enforcement Witness Credibility: If a juror would automatically give enhanced credibility or weight to the testimony of a law enforcement witness (or any particular class of witness), he would be excused for cause. State v. Cummings, 361 N.C. 438, 457-58 (2007); State v. McKinnon, 328 N.C. 668, 675-76, 403 S.E.2d 474 (1991).

Legal Principles: Defense counsel may question jurors to determine whether they completely understood the principles of **reasonable doubt** and **burden of proof**. Once counsel has fully explored an area, however, the judge may limit further inquiry. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

"The right to an impartial jury contemplates that each side will be allowed to make ***inquiry into the ability of prospective jurors to follow the law***. Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection." State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990).

Defendant Not Testifying: It is proper for defense counsel to ask questions concerning a defendant's failure to testify in his own defense. A court, however, may disallow questioning about the defendant's failure to offer evidence in his defense. State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994).

Court erred in denying the defendant's challenge for cause of juror who

repeatedly said that the defendant's failure to testify would stick in the back of my mind while he was deliberating (in response to question "*whether the defendant's failure to testify would affect his ability to give him a fair trial"*). State v Hightower, 331 N.C. 636 (1992).

Presumption of Innocence and Burden of Proof: A juror gave conflicting and ambiguous answers about whether she could presume the defendant innocent and whether she would require him to prove his innocence. The Supreme Court awarded the defendant a new trial because the trial judge denied the defendant's challenge for cause. The Supreme Court said that **the juror's answers demonstrated either confusion about, or a fundamental misunderstanding of the principles of the presumption of innocence, or a simple reluctance to apply those principles**. Regardless whether the juror was confused, had a misunderstanding, or was reluctant to apply the law, its effect on her ability to give the defendant a fair trial remained the same. State v. Cunningham, 333 N.C. 744, 754-756, 429 S.E.2d 718 (1993).

Pretrial Publicity: Inquiry should be made regarding the effect of the publicity upon jurors' ability to be impartial or keep an open mind. Mu'min, 500 U.S. 415, 419-421, 425 (1991). Although "Questions about the content of the publicity…might be helpful in assessing whether a juror is impartial," they are not constitutionally required. Id. at 425. The constitutional question is *whether jurors had such fixed opinions that they could not be impartial*, not whether or what they remembered about the publicity. It is not required that jurors be totally ignorant of the facts and issues involved. Id., 500 U.S. at 426 and 430.

It was deemed proper for a prosecutor to describe some of the "uncontested" details of the crime before he asked jurors whether they knew or read anything about the case. State v. Nobles, 350 N.C. 483, 497-498, 515 S.E.2d 885, 894-895 (1999) (ADA noted that defendant was charged with discharging a firearm into a vehicle occupied by his wife and three small children). It was not a "stake-out" question.

Racial/Ethnic Background: Trial courts must allow questions regarding whether any jurors might be prejudiced against the defendant because of his race or ethnic group where the defendant is accused of a violent crime and the defendant and the victim were members of different racial or ethnic groups. (If this criteria is not met, racial and ethnic questions are discretionary.) Rosales-Lopez v. United States, 451 U.S. 182, 189, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981). Such questions must be allowed in capital cases involving a charge of murder of a white person by a black defendant. Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1783, 90 L.Ed.2d 27 (1986).

Sexual Offense/Medical Evidence: In a sexual offense case, the prosecutor asked, *"To be able to find one guilty beyond a reasonable doubt, are you going to require that there be medical evidence that affirmatively says an incident occurred?"* This was a proper, non-stake-out question. Since the law does not require medical evidence to corroborate a victim's story, the prosecutor's question was a proper attempt to measure prospective jurors' ability to follow the law. State v. Henderson, 155 N.C. App. 719, 724-727 (2003).

Sexual Orientation: Proper for prosecutor to question jurors regarding prejudice against homosexuality for the purpose of determining whether they could impartially consider the evidence knowing that the State's witnesses were homosexual. State v Edwards, 27 N.C. App. 369 (1975).

IV. IMPROPER QUESTIONS OR IMPROPER PURPOSES

Answers to Legal Questions: Counsel should not "fish" for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980). [Does this mean can counsel get judge to give preliminary instructions before voir dire, and then ask questions about the law?]

Arguments that are Prohibited: A lawyer (even a prosecutor) may not make statements during jury selection that would be improper if they were later argued to the jury. State v. Hines, 286 N.C. 377, 385, 211 S.E.2d 201 (1975) (reversible error for the prosecutor to make improper statements during voir dire about how the death penalty is rarely enforced).

Confusing and Ambiguous Questions: Hypothetical questions so phrased to be ambiguous and confusing are improper. For example, *"Now, everyone on the jury is in favor of capital punishment for this offense…Is there anyone on the jury, because the nature of the offense, feels like you might be a little bit biased or prejudiced, either consciously or unconsciously, because of the type or the nature of the offense involved; is there anyone on the jury who feels that they would be in favor of a sentence other than death for rape?"* (see, Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975)); or, *"Would you be willing to be tried by one in your present state of mind if you were on trial in this case?"* State v. Denny, 294 N.C. 294, 240 S.E.2d 437 (1978).

Inadmissible Evidence: An attorney may not ask prospective jurors about inadmissible evidence. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

Incorrect Statements of Law: Questions containing incorrect or inadequate statements of the law are improper. State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

Indoctrination of Jurors: Counsel should not engage in efforts to indoctrinate jurors and counsel should not argue the case in any way while questioning jurors. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980). In order to constitute an attempt to indoctrinate potential jurors, the improper question would be aimed at indoctrinating jurors with views favorable to the [questioning party]…or…advancing a particular position. State v. Chapman, 359 N.C. 328, 346 (2005). An **example of a non-indoctrinating question** is: *Can you imagine a set of circumstances in which…your personal beliefs conflict with the law? In that situation, what would you do?* See Chapman.

Overbroad and General Questions: *"Would you consider, if you had the opportunity,*

evidence about this defendant, either good or bad, other than that arising from the incident here?" This question was overly broad and general, and not proper for voir dire. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

Rapport Building: Counsel should not visit with or establish "rapport" with jurors. State v. Phillips, 300 NC 678, 268 SE2d 452 (1980).

Repetitive Questions: The court may limit repetitious questions. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975). Where defense counsel had already inquired into whether jurors could "*independently weigh the evidence, respect the opinion of other jurors, and be strong enough to ask other jurors to to respect his opinion,"* the trial judge properly limited a redundant question that was based on an Allen jury instruction. State v. Maness, 363 N.C. 261 (2009).

Stake-Out Questions:
"Staking out" jurors is improper. Simpson, 341 N.C. 316, 462 S.E.2d 191, 202 (1995). "Staking out" is seen as an attempt to indoctrinate potential jurors as to the substance of defendant's defense. State v. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

"Staking out" defined***: Questions that tend to commit prospective jurors to a specific future course of action in the case***. Chapman, 359 N.C. 328, 345-346 (2005).

Counsel may not pose hypothetical questions designed to elicit in advance what the jurors' decision will be under a certain state of the evidence or upon a given state of facts...The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts. State v Vinson, 287 N.C. 326, 336-37 (1975), death sentence vacated, 428 U.S. 902 (1976).

Examples of Stake-Out Questions:

1) "*Is there anyone on the jury who feels that because the defendant had a gun in his hand, no matter what the circumstances might be, that if that-if he pulled the trigger to that gun and that person met their death as result of that, that simply on those facts alone that he must be guilty of something?"* Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

2) Improper "reasonable doubt" questions:
- a) *What would your verdict be if the evidence were evenly balanced?*
- *b) What would your verdict be if you had a reasonable doubt about the defendant's guilt?*
- *c) What would your verdict be if you were convinced beyond a reasonable doubt of the defendant's guilt?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).
- d) The judge will instruct you that *"you have to find each element beyond a reasonable doubt. Mr. [Juror], if you hear the evidence that comes in and find three elements beyond a reasonable doubt, but you don't find on the*

fourth element, what would your verdict be?" State v. Johnson, __ N.C.App. __, 706 S.E.2d. 790, 796 (2011)

3) *Whether you would vote for the death penalty […in a specified hypothetical situation…]?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

4) *If you find from the evidence a conclusion which is susceptible to two reasonable interpretations; that is, one leading to innocence and one leading to guilt, will you adopt the interpretation which points to innocence and reject that of guilt?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

5) *If it was shown…that the defendant couldn't control his actions and didn't know what was going on…,would you still be inclined to return a verdict which would cause the imposition of the death penalty?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

6) *If you are satisfied from the evidence that the defendant was not conscious of his act at the time it allegedly was committed, would you still feel compelled to return a guilty verdict?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

7) *If you are satisfied beyond a reasonable doubt that the defendant committed the act but you believed that he did not intentionally or willfully commit the crime, would you still return a guilty verdict knowing that there would be a mandatory death sentence?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

8) Improper Burden of Proof Questions:

a) *If the defendant chose not to put on a defense, would you hold that against him or take it as an indication that he has something to hide?*

b) *Would you feel the need to hear from the defendant in order to return a verdict of not guilty?*

c) *Would the defendant have to prove anything to you before he would be entitled to a not guilty verdict?* State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994); State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980), or

d) *Would the fact that the defendant called fewer witnesses than the State make a difference in your decision as to her guilt?* State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986).

9) Improper Insanity Questions:

a) *Do you know what a dissociative period is and do you believe that it is possible for a person not to know because some mental disorder where they actually are, and do things that they believe they are doing in another place and under circumstances that are not actually real?*

b) *Are you thinking, well if the defendant says he has PTSD, for that reason alone, I would vote that he is guilty?* State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

10) Improper "Hold-out" Juror Questions:

a) A question designed to determine how well a prospective juror would stand up

to other jurors in the event of a split decision amounts to an impermissible "stake-out." State v. Call, 353 N.C. 400, 409-410, 545 S.E.2d 190, 197 (2001). For example, *"if you personally do not think that the State has proved something beyond a reasonable doubt and the other 11 jurors have, could you maintain the courage of your convictions and say, they've not proved that?"*

b) It is permissible to ask jurors *"if they understand that, while the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, they have the rights to stand by their beliefs in the case."* If this permissible question is followed by the question, *"And would you do that?"* this crosses the line into an impermissible stake-out question. State v. Elliott, 344 N.C. 242, 263, 475 S.E.2d 202, 210 (1996).

c) The following hypothetical inquiry was deemed an improper stake-out question: *"If you were convinced that life imprisonment without parole was the appropriate penalty after hearing the facts, the evidence, and the law, could you return a verdict of life imprisonment without parole even if you fellow jurors were of different opinions?"* State v. Maness, 363 N.C. 261, 269-70 (2009).

11) Improper Questions about Witness Credibility:

a) *"What type of facts would you look at to make a determination if someone's telling the truth?"*

b) In determining whether to believe a witness, *"would it be important to you that a person could actually observe or hear what they said [that] they have [seen or heard] from the witness stand?"* State v. Johnson, __ N.C.App. __, 706 S.E.2d. 790, 793-94 (2011).

c) 11) *"Whether you **would** automatically reject the testimony of mental health professionals."* State v. Neal, 346 N.C. 608, 618 (1997).

Examples of NON-Stake Out Questions:

1) Prosecutor asked the jurors *"if they would consider that the defendant voluntarily consumed alcohol in determining whether the defendant was entitled to diminished capacity mitigating factor."* The Supreme Court stated, "This was a proper question. He did not attempt to stake the jury out as to what their answer would be on a hypothetical question." State v. Reeves, 337 N.C. 700 (1994)

2) Prosecutor informed prospective jurors that *"only the three people charged with the crimes know what happened to the victims…and…none of the three would testify against the others and therefore the State had no eyewitness testimony to offer."* He then asked: *Knowing that this is a serious case, a first degree murder case, do you feel like you have to say to yourself, well, the case is just too serious…to decide based upon circumstantial evidence and I would require more than circumstantial evidence to return a verdict of first degree murder?* Court found that these statements properly (1) informed the jury that the state would be relying on circumstantial evidence and (2) inquired as to whether the lack of eyewitnesses would cause them problems. (Also, it was not a stake-out question.) State v. Teague, 134 N.C. App. 702 (1999).

3) *"Do you feel like you will automatically turn off the rest of the case and predicate your verdict of not guilty solely upon the fact that these people were out looking for drugs and involved in the drug environment, and became victims as a result of that?"* State v Teague, 134 N.C. App. 702 (1999).

4) *"If someone is offered as an expert in a particular field such as psychiatry, could you accept him as an expert, his testimony as an expert in that particular field."* According to State v Smith, 328 N.C. 99, 131 (1991), this was NOT an attempt to stake out jurors.

5) Proper "non-stake-out" questions (by the prosecutor) about a **co-defendant/accomplice with a plea arrangement** from State v. Jones, 347 N.C. 193, 201-202, 204, 491 S.E.2d 641, 646 (1997):

a) *There may be a witness who will testify…pursuant to a plea arrangement, plea bargain, or "deal" with the State. Would the mere fact that there is a plea bargain with one of the State's witnesses affect your decision or your verdict in this case?*

b) *Could you listen to the court's instructions of how you are to view accomplice or interested witness testimony, whether it came from the State or the defendant….?*

c) *After having listened to that testimony and the court's instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness?*

6) Proper "non-stake-out" questions asked by prosecutor about views on death penalty from State v. Chapman, 359 N.C. 328, 344-346 (2005):

a) As you sit here now, do you know how you would vote at the penalty phase…regardless of the facts or circumstances in the case?

b) Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?

c) Can you imagine a set of circumstances in which…your personal beliefs [for or against the death penalty] conflict with the law? In that situation, what would you do?

A federal court in United States v. Johnson, 366 F.Supp. 2d 822 (N.D. Iowa 2005), explained how to avoid improper stakeout questions in framing proper case-specific questions. A proper question should address the juror's ability to consider both life and death instead of seeking to secure a juror's pledge vote for life or death under a certain set of facts. 366 F.Supp. 2d at 842-844. For example, questions about *1) whether a juror* ***could find*** *(instead of would find)* ***that certain facts call for the imposition of life or death****, or 2) whether a juror* ***could fairly consider both life and death in light of particular facts*** are appropriate case-specific inquiries. 366 F.Supp. 2d at 845, 850. Case-specific questions should be prefaced on "if the evidence shows," or some other reminder that an ultimate determination must be based on the evidence at trial and the court's instructions. 366 F.Supp. 2d at 850.

7) The prosecutor's question, *"Would you feel sympathy towards the defendant simply because you would see him here in court each day…?"* was NOT a stake-out attempt to get jurors to not consider defendant's appearance and humanity in capital sentencing hearing. Chapman, 359 N.C. 328, 346-347 (2005).

8) Prosecutor properly asked "non-stake-out" questions about jurors' abilities to follow the law regarding acting in concert, aiding and abetting, and the felony murder rule in State v. Cheek, 351 N.C. 48, 65-68, 520 S.E.2d 545, 555-557 (1999):

a) *"[I]f you were convinced, beyond a reasonable doubt, of the defendant's guilt, even though he didn't actually pull the trigger or strike the match or strike the blow in the murder, but that he was guilty of aiding and abetting and shared the intent that the victim be killed—could you return a verdict of guilty on that?"*

b) *"[T]he fact that one person may not have actually struck the blow or pulled the trigger or lit the match, but yet he could be guilty under the felony murder rule if he was jointly acting together with someone else in the kidnapping or committing an armed robbery?"*

c) *"[C]ould you follow the law…under the felony murder rule and find someone guilty of first-degree murder, if you were convinced, beyond a reasonable doubt, that they had engaged in the underlying felony of either kidnapping or armed robbery, and find them guilty, even though they didn't actually strike the blow or pull the trigger or light the match…that caused [the victim's] death…?"*

9) In a sexual offense case, the prosecutor asked, *"To be able to find one guilty beyond a reasonable doubt, are you going to require that there be medical evidence that affirmatively says an incident occurred?"* This was NOT a stake-out question. Since the law does not require medical evidence to corroborate a victim's story, the prosecutor's question was a proper attempt to measure prospective jurors' ability to follow the law. State v. Henderson, 155 N.C. App. 719, 724-727 (2003) (The court said that the following question would have been a stake-out if the ADA had asked it, *"If there is medical evidence stating that some incident has occurred, will you find the defendant guilty beyond a reasonable doubt*).

10) In a case involving eyewitness identification, the prosecutor asked: *"Does anyone have a per se problem with eyewitness identification? Meaning, it is in and of itself going to be insufficient to deem a conviction in your mind, no matter what the judge instructs you as to the law?"* The Court said that this question did NOT cause the jurors to commit to a future course of action. The prosecutor was "simply trying to ensure that the jurors could follow the law with respect to eyewitness testimony…that is treat it no differently that circumstantial evidence." State v. Roberts, 135 N.C. App. 690, 697, 522 S.E.2d 130 (1999).

11) In a child homicide case, the prosecutor was allowed to ask a prospective juror *"if he could look beyond evidence of the child's poor living conditions and lack of motherly care and focus on the issue of whether the defendant was guilty of killing the child."* The

Supreme Court found that this was not a stake-out question. State v. Burr, 341 N.C. 263, 285-86 (1995).

JURY SELECTION IN DEATH PENALTY CASES

I. GENERAL PRINCIPLES

Both the defendant and the state have the right to question prospective jurors about their views on capital punishment…The extent and manner of the inquiry by counsel lies within the trial court's discretion and will not be overturned absent an abuse of discretion. State v. Brogden, 334 N.C. 39, 430 S.E.2d 905, 908 (1993).

A defendant on trial for his life should be given great latitude in examining potential jurors. State v Conner, 335 N.C. 618 (1995).

[C]ounsel may seek to identify whether a prospective juror harbors a general preference for a life or death sentence or is resigned to vote automatically for either sentence….A juror who is predisposed to recommend a particular sentence without regard for the unique facts of a case or a trial judge's instruction on the law is not fair and impartial. State v. Chapman, 359 N.C. 328, 345 (2005) (citation omitted).

"Part of the Sixth Amendment's guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors…Voir dire plays a critical function in assuring the criminal defendant that his constitutional right to an impartial jury will be honored." Morgan v Illinois, 504 U.S. 719, 729, 733 (1992)

Voir dire must be available ***"to lay bare the foundation"*** of a challenge for cause against a prospective juror. Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would never do so. . Morgan, 504 U.S. at 733-34.

In voir dire, "what matters is how…[the questions regarding capital punishment] might be understood-or misunderstood-by prospective jurors." For example, "a general question as to the presence of reservations [against the death penalty] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases." One cannot assume the position of a venireman regarding this issue absent his own unambiguous statement of his beliefs. Witherspoon, 391 U.S. at 515, n. 9.

The trial court **must allow a defendant to go beyond the standard "fair and impartial" question**: "As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed...It

may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception." Morgan, 504 U.S. at 735-36.

It is not necessary for the trial court to explain or **for a juror to understand the process of a capital sentencing proceeding before the juror can be successfully challenged for his answers to questions.** An **understanding of the process should not affect one's beliefs regarding the death penalty**. Simpson, 341 N.C. 316, 462 SE2d 191, 202, 206 (1995).

II. Death Qualification: General Opposition to Death Penalty Not Enough

Under the "impartial jury" guarantee of the Sixth Amendment, death penalty jurors may not be excused "for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction"…, or "that there are some kinds of cases in which they would refuse to recommend capital punishment. Witherspoon, 391 U.S. at 522, 512-13.

The Supreme Court recognized that "A man who opposes the death penalty…can make the discretionary judgment entrusted to him by the state and can thus obey the oath he takes as a juror." Id., 391 U.S. at 519.

"Not all [jurors] who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors…so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart v. McCree, 476 U.S. 162, 176, 106 S.Ct. 1758, 1766, 90 L.Ed.2d 137, 149 (1986). [Note that the Court in Lockhart reaffirmed its position that death-qualified juries are not conviction-prone, and it is constitutional for a death-qualified jury to decide the guilt/innocence phase. The Court rejected the "fair-cross-section" argument against death-qualified juries deciding guilt.]

"[A] ***juror is not automatically excluded from jury service merely because that juror may have an opinion*** about the propriety of the death penalty." State v. Elliott, 360 N.C. 400, 410 (2006). General opposition to the death penalty will not support a challenge for cause for a potential juror who will "conscientiously apply the law to the facts adduced at trial." Such a **juror may be properly excluded "if he refuses to follow the statutory scheme and truthfully answer the questions** put by the trial judge." State v. Brogden, 430 S.E.2d at 907-08 (1993)(citing Witt, Adams v. Texas, and Lockhart).

III. Death Qualification Rules: Witherspoon and Witt Standards

The State may excuse jurors who make it **"unmistakably clear" that (1) they**

would "automatically vote against the death penalty" no matter what the facts of the case were, or (2) "their attitude about the death penalty would prevent them from making an impartial decision" regarding the defendant's guilt. Witherspoon, 391 U.S. at 522, n. 21 (1968).

A . . . prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be **willing to consider all of the penalties** provided by state law, and that he **not be irrevocably committed against the penalty of death regardless of the facts and circumstances**..." that might emerge during the trial. Witherspoon v Illinois, 391 U.S. 510, 523 n.21 (1968).

The proper standard for excusing a prospective juror for cause because of his views on capital punishment is: **"Whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instruction or his oath."** Wainwright v. Witt, 469 U.S. at 424.

Note that **considerable confusion regarding the law** on the part of the juror could amount to **"substantial impairment."** Uttecht v. Brown, 551 U.S. 1, 127. S.Ct. 2218, 167 L.Ed.2d 1014, 1029 (2007).

Prospective jurors may not be excused for cause simply because of the possibility "of the **death penalty may affect** what their **honest judgment of the facts** will be or **what they may deem to be a reasonable doubt**." The fact that the possible imposition of the death penalty would **"affect" their deliberations by causing them to be more emotionally involved or to view their task with greater seriousness** is not grounds for excusal. The same rule against exclusion for cause applies to **jurors who could not confirm or deny** that their **deliberations would be affected** by their views about the death penalty or by the possible imposition of the death penalty. Adams v. Texas, 448 U.S. 38, 49-50 (1980).

The State may excuse for cause a juror if he affirmatively answers the following question: **"Is your conviction [against the death penalty] so strong that you cannot take an oath [to fairly try this case and follow the law], knowing that a possibility exists in regard to capital punishment."** Lockett v. Ohio, 438 U.S. 586, 595-96 (1978). This ruling was based on the impartiality prong of the Witherspoon standard (i.e., their attitudes toward the death penalty would prevent them from making an **impartial decision as to the defendant's guilt**.)

The N.C. Supreme Court has upheld the removal of potential jurors **who equivocate** or who state that although they believe generally in the death penalty, they indicate that they personally **would be unable or would find it difficult to vote for the death penalty**. Simpson, 341 N.C. 316, 462 S.E.2d 191, 206 (1995); State v. Gibbs, 335 NC 1, 436 SE2d 321 (1993), cert. denied, 129 L.Ed.2d 881 (1994).

The following questions **by the prosecutor** were found to be proper:

1) [Mr. Juror…], *how do you feel about the death penalty, sir, are you opposed to it or [do] you feel like it is a necessary law?*

2) *Do you feel that you could be part of the legal machinery which might bring it about in this particular case?* State v Willis, 332 N.C. 151, 180-81 (1992).

IV. Rehabilitation of Death Challenged Juror

It is not an abuse of for the trial court to deny the defendant the chance to rehabilitate a juror **who has expressed clear and unequivocal** opposition to the death penalty in response to questions asked by the prosecutor and judge **when further questioning by defendant would not have likely produced different answers**. Brogden, 334 N.C. 39, 430 SE2d 905, 908-09 (1993); see also State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992). [In Brogden, a juror said that he could consider the evidence, was not predisposed either way, and could vote for death in an appropriate case. The same juror also said his feelings about the death penalty would "partially" or "to some extent" affect his performance as a juror. The trial court **erroneously** denied the defendant the opportunity to rehabilitate this juror.]

It is **error** for a trial court to enter "**a general ruling, as a matter of law," a defendant will never be allowed to rehabilitate** a juror when the juror's answers…have indicated that the **juror may be unable to follow the law** and fairly consider the possibility of recommending a sentence of death. State v. Green, 336 N.C. 142, 161 (1994) (based on Brogdon).

V. Life Qualifying Questions: Morgan v. Illinois

"If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts were?" Morgan, 504 U.S. at 723. A juror who will automatically vote for the death penalty in every case will fail to follow the law about considering aggravating and mitigating evidence, and has already formed an opinion on the merits of the case. Id. at 504 U.S. at 729, 738.

"Clearly, the extremes must be eliminated-i.e., those who, in spite of the evidence, would automatically vote to convict or impose the death penalty or automatically vote to acquit or impose a life sentence." Morgan, 504 U.S. at 734, n. 7.

"General fairness and follow the law questions" are not sufficient. **A capital defendant is entitled to inquire and ascertain a potential juror's predeterminations regarding the imposition of the death penalty.** Morgan, 504 U.S. at 507; State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 840 (1994).

[For a good summary of Morgan, see U.S. v. Johnson, 366 F.Supp. 2d 822, 826-831 (N.D. Iowa 2005).]

Proper Questions:

1) ***As you sit here now, do you know how you would vote at the penalty phase…regardless of the facts or circumstances in the case?*** Chapman, 359 N.C. 328, 344-345 (2005).

2) ***Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?***

[According to the Supreme Court, these general questions (asked by the prosecutor, i.e., #1 and #2 herein) did not tend to commit jurors to a specific future course of action. Instead, the questions helped to clarify whether the jurors' personal beliefs would substantially impair their ability to follow the law. Such inquiry is not only permissible, it is desirable to safeguard the integrity of a fair and impartial jury" for both parties. Chapman, 359 N.C. 328, 344-345 (2005).]

3) ***Can you imagine a set of circumstances in which…your personal beliefs*** *[…for or against the death penalty…]* ***conflict with the law? In that situation, what would you do?***

[While a party may not ask questions that tend to "stake out" the verdict a prospective juror would render on a particular set of facts…, **counsel may seek to identify whether a prospective juror harbors a general preference for a life or death sentence or is resigned to vote automatically for either sentence**….A juror who is predisposed to recommend a particular sentence without regard for the unique facts of a case or a trial judge's instruction on the law is not fair and impartial. State v. Chapman, 359 N.C. 328, 345 (2005) (citation omitted)…..The Supreme Court said that, although the prosecutor's questions (numbered 1-3 above) were hypothetical, they did not tend to commit jurors to a specific future course of action in this case, nor were they aimed at indoctrinating jurors with views favorable to the State. These questions do not advance any particular position. In fact, the questions address a key criterion of juror competency, i.e., ability to apply the law despite of their personal views. In addition, the questions were simple and clear. Chapman, 359 N.C. 328, 345-346 (2005).]

4) ***Is your support for the death penalty such that you would find it difficult to consider voting for life imprisonment for a person convicted of first-degree murder?*** Approved in State v Conner, 335 N.C. 618 (1994)

5) ***Would your belief in the death penalty make it difficult for you to follow the law and consider life imprisonment for first-degree murder?*** Approved in State v Conner, 335 N.C. 618 (1994). [The gist of the above two questions (numbered 4 and 5) was to determine whether the juror was willing to consider a life sentence in the appropriate circumstances or would automatically vote for death upon conviction. Conner, 440 SE2d at 841.]

6) ***If at the first stage of the trial you voted guilty for first-degree murder, do you think that you could at sentencing consider a life sentence or would your feelings about the death penalty be so strong that you could not consider a life sentence?*** State v Conner, 335 N.C. 618, 643-45 (1994) (referring to State v Taylor).

7) ***If you had sat on the jury and had returned a verdict of guilty, would you then presume that the penalty should be death?*** State v Conner, 335 N.C. 618, 643-45 (1994). [Referring to questions used in State v Taylor, 304 N.C. at 265, would now be acceptable). Also approved in State v. Ward, 354 N.C. 231, 254, 555 S.E.2d 251, 266 (2001) when asked by the prosecutor.]

8) ***If the State convinced you beyond a reasonable doubt that the defendant was guilty of premeditated murder and you had returned a verdict of guilty, do you think then that you would feel that the death penalty was the only appropriate punishment?*** State v Conner, 335 N.C. 618, 643-45 (1994). [The Court recognized that questions (numbered here as 6-8) that were deemed inappropriate in State v Taylor, 304 N.C. at 265, would now be acceptable.]

9) A capital defendant **must be allowed** to ask, ***"whether prospective jurors would automatically vote to impose the death penalty in the event of a conviction."*** State v. Wiley, 355 N.C. 592, 612 (2002) (citing Morgan 504 U.S. 719, 733-736).

Improper Questions:

1) Improper questions due to "**form**" (according to Simpson, 341 N.C. 316, 462 S.E.2d 191, 203 (1995)):

a) *Do you think that a sentence to life imprisonment is a sufficiently harsh punishment for someone who has committed cold-blooded, premeditated murder?*

b) *Do you think that before you would be willing to consider a death sentence for someone who has committed cold-blooded, premeditated murder, that they would have to show you something that justified that sentence?*

2) Questions that were **argumentative, incomplete statement of the law, and "stake-outs"** are improper. Simpson, 341 N.C. at 339-340.

3) The following question was properly disallowed under Morgan because it was **overly broad and called for a legislative/policy decision**: *Do you feel that the death penalty is the appropriate penalty for someone convicted of first-degree murder?* Conner, 335 N.C. at 643.

4) Defense counsel was not allowed to ask the following questions because they were **hypothetical stake-out questions** designed to pin down jurors regarding the kind of fact scenarios they would deem worthy of LWOP or the death penalty:

a) *Have you ever heard of a case where you thought that LWOP should be the appropriate punishment?*

b) *Have you ever heard of a case where you thought that the death penalty should be the punishment?*

c) *Whether you could conceive of a case where LWOP ought to be the punishment? What type of case is that?* State v. Wiley, 355 N.C. 592, 610-613 (2002).

Case-Specific Questions under Morgan:

The court in United States v. Johnson, 366 F.Supp. 2d 822 (N.D. Iowa 2005) addressed the issue of whether Morgan allows for case-specific questions (i.e., questions that ask whether jurors can consider life or death in a case involving stated facts). The court decided that Morgan did not preclude (or even address) case-specific questions. 366 F.Supp. 2d at 844-845. ***The essence of the Supreme Court's decision in Morgan was that, in order to empanel a fair and impartial jury, a defendant must be afforded the opportunity to question jurors about their ability to consider life and death sentences based on the facts and law in a particular case rather than automatically imposing a particular sentence no matter what the facts were.*** Therefore, the court in

Johnson found that case-specific questions (other than stake-out questions) are appropriate under Morgan. 366 F.Supp. 2d at 845-846.

In fact case-specific questions may be constitutionally required since a prohibition on such questions could impede a party's ability to determine whether jurors are unwaveringly biased for or against a death sentence. 366 F.Supp. 2d at 848.

The Johnson court explained how to avoid improper stakeout questions in framing proper case-specific questions. A proper question should address the juror's ability to consider both life and death instead of seeking to secure a juror's pledge vote for life or death under a certain set of facts. 366 F.Supp. 2d at 842-844. For example, questions about *1) whether a juror **could find** (instead of would find) **that certain facts call for the imposition of life or death**, or 2) whether a juror **could fairly consider both life and death in light of particular facts*** are appropriate case-specific inquiries. 366 F.Supp. 2d at 845, 850. Case-specific questions should be prefaced on "if the evidence shows," or some other reminder that an ultimate determination must be based on the evidence at trial and the court's instructions. 366 F.Supp. 2d at 850.

VI. Consideration of MITIGATION Evidence

General Principles:

Pursuant to Morgan v. Illinois, capital jurors must be able to consider and give weight to mitigating circumstances. "Any juror who states that he or she will automatically **vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider mitigating evidence** and to decide if it is sufficient to preclude imposition of the death penalty." Morgan, 504 U.S. at 738, 119 L.Ed.2d at 508. Such jurors "not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it." Morgan, 504 U.S. at 736, 119 L.Ed.2d at 507. **"Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause**, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial." Morgan, 504 U.S. at 739, 119 L.Ed.2d at 509.

Not only must the defendant be allowed to offer all relevant mitigating circumstance, "the sentencer [must] listen-that is **the sentencer must consider the mitigating circumstances when deciding the appropriate sentence.** Eddings v Oklahoma, 455 U.S. 104, 115 n.10 (1982)

[Jurors] may determine the weight to be given relevant mitigating evidence...[b]ut **they may not give it no weight by excluding such evidence from their consideration**. Eddings v Oklahoma, 455 U.S. 104, 114 (1982)

[The] decision to impose the death penalty is a reasoned moral response to the

defendant's background, character and crime…Jurors make individualized assessments of the appropriateness of the death penalty. Penry v. Lynaugh, 109 S.Ct. 2934, 2948-9 (1988)

Procedure must require the sentencing body **to consider the character and record of the individual offender and the circumstances of the particular offense**. Woodsen v North Carolina, 428 U.S. 280, 304 (1976)

In a capital sentencing proceeding before a jury, the jury is called upon to make a highly subjective, unique individualized judgment regarding the punishment that a particular person deserves. Turner v Murray, 476 U.S. 23, 33-34 (1985) (quoting Caldwell v Mississippi, 472 U.S. 320, 340 n.7 (1985).

Potential Inquiries into Mitigation Evidence:

[The N.C. Supreme Court] conclude[d] that, in permitting defendant to inquire generally into jurors' feelings about mental illness and retardation and other mitigating circumstances, he was given an adequate opportunity to discover any bias on the part of the juror…[That, combined with questions] asking jurors if they would automatically vote for the death penalty…and if they could consider mitigating circumstances.., satisfies the constitutional requirements of Morgan.
State v. Skipper, 337 N.C. 1, 21-22 (1994). [Note that the only restriction…was whether a juror could "consider" a specific mitigating circumstance in reaching a decision. State v. Skipper, 337 N.C. 1, 21 (1994)]

The Supreme Court had the following to say about the following question (and two other questions) originally asked by a prosecutor: "***Can you imagine a set of circumstances in which…your personal beliefs*** *[about __?]* ***conflict with the law? In that situation, what would you do?"*** Although the prosecutor's questions were hypothetical, they did not tend to commit jurors to a specific future course of action in this case, nor were they aimed at indoctrinating jurors with views favorable to the State. These questions do not advance any particular position. In fact, the questions address a key criterion of juror competency, i.e., ability to apply the law despite of their personal views. In addition, the questions were simple and clear. Chapman, 359 N.C. 328, 345-346 (2005).

Note, however, the following questions were deemed improper because 1) they "fished" for answers to legal questions before the judge instructed the jury about the applicable law, and 2) the questions "staked-out" jurors about what kind of verdict they would render under certain named circumstances:

a) "*If the State is able to prove that the defendant premeditatedly and deliberately killed three people…, would you be able to fairly consider things like sociological background, the way he grew up, if he had an alcohol problem, things like that in weighing whether he should get death or LWOP?"*;

b) "*Assuming the State proves three cold-blooded P&D murders, can you conceive in your own mind the mitigating factors that would let you find your ability for a*

penalty less than death?" State v. Mitchell, 353 N.C. 309, 318-319 543 S.E.2d 830, 836-837 (2001).

The following question was allowed by the trial court: ***"Do you feel like whatever we propose to you as a potential mitigating factor that you can give that fair consideration and not already start out dismissing those and saying those don't count because of the severity of the crime."*** State v Jones, 336 N.C. 229, 241 (1994).

An inquiry into jurors' **latent bias against any type of mitigation evidence** may be appropriate. In Simpson, 341 N.C. 316, 340-341, 462 S.E.2d 191, 205 (1995), the "majority" of the following questions **were deemed improper** questions about whether jurors could consider certain mitigating circumstances due to "form" or "staking out":

a) "*Do you think that the punishment that should be imposed for anyone in a criminal case in general should be effected [sic] by their mental or emotional state at the time that the crime was committed?"*

b) *"If you were instructed by the Court that certain things are mitigating, that is they are a basis for rendering or returning a verdict of life imprisonment as opposed to death and were those circumstances established you must give them some weight or consideration, could you do that?"*

c) *"Mr. [Juror], in this case if there was evidence to support, evidence to show that the defendant was under the influence of a mental or emotional disturbance at the time of the commission of the murder and if the Court instructed you that was a mitigating circumstance, if proven, that must be given some weight, could you follow that instruction?"*

d) *"If the Court advises you that by the preponderance of the evidence that if you are shown that the capability of the defendant to conform his conduct to the requirements of the law was impaired at the time of the murder, and the Court instructed you that was a circumstance to which you must give some consideration, could you follow that instruction?"*

e) *"Do you believe that a psychologist or a psychiatrist can be successful in treating people with mental or emotional disturbances?"*

f) *"Do you personally believe, and I am talking about your personal beliefs, that if by the preponderance of evidence, that is evidence that is established, that a person who committed premeditated murder was under the influence of a mental or emotional disturbance at the time that the crime was committed, do you personally consider that as mitigating, that is as far as supporting a sentence of less than the death penalty?"*

g) *"Now if instructed by the Court and if it is supported by the evidence, could you take into account the defendant's age at the time of the commission of the crime?"*

h) *"Do you believe that you could fairly and impartially listen to the evidence and consider whether any mitigating circumstances the judge instructs you on are found in the jury consideration at the end of the case?"*

In finding "most" of the above-cited questions improper, it was important to the Supreme Court that the trial court had allowed the defense lawyers to asked jurors about their experiences with mental problems, mental health professions, and foster care. **Such questions allowed the defendant to explore whether jurors had any latent bias**

against any type of mitigation evidence. Simpson, 341 N.C. at 341-342.

See discussion of U.S. v. Johnson, 366 F.Supp. 822 (N.D. Iowa 2005) above for authority or argument that case-specific inquiry about mitigation should be allowed under Morgan.

*For more mitigation questions, see below for "specific areas of inquiry."

VII. Specific Areas of Inquiry

Accomplice Liability: It was proper for prosecutor to ask prospective juror if he would be able to recommend the death penalty for someone who did not actually pull the trigger since it was uncontroverted that the defendant was an accessory. The State could inquire about the jurors' ability to impose the death penalty for an accessory to first-degree murder. State v Bond, 345 N.C. 1, 14-17, 478 S.E.2d 163 (1996):

a) *"The evidence will show [the defendant] did not actually pull the trigger. Would any of you feel like simply because he did not pull the trigger, you could not consider the death penalty and follow the law concerning the death penalty."*

b) *"Regardless of the facts and circumstances concerning the case, you could not recommend the death penalty for anyone unless it was the person who pulled the trigger."*

Age of Defendant:

The following question was asked by defense counsel: *"[T]he defendant will introduce things that he contends are mitigating circumstances, things like his age at the time of the crime...Do you feel like you can consider the defendant's age at the time the crime was committed ...and give it fair consideration?"* The Supreme Court assumed it was error for the trial court to sustain the State's objection to this question. In finding it harmless, however, the Court stated, "[i]n the context that this question was propounded, the juror is bound to have known the circumstance to which the defendant referred was the age of the defendant." State v Jones, 336 N.C. 229, 241 (1994)

Note, however, the question *"Would you consider the age of the defendant to be of any importance in this case [in deciding whether the death penalty is appropriate]?"* was found to be a "stake-out" question in State v. Womble, 343 N.C. 667, 682 473 S.E.2d 291, 299 (1996).

