UIC Law Review

Volume 8 | Issue 3 Article 3

Spring 1975

The Constitutional Rights of Criminal Defendants: The Identity of Informers, 8 J. Marshall J. Prac. & Proc. 401 (1975)

John W. Cox Jr.

THE CONSTITUTIONAL RIGHTS OF CRIMINAL DEFENDANTS: THE IDENTITY OF INFORMERS

INTRODUCTION

> The value of informants to effective law enforcement is so highly regarded that encouragement of their use, through protection of their identity, has resulted in the development of one of the few privileges accorded to the prosecution.[1]

The necessary balance between the criminal defendant's constitutional rights and the need for the free flow of information to proper law enforcement officials is a problem which has plagued judges and legal scholars for many years.[2] In recent years, Illinois has been in the forefront in the development of approaches toward dealing with this dichotomy.[3]

It is the purpose of this article to present a comprehensive survey of the status of the law of the State of Illinois concerning the prosecutorial privilege of informer identity. Toward this end, the arguments for and against this privilege will first be presented. Then the few cases which have dealt with the privilege will be discussed, extending those discussions of the privilege to other situations in which the question of informer-identity disclosure may arise.

One thought must remain foremost in the mind of the reader of this article. When the interests of society conflict with the rights of a criminal defendant, it is in the interest of society to reach an accord often defined in the form of that fleeting concept —"fundamental fairness."[4]

THESIS

It is fundamental to our system of justice that the criminal defendant know the identity of any person who provides any

1. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND PROCEDURE BEFORE TRIAL § 2.6 at 91 (1969) [hereinafter cited as the ABA STANDARDS].

2. *See, e.g.*, United States v. Garsson, 291 F. 646 (S.D.N.Y. 1923).

3. Many of the leading cases addressing the prosecutorial informer-identity privilege originated in Illinois. *See, e.g.*, McCray v. Illinois, 386 U.S. 300 (1967); Roviaro v. United States, 353 U.S. 53 (1957).

4. Mr. Justice William O. Douglas, in a lecture delivered at New York University a few years ago, lent strong support to this concept when he referred to the role of John Adams in the defense of British soldiers being tried in Boston in 1770 for having allegedly killed American soldiers in the so-called "Boston Massacre." Six were acquitted; two were convicted of manslaughter. Justice Douglas said:

> Feelings ran high. But Adams and Quincy did not hesitate [to defend the accused], Adams saying that counsel 'ought to be the very last thing that an accused Person should want in a free Country.' This was in the best tradition of our bar.

Douglas, *The Bill Of Rights Is Not Enough*, 38 N.Y.U.L. REV. 207, 216 (1963) (footnote omitted).

assistance to the prosecution in developing its case against the defendant.

This proposition has been supported by postulates ranging from nondisclosure being in the nature of punishment to full disclosure being necessary to effectuate the guarantees of the Bill of Rights. Immanuel Kant has argued that it is highly improper to punish an individual by using him as an example to further the needs of society in general.[5] To punish an individual in a manner not connected with his illegal act, solely for the benefit of society in general, is totally unjustifiable. It is submitted that the concealment of an informer's identity is such a form of punishment. Although revealing the identity of an undercover agent will result in the destruction of his utility in the future, failure to require such disclosure imposes punishment by seriously hindering the defendant in preparing for trial.[6]

Those who argue in support of total criminal discovery, encompassing the discovery of the identity of an informer, have stated that this discovery acts in the service of justice by insuring that all relevant facts are presented at trial and that no unfair surprise will occur due to nondisclosure.[7] Legal scholars believe that in light of the disadvantages facing a person accused of a crime, the ends of justice mandate such discovery.

> First, it is only fair to give an accused, who stands to lose his liberty, the same rights given to a civil defendant. Second, the prosecution has a superior investigative force that has usually begun to act before the accused has counsel or an opportunity to commence the preparation of a defense. Third, the accused has often given the state a statement or confession. Fourth, adequate investigation by the accused may be precluded by investigating officers who usually refuse to discuss the case with defense counsel. Fifth, the late start given the accused may present defense counsel with witnesses whose memory has dimmed. Sixth, scientific evidence cannot be met effectively at trial without discovery. Finally, the accused is presumed innocent and consequently, presumed to know nothing of the crime charged.[8]

The question of whether or not the identity of an informer need be revealed to the defendant in a criminal proceeding discloses a potential conflict with the guarantees of the Bill of Rights. At the pretrial stages, the fourth amendment guarantees

---

5. I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 142-44 (J. Ladd transl. 1965).

6. *See, e.g.*, Comment, *Prosecutorial Discovery Under Proposed Rule 16*, 85 HARV. L. REV. 994, 1016 (1972).

