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THE INFORMER PRIVILEGE

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The article, which was submitted by Mr. Gutterman in partial fulfillment of the requirements for the LL.M. degree at Northwestern, sets forth the utility of informers to police work, particularly in the vice control area. He also collects and analyzes the decisional law of the federal and state courts which have wrestled with the vexing problem of when, and under what circumstances, a defendant is entitled to know the identity of an informant who has played some role in the case against him. Publication of Mr. Gutterman's article in this issue is especially timely since the Supreme Court of the United States may undertake a re-examination of this entire body of law in *McCray v. Illinois*, 384 U.S. 949 (1966), now pending in that Court.

Law enforcement agencies, in their efforts to combat crime, oftentimes must rely heavily upon statements of secret informers. The communications from informers have proven vital to the detection of criminal activities.[1] The information received may expose a crime, or be used as a basis for an arrest or search. Such information at times may prompt an investigation, and eventually sufficient information may be gathered to prosecute a criminal action.

To encourage this type of communication to law enforcement agencies, it is often deemed necessary to suppress the identity of the informer. The informer does not wish to expose himself because of fear of physical harm to himself and his family. This very real danger is well illustrated by the murder of Arnold Schuster. The New York Police publicly disclosed that it was Schuster's identification that led to the arrest of bank robber Willie Sutton. A few days later, Schuster was mysteriously slain.[2] In addition, the informant may also be subjected to diverse social reactions as well as civil action.[3]

The government also has an interest in nondisclosure. It is not enough to declare that it is the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officers; many individuals will still remain reluctant to give this information unless they are assured of anonymity. By preserving their identity, the continued value of the individual informer to the police is protected. It also encourages other persons to cooperate in the administration of justice.

The judiciary, in its effort to preserve the public interest in facilitating the use of informers, has developed the so-called evidentiary rule—the informer's privilege. But the informer's privilege is, in reality, no more than the *government's* privilege to withhold from disclosure the identity of persons who furnish information of violations of crime.[4]

The privilege of withholding disclosure of an informer's identity is not absolute. As to the question when the privilege of nondisclosure applies and when exception should be made, and disclosure required, no fixed rule is justifiable.[5] The problem is one that calls for balancing the public interest in protecting the flow of information against the fundamental principle that an individual accused of a crime is entitled to a full and fair opportunity to defend himself. Where, in a particular case, the balance is to be drawn has become an ever increasing and vexatious problem to the courts.

This article will first describe the police practice in the use of their informants. It will then analyze the informer privilege at both the federal and state

[1] VOLLMER, THE POLICE IN MODERN SOCIETY (1936).
[2] N.Y. Times, Feb. 21, 1952, p. 1, col. 2, *id.* March 9, 1952, p. 1, col. 8.
[3] Vogel v. Gruaz, 110 U.S. 311 (1884); Elrod v. Moss, 278 Fed. 123 (4th Cir. 1921); Worthington v. Scribner, 109 Mass. 487 (1872).
[4] Roviaro v. United States, 353 U.S. 53 (1957).
[5] *Ibid.*

level, with a view toward determining where the balance is to be drawn.

Police Procedure in the Use of Informants

The cooperation of individuals who can furnish accurate information to the police is necessary if law enforcement agencies are to discharge their obligations. Generally, an informant is the person who voluntarily gives this information to the police.[6]

Informants include persons from varied occupations, ages, and neighborhoods. Many persons, because of their occupations, are in a good position to supply the police with valuable information:

> For instance, hotel bellboys, doormen and switchboard operators are aware of the activities of guests. Doctors, dentists and nurses may have knowledge of a suspect's injuries. Dance hall and pool hall operators usually have information about their patrons. Taxicab drivers, bus drivers and railroad employees have an opportunity to observe their passengers. Garagemen and parking lot attendants can supply information about the condition of a car. Janitors and building managers know what goes on in their buildings. Public utility employees have an opportunity to observe things in the buildings they enter. Barbers listen a great deal and become informed from the many conversations with their customers.[7]

The considerations that may motivate a person to cooperate with the police are legion. Some of the more prevalent motives are fear, avoidance of punishment, jealousy, revenge, competition, egotism or vanity, gain, repentence, remuneration, and civic-mindedness. The informant's motive is of value to the police, of course, in evaluating the reliability of the information received.[8]

The Chicago Police Department classifies informants into nine general types, depending upon the informer's motive for revealing information.[9]

1. *The Anonymous Informant.* He may be a telephone caller or letter writer. The Gambling Unit of the Vice Control Division average six anonymous telephone calls a week, and approximately twice as many anonymous letters. Information from the anonymous informant is always treated as potentially valuable.[10]

2. *The Self-Aggrandizing Informant.* This person, who usually has contacts among the underworld, delights in giving information to gain favor from the police. The informant's ego is enhanced by magnifying his importance in the disclosed operation.

3. *The Legitimate Informant.* He is the law-abiding operator of a legitimate business who has an opportunity to observe the criminally prone in his everyday transactions.

The Licensing Unit of the Vice Control Division obtains accurate information about criminal activity from owners of lounges and taverns. These establishments' entertainment and liquor licenses are subject to suspension and revocation, and thus the legitimate owner tries to prevent his place of business from becoming a hangout for the criminal element.[11]

4. *The Woman Informant.* She may be a girl friend of a criminal or the wife of a gambling husband. Her motive for informing is generally emotional.

5. *The Frightened Informant.* This type of informant usually fears that he will be placed in a dangerous situation through some criminal act of his associates. He fears his own well-being and provides information as a means of protection.

6. *The Rival Informant.* He is one who earns a living by questionable means and wishes, by informing, to eliminate his competitor.

7. *The Mercenary Informant.* He informs for money or for some other material gain. Also, he may seek revenge as well as profit for his revelation.

The monetary consideration paid by the Gambling and Narcotics Units range from ten to twenty-five dollars, depending upon the value of the information.

The Narcotics Unit retains receipts for all monies given to the informer. The informer's card (indexed according to assigned number) contains the amount of money given, the raid number, and the prior cases in which the informant has rendered assistance. The name of the informer, and his assigned number are kept on separate cards, in a secure place, and is available to limited personnel only.

[6] Investigator's Notebook, Chicago Police Department, August 21, 1961.

[7] Training Bulletin, Chicago Police Department, September 4, 1961.

[8] *Ibid.*

[9] *Ibid.*

[10] Interviews With Unit Lieutenants of Gambling, Narcotics, Prostitution and Licensing Units of the Chicago Vice Control Division, in Chicago, September & October, 1965.

[11] Interviews.

The Gambling Unit is quite cautious about its payments to informants, because through experience, they have learned that their informers have at times worked both sides—receiving money from the police for information about a gambling operation, and from the policy operator for information about a potential raid. No money is paid by the unit until the information has proved reliable.[12]

8. *The False Informant.* His falsity is due to "dreamed up" information. Sometimes his purpose may be the desire to appear on the side of the police in order that suspicion will not be focused on him.

9. *The Double-Crosser Informant.* He usually wants to talk to the police to get more information than he is going to give in return.

The general type may include female or juvenile informants. The Chicago Police Department, recognizing a potential hazard in the officer's dealings with these informants, issues a special warning:

> If the investigator comes in contact with a juvenile informant, he should consult the juvenile officer and the parents of the juvenile to avoid any possibility for a complaint to be made that the juvenile was abused or taken advantage of. Female informants may be invaluable sources of information, but certain dangers are present. An emotional motive is usually the cause for a female to turn informant. Females often know men and are quick to recognize their weaknesses. In a case where a protracted association with a female informant is necessary, a definite danger exists for the investigator. If not extremely careful, the investigator may allow himself to be diverted into side excursions with the female informant.[13]

The ability of the investigator to obtain and hold on to a reliable informant depends on many considerations. One of the most important is the reputation of the investigator, and the police department, for integrity and fair dealing.[14] The department stresses that the investigator should never make a promise that he cannot fulfill, or has no intention of delivering. Generally, the only representation that is made to the informant having a pending criminal case is that his cooperation will be brought to the prosecutor's attention.[15]

A most compelling deterrent against informing is the sinister connotation of the word itself. The informant resents being referred to as squealer, stoolie, rat, stool pigeon, squawker, or in similar terms. Investigatory agencies now take a more intelligent, objective, and professional attitude toward the informant. "They no longer refer to 'stool pigeons' in official reports. 'Informer' is the strongest derogatory word.... [They] substitute words like 'source' or 'complainant' or 'special employee' or some more euphemistic term."[16]

Each investigatory unit employs a different operating procedure in the use of informants. The unit commander's preference is determined by the unit's experience in dealing with informants and the legal restrictions applicable to his department.

The Narcotics Unit uses three basic methods:

1. The informant may be used in a "controlled buy." The officer conducts a complete "strip search" of the informant's person and clothing. Once it is established that the informant does not possess narcotics, he is handed marked money, and is immediately transported by the agents to the location of the buy. If possible, the agents secure a concealed position to observe the transaction. Upon completion of the transaction, the peddler is arrested, and the marked money and other contraband taken from his possession. The narcotics are recovered from the informant, establishing the fact that the informant obtained the narcotics from the person arrested for making the sale.

2. The informant may provide the entrée to a narcotics operation. The narcotics peddler often will not deal with outsiders. The informant, usually an addict himself, makes the initial introduction of the undercover agent to the peddler, passing him off as a fellow addict or a potential one. Acceptance of the undercover agent is primarily predicated upon the informant's relationship with the peddler. Once accepted, the agent attempts to gain the peddler's confidence, and endeavors to work himself into the heirarchy of the organization. His success depends on many factors; the size of the operation, the organization's procedure, the officer's experience and capability, and the money available to sustain the operation. The money and time necessary for an extensive investigation often prohibits the Narcotics Unit from engaging in this

[12] Interviews.

[13] Investigator's Notebook, Chicago Police Department, August 21, 1961.

[14] HARNEY & CROSS, THE INFORMER IN LAW ENFORCEMENT 52, (1960).

[15] Interviews; Investigator's Notebook, Chicago Police Department, August 21, 1961.

[16] HARNEY & CROSS, *op. cit. supra* note 14, at 55.

type of operation. Because of the cost factor, this procedure is used primarily by the federal authorities.

3. The informant is most commonly used in obtaining a search warrant. The informant advises the investigator that he has visited the home, room or apartment, of a person trafficking in narcotics, where he observed contraband on the premises; he specifies the contraband and its location on the premises. The investigator surveys the described place, with a special interest in the entrance and exit of known narcotics users. By further investigation the officer seeks the identity of the occupants of the premises, their criminal record, and possible unexecuted arrest warrants.

Once satisfied that the surveillance and investigation has yielded all attainable information, the officer determines the type of complaint to be used in obtaining the search warrant. Most often the informant is surreptitiously brought before a magistrate, the informant and officer swearing to the truth of the facts in the complaint. The complaint, drawn by the officer, states the informant's observations, his visits to the premises, and the officer's own personal observations as a result of the investigation. The informant is almost always given a fictitious name to protect his identity.

On some occasions the officer is the sole swearing party to the complaint, affirming all the facts uncovered by the investigation, including the informant's initial statement. The complaint for "hearsay warrants" will describe prior events which lead to the conclusion that the informer is *reliable.*

The Narcotics Unit takes every precaution to avoid entrapment, and the appearance of entrapment, by the informant. The department has issued a pertinent warning:

> When using an informant, it is possible that the informant through ignorance, some ulterior motive, or greediness might scheme or heedlessly entrap into crime a person, who has no intention of committing a crime, and who was motivated to this crime by the informant, who becomes the instrumentality of the law. The danger can be avoided by an investigator who uses a degree of wariness and intelligence in the handling of the informant.[17]

[17] Investigator's Notebook, Chicago Police Department, August 21, 1961. See HARNEY & CROSS, *op. cit. supra* note 14, at 53.

There is another special risk noted in the handling of informants in narcotics cases. That is in connection with the informer who is addicted:

> Some of these people will importune the investigating officer for a ration of narcotics "to keep going" until they help us make a case. Any officer who accedes to this request jeopardizes his reputation and his job, and becomes a dope peddler, subject to imprisonment in the penitentiary. . . . In passing, it should be said that if the system of any narcotic law enforcement agency is such as to permit accessibility to drugs to supply an addict, that system should be corrected, as the organization may be on the verge of disaster.[18]

Not peculiar to narcotics, but certainly applicable, is the danger that minor illegal conduct by the informant may be overlooked by the investigator because of the informant's value and reliability. "The fact that a person is an informant for an investigator, must not be a license for him to engage in illegal misconduct. The greatest dangers of any compromise with crime are the possibility they will result in disgrace to the law enforcement agency, a distorted perspective, create a privileged class of petty criminals, and lead to faulty judgment."[19]

The Prostitution Unit uses informants in a more restrictive manner. After receiving information, which may be from any of the sources previously enumerated, that premises are being used for the purpose of prostitution, a surveillance is established. Once satisfied that the information is accurate, the investigator will question male patrons exiting from the premises. The investigator basically seeks the "contact name" necessary to secure an appointment with the girl. Once the informant reveals the "contact name" an appointment is obtained, and the girl is arrested if the subsequent facts make out a violation of the prostitution laws.

If the surveillance indicates that the operation is controlled by an outside source who sends patrons to the girl, a slightly different procedure is employed. The officer will stop patrons from entering the premises and engage their assistance. The officer borrows the informant's identification, and by the use of this identification gains entrance to the premises. Once in the premises, and under

[18] HARNEY & CROSS, *op. cit. supra* note 14, at 54.

[19] Investigator's Notebook, Chicago Police Department, August 21, 1961.

the assumed personality, the officer independently establishes the elements constituting the offense of prostitution. Very often the patron or arrested girl will reveal the identity of the outside party.

Other information is usually obtained as a result of the initial arrest. The patron may supply the officer with a list of additional prostitutes. A search of the premises often produces a "trick book," which contains the names of the girl's patrons. The "trick book" is a valuable tool for the investigator. By contacting the individuals listed he is able to persuade these individuals to reveal the identity, location and "contact name" of prostitutes he has patronized or knows.

The Gambling Unit basically uses the informant in obtaining search warrants. The informant advises the investigator that a wire room is operating on certain premises. At the investigator's direction, the informant telephones the given number and places a bet, while the investigator listens to the conversation on an extension phone.[20] The telephone number is checked for location, and a surveillance is established. After the surveillance is completed a search warrant is obtained. The complaint for the search warrant, which is affirmed only by the officer, states that the officer received information from a "reliable informant," citing the information, the placed bet, and the results of the surveillance. The warrant is executed promptly to avoid a possible leak or shut-down of the wire room.

As previously stated, information received from informers provides not only the basis for an arrest, but also the impetus for police investigation. The outlined police techniques are only a few of the more widely used methods that a law enforcement agency may employ in the use of informers. The effective law enforcement agency clearly recognizes that the informant is extremely useful, if not absolutely essential, to their department.

The Extent of the Privilege in the Federal Courts

There is no fixed rule in balancing of the public interest in the use of informers against the individual's right to defend himself. In an early English case, Lord Esher suggested:

> [I]f upon the trial of a prisoner the judge should be of the opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail.[21]

In the federal jurisdiction it was slowly recognized that fundamental requirements of fairness may require disclosure. Where the informer was not simply a "tipster" who aroused the police officer to a crime that was committed, or about to be committed, but, on the contrary, played an active part in the actual commission of the crime, the courts began to hold that the informer became a material witness and vital to the defense of the case.

This informer participant theory is well illustrated by *United States v. Conforti*.[22] In *Conforti*, it was alleged that on several occasions the defendant had passed counterfeit money to a government informer, and that the transactions had been witnessed by police officers. On appeal, the defendant contended that the trial court erred in permitting testimony to be offered of his conversations with the government informers without requiring disclosure of their identity. The court ruled that the defendant would have been entitled to know the identity of the informer who was alleged to have received the counterfeit money if proper inquiry had been made:[23]

> [He] was more than a mere informer. He was not simply an individual who, knowing that the defendant had committed or was about to commit a crime, communicated that knowledge to the authorities so that the police, acting independently, might then procure evidence of the crime. On the contrary, . . . [he] played a part with the defendant in the very transaction upon which the Government relies to prove its case.[24]

[20] There is a possibility that this procedure may be lost by virtue of a recent Illinois Supreme Court decision, People v. Kurth, 34 Ill. 2d 387, 216 N.E.2d 154 (1966), which construed the Illinois eavesdropping statute as meaning that any party who has not consented to a recording or transmission of his conversation may bar its admission as evidence against him.

