Louisiana Law Review

Volume 40 | Number 1
Fall 1979

Defendant's Right to a Confidential Informant's Identity

Michael D. Bewers

COMMENTS

DEFENDANT'S RIGHT TO A CONFIDENTIAL INFORMANT'S IDENTITY

General Considerations

Although the purpose of the criminal justice system is to find the truth, the search for truth is often confined within narrow limits by technical rules of evidence and policy. When the issue is the discovery of the identity of police confidential informants, technical rules are imposed, often restricting the fact finder's view and in some cases the truth. The courts have sought to delimit the "allowable zone of inquiry" by balancing the interests of society in concealing an informant's identity with the rights of the accused to know his accusers and to have adequate means to defend himself against false accusations.[1]

Information regarding the identity of an informant falls within the broad class of communications which is labeled "privileged." Although often referred to as the "informer's privilege," this is not a privilege enjoyed by the informant himself. If the government fails to assert the privilege, then the informer has no standing to do so.[2] Thus, at common law, even those courts and commentators who are most reluctant to recognize any obstruction to the production of all relevant evidence have agreed that certain government officials have a genuine privilege not to be compelled to disclose the identity of informants unless it appears essential to the proper disposition of justice.[3] The rationale of the privilege is to encourage citizens to communicate to proper officials any information they have regarding

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1. *See* Hatchett, *Discovering the Identity of the Informer*, 46 FLA. B.J. 644 (1972).

2. Roviaro v. United States, 353 U.S. 53, 59-60 (1957); 8 J. WIGMORE, EVIDENCE § 2374, at 752 (3d ed. 1940). According to some authorities, the one alleged to be the informant may claim the privilege, and when neither the government nor the informer is represented at trial, some jurisdictions allow the judge to invoke it for the absent holder. *See* C. MCCORMICK, EVIDENCE § 111, at 237 (2d ed. 1972), and cases cited therein.

3. *E.g.*, Scher v. United States, 305 U.S. 251 (1938); Cannon v. United States, 158 F.2d 952 (5th Cir. 1946); C. MCCORMICK, *supra* note 2, § 111, at 236; 2 J. WEINSTEIN, EVIDENCE, UNITED STATES RULES 510-19 (1978); J. WIGMORE, *supra* note 2.

UNIFORM RULE OF EVIDENCE 36 provides:

> A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative of the State or the United States or a government 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.

See also FED. R. EVID. 501.

the commission of crimes.[4] As McCormick has pointed out, "[I]nformers are shy and timorous folk; and if their names are subject to be readily revealed, this source of information would be almost cut off."[5]

One commentator has noted that, compared to the speculative benefits of other privileged communications, the importance of protecting an informant's identity can be statistically corroborated: an alarming number of government informants are murdered each year.[6] Even if the consequences of disclosure are not drastic in *all* criminal cases, or in civil cases, other undesirable consequences such as social ostracism, employer retaliation, or defamation and malicious prosecution actions are sufficient to deter an informant from communicating with authorities unless he is guaranteed anonymity.[7]

The government does not enjoy an absolute privilege to withhold the identity of an informant.[8] However, even with limita-

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> 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 non-disclosure 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.

McCray v. Illinois, 386 U.S. 300, 308 (1967) (quoting 8 J. WIGMORE, EVIDENCE § 2374 (McNaughton rev. ed. 1961)). *See also* United States v. Tucker, 380 F.2d 206, 213 (2d Cir. 1967).

Especially in the area of narcotics offenses, liquor law violations, and sexual crimes, where an aggrieved victim rarely steps forward, the government relies heavily on communications from informants. United States v. Tucker, 380 F.2d 206, 213 (2d Cir. 1967); J. WEINSTEIN, *supra* note 3, at 510-20; Comment, *An Informer's Tale: Its Use in Judicial and Administrative Proceedings*, 63 YALE L.J. 206 (1953) ("Informers' communications . . . most repeatedly involve liquor and narcotics law violations, larceny, vice, and illegal gambling. Reports of . . . antitrust and wage-hour law violations are also frequent."). *See also* Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399, 403 (1959), where it is stated that "ninety-five percent of all federal narcotics cases are obtained as a result of the work of informers."

5. C. MCCORMICK, EVIDENCE § 148, at 309 (1954).

6. Former Attorney General Katzenbach estimated that between 1961 and 1965, twenty-five of the government's informers in the organized crime field alone were murdered. *Invasions of Privacy, Hearings Before the Senate Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary*, 89th Cong., 1st & 2d Sess. (pt. 3) at 1158 (1965), *cited in* J. WEINSTEIN, *supra* note 3, at 510-11.

7. J. WEINSTEIN, *supra* note 3, at 510-20; J. WIGMORE, *supra* note 2.

8. Roviaro v. United States, 353 U.S. 53, 62 (1957); J. WEINSTEIN, *supra* note 3, at 510-20.

tions, the very existence of such a privilege raises serious constitutional questions. The sixth amendment rights of confrontation and compulsory process and the fifth and fourteenth amendment requirements of due process of law address themselves to the defendant's constitutional right to a fundamentally fair trial. It is contended that in many instances the informer privilege cannot stand in the face of these constitutional commands.

Confrontation and Compulsory Process

A unified theory of the right of confrontation and compulsory process has been advanced, an understanding of which casts considerable light on the validity of the informer privilege.[9] This theory demonstrates that the right of confrontation consists of five distinct layers. The first layer requires that the accused not be tried in absentia.[10] Secondly, the confrontation clause requires the state, whenever possible, to produce in person the witnesses whose statements it uses against the accused.[11] Following the production of available witnesses, the third layer of the confrontation clause requires the state to call such persons as witnesses for the prosecution and to endeavor to elicit their evidence directly before resorting to their out-of-court statements.[12] The fourth layer of the right to confrontation is the defendant's right to elicit evidence from the state's

9. Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978).

10. Relying on *Illinois v. Allen*, 397 U.S. 337 (1970), Westen demonstrates that although the sixth amendment prohibition of trials in absentia is not absolute, the prosecution must show a compelling state interest, not merely a rational basis, for the exclusion of the defendant from his own trial. Westen, *supra* note 9, at 574.

11. *Pointer v. Texas*, 380 U.S. 400 (1965), rejected the view that a state has no obligation to produce witnesses from beyond its territorial boundaries. The Court in *Pointer* held that Texas had violated the defendant's constitutional right of confrontation by using the prior testimony of a witness whom it made no effort to produce. *Barber v. Page*, 390 U.S. 719 (1968), rejected the notion that the state may rely merely on its customary procedures for producing witnesses. The Court in *Barber* held that if a state hopes to introduce out-of-court statements, it must make a "good-faith effort" to use all feasible means, including requests for cooperation from sister states and federal authorities, to produce the witness in person.

12. Westen argues persuasively that if this rule were otherwise the state could try the defendant by affidavit, provided it secured the witness's attendance at trial so that the accused could call him as a defense witness. "Thus, the confrontation clause is not merely a constitutional rule governing the attendance of witnesses; it also embodies constitutional controls on the manner by which the state presents its case against the accused." Westen, *supra* note 9, at 578. Relying on *Douglas v. Alabama*, 380 U.S. 415, 418 (1965), and *Pointer v. Texas*, 380 U.S. 400, 404 (1965), the writer notes that "the Court has consistently emphasized that the confrontation clause is designed to permit the defendant to *cross*-examine the witnesses against him." Westen, *supra* note 9, at 577-78 n.30.

witnesses at trial.[13] The final layer of Westen's confrontation analysis resolves itself in the following rule: the state is not estopped to introduce out-of-court statements by witnesses who are unavailable for courtroom examination through no fault of the state, provided that this evidence in the form of out-of-court statements is the best available. However, the due process clause of the fourteenth amendment independently requires that all evidence—both direct and hearsay—be sufficiently reliable for rational assessment by the trier of the fact.[14]

Having analyzed the right of confrontation, Westen proceeds to demonstrate that essentially the same procedural values underlie the correlative concept of compulsory process.[15] The first layer of

13. In *Smith v. Illinois*, 390 U.S. 129 (1968), the defendant was denied the opportunity to cross-examine a prosecution [informant] witness about his real name and address, apparently on the ground that the information was immaterial and therefore outside the scope of cross-examination under state law. The Court held that the defendant's right of confrontation had been violated. In *Davis v. Alaska*, 415 U.S. 308 (1974), the Court concluded:

> [T]he right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record . . . is outweighed by [defendant's] right to probe into the influence of possible bias in the testimony of a crucial identification witness.

415 U.S. at 319. Westen argues that "*Davis* appears to stand for the proposition that the defendant's right of cross-examination—like his right to be present at trial—can be overcome, if at all, only for compelling reasons," and as in *Smith* this right to elicit testimony from prosecution witnesses is not superseded by state rules of evidence to the contrary. Westen, *supra* note 9, at 380-81.

