

Confidential Informants in North Carolina

Discovery, Audio/Video Recordings, and Motions to Reveal Identity

Daniel Spiegel

CONTENTS

- I. *Roviaro v. United States* ... 2
- II. **Applicable Statutes** ... 4
 - G.S. 15A-903: Open-File Discovery ... 4
 - G.S. 15A-904(a1): Exception for Identity of CI ... 5
 - G.S. 15A-908: Protective Orders ... 5
 - G.S. 15A-978: When the CI's Identity Must Be Revealed for a Motion to Suppress ... 6
- III. **How to Handle CI Video** ... 6
 - Four Options ... 6
 - (1) *Blurring Out* ... 6
 - (2) *Redaction* ... 7
 - (3) *Muting* ... 7
 - (4) *Entering a Protective Order* ... 7
 - Two Common Types of Video: Main Events and Lead-Up Buys ... 8
 - Main Events* ... 8
 - Lead-Up Buys* ... 9
- IV. **How Other Jurisdictions Are Handling CI Video** ... 10
 - United States v. Loden* (Eastern District of Tennessee): A Blend of Main-Event and Lead-Up Activity ... 10
 - Beville v. State* (Indiana): An Attempt to Limit Disclosure of Video to Defense Counsel Only ... 11
 - State v. Williams* (Florida) and *United States v. DeAraujo* (District of Massachusetts): Can Turning Over Video Substitute for Revealing the CI's Identity? ... 12
- V. **Assertion of the Defense Theory** ... 13
- VI. **The CI File: What It Contains and When It Must Be Disclosed to the Defense** ... 15
 - The Contents of the CI File ... 16
 - Defense Motions to Obtain the CI File ... 16
 - Timing ... 19
- VII. **Whether the CI's Identity Must Be Revealed at the Motion-to-Suppress Stage** ... 20
 - G.S. 15A-978(b) ... 20
 - The Two-Officer Rule ... 22

[Daniel Spiegel](#) is an assistant professor at the School of Government specializing in criminal law, procedure, and evidence.

This bulletin was originally published as a series of blog posts on [North Carolina Criminal Law](https://nccriminallaw.sog.unc.edu/) (<https://nccriminallaw.sog.unc.edu/>). The content has been revised and updated for presentation in this format. The author would like to thank Phil Dixon, Jeff Welty, Sheridan King, Jackie Willingham, Robert Singagliese, Gayla Biggs, Thomas Hogan, and Shaun Horton for their significant contributions.

This bulletin addresses the law on confidential informants (CIs) in North Carolina, with an emphasis on discovery, audio/video recordings, and motions to reveal a CI's identity. Technological developments have made it more common for law enforcement to document the activity of a CI through audio and video recording. This change in practice complicates the questions of whether the identity of the CI must be revealed to the defense and what must be turned over in discovery.

The bulletin begins with a discussion of the landmark case *Roviaro v. United States*, 353 U.S. 53 (1957), laying out the factors that tend toward disclosure of the CI's identity to the defense and the factors that tend toward nondisclosure. Next is a discussion of the relevant state statutes governing discovery and how they apply to cases with CIs. The bulletin then introduces the sometimes thorny issues that arise when CI activity is documented through video and audio recordings, discussing steps the trial court can take to balance competing interests and looking to jurisdictions outside North Carolina for guidance on this developing issue. After surveying this landscape, the bulletin explores strategic implications for both the defense and the state. Next, the bulletin discusses the *CI file* and when information contained therein must be shared with the defense. The bulletin concludes with an analysis of the unique legal issues involved in litigating motions to suppress involving CIs.

I. *Roviaro v. United States*

The law on CIs and, specifically, when the state must reveal the identity of the CI to the defense, is grounded in the fascinating case of *Roviaro v. United States*. The case has been cited more than 5,000 times in subsequent cases. *Roviaro* is worth revisiting not only because it is so fundamental to our modern understanding of the law of CIs, but also because the facts are unusual and dramatic.

Two federal narcotics agents were working with two Chicago police officers to bring a drug case against Albert Roviaro. The four officers secured the services of a CI, "John Doe." As one might only expect to see in the movies, one of the police officers "secreted himself in the trunk of Doe's Cadillac, taking with him a device with which to raise the trunk lid from the inside."¹ Doe drove the Cadillac to a particular location, followed by the three other officers. Roviaro entered the Cadillac and sat in the passenger seat beside Doe. They then proceeded on a "circuitous route." When Doe finally stopped, one of the federal agents stepped out of his car and saw Roviaro get out of the Cadillac, walk a few feet to a tree, pick up a small package, return to the Cadillac, and deposit the package on the passenger side. The federal agent immediately retrieved the package from the floor of the Cadillac.²

Throughout, the Chicago police officer hidden in the trunk of the Cadillac was listening carefully to the conversation between Doe and Roviaro. He overheard a variety of important details: Roviaro's urging Doe to pull over and cut the motor so as to lose a "tail," Roviaro's inquiry into money that Doe owed him, and Roviaro's saying that Doe had brought him "three pieces this time."³ The hidden officer raised the lid of the trunk once the Cadillac came to a stop and peeked

1. *Roviaro v. United States*, 353 U.S. 53, 56 (1957).

2. *Id.* at 57.

3. *Id.* at 57.

through the crack to see Roviario walk to the tree and retrieve the package. He then climbed out of the trunk to find his fellow officer holding the package, which contained three glassine envelopes of white powder, later determined to be heroin.⁴

The question for the U.S. Supreme Court was whether a fair trial required that the government reveal the CI's identity. The government asserted that the identity need not be revealed as the law enforcement witnesses could supply all the necessary details at trial. After all, the officer in the trunk had essentially a front-row seat to the transaction (albeit with only aural rather than visual access), and the other officers observed many of the crucial details. Essentially, the government argued that no testimony the CI could offer at trial would have any bearing on the guilt or innocence of the defendant. The case hinged on the testimony of the officers.⁵

The defense, on the other hand, stressed that the CI was the only true witness to what occurred, as he was the only person directly involved in the transaction. He was sitting next to the defendant, he knew the context behind what happened and what was said, and it was essential for the defense to have access to his testimony at trial.⁶

The Supreme Court sided with the defense and determined that the defendant's fundamental right to a fair trial required that the identity of the CI be revealed. The CI was simply too wrapped up in the nucleus of facts leading to the charges; he was the "one material witness" to the transaction who could "controvert, explain, or amplify" the officers' testimony.⁷ The Court emphasized that the charge did not assert mere possession of heroin, but knowing possession. The justices reasoned that the CI's testimony could have a bearing on a variety of defenses, including entrapment, identity, and lack of knowledge of the contents of the package. The Court also pointed out that the CI denied knowing the defendant when encountering him subsequently at the police station (though in dissent, Justice Clark argued strenuously that the CI said this only to maintain the ruse).⁸

The question of whether the identity of a CI should be turned over to the defense involves tension between various objectives. On the one hand, the state has an interest in shielding the identity of those who provide information to law enforcement. The state wants to facilitate cooperation and protect the safety of individuals who make themselves vulnerable by working with law enforcement. On the other hand, the defendant has a fundamental right to a fair trial and a due-process right to effectively prepare the defense case under the Fifth and Fourteenth Amendments to the United States Constitution. Defendants also have the right to challenge the state's evidence by confronting the witnesses against them under the Sixth Amendment. These countervailing concerns, often of constitutional dimension, have not been addressed in depth by the U.S. Supreme Court since the 1950s and 60s.

The *Roviario* Court expressly declined to create a "fixed rule," instead setting forth a framework for analysis that has been refined and explicated in the lower courts. North Carolina courts have relied on *Roviario*, along with *McCray v. Illinois*, 386 U.S. 300 (1967), in determining

4. *Id.* at 57–58.

5. *Roviario*, 353 U.S. 53.

6. *Id.*

7. *Id.* at 64.

8. *Id.* at 67–68.

when the identity of the CI must be revealed in a series of cases, including *State v. McEachern*, 114 N.C. App. 218 (1994), and *State v. Dark*, 204 N.C. App. 591 (2010).⁹ These cases and their strategic implications are discussed in detail below.

