

Excerpts from Summaries of Legislation on Criminal Discovery

1. Excerpt from 2004 Legislation Affecting Criminal Law and Procedure:
Summarizes “open-file” discovery law enacted by the 2004 NC General Assembly,
which significantly expanded criminal defendants’ statutory right to discovery
2. Excerpt from 2007 Legislation Affecting Criminal Law and Procedure:
Summarizes limited changes to discovery law enacted by the 2007 NC General Assembly

The full summaries are online at www.sog.unc.edu/programs/crimlaw/aoj.htm

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2004 LEGISLATION AFFECTING CRIMINAL LAW AND PROCEDURE

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The General Assembly enacted three major pieces of legislation in the field of criminal law and procedure as well as numerous smaller acts. The General Assembly significantly expanded the discovery rights of both the defense and prosecution in criminal cases. It enacted a package of legislation recommended by the House Select Committee on Domestic Violence, making changes that affect domestic violence prosecutions and criminal law generally. And, it significantly increased the punishments for offenses involving the controlled substance methamphetamine.

Each ratified act discussed here is identified by its chapter number in the session laws and by the number of the original bill. When an act creates new sections in the General Statutes (G.S.), the section number is given; however, the codifier of statutes may change that number later. Copies of the bills may be viewed on the website for the General Assembly, <http://www.ncga.state.nc.us/>.

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Some of the material in this bulletin was drawn from the forthcoming School of Government publication NORTH CAROLINA LEGISLATION 2004. That publication will be posted on the School's web site at <http://ncinfo.iog.unc.edu/pubs/nclegis/index.html> and can be ordered from the School's publication sales office. Contact information for the publications department is included on the last page of this bulletin.

Criminal Discovery

A defendant's right to pretrial discovery in cases within the original jurisdiction of the superior court (that is, felonies and misdemeanors joined with felonies) has been limited to fairly narrow statutory categories. The defendant was entitled to obtain discovery of his or her own statements, statements of codefendants, documents that the state intended to use at trial or that belonged to the defendant, reports of examinations and tests in connection with the case, and statements of witnesses once the witness testified. The defendant's obligation to provide information to the state has also been limited. A defendant had to turn over documents and reports of examinations and tests that he or she intended to introduce at trial but little more. Both sides complained that criminal proceedings amounted to "trial by ambush."

Many district attorneys adopted "open-file" discovery policies, allowing defendants access to investigative and other materials beyond the statutory categories. But, the decision to have an open-file policy rested with individual district attorney's offices. There also was not a uniform understanding of what information a defendant could review under an open-file policy; and, if a prosecutor failed to turn over information covered by the policy but not legally required, a defendant had little, if any, recourse.

To ensure greater openness in the discovery process, S.L. 2004-154 (S 52) revises the statutory discovery rights of both the defense and prosecution. The procedure for obtaining discovery remains essentially the same, but the categories of discoverable information differ significantly. This bulletin summarizes the new discovery provisions and provides some guidance concerning how the changes may apply in practice.

Applicability and Effective Date

G.S. 15A-901 continues to provide that the revised discovery article (Ch. 15A, Art. 48) applies only to

cases within the superior court's original jurisdiction. It does not apply to misdemeanors heard initially in district court or appealed for trial de novo to superior court. A defendant does not have the right to discovery in those cases except to the extent guaranteed by the United States and North Carolina Constitutions (a defendant has the right to exculpatory evidence) or by other statutes (for example, under G.S. 20-139.1(e), a defendant has the right in impaired driving cases to a copy of the record of the chemical analysis).

The changes become effective October 1, 2004, and apply to cases in which the trial date set pursuant to G.S. 7A-49.4 is on or after October 1, 2004. In other words, in addition to future cases, the new discovery provisions apply to pending cases in which the trial is not set to commence before October 1. Thus, if the trial is set for a date before October 1 but is continued to a date after October 1, the new discovery provisions may not apply. (A broader interpretation of the effective-date language would be that the new discovery provisions apply to cases in which the trial has not actually commenced before October 1.)

What must the parties do to exercise their new discovery rights in pending cases? For cases in which the defendant is represented by counsel and the probable cause hearing has not yet been held or waived, the parties would have to comply with the normal timelines for requesting discovery (for defendants represented by counsel, within ten working days of the probable cause hearing or waiver, and for the prosecution within ten working days of when it provides discovery in response to the defendant's request). In cases in which those dates have already passed but the trial has not yet occurred, the parties could not have complied with those timelines because they had no right to request the broader discovery until the act's effective date. The legislation does not set a specific deadline or procedure to follow to obtain the broader discovery in those cases, and probably the safest course for the parties to take is to make a new discovery request as soon after the act's effective date as possible.

Basic Procedures

With minor revisions, G.S. 15A-902 continues to establish the basic procedure for obtaining discovery. The principal procedural changes do the following: expand the circumstances in which a defense request for discovery triggers reciprocal discovery rights by the prosecution; allow the parties to apply ex parte for a protective order limiting disclosure (in G.S. 15A-908); modify the standard for obtaining sanctions (in

G.S. 15A-910); and recognize explicitly that the parties may waive the requirement of a written request for discovery. There are additional procedural changes that apply to specific categories of discovery (for example, the disclosure of the identity of witnesses), which are discussed below in connection with the particular category of information.

Defense Discovery Requests. Under G.S. 15A-902, the defendant ordinarily remains responsible for initiating the discovery process by making a written request that the prosecution voluntarily provide discovery. A new provision, discussed below, waives the requirement of a written request if the parties have entered into a written agreement to that effect, but for purposes of this discussion it is assumed there is no written agreement in place. If dissatisfied with the prosecution's response to the discovery request, the defendant may file a motion with the court to compel the requested discovery. If the court orders discovery and the prosecution fails to comply, the defendant may ask the court for sanctions. The time limit for making an initial discovery request is the same as under prior law. If the defendant is represented by counsel, the defendant may as a matter of right request discovery no later than the tenth working day after either the probable cause hearing or the date the defendant waives the hearing. (The time limits for unrepresented defendants also remain the same as under prior law.)