14. Westen argues that his theory is a minor qualification of the Supreme Court's interpretation of the confrontation clause in *California v. Green*, 399 U.S. 149 (1970), where the Court interpreted its earlier confrontation clause cases as standing for the proposition that evidence obtained out-of-court from witnesses unavailable at the time of trial must possess sufficient "indicia of 'reliability'" for submission to the jury. Westen, *supra* note 9, at 586. Westen notes that this standard suggests that even evidence offered in its best available form may be inadmissible if it does not possess the requisite "indicia of 'reliability'" as defined by the confrontation clause. Westen fully agrees with this rule, but prefers to rely on the due process clause as a foundation for the reliability requirement. "The due process clause prohibits the state (1) from convicting a defendant unless its evidence, taken as a whole, is sufficiently probative to permit the trier of fact to find him guilty beyond a reasonable doubt," *citing In re* Winship, 397 U.S. 358 (1970), "and (2) from using any single item of evidence against a defendant which is inherently too unreliable for rational evaluation by the jury," *citing* Estelle v. Williams, 425 U.S. 501, 503-04 (1976); Vachon v. New Hampshire, 414 U.S. 478, 480 (1974); Leary v. United States, 390 U.S. 377, 384 (1968). "[W]e may agree that considerations of due process, *wholly apart from the Confrontation Clause*, might prevent convictions where a reliable evidentiary basis is totally lacking." California v. Green, 399 U.S. 149, 163 n.15 (1970) (emphasis added). Westen, *supra* note 9, at 586, 598-600.

15. Westen, *supra* note 9, at 586. "Indeed, I will argue that these two provisions—much like a physical object and its own mirror image—are both the converse of one another and yet substantially identical." *Id.* at 569.

Westen's compulsory process analysis shows that this sixth amendment right prohibits the state from prosecuting a defendant without supplying him subpoena power to compel the attendance of witnesses in his favor.[16] Although the issue rarely arises, the next layer of compulsory process guarantees the defendant's right, absent exceptional circumstances, to be present in court when witnesses testify in his favor.[17] The most important aspect of compulsory process is its guarantee to the defendant of the right to introduce his witnesses' testimony into evidence by a constitutional standard independent of domestic rules of evidence.[18] The final layer of compulsory process is negative from defendant's perspective in that the state has no duty to produce a witness to testify in defendant's favor if, through no fault of the state, the witness has become unavailable because of death, disappearance, or illness.[19]

16. Compulsory process "operates as an independent standard defining the circumstances under which a defendant is entitled to subpoena witnesses." *Id.* at 587. Thus, the state cannot limit the scope of this subpoena power to that which is provided to the prosecution.

In *State ex rel. Gladden v. Lonergan*, 201 Or. 163, 269 P.2d 491 (1954), the court rejected the notion that compulsory process was a rule of parity and enforced the defendant's request for a witness held in state prison despite a statute declaring state prisoners beyond the subpoena power of the courts and prosecution. *See* J. WIGMORE, EVIDENCE, *supra* note 4, at § 2191. However, Westen demonstrates that although the compulsory process clause, like the confrontation clause, requires the state to make a good faith effort to produce witnesses for the defendant's use at trial, it does not mandate that a state produce witnesses who are no longer available through no fault of the state. Westen, *supra* note 9, at 588.

17. In *Illinois v. Allen*, 397 U.S. 337 (1970), the Court said that the confrontation clause gives the defendant the "right to be present in the courtroom *at every stage of his trial.*" *Id.* at 338 (emphasis added). Nonetheless, the Court in *Allen* eventually held that this right can be forfeited by defendant's misconduct. See note 10, *supra.* Westen concludes that "if the defendant has a sixth amendment right to be present during the testimony of defense witnesses, that right must have its source in the compulsory process clause." Westen, *supra* note 9, at 590.

18. In *Washington v. Texas*, 388 U.S. 14 (1967), the Court held that the right of compulsory process is paramount to a state statute which prohibits a defendant's coindicted accomplice from testifying in the defendant's behalf. Westen summarized this layer of procedural protection by noting:

> There are undoubtedly limits to this principle that a defendant shall be permitted to present evidence in his defense. But it is important to recognize that the question whether the testimony of a defense witness is competent, material or *nonprivileged* is ultimately a federal one to be resolved by constitutional standards, that the constitutional standard is a rigorous one, and that the standard is the same, whether in the context of the defendant's effort to cross-examine prosecution witness [confrontation] or in the context of his effort to examine defense witnesses [compulsory process].

Westen, *supra* note 9, at 593 (emphasis added).

19. Although this conclusion may seem self-evident, Westen points out that the opposing theory is not implausible.

> [The defendant's] interest in an accurate assessment of his guilt is not satisfied by

In connection with the informer privilege and in light of the foregoing analysis, Westen argues that once the determination has been made that a witness possesses relevant and material evidence, the defendant's sixth amendment right to elicit the testimony—whether it arises during cross-examination or direct examination—overrides all testimonial privileges and puts the state to a choice between protecting the interests underlying the privilege or prosecuting the accused.[20] This argument is supported by most of the cases which have addressed the issue of whether a defendant's right to make out a defense supersedes a testimonial privilege,[21] although there are areas of disagreement.[22]

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the production of only so much evidence as is still available at the time of trial; he may also have the right not to be tried at all if the available evidence of his innocence is substantially incomplete.

Westen, *supra* note 9, at 594-95. Westen concludes that such an approach is hardly inevitable, and that as a matter of constitutional policy, the state should not be required to produce witnesses who are unavailable through no fault of the prosecution or the court. *Id.*

20. Westen, *supra* note 9, at 581. *See also* Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 159-77 (1974).

> The choice can take one of two forms. If the evidence the defendant is seeking would tend to impeach a prosecution witness, then the Sixth Amendment puts the state to the choice between preserving the confidential nature of the privileged information (and thus striking the prosecution witness testimony from the record), or standing on the prosecution witness' testimony (and thus foregoing the confidentiality of the privileged information). *See, e.g., Davis v. Alaska*, 415 U.S. 308, 320 (1974). On the other hand, if the evidence a defendant seeks would tend to contradict the very elements of the charge against him, the Sixth Amendment puts the prosecution to the choice between preserving the confidentiality of the privileged information (and thus dropping the prosecution), or pursuing the prosecution (and thus foregoing confidentiality). *See, e.g., Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). *Jencks v. United States*, 353 U.S. 657, 670-72 (1957). *See also United States v. Reynolds*, 345 U.S. 1, 12 (1953).
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> This proposed constitutional rule . . . rests on the assumption that the use of an *in camera* inspection procedure will enable the trial court to determine whether the privileged testimony is material and relevant to the defendant's case before having to decide whether the witness' interest in secrecy should be overriden.

Westen, *supra* note 9, at 581 n.38. This writer fully agrees with the foregoing analysis and will examine the *in camera* hearing in detail. See text at note 113, *infra*.

21. United States v. Nixon, 418 U.S. 683, 711 (1974) (dictum) (sixth amendment overrides constitutionally based privilege for confidential communications between the President and his advisors); Davis v. Alaska, 415 U.S. 308 (1974) (confrontation clause overrides privilege for the confidentiality of juvenile court records); Chesney v. Robinson, 403 F. Supp. 306 (D. Conn. 1975) (confrontation clause overrides privilege for grand jury testimony); Melendez v. Superintendent, Clinton Correctional Facility, 399 F. Supp. 430 (E.D.N.Y. 1975) (compulsory process overrides government informant's privilege if defendant can show special need). *See also* Westen, *supra* note 9, at 627 n.164, for other cases cited therein.

22. Westen, *supra* note 9, at 627 n.164, and cases cited therein.

The conclusion is inescapable that violence would be done to the rights of confrontation and compulsory process if they could be superseded in all cases by the mere invocation of the informer privilege. Certainly the right of confrontation should be the foundation of a valid hearsay objection when a witness attempts to relate the contents of an informant's statements "for the truth of the matter asserted,"[23] and the state should not be able to claim that the declarant is unavailable through no fault of its own.[24] Most significantly, the compulsory process clause guarantees defendant's right to compel the attendance and testimony of an informant whose testimony is material to his defense. Even if the prosecution can show a compelling state interest for withholding the informant's identity, compulsory process demands that the prosecution be dropped if withholding the informant's identity and testimony would prevent the defendant from contradicting the very elements of the charge against him.[25]

Due Process and Roviaro

The due process clauses of the fifth and fourteenth amendments, although far from absolute concepts, pose formidable obstacles to the government's claim of an informer privilege. Numerous cases stand for the proposition that the constitutional requirement of due

23. *See The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Evidence*, 31 LA. L. REV. 385 (1971); *The Work of the Louisiana Appellate Courts for the 1964-1965 Term—Evidence*, 26 LA. L. REV. 617 (1966), reprinted in G. PUGH, LOUISIANA EVIDENCE LAW 429, 431 (1974).

24. Federal Rule of Evidence 804 is not contra to this position, for although this rule defines "unavailability as a witness" to include the situation in which the declarant "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement," FED. R. EVID. 804, its hearsay exceptions are limited to four narrowly defined categories which rarely have anything to do with an informant's hearsay statements offered for the truth of the matter asserted. FED. R. EVID. 804. In addition its omnibus exception would be of no avail to the prosecution, because it requires that the state disclose the name and address of the unavailable declarant. FED. R. EVID. 804(5).

