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McCray v. Illinois: Probable Cause and the Informer Privilege

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McCRAY v. ILLINOIS: PROBABLE CAUSE AND THE INFORMER PRIVILEGE

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In recent years, no area of the law has been the subject of so many court opinions or has engendered more public controversy than has the law of criminal procedure. In this decade alone, the many decisions of the United States Supreme Court dealing with the Constitutional rights of the criminally accused has wreaked havoc among defense attorneys, prosecutors, lower court judges, law school professors and text writers, and the public. The arena of criminal procedure is caught up in the pangs of rapid transition and has been the subject of innumerable legal articles in scholarly journals. Mr. Quinn, of the Denver Public Defender's office, devotes his attention in this article to one particular area of criminal procedure — the acquisition of evidence by police officers from a search and seizure based on the tip from an undisclosed informer. The recent Supreme Court decision of McCray v. Illinois dealt with this area, and the author is critical of the decision. After considering the historical use of the informer in law enforcement, the author considers in depth the dual problems of when an informer's tip can constitute probable cause for a search and seizure and when the identity of the informer should be disclosed to the accused in connection with a pre-trial motion to suppress the seized evidence.

SINCE the decision of the United States Supreme Court in *Weeks v. United States*,[1] the law of search and seizure has assumed significant dimensions in the administration of criminal justice. *Weeks* held that the fourth amendment barred the use in federal courts of evidence secured through an unconstitutional search and seizure. In *Mapp v. Ohio*,[2] the Supreme Court made applicable to the states under the fourteenth amendment the exclusionary rule of *Weeks*. As a result of *Mapp*, intricate problems of evidentiary acquisition by law enforcement officials have become critical in every jurisdiction of the United States. In order to implement the exclusionary rule first enunciated in *Weeks*, rule 41(e) of the Federal Rules of Criminal Procedure was enacted; it has since been adopted by several states, including Colorado.[3] Federal rule 41(e) affords a party aggrieved by an unlawful search and seizure the right to move the court for an order suppressing for use as evidence anything so obtained on the ground that "(1) the property was illegally seized without warrant, or (2) the warrant is insufficient

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[1] 232 U.S. 383 (1914).

[2] 367 U.S. 643 (1961).

[3] COLO. R. CRIM. P. 41(e).

on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed."[4]

This article will focus on one area of evidentiary acquisition by law enforcement officials: a search and seizure based on a tip from an undisclosed informer.[5] Generally, the term "informer" refers to anyone who, unknown to the alleged offender, communicates to law enforcement officials information concerning criminal activity on the part of another.[6] In practical application, particularly within the area of search and seizure, an informer is someone who furnishes the police with information or a "tip" concerning another's criminal acts, which tip serves as an ostensible reason to arrest and search the person or premises of the alleged offender, while the informer's identity remains unknown to the person arrested.[7] The term can also include those who, having participated in some criminal offense and having been apprehended, disclose information of another's criminal activity to the police under a promise of immunity from prosecution or reduction of the criminal charges, the identity of the informer once again being unknown to the one whose criminal conduct is reported.

The initial question in the informer-search and seizure area is whether a tip from an undisclosed informer constitutes probable cause. Of equal significance is the question whether, and under what circumstances, the identity of the informer should be disclosed to the one aggrieved by the search.

The problem of balancing the public interest in effective law enforcement with the often competing constitutional right to be secure against an unreasonable search and seizure is no more apparent than in the case of a search based on an informer's tip to the police; the prosecution in such a case will universally claim the informer privilege, that is, the evidentiary privilege of withholding the informer's identity upon a demand for disclosure by the defendant. While the effect of the privilege is to protect the informer's identity,

[4] FED. R. CRIM. P. 41(e). *See* 8 J. MOORE, FEDERAL PRACTICE, ¶ 41.02 (1966).

[5] For an excellent and detailed analysis of the entire search and seizure area, although principally examining Illinois law, see LaFave, *Search and Seizure: "The Course of True Law . . . has not . . . Run Smooth,"* 1966 U. ILL. L. F. 255.

[6] 8 J. WIGMORE, EVIDENCE § 2374 (McNaughton rev. 1961). For an emperical study as to the nature of informants, see Comment, *An Informer's Tale: Its Use in Judicial and Administrative Proceedings,* 63 YALE L.J. 206 (1953).

