

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2003

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SENATE BILL 1403

Short Title: Open Discovery/Crim Cases.

(Public)

Sponsors: Senator Rand.

Referred to: Judiciary I.

May 28, 2004

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR OPEN DISCOVERY IN CLASS A THROUGH E  
FELONIES AND TO MAKE CERTAIN OTHER AMENDMENTS TO THE  
LAWS REGARDING DISCOVERY IN CRIMINAL CASES:

The General Assembly of North Carolina enacts:

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

**"§ 15A-902. Discovery procedure.**

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

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

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

(d) If a defendant is represented by counsel, he may as a matter of right request voluntary discovery from the State under subsection (a) above not later than the tenth working day after either the probable-cause hearing or the date he waives the hearing. If a defendant is not represented by counsel, or is indicted or consents to the filing of a bill of information before he has been afforded or waived a probable-cause hearing, he may as a matter of right request voluntary discovery from the State under subsection (a) 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           (c) 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) ~~Except as provided in subsection (h) of this section, in~~ any criminal  
30           prosecution brought by the State, no statement or report in the  
31           possession of the State that was made by a State witness or prospective  
32           State witness, other than the defendant, shall be the subject of  
33           subpoena, discovery, or inspection until that witness has testified on  
34           direct examination in the trial of the case.
- 35           (2) After a witness called by the State has testified on direct examination,  
36           the court shall, on motion of the defendant, order the State to produce  
37           any statement of the witness in the possession of the State that relates  
38           to the subject matter as to which the witness has testified. If the entire  
39           contents of that statement relate to the subject matter of the testimony  
40           of the witness, the court shall order it to be delivered directly to the  
41           defendant for his examination and use.
- 42           (3) If the State claims that any statement ordered to be produced under this  
43           section contains matter that does not relate to the subject matter of the  
44           testimony of the witness, the court shall order the State to deliver that

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

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

22 (5) The term "statement," as used in subdivision (2), (3), and (4) in  
23 relation to any witness called by the State means

- 24 a. A written statement made by the witness and signed or  
25 otherwise adopted or approved by him;  
26 b. A stenographic, mechanical, electrical, or other recording, or a  
27 transcription thereof, that is a substantially verbatim recital or  
28 an oral statement made by the witness and recorded  
29 contemporaneously with the making of the oral statements.

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

35 (h) Class A through E Felonies. – This subsection applies to cases within the  
36 original jurisdiction of the superior court in which the defendant is charged with a Class  
37 A, B1, B2, C, D, or E felony. This Article also applies to felony and misdemeanor  
38 charges of any class that are brought contemporaneously with or subsequently joined  
39 with a Class A, B1, B2, C, D, or E felony.

40 Upon motion of the defendant, the court must order the prosecutor:

- 41 (1) To make available to the defendant the complete files of all law  
42 enforcement and prosecutorial agencies involved in the investigation  
43 of the crimes committed or the prosecution of the defendant. The term  
44 "file" includes, but is not limited to: the defendant's statements,

1 witness statements, investigating officers' notes, results of tests and  
2 examinations, or any other matter or evidence obtained during the  
3 investigation of the offenses alleged to have been committed by the  
4 defendant. The defendant shall have the right to inspect and copy or  
5 photograph any materials contained therein and, under appropriate  
6 safeguards, to inspect, examine, and test any physical evidence or  
7 sample contained therein.

8 (2) To provide the discovery required in G.S. 15A-903(a) through (e) if  
9 not provided under subdivision (1) of this subsection.

10 (3) To give notice to the defendant of the intent to call any expert  
11 witnesses at trial. Each expert that the State intends to call as a witness  
12 at trial shall prepare, and the State shall furnish to the defendant, a  
13 report of the results of any examinations or tests conducted by the  
14 expert. The State shall also furnish to the defendant the expert's  
15 curriculum vitae and a written description of the substance of the  
16 expert's proposed testimony, the expert's opinion, and the underlying  
17 basis for that opinion. The defendant shall give the notice and furnish  
18 the materials required by this subsection within a reasonable time prior  
19 to trial, as specified by the court.

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

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

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

30 (a) Except as provided in G.S. 15A-903(a), (b), (c) and (e), this Article does not  
31 require the production of reports, memoranda, or other internal documents made by the  
32 prosecutor, law enforcement officers, or other persons acting on behalf of the State in  
33 connection with the investigation or prosecution of the case, or of statements made by  
34 witnesses or prospective witnesses of the State to anyone acting on behalf of the State.  
35 The State is not required to disclose written materials drafted by the prosecuting  
36 attorney or the prosecuting attorney's legal staff for their own use at trial, including  
37 witness examinations, voir dire questions, opening statements, and closing arguments.  
38 Disclosure is also not required of legal research or of records, correspondence, reports,  
39 memoranda, or trial preparation interview notes prepared by the prosecuting attorney or  
40 by members of the prosecuting attorney's legal staff to the extent they contain the  
41 opinions, theories, or conclusions of the prosecuting attorney or the prosecuting  
42 attorney's legal staff.