Aggravating Circumstances:

The Supreme Court has held that **questions about a specific aggravating circumstance that will arise in the case amounts to a stake–out question**. State v. Richmond, 347 N.C. 412, 424, 495 S.E.2d 677 (1998)(*"could you still consider mitigating circumstances knowing that the defendant had a prior first-degree murder conviction"*); State v. Fletcher, 354 N.C. 455, 465-66 (2001)(in a re-sentencing in which

the first-degree murder conviction was accompanied by a burglary conviction, counsel asked, the State has *"to prove at least one aggravating factor, that is…the fact that the murder was part of a burglary. That's true in this case because [the defendant] was also convicted of burglary. Knowing that about this case, could you still consider a life sentence…?"*)

Cost of Life Sentence vs. Death Sentence

In State v. Elliott, 360 N.C. 400, 409-10 (2006), the Supreme Court held that "we cannot say that the trial court clearly abused its discretion" when it did not allow defense counsel to ask, *"Do you have any preconceived notions about the costs of executing someone compared to the cost of keeping him in prison for the rest of his life."* The Supreme Court admitted that the question was "relevant" but, in light of the inquiry the trial court allowed, it was not a clear abuse of discretion to disallow the question. See also, State v. Cummings, 361 N.C. 438, 465 (2007). On the other hand, a trial court may reverse its previous denial and allow the "costs" question. State v. Polke, 361 N.C. 65, 68 (2006).

Course of Conduct Aggravator (or Multiple Murders):

Prosecutor was not staking out juror when asking: *"If the State satisfied you... that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, then I take it you could give the defendant the death penalty for beating two humans to death with a hammer, is that correct?"* State v Laws, 325 N.C. 81 (1989).

Felony Murder Defined:

Prosecutor properly defined felony murder as *"a killing which occurs during the commission of a violent felony, such as _____"* (the felony in this case was discharging a firearm into an occupied vehicle). State v. Nobles, 350 N.C. 483, 498, 515 S.E.2d 885, 895 (1999).

Forecast of Aggravating or Mitigating Circumstance(s):

In State v Payne, 328 N.C. 377, 391 (1991), the defendant argued it was improper for the prosecutor to forecast to the jury during voir dire that they might consider HAC as an aggravating factor. The Court found no error and stated: **[I]t is permissible for a prosecutor during voir dire to state briefly what he or she anticipates the evidence may show,** provided the statements are made in good faith and are reasonably grounded in the evidence available to the prosecutor.

A defendant is not entitled to put on a mini-trial of his evidence during voir dire by using hypothetical situations to determine whether a juror would cast his vote for his theory. The trial court in Cummings **allowed defense counsel to question prospective jurors about whether they had been personally involved** in any of those situations [such as domestic violence, child abuse, and alcohol and drug abuse], however, the judge **properly refused to allow defense counsel to ask hypothetical and speculative questions** that were being used to try the mitigation evidence during jury selection. State v. Cummings, 361 N.C. 438, 464-65 (2007).

Foster Care:

It was proper to ask, *Whether any jurors have had any experience with foster care?* Simpson, 341 N.C. 316, 462 S.E.2d 191, 205 (1995).

Gender of Defendant [or Victim?]:

The prosecutor properly asked, *"Would the fact that the Defendant is a female in any way affect your deliberations with regard to the death penalty?"* This was not a stake-out question. It was appropriate to inquire into the possible sensitivities of prospective jurors toward a female defendant facing the death penalty in an effort to ferret out any prejudice arising out of defendant's gender. State v. Anderson, 350 N.C. 152, 170-171, 513 S.E.2d 296, 307-308 (1999).

HAC Aggravator:

In State v Payne, 328 N.C. 377, 391 (1991), the defendant argued it was improper for the prosecutor to forecast to the jury during voir dire that they might consider HAC as an aggravating factor. The Court found no error and stated: [I]t is permissible for a prosecutor during voir dire to state briefly what he or she anticipates the evidence may show, provided the statements are made in good faith and are reasonably grounded in the evidence available to the prosecutor.

Impaired Capacity (f)(6):

Could the juror consider impaired capacity due to intoxication by drugs or alcohol as a mitigating circumstance and give the evidence such weight as you believe it is due ? Would your feelings about drugs or alcohol prevent you from considering the evidence ? State v Smith, 328 N.C. 99, 127 (1991). (See, where Court found that the following was a stake-out question: *"How many of you think that drug abuse is irrevelant to punishment in this case."* State v. Ball, 344 N.C. 290, 304, 474 S.E.2d 345, 353 (1996).

Prosecuting attorney asked the jurors, *"If they would consider that the defendant voluntarily consumed alcohol in determining whether the defendant was entitled to diminished capacity mitigating factor.* The Supreme Court stated: "This was a proper question. He did not attempt to stake the jury out as to what their answer would be on a hypothetical question." State v. Reeves, 337 N.C. 700 (1994).

It was proper for prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. (*If it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to affect your verdict.*) State v McKoy, 323 N.C. 1 (1988).

Lessened Juror Responsibility:

In closing argument and during jury selection, **it is improper for a prosecutor to make statements that lessens the jury's role or responsibility** in imposing a potential death penalty **or lessens the seriousness or reality of a death sentence**. State v. Hines, 286 N.C. 377, 381-86, 211 S.E.2d 201 (1975) (reversible error for the prosecutor to tell a

prospective juror, *"to ease your feelings [about imposing the death penalty], I might say…that one [person] has been put to death in N.C. since 1961"*; State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975), State v. Jones, 296 N.C. 495, 497-502 (1979) (it is error for *a prosecutor to suggest that the appellate process or executive clemency will correct any errors in a jury's verdict*); State v. Jones, 296 N.C. at 501-502 (prosecutor improperly discussed how *15A-2000(d) provides for an automatic appeal and how the Supreme Court must overturn a death sentence if it makes certain findings*. This had the effect of minimizing in the jurors' minds their role in recommending a death sentence).

Life Sentence (Without Parole):

During jury selection, a prospective juror indicated that he did not feel that a life sentence actually meant life (prior to LWOP statute). The trial court then instructed the jury that they should consider a life sentence to mean that defendant would be imprisoned for life and that they should not take the possibility of parole into account in reaching a verdict. The juror indicated that he would have trouble following that instruction and was excused for cause. Defense counsel requested that he be allowed to ask the other prospective jurors whether they could follow the court's instructions on parole. The trial court erroneously refused to allow the question. The Supreme Court held that **the defendant has a right to inquire as to whether a prospective juror will follow the court's instruction (i.e., life means life).** State v Jones, 336 N.C. 229, 239-40 (1994).

In several cases, the Supreme Court has upheld the refusal to allow defense counsel to ask about jurors' *"understanding of the meaning of a sentence of life without parole", "conceptions of the parole eligibility of a defendant serving a life sentence", or their feelings about whether the death penalty is more or less harsh that life in prison without parole."* State v. Neal, 346 N.C. 608, 617-18 (1997); State v. Jones, 358 N.C. 330 (2004); State v. Garcell, 363 N.C. 10, 30-32 (2009). These decisions were based on the principle that a defendant does not have the constitutional right to question the venire about parole. State v. Neal, 346 N.C. at 617.

In light of this, a safe inquiry might avoid the topic of "parole" and simply ask jurors about "their views of a life sentence for first-degree murder."

Another safe inquiry might be based on 15A-2002 which provides that "the judge shall instruct the jury…that a sentence of life imprisonment means a sentence of life without parole." There is no doubt that the jury will hear this instruction and, generally, the parties should be allowed to inquire whether jurors hold misconceptions that will affect their ability to "follow the law." **"Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection voir dire."** See, State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990); State v. Henderson, 155 N.C.App. 719, 727 (2003)

A juror's misperception about a life sentence with no possibility of parole may substantially impair his or her ability to follow the law. Uttecht v. Brown, 551 U.S. 1, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007). In Uttecht, despite a juror being informed four

or five times that a life sentence meant "life imprisonment without the possibility of parole," the juror continued to say that he would support the death penalty if the defendant would be released to re-offend. That juror was properly removed for cause. 167 L.E.d2d at 1025-30.

In a pre-LWOP case, the prosecutor improperly argued that the defendant could be paroled in 20 years if the jury awarded him a life sentence. The Supreme Court stated that, **"The jury's sentence recommendation should be based solely on their balancing the aggravating and mitigating factors before them. The possibility of parole is not such a factor, and it has no place in the jury's recommendation of their sentence to be imposed."** State v. Jones, 296 N.C. 495, 502-503 (1979). This principle might provide authority for inquiring into jurors' erroneous beliefs about parole to determine if they can follow the law.

Mental or Emotional Disturbance:

If the court instructs you that you should consider whether or not a person is suffering from mental or emotional disturbance in deciding whether or not to give someone the death penalty, do you feel like you could follow the instruction? State v Skipper, 337 N.C. 1, 20 (1994)).

The following were proper mental health related questions as found in Simpson, 341 N.C. 316, 462 S.E.2d 191, 205 (1995):

1) *Whether the jurors had any background or experience with mental problems in their families ?*

2) *Whether the jurors have any bias against or problem with any mental health professionals ?*

Murder During Felony Aggravator (e)(5):

Prosecutor informed jury about aggravating factors and indicated that the State *is relying upon...the capital felony was committed while the defendant was engaged, or was an aider and abettor in the commission of, or attempt to commit...any homicide, robbery, rape....* Supreme Court said that the prosecutor during jury voir dire should limit reference to aggravating factors, including the underlying felonies listed in G.S. 15A-2000(e)(5), to those of which there will be evidence and upon which the prosecutor intends to rely. Payne, 328 N.C. 377 (1991)

No Significant Criminal Record:

The following question was deemed improper as hypothetical and an impermissible attempt to indoctrinate a juror: *"Would the fact that the defendant had no significant history of any criminal record, would that be something that you would consider important in determining whether or not to impose the death penalty?"* State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989).

Personal Strength to Vote for Death:

Prosecutor asked: *"Are you strong enough to recommend the death penalty ?"*

State v Smith, 328 N.C. 99, 128 (1991). This repeated inquiry by prosecutor is not an attempt to see how jurors would be inclined to vote on a given state of facts. State v. Fleming, 350 N.C. 109, 125, 512 S.E.2d 720, 732 (1999).

Prosecutors were allowed to ask jurors *"whether they possessed the intestinal fortitude [or "courage", or "backbone"] to vote for a sentence of death."* When jurors equivocated on the imposition of the death penalty, prosecutors were allowed to ask these questions to determine whether they could comply with the law. State v. Murrell, 362 N.C. 375, 389-91 (2008); State v. Oliver, 309 N.C. 326, 355 (1983); State v. Flippen, 349 N.C. 264, 275 (1998); State v. Hinson, 310 N.C. 245, 252 (1984).

Religious Beliefs:

The defendant's "right of inquiry" includes "the right to make appropriate inquiry concerning a prospective juror's moral or religious scruples, morals, beliefs and attitudes toward capital punishment." State v. Vinson, 287 N.C. 326, 337, 215 S.E.2d 60, 69 (1975), death sentence vacated, 428 U.S. 902, 49 L.Ed.2d 1206 (1976). The issue is whether the prospective juror's religious views would impair his ability to follow the law. State v. Fletcher, 354 N.C. 455, 467 (2001). This right of inquiry does not extend to all aspects of the jurors' private lives or of their religious beliefs. State v. Laws, 325 N.C. 81, 109, 381 S.E.2d 609, 625 (1989).

General questions about the effect of a juror's religious views on his ability to follow the law are favored over detailed questions about Biblical concepts or doctrines. It was held improper to ask about a juror's *"understanding of the Bible's teachings on the death penalty."* State v. Mitchell, 353 N.C. 309, 318, 543 S.E.2d 830, 836 (2001). The Defendant, however, was allowed to ask the juror about her religious affiliation and whether any teachings of her church would interfere with her ability to perform her duties as a juror. In State v. Laws, 325 N.C. 81, 109, 381 S.E.2d 609, 625-626 (1989), sentence vacated on other grounds, 494 U.S. 1022, 110 S.Ct. 1465, 108 L.Ed.2d 603 (1990), the trial court did not abuse its discretion by not allowing defense counsel to ask a juror *"whether she believed in a literal interpretation of the Bible."*

In State v. Fletcher, 354 N.C. 455, 467, 555 S.E.2d 534, 542 (2001), defense counsel was allowed to inquire into a juror's religious affiliation and his activities with a Bible distributing group, but the trial court properly disallowed the question, whether the juror is a person *"who believes in the Biblical concept of an eye for an eye."* On the other hand, another trial court did not allow counsel to ask questions about jurors' *"church affiliations and the beliefs espoused by others [about the death penalty] representing their churches."* State v. Anderson, 350 N.C. 152, 171-172, 513 S.E.2d 296, 308 (1999).

Sympathy for the Defendant [or the Victim?]:

An inquiry into the sympathies of prospective jurors is part of the exercise of (the prosecutor's) right to secure an unbiased jury. State v. Anderson, 350 N.C. 152, 170-171, 513 S.E.2d 296, 307-308 (1999). (Arguably, the same right applies to the defendant.)

Prosecutor properly asked, "*Would you feel sympathy towards the defendant simply because you would see him here in court each day…?"* Jurors may consider a defendant's demeanor in recommending a sentence. The question did not "stake out" jurors so that they could not consider the defendant's appearance and humanity. The question did not address definable qualities of the defendant's appearance and demeanor. It addressed jurors' feelings toward the defendant, notwithstanding his courtroom appearance or behavior. Chapman, 359 N.C. 328, 346-347.

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EVIDENCE BLOCKING

Evidence Blocking*

Jonathan Rapping**

* The term "evidence blocking" and the ideas set forth in this paper come from my colleague and mentor at the D.C. Public Defender Service, Jonathan Stern. Mr. Stern honed the practice of evidence blocking to an art. There is not a concept in this paper that I did not steal from Mr. Stern, including examples presented. He deserves full credit for this paper.

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I. Facts of the World v. Facts of the Case

If a tree falls in the woods and no one is there to hear it, does it make a sound? We may confidently answer, "yes." However, we cannot, with certainty, know what exactly it sounded like. Scientists might estimate what the sound would have been based on whatever factors scientists use, but that will be an approximation. They may disagree on the density of other vegetation in the area that would affect the sound, or the moisture in the soil that may be a factor. Perhaps the guess will be close to the actual sound. Perhaps not. We can never know for sure. A trial is the same way. It is a recreation, in a courtroom, of a series of events that previously took place. There are disagreements over factors that impact the picture that is created for the jury. The picture painted for the jury is affected by biases of the witnesses, the quality and quantity of evidence that is admitted, and the jury's own viewpoint. In the end, the picture the jury sees may be close to what actually occurred or may be vastly different.

Understanding that the picture that is painted for the jury is the one that matters is central to the trial lawyer's ability to be an effective advocate. It is helpful to think of facts in two categories: facts of the world and facts of the case. The first category, facts of the world, are the facts that actually occurred surrounding the event in question in our case. We will never know with certainty what the facts of the world are. The second category, facts of the case, are the facts that are presented at trial. It is from these facts that the fact-finder will attempt to approximate as closely as possible the facts of the world. The fact-finder will never be able to perfectly recreate a picture of what happened during the incident in question. How close the fact-finder can get will be a function of the reliability and completeness of the facts that are presented at trial.

II. The Difference Between Prosecutors and Defense Attorneys

By understanding that the outcome of the trial is a function of the facts of the case, we have a huge advantage over the prosecution. The prosecutor tends to believe he knows the "truth." He thinks the facts of the world are perfectly reflected by his view of the evidence known to him. When the facts of the case point to a conclusion that is different from the one he believes he knows to be true, the prosecutor is unable to adjust. He can't move from the picture he has concluded in his mind to be "true." Therefore, he renders himself unable to see the same picture that is painted before the jury at trial. The good defense attorney understands she is incapable of knowing the "truth." She focuses on the facts of the case. She remains flexible to adjust to facts that are presented, or excluded, that she did not anticipate. In that sense she is better equipped to see

the picture the jury sees and to effectively argue that picture as one of innocence, or that at least raises a reasonable doubt.

The ability to think outside the box is one of the main advantages defense attorneys have over prosecutors. It is a talent honed out of necessity. We necessarily have to reject the version of events that are sponsored by the prosecution. They are a version that points to our client's guilt. We must remain open to any alternative theory, and proceed with that open mind throughout our trial preparation.

Prosecutors generally develop a theory very early on in the investigation of the case. Before the investigation is complete they have usually settled on a suspect, a motive, and other critical details of the offense. In the prosecutor's mind, this version of events is synonymous with what actually happened. In other words, the prosecutor assumes he knows the "truth." The fundamental problem with this way of thinking is that all investigation from that point on is with an eye towards proving that theory. Instead of being open minded about evidence learned, there is a bias in the investigation. Evidence that points to another theory must be wrong. When it comes to a witness who supports the government's theory but, to an objective observer, has a great motive to lie, the prosecutor assumes the witness is truthful and that the motive to lie is the product of creative defense lawyering. This way of thinking infects the prosecution at every level: from the prosecutor in charge of the case to law enforcement personnel who are involved with the prosecution. Whether the prosecution theory ultimately is right or wrong, this mid-set taints the ability to critically think about the case.

Good defense attorneys don't do this!!! We understand that the "truth" is something we will almost certainly never know and that, more importantly, will not be accurately represented by the evidence that makes it into the trial. We understand that a trial is an attempt to recreate a picture of historical events through witnesses who have biases, mis-recollections, and perceptions that can be inaccurate. We know trials are replete with evidence that is subject to a number of interpretations and that the prism through which the jury views this evidence depends on the degree to which, and manner in which, it is presented. In short, as defense attorneys, we understand that a trial is not about what "really happened." Rather, it is about the conclusions to which the fact-finder is led by the facts that are presented at trial. This may closely resemble what actually occurred or be far from it. We will never know. As defense attorneys we deal with the facts that will be available to our fact-finder. To do otherwise would be to do a disservice to our client.

For example, imagine a case that hinges on one issue, whether the traffic light was red or green. The prosecutor has interviewed ten nuns, all of whom

claim to have witnessed the incident in question. Each of the ten nuns insists that the light was green. The defense has one lone witness. This witness says the light was red. At trial, not a single nun shows up to court. The only witness to testify to the color of the light is the lone defense witness, who says it was red. The prosecutor sees this case as a green light case in which one witness was wrong. The jury, on the other hand, sees only a red light case. It knows nothing of the nuns. The only evidence is that the light was red. As defense attorneys we must also see the case as a red light case. These are the only facts of the case. Even assuming the ten nuns were correct, that the light was green, those facts are irrelevant to this case and the jury that will decide it.

III. The Art of Evidence Blocking

The defense attorney's job is to shape the facts of the case in a manner most favorable to her client. She must be able to identify as many ways as possible to keep facts that hurt her client from becoming facts of the case. Likewise, she must be thoughtful about how to argue the admissibility of facts that are helpful to her client's case. This requires a keen understanding of the facts that are potentially part of the case and a mastery of the law that will determine which of these facts become facts of the case.

As a starting proposition, the defense attorney should consider every conceivable way to exclude every piece of evidence in the case. Under the American system of justice, the prosecution has the burden of building a case against the defendant. The prosecution must build that case beyond a reasonable doubt. The facts available to the prosecution are the bricks with which the prosecutor will attempt to build that case. At the extreme, if we can successfully exclude all of the facts, there will be no evidence for the jury. It follows that the more facts we can successfully keep out of the case, the less bricks available to the prosecution from which to build the case against our client.

A wise advocacy principle is to never underestimate your opponent. Along this line it would behoove you to assume that if the prosecutor wants a piece of evidence in a case, it is because it is helpful to his plan to win a conviction against your client. Assume he is competent. Assume he knows what he is doing. Assume that fact is good for his case, and therefore bad for your client. Therefore, you do not want that fact in the case. Resist the temptation to take a fact the prosecution will use, and make it a part of your defense before you have considered whether you can have that fact excluded from the trial and how the case will look without it. Far too often defense attorneys learn facts in a case and begin thinking of how those facts will fit into a defense theory without considering whether the fact can be excluded from the trial. This puts the cart

before the horse. We must train ourselves to view every fact critically. We must consider whether that fact is necessarily going to be a part of the case before we decide to embrace it[1].

The prosecutor obviously knows his case, and how he plans to build it, much better than you do. If you accept the premise prosecutors tend to do things for a reason, i.e. to help convict your client, then it follows that any fact the prosecution wishes to use to build its case against your client is one we should try to keep out of evidence. Even if you are unwilling to give the prosecutor that much credit, limiting the facts at his disposal to use against your client can only be beneficial. This defines a method of practice coined by Jonathan Stern as "evidence blocking." Put plainly, evidence blocking is the practice of working to keep assertions about facts of the world out of the case. This exercise is one that forces us to consider the many ways facts can be kept out of evidence, and therefore made to be irrelevant to the facts of the case, and the derivative benefits of litigating these issues.

It is helpful to think of evidence blocking in four stages: 1) suppression/discovery violations; 2) witness problems; 3) evidence problems; and presentation problems.

A. Suppression / Discovery and Other Statutory Violations

The first stage we must think about when seeking to block evidence includes violations by the prosecution team of the Constitution, statutory authority, or court rule. We must think creatively about how evidence gathered by the State may be the fruit of a Constitutional violation. Generally, in this regard, we consider violations of the Fourth, Fifth, and Sixth Amendments. We look to any physical evidence seized by the government, statements allegedly made by your client, and identifications that arguably resulted from a government-sponsored identification procedure. We consider theories under which this evidence was obtained illegally and we move to suppress that evidence. We also must look to any violations of a statute or rule that might arguably warrant exclusion of evidence as a sanction. A prime example of this is a motion to exclude evidence based on a violation of the law of discovery. How we litigate these issues will define how much of the evidence at issue is admitted

[1] Of course, after going through this exercise, there will be facts that you have concluded are going to be part of the "facts of the case." These are "facts beyond control." At that point it is wise to consider how your case theory might embrace these facts beyond control, thereby neutralizing their damaging impact. However, this paper is meant to serve as a caution to the defense attorney to not engage in the exercise of developing a case theory around seemingly bad facts until she has thoroughly considered whether she can exclude those facts from the case.

at trial and how it can be used. We must use our litigation strategy to define how these issues are discussed.

B. Witness Problems

A second stage of evidence blocking involves identifying problems with government witnesses. This includes considering the witness' basis of knowledge. A witness may not testify regarding facts about which she does not have personal knowledge. It also includes thinking about any privileges the witness may have. Be thoughtful about whether a witness has a Fifth Amendment privilege. Consider marital privilege, attorney/client privilege, and any other privilege that could present an obstacle to the government's ability to introduce testimony it desires in its case. Another example of a witness problem is incompetency. We should always be on the lookout for information that arguable renders a witness incompetent to testify and move to have that witness excluded from testifying at trial. These are some examples of witness problems.

C. Evidence Problems

While witness problems relate to problems with the witness herself, we must also consider a third stage of evidence blocking: problems with the evidence itself. Even with a witness who has no problems such as those described above, there may be problems with the evidence the government wishes for them wish to present. Perhaps the information the witness has is barred because it is hearsay. Consider whether the evidence is arguably irrelevant. Think about whether the evidence is substantially more prejudicial than probative. These are all examples of problems with the evidence.

D. Presentation Problems

A final stage of evidence blocking involves a problem with the method of presentation of the evidence. Maybe the government is unable to complete the necessary chain of custody. The prosecutor may be missing a witness who is critical to completing the chain of custody. Maybe the prosecutor has never been challenged with respect to chain of custody and is unaware of who he needs to get the evidence admitted. By being on your feet you may successfully exclude the evidence the prosecutor needs to make its case against your client. Another example of a presentation problem is where the prosecutor is unable to lay a proper foundation for admission of some evidence. A third example is a prosecutor who is unable to ask a proper question (for example, leading on

direct). These are all examples of problems the prosecutor could have in getting evidence before the jury if you are paying attention and making the appropriate objections.

IV. How Do You Raise An Issue

Once you have decided that there is evidence that should not be admitted at your trial you must consider the best method for bringing the issue to the Court's attention. You essentially have three options: 1) file a pretrial written Motion in Limine, 2) raise the issue orally as a preliminary matter, or 3) lodge a contemporaneous objection. There are pros and cons to each of these methods.

Some motions must be filed in writing prior to trial, such as motions to suppress. Each jurisdiction is different on the requirement regarding what must be filed pre-trial and the timing of the filing[2]. For any motions that must be filed pretrial, you should always file pretrial motions whenever possible, for reasons stated below. However, many evidentiary issues may be raised without filing a motion. Objections to evidence on grounds that it is hearsay, irrelevant, substantially more prejudicial than probative, or any number of evidentiary grounds, are routinely made contemporaneously during trial. Certainly, should you anticipate an evidentiary issue in advance of trial you may raise it with the court. This may be done orally as a preliminary matter or in writing as a motion in limine.

What are the pros and cons of the different methods of raising an objection? Let's first consider a written, pretrial motion in limine. There are several advantages to filing a pretrial motion in limine to exclude evidence on evidentiary grounds. One is that it gives you a chance to educate the judge on the issue. Judges, like all of us, often do not know all of the law governing a particular issue off the top of their heads. If forced to rule on an issue without giving it careful thought, most judges rely on instinct. It is the rare judge whose instinct it is to help the criminal defendant. If the judge is going to rely on one of the parties to guide her, it is more often than not the prosecutor[3]. Therefore, you are often better often having had the chance to educate the judge than to rely on her ruling in your favor on a contemporaneous objection when the answer is not obvious.

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[2] In Georgia, pursuant to O.C.G.A. 17-7-110, all pretrial motions, demurrers, and special pleas must be filed within ten days of the date of arraignment unless the trial court grants additional time pursuant to a motion.

[3] To the extent that you have previous experience with that judge and you have developed a reputation for being thorough, smart, and honest, you may be the person upon whom the judge relies. If that is the case with the judge before whom you will be in trial, that may factor into your decision about whether to object contemporaneously.

A second reason for filing a written motion pretrial is that you are entitled to a response from the prosecutor. This benefits you in several ways. First, every time you force the prosecution to commit something to writing, you learn a little more about their case. Filing motions are a great way to get additional discovery by receiving a response. Second, whenever the prosecutor commits something to writing, he is locking himself into some version of the facts. If he characterizes a witnesses testimony in a particular way and that witness ends up testifying differently, you have an issue to litigate. Presumably, the prosecutor accurately stated in his response to your motion what the witness told him or his agent. You now are entitled to call the prosecutor, or his agent, to impeach the witness. Maybe the response is an admission of the party opponent that can be introduced at trial. The bottom line is that there is now an issue where there would not have been one had you not forced the response to your motion[4].

A third reason for filing a written motion is that there is always the chance that the prosecutor will fail to respond, despite being required to by law or ordered to by the court. Whenever the prosecutor fails to respond to a written motion you are in a position to ask for sanctions. Sanctions may be for the court to treat your motion as conceded. They might be exclusion of some evidence. Perhaps you may get an instruction in some circumstances. Be creative in the sanctions you request.

A fourth reason is that when you file a motion, you get a hearing. Pretrial hearings are great things. They give us a further preview of the prosecutions case, commit the prosecution to the evidence presented at the hearing, and may result in sanctions.

A fifth reason for filing motions whenever you can is that it increases the size of your client's court file. A thick court file can be beneficial to your client in several ways. The shear size of a large court file is intimidating to judges and prosecutors. Judges like to move their dockets. Thick case files tend to be trials that take a long time to complete. Judges will be less likely to force you to trial in a case with a thick case jacket. Similarly, prosecutors often have to make choices about which cases to offer better pleas in or to dismiss outright. The more of a hassle it is to deal with a case, the greater the chance the prosecutor will offer a good plea to your client or dismiss the case outright.

A sixth reason is that by taking the time to research and write the motion, you are better preparing yourself to deal with the issue and to consider how it impacts your trial strategy.

[4] One of Jonathan Stern's cardinal rules that I have taken to heart is that you always want to be litigating something other than guilt or innocence.

A final reason for filing pretrial motions even when not required is that you appear to be honest and concerned with everyone getting the result right. By appearing to be on the up and up you can gain points with the court that will spill over to other aspects of the trial.

What are the downsides to filing a motion in advance of trial. One is certainly that you give the prosecution a heads up to an issue you seek to raise. To the extent that you identify a problem with the government's case, they may be able to fix it with advance notice. Certainly this is an important consideration that must be factored into your decision about whether to raise an evidentiary issue in writing, pretrial. A second issue, which concerns me much less, is that it allows the prosecutor to do the research he needs to do to address the legal issue you raise. Certainly by filing a pretrial motion you allow everyone to be more prepared. However, if the issue is an important one, and the judge's ruling depends on the prosecutor having a chance to do some research, most judges will give the prosecutor time to research the question before ruling whenever you raise it. To the extent this holds up the trial, there is always the risk the judge will fault you for not raising the issue earlier.

The third option, raising the issue orally as a preliminary matter, is a compromise between the other two alternatives. Obviously, it has some of the pros and cons of the other alternatives. How you handle any given issue must be the product of careful thought and analysis.

V. Conclusion

In conclusion, as defense attorneys we must take advantage of any tools at our disposal to alter the landscape of the trial in our client's favor. In order to do this we must understand and appreciate the difference between facts in the world and facts in the case. By undergoing a rigorous analysis of the facts that are potentially part of the case against our client, we may be able to keep some of those facts out of evidence. This exercise has the benefit of keeping from the prosecutor some of the blocks he hoped to use to build the case against you client. It alters the facts of the case in a way the prosecutor may be unable to deal with. And by litigating these issues we stand to derive residual benefits that will shape the outcome of the trial.

If You Build It, They Will Come: Creating and Utilizing a Meaningful Theory of Defense

by Stephen P. Lindsay

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So the file hits your desk. Before you open to the first page you hear the shrill noise of not just a single dog, but a pack of dogs. Wild dogs. Nipping at your pride. You think to yourself, "Why me? Why do I always get the dog cases? It must be fate." You calmly place the file on top of the stack of ever-growing canine files. Your reach for your cup of coffee and seriously consider upping your membership in the S.P.C.A. to "Angel" status. Just as you think a change in profession might be in order, your coworker steps in the door, new file in hand, lets out a piercing howl and says, "This one is the dog of all dogs. The mother of all dogs!" Alas. You are not alone.

Dog files bark because there does not appear to be any reasonable way to mount a successful defense. Put another way, winning the case is about as likely as a crowd of people coming to watch a baseball game at a ballpark in a cornfield in the middle of Iowa. According to the movie, *Field of Dreams,* "If you build it, they will come . . ." And they came. And they watched. And they enjoyed. Truth be known, they would come again, if invited —even if they were not invited.

Every dog case is like a field of dreams: nothing to lose and everything to gain. Believe it or not, out of each dog case can rise a meaningful, believable, and solid defense—a defense that can win. But as Kevin Costner's wife said in the movie, "[I]f all of these people are going to come, we have a lot of work to do." The key to building the ballpark is in designing a theory of defense supported by one or more meaningful themes.

What Is a Theory and Why Do I Need One?

Having listened over the last 20 years to some of the finest criminal defense attorneys lecture on theories and themes, it has become clear to me that there exists great confusion as to what constitutes a theory and how it differs from supporting themes. The words "theory" and "theme" are often used interchangeably. However, they are very different concepts. So what is a theory? Here are a few definitions:

- *That combination of facts (beyond change) and law which in a common sense and emotional way leads a jury to conclude a fellow citizen is wrongfully accused.*—Tony Natale
- *One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial.* —Mario Conte
- *A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused's acquittal or conviction on a lesser charge while telling the defense's story of innocense or reduces culpability.* —Vince Aprile

Common Thread Theory Components

Although helpful, these definitions, without closer inspection, tend to leave the reader thinking "Huh?" Rather than try to decipher these various definitions, it is more helpful to compare them to find commonality. The common thread within these definitions is that each requires a theory of defense to have the same three essential elements:

1. a factual component (fact-crunching/ brainstorming);
2. a legal component (genre); and
3. an emotional component (themes/ archetypes).

In order to fully understand and appreciate how to develop each of these elements in the quest for a solid theory of defense, it

is helpful to have a set of facts with which to work. These facts can then be used to create possible theories of defense. The Kentucky Department of Public Advocacy developed the following fact problem:

State v. Barry Rock, 05 CRS 10621 (Buncombe County)

Betty Gooden is a "pretty, very intelligent young lady" as described by the social worker investigating her case. Last spring, Betty went to visit her school guidance counselor, introducing herself and commenting that she knew Ann Haines (a girl that the counselor had been working with due to a history of abuse by her uncle, and who had recently moved to a foster home in another school district).

Betty said that things were not going well at home. She said that her stepdad, Barry Rock, was very strict and would make her go to bed without dinner. Her mother would allow her and her brother (age 7) to play outside, but when Barry got home, he would send them to bed. She also stated that she got into trouble for bringing a boy home. Barry yelled at her for having sex with boys in their trailer. This morning, she said, Barry came to school and told her teacher that he caught her cheating—copying someone's homework. She denied having sex with the boy or cheating. She was very upset that she wasn't allowed to be a normal teenager like all her friends.

The counselor asked her whether Barry ever touched her in an uncomfortable way. She became very uncomfortable and began to cry. The counselor let her return to class, then met her again later in the day with a police officer present. At that time, Betty stated that since she was 10, Barry had told her if she did certain things, he would let her open presents. She explained how this led to Barry coming into her room in the middle of the night to do things with her. She stated that she would try to be loud enough to wake up her mother in the room next door in the small trailer, but her mother would never come in. Her mother is mentally retarded, and before marrying Barry, had quite a bit of contact with Social Services due to her weak parenting skills. She stated that this had been going on more and more frequently in the last month and estimated it had happened 10 times.

Betty is an A/B student who showed no sign of academic problems. After reporting the abuse, she has been placed in a foster home with her friend Ann. She has also attended extensive counseling sessions to help her cope. Medical exams show that she has been sexually active.

Kim Gooden is Betty's 35-year-old mentally retarded mother. She is a "very meek and introverted person" who is "very soft spoken and will not make eye contact." She told the investigator she had no idea Barry was doing this to Betty. She said Barry made frequent trips to the bathroom and had a number of stomach problems that caused diarrhea. She said that Betty always wanted to go places with Barry and would rather stay home with Barry than go to the store with her. She said that she thought Betty was having sex with a neighbor boy, and she was grounded for it. She said that Betty always complains that she doesn't have normal parents and can't do the things her friends do. She is very confused about why Betty was taken away and why Barry has to live in jail now. An investigation of the trailer revealed panties with semen that matches Barry. Betty says those are her panties. Kim says that Betty and her are the same size and share all of their clothes.

Barry Rock is a 39-year-old mentally retarded man who has been married to Kim for five years. They live together in a small trailer making do with the Social Security checks that they both get due to mental retardation.

Barry now adamantly denies that he ever had sex and says that Betty is just making this up because he figured out she was having sex with the neighbor boy. After Betty's report to the counselor, Barry was interviewed for six hours by a detective and local police officer. In this videotaped statement, Barry is very distant, not making eye contact, and answering with one or two words to each question. Throughout the tape, the officer reminds him just to say what they talked about before they turned the tape on. Barry does answer "yes" when asked if he had sex with Betty and "yes" to other leading questions based on Betty's story. At the end of the interview, Barry begins rambling that it was Betty that wanted sex with him, and he knew that it was wrong, but he did it anyway.

Barry has been tested with IQs of 55, 57, and 59 over the last three years. Following a competency hearing, the trial court found Barry to be competent to go to trial.

The Factual Component

The factual component of the theory of defense comes from brainstorming the facts. More recently referred to as "fact-busting," brainstorming is the essential process of setting forth facts that appear in discovery and arise through investigation.

It is critical to understand that facts are nothing more—and nothing less—than just facts during brainstorming. Each fact should be written down individually and without any spin. Non-judgmental recitation of the facts is the key. Do not draw conclusions as to what a fact or facts might mean. And do not make the common mistake of attributing the meaning to the facts that is given to them by the prosecution or its investigators. It is too early in the process to give value or meaning to any particular fact. At this point, the facts are simply the facts. As we work through the other steps of creating a theory of defense, we will begin to attribute meaning to the various facts.

Judgmental Facts (WRONG)	Non-Judgmental Facts (RIGHT)
Barry was retarded	Barry had an IQ of 70
Betty hated Barry	Barry went to Betty's school, went to her classroom, confronted her about lying, accused her of sexual misconduct, talked with her about cheating, dealt with her in front of her friends
Confession was coerced	Several officers questioned Barry, Barry was not free to leave the station, Barry had no family to call, questioning lasted six hours

The Legal Component

Now that the facts have been developed in a neutral, non-judgmental way, it is time to move to the second component of the theory of defense: the legal component. Experience, as well as basic notions of persuasion, reveal that stark statements such as "self-defense," "alibi," "reasonable doubt," and similar catch-phrases, although somewhat meaningful to lawyers, fail to accurately and completely convey to jurors the essence of the defense. "Alibi" is usually interpreted by jurors as "He did it, but he has some friends that will lie about where he was." "Reasonable doubt" is often interpreted as, "He did it, but they can't prove it."

Thus, the legal component must be more substantive and understandable in order to accomplish the goal of having a meaningful theory of defense. Look at Hollywood and the cinema; thousands of movies have been made that have as their focus some type of alleged crime or criminal behavior. According to Cathy Kelly, training director for the Missouri Pubic Defender's Office, when these types of movies are compared, the plots, in relation to the accused, tend to fall into one of the following genres:

1. It never happened (mistake, set-up);
2. It happened, but I didn't do it (mistaken identification, alibi, set-up, etc.);
3. It happened, I did it, but it wasn't a crime (self-defense, accident, claim or right, etc.);
4. It happened, I did it, it was a crime, but it wasn't this crime (lesser included offense);
5. It happened, I did it, it was the crime charged, but I'm not responsible (insanity, diminished capacity);
6. It happened, I did it, it was the crime charged, I am responsible, so what? (jury nullification).