Under *Roviaro* and its progeny, the following factors militate toward requiring disclosure of the CI's identity:

- The CI was an “active participant”¹⁰ in the crime alleged.
- If not an active participant, the CI took actions that were bound up integrally with the facts at issue at trial.
- The defendant has asserted a defense, such as lack of knowledge, alibi, or entrapment, and the CI's testimony is relevant to support (or undermine) the defense.

The following factors militate against requiring disclosure of the CI's identity:

- The CI is a “mere tipster.”
- The defendant has failed to show how the CI's testimony would be relevant or helpful to establish a defense.
- The defendant already knows the identity of the CI.

The *Roviaro* Court ultimately concluded that the officer in the trunk was no substitute for the man in the driver's seat, requiring disclosure of the CI's identity for a full and fair trial. But what if a video or audio recording captures the entire transaction? And when a video is made, how does the state comply with open-file-discovery requirements while attempting to maintain the confidentiality of the informant's identity?

II. Applicable Statutes

Before delving into these questions, it is important to understand what North Carolina General Statutes (G.S.) are at play. These statutes complicate and refine the basic constitutional question of whether fundamental fairness requires the state to turn over the CI's identity.

G.S. 15A-903: Open-File Discovery

First, there is the baseline statutory requirement that essentially the entire investigatory file must be provided to the defense under G.S. 15A-903. *Open-file discovery* has been required under the law in North Carolina since 2004. Defining the scope of the investigatory file is at times difficult. Especially in drug cases, the “file” may be a sprawling, many-tentacled series of investigations. In cinematic terms, it can be difficult to determine where the movie should begin and which subplots are part of the film. For example, in a drug-trafficking case, investigators may have been aware of the defendant for many years, and his name may have come up in several interviews. However, the complete history of all law enforcement contacts with the defendant likely stretches beyond a reasonable definition of the “investigative file” in a particular case. The trial court must ultimately draw these lines, and questions of relevance and usefulness to the defense will influence the court's decision-making.

9. See Jeff Welty, [The Informer's Privilege](https://nccriminallaw.sog.unc.edu/the-informers-privilege/), N.C. CRIM. L.: A UNC SCH. OF GOV'T BLOG (June 17, 2010), <https://nccriminallaw.sog.unc.edu/the-informers-privilege/> (discussing *Dark*).

10. *Roviaro*, 353 U.S. at 58.

For the purposes of this bulletin addressing CIs, the two most common types of CI interaction are almost always properly considered part of the investigative file. These two types of CI activity are what will be referred to as *main events* (drug activity for which the defendant has been indicted) and *lead-up buys* (drug activity that is used to develop probable cause for a future search or to build up to a main event). As main events and lead-up buys naturally fit within a common-sense understanding of the course of an investigation, and such episodes are generally relevant to the subject of the trial, the baseline statutory principle is that the investigative file pertaining to these CI activities (including police reports, interviews, videos, and more) should be shared with the defense.

G.S. 15A-904(a1): Exception for Identity of CI

However, G.S. 15A-904(a1) makes an express carve-out for the identity of the CI: “The state is not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law.” In practice, this often means that the state turns over reports in which law enforcement refers to the CI as only “CI” rather than revealing the CI’s name. The state may also attempt to conceal additional details that would lead the defendant to identify the CI, by providing reports that refer to a period of time rather than a particular date, or a generalized location rather than a specific address. Where there is ambiguity about what information has been withheld, the state should indicate to the defense what specifically has not been shared so as to avoid running afoul of G.S. 15A-903, requiring full disclosure of the investigative file.

The state may desire to go further to protect the CI by omitting an episode involving the CI entirely. However, where the CI activity naturally builds to the main event, it is likely improper for the state to “start the movie” just before the main event and cut the CI out of the picture, as such a reading of the statute strains the definition of *investigative file* under G.S. 15A-903.

What is the state to do if including details as to the precipitating incident would almost certainly reveal the CI’s identity? As an initial matter, the state may want to avoid the type of police work in which law enforcement springs from the bushes immediately after the CI calls the defendant on the phone, as such techniques are likely to render efforts to conceal the CI’s identity useless in the first place. But as discussed further below, the court may approve of the use of redaction, muting, blurring, and other approaches to comply with constitutional and statutory requirements while shielding the CI’s identity.

G.S. 15A-908: Protective Orders

The state may also choose to apply in writing under G.S. 15A-908 for a protective order preventing or limiting disclosure of certain materials upon a showing of “substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment.”¹¹ Given G.S. 15A-904(a1), it doesn’t appear that such action is necessary where the state is merely withholding the CI’s name. However, invoking G.S. 15A-908 is likely necessary where the state desires to withhold swaths of the investigative file, such as a video in its entirety or a myriad of investigative details.

The court will then have to balance the state’s interest in protecting the CI against the defendant’s constitutional and statutory rights. Challenging questions may arise, especially given that the statute allows the state to apply for a protective order *ex parte*. The defense is entitled to notice that an order was granted per G.S. 15A-908(a). Where the defense has concerns that

11. G.S. 15A-908(a).

key information necessary to an effective defense has been withheld, the defense may ask to be heard. The “affidavits or statements” supporting the state’s motion must be sealed and preserved for appellate review.¹²

G.S. 15A-978: When the CI’s Identity Must Be Revealed for a Motion to Suppress

Finally, G.S. 15A-978, located in the part of Chapter 15A that deals with motions to suppress rather than discovery, also has a bearing on the analysis. Importantly, G.S. 15A-978 addresses the circumstances under which the state must reveal the CI’s identity in the context of a *motion to suppress*, whereas *Roviario* and the vast majority of the CI cases address whether the state must reveal the CI’s identity *before trial*. The case of *McCray v. Illinois*, noted above, also dealt with the question of what the defense should be entitled to in challenging a search warrant pursuant to a motion to suppress, not whether the state must provide the defense with the CI’s identity to ensure a fair trial.¹³ This bulletin’s final section looks at G.S. 15A-978 in more detail.

III. How to Handle CI Video

As technological advances make it easier to both capture video in a cost-effective way and conceal the recording device from the target of the investigation, more and more CI interactions are being recorded on video.

The existence of video evidence introduces new complexity and nuance into questions of whether and how the CI’s identity should be kept confidential and what should be turned over in discovery. Where the state attempts to withhold video evidence depicting the CI’s involvement, defense counsel may justifiably object that a rich trove of information from the investigative file is being denied to the defendant in contravention of G.S. 15A-903. The video may contain key details, such as locations, patterns of behavior, body language, or statements (when the video includes audio). The state may respond that turning over the video all but ensures that the CI will be put in danger, as even if the CI’s name were to be kept secret, the CI’s face, appearance, or other identifying information may be gleaned from the recording.

Four Options

The following four options of limiting or modifying disclosures may be useful in balancing the competing concerns while navigating constitutional and statutory requirements. As the options below all involve some form of withholding of discovery that the defense is statutorily entitled to, the state must likely make an adequate showing of “substantial risk” to a person of “physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment” under G.S. 15A-908 before the court orders that discovery be modified or withheld.

(1) Blurring Out

When technologically feasible, modifying the video by blurring the CI’s face is an appealing option in some cases, as it may allow the defense to receive much of what is useful on the video while shielding the CI’s identity. G.S. 15A-908 contemplates situations where the court may allow the state to withhold entire portions of the investigative file. Withholding only a face on

12. *Id.* § (b).

13. See *McCray v. Illinois*, 386 U.S. 300 (1967).

a video is a lesser measure that may strike an appropriate balance between concerns about CI safety and fair disclosure of evidence to the defense. Of course, the defense may still be able to articulate compelling reasons why the original, unblurred footage must be turned over, and the defense may be constitutionally entitled to the unedited video, depending on the unique facts of each case.

(2) Redaction

Similar to the blurring option above, sharing portions of the video but “cutting out” segments that tend to reveal the CI’s identity is sometimes a potential solution. Defense counsel may have concerns that key portions are being withheld, and the court may choose to exercise caution by reviewing the entire video in chambers after hearing arguments to ensure that the correct balance is struck. The court may also receive the entire video under seal to allow for appellate review of the decision to withhold discovery. (Note that G.S. 15A-908(b) appears to contemplate sealing and preserving the state’s “supporting affidavits and statements” rather than the video footage itself, but it would seem proper to receive the video footage under seal with appropriate safeguards.)