[7] Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agent Provocateurs,* 60 YALE L.J. 1091, 1092 (1951).

it is not the informer, but rather the government or prosecution which has the privilege and the legal standing to claim it.[8]

Several federal and state courts have addressed themselves to the problem of the informer privilege in search and seizure situations,[9] and the decisions have ranged in approach from unqualified dismissal of the criminal charge in the absence of disclosure of the informer's identity[10] to the sustainment of the privilege, even at the expense of depriving the defendant of the only effective device of protecting his fourth amendment rights.[11] Without the benefit of a conclusive constitutional mandate from the Supreme Court, the thrust of recent judicial opinion in state and lower federal courts has been noticeably in the direction of abrogating the privilege in the interest of affording the defendant fundamental fairness in litigating his constitutional right to be secure against an unreasonable search and seizure.[12]

Recently the Supreme Court of the United States in *McCray v. Illinois*[13] considered the issue of whether probable cause existed in a warrantless arrest and search and seizure, predicated primarily on an informer's tip which was partially corroborated by police observation of, and previous acquaintance with, the defendant, and the further issue of whether the sixth and fourteenth amendments necessitated a total abandonment of the informer privilege. By a 5-4 decision the court held: (1) there was probable cause for the arrest, search, and seizure of McCray; and (2) McCray's challenge to the informer privilege did not pose a constitutional issue, the problem

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[8] 8 J. WIGMORE, EVIDENCE § 2374 (McNaughton rev. 1961); Roviaro v. United States, 353 U.S. 53 (1957); Wilson v. United States, 59 F.2d 390, 392 (3d Cir. 1932).

[9] *E.g.*, United States v. Robinson, 325 F.2d 391 (2d Cir. 1963); Lane v. United States, 321 F.2d 573 (5th Cir. 1963); Costello v. United States, 298 F.2d 99 (9th Cir. 1962); United States *ex rel.* DeNegris v. Menser, 247 F. Supp. 826 (D. Conn. 1965); United States *ex rel.* Coffey v. Fay, 234 F. Supp. 543 (S.D.N.Y. 1964); People v. Perez, 62 Cal. 2d 769, 401 P.2d 934 (1965); People v. McShann, 50 Cal. 2d 802, 330 P.2d 33 (1958); Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958); People v. Gutierrez, 171 Cal. App. 2d 728, 341 P.2d 54 (1959); Drouin v. State, 222 Md. 271, 160 A.2d 85 (1960); State v. Oliver, 92 N.J. Super. 228, 222 A.2d 761 (1966). *See generally* Annot., 76 A.L.R.2d 257 (1961).

[10] In Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958), the California Supreme Court issued a peremptory writ of prohibition, preventing defendant's trial.

[11] Commonwealth v. Carter, 208 Pa. Super. 245, 222 A.2d 475 (1966), and 71 DICK. L. REV. 366 (1967), which criticizes the *Carter* decision. *See* cases cited in 8 J. WIGMORE, EVIDENCE § 2374 n.10 (McNaughton rev. 1961).

[12] Cases cited note 9 *supra*. *But cf.* Commonwealth v. Carter, 208 Pa. Super. 245, 222 A.2d 475 (1966). *See* 28 U. PITT. L. REV. 477, 481-82 (1967).

[13] 386 U.S. 300 (1967). For case comments on McCray v. Illinois, see 32 ALBANY L. REV. 218 (1967); 1967 DUKE L.J. 888; 36 U. CIN. L. REV. 746 (1967); 7 WASHBURN L.J. 115 (1967); 42 ST. JOHN'S L. REV. 270 (1967). *See The Supreme Court, 1966 Term*, 81 HARV. L. REV. 112, 196 (1967).

instead being primarily of evidentiary, as opposed to constitutional, dimensions and, therefore, a proper subject of *state* control.[14]

This article will trace the development of the informer privilege prior to *McCray,* and then analyze *McCray* and the dual problems of probable cause and disclosure of an informer's identity upon demand by the accused in connection with a motion to suppress.

