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PRETRIAL DISCOVERY OF GOVERNMENT INFORMERS IN FEDERAL NARCOTICS CASES: A DEFENSE TOOL

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Most narcotics cases brought in federal court involve the use of informers by agents of the Drug Enforcement Administration. The practice is justified on the grounds that it's difficult for law enforcement officers to penetrate suspected narcotics rings without the help of informers, and also, that the experienced narcotics seller is unlikely to deal with an unfamiliar person.[1]

Informers are recruited in various ways.[2] Often, government agents will impress upon a person arrested for violation of the Controlled Substances Act[3] the seriousness of the charges and the possible penalties that could be imposed. The individual is assured that the government will request that a low bond be set and is told that his cooperation will be considered in deciding whether an indictment will be brought against him. The agents also promise to tell the sentencing judge of the defendant's cooperation. The defendant, facing the possibility that bond might be set so high as to assure his incarceration, and that a substantial penalty could be imposed upon him, will frequently agree to work for the agents. Once he does, he is released and begins to develop cases for the government. If he proves to be particularly valuable, the complaint is dismissed and he is paid for his services.[4]

Frequently, informers in narcotics cases take an active part in the transaction which results in the arrest of another.[5] They are generally involved in one of two types of cases: either the informer introduces an agent to a drug seller and arranges for a

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1. Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399 (1959).

2. Note, *Informers in Federal Narcotics Prosecutions*, 2 COLUM. J. LAW AND SOC. PROB. 47 (1966). This note describes various methods used by the government to recruit informers.

3. 21 U.S.C. §§ 841-48 (1970).

4. The fees paid to informers may be contingent upon their producing a case for the agents. *See* Annot., 13 A.L.R. FED. 905 (1972).

5. *See* BERNHEIM, DEFENSE OF NARCOTICS CASES, § 2.02 (1975); Annot., 76 A.L.R.2d 267 (1961). This article will not deal with those informers who merely provide information about violations of the law; instead, it will focus on those who are active participants in the transaction.

sale to the agent,[6] or the informer makes a purchase while the agents witness the transaction.[7] This is the "controlled sale" type of transaction. The government prefers the former arrangement (purchase by an agent), since there is a greater possibility that a motion for discovery of their informer will be granted if the informer is the purchaser. Also, when the informer is the purchaser, the government runs the risk of being compelled to call the informer as a witness.

The use of informers has long been recognized as a legitimate and necessary tool of law enforcement. However, their use is fraught with dangers and abuses.[8] The government argues that agents are not insurers of the conduct of their informers; however, agents are required to closely supervise the informers and to warn them against entrapment.[9]

THE MOTION FOR DISCOVERY

It is apparent that the defense attorney must learn as much as possible about the informer, including the extent of his participation in the offense for which the defendant is charged and his arrangement with the government. The informer should be interviewed prior to trial if at all possible. As a precautionary measure, a witness, preferably a court reporter, should always be present at such interviews.

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6. United States v. Cansler, 419 F.2d 952 (7th Cir. 1969). Here, the informer introduced the defendant to an undercover agent who then purchased heroin from the defendant. At trial, the defendant testified that he had merely negotiated with the agent on behalf of the informer and that the drugs came from the informer. The agent testified that he received the heroin from the defendant, and a surveillance agent supported that testimony.

This case illustrates why the government prefers this type of transaction over the type where the informer makes the actual purchase. At the time of trial the informer could not be located. An F.B.I. agent testified that he made several telephone calls and a general area search for the informer. The court held that since the defendant did not make a pretrial motion for the production of the informer, he was not prejudiced by his absence.

7. Sherman v. United States, 356 U.S. 369 (1958).

8. United States v. Silva, 180 F. Supp. 557 (S.D.N.Y. 1959), is an example of the abuse that can occur. The court found that the informer had introduced the defendant to the use of drugs and that when the defendant went to the informer for more drugs, the informer promised to continue his supply only if he would deliver a package of drugs. The defendant agreed, and it was the delivery of this package that resulted in his arrest.

An informer may even frame a defendant. The informer procures drugs from a third party and turns them over to agents, claiming they came from the defendant. The government tries to guard against this occurrence, but there is always this danger, especially if the informer is under pressure to make a case. *See* 3 BERNSTEIN, CRIMINAL DEFENSE TECHNIQUES, § 57.05(4) (1974).