7. For an excellent discussion of the historical development of discovery in the area of criminal justice in the United States and the arguments in favor of and against total criminal discovery see Comment, *Constitutional Infirmities of the Revised Illinois Rules of Criminal Discovery*, 7 J. MAR. J. 364 (1974).

8. Zagel & Carr, *State Criminal Discovery and the New Illinois Rules*, 1971 U. ILL. L.F. 557, 560.

are asserted when an accused seeks the identity of an informer in challenging an arrest or the issuance of a search warrant. The sixth amendment rights of confrontation and compulsory process are relied on in seeking disclosure of an informant's identity, alleging that his testimony is necessary to negate the prosecution's case. For these rights to be more than mere words, an accused must have at his disposal all the tools necessary to make their assertion meaningful.

As Chief Justice John Marshall has stated:

> The right of an accused person to the process of the court to compel the attendance of witnesses seems to follow, necessarily, from the right to examine those witnesses; and, wherever the right exists, it would be reasonable that it should be accompanied with the means of rendering it effectual.[9]

The failure to reveal the identity of an informer involved in a criminal case causes the guarantees of the fourth and sixth amendments to become less than "effectual." Can a defendant obtain a fair trial when the identity of an informer who assisted the prosecution in creating its case is not disclosed to the defendant in order to enable his attorneys to ascertain whether the informer is of value to the defense? It is possible that the informer could be of value to the defense, and, in light of the existence of this possibility, a fair and meaningful trial requires disclosure of the informer's identity.

Since the informer-identity privilege is based on public policy, the advocates of the privilege have a plethora of arguments based on this policy in support of their "antithesis."

ANTITHESIS

In order to achieve effective law enforcement it is often necessary to conceal the name of an informer and such concealment does not violate any constitutional right of the criminal defendant.

Judge Learned Hand, speaking in favor of the informer-identity privilege, stated:

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense . . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.[10]

9. United States v. Burr, 25 F. Cas. 30, 32 (No. 14692d) (C.C. Va. 1807).

10. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

Many changes have occurred in the area of criminal discovery since the day Judge Hand wrote these words,[11] but the basic premise remains valid—the accused already has most of the advantages in a criminal prosecution and there is no need to give him the further advantage of permitting discovery of the identity of the informer. Moreover, the disclosure of the informer's identity not only has an adverse effect on the prosecution of a case currently before the courts, but also on future law enforcement efforts.

The courts have consistently held that this privilege exists in recognition of the necessity of the citizenry to relay any information they might possess concerning the commission of crimes to law enforcement officials. This benefits society by aiding in the elimination of criminal activity. By preserving the anonymity of informers, the free flow of information to the prosecutor as well as the recruitment of citizen-informers is encouraged.[12]

Absent the existence of the privilege, individuals with knowledge and evidence of the commission of a crime would hesitate to come forward with their evidence out of fear of intimidation or reprisal. The safety and protection of third persons as well as the integrity and continued validity of the trial process is involved. The mere possibility of such intimidation makes the prosecution's refusal to disclose the informer's identity quite understandable and permissible.

In many instances, the government attorney's refusal to reveal the identity of an informer is based on executive decisions going to the strength of the government's case or the admissibility of evidence. The informer's utility as a witness to either the prosecution or the defense is negligible in the face of other clear and convincing evidence against the accused. Furthermore, the testimony of the informer would generally be inadmissible as hearsay or totally irrelevant to the facts at issue in the case. The failure to disclose in such a situation does not violate the constitutional rights of the accused to a fair trial or to a confrontation of witnesses.[13] Therefore, since the defendant could only have a vindictive purpose in seeking the identity of an informer, the

11. An excellent discussion of the prosecution's case against liberalization of criminal discovery rules may be found in a presentation by Thomas A. Flannery, former Assistant United States Attorney, before a Symposium at the Judicial Conference of the District of Columbia Circuit. Discovery in Federal Criminal Cases, 33 F.R.D. 47, 74 (1963).

