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The North Carolina "Canary" Rule—Protection for an Endangered Species?

For a forty-three day period beginning July 14, 1983, the North Carolina statute that allows criminal defendants discovery of their past oral statements¹ was among the most liberal of such statutes in the United States. The statute allowed defendants discovery of all of their past statements, regardless of to whom they were made, and seemed to require prosecutors to make a "diligent search" for all such statements. Many North Carolina district attorneys believed that the statute was too liberal and would be harmful to law enforcement efforts. They feared that it would impose a tremendous paperwork burden and would have a detrimental effect on the use of confidential informants.² Because of these concerns, the North Carolina General Assembly met in a special session on August 26, 1983, and amended the statute.³ Although this amendment limited the scope of discovery, criminal defendants in North Carolina remain in a better position than they were prior to 1983. The amended statute balances the defendants' interests in expansive discovery with the State's interests in less burdensome procedures and the use of confidential informants. This note considers the concerns that prompted the General Assembly to limit discovery of defendants' past statements and concludes that, although many of these concerns are supported weakly, the amended statute represents an effective compromise.

By liberalizing defense discovery the legislature probably hoped to make trial "less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."⁴ Allowing a defendant to discover his past oral statements that are known to the prosecution is supported on the ground that "it is especially helpful to defense counsel in preparing for trial or in determining whether a guilty plea is advisable."⁵ Prior to 1983, a North Carolina defendant's right to discovery of such state-

1. Act of July 14, 1983, ch. 759, § 3, 5 1983 N.C. Adv. Legis. Serv. 39, amended by Act of Aug. 26, 1983 (codified at N.C. GEN. STAT. § 15A-903(a)(2)(b) (1983)).

2. See *infra* text accompanying notes 18-28.

3. Act of Aug. 26, 1983. See *infra* text accompanying notes 47-53.

4. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 1147 (5th ed. 1980) (quoting United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958)) [hereinafter cited as Y. KAMISAR].

5. Y. KAMISAR, *supra* note 4, at 1155. The American Bar Association Standards for Criminal Justice identifies as one of its "General Principles" that "procedure prior to trial should: . . . [p]rovide the accused with sufficient information to make an informed plea." STANDARDS FOR CRIMINAL JUSTICE § 11-1.1(a)(ii) (1978). In its comments, the ABA notes,

[A] defendant who is ill-informed about the circumstances of the case may make judgments that are costly to the individual as well as the system. An overly optimistic view of the circumstances may lead to a wasteful trial, while an unduly pessimistic view of the circumstances may lead to a premature plea which is subsequently challenged. The finality of guilty pleas is particularly important when a substantial majority of all cases are resolved by plea.

Id. § 11 commentary at 11. In its comments regarding the principle that pretrial procedures should "permit thorough preparation for trial and minimize surprise at trial," the drafters note that "preparation is essential to proper conduct at trial. . . . [T]he realist knows that effective-

ments was governed by the limiting language of North Carolina General Statutes section 15A-903(a)(2).⁶ Section 15A-903(a) provided that:

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

. . . .

(2) To divulge, in written or recorded form, the substance of any oral statement made by the defendant which the State intends to offer in evidence at trial.⁷

Disclosure of the substance of the defendant's oral statements that the prosecutor intended to use at trial was mandatory. An additional limitation imposed by the judiciary restricted mandatory disclosure to statements that had been made to a person acting on behalf of the State.⁸ Both these limitations were modeled on rule 16 of the Federal Rules of Criminal Procedure, the model for the more restrictive discovery statutes in the United States.⁹

In July of 1983 the North Carolina General Assembly significantly broadened the scope of mandatory disclosure by amending the statute to eliminate both limitations. Amended section 15A-903(a)(2) required the prosecutor:

To divulge, in written or recorded form, the substance of any oral statement made by the defendant, regardless of to whom the statement was made, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor.¹⁰

