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THE USE OF IN CAMERA HEARINGS
IN RULING ON THE INFORMER PRIVILEGE

The use of informants has generally been considered a necessary facet of any adequate law enforcement program because of the limited information-gathering and investigative capacity of law enforcement agencies.\(^1\) This assumed need for information gained from nonpolice sources\(^2\) is the basis for the well-recognized governmental privilege to withhold from the defendant the identity of informers supplying such information to law enforcement agencies.\(^3\) However, it is also recognized that the policies under-

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\(^1\) There are many judicial statements to this effect. For example, in Harrington v. State, 110 So.2d 495 (Fla. App. 1959), *app. denied*, 113 So.2d 231 (Fla. 1959), the court commented:

> It is common knowledge that without the aid of confidential informants the discovery and prevention of crime would present such a formidable task as practically to render hopeless the efforts of those charged with law enforcement.

110 So.2d at 497. In discussing the informer privilege, the Supreme Court noted:

> The purpose of the privilege is the furtherance and protection of the public interest in effective law-enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.


\(^3\) Roviaro v. United States, 353 U.S. 53, 59 (1957). Professor Wigmore, in an often-quoted passage, describes the privilege and the policies which underly it:

> A genuine privilege, on . . . fundamental principle . . ., must be recognized for the identity of persons supplying the government with information concerning the commission of crimes. Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity—to protect himself and his family from harm, to preclude adverse social reactions and to avoid the risk of defamation or malicious prosecution actions against him. The government also has an interest in nondisclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such persons ends their usefulness to the government and discourages others from entering into a like relationship.
lying the privilege of anonymity must give way when they would
depreserve an accused of his constitutional right to adequate de-
defense.\textsuperscript{4} Therefore, a perennial judicial problem is the need to
reconcile these strong opposing policies. A study of the case law
reveals that courts evince a wide variety of solutions and attitudes
in their efforts to cope with this dilemma. In some jurisdictions
the courts display the greatest sensitivity to the needs of the
police and the privilege is nearly absolute. At the other extreme
are jurisdictions in which the courts show the most delicate regard
for the rights and needs of defendants and sharply limit the extent
of the privilege. Since this conceptual disagreement exists within
an environment of widespread use of informants by law enforce-
ment agencies,\textsuperscript{5} a substantial amount of irreconcilable case law
exists concerning the scope of the informer privilege.\textsuperscript{6} Fur-
thermore, in some states the privilege is statutorily defined.\textsuperscript{7}

The thesis of this article is that most of the problems of defining
the scope of the privilege in a particular case are due to the
paucity of information available to the trial judge who must rule
on the issue. Furthermore, many of the formulas presently used
are conceptually and functionally inadequate. Both of these prob-
lems can be solved by the use of \textit{in camera} hearings,\textsuperscript{8} for such
proceedings not only will provide the trial judge with sufficient
information to make a fair and rational decision, but will also
alleviate the present necessity to rule only on the basis of vague
and indefinite standards.

This article will first examine the diversity of approaches to the
problem in the case law and will then discuss one proposal of the
Supreme Court in its promulgation of rules of evidence for the

\textsuperscript{4} See, e.g., Scher v. United States, 305 U.S. 251 (1938) (when "essential to the
defense"); Sorrentino v. United States, 163 F.2d 627 (9th Cir. 1947); United States v. Li
Fat Tong, 152 F.2d 650 (2nd Cir. 1945) (\textit{dictum}; when "necessary or desirable to show
the prisoner's innocence").

\textsuperscript{5} Informers are particularly crucial in any program to enforce narcotics laws. See e.g.,
\textit{The President's Commission on Law Enforcement and the Administration of

\textsuperscript{6} See notes 21-36 and accompanying text infra.

1974-75).

\textsuperscript{8} While the term "\textit{in camera} proceeding" may have other meanings, in this article it
refers to a closed, secret hearing attended by the trial judge, the prosecuting attorney, and
usually the informer.
federal courts. This approach may have great influence on attitudes about the scope of the privilege. Finally, an evaluation of these proposed tests and of the proposed new standards will be made. The article is limited to a discussion of the privilege in instances in which the defendant is seeking disclosure of the identity of an informant who may give testimony on issues concerning guilt or innocence but who is not produced by the prosecution as a witness. Situations in which the informant’s testimony is relevant only to supporting a search warrant or an arrest warrant or in which the informant is produced by the prosecution as a witness are controlled by constitutional considerations beyond the scope of this discussion. The discussion will also be limited to the context of criminal actions.

I. OVERVIEW AND HISTORY OF THE PRESENT LAW

The informer privilege has deep historical antecedents in the English common law. Originally an absolute privilege, it gradually gave way in cases where it was considered inconsistent with the concept of a fair trial.

The case law had become extremely inconsistent. In 1937, a federal district judge in United States v. Keown, after extensively reviewing all of the federal cases on point, could only conclude that they were not “in harmony” and that the Supreme Court had not given guidance. The court compromised by holding that, although no disclosure was required, the prosecution could not call any witness who knew the informant’s identity and would not reveal it on cross-examination.

The Roviaro case did not come without warning. The year

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9 See part F infra.
10 For purposes of showing the existence of probable cause for an arrest or search, the prosecution normally is not required by the fourth and fourteenth amendments to disclose the name of an informant who has supplied information about the probable cause if his reliability can be established by testimony that he has been accurate or knowledgeable in the past. McCray v. Illinois, 386 U.S. 300 (1967).

If the prosecution calls an informant as a witness, his correct identity must be revealed to the defendant. Otherwise, the right to cross-examination protected by the sixth and fourteenth Amendments will be "emasculated." Smith v. Illinois, 390 U.S. 129, 131 (1968).