I. THE INFORMER PRIVILEGE

Over the centuries law enforcement officials have depended on informers to furnish them with information of criminal activities. In medieval England, a procedure called "approvement" developed, by which a person arraigned for treason or another felony would confess his guilt and then offer to inform and convict other criminals in exchange for a pardon; if they were convicted he was pardoned, if not, he was hanged.[15] During the 16th and 17th centuries, statutes were passed creating what has been called the "informer suit," whereby any member of the public had the right to sue for, and retain a part of, the fine imposed for statutory violations.[16] Motivated by personal profit, persons made false accusations to such an extent that Coke characterized the informer as a "viperous vermin, which endeavoured to have eaten out the sides of the church and common-wealth."[17] Even today, vestiges of the "informer suit" remain with us in the form of statutes which award the informer a share of the fine.[18]

The law has long accorded privileged status to the identity of persons supplying law enforcement officials with information concerning the commission of criminal offenses.[19] The theoretical pur-

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[14] The Court in *McCray* also stated that it had not laid down any hard and fast evidentiary rules to guide the *federal* courts in this area of disclosure and would not do so. The ambivalent and case-by-case approach of the Supreme Court in this area readily explains the wide ranging opinions by lower federal and state courts when confronted with informer-search and seizure cases.

[15] Donnelly, *supra* note 7, at 1091.

[16] *Id.*

[17] E. COKE, THIRD INSTITUTE *194.

[18] Various federal statutes provide for compensation to informers providing information relating to criminal offenses. They range over a broad area, including but not limited to the following: contraband articles, 49 U.S.C. § 784 (1964); cotton futures, 26 U.S.C. § 7263 (1964); custom law violations, 19 U.S.C. §§ 1619, 1620 (1964); vessels engaging in slave trade, 46 U.S.C. §§ 1351, 1353 (1964); Indian liquor traffic violations, 18 U.S.C. § 3113 (1964); Indian law violations, 25 U.S.C. § 201 (1964); narcotic drug violations, 21 U.S.C. §§ 183, 199 (1964); postal law violations, 39 U.S.C. § 2407 (1964); export of war materials, 22 U.S.C. § 401 (1964); presidential assassination, kidnap or assault, 18 U.S.C. § 1751 (Supp. II, 1967).

[19] 8 J. WIGMORE, EVIDENCE § 2374 (McNaughton rev. 1961); Rex v. Akers, (1790), as cited in footnote in King v. Howe, 6 Esp. 124, 125-26, 170 Eng. Rep. 849, 850 (N.P. 1808). For an annotation collecting the federal cases on the government's privilege of nondisclosure, see Annot., 1 L. Ed. 2d 1998 (1957). *See generally* Annot., 76 A.L.R.2d 257 (1961).

pose of the informer privilege is to spur the public interest in effective law enforcement by protecting the personal welfare and preserving the anonymity of the informer, thus encouraging him to communicate his knowledge of criminal violations.[20]

So frequent is the use of informer's tips by law enforcement officials as justification for an arrest and search that one Supreme Court Justice has characterized the times as "an age where faceless informers have been reintroduced in our society in alarming ways."[21] Thus far, there remains a prevailing judicial adherence to the value judgment that "the informer is a vital part of society's defensive arsenal."[22] Even courts which strongly urge the preservation of the informer privilege have, however, imposed various limitations on that privilege. Thus the privilege applies only to communications made to law enforcement officials who have the responsibility of investigating crime.[23] And the privilege protects only the identity of the informer; the content of the communication is not privileged.[24]

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[20] Roviaro v. United States, 353 U.S. 53, 59 (1957); Worthington v. Scribner, 109 Mass. 487, 488-89 (1872); State v. Hall, 189 Wash. 174, 178, 64 P.2d 83, 85 (1957). *See* 42 ST. JOHN'S L. REV. 270, 279-80 (1967). For an example of the premise that there exists a very real danger of personal retaliation in informer cases, see Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534 (1958), relating the notorious case of Arnold Schuster who was murdered after informing on bankrobber Willie Sutton. *See* Comment, *An Informer's Tale: Its Use in Judicial and Administrative Proceedings*, 63 YALE L.J. 206, 207-08 (1953).

In THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1967), the Commission, in detailing the difficulties in obtaining proof in combating organized crime, states at 198:

> [T]he true victims of organized crime, such as those succumbing to extortion, are too afraid to inform law enforcement officials. Some misguided citizens think there is social stigma in the role of "informer", and this tends to prevent reporting and cooperating with police.
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> Law enforcement may be able to develop informants, but organized crime uses torture and murder to destroy the particular prosecution at hand and to deter others from cooperating with police agencies. Informants who do furnish intelligence to the police often wish to remain anonymous and are unwilling to testify publicly.