Thus, the July amendment removed the "intended for use at trial" limitation and specifically removed from the coverage of the statute any limitation to statements made to persons acting on behalf of the State.¹¹ Those who favored the amendment stated that it ensured that "all the cards are on the table"¹² during trial, and gave "the defendant the opportunity to know what he is dealing with."¹³ These proponents noted that the defendant would no longer "be confronted by nameless accusers."¹⁴

ness at trial depends upon meticulous evaluation and preparation of the evidence to be presented at trial. *Id.*

6. N.C. GEN. STAT. § 15A-903(a)(2) (1983), amended by Act of Aug. 26, 1983. North Carolina has recognized that "no right to pretrial discovery existed at common law." *State v. Hardy*, 293 N.C. 105, 124, 235 S.E.2d 828, 840 (1977). Instead, a defendant's right to discovery in North Carolina is governed by Article 48 of Chapter 15A of the General Statutes. Section 15A-903(a) governs discovery of statements made by the defendant; subdivision 1 governs written or recorded statements. Subdivision 2, with which this note is concerned, covers oral statements.

7. N.C. GEN. STAT. § 15A-903(a)(2) (1983).

8. *See State v. Mills*, 307 N.C. 504, 299 S.E.2d 203 (1983).

9. *See id.* at 509, 299 S.E.2d at 206; *State v. Crews*, 296 N.C. 607, 619, 252 S.E.2d 745, 753-54 (1979). Federal rule 16 limits discovery of a defendant's oral statements to those intended to be used at trial and those made "in response to interrogation by any person then known to be a government agent." FED. R. CRIM. P. 16.

10. Act of July 14, 1983, ch. 759, § 3, 5 1983 N.C. Adv. Legis. Serv. 39, amended by Act of Aug. 26, 1983. (codified at N.C. GEN. STAT. § 15A-903(a)(2)(b) (1983)).

11. *See id.*

12. Interview with Alan D. Briggs, Lobbyist for the N.C. Academy of Trial Lawyers, quoted in *Raleigh News and Observer*, July 29, 1983, at 1D, col. 3.

13. Interview with Rep. Allen Adams, D-Wake, quoted in *Raleigh News and Observer*, July 29, 1983, at 1D, col. 3.

14. *Id.*

The July amendment made North Carolina one of the more liberal jurisdictions under this category of defense discovery. The North Carolina statute no longer resembled federal rule 16, but came closer in form to the American Bar Association Standards,¹⁵ the primary model for many of this country's most liberal discovery statutes.¹⁶

Although proponents of liberal discovery supported this change, many North Carolina district attorneys disagreed. The district attorneys contended that the amended statute would harm law enforcement efforts. They argued against the statute, asserting two criticisms that traditionally are directed at broad discovery: first, the statute's vague and undefined boundaries would increase the prosecutor's paperwork burden; and second, the statute would lead to harassment of informants.¹⁷ The argument that the broadened scope of the prosecutor's duty would greatly increase their paperwork burdens¹⁸ was based on the requirement that the prosecutor disclose to the defendant all statements made by the defendant to any person, regardless of whether that person would be testifying at trial. The limits of this duty were marked by vague and undefined boundaries. The prosecutor was to disclose all such statements "within the possession, custody, or control of the State" that are "known or by the exercise of due diligence may become known to" the prosecutor.¹⁹ The statute did not indicate whether the prosecutor's duty was limited

15. STANDARDS FOR CRIMINAL JUSTICE § 11-2.11 (1978) provides for open file discovery.

16. "By 1975, twenty-two states had substantially implemented the ABA standards through judicial or legislative action." *Id.* § 11-1.1 commentary at 11.8, n.3 (citing Robinson, *The ABA Standards for Criminal Justice: What They Mean To The Criminal Defense Attorney*, 1 NAT'L J. CRIM. DEF. 3 (1975)); see generally Y. KAMISAR, *supra* note 4, at 1155.