12. The major cases dealing with the privilege and explaining its existence are Scher v. United States, 305 U.S. 251 (1938); *In re* Quarles and Butler, 158 U.S. 532 (1895); Vogel v. Gruaz, 110 U.S. 311 (1884).

13. Even the cases requiring the disclosure of the informer's identity clearly require that the identity be in some way relevant to the issues in the case.

need to maintain the secrecy of the informer's identity in this type of case is clear.

On the other hand, the defendant often knows the informer quite well, although not in the role of informer, and if he wished to use him as a witness at trial, the informer could easily be located. His usefulness as a witness should already be known to the accused and a disclosure of his identity would be of no further benefit to the defense.

The conflict between defense and prosecution in this area has led to a "synthesis" of the arguments in an attempt to attain a balance among all interests.

SYNTHESIS

The public interest in protecting and maintaining the free flow of information to law enforcement officials must be balanced against the right of the individual defendant to prepare his defense.

Did the trial court commit reversible error

> when it allowed the Government to refuse to disclose the identity of an undercover employee who had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged.[14]

Therein did Justice Burton state the issue in *Roviaro v. United States.*[15] The defendant was tried under a two-count indictment. In the first count, he was charged with selling heroin to one John Doe in violation of 26 U.S.C. 2554(a). The second count charged that on the same day and in the same place he did "fraudulently and knowingly receive, conceal, buy and facilitate the transportation of . . . heroin . . . ."[16] The alleged sale occurred in the auto of John Doe while a government agent, who testified as to the involvement of John Doe in the incident, was secluded in the trunk of the car. This agent saw the defendant deliver a package to Doe, the contents of which were later found to be heroin. The government witnesses admitted that Doe later, in the presence of the defendant, denied knowing or having ever met the defendant. Prior to trial, the defendant sought disclosure of the name, address and occupation of John Doe in a motion for a bill of particulars, but the motion was denied.

On appeal, the defendant contended that since Doe was an active participant in the alleged crime, his identity must be re-

14. Roviaro v. United States, 353 U.S. 53, 55 (1957).
15. 353 U.S. 53 (1957).
16. *Id.* at 55.

vealed. The Government chose not to defend nondisclosure as to count one involving the sale to Doe, but it did attempt to sustain the conviction on the second count alleging the transportation of narcotics.[17] While the Government impliedly admitted that Doe was an active participant in count one, it asserted that as to the transportation count, the identity of the informer had no bearing on the charge and was, therefore, privileged.

In holding that the trial court had committed reversible error in denying disclosure of the informer's identity, Justice Burton took the opportunity to discuss the scope of the privilege and how it may be employed. Since the public interest is fostered by concealing only the identity of the informer, "where the disclosure of the contents of the communication will not tend to reveal the identity of the informer, the contents are not privileged."[18] Addressing the extent of a disclosure that would defeat the existence of the privilege, the court stated 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."[19] The purpose of the privilege is to allow the Government to maintain their sources of information by shielding the identity of an informer from those who would have cause to resent his conduct. Therefore, the privilege should not be defeated by a disclosure to other law enforcement officials. The scope of the informer-identity privilege is limited by the requirement of "fundamental fairness." However, the court refused to enunciate a fixed rule.

> 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.[20]

The problem remains one of balancing the public interest against the requirement of fairness. The items to be considered in achieving that balance may include the particular circumstances of the case, the nature of the crime with which the defendant

17. The court explained that due to the concurrent sentences in this case which did not exceed that which could be imposed on either count, the judgment may be affirmed if the conviction could be sustained on either count. Pinkerton v. United States, 328 U.S. 640, 641-42 (1946); Hirabayashi v. United States, 320 U.S. 81, 85 (1943); Abrams v. United States, 250 U.S. 616, 619 (1919); Claassen v. United States, 142 U.S. 140, 146-47 (1891).

18. 353 U.S. at 60 (footnote omitted). *See also* Foltz v. Moore McCormack Lines, Inc., 189 F.2d 537, 539-40 (2d Cir. 1951); 8 WIGMORE, EVIDENCE § 2374(1) (3d ed. 1940); MODEL CODE OF EVIDENCE rule 230 (1942). *But cf. In re* Quarles and Butler, 158 U.S. 532 (1895); Vogel v. Gruaz, 110 U.S. 311, 316 (1884).