[21] Marks v. Beyfus, 25 Q.B.D. 494, 498 (1890).

[22] 200 F.2d 365 (7th Cir. 1952), *cert. denied*, 345 U.S. 925 (1952).

[23] The court, although holding the defendant was entitled to be given the identity of the informer who received the currency, ruled that nondisclosure of such identity did not require a reversal in view of the fact that there was no showing that the defendant ever made a demand for the informer's name. See note 42 *infra* and accompanying text.

[24] 200 F.2d at 367.

In 1955, the Court of Appeals for the Fifth Circuit made it clear that there was a distinction between the case where the person called the informer is that and nothing more, in which case the defendant would not have been entitled to have his identity disclosed, and a case . . . where the informer is the person to whom the defendant is said to have sold and dispensed the opium described in the indictment. In such a case information as to the person's identity was material to the defense, and the denial of the requested information was error.[25]

In 1957, the Supreme Court, in *Roviaro v. United States*,[26] Justice Clark dissenting, ruled that the district court had committed reversible error by permitting the Government to withhold disclosure of the identity of the informer, where the informer, an undercover government employee, had taken a material part in bringing about the defendant's possession. It is interesting to note that the defendant in *Roviaro* was convicted on two counts, sale of narcotics to the undisclosed informer, and possession of narcotics. The Government, before the Supreme Court, did not defend the first count, which charged a sale. The Court indicated, in a footnote, that the district court erred in denying the petitioner's motion for the identity and address of the informer prior to trial.[27]

The information elicited from an informer may be relevant and helpful to the defense even though the informer is not a participant in the offense. The importance of informer testimony in nonparticipant type crimes is clearly illustrated by an old English case *Regina v. Richardson*,[28] where the defendant was indicted for administering poison with intent to murder. The police, through information furnished to them by informers, found a bottle of poison in a place used only by the defendant. The informers were not called as witnesses and the court held that their disclosure was material to the ends of justice. The court pointed out that such witnesses could have stated how it was that they had come to know where the bottle of poison was to be found and perhaps could have given some clue as to the person who had put it there.

The Supreme Court's language in *Roviaro* would seem to indicate that disclosure may not be limited to those cases where the informer is a participant. The Court ruled that there was no fixed rule with respect to disclosure:

> Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.[29]

This language would indicate that the fact the informer is a participant in the crime charged would be only one relevant factor and disclosure would be required even where the informer did not actually participate if the "contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause."[30] For this latter proposition the Court in *Roviaro* not only cited *Scher v. United States*[31] and *Wilson v. United States*[32] but also the early English case of *Regina v. Richardson*. At this time, it is interesting to note that both *Scher* and *Wilson* are requests for disclosure of the informant to test probable cause; in *Scher* for the arrest, in *Wilson* for the search.[33]

In cases subsequent to *Roviaro*, the federal Courts of Appeal have emphasized varying portions of that opinion in formulating rules for their particular circuits. A limited number of courts have applied participant informer criteria to probable cause type informer cases, thus greatly diminishing the dictum impact of *Roviaro*.[34] Other circuits appear to have limited *Roviaro* to prosecutions where entrapment is the defense,[35] and even in those

[25] Portomene v. United states, 221 F.2d 582, 583 (5th Cir. 1955).

[26] 353 U.S. 53 (1957).

[27] *Id.* at 65 n. 15.

[28] 176 Eng. Reprint 318 (1863).

[29] 353 U.S. at 62.

[30] *Id.* at 60, 61.

[31] 305 U.S. 251 (1938).

[32] 59 F.2d 390 (3d Cir. 1932). In *Wilson*, the court enunciated the rule that "if what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled." 59 F.2d at 392.

[33] See *infra* notes 68 through 99 and accompanying text for necessity of disclosure in probable cause situations.

[34] Jones v. United States, 326 F.2d 124 (9th Cir. 1963), *cert. denied*, 377 U.S. 956 (1964); United States v. Whiting, 311 F.2d 191 (4th Cir. 1962), *cert. denied*, 372 U.S. 935 (1963); Williams v. United States, 273 F.2d 781 (9th Cir. 1960), *cert. denied*, 362 U.S. 951 (1960); Pegram v. United States, 267 F.2d 781 (6th Cir. 1959).

[35] United States v. Simonetti, 326 F.2d 614 (2d Cir. 1964); United States v. Collier, 313 F.2d 157 (7th Cir. 1963), *cert. denied*, 374 U.S. 844 (1963); Mosco v. United States, 301 F.2d 180 (9th Cir. 1962), *cert. denied*, 371 U.S. 842 (1962); United States v. Clarke, 220 F.Supp. 905 (E.D. Penn. 1963).

prosecutions it has been held that disclosure of the informer is not absolute.[36] The majority of the courts have, however, limited *Roviaro* to informers who have participated in the offense.[37]

Recently, the Supreme Court was asked to decide whether it was necessary to limit disclosure to a participant informer. In *Rugendorf v. United States*,[38] the defendant was convicted of knowingly receiving, concealing, and storing stolen furs which had been transported in interstate commerce. The stolen furs were found in the basement of the defendant's home pursuant to a search warrant based partly on information from confidential informants. Justice Clark, expressing the views of five members of the Court, held that the defendant's claim to disclosure by the Government of the identity of the government's informers was not maintainable because it was not properly raised in the trial court nor passed upon there.[39] Justice Douglas, speaking for the minority, concluded that the defendant's trial court statement alleging that he needed the identity of the informant for his defense, was sufficient to raise the issue of whether the information was so essential to the defense as to outweigh the public interest involved in protecting the informant's identity.[40]

If the Court in *Rugendorf* had reached the merits of the defendant's contention, it might have been forced to recognize that the informant's identity was essential to a proper defense. The defendant asserted that he was unaware of the presence of the furs in his basement. He produced evidence that for a period between February 17 until March 4, he was out of town. During this period four persons possessed keys to his home, including a brother who was an acknowledged fence for stolen goods. The search occurred on March 22 and both the defendant and his wife testified that they had not entered the basement since their return on March 4.

In order to establish that he had no knowledge that the furs were concealed in his home, it would seem essential that the defendant obtain information concerning the identity of the individual who placed the furs in the basement, his reason for doing so, and his relationship, if any, to the defendant. There was a strong possibility that the informant who supplied the information to the officers could have also furnished this information for the defendant to establish his defense. It must be stressed that it is not clear whether the informer was a participant in the crime; however, it is clear that the informer's testimony might have shed light on the guilt or innocence of the defendant even if the informant had not been a participant.[41]

Circumventing Disclosure

Since there is a strong desire by the courts to preserve the identity of the informer, disclosure will not be required, even where the informer is a participant in the crime, unless the record clearly indicates that a demand was made for the information. This is again clearly illustrated in the *Conforti* decision,[42] where the court, although holding that the defendant was entitled to be given the identity of the informer, ruled that nondisclosure did not require a reversal of the conviction in view of the fact that there was no showing that any demand for disclosure was made. And, as stated previously, the majority of the Court in *Rugendorf* ruled that the defendant's claim for disclosure of the informer was not maintainable because it was improperly raised on trial.[43]

A leading qualification of the informer privilege is that "once the identity of the informer has been disclosed to those who could have cause to resent

[36] Firo v. United States, 340 F.2d 597 (5th Cir.), *cert. denied*, 381 U.S. 929 (1965); United States v. Fredia, 319 F.2d 853 (2d Cir. 1963); Mosco v. United States, *supra* note 35.

[37] United States v. D'Angiolillo, 340 F.2d 453 (2d Cir. 1965), *cert. denied*, 380 U.S. 955 (1965); United States v. Konigsberg, 336 F.2d 844 (3d Cir. 1964), *cert. denied*, 379 U.S. 933 (1964); United States, *ex. rel.* Drew v. Meyers, 327 F.2d 174 (3d Cir. 1964), *cert. de ied*, 379 U.S. 847 (1964); Williams v. United States, *supra* note 34; Miller v. United States, 273 F.2d 279 (5th Cir. 1959), *cert. denied*, 362 U.S. 928 (1960); Pegram v. United States, *supra* note 34; Gilmore v. United States, 256 F.2d 565 (5th Cir. 1958).

[38] 376 U.S. 528 (1964).

[39] The defendant also sought the identity of the informants in order to establish the lack of probable cause upon which the search warrant had been issued. The Court concluded that adequate probable cause existed from other circumstantial evidence and held that the informer's identity was privileged. See note 93 *infra* and accompanying text for further discussion of the "probable cause" problem in *Rugendorf*.

[40] The majority further held that they could not decide the question of necessity of disclosure because the defendant failed to develop the criteria necessitating such disclosure.

[41] See Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958); People v. McShann, 50 Cal. 2d 802, 330 P.2d 33 (1958).

[42] United States v. Conforti, *supra* note 22. *Accord*, United States v. Colletti, 245 F.2d 781 (2d Cir. 1957), *cert. denied*, 355 U.S. 874 (1957); Cannon v. United States, 158 F.2d 952 (5th Cir. 1946), *cert. denied*, 330 U.S. 839 (1946).

[43] See *supra* note 38 and accompanying text.

the communication, the privilege is no longer applicable."[44] This ruling apparently means that in an appropriate case, in which the defendant has learned the identity of the informer from some other source, he is entitled to have the informant disclosed in open court. Of course, the accused can never be absolutely sure that he knows the informant, unless the informant is definitely identified in court. And conceivably, even when the defendant knows the identity of the informer, public disclosure may still be against the public interest.

However, this qualification is greatly diminished by the rulings that error in failing to require disclosure is ordinarily not prejudicial where the identity of the informer is known to the accused.[45] Thus in *Sorrentino v. United States*,[46] the court, although agreeing that disclosure was necessary, ruled that the error in failing to require disclosure was harmless, since the identity of the informer was disclosed by the testimony of another government witness.

In this connection, it should be noted that in *Roviaro*, Justice Clark dissented on the very ground that the informer was well known to the defendant, and consequently, he could not have been prejudiced by the nondisclosure.[47] The majority in *Roviaro* gave tacit approval to the rule that if the defendant knew the identity of the informant, nondisclosure would not be prejudicial. The majority commented that no factual findings were made by the trial court that the accused knew the informer's identity, and therefore, they would not assume that the informer's identity was known.[48]

There is authority, however, that nondisclosure is not made harmless because the defendant knew the name of the informer. In *Portomene v. United States*,[49] the defendant and another woman testified that they were of the opinion that they knew the informer, and that there was bad blood between the defendant and the informer because of the defendant's relationship to her. The defendant's relationship to the woman was advanced as the motive for the informer desiring to involve the defendant with the false charges that he dealt in narcotics. The *Portomene* court discussed the Ninth Circuit *Sorrentino* opinion,[50] and the Seventh Circuit *Conforti* decision,[51] but rejected their theory for the Fifth Circuit, explicitly holding that it was prejudicial error not to disclose the informer's identity to the accused:

> We do not think this will at all do. [Referring to *Sorrentino* and *Conforti*] Who can say whether, deprived of the information to which he was entitled, the defendant in his lame and halting efforts to extricate himself from the situation in which the refusal to name the informer had placed him, did not greatly prejudice his defense by offering testimony which the jury may have throught was adduced to set up a straw man simply to knock him down?[52]

Inapplicability of Informer Privilege

Once disclosure is required, the Government must either reveal the identity of the informer to the defendant or drop its prosecution.[53] After naming the informant, the Government's further duty is not clear.

The Ninth Circuit, in *Eberhart v. United States*,[54] reasoned that once identified, "the failure of the Government to produce an informer or other person as witness does not violate the defendant's rights."[55] This appears to be the prevailing rule in the federal circuits that have been confronted with this problem.[56] However, in *United States v.*

[44] Roviaro v. United States, 353 U.S. at 60.

[45] United States v. Conforti, *supra* note 22; Sorrentino v. United States, 163 F.2d 627 (9th Cir. 1947). An accused's knowledge of the identity of the informer may be a factor relied upon in support of sustaining the privilege of nondisclosure. Smith v. United States, 273 F.2d 462 (10th Cir. 1959), *cert. denied*, 363 U.S. 846 (1959).

[46] 163 F.2d 627 (9th Cir. 1947).

[47] 353 U.S. 53 (1957) (Clark, J., dissenting.)

[48] *Id.* at 60 n. 8. In fact, one of the police officers testified that the informer at police headquarters denied knowing or ever having seen the accused.

An interesting question is, upon whom does the burden rest to show lack of knowledge of the informer's identity? See De Losa v. Superior Court, 166 Cal. App. 2d 1, 332 P.2d 390 (1958).

[49] 221 F.2d 582 (5th Cir. 1955).

[50] Sorrentino v. United States, *supra* note 45.

[51] United States v. Conforti, 200 F.2d 365 (7th Cir. 1952), *cert. denied*, 345 U.S. 925 (1952).

[52] 221 F.2d at 584. *Cf.* Firo v. United States, 340 F.2d 597 (5th Cir.), *cert. denied*, 381 U.S. 929 (1965).

[53] Roviaro v. United States, 353 U.S. 53 (1957). *But cf.* Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958). See also United States v. Keown, 19 F.Supp. 639 (W.D. Ky. 1937).

[54] 262 F.2d 421 (9th Cir. 1958).

[55] *Id.* at 422.

[56] Williams v. United States, 273 F.2d 781 (9th Cir. 1959), *cert. denied*, 362 U.S. 951 (1960); Smith v. United States, 273 F.2d 462 (10th Cir. 1959), *cert. denied*, 363 U.S. 846 (1960); Eberhart v. United States, 262 F.2d 421 (9th Cir. 1948); Dear Check Quong v. United States, 160 F.2d 251 (D.C. Cir. 1947).

Clarke,[57] the District Court for the Eastern District of Pennsylvania, in a prosecution for conspiracy and sale of narcotics without written orders, held that the defendant's trial was unfair because of the absence of an identified informer who was the sole participant in all but one of five alleged sales, and who was the only person, aside from the defendant, who could have shed light on the defense of entrapment. The informer's absence without satisfactory explanation, the court held, necessitated a new trial. The court stated that "common fairness made it the Government's duty to produce [the informer] at the trial, or, failing that, to show that reasonable efforts to produce him were fruitless."[58] And in *United States v. Rosario*,[59] the Second Circuit inferentially supported the proposition that there may be cases where the Government would be under a duty to produce the informer, if it is able to do so.

Although it would appear that generally the Government may not be required to produce the informer or to call him as a witness, information sufficient to enable the defense to locate the informer must be given if the Government has it. This proposition is supported by the Second Circuit's opinion in *United States v. D'Angiolillo*,[60] the court reasoning that the defense is entitled not only to the informer's name, but to other information concerning his whereabouts, and to reasonable cooperation in securing his appearance. The court, however, affirmed the defendant's conviction, stressing that not only was the informer's identity revealed, but that he was readily available to subpoena, since he was confined in a federal penitentiary. Moreover, the judge offered to subpoena the informer and afford defense counsel an opportunity to confer with him privately and to call him as a defense witness and to question him as a hostile witness if he proved to be one.

The Seventh Circuit, in *United States v. Collier*,[61] reversed a conviction for a violation of the narcotics laws, where the defense was entrapment, holding that the trial court should have persisted in determining whether the Government knew where the informer was or would be, and whether they could find out where he was. And the Eighth Circuit, in *White v. United States*,[62] inferentially supports the proposition that if the name of the informant is to be disclosed, all reasonable efforts to locate him must be made by the prosecution.

