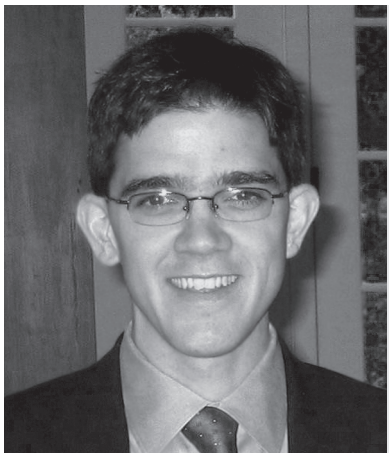
State v. Shannon

Introduction by Bradley J. Bannon



Brad Bannon practices criminal defense in state, federal, and appellate courts in North Carolina. He is chair of the Criminal Defense Section of the North Carolina Academy of Trial Lawyers and a member of its board of governors. Bannon is also legislative chair of the Criminal Justice Section of the North Carolina Bar Association. In October 2005, upon nomination by the North Carolina State Bar Council, Governor Mike Easley appointed him to serve on the five-member North Carolina Inmate Grievance Resolution Board. Bannon has written and lectured on various topics related to criminal trial practice and worked with others on recent efforts to improve North Carolina's criminal justice system and the North Carolina Rules of Professional Conduct related to criminal trial practice.

In 2004, with significant input from Academy members, the North Carolina General Assembly made historic changes to our state's criminal pretrial discovery rules and established "open-file discovery." Before these changes, prosecutors had wide discretion when deciding what to provide from a criminal investigation to the defense before trial, and many criminal defendants were unfairly convicted as a result. Since the changes, prosecutors have attempted to limit open-file discovery in the legislature and the courts, while the Academy has fought to preserve it.

In 2007, with their most recent effort essentially defeated in the legislature, prosecutors turned to the courts and the case of *State v. Shannon.* At trial, Academy member Paul Herzog wisely preserved an issue of first impression under the open-file discovery laws. Academy member Connie Widenhouse successfully argued the issue at the North Carolina Court of Appeals. When the North Carolina Supreme Court granted review, and prosecutors filed briefs that appeared to contradict the legislative history of open-file discovery, Academy President Joe Cheshire and Criminal Defense Section Chair Brad Bannon filed an amicus brief tracing the evolution of open-file discovery in the state. In November 2007, shortly before oral argument was set to be heard in the Supreme Court, the State withdrew its appeal, citing developments in the 2007 legislative session that were the focus of much of the Academy's amicus brief. ■

No. 177A07 **TWELFTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA
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STATE OF NORTH CAROLINA	)	
	)	
v.	)	**From Cumberland County**
	)	
JOAN MYRTLE SHANNON,	)	
Defendant-Appellee	)	

****

AMICUS CURIAE BRIEF
NORTH CAROLINA ACADEMY OF TRIAL LAWYERS

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ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT N.C.G.S. § 15A-903(a)(1) REQUIRES THE STATE TO DISCLOSE THE SUBSTANCE OF ORAL STATEMENTS MADE BY WITNESSES TO PROSECUTORS IN THE INVESTIGATION AND PROSECUTION OF A CRIMINAL CASE.

SUMMARY OF ARGUMENT

Before 1996, the North Carolina Criminal Procedure Act provided for limited disclosure to the defense of information obtained by the State during the investigation and prosecution of a criminal case. In 1996, the General Assembly amended the Act to provide open-file discovery to defendants who had been convicted of a capital crime and sentenced to die. When condemned defendants used that amendment to obtain the complete files of their prosecutions, a number of their convictions were overturned based on the State's failure to provide them, before their capital trials, with exculpatory evidence to which they were constitutionally entitled.

In 2004, the General Assembly further amended the Act to extend open-file discovery from *capitally convicted* defendants in the *post-conviction* stage of criminal litigation to *all felony* defendants in the *pre-trial* stage of criminal litigation. The amendments included a new general rule that any oral statements made by witnesses in the course of an investigation or prosecution be provided to the defense in written or recorded form before trial.

In 2007, following the decision of the Court of Appeals in the instant case, the General Assembly created a statutory exception to that general rule, providing that oral statements made by a witness "to a prosecuting attorney outside the presence of a law enforcement officer or investigatorial assistant shall not be required to be in written or recorded form unless there is significantly new or different information in the oral statement from a prior statement made by the witness." For oral statements made by witnesses under all other circumstances, the amendments left intact the general rule requiring full disclosure.

The plain language and legislative history of open-file discovery in North Carolina show that the Court of Appeals correctly held: (1) generally, the State must disclose to the defendant the substance of any oral statements made by a witness in the course of a criminal investigation and prosecution, regardless of to whom those oral statements were made; and (2) specifically in this case, the State was required to disclose to the Defendant the substance of any oral statements made by Daisy Shannon or any other witness to the prosecutor.