The six genres are presented in this particular order for a reason. As you move down the list, the difficulty of persuading the jurors that the defendant should prevail increases. It is easier to defend a case based upon the legal genre "it never happened" (mistake, set-up) than it is on "the defendant is not responsible" (insanity).

Using the facts of the Barry Rock example as developed through non-judgmental brainstorming, try to determine which genre fits best. Occasionally, facts will fit into two or three genres. It is important to settle on one genre, and it should usually be the one closest to the top of the list; this decreases the level of defense difficulty. The Rock case fits nicely into the first genre (it never happened), but could also fit into the second category (it happened, but I didn't do it). The first genre should be the one selected.

But be warned. Selecting the genre is not the end of the process. The genre is only a bare bones skeleton. The genre is a legal theory, not your theory of defense. It is just the second element of the theory of defense, and there is more to come. Where most attorneys fail when developing a theory of defense is in stopping once the legal component (genre) is selected. As will be seen, until the emotional component is developed and incorporated, the theory of defense is incomplete.

It is now time to take your work product for a test drive. Assume that you are the editor for your local newspaper. You have the power and authority to write a headline about this case. Your goal is to write it from the perspective of the defense, being true to the facts as developed through brainstorming, and incorporating the legal genre that has been selected. An example might be:

Rock Wrongfully Tossed from Home by Troubled Stepdaughter

Word choice can modify, or entirely change, the thrust of the headline. Consider the headline with the following possible changes:

Rock →	***Barry, Innocent Man, Mentally Challenged Man***
Wrongfully Tossed →	***Removed, Ejected, Sent Packing, Calmly Asked To Leave***
Troubled →	***Vindictive, Wicked, Confused***
Stepdaughter →	***Brat, Tease, Teen, Houseguest, Manipulator***

Notice that the focus of this headline is on Barry Rock, the defendant. It is important to decide whether the headline could be more powerful if the focus were on someone or something other than the defendant. Headlines do not have to focus on the defendant in order for the eventual theory of defense to be successful. The focus does not even have to be on an animate object. Consider the following possible headline examples:

Troubled Teen Fabricates Story for Freedom

Overworked Guidance Counselor Unknowingly Fuels False Accusations

Marriage Destroyed When Mother Forced to Choose Between Husband and Troubled Daughter

Underappreciated Detective Tosses Rock at Superiors

Each of these headline examples can become a solid theory of defense and lead to a successful outcome for the accused.

The Emotional Component

The last element of a theory of defense is the emotional component. The factual element or the legal element, standing alone, are seldom capable of persuading jurors to side with the defense. It is the emotional component of the theory that brings life, viability, and believability to the facts and the law. The emotional component is generated from two sources: archetypes and themes.

Archetypes, as used herein, are basic, fundamental, corollaries of life that transcend age, ethnicity, gender and sex. They are truths that virtually all people in virtually all walks of life can agree upon. For example, few would disagree that when one's child is in danger, one protects the child at all costs. Thus, the archetype demonstrated would be a parent's love and dedication to his or her child. Other archetypes include love, hate, betrayal, despair, poverty, hunger, dishonesty and anger. Most cases lend themselves to one or more archetypes that can provide a source for emotion to drive the theory of defense. Archetypes in the Barry Rock case include:

- The difficulties of dealing with a stepchild
- Children will lie to gain a perceived advantage
- Maternity/paternity is more powerful than marriage
- Teenagers can be difficult to parent

Not only do these archetypes fit nicely into the facts of the Barry Rock case, each serves as a primary category of inquiry during jury selection.

In addition to providing emotion through archetypes, attorneys should use primary and secondary themes. A primary theme is a word, phrase, or simple sentence that captures the controlling or dominant emotion of the theory of defense. The theme must be brief and easily remembered by the jurors.

For instance, a primary theme developed in the theory of defense and advanced during the trial of the O.J. Simpson case was, "If it doesn't fit, you must acquit." Other examples of primary themes include:

- One for all and all for one
- Looking for love in all the wrong places
- Am I my brother's keeper?
- Stand by your man (or woman)
- Wrong place, wrong time, wrong person
- When you play with fire, you're going to get burned

Although originality can be successful, it is not necessary to redesign the wheel. Music, especially country/western music, is a wonderful resource for finding themes. Consider the following lines taken directly from the songbooks of Nashville (and assembled by Dale Cobb, an incredible criminal defense attorney from Charleston, South Carolina):

Top 10 Country/Western Lines (Themes?)

10. Get your tongue outta my mouth 'cause I'm kissin' you goodbye.
9. Her teeth was stained, but her heart was pure.
8. I bought a car from the guy who stole my girl, but it don't run so we're even.
7. I still miss you, baby, but my aim's gettin' better.
6. I wouldn't take her to a dog fight 'cause I'm afraid she'd win.
5. If I can't be number one in your life, then number two on you.
4. If I had shot you when I wanted to, I'd be out by now.
3. My wife ran off with my best friend, and I sure do miss him.
2. She got the ring and I got the finger.
1. She's actin' single and I'm drinkin' doubles.

Incorporating secondary themes can often strengthen primary themes. A secondary theme is a word or phrase used to identify, describe, or label an aspect of the case. Here are some examples: a person—"never his fault"; an action—"acting as a robot"; an attitude—"stung with lust"; an approach—"no stone unturned"; an omission—"not a rocket scientist"; a condition—"too drunk to fish."

There are many possible themes that could be used in the Barry Rock case. For example, "blood is thicker than water"; "Bitter Betty comes a calling"; "to the detectives, interrogating Barry should have been like shooting fish in a barrel"; "sex abuse is a serious problem in this country—in this case, it was just an answer"; "the extent to which a person will lie in order to feel accepted knows no bounds."

Creating the Theory of Defense Paragraph

Using the headline, the archetype(s) identified, and the theme(s) developed, it is time to write the "Theory of Defense Paragraph." Although there is no magical formula for structuring the paragraph, the following template can be useful:

Theory of Defense Paragraph
- Open with a theme
- Introduce protagonist/antagonist
- Introduce antagonist/protagonist
- Describe conflict
- Set forth desired resolution
- End with theme

Note that the protagonist/antagonist does not have to be an animate object.

The following examples of theory of defense paragraphs in the Barry Rock case are by no means first drafts. Rather, they have been modified and adjusted many times to get them to this level. They are not perfect, and they can be improved upon. However, they serve as good examples of what is meant by a solid, valid, and useful theory of defense.

Theory of Defense Paragraph One

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. "Barry, if you just tell us you did it, this will be over and you can go home. It will be easier on everyone." Barry Rock is a very simple man. Not because of free choice, but because he was born mentally challenged. The word of choice at that time was "retarded." Despite these limitations, Barry met Kim Gooden, who was also mentally challenged, and the two got married. Betty, Kim's daughter, was young at that time. With the limited funds from Social Security Disability checks, Barry and Kim fed and clothed Betty, made sure she had a safe home in which to live, and provided for her many needs. Within a few years, Betty became a teenager, and with that came the difficulties all parents experience with teenagers: not wanting to do homework, cheating to get better grades, wanting to stay out too late, experimenting with sex. Mentally challenged, and only a stepparent, Barry tried to set some rules—rules Betty didn't want to obey. The lie that Betty told stunned him. Kim's trust in her daughter's word, despite Barry's denials, hurt him even more. Blood must be thicker

than water. All Barry wanted was for his family to be happy like it had been in years gone by. "Everything will be okay, Barry. Just say you did it and you can get out of here. It will be easier for everyone if you just admit it."

Theory of Defense Paragraph Two

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. Full of despair and all alone, confused and troubled, Betty Gooden walked into the guidance counselor's office at her school. Betty was at what she believed to be the end of her rope. Her mother and stepfather were mentally retarded. She was ashamed to bring her friends to her house. Her parents couldn't even help her with homework. She couldn't go out as late as she wanted. Her stepfather punished her for trying to get ahead by cheating. He even came to her school and made a fool of himself. No—of her!!! She couldn't even have her boyfriend over and mess around with him without getting punished. Life would be so much simpler if her stepfather were gone. As she waited in the guidance counselor's office, *Bitter Betty* decided there was no other option—just tell a simple, not-so-little lie. *Sex abuse is a serious problem in this country.* In this case, it was not a problem at all—because it never happened. *Sex abuse was Betty's answer.*

The italicized portions in the above examples denote primary themes and secondary themes—the parts of the emotional component of the theory of defense. Attorneys can strengthen the emotional component by describing the case in ways that embrace an archetype or archetypes—desperation in the first example, and shame towards parents in the second. It is also important to note that even though each of these theories are strong and valid, the focus of each is from a different perspective. The first theory focuses on Barry, and the second on Betty.

The primary purpose of a theory of defense is to guide the lawyer in every action taken during trial. The theory will make trial preparation much easier. It will dictate how to select the jury, what to include in the opening, how to handle each witness on cross, how to decide which witnesses are necessary to call in the defense case, and what to include in and how to deliver the closing argument. The theory of defense might never be shared with the jurors word for word; but the essence of the theory will be delivered through each witness, so long as the attorney remains dedicated and devoted to the theory.

In the end, whether you choose to call them dog cases, or to view them, as I suggest you should, as fields of dreams, such cases are opportunities to build baseball fields in the middle of cornfields in the middle of Iowa. If you build them with a meaningful theory of defense, and if you believe in what you have created, the people will come. They will watch. They will listen. They will believe. "If you build it, they will come . . ." ▪

MOTIONS TO SUPPRESS

Chapter 14
Suppression Motions

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A motion to suppress illegally obtained evidence is one of the most effective weapons in a criminal defense lawyer's arsenal. Failing to file a motion to suppress when there are grounds to do so may constitute ineffective assistance of counsel. *See State v. Gerald*, ___ N.C. App. ___, 742 S.E.2d 280 (2013) (counsel was ineffective by failing move to suppress evidence obtained by a "patently unconstitutional seizure"), *temp. stay allowed*, ___ N.C. ___, 742 S.E.2d 194 (2013); *State v. Canty*, ___ N.C. App. ___, 736 S.E.2d 532 (2012). There are multiple reasons to file a suppression motion. In addition to suppressing evidence that is harmful to your client, you may be able to:

- obtain detailed information at the suppression hearing from officers or other witnesses who might not otherwise be willing to talk to you;
- obtain impeachment material for use at trial in the form of sworn testimony of witnesses;
- provide your client and the prosecutor an opportunity to hear the evidence and get a more realistic view of the case; and
- earn your client's trust by demonstrating zealous advocacy.

Section 14.1 discusses basic types of evidence subject to exclusion and grounds for exclusion. Sections 14.2 through 14.5 discuss in greater detail those categories of evidence. Section 14.6 discusses general procedures governing suppression motions, including content and timing requirements and the scope of the right to an evidentiary hearing. Section 14.7 covers appeals from suppression motions.

It is beyond the scope of this chapter to review exhaustively the law on all constitutional (or statutory) violations that may result in the suppression of evidence. A fuller discussion of the law on these issues may be found in WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE (3d ed. 2007) (hereinafter LAFAVE, CRIMINAL PROCEDURE) (a multi-volume set discussing Fifth and Sixth Amendment issues, among other things); WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (5th ed. 2012) (hereinafter LAFAVE, SEARCH AND SEIZURE) (a

multi-volume set); and ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA (UNC School of Government, 4th ed. 2011) (hereinafter FARB).

This chapter also does not review other constitutional and evidentiary grounds for challenging the admission of evidence, as when the State offers testimonial out-of-court statements in violation of the Confrontation Clause or opinion testimony about the identity of a controlled substance without a confirmatory lab test. While such grounds may warrant exclusion of evidence, by motion in limine before trial or objection during trial, they do not involve the suppression of illegally obtained evidence in the sense discussed in this chapter.

For discussion of issues involved with warrantless stops and searches, including reasonable suspicion to stop, grounds to frisk, and numerous other issues in that context, see *infra* Ch. 15, Stops and Warrantless Searches.

14.1 Evidence Subject to Exclusion

A. Categories

There are three basic types of evidence subject to exclusion:

- physical evidence (as well as observations or other information) obtained through a search or seizure;
- confessions or statements; and
- identifications.

See also supra § 12.2A, Suppressing Prior Uncounseled Conviction.

B. Grounds for Exclusion

Various constitutional and statutory provisions govern the above types of evidence, discussed in greater detail in the following sections. As a general matter, if the State obtains evidence in violation of a suspect's constitutional rights, the evidence must be excluded from trial. *See Mapp v. Ohio*, 367 U.S. 643 (1961); *State v. Carter*, 322 N.C. 709 (1988). Violations of statutory rights also may provide the basis for suppression.

The exclusionary rule is codified in North Carolina in Section 15A-974(a) of the North Carolina General Statutes (hereinafter G.S.), which states that evidence must be suppressed if:

(1) its exclusion is required by the Constitution of the United States or the Constitution of North Carolina, or
(2) the evidence is obtained as a result of a "substantial violation" of the Criminal Procedure Act.

The Official Commentary to the statute explains that subdivision (1) of subsection (a) is intended to track case law developed by the United States Supreme Court and the Supreme Court of North Carolina on the reach of constitutional exclusionary rules. The same approach applies to derivative evidence, also called the "fruit of the poisonous tree." If case law interpreting the federal or state constitution prohibits the admission of derivative evidence, so will subdivision (1) of subsection (a) of the statute.

Subdivision (2) of subsection (a) of G.S. 15A-974 goes beyond constitutional requirements and mandates the exclusion of evidence that is obtained in "substantial violation" of state criminal procedure requirements. For a discussion of the meaning of a "substantial violation," see *infra* § 14.5, Substantial Violations of Criminal Procedure Act.

14.2 Warrants and Illegal Searches and Seizures

A. Generally

The primary constitutional grounds for excluding evidence obtained through an illegal search or seizure is the Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and article I, section 20 of the North Carolina Constitution.

There are numerous situations in which a search or seizure may violate these provisions. For example, the evidence may have been obtained

- during a seizure that was not supported by reasonable suspicion or probable cause;
- in a search without probable cause or a valid consent to search;
- through outrageous police misconduct (in violation of the Fifth Amendment); or
- without a warrant when a warrant was required.

The focus of this section is on the last category: searches and seizures in violation of warrant requirements. Discussed below are some common violations. For a discussion of limits on warrantless searches and seizures, see *infra* Ch. 15, Stops and Warrantless Searches.

B. Search Warrants

Warrant requirement and exceptions. Generally, before entering a person's home or searching his or her car, personal property, or person, the police must obtain a warrant, based on "probable cause" to believe that the evidence being sought is in the place to be searched. *See generally Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (per curiam) ("A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement[.]" (citation omitted)); N.C. CONST. art. I, sec. 20 ("General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize

any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.").

There are a number of exceptions to the warrant requirement. A warrantless search or entry into a home is permissible, for example, where the officer has probable cause to believe a crime has taken place and where "exigent circumstances," such as the safety of the officer or the possibility of the destruction of evidence, require an immediate search. *See, e.g., Kentucky v. King*, ___ U.S. ___, 131 S. Ct. 1849 (2011) (officers' warrantless entry to prevent destruction of evidence was lawful; police did not create exigency through actual or threatened Fourth Amendment violation by banging on door and announcing their presence); *Michigan v. Fisher*, 558 U.S. 45 (2009) (officer's warrantless entry into home did not violate Fourth Amendment where it was reasonable for officer to believe there was an emergency necessitating immediate aid to an occupant); *State v. Fuller*, 196 N.C. App. 412 (2009) (exigent circumstances supported officers' warrantless entry and search of defendant's mobile home where defendant was a flight risk, had previous convictions for armed robbery and drug offenses, and ran out of view when officers announced their presence); *State v. Frazier*, 142 N.C. App. 361 (2001) (exigent circumstances existed to search defendant's motel room where defendant tried to flee from officers and there was a danger that the controlled substance would be destroyed). Similarly, exigent circumstances combined with probable cause may justify a warrantless search of a suspect. *See, e.g., State v. Williams*, 209 N.C. App. 255 (2011) (probable cause and exigent circumstances justified warrantless search of defendant's mouth for drugs during investigatory stop of vehicle).

Additionally, officers may search a person without a warrant incident to a lawful arrest. *See United States v. Robinson*, 414 U.S. 218 (1973); *State v. Goode*, 350 N.C. 247 (1999). *But see State v. Battle*, 202 N.C. App. 376 (2010) (noting limits on search of person incident to arrest and finding roadside strip search incident to arrest unconstitutional in absence of probable cause and exigent circumstances). Vehicle searches, based on probable cause or arrest of a recent occupant of the vehicle, also may be permissible without a search warrant. *See infra* § 15.6, Did the Officer Act within the Scope of the Arrest or Search (discussing grounds for and limits on such searches).

For further discussion of possible exceptions to the warrant requirement for searches, see the general authorities cited at the beginning of this chapter.

Good faith exception for constitutional violations not valid in North Carolina. North Carolina does not recognize a "good faith" exception to the warrant requirement—that is, if the officer believes in good faith that he or she has authority to search under a warrant (or a nontestimonial identification order), but the officer is mistaken, the evidence still must be excluded. *See State v. Carter*, 322 N.C. 709 (1988) (relying on state constitution, court declines to follow *United States v. Leon*, 468 U.S. 897 (1984), which recognized a good faith exception to the Fourth Amendment exclusionary rule for certain violations)). North Carolina's stance is not affected by the U.S. Supreme Court's decision in *Herring v. United States*, 555 U.S. 135 (2009), holding that exclusion was not required by the U.S. Constitution where an officer arrested the defendant under a mistaken belief that

there was an outstanding warrant for the defendant's arrest, and the officer's conduct was not deliberate, reckless, grossly negligent, or owing to systemic negligence.

Carter remains the law in North Carolina, but it is under pressure. In *State v. Banner*, 207 N.C. App. 729 (2010), the N.C. Court of Appeals cited the N.C. Supreme Court's decision in *State v. Garner*, 331 N.C. 491 (1992), and questioned whether the North Carolina courts have abandoned *Carter*. The *Garner* decision, however, dealt with whether the State must show lack of bad faith to rely on the inevitable discovery doctrine, discussed further below, as a basis for rendering lawful an otherwise unlawful action. *Garner* does not affect the continued validity of *Carter* and its rejection of a good faith exception to the warrant requirement.

In 2011, the North Carolina General Assembly created a good faith exception for statutory violations in G.S. 15A-974(a)(2), which states: "Evidence shall not be suppressed under this subdivision if the person committing the violation of the provision or provisions under this Chapter acted under the objectively reasonable, good faith belief that the actions were lawful." The word "subdivision" refers to subdivision (2) in subsection (a), the portion of the statute that deals with substantial violations of Chapter 15A. Thus, the statutory good faith exception applies only to statutory violations and not to constitutional ones. This exception may have little practical impact given that suppression is required under (a)(2) only for *substantial* statutory violations; violations that are substantial are most likely not committed in good faith. For a further discussion of statutory violations, see *infra* § 14.5, Substantial Violations of Criminal Procedure Act.

In a section of the legislation not incorporated into the General Statutes, the General Assembly requested that the N.C. Supreme Court reconsider and overrule its decision in *State v. Carter*. *See* 2011 N.C. Sess. Laws Ch. 6, sec. 2 (H 3). However, the holding in *Carter* remains the law until that Court reconsiders it. *See State v. Springs*, ___ N.C. App. ___, 722 S.E.2d 13 (2012) (unpublished) (discussing *Carter* and later decisions and continuing to follow *Carter*), *rev. denied*, ___ N.C. ___, 731 S.E.2d 160 (2012); *cf. infra* "Mistake of law" in § 15.3L, Mistaken Belief by Officer (discussing exception recognized by N.C. Supreme Court for good faith misinterpretation of law as basis for stop without warrant).

Plain view doctrine and warrants. As a matter of federal constitutional law, a seizure is lawful under the plain view doctrine when the officer is in a place he or she has a right to be and it is immediately apparent to the officer that the items are evidence of a crime or contraband. *See Horton v. California*, 496 U.S. 128 (1990); *State v. Lupek*, ___ N.C. App. ___, 712 S.E.2d 915 (2011) (evidence not suppressed where officer responded to a call about a dog shooting, went to defendant's house to investigate, and saw a bong in plain view inside the home while standing on the front porch); *State v. Carter*, 200 N.C. App. 47 (2009) (officer did not have authority to seize and search papers on seat of defendant's car under plain view doctrine where it was not immediately apparent that the papers were evidence of crime). North Carolina law includes the additional requirement that when officers are executing a search warrant, evidence in plain view not specified in

the warrant must be discovered inadvertently. *See* G.S. 15A-253; *State v. Mickey*, 347 N.C. 508 (1998).

By analogy to the plain view doctrine, North Carolina has also recognized a "plain smell" doctrine (*State v. Corpening*, 200 N.C. App. 311 (2009) (smell of marijuana emanating from vehicle authorized warrantless search)), and a "plain feel" doctrine. *State v. Williams*, 195 N.C. App. 554 (2009) (following *Minnesota v. Dickerson*, 508 U.S. 366 (1993), court holds that officer who is conducting a lawful frisk and immediately develops probable cause that an item he or she feels is contraband may seize it).

Illegal surveillance. Whenever law enforcement officers watch or listen in a place where an individual would have a reasonable expectation of privacy, the law enforcement activity constitutes a Fourth Amendment search and is subject to the usual warrant and probable cause requirements. *See United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945 (2012) (government's installation of GPS tracking device on vehicle and its use to monitor vehicle's movements on public streets constitutes a "search"); *Kyllo v. United States*, 533 U.S. 27 (2001) (use of thermal imaging or other technology to gather information that would otherwise require physical intrusion into home or other constitutionally protected area is "search"); *Katz v. United States*, 389 U.S. 347 (1967) (person has reasonable expectation of privacy in phone booth); *cf. State v. Rollins*, 363 N.C. 232 (2009) (in finding that communication between prisoner and spouse was not protected by privilege for marital communications privilege, court finds that they had no reasonable expectation of privacy in public visiting area of prison); *State v. Terry*, 207 N.C. App. 311 (2010) (defendant did not have reasonable expectation of privacy in conversation with wife at county sheriff's office in interview room where warning signs indicated premises were under surveillance); *State v. Jarrell*, 24 N.C. App. 610 (1975) (no search where police officer hid in attic and watched public areas of restroom; person would have reasonable expectation of privacy in stalls only); *State v. McCray*, 15 N.C. App. 373 (1972) (no error in allowing police officer to testify regarding statements he overheard the defendant make when the defendant was making a phone call while in custody). For additional information on the U.S. Supreme Court's recent *Jones* opinion, see Jeff Welty, *The Supreme Court on GPS Tracking: U.S. v. Jones*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 24, 2012), http://nccriminallaw.sog.unc.edu/?p=3235. *See also generally* Jeff Welty, *Warrantless Searches of Computers and Other Electronic Devices* (UNC School of Government, Apr. 2011) (listing cases from around the country), http://nccriminallaw.sog.unc.edu//wp-content/uploads/2011/05/2011-05-PDF-of-Handout-re-Warrantless-Searches.pdf; Jeff Welty, *Warrant Searches of Computers* (UNC School of Government, Apr. 2011), http://nccriminallaw.sog.unc.edu//wp-content/uploads/2011/05/2011-05-11-PDF-Continuously-Updated-Handout-re-Warrant-Searches.pdf.

Federal and state law prevent either private parties or the government from engaging in eavesdropping or wiretapping without a court order. *See* 18 U.S.C. 2510 through 18 U.S.C. 2522; G.S. 15A-286 through G.S. 15A-298. Violation of wiretapping and eavesdropping laws may be the basis of a suppression motion. *See State v. Shaw*, 103 N.C. App. 268 (1991); *see also State v. Price*, 170 N.C. App 57 (2005) (interception of telephone calls

does not violate federal or state wiretapping law as long as one of parties to communication gives prior consent; pretrial detainee and other party were deemed to have consented to recording of phone conversation on jail phone when they kept talking after a message gave notice that the call was subject to recording). Violations of other federal laws may not provide a suppression remedy. *See State v. Stitt*, 201 N.C. App. 233 (2009) (even if State did not fully comply with 18 U.S.C. 2703(d) of the Stored Communications Act in obtaining records pertaining to cell phones possessed by defendant, federal law did not provide for suppression remedy). *See generally* Jeffrey B. Welty, *Prosecution and Law Enforcement Access to Information about Electronic Communications*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/05 (UNC School of Government, Oct. 2009), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0905.pdf.

Inevitable discovery rule. Although not an exception to the warrant requirement, the "inevitable discovery" rule is an exception to the exclusionary rule. If the police discover evidence as the result of an illegal search, but can prove at a suppression hearing that the evidence would inevitably have been discovered by legal means, the evidence may be admitted at trial. *See Nix v. Williams*, 467 U.S. 431 (1984); *State v. Garner*, 331 N.C. 491 (1992) (following *Nix*); *State v. Wells*, ___ N.C. App. ___, 737 S.E.2d 179 (2013) (trial court erred in finding defendant's laptop would have inevitably been discovered); *see also Costello v. United States*, 365 U.S. 265 (1961) (fruit of poisonous tree doctrine does not require exclusion of evidence obtained from an independent source).

C. Arrest Warrants

Generally, a person is "seized" for purposes of the Fourth Amendment when a reasonable person in the suspect's position would not feel free to leave the presence of the officer. *See United States v. Mendenhall*, 446 U.S. 544 (1980); *see also infra* § 15.2, Did the Officer Seize the Defendant? (discussing general test and circumstances in which a different test may apply).

An arrest is one example of a Fourth Amendment "seizure." As a general matter, a person may not be seized or arrested without the issuance of a warrant based on "probable cause" to believe the person seized or arrested committed a crime. *See State v. Farmer*, 333 N.C. 172 (1993). There are a number of exceptions to this rule, however. Thus, an officer may make a brief investigative stop, known as a *Terry* stop, without a warrant or probable cause if he or she has "reasonable suspicion" of illegal activity. *See Terry v. Ohio*, 392 U.S. 1 (1968); *see also infra* § 15.3, Did the Officer have Grounds for the Seizure? (discussing *Terry* stops and other grounds for warrantless seizures). An officer also may arrest a person without a warrant if the officer has probable cause to believe that the suspect has committed a felony or certain misdemeanors or violated a pretrial release order, or witnesses the suspect commit a misdemeanor. *See* G.S. 15A-401(b); *State v. Dammons*, 128 N.C. App. 16 (1997). For a further discussion of possible exceptions to the warrant requirement for arrests and other seizures, see the general authorities cited at the beginning of this chapter.

D. Search Incident to Arrest

For a discussion of whether the officer acted within the scope of arrest when conducting a search, see *infra* § 15.6B, Search Incident to Arrest; § 15.6C, Other Limits on Searches Incident to Arrest. Of particular note is the case of *Arizona v. Gant*, 556 U.S. 332 (2009), which overruled prior U.S. Supreme Court and North Carolina decisions allowing an unlimited search of the passenger compartment of a vehicle incident to arrest of an occupant of the vehicle. In *Gant*, the United States Supreme Court held that officers may search a vehicle incident to arrest only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted and thus able to obtain a weapon or destroy evidence; or (2) it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. *See also State v. Mbacke*, 365 N.C. 403 (2012) (analogizing the "reasonable to believe" standard in the second prong of *Gant* to the "reasonable suspicion" standard of a *Terry* stop, court finds that arresting officers could have reasonably believed that evidence relevant to offense of arrest of carrying a concealed weapon would be found in defendant's vehicle); *State v. Johnson*, 204 N.C. App. 259 (2010) (applying *Gant* and finding search of defendant's vehicle unconstitutional; defendant was secured in back of police car before search started and it was not reasonable for officers to believe evidence of defendant's revoked license would be found); *State v. Carter*, 200 N.C. App. 47 (2009) (suppressing evidence in light of *Gant* and lack of any other ground to uphold search).

E. Knock and Talk

Validity of the practice. The "knock and talk" practice is one in which law enforcement officers, acting without a warrant and often without probable cause, knock on the door of a dwelling in order to question its inhabitants and often ask for consent to search their home. Officers may approach the front door for a "knock and talk" without a warrant on the theory that occupants generally expect, and therefore implicitly consent to, this sort of intrusion onto their property. *State v. Church*, 110 N.C. App. 569, 573–74 (1993); *see generally State v. Corbett*, 516 P.2d 487, 490 (Ore. App. 1973) ("[i]f one has a reasonable expectation that various members of society may enter the property in their personal and business pursuits, he should find it equally likely that the police will do so"). Because the decision to approach an occupant's door to conduct a "knock and talk" is recognized under the Fourth Amendment and therefore is not subject to prior judicial review, this practice has been criticized as one that allows the targeting of minorities or other vulnerable populations. *See* Brian J. Foley, *Policing From the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261, 340 (2010) (observing that "when police do not have to give reasons for discretionary searches or seizures, conscious and unconscious racism may prevail").

Limitations on the "knock and talk" practice. In *U.S. v. Johnson*, 333 U.S. 10 (1948), the U.S. Supreme Court considered and disapproved of the "knock and talk" technique used in that case, but courts have routinely allowed it since then and the U.S. Supreme Court has not specifically revisited it. North Carolina appellate courts recognize that law enforcement officials "may conduct 'knock and talk' investigations that do not rise to the

level of a Fourth Amendment search." *State v. Grice*, ___ N.C. App. ___, 735 S.E.2d 354 (2012) ("Law enforcement officers have the right to approach a person's residence to inquire whether the person is willing to answer questions." (citation omitted)), *review allowed*, ___ N.C. ___, 743 S.E.2d 179 (2013).

Despite its general validity, there are meaningful limitations to the "knock and talk" practice.

- A "knock and talk" may violate the Fourth Amendment if an officer enters an occupant's backyard to knock on a defendant's backdoor. *See State v. Pasour*, ___ N.C. App. ___, 741 S.E.2d 323 (2012) (police violated Fourth Amendment by entering backyard to knock on backdoor after receiving no response to knocks on front and side doors); *Pena v. Porter*, 316 Fed. Appx. 303 (4th Cir. 2009) (unpublished) (police may not enter backyard unless there is reason to believe an occupant might be there or a knock at the backdoor might produce a different result); *Alvarez v. Montgomery County*, 147 F.3d 354 (4th Cir. 1998) (police may enter backyard when circumstances suggest an occupant might be there).
- An officer conducting a "knock and talk" may not seize evidence, even if in plain view, unless he or she has a "lawful right of access" to the evidence itself. *State v. Grice*, ___ N.C. ___, 735 S.E.2d 354 (2012), *review allowed*, ___ N.C. ___, 743 S.E.2d 179 (2013); *see also State v. Nance*, 149 N.C. App. 734, 742 (the permissibility of knock and talks does not "stand[] for the proposition that law enforcement officers may enter private property without a warrant and seize evidence of a crime").
- The right to approach an occupant's front door to conduct a "knock and talk" does not include free license to search the curtilage for evidence or speak to house guests after the officers have been asked to leave. *Rogers v. Pendleton*, 249 F.3d 279, 295 (4th Cir. 2001).
- Using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment. *Florida v. Jardines*, 569 U.S. ___, 133 S. Ct. 1409 (2013).

Attorneys also may raise Equal Protection Clause challenges to race-based decisions to initiate "knock and talks". Such challenges might be considered, for example, when it appears that police officers are targeting predominantly minority neighborhoods for "knock and talks." Such challenges should also be raised under article I, section 19 of the N.C. Constitution.

Consent to search following a "knock and talk." Searches following "knock and talks" are permissible when the occupant freely, voluntarily, and unequivocally consents to the search. Evidence obtained in a consent search will be admitted only when there is "clear and positive testimony that consent was unequivocal and specific and freely given; and . . . [t]he government . . . prove[s] consent was given without duress or coercion, express or implied." *U.S. v. Miller*, 933 F. Supp. 501, 505 (M.D.N.C. 1996). Consent must be granted intentionally. In *U.S. v. Johnson*, 333 U.S. 10, 13 (1948), the Supreme Court characterized a defendant's alleged permission to search following a "knock and talk" as

a "submission to authority rather than as an understanding and intentional waiver of a constitutional right" and rejected it as nonconsensual. *See also Rogers v. Pendleton*, 249 F.3d 279, 295 (4th Cir. 2001) ("The police do not have a right to arrest citizens for refusing to consent to an illegal search."). Two factors that strengthen a defendant's argument that his or her consent was invalid are a defendant's attempts to prevent officers from entering the home and an officer's coercive tactics, including drawn weapons, raised voices, and intimidating demands. *See* Craig M. Bradley, *"Knock and Talk" and the Fourth Amendment*, 84 IND. L.J. 1099, 1104 (2009).

For a general discussion of the circumstances bearing on the validity of a consent to search, including characteristics of the defendant (such as youth, mental limitations, and intoxication), see FARB at 203–05.

F. Adequacy of Affidavit in Support of Probable Cause

All search and arrest warrants must be based on the issuing magistrate's or judge's determination of "probable cause"—for a search warrant, probable cause to believe that the evidence to be seized is in the place to be searched; and for an arrest warrant, probable cause to believe that the suspect to be arrested committed the crime. (A clerk of court also may issue search and arrest warrants. G.S. 15A-243; G.S. 7A-180; G.S. 7A-181.)

Adequacy of record. A finding of "probable cause" for a search warrant must be supported by sufficient credible facts alleged in a supporting affidavit. *See Aguilar v. Texas*, 378 U.S. 108 (1964); *State v. Hyleman*, 324 N.C. 506 (1989) (bare bones, conclusory affidavit insufficient to support finding of probable cause); *accord State v. Bone*, 354 N.C. 1 (2001); *State v. Taylor*, 191 N.C. App. 587 (2008) (magistrate did not have a substantial basis for finding probable cause to issue search warrant); G.S. 15A-244(3) (describing requirements for search warrant application). This means that only the evidence in the affidavit (or other evidence contemporaneously submitted to the issuing official under oath and made part of the record by the issuing official) may be considered in determining the adequacy of the showing of probable cause for the warrant. *See* G.S. 15A-245(a) (stating requirement); *State v. Teasley*, 82 N.C. App. 150 (1986) (officer's oral testimony to magistrate could not be considered in determining sufficiency of evidence for issuance of search warrant because magistrate did not make the statement part of the record).

Practice note: Because the evidence submitted in support of a search warrant is effectively fixed and not subject to change at a suppression hearing, cases involving search warrants present fruitful opportunities for suppression.

False information. If a defendant establishes by a preponderance of the evidence that an affiant made a false statement knowingly or with reckless disregard for the truth, then that false information must be set aside. If the remainder of the affidavit is insufficient to establish probable cause, then the warrant must be voided and the fruits of the search or arrest excluded from trial. *See Franks v. Delaware*, 438 U.S. 154 (1978); *State v. Severn*,

130 N.C. App. 319 (1998); G.S. 15A-978 (defendant entitled to challenge truthfulness of affidavit supporting search warrant); *see also State v. Martin*, 315 N.C. 667 (1986) (applying *Franks* to arrest warrant); *State v. Pearson*, 356 N.C. 22 (2002) (same rules apply to affidavit in support of nontestimonial identification order); *see also State v. Watkins*, 120 N.C. App. 804 (1995) (information fabricated by one officer and supplied to stopping officer may not be used to show reasonable suspicion, even if stopping officer did not know that the information was fabricated).

A defendant is entitled to introduce evidence at a suppression hearing contesting the truthfulness of the evidence presented to the magistrate. *See* G.S. 15A-978(a); *State v. Monserrate*, 125 N.C. App. 22 (1997) (trial court erred in excluding evidence tending to show that police inaccurately reported informant's information to magistrate).

G. "Fruits" of Illegal Search or Arrest

When evidence is obtained as a result of illegal police conduct, not only must that evidence be suppressed, but also all evidence that is the "fruit" of the illegal conduct. For example, if an illegal entry into a person's home or an illegal arrest results in a confession or admission, the statement must be suppressed. *See Wong Sun v. United States*, 371 U.S. 471 (1963); *Davis v. Mississippi*, 394 U.S. 721 (1969); *State v. Guevara*, 349 N.C. 243 (1998); *State v. Freeman*, 307 N.C. 357 (1983).

Such derivative evidence is admissible only if the "taint" of the constitutional violation is removed. *See Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200 (1979); *State v. Allen*, 332 N.C. 123 (1992) (two-hour lapse between illegal arrest and statement did not purge taint, and confession had to be suppressed); *see also supra* "Inevitable discovery rule" in § 14.2B, Search Warrants (illegally obtained evidence that otherwise would be inadmissible may be admissible under the inevitable discovery rule). Where a person commits a crime subsequent to an illegal seizure, North Carolina has held that evidence of the crime is not subject to suppression. *See State v. Barron*, 202 N.C. App. 686 (2010) (although defendant was arrested without probable cause, his subsequent criminal conduct of giving the officers false identifying information was admissible and not barred by the exclusionary rule).

H. Invalid Consent

A person may consent to a search or a stop by a police officer. However, consent must be voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *State v. Pearson*, 348 N.C. 272 (1998). The State has the burden of proving voluntariness. *State v. Crenshaw*, 144 N.C. App. 574 (2001). The question of whether consent was voluntary or was the product of duress or coercion is a question of fact to be determined from the totality of the circumstances. *See State v. Steen*, 352 N.C. 227 (2000) (citing *Schneckloth*); *State v. McMillan*, ___ N.C. App. ___, 718 S.E.2d 640 (2011) (court finds defendant's consent voluntary to an oral swab, photographing his injuries, and collection of items of clothing after he voluntarily went to sheriff's office, even though officers told defendant he could consent or be detained four or five hours while officers obtained search warrant); *State v.*

Boyd, 207 N.C. App.632 (2010) (defendant's consent to provide saliva sample for DNA testing voluntarily given, even though the defendant was not told he was being investigated for sexual offenses); *State v. Kuegel***,** 195 N.C. App. 310 (2009) (defendant's consent to search his residence was voluntary despite officer's untruthful statements that he had been conducting surveillance of the residence and had obtained evidence of drug dealing).

A search or seizure may not extend beyond the scope of the suspect's consent. *See State v. Stone*, 362 N.C. 50 (2007) (defendant's general consent to search did not authorize officer to pull defendant's pants away from his body and shine flashlight on groin area); *State v. Pearson*, 348 N.C. at 277 (consent to search vehicle did not imply consent to search person); *State v. Schiro*, ___ N.C. App. ___, 723 S.E.2d 134 (2012) (vehicle search based on consent not invalid where officers removed the rear quarter panels from the interior of the trunk); *see also* G.S. 15A-221 through G.S. 15A-223 (statutory provisions on search and seizure by consent).

