

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

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HOUSE BILL 1800

Short Title: Open Discovery Rules/Funds.

(Public)

Sponsors: Representative Kiser.

Referred to: Rules, Calendar, and Operations of the House.

May 31, 2004

A BILL TO BE ENTITLED

1 AN ACT TO PROVIDE FOR OPEN DISCOVERY IN FELONIES AND TO MAKE
2 CERTAIN OTHER AMENDMENTS TO THE LAWS REGARDING
3 DISCOVERY IN CRIMINAL CASES AND TO APPROPRIATE FUNDS TO
4 IMPLEMENT THIS ACT.
5

6 The General Assembly of North Carolina enacts:

7 **SECTION 1.** G.S. 15A-902 reads as rewritten:

8 "**§ 15A-902. Discovery procedure.**

9 (a) A party seeking discovery under this Article must, before filing any motion
10 before a judge, request in writing that the other party comply voluntarily with the
11 discovery request. A written request is not required if the opposing party agrees in
12 writing to waive that requirement. Upon receiving a negative or unsatisfactory response,
13 or upon the passage of seven days following the receipt of the request without response,
14 the party requesting discovery may file a motion for discovery under the provisions of
15 this Article concerning any matter as to which voluntary discovery was not made
16 pursuant to request.

17 (b) To the extent that discovery authorized in this Article is voluntarily made in
18 response to a request, or written agreement, the discovery is deemed to have been made
19 under an order of the court for the purposes of this Article.

20 (c) A motion for discovery under this Article must be heard before a superior
21 court judge.

22 (d) If a defendant is represented by counsel, he may as a matter of right request
23 voluntary discovery from the State under subsection (a) above not later than the tenth
24 working day after either the probable-cause hearing or the date he waives the hearing. If
25 a defendant is not represented by counsel, or is indicted or consents to the filing of a bill
26 of information before he has been afforded or waived a probable-cause hearing, he may
27 as a matter of right request voluntary discovery from the State under subsection (a)
28 above not later than the tenth working day after

1 (1) The defendant's consent to be tried upon a bill of information, or the
2 service of notice upon him that a true bill of indictment has been found
3 by the grand jury, or

4 (2) The appointment of counsel – whichever is later.

5 For the purposes of this subsection a defendant is represented by counsel only if counsel
6 was retained by or appointed for him prior to or during a probable-cause hearing or
7 prior to execution by him of a waiver of a probable-cause hearing.

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

12 (f) A motion for discovery made at any time prior to trial may be entertained if
13 the parties so stipulate or if the judge for good cause shown determines that the motion
14 should be allowed in whole or in part."

15 **SECTION 2.** G.S. 15A-903 reads as rewritten:

16 "**§ 15A-903. Disclosure of evidence by the State – Information subject to**
17 **disclosure.**

18 (a) ~~Statement of Defendant.—Upon motion of a defendant, the court must order~~
19 ~~the prosecutor:~~

20 (1) ~~To permit the defendant to inspect and copy or photograph any~~
21 ~~relevant written or recorded statements made by the defendant, or~~
22 ~~copies thereof, within the possession, custody, or control of the State~~
23 ~~the existence of which is known or by the exercise of due diligence~~
24 ~~may become known to the prosecutor; and~~

25 (2) ~~To divulge, in written or recorded form, the substance of any oral~~
26 ~~statement relevant to the subject matter of the case made by the~~
27 ~~defendant, regardless of to whom the statement was made, within the~~
28 ~~possession, custody or control of the State, the existence of which is~~
29 ~~known to the prosecutor or becomes known to him prior to or during~~
30 ~~the course of trial; except that disclosure of such a statement is not~~
31 ~~required if it was made to an informant whose identity is a prosecution~~
32 ~~secret and who will not testify for the prosecution, and if the statement~~
33 ~~is not exculpatory. If the statement was made to a person other than a~~
34 ~~law-enforcement officer and if the statement is then known to the~~
35 ~~State, the State must divulge the substance of the statement no later~~
36 ~~than 12 o'clock noon, on Wednesday prior to the beginning of the~~
37 ~~week during which the case is calendared for trial. If disclosure of the~~
38 ~~substance of defendant's oral statement to an informant whose identity~~
39 ~~is or was a prosecution secret is withheld, the informant must not~~
40 ~~testify for the prosecution at trial.~~

41 (b) ~~Statement of a Codefendant.—Upon motion of a defendant, the court must~~
42 ~~order the prosecutor:~~

1 (1) To permit the defendant to inspect and copy or photograph any written
2 or recorded statement of a codefendant which the State intends to offer
3 in evidence at their joint trial; and

4 (2) To divulge, in written or recorded form, the substance of any oral
5 statement made by a codefendant which the State intends to offer in
6 evidence at their joint trial.