G.S. 15A-902 continues to state that if the prosecution voluntarily provides discovery in response to a written request, the prosecution assumes the obligation to provide discovery as if under order of the court. (Revised G.S. 15A-903(b), which describes the information the prosecution must provide in discovery, reiterates this requirement.) An important consequence of this principle is that without first obtaining a court order compelling discovery, the defendant may request sanctions for the prosecution's failure to provide discovery.

Prosecution Discovery Requests. In most respects, the same procedures apply to prosecution discovery requests. The prosecution must make a written request for discovery (unless there is a written agreement waiving the requirement) and, if dissatisfied with the response, must follow up with a motion to compel discovery. If following a written request the defendant voluntarily provides discovery or the court orders discovery, the prosecution may seek sanctions for non-compliance. As under prior law, the prosecution must make its discovery request within ten working days of when it provides discovery to the defendant.

The prosecution's right to discovery differs in one significant respect from the defendant's rights. At least

in principle, the defendant controls whether the prosecution obtains discovery, although in practice most defendants will rarely exercise this right. As under prior law, the prosecution has the right to discovery from the defendant only if the defendant requests discovery of the prosecution and either the prosecution voluntarily furnishes the discovery in response or the court compels discovery. (G.S. 15A-905(c), which sets forth the new categories of information that the defendant must provide to the prosecution, reiterates that if the prosecution voluntarily furnishes discovery in response to a written request for discovery, the discovery is deemed to have been made under court order and therefore triggers the prosecution's reciprocal discovery rights; this language does not change existing law, embodied in G.S. 15A-902(b).) Consequently, if the defendant does not make a written request for discovery, the prosecution has no right to discovery from the defendant.

The circumstances in which a defendant opts not to take advantage of discovery from the prosecution should be rare, however. Under the revised statute, the defendant must make an all-or-nothing decision about discovery. If the defendant makes a written request for any statutory discovery and the prosecution voluntarily provides discovery or is ordered to do so by the court, the prosecution gains full discovery rights. Previously, a defendant could pick and choose which discovery rights to afford the prosecution by selecting which categories of discovery it wanted. For example, if the defendant requested all of the discovery categories from the prosecution except reports of examinations and tests, the prosecution had no right to reciprocal discovery of the defendant's reports of examinations and tests. The General Assembly accomplished this change by providing that the prosecution is entitled to the discovery set forth in each subsection of G.S. 15A-905 if the court grants any relief sought by the defendant under G.S. 15A-903, the section giving the defendant discovery rights. Previously, each subsection of G.S. 15A-905 was limited to the corresponding subsection of G.S. 15A-903.

Written Agreements. Revised G.S. 15A-902(a) and (b) recognize that a written request for discovery is not required of either party if they have agreed in writing to comply voluntarily with the statutory discovery requirements. A written agreement, in other words, takes the place of a written request. While the provision allows the parties to enter into a written agreement on a case-by-case basis, the main purpose of the provision was to clarify the enforceability of standing discovery agreements such as in Mecklenburg County. There, the District Attorney and the Public Defender's office have had an agreement to provide

discovery without a written request by the opposing party, reducing the need for form discovery requests by both sides. Because the state is a party in all criminal prosecutions, a District Attorney should be able to enter into such an agreement and bind the state in all prosecutions in that district. Such an agreement would have a more limited effect on defendants because a Public Defender can act only on behalf of clients represented by his or her office. In addition, because the defendant is not the same party in each case, a standing agreement would have to give Public Defender clients the right to opt out if they wanted to forego discovery of the prosecution and avoid triggering reciprocal discovery.

Protective Orders. G.S. 15A-908(a) has allowed either party to apply to the court, by written motion, for a protective order protecting information from disclosure for good cause, such as substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment. The statute is revised to provide that a party may now apply *ex parte* for such an order. Under the revised provision, if an *ex parte* protective order is granted, the opposing party receives notice of entry of the order but not the subject matter of the order. The revised section does not specify any further procedures, but the court should maintain under seal the motion, order, and information protected by the order in the event disclosure is required at trial or the propriety of the order is challenged on appeal.

Sanctions. G.S. 15A-910 has provided that a party may seek sanctions if the responding party has failed to comply with an order for discovery, including voluntary discovery deemed to be made under court order. The revised section adds that the court, before imposing sanctions, must consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply. The extent to which this new requirement changes existing law is not clear.

Continuing Duty to Disclose. G.S. 15A-907, which imposes a continuing duty to disclose discoverable evidence, was not materially changed.

Defense Discovery Rights

The legislation completely rewrites G.S. 15A-903, the section giving the defense discovery rights, by deleting all of the former discovery categories and creating three new ones: investigative and prosecutorial files, expert witnesses, and lay witnesses.

Investigative and Prosecutorial Files. The most significant discovery category is in new G.S. 15A-

903(a)(1), which provides that the state must make available to the defendant “the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant.” This provision is patterned after G.S. 15A-1415(f), revised in 1996 to give defendants sentenced to death the right to open-file discovery in post-conviction proceedings. The pretrial and post-conviction provisions differ in one important respect, however. In capital post-conviction proceedings, the law provides no protection for the prosecuting attorney’s work product (although the state may ask the court in the interests of justice to deny access to some files). *See* State v. Bates, 348 N.C. 29 (1998). In contrast, revised G.S. 15A-904, discussed below, continues to protect before trial materials containing the prosecuting attorney’s theories, strategies, and other mental processes. The new pretrial discovery provision also differs from the post-conviction discovery provision in that the pretrial provision does not provide that the state’s disclosure obligation is “to the extent allowed by law.” Interpreting this qualifying language in the context of capital post-conviction proceedings, the North Carolina Supreme Court in *Bates* held that the state is not required to produce information that it is prohibited by other laws from disclosing. Because this qualification does not appear in the new pretrial discovery provisions, the state would appear to be obligated to disclose all evidence it obtains in the investigation or prosecution of the defendant. (Even under the capital post-conviction provision, the extent to which the state is actually prohibited from disclosing information, once the state comes into possession of the information, is unclear.) There conceivably could be some circumstances, however, in which other laws might preempt the statutory discovery requirements.