A. The plain language of the law, canons of statutory construction, and the legislative history of statutory open-file discovery rights in North Carolina support the Court of Appeals' ruling that § 15A-903(a)(1) requires the State to disclose the substance of oral statements made by witnesses to prosecutors in the investigation and prosecution of a criminal case.

This Court is presented with the specific question of whether N.C.G.S. § 15A-903(a)(1), as amended in 2004, requires disclosure to the defense of oral statements that are connected to the prosecution and made by a witness to a prosecutor. The question is not whether the United States Constitution requires such disclosure, but whether disclosure is required by the North Carolina Criminal Procedure Act.

This is an important analytical distinction, because, as it relates to the disclosure of information obtained in the investigation and prosecution of criminal cases in North Carolina, this state's criminal statutory discovery laws impose separate and greater obligations on law enforcement and prosecutorial agencies—and afford separate and greater rights and remedies to defendants—than the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Unlike the discovery laws, the Due Process Clause generally requires the State to disclose only that evidence which tends to negate the guilt of the accused or mitigate the range of a potential punishment (i.e., *Brady* material). *See*, *e.g.*, *United States v. Agurs*, 427 U.S. 97 (1976); *Giglio v. United States*, 405 U.S. 150 (1972); and *Brady v. Maryland*, 373 U.S. 83 (1963).

While the disclosure requirements of North Carolina's statutory discovery laws often overlap with the disclosure requirements of the Due Process Clause, the obligations are not identical. Accordingly, the Court of Appeals majority correctly noted in its decision below:

> Whatever the *constitutional* requirements to disclose exculpatory evidence to the accused, the *statutory* issue implicated by G.S. § 15A-903(a)(1) in the instant case is wholly different. The legislature has, by its amendments to § 15A-903, **assured the accused greater access than that afforded by simple due process**.

State v. Shannon, No. COA06-418 (N.C. Ct. App. April 3, 2007) (bold emphasis added).[1]

With that fundamental analytical distinction in mind, it is important to consider the historical process of how and why the North Carolina General Assembly came to assure accused persons in this state "greater access" to information obtained during the course of a criminal investigation and prosecution "than that afforded by simple due process."

Before 1996, a defendant's statutory rights to discovery in North Carolina were defined by then-existing N.C.G.S. § 15A-903 (1983) and § 15A-904 (1973), which respectively set out what the State did and did not have to disclose to a defendant before a criminal trial. Those older versions of the law, which provided for very limited disclosure of only certain types of information obtained by law enforcement and prosecutorial agencies, are attached to this brief as Appendix 1.

As an example of the type of limited disclosure required by the old pre-trial discovery laws—an example particularly relevant to the question presented in this case—"statements" obtained during the investigation and prosecution of a criminal case were first broken down into sub-categories by the character of the speaker (defendant, co-defendant, or witness), followed by separate standards and timelines for disclosure for each sub-category.[2] The subcategory of "witness statements" was further defined as "a written statement made by the witness and signed or otherwise adopted or approved by him," or "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, that is a substantially verbatim recital or an oral statement made by the witness and recorded contemporaneously with the making of the oral statements," and the State did not have to disclose such "witness statements" until *after* the witness testified at trial. *See* Appendix 1, § 15A-903(f)(5) (1983) and § 15A-903(f)(2) (1983).

In 1996, the General Assembly amended Article 89 of the Criminal Procedure Act (Motion for Appropriate Relief and Other

Post-Trial Relief) as follows to establish post-conviction open-file discovery for capitally convicted defendants who had been sentenced to die:

> In the case of a defendant who has been convicted of a capital offense and sentenced to death, . . . [t]he State . . . shall make available to the capital defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant.

See N.C.G.S. § 15A-1415(f) (1996). While that expansion of statutory discovery applied to a narrow class of criminal defendants (capital defendants, as opposed to all felony defendants) in a later phase of criminal litigation (post-conviction, as opposed to pre-trial), it clearly signaled the General Assembly's shift toward more complete disclosure of information obtained by law enforcement and prosecutorial agencies in a criminal investigation and prosecution.

This change in the law also exposed a striking pattern of wrongful capital convictions in North Carolina based on the State's failure to disclose *Brady* material to defendants facing the most severe punishment—and enjoying the most thorough appellate and post-conviction review—that our law allows. In the eight years following the adoption of post-conviction open-file discovery for capital defendants, an average of nearly one capital conviction per year was overturned, and a new trial ordered, based on the State's pre-trial failure to disclose *Brady* material to a capital defendant:

- In *State v. Womble*, Columbus County Superior Court File Nos. 93 CRS 1992-1993 (July 22, 1998), the State failed to disclose evidence concerning the victim's time of death which was inconsistent with evidence presented at trial.

- In *State v. Munsey*, Wilkes County Superior Court File No. 93 CRS 4078 (May 14, 1999), the State failed to disclose evidence that a key witness against the defendant had fabricated his story.

- In *State v. Bishop*, Guilford County Superior Court File Nos. 93 CRS 20410-20423 (January 10, 2000), the State failed to disclose evidence that placed the defendant elsewhere at the time of the crime and contradicted key prosecution witness's testimony.