For a further discussion of consent in the context of a warrantless stop or arrest, see *infra* § 15.4E, Nature, Length, and Purpose of Detention, and § 15.5D, Consent.

I. Nontestimonial Identification Orders

When a suspect is not in police custody and police wish to obtain hair, fingerprints, or other samples from the person, the police may obtain a nontestimonial identification order from a judge on a showing of less than traditional probable cause—that is, probable cause to believe that a felony or Class A1 or 1 misdemeanor has been committed, reasonable suspicion to believe the named person committed the offense, and grounds to believe that the procedure will be of material aid in determining whether the person committed the offense. *See* G.S. 15A-273; G.S. 15A-274. If the suspect is in police custody, police must obtain a search warrant. *See State v. Carter*, 322 N.C. 709 (1988). Further, for more intrusive procedures, such as withdrawing blood, a search warrant, supported by probable cause, is required regardless of whether the person is in custody. *See id.*; *see also* FARB at 222 (so interpreting *Carter*). For a discussion of the statutory authorization to take a DNA sample at the time of arrest for certain offenses, see *infra* § 14.4H, DNA Samples at Time of Arrest.

In the impaired driving context, the taking of a blood or urine sample without a search warrant has been held permissible where exigent circumstances exist. *See Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013) (natural dissipation of alcohol does not constitute exigency in every case sufficient to justify blood test without warrant); *Schmerber v. California*, 384 U.S. 757 (1966) (an officer who has probable cause to believe a person has committed an offense involving impaired driving, a clear indication that the blood sample will provide evidence of the defendant's impairment, and either a search warrant or exigent circumstances, may compel a person to submit to a forced extraction of blood in a reasonable manner); *State v. Fletcher*, 202 N.C. App. 107, 111 (2010) (finding "the exigency surrounding obtaining a blood sample when blood alcohol level is at issue . . . and the evidence of a probability of significant delay if a warrant were

obtained" to constitute sufficient evidence of exigent circumstances); G.S. 20-139.1(d1) (stating that if a person charged with an implied consent offense refuses testing, "any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine").

14.3 Illegal Confessions or Admissions

The constitutional bases for excluding illegally obtained confessions or admissions are the Fifth and Sixth Amendments to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and article I, sections 19, 23 and 24, of the North Carolina Constitution. In addition to the general reference sources cited at the beginning of this chapter, see Barbara S. Blackman, *Custody, Waiver of Miranda Rights, and Coerced Confessions* at 1–3 (2012 Spring Public Defender Conference), *available at* www.ncids.org/Defender%20Training/2012SpringConference/CustodyWaiverMiranda%20Rights.pdf; and Jeff Welty, *The Law of Interrogation in North Carolina* (UNC School of Government, June 2012), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/The%20Law%20of%20Interrogation%20in%20North%20Carolina_June%202012.pdf.

A. Involuntary Confessions

Due process is violated when police coerce a suspect into making a confession. Coercion may include: (i) physical force; (ii) depriving the suspect of food, sleep, or the ability to communicate with the outside world; or (iii) psychological ploys such as threats or promises. Because it is so suspect, an involuntary confession is inadmissible for any purpose, including impeachment. *See Mincey v. Arizona*, 437 U.S. 385 (1978) (confession obtained from hospitalized suspect in great pain not voluntary and not admissible even to impeach); *State v. Pruitt*, 286 N.C. 442 (1975) (confession made in response to inducement of hope that defendant would obtain relief from charged offense not voluntary); *State v. Bordeaux*, 207 N.C. App. 645 (2010) (confession not voluntary where defendant confessed after officers promised to testify on his behalf, engendering hope of more lenient punishment, and suggested defendant might still be able to attend college); *compare State v. Wallace*, 351 N.C. 481 (2000) (confession not involuntary where induced by promise that defendant could see his daughter and girlfriend if he confessed); *State v. Cornelius*, ___ N.C. App. ___, 723 S.E.2d 783 (2012) (confessions obtained from hospitalized suspect on medication not involuntary where hospital records and recorded statements supported findings that suspect was alert and oriented); *State v. Hunter*, 208 N.C. App. 506 (2010) (confession not involuntary although the defendant ingested crack cocaine several hours before interrogation).

A court must examine the totality of the circumstances in determining whether a confession is involuntary. *See Malloy v. Hogan*, 378 U.S. 1 (1964); *Bordeaux*, 207 N.C.

App. at 655–66 (applying totality of circumstances test and finding confession involuntary).

B. *Miranda* Violations

Generally. A defendant may be able to suppress a statement under the authority of *Miranda v. Arizona*, 384 U.S. 436 (1966), if he or she gives a statement while in police custody in response to interrogation and:

- was not adequately given *Miranda* warnings;
- did not knowingly and voluntarily waive his or her *Miranda* rights; or
- invoked his or her rights and that invocation was not honored by the police.

Requirements of "custody" and "interrogation." As a means of protecting the Fifth Amendment privilege against self-incrimination, a suspect is constitutionally entitled to receive *Miranda* warnings if he or she (i) is in police custody, and (ii) is interrogated by the police.

"Custody" has been defined as either arrest or "a restraint on freedom of movement of the degree associated with formal arrest." *State v. Buchanan*, 353 N.C. 332 (2001) (disavowing former test for custody of whether reasonable person would feel free to leave presence of police, the test used under the Fourth Amendment for determining whether a seizure occurred); *see also State v. Waring*, 364 N.C. 443 (2010) (defendant not in custody during initial questioning at police station; officer first told defendant that he was "being detained" but "was not under arrest" and defendant then voluntarily went to police station, where he was left alone in unlocked interview room with no guard posted); *State v. Hemphill*, ___ N.C. App. ___, 723 S.E.2d 142 (2012) (interrogation was custodial for *Miranda* purposes where defendant was chased, forced to ground with taser, and handcuffed; court finds defendant not prejudiced by failure to suppress statements); *State v. Allen*, 200 N.C. App. 709 (2009) (defendant at hospital for treatment was not in custody to require *Miranda* warnings when officer questioned him). A person is not necessarily in custody within the meaning of *Miranda* when he is in prison and is removed from the general population for questioning about events that occurred outside prison. See *infra* "Interrogation of pretrial detainees and prisoners" in this subsection B.

The age of a child subjected to police questioning is relevant to the *Miranda* custody analysis if the child's age was known to the officer at the time of police questioning or would have been objectively apparent to a reasonable officer. *J.D.B. v. North Carolina*, ___ U.S. ___, 131 S. Ct. 2394 (2011). The rationale for this holding is that a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. While *J.D.B.* declined to consider factors other than age, counsel may argue that other personal characteristics, such as low IQ, may similarly affect a person's understanding of his or her freedom of action. *See* Barbara S. Blackman, *Custody, Waiver of Miranda Rights, and Coerced Confessions* at 1–3 (2012 Spring Public Defender Conference), www.ncids.org/Defender%20Training/2012SpringConference/CustodyWaiverMirand

a%20Rights.pdf; *see also State v. Quick*, ___ N.C. App. ___, 739 S.E.2d 608 (2013) (State failed to prove that any waiver of *Miranda* rights was knowing and voluntary where defendant was 18 years old, had limited experience with the criminal justice system, there was a period of time between 12:39 p.m. and 12:54 p.m. where there is no evidence as to what occurred, and the interrogation was not recorded).

"Interrogation" is defined as questioning or its functional equivalent—that is, statements or actions that the officers should have known were reasonably likely to elicit an incriminating response by the subject. *See Rhode Island v. Innis*, 446 U.S. 291, 300–02 (1980); *State v. Hensley*, 201 N.C. App. 607 (2010) (officer's conduct and statements to defendant, including saying the conversation was not "on the record," constituted interrogation to require *Miranda* warnings); *compare State v. Stover*, 200 N.C. App. 506 (2009) (court finds that officer asked defendant why he was hanging out the window to ascertain circumstances rather than to elicit incriminating response; additional, unsolicited statements by defendant were not in response to question asked). There is no violation of the Fifth Amendment when a suspect makes a "spontaneous" statement to police, not in response to interrogation. *See, e.g.*, *State v. Jones*, 161 N.C. App. 615 (2003). Factors that are relevant to the determination of whether police interrogated a suspect, or should have known their conduct was likely to elicit an incriminating response, include: (1) the intent of the police; (2) whether the practice is designed to elicit an incriminating response from the accused; and (3) any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion. *State v. Fisher*, 158 N.C. App. 133 (2003), *aff'd per curiam*, 358 N.C. 215 (2004); *see also State v. Herrera*, 195 N.C. App. 181 (2009) (police did not interrogate suspect by placing call to suspect's grandmother in Honduras and allowing him to converse with her on speaker phone in presence of officer and interpreter), *rev'd on other grounds by State v. Ray*, 364 N.C. 272 (2010).

Miranda warnings do not apply to a request for consent to search, in part because a request for consent has been held not to constitute an interrogation under *Miranda*. *See State v. Cummings*, 188 N.C. App. 598 (2008) (defendant's motion to suppress evidence seized as a result of consent search of his car denied although officer obtained consent after defendant had invoked *Miranda* rights).

Waiver. Before any custodial statement, made in response to police interrogation, is admissible at trial, the suspect must knowingly and voluntarily waive his or her rights. *See Miranda v. Arizona*, 384 U.S. 436 (1966). As a practical matter, law enforcement officers generally try to obtain an express waiver of rights from a defendant. *See* FARB at 542 (recommending this practice to officers). An express waiver may not be necessary, however. *See North Carolina v. Butler*, 441 U.S. 369 (1979) (so stating). For example, in *Berghuis v. Thompkins*, 560 U.S.370 (2010), the Court found that a suspect who had been given *Miranda* warnings and had remained largely silent during a two hour and forty-five minute interrogation waived his rights by responding to a question. The court did not require an express waiver and found instead that the uncoerced statement constituted an implied waiver. The suspect's silence during the bulk of the interrogation did not invoke his right to remain silent. For additional

analysis of the *Berghuis* opinion, see Robert L. Farb, *The United States Supreme Court's Ruling in* Berghuis v. Thompkins, (UNC School of Government, June 2010), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/berghuisvthompkins.pdf.

Conversely, an express waiver may not be sufficient to show a valid waiver of rights if other evidence, such as evidence of coercion or lack of understanding, shows that the defendant did not waive his or her rights knowingly and voluntarily.

Whether a waiver of *Miranda* rights was knowing and voluntary has been the subject of numerous cases, too numerous to cover in this manual. *See, e.g., State v. Quick*, ___ N.C. App. ___, 739 S.E.2d 608 (2013) (State failed to prove that any waiver of *Miranda* rights was knowing and voluntary where defendant was 18 years old, had limited experience with the criminal justice system, there was a period of time between 12:39 p.m. and 12:54 p.m. where there is no evidence as to what occurred, and the interrogation was not recorded); *State v. Robinson*, ___ N.C. App. ___, 729 S.E.2d 88 (2012) (waiver knowing and voluntary based on totality of circumstances despite defendant's limited mental capacity); *State v. Bordeaux*, 207 N.C. App. 645 (2010) (confession was involuntary where defendant received *Miranda* warnings and waived right to remain silent after officers promised to testify on his behalf, engendering a hope of more lenient punishment, and suggested defendant may still be able to attend college); *State v. Mohamed*, 205 N.C. App. 470 (2010) (the defendant's English skills sufficiently enabled him to understand *Miranda* warnings that were read to him where the defendant complied with officer's instructions, wrote his confession in English, and never asked for an interpreter); *State v. Nguyen*, 178 N.C. App. 447 (2006) (defendant's written waiver of *Miranda* rights knowing and voluntary where police officer acted as interpreter); *State v. Crutchfield*, 160 N.C. App. 528 (2003) (defendant moved to suppress statements made while he was in the hospital and under medication on the theory that he did not knowingly and voluntarily waive *Miranda* rights; denial of motion upheld).

Invocation of right to counsel. If a suspect invokes his or her *right to counsel*, the invocation must be honored by police and *all* in-custody interrogation must stop regarding *all* crimes until the suspect is provided with counsel or, as discussed below, there has been a 14-day break in custody. In-custody questioning may resume before then only if the suspect asks to talk further with police. *See Edwards v. Arizona*, 451 U.S. 477 (1981); *State v. Torres*, 330 N.C. 517 (1992), *overruled on other grounds by State v. Buchanan*, 353 N.C. 332 (2001); *State v. Quick*, ___ N.C. App. ___, 739 S.E.2d 608 (2013) (defendant did not initiate communication with police after his initial request for counsel and thus did not waive right to counsel; defendant talked to police only after they told him an attorney could not help him, which police knew or should have known would be reasonably likely to elicit an incriminating response); *State v. Moses*, 205 N.C. App. 629 (2010) (no error to deny defendant's motion to suppress where defendant initially invoked his right to counsel and later reinitiated conversation with officer, who again advised defendant of *Miranda* rights and obtained a written waiver).

In *Edwards*, the U.S. Supreme Court established that once a defendant asserts the right to counsel at a custodial interrogation, an officer may not conduct a custodial

interrogation of the defendant until a lawyer is made available for the interrogation or the defendant initiates further communication with the officer. The rationale behind *Edwards* was that once the defendant invokes the right to counsel, any subsequent waiver of the right to counsel and response to police-initiated custodial interrogation is presumed involuntary. However, in *Maryland v. Shatzer*, 559 U.S. 98 (2010), the U.S. Supreme Court announced a new rule—when there is a break in custody for 14 days or more after a defendant has asserted the right to counsel at a custodial interrogation, an officer may reinitiate custodial interrogation after giving *Miranda* warnings and obtaining a waiver of *Miranda* rights. A two-week break in custody, according to the Court, is sufficient to end the inherently compelling pressures of custodial interrogation. Thus, officers may lawfully approach a defendant, obtain a waiver, and interrogate him or her, even though the defendant told the officers two weeks earlier that he or she did not want to talk to them without having a lawyer present. For further discussion of the impact of *Shatzer*, see Robert L. Farb, *The United States Supreme Court's Ruling in* Maryland v. Shatzer (UNC School of Government, May 10, 2010), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/marylandshatzer2010.pdf. For a discussion of the impact of *Shatzer* on questioning of pretrial detainees, see *infra* "Interrogation of pretrial detainees and prisoners" in this subsection B.

As a general matter, a request for counsel must be unambiguous to halt interrogation. *See Davis v. United States*, 512 U.S. 452 (1994); *State v. Little*, 203 N.C. App. 684 (2010) (suspect did not invoke right to counsel by asking detective whether he needed a lawyer); *State v. Dix*, 194 N.C. App. 151, 156–57 (2008) (under circumstances, suspect's statement "I'm probably gonna have to have a lawyer," did not invoke right to counsel); *compare State v. Torres*, 330 N.C. 517 (1992) (in pre-*Davis* case, the court held that when a defendant makes an ambiguous request for counsel, officer must clarify the defendant's request before continuing with the interrogation [although this aspect of the decision has been superseded by *Davis*, the court's holding that the defendant invoked her right to counsel in the circumstances of the case may remain good law—she twice asked officers whether she needed a lawyer and was advised that she did not need one; in *Dix*, 194 N.C. App. at 157, the court noted that the officers in *Torres* dissuaded the defendant from having counsel during the interrogation]).

For a discussion of the limits on questioning a defendant who is not in custody and who is protected by the Sixth Amendment right to counsel, see *infra* § 14.3C, Confessions in Violation of Sixth Amendment Right to Counsel.

Invocation of right to silence. If a suspect invokes his or her *right to silence*, the interrogation likewise must stop. Some cases suggest that if a suspect invokes the right to silence only, an officer may later reinitiate interrogation without a break in custody in some circumstances. *See State v. Murphy*, 342 N.C. 813 (1996) (finding on facts presented that reinitiation of interrogation violated defendant's Fifth Amendment rights; officers did not "scrupulously honor" defendant's assertion of right to remain silent); *see also* FARB at 545–46 (discussing issue); 2 LAFAVE CRIMINAL PROCEDURE § 6.9(f), at 839 (finding it highly questionable to permit police to reinitiate interrogation about same crime of defendant who has asserted right to remain silent).

The suspect must clearly invoke the right to remain silent. *See State v. Fletcher*, 348 N.C. 292 (1998) (incriminating statements admissible where defendant said that after he got some sleep he would lead officers to stolen items, the officers took a break, and then they reinitiated interrogation). Remaining silent does not necessarily constitute an assertion of the right to remain silent. In *Berghuis v. Thompkins*, 560 U.S. 370 (2010), the court held that the defendant did not unambiguously assert the right to remain silent where he was mostly silent during two hours and forty-five minutes of interrogation and then made incriminating statements without affirmatively asserting the right to remain silent. *See also State v. Westmoreland*, 314 N.C. 442, 445 (1985) (defendant who remained silent except for occasional brief denials of involvement "only showed that he did not desire to respond to specific questions" and did not thereby assert his right to remain silent); *State v. Bordeaux*, 207 N.C. App. 645 (2010) (following *Berghuis* in dictum).

Impeachment exception. A confession that has been suppressed for a *Miranda* violation, if otherwise voluntary under the Due Process Clause, may still be used to impeach a defendant who takes the stand and testifies on his or her own behalf at trial. *See Harris v. New York*, 401 U.S. 222 (1971); *State v. Bryant*, 280 N.C. 551 (1972); *State v. Burton*, 119 N.C. App. 625 (1995). *But see Missouri v. Seibert*, 542 U.S. 600 (2004) (court holds that deliberate withholding of *Miranda* warnings until after defendant confessed rendered inadmissible subsequent incriminating statements made after warnings were given; court expresses disapproval, in footnote 7, of similar tactic to obtain impeachment evidence).

Interrogation of pretrial detainees and prisoners. In *Maryland v. Shatzer*, 559 U.S. 98 (2010), the U.S. Supreme Court announced that when there is a break in custody for 14 days or more after a defendant has asserted the right to counsel at a custodial interrogation, an officer may reinitiate custodial interrogation after giving *Miranda* warnings and obtaining a waiver of *Miranda* rights. The Court also ruled in *Shatzer* that a return to the general prison population by a prisoner serving his or her sentence may constitute a break in custody. The Court reasoned that a defendant who returns to the general prison population regains the degree of control over his or her life that existed before the interrogation. Thus, the inherently compelling pressures of custodial interrogation end when the defendant returns to his or her "normal life" in prison.

In *Howes v. Fields*, ___ U.S. ___, 132 S. Ct. 1181 (2012), the U.S. Supreme Court held that incarceration does not always amount to custody for purposes of *Miranda*. In *Fields*, the Court found that the defendant, an inmate who was serving a prison sentence, was not in custody for *Miranda* purposes when he was taken from his cell to a conference room and questioned for five to seven hours about crimes allegedly committed outside of prison. The Court reasoned that questioning a person who is already serving a prison sentence does not generally involve the shock that accompanies arrest, and a person who is already serving a prison sentence is unlikely to be lured into speaking by a longing for prompt release and would be likely to know that law enforcement officers lack the authority to alter his sentence. The Court took note of factors such as: the defendant was told that he could leave and go back to his cell whenever he wanted, the conference room door was sometimes open, and the defendant was not restrained.

In light of *Fields*, the State could argue that officers may reinitiate interrogation of a prisoner without giving *Miranda* warnings and without waiting 14 days as long as the prisoner is questioned in a noncustodial setting. Thus, defense counsel must be prepared to show that the defendant was "in custody while in custody," pointing to factual circumstances such as the setting in which the interrogation takes place and whether the defendant was given the opportunity to return to the general population.

Both *Shatzer* and *Fields* distinguished inmates who are serving a sentence from those in pretrial custody. Under the reasoning of these decisions, a pretrial detainee's return to his or her jail cell following assertion of his *Miranda* rights should not constitute a break in custody permitting reinterrogation; nor should interrogation of a pretrial detainee be considered noncustodial.

Juvenile warnings. Before interrogating a juvenile, law enforcement officers must inform the juvenile of his or her rights under G.S. 7B-2101. In addition to the usual *Miranda* rights, a juvenile must be advised of the right to have a parent or guardian present during questioning.

A "juvenile" is any person under eighteen years of age who is not emancipated, married, or in the military. If the suspect is under eighteen, juvenile rights must be given even though the suspect may be old enough to be prosecuted in superior court. *See State v. Fincher*, 309 N.C. 1 (1983) (seventeen-year-old entitled to statutory juvenile warnings); *State v. Brantley*, 129 N.C. App. 725 (1998) (right to statutory warning applies to all juveniles).

If the juvenile is less than 14 years old, a parent, guardian, custodian, or attorney must be present when the juvenile is interrogated; otherwise any statement made by the juvenile is inadmissible against him or her. *See* G.S. 7B-2101(b).

The age of a child subjected to police questioning is also relevant to the *Miranda* custody analysis. *See J.D.B. v. North Carolina*, ___ U.S. ___, 131 S. Ct. 2394 (2011), discussed *supra* under "Requirements of 'custody' and 'interrogation'" in this subsection B.

For a further discussion of interrogation of juveniles, see NORTH CAROLINA JUVENILE DEFENDER MANUAL § 11.3 (Bases for Motions to Suppress Statement or Admission of Juvenile); § 11.4 (Case Law: Motions to Suppress In-Custody Statement of Juvenile) (UNC School of Government, 2008), *available at* www.ncids.org (select "Training & Resources," then "Reference Manuals").

Warnings to noncitizens. *See State v. Herrera*, 195 N.C. App. 181 (2009) (violation of Vienna Convention on Consular Relations, requiring notification to arrested foreign national of right to have consul of his or her country notified of arrest, does not provide remedy of suppression of confession), *rev'd on other grounds by State v. Ray*, 364 N.C. 272 (2010).

C. Confessions in Violation of Sixth Amendment Right to Counsel

Generally, the Sixth Amendment right to counsel attaches at the initial appearance before a magistrate—that is, when a defendant has been arrested and taken to a magistrate by law enforcement—and the right exists at any critical stage thereafter, including interrogation. *See Rothgery v. Gillespie County*, 554 U.S. 191 (2008). Thus, following the initial appearance, a defendant has a Sixth Amendment right to have counsel present at any interrogation by the police, regardless of whether the defendant is in custody. The Sixth Amendment right to counsel may attach before the initial appearance before a magistrate, as when the case begins by indictment, which signals the initiation of adversary criminal proceedings and triggers Sixth Amendment protections. *See Rothgery*, 554 U.S. at 198 (citing *Kirby v. Illinois*, 406 U.S. 682 (1972)). The Sixth Amendment right to counsel is "offense specific"; thus, law-enforcement officers do not violate a defendant's Sixth Amendment rights by questioning an in-custody defendant about crimes unrelated to the charged offense. (Officers still must comply with the Fifth Amendment for any custodial interrogation. *See supra* § 14.3B, *Miranda* Warnings.) If the person is not in custody, but the Sixth Amendment right to counsel has attached, police likewise may ask questions about unrelated crimes. *See McNeil v. Wisconsin*, 501 U.S. 171 (1991); *State v. Williams*, 209 N.C. App. 441 (2011) (no Sixth Amendment violation for officers to speak with defendant about robbery and murder where defendant had not been formally charged with those crimes and was in custody on unrelated charges).

Under an earlier U.S. Supreme Court decision, *Michigan v. Jackson*, 475 U.S. 625 (1986), law enforcement officers were prohibited from initiating contact with a defendant who had exercised his Sixth Amendment rights after they had attached—that is, law enforcement could not question the defendant about the charges, whether he was in or out of custody, if the defendant had requested that the court appoint counsel on the charges. However, in *Montejo v. Louisiana*, 556 U.S. 778 (2009), the U.S. Supreme Court overruled *Michigan v. Jackson* and took a different approach to police questioning after the attachment of Sixth Amendment protections. *Montejo* held that officers may initiate contact with and question a defendant whose Sixth Amendment right has attached, even if the defendant has requested and received appointed counsel in court, provided that officers advise the defendant of the right to counsel (essentially, through *Miranda*-style warnings) and the defendant knowingly and voluntarily waives that right. (Officers still may be prohibited from interrogating an in-custody defendant who has asserted his or her right to counsel under the Fifth Amendment. *See supra* § 14.3B, *Miranda* Warnings.)

The "impeachment exception" (discussed *supra* in § 14.3B, *Miranda* Warnings) applies when the defendant's rights have been violated under the Sixth Amendment. *See Kansas v. Ventris*, 556 U.S. 586 (2009) (defendant's incriminating statement to a jailhouse informant, assumed to have been obtained in violation of the defendant's Sixth Amendment right to counsel, was admissible on rebuttal to impeach the defendant's trial testimony in conflict with the statement).

For a further discussion of the impact of *Montejo* on police questioning after attachment of the Sixth Amendment right to counsel. see Robert L. Farb, *The United States Supreme Court Ruling in* Montejo v. Louisiana (UNC School of Government, May 30, 2009), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/Montejoruling.pdf.

D. Confession as Fruit of Illegal Arrest

If a suspect is illegally seized in violation of his or her Fourth Amendment rights and, as a result of that seizure, gives a statement, the statement is ordinarily inadmissible as the "fruit of the poisonous tree." *See Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200 (1979); *State v. Graves*, 135 N.C. App. 216 (1999); *see also supra* § 14.2G, "Fruits" of Illegal Search or Arrest.

E. Evidence Derived from Illegal Confession

Involuntary confessions. An "involuntary" confession—that is, a confession obtained in violation of due process—"taints" any further confession and any evidence obtained as a result of the confession. *See* 3 LAFAVE, CRIMINAL PROCEDURE § 9.5(a), at 466–67; *Michigan v. Tucker*, 417 U.S. 433 (1974); *see also supra* § 14.2F, "Fruits" of Illegal Search or Arrest.

Confessions in violation of *Miranda*. If a confession is obtained in violation of the *Miranda* rule, but is not "involuntary" under the Due Process Clause, the "fruit of the poisonous tree" principle generally does not apply; failure to administer *Miranda* warnings does not automatically create a coercive atmosphere. *See Oregon v. Elstad*, 470 U.S. 298 (1985). Thus, derivative evidence, such as subsequent statements or physical evidence, obtained as the result of an unwarned but otherwise voluntary confession is not barred. *See id.* (unwarned confession did not taint later warned confession); *State v. Hicks*, 333 N.C. 467 (1993) (following *Elstad*); *State v. Goodman*, 165 N.C. App. 865 (2004) (where defendant's statements were obtained in violation of his *Miranda* rights, physical evidence, including a body discovered as a result of statements, did not have to be suppressed); *see also* 3 LAFAVE, CRIMINAL PROCEDURE § 9.5(a), at 467–71 (discussing inapplicability of the fruit of the poisonous tree doctrine to *Miranda* violations).

The U.S. Supreme Court has condemned the "ask first, warn later" two-step interrogation technique in which law enforcement officers interrogate the defendant without giving *Miranda* warnings, obtain a confession, and subsequently give the defendant *Miranda* warnings and ask him or her to repeat the confession. *See Missouri v. Seibert*, 542 U.S. 600 (2004) (confession held inadmissible where detectives deliberately withheld *Miranda* warnings, questioned defendant until she confessed to murder, and then, after a 15- to 20-minute break, gave defendant *Miranda* warnings and led her to repeat prior confession). *Cf. Bobby v. Dixon*, ___ U.S. ___, 132 S. Ct. 26 (2011) (per curiam) (second, warned confession to murder not suppressed where defendant denied involvement in murder during unwarned interrogation and then reversed course and confessed after *Miranda* warnings).

Confessions in violation of Sixth Amendment right to counsel. *See* 3 LAFAVE, CRIMINAL PROCEDURE § 9.5(b), at 476 (taking position that fruit-of-poisonous tree doctrine may still bar evidence discovered as result of statements taken in violation of Sixth Amendment right to counsel).

F. Codefendant's Confession

Generally, one defendant does not have standing to assert constitutional violations in the taking of another defendant's confession and cannot move to suppress the other defendant's confession on those grounds. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966) (discussing the privilege against self-incrimination as an individual's substantive right). Still, the portions of an accomplice's confession that are not genuinely self-inculpatory (for example, "I did it"), but are blame-shifting (for example, "he did it" or "we did it"), are ordinarily not admissible against the non-confessing defendant. Any extrajudicial statement, such as a confession to police or to a lay witness, must meet two basic requirements, discussed below, to be admissible against a criminal defendant. If the statement does not meet these requirements, the defendant who is being blamed may make a motion in limine before trial to exclude the statement and object at trial to its introduction.

First, an out-of-court statement must satisfy the Confrontation Clause of the Sixth Amendment to the U.S. Constitution, as interpreted in *Crawford v. Washington*, 541 U.S. 36 (2004), and article I, section 23 of the North Carolina Constitution. An extrajudicial confession that names or blames an accomplice, particularly if made to the police, will ordinarily constitute "testimonial" statements and will be barred by the Confrontation Clause.

Second, the statement must satisfy North Carolina's hearsay and other evidence rules. Blame-shifting confessions typically will not fall within the scope of a hearsay exception under North Carolina's evidence rules. For a discussion of Confrontation Clause and hearsay restrictions on the admission of codefendants' statements, see *supra* § 6.2E, Blame-Shifting and Blame-Spreading Confessions.

If the codefendants are tried separately, the State ordinarily will be unable to introduce the blame-shifting portions of a confession in light of Confrontation Clause and hearsay restrictions. Thus, the defendant may find it advantageous to move for severance where the confession of a codefendant will be prejudicial to the defendant's case. In a joint trial, if the State wants to offer a codefendant's confession against that codefendant, the State must "sanitize" the confession by removing all direct or indirect references to individuals other than the codefendant who made the confession before the confession may be admitted into evidence. *See Bruton v. United States*, 391 U.S. 123 (1968); *Gray v. Maryland*, 523 U.S. 185 (1998) (replacing defendant's name with a blank space or "deleted" not sufficient redaction); *State v. Gonzalez*, 311 N.C. 80 (1984) (error to admit statement by one codefendant saying "I didn't rob anyone, they did"); G.S. 15A-927(c)(1) (codifies *Bruton* rule). For further discussion of the *Bruton* rule on redacting

codefendants' statements at joint trials, see *supra* § 6.2E, Blame-Shifting and Blame-Spreading Confessions.

G. Recording of Statements

G.S. 15A-211, enacted in 2007, requires electronic recording of custodial interrogations in homicide investigations at any place of detention. Effective for offenses committed on or after December 1, 2011, the statute was expanded to require electronic recording of custodial interrogations conducted at any place of detention for investigations related to any Class A, B1, or B2 felony and any Class C felony of rape, sex offense, or assault with a deadly weapon with intent to kill inflicting serious injury. The amended statute also requires electronic recording of all custodial interrogations of juveniles in criminal investigations conducted at any place of detention. The juvenile provision is not limited to specific offenses. The provision does not define "juvenile" and may apply to any person under the age of 18. *See* G.S. 7B-101(14) (defining juvenile for purposes of Juvenile Code as person under age 18); *see also State v. Fincher*, 309 N.C. 1 (1983) (applying statutory juvenile warning requirements to defendants under age 18). For a further discussion of the legislation, see John Rubin, *2007 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/01, at 5–6 (UNC School of Government, Jan. 2008), *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0801.pdf, and John Rubin, *2011 Legislation Affecting Criminal Law and Procedure* at 35, no. 63 (UNC School of Government, Dec. 12, 2011), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/2011%20Legislation%20Affecting%20Criminal%20Law%20and%20Procedure_0.pdf.

14.4 Illegal Identification Procedures

A. Pretrial Identification Procedures: Constitutional and Statutory Requirements

A pretrial identification procedure violates due process when (i) the procedure is suggestive, and (ii) the suggestiveness of the procedure results in a strong probability of misidentification. *See Manson v. Brathwaite*, 432 U.S. 98 (1977) (requiring both suggestiveness and unreliability); *Neil v. Biggers*, 409 U.S. 188 (1972) (to same effect); *accord State v. Harris*, 308 N.C. 159 (1983). A violation of due process requires suppression of the pretrial identification and possibly any later identifications.

In 2007, the North Carolina General Assembly recognized the need for uniform, reliable eyewitness identification procedures to reduce the risk of misidentification and enacted the Eyewitness Identification Reform Act. *See* G.S. 15A-284.50 through G.S. 15A-284.53; *see also* John Rubin, *2007 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/01, at 2–4 (UNC School of Government, Jan. 2008), *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0801.pdf. While suppression is not mandatory for a violation of statutory requirements, the court must consider noncompliance in adjudicating motions to suppress. G.S. 15A-284.52(d)(1). Therefore, counsel should move to suppress suggestive pretrial identification procedures

under the Due Process Clause, article I, section 19 of the North Carolina Constitution, and North Carolina statutes. *See United States v. Greene*, 704 F.3d 298, 305 n.3 (4th Cir. 2013) (in suppressing identification under U.S. Constitution, court notes that some states have provided greater protections for defendants under their state constitutions "based on the last 35 years of social science research into the reliability of eyewitness identifications"). The statutory requirements are discussed first because they provide guidance on the characteristics of a reliable identification procedure.

B. Statutory Requirements for Lineups

Requirements for lineup. Under G.S. 15A-284.52(b), a lineup must meet all of the requirements set out in subdivisions (1) through (15), including:

- the lineup shall be conducted by a neutral administrator, a person who does not know which person is the suspect;
- where an independent administrator is not used, an alternative method must be used that has been approved by the North Carolina Criminal Justice Education and Training Standards Commission, e.g., an automated computer program;
- individuals or photos shall be presented sequentially, one at a time;
- specific instructions must be given to the eyewitness, including that the suspect may not be in the lineup and that it is as important to exclude the innocent as it is to identify the perpetrator;
- at least five fillers must be included and they must resemble the eyewitness's description of the perpetrator.
- the suspect or the photo of the suspect must not stand out from the fillers;
- nothing shall be said to influence the identification;
- the eyewitness shall provide a statement regarding his or her level of confidence in the identification;
- live identification procedures shall be recorded on video (where video is not practical, an audio recording shall be made of live lineups, and a written record of the live lineup shall be made if neither video nor audio is practical);
- for any identification procedure, a detailed record shall be made including all of the information described in G.S. 15A-284.52(b)(15).

Remedies for noncompliance. While suppression does not automatically follow from failure to comply with the requirements of G.S. 15A-284.52(b), the court must consider noncompliance when deciding whether to grant a motion to suppress the identification. Counsel also may argue that noncompliance constitutes a violation of the Due Process Clause and a substantial violation of statutory criminal procedure provisions, requiring exclusion under G.S. 15A-974.

Evidence of noncompliance is admissible at trial to support a claim of misidentification, unless the evidence is otherwise barred. In the event that evidence of noncompliance is presented at trial, the judge must instruct the jury that it may consider such evidence in determining the reliability of the identification. G.S. 15A-284.52(d). *See State v. Stowes*,

___ N.C. App. ___, 727 S.E.2d 351 (2012) (trial court did not exclude evidence for violation of the Eyewitness Identification Reform Act but granted the other statutory relief).

C. Constitutional Requirements

Suggestiveness of procedure. A pretrial identification procedure may be unconstitutionally suggestive if:

- the defendant stands out in the lineup based on his or her size, age, or apparel (*see State v. Pigott*, 320 N.C. 96 (1987) (photo array suggestive where 6 of 10 photos unclear and seventh photo showed deputy in uniform); *State v. Harris*, 308 N.C. 159, 166 (1983) (assuming arguendo that photo array suggestive where defendant was shown wearing cap and scarf similar to ones worn by assailant); *State v. Gaines*, 283 N.C. 33 (1973) (lineup not unduly suggestive even though defendant only juvenile in group));
- an officer makes comments during the identification procedure that taint the process (*see State v. Wilson*, 313 N.C. 516 (1985) (identification procedure tainted by officer suggesting to witness that perpetrator was in lineup); *State v. Headen*, 295 N.C. 437 (1978) (deputy's comments naming defendant as perpetrator tainted identification procedure));
- the defendant is shown alone to the witness in a showup (*see State v. Capps*, 114 N.C. App. 156 (1994) (witness shown defendant alone in police car); *see also Stovall v. Denno*, 388 U.S. 293 (1967) (practice of showing suspect singly for purposes of identification and not as part of lineup has been widely condemned)).

Where law enforcement officers conduct an unduly suggestive procedure, exclusion of the identification is not automatically required under the Due Process Clause. The trial judge must screen the evidence for reliability, discussed below. *Perry v. New Hampshire*, ___ U.S. ___, 132 S. Ct. 716 (2012). Where the suggestive circumstances are not the result of government action, the trial court may admit the identification without performing this preliminary inquiry into the reliability of the identification. "When no improper law enforcement activity is involved . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." *Id.* at 721.

Risk of misidentification. In addition to showing that an identification procedure was suggestive, the defendant must show that the procedure created a strong probability of misidentification. *See State v. Harris*, 308 N.C. 159 (1983); *State v. McCraw*, 300 N.C. 610 (1980); *State v. Breeze*, 130 N.C. App. 344 (1998). If there is a substantial likelihood of misidentification, the judge must exclude the evidence. If the indicia of reliability are strong enough to outweigh the corrupting effect of the suggestive circumstances, the identification evidence remains admissible. *Perry v. New Hampshire*, 132 S. Ct. at 720.

In deciding whether the suggestive procedure impermissibly influenced the identification, the courts consider the totality of the circumstances. Key factors include: (1) the opportunity of the witness to view the perpetrator at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the time of confrontation; and (5) the length of time between the crime and the confrontation. *See, e.g.*, *State v. Harris*, 308 N.C. 159, 164 (1983) (citing *Neil v. Biggers*, 409 U.S. 188 (1972)).

D. Showups

Constitutional considerations. The North Carolina courts have recognized that showup procedures, whereby a single suspect is shown to a witness for the purpose of identification, are "inherently suggestive." *State v. Turner*, 305 N.C. 356, 364 (1982); *State v. Oliver*, 302 N.C. 28, 45 (1981). Because of its suggestiveness, the procedure is frowned upon and should be utilized in limited circumstances. *See* FARB at 558–59 (noting that a showup is a suggestive identification procedure that normally should be avoided but that it may be permissible in an emergency or soon after a crime is committed)**.**

An unnecessary showup may still be admissible if the witness's identification of the defendant is otherwise reliable. *See Stovall v. Denno*, 388 U.S. 293, 302 (1967) ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it . . . ."), *abrogation on other grounds recognized by Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993); *see also Turner*, 305 N.C. at 364–65 (upholding admission of identification from showup where, among other things, witness knew defendant from having previously seen him in the neighborhood); *State v. Rawls*, 207 N.C. App. 415 (2010) (finding showup unduly suggestive where an officer told the witness beforehand that "they think they found the guy" and at the showup the defendant was detained and several officers were present; but, holding that there was not a substantial likelihood of irreparable misidentification because, among other things, before the showup the witness had looked directly at the suspect and made eye contact with him from a table's length away during daylight hours and the showup occurred only fifteen minutes later); *State v. Pinchback*, 140 N.C. App. 512 (2000) (considering the five factors for assessing the reliability of an identification [discussed under "Risk of misidentification" in subsection C., above], court finds that identification was unreliable and should have been suppressed). For a further discussion of showups, see FARB at 558–59.