(3) Muting

Muting portions of a video to avoid revealing the CI’s identity can be another potential solution.¹⁴ Of course, as was the case in *Roviaro*, the specifics of what was said, especially in a drug transaction, could be critical in determining whether the defendant had knowledge of the substance sold, or whether some other defense exists, such as entrapment. If so, the defendant may have a strong argument that the defense is entitled to the audio. Related options include voice alteration or transcription of muted statements.

(4) Entering a Protective Order

The court may issue a protective order covering the video, allowing the defendant and defense counsel to view it but preventing the video from being shared with anyone not party to the case.¹⁵ In cases with heightened concern of danger, the protective order may go so far as to prohibit defense counsel from showing the video to the defendant.¹⁶ This type of protective order appears to be used with some frequency in federal court.¹⁷ The solution may be attractive in that it alleviates some of the concerns that the defense is being deprived of crucial information but avoids the risks that may arise when the defendant directly views the CI on the video or shares the footage with others.

However, this practice raises some thorny questions. For one, it seems likely that the defense lawyer would have to relate some of the details observed on the video to the client as a matter of providing effective assistance of counsel. Once sufficient details are shared, the defendant might

14. See, e.g., *United States v. Taylor*, 688 F. App’x 638, 641–43 (11th Cir. 2017) (unpublished) (video introduced into evidence but audio withheld). It is unclear from the opinion whether audio was withheld to shield the CI’s identity or to avoid potential hearsay and confrontation problems.

15. See *United States v. Velez*, No. 3:19-cr-30059-MGM, 2020 WL 4040730 at *8 (D. Mass. July 17, 2020) (allowing the defendant to review confidential information but only in defense counsel’s presence).

16. See G.S. 15A-908 (court may “restrict” discovery or inspection or may “make other appropriate orders”); *Beville v. State*, 71 N.E.3d 13 (Ind. 2017); *People v. Singh*, 187 A.D.3d 691 (N.Y. App. Div. 2020).

17. See, e.g., *United States v. Cousin*, No. 20-10071-ADB, 2022 WL 314853 at *36 (D. Mass. Feb. 2, 2022) (limiting production of various documents related to CI to “attorneys’ eyes only”).

discover the CI's identity. For another, North Carolina is unusual among states in the relative emphasis our courts place on the client's wishes when defining the principal-agent relationship between a client and defense attorney.¹⁸ It is potentially problematic for the principal in the relationship—the client—to be denied access to an important piece of evidence, especially where the client has important knowledge pertaining to the larger context of an interaction that the lawyer lacks. Furthermore, this kind of selective sharing of the video evidence could inject tension into the lawyer-client relationship and set the stage for a future claim of ineffective assistance of counsel. Nonetheless, this fourth option may be worth considering at times.

Two Common Types of Video: Main Events and Lead-Up Buys

In considering whether the court should approve of one of the four options above when dealing with videos capturing CI activity, it is helpful to think carefully about the nature of the transaction captured by video. There are commonly two types of CI video: video showing a main event and video showing a lead-up buy.

Main Events

Video depicting the main event (again, the actual drug transaction for which the defendant is indicted) is obviously highly relevant to the issues at trial. On first blush, it is difficult to see how it could be constitutional to withhold video from the defense where it offers a front-row seat to the crime alleged. Recall that in *Roviaro*, the defendant successfully argued that the CI's identity must be revealed, as the CI was directly involved in the alleged drug transaction, and the officer crouching in the trunk was no substitute for the CI as a witness. If the transaction in *Roviaro* had been videotaped, and North Carolina's statutory framework of open-file discovery were applied, it seems likely that the state would have been required to turn the video over.

However, state law has evolved somewhat since *Roviaro*, and the state might argue that recent caselaw allows it to withhold video footage of a main event or, alternatively, to provide blurred or redacted video to the defense in the interest of protecting the CI's identity. Several more modern North Carolina cases seem to require more of the defendant than floating possible defenses that could potentially be affected by CI testimony. (This seemed to be enough in *Roviaro*, where the court enumerated several "possible defenses."¹⁹)

For example, in *State v. Dark*, the North Carolina Court of Appeals seemed to demand that the defendant put forward a specific defense and articulate how the CI's testimony would have a bearing on that particular theory. In *Dark*, an undercover officer was driving the car, and the CI was also sitting in the car after arranging the drug transaction over the telephone. The drug transaction occurred between the defendant, who was standing outside the car, and the officer. In conducting the analysis of whether the CI's identity should have been disclosed, the court emphasized the defendant's failure to show how the CI's testimony might resolve some contradiction between the defense's theory and the state's theory. Though the CI was a direct participant in the crime alleged and was present on scene, the court of appeals upheld the trial court's decision allowing the state to withhold the CI's identity.²⁰

18. See *State v. Ali*, 329 N.C. 394 (1991) (where lawyer and client come to an absolute impasse on tactical decisions, such as which jurors to strike, the client's wishes control).

19. *Roviaro v. United States*, 353 U.S. 53, 62 (1957).

20. *State v. Dark*, 204 N.C. App. 591 (2010).

Where the main-event video captures the defendant's participation in the drug transaction, the state may argue that the case is open-and-shut, as common defenses such as identity, alibi, or mistake are foreclosed. Where the defendant is unable to demonstrate how the CI's testimony would support or undercut a theory of defense, whether the CI's identity (and video of the main event) must be disclosed to the defense may be a more open question, even where the CI directly participated in the transaction at issue.²¹

Of course, such an interpretation depends on state caselaw, and the defense may argue that *Roviaro* and federal constitutional due-process protections demand more. After all, where the CI is directly engaged in the hand-to-hand transaction on which the trial is based, characteristics such as truthfulness, motivation, and bias seem to be at least somewhat relevant in virtually every case.

Lead-Up Buys

Where the video of CI activity shows a series of controlled purchases designed to establish probable cause to search a particular location, the state has a stronger argument that the CI's identity, and the video depicting the transactions, may properly be withheld. This argument is based on the original *Roviaro* dichotomy whereby "tipster" activity generally does not require disclosure of the CI's identity, but direct participation generally does (notwithstanding the trend discussed above in *Dark* and *Watson*). The defense might argue that a series of purchases is more than mere tipster behavior, but the state can respond that it is appropriate to cordon off this activity as it only establishes a legal justification to search a given location and does not directly relate to the drugs at issue at trial. Thus, although G.S. 15A-908 must likely be invoked to withhold pieces of the investigative file, the state may be justified in seeking to prevent the defense from learning the CI's identity from video of the lead-up buy.

Crucially, the analysis changes significantly if the state seeks to introduce evidence pertaining to these lead-up buys at trial. The state may want to get these lead-up buys before the jury pursuant to Rule of Evidence 404(b) to show the defendant's knowledge of drugs in the closet of a given house, opportunity to sell a given drug, or some other possible 404(b) purpose. The state may also want to introduce this evidence to tell a coherent story to the jury by explaining the course of the investigation (*res gestae*).²² But where the state desires to include the lead-up buys in its case-in-chief, the defense's argument becomes much stronger that the disclosure of the CI's identity as well as video footage of the lead-up buys is necessary to ensure that the defense can fairly challenge the evidence. As discussed below, the court may properly be skeptical of the government's request to withhold video of lead-up buys if the government wishes to introduce evidence of these lead-up episodes at trial.²³

21. See *id.*; see also *State v. Watson*, 303 N.C. 533, 537 (1981) (upholding denial of disclosure of CI's identity where "defendant made no showing . . . as to his particular need for knowing the identity of the source").

22. See *United States v. Allen*, No. 1:19-cr-647, 2021 WL 243188 at *6 (N.D. Ohio, E. Div. Jan. 25, 2021).

23. See *United States v. Loden*, No. 1:18-cr-00016-HSM-SKL-2, 2018 WL 6308725 (E.D. Tenn. Dec. 3, 2018).

IV. How Other Jurisdictions Are Handling CI Video

Though trial courts throughout North Carolina must regularly determine when CI recordings should be turned over to the defense, there is a scarcity of North Carolina appellate law on the subject. However, federal district courts and appellate courts in other states are beginning to address these issues. The cases discussed below are some of the first to engage in a substantive way with the tensions raised above. Although criminal discovery laws in these other jurisdictions differ from those in North Carolina and the cases below are not binding on North Carolina courts, the reasoning is still helpful as the fundamental issues are the same.