- In *State v. Canady*, 355 N.C. 242, 559 S.E.2d 762 (2002), the State failed to disclose the name of a confidential informant who implicated persons other than the defendant in the charged murders.

- In *State v. Gell*, Bertie County Superior Court File No. 95 CRS 1884 (December 9, 2002), the State failed to disclose multiple eyewitness statements that the victim was seen alive after the last moment when the defendant could have killed him, as well as a secretly recorded conversation in which the State's star trial witness discussed fabricating a story to comport with the ongoing investigation.

- In *State v. Hamilton*, Richmond County Superior Court File No. 95 CRS 1670 (April 23, 2003), the State failed to disclose evidence that the sole witness who testified against the Defendant was hoping for a plea deal from the State.

- In *State v. Hoffman*, Union County Superior Court File No. 95 CRS 15695 (April 30, 2004), the State failed to disclose evidence that a key prosecution witness received favorable treatment for his testimony.

In each of the above-referenced cases, post-conviction open-file discovery revealed that the State had failed to disclose exculpatory evidence which, if disclosed pre-trial, may have affected the outcome of the case. For purposes of the *Brady* analysis in those cases (as in any case), it was immaterial whether the State's failure to disclose the exculpatory evidence was negligent or intentional, the result of good faith or bad faith. Whether the State withheld exculpatory evidence in bad faith, or based on an individual prosecutor's good-faith (but incorrect) application of *Brady* principles to the case-specific disclosure analysis, or simply because the prosecutor had failed to review the entire case file, the result was the same: exculpatory evidence in the State's law enforcement and prosecution files was not making its way to the defense, and presumed innocent defendants were being sentenced to die as a result.

One such defendant was James Alan Gell, whose 1998 conviction and death sentence were upheld by this Court in 2000. *State v. Gell*, 351 N.C. 192, 524 S.E.2d 332 (2000). Pursuant to § 15A-1415(f), Gell's post-conviction counsel then obtained "the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant." In those files, Gell's counsel found previously undisclosed statements by multiple witnesses who told law enforcement officers that they had seen the murder victim alive after the last point in time when Gell, who had been incarcerated on an unrelated charge, could have killed him. Gell's counsel also found a secretly recorded phone conversation in which the State's star witness against Gell admitted to making up stories in her conversations with law enforcement to comport with the evolving investigation. Over the State's objection, Bertie County Senior Resident Superior Court Judge Cy A. Grant, Sr. summarily granted Gell a new trial based on the State's multiple *Brady* violations in failing to disclose the exculpatory evidence.

At Gell's second trial in February 2004, the jury heard, for the first time, the secretly recorded conversation and testimony from the witnesses whose statements were withheld from Gell's first trial counsel (and first trial *jury*). The second trial jury deliberated for approximately two hours and asked to hear the secretly recorded—and previously withheld—phone conversation shortly before rendering a unanimous verdict of not guilty. Alan Gell was freed after nearly 10 years of incarceration, five of those years on death row.

In early 2004, following Gell's highly publicized retrial and acquittal, and just as another death row conviction was overturned based on *Brady* violations discovered through post-conviction open-file discovery (*see State v. Hoffman*, Union County Superior Court File No. 95 CRS 15695 (April 30, 2004)), the General Assembly began the legislative process that expanded open-file discovery from the post-conviction phase for capital defendants into the pre-trial phase for all felony defendants. With input and consensus language endorsed by representatives of the North Carolina Conference of District Attorneys and the North Carolina Academy of Trial Lawyers, the General Assembly replicated the language used to provide for capital post-conviction open-file discovery in the statutes governing pre-trial discovery and expanded the scope of the obligation. The new pre-trial open-file discovery law required the State to:

> Make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. Oral statements shall be in written or recorded form. The defendant shall have the right to inspect and copy or photograph any materials contained therein and, under appropriate safeguards, to inspect, examine, and test any physical evidence or sample contained therein.

N.C.G.S. § 15A-903(a)(1) (2004).
Specifically defining and protecting the work product of prosecutors, while not limiting the defendant's access to all information reported by witnesses to prosecutors, the General Assembly allowed the State to withhold from the defense only those

> 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. Disclosure is also not required of legal research or of records, correspondence, reports, memoranda, or trial preparation interview notes prepared by the prosecuting attorney or by members of the prosecuting attorney's legal staff **to the extent they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or the prosecuting attorney's legal staff**.

N.C.G.S. § 15A-904(a) (2004) (emphasis added).
Finally, the General Assembly kept in place the protective order provisions of the existing discovery laws:

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

N.C.G.S. § 15A-908(a) (2004).
The language of §§ 15A-903 and 15A-904 as amended in 2004 —read *in pari materia* and understood in the historical context of their adoption—make the legislative intent of the new pre-trial open-file discovery law clear: except for the specifically defined attorney work product of prosecutors, and except for information that the court may independently exempt from disclosure by protective order, the defendant should receive *all* information obtained by *all* law enforcement and prosecutorial agencies in the investigation and prosecution of *all* felony criminal cases, regardless of how or by whom that information was received, and regardless of whether an individual prosecutor might believe (or not believe) that the information is further required to be disclosed by *Brady* and its progeny.