17. See *infra* note 24.

18. See L. WATTS, REPORT TO THE HOUSE SELECT COMMITTEE TO EXAMINE THE PRETRIAL CRIMINAL DISCOVERY PROVISIONS OF SECTION 3 OF CHAPTER 759 (HOUSE BILL 1143), SESSION LAWS OF 1983 7 (Aug. 24, 1983) (Mr. Watts is Assistant Director, The Institute of Government, The University of North Carolina at Chapel Hill.). The report concluded that "paperwork is the most important single factor in the acceptance or rejection of any new procedure." *Id.* at 12. See also M. EASLEY, INTERVIEWS WITH FLORIDA STATE'S ATTORNEYS AND FLORIDA LAW ENFORCEMENT OFFICERS (Aug. 23, 1983) (Easley is the District Attorney for the 13th Judicial District of North Carolina.). Easley's report placed great emphasis on the greatly increased time and expense burdens.

The ABA Standards recognize that pretrial procedures should "effect economies in time, money, judicial resources, and professional skills by minimizing paperwork." STANDARDS FOR CRIMINAL JUSTICE § 11-1.1(vi) (1978). Although the ABA Standards provide for broad, liberalized discovery, the policy of minimizing paperwork is accomplished by allowing "open file" discovery—the prosecutor's files are open to the defendant. This minimizes the prosecutor's burden. Because the North Carolina statute denies discovery for much information, such as the names of witnesses, and witness statements, see *supra* text accompanying note 8, disclosure must be accomplished by defining the prosecutor's duty.

19. See *supra* note 10 and accompanying text.

Since one does not ordinarily use the language "possession, custody, or control," when speaking of things that do not have physical existence (such as oral statements), it is not possible to predict with reasonable certainty how this limitation will be interpreted It is unclear whether oral statements known to non-law-enforcement potential State's witnesses are included within "possession, custody, or control," but once anyone investigating or prosecuting the case learns of it, the State would seem to have possession, custody, or control [T]he statute places a further limitation based on the knowledge of the prosecutor in the case. He must know of the statement or be able to know of it through the exercise of due diligence. This raises an issue whether a discovery request by a defendant requires a prosecutor to begin a diligent search for any oral statements.

to disclosure of statements that were relevant to the offense charged, or whether there was a limitation with respect to the time when the statement was made.²⁰ Thus, the new statute arguably expanded the prosecutor's duty far beyond his own trial preparation to require a "diligent search"²¹ for any oral statements made by the defendant. The statute created an expensive, time-consuming paperwork burden for the State.

The paperwork argument, though important for the policy of effecting economies in the discovery process,²² was not the pivotal reason for the amendment by the North Carolina General Assembly. The needlessly vague and overreaching aspects of the statute could be changed easily and without-controversy to appease the district attorneys.²³ The district attorney's second argument—that the Act would lead to harassment of confidential informants—goes to the heart of the broad-versus-limited discovery argument and was the focal point of the controversy that led to the second amendment in August 1983.²⁴

The district attorneys contended that the July amendment would lead to the disclosure of the identities of confidential informants,²⁵ and that such disclosure would give rise to threats, and, in many cases, harm to informants. Although the July amendment did not order specifically the disclosure of the

The likelihood, however, is that the prosecutor—with his continuing duty to disclose under G.S. 15A-907—must, at a minimum, disclose oral statements when he learns of them.

K. CANNADAY, MEMORANDUM TO REPRESENTATIVE ALLEN ADAMS 2 (Aug. 11, 1983) (Cannaday is Assistant Director, The Institute of Government, The University of North Carolina at Chapel Hill.)

20. [M]ust the statement have some apparent relevance to the crime charged to be discoverable? No such limitation is explicitly contained in G.S. 15A-903(a)(2) as amended. Probably some apparent relevance is required. The question of whether that relevance was "apparent" would be for ad hoc determination in a hearing conducted in the absence of the jury. This issue did not arise under the old law since all statements intended for use at trial have apparent relevance.

Second, is there a limitation with respect to the time when the statement was made? Under the old law, this issue did not arise, since discovery was limited to statements made to persons acting on behalf of the State, which normally occur during the investigation of the alleged crime. This is in accord with the use of the word "statement" which, especially in the context of litigation, normally refers to formal declarations, reports, or narratives. However, "statement" can also mean a single declaration or remark. Thus, the new law may be interpreted to mean that the prosecutor must reduce to written or recorded form everything said by the defendant during the commission of the alleged offense, as well as anything relevant that he said before or afterward, no matter how voluminous this material may be.