25. Westen, *supra* note 9, at 581. See note 38, *infra*, and note 21, *supra*. *See also* Westen, *supra* note 20, at 159-77; *The Work of the Louisiana Appellate Courts, 1974-1975 Term—Evidence*, 36 LA. L. REV. 666 (1974), reprinted in G. PUGH, LOUISIANA EVIDENCE LAW 221 (Supp. 1978). In *Melendez v. Superintendent, Clinton Correctional Facility*, 399 F. Supp. 430 (E.D.N.Y. 1975), the court stated:

> If he [the informant] is such a potential witness, then his testimony belongs in the case, and if his identity is called for by the Petitioner, manifestly it cannot be denied to him except in the service of some important interest, an interest that outweighs the defendant's interest in access to witnesses in the control of the prosecution.

399 F. Supp. at 437. Although *Melendez* was grounded explicitly on the right of compulsory process, it still recognizes that a compelling state interest might override the right of compulsory process.

process has been equated to the basic concepts of fairness.[26] A court should not lightly dismiss the argument that it offends the basic principles of fairness to require an individual to make out his defense without the names and testimony of those intimately involved in his prosecution. The leading case on the informer privilege, *Roviaro v. United States*,[27] was itself grounded on the "fundamental requirements of fairness," although the Court never specifically denoted this as a due process right.[28]

In *Roviaro*, the defendant entered the car of "John Doe," who was working with two federal narcotics agents and two local policemen. One of the federal agents was hiding in the trunk of the car, from which point he could hear the conversation of Doe and the defendant. The three other officers tailed Doe's car in two cars, as Doe made a circuitous route through the city. Eventually Doe stopped his car, as observed by one of the officers tailing Doe's car from about 100 feet away. This officer further observed the defendant get out of Doe's car, walk to a nearby tree, retrieve a package which he deposited in Doe's car, and then wave to Doe and walk away. This officer and the one in the trunk immediately inspected the package and found a white powder, which a later test proved to be an opium derivative. The officer concealed in the trunk had heard the conversation between Doe and the defendant. He testified that the defendant greeted John Doe and directed him where to drive, that the defendant had asked Doe about money which Doe owed him, and that after he retrieved the package, the defendant told Doe that "I'll call you in a couple of days."[29]

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26. *E.g.*, Ham v. South Carolina, 409 U.S. 524 (1973); Washington v. Texas, 388 U.S. 14 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963); Lisenba v. California, 314 U.S. 219 (1941).

27. 353 U.S. 53 (1957).

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> A further limitation on the applicability of the [informer's] privilege arises from the fundamental requirements of fairness. 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 the 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.

Id. at 60-61. Other limitations on the scope of the informer privilege include situations where its invocation would not serve the privilege's underlying purpose.

> Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, 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.

Id. at 60.

29. The importance of the overheard conversation is that it strongly implies that the defendant knew who "John Doe" was, and that, therefore, as the government suggested to the Supreme Court, the trial court's failure to require disclosure would not

Believing that no fixed rule with respect to disclosure was justifiable, the Court announced a balancing test:

> The problem is one that calls for balancing the public interest in protecting the flow of information against an individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors.[30]

Within this factual framework the Court concluded that John Doe was the defendant's one material witness unless the defendant waived his constitutional right not to take the stand in his own defense. The Court found that this informant, having played a prominent role in the criminal occurrence, might have been crucial in establishing a defense, such as entrapment. Furthermore, Doe "might have thrown doubt upon petitioner's identity or the identity of the package." Also, the Court noted that Doe was the "one witness who might have testified to petitioner's possible lack of knowledge of the contents of the package that he 'transported' from the tree to John Doe's car."[31]

Because the *Roviaro* Court failed to hold specifically that defendant's right to learn the identity of "John Doe" was required by due process of law, *Roviaro* has been read as an exercise of the Court's supervisory power over the federal courts, rather than as a matter of constitutional law. The Supreme Court itself perpetuated this reading of *Roviaro* in *McCray v. Illinois*.[32]

McCray concerned the right of the defendant to learn the identity of a confidential informant at a preliminary hearing to determine probable cause for defendant's arrest and the incidental search. The Court held that neither the due process clause of the fourteenth

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be prejudicial even if erroneous. Citing *Sorrentino v. United States*, 163 F.2d 627 (9th Cir. 1947), the Court answered this argument by saying:

> However, any indications that petitioner, at the time of the trial was aware of John Doe's identity are contradicted by the testimony of Officer Bryson that John Doe at police headquarters denied knowing, or ever having seen, petitioner. The trial court made no factual finding that petitioner knew Doe's identity. On this record we cannot assume that John Doe was known to petitioner, and if alive, available to him as a witness. Nor can we conclude that John Doe died before the trial.

353 U.S. at 60.

30. 353 U.S. at 62.

31. *Id.* at 64. The Court had earlier noted that where "knowledge" is an element of the crime the testimony of a participating informant might be highly material. *Id.* at 63.

32. 386 U.S. 300 (1967).

amendment nor the sixth amendment right of confrontation is violated when a state court recognizes the privilege against disclosure of the identity of an informant where the arresting officers' sworn testimony fully supported a finding of probable cause.[33] In dictum the Court stated: "What *Roviaro* thus makes clear is that this court was unwilling to impose any absolute rule requiring disclosure of an informer's identity even in formulating evidentiary rules for federal criminal trials."[34]

Despite this prevailing interpretation of *Roviaro*, a fascinating opinion by Judge M. Joseph Blumenfeld of the District Court for Connecticut, was handed down in 1973, showing that the right to the informant's identity has constitutional dimensions. *Hawkins v. Robinson*[35] was a habeas corpus proceeding brought by a state prisoner after his conviction for selling heroin. At his trial petitioner had sought the name of an informant who was present during the drug transaction between petitioner and a narcotics agent. The trial court sustained the state's objection to this line of questioning. The Connecticut Supreme Court refused to consider the merits of petitioner's appeal because petitioner's counsel had failed to give the court some "inkling" as to the grounds of admissibility, and had further failed to take formal exception to the judge's ruling, as required by the State Practice Book.[36]

Judge Blumenfeld, after finding that petitioner had exhausted his state remedies, stated that the central issue in the case was raised by the Connecticut Supreme Court's interpretation of *Roviaro* in *Connecticut v. Harris*.[37] In resolving this issue[38] the federal court

33. *Id.* at 313.

34. *Id.* at 311.

35. 367 F. Supp. 1025 (D. Conn. 1973).

36. State v. Hawkins, 162 Conn. 514, 294 A.2d 584, *cert. denied*, 409 U.S. 984 (1972).

37. 159 Conn. 521, 271 A.2d 74 (1970).

38. This issue is best summed up in the following passage from the federal court's opinion:

> The United States Supreme Court in *Roviaro* held that the "fundamental requirements of fairness" dictate the disclosure of an informant's identity in certain circumstances, but nowhere in the opinion did the Court explicitly state that such disclosure was required by a specific provision of the Constitution. As noted above, the Connecticut Supreme Court held that *Roviaro* dealt with "federal rules rather than constitutional rights." It relied upon *McCray v. Illinois*, in which the United States Supreme Court discussed its holding in *Roviaro* in connection with the formulation of "evidentiary rules for federal criminal trials." An issue crucial to petitioner's case is thus presented: if disclosure of the informant's identity under the circumstances discussed in *Roviaro* is solely a matter of enforcement of "evidentiary rules for federal criminal trials," then the ruling of the trial judge was at best an error on a question of evidence, and the failure of the trial judge to order such disclosure does not rise to the level of a constitutional ground upon which petitioner may apply to this Court for a writ of habeas corpus. If, on the

noted that the phrase "fundamental requirements of fairness" as used in *Roviaro* connotes a constitutional guarantee.[39] Observing that other federal courts had evidently assumed that the requirements of disclosure in particular circumstances were rooted in the constitutional guarantee of a "fundamentally fair" trial,[40] Judge Blumenfeld particularly noted that *Roviaro* has at least twice been used as a foundation for the granting of a writ of habeas corpus for state prisoners, further affirming that the case involves constitutional guarantees and not merely federal evidentiary rules.[41]

Concluding his argument that in some cases an accused has a constitutional right to the name of an informant, Judge Blumenfeld stated:

> We need not indulge in semantic gymnastics or turn conceptual somersaults over the fact that the Supreme Court did not specifically denote the Due Process Clause as the basis for its decision in *Roviaro*: it is beyond peradventure that the right to a trial in which the "fundamental requirements of fairness" are secured is a right essential to, and at the very heart of, the protections guaranteed by our Constitution.[42]

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other hand, the disclosure of the informant's identity required in *Roviaro* and sought at petitioner's trial was dictated by constitutional requirements, then petitioner's constitutional rights may have been violated.

367 F. Supp. at 1029-30 (citations omitted).

39. The court cited numerous cases for the proposition that due process is the equivalent of the basic concept of fairness. *See* note 26, *supra.*

40. United States v. Emory, 468 F.2d 1017, 1020-21 (8th Cir. 1972); Burwell v. Teets, 245 F.2d 154, 165 (9th Cir. 1957), *cert. denied*, 355 U.S. 896 (1958).

41. United States *ex rel.* Drew v. Myers, 327 F.2d 174, 180-81 (3d Cir.), *cert. denied*, 379 U.S. 847 (1964); Hernandez v. Nelson, 298 F. Supp. 682, 685-87 (N.D. Cal. 1968), *aff'd*, 411 F.2d 619 (9th Cir. 1969).