11 Donnelly, supra note 2 at 1091.
12 In re Quarles and Butler, 158 U.S. 532, 535-36 (1895) (dictum); Vogel v. Gruaz, 110 U.S. 311 (1884); United States v. Rogers, 53 F.2d 874 (1931); Mitrovich v. United States, 15 F.2d 163 (9th Cir. 1926).
14 See notes 21-27 and accompanying text infra.
after *Keown* was written, the Supreme Court decided *Scher v. United States*. Although *Scher* concerns the use of an informer's communication to justify a search without a warrant, it plays an important role in the evolution of the privilege in the testimonial context. Because the court held that the search was permissible on the facts of *Scher* without reference to any communication from the informant, the holding may be dictum even for purposes of evaluating the propriety of the informer privilege when determining the legality of a search. Nevertheless the court *did* hold that disclosure of the informant's identity was not required because "public policy forbids disclosure of an informer's identity unless essential to the defense, as, for example, where this turns upon an officer's good faith." The exception, although clearly dictum, was the first serious crack in the absolute nature of the privilege in federal court.

In the decade before *Roviaro* was decided the transition was continued by three federal court cases. In *Sorrentino v. United States*, the court, relying on *Scher*, held that it was error for the trial court to sustain objections to defense questions eliciting the informer's name. (The court, finding the error harmless because other testimony revealed the informant's identity, did not reverse the judgment.) The court reasoned that

> [i]f the person whom Grady [the testifying federal agent] called an informer had been an informer and nothing more, appellant would not have been entitled to have his identity disclosed; but the person whom Grady called an informer was something more. He was the person to whom appellant was said to have sold and dispensed the opium described in the indictment. Information as to this person's identity was therefore material to appellant's defense, and appellant was entitled to a disclosure thereof.

The same rationale was used by the court in *United States v. Conforti*, where the court held that a defendant accused of selling counterfeit money to an informer had the right to know the identity of that informer. However, reversal of the conviction was avoided by a finding that no proper demand for the informer's identity had been made by the defense. Finally, in *Portomene v.*
United States, the court reversed a conviction where the defendant was accused of selling heroin to the informer but had been denied disclosure of his identity, relying on Conforti and Sorrentino but showing some impatience with the avoidance of reversal.

A. The Roviaro Case

In 1957 the Supreme Court in the case of Roviaro v. United States reversed a trial court's denial of the defendant's motion for disclosure of an informer's identity and stated general principles which have provided the starting point for much of the subsequent judicial analysis of the informer privilege. Although many state courts have relied on Roviaro, it should be noted that the decision does not purport to bind the states. The Court was deciding the law of evidence in federal courts, not a constitutional issue.

In stating the standards for ruling on the privilege, the Court appears to have articulated two different tests. The first formulation was based on whether the identity of the informer is “relevant and helpful” to the defense: if the informer's identity can be so characterized, it must be revealed to the defendant. The second formulation balances “the public interest in protecting the

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20 221 F.2d 582 (5th Cir. 1955).
22 Roviaro was arrested for selling heroin to a police informer. The informer was alone with the defendant in an automobile during much of the transaction; a police officer in the trunk of the automobile overheard and testified to their conversation.
23 That the Roviaro court was exercising its supervisory power over the federal courts and not determining a constitutional question is made explicit in a later case:

In the federal courts the rules of evidence in criminal trials are governed “by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” This Court, therefore, has the ultimate task of defining the scope to be accorded to the various common law evidentiary privileges in the trial of federal criminal cases . . . . This is a task which is quite different, of course, from the responsibility of constitutional adjudication. In the exercise of this supervisory jurisdiction the Court had occasion 10 years ago, in Roviaro v. United States, 353 U.S. 53, to give thorough consideration to one aspect of the informer's privilege . . . .

24 The Court held that:

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of 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. In these situations the trial court may require disclosure and, if the government withholds the information, dismiss the action.

353 U.S. at 60-61.
flow of information against the individual's right to prepare his
defense." 25 All relevant factors are to be considered in this deter-
mination. 26 The Court seems to have based its disposition of the
case on the fact that the informer was a participant in the crime
and the only witness to the transaction, 27 for the Court did not
explicitly apply the balancing approach to the facts of the case.
Nevertheless, the balancing test is the starting point for much of
the contemporary analysis.

The initial question for a reader of Roviaro is whether the
balancing test is consistent with the relevant-and-helpful test.
Because of the continuing heavy reliance on Roviaro by other
courts, this problem is more than academic. It is difficult to see
any place for consideration of the public interest in the protection
of confidential informants if disclosure is required whenever rele-
vant and helpful to the defense. If the answer is that the balance is
always tipped in favor of disclosure when the informant's identity
is relevant and helpful to the defense, then the balancing test has
no content. Reliance solely upon the relevant and helpful test
would leave an absolute standard requiring disclosure when help-
ful to the defense, and the informer privilege would be reduced to
a general evidentiary objection denying disclosure only when such
disclosure would be irrelevant and immaterial. 28 Moreover such a
reading of Roviaro compels the conclusion that the Court
knowingly set out inconsistent standards for the privilege. A bet-
ter reading of Roviaro is that the trial courts must initially estab-
lish the relevance and helpfulness of the informer's identity to the
defense and once established then balance this against the public
interest in disclosure of the particular informant's identity. Ass-
suming a sufficient base of data and a studied evaluation of all
relevant factors, 29 this balancing approach would provide a very

25 The full statement of this "balancing test" is found at 353 U.S. at 62:
We believe that no fixed rule with respect to disclosure is justifiable. 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 significance of the informer's testimony,
and other relevant factors.
26 Id.
27 353 U.S. at 64, 65.
28 See Comment, Disclosure of Informers Who Might Establish the Accused's In-
29 The Roviaro court explicitly includes the crime charged, the possible defenses, and
the possible significance of the informer's testimony within the "relevant factors" to be
considered, but this list is not exhaustive. 353 U.S. at 62.
workable and flexible framework for correct decision-making.\textsuperscript{30} Unfortunately, such an analysis has not prevailed.