A question not yet decided is whether the Government is under a duty to make a good faith effort to inform itself of the names and addresses of its informers. Or can it effectively avoid disclosure by merely making no attempt to learn the facts? In *United States v. Oropoza*,[63] the Seventh Circuit, on its own motion, raised this precise question but then stated that it need not face that issue in the case before it.[64] The same circuit again alluded to this problem in *United States v. Pruitt*,[65] in discussing the defendant's contention that the identity of the informant must include sufficient information for service of a subpoena and that "the Government must have a duty to retain control over its special employees, or to prove that it has made good faith efforts to obtain specific information about their names, addresses and whereabouts."[66] The court held that the Government had satisfied its duty where it furnished the accused with the last known address of the informant, who was also known to the accused, and had made an unsuccessful search for the informer, giving the defense full disclosure of all known information.

It would seem that once disclosure is required some good faith on the part of the prosecution must prevail. The Government should not refrain from disclosing the informer's identity until he ceases to be available as a witness, nor should the Government procure the removal of the informer from the jurisdiction.[67]

The Informer and Probable Cause

In the landmark case of *Weeks v. United States*,[68] the Supreme Court, in exercising its supervisory powers over the federal courts, held that in a federal prosecution, the fourth amendment barred

[57] 220 F.Supp. 905 (E.D. Penn. 1963).
[58] *Id.* at 908.
[59] 327 F.2d 561 (2d Cir. 1964).
[60] 340 F.2d 453 (2d Cir. 1965), *cert. denied*, 380 U.S. 955 (1965).
[61] 313 F.2d 157 (7th Cir. 1963), *cert. denied*, 374 U.S. 844 (1963).
[62] 330 F.2d 811 (8th Cir. 1964), *cert. denied*, 379 U.S. 855 (1964).
[63] 275 F.2d 558 (7th Cir. 1960).
[64] The court indicated that "the answer must be resolved within the standards set out in the Roviaro case." *Id.* at 561. The court was apparently referring to the "balancing test" in *Roviaro*.
[65] 331. F.2d 232 (7th Cir. 1964), *cert. denied*, 379 U.S. 884 (1964).
[66] *Id.* at 235.
[67] See People v. Kiihoa, 53 Cal. 2d 748, 349 P.2d 673 (1960); People v. Wilson, 24 Ill. 2d 425, 182 N.E. 2d 203 (1962).
[68] 232 U.S. 383 (1914).

the use of evidence secured through an illegal search and seizure. It was not until 1961, in *Mapp v. Ohio*,[69] that the Supreme Court held exclusion to be an essential ingredient of the core of fourth amendment rights, thus rendering evidence obtained through an unreasonable search and seizure inadmissible in state courts.

A federal law enforcement officer can make a lawful search for the seizure of evidence when (1) he is possessed of a valid search warrant authorizing the search and seizure, or (2) the search is without a search warrant, but incidental to a lawful arrest. A lawful arrest occurs when the arrest is made either with an arrest warrant or, as more commonly done, without such a warrant for any offense against the United States committed in his presence, or for any felony upon reasonable grounds to believe that the person to be arrested has committed or is committing such felony.[70]

In those criminal proceedings where the evidence is obtained during a search without a warrant, in order to have the evidence excluded the defendant is constantly striving to convince the court that the police officer had no probable cause to make the arrest. The prosecution is equally trying to show the existence of probable cause without having to reveal the name of its secret informants. Here again, then, is a situation where the informer privilege may come into direct conflict with the defendant's rights.

The case of *United States v. Blich*,[71] clearly points out the conflict in the federal courts and in the probable cause situations. In *Blich*, a federal prohibition agent testified that a "reliable informant" had advised him that the defendant at a certain time would be making delivery of intoxicating liquor at a certain designated place on the evening in question. The agent, without a warrant, at the designated time and place, stopped and searched the defendant's car and found it to contain liquor in violation of the National Prohibition Act. At the trial the agent refused to disclose the name of the informer. The court held that under these circumstances the evidence obtained could not be considered without the disclosure of the informant. The informer's identity was essential to establish reasonable grounds so that the court could "determine whether, under all the circumstances, such information was reliable and the agent was justified in having such belief."[72] It must be noted, however, that the informant's statement was the *only* basis upon which the officer could establish probable cause.

In *Scher v. United States*,[73] federal officers received confidential information, which they thought reliable, that a certain automobile would be transporting liquor. The officer went to the specified place and there observed a car being loaded with heavy packages. Upon a search without warrant, the officers found the car to contain bootleg liquor. In affirming the conviction after a trial in which the name of the informant was not revealed, the Supreme Court distinguished the *Blich* case, holding that the legality of the search here was based upon what the officers saw and heard, not the information which caused the defendant to be observed. It must be emphasized that the arresting officers were not forced to sustain the validity of their search and seizure *solely* upon probable cause resulting from information which had been furnished them, but could sustain its validity on what they themselves saw and heard before the search, seizure and arrest was made.[74]

An interesting case on this point is *Segurola v. United States*.[75] In *Segurola*, the officer testified

[69] 367 U.S. 643 (1961).

[70] 18 U.S.C. §3053 (1952). Many states now provide that an officer may arrest without a warrant upon a showing of reasonable or probable cause to believe that a crime was committed or is presently being committed in the officer's presence.

[71] 45 F.2d 627 (D.C. Wyo. 1930).

[72] *Id.* at 629. An interesting problem would have been posed if the officer in *Blich* was sued civilly. Since a search is illegal unless based upon probable cause, and probable cause could not be established without revealing the identity of the informer, the Government would have been torn between the policy of protecting its agent from civil liability and preserving the secrecy of its informers.

[73] 305 U.S. 251 (1938).

[74] Reasonable cause may surely be established *solely* upon the officer's own investigation after acting upon a tip from an informer. However, in *Scher*, the informer aroused the suspicion of the police officer, and an officer acting upon suspicion needs far less observation to show he acted upon probable cause. The officer need only show for the purpose of satisfying probable cause that he acted as a reasonable person would under *all the circumstances present*. Certainly, the loading of heavy packages, of itself, was not enough to satisfy probable cause. The legality of the search was in fact based upon what the officers saw and heard, *and* the information which aroused their suspicion. The confidential information received in *Scher* would seem to be vital in the determination of whether the arrest was legal.

[75] 16 F.2d 563 (1st Cir. 1926), *aff'd*, 275 U.S. 106 (1927). In a vigorous dissent, Judge Bingham held that once the officer was called and testified to the contents of the confidential information, the Government waived its privilege and the defendant became entitled to a full disclosure, including the name of the informant. "[T]he

that he received confidential information that the defendant would be illegally transporting liquor in a Buick. When he spotted the Buick, the driver started to speed and weave and finally crashed into a post. The First Circuit court ruled that the attempt on the part of the defendant to run away from the officer was sufficient to establish probable cause and that the informer's name would not have to be revealed.[76]

Wilson v. United States[77] is one of those rare cases where an officer was held in contempt for his refusal to reveal the identity of the person upon whose information he acted in searching defendant's premises. In upholding the trial judge's contempt citation, the Third Circuit held that it was necessary for the trial judge to know whether the entry was legal or not, since such fact would determine whether the evidence could be suppressed. In words reminiscent of those later used by the Supreme Court, the circuit court held that "if what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled."[78] This evidence "was essential to the proper disposition of the case" and therefore the officer should have disclosed the informant.

In a later Second Circuit case, *United States v. Li Fat Tong*,[79] the court took a step back in deciding that the disclosure of an informer's identity was unnecessary. The defendant was arrested without a warrant on information supplied to the arresting agent from another agent, the latter receiving his information from an unidentified informer. The court, in a dubious distinction, indicated that the proof for establishing probable cause, though based on hearsay, was not from an "informer," since it was filtered through another agent. The court's further theory in upholding the lower court was "that a government official cannot be compelled to disclose the identity of an informer *unless it appears upon the trial* that the disclosure of the informer's name is necessary or desirable to show the prisoner's innocence."[80] The decision indicated that the defendant was obviously guilty since he was carrying narcotics when arrested, and therefore the names of the secret informers would not prove the defendant's innocence.

In *United States v. Nichols*,[81] the defendant protested against the admission of statements by an informer to establish probable cause without at the same time disclosing the informer's name. The district court, taking its lead from the *Li Fat Tong* case, overruled the objection, holding that "the defendant did not allege that it was his belief that the officer was testifying falsely as to having received the information, or that a disclosure of the informer's identity was essential to his defense on the merits of the case, as necessary or desirable to show his innocence of the charge against him."[82]

The Supreme Court in *Roviaro*, although not dealing with a probable cause issue, indicated that under certain circumstances disclosure of the informer in this area is required. "Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, *or is essential to a fair determination of a cause*, the privilege must give way."[83] The Court, in dicta, commented:

> Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication.[84]

After *Roviaro*, most of the federal circuits

government could not require the officer to disclose so much of the matter as was helpful to it, and then shut the door as to any further inquiry by the defendant relating to the communication." 16 F.2d at 566.

The Supreme Court never reached the disclosure problem, disposing of the case upon the failure of the defendant to make a pre-trial motion to exclude the evidence. The Court held that it was too late to try to exclude the evidence on trial.

[76] *Cf.* United States v. Keown, 19 F.Supp. 639 (W.D. Ky. 1937), where under similar facts the court held disclosure necessary.

[77] 59 F.2d 390 (3d Cir. 1932).

[78] *Id.* at 392.

[79] 152 F.2d 650 (2d Cir. 1945).

[80] *Id.* at 652. (Emphasis added.) Contrast this with the statement of another Second Circuit opinion. "It is true that, when they act upon information, it is proper to compel them to disclose its source—subject to some limitations—since otherwise there is no way to test whether they have had 'reasonable cause' for the arrest." United States v. Heitner, 149 F.2d 105, 107 (2d Cir. 1945), *cert. denied*, 326 U.S. 727 (1945).

[81] 78 F.Supp. 483 (W.D. Ark. 1948), *aff'd*, 176 F.2d 431 (8th Cir. 1949).

[82] *Id.* at 487.

[83] 353 U.S. at 60. (Emphasis added.) For this proposition the Court cites *Scher* and *Wilson* (discussed above, *supra* notes 73, 77), both probable cause cases.

[84] *Id.* at 61.

applied this dictum,[85] holding it to be reversible error if the name of the alleged informant, upon whose tip probable cause for the defendant's arrest was based, was not divulged.[86] The decisions began to center upon whether there was enough evidence, independent of the informer's tip, to constitute probable cause.

However, there still is limited authority for the principle enunciated in *Li Fat Tong*, that only upon the trial of the merits of the case if it appears necessary to show the prisoner's innocence, will disclosure be compelled.[87] The decisions following this principle apply the participant informer type reasoning of *Roviaro* to cases involving only a question of probable cause. Typical of this type of decision, is *Pegram v. United States*,[88] where the Sixth Circuit upheld the trial court's refusal (on the motion to suppress hearing) to reveal the name of the informer (on the issue of probable cause for the arrest) since there was no showing that the informer was in any way connected with the *commission* of the offense.

There has also evolved another theory adhered to by some courts in the probable cause area under which nondisclosure of the informant is sought to be justified. In 1959, the Supreme Court held in *Draper v. United States*,[89] that where an informant had been reliable in the past, and the information supplied to the officer is to a great extent corroborated prior to the defendant's arrest, there is probable cause for the arrest of the defendant, despite the fact that the officer's observations, independent of the information supplied by the informer, would not constitute probable cause.

The facts in *Draper* were that a named informer, who had given accurate tips in the past, told the police that the defendant would be arriving in Denver by train from Chicago, wearing certain clothing, and carrying narcotics. The Supreme Court held that when the narcotics agents saw the defendant alight in Denver from an incoming Chicago train, attired as the informer had predicted, they had probable cause without more to arrest the defendant for concealing and transporting narcotics. (It must, be remembered however, that in *Draper*, the informer's identity was disclosed at the hearing on the motion to suppress.)[90] Combining *Scher* and *Draper*, some federal courts have held that where a reliable informant supplies the information, which is to some extent corroborated by the officer's observations prior to the arrest, disclosure is not required.[91] The emphasis is placed not upon the independent observations of the officers, but upon the past reliability of the informant as bearing upon the issue of probable cause. However, there is authority for the proposition that where the reliability of the informant is essential to establish probable cause, the Government must name the informant or suffer suppression of the evidence.[92]

The *Rugendorf*[93] situation is unique in that the defense sought the identity of the informants in order to establish lack of *probable cause* upon which the *search warrant* had been issued. A deficiency in probable cause to issue the search warrant would have caused the suppression of the evidence obtained during the search. The Supreme Court held there was substantial basis for the Commissioner issuing the search warrant to conclude that stolen furs were probably in the defendant's basement. The Court also reaffirmed its decision in *Jones v. United States*,[94] that "hearsay alone does not render an affidavit insufficient, the Commissioner need not have required the in-

[85] United States v. Elgisser, 334 F.2d 103 (2d Cir. 1964), *cert. denied*, 379 U.S. 879 (1964); United States v. Robinson, 325 F.2d 391 (2d Cir. 1963); Costello v. United States, 298 F.2d 99 (9th Cir. 1962), *cert. denied*, 376 U.S. 930 (1964); Cochran v. United States, 291 F.2d 633 (8th Cir. 1961). See Marderosian v. United States, 337 F.2d 759 (1st Cir. 1964), *cert. denied*, 380 U.S. 971 (1965), where probable cause for the issuance of a search warrant was based upon a reliable informant and the independent observations of the police officer (affiant).

[86] United States v. Robinson, *supra* note 85; Costello v. United States, *supra* note 85; Cochran v. United States, *supra* note 85. See also United States v. Goss, 237 F.Supp. 26 (S.D. N.Y. 1965).

[87] Pegram v. United States, 267 F.2d 781 (6th Cir. 1959). See Jones v. United States, 326 F.2d 124 (9th Cir. 1963); United States v. Whiting, 311 F.2d 191 (4th Cir. 1962), *cert. denied*, 372 U.S. 935 (1963); Bruner v. United States, 293 F.2d 621 (5th Cir. 1961), *cert. denied*, 368 U.S. 947 (1961).

[88] 267 F.2d 781 (6th Cir. 1959).

[89] 358 U.S. 307 (1959).

[90] *Id.* at 309.

[91] United States *ex. rel.* Coffey v. Fay, 344 F.2d 625 (2d Cir. 1965); United States v. Elgisser, 334 F.2d 103 (2d Cir. 1964), *cert. denied*, 379 U.S. 879 (1964); Buford v. United States, 308 F.2d 804 (5th Cir. 1962). See also Lane v. United States, 321 F.2d 573 (5th Cir. 1963), *cert. denied*, 377 U.S. 936 (1964); United States v. Peisner, 198 F.Supp. 67 (D. Md. 1961), *rev'd on other grounds*, 311 F.2d 94 (4th Cir. 1962). *Cf.* Cochran v. United States, 291 F.2d 633 (8th Cir. 1961).

[92] Cases cited note 85 *supra*. See also United States v. Santiago, 327 F.2d 573 (2d Cir. 1964); United States v. Rosario, 327 F.2d 561 (2d Cir. 1964); Jones v. United States, 266 F.2d 924 (D.C. Cir. 1959) (Bazelon, J., concurring opinion).

[93] Rugendorf v. United States, 376 U.S. 528 (1964).

[94] 362 U.S. 257 (1960).

formants . . . to be produced . . . so long as there was a substantial basis for crediting the hearsay."[95] The Court concluded that the underlying circumstances leading to the conclusions of the informants appear to have been adequately disclosed in the communications themselves; that the information was received from three independent sources, and each communication supported the other. Consequently, the Court held that there was substantial basis for crediting the hearsay and the informer's identities need not be disclosed.