7 (e) Defendant's Prior Record.—Upon motion of the defendant, the court must
8 order the State to furnish to the defendant a copy of his prior criminal record, if any, as
9 is available to the prosecutor.

10 (d) Documents and Tangible Objects.—Upon motion of the defendant, the court
11 must order the prosecutor to permit the defendant to inspect and copy or photograph
12 books, papers, documents, photographs, motion pictures, mechanical or electronic
13 recordings, buildings and places, or any other crime scene, tangible objects, or copies or
14 portions thereof which are within the possession, custody, or control of the State and
15 which are material to the preparation of his defense, are intended for use by the State as
16 evidence at the trial, or were obtained from or belong to the defendant.

17 (e) Reports of Examinations and Tests.—Upon motion of a defendant, the court
18 must order the prosecutor to provide a copy of or to permit the defendant to inspect and
19 copy or photograph results or reports of physical or mental examinations or of tests,
20 measurements or experiments made in connection with the case, or copies thereof,
21 within the possession, custody, or control of the State, the existence of which is known
22 or by the exercise of due diligence may become known to the prosecutor. In addition,
23 upon motion of a defendant, the court must order the prosecutor to permit the defendant
24 to inspect, examine, and test, subject to appropriate safeguards, any physical evidence,
25 or a sample of it, available to the prosecutor if the State intends to offer the evidence, or
26 tests or experiments made in connection with the evidence, as an exhibit or evidence in
27 the case.

28 (f) Statements of State's Witnesses.

29 (1) In any criminal prosecution brought by the State, no statement or
30 report in the possession of the State that was made by a State witness
31 or prospective State witness, other than the defendant, shall be the
32 subject of subpoena, discovery, or inspection until that witness has
33 testified on direct examination in the trial of the case.

34 (2) After a witness called by the State has testified on direct examination,
35 the court shall, on motion of the defendant, order the State to produce
36 any statement of the witness in the possession of the State that relates
37 to the subject matter as to which the witness has testified. If the entire
38 contents of that statement relate to the subject matter of the testimony
39 of the witness, the court shall order it to be delivered directly to the
40 defendant for his examination and use.

41 (3) If the State claims that any statement ordered to be produced under this
42 section contains matter that does not relate to the subject matter of the
43 testimony of the witness, the court shall order the State to deliver that
44 statement for the inspection of the court in camera. Upon delivery the

1 court shall ~~excise the portions of the statement that do not relate to the~~
2 ~~subject matter of the testimony of the witness. With that material~~
3 ~~excised, the court shall then direct delivery of the statement to the~~
4 ~~defendant for his use. If, pursuant to this procedure, any portion of the~~
5 ~~statement is withheld from the defendant and the defendant objects to~~
6 ~~the withholding, and if the trial results in the conviction of the~~
7 ~~defendant, the entire text of the statement shall be preserved by the~~
8 ~~State and, in the event the defendant appeals, shall be made available~~
9 ~~to the appellate court for the purpose of determining the correctness of~~
10 ~~the ruling of the trial judge. Whenever any statement is delivered to a~~
11 ~~defendant pursuant to this subsection, the court, upon application of~~
12 ~~the defendant, may recess proceedings in the trial for a period of time~~
13 ~~that it determines is reasonably required for the examination of the~~
14 ~~statement by the defendant and his preparation for its use in the trial.~~

15 (4) ~~If the State elects not to comply with an order of the court under~~
16 ~~subdivision (2) or (3) to deliver a statement to the defendant, the court~~
17 ~~shall strike from the record the testimony of the witness, and direct the~~
18 ~~jury to disregard the testimony, and the trial shall proceed unless the~~
19 ~~court determines that the interests of justice require that a mistrial be~~
20 ~~declared.~~

