Discovery Dilemmas #2: Confidential Informants
Legal Question of The Week
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In my last legal update, you may recall I made the following statements concerning discovery in felony cases:

> The easiest rule to remember is the discovery rights of a defendant charged with a felony. A defendant charged with a felony is entitled to see EVERYTHING in the "complete files of all law enforcement agencies involved in the investigation of the crimes committed or the prosecution of the defendant." (N.C.G.S. 15A-903.) What do you have to turn over to the State? Everything. Say it out loud. "Everything." The law says that your file "includes the defendant's statements, the codefendants' statements, witness statements, investigating officer's notes, results of tests and examinations, or <u>any other matter or evidence</u> obtained during the investigation of the offenses alleged to have been committed by the defendant." (N.C.G.S. 15A-903(a)(1), emphasis added.) This definition may be tricky to memorize, so let me sum it up for you. Everything.

In fact, you may even remember that I offered a pretty comprehensive definition of the word "everything." You may have thought it surprising that a lawyer would be so straightforward and make such a categorical statement. There's a reason that lawyers tend to not be so straightforward and categorical and that is because for every rule, there is an exception. The exception here, the "thing" that "everything" does not cover, is the identity of a confidential informant.[2] So, when I say "everything," I of course don't really mean "everything," I mean "almost everything."[3]

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[1] Many of you probably believe that this update will be filled with references to a certain basketball team which won a pretty important game just 4 days ago. Let me assure you that I would not be that insensitive to the "fans" of a certain rival school. That would also be WAY too predictable of me.

[2] I have since gone back and edited my last legal update to include this caveat. Please destroy any copies that do not contain this correction. Like "unpersons" in George Orwell's <u>1984</u>, if you can't prove the mistake happened, it never happened.

[3] It is subtle nuances like this that require you to attend law school for 3 years and pass an exam to be permitted to practice law.

N.C.G.S. 15A-904(a1) protects the identity of a confidential[4] informant from the discovery rules "unless the disclosure [of that identity] is otherwise required by law," which raises the question, "When is the disclosure of the identity of a confidential informant required by law," which makes for a great legal update topic, which completes the circle of life and brings us up to now. Hopefully, this update will assist[5] you in guarding[6] your informants from retaliation. There is also an appendix at the end which summarizes this information.

If you use your informants correctly, you will usually be able to shield their identities. By looking at the circumstances that require the informant to be identified to the defendant, you will know what situations to avoid in those times where you wish to keep your source confidential. There are two common circumstances in which the defendant may try to have the confidential informant's identity revealed: a motion to suppress evidence obtained from an action that relied at least in part on information supplied by an informant or when the defendant wants to use the informant as a witness at trial.[7]

Most of the time when you receive information from a confidential and reliable source, you use that information to take some action that involves the Fourth Amendment. You might make that information the center[8] point of an affidavit for a search warrant or you might move forward[9] with some warrantless stop or arrest of a suspect. Very often, a defense attorney will file a motion to suppress the evidence you obtained from that search or seizure and ask that the informant's identity be revealed.

N.C.G.S. 15A-978 is the controlling statute in this situation and follows the leading U.S. Supreme Court case on the issue, McCray v. Illinois, 386 U.S. 306 (1967). G. S. 15A-978(b) states that when a motion to suppress evidence is made that contests the truthfulness of the testimony presented to establish probable cause[10] and that testimony includes information furnished by an unnamed informant, the defendant is entitled to know the informant's identity unless:

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[4] Confidential: (adjective); classified; secret; strictly private. It is no secret that UNC annihilated Michigan State 89-72 on Monday to win their 5th (or 6th, depending on who you ask) national championship. Oops, I said I wasn't going to talk about that.

[5] Ty Lawson had six assists and only one turnover in Monday's game and scored 21 points, mostly from the free throw line.

[6] Speaking of guards, Wayne Ellington was named the Final Four Most Outstanding Player after pouring in 19 points and going 3 for 3 from the three point line.

[7] In addition to these situations, an indictment for Sale of a Controlled Substance must name the purchaser under State v. Bennett, 280 N.C. 167 (1971). So if that person was your informant, he is no longer anonymous.

[8] Although he is more of a forward, Tyler Hansbrough has played center for UNC for the last four years. Maybe you've heard of him. He scored 18 points and pulled down 7 rebounds Monday night.

[9] UNC forward Deon Thompson scored 9 points including two important early baskets. Danny Green hit some three pointers but mostly was responsible for committing personal fouls last weekend.

[10] This would include just about every motion to suppress. Additionally, although the statute says probable cause, I believe it would also apply to actions where only reasonable suspicion was needed.

1. The evidence was seized pursuant to a search warrant or arrest warrant,[11] OR
2. The informant's existence is corroborated by evidence independent of the officer's testimony.