Rugendorf was cited with approval in *Aguilar v. Texas*,[96] a state prosecution for illegal possession of heroin. The Supreme Court, in striking down a state search warrant, held, as follows:

> [A]lthough an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, [citing *Jones v. United States*] the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, *whose identity need not be disclosed*, [citing *Rugendorf v. United States*] was credible or that his information was reliable.[97]

It would appear, therefore, that the Supreme Court's preference for search warrants in the search and seizure area was now carried over to the informer privilege in the probable cause sphere. This preference is clearly noted in *Aguilar*, where the Supreme Court stated:

> [W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer acting on his own without a warrant," and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present."[98]

The reliance by the Supreme Court in both *Rugendorf* and *Aguilar*, on *Jones*, compels a careful consideration of the defense attack on the search warrant in *Jones*. In *Jones*, the petitioner argued that the search warrant was defective because of the affiant officer's informants were not produced; that his affidavit did not even state their names; and that affiant did not undertake and swear to the results of his own independent investigation of the claims made by his informants. The Court was required to decide whether the Commissioner acted properly in signing the warrant, conceding the truth of the statements alleged in the affidavit. The defense did not attack the police officer by contending that he had misrepresented the facts to the Commissioner, or that the information given to the police officer was not that related in the affidavit, or that there was, in fact, no informant. The Court stated that had objections been raised that the police officer misrepresented his basis for seeking a warrant, full disclosure may have been required. Thus the Court left open the possibility that a defendant might, in the proper case, directly attack an alleged perjurious affidavit where an alleged informer is used to establish probable cause for its issuance.[99]

Testing Reliability

Many recent decisions have stressed the reliability of the informant as a factor in upholding the informer privilege. These decisions contend that probable cause for an arrest may be based, in part, upon information from a reliable informant, whose identity need not be disclosed.[100]

[95] 376 U.S. at 533.

[96] 378 U.S. 108 (1964).

[97] *Id.* at 114 (Emphasis added).

[98] *Id.* at 111. See also People v. Keener, 55 Cal 2d 714, 361 P.2d 587 (1961). *Cf.* People v. Burnett, 42 N.J. 377, 201 A.2d 39 (1964).

[99] The Court commented as follows:

> If the objections raised were that Didone [the affiant] had misrepresented to the Commissioner his basis for seeking a warrant, these matters might be relevant. Such a charge is not made. All we are here asked to decide is whether the Commissioner acted properly, not whether Didone did. 362 U.S. at 271.

What result would the Supreme Court in *Rugendorf* have reached if the petitioner had attacked the affiant charging his bad faith in securing the warrant? For example, suppose the petitioner had attacked the affiant, claiming there was, in actuality, no informer; or that the information given to the police officer was materially different than that sworn to by the police officer in his affidavit. See United States v. Pearce, 275 F.2d 318 (7th Cir. 1960), where the court went behind the affidavit to test the affiant's good faith in securing the search warrant.

[100] Federal cases: Cases cited note 91 *supra*. State cases: People v. McCray, 33 Ill. 2d 66, 210 N.E. 2d 161 (1965), *cert. granted*, 384 U.S. 949 (1966); People v. Durr, 28 Ill. 2d 308, 192 N.E. 2d 379 (1963), *cert. denied*, 376 U.S. 973 (1964); Drouin v. State, 222 Md. 271, 160 A.2d 85 (1960); State v. Edwards, 317 S.W. 2d 441 (Mo.

This contention presents an interesting problem concerning the permissible area of defense inquiry into reliability. If the suggested approach is that, under certain circumstances, the reliability of the informer is an effective substitute for disclosure, then a fair hearing necessitates that the defense be permitted to effectively test reliability. This, however, presents an apparent dilemma when it is recognized that questions which are vital in establishing the informer's reliability may also tend to disclose his identity.

Those courts that have held that an officer's past experience with an informant may establish his reliability, have failed to set any guidelines for proper defense examination to test those experiences. Some courts have permitted the defendant to inquire about such facts as the length of time the officer has known the informant, the number of tips the officer has received from him, and the number of arrests and convictions secured on the basis of these tips.[101] The state prosecutor, in a recent Illinois opinion, argued against disclosure, contending that the defendant might have tested the informant's reliability by inquiries such as when and how often information was secured from the informer, and who had been arrested as a result of this information.[102]

However, if the Illinois prosecutor's suggestion is followed, there is a great danger that the informant will be disclosed. Any detailed examination into the names of those persons arrested as a result of information supplied by an informant, may indicate to the defendant the informer's identity. This danger is readily apparent in the area of vice crimes (prostitution, gambling and narcotics) where a defendant, with even limited connections to vice activities, may be able to extricate the informant's identity after learning that he has provided information leading to the arrest of certain known persons. In fact, the more reliable the informant, the more information he has probably given, and the more arrests and convictions probably secured on the basis of these tips, and paradoxically, the greater the likelihood that by naming those persons arrested, his identity will be revealed.

Moreover, if it is proper to argue that the names of those persons previously *arrested* on the basis of the informant's tip are to be revealed in order to establish his reliability, (and this will undoubtedly include those persons arrested either with or without an arrest warrant), then by logical extension, when the informer's information has been used as the basis for previous *searches*, either with or without a search warrant, this information, including the location of the premises searched, should likewise be disclosed. Once all this information is known, the likelihood that the informant can be identified is greatly increased.

The Supreme Court has recognized that the mere *conclusion*, in an affidavit, that information received was reliable and from a credible person is insufficient to sustain a search warrant. In *Aguilar v. Texas*,[103] the Court held that as part of the evidence constituting probable cause, an affidavit for a search warrant must disclose some of the underlying circumstances which reveal the source of the informant's knowledge and some of the underlying circumstances from which the officer concluded that the informant, who need not be disclosed, was credible or his information reliable. Although *Aguilar* deals with a state search warrant, and as the Court indicates, a search warrant may be issued on less persuasive or competent evidence than that required to give probable cause for an officer to act without a warrant,[104] the holding enunciated provides, at the minimum, applicable standards for an officer also acting without benefit of a warrant.

Significantly, the Court speaks in the conjunctive, requiring a recital of some of the circumstances underlying (1) the source of the informant's knowledge *and* (2) the reason the officer concluded the informant was credible or his information reliable. It is highly doubtful that the Court will condition probable cause upon a recital of such facts and then foreclose the defendant from inquiring into the truth or falsity of such evidence.

Any defense inquiry into the underlying facts concerning the source of the informant's knowledge must invariably consider the how, when and where questions. "How" encompasses the mode and method the informant used to obtain his information. This may be by direct observation, from the

1958); State v. Burnett, 42 N.J. 377, 201 A.2d 39 (1964;) People v. Malinsky, 15 N.Y. 2d 86, 204 N.E. 2d 188 (1965); People v. Coffey, 12 N.Y. 2d 443, 191 N.E. 2d 263 (1963), *cert. denied*, 376 U.S. 916 (1964); Simmons v. State, 198 Tenn. 587, 281 S.W. 2d 487 (1955).

[101] See People v. McCray, 33 Ill. 2d 66, 210 N.E. 2d 161 (1965), *cert. granted*, 384 U.S. 949 (1966); People v. Moore, 154 Cal.App 2d 43, 315 P.2d 357 (1957).

[102] People v. Durr, 28 Ill. 2d 308, 192 N.E. 2d 379 (1963), *cert. denied*, 376 U.S. 973 (1964).

[103] 378 U.S. 108 (1964).

[104] *Id.* at 111.

accused, through a third party, or by recording, wiretap or other means. "When" and "where" will involve an examination into the date, place and time the informant received his information.[105] Unquestionably, the more detailed the questioning, the greater the likelihood that the informant's identity will be revealed by the answers.

The second requirement under *Aguilar* necessitates a showing of some of the underlying circumstances from which the officer concluded that the informer was credible or his information reliable. The credibility of the informant and the reliability of his information may encompass substantially the same standards. The officer's past experience with the informant may satisfy this requirement, but there is a danger, as indicated, that by disclosing these experiences the identity of the informant may be revealed. It would appear, however, that the officer may, by independently corroborating a substantial part of the information received prior to an arrest, or if a warrant is involved, by reciting these corroborating observations therein, satisfy this requirement.[106]

The traditional means of establishing or testing credibility presents an equally formidable problem. Certainly the reputation of an informant for truthfulness and veracity are relevant,[107] but there are presently no methods for testing the reputation of an undisclosed person. Perhaps an examination into the informant's criminal record, his addiction to narcotics, if any, or his motive for informing, would suffice.[108] As a credibility factor, these questions are relevant, although subject to diverse interpretation, since it may be expected that an informant has involvement with criminal activities. In fact, the more involved the informant is with criminal activities, the more acurate his information is likely to be. Thus, an informant cooperating with a narcotics unit has probably had extensive dealings with narcotics, and the fact that he has narcotics convictions, or is presently addicted to narcotics, may tend to enhance, rather than detract from, his reliability.

Impact of Federal Informer Privilege on State Law

The impact of the informer privilege and its disclosure aspects on state law is not clear. The Supreme Court's decisions most often appear to rest upon evidentiary grounds and its supervisory power over the federal courts.[109] Perhaps the reason why this has been so is because the leading case, *Roviaro*, was decided before the celebrated *Mapp* case, which held the fourth amendment exclusionary rule applicable to the states via the "due process" clause of the fourteenth amendment.[110]

In an attack on a state conviction, following a trial in which disclosure was denied, the Supreme Court might well apply its own concepts through the "due process" clause of the fourteenth amendment. Since the fourteenth amendment guarantees to an individual a "fair trial" in state prosecutions, a denial by the state court of the informer's identity, in participant informer cases anyway, may be considered so unfair as to violate this fundamental right.[111]

In *Drew v. Myers*,[112] the United States Court of Appeals for the Third Circuit had to decide whether federal constitutional safeguards had been violated in a state narcotics prosecution. Prior to trial, the defense counsel requested the identity of an eye witnesses to the alleged crime not endorsed on the indictment; the prosecution responded by denying that there were any other witnesses except those listed. However, at the trial, the state's witness, an undercover police officer, testified that an identified informant made the initial contact with the accused immediately prior to the alleged illegal sale of narcotics to him. The officer further testified that the alleged informant was only about ten feet away when the illegal transaction occurred.

After conviction in the Pennsylvania state court, the defendant filed a writ of habeas corpus in the federal court claiming a deprivation of due process fourteenth amendment guarantees. The Court of Appeals affirmed denial of the writ because the defendant had failed to exhaust his state remedies prior to initiating the federal suit, but, the court stated in dictum that the informant was an essen-

[105] See State v. Edwards, 317 S.W. 2d 441 (Mo. 1958).

[106] Jones v. United States, 362 U.S. 257 (1960). See Giordenello v. United States, 357 U.S. 480 (1958); Nathanson v. United States, 290 U.S. 41 (1933).

[107] See Hill v. State, 151 Miss. 518, 118 So. 539 (1928).

[108] See McCoy v. State, 216 Md. 332, 140 A.2d 689 (1958), *cert. denied*, 358 U.S. 853 (1958).

[109] It appears that the state courts view the federal standards as constitutional requirements. The states have been applying the *Roviaro* "balancing test" in reviewing their decisions in the informer area. For a collection of state informer privilege cases, see 76 A.L.R. 2d 262 (1961). See United States *ex. rel.* Coffey v. Fay, 344 F.2d 625 (2d Cir. 1965); *Cf.* State v. Burnett, 42 N.J. 377, 201 A.2d 39 (1964).

[110] Mapp v. Ohio, 367 U.S. 643 (1961).

[111] See Palko v. Connecticut, 302 U.S. 319 (1937). The Court will hear, in the 1966 term, a case in which the issue of informant disclosure in state prosecutions may be resolved. See McCray v. Illinois, 384 U.S. 949 (1966).

[112] 327 F.2d 174 (3d Cir. 1964).

tial witness as to the identity of the individual allegedly conducting the illegal transaction, and was the only person, other than the police officer, who could have identified the accused as being at the scene of the alleged sale. In so stating, the court further held that the cumulative effect of (a) the Commonwealth's nondisclosure of the informer's presence at the scene, (b) denial of continuance to allow the defense time in which to locate and produce the informer, and (c) denial of continuance to secure the testimony of an alleged alibi witness, raised a reasonable doubt as to whether constitutional safeguards of fundamental justice had been violated by the State in its prosecution of this defendant.

A future defendant in a state "probable cause" case may challenge his conviction in the Supreme Court, arguing that the Court must apply federal constitutional standards to the states in order to give full impact to the exclusionary rule enunciated in *Mapp*. In *Priestly v. Superior Court*,[113] California recognized clearly the ultimate effect of denying disclosure:

> If an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he would become the sole judge of what is probable cause to make the search. *Such a holding would destroy the exclusionary rule.*[114]

In *Ker v. California*,[115] the Supreme Court held that the fourth amendment's proscriptions are enforced against the states through the fourteenth amendment and that "the standard of reasonableness is the same under the Fourth and Fourteenth Amendments. . ."[116] In applying that "standard of reasonableness," consistent with federal constitutional guarantees, the informer privilege should give way to test "probable cause" in state prosecutions where federal standards would require it.

In *United States ex.rel. Coffey v. Fay*,[117] the defendant was convicted of burglary in a New York state court. The principal items of evidence against him at the trial were diamonds from the burglarized establishment. The trial took place prior to *Mapp*, but because defense counsel had preserved the search and seizure issue by proper objection, the New York Court of Appeals directed a hearing on the admissibility of the jewels in accordance with *Mapp* criteria. At the hearing, the trial judge ruled that the evidence was admissible since it had been seized in the course of a search incident to a lawful arrest upon probable cause. The Court of Appeals affirmed this ruling, and *certiorari* was denied by the Supreme Court.[118]

Having exhausted all available state remedies, Coffey petitioned the federal district court for a writ of habeas corpus, seeking his release from the state prison. The district court ruled that, on the state record, because probable cause to arrest petitioner was based in part upon the tips from an informer whose name the state refused to divulge, the petitioner had been deprived of his fourteenth amendment right to a fair hearing on the issue of probable cause and granted the writ.[119] On appeal to the United States Court of Appeals for the Second Circuit, the district court's decision was reversed and the writ denied.

In denying the writ, the appellate court looked to the facts of the case and the possible significance of the informer's testimony. The court held that under the particular circumstances of the case, the "petitioner's prospects of demonstrating, with the help of the informer, that he was arrested without probable cause, are overbalanced by the State's dual interest in encouraging the free flow of confidential information and in using probative demonstrative evidence at the trial of a suspected criminal."[120]

The court reached this decision on the basis that federal informer standards, namely *Roviaro*, are relevant to state prosecutions. "Petitioner, the State, and all the courts that have passed on the case, have treated the leading decision on the informer's privilege in federal prosecution, *Roviaro v. United States*, as if it were fully applicable to state prosecutions as well."[121] Even though it applied federal standards, in reaching its decision, however, the *Coffey* court questioned whether *Roviaro* was fully applicable to state prosecutions:

> We would suppose that Roviaro would not be wholly applicable to state prosecutions unless it expressed a constitutional mandate; if it

[113] 50 Cal 2d 812, 330 P.2d 39 (1958). For a full discussion of the facts and holding in Priestly see *infra* notes 137 through 143 and accompanying test.
[114] *Id.* at 818, 330 P.2d at 43.
[115] 374 U.S. 23 (1963).
[116] *Id.* at 33.
[117] 344 F.2d 625 (2d Cir. 1965).
[118] 12 N.Y. 2d 443, 191 N.E. 2d 263 (1963), *cert. denied*, 376 U.S. 916 (1964). For a discussion of *Coffey* at the state level, see *infra* notes 206 through 209 and accompanying text.
[119] 234 F.Supp. 543 (S.D. N.Y. 1964).
[120] 344 F.2d at 634.
[121] *Id.* at 631.

merely laid down a rule of evidence, the decisions would be fully pertinent to federal prosecutions alone. Furthermore, this distinction would apparently be operative even though the issues being tried in the state prosecutions were federal issues such as the legality of a search under the Fourteenth Amendment. These are the lessons we gather from *Mapp v. Ohio*, which also concerned illegally seized evidence. There the Supreme Court expressly justified its extension of the exclusionary rule to state prosecutions on the ground that the rule was of constitutional origin rather than merely part of the federal law of evidence.

Moreover, it seems to us that Roviaro may have laid down a rule of evidence rather than a constitutional mandate. The doctrines it enunciates are derived directly from the common law. . . . The opinion never expressely cites the Fifth Amendment, although its mention of "fundamental requirements of fairness" may indicate that in reaching the Roviaro result, constitutional considerations were involved to some extent[122].

The States and the Informer Privilege

Many of the states have encountered the same problems as the federal courts in trying to balance the government's desire to protect its source of information from informants against the fundamental rights of a defendant to a full and fair trial.

