

## The Present Extent Of The Informer Privilege - Walker v. United States

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## The Present Extent Of The Informer Privilege

### *Walker v. United States*<sup>1</sup>

Defendants were convicted of illegal possession of narcotics, discovered by the police when they executed a search warrant. At the hearing on the motion to suppress this evidence, defendants contended that the search warrant was invalid. The affidavit for the warrant had stated that the affiant had been told by two previously reliable informers that defendants were selling heroin.<sup>2</sup> It stated further that another detective had informed the affiant that for a week he had observed known drug addicts entering and leaving defendants' apartment building. The defendants argued that since the affidavit neither identified the informants nor stated the basis for the belief in their reliability, it did not show probable cause to believe that defendants were committing a criminal act and was an insufficient basis for the issuance of the search warrant.<sup>3</sup> The trial judge refused to require disclosure of the informants' identities and, when the defense asked whether any of them were drug addicts, said that he would not hear any evidence at all concerning the reliability of the informers. He then upheld the validity of the search warrant. The United States Court of Appeals found that the stories of the informants were corroborated by the detective's observations and affirmed the trial court, stating that "reliance may be placed on unidentified informants, 'so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge'."<sup>4</sup> The court said that since the defendants' request for the informers' identities was based on an erroneous belief that the evidence of probable cause consisted *entirely* of the statements of the three informers, they did not need to decide the issue of whether the trial court erred in denying disclosure.

On the court's denial of a rehearing, Judge Wright, joined by Chief Judge Bazelon, dissented. He took issue with the trial court's categorical refusal to permit the defendants' counsel to question the affiant as to characteristics of the informers which might have shown that they were unreliable. He felt that even though a trial judge may decide that the informers should remain anonymous, "the defendant would nevertheless have the right to test the police officer's representations in the affidavit, including the asserted reliability of the unnamed informant."<sup>5</sup>

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1. 327 F.2d 597 (D.C. Cir. 1963).

2. The affidavit also stated that one of the informants had made purchases of narcotics from the defendants throughout the preceding month, with one purchase being made on the very day the warrant was issued. This informant had, furthermore, identified the defendants from police photographs.

3. The defendants were relying on Rule 41(e) of the Federal Rules of Criminal Procedure. This rule permits as a basis for a motion to suppress that "there was not probable cause for believing the existence of the grounds on which the warrant was issued."

4. 327 F.2d at 598. The court was quoting from *Jones v. United States*, 362 U.S. 257, 269 (1960).

5. 327 F.2d at 601.

This case presents two questions for discussion. First, under what circumstances should full disclosure of the identity of an informer be given to the defendants? Secondly, in cases where such disclosure is not warranted, to what extent can the defendant ask questions about the informer which would not directly reveal his identity but might cast light on his alleged reliability?

Under the laws of evidence, the prosecution may invoke the informer privilege and refuse to disclose the identity of persons who have supplied law enforcement officers with information concerning the defendant's criminal activities.<sup>6</sup> The privilege is based on public policy.<sup>7</sup> Every citizen has a duty to communicate to law enforcement officers any knowledge he may have regarding a violation of the law.<sup>8</sup> If disclosure of the identity of the informer could be required, persons who might otherwise become informers would certainly hesitate to do so, in view of the prospect of retaliation by the accused offender or his confederates.<sup>9</sup> Since the use of informers is vital in law enforcement, especially in areas difficult to detect, such as narcotics, gambling, prostitution, and liquor violations, it is of the highest public interest to endeavor to keep open this channel of communication.<sup>10</sup> As Professor McCormick has stated, "Informers are shy and timorous folk, and if their names were subject to be readily revealed, this source of information would be almost cut off."<sup>11</sup>