K. CANNADAY, *supra* note 19, at 2-3.

21. *See supra* note 19.

22. *See supra* note 18.

23. *See infra* text accompanying notes 49-53.

24. According to newspaper reports, the concern that led to the August amendment was the protection of confidential informants. *See* Raleigh News and Observer, July 16, 1983, at 1C, col. 5; *id.* July 29, 1983, at 1D, col. 3; *id.* July 30, 1983, at 1A, col. 6; *id.* Aug. 5, 1983, at 1A, col. 1; *id.* Aug. 13, 1983, at 1A, col. 1; *id.* Aug. 16, 1983, at 1A, col. 5; *id.* Aug. 21, 1983, at 29A, col. 3; *id.* Aug. 23, 1983, at 1A, col. 1; *id.* Aug. 25, 1983, at 1A, col. 1.

25. North Carolina recognizes the privilege to withhold the identity of informants in N.C. GEN. STAT. § 15A-978(b) (1983). *See also* State v. Boles, 246 N.C. 83, 97 S.E.2d 476 (1957). This privilege is constitutional, at least as long as the issue is the lawfulness of the arrest. *Rugendorf v. United States*, 376 U.S. 528 (1964).

identities of prosecution informants, as do the statutes of the most liberal discovery jurisdictions,²⁶ opponents argued that a defendant who learned the incriminating statements from the prosecutor, as required by the July amendment, often would be able to determine the identity of the informants.²⁷ At a minimum, opponents argued that the possibility of exposure of the identities of informants and the resulting reluctance of informants to come forward would have a "chilling effect" on the use of this important prosecution device.²⁸

Proponents countered by arguing that this "chilling effect" would not result because district attorneys under existing state law would be able to obtain protective orders to shield informants.²⁹ Prosecutors, however, argued that protective orders do not guarantee satisfactorily informant anonymity. What a prosecutor might consider to be good cause for a protective order might not satisfy the judge who issues the orders. Thus, policemen and prosecutors would not be certain whether they could obtain a protective order. Without such guarantees most informants likely would not come forward.³⁰

These witness harassment arguments are speculative.³¹ The evidence presented to the legislative committee that examined the difficulties experienced by other states in implementing similar statutes demonstrates that, with the possible exception of Florida, no state has had any difficulty with witness harassment.³² A report on Florida's witness harassment experience was the

26. See Y. KAMISAR, *supra* note 4, at 1158.

27. Raleigh News and Observer, July 29, 1983, at 1D, col. 3.

28. *Id.*, Aug. 16, 1983, at 1A, col. 5.

29. *Id.* See also N.C. GEN. STAT. § 15A-908 (1983); *infra* text accompanying note 55.

30. Raleigh News and Observer, July 30, 1983, at 1A, col. 6; *id.* Aug. 13, 1983, at 1A, col. 1.

31. The ABA finds such arguments unconvincing:

Some of the traditional reasons for denying or restricting discovery have been the fear that pretrial disclosure will subject victims and witnesses to threats or other abuse. . . . However, experience with broad discovery suggests that discovery does not pose such problems in the majority of cases and that protective orders are an appropriate method of coping with the occasional case in which pretrial disclosure will jeopardize victims, witnesses, or evidence.

STANDARDS FOR CRIMINAL JUSTICE § 11 commentary at 11.16-.17.

32. See M. EASLEY, *supra* note 18; L. WATTS, *supra* note 18. The difficulty of making comparisons with other states was recognized in the L. WATTS report:

Other states usually enacted broad discovery as a package, and the respondents from other states had difficulty in focusing upon the problems specifically caused by the portion on oral statements of defendants.