Statutory considerations. In *State v. Rawls*, 207 N.C. App. 415 (2010), the court held that the Eyewitness Identification Reform Act (EIRA) does not apply to showups. The EIRA sets out procedural requirements that an officer must follow in conducting a photographic or live lineup. *See* G.S. 15A-284.52. The court distinguished a showup from a live lineup and held that a showup does not have to conform to EIRA

requirements. However, *Rawls* does not necessarily mean that officers may avoid EIRA lineup requirements by conducting showups when not warranted by legitimate law enforcement objectives. *Rawls* involved a classic situation in which officers decided to do a showup in light of the exigencies of the situation. Officers arrived on the scene within minutes after the victim's apartment had been broken into; they located the defendant and other suspects shortly thereafter, who were still in the area; and they drove the victim to where the suspects were being held, which took a mere 45 seconds. Other instances, when a showup is unnecessary or is employed to avoid EIRA procedures, may violate both statutory as well as constitutional requirements.

E. In-Court Identification

An impermissibly suggestive pretrial identification procedure may taint an in-court identification. *See State v. Flowers*, 318 N.C. 208 (1986); *State v. Headen*, 295 N.C. 437 (1978). Before admitting an in-court identification that has been challenged, the trial court must conduct a voir dire, find facts, and determine that the in-court identification is of independent origin and not the result of an impermissibly suggestive pretrial procedure. *See Flowers*, 318 N.C. at 216 (so holding, but finding that failure to conduct voir dire was harmless error where evidence was clear and convincing that witness's in-court identification originated with the witness's observation of defendant at the time of the crime and not from an impermissibly suggestive pretrial identification procedure). In determining whether an in-court identification is independent of a flawed pretrial investigation, the court should consider the five factors listed under "Risk of misidentification in subsection C, above. *See State v. Harris*, 308 N.C. 159 (1983); *State v. Thompson*, 303 N.C. 169 (1981).

The lack of a pretrial identification procedure does not necessarily make an in-court identification inadmissible. *See State v. Fowler*, 353 N.C. 599 (2001) (fact that victim's first identification of defendant took place in courtroom did not render identification procedure impermissibly suggestive) *State v. Hussey*, 194 N.C. App. 516 (2008) (to same effect). *But see Moore v. Illinois*, 434 U.S. 220, 230 (1977) (in considering an in-court identification, court states that it "is difficult to imagine a more suggestive manner in which to present a suspect to a witness for their critical first confrontation than was employed in this case"; court does not rule on due process claim and instead finds violation of Sixth Amendment right to have counsel present at identification); 2 LAFAVE, CRIMINAL PROCEDURE § 7.4(g), at 963–67 (discussing possible ways in which to reduce suggestiveness of in-court identification).

Practice note: Generally you must make a motion before trial to suppress evidence of pretrial identifications and tainted in-court identifications (*see infra* § 14.6A, Timing of Motion). If your motion is denied, you also must object to the evidence of the pretrial identification procedure when it is introduced and to any in-court identification of the defendant when made to preserve those issues for appeal. *See State v. Hunt*, 324 N.C. 343, 355 (1989) ("[a]ssuming arguendo that defendant's constitutional right of assistance of counsel at the lineup was violated, defendant waived that error by failing to object when the witness later identified him before the jury as the man he had picked out of the

lineup"). If you fail to do so, you will waive the objections and will have to meet the much higher standard of plain error on appeal. *See State v. Hammond*, 307 N.C. 662 (1983); *State v. Stowes*, ___ N.C. App. ___, 727 S.E.2d 351, 355 (2012).

F. Right to Counsel at Lineups

Constitutional considerations. Defendants have a Sixth Amendment right to have counsel present at a live lineup that occurs after adversary proceedings have begun. *See Gilbert v. California*, 388 U.S. 263 (1967). The right to counsel attaches after initial appearance or indictment, whichever occurs first. *See Rothgery v. Gillespie County*, 554 U.S. 191 (2008); *see also supra* § 12.4A, When Right to Counsel Attaches.

If the defendant's right to counsel is not honored, the pretrial identification must be suppressed. *See State v. Hunt*, 339 N.C. 622 (1994) (recognizing principle [note that decision was issued before *Rothgery*, when right to counsel was held by North Carolina courts to attach at defendant's first court appearance]). An in-court identification by a witness who took part in a pretrial lineup in violation of the defendant's right to counsel also must be excluded unless the State demonstrates by clear and convincing evidence that the in-court identification is of independent origin and not tainted by the illegal pretrial procedure. *See United States v. Wade*, 388 U.S. 218 (1967); *Hunt*, 339 N.C. at 647. While the accused may waive the right to have counsel present at a live lineup, the State bears the burden of demonstrating by clear and convincing evidence that the right was waived freely, voluntarily, and with full understanding. *See Wade*, 388 U.S. at 240; *State v. Harris*, 279 N.C. 177 (1971).

The Sixth Amendment does not guarantee the right to counsel where a lineup occurs before adversarial proceedings have commenced. *Kirby v. Illinois*, 406 U.S. 682 (1972); *State v. Henderson*, 285 N.C. 1 (1974), *vacated on other grounds*, 428 U.S. 902 (1976); *see also State v. Taylor*, 354 N.C. 28 (2001) (holding in pre-*Rothgery* case in different context that Sixth Amendment right to counsel did not attach with issuance of arrest warrant). *But cf.* FARB at 559 n.156 (noting that U.S. Supreme Court has not yet decided whether the Sixth Amendment right to counsel begins with issuance of arrest warrant before the defendant's initial appearance). The Sixth Amendment also does not guarantee the right to counsel at a photographic identification procedure. *United States v. Ash*, 413 U.S. 300 (1973); *State v. Miller*, 288 N.C. 582 (1975).

Statutory considerations. G.S. 7A-451(b)(2) states that an indigent person is entitled to counsel after formal charges have been preferred for a pretrial identification procedure at which the presence of the accused is required. The North Carolina courts appear to have interpreted this provision as not affording a defendant a greater right to counsel than provided by the Sixth Amendment. *See State v. Henderson*, 285 N.C. 1 (1974), *vacated on other grounds*, 428 U.S. 902 (1976).

The Eyewitness Identification Reform Act does not state that there is a right to counsel at the identification proceedings covered by the act. It recognizes, however, that counsel is not excluded from identification procedures. *See* G.S. 15A-284.52(b)(13) (prohibiting

anyone who knows the suspect's identity from being present during the lineup or identification procedure "except the eyewitness and counsel as required by law").

G. Nontestimonial Identification Procedures

Nontestimonial identification procedures, such as the taking of hair samples, may be ordered for suspects who have not been arrested or who have been formally charged and released from custody pending trial. *See* G.S. 15A-271 through G.S. 15A-282; *State v. Irick*, 291 N.C. 480 (1977) (discussing purpose of procedures); c*f. State v. Carter*, 322 N.C. 709 (1988) (probable cause and search warrant required for taking of blood sample unless exigent circumstances permit taking of blood without warrant; nontestimonial identification order not proper for taking of blood sample or for in-custody defendant). A suspect has a statutory right to have counsel present during a nontestimonial identification procedure and must be told about this right before the procedure takes place. *See* G.S. 15A-279(d); *State v. Satterfield*, 300 N.C. 621 (1980); *see also supra* "Nontestimonial identification procedures" in § 12.4C, Particular Proceedings (discussing right to counsel for such procedures). The statutory right to counsel does not apply to nontestimonial procedures lawfully conducted by law enforcement without a nontestimonial identification order. *See State v. Coplen*, 138 N.C. App. 48 (2000) (upholding denial of motion to suppress results of gunshot residue test that was based on probable cause and exigent circumstances and was conducted without a nontestimonial identification order).

G.S. 15A-279(d) states that any statements made during the proceeding must be suppressed if the defendant does not have counsel present. *See also State v. Page*, 169 N.C. App. 127 (2005) (officer violated statute by failing to advise defendant of right to counsel before conducting gunshot residue test, but violation was not prejudicial because defendant did not identify any statements made during test); *State v. Coplen*, 138 N.C. App. 48 (2000) (refusing to suppress results of identification procedure, as distinguished from statements of defendant, for violation of statutory right to counsel). The results of a nontestimonial identification procedure may be subject to suppression on other grounds, however. *See, e.g., State v. Pearson*, 356 N.C. 22 (2002) (recognizing that results may be suppressed if affidavit does not provide reasonable suspicion for test or was based on falsehoods, but finding no violation in this case); *State v. Carter*, 322 N.C. 709 (1988) (nontestimonial identification order does not authorize taking of blood sample).

H. DNA Samples at Time of Arrest

Statutory authorization exists for taking DNA samples at the time of arrest for certain offenses. *See* G.S. 15A-502.1; G.S. 15A-266.3A; *see also Maryland v. King*, 569 U.S. ___, 133 S. Ct. 1958 (2013) (defendant's Fourth Amendment rights were not violated by the taking of a DNA cheek swab as part of booking procedures). The sample must be expunged if, among other reasons, there is no charge filed within the statute of limitations or if there is no conviction or active prosecution for an offense covered under the DNA sampling law within three years of the date of arrest. G.S. 15A-266.3A(h); *see also* "DNA Records" in John Rubin, *Relief from a Criminal Conviction: A Digital Guide to*

Expunctions, Certificates of Relief, and Other Procedures in North Carolina (UNC School of Government, 2012), www.sog.unc.edu/node/2588.

Any identification, warrant, or arrest based on a DNA match that occurs after the statutory period for expunction expires is invalid and inadmissible. G.S. 15A-266.3A(m).

14.5 Substantial Violations of Criminal Procedure Act

A. Required Showing

In addition to the above constitutional suppression issues, a defendant may move to suppress evidence that was obtained as a result of a "substantial" violation of the Criminal Procedure Act. In determining whether a violation is substantial, the court must weigh the following four factors:

1. the importance of the particular interest violated;
2. the extent of the deviation from lawful conduct;
3. the extent to which the violation was willful; and
4. the extent to which exclusion will tend to deter future violations of the Criminal Procedure Act.

See G.S. 15A-974(a)(2). In 2011, the N.C. General Assembly created a good faith exception to the exclusionary rule for statutory violations, providing that evidence obtained as a result of a substantial violation will not be suppressed if the person had an objectively reasonable, good faith belief that his or her actions were lawful. For additional discussion of this exception, see *supra* "Good faith exception for constitutional violations not valid in North Carolina" in § 14.2B, Search Warrants (discussing constitutional and statutory issues).

While G.S. 15A-974 refers specifically to violations of the Criminal Procedure Act—that is, G.S. Chapter 15A—the North Carolina courts have recognized that suppression may be the appropriate remedy for other statutory violations, such as violations of G.S. Chapter 20, Motor Vehicles. *See, e.g.*, Shea Denning, *Can I Get a Remedy? Suppression of Chemical Analyses in Implied Consent Cases for Statutory Violations,* N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 4, 2010) (observing that the North Carolina appellate courts have suppressed chemical analysis results based on violations of Chapter 20), http://nccriminallaw.sog.unc.edu/?p=1729.

B. Case Summaries on "Substantial Violations"

In the following cases the courts addressed whether the defendant had made a sufficient showing of a statutory violation to warrant suppression.

State v. Pearson, 356 N.C. 22 (2002) (no substantial violation where officer failed to provide defendant a copy of test results following nontestimonial identification procedure

and failed to return an inventory of seized evidence to judge who issued order for procedure)

State v. Wallace, 351 N.C. 481 (2000) (confession admissible despite delay of 19 hours in taking defendant to magistrate for initial appearance; interrogating officer had read suspect *Miranda* rights before questioning)

State v. Hyleman, 324 N.C. 506 (1989) (bare bones search warrant, where allegations of fact failed to comply with requirements of G.S. 15A-244(3), constituted substantial violation of Criminal Procedure Act requiring suppression of evidence seized in search)

State v. Satterfield, 300 N.C. 621 (1980) (failure to remind defendant of right to counsel at nontestimonial identification procedure did not require suppression of identification evidence, although statements made by defendant had to be suppressed)

State v. Caudill, ___ N.C. App. ___, 742 S.E.2d 268 (2013) (trial court did not err by denying defendant's motion to suppress statements to officers on grounds that they were obtained in violation of G.S. 15A-501(2), which requires that arrested person be taken before a judicial official without unnecessary delay; delay was not unnecessary and there was no causal relationship between delay and defendant's statements)

State v. Scruggs, 209 N.C. App. 725 (2011) (even if stop and arrest of defendant by campus police officers while off campus violated G.S. 15A-402(f), violation was not substantial; stop and arrest were constitutional and officers were acting under mutual aid agreement with municipality; court cites other cases in which officers were acting just outside territorial jurisdiction and substantial statutory violation was not found)

State v. White, 184 N.C. App. 519 (2007) (G.S. 15A-974(2) did not require suppression of evidence obtained after officers performed unlawful forced entry of residence to execute search warrant because evidence was not discovered as a result of unlawful entry)

State v. McHone, 158 N.C. App. 117 (2003) (suppression required where search warrant issued on the basis of inadequate affidavit that merely concluded probable cause existed, constituting a substantial violation of G.S. 15A-244)

State v. Sumpter, 150 N.C. App. 431 (2002) (no substantial violation under circumstances where officer, in executing search warrant, failed to announce presence before entering residence)

State v. Davidson, 131 N.C. App. 276 (1998) (no substantial violation where search warrant for bank records was served within 48 hours but records were not delivered to officer until after 48 hours had passed)

State v. Pearson, 131 N.C. App. 315 (1998) (no substantial violation of Criminal Procedure Act where officer administered breathalyzer test outside of his territorial

jurisdiction [G.S. 20-38.2 now permits officers who are investigating an implied-consent offense or a vehicle crash that occurred in the officer's territorial jurisdiction to investigate and seek evidence of the driver's impairment outside the officer's territorial jurisdiction])

State v. Harris, 43 N.C. App. 346 (1979) (no substantial violation where Stokes County deputy saw murder suspect driving just over county line in Forsyth county and made stop)

14.6 Procedures Governing Suppression Motions

A. Timing of Motion

General timing rules in superior court. In superior court, a suppression motion ordinarily must be made before trial. *See* G.S. 15A-975(a); *State v. Satterfield*, 300 N.C. 621 (1980) (a defendant who should have but did not raise suppression issue before trial waives right to have issue heard); *State v. Reavis*, 207 N.C. App. 218 (2010) (motion to suppress untimely where not made until trial and State disclosed evidence in timely manner); *see also State v. Langdon*, 94 N.C. App. 354 (1989) (motion filed on day case calendared for trial but before jury selection deemed timely). *But cf. State v. Hill*, 294 N.C. 320 (1978) (defendant's motion to suppress deemed not timely where filed just before jury selection, the evidence in question was of the type listed in G.S. 15A-975(b), and defendant failed to comply with time limits of G.S. 15A-976(b), discussed below).

A suppression motion may be made at trial in superior court only if:

- the defendant did not have a "reasonable opportunity to make the motion before trial"; or
- the State failed to give notice of certain types of evidence (discussed under "Special timing rules for certain types of evidence in superior court," below, in this subsection A.). *See* G.S. 15A-975(a), (b); *State v. Fisher*, 321 N.C. 19 (1987) (defendant could raise suppression issue at trial when he was unaware State intended to introduce certain evidence against him).

The N.C. appellate courts have strictly construed the requirement that, where possible, suppression motions be made before trial. *See, e.g., State v. Hill*, 294 N.C. 320 (1978) (upholding court's denial of untimely suppression motion where court made finding that defendant had reasonable opportunity before trial to make motion); *State v. Jones*, 157 N.C. App. 110 (2003) (miscalculating strength of State's case is not sufficient excuse for failing to make motion to suppress pretrial); *State v. Austin*, 111 N.C. App. 590 (1993). Therefore, if you know or have good reason to believe that the State intends to rely on evidence that may be the subject of a suppression motion, the safest course is to file a pretrial motion objecting to the admission of the evidence.

The requirement that motions to suppress be filed before trial applies only to motions to suppress made pursuant to G.S. 15A-974 (violation of state or federal constitution or substantial violation of Criminal Procedure Act). Motions to exclude evidence on nonconstitutional evidentiary grounds, such as lack of authentication of evidence or unreliable scientific tests, may be made for the first time at trial. *See State v. Tate*, 300 N.C. 180 (1980) (discussing which types of motions must be made before trial). Again, however, if you know or have good reason to believe that the State intends to rely on evidence that may be subject to exclusion, such as evidence of prior bad acts, you may want to file a motion in limine and seek a ruling before the trial commences. *See supra* § 13.1F, Motions in Limine. For a further discussion of the difference between motions to suppress and other objections to admissibility, see Jeff Welty, *What's a Motion to Suppress?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 21, 2010), http://nccriminallaw.sog.unc.edu/?p=1612.

Special timing rules for certain types of evidence in superior court. The following types of evidence are subject to special timing rules for motions to suppress:

- statements by the defendant,
- evidence obtained through a search without a search warrant, and
- evidence obtained pursuant to a search warrant when the defendant was not present during execution of the search warrant.

See G.S. 15A-975(b); G.S. 15A-976(b).

If the State gives notice at least 20 working days before trial of its intent to introduce such evidence at trial, then the defendant must move to suppress the evidence within 10 working days of receipt of the notice. *See* G.S. 15A-976(b); *State v. Paige*, 202 N.C. App. 516 (2010) (defendant's motion to suppress during trial was untimely where the State gave more than 20 working days notice); *State v. Ford*, 194 N.C. App. 468 (2008) (to same effect); *see also State v. Davis*, 97 N.C. App. 259 (1990) (where defendant given permission to refile suppression motion in a form meeting procedural requirements, ten-day limit applied to refiling), *aff'd per curiam*, 327 N.C. 467 (1990).

If the State does not notify the defendant at least 20 working days before trial, then the defendant may move to suppress the types of evidence listed above at trial. *See* G.S. 15A-975(b); *State v. Patterson*, 335 N.C. 437, 456 (1994) (noting that defendant may move during trial to suppress custodial statement of defendant where State does not provide notice 20 days before trial of intent to offer statement at trial); *State v. Roper*, 328 N.C. 337 (1991) (failure of State to notify defendant that it would seek to admit at trial evidence obtained from consent search of defendant's residence entitled defendant to make suppression motion at trial, but defendant failed to make oral motion in a proper form where he did not specify it was a motion to suppress, request a voir dire, or provide a factual or legal basis); *State v. Battle*, 136 N.C. App. 781 (2000) (failure of State to notify defendant of intent to offer cocaine seized in warrantless search entitled defendant to raise suppression issue at trial).

Practice note: Prosecutors may include in their response to the defendant's discovery request a notice of intent to use the above types of evidence, starting the clock on the 10 working days in which the defendant must file motions to suppress.

Misdemeanor appeals. A defendant who wishes to have evidence suppressed on de novo appeal from a misdemeanor conviction must file a suppression motion before trial in superior court if, as in most cases, the defendant knows of the evidence based on the proceedings in district court. *See* G.S. 15A-975 Official Commentary; *State v. Simmons*, 59 N.C. App. 287 (1982), *overruled on other grounds by State v. Roper*, 328 N.C. 337 (1991). The exceptions set forth in G.S. 15A-975(b) do not apply to misdemeanor appeals—that is, the State is not required to give notice of its intent to introduce the types of evidence listed in the subsection when a misdemeanor is appealed for trial de novo in superior court. *See* G.S. 15A-975(c).

Timing rules in misdemeanor cases in district court. Suppression motions in misdemeanor cases tried in district court (other than impaired driving and other implied-consent offenses, discussed below) are not subject to the time limits applicable to suppression motions in superior court. The governing statute provides that suppression motions should ordinarily be made during trial, although they may be made beforehand. *See* G.S. 15A-973 (motions to suppress in district court). Usually defense counsel will want to wait until the trial is under way in district court before moving to suppress because, if the judge grants the motion, the State may not have sufficient evidence to withstand a nonsuit motion. For example, in a possession of marijuana case, if the defendant is contesting the grounds for the search, counsel will often want to wait until the searching officer takes the stand and then request that the judge allow counsel to conduct a voir dire of the officer regarding the reasons for the search. *See infra* "When evidentiary hearing required" in § 14.6D, Disposition of Motion.

Implied-consent offenses. Offenses involving impaired driving, misdemeanor death by vehicle, and certain other alcohol-related offenses are considered implied-consent offenses. *See* G.S. 20-16.2(a1). The N.C. General Assembly has enacted procedures for motions practice that are specific to implied-consent offenses. Generally, in cases involving implied-consent offenses, the defendant must move to suppress or dismiss the charges before trial even where the matter is in district court. *See* G.S. 20-38.6(a). The court may summarily deny a motion to suppress made during trial where the defendant knows all facts material to the motion before trial and fails to make the motion before trial. *See* G.S. 20-38.6(d). However, where the defendant discovers facts during the course of the trial that were not known before trial, he or she may move to suppress or dismiss during the course of the trial. For additional procedural requirements in implied-consent cases, see *supra* "Implied-consent offenses" in § 13.3A, Misdemeanors. For a discussion of the appeal procedure for suppression motions in implied consent cases, see *infra* § 14.7A, State's Interlocutory Right to Appeal.

Local practice. Counsel also should be aware of local timing rules. For example, as of the time of this writing, an agreement in Mecklenburg County between the prosecutor's and public defender's office requires that defense counsel file a suppression motion in felony

cases in superior court within ten days of arraignment rather than within ten days of notification by the State of its intent to introduce certain evidence. The purpose of this rule is to avoid the unnecessary filing of motions before it is determined whether the case will be resolved through a plea or trial.

B. Renewal of Motion

Superior court proceedings. If a motion to suppress is denied before trial, the defendant may renew the motion before or at trial if:

- additional pertinent facts have been discovered, and
- those facts could not have been discovered through due diligence before the previous determination of the motion.

See G.S. 15A-975(c); *State v. Wade*, 198 N.C. App. 257 (2009) (alleged inconsistencies between officers' testimony at suppression hearing and during trial did not constitute additional pertinent information warranting reconsideration of motion); *State v. Moose*, 101 N.C. App. 59 (1990) (previously undiscovered facts may entitle defendant to renew suppression motion at trial; motion not allowed under circumstances because defendant did not allege new facts); *see also supra* § 13.2H, Renewing Pretrial Motions (discussing authority of trial judge to reconsider own pretrial ruling and limitations on one trial judge overruling or modifying the ruling of another).

For a discussion of renewing suppression motions at a second trial, see 2 NORTH CAROLINA DEFENDER MANUAL § 31.10B (Rulings from Previous Trials) (UNC School of Government, 2d ed. 2012).

Practice note: The defendant must renew his or her objection to the evidence when the State offers the evidence at trial to preserve the right to appeal the denial of an earlier suppression motion. Otherwise, any objection to use of the evidence may be waived. *See infra* § 14.7C, Renewing Objection at Trial.

Misdemeanor appeals. If a motion to suppress is denied in a misdemeanor case in district court (or if the defendant makes no suppression motion at all), the defendant has the right to make the motion in superior court regardless of whether there are any additional facts to support the motion. *See* G.S. 15A-953 ("no motion in superior court is prejudiced by any ruling upon, or a failure to make timely motion on, the subject in district court"). If the defendant prevails on a suppression motion in district court but is nevertheless convicted, the defendant must timely refile the motion in superior court on appeal for a trial de novo.

C. Contents of Motion

Pretrial motion. A pretrial suppression motion must:

- be in writing;

- state the legal grounds for the motion; and
- be accompanied by an affidavit setting forth facts that support the legal grounds.

See G.S. 15A-977(a); *State v. Phillips*, 132 N.C. App. 765 (1999) (if motion to suppress fails to allege legal or factual basis for suppressing evidence, it may be summarily dismissed); *State v. Creason*, 123 N.C. App. 495 (1996) (defendant waives right to contest search by not attaching affidavit to suppression motion), *aff'd per curiam*, 346 N.C. 165 (1997); *State v. Williams*, 98 N.C. App. 405 (1990) (upholding trial court's denial of suppression motion accompanied by affidavit that did not support alleged ground for suppression), *overruled on other grounds by State v. Pipkins*, 337 N.C. 431 (1994); *State v. Harris*, 71 N.C. App. 141 (1984) (court may summarily dismiss suppression motion that is not accompanied by affidavit); *State v. Summerlin*, 35 N.C. App. 522 (1978) (noting requirement that suppression motion be in writing). *Cf. State v. O'Connor*, ___ N.C. App. ___, 730 S.E.2d 248 (2012) (while trial court may summarily deny or dismiss a suppression motion for failure to attach a supporting affidavit, it has the discretion to refrain from doing so).

Practice note: The affidavit supporting a motion to suppress need not and generally should not be attested to by the defendant. The defendant's lawyer can attest to the truthfulness of the affidavit based on information and belief. *See State v. Chance*, 130 N.C. App. 107 (1998).

Motion made during trial. A motion to suppress made during trial may be made orally or in writing. *See* G.S. 15A-977(e). An affidavit is not required for a motion that is timely made at trial (*see supra* § 14.6A, Timing of Motion), although the defendant must articulate the legal grounds for suppression. *See State v. Roper*, 328 N.C. 337 (1991) (overruling case law that suggested an affidavit is required for motions made at trial, but upholding admission of evidence because defendant failed to specify that he was making motion to suppress and failed to state any legal or factual basis for exclusion of evidence).

D. Disposition of Motion

Summary granting of motion. Under G.S. 15A-977(b), the trial court *must* summarily grant a motion to suppress if the motion complies with statutory procedural requirements and

- the motion states grounds that require suppression of the evidence and the State concedes the truth of the allegations, or
- the State stipulates that the evidence that is sought to be suppressed will not be offered in any trial or proceeding against the defendant.

When evidentiary hearing required. The court must allow an evidentiary hearing on a motion to suppress if the motion

- is timely filed,

- alleges a legal basis for suppression, and
- is accompanied by an affidavit that sets out facts supporting the ground for suppression.

See G.S. 15A-977(d); *State v. Breeden*, 306 N.C. 533 (1982) (reversible error for trial court to summarily deny suppression motion that complied with all statutory requirements; court required to conduct hearing and make findings of fact), *abrogation by statute on other grounds recognized in State v. Salinas*, 366 N.C. 119 (2012); *State v. Battle*, 136 N.C. App. 781 (2000) (defendant's right to due process and statutory right to make a motion to suppress denied where trial court would not allow defendant to state his grounds or present evidence in support of his motion); *State v. Kirkland*, 119 N.C. App. 185 (1995) (error, harmless on these facts, for court to admit evidence without holding hearing on defendant's suppression motion), *aff'd per curiam*, 342 N.C. 891 (1996); *State v. Martin*, 38 N.C. App. 115 (1978) (reversible error to fail to hold hearing on suppression motion).

When the defendant's motion to suppress is made during trial, the court must conduct a voir dire hearing outside the presence of the jury before admitting the evidence. *See* G.S. 15A-977(e); *State v. Butler*, 331 N.C. 227 (1992); *State v. James*, 118 N.C. App. 221 (1995).

Summary dismissal. The trial court may summarily dismiss a suppression motion that is untimely filed, fails to adequately state the legal grounds or the factual basis of the claim, or includes an affidavit that does not support the grounds alleged. *See* G.S. 15A-977(c); *State v. Satterfield*, 300 N.C. 621 (1980) (summary denial proper where motion was inadequate); *State v. Blackwood*, 60 N.C. App. 150 (1982) (upholding court's summary dismissal of motion where accompanying affidavit did not allege facts that would support suppression of evidence); *State v. Smith*, 50 N.C. App. 188 (1980) (upholding trial court's summary dismissal of suppression motion where affidavit did not support motion).

While the burden is on the State in most cases to show that the evidence was properly obtained (*see* "State's burden of proof" in subsection E., below), the burden is on the defendant to demonstrate that he or she has complied with the statutory procedures governing suppression motions. *See State v. Holloway*, 311 N.C. 573 (1984) (noting burden on defendant to show compliance with procedural requirements for suppression motions), *habeas corpus granted sub nom.*, *Holloway v. Woodard*, 655 F. Supp. 1245 (W.D.N.C. 1987); *State v. Satterfield*, 300 N.C. 621 (1980) (same).

E. Conduct of Evidentiary Hearing

Generally. A hearing on a motion to suppress made pursuant to G.S. 15A-974 must be conducted out of the presence of the jury. *See* G.S. 15A-977(e); N.C. R. EVID. 104(c). Testimony at a suppression hearing must be under oath. *See* G.S. 15A-977(d); *State v. Dorsey*, 60 N.C. App. 595 (1983) (testimony presented by defendant at hearing must be under oath); *see also State v. Salinas*, 366 N.C. 119 (2012) (trial judge may not rely on allegations in defendant's affidavit as evidence to support findings of fact).

State's burden of proof. Once the defendant properly raises a suppression issue, the State has the burden of proving by a preponderance of the evidence that the challenged evidence is admissible. *See, e.g.*, *State v. Johnson*, 304 N.C. 680 (1982) (stating preponderance of the evidence standard); *State v. Breeden*, 306 N.C. 533, 539 (1982) (reversible error for court to deny defense motion to suppress "for failure of proof"); *State v. Tarlton*, 146 N.C. App. 417 (2001) (burden on State to show admissibility of challenged evidence); *State v. Nowell*, 144 N.C. App. 636 (2001) (State has burden to prove warrantless search constitutional once defendant moves to suppress), *aff'd per curiam*, 355 N.C. 273 (2002); *see also State v. Williams*, ___ N.C. App. ___, 738 S.E.2d 211 (2013) (while the party who bears the burden of proof typically presents evidence first, that defendant presented evidence first at suppression hearing did not itself establish that burden of proof was shifted to defendant).

There is a partial exception when police acted under a warrant. Unless its invalidity appears on the face of the record, a warrant is presumed valid, and the defendant has the burden to show otherwise. Thus, a defendant would have the burden of proof on a *Franks* claim—that is, a claim that an affiant made a knowingly or recklessly false statement to obtain a warrant. *See State v. Walker*, 70 N.C. App. 403 (1984) (defendant must rebut presumption of validity); *see also supra* § 14.2E, Adequacy of Affidavit in Support of Probable Cause. However, the State would still have the burden of establishing the adequacy of the probable cause allegations in the search warrant affidavit itself. *See State v. Hicks*, 60 N.C. App. 116 (1982); *see also State v. Kornegay*, 313 N.C. 1 (1985) (affidavit part of warrant).

Hearsay at suppression hearing. Hearsay evidence that would be inadmissible at trial is admissible in a suppression hearing. *See* N.C. R. EVID. 104(a) (on preliminary questions of admissibility court is not bound by rules of evidence except with respect to privileges); *State v. Melvin*, 32 N.C. App. 772 (1977) (hearsay statements by officer about what joint occupant said in consenting to search of premises admissible at voir dire hearing to determine validity of consent). Additionally, most courts that have considered the issue have ruled that *Crawford v. Washington*, 541 U.S. 36 (2004), which generally bars admission of testimonial hearsay statements made out of court unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine, does not apply to suppression or preliminary hearings. *See, e.g.*, *People v. Felder*, 129 P.3d 1072 (Colo. Ct. App. 2005); *State v. Watkins*, 190 P.3d 266 (Kan. Ct. App. 2007); *Sheriff v. Witzenburg*, 145 P.3d 1002 (Nev. 2006); *Vanmeter v. State*, 165 S.W. 3d 68 (Tex. App. 2005).

Defendant's testimony at suppression hearing. The State may not offer the testimony of the defendant from a suppression hearing as evidence of guilt at the defendant's trial; the rationale behind this rule is that the defendant should not have to jeopardize one constitutional right, the privilege against self-incrimination, to protect others. *See Simmons v. United States*, 390 U.S. 377, 394 (1968). However, where a defendant waives his privilege against self-incrimination by taking the stand at trial, the State may use the defendant's suppression hearing testimony to impeach the defendant. *See State v. Bracey*, 303 N.C. 112 (1981).

Right to disclosure of identity of confidential informant. A defendant is entitled to disclosure of a confidential informant's identity, usually for purposes of trial, if necessary to defend against the merits of the charge or otherwise essential to a fair determination of the case. *See Roviaro v. United States*, 353 U.S. 53 (1957); *State v. Watson*, 303 N.C. 533 (1981); *see also* JOHN RUBIN, THE ENTRAPMENT DEFENSE IN NORTH CAROLINA 49–51 (Institute of Government, 2001) (discussing cases in which court has ordered disclosure of confidential informant's identity in entrapment and other cases).

A defendant is generally not constitutionally entitled to disclosure of the identity of a confidential informant for a pretrial hearing to challenge the validity of a search or arrest. *See McCray v. Illinois*, 386 U.S. 300 (1967). A defendant is statutorily entitled, however, to disclosure of the identity of an informant in the following circumstances: (a) the defendant is contesting the truthfulness of the testimony presented to establish probable cause, (b) the search (or arrest underlying a search incident to arrest) was without a warrant, and (c) there is no independent corroboration of the informant's existence. *See* G.S. 15A-978(b).

For a further discussion of disclosure of confidential informants, see *supra* § 4.6D, Identity of Informants.

F. Required Findings

Findings of fact. As a general rule, following a hearing on a suppression motion in superior court, the trial court must set forth in the record findings of fact and conclusions of law. *See* G.S. 15A-977(f); *State v. Chamberlain*, 307 N.C. 130 (1982) (duty of trial court to resolve factual conflicts by making findings of fact); *State v. Clark*, 301 N.C. 176 (1980) (after hearing evidence on admissibility of pretrial identification procedures, court must make findings of fact before allowing in-court identification of defendant); *State v. Biggs*, 289 N.C. 522 (1976) (new trial awarded where court admitted defendant's statements without making finding that defendant had knowingly and intelligently waived his right to counsel before making statements); *State v. Rollins*, 200 N.C. App. 105, 110 (2009) (error not to make findings); *cf. State v. Munsey*, 342 N.C. 882 (1996) (if there is no conflict in the evidence on a fact, it is not error to fail to find that fact); *State v. Ladd*, 308 N.C. 272 (1983) (if conflicts in evidence are immaterial and have no effect on inadmissibility, not error to omit factual findings, although it is better practice to make factual findings).

For a further discussion of the rules on making findings of fact, *see supra* § 13.2G, Disposition of Motions (discussing general rules regarding pretrial motions).

Remand as remedy for inadequate fact finding. If the superior court fails to make adequate findings, the appellate court may either reverse the conviction and order a new trial or, more commonly, remand to the trial court for further findings of fact. *See State v. Smith*, 346 N.C. 794 (1997) (court remands for findings of fact on voluntariness of consent to search); *State v. Booker*, 306 N.C. 302 (1982) (remand to superior court for proper findings of fact to resolve conflict in evidence adduced at suppression hearing);

State v. Neal, 210 N.C. App.645 (2011) (reversing denial of motion to suppress and remanding for further findings of fact rather than new trial where trial court failed to make findings of fact to resolve material conflict in evidence); *State v. Rollins*, 200 N.C. App. 105 (2009) (remand for new suppression hearing where superior court failed to provide basis for denial of defendant's motion).

14.7 Appeal of Suppression Motions

A. State's Interlocutory Right to Appeal

From superior court's ruling. One of the few instances in which the State has the right to appeal in a criminal case is when a pretrial suppression motion is granted in superior court. The State may only appeal the granting of a pretrial suppression motion if the prosecutor certifies that the appeal is not taken for the purpose of delay and the suppressed evidence is essential to the case. *See* G.S. 15A-979(c). The burden is on the State to show it has complied with the statutory prerequisites for appeal. *See State v. Judd*, 128 N.C. App. 328 (1998) (finding that Court of Appeals had no jurisdiction to hear State's appeal where there was no indication in record that prosecutor followed requirements of G.S. 15A-979(c)); *State v. Blandin*, 60 N.C. App. 271 (1983) (State's appeal dismissed where prosecutor did not timely file certificate); *see also State v. Oates*, 366 N.C. 264 (2012) (describing time frame in which State must file notice of appeal from trial court's ruling on suppression motion).

From district court's ruling. With the exception of the preliminary granting of a suppression motion in an implied-consent case, discussed below, the State has no right to appeal a district court judge's granting of a motion to suppress even if the motion to suppress was heard before trial. *See* G.S. 15A-1432 (describing grounds for appeal by State from district to superior court). The State may be able to file a writ of certiorari in superior court, under Rule 19 of the General Rules of Practice for the Superior and District Courts, to obtain review of a pretrial ruling by a district court on a motion to suppress. If the motion to suppress is granted during trial in district court, however, the State may have insufficient evidence to withstand a motion for nonsuit, which is not reviewable.

If the district court suppresses evidence at a probable cause hearing in a felony case (*see supra* § 3.5B, Rules of Evidence) and the State thereafter indicts the defendant, the district court's ruling has no legal effect and the defendant must timely refile the suppression motion in superior court. *See State v. Lay*, 56 N.C. App. 796 (1982).

Implied-consent cases. The Motor Vehicle Driver Protection Act of 2006 created an interlocutory right to appeal for the State in the context of suppression motions. Following a hearing on the defendant's motion to suppress evidence in district court, the district court judge must make written findings of fact and conclusions of law and preliminarily indicate whether the motion should be granted or denied. *See* G.S. 20-38.6(f). Where the judge indicates that the motion should be granted, the State may

appeal to superior court within a reasonable time. *See* G.S. 20-38.7(a); *State v. Fowler*, 197 N.C. App. 1 (2009) (time by which the State must give notice of appeal depends on the circumstances of each case); *State v. Palmer*, 197 N.C. App. 201 (2009) (G.S. 15A-1432(b) may be used as a procedural guideline for giving notice of appeal but is not binding). No final order may be entered until the State has either appealed or indicated that it does not intend to do so. *See* G.S. 20-38.6(f). If the State appeals, the superior court must consider the merits of the motion and then remand to district court for entry of judgment. Where the superior court affirms the district court's preliminary indication that the evidence should be suppressed and remands for entry of judgment, the State may not appeal from the remand order or from the district court's final judgment suppressing the evidence. *See Fowler*, 197 N.C. App. at 18*; State v. Rackley*, 200 N.C. App. 433 (2009) (following *Fowler*); *see also* Shea Riggsbee Denning, *Motions Procedures in Implied Consent Cases after* State v. Fowler *and* State v. Palmer, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/06 (UNC School of Government, Dec. 2009), *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0906.pdf.