Concerns other than anonymity often affect the informant's motives in telling his tale to the police. This is particularly true in the area of narcotic violations and drug abuse. As stated by the Commission, at 218:

> The use of informants to obtain leads . . . is also standard and essential. An informer may or may not be a person facing criminal charges. If he is not, he may supply information out of motives of revenge or monetary reward. More typically the informant is under charges and is induced to give information in return for a "break" in the criminal process such as a reduction of those charges. Frequently he will make it a condition of cooperation that his identity remain confidential.

[21] Jones v. United States, 362 U.S. 257, 273 (1960) (Douglas, J., dissenting opinion).

[22] State v. Burnett, 42 N.J. 377, 201 A.2d 39, 44 (1964), *as quoted in* McCray v. Illinois, 386 U.S. 300, 306-08 (1967).

[23] 8 J. WIGMORE, EVIDENCE §2374 (McNaughton rev. 1961).

[24] *Id. See* Mitchell v. Bass, 252 F.2d 513 (8th Cir. 1958); Henrik Mannerfrid Inc. v. Teegarden, 23 F.R.D. 173 (S.D.N.Y. 1959); Nola Elec. v. Reilly, 11 F.R.D. 103 (S.D.N.Y. 1950).

The informer privilege has come under most serious scrutiny in cases involving the fourth amendment.[25] The questions posed are usually the two mentioned before: (1) whether and under what circumstances an informer's tip constitutes probable cause for an arrest, search, and seizure; and (2) whether and under what circumstances the defendant has a right to know the identity of the informer. The genesis of judicial concern over the informer privilege largely stems from *Roviaro v. United States*.[26] In *Roviaro* the anonymous informer was potentially a material witness on the issue of guilt, rather than the source of information leading to the search and seizure. Roviaro had purchased narcotics from the informer who was riding in Roviaro's vehicle, while a government agent, riding in the trunk of the vehicle, overheard conversation between the informer and Roviaro concerning the sale. Both before and at the trial the defendant requested the name of the informer on the ground that he might be able to give relevant and exculpatory evidence. The motion for disclosure was denied, and Roviaro was convicted. The Supreme Court of the United States reversed the conviction and in the course of its opinion limited the proper invocation of the privilege as follows:

> A . . . limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.[27]

In dictum the Court in *Roviaro* discussed the informer privilege as it related to the issue of probable cause. Recognizing that probable cause and informer privilege are practically inseparable issues, the Court stated that in informer cases "the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his communication."[28]

Subsequent to *Roviaro*, several courts have required the disclosure of the informer's identity when a warrantless search and

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[25] U.S. CONST. amend. IV, provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[26] 353 U.S. 53 (1957).

[27] *Id.* at 60-61.

[28] *Id.* at 61.

seizure were predicated on an informer's tip.[29] Relying on *Roviaro's* dictum, Mr. Justice Traynor in *Priestly v. Superior Court*[30] held that if communications from an informer are necessary to establish probable cause, then disclosure should be compelled in order to give the defendant a fair opportunity to rebut the testimony of the officer concerning the informer's tip. Otherwise, the arresting officer would become the sole judge of the existence of probable cause to make the search.

It was in the context of the growing judicial reluctance to sanction the privilege that the *McCray* decision arose. To glean the significance of *McCray,* a detailed analysis of the opinion is in order.

II. The McCray Case and Probable Cause

A. *McCray v. Illinois*

On January 16, 1964, at about seven o'clock in the morning, George McCray was arrested without warrant for possession of narcotics near the intersection of 49th Street and Calumet Avenue in Chicago, Illinois. The arresting officers found a package on McCray containing heroin, and he was indicted for its unlawful possession. Before trial he filed a motion to suppress, claiming that the police had acquired the heroin in an unconstitutional search and seizure. At the suppression hearing McCray testified that until about one-half hour before his arrest he had been at a friend's house, that after leaving, he had walked with a lady to 48th Street and South

[29] *E.g.,* Costello v. United States, 298 F.2d 99, 101 (9th Cir. 1962) ("The 'privilege' must give way when a challenge of the informant is essential to the proper disposition of the case. The determination of the validity of an arrest, search and seizure is essential to such a disposition."); United States *ex rel.* Coffey v. Fay, 234 F. Supp. 543, 548 (S.D.N.Y. 1964) ("Upon a review of the entire record the Court concludes that the informer's identity was necessary to resist the State's evidence on the issue of probable cause, and that without it he was denied the only effective and available means of rebutting Gilhofer's testimony, and consequently deprived of a fundamentally fair trial."); People v. Gutierrez, 171 Cal. App. 2d 728, 341 P.2d 54 (1959); Drouin v. State, 222 Md. 271, 160 A.2d 85, 92-93 (1960).