Most of the sixteen states surveyed require the provision of witness lists to defendants, and in many instances the statements of those witnesses. Thus a major criticism made here that furnishing the oral statements of defendants made to third parties will reveal the identity of those parties has no force in those states. Many other jurisdictions have specific provisions for keeping the identity of confidential informants secret, in the absence of constitutional prejudice to the defendant. In some states the privilege is in the section concerning what need not be disclosed along with the work-product exception; in others the maintenance of confidentiality as to an informer's identity is specifically a factor to be considered by the judge in fashioning protective orders. The most pervasive problem of comparability, though, arises from the fundamentally different way that prosecutors screen and prepare cases in the other jurisdictions contacted and contrasted with the way the majority of North Carolina prosecutors do.

L. WATTS, *supra* note 18, at 8.

instrumental factor in prompting the August amendment of the North Carolina statute.³³ To evaluate the effect of the August amendment, an analysis of the Florida experience is necessary.

Initially, it must be emphasized that any comparison between Florida's discovery laws and the July amendment to section 15A-903(a)(2) is critically suspect. The Florida law specifically requires the disclosure, prior to trial, of the names and addresses of all people whom the prosecutor believes have information concerning the case.³⁴ Furthermore, it allows the defendant to see the statements of informants.³⁵ Under North Carolina's July amendment, however, informants who did not offer prior statements of the defendant remained anonymous. Defendants were not entitled to see the exact statements or know the identity of the source. Therefore, Florida law differs substantially from the North Carolina law in a way that makes witness harassment considerably more likely under the former's version.

Although both states have protective order provisions to deny discovery when necessary to protect informants,³⁶ the effectiveness of such orders on an informant's willingness to come forward depends on the informant's certainty that the order will be issued.³⁷ Because Florida's discovery statute is much broader than the July amendment, there is a much greater risk to informants, and much less certainty about the effectiveness of protective orders. Thus, it does not follow that the July amendment would have caused any of the Florida witness harassment problems or the "chilling effect" on use of informants.

Although the Florida statute is distinguishable from the July amendment, Florida's experience contributed significantly to the North Carolina General Assembly's decision to amend the statute. It appears that the General Assembly was impressed by the similarity between both states' experience with drug trafficking, and the large amount of drug-related deaths in Florida that are connected with witness harassment.³⁸ Interestingly, the evidence presented to

33. Act of Aug. 26, 1983.

34. FLA. R. CRIM. P. 3.220.

35. *Id.*, which states in part:

(a) Prosecutor's Obligation.

(1) After the filing of the indictment or information, within fifteen days after written demand by the defendant, the prosecutor shall disclose to defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the State's possession or control:

(i) The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto.

(ii) The statement of any person whose name is furnished in compliance with the preceding paragraph. . . .

36. *See id.*; N.C. GEN. STAT. § 15A-908 (1983). In Florida, the "general rule is that the State has the privilege of nondisclosure of the identity of a confidential informant and the burden is on the defendant to show why disclosure should be compelled." *Elkins v. State*, 388 So. 2d 1314, 1315 (Fla. Dist. Ct. App. 1980).

37. This conclusion follows from the argument of the North Carolina district attorneys who feared a "chilling effect" on the use of confidential informants. *See supra* text accompanying note 30.

38. *See infra* note 42.

the General Assembly demonstrates that Florida's problems with witness harassment are not widespread,³⁹ but apparently confined to a single county. In his report to the General Assembly,⁴⁰ Michael F. Easley, a North Carolina district attorney, noted that drug-related homicides were the second-highest category of murders in Dade County during 1981 and 1982.⁴¹ He also noted that Florida's discovery law, which requires disclosure of the names of witnesses, "contributed heavily to the drug-related murders."⁴²

The North Carolina General Assembly was concerned with the possibility of a similar increase in drug-related homicides as a result of the July amendment. The North Carolina district attorneys who were most unhappy with the July amendment were those in the coastal counties where, because of the "extensive coastline and expansive rural areas," drug smuggling is "rampant."⁴³ It was argued that under the liberal discovery provision of the July amendment, "[a]n attempt by the state, under those circumstances, to continue to aggressively prosecute all drug trafficking cases would be irresponsible. It would result in intimidation, serious bodily injury and death of potential state witnesses."⁴⁴ The district attorneys argued that in drug-related cases, "criminal penalties are stiff and defendants go to great lengths to avoid conviction."⁴⁵ Thus, because of organized crime's involvement in drug trafficking,⁴⁶ there would be a dangerous likelihood of harassment and harm to informants if their identity could be ascertained from the disclosures required by the July amendment. The General Assembly apparently was persuaded.