United States v. Loden (Eastern District of Tennessee):

A Blend of Main-Event and Lead-Up Activity

United States v. Loden, a federal district court opinion out of Tennessee, contains a thorough analysis of issues that commonly arise in cases involving recordings of CI activity. In *Loden*, the question was whether audio recordings of a series of controlled buys should be turned over to the defense. The audio recordings could not neatly be categorized as either main events or lead-up buys. On the one hand, they seemed like main events because they occurred within the date range set out in the indictment for conspiracy to distribute methamphetamine. On the other hand, they seemed like lead-up buys because they culminated in a search warrant for the defendant's residence and the defendant was not directly charged for selling to the CI. Thus, the judge concluded that the role of the CI was somewhere between a mere tipster and an active participant.²⁴

The *Loden* court situated the facts between two other cases: *United States v. Parks*, No. 1:08-CR-58, 2009 WL 1617010 (E.D. Tenn. June 9, 2009), and *United States v. Pesaturo*, 519 F. Supp. 2d 177 (D. Mass. 2007). In *Parks*, the CI was recorded making a controlled purchase of crack cocaine from the defendant. An arrest warrant was issued, and the defendant was ultimately charged with the drugs and gun found upon execution of the warrant. Thus, *Parks* involved a classic lead-up buy, as the CI activity could neatly be separated from the incident for which the defendant was being tried. The *Parks* court concluded that the audio recordings need not be disclosed.²⁵ In contrast, in *Pesaturo*, the defendant was directly charged with distribution offenses involving sales of oxycodone to the informant. The defendant invoked a defense of entrapment and clearly articulated how the substance of the conversation captured on the audio recording could bolster his claim that he was entrapped. Because the recording involved a main event, and the defense showed how the information was material to his defense, the defendant prevailed in obtaining the CI's identity and the recorded conversations.²⁶

Although the *Loden* court acknowledged that the case at hand differed from *Parks* in that the CI activity could not be so neatly separated from the activity at issue at trial, the court still found the facts much closer to *Parks* than *Pesaturo*. Crucial to this determination was the government's representation that it did not plan to introduce the recordings at trial nor to call the CI as a witness. (In a footnote, the *Loden* court implied that the analysis would likely be different if the government attempted to introduce evidence relating to the CI's involvement.)²⁷ The district court judge then considered whether the defense had demonstrated how the recordings were

24. See *id.*; see also *supra*, Section I.

25. *United States v. Parks*, No. 1:08-CR-58, 2009 WL 1617010 (E.D. Tenn. June 9, 2009).

26. *United States v. Pesaturo*, 519 F. Supp. 2d 177 (D. Mass. 2007).

27. See *Loden*, 2018 WL 6308725, n.2; see also *Allen*, 2021 WL 243188 at *6.

material to his theory of defense. Much as in *Dark*, the court was not satisfied with “conclusory arguments concerning materiality,”²⁸ but demanded that the defendant specifically explain how the contents of the audio recording could further his defense. The defendant attempted to argue that the conspiracy ended earlier than the government alleged, but he was unsuccessful in demonstrating how the CI’s potential testimony or audio recordings of the buys might support his defense theory. The court concluded the defense had not met its burden and sided with the government in allowing the recordings and the CI’s identity to be withheld.²⁹

From a strategic perspective, it is worth highlighting that the defense may sometimes benefit from filing a motion to reveal the CI’s identity, even without winning the motion. The government may agree not to introduce potentially damning evidence pertaining to the CI’s involvement in order to avoid having to reveal the CI’s identity, as appears to have occurred in *Loden*. The state’s case may be weakened, and consequently, plea negotiations could be affected.

***Beville v. State* (Indiana): An Attempt to Limit Disclosure of Video to Defense Counsel Only**

In another relatively recent opinion, the Indiana Supreme Court addressed issues pertaining to video recording of CI activity. The case is especially interesting in that it is a rare example of an appellate court engaging with some of the nuances of discovery management set forth above. In *Beville v. State*, 71 N.E.3d 13 (Ind. 2017), the defendant was accused of dealing marijuana and maintaining a nuisance. The CI was directly involved in the indicted conduct, as he was the purchaser of the marijuana. The state showed the defense counsel footage of the main event but attempted to prevent the attorney from showing the video to his client in order to protect the CI. The court noted that this was somewhat strange since it seemed that the state intended to introduce the video at trial, and at that point the video would be revealed to the defense and the larger public. Nonetheless, the state argued that allowing the defendant to view the video ahead of trial would reveal the CI’s identity and make the CI a “target for reprisal.”³⁰

The Indiana Supreme Court sided with the defendant. The reviewing court found it problematic that the trial court did not review the video in chambers to determine whether the video would actually reveal the CI’s identity as the state argued. The defense maintained that the camera angle was focused on the defendant and it was unclear whether the CI’s identity would be revealed by allowing the defendant to view it.³¹ A lesson from the case is that an in camera review by the trial court is advisable to ensure that the court makes the most informed decision possible.

The Indiana Supreme Court went further, though, noting that even if the identity would be revealed, the defendant had carried his burden of demonstrating that the video would be helpful. The court invoked the *Roviaro* dichotomy and emphasized that the CI was directly involved in the transaction. The court described it as “axiomatic” that the video would show details that the defendant needed to review. The court stressed that the defendant was charged with maintaining a nuisance in addition to dealing, and thus all the background details shown on the video portraying dominion over the premises, physical layout, and general behavior could be helpful and relevant to the defense. The court concluded it was not enough just to show the video to the attorney, since the defendant was in the “best position” to understand the context of all that was

28. *Loden*, 2018 WL 6308725 at *2 (quoting *United States v. Lykins*, 948 F. App’x 621, 624 (6th Cir. 2011)).

29. *Id.* at *4–6.

30. 71 N.E.3d 13, 17 (Ind. 2017).

31. *Id.* at 17–22.

potentially depicted. The court also stressed that the state offered only generalities rather than case-specific arguments for why the video should not be divulged.³² The *Beville* case offers an example of the potential pitfalls of limiting disclosure to only the defense attorney rather than the defendant.

***State v. Williams* (Florida) and *United States v. DeAraujo* (District of Massachusetts): Can Turning Over Video Substitute for Revealing the CI's Identity?**

Finally, the cases of *State v. Williams*, 389 So. 3d 578 (Fla. Dist. Ct. App. Sept. 6, 2023), and *United States v. DeAraujo*, 471 F. Supp. 3d 382 (D. Mass. 2020), serve as examples of the question introduced above: Can the state avoid revealing the CI's identity by instead turning over a video of the CI activity to the defense? Of course, turning over the video to the defense may inherently result in the identity of the CI being revealed, but sometimes questions will remain.

In *Williams*, video captured multiple drug sales between the defendant and the CI, and though the CI was the sole participant, officers were able to observe the transactions from a distance and listen in on the conversations between the defendant and the CI. The defendant was charged with these sales. The defendant moved to reveal the CI's identity, and the state countered that the video would substitute for the witness at trial. On appeal, the Florida appellate court ruled for the defense. The court declined to carve out an exception to *Roviaro* where the transactions were recorded, and the CI was clearly a direct participant. Further, the court found that the videos did not depict several of the charged transactions, and thus it was important for the defense to learn the CI's identity to effectively defend against the case in its entirety. However, in a concurrence, an appellate judge opined that there could be cases where a clear audio-video recording of *all the conduct* at issue at trial might render it unnecessary to reveal the CI's identity.³³

This is what happened in *DeAraujo*. There, the defendant was charged with possessing and dealing firearms. The government had a video recording and transcript of an alleged firearm sale from the defendant to a CI. Although the defendant raised a specific defense of entrapment, and the CI was the only witness to the alleged sale, the government countered that it would offer the video and transcript at trial instead of calling the CI. The jury would be able to view and hear the entirety of the incident. The federal district court concluded that the defense had failed to articulate what could be gleaned from revealing the CI's identity beyond what was already captured by the footage and ruled with the government that the CI's identity need not be divulged.³⁴

32. *Id.* at 22–23.