Even prior to *Roviaro,* courts have compelled disclosure when essential to the issue of the validity of an arrest, search, and seizure without warrant. United States v. Blich, 45 F.2d 627, 629 (D. Wyo. 1930) ("[T]he only safe rule to adopt will be to require officers who presume to make search and seizures . . . without warrant, to disclose every element which goes to make up their case of probable cause, and that this rule reasonably includes the source of their information . . . ."); Wilson v. United States, 59 F.2d 390 (3d Cir. 1932); United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937); Smith v. State, 169 Tenn. 633, 90 S.W.2d 523 (1936).

Various courts have recognized the rule of disclosure but did not require it in the particular case. *E.g.,* Lane v. United States, 321 F.2d 573 (5th Cir. 1963); United States v. One 1957 Ford Custom Tudor, 264 F.2d 682 (10th Cir. 1959); McQuaid v. United States, 198 F.2d 987 (D.C. Cir. 1952); Cannon v. United States, 158 F.2d 952 (5th Cir. 1946); Shore v. United States, 49 F.2d 519 (D.C. Cir. 1931); People v. McMurray, 171 Cal. App. 2d 178, 340 P.2d 335 (1959); Ferrara v. State, 101 So. 2d 797 (Fla. 1958); People v. Mack, 12 Ill. 2d 151, 145 N.E.2d 609 (1957); Brewster v. Commonwealth, 278 S.W.2d 63 (Ky. 1955); Arredondo v. State, 324 S.W.2d 217 (Tex. Crim. App. 1959).

[30] 50 Cal. 2d 812, 330 P.2d 39 (1958).

Park, and that as he approached 49th Street and Calumet Avenue, an officer stopped him in an alley. McCray further testified that the officer did not show him a warrant but rather proceeded to search his person and seize the narcotics.

One of the arresting officers, Jackson, testified that on the morning of the arrest he and two fellow officers had a conversation with an informer in their unmarked police car. Jackson had been acquainted with the informer during the past year, and during this period the informer had supplied him with information about narcotics activities on at least 15 or 16 occasions; the information was accurate and resulted in numerous arrests and convictions. Jackson furnished to the court the names of persons convicted of narcotics violations as the result of the informer's previous tips.

Jackson testified that on the morning of McCray's arrest the informer told him that McCray "was selling narcotics and had narcotics on his person and that he could be found in the vicinity of 47th and Calumet at this particular time."[31] Officer Jackson, who was acquainted with McCray, drove with the informer and other police officers to the vicinity of 47th and Calumet. The informer observed McCray, pointed him out to the police, and then left on foot. Officer Jackson testified that McCray was seen "walking with a woman, then separating from her and meeting briefly with a man, then proceeding alone, and finally, after seeing the police car, 'hurriedly walk[ing] between two buildings.' "[32] Thereupon Jackson and his partners left their patrol car, accosted McCray, and informed him that he was under arrest.

Arresting Officer Arnold also testified at the suppression hearing, and gave substantially the same account of the circumstances of McCray's arrest and search. Arnold testified that he had known the informer for approximately two years and that, during that time, the informer had given him information concerning narcotics violations about 20 or 25 times, and that the tips had resulted in convictions.

Officers Jackson and Arnold were asked on cross-examination by McCray's counsel to reveal the name and address of the informer. The immediate objection by the prosecution on grounds of privilege was sustained by the trial court. The motion to supress was denied, McCray was ultimately convicted, and the Supreme Court of Illinois affirmed.[33] On certiorari to the Supreme Court[34] the judgment was affirmed, the Court holding (1) that there was probable cause to

[31] McCray v. Illinois, 386 U.S. 300, 302 (1967).

[32] *Id.*

[33] People v. McCray, 33 Ill. 2d 66, 210 N.E.2d 161 (1965).

[34] 384 U.S. 949 (1966).

sustain the arrest and incidental search and seizure, and (2) that neither the due process clause of the fourteenth amendment nor the sixth amendment rights of confrontation and cross-examination were violated by Illinois' recognition of the informer privilege on these facts.