That legislative intent was reiterated during the spring and summer of 2007, when the General Assembly considered various proposals and passed further amendments to the open-file discovery laws that bear particular—and arguably dispositive—relevance to the question presented to the Court in this case.

In March 2007, the North Carolina Conference of District Attorneys proposed an amendment to N.C.G.S. § 15A-904 that would have significantly rolled back open-file discovery by closing the files of prosecutorial agencies under the theory of protecting attorney "work product." In addition to adding a clause to § 15A-904 that would return disclosure requirements regarding confidential informant information to the law that existed before open-file discovery, the proposed amendments eliminated the clause in § 15A-904(a) that specifically defined and protected the work product of prosecutors. The elimination of that clause would have effectively returned unilateral discretion to prosecutors to withhold or disclose information in their *prosecutorial agency* files on a case-by-case, fact-by-fact, prosecutor-by-prosecutor analysis.

On March 20, 2007, the proposed amendments were identically introduced in the North Carolina legislature as Senate Bill 1009 (S1009) and House Bill 768 (H768). The Senate version of the original bill (S1009) is attached to this brief as Appendix 2. The official history maintained by the North Carolina General Assembly for S1009 is attached to this brief as Appendix 3.[3] The amendments proposed by the Conference, which include the proposed title of the Act, follow:

> AN ACT TO CLARIFY THAT THE STATE IS NOT REQUIRED TO DISCLOSE THE IDENTITY OF A CONFIDENTIAL INFORMANT IN A CRIMINAL CASE UNLESS DISCLOSURE IS OTHERWISE REQUIRED BY LAW, AND TO PROTECT THE WORK PRODUCT OF PROSECUTORS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-904 reads as rewritten:
§ 15A-904. Disclosure by the State—Certain information not subject to disclosure.
(a) The State is not required to disclose 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. Disclosure is also not required of legal research or of records, correspondence, reports, memoranda, or trial preparation interview notes prepared by the prosecuting attorney or by members of the prosecuting attorney's legal ~~staff to the extent they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or the prosecuting attorney's legal~~ staff.
(a1) The State is not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law.
(b) Nothing in this section prohibits the State from making voluntary disclosures in the interest of justice nor prohibits a court from finding that the protections of this section have been waived.
(c) This section shall have no effect on the State's duty to comply with federal or State constitutional disclosure requirements.
SECTION 2. This act is effective when it becomes law and applies to pending cases.

On March 21, 2007, S1009 was referred to the Senate Judiciary I Committee for further review and consideration. That began a process similar to the process that led to adoption of the pre-trial open-file discovery laws in 2004, where representatives of the North Carolina Conference of District Attorneys (on behalf of prosecutors) and representatives of the North Carolina Academy of Trial Lawyers (on behalf of the defense bar) met with the bill's sponsors, Senator Tony Rand and Representative Ray Warren, as well as members of Senator Rand's office, to discuss the amendments.

On April 3, 2007, the Court of Appeals rendered its decision in *State v. Shannon*, No. COA06-418 (N.C. Ct. App. April 3, 2007). Interpreting the plain language of § 15A-903(a) (as amended in 2004), the Court of Appeals held that, whether in written or oral form, assertions made by a witness to a prosecutor during an interview or conversation that are connected to the prosecution of the defendant are discoverable. The Court of Appeals thoroughly compared the previous and amended versions of § 15A-903, specifically noted what language the General Assembly deleted from the previous version and added to the new version, and articulated the governing principles of statutory construction:

> In interpreting statutory language, "it is presumed the General Assembly intended the words it used to have the meaning they have in ordinary speech. When the plain meaning of a statute is unambiguous, a court should go no further in interpreting the statute." "If the legislature deletes specific words or phrases from a statute, it is presumed that the legislature intended that the deleted portion should no longer be the law." "[W]e follow the maxims of statutory construction that words of a statute are not to be deemed useless or redundant and amendments are presumed not to be without purpose."

Shannon, Modified slip. op. at 13-14 (citations omitted). Applying those principles, the Court of Appeals further noted:

> [T]he former statutory definition of "statement" in G.S. § 15A-903(f)(5) no longer has application to the revised version of G.S. § 15A-903(a)(1). The definition was completely omitted from the current version of the statute and we presume . . . that it was the General Assembly's intention that the deleted portion of the statute no longer be the law of North Carolina. Moreover, again in contrast to the former version of the statute, amended 15A-903(a)(1) madates that "[o]ral statements shall be in written or recorded form." The plain, unambiguous meaning of this requirement is that "statements" need not be signed or adopted by a witness before being subject to discovery.

Id.