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6. *Roviaro v. United States*, 353 U.S. 53, 59 (1957); *McCoy v. State*, 216 Md. 332, 336-37, 140 A.2d 689 (1958), *cert. denied*, 358 U.S. 853 (1958). Generally, the privilege may not be applied to conceal the contents of the informer's communication unless its disclosure would reveal the informer's identity. See, e.g., *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221 (1950); *Pihl v. Morris*, 319 Mass. 577, 66 N.E.2d 804, 806 (1946); 8 WIGMORE, EVIDENCE § 2374(1) (M'Naghten rev. ed. 1961); MODEL CODE OF EVIDENCE, comments to rule 230 (1942). *Contra*, *People v. Roban*, 45 N.Y.S.2d 213, 216 (Magis. Ct. 1943). Also, the privilege does not apply to all public officials but only to those who have a responsibility to investigate or to prevent public wrongs. It may, however, include any administrative officials who have a duty of inspection or law enforcement in their particular areas. 8 WIGMORE, *supra* § 2374(3).

7. For a summary of the early history of the informer privilege, see *Worthington v. Scribner*, 109 Mass. 487 (1872).

8. *In re Quarles & Butler*, 158 U.S. 532, 535 (1895); *Vogel v. Gruaz*, 110 U.S. 311, 316 (1884). Although usually this is only a moral duty, under the common law crime of misprision of felony a person was guilty if he knew "of the commission of a felony and who the offender was [but did not] take the proper steps to prosecute the felon with all possible expedition." *State v. Biddle*, 32 Del. 401, 124 Atl. 804, 805 (1923). However, misprision of felony has become practically obsolete as a substantive offense. *State v. Graham*, 190 La. 669, 182 So. 711, 714 (1938).

9. For a striking example of what can happen to an informer whose identity has been disclosed, see *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958). In that case, the informer, a public-spirited citizen with no underworld connections, was shot and killed after he had supplied information to the police which led to the capture of a notorious criminal, Willie Sutton.

10. *Harrington v. State*, 110 So. 2d 495, 497 (Fla. App. 1959), *appeal dismissed*, 113 So. 2d 231 (Fla. 1959); *People v. McShann*, 50 Cal. 2d 802, 330 P.2d 33, 35 (1958); *Roviaro v. United States*, 353 U.S. 53, 66 (1957). See also the dissenting opinion of Justice Shenk in *People v. Durazo*, 52 Cal. 2d 354, 340 P.2d 594, 597 (1959), in which he states that since the informer privilege was weakened in California, "the use of informers [in detecting violations of the narcotics laws] has been almost eliminated and law enforcement in this area has become comparatively ineffective." For the views of the police regarding the value of informers, see HARNEY & GROSS, *THE INFORMER IN LAW ENFORCEMENT* 4 (1960).

11. MCCORMICK, EVIDENCE § 148 (1954).

There are, however, times when the public interest in protecting the informer must yield to a higher public interest.<sup>12</sup> The prosecution has a duty to see that justice is done<sup>13</sup> and may not invoke the privilege to deprive the accused of information "relevant and helpful" to his defense or "essential to a fair determination of a cause."<sup>14</sup> This limitation on the informer privilege is recognized in Maryland,<sup>15</sup> as well as in numerous other states.<sup>16</sup> The test for determining whether disclosure is required was set out by the Supreme Court in *Roviaro v. United States*:

"The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. 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."<sup>17</sup>

The *Roviaro* "balancing" test has been given great weight in most state courts.<sup>18</sup>

Since information received from informers frequently leads to a search, either by warrant or pursuant to arrest, disclosure of the identity of the informer is often important in determining whether the search was lawful and the evidence obtained admissible. The question of the identity of the informer becomes particularly important in view of the fact that informers themselves are often underworld characters, and they are frequently paid for their information.<sup>19</sup> "Without the identity of the informer, the person investigated or accused stands helpless. The prejudices, the credibility, the passions, the perjury of the informer

12. "The rule is one of policy which will be followed unless it conflicts with a rule of justice." 3 WHARTON, CRIMINAL EVIDENCE § 795 (12th ed. 1955).

13. *United States v. Reynolds*, 345 U.S. 1, 12 (1953).