33. *State v. Williams*, 389 So. 3d 578 (Fla. Dist. Ct. App. 2023).

34. *United States v. DeAraujo*, 471 F. Supp. 3d 382 (D. Mass. 2020). *See also* *United States v. Royal*, No. CR421-135-6, 2022 WL 677577 (S.D. Ga. Mar. 7, 2022) (unredacted video of sales must be turned over to the defendant because videos were material to his defense, but CI's identity properly withheld by the government).

V. Assertion of the Defense Theory

This section explores some specific aspects of defense strategy in litigating issues involving the identity of the CI, as well as some related aspects of strategy on the state's side. As the cases discussed thus far illustrate, the defense is more likely to win a motion to reveal the identity of a CI when the defendant is able to tie the potential CI testimony to a particular theory of defense and explain how it furthers that defense. Whereas in *Roviaro*, the U.S. Supreme Court listed a variety of ways in which the CI's testimony might be helpful for the defense, North Carolina appellate courts have repeatedly stated that the defense cannot merely speculate about how the CI's testimony might be relevant. The defense must clear an initial hurdle of showing how the testimony might resolve a material conflict at trial in order to prevail on a motion to reveal the identity of the CI.³⁵ While the defense may invoke federal due-process rights in challenging whether this should in fact be a requirement, defenders should be aware of what North Carolina appellate courts are demanding.

An interesting strategic implication of *Dark* and *Watson* is that in CI cases, the defense may benefit from committing to a particular theory of defense and “showing its cards” to the state in a pretrial hearing. Defenders are often reluctant to call their clients to the stand, even in a pretrial hearing, unless client testimony appears to be necessary or exceptionally persuasive. Defenders may be concerned about the risk of damaging cross-examination and the possibility that the testimony of an unsavvy client might hurt the case, even where the client is telling the truth.³⁶ In cases where there is a viable motion to reveal the identity of the CI, though, the risk will sometimes be worth the possible reward. The prospect of winning a dismissal, a concession in plea negotiations, or suppression of key evidence may counterbalance a tendency by the defense to avoid putting the client on the stand in a pretrial hearing.

State v. McEachern is illustrative: Police officers worked with a CI to build a drug case on the defendant, Toney McEachern. The CI stated that he had seen a large amount of cocaine in McEachern's trailer home and knew McEachern was selling drugs. The officers set up a controlled purchase. They provided the CI with money and drove him to McEachern's trailer. The CI went into the home and returned to the officer's car, showing the officer cocaine that he stated he had purchased from “Toney.” The same day, the officers obtained a search warrant for the trailer and searched it. They found evidence of drug dealing and charged McEachern with various drug offenses.³⁷

The key factor in *McEachern* was the defendant's testimony during the pretrial hearing on the motion to reveal the CI. The defendant gave a detailed account of what occurred on the day in question (and the day before). According to McEachern, the day before the controlled purchase and the search of McEachern's trailer home, McEachern allowed his nephew, Charles Jackson, to use his home for a party. McEachern said he left the trailer to stay with his uncle in the nearby town of Lumber Bridge. He stayed in Lumber Bridge until the evening of the incident when his next-door neighbor, Charles McLaughton, called and asked for a ride to Red Springs. When

35. See *State v. Dark*, 204 N.C. App. 591, 593 (2010); *State v. Watson*, 303 N.C. 533 (1981).

36. See generally Talk of the Nation, *Deciding Whether Defendants Should Take the Stand*, NPR (June 20, 2012), <https://www.npr.org/2012/06/20/155440684/deciding-whether-defendants-should-take-the-stand> (discussing this dilemma); Peter J. Henning, *When to Put the Defendant on the Witness Stand*, N.Y. TIMES (Nov. 2, 2015), <https://www.nytimes.com/2015/11/03/business/dealbook/when-to-put-the-defendant-on-the-witness-stand.html> (same).

37. 114 N.C. App. 218, 219–20 (1994).

McEachern drove back to his neighborhood to pick up McLaughton, he encountered the police, who had already performed the controlled purchase out of McEachern's trailer that day and were about to execute the search warrant. McEachern maintained that there were no drugs in his house when he offered his home for his nephew's party and that he had no idea who might have come and gone while he was staying in Lumber Bridge. He added that he hadn't seen his nephew since the incident and that his attempts to locate his nephew had been to no avail.

The defendant's account, the I-was-at-my-uncle's-house-while-my-nephew-threw-a-party defense, may not have been the most plausible. However, in taking the stand and setting forth his defense theory and alibi, the defendant succeeded in rendering the CI's testimony potentially helpful and at least material to a determination of guilt. It was the trial judge's task to assess the credibility of the witnesses at the pretrial hearing on the motion to reveal the identity of the CI, and the judge found McEachern credible enough to rule that the defendant had "established the informant as a material and necessary witness to . . . corroborate the defendant's alibi, point toward third party guilt, and show nonexclusivity of the defendant's premises."³⁸ The judge thus sided with the defendant in ordering the state to disclose the CI's identity. When the state refused to do so, the court dismissed all charges with prejudice based on a violation of the defendant's constitutional due-process rights.³⁹

On appeal, the appellate court stressed that the only evidence connecting McEachern to the drug crimes was what the CI told the officer about what the CI observed inside the home. The court agreed with the trial judge that the CI could provide critical testimony as to the identity of the individual who sold the drugs and that the CI's testimony could corroborate or controvert McEachern's alibi. Interestingly, the court cited *Brady v. Maryland*, 373 U.S. 83 (1963), for the proposition that suppression of evidence "favorable to an accused" violates due process where material to guilt.⁴⁰ It is not clear that the CI's testimony would have been favorable to the defense, although it clearly would have been material to guilt or innocence. Ultimately, the court of appeals upheld the trial court's decision.⁴¹

In considering *McEachern*, one might ask whether the state intended to present evidence regarding the controlled purchase and the CI's involvement in the case at trial. As discussed above, the court's decision on a motion to reveal the identity of a CI may be influenced by what evidence the state chose to attempt to present at trial. If the state planned to introduce evidence pertaining to the controlled purchase, it seems unlikely that the state would be able to introduce the CI's account of what occurred without calling the CI to the stand (and thus revealing the CI's identity) given hearsay and confrontation problems. But could the state introduce the officer's observations of the controlled purchase without divulging the CI's identity? Perhaps, although this might render the controlled purchase more of a main event, tending toward disclosure of the CI's identity, rather than a lead-up buy, tending toward nondisclosure. Perhaps the state had no intention of introducing evidence pertaining to the CI's involvement and instead planned to rely on the drugs found during the ultimate search of the trailer, the defendant's proximity to the home, and the defendant's dominion over the premises to prove its case. This would make for a weaker case overall, but it might have been worth it to shield the CI's identity. It is not clear from the opinion what course the state intended to take, and the appellate court's analysis does

38. *See id.* at 220.

39. *Id.* at 220–21.

40. *Id.* at 222 (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

41. *Id.* at 223.

not appear to depend on the state's decisions in this regard. As a general matter, the state must regularly consider the value of a particular conviction, the value of maintaining confidentiality of the informant's identity, and the likelihood of success at trial with and without revealing the identity of the CI. These factors all influence the state's strategy in litigating CI cases.

A lesson for defenders from *McEachern* is that in cases where the defense is considering a motion to reveal the identity of the CI, defense counsel should carefully consider the potential advantage and risk of asserting its defense theory by calling its client to the stand in a pretrial hearing. There are risks associated with doing so. An obvious concern is the prospect of the state using the defendant's pretrial testimony against the defendant. The state is likely prohibited from introducing the defendant's pretrial testimony on the issue of guilt at trial.⁴² However, the state can still use the pretrial testimony as impeachment material should the defendant take the stand at trial.⁴³ Pretrial testimony offered by a defendant "must often be highly prejudicial," as it may well "link" the defendant to a key piece of evidence for the prosecution.⁴⁴ This rings especially true for CI cases, where the defendant may acknowledge proximity to contraband or involvement in an incident while maintaining some other defense, such as lack of knowledge or entrapment. Consider *McEachern*, where the defendant conceded ownership of the premises where drug activity occurred while asserting an alibi.