42. 367 F. Supp. at 1034. The recent case of *Pena v. LeFerve*, 419 F. Supp. 112 (1976), following the rationale of the Connecticut federal district court in *Hawkins*, stated:

> [I]t is probable that the Supreme Court was concerned not merely with the formulation of a rule of evidence in federal criminal trials: at stake was the basic fairness of the proceedings against Roviaro. And, the denial of basic fairness in a criminal proceeding is a "violation of the Constitution . . . of the United States." 28 U.S.C. § 2254(a). Furthermore, where the very integrity of the fact finding process is at issue, *i.e.*, in the presentation or exclusion of evidence directly relating to an accused's innocence or guilt at trial, the Supreme Court has determined the accused's "fundamental" rights to be of constitutional origin.

419 F. Supp. at 117. The *Pena* Court went on to note that *Roviaro* did not lay down a blanket rule requiring disclosure of a confidential informant's identity whenever a defendant demanded it. The court concluded that "when the factors are considered together: the minimal role the informer played, the strong identification testimony, the lack of any allegation of entrapment, and the paucity of petitioner's alibi defense, lead to the conclusion that the trial court properly denied petitioner's request for disclosure." 419 F. Supp. at 118.

It can be concluded that the informer privilege, like other privileges or rules of evidence or competence, often operates effectively to deny the defendant the benefit of exculpatory evidence and thus may violate due process of law. Most rules of evidence and competence are designed to promote the integrity of the fact finding process by excluding potentially unreliable or misleading evidence, but they are nonetheless vulnerable to constitutional attack if they have the effect of seriously inhibiting the defendant's right to make out a defense.[43] Privileges, on the other hand, are designed to promote relationships and interests outside the courtroom by permitting witnesses to withhold even reliable evidence. Although it is often stated that these extrajudicial interests, which privileges serve to protect, are more important than the unfettered determination of the truth in judicial proceedings, this writer agrees with Westen that "no interest protected by a privilege is sufficiently important to outweigh the defendant's right to establish his innocence through the presentation of clearly exculpatory evidence."[44]

Even if one reads *Roviaro* as based on the Court's supervisory jurisdiction over the lower federal courts, *Roviaro's* reasoning and language suggest that the decision was constitutionally compelled. Having concluded that the government has a significant interest in preserving the confidentiality of its sources of information to support a federal "informer privilege," the Court found that the scope of such a privilege does not extend so far as to allow concealment of

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43. *See* Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967). In *Washington*, the compulsory process clause was held to supersede a rule of competence on the ground that the state's competency rule had the effect of abridging defendant's right to present a defense. In *Chambers*, the Court found a violation of the due process clause when two traditional state evidentiary rules effectively denied the defendant a fair trial. The trial court had invoked the "voucher rule"—that the party calling a witness vouches for the witness's credibility—to prohibit Chambers from impeaching his own witness. This witness had signed a written confession and made other self-incriminating statements shortly after the crime occurred but had repudiated his confession by the time Chambers came to trial. The state did not call this witness to the stand, because although he was willing to testify that he was himself innocent, he did not claim to possess information linking Chambers to the crime. The trial court also employed the hearsay rule to prohibit Chambers from offering the testimony of three witnesses to whom this witness had made oral confessions shortly after the crime. Westen, who was counsel for Chambers before the United States Supreme Court, notes:

> [The Court] apparently for jurisdictional reasons, . . . based its decision not on the rights of confrontation and compulsory process but on the ground that the defendant had been denied a fair trial under the due process clause. Nonetheless, there is reason to believe that under other procedural circumstances the Court would have decided *Chambers* directly on Sixth Amendment grounds . . . .

Westen, *supra* note 9, at 607.

44. Westen, *supra* note 20, at 161. See text at note 20, *supra*.

exculpatory testimony. As noted by Westen: "[W]hile the Court defined the scope of the federal privilege on nonconstitutional grounds by weighing the two conflicting interests, one of those interests—giving the defendant the 'right to prepare his defense'—is constitutionally based and would compel the same result on constitutional grounds."[45]

Roviaro's Progeny

Because the Supreme Court has not specifically recognized a constitutional right to learn the identity of an informant, most federal and state courts have, in turn, side-stepped constitutional challenges to the informer privilege. Following the guidelines announced in *Roviaro*, the majority of the decisions employ a balancing test in order to ascertain whether disclosure is necessary in a particular case. As one commentator has pointed out, the courts have developed what amounts to a checklist of elements which must exist before an accused can surmount the informer's privilege.[46] This checklist includes: the trial stage must have been reached;[47] the informant must have participated significantly in the criminal act with which the accused is charged;[48] the crime must be of such a nature that the informant's testimony will be useful in the formulation of realistic defenses;[49] and the informer must be a stranger to the accused.[50] The courts have also considered several possible defenses enumerated in *Roviaro* to which an informant might contribute: entrapment, alibi, mistaken identity, and lack of sufficient knowledge on the part of the accused where knowledge is an element of the crime.[51]

In addition to the foregoing necessary elements, the courts have placed a heavy burden on the accused to specify concrete reasons

45. *Id.* at 165.

> To prosecute a person while withholding material witnesses in his favor is indeed "unfair," not only in some general due process sense, but in the specific sense that it denies him access to evidence of his innocence. This is precisely the kind of unfairness the framers intended to prohibit by adopting the compulsory process clause.

Id. at 166.

46. Hayes, *Disclosure of Informers: The Accused's Right*, 48 CONN. B.J. 91 (1974).

47. McCray v. Illinois, 386 U.S. 300 (1967).

48. Rugendorf v. United States, 376 U.S. 528 (1964); Roviaro v. United States, 353 U.S. 53 (1957); United States v. Clark, 482 F.2d 103 (5th Cir. 1973). The informant's degree of participation is one pre-requisite which has received extensive treatment.

49. Roviaro v. United States, 353 U.S. 53 (1957); Hawkins v. Robinson, 367 F. Supp. 1025 (D. Conn. 1973).

50. Roviaro v. United States, 353 U.S. 53 (1957); United States v. D'Angiolillo, 340 F.2d 453 (2d Cir. 1965).

51. 353 U.S. at 64.

why he needs to know the identity of the informant.[52] However, if the defendant shows sufficient grounds for his requested disclosure, it will be reversible error for the trial court to fail to order such disclosure.[53] Further, in the event disclosure of the informant is merited, at least one United States Court of Appeals has imposed the additional burden upon the prosecution to assist in producing the informant.[54]

The Fifth Circuit

The fifth circuit jurisprudence on the right of the accused to learn the name of an informant has been developed extensively in recent years. The fifth circuit in fact anticipated the Supreme Court's decision in *Roviaro*.[55] An analysis of the cases reveals that the fifth circuit has used a strict *Roviaro* approach, balancing the benefits to the defendant of disclosure and production against the potential harm to the informant or society. The proper ruling in the fifth circuit will depend upon the specific facts and circumstances of

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52. In *Rugendorf v. United States*, 376 U.S. 528 (1964), the Court described the burden as follows:

> The necessity for disclosure depends upon "the particular circumstances of each case, taking into consideration the crime charged, the possible defense, the possible significance of the informer's testimony, and other relevant factors . . . ." Petitioner did not develop any such criteria with reference to the merits of the case . . . . Never did petitioner's counsel indicate how the informant's testimony could help establish petitioner's innocence.

Id. at 535.

53. United States v. Portomene, 221 F.2d 582 (5th Cir. 1955). *Portomene* was cited by the Supreme Court in *Roviaro*. The fifth circuit in *Portomene* rejected the government's argument that if the "refusal to disclose" ruling was erroneous, it was harmless because the defendant testified that he thought he knew the informant's identity and believed the informant to be Joe Vega, who had a motive to frame him. The court said:

> [I]t does not lie in the mouth of the government to say that, though the court erred by depriving the defendant of the information he sought and to which he was entitled, and thus visited a wrong upon him, the conviction should nevertheless stand because the amount and extent of the prejudice is not precisely shown.

Id. at 584. Many subsequent fifth circuit cases have cited *Portomene* without repudiating this point, so it can be argued that the fifth circuit does not require that the informant be a stranger to the accused. However, it can be argued that *Roviaro* impliedly holds that if the defendant had known the accused then the refusal to disclose would have been harmless error. See note 29, *supra*.

54. United States v. D'Angiolillo, 340 F.2d 453 (2d Cir. 1965). In *D'Angiolillo*, it was said: "The rule emerging from these and earlier decisions is that, where the informer's testimony may be relevant to the defense, the defendant is entitled to his name, to such information as the government may have concerning his whereabouts, and to reasonable cooperation in securing his appearances." *Id.* at 455. This is consistent with Westen's theory of compulsory process since the court found the witness to be available. See note 16, *supra*.