The Court of Appeals also appropriately rejected the State's argument that the Court's ruling, as applied to *oral* statements made by witnesses *to prosecutors*, would "seriously undermine" work product protection for prosecutors. Referring to the parameters of a prosecutor's work product that had been clearly defined and protected from disclosure by the General Assembly in § 15A-904(a)(2004), the Court of Appeals stated, "We reject outright the contention that every writing evidencing a witness's assertions to a prosecutor will necessarily include the prosecutor's 'opinions, theories, strategies, or conclusions'*—that which is still afforded protection under G.S. § 15A-904(a).*"[4] *Shannon*, Modified slip. op. at 18 (emphasis added).

Although *Shannon* had not been decided when the Conference of District Attorneys proposed the amendments at Appendix 2, the Court of Appeals' decision immediately became a focal point of the legislative discussions. Representatives of the Conference echoed the chief policy concern raised by Judge McCullough in his dissent, namely, that requiring prosecutors to make memoranda of every conversation they have about a case would saddle them with an enormous administrative burden. Representatives of the defense bar responded that the burden could certainly be ameliorated in a manner that did not offend the central purpose of open-file discovery or return complete unilateral discretion to prosecutors under a *Brady* standard to determine what information from their prosecutorial agency's files (as opposed to a law enforcement agency's files) should be disclosed to the defense.

At the conclusion of those legislative meetings, S1009 had been modified to change the title of the Act and to include the following amendments to N.C.G.S. §§ 15A-903(a)(1) and 15A-904:

AN ACT TO CLARIFY THAT A WITNESS'S ORAL STATEMENTS TO A PROSECUTING ATTORNEY DO NOT NEED TO BE RECORDED UNLESS THE STATEMENT CONTAINS SIGNIFICANTLY NEW OR DIFFERENT INFORMATION FROM A PRIOR STATEMENT AND TO PROVIDE WHAT TYPE OF WITNESS IDENTIFICATION INFORMATION MUST BE DISCLOSED TO THE DEFENDANT.

The General Assembly of North Carolina enacts:
SECTION 1. G.S. 15A-903(a)(1) reads as rewritten:
§ 15A-903. Disclosure of evidence by the State—Information subject to disclosure.
(a) Upon motion of the defendant, the court must order the State to:
(1) Make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. Oral statements shall be in written or recorded ~~form.~~ form, except that oral statements made by a witness to a prosecuting attorney outside the presence of a law enforcement officer or investigatorial assistant shall not be required to be in written or recorded form unless there is significantly new or different information in the oral statement from a prior statement made by the witness. The defendant shall have the right to inspect and copy or photograph any materials contained therein and, under appropriate safeguards, to inspect, examine, and test any physical evidence or sample contained therein.
SECTION 2. G.S. 15A-904 reads as rewritten:
§ 15A-904. Disclosure by the State—Certain information not subject to disclosure.
(a) The State is not required to disclose 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. Disclosure is also not required of legal research or of records, correspondence, reports, memoranda, or trial preparation interview notes prepared by the prosecuting attorney or by members of the prosecuting attorney's legal staff to the extent they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or the prosecuting attorney's legal staff.
(a1) The State is not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law.
(a2) The State is not required to provide any personal identifying information of a witness beyond that witness's name, address, date of birth, and published phone number, unless the court determines upon motion of the defendant that such additional information is necessary to accurately identify and locate the witness.
(b) Nothing in this section prohibits the State from making voluntary disclosures in the interest of justice nor prohibits a court from finding that the protections of this section have been waived.
(c) This section shall have no effect on the State's duty to comply with federal or State constitutional disclosure requirements.
SECTION 3. This act is effective when it becomes law and applies to pending cases.

The final version of S1009, attached to this brief as Appendix 4, was presented to Governor Michael F. Easley on July 28, 2007, and became effective upon signing.[5]

Comparison of the original version of S1009 (proposed by the Conference of District Attorneys) to the final version of S1009 (unanimously passed by both legislative houses) clearly reflects the General Assembly's intent to remain on the path toward full disclosure that began with capital post-conviction open-file discovery in 1996 and continued with the advent of pre-trial open-file discovery in 2004. It also shows that the Court of Appeals correctly concluded that the plain language of § 15A-903(a)(1), as well as the legislative intent behind it, required prosecutors to disclose to the defense any assertions made to prosecutors by witnesses that are connected to the prosecution of the defendant.

This is particularly true given the fact that the *Shannon* decision, which included the policy concerns raised by Judge McCullough in his dissent and addressed many if not all of the arguments raised by the State in its New Brief before this Court, was rendered **and specifically discussed** while the legislature debated the final language of S1009.