The uncertainty as to the meaning of \textit{Roviaro} and the vagaries of its standards have led to a wide variety of judicial approaches to the problem of the exact scope of the informant privilege. The results have been described as a "judicial guessing game."\textsuperscript{31} A number of variations have developed under the direct influence of \textit{Roviaro}. Some courts require disclosure whenever the informer was a participant in the crime.\textsuperscript{32} Some courts adopt the converse and uphold the state's privilege to refuse disclosure whenever the informer was a "mere informer" who did not take part in the crime.\textsuperscript{33} Other courts require disclosure whenever there is a reasonable possibility that the informer has knowledge of material elements of the case\textsuperscript{34} Still others place a heavy burden on the defense to show that the informer's testimony is necessary or essential to a fair trial.\textsuperscript{35} Finally, some courts make an explicit effort to balance all of the conflicting variables.\textsuperscript{36} The following discussion will reveal the conceptual inadequacies of these various formulations of the informant privilege.

\textbf{B. The "Participant Test"}

As indicated previously, the \textit{Roviaro} court placed great emphasis on the fact that the informer was an actual participant in the

\textsuperscript{30} United States v. Alvarez, 469 F.2d 1065 (9th Cir. 1972); United States v. Day, 384 F.2d 464, 469 (3rd Cir. 1967) (concurring opinion).

Judge McLaughlin's concurring opinion in \textit{Day} places particular emphasis on the trial judge's discretion in the balancing process:

The importance of \textit{Roviaro} is that it remitted to the discretion of the trial court the task of "... balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." ... To this purpose the court becomes the arbiter of fundamental fairness in regard to the question of whether an informer's identity should be divulged. Judicial discretion in this area would even seem to extend to situations where the informer's testimony might help the accused. The Court in \textit{Roviaro} stated: [The necessary and helpful test]. Thus it appears that in no case is there a mandatory right of disclosure but rather only a permissive right at the discretion of the court.

\textsuperscript{32} See part \textit{B} infra.

\textsuperscript{33} See part \textit{C} infra.

\textsuperscript{34} See part \textit{D} infra.


\textsuperscript{36} United States v. Toombs, 497 F.2d 88 (5th Cir. 1974).
crime,\textsuperscript{37} and this approach has been followed by other courts.\textsuperscript{38} For example, in \textit{Bennett v. Arkansas}\textsuperscript{39} the Arkansas Supreme Court reversed a conviction for possession of marijuana where the trial court refused to order disclosure. The court held that disclosure is required whenever the informant actually participated in the criminal transaction.\textsuperscript{40} A concurring opinion resists the rigidity of an absolute rule requiring disclosure when the informant was a participant; it preferred to balance all of the relevant factors.\textsuperscript{41}

The courts which rigidly adhere to the "participation" test may be criticized for unduly relying on and possibly extending the \textit{Roviaro} rationale. \textit{Roviaro} on its facts was a situation where the informant was not only a participant but was essential to the defense. Merely because a participant-informer "could" have information relevant to amplify, modify, or contradict prosecution testimony does not mean that he \textit{will} have such valuable testimony in every case. Nor do these courts consider the possibility that the participant-informer was only one of several witnesses or is able to contribute only highly redundant testimony or testimony useful only to the prosecution.\textsuperscript{42} While participation is a crucial

\textsuperscript{37} \textit{Roviaro} v. United States, 353 U.S. 53, 64-65 (1957).
\textsuperscript{38} United States v. Gibbs, 435 F.2d 621, 624 (9th Cir. 1970); Bennett v. Arkansas, 252 Ark. 128, 131, 477 S.W.2d 497, 499 (1972); People v. Williams, 51 Cal.2d 355, 358-59 333 P.2d 19, 21 (1959); McCoy v. Maryland, 216 Md. 332, 140 A.2d 689 (1958); Missouri v. Davis, 450 S.W.2d 168 (Mo. 1970).
\textsuperscript{39} 252 Ark. 128, 477 S.W.2d 497 (1972).
\textsuperscript{40} The court attached great importance to the fact of participation:

Generally, whether the privilege of nondisclosure of an informer's identity applies depends upon whether the informant was present and participated in the alleged illegal transaction with which the defendant is charged, or whether the informant was "merely" one who supplied only a "lead" to law enforcement officers to assist them in the investigation of a crime. The identity of an informant is required in certain instances, particularly where he was present as a participant. \textit{Roviaro} v. United States . . . . The rationale is that where the informant is a witness to an illegal transaction, his testimony could be relevant to amplify, modify, or contradict the testimony of a government witness, and, therefore, essential to a fair determination of the cause.

\textsuperscript{41} \textit{Id.} at 134-36, 477 S.W.2d at 501-502.
\textsuperscript{42} \textit{See} Illinois v. Jarrett, 57 Ill. App.2d 169, 206 N.E.2d 835 (1965) where the identity of an informer who participated in arranging for prostitution was not disclosed in defendant's trial for pandering.
factor in any balancing process, it is not conclusive but must be weighed in connection with other specific factors.

C. The "Mere Informer" Rule

A number of cases hold that it is not necessary to disclose the identity of an informer who did not participate in the crime but merely cooperated with the police. This "mere informer" test is essentially the converse of the "participant test." In some cases the informer introduced a police officer to the defendant so that the officer could participate in the criminal transaction. In other cases the informer told the police that they could purchase drugs from the defendant but never saw the police and the defendant together. In other cases applying this rule the informer was an eyewitness to a crime but was otherwise unconnected with it.