19. 353 U.S. at 60. *See also* Sorrentino v. United States, 163 F.2d 627, 629 (9th Cir. 1947).

20. 353 U.S. at 60-61.

is charged, the possible defenses, and the potential significance of the informer's testimony. The court, in *Roviaro*, felt that on the facts of the case, the scales tipped against the public interests in protecting the informer's identity and reversed and remanded the case for purposes of disclosure.

When it refused to lay down a fixed rule, it is clear that the court created a discretionary privilege—one allowing the trial judge to ascertain, as best he may, whether, in light of the facts of the case, the identity of the informant could be of assistance to the defense, and whether a failure to disclose would be in contravention of the requirement of fundamental fairness. However, the court did not give an indication as to when disclosure was to be considered "relevant" or "helpful" or "essential" to a fair determination of a cause. But, later interpretations of *Roviaro* did enunciate "hard and fast" rules, drawing distinctions between the various stages of a criminal proceeding.

Roviaro Given Substance

The Informer as an Occurrence Witness

In *People v. Lewis*,[21] the Supreme Court of Illinois attempted to interpret the rule as set out in *Roviaro*. The case dealt with the joint trial of two defendants charged with the sale of heroin to an agent of the Illinois Bureau of Investigation. The agent testified that the purchase was arranged by the informer. The only witnesses to the occurrence of the alleged sale were the agent, the informer, and the two defendants. The defendants denied that the agent and the informer were ever in the house where the sale allegedly occurred and denied that any sale had ever occurred. The defendant's pretrial motions for disclosure of the identity of the informer were denied. During the trial, numerous attempts to obtain the name and address of the informer from government witnesses were not permitted because a police officer stated that threats had been made against the informer's life.[22]

On appeal, the state contended that if the informer were merely present as a witness to a narcotics violation but did not testify and if there were an occurrence witness who did testify, the judge may properly allow nondisclosure of the informer's

21. 57 Ill. 2d 232, 311 N.E.2d 685 (1974). Three cases were involved in this decision, all of which came from the circuit court of Rock Island County. People v. Lewis, 12 Ill. App. 3d 762, 301 N.E.2d 469 (1973); People v. Flippo, 12 Ill. App. 3d 774, 301 N.E.2d 477 (1973); People v. Weathers, 12 Ill. App. 3d 776, 301 N.E.2d 479 (1973). The appellate court, with one judge dissenting, reversed the convictions for failure to reveal the identities of the informers involved.

22. The facts of the two companion cases were essentially the same.

identity. The court disagreed with this contention, stating that the informer played the dual role of informer-participant in the alleged sale. Although there was sufficient corroboration for the presence of the informer and agent at the scene, there was absolutely no corroboration for the essential elements of the sale. The court held that "in the cases at bar, . . . the balancing of rights test as enunciated in *Roviaro* requires the disclosure of the informer's identity at a trial on the merits."[23] Critical to the holding was the informer's possible utility to the defense as an occurrence witness in so far as he was the only one who could refute the existence of the sale.

> The informer was the only witness in a position to amplify or contradict the testimony of the government witnesses. In such instances, the defendant must, at minimum, be allowed to interview the informer, and if he desires, call him as his own witness.[24]

The Illinois Supreme Court felt that it was possible that a defendant may choose to call one of the state's prospective witnesses when the state chooses not to call that witness—the decision to use a person as a witness lies with the defendant, not the state. In this type of case, where the defendant already knows the informer by sight, it would be unfair to fail to permit the defendant to decide whether the testimony of the informer would be helpful to the defense.[25] The court said that the failure to do so would violate the sixth amendment and the court clearly held that, in cases such as this, the definition of "helpful" lies with the defendant.

The state also contended that the identity of the informer should not be disclosed if his health and safety were in jeopardy. With this, the court agreed. However, a mere assertion by the state that the health and safety of the informer are in jeopardy is insufficient. "If the prosecution can *establish* that giving the name and address of the witness would jeopardize his health and safety, the informer's name and address may be withheld."[26] If the court were to allow the state's interpretation of *Roviaro* to prevail, no defendant would ever learn the identity of an informer for the state could always claim that the life or health of the informer would thereby be placed in jeopardy.

The court went even further, drawing a distinction between calling the informer as a witness and revealing his identity.