At the conclusion of that legislative process, the General Assembly rejected the broad change to open-file discovery sought in the original proposal by the Conference of District Attorneys. Instead, the legislature addressed the concerns raised by the State in *Shannon* and by the Conference in the legislative process by creating a limited exception to the general rule requiring disclosure of all information obtained by the State in a criminal case: regarding information obtained *in the specific form of* "oral statements" made by witnesses "to a prosecuting attorney outside the presence of a law enforcement officer or investigatorial assistant," the State is now only required to disclose, in written or recorded form, any "significantly new or different information . . . from a prior statement made by the witness." N.C.G.S. § 15A-903(a)(1) (as amended in 2007).

In creating that narrow exception for that limited circumstance, the General Assembly reaffirmed the original intent and general principle of open-file discovery: the defense should receive all information gathered from witnesses, regardless of whether that information came in the form of oral or written statements, regardless of whether that information flowed to a "law enforcement agency" or a "prosecutorial agency," and regardless of whether an individual prosecutor believed that information was otherwise required to be disclosed by *Brady*.

Indeed, if that were not the general rule and legislative intent behind open-file discovery, there would have been no need for the General Assembly to *create* the narrow exception. Moreover, in creating it, the General Assembly *specifically addressed* the burden placed *specifically on prosecutors* to satisfy the State's obligation to disclose to the defense the substance of a witness's

oral statement. In the limited circumstance where the witness's oral statement is made *to a prosecutor with no "law enforcement officer" or "investigatorial assistant" present* to reduce its entire substance to writing, the prosecutor must only do so to the extent that it contains "significantly new or different" information.

In creating the new standard for disclosure of oral statements made in such a limited circumstance, the General Assembly clearly rejected the case-by-case, fact-by-fact, prosecutor-by-prosecutor analysis under *Brady*; rather, the standard for disclosure is simply whether the witness says anything "significantly new or different" than information previously attributed to that witness and provided to the defense in discovery. By narrowing the disclosure requirement in that limited circumstance, the legislature addressed the concern, raised in Judge McCullough's dissent, that the majority's ruling below would place a "redundant administrative burden" on prosecutors. *Shannon*, Modified slip. op. at 23. While it would be "redundant" to require prosecutors to memorialize witness statements that were identical to statements previously attributed to that witness and provided to the defense, it can hardly be redundant to require prosecutors to provide the defense with "significantly new or different" information obtained from the witness.

This is perfectly illustrated by the facts of the instant case, where one of the witnesses at issue, Daisy Shannon, had never been interviewed by anyone on behalf of the State except the prosecutor. Requiring the State under those circumstances to provide the defendant with the substance of that witness's oral statements to the prosecutor could hardly be "redundant," nor any associated burden "unnecessary." Conversely, allowing the State to withhold such statements under a theory of attorney work product or unnecessary administrative redundancy would directly contravene the plain language of § 15A-903(a)(1) and thwart the legislative intent behind it.

The intent of the General Assembly in choosing the final language of S1009 (at Appendix 4) and rejecting the original language proposed by the Conference of District Attorneys (at Appendix 2) was to balance the burden on prosecutors of memorializing *all* oral statements made by witnesses to prosecutors against the legislature's decade-long commitment to further and fuller disclosure to defendants of all information obtained in the course of a criminal investigation and prosecution. That intent is likewise reflected in the final *title* of S1009 itself. Gone from the title of the Act is the language from the original proposal about "PROTECT[ING] THE WORK PRODUCT OF PROSECUTORS"; in its place, the new title begins: "AN ACT TO CLARIFY THAT A WITNESS'S ORAL STATEMENTS TO A PROSECUTING ATTORNEY DO NOT NEED TO BE RECORDED UNLESS THE STATEMENT CONTAINS SIGNIFICANTLY NEW OR DIFFERENT INFORMATION FROM A PRIOR STATEMENT."

Finally, the intent of the General Assembly to expand, rather than retract, open-file discovery is further evidenced by another amendment to § 15A-903(a)(1) that passed during the 2007 legislative session and will become effective on October 1, 2007. In Senate Bill 1130, which is attached to this brief as Appendix 5, the North Carolina General Assembly added language to § 15A-903(a)(1) to clarify that *any* entity, even a *private* entity, that obtains information on behalf of a law enforcement agency or prosecutor in connection with the investigation or prosecution of a criminal case shall be included in the definition of "prosecutorial agency" and, hence, subject to the general rule of full disclosure.

B. In light of the plain language and legislative history of open-file discovery in North Carolina, this Court should affirm the Court of Appeals' ruling and reject the State's request to disregard the plain language of the law and the legislative intent in adopting it.

The foregoing analysis of the legislative history and evolution of statutory open-file discovery in North Carolina—including the comparison of the plain language of § 15A-903(a)(1) from its 1983 version (Appendix 1), to its 2004 version, to its initial (Appendix 2) and final (Appendix 4) 2007 versions—shows that the Court of Appeals correctly ruled that the 2004 version of § 15A-903(a)(1) required the State to disclose assertions made in oral statements by witnesses to prosecutors related to the prosecution of the case.