Cf. Illinois v. Williams, 38 Ill.2d 150, 230 N.E.2d 214 (1967) where disclosure of the identity of a material witness was not required because of consistency in the testimony of other witnesses.

Cf. United States v. Ortega, 471 F.2d 1350 (2d Cir. 1972) and United States v. Kelly, 449 F.2d 329 (9th Cir. 1971), where disclosure of the identity of the participant-informers who could not give significant testimony was not required.

United States v. Skeens, 449 F.2d 1066 (D.C. Cir. 1971) ("The informer was an informer and nothing more."); United States v. Gibbs, 435 F.2d 621, 624 (9th Cir. 1970); Sorrentino v. United States, 163 F.2d 627, 628 (9th Cir. 1947); Bennett v. Arkansas, 252 Ark. 128, 131, 477 S.W.2d 499 (1972); Maryland v. Lee, 235 Md. 301, 201 A.2d 502 (1964); Young v. Mississippi, 245 So. 2d 26 (Miss. 1971); New Jersey v. Oliver, 50 N.J. 39, 231 A.2d 805 (1967).

The California Supreme Court defined "mere informer" in the following terms:

[A] "mere informer" was to be distinguished from one who was or could be a material witness for the defense. "A mere informer has a limited role. 'When such a person is truly an informant he simply points the finger of suspicion toward a person who has violated the law. He puts the wheels in motion which cause the defendant to be suspected and perhaps arrested, but he plays no part in the criminal act with which the defendant is later charged.' . . ."


For example, in Maryland v. Lee, 235 Md. 301, 201 A.2d 502 (1964), the testifying officer was introduced to the defendant by the informer; however, the informer was not present at two sales of heroin for which the defendants were arrested. The Maryland Supreme Court held that the general rule of nondisclosure was applicable "since the informer was not a direct participant in the sale of heroin which formed the basis for the appellant's subsequent conviction." 235 Md. at 305, 201 A.2d at 504 (distinguishing Roviaro).

For example, in Young v. Mississippi, 245 So. 2d 26 (Miss. 1971), the informer told the police that they could purchase marijuana from the defendant but he did not see the police with the defendant. The court upheld the privilege in the absence of proof of participation. Id. at 27. See also Miller v. United States, 273 F.2d 279 (5th Cir. 1960).

In New Jersey v. Oliver, 50 N.J. 39, 231 A.2d 805 (1967), the court found that no disclosure was warranted where the informer, while in the company of the agent who testified at the trial, observed the activities for which the defendant was convicted of bookmaking. The Oliver court's discussion reveals the policy considerations which motivated its stark holding:
Again, the rule in these cases seems rigid. In all of the cases the informer potentially could testify as to entrapment or mistaken identity. In New Jersey v. Oliver, a case involving a nonparticipating eyewitness, the rule was applied although there was a possibility that the informer might have offered testimony contrary to that of a testifying eyewitness. Yet none of these cases indicates that full consideration was given to the needs of the defense. The New Jersey court held that in general there was only a “remote possibility that an informer’s testimony might serve some defendant.” The accuracy of that assumption is crucial for the argument. If a defendant’s case may be served by such a “mere informer,” it is difficult to justify a rule of non-disclosure in all cases.

While it seems clear that the “mere informer” test has severe shortcomings, its use is understandable because judges are presently required to protect the law enforcement interests in a factual vacuum. Often they must rule on a prosecutorial invocation of the privilege before any evidence is presented. New procedural devices are needed to provide information for a proper determination of the potential testimonial contribution of an informer.

D. The “Materiality Test”

The California courts require the prosecution to disclose an informer’s identity whenever there is a reasonable probability that the informer can offer testimony material to an issue bearing on guilt or innocence. While this test is not as inherently inflexible as the two abovementioned tests, there is a threshold problem to impart some definitiveness to the word “materiality.” The general notion of materiality is that a court will admit only that testimony which tends to establish facts which, as a matter of substantive

At the moment a choice seems unavoidable between a disclosure of the witness-informer in all cases or in none at all. A policy decision must be made and it must rest upon probabilities. In those terms the risk of loss to defendants is pure conjecture, while the loss to society in its efforts to cope with crime would be real and substantial. The balance being contemplated by Roviaro must be struck in favor of law and order.

50 N.J. at 48, 231 A.2d at 810 (emphasis added). This rationale demonstrates the need for a systematic method of presenting evidence to the trial court so that the defendant’s loss will no longer be “pure conjecture.”

47 Id.
48 Id. at 47, 231 A.2d at 810.
law, have probative value on the issues before the court. The courts which require disclosure whenever the informer has testimony "material" to the issue of guilt have not indicated another definition of the word. One writer has asserted that if the term is used in this normal evidentiary sense, then the privilege has been virtually eliminated by the California courts, which are liberal in determining that testimony will be probative to guilt or innocence.

The "materiality test" is inferior to the balancing test in several respects. Although materiality is a minimal requirement for all evidence, the public interest in the protection of the flow of information to law enforcement agencies requires an informer privilege of greater scope. Where the informant's testimony will merely impeach a government witness of marginal importance, or add weight to several other defense witnesses, or tend to show entrapment in cases where the defendant is attempting to prove that he did not even take part in a criminal act, or is highly repetitive, or is otherwise relevant and material but not crucial to the defense, the public interest in the protection of the informant may outweigh the particular defense need. Again, the better approach is to allow the judge to balance the conflicting values in a particular case.