Alabama

In *Parson v. State*,[123] the Alabama Supreme Court in dicta commented, "that a government official cannot be compelled to disclose the name of an informer. But there is an exception recognized by the cases based on constitutional grounds which is that if it appears that the informer's name is necessary or desirable to show the prisoner's innocence, the official can be required by the court to make disclosure."[124] And, in *Dixon v. State*,[125] a prosecution for transporting prohibited liquor, the Court of Appeals pointed out that "the disclosure of the identity of an informer [as distinguished from a participating decoy] is not ordinarily in the public interest save where needful to show the innocence of the accused."[126]

Roach v. State,[127] is interesting in that the state's case for the selling of prohibited liquor was made out by the testimony of a federal agent. The Court of Appeals reversed the lower court on grounds other than the informer privilege, but in the course of its opinion the court commented as follows:

> We do not believe an employee of the Federal Government carries about him a mantle such as the Roman citizenship that shielded the Apostle Paul from the municipal law. Hence, we do not conceive that the superintendency in Rea v. U.S., operates to such an extent as to make the principle [of requiring the disclosure of the name of a participating decoy] in Roviaro v. U.S., become the law of Alabama when a Federal witness testifies in a state court regarding a state crime.[128]

California

The California Supreme Court, in rapid succession on the same day, decided three cases that covered many of the current questions dealing with the necessity of revealing the informer's identity. In *People v. McShann*,[129] the California Supreme Court reaffirmed an earlier appellate ruling which held that an informer who is a participant in the offense charged must be identified upon demand at the trial.[130] In *McShann*, the informer allegedly made several telephone calls to the defendant arranging for a sale of narcotics. These telephone calls were recorded by police officials with the consent of the informer. On one of the occasions, after a telephone call, the informer allegedly made a purchase of narcotics, this purchase being the basis of the sale charge against the defendant. Several days later, via another recorded telephone

[122] *Id.* at 631 n. 4.
[123] 251 Ala. 467, 38 So. 2d 209 (1948).
[124] *Id.* at 473, 38 So. 2d at 213.
[125] 39 Ala. App. 575, 105 So. 2d 354 (1958).
[126] 105 So. 2d at 357.
[127] 39 Ala.App. 271, 97 So. 2d 837 (1957).
[128] 97 So. 2d at 839. Is the court's comment directed to the fact that when a federal officer testifies in a state court, regarding a state crime, the state's rules of evidence apply? Is the Alabama court, in effect, saying that when a federal officer testifies in an Alabama court, the Alabama informer privilege applies? Conversely, is a state officer, testifying in a federal court, concerning a federal crime, bound by the federal informer privilege? For a discussion of the applicability of the federal informer privilege to the states see *supra* notes 109 through 122, and accompanying text.
[129] 50 Cal. 2d 802, 330 P.2d 33 (1958).
[130] People v. Lawrence, 149 Cal.App. 2d 435, 308 P.2d 821 (1957).

conversation, the informer arranged for a second purchase. After this conversation, the officers followed the defendant as he left his home and subsequently stopped his car at a traffic light. As the defendant alighted from his car he allegedly dropped a tinfoil packet containing heroin. A subsequent search of the defendant allegedly revealed four other packets of heroin. At the trial, the recorded conversations between the informer and the defendant were played to the jury and, when on cross-examination the defendant sought the name of the informant, the prosecution's objection under the informer privilege was sustained.

As to count 1, the alleged sale, the California Supreme Court held that the ruling of *People v. Lawrence*,[131] decided at about the same time as *Roviaro*,[132] was controlling, and the prosecution was held to have lost its right to withhold the identity of the informer who is a participant in the crime alleged. The court indicated that in California the disclosure of a participant informer was now mandatory.

However, there was a second count charging McShann with possession of heroin. In dictum, the court held that disclosure of the informant is not limited to one who participates in the crime alleged:

> The information elicited from an informer may be 'relevant and helpful to the defense of the accused or essential to a fair determination of a cause' even though the informer was not a participant. . . .
>
> When it appears from the evidence, however, that the informer is also a material witness on the issue of guilt, his identity is relevant and may be helpful to the defendant. Nondisclosure would deprive him of a fair trial.[133]

The court commented that the prosecution could have relied solely upon the officer's testimony as to the defendant's possession of heroin and as to his admissions.[134] However, it chose also to introduce evidence of the telephone calls to substantiate the officer's testimony and discredit the defendant's. The court said:

> The informer's telephone call was persuasive evidence on possession, for it indicated that the defendant was en route to make a sale of heroin when he was arrested and therefore knowingly had possession at that time. As the originator of the telephone call the informer was a material witness on the issue of possession. The prosecution made him such a witness by introducing evidence of his telephone call to make a purchase of heroin and by playing a recording of the telephone conversation before the jury.[135]

The court held the defendant was therefore entitled to the name of the informer who made the call.[136]

The informer problem in *Priestly v. Superior Court*,[137] arose at the preliminary hearing, at which stage the prosecution in California is required to present sufficient legal evidence to bind the defendant over for trial.[138] In *Priestly*, the informers were neither participants in, nor material witnesses to, the offense of possession of narcotics. But the arrest and search was made without a warrant by officers acting solely on the basis of communications from informers. At the preliminary hearing, the defendant unsuccessfully sought the names of the informants; moved to strike the testimony of the officers relating to the informers; and objected to the introduction of the evidence, claiming it was illegally obtained and therefore inadmissible because the officers had lacked reasonable cause to make the arrest. The magistrate allowed the prosecutor to invoke the privilege of nondisclosure and ruled that the evidence was sufficient to hold the defendant for trial.

In granting a writ of prohibition depriving the trial court of jurisdiction, the California Supreme Court held that, in such a case, the defendant has a right to disclosure of the informant's testimony

[131] *Ibid. Lawrence* was followed by other appellate courts. See People v. Alvarez, 154 Cal.App. 2d 694, 316 P.2d 1006 (1957); People v. Castiel, 153 Cal.App. 2d 653, 315 P.2d 79 (1957).

[132] Roviaro v. United States, 353 U.S. 53 (1957). The *McShann* court commented on the strong parallel between *Roviaro* and the instant case.

[133] 50 Cal. 2d at 808, 330 P.2d at 36.

[134] The police officer's testimony alleged that the defendant made admissions concerning the possession of heroin.

[135] 50 Cal. 2d at 809, 330 P. 2d at 37.

[136] See CAL. CODE CIV. Proc. §1881 (4) which provides as follows: "A public officer cannot be examined as to communications made to him in official confidence when the public interest would suffer by disclosure." The court interpreted the informer privilege in light of this section and held that it was for the judiciary to determine when the public interest would suffer by disclosure.

[137] 50 Cal. 2d 812, 330 P.2d 39 (1958).

[138] In California only legal evidence may be considered by the magistrate in determining whether to hold the accused for trial. See Rogers v. Superior Court, 46 Cal. 2d 3, 291 P.2d 929 (1955).

or to have the court strike the testimony as to the informer's tip.[139] The court reasoned that to adhere to the informer privilege in this situation would make the arresting officer the sole judge of the issue of reasonable cause and would destroy the exclusionary rule.[140] The court stated:

> If testimony of communications from a confidential informer is necessary to establish the legality of a search, the defendant must be given a fair opportunity to rebut that testimony. He must therefore be permitted to ascertain the identity of the informer, since legality of the officer's action depends upon the credibility of the information, not upon facts that he directly witnessed and upon which he could be cross-examined.[141]

Implicit in the *Priestly* decision is that if the search and seizure can be justified without reliance upon the informer there is no need to disclose his identity.[142] The intended effect of the *Priestly* holding is to compel independent police investigations before an arrest may be made on the word of even the most reliable informers.[143]

The last of the trio of cases, *Mitchell v. Superior Court*,[144] was a limited holding by the California Supreme Court requiring disclosure of a participant informer at the preliminary hearing. The court in this case did not grant prohibition since there was some competent evidence to bind the defendant over for trial, but emphasized that the informant would have to be disclosed at the trial, and, if the magistrate had ruled correctly, it would obviate any unnecessary delay at the trial to enable the defendant to locate the informer and prepare his defense.

Subsequent to these cases, in *People v. Keener*,[145] a bookmaking prosecution, a search was made pursuant to a search warrant obtained upon an affidavit of a police officer, which affidavit was based partly upon information from an undisclosed reliable informant. The California Supreme Court, in sustaining the hearing court's refusal to disclose the informant, explicitly held "that where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it."[146]

In distinguishing *Priestly*, the court stated that there is "nothing novel in the view that law enforcement officials may be in a more favorable position where a warrant is obtained than where action is taken without a warrant."[147] In explaining the distinction in the rationale between a search with, as compared to a search without, a warrant, the court said:

> If a search is made pursuant to a warrant valid on its face and the only objection is that it was based on information given to a police officer by an unnamed informant, there is substantial protection against unlawful search and the necessity of applying the exclusionary rule in order to remove the incentive to engage in unlawful searches is not present. The war-

[139] The court commented: "If the prosecution refuses to disclose the identity of the informer, the court should not order disclosure, but on proper motion of the defendant should strike the testimony as to communications from the informer." 50 Cal.2d at 819, 330 P.2d at 43. Striking the testimony of the informer's tip would rule out the only basis for a showing of reasonable cause for the arrest and search and would eliminate all evidence on which to hold the defendant. In effect the court applied the general federal rule when the informer privilege is inapplicable; *i.e.* the prosecution must either reveal the informer's identity or suffer dismissal of the charge.

[140] See *supra* note 114 and accompanying text.

[141] 50 Cal.2d at 818, 330 P.2d at 43.

[142] Prior to *Priestly*, in order to establish the reliability of the informer, it was accepted California practice to permit the officer to testify to such facts as the following: The length of time the police knew the informer; the number of tips received from him; the number of arrests and convictions secured on the basis of his communications. See *e.g.*, People v. Moore, 154 Cal.App 2d 43, 315 P.2d 357 (1957).

[143] "[A requirement of disclosure] does not unreasonably discourage the free flow of information to law enforcement officers or otherwise impede law enforcement. Actually its effect is to compel independent investigations to verify information given by an informer or to uncover other facts that establish reasonable cause to make an arrest or search. Such a practice would ordinarily make it unnecessary to rely on the communications from the informer to establish reasonable cause." 50 Cal. 2d at 818, 330 P. 2d at 43.

See Scher v. United States, 305 U.S. 251 (1938), where the United States Supreme Court also encouraged the police to make their own independent investigations of informer's tips. In *Scher*, the Court held that there was sufficient evidence to establish probable cause, independent of the information supplied by the informer, and sustained the government's claim of the privilege. The Court, however, implied that disclosure would be required where the issue of probable cause rests squarely on the informer's credibility, the *Priestly* situation. In *Roviaro*, the Supreme Court, in dicta, stated the rule thusly: "[T]he Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication." 353 U.S. at 61.

[144] 50 Cal. 2d 827, 330 P.2d 48 (1958).

[145] 55 Cal. 2d 714, 361 P.2d 587 (1961).

[146] *Id.* at 723, 361 P.2d at 592.

[147] *Ibid.*

rant, of course, is issued by a magistrate, not by a police officer, and will be issued only when the magistrate is satisfied by the supporting affidavit that there is probable cause. He may, if he sees fit, require disclosure of the identitiy of the informer before issuing the warrant or require that the informant be brought to him. The requirement that an affidavit be presented to the magistrate and his control over the issuance of the warrant diminish the danger of illegal action, and it does not appear that there has been frequent abuse of the search warrant procedure. One of the purposes of the adoption of the exclusionary rule was to further the use of warrants, and it obviously is not desirable to place unnecessary burdens upon their use. The additional protection which would result from application of the Priestly rule in situations such as the one involved here would not offset the disadvantages of excluding probative evidence of crime and obstructing the flow of information to police.[148]

The situation in California at this time is that a defendant may now compel disclosure of an informer participant at the preliminary examination,[149] hearing or the "voir dire" examination into the reasonableness of the arrest and search,[150] as well as the trial itself.[151] Where the prosecution relies upon the informer to establish reasonable cause for the arrest or search without a warrant, evidence of his information will be stricken out unless his name is revealed on demand.[152] And when there are several counts charged against the same defendant, some involving an informer who is a participant, and some not, and evidence as to the participant informer is given, the informer's evidence is also material as to those counts with which he was not directly involved and disclosure will be required.[153] However, where a search is made pursuant to a warrant valid on its face the prosecution is not required to reveal the identity of the informer in order to establish the legality of the search and seizure.[154]

Florida

The three Florida District Courts of Appeal appear to be in conflict with each other concerning the informer privilege. The First District in *Harrington v. State*,[155] a prosecution for conducting a lottery, held that the affidavit of a sheriff, though based largely on information received from an unidentified confidential informer, stated facts sufficient to show probable cause for issuance of a search warrant to search the taxicab operated by defendant, and that the state was not required to identify this informer. The court further stated that, "what we have said is not to be construed as indicating that such disclosure is absolutely privileged. The trial court may compel the disclosure when necessary to avoid the risk of false testimony or to secure useful testimony."[156]

The *Harrington* rationale was adhered to by the same district court in *State v. Hardy*,[157] a prosecution for unlawful possession of moonshine whiskey, where the defendant filed a motion for a bill of particulars to furnish the name, address, telephone number and size and description of an alleged confidential informer, who was alleged to have gone into her house. She also demanded to be confronted by the same alleged informer who claimed to have made a buy of moonshine whiskey. At the trial, the defendant again requested information concerning the informer, claiming that the search warrant was predicated upon an affidavit made by a fictitious person; that in fact no buy was made; and that she was deprived of her right to be confronted by, and to cross-examine, this fictitious informant. The court, in upholding the informer privilege, relied upon its recently decided *Harringing* opinion. The court also distinguished this case from *Roviaro*, by holding that *Roviaro* was a prosecution for the unlawful sale of contraband, not unlawful possession, and further, that there was

[148] 55 Cal. 2d at 722, 361 P. 2d at 591.

[149] Mitchell v. Superior Court, 50 Cal. 2d 827, 330 P.2d 48 (1958).

[150] Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958).

[151] People v. McShann, 50 Cal. 2d 802, 330 P.2d 33 (1958); People v. Lawrence, 149 Cal.App. 2d 435, 308 P.2d 821 (1957).

[152] Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958).

[153] People v. McShann, 50 Cal. 2d 802, 330 P.2d 33 (1958).

[154] People v. Keener, 55 Cal. 2d 714, 361 P.2d 587 (1961). In a recently enacted Evidence Code, to become operative January 1, 1967, California decisional law in the informer privilege area was to a large extent codified. See CAL. EVIDENCE CODE §§1041, 1042.

[155] 110 So. 2d 495 (1st D.C.A. Fla. 1959), *appeal dismissed without opinion*, 113 So. 2d 231 (Fla. 1959).

[156] 110 So. 2d at 497. The court further stated: "The identity of the informant is in no manner material in determining the guilt or innocence of the defendant who produced no testimony whatever in rebuttal of the state's case." *Id.* at 498.

[157] 114 So. 2d 344 (1st D.C.A. Fla. 1959).

no showing that the informer was a participant in the transaction charged or that he would be a material witness at the trial.[158]

In *Byers v. State*,[159] a prosecution for conducting a lottery, the Second District Court of Appeals held that there was no authority requiring the state to produce the affiant (informer) upon whose affidavit a search warrant was based, or to continue the case until such time as the defendant might be able to locate him. The court further pointed out that, in fact, far from refusing to disclose the informer's identity, the evidence showed that the state cooperated in the defendant's effort to ascertain the identity of the affiant (informer) and freely afforded defense counsel all information that the state had as to his identity and whereabouts.