While both the State (in its New Brief) and the North Carolina Conference of District Attorneys (in its Amicus Brief) present a number of policy arguments against the Court of Appeals' ruling—and, implicitly, against the plain language of § 15A-903(a)(1)—neither has presented this Court with a legal justification for disregarding that language or the legislative process that led to its adoption. They attempt to do so by citing a statutory construction rule that statutes should be interpreted to avoid "absurd consequences" (*see* State's New Brief at 23; Amicus Brief by North Carolina Conference of District Attorneys at 4). As the Court of Appeals rejected that end-run approach, so, too, should this Court. This is especially true in light of the 2007 amendments to § 15A-903(a)(1), the substance and timing of which clearly show that the General Assembly considered all of the potential "consequences" mentioned by the State, the Conference, and Judge McCullough in his dissent below.

Moreover, in considering the State's "absurd consequences" argument, this Court should note that no consequence is more absurd in the application of criminal law and procedure than a potentially (and, in some cases, *demonstrably*) innocent person being convicted of a crime and sentenced to die. Yet a pattern of that most absurd consequence is exactly what capital post-conviction open-file discovery revealed.

That revelation further demonstrated that defendants were being denied constitutionally-required access to exculpatory evidence in the State's law enforcement and prosecution files ***regardless*** of whether the State was acting in good or bad faith. That "absurd consequence" of limited pre-trial discovery led the General Assembly to adopt open-file pre-trial discovery.

The reversal of multiple capital convictions in the wake of post-conviction open-file discovery also demonstrated another seriously flawed argument of the State and the Conference: namely, that other federal and state laws, as well as appellate review, adequately protected defendants' rights in North Carolina criminal cases. (*See*, *e.g.*, Amicus Brief by North Carolina Conference of District Attorneys Brief at 12.) Clearly, in all of the capital cases overturned through post-conviction open-file discovery, the existence of *Brady* and its progeny was hardly an adequate protection

of discovery rights. Likewise, as demonstrated by affirmance of Alan Gell's original conviction and death sentence, direct appellate review was not an adequate protection of discovery rights in capital cases.[6]

The General Assembly decided in 2004 that the only "adequate protection" for discovery rights in North Carolina was a rule requiring the State to disclose to the defendant all information obtained in the course of an investigation and prosecution, regardless of whether that information was obtained by a law enforcement or prosecutorial agency, regardless of whether it was in the form of a written or oral statement by a witness, and regardless of whether it was otherwise discoverable under *Brady*. While stating that new and sweeping general rule of full disclosure, the General Assembly still provided exceptions, in 2004 and then in 2007, for:

1. Information protected from disclosure by a neutral Superior Court Judge, *see* N.C.G.S. § 15A-908;
2. A prosecuting attorney's work product, clearly defined as her "opinions, theories, strategies, or conclusions" about a case, *see* § 15A-904(a) (2004);
3. Information regarding confidential informants, unless disclosure is otherwise required by law, *see* § 15A-904(a1) (2007); and
4. Certain personal identifying information of witnesses, *see* § 15A-904(a2) (2007).

The State and the Conference of District Attorneys now urge this Court to create from the bench a fifth exception, which the General Assembly specifically rejected, for information obtained in oral statements made by witnesses to prosecutors. In doing so, they fail to acknowledge in their briefs to this Court the amendments to § 15A-903(a)(1) in 2007, when the General Assembly *considered those same arguments and specifically declined to create such a sweeping exception.*

But before the General Assembly had reached the same conclusion, the Court of Appeals correctly disposed of the "work product" argument by rejecting the notion that, just because information is relayed to someone in a "prosecutorial agency" (rather than a "law enforcement agency"), it necessarily becomes attorney work product. If that were indeed true, prosecutors and their "legal staff" could interview countless witnesses in a criminal prosecution, obtain information that had never been seen or heard before, and withhold all of that information from the defense under the work product doctrine, unless the individual prosecutor felt compelled to disclose it under *Brady*. The legislature clearly did not intend that absurd consequence when it adopted pre-trial open-file discovery in 2004 and amended it in 2007.

The State and the Conference of District Attorneys also raise another "absurd consequence" they believe will flow from affirmance of the Court of Appeals' decision: the possibility that prosecutors may become witnesses themselves where a witness's trial testimony differs from an oral statement attributed to that witness during a pre-trial interview by a lone prosecutor. That unfortunate possibility is certainly not lost on criminal defense attorneys, especially indigent criminal defense attorneys who have limited access to private investigator funds and often risk that same possibility at trial by interviewing fact witnesses themselves, without anyone else present. Nevertheless, that possible consequence does not relieve a criminal defense attorney of her ethical duty to conduct an independent factual investigation of a case; nor should it relieve a prosecutor of her ethical duty to see that justice is done in a case. And that theoretical risk is insufficient justification for this Court to create a special exception to open-file discovery for factual information obtained from witnesses in oral statements made to prosecutors—a broad exception specifically rejected by the General Assembly.