The new subsection provides a definition of the term “file,” stating that it includes “the defendant’s statements, the codefendants’ statements, witness statements, investigating officers’ notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.” This definition, particularly the last clause, makes it clear that the defendant is not literally entitled to review all of the files of an agency involved in the investigation or prosecution of a defendant; rather, the defendant is entitled to the complete agency files concerning the investigation or prosecution of the defendant. For example, a defendant would be entitled to law-enforcement files concerning the investigation of the offenses allegedly committed by the defendant

but would not necessarily be entitled to information from other files, such as the investigating officer's personnel file or the files of investigations of other offenses, unless the investigation or prosecution of the defendant involved that information or other grounds warranted disclosure, such as that the files contained exculpatory evidence.

The definition of "file" repeats some of the categories of information that the prosecution formerly had to provide—the defendant's statements, codefendants' statements, and results of tests and examinations. Presumably, the defendant (and the prosecution to the extent it is entitled to discovery of the defendant's tests and examinations) would be entitled to the data underlying the tests and examinations, as under prior law. *See State v. Cunningham*, 108 N.C. App. 185 (1992) (interpreting prior discovery statute, which gave defendant right to discover results and reports of tests and examinations, court held that defendant was entitled to underlying data).

The definition also adds new categories of discoverable information. Thus, the prosecution must turn over witness statements in pretrial discovery; previously, the statute required the state to turn over witness statements only after the witness testified and only if the statement fell within the definition of witness statement in repealed G.S. 15A-903(f)(5) (requiring disclosure only of statements signed or otherwise adopted or approved by the witness, recorded statements, and substantially verbatim transcriptions of statements). The prosecution also must turn over officer notes; previously, the statute required that an officer's notes (as well as officer reports) be turned over only to the extent they contained information within specific statutory discovery categories. The definition includes a catch-all requirement that the state turn over any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.

As under prior law, the defendant has the right to inspect and obtain copies or photographs of discoverable information and, under appropriate safeguards, to test physical evidence. This language tracks prior law. The subsection also states that oral statements shall be in written or recorded form. Previously, only oral statements of defendants and codefendants had to be reduced to writing or recorded. The new provision is not limited to defendants and codefendants, and its reach is not clear.

What agencies' files must the prosecution obtain and make available for the defendant's review? The language of the statute both establishes the

prosecution's obligation and limits it, although there may be lingering questions. The clearest way to consider this issue may be to look at different types of agencies.

1. Obviously, files within the prosecuting district attorney's own office are subject to the new discovery requirements.
2. The files of state and local law-enforcement offices (as well as other district attorney's offices) involved in investigating the defendant are also subject to discovery. Revised G.S. 15A-501 reinforces this obligation, stating that following arrest of a person for a felony, law enforcement has the duty to make available to the prosecutor on a timely and continuing basis all materials and information acquired in the course of the investigation. These requirements are similar to the obligations the state had under the prior discovery statute and under *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court decision requiring the state to turn over exculpatory evidence. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (prosecutor has duty to learn of favorable evidence known to others acting on government's behalf in case); *State v. Smith*, 337 N.C. 658, 662 (1994) (under *Brady*, prosecution deemed to have knowledge of information in possession of law enforcement); *State v. Pigott*, 320 N.C. 96, 102 (1987) (court holds under prior discovery statute that prosecutor is obligated to turn over discoverable information in possession of "those working in conjunction with him or his office"; photographs taken by law-enforcement officer were subject to discovery).
3. The files of state and local agencies that are not law-enforcement or prosecutorial agencies, such as schools and social services departments, would appear to be exempt from the statutory discovery procedures in most circumstances. A defendant may still be entitled to the information in some instances, however. First, the disclosure requirements would apply to materials obtained from other agencies by law-enforcement or prosecutorial agencies during the investigation of the defendant. Second, in some circumstances a defendant may have the right to obtain the information directly from the agency in possession of it, by subpoena or motion to the

court. *See generally* Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (describing defendant's right to obtain records in possession of third parties). Third, an agency could be so involved in a criminal investigation that it could be considered to be acting in a law-enforcement capacity, and the portion of its files pertaining to the investigation could become subject to the statutory disclosure requirements. Whether an agency has crossed this line may be difficult to determine. *See generally* State v. Morrell, 108 N.C. App. 465 (1993) (social worker representing abused child acted as law-enforcement agent in interviewing defendant, rendering inadmissible custodial statements made to worker without *Miranda* warnings); *Martinez v. Wainwright*, 621 F.2d 184, 186-88 (5th Cir. 1980) (in case applying *Brady v. Maryland*, court found that prosecution was obligated to disclose evidence in medical examiner's possession; although not a law-enforcement agency, medical examiner's office was participating in criminal investigation).

4. Information collected by federal agencies may be subject to disclosure in some circumstances. The prosecution would be obligated to turn over information that it or state or local law-enforcement agencies obtained from federal agencies (unless the prosecution obtained a protective order). When state and federal law-enforcement agencies are engaged in a joint investigation of the defendant, the prosecution also may have an obligation to request information obtained by the federal agency. Ultimately, however, the prosecution's obligation to obtain information from non-state agencies would appear to be limited by the willingness of the other agencies to provide it. *See generally* State v. Crews, 296 N.C. 607 (1979) (prior discovery law obligated state to produce information if within its possession, custody, or control; materials within possession of mental health center and social services department were not subject to statutory discovery where prosecution was denied access to and had no power to obtain information).