9. Bullock v. United States, 383 F.2d 545 (5th Cir. 1967); United States v. Crim, 340 F.2d 989 (4th Cir. 1965). *See generally* Annot., 13 A.L.R. FED. 905 (1972).

The attorney must begin gathering information about the informer by questioning his client about the offense for which he has been arrested. Often in narcotics cases, the informer will have been a close friend of the defendant, and he will not want to implicate the informer by mentioning his part in the transaction, thinking he is protecting a friend.[10] Under these circumstances, the defendant is the best source from which to learn about the informer. He should be questioned carefully about the informer's address, occupation, associates, and criminal record.

If the defendant has insufficient knowledge concerning the identity of the informer, however, pretrial motions must be filed to discover his identity, address, relationship with the government, and criminal record. The government has a privilege to withhold the informer's identity,[11] but there are many exceptions and limitations to this privilege. One is that disclosure is required if the informer's identity or testimony is relevant and helpful to the defense.[12] As the defendant has the burden of showing the relevancy and importance to his case of the informer's testimony, the pretrial motion should set out with particularity those facts known at the time the motion is filed which show that the informer was involved in the transaction. These facts must be stated carefully, since either failure to show the relevancy of the informer's identity, or failure to make a specific motion for disclosure, may be considered as a waiver of the issue.[13]

Relevancy in pretrial discovery should be liberally construed,[14] but some cases have construed it quite narrowly.[15] If

10. United States v. Curry, 284 F. Supp. 458 (N.D. Ill. 1968), shows how close a defendant and an informer can be. The defendant, Curry, had known the informer, Jones, since their childhood in Mississippi. They had attended school together. When Curry moved to Chicago he became reacquainted with Jones. Curry was a frequent patron of Jones's restaurant and had purchased marijuana from Jones. Jones was able to convince Curry to secure a quantity of marijuana for an undercover narcotics agent.

11. Scher v. United States, 305 U.S. 251 (1938). The privilege is designed to protect the interest of the public in effective law enforcement. It is not designed to protect the informer.

12. Roviaro v. United States, 353 U.S. 53, 60-61 (1957). This leading case involves the disclosure of the identity of an informer. The Court recognized that under certain circumstances, disclosure of the identity of the informer prior to trial is necessary. They made it clear, however, that no fixed rule was being established and that disclosure of the identity of the informer required a balancing of the public interest in protecting the flow of information against the individual's right to prepare an adequate defense. 353 U.S. at 62.

13. *See* United States v. Norton, 504 F.2d 342, 345 (8th Cir. 1974); United States v. Conforti, 200 F.2d 365 (7th Cir. 1952).

14. ABA, *Standards Relating to Discovery and Procedure Before Trial*, § 2.1(a)(ii) (1970).

15. United States v. Norton, 504 F.2d 342 (8th Cir. 1974); United States v. Toombs, 497 F.2d 88 (5th Cir. 1974); United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973).

the government responds that the informer's identity is irrelevant, the court should be asked to examine the government's file *in camera*, and to seal the file for purposes of appeal.[16]

The government will generally reply to a motion for discovery of the informer's identity that it is in the public interest not to require his disclosure.[17] However, they must state in specific terms why that is true. They may also allege that the informer's life would be endangered by disclosure.[18] Again, in this situation, the court should be requested to examine the relevant information *in camera* to determine whether disclosure would represent a real danger to the informer.[19]

Most courts hold that the government need not disclose the name of the informer if it is already known to the defendant.[20] In those situations, the pretrial motion should specifically request that the required information be disclosed as to the individual known to be the government's informer. It should also specifically ask for the current address of the informer in order to facilitate interviewing him.[21] Such requests are critical, as the government is not responsible for producing the informer, and decisions have held that the most perfunctory search to locate him was sufficient to discharge the government of any duty.[22] It should also be pointed out in the motion that witnesses do not belong to either party and that the defendant has a right to interview all witnesses.[23]

Since *Giglio v. United States*[24] was decided, the motion for discovery may request all promises and inducements made by the government to the informer for his cooperation. In *Giglio*, the Court held that it was a denial of due process to withhold the fact that a government witness had been promised immunity.[25] Subsequent cases have also held that the government has a duty