In response to the issues raised by the liberalized discovery statute the

39. See, e.g., Raleigh News and Observer, Aug. 21, 1983, at 29A, col. 3 (quoting Steve Masterson, Executive Director, Academy of Florida Trial Lawyers):

Masterson said his state has no problems prosecuting criminal cases while operating under a far more liberal disclosure rule than North Carolina's law officers are fighting. . . .

When informants do need to be kept confidential, Florida's rules permit statements and identities to be withheld from the defendant if "there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment resulting from such disclosure."

According to Masterson, "If the prosecution can go in and show with any kind of reasonable prospect that there is going to be danger, it can get a protection order. In our area, many judges are former prosecutors, and they understand well the problems."

40. See M. EASLEY, *supra* note 18.

41. *Id.* at 2.

42. In a summary of his interview with Mike Diaz, a detective with the Homicide Division in Dade County, Easley noted the statement by Diaz that "the name of a witness must be disclosed prior to trial under their current discovery law and that this contributed heavily to the drug related murders." *Id.* at 2.

43. Raleigh News and Observer, July 30, 1983, at 1A, col. 6; *id.* July 29, 1983, at 1D, col. 3.

44. Raleigh News and Observer, July 30, 1983, at 1A, col. 6.

45. *Id.*, July 29, 1983, at 1D, col. 3.

46. Officer Diaz stated that these murders are difficult to solve because it was very easy to have Colombians and other Latins to fly in, get off the airplane, go to the victim's home, do the killing, go back to the airport and leave the country. Under those circumstances even if they could determine who did the killing it would not be practical to attempt to extradite the defendant from Colombia.

M. EASLEY, *supra* note 18, at 3.

General Assembly again amended the statute in August 1983. As amended, section 15A-903(a)(2) requires the prosecutor:

To divulge, in written or recorded form, the substance of any oral statement *relevant to the subject matter of the case* made by the defendant, regardless of to whom it is made, within the possession, custody, or control of the State, the existence of which *is known to the prosecutor or becomes known* to him prior to or during the course of the trial. . . .⁴⁷

Thus, amended section 15A-903(a)(2) limits the prosecutor's duty to disclose to defendants, statements "relevant to the subject matter of the case" and eliminates the "diligent search" requirement. By more clearly defining this duty, the August amendment rids the statute of much of the vagueness of the July amendment, and makes certain that this duty is not as broad as the July amendment implied.⁴⁸

The August amendment also reduces the prosecutor's paperwork burden. The statute continues with the limitation that "disclosure of such a statement is not required if it was made to an informant whose identity is a prosecution secret and who will not testify for the prosecution, and if the statement is not exculpatory."⁴⁹ This limitation also reduces significantly the paperwork burden since prosecutors need only be concerned with documenting statements made to witnesses who will testify at trial—a burden that merely is incidental to normal trial preparation. Moreover, the prosecutor no longer will have to worry about divulging statements of his informants as long as they do not testify at trial. This latter aspect should eliminate fears of witness harassment and reduce any "chilling effect" on witnesses or informants. Furthermore, the reference in the statute requiring the disclosure of "exculpatory statements" known to the prosecutor is consonant with the due process requirement that exculpatory evidence be made available to the defendant.⁵⁰

As a safeguard to the defendant's interests in not being surprised at trial, the new statute adds: "If disclosure of the substance of defendant's oral statement to an informant whose identity is or was a prosecution secret is withheld, the informant must not testify for the prosecution at trial."⁵¹ This addition ensures that if a statement is withheld from a defendant because it became known to the prosecution through a confidential informant, the informant will not be allowed to testify for the prosecution at trial—even if the informant

47. Act of Aug. 26, 1983 (emphasis added) (codified at N.C. GEN. STAT. § 15A-903(a)(2)(b) (1983)).

48. See *supra* text accompanying note 21.

49. Act of Aug. 26, 1983 (codified at N.C. GEN. STAT. § 15A-903(a)(2)(b) (1983)).

50. The disclosure of known exculpatory evidence that has been "requested" and is "material" is mandated by the due process guarantee of a fair trial. See *United States v. Agurs*, 427 U.S. 97, 105 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady* the Court stated:

A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice

Id. at 87-88.