Expert Witnesses. Under new subsection (a)(2) of G.S. 15A-903, the prosecution must give notice to the defendant of any expert witness that it reasonably

expects to call as a witness at trial. Each such witness must prepare, and the prosecution must furnish to the defendant, a report of the results of any examinations or tests, including the expert's opinion and underlying basis for that opinion. The expert also must provide his or her curriculum vitae. The courts had interpreted the prior discovery provisions as allowing trial courts to require testifying experts for each side to prepare and furnish reports of their findings to the other side. *See* State v. East, 345 N.C. 535 (1997). The new provision makes that practice an explicit requirement. The specified information must be produced a reasonable time before trial, as specified by the trial court.

Other Witnesses. Subsection (a)(3) of G.S. 15A-903 provides that at the beginning of jury selection, the state must provide to the defendant a list of all other witnesses whom the state reasonably expects to call at trial. Previously, trial judges often pressed the parties to disclose their witnesses before jury selection, which helped expedite the trial. The new subsection makes this practice a requirement, subject to three exceptions. First, the prosecution may omit names if it certifies in writing and under seal to the court that disclosure may subject the witnesses or others to physical or substantial economic harm or coercion or that there is other particularized compelling need. The statute does not explicitly require court approval, but a prudent prosecutor may want to obtain it. The omission of a witness's name without adequate cause could be grounds for sanctions, including the witness being precluded from testifying. Second, if the prosecution in good faith did not list a witness because it did not reasonably expect to call the witness, the statute does not bar the prosecution from calling the witness. Third, the court has the discretion to permit an undisclosed witness to testify in the interests of justice.

Work Product Restrictions. The attorney work-product doctrine is "designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client's case." State v. Hardy, 293 N.C. 105, 126 (1977). At its broadest, the doctrine has been interpreted as protecting information collected by an attorney and his or her agents in preparing the case, including witness statements and other factual information. *See* Hickman v. Taylor, 329 U.S. 495 (1947) (discussing doctrine in civil cases). At its core, the doctrine is concerned with protecting the attorney's mental impressions, opinions, conclusions, theories, and strategies. *See Hardy*, 293 N.C. at 126. Former G.S. 15A-904 reflected the broader version of the work-product doctrine, although the statute did not specifically mention the term. *Id.* (discussing statute and doctrine). It allowed the state to withhold from the

defendant internal documents made by the prosecutor, law enforcement, or others acting on the state's behalf in investigating or prosecuting the case unless the document fell within certain discoverable categories (for example, it contained the defendant's statement). Revised G.S. 15A-904 reflects the narrower version of the doctrine. It continues to protect the prosecuting attorney's mental processes while allowing the defendant access to factual information collected by the state.

The revised statute provides that the state may withhold the following from discovery:

- written materials drafted by the prosecuting attorney or the prosecuting attorney's legal staff for their own use at trial, including witness examinations, voir dire questions, opening statements, and closing arguments;
- legal research; and
- records, correspondence, reports, memoranda, or trial preparation interview notes prepared by the prosecuting attorney or the prosecuting attorney's legal staff to the extent they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or prosecuting attorney's legal staff.

Thus, the revised statute no longer protects materials prepared by non-legal staff or by personnel not employed by the prosecutor's office, such as law-enforcement officers. It also does not protect evidence or information obtained by a prosecutor's office. For example, interview notes reflecting a witness's statements, whether prepared by a law-enforcement officer or a member of the prosecutor's office, would not be protected under the work-product provision; however, notes made by the prosecutor or his or her legal staff reflecting their theories, strategies, and the like remain protected.

Prosecution Discovery Rights

The legislation significantly adds to the prosecution's discovery rights in G.S. 15A-905, retaining the previous two categories of discovery and adding three new ones.

Documents and Reports of Examinations and Tests. G.S. 15A-905(a) has given the state the right to inspect and copy books, papers, photographs and other tangible objects that the defendant intends to introduce in evidence at trial. G.S. 15A-905(b) has given the state the right to: (1) inspect and copy the results or reports of physical or mental examinations or tests,

measurements, or experiments made in connection with the case if the defendant intends to introduce them at trial or they were prepared by and relate to the testimony of a witness whom the defendant intends to call at trial; and (2) test physical evidence, subject to appropriate safeguards, if the defendant intends to offer the evidence or tests or experiments made in connection with the evidence. The legislation retains these rights. The only change is that if the defendant requests and obtains from the prosecution any discovery authorized by G.S. 15A-903, the prosecution is entitled to seek all of the discovery authorized by G.S. 15A-905, not just the particular category of discovery requested by the defendant (see Basic Procedures, above).

Notice of Defenses. The first of three new categories of prosecution discovery is in G.S. 15A-905(c)(1). It requires the defendant to give notice of the intent to offer at trial any of the following defenses: alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, and voluntary intoxication. The defendant must give this notice within twenty working days after the date the case is set for trial pursuant to G.S. 7A-49.4 or such other time as set by the court. The notice is inadmissible against the defendant at trial.

Conforming changes were made to G.S. 15A-959, which contains a notice requirement for the defense of insanity and the introduction of expert testimony relating to a mental condition that bears on whether the defendant had the mental state required for the offense charged. Under amended G.S. 15A-959(a), if the defendant intends to raise the defense of insanity, he or she must comply with the time limits in revised G.S. 15A-905(c)(1); in cases not subject to G.S. 15A-905(c)(1)—that is, cases in which the defendant has not requested discovery and the prosecution has no reciprocal discovery rights—the defendant must give notice of the defense of insanity within a reasonable time before trial. Likewise, under amended G.S. 15A-959(b), if the case is not subject to G.S. 15A-905(c), the defendant must give notice of the intent to use the indicated expert testimony within a reasonable time before trial; if the prosecution has reciprocal discovery rights under G.S. 15A-905(c), the defendant must give notice of the defenses listed in subsection (c)(1) and notice of his or her expert witnesses as provided in subsection (c)(2), discussed below.