55. See note 53, *supra*.

each individual case.[56] However, as one recent fifth circuit case, *United States v. Fischer*,[57] has pointed out, although the courts have not attempted to formulate a blanket rule for informant cases, several broad categories have emerged.[58]

As the *Fischer* court notes "at one extreme are those cases where the informant was a mere tipster.[59] It is settled that the *Roviaro* principle does not require disclosure and production of such an informant."[60] The major fifth circuit case supporting this rule is *United States v. Clark*.[61] An analysis of *Clark* is disturbing from the outset for it is readily apparent that the informant was not a mere tipster. In *Clark* the informant introduced two special narcotics agents to the defendant, who shortly thereafter sold some heroin to one of the agents. The defense introduced no testimony, but requested the name of the informant, which was denied. The court held that where the evidence shows that an informant is nothing more than an tipster and does not participate in the transaction, no disclosure of his identity is required.[62] Probably of more significance is the following language of the court:

> The critical factor in *Roviaro* which favored disclosure, not present here, is that the informer was not only an active participant but the sole participant other than the defendant in the crime charged, and was the only witness in a position to amplify or contradict testimony of the Government's witnesses.[63]

It is contended that, although the informant's "sole" participation in the transaction is a distinguishing feature in *Roviaro*, nonetheless the informant in the *Clark* case is still the only witness in a position to "amplify or contradict" the testimony of the government's witnesses other than the defendant himself. The New York federal district court in *Melendez v. Superintendent, Clinton Correctional Facility*[64] correctly noted the necessity of the informant's testimony in a strikingly similar factual setting.[65] However,

56. This writer will attempt to show that unfortunately these rulings have not always been proper.

57. 531 F.2d 783 (5th Cir. 1976).

58. The court's treatment of the informant issue is very interesting and will be discussed in detail.

59. *See* Bourbois v. United States, 530 F.2d 3 (5th Cir. 1976); United States v. Clark, 482 F.2d 103 (5th Cir. 1973).

60. 531 F.2d at 787.

61. 482 F.2d 103 (5th Cir. 1973).

62. *Id.* at 104.

63. *Id.*

64. 399 F. Supp. 430 (E.D.N.Y. 1975).

65. The New York court said:

> Uncertainty arose on the prosecution's own testimony concerning the presence of the alleged informer throughout the transaction, but that uncertainty left open

Melendez can be distinguished from *Clark* in that the defendant in *Melendez* had raised the defense that no transaction involving himself had taken place, whereas the defendant in *Clark* failed to allege a defense which necessitated disclosure of the informant's identity.[66]

The other fifth circuit case cited in *Fischer* for the "tipster" rule is *Bourbois v. United States.*[67] In *Bourbois* a narcotics agent, acting on information provided by a previously reliable informant, arrested the defendant and seized some 333 pounds of marijuana from his car. His motion to suppress having been denied, defendant was convicted of possessing a controlled substance with intent to distribute. The fifth circuit summarily affirmed the conviction on appeal. Thereafter the defendant filed a motion to vacate the judgment and sentence,[68] alleging that the government's failure to provide him with the identity of the informant violated his right of confrontation, was a denial of due process, and constituted plain error. The district court denied relief, and in a short per curiam opinion the fifth circuit affirmed. The court held that the government is not required to disclose the identity of an informant who is a mere tipster and not an active participant in the offense charged.[69]

Unlike the *Clark* case, *Bourbois* is a "pure tipster" case in that the informant played no active part in the crime charged and never came into contact with the defendant during a stakeout or criminal transaction. More significant is the fact that the fifth circuit in its

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> not only the possibility that the informer was present throughout, but also the possibility that, if he stood apart from the final phase of the transaction, he was close enough to see whether anything passed from hand to hand after he stood aside . . . . The alleged informant if present to the extent that the prosecution's evidence indicated, would, if the police testimony was fully truthful, have been a merely cumulative prosecution witness. But if the critical testimony of the undercover detective was suspect, the alleged informer's testimony could have contradicted it along a half dozen imaginable paths not excluding the identity of the seller, failure to make a "buy" (for, of course, not every approach even to a known peddler results in a transaction; even peddlers run out of stock), refusal to deal (whether or not petitioner was a peddler), recognition of the undercover officer as what he was, etc.

Id. at 438-39.

66. The *Clark* court stated in a footnote that it had considered defendant's argument in light of *Brady v. Maryland*, 373 U.S. 83 (1963), which was cited as authority for the proposition that due process is violated by suppression of evidence favorable to the accused. However, it found that nothing in the record indicated that the informer possessed exculpatory information, which would tend to benefit appellant or to bring this matter within the ambit of *Brady*. 482 F.2d at 104. *Cf.* United States v. Davis, 487 F.2d 1249 (5th Cir. 1973).

67. 530 F.2d 3 (5th Cir. 1976).

68. 28 U.S.C. § 2255 (1949).

69. 530 F.2d at 3.

per curiam opinion did not address defendant's constitutional claims. Instead the court merely cited cases from the fifth circuit which had developed the foregoing rule out of the *Roviaro* balancing test. One can postulate, however, that if the defendant had alleged that he was being framed (*i.e.*, if all the contraband had been in the trunk and he claimed that he did not know it was there) and had coupled that allegation with a claim that to deny him the name of the informant was a violation of his right to compulsory process, the court would have had to address this constitutional issue. Otherwise, how could the defendant make out his defense of a frameup without calling a person who might have planted the contraband in his car?

The next category of cases enumerated in *Fischer* as those at the opposite extreme from the "tipster" cases is that group of cases such as *Roviaro* itself, in which the informant has played a crucial role in the alleged criminal transaction, and disclosure and production of the informant are required to ensure a fair trial.[70] The *Fischer* court stated that examples of such cases in the fifth circuit are *United States v. Jiminez-Serrato*,[71] in which the informant was the only participant in the transaction who could establish the defendant's mens rea, and *Portomene v. United States*,[72] the pre-*Roviaro* case in which the informant was the only one who actually purchased narcotics from the defendant.

In *Jiminez-Serrato* the defendant was convicted of possession of counterfeit money, a crime requiring knowledge and intent.[73] At trial the prosecution's evidence consisted solely of the testimony of two Secret Service agents. The first agent testified that he had met the defendant while on an undercover Secret Service mission in Columbia and that at that meeting the defendant offered to supply him with some counterfeit bills. However, when the bills were to be delivered, the defendant never appeared. The second agent testified that on a given day a confidential informant came to his office with some counterfeit bills which the informant claimed he had received from the defendant, who was waiting for the informant at a hotel. The agent marked the bills and then proceeded to the hotel with several other agents and the informant. The agent testified further that the informant was instructed to present the sealed envelope containing the bogus bills to the defendant and state that he had been unable to pass them off. The agents "staked out" the conversation of the informant and the defendant which took place in the lobby of the hotel and arrested the defendant shortly after he had ac-

70. 531 F.2d at 787.
71. 451 F.2d 523 (5th Cir. 1971).
72. 221 F.2d 582, 583-84 (5th Cir. 1955).
73. 18 U.S.C. § 472 (1948).

cepted the envelope. The defendant testified at trial that he had met the informant through a man he had known for ten years and had entrusted a ring to the informant to sell. The defendant further testified that when the informant approached him in the lobby, the informant said: "Take this and then later we will talk."

On appeal the court noted that the sole point of argument was whether knowledge, intent, and concealment were sufficiently proven by the government. The court concluded that except for the inference which could be drawn from the first agent's testimony, there was no evidence in the record that could support the judge's finding of guilty knowledge. Thus, the court concluded with the following statement:

> In essence, the case boils down to whether the defendant, who took the stand and testified subject to cross-examination, or the unnamed and unproduced Government informant is to be believed, for it is only the informant's suggestion to the Government's agents that he obtained the counterfeit bills in question from defendant which ties him to the bills. While the informant has a qualified privilege not to testify, the Government's attempt to make its case against Serrato without the informant's testimony failed to prove *mens rea*.[74]

This case is not a *Roviaro* problem at all, although the court's reliance on *Roviaro* is certainly justifiable. Although the opinion is not clear on this point, it appears that the defendant never requested the name of the informant and had instead correctly taken exception to the government's failure to prove mens rea. Further, the quoted passage of the court's opinion shows that the true grounds for reversal were that defendant was convicted on hearsay evidence and that his sixth amendment right of confrontation had been violated.[75]

The third category of informant cases delineated by the *Fischer* court is that group of cases typified by *United States v. Toombs*,[76] in which "there was a slight possibility that the defendant might benefit from disclosure, but the government had demonstrated a compelling need to protect its informer."[77] *Toombs* is a difficult case

74. 451 F.2d at 526, *citing* Roviaro v. United States, 353 U.S. 53 (1953).

75. It should be emphasized that the defendant's right of confrontation was not violated because the name of the informant was not disclosed to him. Rather, this constitutional protection was abridged because the true witness against him, which proved a necessary element of the crime, was not produced so that defendant could confront and cross-examine him. However, it can be argued that the case merely stands for the proposition that the government cannot abrogate its responsibility to prove an element of a crime, such as mens rea, by claiming the informer privilege.

76. 497 F.2d 88 (5th Cir. 1974).