16. MacCarthy, *Pretrial Discovery in Federal Court*, I.C.L.E. on Illinois Criminal Law, § 3b.5 (1974).
17. Roviaro v. United States, 353 U.S. 53 (1957).
18. United States v. LaBarbera, 463 F.2d 988 (7th Cir. 1972); United States v. Saletko, 452 F.2d 193 (7th Cir. 1971).
19. United States v. Varelli, 407 F.2d 735 (7th Cir. 1969).
20. Churder v. United States, 387 F.2d 825 (8th Cir. 1968); Williams v. United States, 273 F.2d 781 (9th Cir. 1959); Smith v. United States, 273 F.2d 462 (10th Cir. 1959).
21. United States v. Gentile, 495 F.2d 626 (5th Cir. 1974).
22. United States v. Escobedo, 430 F.2d 603 (7th Cir. 1970); Glass v. United States, 371 F.2d 418 (7th Cir. 1966). Both of these cases hold that it is not the government's responsibility to produce the informer. United States v. Emory, 468 F.2d 1017 (8th Cir. 1972), and United States v. Cansler, 419 F.2d 952 (7th Cir. 1969), hold that, in any event, very little would be required in the way of a search by the government in order to satisfy any obligation that could arguably be theirs to produce the informer.
23. Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966).
24. 405 U.S. 150 (1971).
25. *Id.* at 155.

to disclose their arrangements with the informer. The reasoning of several of these cases is based upon the premise that not only is it a denial of due process, but that the defendant is also deprived of his right to effective cross-examination when the government fails to disclose arrangements made with the informer.[26]

The government may respond to a motion for disclosure of promises and inducements with the argument that the defendant is not entitled to this information until the time of trial, but there is no authority to support this contention. In fact, the Federal Rules of Criminal Procedure actually contemplate such discovery prior to trial.[27] It should also be argued that the right to this information is predicated on the right of cross-examination, and that it must therefore be turned over in sufficient time for the preparation of a defense.

The motion should further request that the government produce any vouchers for the payment of an informer.[28] One district court has recently held that the failure of the government to turn over such information when the payments began simultaneously with the informer's use of drugs, was a denial of due process, and the defendant's post trial motion to dismiss was granted.[29]

The discovery motion should request the record of the informer's previous convictions. As *Brady v. Maryland*[30] requires disclosure of all evidence favorable to the defendant, it should be argued that the informer's conviction record is such evidence and is essential for the preparation of a defense.

> As to the criminal record of government witnesses, such information may well be evidence 'favorable to the accused' within the meaning of those terms as expressed in Brady v. Maryland. *See* Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed. 2d 737 (1967). The impeachment value of a prior criminal record is fully appreciated by the prosecution and its use should be available to both sides of a criminal trial.[31]

To motions for discovery of informers, the government might respond that since the prosecution does not intend to call the witness, the information need not be divulged. Or, they may offer to produce the informer at the time of trial if the defense

26. DeMarco v. United States, 415 U.S. 449 (1974); Teague v. United States, 499 F.2d 1381 (7th Cir. 1974); United States v. Barnes, 486 F.2d 776 (8th Cir. 1973).
27. FED. R. CRIM. P. 16 and 17.
28. Giglio v. United States, 405 U.S. 150 (1971).
29. United States v. Acosta, 386 F. Supp. 1072 (S.D. Fla. 1974).
30. 373 U.S. 83 (1963).
31. United States v. Leichtfuss, 331 F. Supp. 723, 736 (N.D. Ill. 1971). United States v. Eley, 335 F. Supp. 353 (N.D. Ga. 1972) and United States v. Puco, 338 F. Supp. 1252 (S.D.N.Y. 1972) required the disclosure of the criminal records of informers. *See also* 58 IOWA L. REV. 1194 (1973).

wishes to call him as its witness. This offer has convinced some courts that the defendant is not prejudiced by the failure of the government to disclose the requested information.[32] Such an arrangement is totally unsatisfactory to a defendant however. If the government does make such an offer it must be urged that the information is still needed to properly prepare an adequate defense. Merely producing the informer at trial is insufficient for such preparation.

Conclusion

The defense of a narcotics case requires careful preparation, an essential part of which is the discovery of the part played by informers, and as much background information on the informers as is possible to obtain. The informer system used by the Drug Enforcement Administration is subject to abuse. Unless the defense attorney demands full disclosure of information pertaining to informers and then utilizes the information with thorough investigations and thorough preparation for trial, persons may be convicted of crimes they have not committed.

32. United States v. Brooker, 480 F.2d 1310 (7th Cir. 1973).