For the defense of alibi, the court upon motion of the state may order the defendant to disclose the identity of his or her alibi witnesses two weeks before trial. If the state opts to make the motion and the court orders disclosure, the court must require the state to

disclose any rebuttal alibi witnesses no later than one week before trial. The court may set different time limits if the parties agree.

For defenses for which the burden is on the defendant to persuade the jury—namely, duress, entrapment, insanity, automatism, and involuntary intoxication—the revised statute states that the notice of defense also must contain specific information as to the nature and extent of the defense.

Expert and Other Witnesses. G.S. 15A-905(c)(2) mirrors G.S. 15A-903(a)(2), discussed above, which gives the defendant the right to discovery of the state's expert witnesses. It requires the defendant to give notice to the state of the expert witnesses he or she reasonably expects to call at trial and to provide the state with a report by each such witness and other supporting information. The defendant must produce the information within a reasonable time before trial, as specified by the trial court.

Likewise, G.S. 15A-905(c)(3) mirrors G.S. 15A-903(a)(3). It provides that at the beginning of jury selection, the defendant must provide the state with a list of all other witnesses whom the defendant reasonably expects to call at trial. The subsection sets forth the same circumstances in which non-disclosure is permitted.

Work Product Restrictions. G.S. 15A-906, which protects the defendant's "work product," was not changed. It reflects that the defendant's discovery obligations, although expanded, remain narrower than the prosecution's. Thus, under G.S. 15A-905, the defendant must provide certain categories of information to the state, not his or her complete files. G.S. 15A-906 recognizes that internal defense documents outside these categories are not subject to discovery.

Domestic Violence

The General Assembly passed a package of legislation addressing domestic violence and related issues. The principal act, S.L. 2004-186 (H 1354), spans several areas of law, incorporating recommendations made by the House Select Committee on Domestic Violence, created by the General Assembly in 2003. That act is referred to here as the DV Act. Unless otherwise noted, all changes are contained in that act.

Criminal Offenses and Sentencing

New Strangulation Offense. The DV Act creates a new felony offense of strangulation. Effective for

offenses committed on or after December 1, 2004, new G.S. 14-32.4(b) makes it a Class H felony to:

- assault another person and
- inflict physical injury by
- strangulation.

The new subsection does not contain a definition of "strangulation" or "physical injury." (The revised habitual misdemeanor assault offense, discussed below, also makes "physical injury" an element of the offense, but it does not define the term either.)

Courts from other states, interpreting the term "strangulation" primarily in murder cases in which strangulation was an element of the offense, have looked to dictionaries for guidance. Although the term "strangulation" (or "strangle") often is used to refer to acts that result in death, it does not always refer to lethal acts, and the General Assembly certainly could not have intended in an assault statute to refer only to actions resulting in death. Webster's Third New International Dictionary (3d ed. 1966) gives as one definition "inordinate compression or constriction of a tube or part (as the throat . . .) esp. to a degree that causes a suspension of breathing, circulation, or passage of contents."

If this or a comparable definition of strangulation is used, the act of strangulation alone could be sufficient to satisfy the element of "physical injury." Because the statute requires both strangulation and physical injury, however, additional evidence of injury may be required to prove the offense. *See generally* State v. Kelly, 580 A.2d 520 (Conn. App. 1990) (offense of assault on peace officer under Connecticut statute required proof of "physical injury;" defined as "impairment of physical condition or pain"; court finds that judo stranglehold that made officer grow faint to the verge of unconsciousness qualified as impairment of physical condition). In comparison to existing assault offenses in North Carolina, the injuries required to show "physical injury" would certainly not need to be as great as for the Class F felony of assault inflicting "serious bodily injury" under G.S. 14-32.4(a). Injuries inflicted by strangulation may not need to be as great as for the misdemeanor offense of assault inflicting "serious injury" under G.S. 14-33(c). More would appear to be required, however, than is required for the offense of battery under G.S. 14-33(a), which may be proven by mere physical contact. *See* State v. West, 146 N.C. App. 741 (2001) (defining battery as unlawful application of force, however slight). The new strangulation offense could not be established by the threat of physical injury without physical contact, which can be sufficient for assault



2007 Legislation Affecting Criminal Law and Procedure

by John Rubin*

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Other Sex Offender Changes

Warrantless searches and other conditions. Effective for persons placed on probation on or after December 1, 2007, the 2007 Sex Offender Act (S.L. 2007-213) revises G.S. 15A-1343(b2) to provide that a person convicted of a reportable offense or of an offense involving physical, mental, or sexual abuse of a minor must submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present. The searches must be for purposes specified by the court and reasonably related to the probation supervision, and the probationer may not be required to submit to a search that is otherwise unlawful. The revised provision also states that warrantless searches of the probationer's computer or other electronic mechanisms that may contain electronic data are considered reasonably related to the probation supervision. Amendments to G.S. 15A-1374(b)(11) and 15A-1368.4(b1) make similar changes for parolees and people on post-release supervision.

Other consequences. The 2007 Sex Offender Act revises G.S. 14-208.9(a) to require offenders who are required to register and who move from one county to another to report in person to the sheriff of the new county (as well as to the sheriff of the previous county) and to provide written notice to each sheriff of the new address within ten days of the change of address. This provision was initially set to take effect on December 1, 2007 (*see* Section 15 of S.L. 2007-213), but a technical corrections bill changed the effective date to July 11, 2007. *See* Section 42(b) of S.L. 2007-484 (S 613). Since the technical corrections bill did not take effect until August 30, 2007, the above requirement likely applies beginning on that date.