B. *Informer-Probable Cause*

To establish probable cause for a search and seizure, more is demanded than common rumor or report, suspicion, or even strong reason to suspect.[35] Probable cause is based on probabilities — "the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act."[36] In other words, are " ' the facts and circumstances within . . . [the officers'] knowledge, and of which they had reasonably trustworthy information . . . sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed"?[37] The factors constituting probable cause are no different in the case of a warrantless search than in the case of a search pursuant to warrant.[38] Thus, whether probable cause can be predicated on an informer's tip depends primarily on whether the tip is "reasonably trustworthy." The trustworthiness of the tip will depend on such factors as (1) the proven reliability of the informer, *i.e.,* the consistency with which prior disclosures led to successful arrests and productive searches; (2) the timeliness of the information conveyed;[39] (3) the apparent basis of the informer's knowledge — whether personal knowledge ("I saw") or hearsay knowledge ("I heard"); (4) the factual content of the communication itself; and (5) the corroboration, if any, of the content of the informer's tip by independent observation or knowledge.[40]

The Supreme Court in *Aguilar v. Texas*[41] indicated what was needed for an informer's tip to constitute probable cause. *Aguilar,*

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[35] Henry v. United States, 361 U.S. 98 (1959); Brinegar v. United States, 338 U.S. 160 (1949); Nathanson v. United States, 290 U.S. 41 (1933).

[36] Brinegar v. United States, 338 U.S. 160, 175 (1949), *modifying* Grau v. United States, 287 U.S. 124 (1932), which had indicated that only evidence competent in a jury trial may be adduced to show probable cause.

[37] Brinegar v. United States, 338 U.S. 160, 175-76 (1949), *citing* Carroll v. United States, 267 U.S. 132, 162 (1925).

[38] *E.g.,* Jones v. United States, 362 U.S. 257 (1960). This is not to say that the search will be considered valid so long as probable cause exists, regardless of the existence of a warrant. The Supreme Court strongly prefers searches under a warrant, and a doubtful or marginal case of probable cause may be sustained under a warrant where without one the search might be considered unlawful. Ventresca v. United States, 380 U.S. 102, 106-07 (1965); Jones v. United States, 362 U.S. 257, 270 (1960).

[39] For an excellent collection of cases dealing with the sufficiency of a showing as to the time of occurrence of the facts relied upon to support an affidavit for a search warrant, see Annot., 100 A.L.R.2d 525 (1965).

[40] *See generally* Comment, *Informer's Word as the Basis for Probable Cause in the Federal Courts,* 53 CALIF. L. REV. 840 (1965).

[41] 378 U.S. 108 (1964).

a case involving a search pursuant to a warrant, held that the underlying facts and circumstances of the informer's tip must be affirmatively set forth in the police officer's affidavit; mere conclusions are insufficient. More specifically, *Aguilar* held that there must be a showing not only of the factual circumstances which led the officer to believe the informer (such as informer reliability) but also of the factual circumstances which demonstrate that the informer really knew those things which he told the police (credibility of information).[42]

Informer reliability is predicated on the accuracy of information given by the informer to law enforcement officials on prior occasions;[43] the mere testimonial characterization of the informer as previously reliable is, of course, a conclusion and therefore improper.[44] Prior reliability should be established factually. Thus, the fact that an informer has previously given information which merely resulted in arrests would not ipso facto establish his reliability, since the subsequent arrests might not have been for the reason initially indicated by the informer, and might not necessarily have resulted in the discovery of the anticipated contraband.[45] Where, however, it is established that the informer on two separate occasions in the past gave information "regarding the possession of marijuana by various persons," and "on each of these occasions said information proved to be correct and resulted in two arrests for possesion of

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[42] *See* Ventresca v. United States, 308 U.S. 102, 108-09 (1965). Precisely how *much* factual information of the underlying circumstances is needed to obtain a warrant pursuant to affidavit varies, depending upon the type of offense. For example, a few simple facts would logically establish probable cause in a possession of narcotics case, but much more will be required in a tax fraud case. Jaben v. United States, 381 U.S. 214 (1965). *See* LaFave, *supra* note 5, at 262-66.