Of course, cases will arise in which the informer is so important to the defense that his identity is required regardless of the danger to law enforcement. Even courts which are committed to a balancing approach will hold that where the identity of the informant

50 H. Wigmore, Evidence § 2 (3rd ed. 1940); C. McCormick, Evidence § 185 (2nd ed. 1972).

51 This view is expressed in Comment, Disclosure of Informers Who Might Establish the Accused's Innocence, 12 Stan. L. Rev. 256 (1959).

52 The materiality test does not give certain of the benefits of other tests. While the participant and mere informer tests are relatively mechanical, the materiality test requires that the judge make a sensitive appraisal of the facts early in the trial. The judicial response in California was to make the defense assume an extremely light burden of proof, resulting in the near elimination of the privilege. See, e.g., People v. Garcia, 67 Cal.2d 830, 840, 434 P.2d 366, 373, 64 Cal. Rptr. 110, 117 (1967).

53 There is no doubt that in California a defendant may invoke the defense of entrapment without admitting the actual commission of the criminal acts charged. People v. Perez, 62 Cal.2d 769, 775, 776, 401 P.2d 934, 44 Cal.Rptr. 326 (1965). Nevertheless, it is possible that a defendant alleging such inconsistent defenses should not be permitted thereby to force disclosure of an informant's identity. A contrary result would allow the negation of the privilege by spurious defenses of entrapment. This problem, like so many others, may be minimized by permitting the judge to hold secret hearings to determine the informer's testimony with regard to the alleged entrapment (only for purposes of ruling on the privilege). See part II, infra.

See also State v. Swaney, 277 N.C. 602, 178 S.E.2d 399 (1971).

54 See United States v. Toombs, 497 F.2d 88 (5th Cir. 1974); United States v. Alvarez, 469 F.2d 1065 (9th Cir. 1972); United States v. Day, 384 F.2d 464, 469 (3rd Cir. 1967) (concurring opinion).
is "crucial," "essential," or "necessary" to the defense, any public interest in law enforcement is outweighed by the needs of the defense.\textsuperscript{55} There is dictum that this rule is constitutionally required by due process.\textsuperscript{56} However, where the testimony is material, relevant, or helpful, but not essential to a fair trial, public interest should be considered and weighed against the defense needs determined by the particular facts of each case.\textsuperscript{57}

\textbf{E. Essential, Necessary, or Crucial Test}

Some cases have held that no disclosure of an informant's identity is required unless that information is essential, necessary, or crucial to the defense.\textsuperscript{58} The courts employing this standard usually puts a heavy burden of proof on the defense.\textsuperscript{59} Of the four rules discussed supra, the essential, necessary, or crucial test may be the best approximation to the balancing test because it permits

\begin{itemize}
  \item Even courts which place great reliance on the balancing test would not allow any public interest in law enforcement to prevail where "the informer's testimony is of vital significance to a fair determination of the defendant's guilt or innocence." United States v. Day, 384 F.2d 464, 469 (3rd Cir. 1967).
  \item People v. Garcia, 67 Cal.2d 830, 842, 434 P.2d 366, 374, 64 Cal.Rptr. 110, 118 (1967).
  \item United States v. Toombs, 497 F.2d 88 (5th Cir. 1974); United States v. Alvarez, 469 F.2d 1065 (9th Cir. 1972).
  \item This is the result that would seem to be required by the MODEL CODE OF EVIDENCE rule 230:

  \begin{quote}
    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 a State or of the United States to a representative of the State or the 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.
  \end{quote}

  In State v. Dotson, 260 La. 471, 256 So. 2d 594 (1972), an informant tipped the police that the defendant was in possession of drugs. The police arrested the defendant on a traffic violation, secured a search warrant to search his person, and found some marijuana. The defendant claimed that either the police or the informer planted the drugs in his overcoat pocket and demanded to know the informer's identity in order to prepare his defense. The prosecution's invocation of the privilege was upheld. The Louisiana courts would order disclosure of the name of a confidential informant only under exceptional circumstances for the prevention of an injustice. The burden is upon the defendant to show exceptional circumstances justifying disclosure.

  260 La. at 506, 256 So. 2d at 606. Since the defendant had no evidentiary support for his claim that the informer had framed him by placing the drugs in his overcoat, the burden was not met. See also State v. Braun, 209 Kan. 181, 495 P.2d 1000 (1972); State v. Schena, 110 N.H. 73, 260 A.2d 93, 94 (1969); New Jersey v. Dolce, 41 N.J. 422, 197 A.2d 185 (1964); Dixon v. State, 39 Ala. App. 575, 103 So. 2d 354 (1958).
\end{itemize}
due consideration of both sets of policies. The unfairness of this approach lies in its allocation of burden of proof. While the defense is given this burden, nearly all of the information pertaining to the informer is uniquely in the hands of the prosecution. The courts have been motivated to this allocation of burden of proof by the justified fear of spurious motions for disclosure of the informer's identity by the defense intended only to force the prosecution to dismiss the charges rather than reveal its sources.\textsuperscript{60} Clearly, a procedural device is needed to eliminate or reduce both the fear of spurious defense motions for disclosure and the unfairness of requiring proof by the party who usually has less information.

\textbf{F. Proposal for Codification}

On February 5, 1973, Chief Justice Warren Burger transmitted to Congress proposed rules of evidence promulgated by the Supreme Court on November 20, 1972 (with Justice Douglas dissenting).\textsuperscript{61} Article V of the proposed rules contained the provisions defining privileges in the federal courts. Proposed Rule 510 would have delineated the nature and scope of the informer privilege.\textsuperscript{62} Public Law 93-12\textsuperscript{63} postponed the effectiveness of the proposed rules until they were expressly approved by Congress. On November 15, 1973, the House Committee on the Judiciary reported favorably on a bill\textsuperscript{64} that eliminated the Supreme Court's specific rules on privileges contained in Article V. This bill was

\textsuperscript{60} For example, in New Jersey v. Dolce, 41 N.J. 422, 197 A.2d 185 (1964), the court discussed the underlying policies:

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 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.