G.S. 14-208.16 prohibits a person who is required to register from residing within 1,000 feet of a school as defined in that section. Subsection (d) provides that the restriction does not apply if the residence was established before the nearby property was turned into a school. This exception includes situations in which the offender resides with an immediate family member who established residence before a change in the ownership or use of the nearby property. Effective July 11, 2007, the act revises the exception to define *immediate family member* as a child or sibling who is eighteen years of age or older, or a parent, grandparent, legal guardian, or spouse of the offender.

Disclosure of certain reportable convictions in child custody proceedings. Effective for actions or proceedings filed on or after October 1, 2007, S.L. 2007-462 (H 1328) adds G.S. 50-13.1(a1) to require any person instituting an action or proceeding for custody *ex parte* who has been convicted of a sexually violent offense, as defined in G.S. 14-208.6(5), to disclose the conviction in the pleadings. A *sexually violent offense* is the principal type of conviction that requires a person to register as a sex offender under North Carolina's sex offender registration law.

Funds. The 2007 appropriations act appropriates approximately \$210,000 in recurring funds for each year of the 2007-09 fiscal biennium for a staff position and operating funds for the sex offender registry. *See* Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets, Section I, Justice.

Criminal Discovery and Related Procedures

In 2004, the General Assembly rewrote the criminal discovery provisions and significantly expanded the statutory rights of criminal defendants to obtain information from the state about the prosecution against them. The collection of revised statutes is commonly known as the "open-file discovery" law. *See* S.L. 2004-154 (S 52); John Rubin, *2004 Legislation Affecting Criminal Law and Procedure*,

ADMINISTRATION OF JUSTICE BULLETIN No. 2004/06 (Oct. 2004), at www.sog.unc.edu/programs/crimlaw/aoj200406.pdf. In the 2007 session, the General Assembly passed three acts making minor modifications to those provisions as well as other acts giving the parties in criminal cases access to information.

Open-File Discovery Changes

Law enforcement's obligation to provide evidence to prosecuting attorney. As part of the 2004 revisions to the criminal discovery laws, the General Assembly required law enforcement officers to make available to the state (that is, the prosecutor) on a timely and continuing basis all materials and information acquired in the course of the investigation of a felony. This provision was added to enable the state to comply with its obligation under revised G.S. 15A-903(a) to make available to the defendant the complete files of all law enforcement agencies involved in the investigation. The problem with the provision was that it was added to a statute that was easily overlooked—G.S. 15A-501(6), in Article 23 of G.S. Chapter 15A, Police Processing and Duties Upon Arrest. S.L. 2007-183 (H 786) reinforces law enforcement agencies' obligations by placing a similar provision in new G.S. 15A-903(c), a part of the criminal discovery statutes. The new subsection provides that on the state's request, law enforcement agencies (and prosecutorial agencies) must make available to the state a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant. The act applies to cases where the trial date set pursuant to G.S. 7A-49.4 is on or after December 1, 2007. For cases before that date, law enforcement still has an obligation to provide its investigative files to the state under G.S. 15A-501(6).

Oral statements by witnesses. In 2004, the General Assembly significantly expanded the state's obligation to provide statements of witnesses to the defendant. Before that change, the state was required to provide witness statements to the defendant only if the statements met certain criteria (for example, they were signed or otherwise formally adopted by the witness) and only after the witness had testified. The state also was required to reduce to written or recorded form oral statements by the defendant and any co-defendant being tried jointly with the defendant. The General Assembly deleted those provisions in 2004 and required in revised G.S. 15A-903(a)(1) that the state provide to the defendant all witness statements and reduce to written or recorded form and provide to the defendant all oral statements. In *State v. Shannon*, the Court of Appeals recognized that these provisions require prosecuting attorneys and their legal staff, as well as law enforcement officers, to memorialize oral statements made to them by witnesses and provide them to the defendant in discovery. The court rejected the state's argument that prosecuting attorneys are exempt from the requirement of memorializing oral statements by witnesses. See *State v. Shannon*, ___ N.C. App. ___, 642 S.E.2d 516 (2007) (state petitioned North Carolina Supreme Court to review Court of Appeals' decision but, in light of legislation below, state withdrew its petition).

In S.L. 2007-377 (S 1009), the General Assembly reaffirmed its approach to oral witness statements, with minor modifications, effective for cases pending on or after August 19, 2007. Revised G.S. 15A-903(a)(1) continues to require the state to reduce all oral statements to written or recorded form and provide them to the defendant except in the following circumstances: (1) the oral statement was made to a prosecuting attorney outside the presence of a law enforcement officer or investigational assistant and (2) the oral statement does not contain significantly new or different information from a prior statement made by the witness. (The classification of investigational assistant is described in G.S. 7A-69.) Thus if the specified personnel are present when a witness speaks to a prosecutor, any

statements by the witness must be reduced to writing; if the prosecutor is alone or with someone other than the specified personnel, any statements also must be reduced to writing unless the statements contain no significantly new or different information.

Certain information not subject to disclosure. Before the 2004 revisions to the discovery law, the state had the right to withhold a broad range of information from discovery. The then-existing “work product” provision, in G.S. 15A-904(a), provided that unless disclosure was otherwise required by the discovery statute or constitutional principles, the state could withhold reports, memoranda, and other documents made by the state in the investigation and prosecution of the case as well as statements made by witnesses and prospective witnesses. The 2004 open-file discovery legislation rewrote the work product provision in G.S. 15A-904(a) to focus on protecting prosecuting attorneys’ mental impressions and conclusions about the case while ensuring that the defendant had access to factual information, whether obtained by a prosecuting attorney or law enforcement officer. Thus revised G.S. 15A-904(a) allowed the state to withhold written materials drafted by the prosecuting attorney or the prosecuting attorney’s legal staff for their own use at trial (such as voir dire questions or closing arguments) and other materials that they drafted to the extent the materials contained their opinions, theories, strategies, or conclusions. Under G.S. 15A-908, prosecutors (as well as defendants) could apply to the court for a protective order if they wanted to withhold information that otherwise would have to be disclosed.