Arguing that this Court should create such a broad exception, the Conference of District Attorneys asks this Court to

> [i]magine the impact the [Court of Appeals] majority's rule will have upon the victims of violent crime. It will be inappropriate and insensitive beyond words for the District Attorney to place a tape recorder on the table while talking with the family of a murder

> victim (or to a rape victim, for example), and then explain that she is recording the conversation for the benefit of the defendant.

Brief of Amicus Conference of District Attorneys at 6-7. While that is certainly an emotional and dramatic image, it completely misstates the obligations placed on the State by the plain language of § 15A-903(a)(1), and it completely ignores the protective order provisions of § 15A-908.

The open-file discovery law does not require prosecutors to put a tape recorder in front of a murder victim's family member, or an alleged rape victim, and say, "I'm doing this for the benefit of the person who killed your loved one," or "I'm doing this for the benefit of the person who raped you." The law simply requires the State to provide to *presumed innocent defendants* the substance of oral statements made by witnesses in the course of an investigation and prosecution, regardless of to whom those oral statements were made. The State may provide those oral statements in *written* or recorded form. And if a prosecutor believes that any such statement should be withheld from the defense under any theory recognized by law, she is free to petition the Superior Court for a protective order pursuant to § 15A-908(a) (emphasis added):

> Upon written motion of a party and a finding of good cause, which may include, but is not limited to a finding that there is a substantial risk to any person or physical harm, intimidation, bribery, economic reprisals, or **unnecessary annoyance or embarrassment**, the court may at any time order that discovery or inspection be denied, restricted, or deferred, or may make other appropriate orders.

The remainder of the policy concerns raised by the State and the Conference of District Attorneys appear to have more to do with the amount of resources provided to prosecutorial agencies by the General Assembly to satisfy open-file discovery than by any legal argument for ignoring the plain language of the statute and the legislature's intent. While no one involved in North Carolina's criminal court system—from judges to clerks to prosecutors to law enforcement officers to indigent criminal defense lawyers—could seriously deny that all levels and actors in our court system need additional resources, that very real need does not constitute a legal justification for rejecting the language and intent of the North Carolina General Assembly.[7]

CONCLUSION

Using traditional rules of statutory construction, and considering the legislative history and intent of North Carolina's open-file discovery laws, the Court of Appeals correctly held that the plain language of N.C.G.S. § 15A-903(a)(1) requires the State to provide the defense with the substance of oral statements made by witnesses to prosecutors in the course of a criminal investigation or prosecution. The holding and rationale were reinforced by recent amendments to § 15A-903(a)(1), which occurred following publication of the majority's decision. Accordingly, this Court should affirm the Court of Appeals' decision.

Respectfully submitted for Amicus Curiae North Carolina Academy of Trial Lawyers, this the 29th day of August, 2007.

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[1] The concept of separate—and sometimes *greater*—protection being afforded to criminal defendants by North Carolina's Criminal Procedure Act than by the United States Constitution is illustrated elsewhere in the Act. For example, § 15A-974 provides for the exclusion of evidence obtained in substantial violation of the provisions of the Act *in addition to* exclusion of evidence obtained in violation of the North Carolina and United States Constitutions.

[2] *See* Appendix 1, § 15A-903(a) (1983) (Statement of Defendant); § 15A-903(b) (1983) (Statement of a Codefendant); and § 15A-903(f) (1983) (Statements of State's Witnesses).

[3] This history is maintained on the North Carolina General Assembly Web site at www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2007&BillID=s1009&submitButton=Go.

[4] Ironically, it was this very phrase, which protected prosecutors' work product, that the Conference of District Attorneys sought to *eliminate* in their 2007 proposed amendments to § 15A-904(a), in a bill partially entitled "AN ACT . . . TO PROTECT THE WORK PRODUCT OF PROSECUTORS." *See* Appendix 2.

[5] As the attached legislative history (Appendix 3) reflects, this language received a favorable report from the Senate Judiciary I Committee on May 22, 2007. Representatives of the Conference of District Attorneys and the criminal defense bar were present that day at the Committee meeting to express their consensus agreement regarding the final language. On May 23, 2007, the language of S1009 unanimously passed the North Carolina Senate. On July 27, 2007, it unanimously passed the North Carolina House. On July 28, 2007, the language was ratified and presented to Governor Michael F. Easley. As Section 3 of the Act reflects, the amendments immediately went into effect upon signing and apply to pending cases.

[6] After all, an appellate court can only review evidence in the record of the trial court's proceeding. Information never disclosed to the defense or presented to a trial court for *in camera* review is necessarily unavailable to a reviewing court.

[7] To the extent this Court considers the resource-based policy arguments advanced by the State and the Conference, the Court should also know that the budget recently passed by the General Assembly included a recurring increase of nearly $4,000,000 (four million dollars) for fiscal year 2007-2008 and over $10,000,000 (ten million dollars) for fiscal year 2008-2009 for new prosecutors and support staff. This information is officially available as a public record on the Web site for the North Carolina General Assembly at www.ncleg.net/sessions/2007/budget/budgetreport7-27.pdf.