A directly opposite ruling was announced by the Third District Court of Appeals in *Baker v. State*,[160] a prosecution for operating a gambling house. In *Baker*, the trial court, as in *Byers*, refused to quash an affidavit and search warrant, and refused to force production of the affiant (informer) on motion of the defense for a bill of particulars. The court held that the failure of the trial judge to require the state to disclose information it had relating to the individual assertedly signing the affidavit upon which the search warrant was issued vitiated all evidence obtained thereunder. The court based its decision on two grounds. First, the court relied upon the principle that one accused of a crime is entitled to be confronted by his accusers, citing the sixth amendment to the United States Constitution, and second, that "to expand the rule protecting confidential informants to protect one who actually executes an affidavit . . . would do violence to provisions of the Federal and State Constitutions. . . ."[161] But in a subsequent decision, *City of Miami v. Jones*,[162] the Third District's decision in *Baker* was severely limited, the court now holding that the defendant was not entitled to the name of a confidential informer upon whose information an identified officer made an affidavit on which a search warrant was issued. The court distinguished the *Baker* case by reasoning that in *Baker* the informant was the affiant, and it being charged that a fictitious name had been signed to the affidavit, there was no one who could be held for perjury; while in the instant case the affidavit was sworn to by an identified police officer who was exposed to punishment for perjury.[163]

It would seem that it is necessary that the issues must be resolved by the Florida Supreme Court.[164]

Georgia

The Georgia appellate courts have made a sharp distinction between an informer and a decoy, recognizing that in cases of decoys, the defendant has a right to be informed of the decoy's identity, while the rule is otherwise in the case of informers.[165] It is apparent, however, that the courts have only drawn the usual distinction between a mere tipster (the informer) and a person who participates in the crime charge (the decoy).

This distinction is clearly shown in *Crosby v. State*,[166] a prosecution for the illegal sale of whiskey. The Court of Appeals ruled that a person who accompanied a revenue agent and aided in the purchase of the whiskey was a decoy rather than an informer and that the trial court's refusal to require the prosecution witness to divulge the decoy's name was an improper abridgement of the defendant's fundamental right of cross-examination. The court then commented on the distinction between

[158] The court apparently failed to notice that the defendant in *Roviaro* was convicted on two counts; sale of narcotics to the undisclosed informer, and possession of narcotics. The Government in the Supreme Court did not defend the first count, which charged a sale. See *supra* note 27 and accompanying text.

[159] 109 So. 2d 382 (2d D.C.A. Fla. 1959). See Garcia v. State, 110 So. 2d 709 (2d D.C.A. Fla. 1959), recognizing that subject to certain limitations, not discussed but citing *Harrington*, the identity of an informant who gives information concerning the commission of a crime is privileged.

[160] 150 So. 2d 729 (3d D.C.A. Fla. 1963).

[161] 150 So. 2d at 730.

[162] 165 So. 2d 775 (3d D.C.A. Fla. 1964).

[163] It is most difficult to follow the court's rationale. If the court conceded that it is permissible to accept an affidavit based on the unsworn statement to the affiant, by an undisclosed informant, known only to affiant, who thus becomes the sole arbiter of the informant's credibility, why should the court attach greater suspicion to an affiant who comes before the magistrate in person, discloses his identity, is sworn, and is available to thorough cross-examination by the magistrate?

[164] See Ferrera v. State, 101 So. 2d 797 (Fla. 1958), where the Florida Supreme Court refused to reverse a defendant's conviction for participating in a lottery because "lurking in the background was some informer who the appellant should have been permitted to examine." *Id.* at 799. It appears that the court was discussing the informer privilege only in relation to the possible prejudice to the jury by the police officer's testimony that he had reason to believe that the defendant was participating in a lottery. See also Chacon v. State, 102 So. 2d 578 (Fla. 1958).

[165] Hodges v. State, 98 Ga.App. 97, 104 S.E. 2d 704 (1958), *reversed on other grounds*, 214 Ga. 614, 106 S.E. 2d 795 (1959); Crosby v. State, 90 Ga.App. 63, 82 S.E. 2d 38 (1954); Anderson v. State, 72 Ga.App. 487, 34 S.E. 2d 110 (1945).

[166] 90 Ga.App. 63, 82 S.E. 2d 38 (1954).

an informer and a decoy. "There is, however, a vast difference between an informer (usually a citizen who communicates to public authorities suspected infractions of penal laws) and a decoy (usually a person employed by law-enforcement agencies to obtain evidence upon which prosecutions are based)."[167]

The Court of Appeals in *Greeson v. State*,[168] a prosecution for the possession and sale of illegal whiskey, ruled that the prosecution's refusal to summon as a witness or produce in court the informer or decoy upon whom the state did not rely upon to make out its case before the jury did not deprive the defendant of his constitutional right to confrontation and cross-examination. It would also appear, from *Staggers v. State*,[169] that the burden is upon the defendant to show that the person is a decoy, rather than an informer, and the prosecution will not be required to divulge the person's identity to determine if he was a mere informer or a decoy.

Illinois

In *People v. Mack*,[170] a search warrant for the defendant's apartment was procured on the basis of an affidavit of an informant who admittedly used a fictitious name. The affidavit stated that the informer saw, and had in fact purchased, narcotics on the premises to be searched. On the motion to suppress the evidence the defense requested the informer's identity. This request was refused and the motion to suppress was denied. The defendant then proceeded to trial but made no further request for the informer's identity.

On appeal to the Supreme Court of Illinois from a conviction for unlawful possession of heroin, the defense asserted that the prosecution's refusal to disclose the identity of the informant denied the defendant due process of law and also denied him the right under the state constitution to meet the witnesses against him face to face and to have process to compel the attendance of witnesses in his behalf. The court, in affirming the conviction, noted that it was only during the hearing on the motion to quash the search warrant that the defense made any demand for the informer to be identified, and that the attack on the search warrant was not pursued in the appellate court. The court further held that there was no basis for upsetting the public purpose upon which the informer privilege rests where it appears that the informer took no part in serving the search warrant or in the defendant's arrest; that he neither participated in the defendant's crime nor helped set up its commission; and that no part of his communication to the police or conversations with defendant were used as evidence in the case.

In *People v. Reed*,[171] the trial court restricted the defendant's cross-examination of the arresting officer, and of a federal agent, as to the identity and whereabouts of an informer who introduced the federal agent to the defendant. The Illinois Supreme Court, citing *Mack*, held that this restriction on cross-examination was not improper since there was no showing that the informer participated in the transaction with which defendant was charged or that his testimony would in any way be helpful to the defendant.

The leading Illinois informer privilege case is *People v. Durr*,[172] a probable cause informer decision. In *Durr*, the arresting officer testified at the motion to suppress, that a short time prior to the arrest charged a reliable informer told him that a man named Ray was peddling narcotics, was traveling in an old blue car and would be making a delivery of narcotics at a designated place. The informer also gave the officer a detailed description of the man. Acting on this information, the officer went to the described area and observed a man fitting the informer's description driving the described car into a parking lot. The officer followed the auto into the lot and as the defendant alighted from the car he was placed under arrest. A search

[167] 82 S.E. 2d at 39. Accord, Smallwood v. State, 95 Ga.App. 766, 98 S.E. 2d 602 (1957); Roddenberry v. State, 90 Ga.App. 66, 82 S.E. 2d 40 (1954). See also Anderson v. State, 72 Ga.App. 487, 34 S.E. 2d 110 (1945), where, in a prosecution for unlawful possession of illegal whiskey, the Georgia Court of Appeals, relying upon a Georgia statute that provides that official persons shall not be called upon to disclose State matters of which the policy of the State requires concealment, held, that ordinarily one who acts in the capacity of a peace officer will not be required to disclose the name of his informant concerning the crime for which the accused is being held. However, the facts in *Anderson* show that the informer merely supplied the police with information, and did not participate in the investigation or act as a decoy.

The Georgia Supreme Court, in Morgan v. State, 211 Ga. 172, 84 S.E. 2d 365 (1954), a murder prosecution, relying upon the same statute, and upon *Anderson*, ruled that a police officer was not required to disclose the names of persons who had given the officer information leading to the defendant's arrest.

[168] 97 Ga.App. 245, 102 S.E. 2d 503 (1958).

[169] 101 Ga.App. 463, 114 So. 2d 142 (1960).

[170] 12 Ill. 2d 151, 145 N.E. 2d 609 (1957).

[171] 21 Ill. 2d 416, 173 N.E. 2d 422 (1961), *cert. denied*, 368 U.S. 990 (1962).

[172] 28 Ill. 2d 308, 192 N.E. 2d 379 (1963), *cert. denied*, 376 U.S. 973 (1964).

of his person revealed the heroin forming the basis for the motion to suppress and defendant's subsequent conviction for possession of narcotics.

The Illinois Supreme Court, in sustaining the trial court's refusal to reveal the identity of the informer, commented as follows:

> In our consideration of this question we have been unable to perceive any necessity to hold inherent in the constitutional safeguards protecting those charged with crime the right to information completely irrelevant to the question of innocence, disclosure of which would seriously hamper effective law enforcement. . . . Considering also the deterrent aspects of the civil and criminal remedies for false arrests, it is our opinion that determination of probable cause by reliance upon the officer's testimony as the reliability of an otherwise anonymous informer is likely to produce evils of far less consequence than those resulting from depriving the public of an important source of information necessary to the suppression of a particularly vicious form of crime.[173]

The *Durr* opinion was recently re-examined in *People v. McCray*,[174] where the defense argued that the policies underlying the *Durr* decision ought to be reconsidered and *Durr* overruled. After discussing the recent federal informer privilege cases, the court adhered to its former ruling in *Durr* stating:

> [W]e believe that an accused is afforded constitutional protection against unreasonable search and seizure if the State is compelled to support a search incidental to an arrest without a search warrant by credible evidence showing the basis for reasonable cause by the arresting officer. We do not believe that it is necessary to bare the identity of every informant assisting society in its struggle against the narcotic traffic in order to preserve the fundamental guarantees of the Constitution. Otherwise the so-called informant's privilege and its value would disappear.[175]

Kentucky

In *Brewster v. Commonwealth*,[176] a police officer, acting upon information furnished to him by an informer, arrested an identified individual. This individual gave the officer further information implicating the defendant in a burglary. The Kentucky Court of Appeals, quoting from a federal district court's opinion, *United States v. Keown*,[177] that an "officer may use the facts furnished by the informer as a basis for his own investigation and discover sufficient facts to search or arrest without disclosing the source of his information,"[178] held that the officer was not required to divulge the name of the informer.

Maine

In *State v. Fortin*,[179] a prosecution for maintaining a nuisance, the Supreme Judicial Court of Maine, in upholding the trial judge's ruling that the defendant was not entitled to the names of the individuals who initiated complaints against him, stated:

> It is a well-settled rule that a defendant upon the trial of an indictment against him is not entitled as of right to know who gave the information or made the complaints which started the prosecution. Such communications to officers of the law should ordinarily be regarded as privileged as to the identity of the informant or complainant on the ground of public policy, so that no one from fear of consequences to him personally shall hesitate to give information of offenses.[180]

Maryland

In two recent cases, the Maryland Court of Appeals has defined the state's privilege of nondisclosure in both the probable cause and participant informer area. In *McCoy v. State*,[181] a prosecution for possession and control of narcotic drugs, the accused, when questioned by a police lieutenant admitted he knew the informer, who, by arrangement with the police had bought the drugs

[173] *Id.* at 314, 192 N.E. 2d at 382.
[174] 33 Ill. 2d 66, 210 N.E. 2d 161 (1965).
[175] *Id.* at 73, 210 N.E. 2d at 165, *cert. granted*, McCray v. Illinois, 384 U.S. 949 (1966).
[176] 278 S.W. 2d 63 (Ky. 1955).
[177] 19 F.Supp. 639 (W.D. Ky. 1937).
[178] 278 S.W. 2d at 64.
[179] 106 Me. 382, 76 Atl. 896 (1910).
[180] *Id.* at 383, 76 Atl. at 896. In sustaining the privilege of nondisclosure, the court also held that it was immaterial whether reference to the complainant was made by the prosecution or by the defense.
See also State v. Soper, 16 Me. 293 (1839), where it was held that the owner of property alleged to have been stolen is not bound to disclose the names of persons in his employ who supplied him with information which induced him to take measures leading to the detection of the accused.
[181] 216 Md. 332, 140 A. 2d 689 (1958), *cert. denied*, 358 U.S. 853 (1958).

from the defendant. At the trial, one of the police officers disclosed the name of the informer without any demand being made. Several other questions were asked about the informer. Was the informer a dope addict? Had he ever been arrested? Did the police officer know where the informer was at this time? But at no time did the defendant ask for the identity of the informer, demand that the state call him as a witness, or request the state to explain his absence.

The court held that ordinarily the state has a privilege of nondisclosure, and is not required to divulge the name of a person who furnished information of violations of law to an officer charged with enforcing that law. An exception to this general rule is when the informer is an integral part of the illegal transaction. This exception does not apply, however, if the informer was already known to the accused or if he is not known, the accused fails to make proper demand at the trial for disclosure of the identity of the informer.[182] Since the informer was already known to the defendant, and no demand was made for further identification, the exception in the instant case did not apply. The court further stated that the mere fact that the state failed to call the informer as a witness was not important.

In the second case, *Drouin v. State*,[183] the state, in order to establish a lawful arrest so that evidence obtained by police officers would be admissible against the accused with respect to the misdemeanor count of statutory theft, attempted to show that the officers had reasonable grounds to suspect that a felony had been committed and that the accused was the guilty party. To this effect the state offered proof that the officers knew that a home had been burglarized and certain property stolen therefrom. Further testimony by the officers tended to show that on the evening of the crime they had been informed by certain neighbors that the accused had been seen in the rear of the burglarized home shortly after its occupants had left, acting in a suspicious manner.

The court found that the trial court did not purport to decide whether the names of the informers were material to the defendant's defense or to the determination of the issue of probable cause, and that the accused was entitled to this proper exercise of the trial court's discretion as to the necessity of disclosure. In so holding, the court commented as follows:

> We think the reasonable and proper rule after careful consideration of all of the authorities, to be that in criminal cases where the probable cause for the defendant's arrest depends wholly, or in part, on information received from a nonparticipating informer, if the name of the informer is useful evidence to vindicate the innocence of the accused, lessen the risk of false testimony or is essential to a proper disposition of the case, disclosure should be compelled, or the evidence obtained by reason of the arrest and search suppressed. If the accussed asserts any substantial ground indicating that the identity of the informer is material to his defense or the fair determination of the case on the issue of probable cause the trial court should require the informant's name to be given [or the evidence suppressed] so that the informant may be summoned and interrogated if it be necessary to do so in order to determine whether or not the officer had probable cause to make the arrest.[184]

Massachusetts

In an action for maliciously and falsely representing to the Treasury Department of the United States that the plaintiff was intending to defraud the revenue, the Supreme Judicial Court of Massachusetts, in *Worthington v. Scribner*,[185] held that the defendant cannot be compelled to answer interrogatories filed by the plaintiff inquiring as to

[182] For this proposition the court cites Sorrentino v. United States, 163 F.2d 627 (9th Cir. 1947) (informer disclosed by record); United States v. Conforti, 200 F.2d 365 (7th Cir. 1952), *cert. denied*, 345 U.S. 925 (1952) (no demand); and United States v. Colletti, 245 F.2d 781 (2d Cir. 1957), *cert. denied*, 355 U.S. 874 (1957) (no demand). For a discussion of other cases involving this problem, see *supra* notes 42 through 48 and accompanying text.

[183] 222 Md. 271, 160 A.2d 85 (1960).

[184] *Id.* at 286, 160 A.2d at 92. The court further discussed the California rule enunciated in Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958), stating: "While there is much logic and sound reasoning in the *Priestly* case . . . we do not deem it necessary nor desirable to establish such a hard and inflexible rule as stated in that case. Of course, disclosure may be necessary in many instances as the only means available to afford the traverser an opportunity to establish that no informers did, in fact, exist; or, if they did exist, they did not transmit the information claimed. On the other hand, there may be circumstances that call for the trial judges to exercise their sound discretions as to whether disclosure should be required." 222 Md. at 285, 160 A.2d at 92. *Cf.* State v. Burnett, 42 N.J. 377, 201 A.2d 39 (1964), in which the New Jersey Supreme Court commented: "We read Drouin v. State . . . to eschew an invariable requirement of disclosure." 42 N.J. at 383, 201 A.2d at 42.

[185] 109 Mass. 487 (1872).

whether they did not give or cause to be given to the department information of supposed frauds on the revenue contemplated by the plaintiffs.