S.L. 2007-377 leaves these provisions in place but revises G.S. 15A-904, effective for cases pending on or after August 19, 2007, to allow the state to withhold two additional types of information without seeking a protective order. First, under new G.S. 15A-904(a1), the state is not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law. Thus to obtain the identity of a confidential informant, a defendant would have to make a motion to the court for disclosure based on constitutional or statutory grounds. *See, e.g., Roviario v. United States*, 353 U.S. 53 (1957); G.S. 15A-978. Second, under new G.S. 15A-904(a2), the state is not required to provide any personal identifying information of a witness (such as a social security number) beyond the witness’s name, address, date of birth, and published phone number unless on the defendant’s motion the court determines that the defendant needs additional information to accurately identify and locate the witness.

Meaning of “prosecutorial agency.” As revised in 2004, G.S. 15A-903(a)(1) requires the state to make available to the defendant the files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. In effect, this provision requires the prosecuting attorney to obtain the files of these agencies and provide them to the defendant. A lingering question has concerned which agencies’ files the prosecuting attorney must obtain and provide to the defendant. Certainly, the district attorney’s office that is prosecuting the case would be a covered agency, and the prosecuting attorney would have to disclose information in that office’s possession. Likewise, the files of investigating law enforcement agencies must be disclosed. (To assist prosecutors in complying with that obligation, another act from the 2007 legislative session requires law enforcement agencies to provide their files to the prosecuting attorney on request. *See* S.L. 2007-183, discussed above.)

What if an entity is not a law enforcement or prosecutorial agency itself but obtains information on behalf of a law enforcement or prosecutorial agency? For example, suppose the prosecuting attorney uses a private lab for DNA testing in a criminal case. Few would dispute that the prosecuting attorney would have to disclose that information. If the prosecuting attorney obtained the lab report, it would be considered part of the prosecutor’s file and therefore would be subject to statutory

discovery requirements. Even if the prosecutor did not actually take possession of the report, he or she would have the right to obtain it and would be obligated to disclose it to the defendant. *See State v. Pigott*, 320 N.C. 96, 102 (1987) (court holds under prior discovery statute that a prosecutor is obligated to turn over discoverable information in possession of “those working in conjunction with him and his office”); *see also Martinez v. Wainwright*, 621 F.2d 184, 188 (5th Cir. 1980) (in case applying *Brady v. Maryland*, which deals with prosecutors’ constitutional obligation to disclose evidence, court held that a prosecutor could not avoid disclosing evidence “by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial”).

S.L. 2007-393 (S 1130) makes the prosecutor’s obligations explicit with respect to outside agencies. Effective October 1, 2007, G.S. 15A-903(a)(1) provides that “the term ‘prosecutorial agency’ includes any public or private entity that obtains information on behalf of a law enforcement agency or prosecutor in connection with the investigation of the crimes committed or the prosecution of the defendant.” This language clearly would cover information developed by the private lab in the above example. There still may be some gray areas, however. For example, in connection with allegations of abuse and neglect, a county Department of Social Services (DSS) may investigate the same conduct as charged in a criminal case. Under the new language in G.S. 15A-903(a)(1), it seems unlikely that DSS would be considered a “prosecutorial agency” just because it had investigated the same conduct and, therefore, unlikely that its files would automatically be subject to the statutory discovery provisions. *See State v. Pendleton*, 175 N.C. App. 230 (2005) (interpreting 2004 version of G.S. 15A-903(a)(1), court finds that DSS did not act in the capacity of a prosecutorial agency where DSS referred matter to police for investigation, the police gathered their own evidence, and a DSS employee sat in on an interview by police of a child victim). In some instances, however, DSS or other outside agencies could become so involved in a criminal investigation that they could be considered to be acting in a law enforcement or prosecutorial capacity, and the portion of their files pertaining to the case could be subject to the statutory disclosure requirements. *See generally State v. Morrell*, 108 N.C. App. 465 (1993) (social worker assigned to case of allegedly abused child acted as a law enforcement agent in interviewing the defendant, rendering inadmissible custodial statements made to social worker without *Miranda* warnings). Regardless of whether an outside agency would be considered a “prosecutorial agency” under the new language, the state would still have to disclose information it obtains from an outside agency, just as it would have to turn over information obtained from any other source. The defendant also would have the right in some circumstances to obtain the information directly from the outside agency by motion to the court or subpoena. *See generally Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (describing defendant’s right to obtain records in possession of third parties).

Other Discovery Mechanisms

Subpoenas for documents. Rule 45 of the North Carolina Rules of Civil Procedure governs the use of subpoenas in civil cases and, for the most part, in criminal cases as well. G.S. 15A-801 and 15A-802 state that Rule 45 applies to criminal cases except for one subsection of the rule—the provision that requires the subpoenaing party to serve a copy of the subpoena on the other parties to the case and not just on the person or entity being subpoenaed. In 2003 the General Assembly made numerous revisions to Rule 45, prompted primarily by concerns from civil practitioners. Because of the language of G.S. 15A-801 and 15A-802, those changes appeared to apply to criminal cases as well.⁹

9. For a discussion of the changes to Rule 45 and subpoena practice in general, *see* John Rubin and Aimee Wall, *Responding to Subpoenas for Health Department Records*, HEALTH LAW BULLETIN No. 82 (Sept. 2005), posted at

In the 2007 legislative session, Rule 45 was revised in a more limited fashion but again apparently in response to concerns in civil cases. Effective for actions filed on or after October 1, 2007, S.L. 2007-514 (H 316) adds new subsection (d1) to Rule 45 to require a party who has obtained material in response to a subpoena to serve on all other parties a notice of receipt of the material. The party must serve the notice of receipt within five business days after receipt and if requested must provide other parties an opportunity to inspect and copy the materials at the inspecting party's expense.