The defendant is not bound by any pretrial defense asserted and may rely on a different defense at trial as long the defense complies with the statutory deadlines set forth in G.S. 15A-905(c). Defenders must weigh the risks above, listen carefully to their client, and consider whether it is advantageous to call their client to the stand during the pretrial hearing, as the defense did successfully in *McEachern*.

VI. The CI File: What It Contains and When It Must Be Disclosed to the Defense

Let's assume that the defense is successful in a given case in compelling the state to turn over the CI's identity. Perhaps the state agrees that the CI's involvement is central to the case and the defense will likely win under the test outlined in *Roviaro*, so the state voluntarily turns over the CI's identity. Perhaps the defense prevails in a contested hearing on a motion to reveal the CI's identity. Or perhaps the state decides that the trade-off of "blowing the CI's cover" is worth it to prove the individual case against the defendant, and the state intends to call the CI to the stand at trial. In all three scenarios, the defense will learn the CI's name, but key questions remain. Is the CI a trustworthy witness? What is the CI's history of reliability or lack thereof? What is the CI getting in exchange for cooperation? Is the CI being paid by the state? Is the CI in legal jeopardy, and if so, what promises of leniency have been made?

42. See *Simmons v. United States*, 390 U.S. 377, 394 (1968) (a defendant should not have to jeopardize one constitutional right, the privilege against self-incrimination, to protect another). However, the Fourth Amendment was the subject of pretrial litigation in *Simmons*, rather than the Fifth and Sixth Amendment rights involved in pretrial motions to reveal the CI's identity.

43. See *State v. Bracey*, 303 N.C. 112 (1981).

44. See *Simmons*, 390 U.S. at 391.

The answer to these questions, and more, *may* be located in a file law enforcement keeps for each individual CI. It is common for law enforcement agencies, especially larger agencies accredited by organizations such as the Commission on Accreditation for Law Enforcement Agencies or the North Carolina Law Enforcement Accreditation program, to maintain such files. Accrediting bodies may have standards requiring recordkeeping when using CIs.⁴⁵ Local agencies also may have directives or policies addressing the maintenance of CI files.

The Contents of the CI File

Although various accreditation bodies require law enforcement to keep a file for each CI, it is not clear exactly what the file should contain. A CI file may contain

- descriptive information (like gender, race, age, height, weight, hair color, eye color, and other distinguishing features);
- the CI's contact information and address;
- a photo of the CI;
- information about the CI's associates;
- information about any potential substance-use disorder or mental-health issues;
- a history of the CI's reliability or unreliability in narrative form, or a "suitability" report;
- the CI's criminal history;
- narratives recording the CI's prior involvement in various investigations;
- agreements or contracts indicating the terms and expectations of cooperation;
- information on pending charges for which the CI expects to receive some benefit (leniency, specific plea terms, etc.); and
- a record of prior payments made to the CI.

Defense Motions to Obtain the CI File

Most commonly, the defense will rely on *Brady v. Maryland* and *Giglio v. United States*, 405 U.S. 150 (1972), when making a motion for the state to turn over part or all of the CI file. These landmark cases discuss the constitutional due-process requirement that the state turn over material exculpatory information to the defense (*Brady*),⁴⁶ including material information that could be used to impeach a state's witness (*Giglio*).⁴⁷ Although practitioners often use the term "*Giglio* information" when referring to impeachment of a law enforcement officer, the impeachment evidence at issue in the original *Giglio* case actually involved a civilian witness, not an officer.⁴⁸

A crucial question is how to define *materiality* in the context of determining whether exculpatory information must be turned over to the defense for impeachment. "Evidence is considered 'material' if there is a 'reasonable probability' of a different result had the evidence

45. See, e.g., COMM. ON ACCREDITATION FOR L. ENF'T AGENCIES, LAW ENFORCEMENT STANDARDS MANUAL § 42.2.6 (6th ed. 2017); see also U.S. Att'y Gen., [ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS](https://www.ignnet.gov/sites/default/files/files/invprg1211apph.pdf) (May 30, 2002), <https://www.ignnet.gov/sites/default/files/files/invprg1211apph.pdf>; INT'L ASS'N OF CHIEFS OF POLICE, CONFIDENTIAL INFORMANTS (Dec. 2020).

46. See *Brady v. Maryland*, 373 U.S. 83 (1963).

47. See *Giglio v. United States*, 405 U.S. 150 (1972).

48. *Id.*

been disclosed.”⁴⁹ A variety of factors come into play, including the projected impact of the impeachment evidence, the centrality of the witness to the case against the defendant, the overall strength of the case, the similarity between the impeachment evidence and the facts at issue in the case, and more.⁵⁰

Whether the CI file must be turned over depends on a number of questions: How central is the CI to the case? How damaging is the impeachment evidence? To what extent does that evidence show bias, dishonesty, or a motive to lie? Are there facts in the CI file that relate to the facts at issue at trial? Was the CI “working off” pending charges at the time of the incident?⁵¹

The caselaw in North Carolina regarding when the CI file must be turned over to the defense is scant. However, courts in other jurisdictions have found error where the state fails to disclose information in the CI file. In *Schofield v. Palmer*, 279 Ga. 848 (2005), the defendant won a new trial in a death-penalty case because the state suppressed information from the CI’s file showing that officers had paid the CI \$500 for information implicating the defendant as the murderer. The CI’s identity was no longer confidential at trial because the district attorney had named the CI during the opening statement. However, the state refused to turn over the CI file during the trial and post-conviction stages. The defense finally learned of the payments to the CI after the court conducted an in camera review of the file during a habeas corpus evidentiary hearing. The trial court found that the defense was deprived of the opportunity to impeach the CI with “an age-old, logical, pecuniary argument that [the CI] had a motive to lie.”⁵² Despite the “considerable amount of evidence incriminating Palmer in the murders apart from [the CI’s] testimony,” the Supreme Court of Georgia affirmed the trial court’s order granting the defendant a new trial, concluding that a *Brady* violation had occurred and that the integrity of the criminal justice system had suffered from a “corruption of the truth-seeking process.”⁵³

In *State v. Williams*, 392 Md. 194 (2006), a key witness for the state was a paid CI in unrelated matters. The witness was actively seeking and obtaining leniency related to cooperation with the Baltimore police department. The Maryland Court of Appeals held that a reversible *Brady* violation occurred where the state failed to disclose the information. Although the prosecuting attorney was not aware of the witness’s status as a paid CI or the deals made by other prosecutors in her office, she was presumed to have knowledge.⁵⁴ Though the state characterized the defense

49. *State v. Berry*, 356 N.C. 490, 517 (2002) (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

50. See Jeff Welty, [Must Officers’ Prior Misconduct Be Disclosed in Discovery?](https://nccriminallaw.sog.unc.edu/must-officers-prior-misconduct-be-disclosed-in-discovery/), N.C. CRIM. L.: A UNC SCH. OF GOV’T BLOG (May 8, 2012), <https://nccriminallaw.sog.unc.edu/must-officers-prior-misconduct-be-disclosed-in-discovery/>; Jeff Welty, [More on Officer Misconduct and Giglio](https://nccriminallaw.sog.unc.edu/more-on-officer-misconduct-and-giglio/), N.C. CRIM. L.: A UNC SCH. OF GOV’T BLOG (Nov. 20, 2024), <https://nccriminallaw.sog.unc.edu/more-on-officer-misconduct-and-giglio/>; see also Thomas P. Hogan, *An Unfinished Symphony: Giglio v. United States and Disclosing Impeachment Material About Law Enforcement Officers*, 30 CORN. J. OF L. & PUB. POL’Y 715 (2021) (discussing the difficulty of determining materiality through a useful series of concrete examples).