14. *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). See generally Annot., 76 A.L.R.2d 262, 282-85 (1961). Generally the courts have held that the word "identity" includes more than the informer's "mere name if that be insufficient to identify and enable the defense to locate him, limited of course to pertinent information in the possession of the prosecution or its witness." *People v. Diaz*, 174 Cal. App. 2d 799, 345 P.2d 370, 372 (1959); see also 8 WIGMORE, *op. cit. supra* note 6, § 2374. However, the prosecution usually is not under a duty to produce the informer in court. See, *e.g.*, *United States v. Cimino*, 321 F.2d 509, 512 (2d Cir. 1963), *cert. denied*, 375 U.S. 974 (1964); *Eberhart v. United States*, 262 F.2d 421, 422 (9th Cir. 1958); *People v. Escoto*, 185 Cal. App. 2d 599, 8 Cal Rptr. 488, 490 (1960). *Cf. United States v. Rosario*, 327 F.2d 561, 564 (2d Cir. 1964) and *United States v. Cimino*, 321 F.2d 509, 514 (2d Cir. 1963) (separate opinion), *cert. denied*, 375 U.S. 974 (1964).

15. *Drouin v. State*, 222 Md. 271, 280, 160 A.2d 85 (1960). "When the name of the person from whom a police officer has received certain information is material to the issue it cannot be withheld, but, if it be immaterial the courts cannot compel its disclosure."

16. See, *e.g.*, *State v. Freeman*, 245 La. 665, 160 So. 2d 571, 574 (1964); *Artell v. State*, ... Tex. Crim. ... , 372 S.W.2d 944, 949 (1963), *cert. denied*, 375 U.S. 951 (1963); *State v. Bouchelle*, 122 W.Va. 498, 11 S.E.2d 119, 120 (1940); N.J. STAT. ANN. 2A:84A-23 (Supp. 1963).

17. 353 U.S. 53, 62 (1957).

18. Annot., 76 A.L.R.2d 262, 269-70 (1961).

19. *State v. Edwards*, 317 S.W.2d 441, 451-52 (Mo. 1958) (separate opinion). In Maryland it is forbidden by statute to pay a "portion of any fine, penalty or forfeiture to any informer." 4 MD. CODE ANN. art. 38, § 3 (1957).

are never known. If they were exposed, the whole charge might wither under the cross-examination."<sup>20</sup> Nevertheless, the majority of appellate courts have been reluctant to require full disclosure.<sup>21</sup>

In cases where no warrant was issued and the search was pursuant to a legal arrest, most courts, including Maryland,<sup>22</sup> leave the matter of requiring disclosure to the discretion of the trial judge.<sup>23</sup> These courts have set forth broad guidelines within which the trial judge is to exercise his discretion.<sup>24</sup> However, where the prosecution relies *solely* on the information of the informer in order to satisfy the requirements of probable cause<sup>25</sup> or where the informer is an actual participant or

20. *United States v. Nugent*, 346 U.S. 1, 14 (1953). See also *Gilmore v. United States*, 256 F.2d 565, 567 (5th Cir. 1958).

21. Once a court decides that a particular set of facts warrants a disclosure of the identity of the informer, other problems still remain. For one thing in some jurisdictions the court must determine whether the defendant already knows the identity of the informer. See generally 76 A.L.R.2d 262, 291-95 (1961). Many courts feel that the defendant will not be prejudiced when he already has knowledge of the informer's identity, and therefore, they will not require disclosure. See, e.g., *United States v. Rosario*, 327 F.2d 561, 563-64 (2d Cir. 1964); *United States v. Gernie*, 252 F.2d 664, 669 (2d Cir.), *cert. denied*, 356 U.S. 968 (1958); *People v. McShann*, 50 Cal. 2d 802, 330 P.2d 33, 35-36 (1958). This is the view of the Maryland court. *McCoy v. State*, 216 Md. 332, 337-38, 140 A.2d 689 (1958), *cert. denied*, 358 U.S. 853 (1958). Other courts are of the opinion that "once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable." *Roviaro v. United States*, 353 U.S. 53, 60 (1957); *accord*, *Jencks v. United States*, 357 U.S. 657, 675 (1957); *Crosby v. State*, 90 Ga. App. 63, 82 S.E.2d 38, 40 (1954); *Pihl v. Morris*, 319 Mass. 577, 66 N.E.2d 804, 806 (1946). See also MODEL CODE OF EVIDENCE rule 230 (1942); 8 WIGMORE, *op. cit. supra* note 6, § 2374(2). The rationale for this view is that the informer privilege would no longer protect the informer since his identity is already known and, therefore, there is no longer any reason to conceal any evidence the informer might be able to give. But an "identification in open court would publicly 'brand' the informer and subject him to an increased danger of retaliation." 46 CALIF. L. REV. 467, 470 (1958). *United States v. Cimino*, 321 F.2d 509, 517 (2d Cir. 1963) (separate opinion), *cert. denied*, 375 U.S. 974 (1964).