The act does not specifically exempt criminal cases from this requirement, although somewhat paradoxically the subpoenaing party in a criminal case need not give notice of the service of a subpoena in light of the above provisions of G.S. Chapter 15A. The new subpoena provisions are also in tension with G.S. 15A-905 and 15A-906, which essentially provide that a criminal defendant is only obligated to disclose to the state evidence that he or she intends to use at trial. If the new notice and inspection requirements do apply to criminal cases, a party may have grounds to seek a protective order under G.S. 15A-908 to withhold the records from disclosure. Alternatively, instead of using a subpoena, a party may move for a court order for production of records, which is not governed by Rule 45.¹⁰

Access to confidential school personnel files by state. Effective July 8, 2007, S.L. 2007-192 (H 550) revises G.S. 115C-321 to create an exception to school employees' right to confidentiality in their personnel files. New G.S. 115C-321(a1) provides that information in an employee's personnel file that is relevant to certain crimes may be made available to law enforcement and the district attorney. New G.S. 115C-321(a2) provides that the employee must be given five working days' written notice of any disclosure so that the employee may apply to the district court to determine whether the information is relevant to any criminal misconduct. Failure of the employee to apply for review waives any right to relief. The statute does not specify who must give the employee notice. New G.S. 115C-321(a3) provides that statements or admissions made by the employee and produced under subsection (a1) are not admissible in any subsequent criminal proceeding against the employee.

Disclosures of health information to law enforcement. Effective June 27, 2007, S.L. 2007-115 (H 353) amends G.S. 90-21.20B in an attempt to harmonize state and federal confidentiality law by allowing health care providers to disclose health information in certain situations permitted under federal law. Under the federal privacy regulation promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA Privacy Rule, 45 C.F.R. Parts 160 and 164), regulated health care providers are allowed to disclose protected health information without patient permission in a variety of circumstances. States are allowed, however, to have more protective state laws in place. Interpretation and implementation of North Carolina's confidentiality laws has been uneven and somewhat confusing over the years, primarily because it has not been clear whether the state's physician-patient privilege (G.S. 8-53) was more protective of privacy than the HIPAA Privacy Rule. Many health care providers erred on the side of caution by concluding that the privilege was more protective. Therefore, many providers refused to disclose protected health information without patient permission or a court order in circumstances in which the HIPAA Privacy Rule would have allowed disclosure.

www.sog.unc.edu/pubs/electronicversions/pdfs/hlb82.pdf. Although this bulletin was written to assist health departments in responding to subpoenas, the information about subpoena requirements is generally applicable to all proceedings.

10. See 1 NORTH CAROLINA DEFENDER MANUAL § 4.7A, at 35-38 (May 1998) (discussing grounds and procedures for obtaining records in possession of third parties), posted at www.ncids.org.

S.L. 2007-115 addresses this ambiguity in part by adding new language to G.S. 90-21.20B authorizing health care providers to ignore the privileges and disclose information for (1) law enforcement purposes as permitted by a specific section of the HIPAA Privacy Rule, 45 C.F.R. 164.512(f) and (2) treatment, payment, and health care operations purposes as permitted by another section of the federal rule, 45 C.F.R. 164.506. Health care providers must still comply with any state law that “specifically” prohibits disclosure of particular information, such as information identifying a person who has or may have a reportable communicable disease, which is protected under G.S. 130A-143. Overall, this change in the law is rather significant in that it opens the door for health care providers to share information with each other and with law enforcement officials to the extent permitted by the HIPAA Privacy Rule without concern for potential violations of the privileges recognized in state law.¹¹

Criminal Offenses and Related Matters

Domestic Violence

Felony violation of domestic violence protective order. Ordinarily, a violation of a domestic violence protective order (DVPO) is a Class A1 misdemeanor under G.S. 50B-4.1(a). The 2001 General Assembly revised G.S. 50B-4.1 to add two felony offenses—committing a felony knowing that a DVPO prohibits that conduct, punishable as a felony one class higher than the felony committed, and violating a DVPO after three convictions under G.S. Chapter 50B, a Class H felony. Effective for offenses committed on or after December 1, 2007, S.L. 2007-190 (H 47) creates a new felony offense. Under new G.S. 50B-4.1(g), a person is guilty of a Class H felony if he or she

- while in possession of a deadly weapon on or about or within close proximity of his or her person
- knowingly
- violates a valid DVPO
- by failing to stay away from a place or person as directed by the DVPO.

Pretrial release for domestic violence offenses. G.S. 15A-534.1 contains a special procedure, known as the “48-hour law,” for determining pretrial release conditions for defendants charged with certain domestic violence offenses. Under that statute, only a judge may determine pretrial release conditions during the first 48 hours after arrest. Effective for offenses committed on or after December 1, 2007, S.L. 2007-14 (H 42) revises that statute to make the offense of stalking subject to the 48-hour law if the offense is against a spouse or former spouse of the defendant or against a person with whom the defendant lives or has lived as if married.

Separate waiting area for domestic violence victims. Effective April 12, 2007, S.L. 2007-15 (H 46) provides that where practical, the clerk of superior court in each county must work with the county sheriff to make available to domestic violence victims a secure area, segregated from the general population of the courtroom and available on the victim’s request, where they may await hearing of their court case. The Administrative Office of the Courts must report to the Joint Legislative Committee on Domestic Violence by May 1, 2008, on the progress of providing space in each courthouse.

11. The summary of this bill is drawn from Aimee N. Wall, *Health*, in NORTH CAROLINA LEGISLATION 2007 (forthcoming), available online at www.sog.unc.edu/pubs/nclegis/nclegis2007/14%20Health.pdf.