B. Appeal after Guilty Plea

Superior court. Generally, a plea of guilty acts as a waiver of the defendant's right to appeal adverse rulings on pretrial motions in superior court. An exception exists for adverse rulings on suppression motions. A defendant may plead guilty and preserve the right to appeal from the denial of a suppression motion. *See* G.S. 15A-979(b); *see also State v. Davis*, ___ N.C. App. ___, 742 S.E.2d 640 (2013) (where defendant reserves right to appeal on guilty plea, defendant may appeal order denying motion to suppress uncounseled convictions under G.S. 15A-980).

To preserve the right of appeal, the defendant must expressly communicate his intent to appeal the denial of the suppression motion to the prosecutor and the court at the time of the guilty plea. *See State v. Stevens*, 151 N.C. App. 561 (2002) (defendant waived right to appeal from denial of suppression motion where he entered plea of guilty without notifying court and prosecution of intent to appeal); *State v. Brown*, 142 N.C. App. 491 (2001); *State v. McBride*, 120 N.C. App. 623 (1995), *aff'd per curiam*, 344 N.C. 623 (1996); *cf. State v. Brown*, ___ N.C. App. ___, 720 S.E.2d 446, 449 (2011) (defendant gave sufficient notice of intent to appeal denial of motion to suppress by stating at close of State's evidence and before changing not guilty to guilty plea that defendant "would like to preserve any appellate issues that may stem from the motions in this trial"; trial court understood motion defendant wished to appeal and reentered findings of fact on defendant's motion to suppress).

To be safe, the conditional nature of the guilty plea should be put on the record before the plea is entered and should appear in the written transcript of plea. The defendant must appeal from the judgment of conviction itself after the guilty plea, not from the denial of the motion to suppress. *See State v. Miller*, 205 N.C. App. 724 (2010) (defendant's appeal dismissed for lack of jurisdiction where defendant failed to appeal from final judgment of conviction).

For a further discussion, see "Preserving right to appeal from denial of suppression motion" in 2 NORTH CAROLINA DEFENDER MANUAL § 23.6B, (Appeal from Superior Court) (UNC School of Government, 2d ed. 2012).

District court. A guilty plea in district court does not act as a waiver of a defendant's right to make a motion to suppress on appeal for trial de novo in superior court. *See* G.S. 15A-979 Official Commentary (right to trial de novo guarantees defendant right to renew motions in superior court even after guilty plea in district court); *see generally* G.S. 7A-290; *State v. Sparrow*, 276 N.C. 499 (1970) (defendant convicted in district court is entitled to appeal to superior court for trial de novo as matter of right, even if defendant entered guilty plea in district court).

C. Renewing Objection at Trial

To preserve the right to appeal the denial of a suppression motion in superior court, counsel must contemporaneously object when the evidence is offered at trial. *See State v. Golphin*, 352 N.C. 364 (2000) (since motion to suppress is type of motion in limine, counsel must object to admission of evidence at time offered at trial to preserve right to appeal); *see also generally State v. Ray*, 364 N.C. 272 (2010) (abrogating *State v. Herrera*, 195 N.C. App. 181 (2009), and holding that defendant must make contemporaneous objection when evidence is offered at trial, not just at hearing outside presence of jury before actual offer of evidence); *State v. Hill*, 347 N.C. 275 (1997) (defendant required to contemporaneously object to admission of evidence after motion in limine denied). In objecting, counsel should indicate that the objection is based on the previous motion to suppress.

D. Grounds for Appeal

A defendant may not assert on appeal a new theory for suppression that was not asserted at trial in superior court. *See State v. Benson*, 323 N.C. 318 (1988) (defendant may not "swap horses" on appeal); *State v. Hernandez*, ___ N.C. App. ___, 742 S.E.2d 825 (2013) (defendants failed to preserve challenge to vehicle stop based on stop being impermissibly extended where theory on appeal differed from theory argued at trial court, that is, that anonymous tip was insufficient to support stop); *State v. Smarr*, 146 N.C. App. 44 (2001) (to same effect). Thus, trial counsel should raise all possible grounds for suppressing evidence when making the motion. *See also State v. Phillips*, 151 N.C. App. 185 (2002) (State's abandonment of argument at trial level that defendant did not have standing waived appellate review of issue); *State v. Cooke*, 306 N.C. 132 (1982) (State may not assert on appeal ground against suppression that it did not assert at trial level).

MOTIONS TO SUPPRESS: STATEMENTS, PROPERTY AND IDENTIFICATION

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I. PROCEDURAL STATUTORY PROVISIONS PERTAINING TO MOTIONS TO SUPPRESS IN SUPERIOR COURT

§ 15A-972. Motion to suppress evidence before trial in superior court in general.

When an indictment has been returned or an information has been filed in the superior court, or a defendant has been bound over for trial in superior court, a defendant who is aggrieved may move to suppress evidence in accordance with the terms of this Article.

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.

(a) Upon timely motion, evidence must be suppressed if:

(1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or

(2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:

a. The importance of the particular interest violated;

b. The extent of the deviation from lawful conduct;

c. The extent to which the violation was willful;

d. The extent to which exclusion will tend to deter future violations of this Chapter.

Evidence shall not be suppressed under this subdivision if the person committing the violation of the provision or provisions under this Chapter acted under the objectively reasonable, good faith belief that the actions were lawful.

(b) The court, in making a determination whether or not evidence shall be suppressed under this section, shall make findings of fact and conclusions of law which shall be included in the record, pursuant to G.S. 15A-977(f).

§ 15A-975. Motion to suppress evidence in superior court prior to trial and during trial.

(a) In superior court, the defendant may move to suppress evidence only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under subsection (b) or (c).

(b) A motion to suppress may be made for the first time during trial when the State has failed to notify the defendant's counsel or, if he has none, the defendant, sooner than 20 working days before trial, of its intention to use the evidence, and the evidence is:

(1) Evidence of a statement made by a defendant;

(2) Evidence obtained by virtue of a search without a search warrant; or

(3) Evidence obtained as a result of search with a search warrant when the defendant was not present at the time of the execution of the search warrant.

(c) If, after a pretrial determination and denial of the motion, the judge is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, he may permit the defendant to renew the motion before the trial or, if not possible because of the time of discovery of alleged new facts, during trial.

When a misdemeanor is appealed by the defendant for trial de novo in superior court, the State need not give the notice required by this section.

§ 15A-976. Timing of pretrial suppression motion and hearing.

(a) A motion to suppress evidence in superior court may be made at any time prior to trial except as provided in subsection (b).

(b) If the State gives notice not later than 20 working days before trial of its intention to use evidence and if the evidence is of a type listed in G.S. 15A-975(b), the defendant may move to suppress the evidence only if its motion is made not later than 10 working days following receipt of the notice from the State.

(c) When the motion is made before trial, the judge in his discretion may hear the motion before trial, on the date set for arraignment, on the date set for trial before a jury is impaneled, or during trial. He may rule on the motion before trial or reserve judgment until trial. (1973, c. 1286, s. 1.)

§ 15A-977. Motion to suppress evidence in superior court; procedure.

(a) A motion to suppress evidence in superior court made before trial must be in writing and a copy of the motion must be served upon the State. The motion must state the grounds upon which it is made. The motion must be accompanied by an affidavit containing facts supporting the motion. The affidavit may be based upon personal

knowledge, or upon information and belief, if the source of the information and the basis for the belief are stated. The State may file an answer denying or admitting any of the allegations. A copy of the answer must be served on the defendant's counsel, or on the defendant if he has no counsel.

(b) The judge must summarily grant the motion to suppress evidence if:

(1) The motion complies with the requirements of subsection (a), it states grounds which require exclusion of the evidence, and the State concedes the truth of allegations of fact which support the motion; or

(2)The State stipulates that the evidence sought to be suppressed will not be offered in evidence in any criminal action or proceeding against the defendant.

(c) The judge may summarily deny the motion to suppress evidence if:

(1) The motion does not allege a legal basis for the motion; or

(2) The affidavit does not as a matter of law support the ground alleged.

(d) If the motion is not determined summarily the judge must make the determination after a hearing and finding of facts. Testimony at the hearing must be under oath.

(e) A motion to suppress made during trial may be made in writing or orally and may be determined in the same manner as when made before trial. The hearing, if held, must be out of the presence of the jury.

(f) The judge must set forth in the record his findings of facts and conclusions of law.

§ 15A-978. Motion to suppress evidence in superior court or district court; challenge of probable cause supporting search on grounds of truthfulness; when identity of informant must be disclosed.

(a) A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance. The defendant may contest the truthfulness of the testimony by cross-examination or by offering evidence. For the purposes of this section, truthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause.

(b) In any proceeding on a motion to suppress evidence pursuant to this section in which the truthfulness of the testimony presented to establish probable cause is contested and the testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, the defendant is entitled to be informed of the informant's identity unless:

(1) The evidence sought to be suppressed was seized by authority of a search warrant or incident to an arrest with warrant; or

(2) There is corroboration of the informant's existence independent of the testimony in question.

The provisions of subdivisions (b)(1) and (b)(2) do not apply to situations in which disclosure of an informant's identity is required by controlling constitutional decisions.

(c) This section does not limit the right of a defendant to contest the truthfulness of testimony offered in support of a search made without a warrant.

§ 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.

(a) Upon granting a motion to suppress evidence the judge must order that the evidence in question be excluded in the criminal action pending against the defendant. When the order is based upon the ground of an unlawful search and seizure and excludes tangible property unlawfully taken from the defendant's possession, and when the property is not contraband or otherwise subject to lawful retention by the State or another, the judge must order that the property be restored to the defendant at the conclusion of the trial including all appeals.

(b) An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty.

(c) An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case. The appeal is to the appellate court that would have jurisdiction if the defendant were found guilty of the charge and received the maximum punishment. If there are multiple charges affected by a motion to suppress, the ruling is appealable to the court with jurisdiction over the offense carrying the highest punishment.

(d) A motion to suppress evidence made pursuant to this Article is the exclusive method of challenging the admissibility of evidence upon the grounds specified in G.S. 15A-974.

§ 15A-980. Right to suppress use of certain prior convictions obtained in violation of right to counsel.

(a) A defendant has the right to suppress the use of a prior conviction that was obtained in violation of his right to counsel if its use by the State is to impeach the defendant or if its use will:

(1) Increase the degree of crime of which the defendant would be guilty; or

(2) Result in a sentence of imprisonment that otherwise would not be imposed; or

(3) Result in a lengthened sentence of imprisonment.

(b) A defendant who has grounds to suppress the use of a conviction in evidence at a trial or other proceeding as set forth in (a) must do so by motion made in accordance with the procedure in this Article. A defendant waives his right to suppress use of a prior conviction if he does not move to suppress it.

(c) When a defendant has moved to suppress use of a prior conviction under the terms of subsection (a), he has the burden of proving by the preponderance of the evidence that the conviction was obtained in violation of his right to counsel. To prevail, he must prove that at the time of the conviction he was indigent, had no counsel, and had not waived his right to counsel. If the defendant proves that a prior conviction was obtained in violation of his right to counsel, the judge must suppress use of the

conviction at trial or in any other proceeding if its use will contravene the provisions of subsection (a).

II. FREQUENT ISSUES INVOLVING POTENTIAL SUPPRESSION MOTIONS RELATED TO VEHICLES

Driving While Impaired charges always seem to gain a lot of attention during legislative sessions. As many of you may know, what starts off as a stop related to suspicion of impaired driving can lead to other charges. These charges often include felonious possession of drugs or various weapons offenses. It is always good to start your analysis with the stop.

DOES THE OFFICER HAVE A REASONABLE ARTICULABLE SUSPICION FOR THE STOP?

In *State v. Kochuk,* ____ NC ____ (2013) a trooper observed the Defendant's vehicle cross the dotted line into the right lane for three to four seconds. The Defendant later, rode on top of the white line for a few seconds on two occasions. The Defendant's motion to suppress based on the stop was granted and the State appealed.

Ultimately, the Supreme Court of North Carolina held that weaving within the lane can support reasonable suspicion for a stop if coupled with other factors. However, standing alone, weaving within the lane of traffic standing alone is not enough to stop a vehicle.

This case illustrates the importance of challenging stops that are based on driving that does not amount to a violation of a specific traffic law. Of course, it your client is charged with an unsafe movement, the unsafe movement in and of itself would create a valid basis for the stop. However, the litmus test is not the charge, but the relevant factors that led to the charge.

For example, failing to signal, would only give rise to a valid stop, if the failure to signal affected another vehicle. In *State v. Griffin*, ____ NC ____ (2013), two State Troopers were conducting a license checkpoint. The checkpoint was made visible by flashing blue lights. At some point, one of the troopers noticed a vehicle stop in the middle of the road as it was approaching the checkpoint. The vehicle made a maneuver akin to a three point turn so as to avoid the checkpoint. As a result of the vehicle's maneuver, one of the troopers stopped the vehicle before it could leave the area.

Upon approach of the vehicle, the trooper smelled an odor of alcohol coming from the driver. The driver was ultimately charged with driving while impaired. Defense counsel challenged the stop.

The Court of Appeals held that the checkpoint was unconstitutional but failed to address whether or not the trooper had reasonable suspicion for the stop. The State argued on appeal that regardless of the checkpoint, the trooper had reasonable suspicion.

A legal turn under certain circumstances can rise to the level of reasonable suspicion. However, this must be considered with the totality of the circumstances. This case is helpful in litigating a motion to suppress based on a stop without a traffic violation. Be mindful however, that this case could be argued conversely to support a stop without an articulable traffic violation if other factors exist.

State v. Brewington, ____ NC ____ (2013) was a case filled with potential suppression issues, although the record does not indicate whether some of the issues were litigated. In *Brewington*, the defendant was riding his bicycle at night without the proper lighting. The defendant was stopped and asked for identification. Furthermore, the officer asked the defendant for consent to search his person. Upon searching the defendant, the officer felt a hard rock like substance in his sock. The item was later found to be crack cocaine. As such, it was sent to the State Bureau of Investigations for testing.

The first suppression attack in this situation could have been whether or not the officer had a reason to frisk Mr. Brewington. In this case, Mr. Brewington conceivably consented to the search. However, it is important to note, that there is no automatic right to perform a protective pat down for weapons. *See State v. Rhyne,* 124 N.C. App. 84, 478 S.E.2d 789 (1996).

The next query would be whether the hard rock like object was readily believed to be crack cocaine. The Supreme Court of the United States held in *Minnesota v. Dickerson*, 508 US 366 (1993), when conducting a frisk, the removal of contraband must be based on plain feel that is sufficient for the officer to readily identify the object to be removed. *Id.*

This is an area where terse cross examination during a motion to suppress could prove to be most helpful. If you can get the officer to admit he had a hunch as to what the object was as opposed to it being "readily apparent", you have won the battle (if you have the right judge, at the right time, on the right day!!!!!

If the consent was coerced because of the show of authority, move to suppress anything after the consent. If the search was not based on consent, move to suppress based on a lack of showing for the necessity for the frisk.

Many cities with downtown bars are likely to see facts similar to those in *State v. Knudsen*, ____ NC App ____ (2013). The Defendant and his passenger were observed with Solo type cups in the downtown area of Winston-Salem. The officers noted that the type of cups possessed by one of the subjects was the same type of cup used at many of the local bars. One officer asked the other to ride by the vehicle on his bicycle in order to ascertain what was in the cup. Although this attempt was unsuccessful, the officers still had a conversation with the Defendant about the contents of the cup. The conversation was achieved by stopping the Defendant at the entrance of the parking deck as he and his friend exited the Defendant's car on foot.

The Courts' findings granting the Defendant's motion to suppress were supported by the evidence. The police did not have a reasonable suspicion to seize the Defendant in an attempt to determine what unknown substance was in his cup.

Obviously, generally there is no way to ascertain the contents of a cup without a closer examination. Remember, the analysis begins with the seizure of the person. Officers are not allowed to detain people to develop evidence. Further, drinking from a cup is not illegal. Unless, the officers can present facts indicating that they knew of the contents of your client's cup, move to suppress any evidence resulting from the unconstitutional seizure.

The case of *State v. Coleman*, ____ NC App ____ (2013)(Filed June 18, 2013) presents a factual scenario that often presents itself either in the form of a crime stoppers tip or an anonymous tip that gives rise to the initial encounter between the defendant and law enforcement. In *Coleman,* an anonymous tip was called in to police communications. The

tipster indicated that a vehicle was in a convenience store parking lot with a cup of beer. She also gave the license plate number of the car. The police communications operator was able to learn the identity of the caller. Later, an officer was dispatched to the scene. While at the scene, the officer found the vehicle that was described and waited until the Defendant came to the vehicle and proceeded to drive off. The officer immediately followed the vehicle and stopped it although he did not observe any traffic violations.

The Court held that an officer must have reasonable suspicion to stop an automobile. While an anonymous tip can provide reasonable suspicion to stop a vehicle, the tip must be reliable. Typically it is necessary that the officer be able to corroborate factors to make the tip reliable in its assertion of illegality. The tip should also generally identify the person who is engaged in illegal activity, as well as the tipster's basis of knowledge. The tip in the case at bar was insufficient to warrant a stop.

Filing a motion to suppress in a case like *Coleman* can give the practitioner several key advantages. First, you get to test the officer's testimony. So often, a law enforcement officer's report can be lacking in important detail that is favorable to your client. Secondly, you will be able to get a feel for the manner that the officer will testify if the case goes forward.

Arizona v. Gant, 556 U.S. 332 (2009), is a case that gave all defense practitioners hope that the police would no longer automatically search vehicles incident to arrest. North Carolina's first notable case after *Gant* is perplexing. In *State v. Mbacke*, ___ N.C. App. ___, ___ S.E.2d ___, 2011 WL 13814 (Jan. 4, 2011), the North Carolina Supreme Court, held that an officer's search of a vehicle was lawful based on the likelihood of finding other evidence relating to the arrest. Mr. Mbacke was found to be in possession of a concealed weapon, so the Court theorized

that it was reasonable for the officers to believe that there may be items related to the ownership of the gun, bullets or possibly a holster.

The analysis in *Mbacke*, is troubling. After all, what is the likelihood that a person with a weapon in their waistband has a holster? The crime of carrying a concealed weapon really needed no further exploration as the crime was completed when the weapon was found to be concealed on the person of Mr. Mbacke. The dissent in *Mbacke,* will hopefully change the thought process on the analysis of future cases regarding automobile searches incident to arrest.

III. SUPPRESSION ISSUES INVOLVING WARRANTLESS SEARCHES OF HOMES

As previously stated, the first question as to whether or not a suppression issue arises is to critically examine the seizure of persons or property. The recent case of *State v. Grice,* ___ NC ___ (2015)(Filed January 23, 2015), complicated a lot of previously settled issues. The Grice case dealt clearly with warrantless seizures of items within the curtilage of a home and privacy issues. The lower court was concerned that the police could approach a residence under the guise of a knock and talk just to gain access to the curtilage. The lower court seemed to give an implicit expectation of privacy within the curtilage of any residence. The North Carolina Supreme Court found that any item in plain view from a driveway that a member of the public or visitor might access, does not manifest an intent of privacy.

State v. Benters, ___ N.C. ___ (2014)(Filed December 19, 2014) affirmed the trial court's suppression of evidence based on a defective search warrant. Paramount in the *Benters* case,

was the discussion of what constitutes a confidential reliable informant as opposed to an anonymous tipster. The *Benter* case provides an excellent analysis of evidence versus conjecture. The police essentially attempted to rely on household gardening items along with blanket statements regarding the power usage at the suspected grow house. All of the conjecture attempted to establish probable cause through training and experience of the police. While the reviewing court gave its' usual deference to training and experience, it indicated that the States' case could not survive solely on an officer's training and experience.

Knock and talk jurisprudence was further clarified by the Supreme Court of the United States in *Florida v. Jardines*, ___ U.S. ___ (2013). This case stated that the police can go to the normal entrance of a home, briefly knock and wait momentarily for an answer. If no one answers within a brief time, the police must leave. Id.

Conversely to *Jardines*, an odd scenario presented itself in *State v. Gerald*, ____ NC App ____ (2013)(Filed May 7, 2013). Defendant and his girlfriend had a violent encounter. Both had different accounts of who the aggressor was and how each party received injuries. The uncontroverted facts reveal that a gun and a knife were involved at some juncture. Based on the forgoing, at some point, the girlfriend's brother and his wife entered the defendant's home with a deputy and began taking pictures and gathering evidence related to the case. While the deputy did not participate in the search, he stood by while the other two gathered the evidence.

At trial, the evidence gathered by the girlfriend's brother and sister-in-law was admitted without objection. The Deputy also testified about what he saw while he was inside the residence. The record was clear that no search warrant was issued prior to this evidence being gathered.

The defendant alleged ineffective assistance of counsel on appeal. Obviously, the suppression issue in this case should have been apparent. The case turned on credibility. The illegally seized evidence tended to support the girlfriend's sequence of events. If a motion to suppress this evidence had been made, it would have been allowed and the case of credibility would not have been as clear. The Court rejected the State's argument that defense counsel didn't object so that he could cross examine the deputy and possibly show his incompetence.

Another area involving warrantless searches arises for people on probation. Probationary searches are often the product of a judgment that allows for warrantless searches at reasonable times by the probation officer. *State v. Trivette*, 725 S.E.2d 472 (N.C. App. 2012) highlights that these searches do not have to be based on probable cause. However, the probation officer must be present at the time of the warrantless search and one could even read the language of this case to suggest that the probation officer must be in charge of the search if law enforcement is called in to assist.

Warrantless searches based on exigent circumstances must be limited to the exigency according to *State v. Woods*, 524 S.E.2d 363, 136 N.C. App. 386 (N.C. App. 2000). In *Woods*, officers were called to respond to a burglar alarm. Initially, they did a search in areas where people might be found. After that, they did a thorough search including the opening of cabinets and drawers. The Court of Appeals found that the motion to suppress the items made at trial regarding the items found during the warrantless search other than for people should have been granted. Furthermore, the court ruled that the warrant that was later obtained based on items found resulting from an unconstitutional warrantless search was invalid.

IV. EXAMINING OUT OF COURT IDENTICATIONS UNDER THE EYEWITNESS IDENTICATION REFORM ACT

§ 15A-284.52. Eyewitness identification reform.

(a) Definitions. - The following definitions apply in this Article:

(1) Eyewitness. - A person whose identification by sight of another person may be relevant in a criminal proceeding.

(2) Filler. - A person or a photograph of a person who is not suspected of an offense and is included in a lineup.

(3) Independent administrator. - A lineup administrator who is not participating in the investigation of the criminal offense and is unaware of which person in the lineup is the suspect.

(4) Lineup. - A photo lineup or live lineup.

(5) Lineup administrator. - The person who conducts a lineup.

(6) Live lineup. - A procedure in which a group of people is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.

(7) Photo lineup. - A procedure in which an array of photographs is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.

(b) Eyewitness Identification Procedures. - Lineups conducted by State, county, and other local law enforcement officers shall meet all of the following requirements:

(1) A lineup shall be conducted by an independent administrator or by an alternative method as provided by subsection (c) of this section.

(2) Individuals or photos shall be presented to witnesses sequentially, with each individual or photo presented to the witness separately, in a previously determined order, and removed after it is viewed before the next individual or photo is presented.

(3) Before a lineup, the eyewitness shall be instructed that:

a. The perpetrator might or might not be presented in the lineup,

b. The lineup administrator does not know the suspect's identity,

c. The eyewitness should not feel compelled to make an identification,

d. It is as important to exclude innocent persons as it is to identify the perpetrator, and

e. The investigation will continue whether or not an identification is made.

The eyewitness shall acknowledge the receipt of the instructions in writing. If the eyewitness refuses to sign, the lineup administrator shall note the refusal of the eyewitness to sign the acknowledgement and shall also sign the acknowledgement.

(4) In a photo lineup, the photograph of the suspect shall be contemporary and, to the extent practicable, shall resemble the suspect's appearance at the time of the offense.

(5) The lineup shall be composed so that the fillers generally resemble the eyewitness's description of the perpetrator, while ensuring that the suspect does not unduly stand out from the fillers. In addition:

a. All fillers selected shall resemble, as much as practicable, the eyewitness's description of the perpetrator in significant features, including any unique or unusual features.

b. At least five fillers shall be included in a photo lineup, in addition to the suspect.

c. At least five fillers shall be included in a live lineup, in addition to the suspect.

d. If the eyewitness has previously viewed a photo lineup or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the current suspect participates shall be different from the fillers used in any prior lineups.

(6) If there are multiple eyewitnesses, the suspect shall be placed in a different position in the lineup or photo array for each eyewitness.

(7) In a lineup, no writings or information concerning any previous arrest, indictment, or conviction of the suspect shall be visible or made known to the eyewitness.

(8) In a live lineup, any identifying actions, such as speech, gestures, or other movements, shall be performed by all lineup participants.

(9) In a live lineup, all lineup participants must be out of view of the eyewitness prior to the lineup.

(10) Only one suspect shall be included in a lineup.

(11) Nothing shall be said to the eyewitness regarding the suspect's position in the lineup or regarding anything that might influence the eyewitness's identification.

(12) The lineup administrator shall seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified in a given lineup is the perpetrator. The lineup administrator shall separate all witnesses in order to discourage witnesses from conferring with one another before or during the procedure. Each witness shall be given instructions regarding the identification procedures without other witnesses present.

(13) If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning the person before the lineup administrator obtains the eyewitness's confidence statement about the selection. There shall not be anyone present during the live lineup or photographic identification procedures who knows the suspect's identity, except the eyewitness and counsel as required by law.

(14) Unless it is not practical, a video record of live identification procedures shall be made. If a video record is not practical, the reasons shall be documented,

and an audio record shall be made. If neither a video nor audio record are practical, the reasons shall be documented, and the lineup administrator shall make a written record of the lineup.

(15) Whether video, audio, or in writing, the record shall include all of the following information:

a. All identification and nonidentification results obtained during the identification procedure, signed by the eyewitness, including the eyewitness's confidence statement. If the eyewitness refuses to sign, the lineup administrator shall note the refusal of the eyewitness to sign the results and shall also sign the notation.

b. The names of all persons present at the lineup.

c. The date, time, and location of the lineup.

d. The words used by the eyewitness in any identification, including words that describe the eyewitness's certainty of identification.

e. Whether it was a photo lineup or live lineup and how many photos or individuals were presented in the lineup.

f. The sources of all photographs or persons used.

g. In a photo lineup, the photographs themselves.

h. In a live lineup, a photo or other visual recording of the lineup that includes all persons who participated in the lineup.

(c) Alternative Methods for Identification if Independent Administrator Is Not Used. - In lieu of using an independent administrator, a photo lineup eyewitness identification procedure may be conducted using an alternative method specified and approved by the North Carolina Criminal Justice Education and Training Standards Commission. Any alternative method shall be carefully structured to achieve neutral administration and to prevent the administrator from knowing which photograph is being presented to the eyewitness during the identification procedure. Alternative methods may include any of the following:

(1) Automated computer programs that can automatically administer the photo lineup directly to an eyewitness and prevent the administrator from seeing which photo the witness is viewing until after the procedure is completed.

(2) A procedure in which photographs are placed in folders, randomly numbered, and shuffled and then presented to an eyewitness such that the administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed.

(3) Any other procedures that achieve neutral administration.

(d) Remedies. - All of the following shall be available as consequences of compliance or noncompliance with the requirements of this section:

(1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification.

(2) Failure to comply with any of the requirements of this section shall be admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible.

(3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.

The Eyewitness Identification Reform Act was recently argued in the case of *State v. Stowes*, 727 S.E.2d 351 (2013). In the *Stowes* case, a clear violation of the Eyewitness Identification Reform Act took place. The investigating officer was present during the photo lineup. As noted above in the statute, one of the requirements is that the investigating officer not be present at the time of the photo lineup.

The aforementioned case also emphasizes the importance of timely filing your suppression motions. The Court noted early in its opinion that the suppression motion was properly denied because the suppression motion was not timely filed. Fortunately, the Court still considered the trial court's actions regarding the violation of the Act.

Even with a properly filed suppression motion, the Court has specific remedies it can choose to apply for violations of the Act. In the case at bar, the Court chose the remedy of allowing defense counsel to argue that based on a violation of the act, the officer's actions could have resulted in a misidentification of the defendant as the perpetrator of the alleged crime. Further, the Court instructed the jury that they could consider whether the identification was credible and reliable.

On first glance, you might ponder as to the efficacy of filing a motion to suppress when the remedies for a violation may often fall short of the exclusion of evidence. However, there is a lot to be gained from having the Court give you the green light to argue a law enforcement officer's willingness to follow the rules. Essentially, you become equipped with the argument that the enforcer of the rules is a breaker of the rules.

V. SUPPRESSION OF STATEMENTS

By now, you all have had clients who were quick to inform you that the arresting officer failed to read them their rights at the time of arrest. Obviously, this is not a requirement in North Carolina unless the officer seeks to question your client while he or she is in custody. There are many cases that distinguish what constitutes a custodial interrogation and what does not. For purposes of this writing, I will not delve deeply into that arena. However, I would like for you to explore an issue that may be an alternative approach to suppressing your client's statements.

In *State v. Memije,* 737 S.E.2d 191 (N.C. App. 2013), defense counsel began by attacking the arrest. Counsel then moved on to attack the search of the car. Later, counsel moved to suppress the inculpatory statement as being fruit of the poisonous tree as it resulted from an unlawful arrest. The big take away from this case is that the fruit of the poisonous tree might be a more viable way to get statements suppressed although it didn't work for Mr. Memije.

A practice pointer is illustrated in the aforementioned case for preserving your suppression issue on appeal. You must object to the evidence, file your suppression motion, and appeal the judgment even if you have noted your exception to the ruling on the denial of your suppression motion.

Another issue that arises is when officers allege that a spontaneous statement was made by the defendant. It is important to be aware of any triggering statement that the officer may have made prior to the alleged spontaneous statement if your client is in custody. In *State v. Harris*, 431 S.E.2d 792, 111 N.C. App. 58 (N.C. App. 1993) a detention officer made a statement in response to the defendant's question as to why the detention officer said he was violent. The officer answered the defendant's question without asking him any questions. The defendant

made a statement and the Court suppressed the statement because he was not read his Miranda rights. This is a great case for suppressing statements made while in custody based an officer's comments that give rise to the defendant's statements.

VI. SEARCH OF CELL PHONES

A long awaited decision was rendered by the Supreme Court of the United States in June of 2014. In the case of *Riley v. California*, 573 U.S. ___ (2014), the Court unanimously held that officers cannot view information contained on a cell phone incident to arrest. This opinion was contrary with some of the previous opinions in the Fourth Circuit.

Previously, in United States v. Murphy, ___ F.3d ___ (4th Cir. 2009), the Fourth Circuit upheld the search of a cell phone incident to arrest. The Court's rationale was that information obtained on the cell phone might be lost during the time that it took the officers to obtain a warrant. Fortunately, as noted above, the Supreme Court of the United States did not discuss the potential loss or destruction of potential evidence as a basis to get around the warrant requirement.

VII. SEARCHES BASED ON THE SMELL OF MARIJUANA

More often than not, many officers are using the purported smell of marijuana as a basis for probable cause to perform searches of people, vehicles and homes. As many of you may surmise, this area of litigation can be tricky for the defendant. How can you effectively challenge whether the officer actually smelled marijuana? Obviously, simply proving that no marijuana was found will not help you overcome the State's evidence of the officer's testimony

that he smelled marijuana. However, you can attack the search resulting from the smell of marijuana.

When searching for any item of contraband, officers are generally limited to areas where the specific contraband to be found might be located. *State v. Johnson* 177 NC App. 122 (2006) has some excellent language regarding searches that exceed the reasonable scope of the consent.

In the *Johnson* case, the Court citing *United States v. Strickland*, 902 F.2d 937, 941 (11th Cir. 1990) stated in dicta that the scope of any search "is constrained by the bounds of reasonableness." Id. Also citing *Florida v. Jimeno*, 500 U.S. 248, 251 (1991), the Court noted, "the standard for measuring the scope of a suspect's consent under the Fourth Amendment is that the objective reasonableness-what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Id.

As the case goes further, the Court indicates Johnson nor the officer should have reasonably inferred that Johnson's consent anticipated physical damage to his vehicle. Therefore, even in a consent search for drugs, an officer should only search areas where it is reasonable to believe that drugs may be found. This would not include the destruction of property to find any such drugs.

VIII. FACT PATTERNS FOR RECOGNIZING POTENTIAL SUPPRESSION MOTIONS

SCENARIO 1

John is walking in a parking deck with a beer bottle in his hand. He is observed getting into his car and driving through the parking deck by a police

officer working the deck. The first officer radios to a police officer at the exit of the deck to stop the car.

John is asked for identification and tells the officer it is in his console. John is told not to open the console and ordered out of the car. The officer without asking for consent to search, opens the console and finds an ounce of cocaine. John is placed under arrest for trafficking in cocaine by possession and possessing an open container. The officer then completely searches John's car incident to arrest and finds a pound of marijuana in the trunk.

SCENARIO 2

Tabitha drives through a license checkpoint. The officer smells alcohol on her breath. She refuses all sobriety tests and is arrested for driving while impaired. The officer on the ride to the station says, "you don't have to cooperate but if you do I'll tell the magistrate you were cooperative and she will probably give you a written promise to appear." Tabitha then states, "I know I shouldn't have driven. I just broke up with my boyfriend and I was just trying to drown my sorrows."

SCENARIO 3

The police are on High Street in Denton, North Carolina which has a reputation for being a high crime area. Upon seeing three guys hanging out on the corner, the police suspect that they may be engaging in the street sale of narcotics.

The police approach the three guys and pat them down. One of the guys has what one officer describes as" feeling like a pill bottle" in his pocket. The officer states in his report that based on his training and experience, drug dealers often put crack rocks in pill bottles. He pulls the pill bottle out of the suspect's pocket and finds three rocks of crack cocaine.

SCENARIO 4

A policeman stops Kevin for speeding. After writing him a citation, the officer asks him why he was in such a hurry. He said he was on his way to the club. The cop then inquired if he had any weed on him. He said no. The cop asked for permission to pat him down for drugs. He consented. The officer didn't find anything but told him he needed him to drop his trousers and shake his shorts. Kevin complied and a bag of marijuana fell to the ground.

SCENARIO 5

Mary is sitting on her front porch on a nice summer day. She decides to smoke some of her best marijuana. The neighbor next door, smells the marijuana and calls the police. The police arrive and can see that Mary is smoking.

Allegedly, based on their training and experience they recognize the odor to be some extremely potent marijuana. They approach Mary on her porch and place her under arrest for possession of marijuana. When they get on the porch, they see a vacuum sealed bag of what appears to be marijuana next to Mary. They seize the bag. The bag is submitted to the SBI lab for testing and is in fact four hundred fifty-six (456) grams of marijuana.

PRESERVING THE RECORD

PRESERVING THE RECORD ON APPEAL

Originally Presented in 2001 and Updated in 2003 by
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I. INTRODUCTION:

- Our appellate courts are increasingly using "waiver" to avoid reaching the merits of defense challenges in criminal cases.
- While appellate attorneys can and do fail to preserve appellate issues, "waiver" most often begins at the trial level . . . . . .

II. BASIC PRESERVATION PRINCIPLES:

- **Express disagreement with what the trial court did (or did not do) and the complete grounds for that disagreement by objection, exception, motion, request, or otherwise**.
- Assert your position in a timely fashion.
- Assert your position in the form required by the applicable rule or statute.
- **Constitutionalize your position whenever possible by explicitly asserting both Federal and State constitutional grounds.**
- Re-assert your position every time the same or a substantially similar issue arises.
- Obtain a ruling on your request, motion, or objection. If the judge says he or she will rule "later," make sure that he or she does so.
- Make an offer of proof if your evidence is wrongly excluded.
- Case Note: In *State v. Canady*, 355 N.C. 242, 559 S.E.2d 762 (2002), the trial attorneys preserved a number of statutory and constitutional errors. While the individual errors may not have warranted a new trial, the Supreme Court held that, when "taken as a whole," the cumulative preserved errors "deprived defendant of his due process right to a fair trial." *Id.* at 254, 559 S.E.2d at 768. The Court's opinion in *Canady* demonstrates the benefit of lodging timely, specific, and frequent objections.

III. PRE-TRIAL:

A. Short-Form Indictments:

- N.C. Gen. Stat. §§ 15-144, 15-144.1, and 15-144.2 permit short-form indictments in first-degree murder, first-degree rape, and first-degree sexual offense cases. In all cases utilizing such a short-form indictment, as well as any cases where the indictment does not in fact set forth all elements of the offense, you should move to dismiss the indictment on the ground that it violates the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *See Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435 (2000). In capital cases, you should move to strike the death penalty from consideration because no aggravating factors are alleged in the indictment. *See Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002) (aggravating factors are elements of a capital offense and must be found by the jury).
- Make a motion for a bill of particulars asking the State to identify the degrees of the offense (*e.g.*, first-degree vs. second-degree) and the theories (*e.g.*, premeditation and deliberation vs. felony murder). If the judge denies the motion, the State cannot then argue on appeal that the defense attorney waived any opportunity to obtain adequate notice of the charge.
- In numerous cases, the Supreme Court of North Carolina has rejected the argument that short-form first-degree murder indictments that do not allege premeditation and deliberation violate *Apprendi*. The Supreme Court has also rejected a challenge to the failure of an indictment to allege aggravating factors in a capital case. *See State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (2003). Regardless of the Court's decisions, you should still preserve the issue for federal review.
- For preservation purposes, you should also move to dismiss under Article I, §§ 22 and 23 of the North Carolina Constitution. Argue two bases for the motion: (1) that the indictment does not give the trial court jurisdiction to try the defendant or to enter a judgment; and (2) that the indictment does not give the defendant adequate notice of the charge.

B. Miscellaneous:

- If your *ex parte* motion for expert assistance is denied, make sure you get the substance of your motion and the trial judge's order on the record.
- If you believe that your client's right to presence has been violated by an *ex parte* contact, find a way to have the record reflect that the contact occurred.

IV. GUILTY PLEAS:

- **The ONLY pretrial motion that you can preserve for appeal after a guilty plea is the denial of a motion to suppress.** N.C. Gen. Stat. § 15A-979(b); *State v. Smith*, --- N.C.

App. ---, 668 S.E.2d 612, 614, *disc. review denied*, No. 534P08, 2009 N.C. LEXIS 764 (N.C. August 27, 2009). **To preserve this error, you must notify the State and the trial court during plea negotiations of your intention to appeal the denial of the motion, or the right to do so is waived by the guilty plea.** *State v. Tew*, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990); *State v. Brown*, 142 N.C. App. 491, 492, 543 S.E.2d 192, 192 (2001). The best way to do this is to put it in writing.