21 (5) ~~The term "statement," as used in subdivision (2), (3), and (4) in~~
22 ~~relation to any witness called by the State means~~
23 ~~a. A written statement made by the witness and signed or~~
24 ~~otherwise adopted or approved by him;~~
25 ~~b. A stenographic, mechanical, electrical, or other recording, or a~~
26 ~~transcription thereof, that is a substantially verbatim recital or~~
27 ~~an oral statement made by the witness and recorded~~
28 ~~contemporaneously with the making of the oral statements.~~

29 (g) ~~DNA Laboratory Reports.~~ ~~The defendant shall have the right to obtain a~~
30 ~~copy of DNA laboratory reports provided to the district attorney revealing that there~~
31 ~~was a DNA match to the defendant that was derived from a CODIS match during a~~
32 ~~comparison search involving the defendant's DNA sample, in accordance with the~~
33 ~~procedure set forth in G.S. 15A-902.~~

34 (a) Upon motion of the defendant, the court must order the prosecutor to do the
35 following:

36 (1) To make available to the defendant the complete files of all law
37 enforcement and prosecutorial agencies involved in the investigation
38 of the crimes committed or the prosecution of the defendant. The term
39 "file" includes, but is not limited to: the defendant's statements,
40 witness statements, investigating officers' notes, results of tests and
41 examinations, or any other matter or evidence obtained during the
42 investigation of the offenses alleged to have been committed by the
43 defendant. The defendant shall have the right to inspect and copy or
44 photograph any materials contained therein and, under appropriate

1 safeguards, to inspect, examine, and test any physical evidence or
2 sample contained therein.

3 (2) To provide the discovery required in G.S. 15A-903.

4 (3) If the State may call an expert witness at trial, the State shall furnish to
5 the defendant notice of the same. Each such expert shall prepare, and
6 the State shall furnish to the defendant, a report of the results of any
7 examinations or tests conducted by the expert. The State shall also
8 furnish to the defendant the expert's curriculum vitae. The State shall
9 give the notice and furnish the materials required by subdivision (1) of
10 this subsection 20 working days prior to trial.

11 (4) To give the defendant, at the beginning of jury selection, a written list
12 of the names of all other witnesses whom the State may call during the
13 trial. Names of witnesses shall not be subject to disclosure if the State
14 certifies to the court that to do so may subject the witnesses or others
15 to physical or substantial economic harm or coercion, or that there is
16 other particularized, compelling need not to disclose. The certification
17 to the court shall be in writing and placed under seal.

18 (5) The term "statement," as used in subdivisions (2), (3), and (4), in
19 relation to any witness called by the State means:

20 a. A written statement made by the witness and signed or
21 otherwise adopted or approved by him.

22 b. A stenographic, mechanical, electrical, or other recording, or a
23 transcription thereof, that is a substantially verbatim recital or
24 an oral statement made by the witness and recorded
25 contemporaneously with the making of the oral statements."

26 **SECTION 3.** G.S. 15A-904 reads as rewritten:

27 "**§ 15A-904. Disclosure of evidence by the State – Certain reports-information not**
28 **subject to disclosure.**

29 (a) ~~Except as provided in G.S. 15A-903(a), (b), (c) and (e), this Article does not~~
30 ~~require the production of reports, memoranda, or other internal documents made by the~~
31 ~~prosecutor, law enforcement officers, or other persons acting on behalf of the State in~~
32 ~~connection with the investigation or prosecution of the case, or of statements made by~~
33 ~~witnesses or prospective witnesses of the State to anyone acting on behalf of the State.~~

34 (b) ~~Nothing in this section prohibits a prosecutor from making voluntary~~
35 ~~disclosures in the interest of justice.~~

36 (a) The State is not required to disclose written materials drafted by the
37 prosecuting attorney or the prosecuting attorney's legal staff for their own use at trial,
38 including witness examinations, voir dire questions, opening statements, and closing
39 arguments. Disclosure is also not required of legal research or of records,
40 correspondence, reports, memoranda, or trial preparation interview notes prepared by
41 the prosecuting attorney or by members of the prosecuting attorney's legal staff.

42 (b) This section shall have no effect on a prosecutor's duty to comply with federal
43 or State constitutional disclosure requirements."

44 **SECTION 4.** G.S. 15A-905 reads as rewritten:

1 "§ 15A-905. Disclosure of evidence by the defendant – Information subject to
2 disclosure.