---

23. 57 Ill. 2d at 235, 311 N.E.2d at 687.
24. *Id.* at 238, 311 N.E.2d at 689.
25. *See* text accompanying notes 13-14 *supra.*
26. 57 Ill. 2d at 237, 311 N.E.2d at 688 (emphasis added). *See also* United States v. Palermo, 410 F.2d 468 (7th Cir. 1969); United States v. Varelli, 407 F.2d 735 (7th Cir. 1969); People v. Manzella, 56 Ill. 2d 187, 194, 306 N.E.2d 16, 19 (1973).

Where the informer is an occurrence witness and could be helpful to the defense, the defendant must be allowed to depose the informer and call him as a witness if he desires. However, "the informer would not be made to disclose his true name and address if it can truly be shown that his life or safety is in jeopardy."[27]

The court felt that this procedure would assist in obtaining the necessary balance of the three main issues of consideration in this area: protecting the constitutional rights of criminal defendants, providing adequate protection to insure the health and safety of informers, and avoiding any decrease in the state's ability to employ informers in its narcotics investigations.

Whether or not this is a workable solution remains to be seen, but it is clear that the Illinois Supreme Court has done an excellent job in its attempt to state its position on this question of long standing concern.[28] The court did, however, specifically limit its holding by reference to a New Jersey case[29] and by stating that in dealing with the application of the balancing test "we are not enunciating a test for application to preliminary hearings, motions to suppress, or similar pretrial proceedings."[30]

The court discussed the Illinois Supreme Court rule dealing with informants[31] and held that that rule did not require a different result since it was essentially a codification of the rule enunciated in *Roviaro*.[32] The rule provides:

> Informants. Disclosure of an informant's identity shall not be required where his identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not be denied hereunder of the identity of witnesses to be produced at a hearing or trial.

The court specifically held that whenever "we find that nondisclosure of the informer's identity does not deprive the defendant of a constitutional right, the rule is applicable."[33] The court did not discuss the second sentence in the rule. It is submitted that this sentence was inserted to avoid the use of the rule by the state as grounds for failure or refusal to include an informant's name on a witness list.[34]

---

27. 57 Ill. 2d at 238, 311 N.E.2d at 689.
28. *See* note 2 *supra*.
29. State v. Burnett, 42 N.J. 377, 201 A.2d 39 (1964). This case gives an excellent statement of the informer privilege and was cited by the United States Supreme Court on that specific point.
30. 57 Ill. 2d at 235, 311 N.E.2d at 687. For a further discussion of how the application of rules of this type differ at preliminary hearings than at trial, *see* United States v. Matlock, 415 U.S. 164 (1974).
31. ILL. REV. STAT. ch. 110A, par. 412(j) (ii) (1974).
32. 57 Ill. 2d at 238, 311 N.E.2d at 688.
33. *Id.*
34. When an informer's name is not included on an indictment or in the list of witnesses furnished the defendant by the state, the informer

The Identity Issue in a Pretrial Motion to Suppress

In *United States v. White*,[35] the Supreme Court dealt with the informer-identity privilege in the context of the fourth amendment. The court held that the fourth amendment did not mandate disclosure of an informer's identity where he had consented to conceal a transmitter on his person allowing government agents to listen to conversations in which the defendant was involved.[36]

In *McCray v. Illinois*,[37] the Supreme Court held that the sixth amendment and the due process clause of the fourteenth amendment did not require the state to disclose the identity of an informer at a pretrial hearing on a motion to suppress evidence. The necessity of disclosure turned on the issue of the probable cause supporting the arrest. As long as there was sufficient evidence that the informer was reliable and that the officers were acting in good faith in relying on the information provided by the informer, disclosure was not constitutionally mandated. In *McCray*, pursuant to information received from an informant, the police arrested the defendant without a warrant for possession of narcotics. At the pretrial hearing, the defendant moved to suppress the evidence found on his person. The police officers testified to the following facts: the informer told them that the defendant sold narcotics and had narcotics on his person, the informer told them where to find the defendant, they found him in that area, the informer pointed the defendant out and left the scene, the defendant was arrested and searched and was found to have narcotics on his person. The officers also testified as to the reliability of the informant in that they had known him for about two years, that he had often given them valuable and accurate information about narcotics violations and that his information had led to many convictions. The lower courts had denied the defense motions for a disclosure of the identity of the informer and for suppression of the evidence obtained as a result of searching the defendant. As was done in *Lewis*, a dis-

may not be permitted to testify to the surprise or prejudice of the defendant. *See* People v. Martin, 74 Ill. App. 2d 431, 221 N.E.2d 13 (1966).