22. *Drouin v. State*, 222 Md. 271, 286, 160 A.2d 85 (1960).

23. See, e.g., *State v. Burnett*, 42 N.J. 377, 201 A.2d 39, 45 (1964); *State v. Edwards*, 317 S.W.2d 441, 447 (Mo. 1958); *Dixon v. State*, 39 Ala. App. 575, 105 So. 2d 354, 357 (1958); *Simmons v. State*, 198 Tenn. 587, 281 S.W.2d 487, 489 (1955). These courts follow the advice given in *Roviaro* that "no fixed rule with respect to disclosure is justifiable." 353 U.S. 52, 62 (1957). See also Comment, 11 HASTINGS L.J. 54, 59 (1959).

24. According to *Simmons*, *supra* note 23, at 489, a trial judge may require disclosure "if it is necessary to do so to get at the reasonableness of [the police officer's] belief that a felony is about to be committed." In *Burnett*, *supra* note 23, at 45, the court said that a trial judge may require it "in order to decide whether the officer is a believable witness." The guideline set forth in *Edwards*, *supra* note 23, at 447, was that disclosure may be required if it "is essential to assure a fair determination of the issue in any given criminal case. . . ." In Maryland, the court said in *Drouin v. State*, 222 Md. 271, 286, 160 A.2d 85 (1960), that "if the name of the informer is useful evidence to vindicate the innocence of the accused, lessens the risk of false testimony or is essential to a proper disposition of the case, disclosure should be compelled. . . ."

25. *Roviaro v. United States*, 353 U.S. 53, 61 (1957); *Sher v. United States*, 305 U.S. 251, 254 (1938); *United States v. Santiago*, 327 F.2d 573, 575 (2d Cir. 1964); *People v. Coffey*, 12 N.Y.2d 443, 191 N.E.2d 263, 240 N.Y.S.2d 721, 727 (1963), *cert. denied*, 376 U.S. 916 (1964). See also 23 GA. B.J. 279, 281 (1960), and 47 CALIF. L. REV. 395, 397 (1959). However, the courts are divided as to whether disclosure should be required when only a part of the grounds relied on for probable cause was the informer's information. *McCORMICK*, *op. cit. supra* note 11, § 148 n.11. See, e.g., *State v. Beck*, 175 Ohio St. 73, 191 N.E.2d 825, 828 (1963), *cert. granted*, 376 U.S. 905 (1964).

decoy in the criminal transaction of which the defendant is accused,<sup>26</sup> disclosure of the identity of the informer will be required.