3 (a) Documents and Tangible Objects. – If the court grants any relief sought by
4 the defendant under G.S. 15A-903(d), the court must, upon motion of the State, order
5 the defendant to permit the State to inspect and copy or photograph books, papers,
6 documents, photographs, motion pictures, mechanical or electronic recordings, tangible
7 objects, or copies or portions thereof which are within the possession, custody, or
8 control of the defendant and which the defendant ~~intends to~~may introduce in evidence at
9 the trial.

10 (b) Reports of Examinations and Tests. – If the court grants any relief sought by
11 the defendant under G.S. 15A-903(e), the court must, upon motion of the State, order
12 the defendant to permit the State to inspect and copy or photograph results or reports of
13 physical or mental examinations or of tests, measurements or experiments made in
14 connection with the case, or copies thereof, within the possession and control of the
15 defendant which the defendant ~~intends to~~may introduce in evidence at the trial or which
16 were prepared by a witness whom the defendant ~~intends to~~may call at the trial, when the
17 results or reports relate to his testimony. In addition, upon motion of a prosecutor, the
18 court must order the defendant to permit the prosecutor to inspect, examine, and test,
19 subject to appropriate safeguards, any physical evidence or a sample of it available to
20 the defendant if the defendant ~~intends to~~may offer such evidence, or tests or
21 experiments made in connection with such evidence, as an exhibit or evidence in the
22 case.

23 (c) Disclosure by the defendant of alibi defense pursuant to State's request. –

24 (1) State's Request for notice and Defendant's Response. – The State may
25 request in writing that the defendant notify the State of any intended
26 alibi defense. The request must state the time, date, and place of the
27 alleged offense. Within 10 days after the request, or at some other time
28 the court sets, the defendant must serve written notice on the State of
29 any intended alibi defense. The defendant's notice must state each
30 specific place where the defendant claims to have been at the time of
31 the alleged offense and the name of each alibi witness on whom the
32 defendant intends to rely.

33 (2) Disclosing State's witnesses. – If the defendant serves a notice under
34 subdivision (c)(1) of this subsection, the State must disclose in writing
35 to the defendant or the defendant's attorney the name of each witness
36 the State intends to rely on to establish the defendant's presence at the
37 scene of the alleged offense and each State's rebuttal witness to the
38 defendant's alibi defense. Unless the court directs otherwise, the State
39 must give its notice of disclosure under subdivision (c)(2) of this
40 section within 10 days after the defendant serves notice of an intended
41 alibi defense under subdivision (c)(1) of this subsection, but no later
42 than 10 days before trial.

43 (3) Continuing Duty to disclose. – Both the State and the defendant must
44 promptly disclose in writing to the other party the name of each

1 additional witness if the disclosing party learns of the witness before or
2 during trial, and the witness should have been disclosed under
3 subdivisions (1) and (2) of this section if the disclosing party had
4 known of the witness earlier.

5 (4) Exceptions. – For good cause, the court may grant an exception to any
6 requirement of subdivisions (1) through (3).

7 (5) Failure to Comply. – If a party fails to comply with this section, the
8 court may exclude the testimony of any undisclosed witness regarding
9 the defendant's alibi. This section does not limit the defendant's right to
10 testify.

11 (6) Inadmissibility of Withdrawn intention. – Evidence of an intention to
12 rely on an alibi defense, later withdrawn, or of a statement made in
13 connection with that intention is not, in any civil or criminal
14 proceeding, admissible against the person who gave notice of the
15 intention.

16 (b) If the court grants any relief sought by the defendant under G.S. 15A-903, the
17 court must, upon motion of the State, order the defendant to do the following:

18 (1) To provide the discovery required by G.S. 15A-905.

19 (2) To give notice to the prosecutor of the intent to offer at trial a defense
20 of duress, entrapment, insanity, mental infirmity, diminished capacity,
21 self defense, accident, automatism, involuntary intoxication, or
22 voluntary intoxication. As to only the defenses of duress, entrapment,
23 insanity, automatism, or involuntary intoxication, such notice by the
24 defendant shall contain specific information as to the nature and extent
25 of the defense. Such notice of defense as described in this paragraph is
26 inadmissible against the defendant. Such notice of defense must be
27 given within 20 working days of when the case is initially set for trial
28 pursuant to G.S. 7A-49.4, or such other later time as set by the court.