Judge Gray, in expressing this rule, stated the oft quoted reason therefore:

> It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among the secrets of state, and leaves the question how far and under what circumstances the name of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications.[186]

Michigan

People v. Laird[187] was a prosecution for burglary in which the police officers, in explaining their presence in the place of the burglary, testified that they received information that the place would be burglarized. On cross-examination each officer was asked a number of questions relating to the source from which they derived their information that a burglary was planned, but the questions were disallowed. In sustaining the trial court, the Michigan Supreme Court stated the general rule that persons engaged in the detection of crime are not bound to disclose the source of information which led to the apprehension of the prisoner. However, the court remarked that "a case might arise where a person claiming to have been innocently at the place of the crime, at the solicitation of a person suspected of being the informant, would be entitled to inquire whether such person was the informant."[188] Apparently the court was referring to the defense of entrapment and since the defense in hand was alibi, no such case was presented.

Mississippi

The Mississippi Supreme Court, in the informer privilege—probable cause area, has apparently adopted the federal court's *Scher* rationale, i.e., that disclosure will be required unless there is sufficient information, aside from the informer's tip, to constitute probable cause.

In the early case of *Ford v. Jackson*,[189] a police officer testified that he had been informed by reliable persons that defendant was handling whiskey on certain streets. Suspecting that the defendant had intoxicating liquor, the police officer pursued him for the purpose of arrest and search. In this pursuit the defendant threw a pint bottle of whiskey from his car. After stopping the car and arresting the defendant, a further search of the car revealed additional whiskey.

The court ruled that the search began at the time of pursuit and that no crime was committed in the officer's presence. The court further held that the undisclosed informant's information to the police officer making the search did not constitute probable cause, and that the evidence regarding the names of the persons giving this information was improperly excluded. "[T]he defendant was entitled to know the source of the officer's information upon which he acted with a view of challenging its sufficiency as well as the credibility of the officer claiming to have the information constituting probable cause."[190]

Hill v. State[191] involved a search of an automobile, without a warrant, for intoxicating liquor. The court held that the defendant had a right to know the name of the party who had given the police

[186] *Id.* at 488. In Pihl v. Morris, 319 Mass. 577, 66 N.E. 2d 804 (1946), the Massachusetts' Supreme Judicial Court, in a trial for slander and malicious prosecution, held, that evidence of statements made by the defendant to a police officer was not excludable on the grounds that the statements were privileged communications. The court reasoned that defendant's identity as the informer against the plaintiff, and the substance of the accusations, had already become a matter of public record when the defendant instituted a criminal complaint against the plaintiff. The court further explained its earlier decision in Commonwealth v. Congdon, 265 Mass. 166, 165 N.E. 467 (1928), as holding that the privilege announced in *Scribner* does not apply when the informer is known or when the communication has already been divulged.

[187] 102 Mich. 135, 60 N.W. 457 (1894).

[188] *Id.* at 140, 60 N.W. at 457. The general rule enunciated in *Laird* was quoted in People v. Asta, 337 Mich. 590, 602, 60 N.W. 2d 472, 479 (1953). Compare *Laird* with State v. Boles, *infra* note 212.

[189] 153 Miss. 616, 121 So. 278 (1929).

[190] *Id.* at 619, 121 So. at 279.

[191] 151 Miss. 518, 118 So. 539 (1928).

officer information which, if believed and acted upon by the officer, constituted probable cause:

> The informant might have been shown to be a notorious liar in that community, or a person of unquestionable integrity. These facts the court must have, in order to determine whether the officer's belief in the truth of the statement was warranted, and in order to allow the defendant an opportunity to show that the statement upon which the officer acted was unworthy of belief and no probable cause existed for such search.[192]

More recently, in *Harris v. State*[193], a prosecution for transporting illegal whiskey, the sheriff had been informed that a load of whiskey would be delivered that night at a certain place. Acting on this information, the sheriff proceeded to a concealed position near a public highway, and from this position he observed the defendant drop and break a jug of liquor. He testified that he was close enough to smell and know that it was whiskey. He thereupon arrested the defendant. The court, in affirming the defendant's conviction, held that the sheriff would not be required to name his informer inasmuch as the arrest was made on what he learned through his own knowledge. The court commented that "this arrest was not made upon information given the sheriff by his unnamed informant. True he went to this particular place pursuant to that information but he made his arrest on what he saw. . . . This was a misdemeanor being committed in his presence."[194]

Missouri

State v. Edwards[195] involved a prosecution for unlawful possession of heroin. The defendant complained that the trial court erred in refusing to require a police officer, at the pre-trial motion to suppress the evidence, to divulge the name of the informant whose tip led to the arrest of the defendant and the discovery of narcotics hidden in the defendant's car. The officer testified that the defendant was a known narcotics addict and that it had been rumored that he was selling narcotics in the street. About ten minutes before the defendant was arrested, the informant, who from past experience was thought to be reliable, personally told the officer that the defendant was selling narcotics from his car; that the defendant would pick up a customer and take him around the corner to make the sale; and that he (the informer) had seen the defendant approach a user. Upon receipt of this information the officer went in search of the defendant and spotted him as he drove his car with a known drug addict riding alongside him. The defendant's car was stopped and he was placed under arrest. A capsule of heroin, the evidence sought by the defense to be suppressed, was found under the seat.

The trial judge did not require that the name of the informer be divulged, although he did permit full interrogation of the officer as to the age, sex, and habits of his informant, and the methods, places, and times of the informant's communications with the officer. In making this ruling the trial judge expressly stated that he was following *State v. Bailey*,[196] which held that a police officer was not required to divulge the identity of an informant upon whose information he bases his right to arrest or search.

The Missouri Supreme Court held, however, that to the extent that the *Bailey* case held the privilege unqualified, it was overruled. The court stated:

> [I]t would simplify matters if the question of divulgence or non-divulgence of the identity of any informant could be finally ruled one way or the other so as to apply to all cases. . . .It is clear, however, that if due regard be given to the demands of justice to the public on one hand and the constitutional rights of the defendant on the other, each case must be considered on its merits. * * *
> [T]he question of whether the disclosure of the identity of a non-participating informant is essential to assure a fair determination of the issue in any given criminal case is for the trial court in the first instanct.[197]

Consequently, the judgement was reversed, and the case remanded to the trial court for the exercise of its discretion, to determine whether the defendant could have a fair trial without requiring disclosure of the informant.[198]

[192] *Id.* at 520, 118 So. at 539. *Accord*, Mapp v. State, 148 Miss. 739, 114 So. 825 (1927); Hamilton v. State, 149 Miss. 251, 115 So. 427 (1928).
[193] 216 Miss. 895, 63 So.2d 396 (1953).
[194] *Id.* at 901, 63 So.2d at 397.
[195] 317 S.W. 2d 441 (1958).
[196] 320 Mo. 271, 8 S.W.2d 57 (1928). *Bailey* adopted the unqualified rule that an officer is not required to reveal the name of the person from whom he receives information upon which he bases his right to arrest or search.
[197] 317 S.W.2d at 447.
[198] Is the court holding disclosure absolute in informer

New Jersey

In *People v. Dolce*,[199] a prosecution for receiving, buying and having stolen certificates of ownership of motor vehicles, the defense sought to obtain, by demand for particulars, the identity and address of the informant who introduced the police officer to him. The prosecution refused to name and locate the person relying on the common law privilege reflected in recently enacted laws.[200] At trial, on cross-examination, the defense again sought the identity of the informant.

The Supreme Court of New Jersey held that under the facts of this case the evidence of entrapment was insufficient to require a finding that disclosure of the identity and whereabouts of the police collaborator was essential to a fair determination of that defense. In so ruling the court stated:

> The legislative policy of New Jersey as declared by [statute] is opposed to such revelation unless the trial judge finds it is essential to a fair determination of the issue of entrapment. A frivolous demand for the information, or one based only on an unsworn assertion that the defendant was seduced into perpetrating the crime by the creative activity of police officers need not be recognized. . . .
>
> The public interest to be served by preserving the free flow of information of criminal activities, and by employing investigative agents who have, or acquire by deception or otherwise, access to persons engaged in such activities, should not be thwarted unless a showing is made that a defense such as entrapment is presented in good faith, with some reasonable factual support, and that the informer is a material witness necessary to the fair determination of the defense. If the rule were otherwise, a defendant by the mere naked allegation that he intended to rely on the defense could force the state to reveal the name and whereabouts of the informer and, on its refusal to do so, gain dismissal of the prosecution.[201]

Recently, the New Jersey Supreme Court, in a well reasoned opinion, *State v. Burnett*,[202] had occasion to deal with the informer privilege in the probable cause area. In *Burnett*, a prosecution for possession of lottery slips, the arresting officer was told by a known confidential informant that in about 10-15 minutes a blue Mercury of a given age, driven by a colored male, would enter a specified parking lot and that the driver would leave with lottery slips on him. The ensuing events squared with the information given by the informer and as the car was backed out of the lot the driver and the defendant (a passenger) were arrested.

The court held that the defendant could not raise the issue as to whether the trial court's refusal to suppress the evidence obtained in a search without a warrant was in violation of his constitutional right—on the basis that the state did not reveal the confidential informant upon inquiring into probable cause—since there was no demand for disclosure or demand to strike the testimony on nondisclosure. Since the state was never given a choice between disclosure and loss of the officer's testimony by proper demand, the issue was improperly raised. However, the court realized that the doctrine of the informer privilege was then provoking so much current litigation that it proceeded to deal with the right to disclosure when probable cause is an issue.

After discussing the recent federal court opinions in *Roviaro* and *Rugendorf*, the court felt that they were not bound by the federal constitution in the informer privilege area. "We are satisfied that there is no federal expression settling the issue in constitutional terms. More specifically . . . *Roviaro* has not been thought to state a view of the Fourth Amendment binding upon us under *Mapp v.*

participant cases? See State v. Redding, 357 S.W. 2d 103 (1962), recognizing the rule that disclosure rests within the discretion of the trial court, and is not required where the informer was not a participant. See also State v. Cookson, 361 S.W. 2d 683 (1962), holding that the trial court's failure to exercise discretion in determining whether the defendant could have a fair trial, without requiring officer to disclose the identity of an informant on whose information the arrest was made, constituted reversible error. The trial court evidently did not know that *Bailey* was modified, if not overruled, by *Edwards*. The *Cookson* court stated: "Not only did the court treat the privilege against disclosure as unqualified, it does not appear whether the informer was a participant or nonparticipant in the offense." 361 S.W.2d at 684.

[199] 41 N.J. 422, 197 A.2d 185 (1964).

[200] N.J.S. 2A:84 A-28, N.J.S.A.

"A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative of the State or United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues."

[201] 41 N.J. at 435, 197 A.2d at 192.

[202] 42 N.J. 377, 201 A.2d 39 (1964).

Ohio. . ."[203] The court then stated its views and future judicial policy in this area. Since this decision is a realistic approach to a most difficult problem, an extensive quote from *Burnett* may be helpful and enlightening:

> If a defendant may insist upon disclosure of the informant in order to test the truth of the officer's statement that there is an informant or as to what the informant related or as to the informant's reliability, we can be sure that every defendant will demand disclosure. He has nothing to lose and the prize may be the suppression of damaging evidence if the State cannot afford to reveal its source, as is so often the case. And since there is no way to test the good faith of a defendant who presses the demand, we must assume the routine demand would have to be routinely granted. The result would be that the State could use the informant's information only as a lead and could search only if it could gather adequate evidence of probable cause apart from the informant's data. Perhaps that approach would sharpen investigatorial techniques, but we doubt that there would be enough talent and time to cope with crime upon that basis. Rather we accept the premise that the informer is a vital part of society's defensive arsenal. The basic rule protecting his identity rests upon that belief. * * *
>
> The question then is whether in view of all of these circumstances it is reasonable and consistent with the purpose and the effective enforcement of the Fourth Amendment to deny disclosure of the informer upon a challenge to the existence of probable cause. We think the public can be accorded the benefit of the informer privilege without a significant dilution of the Fourth Amendment.
>
> The Fourth Amendment is served if a judicial mind passes upon the existence of probable cause. Where the issue is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an *ex parte* proceeding. As we have said, the magistrate is concerned, not with whether the informant lied, but with whether the affiant is trustful in his recitation of what he was told. If the magistrate doubts the credibility of the affiant, he may require that the informant be identified or even produced. It seems to us that the same approach is equally sufficient where the search was without a warrant, that is to say, that is should rest entirely with the judge who hears the motion to suppress to decide whether he needs such disclosure as to the informant in order to decide whether the officer is a believable witness.[204]

[203] *Id.* at 384, 201 A.2d at 43.

New York

Until the celebrated *Mapp* case, New York had been functioning under the *Defore*[205] doctrine which did not require exclusion of illegally obtained evidence. In *People v. Coffey*,[206] the trial for burglary took place prior to the *Mapp* decision, but because defense counsel had preserved the search and seizure issue by proper objection, the New York Court of Appeals returned the case for a hearing to determine if the evidence admitted at the trial should have been excluded.

At that hearing, an F.B.I. agent testified that he had received information from an informant, whom he had used in the past, that the defendant and another were burglars of a certain jewelry store, and that they along with a third person, were attempting to dispose of the jewels. The agent further testified that the informant told him he had seen the jewels in the defendant's possession, and the description given by the informant tallied with that of the missing jewels. The agent also testified that he listened to a telephone conversation between the informant and the third person in which the theft was discussed and in which the third person indicated that all three men would meet in front of a theater at a specified time to dispose of the jewels. The agent checked and learned that all three men had criminal records.

Armed with this information the federal agent notified New York City detectives, told them what he had learned, and in conjunction with the detectives an arrest and search took place near the theater. The search uncovered the stolen jewels—the evidence admitted at the trial and the subject of the hearing. The two New York City detectives that were notified testified to substantially the same facts. In addition, two New York Assistant District Attorneys testified that they had met the

[204] *Id.* at 385, 388, 201 A.2d at 43, 45.

[205] People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).

[206] 12 N.Y. 2d 443, 191 N.E. 2d 263 (1963), *cert. denied*, 376 U.S. 916 (1964).

informer after the search and that the informer verified the federal agent's story.

Defense counsel, at the hearing, repeatedly requested the informer's identity to check the agent's testimony, but the People successfully pleaded the informer privilege, asserting that disclosure might endanger the informer's life. In sustaining the ruling by the hearing judge, the New York Court of Appeals held that there was enough proof which added up to "probable cause" for the defendant's arrest, and that the People's refusal to name the informer was not error. The court stated that "when as here, the person whose name is held back is a mere transmitter of information and not in any sense a competent witness as to the crime itself and when there is, as there is here, strong and dependable proof of the accuracy of his information, 'proper balance' makes nondisclosure appropriate. [Citing *People v. McShann*]."[207] The courts reliance on *McShann*,[208] a California prosecution involving the informer privilege in the participant informer area, and the quoted statement, both reflect the court's failure to draw the necessary distinctions between the informer privilege when probable cause is in issue, as distinguished from the trial on the merits when guilt or innocence is being determined.[209]

The *Coffey* decision was later distinguished, in *People v. Malinsky*,[210] on rather questionable grounds and it would appear that the New York Court of Appeals has reconsidered the former holding. The problem in *Malinsky* arose at the hearing on a motion to suppress, at which time defense counsel requested the name of the informant. The defense claimed that the police had no such informant but had acquired their information by means of an illegal wire tap. The People asserted the informer privilege, and they were sustained by the motion judge. The New York Court of Appeals reversed and remanded the case for a new hearing on grounds other than those involved in the informer privilege area. In discussing the procedure to be followed at the new hearing the court stated that the requirements of fairness necessitated disclosure unless the People could produce other evidence at the hearing—apart from the informant's tale—sufficient to constitute probable cause. The court further stated, in language that seems to reflect second thoughts on its earlier *Coffey* opinion, the following:

> [D]isclosure of the informer's identity is required only in those cases, and they are relatively rare, where there is insufficient evidence, apart from the arresting officer's testimony as to the informer's communications, to establish probable cause. Where such separate evidence exists, the arrest and consequent search will be upheld without requiring disclosure of the informer. But where disclosure is demanded by the requirements of a fair trial—where, in other words, to refuse disclosure would completely deprive the defense of the opportunity of showing that there was in truth no reliable informer or, if there was, that his communication to the police was different from that testified to and that, for either of these reasons, the police did not have probable cause to make the arrest—the prosecution must either disclose or run the risk of having the arrest and search held illegal.[211]

North Carolina

In *State v. Boles*,[212] the North Carolina Supreme Court held that the refusal of the trial court to compel a state's witness to disclose the name of a confidential informer who accompained him in purchasing intoxicating liquor from the defendant was not error, when at the time the witnesses' testimony was uncontradicted and nothing ap-

[207] *Id.* at 453, 191 N.E. 2d at 267.