A few courts, however, have held that in "no warrant" cases the informer's identity must always be disclosed whenever the prosecution relies on an informer's information to establish probable cause.<sup>27</sup> The reasons given by these courts are that it is desirable to induce the police to make "independent investigations to verify information given by an informer or to uncover other facts that establish probable cause to make an arrest and search,"<sup>28</sup> and that without disclosure the policeman would be the sole judge of whether he has probable cause, instead

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26. *Roviaro v. United States*, *supra* note 25, at 64-65; *State v. Redding*, 357 S.W.2d 103, 108 (Mo. 1962); *Dixon v. State*, 39 Ala. App. 575, 105 So. 2d 354, 357 (1958); *People v. McShann*, 50 Cal. 2d 802, 330 P.2d 33 (1958). See also 46 CALIF. L. REV. 467 (1958) and 20 GA. B.J. 562 (1958). Maryland adopted this rule in *McCoy v. State*, 216 Md. 332, 337, 140 A.2d 689 (1958), *cert. denied*, 358 U.S. 853 (1958), saying that disclosure is required "whenever the informer was an integral part of the illegal transaction."

The courts however seem to be very reluctant to extend the requirement of disclosure beyond the precise facts of *Roviaro*. See, *e.g.*, *United States v. Whiting*, 311 F.2d 191, 196 (4th Cir. 1962), *cert. denied*, 372 U.S. 935 (1963); *Lee v. State*, 235 Md. 301, 305, 201 A.2d 502, 504-05 (1964); *State v. Hardy*, 114 So. 2d 344, 345 (Fla. App. 1959); *People v. Mack*, 12 Ill. 2d 151, 145 N.E.2d 609, 615-16 (1957). Even in cases where the informer, although not directly participating, was an eyewitness to the transaction, many courts will not require disclosure. See, *e.g.*, *Miller v. United States*, 273 F.2d 279, 281 (5th Cir. 1959), *cert. denied*, 362 U.S. 928 (1960); *Lee v. State*, 235 Md. 301, 305, 201 A.2d 502, 504-05 (1964); *State v. Boles*, 246 N.C. 83, 97 S.E.2d 476, 477 (1957); *contra*, *People v. McShann*, 50 Cal. 2d 802, 330 P.2d 33, 36 (1958), and *People v. Williams*, 51 Cal. 2d 355, 333 P.2d 19, 21 (1958). Some courts have even been reluctant to require disclosure when there was a possibility of entrapment. *State v. Dolce*, 41 N.J. 422, 197 A.2d 185, 192 (1964) and *Watson v. State*, 382 P.2d 449, 454-55 (Okla. Crim. 1962). This reluctance to compel disclosure appears to have spread even to the Supreme Court where, in the recent case of *Rugendorf v. United States*, 376 U.S. 528 (1964), the majority refused defendant's demand because, in the words of a very strong dissent by Justice Douglas (joined by three other justices), "The proper talismanic words were not used when the request for the informant's name was made." 376 U.S. at 541. The majority rejected defendant's contention that he was entitled to disclosure in order to defend himself on the merits. They said that this claim was not properly raised in the trial court, because of the following language used by the defendant in his motion for a new trial: "The court erred in overruling the defendant's motion for the government to reveal the names of the informers when such information was necessary to the constitutional rights of the defendant in *pursuing his motion to suppress the evidence.*" (Emphasis added by the Court.) The majority said that these words indicated that disclosure was sought solely in support of defendant's motion to suppress and not on the merits; therefore, he could not obtain disclosure even though this was a case where the informer's testimony would clearly have been "relevant and helpful to the defense."

27. See *Priestly v. Superior Court*, 50 Cal. 2d 812, 330 P.2d 39, 43 (1958) (a 4-3 decision) and *Ford v. City of Jackson*, 153 Miss. 616, 121 So. 278, 279 (1929). In Texas, on the other hand, it appears that a police officer is "not required to reveal the names of a person from whom he receives information upon which he bases his right to arrest or search upon probable cause." *Bridges v. State*, 166 Tex. Crim. 556, 316 S.W.2d 757, 760 (1958). *But cf.* *Arrendondo v. State*, 169 Tex. Crim. 110, 324 S.W.2d 217, 218 (1958), in which the court cited the *Bridges* case and then said, "attention also should be directed to the fact that the officers did not arrest and search appellant because of what they had learned from their informant. Such information was responsible only for their being where they were able to see a felony being committed which itself authorized the arrest."