Supreme Court Rule 412 is identical to the rule promulgated by the American Bar Association. ABA STANDARDS, *supra* note 1, § 2.6(b) at 91. In their comments to this section, the ABA argues that the public interest involved in the protection of any sources of information concerning the commission of crimes is provided by nondisclosure of an informant's identity unless "compelling circumstances require it." It is clear that a compelling circumstance would arise when an informer is an occurrence witness.

35. 401 U.S. 745 (1971).

36. *Id.* at 748-53. The court also held that there was no "unreasonable search or seizure" since the defendant had no reasonable expectation of privacy. *See* Katz v. United States, 389 U.S. 347 (1967).

37. 386 U.S. 300 (1967).

tinction was drawn among the various stages of a criminal proceeding. "We must remember also that we are not dealing with the trial of the criminal charge itself. There the need for a truthful verdict outweights society's need for the informer's privilege."[38]

The Rules Applied

The preceding discussion has presented the general rules and rationale supporting those rules in connection with the privilege. The following discussion portrays the application of those rules to the various stages of a criminal proceeding in which the issue of informer identity normally arises.

As a starting point, since the *Lewis* court and the *Roviaro* court were careful to limit their holdings to require disclosure when the identity of an informer was sought for trial, nondisclosure should be the rule rather than the exception at any pretrial proceeding. Indeed, the United States Supreme Court in *United States v. Matlock*,[39] has stated that there is a distinction between the rules applicable to proceedings to determine probable cause for arrest and search and those which govern the criminal trial itself.[40]

It appears clear that the question of whether a search was based on probable cause within the meaning of the fourth amendment may be resolved without the disclosure of the identity of an informer as long as the requirements set out in *McCray* are followed.[41] Therefore, in any probable cause hearing in connection with any arrest or search and seizure, the identity of an informer involved in the transaction need not be revealed if the reliability of the informer and the good faith of the law enforcement officials in relying on his information is substantiated. Substantiation should not pose a problem since hearsay evidence is admissible to show the reliability of the informer and the good faith of the police officers.[42]

In any preliminary hearing or arraignment dealing with the question of whether there is probable cause to bind the defendant over to the grand jury, there should be no need to reveal the identity of the informer. In arriving at a decision on whether to reveal the identity, it must be remembered that when an in-

38. *Id.* at 307. *See* People v. Wolfe, 73 Ill. App. 2d 274, 219 N.E.2d 634 (1966), wherein it was held that an informer who was a *participant* in the alleged offense must be disclosed at the pretrial hearing on a motion to suppress if other evidence does not establish probable cause.

39. 415 U.S. 164 (1974).

40. *See also* Brinegar v. United States, 338 U.S. 160 (1949).

41. *See also* People v. Freeman, 34 Ill. 2d 363, 215 N.E.2d 206 (1966).

42. People v. LaBostrie, 14 Ill. 2d 617, 153 N.E.2d 570 (1958); People v. Jones, 73 Ill. App. 2d 55, 221 N.E.2d 29 (1966).

former's name is not included on an indictment or in the list of witnesses furnished the defendant by the state, the informer may not be permitted to testify to the surprise or prejudice of the defendant.[43]

As is apparent from *Roviaro* and *Lewis*, nondisclosure of the identity of the informer at trial should be the exception rather than the rule. However, if the state is able to "establish" that the health and safety of the informer will be in jeopardy if his identity is revealed, the court must require the informer to testify, but it may direct that his identity be withheld.[44]

The court in *Lewis* specifically limited their decision to that situation in which the informer is an occurrence witness and fundamental fairness demands his availability to the defense. Any situation where the informer is not an occurrence witness is, as viewed by this author, still in question. However, reasonable inferences from *Lewis* and other opinions, both state and federal, indicate a rule usually permitting nondisclosure because disclosure could in no way be "helpful" to the defense. In cases in which the informer is not called as a witness by the state, is clearly not involved in any way in the crime charged, has not taken any part in effectuating the offense, and the evidence of the prosecution is clear and convincing, there is precedent that the identity of such informer need not be disclosed.[45]

As to the trial on the merits, the circumstances of the particular case are clearly controlling. It is the burden of the prosecution to establish that the identity of the informer is either irrelevant or that disclosure clearly jeopardizes the health and safety of the informer. The burden is extremely heavy when the question arises at a trial on the merits.