V. COMPLETE RECORDATION:

- In criminal cases, the trial judge must require the court reporter to record all proceedings *except* non-capital jury selection, opening and closing statements to the jury, and legal arguments of the attorneys. *See* N.C. Gen. Stat. § 15A-1241(a).
- However, **you should move to have *everything* recorded under § 15A-1241(b)!!** Upon motion, the court reporter "must" record all proceedings. You should also ensure that the court reporter is actually present and recording at all stages of trial.
- If a bench conference is not recorded, ask the trial judge to reproduce it for the record and ensure that all of your objections are in the record.
- If something "non-verbal" happens at trial, ask to have the record reflect what happened.
  - ✓ *e.g.*: In *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), the trial attorneys should have asked to have the record reflect that the prosecutor pointed a gun at the only African American juror during closing arguments.
  - ✓ *e.g.*: If your client is shackled without the necessary hearing and factual findings required by N.C. Gen. Stat. § 15A-1031, and the jury saw the shackles, ask to have the record reflect that fact. Also describe for the record what type of restraint was being used.

VI. JURY SELECTION:

A. Preserving Your Right to Ask a Question on *Voir Dire*:

- *e.g.*: In a case involving an interracial crime, you want to ask prospective jurors questions about their views on interracial dating. However, the trial court sustains the State's objections to your questions.
- N.C. Gen. Stat. § 15-1212(9) provides that "[a] challenge for cause to an individual juror may be made by any party on the ground that the juror . . . [f]or any other cause is unable to render a fair and impartial verdict." This section allows a statutory challenge for cause based on juror bias and, thus, should give a defendant a statutory right to explore possible sources of bias.
- In addition, you should try to constitutionalize your right to ask the question. *See, e.g.*, *Turner v. Murray*, 476 U.S. 28, 90 L. Ed. 2d 27 (1986) (right to impartial jury under the Fifth, Sixth, and Fourteenth Amendments guarantees a capital defendant accused of

interracial crime the right to question prospective jurors about racial bias; violation of right requires death sentence to be vacated).

- To fully preserve any error based on curtailed defense questioning during *voir dire*, you should submit a written motion listing the questions you want to ask and obtain a ruling on the record. You also need to exhaust your peremptory challenges. *See State v. Fullwood*, 343 N.C. 725, 734-35, 472 S.E.2d 883, 888 (1996).

B. Preserving Your Denied Motion to Excuse for Cause:

- State clearly and completely the grounds for your challenge for cause. If the trial court denies your challenge, you *must* use a peremptory to excuse that juror unless you have already exhausted all peremptories.
- In addition, N.C. Gen. Stat. § 15A-1214(h) and (i) require that you then: **(1) exhaust all peremptories; (2) renew your challenge for cause; and (3) have your renewed challenge denied.** *See State v. Cunningham*, 333 N.C. 744, 429 S.E.2d 718 (1993) (ordering a new trial where defendant satisfied requirements of § 15A-1214(h)); *State v. Hightower*, 331 N.C. 636, 417 S.E.2d 237 (1992) (same). This procedure is mandatory and must be precisely followed or the error is waived on appeal. *State v. Garcell*, 363 N.C. 10, 678 S.E.2d 618 (2009).

C. *Batson* Error:

- **Establish the races of all prospective jurors for the record**: File a pre-trial motion asking the trial court to ensure that the races of prospective jurors are recorded by (1) the judge inquiring and making findings for the record, or (2) the judge requiring the parties to stipulate to jurors' races as selection proceeds. If the court will not permit any other way, ask each juror to put his or her race on the record orally or by questionnaire.
- **If you use juror questionnaires, move to have them admitted into evidence and made part of the record.** If the questionnaires are left in your possession, save them for the appellate attorney.
- Object every time the prosecutor excuses a juror for even arguably racial reasons. *See State v. Smith*, 351 N.C. 251, 524 S.E.2d 28 (2000). If you are prepared to make a *prima facie* showing, ask the trial court for an opportunity to present evidence. The court is required to honor this request. *See State v. Green*, 324 N.C. 238, 376 S.E.2d 727 (1989).
- If the trial court declines to find a *prima facie* case, object. If the court asks the prosecutor to offer race-neutral reasons, ask for an opportunity to rebut the prosecutor's showing.
- Remember that *Batson* applies to gender-based challenges as well!

VII. EVIDENTIARY RULINGS:

- If you do not make timely and proper objections at trial, erroneous evidentiary rulings will only be reviewed for "plain error" – an extremely difficult standard to meet. On

appeal, the defendant will have to show the error was so fundamental that it denied him a fair trial or had a probable impact on the jury's verdict. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

A. Objecting to the State's Evidence:

- Make timely objections. *See* N.C. Gen. Stat. § 15A-1446(a); N.C. Gen. Stat. § 8C-1, Rule 103(a)(1); N.C. R. App. P. 10(b)(1). If the prosecutor asks a question that you think is improper or may elicit improper testimony, enter a quick *general* objection. If the trial court invites you to argue the objection or rules against you, you should follow up by stating the *basis* for your objection.
  - ✓ **A defendant's general objection to the State's evidence is ineffective unless there is *no* proper purpose for which the evidence is admissible.** *See State v. Moseley*, 338 N.C. 1, 32, 449 S.E.2d 412, 431 (1994) (burden on defendant to show no proper purpose).
  - ✓ **If evidence is objectionable on more than one ground, *every* ground must be asserted at the trial level. Failure to assert a specific ground waives that ground on appeal.** *See State v. Moore*, 316 N.C. 328, 334, 341 S.E.2d 733, 737 (1986); N.C. R. App. P. 10(b)(1).
- If evidence is admissible for a limited purpose, object to its use for all other improper purposes and request a limiting instruction. *See State v. Stager*, 329 N.C. 278, 309-10, 406 S.E.2d 876, 894 (1991). Upon request, the trial court is required to restrict such evidence to its proper scope and to instruct the jury accordingly. *See* N.C. Gen. Stat. § 8C-1, Rule 105.
  - ✓ *e.g.*: If the trial court rules that hearsay statements are admissible for corroboration, ask the trial court to instruct the jury about the permissible uses of that evidence.
  - ✓ If there are portions of the statements that are non-corroborative, specify those portions and ask to have them excised.
  - ✓ If there are portions of the statements that are objectionable on other grounds (*e.g.*, inadmissible "other crimes" evidence), specify those portions and ask to have them excised.
- **When appropriate, constitutionalize your objections.** If a defendant wishes to claim error on appeal under the Federal Constitution as well as state law, the defendant must have raised the constitutional claim when the error occurred at trial. *See State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 222 (1994); *State v. Skipper*, 337 N.C. 1, 56, 446 S.E.2d 252, 283 (1994).
  - ✓ *e.g.*: If the trial court excludes your proffered evidence, do not object solely on state law relevance grounds. You should also cite your client's constitutional due process right to present evidence in his defense.
  - ✓ *e.g.*: If the State offers hearsay evidence, do not object solely on state law hearsay grounds. You should also cite the Confrontation Clause.

- Object to any attempts by the prosecutor to admit substantive or impeachment evidence about your client's post-*Miranda* exercise of his constitutional rights to remain silent and have an attorney present. *See Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976).
  - ✓ *e.g.*: If the State offers police testimony that your client refused to talk and asked for his attorney, object.
  - ✓ *e.g.*: If the State tries to cross-examine your client about his failure to tell certain facts to the police, object.

B. Moving to Strike the State's Evidence:

- If the prosecutor's question was not objectionable (or if your objection to a question is overruled and it later becomes apparent that the testimony is inadmissible) but the witness' *answer* was improper in form or substance, you must make a timely motion to strike that answer. *See State v. Grace*, 287 N.C. 243, 213 S.E.2d 717 (1975); *State v. Marine*, 135 N.C. App. 279, 285, 520 S.E.2d 65, 68 (1999).
- Similarly, if the trial judge sustains your objection but the witness answers anyway, you must make a timely motion to strike the answer. *See State v. Barton*, 335 N.C. 696, 709, 441 S.E.2d 295, 302 (1994); *State v. McAbee*, 120 N.C. App. 674, 685, 463 S.E.2d 281, 286 (1995).

C. Waiving Prior Objections:

- **If you make a motion *in limine* to exclude certain evidence but then fail to object when the evidence is actually offered and admitted at trial, the issue is *not* preserved for appeal.** *See State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (*per curiam*); *State v. Wynne*, 329 N.C. 507, 515, 406 S.E.2d 812, 815-16 (1991). Similarly, if your suppression motion is denied, you must renew that motion or object to the evidence when it is introduced at trial to preserve the error. *See State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000). **You must do this even if the trial judge specifically says you don't have to.** *State v. Goodman*, 149 N.C. App. 57, 66, 560 S.E.2d 196, 203 (2002), *rev'd in part on other grounds*, 357 N.C. 43, 577 S.E.2d 619 (2003).
- **Do NOT rely on N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) to preserve the issue!!!** Although the Legislature attempted to make things easier by amending Evidence Rule 103(a)(2) in 2003 to add a second sentence that states that once the trial court makes a definitive ruling admitting or excluding evidence, either at or before trial, there is no need to later renew the objection, do not rely on this rule. Rule 103(a)(2) has been held to be invalid because it conflicts with Appellate Rule 10(b)(1) which has been consistently interpreted to provide that an evidentiary ruling on a pretrial motion is not sufficient to preserve the issue for appeal unless the defendant renews the objection during trial. *See State v. Oglesby*, 361 N.C. 550, 648 S.E.2d 819 (2007).
- **If you initially object but then allow the same or similar evidence to be admitted later without objection, the issue is not preserved for appeal.** *See State v. Jolly*, 332 N.C. 351, 361, 420 S.E.2d 661, 667 (1992). Likewise, you waive appellate review if you fail to object at the time the testimony is first admitted, even if you object when the same

or similar evidence is later admitted. *See State v. Davis*, 353 N.C. 1, 19, 539 S.E.2d 243, 256 (2000). **Bottom line:** You must object each and every time the evidence is admitted.

- ❖ One way to deal with this problem is to enter a standing line objection to the evidence when it is offered at trial. *See* N.C. Gen. Stat. § 15A-1446(d)(9) & (10); *see also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 22, at 92 (Michie Co., 6th ed. 2004) (discussing waiver and the status of line objections in North Carolina).
  - ✓ To preserve a line objection, you must ask the trial court's permission to have a standing objection to a particular line of questions. *See, e.g., State v. Crawford*, 344 N.C. 65, 76, 472 S.E.2d 920, 927 (1996). In addition, you should clearly state your grounds for the standing objection. If the court denies your request, object to every question that is asked.
  - ✓ **You cannot make a line objection at the time you lose your motion to suppress or your motion *in limine*; you must object to the evidence at the time it is offered.** *See State v. Gray*, 137 N.C. App. 345, 348, 528 S.E.2d 46, 48 (2000).
  - ✓ If there are additional grounds for objection to a specific question within that line, you must interpose an objection on the additional ground.
    - *e.g.*: If you have a standing line objection based on relevance and a specific question in that line calls for hearsay, you need to interpose an additional hearsay objection.

D. Making an Offer of Proof:

- ❖ Evidence Rule 103(a)(2) provides that "[e]rror may not be predicated upon a ruling which . . . excludes evidence unless . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." N.C. Gen. Stat. § 15A-1446(a) provides that "when evidence is excluded a record must be made . . . in order to assert upon appeal error in the exclusion of that evidence."
- ❖ Thus, **if the trial court sustains the prosecutor's objection and precludes you from presenting evidence, making an argument, or asking a question, you must make an offer of proof.** For further discussion of this topic, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 18, at 70 (Michie Co., 6th ed. 2004).
- ❖ **You should make your offer of proof by actually filing the documentary exhibit or by eliciting testimony from the witness outside the presence of the jury.** It is not enough to rely on the context surrounding the question. *See State v. Williams*, 355 N.C. 501, 534, 565 S.E.2d 609, 629 (2002). Summarizing what the witness would have said also may not be sufficient. *See State v. Long*, 113 N.C. App. 765, 768-69, 440 S.E.2d 576, 578 (1994).
- ❖ If the court does not allow you to make an offer of proof, state: "Defendant wants the record to reflect that we have tried to make an offer of proof." Also state that the trial court's failure to allow you to do so violates the defendant's constitutional rights to confrontation, to present a defense, and, if applicable, to compulsory process. It is error

for the court to prohibit you from making an offer of proof. *State v. Silva*, 304 N.C. 122, 134-36, 282 S.E.2d 449, 457 (1981).

- ❖ If the court tells you to make your offer "later," the burden is on you to remember and to make sure that the offer is made.

VIII. MOTIONS TO DISMISS:

- ❖ Always move to dismiss at the close of the State's case. *See* N.C. Gen. Stat. 15-173; N.C. Gen. Stat. § 15A-1227.
- ❖ **Always renew your motion to dismiss at the close of all the evidence (even if you only introduce exhibits)**. The defendant is barred from raising insufficiency of the evidence on appeal if you fail to do so. *See* N.C. R. App. P. 10(b)(3); *see also State v. Stocks*, 319 N.C. 437, 355 S.E.2d 492 (1987) (appellate rule abrogates the contrary provision in N.C. Gen. Stat. § 15A-1446(d)(5)). Furthermore, the appellate courts will not even review the error using the "plain error" standard of review if the motion is not renewed. *See State v. Freeman*, 164 N.C. App. 673, 596 S.E.2d 319 (2004) (plain error analysis only applies to jury instructions and evidentiary matters in criminal cases).
- ❖ If you forget to renew your motion to dismiss at the close of all the evidence, after the verdict you should move to dismiss based on the insufficiency of the evidence or move to set aside the verdict as contrary to the weight of the evidence. *See* N.C. Gen. Stat. § 15A-1414(b). These motions are addressed to the discretion of the trial court and are reviewable on appeal under an abuse of discretion standard. *See State v. Fleming*, 350 N.C. 109, 512 S.E.2d 720 (1999); *State v. Batts*, 303 N.C. 155, 277 S.E.2d 385 (1981).

IX. CLOSING ARGUMENTS:

- ❖ Always object to improper arguments. Failure to timely object to the prosecutor's argument constitutes a waiver of the alleged error. In the absence of an objection, appellate courts will review the prosecutor's argument to determine "whether it was so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu* to correct the error." *State v. Taylor*, 337 N.C. 597, 447 S.E.2d 360 (1994). This is a much more stringent standard of review than is applied to preserved errors so it is critically important for appellate purposes to timely object to improper statements made by the prosecutor and to request curative instructions if the objection is sustained.

- ❖ If your objection is sustained, immediately ask the judge to instruct the jury to disregard the improper statements. You should also carefully consider whether further remedy is necessary or whether it would serve to draw further negative attention to the comments. If you decide that the prejudice resulting from a prosecutor's improper argument was severe and in need of further remedy, you may ask the judge to:
  - admonish the prosecutor to refrain from that line of argument;
  - require the prosecutor to retract the improper argument;
  - repeat the curative instruction during the jury charge; or

- grant a mistrial.

See State Jones, 355 N.C. 117, 129, 558 S.E.2d 97, 105 (2002) (it is incumbent on trial judge to vigilantly monitor closing arguments, "to intervene as warranted, to entertain objections, and to impose any remedies pertaining to those objections"); *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473, 153 S.E.2d 76 (1967) (listing several methods by which a trial judge, in his or her discretion, may correct an improper argument).

❖ The filing of a motion *in limine* regarding closing arguments is not sufficient, by itself, to preserve closing argument error. Appellate Rule 10(b)(1) requires that you actually obtain a ruling on the motion from the trial judge. *See State v. Daniels*, 337 N.C. 243, 275-76 n.1, 446 S.E.2d 298, 318 n.1 (1994). In addition, you should renew the motion or object during the prosecutor's closing argument.

❖ Object to any attempts by the prosecutor to argue in closing that your client's post-*Miranda* exercise of his constitutional rights to silence and counsel support an inference of guilt. *See Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976).

❖ The Supreme Court of North Carolina has displayed an increasing willingness to find reversible error due to improper closing arguments by prosecutors. Be vigilant to improper arguments and object!

X. JURY INSTRUCTIONS:

❖ Clearly and specifically object to erroneous jury instructions before the jury retires to deliberate. *See* N.C. R. App. P. 10(b)(2); *see also State v. Bennett*, 308 N.C. 530, 302 S.E.2d 786 (1983) (appellate rule abrogates the contrary provision in N.C. Gen. Stat. § 15A-1231(d)). If you do not object at trial, instructional errors will only be reviewed for plain error – an extremely difficult standard to meet. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

❖ **Submit all of your proposed jury instructions -- especially special instructions -- *in writing*.** *See* N.C. Gen. Stat. § 1-181; N.C. Gen. Stat.§ 15A-1231(a). Requested instructions that are refused then become a part of the record on appeal by statute. N.C. Gen. Stat. § 15A-1231(d). Then follow along on your copy as the judge instructs the jury. Judges very often make unintentional mistakes while instructing the jury.

❖ **Submit your proposed jury instructions as early as possible so the judge will have a chance to review them and make a ruling.** Parties may submit proposed jury instructions at the close of the evidence or at an earlier time if directed by the judge. N.C. Gen. Stat. § 15A-1231(a). Requests for special instructions must be submitted to the judge before the judge begins to give the jury charge. N.C. Gen. Stat. § 1-181(b); *see also* N.C. Gen. R. Prac. Super. & Dist. Ct. 21 (providing that "[i]f special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference"); *State v. Long*, 20 N.C. App. 91, 200 S.E.2d 825 (1973) (holding that a request for special instruction is not timely if it is tendered after the jury retires to deliberate). However, the judge may, in his or her discretion, consider requests for special instructions regardless of the time they are made. N. C. Gen. Stat. § 1-181(b).

XI. JURY DELIBERATIONS:

- Before consenting to the jury's request to take an exhibit into the jury room pursuant to N.C. Gen. Stat. § 15A-1233(b), carefully consider how the jury may use the exhibit during its deliberations and decide whether it would be in the defendant's best interest to consent. If the trial judge, without obtaining consent from all parties, sends an exhibit to the jury room that you believe is harmful to the defendant's case, object on the record in order to ensure preservation of the issue on appeal.
- Make sure that the timing of jury deliberations is made a part of the record. Lengthy or troubled jury deliberations are an extremely helpful way to show prejudice on appeal.
- Make sure that all jury notes and other communications between the judge and jury are made a part of the record.

XII. SENTENCING:

- **Do not stipulate as a matter of course to the prior record level worksheet or to the defendant's prior convictions, especially if they are out-of-state convictions.** The burden is on the prosecution to prove that the defendant's prior convictions exist. N.C. Gen. Stat. § 15A-1340.14(f). If they are out-of-state convictions, the State must prove they are substantially similar to North Carolina convictions or else they must be classified at the lowest punishment level (Class I for felonies, Class 3 for misdemeanors). N.C. Gen. Stat. § 15A-1340.14(e). If you stipulate (or fail to object when asked or agree in any way), the State does not have to prove anything. *See State v. Alexander*, 359 N.C. 824, 616 S.E.2d 914 (2005). The issue will most likely be preserved if you "take no position" but the safer position is to object (even if you do not wish to be heard).
- Errors that occur during sentencing are supposed to be automatically preserved for review. *See* N.C. Gen. Stat. § 15A-1446(d)(18); *State v. McQueen*, 181 N.C. App. 417, 639 S.E.2d 139 (2007), *appeal dismissed and disc. review denied*, 361 N.C. 365, 646 S.E.2d 535 (2007); *State v. Hargett*, 157 N.C. App. 90, 577 S.E.2d 703 (2003) (citing *State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991)). However, the Court of Appeals has also repeatedly found that a defendant waives appellate review of a sentencing error when he or she fails to object. *See, e.g.*, *State v. Black*, --- N.C. App. ---, 678 S.E.2d 689 (2009) (right to appellate review of constitutional issue was waived because defendant failed to raise it at the sentencing hearing); *State v. Kimble*, 141 N.C. App. 144, 539 S.E.2d 342 (2000) (issue regarding sufficiency of the evidence to support the finding of aggravating factors was not properly before the Court because defendant did not object during the sentencing hearing). To be safe, always object to errors that occur during the sentencing hearing.
- In response to the United States Supreme Court decision in *Blakely v. Washington*, our legislature substantially amended the Structured Sentencing Act. Session Law 2005-145, referred to as the *Blakely* bill, went into effect on June 30, 2005 and applies to prosecutions for all offenses committed on or after that date. It is prudent to preserve all *Blakely* issues just as you would preserve other issues during a trial. This includes

motions to dismiss for failure to prove an aggravating factor beyond a reasonable doubt, objections to evidence, and objections to erroneous jury instructions.

- Present evidence to support mitigating factors if the evidence was not presented at trial. *E.g.*, Have your client's mom testify about his support system in the community. If the mitigating factors are supported by documentary evidence, ask that the documents be entered into evidence.

New Felony Defender Training
Cosponsored by the UNC School of Government &
North Carolina Office of Indigent Defense Services
Chapel Hill / February 11-12, 2010

PRESERVING THE RECORD AND MAKING OBJECTIONS AT TRIAL:

A Win-Win Proposition for Client and Lawyer

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I. The Prime Directive For Preserving the Record and Making Objections at Trial

WHEN IN DOUBT -- OBJECT

A. This cannot be overstated. If you do not object, you have lost -- regardless of whether you are right or wrong about the issue. If you do object, two things can happen, and both of them leave your client in a better position than if you were silent:

1. The objection will be sustained. Whatever you were objecting to has been excluded, and some prejudice has been kept out of the trial. You have also seized the moral high ground for future objections, if the prosecutor violates the judge's ruling.

2. The objection will be overruled. This is not great, but at least you have preserved the issue so that on appeal or habeas, your client will have a chance for reversal. Almost as important, you have begun to educate the judge on the issue, which maximizes your chances of limiting the prosecution's ability to expand the prejudice later in the trial.

B. Many lawyers are afraid to make objections because they think the court may get angry at them for daring to object. There are two answers to this:

1. It is more important to preserve your client's right to appellate and habeas review than it is to have the court happy with you.

2. If a judge is going to get upset with you for objecting, he or she is probably the kind of judge who is already upset with your very existence as a defense lawyer. It's part of our job, so we have to learn to live with it.

MYTH ALERT #1 Objecting too much will make the jurors angry:

When I took trial advocacy courses in law school, I was advised not to object too much, because it will make the jury angry. This is nonsense for two reasons:

1. Jurors don't get angry because you are objecting. They get angry if you are behaving like a jerk when you object. Whining, eye-rolling and other stereotypical lawyer histrionics might offend a jury. Making your objection in an intelligent, calm, sincere and respectful-sounding way lets the jury know you are doing your job and care about your case.

2. The law professors who keep advising you not to object have never gone to jail because they were procedurally barred from raising a winning issue on habeas. Your client will.

II. How to Prepare For Objections and Record Preservation

MYTH ALERT #2: You can't prepare for trial objections. You just have to be very smart and very fast on your feet.

This is also nonsense. It was probably made up by a trial attorney who was invited to teach at an advocacy seminar, and wanted to convince the audience that he was smarter and faster than they were. Like every aspect of a trial, knowing your theory of defense, thinking about your case critically and doing your homework in advance will allow you to make effective objections even if you are really slow on your feet.

A. Know your theory of defense inside out. Go through the exercise of writing out your theory of defense paragraph. Know what story you are going to tell the jury that will convince them to return the verdict you want.

B. Then ask yourself four questions:

1. What evidence, arguments and general prejudice might the prosecutor come up with that will hurt my theory of defense?

2. What legal objections can I make to those tactics?

3. What evidence and arguments will the prosecutor offer in support of his or her theory of the case?

4. What legal objections can I make to the prosecutor's evidence and arguments?

C. Once you have answered these four questions, take the following steps:

1. Go to the law library and research the law on those objections.

2. If you find supportive law, make copies of the relevant cases or statutes. Bring them to court with you, and cite them if you make a motion in limine.

D. If appropriate, make a motion in limine, in writing and on the record, to obtain the evidentiary ruling you want before trial.

E. If a motion in limine is not appropriate, bring the copies of the law you have found with you to trial. This will guarantee that when you make the objection, you will be the only one in the courtroom who is able to cite directly relevant law.

MYTH ALERT #3: You have to choose between preserving the record, and following a good trial strategy.

Baloney. If you know your theory of defense, you will know whether an objection advances the theory or conflicts with it. Object when it advances your theory. Don't object if it conflicts with your theory. Just make sure you know the difference.

III. How to Make Objections

A. Whenever you anticipate a problem, consider making a motion in limine to head off the difficulty and get an advance ruling.

B. When you are unsure whether to object, DO IT. You have far less to lose if you have an objection overruled than if you allow the damaging evidence in without a fight.

C. Be unequivocal when you object, don't waffle.

1. RIGHT: I object.
   WRONG: Excuse, me you honor, but I think that may possibly be objectionable.

2. Don't ever let the judge bully you into withdrawing an objection. If the judge goes ballistic because you have made an objection, just make sure you get it all on the record -- including his ruling.

D. If the objection is sustained, ask for a remedy.

1. Mistrial.

2. Strike testimony.

3. Curative instruction.

E. If you realize that you have neglected to make an objection which you should have made:

1. DON'T PANIC -- but don't just forget about it.

2. Make a late objection on the record.

3. Ask for a remedy which the court can grant now.

a. Curative instruction/strike testimony.

b. Mistrial.

IV. If You Happen To Have A Capital Case, Remember To Make Objections On Non-Capital Issues

NOTE: This particularly important because in many jurisdictions death penalty law is so bad that if a reviewing court feels that an injustice is being done, you have to give the court a non-death penalty issue on which to peg its reversal.

A. If you are objecting to the admission of evidence, raise every possible ground:

EX: If you are objecting to admission of a photo array, don't just cite your state's equivalent of Wade. You may also wish to raise:

1. Suggestive behavior by police
2. Photo array unreliable based on nature of the witness
3. Right to counsel.
4. Fruit of an illegal arrest or other police misconduct.
5. Fruit of an illegally obtained statement

a. Coerced statement
b. Miranda
c. Right to counsel

6. The photo array is biased, based on the latest scientific research on photo arrays.

B. If you are relying on scientific or technical information as the basis for your objection, give the court a copy of the relevant articles in advance of the court proceeding. This not only helps your chances of winning the objection, but it educates the judge about the issue.

C. Prosecutorial Misconduct in Summation

1. In General

a. ***It is not impolite to interrupt opposing counsel's summation -- it is mandatory to preserve error and stop the prejudice.***

b. Be sure to ask for some remedy any time an objection is sustained to remarks in a prosecutor's closing argument.

1. Admonish the jury to ignore the statements.
2. Admonish the prosecutor not to do it again.
3. Mistrial.

2. Some common objections to prosecutorial summations.

a. Distorting or lessening the burden of proof.

b. Negative references to the defendant's exercise of a constitutional or statutory right.

1. Pre- and post- arrest silence.
2. Requests for counsel.
3. Not testifying at trial.

c. Religious or patriotic appeals -- particularly now that the government is asserting that everything it doesn't like (including your client) is tied to terrorism.

d. Appeals to sympathy, passion or sentiment.

e. Name-calling or other invective directed at either the defendant, defense counsel or the defense theory.

f. References to evidence that has been suppressed or not introduced.

g. Attacks on the defendant's character, when character has not been made an issue in the case.

D. Some Common Objections in the Evidentiary Portion of the Trial

1. Improper introduction of uncharged crimes or bad acts attributed to the defendant

2. The court improperly limited the defense right to cross-examine witnesses.

3. The court wrongfully permitted the prosecutor to cross-examine the defendant in a prejudicial manner or about improper subjects.

a. The defendant's pre- and post-arrest silence.

b. The defendant's request for a lawyer and consultation with counsel.

4. The prosecutor tried to have a police officer testify about the defendant's invocation of his right to silence or his request for a lawyer.

5. Improper use of expert testimony.

a. There was no need for an expert because a lay jury could understand the subject on its own.

b. The opinion evidence was given outside the area of the expert's expertise.

c. The expert is unqualified.

d. The expert's opinion is so far outside the mainstream of current thought as to be junk science. Make a Daubert challenge.

SENTENCING ADVOCACY

ART OF SENTENCING

Robert C. Kemp, III
Pitt County Public Defender
New Felony Defender Training
February 19, 2016

A judge is a man who ends a sentence with a sentence.

-Unknown

Guideline 8.1 Obligations of Counsel in Sentencing

1) Manage Client's Expectations
   a. Fully inform client of potential sentences. See *Strickland v. Washington*, 466 U.S. 668 (1984).
   b. Explain to client left/right limits of sentencing options.

2) Sell The Plea
   a. To the Prosecutor
   b. To the Client
   c. To the Judge

Guideline 8.2 Sentencing Options, Consequences, and Procedures

1) Know your options and its consequences, to include collateral consequences

Options:	Deferred prosecution, NCGS 90-96 sentencing, consolidation of charges, probation, split-sentence, incarceration, drug rehabilitation programs, drug court, and post-release supervision.
Consequences:	Loss of driver's license, deportation, violation of probation, no contact order, loss of certification/professional license, loss of the use of a firearm, loss of rights of citizenship, etc.

2) See Collateral Consequences Assessment Tool (C-CAT): http://ccat.sog.unc.edu/

3) Immigration Consequences:

a. See below hyperlinks:
http://www.nlada.org/Defender/Defender_Immigrants/Defender_Immigrants/Defender_Immigrants_Consequence

http://defendermanuals.sog.unc.edu/defender-manual/6

b. See *Padilla v. Kentucky*, 130 S.Ct. 1473 (2000) and *State v. Nkiam*, 778 S.E.2d 437 (N.C. Ct. App. 2015*), temp. stay allowed*, ___N.C.___ (Nov 23, 2015)

1) "Correct advice", if immigration consequences are clear.

4) Sex Offender Registration

a. Prof. Markham Chart (Oct. 15) (SOG)

http://nccriminallaw.sog.unc.edu/wp-content/uploads/2015/10/Sex-offender-flow-chart-Oct-2015.pdf

b. "Consequences of Conviction of Offenses Subject to Sex Offender Registration" (Revised Jan. 2016), Prof. John Rubin (SOG)

http://ccat.sog.unc.edu/sites/ccat.sog.unc.edu/files/Consequences%20of%20Conviction%20of%20Offenses%20Subject%20to%20Sex%20Offender%20Registration%20Jan.%202016.pdf

5) Capital Sentence Hearing

- What does ineffective Counsel look like? See *Porter v. McCollum*, 558 U.S. 30 (2009).

6) Review NCGS 15A-1334—The Sentencing Hearing

- Formal rules of evidence do not apply.

Guideline 8.3 Preparation for Sentencing

1) Gather helpful documents

a. Employment history: paychecks, attendance history, W-2 forms, letter from employer
b. Proof of education: transcript, class schedule, letter from registrar
c. Medical/mental health records
d. Any certifications and licenses
e. Any evaluation and treatment documents
f. Military documents
g. Client's financial documents

2) Determine who will be in court on behalf of your client.
   a. Parents, spouse, children, church official, doctor, etc.

3) Do you need a mitigation specialist?
   a. Serious cases (A, B1, B2 Felonies).
   b. Will the court grant you the funds to hire one?

4) Appearance of Client (You are an artist! Know your audience!)
   a. Haircut
   b. Clean Clothes
   c. Tie (if male)
   d. Belt
   e. Shoes/Socks (no flip-flops)
   f. No jewelry (except wedding ring), conservative earrings on females, tasteful religious symbol
   g. Hide Tattoos! (If possible)
   h. No gum
   i. Stay in courtroom unless official break
   j. No hands in pockets
   k. No cell phone
   l. No crossed arms
   m. "Dress like you are going to your Grandmother's funeral"

5) Will Client Address the Court?
   - Address the Court "Your Honor" or "Yes Ma'am/Sir".

6) Will anyone else address the Court?
   - Deviation from NCGS 15A-1334.

Guideline 8.4 The Sentencing Services Plan or Presentence Report

1) If your district provides such a service, this is a valuable option.
   a. Make a tactical decision on whether such a plan/report is prepared.
   b. If your client participates, ensure the plan/report is accurate and complete.
   c. If approved by the Court, IDS will authorize, and pay, a flat fee of $500 for defense requested sentencing plans.

Guideline 8.5 The Prosecution's Sentencing Position

1) Determine prosecutor's position on sentencing
   a. Agree to no jail, will not object to probationary sentence, consolidation of sentences, concurrent sentences, restitution issues, etc.

b. Factual Basis: minimum or no gruesome details [Remember: If a sentence is recommended, a Judge may change her mind and refuse plea deal. (NCGS 15A–1021, 1023)].

2) Restitution
   a. Agree to amount ahead of time (leverage).
   b. If no such agreement, judge shall determine whether Defendant pays. (NCGS 15A-1340.34).
   c. Amount of restitution must be supported by the record/evidence. (NCGS 15A-1340-36); See *State v. Hammonds*, 777 S.E.2d 359, (N.C. Ct. App. 2015).

   d. Examples:

      i. Bodily injuries—medical bills/income lost. [NCGS 15A-1340.35(a)(1)].
      ii. Real/personal property—value of the property on the date of the damage. [NCGS 15A-1340.35(a)(2)].
      iii. Death of individual—funeral expenses/medical bills/income lost. [NCGS 15A-1340.35(a)(4)].

   e. Court must take into account ability to pay. (NCGS 15A-1340.36).
   f. Prosecutor's unsworn statement or restitution worksheet not enough. See *State v. Smith*, 210 N.C. App. 439 (2011).

Guideline 8.6 The Defense Sentencing Theory

1) Mitigation Factors: (NCGS 15A-1340.16)

   a. Burden of Proof—on Defendant
      - Preponderance of the evidence

   b. Proven at sentencing hearing

   c. Must produce evidence in support

2) Aggravating Factors: (NCGS 15A-1340.16)

   a. Burden of Proof—on State
      - Beyond a reasonable doubt

   b. Must be admitted by Defendant or determined by a jury

3) Departing from the presumptive range is in the discretion of the court. (NCGS 15A-1340.13)

4) Recommended Sentence:
   a. Use the phrase: "I would respectfully request the Court to consider …..when fashioning a judgment."
   b. Use the phrase: "Would the Court consider……"

5) KNOW THE JUDGE!
   a. Her peculiarities;
   b. Her idiosyncrasies;
   c. Her typical judgments for certain offenses;
   d. Her willingness to predict sentence pre-plea; or
   e. Her "pet peeves"

6) Most of the time: CLEAR, CONCISE, CREDIBLE AND CONFIDENT
   a. Credibility can be lost in a sentencing hearing
      i. Do not guess
      ii. Do not embellish/exaggerate
      iii. No ridiculous points
   b. Do not get a reputation for coming to court unprepared. (Asking your client the answer to a judge's question IN COURT!)

7) Examples of theories (not necessarily good ones): one of the crowd; a pawn in the crime; substance abuse; spousal abuse; parent abuse, stupid mistake; youngest one involved; has taken responsibility and ready to pay for her deeds, financially destitute, etc.

8) Substantial Assistance [NCGS 90-95(h)(5)]
   - Have officer and ADA locked into the deal.

9) Extraordinary Mitigation [NCGS 15A1340.13(g)]—Good Luck
   - Do not ask for it without permission of your supervising attorney.

10) Advanced Supervised Release—if DA does not object. (NCGS 15A-1340.18).

11) Sex Offender Registration and Satellite-Based Monitoring
   a. Professor Markham Chart (Oct. 15) (SOG)
   b. Static-99
   c. Form AOC-CR-615 (Judicial Findings and Order for Sex Offenders)

12) Know your record level points
   a. Elements of present offense are included in any prior conviction. (NCGS 15A-1340.14(b)(6). See *State v. Eury*, ___N.C. App. ___, No. COA 15-15-709 (Feb. 2, 2106).
   b. Out of state conviction. See *State v. Sanders*, 367 N.C. 716 (2014).
      -"substantial similarity" test

13) Federal Charges and Court
- Trafficking of drugs, child pornography, illegal firearm possession
- Target Letter
- Proffer Agreement
- If you think your case may go Federal, talk to your supervising attorney.

Guideline 8.7 The Sentencing Process

1) Know the Basics of your case:

a. The facts of the case.
b. Client's background: born and raised, education, family life, work history
c. Forecast the future for your client if the Court gives your client a second chance.
d. What has the client done since being arrested?
e. Client must be present. *State v. Leaks*, 771 S.E.2d 795 (N.C. Ct. App. 2015), *disc. rev. denied*, 368 N.C. 285 (2015).

2) Weave your facts into your mitigation factors.

3) If a factual basis exists, court must accept plea arrangement with no sentencing Agreement. [NCGS 15A-1023(c)].

4) If court rejects plea deal with sentencing recommendations, defendant is entitled to a continuance. [NCGS 15A-1023(b)].

5) District Attorney may withdraw guilty plea at ANYTIME before the Court accepts it. See *State v. Collins*, 300 N.C. 142 (1980).

6) If your client has first been found incompetent to stand trial and then is rehabilitated, do not forget the competency hearing BEFORE you take the plea. (NCGS 15A-1006-7).

7) Verify jail credit with Clerk of Court. See new changes to jail credit (NCGS 15-196.1).