51. See FED. R. EVID. 608, 609; *State v. Rankins*, 133 N.C. App. 607, 610–11 (1999) (reversible error where trial court would not allow defense to present evidence showing that state’s witness had a cooperation deal); *State v. Prevatte*, 346 N.C. 162, 163 (1997) (following *Davis v. Alaska*, 415 U.S. 308 (1974), and ordering a new trial where defense was not permitted to cross-examine the state’s principal witness regarding pending charges and possible promises or inducements to testify); Phil Dixon, [Cross-Examination on Pending Charges](https://nccriminallaw.sog.unc.edu/cross-examination-pending-charges/), N.C. CRIM. L.: A UNC SCH. OF GOV’T BLOG (Oct. 31, 2017), <https://nccriminallaw.sog.unc.edu/cross-examination-pending-charges/>.

52. *Schofield v. Palmer*, 279 Ga. 848, 853 (2005).

53. *Id.*

54. *State v. Williams*, 392 Md. 194 (2006).

counsel's cross-examination of the witness at trial as "nothing short of superb" (despite the state's failure to disclose the information), the Maryland Court of Appeals found the suppressed information to be material.⁵⁵

In many cases, the state does not plan to call the CI to testify at trial. Where the CI is not testifying, it will be significantly more difficult for the defense to articulate why the CI file may contain exculpatory material. After all, the information will not be used to impeach the CI before the jury. However, the defense may be able to articulate some other theory for why the court should conduct an in camera review of the CI file. Perhaps there is a good-faith concern that the CI has a history of planting drugs or a prior pattern of dishonest behavior that undermines confidence in the state's other evidence. The file also may contain evidence relevant to a defense such as entrapment or third-party guilt. In such circumstances, review and potential disclosure could be required.

In certain cases, the defense may also have an argument that portions of the CI file should be turned over pursuant to open-file discovery.⁵⁶ However, much of the CI file may not fall under the definition of *file* as set forth in G.S. 15A-903(a)(1)(a), given that the CI file generally contains information beyond what was "obtained during the investigation of the offenses alleged to have been committed by the defendant."⁵⁷ To the extent that the CI file contains information or narratives pertaining to the principal investigation of the defendant, the defense may be able to obtain the information pursuant to G.S. 15A-903.

The state may have valid reasons to seek to withhold portions of the CI file pertaining to the CI's previous cooperation in other matters. If such information were revealed to the defense and made public, the CI may incur risk beyond that arising from revealing the CI's identity and involvement in the case at hand. Thus, the state may seek a protective order pursuant to G.S. 15A-908 to avoid disclosing certain parts of the CI file based on "substantial risk" to the CI. (Remember that G.S. 15A-908 provides a broader basis to withhold information than G.S. 15A-904(a1), which refers to withholding only the CI's identity.) However, the constitutional due-process guarantees of *Brady/Giglio* would likely trump these statutory provisions should they conflict. If disclosure is called for, the state may consider seeking a protective order to prevent the defense from sharing the information beyond the defense team.

In most cases, the CI file will not be at the state's fingertips, but rather is kept by law enforcement. The state will thus have to request production of the CI file for review.

Under *Kyles v. Whitley*, 514 U.S. 419 (1995), prosecutors have "a duty to learn of any favorable evidence" known to those acting on the state's behalf.⁵⁸ Because it is a constitutional obligation, prosecutors must attempt to uncover such information and turn it over, even in the absence of a defense request, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."⁵⁹

55. *Id.* at 233.

56. *See* G.S. 15A-903.

57. *Id.* § 903(a)(1)(a).

58. 514 U.S. 419, 437 (1995).

59. *Id.* at 432–33 (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

Disclosure obligations under the N.C. Rules of Professional Conduct may be broader than that required by *Brady/Giglio*. Rule 3.8 requires that prosecutors conduct a “reasonably diligent inquiry” into information that “tends to negate the guilt of the accused,” and the rule does not refer to a materiality threshold.⁶⁰

In camera review is a way for prosecutors to seek guidance from the court in determining what should be disclosed under *Brady/Giglio* and the Rules of Professional Conduct rather than deciding for themselves. In-chambers review helps prevent potential miscalculations by the state as to what might be material from the defense’s perspective and allows for a decision by a neutral judge. Defenders should ask for any information in the file that is not released to the defense to be placed under seal so that an appellate court can review the trial court’s decision on the materiality of the information. In certain circumstances, such as when the CI’s identity has not been disclosed to the defense but review of the CI file is still called for, redaction of parts of the file before disclosure to the defense may be appropriate.

Timing

When disclosures of impeachment material should be made is a challenging topic, and a complete discussion is outside the scope of this bulletin. The U.S. Supreme Court has held that “the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.”⁶¹ However, courts have also held that disclosure must be made early enough to “allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure.”⁶² When exculpatory material under *Brady* (as opposed to purely impeachment material under *Giglio*) must be turned over is an open question in North Carolina.⁶³

Rule 3.8 of the Rules of Professional Conduct may require that impeachment material be disclosed earlier than the Constitution requires,⁶⁴ though it is not clear what “timely disclosure” means under the rule.⁶⁵ Prosecutors may elect to turn over *Brady/Giglio* information prior to the plea stage to ensure that a plea is fully informed, notwithstanding the fact that doing so is not required under *Ruiz*.

60. Rules of Professional Conduct of the North Carolina State Bar: Special Responsibilities of a Prosecutor, Title 27, Chapter 2, Rule 3.8 of the North Carolina Administrative Code (hereinafter N.C.A.C.); cf. *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) (“[T]he obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations. . . . [T]he prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.”).

61. *State v. Allen*, 222 N.C. App. 707, 722 (2012) (quoting *United States v. Ruiz*, 536 U.S. 622, 633 (2002) (noting concern that prospective witnesses could be exposed to harm and specifically referring to the risk of a CI’s identity being revealed before the plea stage)).

62. *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir.) (citing *United States v. Elmore*, 423 F.2d 775, 779 (4th Cir. 1970)); accord *United States v. Deutsch*, 373 F. Supp. 289, 290–91 (S.D.N.Y. 1974).

63. See *Allen*, 222 N.C. App. at 724.

64. See 27 N.C.A.C. 02, r. 3.8.

65. See *In re* Petition to Stay the Effectiveness of Formal Ethics Op. 2017-F-163, 582 S.W.3d 200, 208 (Tenn. 2019) (discussing state court opinions finding prosecutor’s ethical duties broader than those under *Brady* and state court opinions finding duties coextensive with *Brady*; discussing how various state courts have interpreted requirement of “timely disclosure”).

In light of the above, practitioners should be aware that the CI file is an important source of information, and they would do well to be familiar with the array of laws, rules, and policies governing maintenance and disclosure. CIs do not tend to collaborate with the government “out of the goodness of [their] heart.”⁶⁶ The CI file will almost always contain something that can be used to impeach the CI, such as the fact that the CI is being paid by the government or working off pending charges. Knowing that the file exists, what might be in the file, what must be disclosed as material, and how to navigate procedural and logistical questions are key aspects of the litigation of CI cases.

VII. Whether the CI’s Identity Must Be Revealed at the Motion-to-Suppress Stage

G.S. 15A-978(b)

Whether the CI’s identity must be revealed in the context of a motion to suppress is governed by G.S. 15A-978(b). This statute applies only to motions to suppress rather than trial. Remember that *Roviaro* established the baseline factors to consider when deciding whether the state must disclose the identity of the CI to the defendant to ensure a fair trial. Another U.S. Supreme Court case decided ten years later, *McCray v. Illinois* addressed the separate but related question of when the defendant is entitled to learn the CI’s identity to have a fair opportunity to litigate a motion to suppress.⁶⁷

At a motion to suppress, the considerations are somewhat different from trial. To this point, this bulletin has dealt with the question whether testimony from the CI is material in determining, at a trial, whether or not the defendant is guilty. In contrast, the question at the motion-to-suppress stage in cases involving CIs is not the guilt or innocence of the defendant. The question is generally whether a search or seizure violated the defendant’s Fourth Amendment rights, with the attendant question whether the officer had probable cause to perform a particular action. Thus, the issues to be decided may be whether law enforcement had good reason to rely on information provided by the CI, whether law enforcement corroborated the information, and whether the officers are being truthful about their interactions with the CI. G.S. 15A-978(b) addresses a related but narrow question: Can we rely on the officer’s assertion *that the CI exists*?