An *in camera* procedure could be developed in this area to deal with specific problems as to the credibility of alleged risks involved in such disclosure. Such procedures have been quite valuable in the area of military and diplomatic secrecy and with problems in connection with grand jury testimony of a witness at trial.[46] It is submitted that these procedures could be employed beyond the mere question of the credibility of allegations that the safety of the informer is in jeopardy. The court could

43. *See* People v. Martin, 74 Ill. App. 2d 431, 221 N.E.2d 13 (1966).

44. *See also* Alford v. United States, 282 U.S. 687 (1931); United States v. Varelli, 407 F.2d 735 (7th Cir. 1969); *cf.* Smith v. Illinois, 390 U.S. 129 (1968).

45. People v. Williams, 45 Ill. 2d 319, 260 N.E.2d 1 (1970); People v. Williams, 38 Ill. 2d 150, 230 N.E.2d 214 (1967); People v. Connie, 34 Ill. 2d 353, 215 N.E.2d 280 (1966); People v. Mack, 12 Ill. 2d 151, 145 N.E.2d 609 (1957).

46. *See* Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875, 885 (1966); United States v. Barson, 434 F.2d 127 (5th Cir. 1970).

consider, *in camera*, the actual question of whether the informer could be of value to the defense. In the proper situation—where the court is convinced that the health of the occurrence witness would be in great jeopardy—the court, *in camera*, could question the informer to ascertain his usefulness to the defense. The basic problem, the availability of the informer to the defendant, could be dealt with by allowing defense counsel to submit interrogatories which the court could use while questioning the defendant. Should the court find that the informer would merely amplify or support the other government witnesses, disclosure could be denied despite *Lewis* or *Roviaro*. It is further submitted, however, that such *in camera* proceedings be employed in only the cases of most extreme danger to the health and safety of the informer.

CONCLUSION

It is fundamental to our system of criminal justice that the constitutional rights of criminal defendants be zealously guarded. It is submitted that *Roviaro*, *Lewis*, and their progeny afford adequate protection to those rights. Effective law enforcement is vital to the maintenance of our society and the informer's privilege is a necessary aspect of that effective law enforcement. *Roviaro*, *Lewis*, and subsequent cases adequately protect this societal interest. The proper balance has, at least in theory, been reached.

The courts must, however, scrupulously avoid placing any limitations on *Roviaro* or *Lewis*. Extreme care must be used in ascertaining whether effective law enforcement will *in reality* be harmed by the release of the identity of an informer whose testimony may possibly be of value to a criminal defendant. Balance is absolutely necessary; but, as the Supreme Court has said, that balance must be "proper."

A statement made by Justice Douglas in his dissenting opinion in *McCray*, should always be considered by the trial court in determining whether or not to require disclosure.

> There is no way to determine the reliability of OLD RELIABLE, the informer, unless he is produced at the trial, and cross-examined. Unless he is produced, the [Bill of Rights] . . . is entrusted to the tender mercies of the police . . . . We should also be mindful that 'disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.'[47]

"It is not unknown for the arresting officer to misrepresent his

47. 386 U.S. at 316. *See also* Dennis v. United States, 384 U.S. 855 (1965).

connection with the informer, his knowledge of the informer's reliability, or the information allegedly obtained from the informer."[48] It is not a question of whether or not a law enforcement official *will* misrepresent the truth; it is, however, a question of who must bear the risk that he *might* do so.

A balance must be obtained, deciding each case on its own merits. The burden must weigh heavily on the prosecution at a trial on the merits if the court is to permit nondisclosure in this area. The decision of the court is a difficult one because, although the "no fixed rule" rule is clearly proper, few guidelines are therein presented to assist the trial judge. The rights of criminal defendants will be properly protected by fair judicial interpretation and implementation of the tests which have been presented in this article on the question of disclosure of the identity of an informer in a criminal action in the State of Illinois.

John W. Cox, Jr.

48. 386 U.S. at 316 n.2. *See also* United States v. Pearce, 275 F.2d 318, 322 (7th Cir. 1960).