SENTENCING IN SUPERIOR COURT

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole					
B1 Max. Life w/o Parole	A 240–300 **192–240** 144–192	A 276–345 **221–276** 166–221	A 317–397 **254–317** 190–254	A 365–456 **292–365** 219–292	A Life w/o Parole **336–420** 252–336	A Life w/o Parole **386–483** 290–386
B2 Max. 484 (*532*)	A EM 157–196 **125–157** 94–125	A EM 180–225 **144–180** 108–144	A 207–258 **165–207** 124–165	A 238–297 **190–238** 143–190	A 273–342 **219–273** 164–219	A 314–393 **251–314** 189–251
C Max. 231 (*279*)	A EM 73–92 **58–73** 44–58	A EM 83–104 **67–83** 50–67	A 96–120 **77–96** 58–77	A 110–138 **88–110** 66–88	A 127–159 **101–127** 76–101	A 146–182 **117–146** 87–117
D Max. 204 (*252*)	A EM 64–80 **51–64** ASR 38–51	A EM 73–92 **59–73** ASR 44–59	A 84–105 **67–84** ASR 51–67	A 97–121 **78–97** 58–78	A 111–139 **89–111** 67–89	A 128–160 **103–128** 77–103
E Max. 88 (*136*)	I/A 25–31 **20–25** ASR 15–20	I/A 29–36 **23–29** ASR 17–23	A 33–41 **26–33** ASR 20–26	A 38–48 **30–38** ASR 23–30	A 44–55 **35–44** 26–35	A 50–63 **40–50** 30–40
F Max. 59	I/A 16–20 **13–16** ASR 10–13	I/A 19–23 **15–19** ASR 11–15	I/A 21–27 **17–21** ASR 13–17	A 25–31 **20–25** ASR 15–20	A 28–36 **23–28** ASR 17–23	A 33–41 **26–33** 20–26
G Max. 47	I/A 13–16 **10–13** ASR 8–10	I/A 14–18 **12–14** ASR 9–12	I/A 17–21 **13–17** ASR 10–13	I/A 19–24 **15–19** ASR 11–15	A 22–27 **17–22** ASR 13–17	A 25–31 **20–25** ASR 15–20
H Max. 39	C/I/A 6–8 **5–6** ASR 4–5	I/A 8–10 **6–8** ASR 4–6	I/A 10–12 **8–10** ASR 6–8	I/A 11–14 **9–11** ASR 7–9	I/A 15–19 **12–15** ASR 9–12	A 20–25 **16–20** ASR 12–16
I Max. 24	C 6–8 **4–6** 3–4	C/I 6–8 **4–6** 3–4	I 6–8 **5–6** 4–5	I/A 8–10 **6–8** 4–6	I/A 9–11 **7–9** 5–7	I/A 10–12 **8–10** 6–8

DISPOSITION
Aggravated
PRESUMPTIVE
Mitigated

Note: Numbers shown are in months. The number shown below each offense class reflects the maximum possible sentence for that class of offense (the highest maximum sentence from the aggravated range in prior record level VI). The maximum sentence for a defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

A—Active Punishment
I—Intermediate Punishment
C—Community Punishment

EM **Extraordinary Mitigation** (possible eligibility). *See* page 4.

ASR **Advanced Supervised Release** (possible eligibility). *See* page 5.

MAXIMUM SENTENCES

FOR OFFENSE CLASSES B1 THROUGH E *(Sex Crimes)*

15–30 *(78)*	56–80 *(128)*	97–129 *(177)*	138–178 *(226)*	179–227 *(275)*	220–276 *(324)*	261–326 *(374)*	302–375 *(423)*
16–32 *(80)*	57–81 *(129)*	98–130 *(178)*	139–179 *(227)*	180–228 *(276)*	221–278 *(326)*	262–327 *(375)*	303–376 *(424)*
17–33 *(81)*	58–82 *(130)*	99–131 *(179)*	140–180 *(228)*	181–230 *(278)*	222–279 *(327)*	263–328 *(376)*	304–377 *(425)*
18–34 *(82)*	59–83 *(131)*	100–132 *(180)*	141–182 *(230)*	182–231 *(279)*	223–280 *(328)*	264–329 *(377)*	305–378 *(426)*
19–35 *(83)*	60–84 *(132)*	101–134 *(182)*	142–183 *(231)*	183–232 *(280)*	224–281 *(329)*	265–330 *(378)*	306–380 *(428)*
20–36 *(84)*	61–86 *(134)*	102–135 *(183)*	143–184 *(232)*	184–233 *(281)*	225–282 *(330)*	266–332 *(380)*	307–381 *(429)*
21–38 *(86)*	62–87 *(135)*	103–136 *(184)*	144–185 *(233)*	185–234 *(282)*	226–284 *(332)*	267–333 *(381)*	308–382 *(430)*
22–39 *(87)*	63–88 *(136)*	104–137 *(185)*	145–186 *(234)*	186–236 *(284)*	227–285 *(333)*	268–334 *(382)*	309–383 *(431)*
23–40 *(88)*	64–89 *(137)*	105–138 *(186)*	146–188 *(236)*	187–237 *(285)*	228–286 *(334)*	269–335 *(383)*	310–384 *(432)*
24–41 *(89)*	65–90 *(138)*	106–140 *(188)*	147–189 *(237)*	188–238 *(286)*	229–287 *(335)*	270–336 *(384)*	311–386 *(434)*
25–42 *(90)*	66–92 *(140)*	107–141 *(189)*	148–190 *(238)*	189–239 *(287)*	230–288 *(336)*	271–338 *(386)*	312–387 *(435)*
26–44 *(92)*	67–93 *(141)*	108–142 *(190)*	149–191 *(239)*	190–240 *(288)*	231–290 *(338)*	272–339 *(387)*	313–388 *(436)*
27–45 *(93)*	68–94 *(142)*	109–143 *(191)*	150–192 *(240)*	191–242 *(290)*	232–291 *(339)*	273–340 *(388)*	314–389 *(437)*
28–46 *(94)*	69–95 *(143)*	110–144 *(192)*	151–194 *(242)*	192–243 *(291)*	233–292 *(340)*	274–341 *(389)*	315–390 *(438)*
29–47 *(95)*	70–96 *(144)*	111–146 *(194)*	152–195 *(243)*	193–244 *(292)*	234–293 *(341)*	275–342 *(390)*	316–392 *(440)*
30–48 *(96)*	71–98 *(146)*	112–147 *(195)*	153–196 *(244)*	194–245 *(293)*	235–294 *(342)*	276–344 *(392)*	317–393 *(441)*
31–50 *(98)*	72–99 *(147)*	113–148 *(196)*	154–197 *(245)*	195–246 *(294)*	236–296 *(344)*	277–345 *(393)*	318–394 *(442)*
32–51 *(99)*	73–100 *(148)*	114–149 *(197)*	155–198 *(246)*	196–248 *(296)*	237–297 *(345)*	278–346 *(394)*	319–395 *(443)*
33–52 *(100)*	74–101 *(149)*	115–150 *(198)*	156–200 *(248)*	197–249 *(297)*	238–298 *(346)*	279–347 *(395)*	320–396 *(444)*
34–53 *(101)*	75–102 *(150)*	116–152 *(200)*	157–201 *(249)*	198–250 *(298)*	239–299 *(347)*	280–348 *(396)*	321–398 *(446)*
35–54 *(102)*	76–104 *(152)*	117–153 *(201)*	158–202 *(250)*	199–251 *(299)*	240–300 *(348)*	281–350 *(398)*	322–399 *(447)*
36–56 *(104)*	77–105 *(153)*	118–154 *(202)*	159–203 *(251)*	200–252 *(300)*	241–302 *(350)*	282–351 *(399)*	323–400 *(448)*
37–57 *(105)*	78–106 *(154)*	119–155 *(203)*	160–204 *(252)*	201–254 *(302)*	242–303 *(351)*	283–352 *(400)*	324–401 *(449)*
38–58 *(106)*	79–107 *(155)*	120–156 *(204)*	161–206 *(254)*	202–255 *(303)*	243–304 *(352)*	284–353 *(401)*	325–402 *(450)*
39–59 *(107)*	80–108 *(156)*	121–158 *(206)*	162–207 *(255)*	203–256 *(304)*	244–305 *(353)*	285–354 *(402)*	326–404 *(452)*
40–60 *(108)*	81–110 *(158)*	122–159 *(207)*	163–208 *(256)*	204–257 *(305)*	245–306 *(354)*	286–356 *(404)*	327–405 *(453)*
41–62 *(110)*	82–111 *(159)*	123–160 *(208)*	164–209 *(257)*	205–258 *(306)*	246–308 *(356)*	287–357 *(405)*	328–406 *(454)*
42–63 *(111)*	83–112 *(160)*	124–161 *(209)*	165–210 *(258)*	206–260 *(308)*	247–309 *(357)*	288–358 *(406)*	329–407 *(455)*
43–64 *(112)*	84–113 *(161)*	125–162 *(210)*	166–212 *(260)*	207–261 *(309)*	248–310 *(358)*	289–359 *(407)*	330–408 *(456)*
44–65 *(113)*	85–114 *(162)*	126–164 *(212)*	167–213 *(261)*	208–262 *(310)*	249–311 *(359)*	290–360 *(408)*	331–410 *(458)*
45–66 *(114)*	86–116 *(164)*	127–165 *(213)*	168–214 *(262)*	209–263 *(311)*	250–312 *(360)*	291–362 *(410)*	332–411 *(459)*
46–68 *(116)*	87–117 *(165)*	128–166 *(214)*	169–215 *(263)*	210–264 *(312)*	251–314 *(362)*	292–363 *(411)*	333–412 *(460)*
47–69 *(117)*	88–118 *(166)*	129–167 *(215)*	170–216 *(264)*	211–266 *(314)*	252–315 *(363)*	293–364 *(412)*	334–413 *(461)*
48–70 *(118)*	89–119 *(167)*	130–168 *(216)*	171–218 *(266)*	212–267 *(315)*	253–316 *(364)*	294–365 *(413)*	335–414 *(462)*
49–71 *(119)*	90–120 *(168)*	131–170 *(218)*	172–219 *(267)*	213–268 *(316)*	254–317 *(365)*	295–366 *(414)*	336–416 *(464)*
50–72 *(120)*	91–122 *(170)*	132–171 *(219)*	173–220 *(268)*	214–269 *(317)*	255–318 *(366)*	296–368 *(416)*	337–417 *(465)*
51–74 *(122)*	92–123 *(171)*	133–172 *(220)*	174–221 *(269)*	215–270 *(318)*	256–320 *(368)*	297–369 *(417)*	338–418 *(466)*
52–75 *(123)*	93–124 *(172)*	134–173 *(221)*	175–222 *(270)*	216–272 *(320)*	257–321 *(369)*	298–370 *(418)*	339–419 *(467)*
53–76 *(124)*	94–125 *(173)*	135–174 *(222)*	176–224 *(272)*	217–273 *(321)*	258–322 *(370)*	299–371 *(419)*	
54–77 *(125)*	95–126 *(174)*	136–176 *(224)*	177–225 *(273)*	218–274 *(322)*	259–323 *(371)*	300–372 *(420)*	
55–78 *(126)*	96–128 *(176)*	137–177 *(225)*	178–226 *(274)*	219–275 *(323)*	260–324 *(372)*	301–374 *(422)*	

FOR OFFENSE CLASSES F THROUGH I

3–13	9–20	15–27	21–35	27–42	33–49	39–56	45–63
4–14	10–21	16–29	22–36	28–43	34–50	40–57	46–65
5–15	11–23	17–30	23–37	29–44	35–51	41–59	47–66
6–17	12–24	18–31	24–38	30–45	36–53	42–60	48–67
7–18	13–25	19–32	25–39	31–47	37–54	43–61	49–68
8–19	14–26	20–33	26–41	32–48	38–55	44–62	

The tables above show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).

Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses above. G.S. 15A-1340.17(f).

Step 1: Determine the Applicable Law

Choose the appropriate sentencing grid based on the defendant's date of offense.

- Offenses committed on or after October 1, 2013.
- Offenses committed December 1, 2011, through September 30, 2013.
- Offenses committed December 1, 2009, through November 30, 2011.
- Offenses committed December 1, 1995, through November 30, 2009.
- Offenses committed October 1, 1994, through November 30, 1995.

NOTES:

- *Grid applicability.* The defendant must be sentenced under the law that existed at the time of his or her offense. State v. Whitehead, 365 N.C. 444 (2012). Subsequent changes to the grid should not be retroactively applied. State v. Lee, 228 N.C. App. 324 (2013).
- *Range of offense dates.* If the precise offense date is unknown and the range of possible dates crosses an effective date threshold, use the law most favorable to the defendant. State v. Poston, 162 N.C. App. 642 (2004). If a continuing offense occurred over a range of dates, use the law in place when the offense was completed. State v. Mullaney, 129 N.C. App. 506 (1998).
- *Older offenses.* Offenses committed before October 1, 1994, are sentenced under the Fair Sentencing Act or other prior law.

Step 2: Determine the Offense Class

North Carolina felonies are assigned to one of ten offense classes—Class A through Class I, from most to least serious. Identify the offense class of the crime being sentenced. See APPENDIX A, Offense Class Table for Felonies.

OFFENSE CLASS REDUCTIONS

Unless otherwise provided by law, the following step-down rules apply for attempts, conspiracies, and solicitations to commit a felony and for other participants in crimes.

Principal Offense	A	B1	B2	C	D	E	F	G	H	I
Same classification as principal: Aiding and Abetting Accessory before the Fact (G.S. 14-5.2)	A	B1	B2	C	D	E	F	G	H	I
One classification lower: Attempt (G.S. 14-2.5) Conspiracy (G.S. 14-2.4)	B2	B2	C	D	E	F	G	H	I	Class 1 Misd.
Two classifications lower: Solicitation (G.S. 14-2.6) Accessory after the Fact (G.S. 14-7)	C	C	D	E	F	G	H	I	Class 1 Misd.	Class 2 Misd.

OFFENSE CLASS ENHANCEMENTS

With appropriate factual findings, the offense class of certain felonies may be increased under the enhancements set out below. Additional procedural requirements apply.

Habitual felon (G.S. 14-7.6)

Offenses committed before 12/1/2011	Enhance to Class C (unless already Class A, B1, or B2)
Offenses committed on/after 12/1/2011	Four-class enhancement, capped at Class C (unless already Class A, B1, or B2)

Habitual breaking and entering (G.S. 14-7.31)

Offenses committed on/after 12/1/2011	Enhance to Class E

Armed habitual felon (G.S. 14-7.41)

Offenses committed on/after 10/1/2013	Enhance to Class C, with 120-month mandatory minimum sentence

Bullet-proof vest enhancement (G.S. 15A-1340.16C)

Offenses committed on/after 12/1/1999	One-class enhancement

Protective order violation (G.S. 50B-4.1(d))

Offenses committed on/after 3/1/2002	One-class enhancement

Injury to pregnant woman (G.S. 14-18.2(b))

Repealed for offenses committed on/after 12/1/2011	One-class enhancement

Step 3: Calculate the Prior Record Level

The defendant is assigned to one of six prior record levels (I through VI) according to a point scale based on his or her criminal history.

POINTS FOR PRIOR CONVICTIONS

Class A	10
Class B1	9
Class B2, C, or D	6
Class E, F, or G	4
Class H or I	2
Qualifying misdemeanors (*Class A1 and 1 non-traffic misdemeanors*; *DWI, commercial DWI, and misdemeanor death by vehicle*)	1
If all elements of the present offense are included in a prior offense, whether or not the prior offense was used in determining the defendant's prior record level. A judicial finding is required; a defendant cannot validly stipulate to this point. G.S. 15A-1340.14(b)(6).	1
If the defendant is on supervised or unsupervised probation, parole, or post-release supervision, serving a sentence, or on escape at the time of the offense. The State must provide 30 days' written notice if it intends to seek this point and then must prove it like an aggravating factor if it is not admitted to. G.S. 15A-1340.14(b)(7); -1340.16(a5).	1

PRIOR RECORD LEVEL POINT SCALE

	Points	
Level	Offenses Committed before 12/1/2009	Offenses Committed on/after 12/1/2009
I	0	0–1
II	1–4	2–5
III	5–8	6–9
IV	9–14	10–13
V	15–18	14–17
VI	19+	18+

QUALIFYING PRIOR CONVICTIONS

COUNT:

- Only the most serious prior conviction from one calendar week of a single superior court. G.S. 15A-1340.14(d).
- Only one conviction from a single session of district court. G.S. 15A-1340.14(d).
- A prayer for judgment continued (PJC). State v. Canellas, 164 N.C. App. 775 (2004).
- A conviction resulting in G.S. 90-96 probation, if it has not yet been dismissed. State v. Hasty, 133 N.C. App. 563 (1999).
- Convictions in superior court, regardless of a pending appeal to the appellate division. G.S. 15A-1340.11(7).
- Qualifying convictions, regardless of when they arose (there is no statute of limitations). State v. Rich, 130 N.C. App. 113 (1998).
- Crimes from other jurisdictions, as described below.
- *For possession of firearm by felon*: The prior felony used to establish the person's status as a felon. State v. Best, 214 N.C. App. 39 (2011).
- *For failure to register as a sex offender:* The sex crime that caused the offender to register. State v. Harrison, 165 N.C. App. 332 (2004).

DO NOT COUNT:

- Class 2 and 3 misdemeanors.
- Misdemeanor traffic offenses other than DWI, commercial DWI, and misdemeanor death by vehicle.
- Infractions.
- Contempt. State v. Reaves, 142 N.C. App. 629 (2001).
- Juvenile adjudications.
- District court convictions on appeal or for which the time for appeal to superior court has not yet expired. G.S. 15A-1340.11(7).
- *For habitual felon*: Prior convictions used to establish habitual felon status. G.S. 14-7.6.
- *For habitual breaking and entering*: Prior convictions used to establish habitual breaking and entering status. G.S. 14-7.31.
- *For habitual DWI*: Prior misdemeanor DWI convictions used to support a habitual DWI charge. State v. Gentry, 135 N.C. App. 107 (1999).

NOTES:

- *Proof.* The State must prove a defendant's record by a preponderance of the evidence. Prior convictions are proved by stipulation, court or administrative records, or any other method found by the court to be reliable. For felony sentencing, the State must make all feasible efforts to obtain and present the defendant's full record. G.S. 15A-1340.14(f).
- *Out-of-state prior convictions.* By default, an out-of-state felony is treated as a Class I felony (2 points), and an out-of-state misdemeanor is treated as a Class 3 misdemeanor (0 points). If the State or defendant proves by a preponderance of the evidence that the out-of-state offense is *substantially similar* to a North Carolina crime, the prior out-of-state conviction may count for points like the similar North Carolina crime. A defendant may stipulate that a crime is a felony or misdemeanor in another state, but not to its substantial similarity, which is a question of law that must be determined by the judge. The judge must compare the elements of the out-of-state crime to the elements of the purportedly similar North Carolina crime. State v. Hanton, 175 N.C. App. 250 (2006).

- *Date of determination.* Prior record level is determined on the date a criminal judgment is entered, G.S. 15A-1340.11(7), and may include convictions for offenses that occurred after the offense now being sentenced, State v. Threadgill, 227 N.C. App. 175 (2013).
- *Prior offense classifications.* If the offense class of a prior conviction has changed over time, use the classification assigned to the prior conviction as of the offense date of the crime now being sentenced. G.S. 15A-1340.14(c).
- *Habitualized prior felonies.* Prior offenses that were sentenced under the habitual felon law count for points according to their original offense class, not the elevated habitual felon offense class. State v. Vaughn, 130 N.C. App. 456 (1998).
- *Ethical considerations.* The State and the defendant may not agree to intentionally underreport a defendant's record to the court. Council of the N.C. State Bar, 2003 Formal Ethics Op. 5. A defendant may not misrepresent his or her record but may remain silent on the issue, even during the presentation of an inaccurate record, provided he or she was not the source of the inaccuracy. 1998 Formal Ethics Op. 5.
- *Suppression.* The defendant may move to suppress a prior conviction obtained in violation of the right to counsel. G.S. 15A-980.

Step 4: Consider Aggravating and Mitigating Factors

With findings of aggravating or mitigating factors, the court may depart from the presumptive range of sentence durations.
See APPENDIX C, Aggravating Factors, *and* APPENDIX D, Mitigating Factors.

NOTES:

- *Notice.* The State must provide written notice of its intent to prove specific aggravating factors at least thirty days before trial or plea, unless the defendant waives the right to notice. G.S. 15A-1340.16(a6). (Use form AOC-CR-614.)
- *Pleading.* Statutory aggravating factors need not be pled. Non-statutory (ad hoc) factors must be pled by indictment or other instrument. G.S. 15A-1340.16(a4).
- *Proof.* Aggravating factors (except for factors 12a and 18a) must be proved to the jury beyond a reasonable doubt, unless admitted to. G.S. 15A-1340.16(a). Admitted aggravating factors must be pled to under G.S. 15A-1022.1; a mere stipulation is insufficient. The defendant bears the burden of proving mitigating factors to the judge by a preponderance of the evidence.
- *Jury procedure.* The jury impaneled for trial may in the same trial determine aggravating factors, unless the court determines that the interests of justice require a separate proceeding. A defendant may admit to aggravating factors but plead not guilty to the underlying felony. Conversely, a defendant may plead guilty to a felony but contest aggravating factors. G.S. 15A-1340.16. If aggravating factors are not addressed at the charge conference held before the guilt-innocence phase of the trial, the trial court must hold a separate charge conference before instructing the jury during the sentencing phase. G.S. 15A-1231; State v. Hill, 235 N.C. App. 166 (2014).
- *Prohibited aggravating factors.* Evidence necessary to prove an element of the offense may not be used to prove an aggravating factor. The same item of evidence may not be used to prove more than one aggravating factor. The defendant's exercise of the right to a jury trial is not an aggravating factor. G.S. 15A-1340.16.
- *Findings.* Written findings of aggravating and mitigating factors are required only when the court departs from the presumptive range. G.S. 15A-1430.16(c). (Use form AOC-CR-605.)
- *Uncontroverted mitigating factors.* If the court gives a sentence from the aggravated range, it must also make written findings of any presented mitigating factor supported by uncontroverted and manifestly credible evidence. State v. Wilkes, 225 N.C. App. 233 (2013).
- *Opportunity to prove.* The court must allow the defendant an opportunity to present evidence of mitigating factors. State v. Knott, 164 N.C. App. 212 (2004).
- *Weighing of factors.* Weighing aggravating and mitigating factors is a matter of judicial discretion and not a mathematical balance. State v. Vaughters, 219 N.C. App. 356 (2012) (no error to find that one aggravating factor outweighed nineteen mitigating factors).
- *Judge's discretion.* The trial court must consider evidence of aggravating and mitigating factors offered by the parties, State v. Kemp, 153 N.C. App. 231 (2002), but the decision to depart from the presumptive range is entirely within the court's discretion. The court may enter a presumptive sentence even after finding that mitigating factors outweigh aggravating factors. State v. Bivens, 155 N.C. App. 645 (2002).

Step 5: Select a Sentence of Imprisonment

The court imposes a sentence of imprisonment as part of every sentence, including probationary sentences. The court then determines (in Step 6) whether the defendant will be incarcerated for that term (Active punishment) or whether the sentence will be suspended and served only upon revocation of probation (Intermediate or Community punishment). The only exception to the requirement for the court to select a sentence of imprisonment is a sentence to a fine only, which is permissible as a Community punishment. G.S. 15A-1340.17(b).

MINIMUM SENTENCE (G.S. 15A-1340.17(c))

The court selects a minimum sentence from the desired range (presumptive, aggravated, or mitigated) of the appropriate cell of the sentencing grid. The range of permissible minimum sentences is set out on the left-hand page of each sentencing grid.

Firearm/Deadly Weapon Enhancement

If a defendant actually possessed and used, displayed, or threatened the use or display of a firearm or deadly weapon in committing a felony, the State may seek an enhancement of the minimum sentence as provided in G.S. 15A-1340.16A. The facts supporting the enhancement must be set out in the indictment or information charging the underlying felony. The enhancement may apply only to a defendant sentenced to Active punishment (see Step 6 below) and may not apply if the evidence necessary to prove the enhancement is needed to prove an element of the felony.

Offenses committed before 10/1/2013

Class B1–E Felonies	60-month enhancement

Offenses committed on or after 10/1/2013

Class B1–E felonies	72-month enhancement
Class F and G felonies	36-month enhancement
Class H and I felonies	12-month enhancement

MAXIMUM SENTENCE (G.S. 15A-1340.17(d)–(f))

The maximum sentence corresponding to each minimum sentence is displayed in the table on the right-hand page of each sentencing grid. Use the portion of the table applicable to the offense class being sentenced (Class F–I at the bottom; Class B1–E at the top), and the maximum in parentheses for Class B1–E felonies that require sex offender registration.

Step 6: Choose a Sentence Disposition

The court must choose a disposition for each sentence. There are three possible sentence dispositions under Structured Sentencing: Active, Intermediate, and Community. The letters shown in each grid cell (A, I, and/or C) indicate which dispositions are permissible in that cell.

EM

Extraordinary Mitigation

Although they fall in "A"-only grid cells, certain Class B2–D felons with fewer than 5 prior record points are eligible for Intermediate punishment if the court finds extraordinary mitigation under G.S. 15A-1340.13(g)–(h). (Use form AOC-CR-606.)

ACTIVE PUNISHMENT (G.S. 15A-1340.11(1))

An Active punishment requires that the defendant serve the imposed sentence of imprisonment in prison, in the custody of the Division of Adult Correction (DAC).

Post-Release Supervision (PRS) (G.S. 15A-1368.2)

All felonies committed on or after December 1, 2011, and sentenced to an Active punishment require post-release supervision (PRS). Defendants subject to PRS are automatically released from prison a certain number of months (indicated in the table below) before attaining their maximum sentence. The remaining term of imprisonment operates as a suspended sentence during a period of PRS, the length of which varies depending on the offense date, offense class, and whether or not the crime requires registration as a sex offender, as shown in the table below. The remaining imprisonment is subject to activation upon certain findings of violation by the Post-Release Supervision and Parole Commission. G.S. 15A-1368.3.

		Release to Post-Release Supervision (months before maximum)	Post-Release Supervision Period
Offenses Committed before 12/1/2011			
Class B1–E felonies	Nonreportable crimes	9 months	9 months
	Reportable sex crimes	9 months	60 months
Class F–I felonies	All crimes	N/A (no PRS)	N/A (no PRS)
Offenses Committed on/after 12/1/2011			
Class B1–E felonies	Nonreportable crimes	12 months	12 months
	Reportable sex crimes	60 months	60 months
Class F–I felonies	Nonreportable crimes	9 months	9 months
	Reportable sex crimes	9 months	60 months

ASR

Advanced Supervised Release (ASR) (G.S. 15A-1340.18)

If the prosecutor does not object, the sentencing judge may, when imposing an Active sentence, also order some defendants into the Advanced Supervised Release (ASR) program. Defendants ordered to ASR who complete "risk reduction incentives" in prison are released onto post-release supervision on their ASR date. Defendants who do not complete the ASR program are released according to their regular sentence.

ELIGIBLE GRID CELLS:

- Class D, Prior Record Levels I–III
- Class E, Prior Record Levels I–IV
- Class F, Prior Record Levels I–V
- All Class G and H felonies

ASR DATE:

- Presumptive or Aggravated sentences: The ASR date is the lowest permissible minimum sentence in the mitigated range for the defendant's offense class and prior record level.
- Mitigated sentences: The ASR date is 80 percent of the imposed minimum sentence.

INTERMEDIATE PUNISHMENT (G.S. 15A-1340.11(6))

Intermediate punishment requires that the court suspend the sentence of imprisonment and impose SUPERVISED probation.

See PROBATIONARY SENTENCES, PAGE 16

COMMUNITY PUNISHMENT (G.S. 15A-1340.11(2))

Community punishment requires that the court suspend the sentence of imprisonment and impose SUPERVISED or UNSUPERVISED probation. A Community punishment also may consist of a fine only.

Step 7: Review Additional Issues, as Appropriate

The section of this handbook on "Additional Issues" includes information on the following matters that may arise at sentencing:

- Fines, costs, and other fees
- Restitution
- Sex crimes
- Sentencing multiple convictions
- Jail credit
- Sentence reduction credits
- DNA sample
- Deferrals (deferred prosecution, prayer for judgment continued (PJC), and conditional discharge)
- Work release
- Purposes of sentencing
- Obtaining additional information for sentencing

See ADDITIONAL ISSUES, PAGE 11

DRUG TRAFFICKING SENTENCING (G.S. 90-95(h))

Drug trafficking is not sentenced using the regular Structured Sentencing grid. Instead, a person convicted of drug trafficking must be sentenced as set out below, including the mandatory fine, regardless of his or her prior criminal record.

CONSECUTIVE SENTENCES

Trafficking sentences must run consecutively with any other sentence being served by the defendant. G.S. 90-95(h)(6). However, when a trafficking offense is disposed of in the same proceeding as another conviction, the court may impose concurrent or consolidated sentences. State v. Walston, 193 N.C. App. 134, 141–42 (2008).

CONSPIRACY TO COMMIT TRAFFICKING

Conspiracies to commit trafficking offenses are punishable the same as the target offense. G.S. 90-95(i).

ATTEMPTED TRAFFICKING

Attempts to commit trafficking are the same *offense class* as the completed offense, but they are sentenced under the ordinary Structured Sentencing grid for that class of offense and prior record level, not the special mandatory sentences for completed trafficking offenses. G.S. 90-98.

SUBSTANTIAL ASSISTANCE

The judge sentencing a defendant for trafficking *may* reduce the fine, impose a prison term less than the applicable minimum, or suspend the prison term and place the defendant on probation when the defendant has provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals. The sentencing judge must enter in the record a finding that the defendant has rendered such substantial assistance. G.S. 90-95(h)(5). The assistance offered need not be limited to accomplices, etc., involved in the defendant's individual case; the court is permitted to consider the defendant's assistance in the prosecution of other cases. State v. Baldwin, 66 N.C. App. 156, 158 (1984). The determination of whether or not the defendant has provided substantial assistance is within the discretion of the trial court. State v. Hamad, 92 N.C. App. 282, 289 (1988). Even when the court finds substantial assistance, the decision to reduce the defendant's sentence is in the court's discretion. State v. Wells, 104 N.C. App. 274, 276–77 (1991).

When substantial assistance applies, the court may select a minimum sentence of its choosing; it is not bound by the regular sentencing grid. State v. Saunders, 131 N.C. App. 551, 553 (1998). The court should order the maximum sentence that corresponds to the selected minimum sentence, based on the defendant's offense class and offense date.

MINIMUM–MAXIMUM SENTENCES FOR DRUG TRAFFICKING CRIMES, BY OFFENSE CLASS

Offense Committed before 12/1/2012

Class	Minimum	Maximum
Class C	225 mos.	279
Class D	175	219
Class E	90	117
Class F	70	84
Class G	35	42
Class H	25	30

Committed on/after 12/1/2012

Class	Minimum	Maximum
Class C	225 mos.	282
Class D	175	222
Class E	90	120
Class F	70	93
Class G	35	51
Class H	25	39

Drug	Amount	Class	Fine (not less than)
Marijuana	In excess of 10 lbs.–49 lbs.	Class H	$ 5,000
	50–1,999 lbs.	Class G	$ 25,000
	2,000–9,999	Class F	$ 50,000
	10,000 or more	Class D	$200,000
Methaqualone	1,000–4,999 dosage units	Class G	$ 25,000
	5,000–9,999	Class F	$ 50,000
	10,000 or more	Class D	$200,000
Cocaine	28–199 grams	Class G	$ 50,000
	200–399	Class F	$100,000
	400 or more	Class D	$250,000
Methamphetamine	28–199 grams	Class F	$ 50,000
	200–399	Class E	$100,000
	400 or more	Class C	$250,000
Amphetamine	28–199 grams	Class H	$ 5,000
	200–399	Class G	$ 25,000
	400 or more	Class E	$100,000
Opium or Heroin	4–13 grams	Class F	$ 50,000
	14–27	Class E	$100,000
	28 or more	Class C	$500,000

Drug	Amount	Class	Fine (not less than)
LSD	100–499 units	Class G	$ 25,000
	500–999	Class F	$ 50,000
	1,000 or more	Class D	$200,000
MDA/MDMA	100–499 units/28–199 grams	Class G	$ 25,000
	500–999 units/200–399 grams	Class F	$ 50,000
	1,000 units/400 grams or more	Class D	$250,000
MDPV*	28–199 grams	Class F	$ 50,000
	200–399	Class E	$100,000
	400 or more	Class C	$250,000
Mephedrone*	28–199 grams	Class F	$ 50,000
	200–399	Class E	$100,000
	400 or more	Class C	$250,000
Synthetic Cannabinoids*	In excess of 50–249 dosage units**	Class H	$ 5,000
	250–1,249	Class G	$ 25,000
	1,250–3,749	Class F	$ 50,000
	3,750 or more	Class D	$200,000

**A "dosage unit" is 3 grams of synthetic cannabinoid or any mixture containing such substance.

* Offenses committed on or after June 1, 2011. S.L. 2011-12.

APPENDIX F: CRIMES REQUIRING SEX OFFENDER REGISTRATION (G.S. 14-208.6)

Sexually Violent Offenses (G.S. 14-208.6(5))

First-Degree Forcible Rape (G.S. 14-27.21)	Committed on/after 12/1/2015
Second-Degree Forcible Rape (G.S. 14-27.22)	Committed on/after 12/1/2015
Statutory Rape of a Child by an Adult (G.S. 14-27.23)	Committed on/after 12/1/2015
Statutory Rape of Person ≤ 15yo/D 6+ Years Older (G.S. 14-27.25(a))	Committed on/after 12/1/2015
First-Degree Forcible Sexual Offense (G.S. 14-27.26)	Committed on/after 12/1/2015
Second-Degree Forcible Sexual Offense (G.S. 14-27.27)	Committed on/after 12/1/2015
Statutory Sexual Offense with a Child by an Adult (G.S. 14-27.28)	Committed on/after 12/1/2015
First-Degree Statutory Sexual Offense (G.S. 14-27.29)	Committed on/after 12/1/2015
Statutory Sexual Offense with Person ≤ 15yo/D 6+ Years Older (G.S. 14-27.30(a))	Committed on/after 12/1/2015
Sexual Activity by a Substitute Parent or Custodian (G.S. 14-27.31)	Committed on/after 12/1/2015
Sexual Activity with a Student (G.S. 14-27.32)	Committed on/after 12/1/2015
Sexual Battery (G.S. 14-27.33)	Committed on/after 12/1/2015
Human Trafficking (*Only if Victim < 18 or for Sex Servitude*) (G.S. 14-43.11)	Committed on/after 12/1/2013
Sexual Servitude (G.S. 14-43.13)	Committed on/after 12/1/2006
Incest between Near Relatives (G.S. 14-178)	Convicted/released from prison on/after 1/1/1996
Employ Minor in Offense/Public Morality (G.S. 14-190.6)	Convicted/released from prison on/after 1/1/1996
Felony Indecent Exposure (G.S. 14-190.9(a1))	Committed on/after 12/1/2005
First-Degree Sexual Exploitation of Minor (G.S. 14-190.16)	Convicted/released from prison on/after 1/1/1996
Second-Degree Sexual Exploitation of Minor (G.S. 14-190.17)	Convicted/released from prison on/after 1/1/1996
Third-Degree Sexual Exploitation of Minor (G.S. 14-190.17A)	Convicted/released from prison on/after 1/1/1996
Taking Indecent Liberties with Children (G.S. 14-202.1)	Convicted/released from prison on/after 1/1/1996
Solicitation of Child by Computer (G.S. 14-202.3)	Committed on/after 12/1/2005
Taking Indecent Liberties with a Student (G.S. 14-202.4(a))	Convicted/released from prison on/after 12/1/2009
Patronizing Minor/Mentally Disabled Prostitute (G.S. 14-205.2(c)–(d))	Committed on/after 10/1/2013
Prostitution of Minor/Mentally Disabled Child (G.S. 14-205.3(b))	Committed on/after 10/1/2013
Parent/Caretaker Prostitution (G.S. 14-318.4(a1))	Convicted/released from prison on/after 12/1/2008
Parent/Guardian Commit/Allow Sexual Act (G.S. 14-318.4(a2))	Convicted/released from prison on/after 12/1/2008
Former First-Degree Rape (G.S. 14-27.2)	Convicted/released from prison on/after 1/1/1996
Former Rape of a Child by an Adult Offender (G.S. 14-27.2A)	Committed on/after 12/1/2008
Former Second-Degree Rape (G.S. 14-27.3)	Convicted/released from prison on/after 1/1/1996
Former First-Degree Sexual Offense (G.S. 14-27.4)	Convicted/released from prison on/after 1/1/1996
Former Sexual Offense with a Child by an Adult Offender (G.S. 14-27.4A)	Committed on/after 12/1/2008
Former Second-Degree Sexual Offense (G.S. 14-27.5)	Convicted/released from prison on/after 1/1/1996
Former Sexual Battery (G.S. 14-27.5A)	Committed on/after 12/1/2005
Former Attempted Rape/Sexual Offense (G.S. 14-27.6)	Convicted/released from prison on/after 1/1/1996
Former Intercourse/Sexual Offense w/Certain Victims (G.S. 14-27.7)	Convicted/released from prison on/after 1/1/1996
Former Statutory Rape/Sexual Offense (13–15yo/D 6+ Years Older) (G.S. 14-27.7A(a))	Committed on/after 12/1/2006
Former Promoting Prostitution of Minor (G.S. 14-190.18)	Convicted/released from prison on/after 1/1/1996
Former Participating in Prostitution of Minor (G.S. 14-190.19)	Convicted/released from prison on/after 1/1/1996

Offenses Against a Minor (G.S. 14-208.6(1m))—Reportable Only When Victim Is a Minor and the Offender Is Not the Minor's Parent

Kidnapping (G.S. 14-39)	Committed on/after 4/1/1998 (at a minimum)
Abduction of Children (G.S. 14-41)	Committed on/after 4/1/1998 (at a minimum)
Felonious Restraint (G.S. 14-43.3)	Committed on/after 4/1/1998 (at a minimum)

Peeping Crimes (G.S. 14-208.6(4)d.)—Reportable Only if the Court Decides That Registration Furthers Purposes of the Registry and That the Offender is a Danger to Community

Felony Peeping under G.S. 14-202(d), (e), (f), (g), or (h)	Committed on/after 12/1/2003
or Second/Subsequent Conviction of:	
Misdemeanor Peeping under G.S. 14-202(a) or (c)	Committed on/after 12/1/2003
Misdemeanor Peeping w/Mirror/Device under G.S. 14-202(a1)	Committed on/after 12/1/2004

Sale of a Child (G.S. 14-208.6(4)e.). Reportable only if the sentencing court rules under G.S. 14-43.14(e) that the person is a danger to the community and required to register. (*Offenses committed on/after 12/1/2012.*)

Attempt. Final convictions for attempts to commit an "offense against a minor" or a "sexually violent offense" are reportable. G.S. 14-208.6(4)a. (*Offenses committed on/after 4/1/1998*, at a minimum, unless target offense has later effective date.)

Conspiracy/Solicitation. Conspiracy and solicitation to commit an "offense against a minor" or a "sexually violent offense" are reportable. G.S. 14-208.6(1m); -208.6(5). (*Offenses committed on/after 12/1/1999*, unless underlying offense has a later effective date.)

Aiding and Abetting. Aiding and abetting an "offense against a minor" or "sexually violent offense" is reportable only if the court finds that registration furthers the purposes of the registry (set out in G.S. 14-208.5). G.S. 14-208.6(4)a. (*Offenses committed on/after 12/1/1999*, unless underlying offense has a later effective date.)