Subsection (b) of G.S. 15A-978 is directly relevant, but subsection (a) provides important context. G.S. 15A-978(a) deals with how the defendant can challenge the truthfulness of the testimony that led to the issuance of a search warrant. The landmark case on attacking the truthfulness of an officer who applied for a search warrant is *Franks v. Delaware*, 438 U.S. 154 (1978). *Franks* established that a defendant is entitled to a hearing on whether a search-warrant affidavit contains a false statement, but only after making a “substantial preliminary showing” that the affiant made the false statement knowingly and intentionally, or with reckless disregard for the truth.⁶⁸ G.S. 15A-978(a) defines *truthful testimony* as “testimony which reports in good faith the circumstances relied on to establish probable cause.” In other words, if an officer

66. *State v. Williams*, 392 Md. 194, 205 (2006).

67. *McCray v. Illinois*, 386 U.S. 300 (1967).

68. *Franks v. Delaware*, 438 U.S. 154 (1978).

receives false information from a CI but includes the information in a search-warrant affidavit in good faith, the officer's testimony should still be considered "truthful." The official commentary to the statute notes that there was some concern that the rule would "immuniz[e]" the hearsay from the CI and leave officers with "everything to lose and nothing to gain from producing the informants directly to the magistrate."⁶⁹ However, lawmakers apparently concluded that the process of applying for a search warrant before a neutral judicial official would ensure adequate vetting of the CI's information.⁷⁰

Crucially, subsection (b), which addresses when the defendant is entitled to the CI's identity, comes into play only in situations where officers do not have a warrant. G.S. 15A-978(b) provides that where the defendant is challenging the truthfulness of the testimony establishing probable cause in a hearing on a motion to suppress,

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 circumstances in which the defendant is entitled to the CI's identity are narrow. In most cases where law enforcement employs the services of a CI, law enforcement will seek a search warrant. This is because the work of cultivating a CI and developing a case relying on a CI's information is usually deliberate in nature. Given the investment of resources and patience involved, the investigation often culminates with a search warrant rather than the type of warrantless interaction associated with a fast-developing situation. Because warrantless CI cases are relatively rare, the exception for cases involving a warrant (where turning over the CI's identity is not required) nearly swallows the rule.

As the statute creates an obligation to reveal the CI's identity only where officers make a warrantless search or seizure, it tends to come into play in situations where the target of an investigation is in a vehicle or on the move. In such situations, the contraband or evidence sought may be within law enforcement's grasp for only a brief time and it may be impracticable to apply for a search warrant.

The caselaw on G.S. 15A-978(b) largely involves seizures where the defendant was in a vehicle. In *State v. Collins*, 44 N.C. App. 141 (1979), the defendant was alleged to be selling drugs out of a van near a high school, and the CI stated that the defendant had just made a sale. In *State v. Bunn*, 36 N.C. App. 114 (1978), the defendant was seen leaving the house with a large paper bag and getting into a car shortly after the CI stated that the defendant was taking drugs to the north end of town. In *State v. Ellison*, 213 N.C. App. 300 (2011), the defendant was stopped in a truck after the CI described a consistent pattern of movements that the defendant followed when trafficking in prescription pills.

69. N.C. GEN. STAT. ANN. § 15A-978.

70. See *id.*

The Two-Officer Rule

The caselaw interpreting G.S. 15A-978(b) establishes that the statute is concerned with the limited question whether there are assurances that the CI exists, not the larger question of the CI's reliability.⁷¹ The statute requires corroboration to establish that the applying officer did not fabricate the existence of a CI as an after-the-fact justification for seizing evidence without a warrant. However, courts have been somewhat flexible in what constitutes adequate corroboration of the CI's existence.

In some cases, the corroboration is relatively straightforward. In *State v. Collins*, 44 N.C. App. 141 (1979), a second officer accompanied the first officer in sending a CI to purchase drugs from a van parked outside a high school. The second officer was in a position to directly corroborate the CI's existence and involvement in the investigation.⁷²

In other cases, the corroboration is less direct. For example, in *Bunn*, the first officer had the CI call a second officer thirty minutes after the arrest to repeat the information given to the first officer. However, the first officer's efforts to corroborate the CI's existence were frustrated when the second officer died while the case was pending. So the first officer had the CI call a third officer and repeat the information, three months after the arrest. The defense complained at the suppression hearing that this was not sufficient corroboration since the information was simply parroted to the third officer well after the fact. However, the state countered that the third officer had in fact participated in the search and arrest of the defendant and that the first officer had told the third officer about the information in advance. The third officer also was familiar with the CI and had received information from the CI leading to three arrests on previous occasions.⁷³

In holding that the corroboration was sufficient, the *Bunn* court read a fair amount of flexibility into G.S. 15A-978(b). Corroboration of the CI's existence could "includ[e] such things as the officer's prediction to others of certain events of which he could not personally know, accompanied by a declaration that his informant has told him so."⁷⁴ Such corroboration does not necessarily involve any direct contact between the informant and a second officer. In *Bunn*, on the day in question, the first officer told the third officer what the CI had said about what the defendant was going to do, including when the defendant was going to leave his home and what drugs the defendant would be carrying. The prediction of future behavior was borne out in observations of the defendant that day. The court held that this was sufficient corroboration even though the third officer didn't speak directly with the CI or directly observe the CI on the day in question.⁷⁵

In all three cases—*Collins*, *Bunn*, and *Ellison*—the court of appeals found sufficient corroboration. However, in all three cases, the state had a second officer who was able to corroborate the CI's existence directly or indirectly. Had there been no second officer, the state would have been compelled by statute to turn over the CI's identity for use at the suppression hearing.

71. See *State v. Bunn*, 36 N.C. App. 114, 116 (1978); *State v. Ellison*, 213 N.C. App. 300, 309 (2011).

72. 44 N.C. App. 141 (1979).

73. *Bunn*, 36 N.C. App. at 115–17.

74. *Id.* at 116.

75. *Id.* at 115–17; cf. *Ellison*, 213 N.C. App. 300 (sufficient corroboration of CI's existence where first officer told second officer about information from the CI regarding a drug transaction and second officer was able to confirm the truth of the information through independent investigation).

As an aside, it's worth noting that the defendant in *Collins* won a new suppression hearing because the defendant tried to call four witnesses to establish that no one could have seen what the CI claimed to have seen (and thus the informant could not have existed), but the trial court would not allow the defendant to present this evidence. The court of appeals in *Collins* held that the defendant should have been afforded the opportunity to present his evidence that the existence of the CI was fabricated, pointing to G.S. 15A-978(c), which provides that the statute does not limit the right of a defendant to contest the truthfulness of testimony offered in support of a warrantless search.

In light of G.S. 15A-978(b), law enforcement should consider avoiding investigations where only one officer works with a particular CI and the officer keeps the details of the relationship and information provided by the CI secret. Alternatively, law enforcement may introduce the CI to a second officer once the relationship has developed and the investigation is underway, but note that merely "parroting" what occurred previously may not be sufficient corroboration. (The third officer in *Bunn* had independent interactions with the CI and involvement in the case at hand; had he not, it is unclear whether corroboration would have been sufficient.) If the CI's work culminates in a warrantless search, the CI's identity may be at risk should the defense invoke G.S. 15A-978(b) and demand corroboration of the CI's existence. Conversely, defenders should bear in mind that they have a strong chance of compelling the state to reveal the CI's identity where the state fails to produce a second officer to corroborate the CI's existence.

However, our appellate courts have found that a CI's existence can be corroborated in a variety of ways. The second officer need not necessarily interact directly with the CI, as long as it is apparent to the second officer that the first officer knows things that only someone with a CI could know and the first officer states that the CI is the source of this knowledge.

Although the caselaw sets a relatively low bar for corroboration of the CI's existence for the purposes of G.S. 15A-978(b), practitioners should remember that the analysis for motions to suppress is separate from that for determining whether the CI's identity must be turned over to ensure a fair trial. Defenders have stronger arguments at the trial stage given the different standards and questions at play. The question is not just whether there is corroboration that the CI exists but also whether due process requires that the defense learn the CI's identity to confront the CI or elicit material testimony on the core question of guilt.