41 N.J. at 435, 436, 197 A.2d at 192.


\textsuperscript{63} 87 Stat. 9 (1973).

\textsuperscript{64} H.R. 5463, 93d Cong., 1st Sess. (1973).
passed by the House on February 6, 1974; at this writing, it is awaiting action by the Senate.

The elimination of the Supreme Court’s specific rules on privileges does not reflect congressional disfavor with the Court’s concept of the scope of the informer privilege in the context of federal criminal actions; rather, Congress has not approved the Court’s effort to codify this privilege. Throughout the deliberations there was criticism that parts of the rules of evidence were unsuited for federal codification,65 and questions of privilege are particularly so unsuited because they reflect substantive objectives of societal importance outside of the courtroom. Many of these objectives are of particular interest to individual states. The House Judiciary Committee was concerned “that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason.”66 The Committee also felt that differences in the privilege law as among the state and federal courts would have encouraged forum shopping in some civil cases.67

Yet the rejection of federal codification of the rule should not result in total disregard of the idea, especially by the states. The proposed Rule 510 would provide a powerful and efficient tool for reconciling the competing policies in rulings on prosecutorial invocations of the informer privilege. The Roviaro balancing test, by requiring the consideration of all of the variables that ought to affect the disclosure, is theoretically flexible and accurate. It fails because judges do not have sufficient information to apply it precisely, particularly when the defense request for disclosure occurs early in the trial. For this reason, important decisions are sometimes made on the basis of speculation.68 A systematic means of acquiring data is necessary in order to allow the courts to accurately evaluate the conflicting variables. The in camera proceedings included in the proposed Rule 510 offers this kind of opportunity.

The proposal would have defined the informer privilege quite broadly:

The government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has

67 Id.
68 United States v. Day, 384 F.2d 464, 469, 470 (3rd Cir. 1967) (warns of the dangers of reaching decisions on insufficient information).
furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.69

An exception would have been provided in the case of an “informer [who] may be able to give testimony necessary to a fair determination of the issue of guilt or innocence.”70 The proposal did not mention the concepts of “presumption” or “burden of proof.” Rather, it required an initial indication “from the evidence in the case or from other showing by a party that an informer may be able to give [the] testimony . . . .”71 If there were such an indication and if the government invoked the privilege, an in camera hearing would be held in which the government would have an opportunity to show, by affidavits and, if necessary, by testimony, “facts relevant to determining whether the informer can, in fact, supply that testimony.”72 The judge would have to determine whether “there is a reasonable probability that the informer can give the testimony,” and, if such a reasonable probability existed, disclosure of the informant would be required to avoid dismissal of the charges against the defendant. Under the proposed rule the defense would not have attended the in camera proceedings, and all of the evidence would have been sealed and revealed only in the event of appellate review.73

G. Suggested Modifications

The proposed rule, while laying the foundation for a fair determination of the informer privilege, should only be viewed as a starting point. The in camera hearing, while a necessary procedural device, is not sufficient, in and of itself.

1. The need for clarification of standards — Although the proposed rule provides a powerful procedural tool for acquiring information, it is ambiguous on some questions that have plagued the courts. The proposal apparently would not compel disclosure of the informant unless his testimony were “necessary to a fair determination of the issue of guilt or innocence.”74 Use of the

71 Id.
72 Id.
73 Id.
74 Id.
word "necessary" implies that the disclosure would be required only where the exercise of the privilege would make a fair determination of innocence impossible or very difficult. However, the Advisory Committee Note cites Roviaro, which would require disclosure not only when necessary to a fair determination of guilt or innocence, but also "whenever relevant and helpful to the defense." It would, therefore, seem that the proposed rule adopts a stricter standard than the relevant-and-helpful test, although the Advisory Committee Note invites a judicial softening. Both standards appear too rigid. Where disclosure of the particular informant will not affect the law enforcement agencies, the courts might be permitted to force disclosure if truly helpful to the defense even though a fair trial would be possible otherwise. Where the disclosure would be especially burdensome to the police, disclosure should not be forced, even if helpful to the defense, unless a fair decision is thereby precluded. This latter result is often reached where the prosecution is able to convince the court that the informer is in extreme peril and physical danger.

2. The need to extend evidentiary considerations — The proposal also limits the evidence which can be adduced in secret to "facts relevant to determining whether the informer can, in fact, supply that testimony." However, the state should be permitted to show particular circumstances which make disclosure particularly dangerous to the public. It might be that the informant is uniquely valuable due to his position in the underworld, and his detection could terminate a rich source of information to the police. There may be evidence that the informant would be in physical danger if his identity were made known to the defend-

76 See note 24 supra.
77 See note 24, supra.
78 The proposed rule does not explicitly recognize the consideration of the public interest in law enforcement in determining whether disclosure is required. Nevertheless, see Krattenmaker, Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence, 62 Geo. L.J. 61, 83 (1973): "Rule 510 would tighten substantially the government's informer privilege and rather consistently chooses to give full protection to government interests at the expense of defendants."
80 For example, in United States v. Toombs, 497 F.2d 88 (5th Cir. 1974), the court refused to require disclosure when the prosecution showed in an in camera hearing that the informer, who was quite useful to law enforcement personnel, had been shot three times subsequent to the crime in question.
ant.\textsuperscript{82} Harm to any informant is likely to discourage the public from communicating with police.\textsuperscript{83} The prosecution ought to have an explicit right to give evidence of such peril to the trial court without the need of showing the evidence to the defense.\textsuperscript{84}