[208] For an analysis of the *McShann* decision see *supra* notes 129 through 136 and accompanying text.

[209] The dissenting judge in *Coffey* drew the necessary distinction. He commented as follows: "In the case before us, a showing of probable cause necessarily depended in part upon the information furnished by the unknown informer. . . . It may well be that the proof of the defendant's guilt is clear but that does not decide this appeal, for, as the court emphasized in the Roviaro case 'fundamental requirements of fairness' are involved." 12 N.Y. 2d at 455, 191 N.E. 2d at 269.

Coffey subsequently proceeded by way of the federal judicial system, petitioning the federal district court for a writ of habeas corpus. The district court, in granting Coffey's petition, agreed with the dissenting judge's decision that "a showing of probable cause necessarily depended in part on the information furnished by the unknown informer." The court stated that "upon all the circumstances disclosed by this record, the conclusion is compelled that the privilege exercised by the State in withholding the identity of the informer deprived the petitioner of his constitutional right to a fair hearing on the issue of probable cause." 234 F.Supp. 543, 552 (S.D.N.Y. 1964). On appeal by the State to the Court of Appeals, the district court's judgment was reversed, and the writ denied. 344 F.2d 625 (2d Cir. 1965). For a discussion of the Court of Appeals opinion, and of the due process questions posed, see *supra* notes 117 through 122 and accompany text.

[210] 15 N.Y. 2d 86, 204 N.E. 2d 188 (1965).

[211] *Id.* at 93, 204 N.E. 2d at 194.

[212] 246 N.C. 83, 97 S.E. 2d 476 (1957).

peared in evidence concerning the informer except the fact that he was present when the witness made the purchase. After the prosecution rested, the defendant took the stand and denied the sale, claiming he was not even home at the time of the alleged sale. He did not renew his request for the informer's identity. The court stated that "had the defendant, in light of this conflict, requested the name of the confidential informer as a possible defense witness, a more serious question would have been presented. . . .The propriety of disclosing the identity of an informer must depend on the circumstances of the case and at what stage of the proceedings the request is made."[213] The court held that at the stage of the trial when disclosure was requested the defendant had not made a sufficient showing to require disclosure.[214]

Ohio

In *State v. Beck*,[215] on information given to the police by an informer, the defendant's car was stopped and the defendant was searched. This preliminary search revealed nothing, but the defendant was arrested and taken to the police station. At the police station, and after a more thorough examination of the defendant's clothing, illegal clearing house slips were discovered. These slips formed the basis for the charge against him and his subsequent conviction.

On appeal, the Ohio Supreme Court held that there was probable cause for the defendant's arrest based upon the information supplied by the informer, coupled with the arresting police officer's knowledge of the defendant's prior history. In failing to draw the necessary distinction between the informer privilege on the trial of the merits, as distinguished from disclosure to test probable cause, the court, in refusing disclosure, commented:

> Only in an instance where an informer's identity would be beneficial and helpful to a defendant is there any basis for requiring disclosure. . . .The revelation of the name of the informer and the information supplied by him would not alter the fact of defendant's guilt. And a mere desire to test the credibility and reliability of the informer is hardly a compelling consideration in the circumstances narrated.[216]

[213] *Id.* at 85, 97 S.E. 2d at 477.
[214] Compare *Boles* with People v. Laird, *supra* note 187.
[215] 175 Ohio St. 73, 191 N.E. 2d 825 (1963), *reversed on other grounds*, 379 U.S. 89 (1965).
[216] *Id.* at 77, 191 N.E. 2d at 828.

South Dakota

In *State v. Martin*,[217] a prosecution for unlawful transportation of intoxicating liquor, the trial court refused to have the witness disclose the name of the person who told him where the liquor could be bought. The South Dakota Supreme Court sustained the trial court stating that they were unable to see in what manner the source of information would have a bearing on the question of whether or not the defendant unlawfully transported the liquor, i.e. the defendant's guilt or innocence.

Tennessee

Tennessee has had occasion to deal with the informer privilege in the probable cause area, but the state's decisions appear to be in conflict. In *Smith v. State*,[218] the police officers testified that they had searched the defendant's car without a warrant and solely upon information received by an officer from an informer that the defendant was bringing whiskey into a named place on the afternoon in question. The Supreme Court of Tennessee held:

> [W]hen an officer seeks to justify an arrest upon a charge made upon reasonable cause, the officer should be required to reveal the identity of the person making the charge as well as the nature of the charge. The Court has to pass upon the officer's justification, and that justification is open to impeachment. A defendant should not be bound by the officer's statement that a charge had been made, and, unless the source of the charge is ascertained, neither its good faith nor reality could well be challenged. An unscrupulous officer, upon a fictitious story of a 'charge made', might vindicate any arrest, however unlawful, if there could be no further inquiry.[219]

The authority of this decision, however, is seriously impaired by its criticism in *Simmons v. State*.[220] In *Simmons*, a highway patrolman had, upon information and without a warrant, stopped and searched the defendant's automobile and found therein some whiskey. On the trial for the unlawful possession of whiskey, and in the absence of a jury, the patrolman testified that a short time before he stopped the defendant's car, an informer told him that a certain automobile,

[217] 55 S.D. 594, 227 N.W. 66 (1929).
[218] 169 Tenn. 633, 90 S.W. 2d 523 (1936).
[219] *Id.* at 637, 90 S.W. 2d at 524.
[220] 198 Tenn. 587, 281 S.W. 2d 487 (1955).

describing it, would be traveling along the highway in question (apparently transporting illegal whiskey). On appeal, the defense contended that the police officer upon request (there was a request for the informer's name at the trial) must be required by the trial court to disclose the name of the informant as part of the proof of "reasonable cause."

On the first hearing of the case, the Tennessee Supreme Court held that it was in the discretion of the trial court whether to require disclosure of the name of the informant in its determination as to whether there was "reasonable ground" for a belief that a felony was about to be committed. On petition for rehearing, it was again urged by the defense that prior opinions of the court, including *Smith*, required disclosure of the informer's name. The court declined to change its previous ruling, resting its decision on the ground that in view of the provisions of its Code—that an officer is privileged to arrest "when the person has committed a felony, though not in his presence,"—the proper rule is to the effect, "that it is a discretionary matter with the trial judge as to whether or not he requires the officer to give the name of the informant when testifying about this arrest in the absence of the jury."[221]

Texas

The informer privilege at this time appears to be absolute in Texas. In *Bridges v. State*,[222] the Court of Criminal Appeals of Texas held that "an Officer is not required to reveal the name of the person from whom he receives information upon which he bases his right to arrest or search upon probable cause."[223] In *Bridges*, police officers received information from an informant that the defendant was going to deliver heroin in a certain manner, at a certain place. The police officers went to the designated area, and upon arriving, saw the defendant place a gum wrapper in his mouth. The court held that under these circumstances the police officer had sufficient reason to believe that the defendant possessed a narcotic drug and was committing a felony in his presence. Subsequent Texas cases accept the rule enunciated in *Bridges* as absolute.[224]

In *Campbell v. State*,[225] the defendant was convicted of an unlawful sale of narcotic drugs to a police officer. The officer was introduced to the defendant by the informer, but it does not appear from the facts whether the informant was present when the alleged sale took place. The court cited *Bridges*, a probable cause situation, in holding flatly that "an officer is not required to name his informer."[226]

However, the recent decision of *Artell v. Texas*,[227] is interesting to note at least for the language used by the court. In *Artell*, a conviction for possession of a weapon, the court held that an officer who received information, later verified, from one believed a reliable informant could search without warrant. The court further commented that, "the court did not err in declining to require . . . [the officer] to name his informer. This is especially so since there is no showing that the informant took any material part in bringing about the offense, was present when it occurred or might be a material witness as to whether or not accused committed the offense."[228]

[221] *Id.* at 598, 281 S.W. 2d at 492. It was further stated that the court, in *Smith*, overlooked the provisions in the Code referred to in the text, and that the *Smith* decision was written by a court consisting of different personnel from that now.

But, only one year prior, the court in Shields v. State, 197 Tenn. 83, 270 S.W. 2d 367 (1954), apparently concurred in the *Smith* opinion. The question in *Shields* was unique, in that a police officer, as defendant in a criminal trial, tried to defend his firing of a pistol, shot into an automobile, on the theory that he had information that the automobile owner was transporting illegal whiskey [a felony in Tennessee]. The State objected to the officer's telling what information he received to justify his belief that the automobile contained illegal whiskey until he disclosed the name of the informant. The trial court sustained the State's objection, requiring disclosure of the informant prior to permitting the defendant detailing the facts leading up to the alleged offense. This ruling was affirmed by the Supreme Court, holding that the question was controlled by the ruling in *Smith*.

[222] 166 Tex. Cr. 556, 316 S.W. 2d 757 (1958).

[223] *Id.* at 559, 316 S.W. 2d at 760.

[224] Sikes v. State, 169 Tex. Cr. 443, 334 S.W. 2d 440 (1960); Arredondo v. State, 168 Tex. Cr. 110, 324 S.W. 2d 217 (1959).

[225] 168 Tex. Crim. 520, 329 S.W. 2d 875 (1959).

[226] *Id.* at 521, 329 S.W. 2d at 877. *Cf.* Brown v. State, 135 Tex. Crim. 394, 120 S.W. 2d 1057 (1938). In *Brown*, a prosecution for the sale of whiskey in a dry area, the court upheld the trial court's refusal to require the state's witness [who worked for the State Liquor Control Board] to disclose the identity of the party who accompanied the witness at the time the witness made a purchase of whiskey from the accused. The court held that the accompanying party was merely a person who pointed out to the witness where liquor could be found, and could see no benefit from divulging his name.

[227] 372 S.W. 2d 944 (1963), *cert. denied*, 375 U.S. 951 (1963).

[228] 372 S.W. 2d at 945. See Phillips v. State, 168 Tex. Cr. 463, 328 S.W. 2d 873 (1959), *cert. denied*, 361 U.S. 839 (1961), where the court held that a police officer is not required to disclose the name of an allegedly reliable informer, upon whose information the officer relies in his affidavit for a search warrant.

Virginia

Webb v. Commonwealth,[229] was a prosecution for a violation of the state's prohibition act. The Virginia Supreme Court upheld, on public policy considerations, the trial court's refusal to compel the arresting officer to disclose the name of the informant who gave him information which led to the issuance of a search warrant to search the outbuilding of the accused. It appears, however, that the legality of the search was never in issue.

Washington

In Washington, the informer privilege, and its disclosure aspects, both in the probable cause and trial of the merits area, appear to be largely discretionary with the trial judge. The latest Washington Supreme Court ruling, *State v. Driscoll*,[230] a prosecution for burglary, held that the trial court did not err in refusing to require a witness to disclose the identity of an alleged police informer, where, at the time of the request and ruling thereon, the defendant had not advised the court of his proposed defense of entrapment or otherwise enlighten the court as to the materiality or relevancy of the desired disclosure. The court adopted the proposition that the accused is required at the time that he seeks disclosure to show that the circumstances justify an exception to the privilege.

The *Driscoll* decision is in accord with an earlier ruling of the Washington Supreme Court, *State v. Hull*.[231] *Hull* was also a prosecution for burglary, the defense being entrapment. The court held that whether or not disclosure would be required is largely discretionary with the trial judge, and its ruling will not ordinarily be disturbed.

The earliest informer privilege case, *State v. Kittle*,[232] was an appeal from a conviction for unlawful possession of liquor, the legality of the search being the prime issue. The court pointed out that the evidence showed reasonable cause for the arrest. The court held that the reputation of the defendant, the information given to the sheriff, and the entry of the defendant into the premises from a moving vehicle at night carrying a sack, all tended to support the view that a crime was committed in the officer's presence. The court concluded that the trial court did not abuse its discretion in refusing to require the sheriff to disclose the source of information upon which he acted since the source was wholly immaterial to the issue involved.

[229] 137 Va. 833, 120 S.E. 155 (1923).
[230] 61 W.2d 533, 379 P.2d 206 (1963).
[231] 189 Wash. 174, 64 P.2d 83 (1937).
[232] 137 Wash. 173, 241 P. 962 (1926).

West Virginia

In *State v. Paun*,[233] the defendant was convicted of unlawfully selling liquor to an officer. The explanation given by the officer for attempting to purchase liquor from the defendant was that he had information of whiskey being sold in the pool room. This statement was the only connection between the informer and the transaction charged. The West Virginia Supreme Court of Appeals held that the defendant could not complain that he was not permitted to cross-examine the officer as to his source of information since "the proper execution of the law in detecting criminals ordinarily forbids requiring officers to disclose informants of crime. . . . No reason appears for taking this case out of the general rule."[234]

Conclusion

Any defense of the informer privilege must unquestionably accept the view that the informant is vital in society's constant effort to combat crime. Once this view is accepted, the assured anonymity of the informant appears as the only effective method of preserving the informant system and of protecting those individuals who have participated in the process.

But, at times, fundamental concepts of fairness may necessitate the disclosure of the informant. The principal pronouncement in *Roviaro*, that the informer privilege is not absolute but is subject to a balancing test, has met with begrudging acceptance. This dissatisfaction has gone far in confusing and disregarding the difference between the standards applicable when the informer privilege is invoked on guilt or innocence issues, as distinguished from when probable cause is the factor to be determined. There is a large distinction between the two things (guilt and probable cause) as well as a difference between the rules of evidence required to establish them.

The principle guiding disclosure at trial should depend upon the significance of the informant's testimony as bearing upon the accused's guilt or innocence. The fact that an informant is a participant in the crime charged should be only one

[233] 109 W.Va. 606, 155 S.E. 656 (1930).
[234] *Id.* at 608, 155 S.E. at 657.

relevant factor in this determination. More particularly, the informer privilege should yield where the informant's identity is so essential to the accused's defense as to outweigh the public interest involved in protecting his identity.

There is no tidy formula for determining when the privilege must yield when probable cause is in issue. Clearly, however, if probable cause exists independent of the confidential communication, there is no need to disclose the informant's identity, for in such a case his identity is immaterial. The clue to the problem, when the confidential communication is a necessary ingredient of probable cause, may lie in the purpose for which the defense seeks disclosure. Aside from the tactical reason of hoping that the Government will dismiss the charge rather than disclose the informant, the defendant may seek disclosure for any of three purposes.

(1) To test the existence of the informant.
(2) To ascertain whether the information given to the police officer was materially different than that sworn to by the officer either in his affidavit for a warrant or at the hearing to suppress.
(3) To determine if the informant is reliable.

The first and second purpose involve the credibility of the officer, and whether he has misrepresented to the court either the existence of the informant, or the recitation of the facts the informant has told him. It would seem sufficient to satisfy these purposes that a *judicial* officer has passed upon the credibility of the *police* officer. If the magistrate doubts the officer's credibility he may require that the informant be identified or even produced.

The third purpose for which a defendant may seek disclosure presents a more difficult but not insurmountable problem. Certainly, probable cause cannot be satisfied on the mere naked conclusionary statement by the officer that the informant was reliable. The officer must disclose some of the underlying factors which prompted him to conclude that the informant was reliable and his information credible. The Government should be required to disclose enough of these underlying factors so as to satisfy the magistrate, that based upon the evidence produced in open court, (such evidence being subject to proper examination) the information received was from a reliable source. If these standards are accepted, the benefit the public derives from the informer privilege can be maintained without significant diminution of the fourth amendment.