51. Act of Aug. 26, 1983.

later decides to give up his confidential status. Thus, even though the defendant will be deprived of the knowledge that the prosecution is aware of this statement, the defendant does not need this information for preparing his case. The prosecutor is prohibited from using this witness at trial.

Finally, the new statute adds the requirement that:

If the statement was made to a person other than a law enforcement officer and if the statement is then known to the State, the State must divulge the substance of the statement no later than 12 o'clock noon, on Wednesday prior to the beginning of the week during which the case is calendared for trial.⁵²

In so doing, the prosecutor's paperwork burden is eased as he is ensured a certain amount of time before his duty of disclosure is triggered. More importantly, it reduces the likelihood of harassment of witnesses whose identity eventually will become known to the defendant. The prosecutor now can protect his witnesses until the latest practical date. The significance of the "Wednesday prior to the beginning of the week" of trial, and the reason that this is the latest practical date, relates to the statutory deadline for pretrial motions, which falls on such Wednesdays at five o'clock P.M.⁵³ The new statute sets twelve o'clock as the prosecutor's disclosure deadline to permit the defense attorney five hours to move for a continuance in light of this new evidence.⁵⁴

Simultaneously with the amendment of this section of the statute, North Carolina General Statutes Section 15A-908(a) was amended to provide protection in, as specific examples of what may constitute "good cause" for the issuance of a protective order, situations where "there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment."⁵⁵ This amendment apparently was an attempt to add a degree of certainty to the process of obtaining protective orders so that confidential informants can be given guarantees of remaining anonymous. Such guarantees, it is hoped, will help avoid any "chilling effect" on informants.

The August amendment is a compromise. On the one hand, it balances the interests of providing defendants with the broadest possible discovery and avoiding surprise at trial. On the other, it balances the interest of effecting economies in the discovery process by limiting the prosecutor's paperwork burden, and protecting the interests of confidential informants. The compromise is sound. A defendant in North Carolina is in a much better position than he was prior to 1983. He will be allowed discovery of all statements he made that became known to the prosecutor through witnesses who will testify

52. *Id.*

53. See N.C. GEN. STAT. § 15A-952(c) (1983).

54. Act of Aug. 26, 1983. Arguably, five hours is too short a time for this decision to be made by anyone, except possibly an attorney whose single client is this defendant. Delaying disclosure to this late moment may be unfair, as there is no guarantee a continuance will be granted, and, even where one is granted, inconvenience would still result.

55. N.C. GEN. STAT. § 15A-908(a) (1983).

against him at trial. In addition, the defendant's position has been improved with a minimal effect on the prosecutor's burden and use of confidential informants.

It can be argued that all of a defendant's known statements should be discoverable,⁵⁶ and that the North Carolina General Assembly's decision to exclude those made to a confidential informant was based on inconclusive comparisons with a single county in Florida. As long as the protected informants do not testify at trial, however, it is difficult to argue that excluding these statements will hurt the defendant in his trial preparation or in determining whether a guilty plea is advisable. The North Carolina district attorneys' arguments in favor of protecting the identities of confidential informants, though weakly supported in evidence, have some logical appeal. A test period in which the legislature could study the effects of the more liberal discovery rules would have been worthwhile. This test period would have been especially appealing in light of the August amendment to the protective order statute. The safety of confidential informants, however, is a significant concern and justifies the less expansive new statute.

JONATHAN M. POLK

56. *See supra* notes 4-5 and accompanying text.