II. ANALYSIS OF STANDARDS FOR THE IN CAMERA PROCEEDINGS

\textbf{A. The Need for the Proceeding}

In order to rule on an invocation of the informer privilege in a systematic manner, the trial judge must be able to reduce a large number of factors to a relatively certain balance. The unique nature of the informer privilege requires a more thorough investigation of substantive issues than is usual in evidentiary rulings. The private, \textit{in camera} hearing may be the best means of acquiring the requisite base of data because it allows the prosecution to argue fully against disclosure without undermining the privilege in the process of that argument. Such a systematic means of reducing uncertainty would enable the courts to discard the fairly crude approximations which have been used. The "mere informer" test, the "participant" test, and the other standards described above are all paradigms of informer situations that are only accurate on occasion. \textit{In camera} hearings would enable the court to go beyond these tests to ascertain and give relevance to complex fact patterns.

\textbf{B. The Allocation of Burdens of Proof}

Initially there should be a presumption in favor of the privilege. There are two fundamental reasons for this view. One reason is that while the needs of a particular defendant must be proved in a given case, the court may safely assume in all cases that the public has an interest in preserving a climate of confidentiality for informants.\textsuperscript{85} Under normal circumstances any disclosure of an informant's identity can diminish the general confidence of informers in the secrecy of their identities; this result can impair law enforcement.\textsuperscript{86} Therefore, until evidence is introduced, the bal-

\textsuperscript{82} See, e.g., note 80 supra.
\textsuperscript{83} United States v. Day, 384 F.2d 464, 46 (3d Cir. 1967) (concurring opinion).
\textsuperscript{84} This is provided by PROPOSED FEDERAL RULES OF EVIDENCE 510(c)(2). The record is sealed for appellate review.
\textsuperscript{85} See notes 1 and 3 supra.
\textsuperscript{86} New Jersey v. Oliver, 50 N.J. 39, 47, 48, 231 A.2d 805, 810 (1967).
ance initially should be tipped against the needs of the defense and in favor of the needs of law enforcement agencies. The second reason for the presumption in favor of the privilege is that courts have been concerned about the possibility that the privilege will be undermined by mere allegations, speculation, and tactical maneuvering.\(^8\) The judicial experience has been that many defendants seek the informant’s identity only to force the prosecution to terminate the case rather than lose its sources.\(^8\) Therefore, there should be an initial presumption in favor of the privilege, and a requirement that the defense come forward initially to rebut that presumption.\(^8\)

However, as previously discussed,\(^9\) the very nature of the privilege makes it difficult for the defendant to show the informant’s knowledge or the importance of his testimony to the defense.\(^9\) In contrast, the prosecution, knowing the informant’s identity has a greater capacity to demonstrate his suitability as a witness.\(^9\) Such a factor is important in apportioning burdens of proof.\(^9\) It nevertheless appears that the courts should retain the policy of requiring the defense to sustain the initial burden of coming forward to show that the privilege should not prevail in a particular case.

One option is to raise an initial presumption in favor of the privilege and give the defense the burden of specifying defenses dependent upon knowledge of the informant’s identity.\(^9\) This would reduce spurious attempts by the defense to obtain disclosure. Once the defense has overcome the initial presumption, the prosecution could bear the burden of proving that the privilege

\(^8\) See, e.g., Miller v. United States, 273 F.2d 279 (5th Cir. 1960), where the court is quite concerned with the danger to the privilege:

[The record must reveal] a factual basis for the assertion that ‘it is well within the realm of probability.’ If the informant’s relation to the acts leading directly to or constituting the crime may be assumed from a fertile imagination of counsel, the Government in practically every case would have to prove affirmatively that the informant had not done any such likely act. Having done that, all would be revealed and the informant privilege, deemed essential for the public interest, for all practical purposes would be no more.

273 F.2d at 281.

\(^8\) See note 60, supra.

\(^9\) See notes 59 and 60, supra.

\(^9\) See part 1E, supra.


\(^9\) Id.

\(^9\) JAMES, CIVIL PROCEDURE, § 7.8 (1965).

\(^9\) Since the defense is usually given the burden of proving its need for the informant’s identity, this option represents a decrease in the burden placed on the defense. See part 1E supra.
should be upheld. In overcoming the initial presumption the defendant should be required to specify consistent defenses so that the judge can truly gauge the importance of the informer's testimony and insure that the defense counsel is acting in good faith. With evidence, affidavits, and pleadings, the defendant should show (for purposes of the motion for disclosure) that the defenses have some basis in fact. The defense should also state the nature of the testimony required from the informer, any reason why the informer might be expected to have such testimony, and the materiality of the expected testimony to the specified defenses. If the trial judge feels that the defense may have cause to learn the informant's identity but that it cannot show cause because of insufficient evidence, then he should proceed to examine the informant or law enforcement officials in secrecy; the burden of defending the privilege should shift to the prosecution. The prosecution, knowing the identity of the informant, can easily reveal further facts in secret hearings. Such facts might show that the informant is not able to supply the testimony which the defense expects. Alternatively, the prosecution might show that the informer's testimony would lend only marginal support to the defense and that the value of the testimony is outweighed by the danger to law enforcement in exposing the informant's identity. In order to avoid undermining the privilege while meeting its burden, the prosecution should be permitted to present its proof in private hearings, with a sealed record for appellate review. Any disadvantage to the defendant could be partially neutralized by permitting defense counsel to submit lines of questioning to the court.