1 (b) Nothing in this section prohibits a prosecutor from making voluntary  
2 disclosures in the interest of ~~justice~~-justice nor prohibits a court from finding that the  
3 protections of this section have been waived.

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

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

7 "**§ 15A-905. Disclosure of evidence by the defendant – Information subject to**  
8 **disclosure.**

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

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

28 (c) Class A through E Felonies. – If the court grants any relief sought by the  
29 defendant under G.S. 15A-903(h), the court must, upon motion of the State, order the  
30 defendant:

31 (1) To provide the discovery required by G.S. 15A-905(a) and (b):

32 (2) To give notice to the prosecutor of the intent to offer at trial a defense  
33 of alibi, duress, entrapment, insanity, mental infirmity, diminished  
34 capacity, self-defense, accident, automatism, involuntary intoxication,  
35 or voluntary intoxication. As to only the defenses of duress,  
36 entrapment, insanity, automatism, or involuntary intoxication, such  
37 notice by the defendant shall contain specific information as to the  
38 nature and extent of the defense. Such notice of defense as described in  
39 this paragraph is inadmissible against the defendant. Such notice of  
40 defense must be given within five working days of when the case is  
41 initially set for trial pursuant to G.S. 7A-49.4, or such other later time  
42 as set by the court.

43 (3) To give notice to the prosecutor of the intent to call any expert  
44 witnesses at trial. Each expert that the defendant intends to call as a

1            witness at trial shall prepare, and the defendant shall furnish to the  
2            prosecutor, a report of the results of the examinations or tests  
3            conducted by the expert. The defendant shall also furnish to the  
4            prosecutor the expert's curriculum vitae and a written description of  
5            the substance of the expert's proposed testimony, the expert's opinion,  
6            and the underlying basis for that opinion. The defendant shall give the  
7            notice and furnish the materials required by this subsection within a  
8            reasonable time prior to trial, as specified by the court.

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

17           (d) "Intent" as contemplated in this section is that intent which exists at the time  
18           of the notice and is subject to the continuing duty to supplement disclosure. Evidence  
19           shall not be excluded, and no witness shall be precluded from testifying for any party,  
20           because the evidence or the witness' identity was not disclosed pursuant to this rule, if  
21           the party calling such witness or offering such evidence did not in good faith intend to  
22           call the witness or offer the evidence at the time that he or she provided the material  
23           required by this rule. In the interests of justice, the judicial authority may in its  
24           discretion permit any undisclosed individual to testify."

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

26           "(a) Upon written motion of a party and a finding of good cause, which may  
27 include, but is not limited to a finding that there is a substantial risk to any person or  
28 physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or  
29 embarrassment, the court may at any time order that discovery or inspection be denied,  
30 restricted, or deferred, or may make other appropriate orders. In cases subject to  
31 G.S. 15A-903(h) and G.S. 15A-905(c), a party may apply ex parte for a protective order  
32 and, if an ex parte order is granted, the opposing party shall receive notice that the order  
33 was entered, but without disclosure of the nature or content of the order."

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

35           **"§ 15A-910. Regulation of discovery – Failure to comply.**

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

- 39           (1) Order the party to permit the discovery or inspection, or  
40           (2) Grant a continuance or recess, or  
41           (3) Prohibit the party from introducing evidence not disclosed, or  
42           (3a) Declare a mistrial, or  
43           (3b) Dismiss the charge, with or without prejudice, or  
44           (4) Enter other appropriate orders.

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

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

5 **"§ 15A-959. Notice of defense of insanity; pretrial determination of insanity.**

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

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

19 (c) Upon motion of the defendant and with the consent of the State the court may  
20 conduct a hearing prior to the trial with regard to the defense of insanity at the time of  
21 the offense. If the court determines that the defendant has a valid defense of insanity  
22 with regard to any criminal charge, it may dismiss that charge, with prejudice, upon  
23 making a finding to that effect. The court's denial of relief under this subsection is  
24 without prejudice to the defendant's right to rely on the defense at trial. If the motion is  
25 denied, no reference to the hearing may be made at the trial, and recorded testimony or  
26 evidence taken at the hearing is not admissible as evidence at the trial."

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

29 **"§ 15A-501. Police processing and duties upon arrest generally.**

30 Upon the arrest of a person, with or without a warrant, but not necessarily in the  
31 order hereinafter listed, a law-enforcement officer:

32 ...

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

36 **SECTION 9.** There is appropriated from the General Fund to the  
37 Administrative Office of the Courts the sum of two hundred fifty thousand dollars  
38 (\$250,000) to be used as a reserve to assist district attorneys with the cost of  
39 administering the new rules under open-file discovery.

40 **SECTION 10.** Section 9 of this act becomes effective July 1, 2004. The  
41 remainder of this act becomes effective October 1, 2004.