77. 531 F.2d at 787.

and illustrates just how intricate the balancing test can be in an informant case. Due to space limitations the involved details of the testimony presented by the government and by the defense will not be recounted in this comment. Judge Ainsworth does an excellent job in distinguishing the factual context of this case from that of *Roviaro*, provided one takes the government's version of the facts as true. Judge Ainsworth might have been attempting to circumvent this problem when he stated in his opinion: "Conceding, *arguendo*, the unlikely possibility that the informant would have corroborated defendant's account of the events, his testimony would have been cumulative to that of the two defense eyewitnesses, whom the jury chose to disbelieve."[78]

In the first place it might not be so unlikely that the informant would have corroborated the defendant's account of the events. After all, in *Roviaro*, which the court painstakingly distinguished, the informant had denied ever seeing the defendant when confronted with him at the police station on the night of the alleged transaction. In the second place, although the informant's testimony might have been cumulative, the effect on the jury of the informant's repudiating the government's version of the story could have been devastating.

Another disturbing aspect of the *Toombs* case is the court's analysis of the defendant's request and reasons for disclosure. As stated earlier the burden is on the defendant to show why disclosure is necessary.[79] Regarding the defendant's request for disclosure of the informant's identity the *Toombs* court said: "In his motion for disclosure and accompanying affidavit, appellant's allegations that the informant was an active participant and a material witness to the alleged transaction were merely conjectural."[80] The fallacy of such an argument is readily apparent, for in *Toombs* the informant's participation was not a product of defense counsel's "fertile imagination." The defense had three witnesses, the defendant and two others, testifying as to the informant's degree of involvement. The implication from this statement by the court is that the

78. 497 F.2d at 93-94.

79. See notes 52-53, *supra*.

80. 497 F.2d at 93. This statement was expounded upon in the following footnote: Much more than speculation is required. There must be a compelling reason for the disclosure. "If the informer'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 acts. Having done that, all would be revealed and the informer privilege, deemed essential for the public interest, for all practical purposes would be no more."

Id. at 93 n.5, *quoting* Miller v. United States, 273 F.2d 279, 281 (5th Cir. 1959).

court chose to accept the government's version of the informant's participation in employing the *Roviaro* balancing test. This is particularly disturbing since the only government witnesses were a special agent and a co-defendant who had pled guilty. Further, the court acknowledged that there were disparities between the testimony of the government's two witnesses as to the degree of the informant's participation but called these "only minor variations."[81] Finally, the co-defendant admitted that he had formerly been a heroin addict and that the informant had been his principal supplier. Therefore, undoubtedly the government was exercising great leverage over both the co-defendant and the informant. In light of this situation the defendant's allegations that the heroin packet belonged to the co-defendant and not to him is not so untenable, and the possibility of a frame-up is not so remote.[82] Therefore, the court was unwarranted in saying that defendant's account of the transaction was "mere conjecture." The degree of participation by the informant in the criminal transaction is often the pivotal point in the *Roviaro* balancing process, and it is contended that for the court to rely unduly on the government's version of the informant's participation places an insurmountable burden on the defendant to show why disclosure is necessary.

The bottom line of this case, however, is that immediately before trial, in the judge's chambers, the government's counsel informed the court that the informant had been shot three times since the time of the incident in question.[83] Thus, this case illustrates that if the defendant only shows what the court considers a "speculative"

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81. 497 F.2d at 91.

82. Nondisclosure meant that the informant's credibility was never tested by cross-examination. Other courts have noted that the reliability of informant information is often suspect, for frequently the informant is motivated not by a desire to aid law enforcement but rather by the hope of obtaining revenge, collecting a reward, procuring drugs or obtaining a reduced sentence. In *Jones v. United States*, 266 F.2d 924, 928 (D.C. Cir. 1959), it is said: "The practice of paying fees to the informer for the cases he makes may also be expected, from time to time, to induce him to lure nonusers into the drug habit and then entrap them into law violations." *See* United States v. Suarez, 380 F.2d 713, 717 (2d Cir. 1967) (court considered defense objection that "the pressure on informers to 'make' cases or go to jail destroys their reliability"); J. WEINSTEIN, *supra* note 3, at 510-22.

83. 497 F.2d at 94. In light of this the court said:

> The necessity of anonymity of the informant for his personal safety is greater than the theoretical necessity possibly underlying refusals to disclose . . . . [this informant's] usefulness to law enforcement officials has already been demonstrated by his role in supplying the information relative to Knight [the co-defendant], another narcotics law offender. Disclosure of his identity would not only destroy any future usefulness but possibly jeopardize his life . . . . The positive advantages to the Government in withholding the informant's identity far outweigh any speculative benefits to the accused.

Id.

need for disclosure, then the government can come forward with compelling reasons for invoking the informer privilege. A question arises, however, concerning the situation where the defendant has convinced the court that disclosure is essential to his defense, and once again the government comes forward with proof that the informant's life is seriously in danger. The probable answer is that the government should be required to discontinue its prosecution of the defendant.[84]

The *Fischer* case represents an enlightened approach to the problem at hand. On the record before it, the court was unable to determine into which category the case should be placed. Pertinent to the informant issue, the record only showed that the informant arranged the parties' introduction, that three meetings occurred between two narcotics agents and the defendants for the purpose of purchasing cocaine, and that the informant was present throughout the first meeting at which he helped test the cocaine.

Although the court concluded that this participation was more active and significant than that of the informant in *United States v. Davis*,[85] it was unable to say from this record that the informant's participation was such that fairness to the defendant required disclosure and production regardless of any showing the government could make in opposition. Under such circumstances the court felt that it could only guess as to the substance of the informant's testimony. Further, the court noted that the record was silent about the interests which the government might have had in resisting disclosure and production. Consequently, the court remanded the case to the district court so that the judge could question the informant *in camera* to ascertain whether his testimony might be helpful to the defendants. At this time, the judge was also directed to question the informant and the government concerning their interests in avoiding disclosure and production. Finally, the record was to be supplemented with an order applying the *Roviaro* balancing test to the facts of the case.

This is a significant and welcomed departure from prior cases. The outstanding feature of this approach is the change of emphasis with regard to the burden that defense counsel must carry in order to require disclosure. Thus, the appellate court refused to penalize the defendant for failing to establish in the lower court why disclosure and production were necessary in order to make out a defense. In fact, the court holds that it is the district judge's responsibility to ascertain the possible relevance of the informant's

84. See text at notes 20 & 44, *supra*.

85. 487 F.2d 1249 (5th Cir. 1973).

testimony. It is submitted that this is a much more realistic approach, for often defense counsel will be unable to explain in the abstract why the informant's testimony is crucial. Further, the government under the court's ruling has a concurrent burden to show why the informer privilege should be sustained. This approach deals with the categories of cases typified by *Toombs* in a manner more appropriate to the *Roviaro* balance of interests.[86] In *Toombs* the district court should have questioned the informant *in camera*. Unless the undisputed facts show that an informant is a "mere" tipster, as in *Bourbois*, or that the informant was an active and sole participant in the criminal transaction as in *Roviaro*, the trial court should order an *in camera* hearing to question the informant. Although the *Fischer* court does not make this point clear, defense counsel should be permitted to be present and allowed to question the informant, in order to obtain meaningful results. This, of course, does not mean defense counsel can ask the informant his name and address. As the *Fischer* court points out, "an in camera hearing will best accommodate the competing governmental and individual interests"[87] in such a case.

86. Professor Pugh has pointed out that the United States Supreme Court creatively dealt with the informant problem when it promulgated the Federal Rules of Evidence. In rule 510, as promulgated, the Supreme Court provided that under certain circumstances a trial judge can make an *in camera* investigation apart from both counsel and defendant. 56 F.R.D. 183, 510 (1972). Unfortunately, Congress punted on this and other privilege rules promulgated by the Court and chose instead to adopt a single rule. FED. R. EVID. 501.

87. 531 F.2d at 788. The *Fischer* court cited two other recent fifth circuit cases as authority for the *in camera* hearing in informant cases. *United States v. Freund*, 525 F.2d 873 (5th Cir. 1976), is not a true *Roviaro* problem, but does involve the protection of confidential informants. The *Freund* court points out that "the United States Supreme Court indicated that an *in camera* procedure was an acceptable device to aid the trial court in its application of the *Roviaro* test." 525 F.2d at 877, *citing* Alderman v. United States, 394 U.S. 165 (1969). *United States v. Doe*, 525 F.2d 878 (5th Cir. 1976), held that a defendant's sixth amendment rights to counsel and confrontation were not violated when the district court conducted a post-trial *in camera* interview with a confidential informant who was present during the narcotics transaction. The court said:

> [I]n light of [defendant's] alibi defense, the district court correctly reasoned that disclosure would not be warranted unless the informant either could not positively identify the [defendant] or possessed some other evidence that would tend to exonerate [him]. Both the *in camera* interview and the test identification procedures provided the court with precisely the sort of information upon which its ruling on disclosure should have been based.

525 F.2d at 880. The opinion is not clear on this point but apparently the right to counsel violation must have stemmed from the fact that defense counsel was not permitted to attend the *in camera* hearing. The court's rejection of this argument seems to indicate that the court does not have to permit defense counsel to be present at such an *in camera* hearing in order to determine whether disclosure is necessary, but this writer feels it should be otherwise.