C. Problem Areas

There is a natural tendency to recoil at the suggestion of secret hearings. They should not be used except for a limited and pre-
cisely defined purpose, and then only if there is a significant public interest to be protected. Despite these limitations, there has been restricted judicial acceptance of the use of such proceedings for determining whether to uphold a prosecutorial invocation of the informer privilege.\(^9\) The danger of misuse of confidential hearings would be minimized if a record of them were sealed and made available for inspection on appellate review.\(^{10}\) Furthermore, the information adduced in secret hearings would be used only for evidentiary rulings and not on the ultimate issues of guilt or innocence.

One aspect of the in camera procedure which is rarely considered is the possibility of in camera participation by defense counsel. Since the absence of defense participation is one of the serious weaknesses of the process, the underlying assumptions behind such total exclusion deserve close scrutiny. Certainly it is possible to have in camera hearings in which the defense counsel but not the defendant is present. The differences between in camera hearings and open court hearings are severalfold: the defendant is not present in the former while he is present in the latter situation; the public is not admitted in camera; no reports to the general public are possible in camera; and the defense counsel may not be present. Allowing the defense counsel to participate in camera (conditioned by a judicial order of silence) could vitiate the most important advantage of the in camera proceeding. The crucial question is whether the considerations that led to the creation of the privilege require that the defense counsel as well as the defendant be barred from the in camera hearing.

The informer privilege was created to protect the flow of information from private citizens to law enforcement agencies. Therefore, the privilege has always been thought to belong to the State and not to the informer himself.\(^{101}\) This flow of information may be endangered in two general ways. One danger is that informers who are privy to important information and who are valuable to the police may be discovered, harmed, or made less useful. The other broad danger is that potential or actual informers will fail to communicate with the police because they wish to avoid the peril or inconvenience which would accompany the disclosure of their identities. Of course these two dangers interact: harm to one informer is likely to influence the conduct of others. Therefore, any definition of the informer privilege must

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\(^9\) See note 68, supra.

\(^{10}\) PROPOSED FEDERAL RULES OF EVIDENCE/510(c)(2); United States v. Day, 384 F.2d 464 (3rd Cir. 1967).

\(^{101}\) See note 3, supra.
take into account both the real danger to informants and the informants' perceptions of the danger to themselves.

There does not appear to be any data to indicate the actual danger into which informers would be placed by the disclosure of their identities to defense counsel. One cannot discount the possibility that some lawyers would willfully disclose the identity of an informer to their clients or others, notwithstanding judicial orders of silence or general ethical principles. There is also the likelihood that a general dissemination of information concerning informers might result in disclosures occasioned by carelessness or lack of sufficient security-consciousness among attorneys or clerks. It is not difficult to imagine a case in which hearings would show the privilege to be applicable but in which the state would abandon prosecution because it did not trust the defense counsel. Although the distinction between the defense counsel and the defendant may be inappropriate or even naive in some cases, it may be that these problems would be reduced where the defendant is represented by public defenders.

Whatever the real danger to informers of allowing defense counsel to participate in *in camera* hearings, such a procedure would probably constrict the flow of information to the police. Few informers will feel secure in the knowledge that their identities will be revealed to the chosen counsel of the defendants. Many informers who fear for their lives when their identities are known only to a few police officers may be expected to withdraw their services upon learning that unknown attorneys will know their identities. Rules governing the informer privilege must accurately reflect the perceptions of terrified people. Of course, this rule should not be inflexible. Determinations of the appropriateness of the privilege are inherently within the discretion of the court. In some circumstances the judge may feel that a disclosure is appropriate, but only if limited to defense counsel. In some cases it may even be possible for the judge to apprise the informer of the relationship between the accused and counsel, and, if the informant felt sufficiently secure, allow defense counsel to participate *in camera*. Where the informer objected, the hearing would continue without defense counsel. But the general disclosure of informants' identities to defense counsel is likely to compromise the fundamental public policy underlying the privilege. Therefore, in the usual case no legal distinction should be drawn between the defense counsel and the defendant for purposes of disclosing the identity of an informer.

Some courts have rejected secret hearings because of concern over the fact that the judge would learn the name of the in-
The rationale seems to be that informers would fear any disclosure of their identities to other than a limited number of local law enforcement agents. Courts using secret hearings have found informers too terrified even to speak with the judge. However, of those informants who are in such desperate circumstances, some will have testimony necessary for a fair trial, and a defendant should be guaranteed an accurate assessment of that possibility.

In certain instances, the prosecution may be able to show that the privilege should be upheld without the necessity of having the court interview the informant or learn his identity. For example, the prosecution may be able to adduce evidence from police officers of the extent of the informer's knowledge. Under the proposed procedure, exposure of the informant to the judge could be required for an intelligent ruling on the invocation of the privilege, but, at the same time, needlessly harm the system of law enforcement. This result would obtain only if two conditions coincide: (1) the court would find that disclosure of the informant's identity to the defendant is inappropriate; and (2) the informer fears that exposure to the judge would compromise his security. Where these conditions are met, and where the prosecution is unable to show the necessity of the privilege without revealing the informer's identity to the judge, the prosecution can protect its informant by accepting dismissal of the charges. In other cases, the advantages of the in camera hearings will warrant exposure of the informant to the judge.

IV. Conclusions

The balancing test is extremely abstract. While it is theoretically superior to other tests, it is difficult to apply in practice and requires that the court have early access to the facts of the case. In practice the courts have been unable to develop fixed disclosure rules. The appropriateness of the privilege is dependent on subtle variations in the facts. The fixed models, though inconsistent with subtle variations, are necessary because of the scarcity of relevant information available to the court at the early stages of a case. The use of in camera hearings, from which the defendant is excluded, offers the trial court the best opportunity to obtain information needed to balance the needs of the defense against the public interest of law enforcement.

—Ronald E. Levine

103 Id.