29 (3) If the defendant may call an expert witness at trial, the defendant shall
30 furnish to the State notice of the same. Each such expert shall prepare,
31 and the defendant shall furnish to the prosecutor, a report of the results
32 of the examinations or tests conducted by the expert. The defendant
33 shall also furnish to the prosecutor the expert's curriculum vitae. The
34 defendant shall give the notice and furnish the materials required by
35 this subsection within 20 working days prior to trial.

36 (4) To give the State, at the beginning of jury selection, a written list of
37 the names of all other witnesses whom the defendant may call during
38 the trial. Names of witnesses shall not be subject to disclosure if the
39 defendant certifies to the court that to do so may subject the witnesses
40 or others to physical or substantial economic harm or coercion, or that
41 there is other particularized, compelling need not to disclose. The
42 certification to the court shall be in writing and placed under seal."

43 **SECTION 5.** G.S. 15A-908(a) reads as rewritten:

1 (a) Upon written motion of a party and a finding of good cause, which may
2 include, but is not limited to a finding that there is a substantial risk to any person or
3 physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or
4 embarrassment, the court may at any time order that discovery or inspection be denied,
5 restricted, or deferred, or may make other appropriate orders. A party may apply ex
6 parte for a protective order and, if an ex parte order is granted, the opposing party shall
7 receive notice that the order was entered, but without disclosure of the nature or content
8 of the order."

9 **SECTION 6.** G.S. 15A-910 reads as rewritten:

10 **"§ 15A-910. Regulation of discovery – Failure to comply.**

11 (a) If at any time during the course of the proceedings the court determines that a
12 party has failed to comply with this Article or with an order issued pursuant to this
13 Article, the court in addition to exercising its contempt powers may

- 14 (1) Order the party to permit the discovery or inspection, or
- 15 (2) Grant a continuance or recess, or
- 16 (3) Prohibit the party from introducing evidence not disclosed, or
- 17 (3a) Declare a mistrial, or
- 18 (3b) Dismiss the charge, with or without prejudice, or
- 19 (4) Enter other appropriate orders.

20 (b) Prior to finding any sanctions appropriate, the court shall consider both the
21 materiality of the subject matter and the totality of the circumstances surrounding an
22 alleged failure to comply with this Article or an order issued pursuant to this Article."

23 **SECTION 7.** G.S. 15A-959 reads as rewritten:

24 **"§ 15A-959. Notice of defense of insanity; pretrial determination of insanity.**

25 (a) If a defendant intends to raise the defense of insanity, he must within the time
26 provided for the filing of pretrial motions under G.S. 15A-952 file a notice of his
27 intention to rely on the defense of ~~insanity~~. insanity as provided in G.S. 15A-905(c) and,
28 if the case is not subject to that section, within a reasonable time prior to trial. The court
29 may for cause shown allow late filing of the notice or grant additional time to the parties
30 to prepare for trial or make other appropriate orders.

31 (b) In cases not subject to the requirements of G.S. 15A-905(c), if ~~if~~ a defendant
32 intends to introduce expert testimony relating to a mental disease, defect, or other
33 condition bearing upon the issue of whether he had the mental state required for the
34 offense charged, he must within a reasonable time prior to trial of the time provided for
35 the filing of pretrial motions under G.S. 15A-952(b) file a notice of that intention. The
36 court may for cause shown allow late filing of the notice or grant additional time to the
37 parties to prepare for trial or make other appropriate orders.

38 (c) Upon motion of the defendant and with the consent of the State the court
39 may conduct a hearing prior to the trial with regard to the defense of insanity at the
40 time of the offense. If the court determines that the defendant has a valid defense of
41 insanity with regard to any criminal charge, it may dismiss that charge, with prejudice,
42 upon making a finding to that effect. The court's denial of relief under this subsection is
43 without prejudice to the defendant's right to rely on the defense at trial. If the motion is

1 denied, no reference to the hearing may be made at the trial, and recorded testimony or
2 evidence taken at the hearing is not admissible as evidence at the trial."

3 **SECTION 8.** G.S. 15A-501 is amended by adding a new subdivision to
4 read:

5 "(6) Must make available to the prosecutor on a timely basis all materials
6 and information acquired in the course of all felony investigations.
7 This responsibility is a continuing affirmative duty."

8 **SECTION 9.** There is appropriated from the General Fund to the
9 Administrative Office of the Courts the sum of fifty thousand dollars (\$50,000) for the
10 2004-2005 fiscal year to implement this act.

11 **SECTION 10.** This act becomes effective October 1, 2004.