The first one is fairly easy to understand - if you used the informant's information to establish probable cause to obtain either a search warrant or an arrest warrant prior to taking action, the informant's identity is protected in so far as the motion to suppress is concerned.[12] But what does it mean to corroborate the existence of the informant?

Let me quote the great Bob Farb: "Corroboration means that there must be some evidence - other than the word of the officer who is testifying about probable cause – that the informant actually exists. It does not mean that the truth of the informant's information must be corroborated."[13] This corroboration often comes from a second officer who knows the informant or who listened to the original conversation between the informant and the officer who used the information.

For an example of how this works, consider the case of <u>State v. Bunn</u>, 36 N.C. App. 114 (1978). In this case, an officer made a stop and arrest for marijuana charges based on a tip from a reliable confidential informant. After the arrest, the officer had the informant repeat the information to a second officer for corroborative purposes. Tragically, the corroborating officer died shortly thereafter. The arresting officer then had the informant repeat the information to a third officer who had participated in the original search and arrest. The defendant argued that this "after the fact" corroboration was not sufficient.

The Court of Appeals upheld the decision to keep the informant anonymous by relying not on the after the fact corroboration but testimony that the third officer knew of the informant's existence <u>at the time the information was given</u>. The Court also pointed out that there was corroboration of the existence of the informant because the officer was able to predict future events of which he could not know absent the information received from the informant. Remember that the reliability of the informant's information is not the key here, only the existence of the informant.

In addition to the suppression motion situation, an informant's identity may have to be disclosed to the defendant if he was so involved in the case that failure to disclose his identity would prevent the defendant from being able to receive a fair trial. This usually occurs in one of two ways:

1. The informant directly participated in the offense being tried; OR
2. The informant is a material witness to the facts about the defendant's guilt or innocence.

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[11] Note that this is yet another advantage gained by getting a warrant prior to taking action. Warrants signed off on by an independent judicial official protect you in so many ways.

[12] The identity may yet have to be disclosed if the informant is a material witness to the facts or directly participated in the offense – more on this later.

[13] <u>Arrest, Search, And Investigation in North Carolina</u>, Third Edition (2003) at page 214. I believe that Farb would also agree that the first half of Monday's game was as good as a Carolina team has ever played for a half…but I can't quote him on that.

In Roviaro v. U.S., 353 U.S. 53, (1956), Chicago, Illinois[14] police officers decided to use an informant to purchase heroin from a suspect. They searched the informant's car to make sure it was free of contraband and one of the officers hid in the trunk of the informant's Cadillac, "taking with him a device with which to raise the trunk lid from the inside."[15] The hidden officer was able to hear the conversation between the informant and the drug dealer who was picked up and an arrest was made after the transaction was complete. The Supreme Court held in this case that the informant's identity must be disclosed because he was a material witness to the facts, having direct knowledge of the offense as it happened.

On the other hand, the informant's mere presence while the crime is occurring is not enough by itself to warrant disclosure of his identity. In the North Carolina Supreme Court case of State v. Watson, 303 N.C. 533 (1981), an undercover SBI agent was accompanied to a store by a confidential informant and purchased LSD tablets from the defendant. The agent testified that no one but he and the defendant were able to hear the conversation that took place during the sale and no one except he and the defendant were in the small storage room where the sale actually took place. The Court ruled that the informant's identity was safe because he was not a material witness.

The facts of the particular case are of crucial importance in making this determination, but generally the identity of the informant is safe unless he or she directly participated in the crime or was a material witness to the crime. The fact that the informant arranged the transaction or made purchases prior to the offense being tried is not enough by itself to forfeit anonymity.

Hopefully, this information will help you prevent defense attorneys from stealing[16] your informant's secret identity and give you the ammunition you need to shoot[17] down every argument they come up with.

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[14] I pause here to point out that both U.S. Supreme Court cases in this update are from Illinois. UNC beat Illinois by a score of 75 to 70 in 2005 to win the national championship.
[15] Kids, don't try this at home. I'm wondering what device in 1956 was capable of opening the trunk door from the inside. A crowbar?
[16] Lawson had an NCAA record 8 steals in the game.
[17] UNC shot 46% from the field for the game, 42% from three-point range compared to 40% and 30% for Michigan State respectively.

CONFIDENTIAL INFORMANT APPENDIX

HOW TO PROTECT THE ANONYMITY OF AN INFORMANT

1. Get a search warrant or arrest warrant based on the informant's information. N.C.G.S. 15A-978(b)(1) OR

2. Ensure that the existence of the informant can be corroborated by evidence independent of one officer's testimony. N.C.G.S. 15A-978(b)(2)

AND

3. Make sure the informant is not a direct participant in the offense being charged or a material witness to the facts about the defendant's guilt or innocence.