28. *Priestly v. Superior Court*, *supra* note 27, at 43. *But cf.* *State v. Burnett*, 42 N.J. 377, 201 A.2d 39, 44 (1964), where the court said that this "approach would sharpen investigatorial techniques, but we doubt that there would be enough talent and time to cope with crime upon that basis."

of the court properly determining that issue.<sup>29</sup> Furthermore, when the informer's tip was completely uncorroborated, the informer himself would in effect have actually been the sole judge of whether there was probable cause.<sup>30</sup>

When there is a warrant, most courts leave the matter of disclosure completely to the discretion of the magistrate issuing the warrant.<sup>31</sup> But, when the informer's information is the sole basis for establishing probable cause, the magistrate may not issue the warrant without requiring disclosure of his identity.<sup>32</sup> The reason for entrusting the matter to the discretion of the magistrate is that in these cases, there was supervision by an impartial judicial authority prior to the arrest.<sup>33</sup> However, a few courts have held that the affidavit for a search warrant must disclose the identity of the informers.<sup>34</sup>

29. *United States v. Robinson*, 325 F.2d 391, 393 (2d Cir. 1963); *Priestly v. Superior Court*, *ibid.*

30. See *Costello v. United States*, 298 F.2d 99, 101-02 (9th Cir. 1962), *cert. denied*, 376 U.S. 930 (1964), and *Jones v. United States*, 266 F.2d 924, 927-28 (D.C. Cir. 1959) (separate opinion by Bazelon, J.).

31. See, *e.g.*, *State v. Burnett*, 42 N.J. 377, 201 A.2d 39, 45 (1964); *People v. Keener*, 55 Cal. 2d 714, 12 Cal. Rptr. 859, 361 P.2d 587, 592 (1961); *Simmons v. State*, 198 Tenn. 587, 281 S.W.2d 487, 491 (1955).

32. *Jones v. United States*, 362 U.S. 257, 271-72 (1960); *People v. Williams*, 27 Ill. 2d 542, 190 N.E.2d 303 (1963). The Maryland court has said that a magistrate may not issue a warrant when it appears that the informer was unknown even to the police. *Kapler v. State*, 194 Md. 580, 588, 71 A.2d 860, 863 (1950); *contra*, *People v. Prewitt*, 52 Cal. 2d 330, 341 P.2d 1, 4-5 (1959).

33. *United States v. Robinson*, 325 F.2d 391, 394 (2d Cir. 1963).

34. *Emberton v. Commonwealth*, 269 S.W.2d 206, 207 (Ky. 1954); *White v. State*, 47 So. 2d 863, 864 (Fla. 1950). See the dissenting opinion of Justice Douglas in *Jones v. United States*, 362 U.S. 257, 273 (1960), which says, "The magistrate should know the evidence on which the police propose to act. Unless that is the requirement, unless the magistrate makes his independent judgment on all the known facts, then he tends to become merely the tool of police interests." At least one court has held that if the informer was the one who signed the affidavit, the trial judge should compel his disclosure. *Baker v. State*, 150 So. 2d 729, 730 (Fla. App. 1963); *contra*, *People v. Mack*, 12 Ill. 2d 151, 145 N.E.2d 609, 615 (1957).