Another case coming out of the fifth circuit, *United States v. Bower*,[88] is interesting in many respects, especially with regard to the trial judge's approach to the request for disclosure, the defendant's constitutional claims, and the strong defense of entrapment. In *Bower* the illegal drug transaction was negotiated by a paid government informant, who had moved into an apartment located above that of the defendant. After the two had become acquainted, the informant repeatedly requested that the defendant supply him with narcotics. The defendant rejected these overtures on several occasions, but finally agreed to supply a quantity of cocaine to an Atlanta buyer. On the day of the transaction a government narcotics agent, posing as the buyer, and the informant went to the defendant's apartment to make the exchange. After delivering the cocaine to the agent, the defendant was placed under arrest. A pistol was found inside defendant's waistband, concealed by his shirttail.

In preparation for trial the defendant filed a motion to compel the disclosure of the informant's name and address. The government admitted the informant's true identity, but filed for a protective order denying discovery of his current address. The trial court granted the government's motion, but ordered the government to make the informant available for a pretrial interview with defendant. However, because the government failed to tender the informant to the defendant for interview prior to trial, the court held the pretrial order had been violated and refused to allow the government to call the informant as a witness.

On appeal the defendant alleged that his fifth amendment right to a fair trial and his sixth amendment right of compulsory process had been violated. The compulsory process claim was grounded on the government's failure to develop affirmatively the facts and circumstances surrounding the informant's involvement in the case. The court rejected this contention, noting that at no time, either before or during the trial, did the defendant seek an interview with the informant or attempt to subpoena him for trial, so that he did not have standing to claim his constitutional right of compulsory process had been violated.

Defendant's due process claim rested on the court's refusal to compel disclosure of the informant's current address. The court noted that when the trial judge is faced with a request for disclosure of an informant, he must accommodate competing interests by employing the *Roviaro* balancing test. The court also stated that when the defense of entrapment is present, the scales are usually tipped in favor of disclosure, "since the defendant's freedom may rest upon allegations which the informer is in a unique

88. 575 F.2d 499 (5th Cir. 1978).

position to affirm or deny."[89] Thus, the court concluded that the trial judge reached a satisfactory solution, especially in light of the fact that the defendant was armed when arrested and the informant had expressed concern for his personal safety.[90] As with defendant's compulsory process claim, the court noted that the judge had taken steps to protect defendant's right to prepare his defense, but that defendant had failed to take advantage of his opportunity to interview the informant.[91] Under these circumstances, the court of appeals found that the trial judge's refusal to order disclosure of the informant's address was not reversible error.

The fifth circuit's opinion in *Bower* is logical, especially with respect to the defendant's request for the informant's address. The court correctly approves of the trial judge's solution to the conflicting interests of the government and the defendant. Such a pretrial interview can be a viable alternative to complete disclosure and production in many cases. *Bower* also correctly acknowledges the defendant's significant interest in disclosure in an entrapment case. Discussion of defendant's waiver of constitutional claims by his failure to request the pretrial interview is beyond the scope of this paper.

Louisiana Law

The Louisiana Supreme Court has recognized an informer privlege,[92] although no express statutory authority exists for it. On the question of whether the defendant can overcome the informer privilege and learn the name of a confidential informant, the leading case of *State v. Dotson*[93] shows that the Louisiana Supreme Court has adopted a strict *Roviaro* balancing test.[94]

89. *Id.* at 503, *citing* United States v. Gomez-Rojas, 507 F.2d 1213 (5th Cir.), *cert. denied*, 423 U.S. 826 (1975).

90. *See* United States v. Hansen, 569 F.2d 406, 410 (5th Cir. 1978); United States v. Toombs, 497 F.2d at 94.

91. At this point in the opinion the court reiterated its earlier statement that had the defendant been pleased with the results of his interrogation of the informant, then he could have subpoenaed him for appearance at trial through the office of the United States Attorney. In light of the foregoing this case is quite distinguishable from a classic *Roviaro* problem. In the instant case the government disclosed the informant's true identity and apparently was going to call him as a witness, until the trial judge denied to the government the right to call him as a witness due to a violation of the court's pretrial order.

92. *E.g.*, State v. O'Brien, 255 La. 704, 232 So. 2d 484 (1970); State v. Freeman, 245 La. 665, 160 So. 2d 571 (1964).

93. 260 La. 471, 256 So. 2d 594 (1971), *cert. denied*, 409 U.S. 913 (1972).

94. Apparently the state made no claim that the informer privilege could be absolute or that *Roviaro* merely announced an evidentiary rule binding on federal courts. Also, defendant made no constitutional claim of entitlement to disclosure and production.

In *Dotson* police officers stopped a car on the basis of information supplied by an informant whom one of the officers claimed to be reliable. The informant had reported that the occupants of the vehicle possessed narcotics. The occupants were placed under arrest, although no search was conducted at that time. At the police station the driver consented to a search of his car, which revealed no narcotics. The defendant exercised his right to remain silent. The officer who received the tip from the informant obtained a search warrant. The officer thereupon searched defendant's clothing and found a matchbox allegedly containing marijuana.

At trial the defendant claimed that he had been the victim of a frame-up. On cross-examination of the arresting officer, defense counsel attempted to learn the name of the informant. With the jury retired, defense counsel stated for the record:

> The defendant will allege that the stuff that was found on him, marijuana, was planted there by the informant. And as direct part of his defense, it will be necessary to place this informer on the stand and attack his credibility and attack whether or not he did in fact, plant the stuff on him. I think this is an exception to the disclosure rule.[95]

The trial judge denied this request, but a bare majority of the Louisiana Supreme Court (three judges dissenting) on original hearing held that the denial was reversible error. The court relied on *Roviaro* and language in a prior Louisiana case,[96] stressing the vital nature of the information to the defense on the merits.

The decision ignited a considerable uproar, as district attorneys throughout the state filed amicus curiae briefs in support of the state's application for a rehearing. On rehearing, the court reversed itself (three judges dissenting) stating that the informer privilege was of such social importance that it should be zealously guarded by the courts. The defendant has the burden to show *exceptional* circumstances justifying disclosure. In any event, the court continued, much discretion is vested in the trial judge in determining whether the circumstances warrant disclosure. Specifically, the court

95. 260 La. at 485, 256 So. 2d at 599. At a later point in the trial, defense counsel once again attempted to learn the informant's identity, asserting that either the officer or the informant planted the marijuana on the defendant.

96. State v. Pagnotta, 253 La. 770, 220 So. 2d 69 (1969) (per curiam). In *Pagnotta*, Justice Hamlin found correct the following proposition: "There was [no] allegation here by the defendant through his counsel or through any testimony that the confidential informant had framed him or had planted the evidence in his apartment, or had done any other act which would require revealing his identity." *Id.* at 779, 220 So. 2d at 72. However, in *Dotson*, Justice Hamlin dissented in the original hearing, protesting that his statement in *Pagnotta* was not intended to open the door for disclosure of an informant's identity every time defense counsel claims his client was framed without offering any proof in support of such a claim. 256 So. 2d at 603 (Hamlin, J., dissenting).

distinguished *Roviaro* since, in the instant case, the *prosecution's evidence* did not show that the informant set up and participated in the crime. Finally, the court concluded that the trial judge was justified in rejecting defendant's speculative claim of frame-up, for to do otherwise would be to jeopardize enforcement of the state's narcotic laws.[97]

The following criticism of the *Dotson* case has been made by one commentator:

> [T]he state should have been forced to reveal the name of the informer or to dismiss the case; otherwise, under the facts given, it is believed, defendant was denied a most fundamental constitutional protection, his right of compulsory process. Possession of narcotics is an offense which lends itself readily to the possibility of a frame-up. . . . By denying the defendant access to the informer, he was cut off from securing information from one of the two people who, under his theory of the case, could establish his innocence. Perhaps defendant was not in good faith in asserting the frame-up defense, but then again perhaps he was. The informant was the key . . . . [T]he name of the informant was necessary if defendant's day in court was to afford him a meaningful test of the state's case.[98]

This writer agrees with the above commentary, for although the court's strict reading of *Roviaro* may be in line with "mere tipster" cases in other jurisdictions, it is contended that the informant's active participation in the crime should not always be the touchstone for disclosure. The defense of a frame-up is subject to abuse, but the Supreme Court in *Roviaro* emphasized that certain defenses necessarily require disclosure if the defendant is to be accorded fundamental fairness. Narcotics cases lend themselves to frame-up. One might ask why the defendant did not dispose of the marijuana at some convenient time while the police were obtaining a search warrant. In any event, it is difficult for a defendant to show he was framed, in order to require disclosure, until he has a chance to examine the person who most likely framed him.[99]

In *State v. Rhodes*[100] the Louisiana Supreme Court reiterated its holding in *Dotson*, emphasizing that the burden is on the defendant to show exceptional circumstances warranting disclosure. In *Rhodes* the informant tipped off police that the defendant had perpetrated the armed robbery. Since the defendant was subsequently convicted

97. 260 La. at 511, 256 So. 2d at 608.

98. *The Work of the Louisiana Appellate Courts, 1971-1972 Term—Evidence*, 33 LA. L. REV. 306, 314 (1973), reprinted in G. PUGH, *supra* note 25, at 188.

99. *Dotson* is a classical illustration of how the informer privilege can be invoked to vitiate the defendant's right of compulsory process.

100. 308 So. 2d 770 (La. 1975).

on independent identification evidence of eyewitnesses and the informant was a mere tipster, this case is consistent with the jurisprudence of most jurisdictions.