A problem in this area is whether the defendant should be permitted to obtain disclosure prior to the trial. Here, there is a conflict of authority. The Supreme Court held in *Roviano* that the defendant could use a bill of particulars to learn the identity of the informer. 353 U.S. 53, 65 n.15 (1957). But this holding also seems to have been given a narrow interpretation in later cases, such as *United States v. Wilson*, 20 F.R.D. 569, 571-72 (S.D. N.Y. 1957). The California court has held that disclosure should be given at the preliminary hearing, in order to "enable defendant to show that there is no reasonable cause to commit him for trial and thus to avoid the degradation and expense of a criminal trial," *Mitchell v. Superior Court*, 50 Cal. 2d 827, 330 P.2d 48, 50 (1958), and also "to obviate the necessity of a continuance during the trial to permit the defendant to locate and interview the informer." *Priestly v. Superior Court*, 50 Cal. 2d 812, 330 P.2d 39, 43 (1958). But it has also been held that communications of the informer which have been used by the prosecution in grand jury proceedings should not be disclosed. *United States v. Schneiderman*, 104 F. Supp. 405, 410 (S.D. Cal. 1952). In Maryland, the Court of Appeals has recently stated that the identity of the informer cannot be obtained by means of Rule 728 of the Maryland Rules of Procedure, which provides for the discovery of the names of all witnesses whom the State intends to call, as long as the prosecution had sufficient evidence to prove its case without having to call the informer as a witness. *Lee v. State*, 235 Md. 301, 304-05, 201 A.2d 502, 504 (1964). The court did not indicate how the trial judge is supposed to decide at the time when discovery of the identity of the informers is requested, whether the prosecution will have enough evidence at the trial to prove its case without using the informer's identity. Chief Judge Brune, in a concurring opinion, implied that use of Rule 728 should be permitted in attempts to get disclosure.

In cases where an application of the *Roviaro* "balancing" test has resolved the issue of the informer's identity in favor of anonymity, it may still be important to ascertain the informer's reliability in order to establish probable cause.<sup>35</sup> Therefore, the defense should be permitted to obtain information relating to the reliability of the informer. That information, however, should not be disclosed if it would aid in revealing the informer's identity and subject him to reprisals.

Two cases in which such questioning was permitted were *McCoy v. State*<sup>36</sup> and *United States v. Conforti*.<sup>37</sup> In these cases police witnesses were asked whether the informer had ever been arrested, whether he was a narcotics addict and whether he had ever previously done any work for the police. All of these questions were relevant in determining the reliability of the informer. In addition, questions were allowed in these cases as to the informer's sex, his whereabouts, and his occupation. However, these cases can be distinguished from the principal case since the informers were actual participants in the criminal transactions of which the defendants were charged, and even disclosure of their identities would have been allowed if the defense had requested it. In *State v. Edwards*,<sup>38</sup> where the informer was not a participant, full interrogation was allowed as to his sex, habits, and age.

In the principal case, the trial judge was within the established bounds in deciding against disclosure of the informers' identities, but his categorical refusal to allow any questions about the informer was without foundation. It appears that no other court has been this restrictive. Perhaps the trial judge refused to allow these questions because he feared that the answers would disclose the informers' identities, leaving them prey to retaliation by confederates of the defendants. However, the information requested by the defense, whether any of the informers were drug addicts,<sup>39</sup> was of a general nature and unlikely to jeopardize the informant. The danger, if any, of decreasing the informers' protection should have been outweighed by the possibility that the informers might have been proven unreliable and their information insufficient to establish probable cause.

*Theodore B. Cornblatt*

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35. *Costello v. United States*, 298 F.2d 99, 101 (9th Cir. 1962), *cert. denied*, 376 U.S. 930 (1964); *United States v. Ramirez*, 279 F.2d 712, 715 (2d Cir.), *cert. denied*, 364 U.S. 850 (1960).

36. 216 Md. 332, 339, 140 A.2d 689 (1958), *cert. denied*, 358 U.S. 853 (1958).

37. 200 F.2d 365, 368 (7th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

38. 317 S.W.2d 441, 444 (Mo. 1958).

39. If the informer was an addict who had been arrested and promised immunity or a lenient sentence in return for his becoming an informer, he would be highly likely to give any information he might have, no matter how doubtful, to the police. See, e.g., *Sherman v. United States*, 356 U.S. 369, 373-74 (1958). Furthermore, if the addict had been offered money for his information, as is commonly the case, "it is to be expected that the informer will not infrequently search for shadow leads or even seek to incriminate the innocent." *Jones v. United States*, 266 F.2d 924, 928 (D.C. Cir. 1959) (separate opinion of Bazelon, J.). *Accord*, *Gilmore v. United States*, 256 F.2d 565, 567 (5th Cir. 1958). See also Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 *YALE L.J.* 1091, 1094 (1951).