In *State v. Santos*[101] Justice Tate rephrased the Louisiana test bringing the Louisiana view more in line with modern jurisprudence. The defendant must show "that disclosure of the informants identity [is] essential for [his] defense on the merits or for his grounds for the motion to suppress."[102] This may represent nothing more than a change in semantics, but since *Santos* is another "mere" tipster case, it is not possible to tell if the court is softening its "exceptional circumstances" approach announced in *Dotson*.[103]

In *State v. Dabon*[104] it was found that the identity of the informant was irrelevant to the determination of the accused's guilt or innocence, since the informant had not participated in any act or event for which the defendant was on trial. In discussing the informer privilege, Justice Tate made the following observation: "It [the privilege] is generally recognized in Louisiana, although the secrecy of identity may be required to yield to competing interests or other constitutional or individual interests where circumstances show the overriding weight of the latter."[105] To this opinion three justices merely concurred, and Justice Tate himself recognized that it is only in exceptional circumstances that disclosure of the informant's identity will be necessary.

The disturbing opinion of *State v. Williams*[106] evoked a well-reasoned concurrence from Justice Tate. In *Williams* the informant and his wife accompanied a New Orleans narcotics agent to a local bar where the informant introduced the defendant to the agent. Pretending to use their combined resources, which was really marked money, the informant and the agent purchased heroin from the defendant. At trial defense counsel repeatedly tried to learn the name of the informant, but the trial judge sustained the state's objection to this inquiry.

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101. 309 So. 2d 129 (La. 1975).

102. *Id.* at 132.

103. In commenting on *Santos*, Professor Pugh has stated:

> The applicability of the test in a particular case, however, is difficult to determine indeed, for under prevailing Louisiana practice a defendant's inability to find out the identity of the informant makes it peculiarly difficult for him to demonstrate the benefits he hopefully would derive from the testimony of the unidentified unknown individual.

The Work of the Louisiana Appellate Courts, 1974-1975 Term—Evidence, 36 LA. L. REV. 651, 666-67 (1976), reprinted in G. PUGH, *supra* note 25, at 222.

104. 337 So. 2d 502 (La. 1976).

105. *Id.* at 503.

106. 347 So. 2d 184 (La. 1977).

Relying on *Dotson*, the majority noted that defense counsel had failed to make known to the trial judge the reason for his request for disclosure of the identity of the informant, or how it would affect his defense. Since the burden is on the defendant to show exceptional circumstances which would justify disclosure, the trial judge did not abuse his discretion in denying this discovery to the defendant. Even in his appellate brief, as the supreme court noted, defendant failed to allege or show prejudice as a result of the failure to disclosure the informant's identity.

In his concurring opinion Justice Tate noted that defendant's claim presented a very close issue of reversible error. Pointing out that the informant, aside from the accused, was the sole nongovernmental witness and participant in the transaction, Justice Tate stated that applying the majority rationale on rehearing in *Dotson* the informant's identity would normally be discoverable under the *Williams* facts. Thus, if the record had indicated any reason why disclosure would have been relevant and helpful to the defense of the accused, then under the facts of this case the accused would have been entitled to disclosure of the informant's name. However, because the defendant had not at trial or on appeal advanced any purpose for ascertaining the informant's name, Justice Tate felt constrained to concur in the affirmance. In particular the defense never indicated that it wished to subpoena or to interrogate the informant, nor did it allege unsuccessful attempts to ascertain his identity and whereabouts. Finally, it was noted that the trial judge did permit a rather full cross-examination on the defendant's behalf as to the informant's employment background, criminal record, and method of compensation for his services. Justice Tate concluded that the judge committed error in denying disclosure, but under the circumstances reversal was not warranted.

It is submitted that the concurring opinion addressed the informant problem with more insight than the majority opinion, and hopefully Justice Tate's comments will serve as a useful guide for future cases. The majority opinion ignored the participation aspect of this case and its rationale in *Dotson*, merely relying on defense counsel's failure to explain to the court why this information was crucial to the defense. It can be argued that in such a case the need for the informant's identity is self-explanatory although it is impossible to show specifically what help his production will provide. Defendants in Louisiana are at least forewarned that they should be prepared to show how the informant's testimony might be crucial to specific defenses.[107]

107. For other interesting Louisiana cases which have been decided recently, *see* State v. Diliberto, 362 So. 2d 566 (La. 1978) (trial judge's grant of motion to disclose was premature where issue was probable cause for search); State v. Weems, 358 So. 2d

Conclusion

One can conclude from the foregoing analysis that there is a strong public policy in favor of protecting the identity of confidential informants.[108] To date the United States Supreme Court has not given specific constitutional dimensions to the right of the defendant to disclosure of the identity of informants, although rigorous arguments have been made in lower federal courts and state courts that due process, the right of confrontation, or the right of compulsory process requires disclosure in certain cases. At least one federal judge has agreed that *Roviaro*, the leading Supreme Court case,[109] is grounded on due process of law.[110] Another federal court has held that the compulsory process clause of the sixth amendment requires disclosure of an informant's identity, absent compelling state interests in maintaining his secrecy.[111] Commentators have argued persuasively that once it has been determined that an informant possesses evidence which is relevant and material to the determination of the defendant's guilt or innocence, the sixth amendment overrides the government's informer privilege.[112]

However, the key to this constitutional right still lies in convincing the court that the informant may be able to give testimony which is necessary to a fair determination of the issue of guilt or innocence.[113] Such a crucial demonstration, which may be impossible for a defendant to present in the abstract, emphasizes the necessity of *in camera* hearings. As Weinstein has noted, most courts have assumed that in following *Roviaro* they have had but two choices—to order public disclosure of the informant's identity or to deny disclosure. Consequently, the required balancing of public interests with the accused's right to make out a defense often pro-

285 (La. 1978) (where defendant admitted knowing informant's name and address, where defendant made no attempt to subpoena informant, and where judge permitted full cross-examination concerning his background, disclosure not necessary despite informant's presence at scene of crime and alleged defense of entrapment); State v. Helmke, 350 So. 2d 1191 (La. 1977) (in prosecution for gambling offense, where informant placed monitored phone calls to accused, disclosure not necessary where state stipulates that no evidence concerning calls will be introduced).

108. See notes 3-7, *supra*.

109. See text at notes 27-31, *supra*.

110. See text at notes 35-42, *supra*.

111. Melendez v. Superintendent, Clinton Correctional Facility, 399 F.2d 430 (E.D.N.Y. 1975). See notes 21, 25 & 65, *supra*.

112. See text at notes 20, 25 & 44, *supra*.

113. *See* Roviaro v. United States, 353 U.S. 53, 63 (1957) (informant's information is "relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause"); FED. R. EVID. 510(c)(2), reprinted in J. WEINSTEIN, *supra* note 3, at 510-11; Westen, *supra* note 20, at 159 ("if the evidence the defendant seeks would tend to contradict the very elements of the charge against him").

ceeds in large measure on speculation.[114] An *in camera* hearing resolves this dilemma by providing an innovative intermediate position. The balancing of interests of the accused and society can proceed on the basis of an informed judgment, which is subject to judicial review, since a record of the *in camera* proceeding must be made available to the appellate court.[115] At such a hearing the judge can probe into the informant's role in the litigated matter, ascertain his credibility, and determine what dangers he would encounter if his identity were revealed. According to Westen, an *in camera* hearing will effectuate his proposed constitutional rule that the defendant's sixth amendment right to elicit exculpatory evidence is forceful enough to put the state to the choice between preserving secrecy and prosecuting the accused.[116]

The fifth circuit has generally avoided the constitutional aspects of informant cases and has instead relied on the "fundamental fairness" balancing test of *Roviaro*. Although certain cases have applied the *Roviaro* balancing test to the facts in a questionable manner, the fifth circuit has at times creatively handled the informant problem by the use of the *in camera* hearing and the pretrial interview without full disclosure. Louisiana courts are extremely reluctant to find a necessity for disclosure. The Louisiana bar has also been unsophisticated in its attempts to convince the courts of the necessity for disclosure, although this writer sympathizes with the difficulty of such a showing in most cases. It is submitted that the Louisiana Supreme Court's approach is much too rigid, placing an impossible burden on defense counsel and often violating the defendant's constitutional rights. It is hoped that in the future, both the Louisiana courts and the federal district courts in the fifth circuit will employ the *in camera* hearing with a more sensitive eye toward the accused's constitutional right to make out a defense.

Michael D. Bewers

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114. J. WEINSTEIN, *supra* note 3, at 510-21, *citing* United States v. Jackson, 384 F.2d 825, 827 (3d Cir. 1967), *cert. denied*, 392 U.S. 932 (1968) ("In the informer situation the burden placed upon the trial judge is great since he must often balance conflicting interests without being aware of what relevant information, if any, the informer possesses.").

115. J. WEINSTEIN, *supra* note 3, at 510-23, *citing* United States v. Day, 384 F.2d 464, 470 (3d Cir. 1967) (McLaughlin, J., concurring) ("I consider it clear that an *in camera* proceeding is warranted for the reason that the power to rule on the question of disclosure is vested by *Roviaro* solely within the discretion of the trial judge, who must be allowed to rely on the investigative power at his disposal if he is to render an enlightened and just decision.").

116. See notes 9, 20 & 44, *supra*.