[43] In People v. McClellan, 34 Ill. 2d 572, 218 N.E.2d 97, 98 (1966), the Supreme Court of Illinois held that the mere fact of police officers' acting on tips received from an informer does not establish previous reliability. The accuracy of the tips must be affirmatively shown:

> The fact that the officers made three arrests based on information furnished by Slick shows only that they acted on his previous tips and does not show that the previous tips proved to be accurate. While it might be inferred that the officers would not continually act on Slick's tips if they proved to be unreliable nevertheless, we feel the informer's past reliability should not be left to inference, when it is such an easy matter to show the accuracy of the previous tips. It is not necessary for us to decide whether the People must show that the previous tips from an informer resulted in convictions, as the defendant contends; but it is sufficient, at this time, to hold that the fact that the police acted upon previous information of an informer does not prove that the prior information was accurate and the informer reliable.

There is apparently no minimum requirement as to the number of previous tips received; one previous tip may be sufficient to establish prior reliability under proper circumstances. Jones v. United States, 362 U.S. 257 at 268 n. 2 (1960).

[44] People v. West, 237 Cal. App. 2d 801, 47 Cal. Rptr. 341 (1965); People v. McClellan, 34 Ill. 2d 572, 218 N.E.2d 97 (1966). *But cf.* United States v. Eisner, 297 F.2d 595 (6th Cir.), *cert. denied*, 369 U.S. 859 (1962), where the court rested its finding of probable cause entirely on information received by an FBI agent which, the affidavit simply averred, he "[believed] to be reliable."

[45] People v. McClellan, 34 Ill. 2d 572, 218 N.E.2d 97 (1966); *see also* United States v. Perry, 380 F.2d 356 (2d Cir. 1967).

marijuana," and "said informant has never given . . . any information that proved to be incorrect," the informer's previous reliability is sufficiently established.[46]

Credibility of information involves a focus upon the timeliness, knowledgeable basis, and content of the communication from the informer. In the absence of a firm basis in timely, personally known facts, the informer's tip is insufficient to constitute probable cause; for in such case the court would be at a loss to know whether the informer spoke from recent personal knowledge or "was merely peddling secondhand gossip overheard in a barroom."[47] Thus, in *Aguilar v. Texas,*[48] the Supreme Court held a search warrant invalid on the ground that the affidavit only stated a conclusion by an unknown informant and there was no proof that either the affiant or the affiant's unidentified source spoke with personal knowledge. Consequently, "the magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on . . . to show probable cause.' "[49]

The question of whether informer-hearsay must be corroborated, at least in part, by personal observations of the police in order to

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[46] People v. West, 237 Cal. App. 2d 801, 47 Cal. Rptr. 341, 343-44 n.1 (1965). However, probable cause was found wanting in *West* because the informer's source of knowledge was not sufficiently established in the affidavit. *See* United States v. Suarez, 380 F.2d 713 (2d Cir. 1967).

[47] People v. West, 237 Cal. App. 2d 801, 47 Cal. Rptr. 341, 345 (1965).

[48] 378 U.S. 108 (1964). The Supreme Court dealt with the problem of the knowledgeable basis of the informer in Nathanson v. United States, 290 U.S. 41 (1933), Giordenello v. United States, 357 U.S. 480 (1958), and *Aguilar.* All three cases involved warrants, but the statements of the Court in holding the affidavits insufficient are equally applicable to warrantless searches. In the *Aguilar* case, Houston police officers obtained a search warrant based on an affidavit which recited that "[a]ffiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates, and other narcotics and narcotic paraphernalia are being kept at the above described premises . . . ." In holding the affidavit insufficient to constitute probable cause, the Court stated:

> The vice in the present affidavit is at least as great as in *Nathanson* and *Giordenello.* Here the "mere conclusion" that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only "contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein," it does not even contain an "affirmative allegation" that the affiant's unidentified source "spoke with personal knowledge." For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession.

378 U.S. at 113-14.

In United States v. Mesner, 247 F. Supp. 826, 831 (D. Conn. 1965), the court commented on an affidavit as follows:

> The affidavit here is fundamentally no more than the bare statement that the police received information from a reliable source that pool selling was being carried on at petitioner's premises. It nowhere discloses how the informant came to his stated conclusion. On what facts was it based? Did he actually see the pool selling being carried on or the "paraphernalia"? Did he hear it from another unmentioned source, or is his statement based on mere suspicion?

[49] Aguilar v. Texas, 378 U.S. 108, 114 (1964).

constitute probable cause has never been expressly decided by the Supreme Court. In upholding the legality of searches in several cases,[50] including *McCray*,[51] the Court has pointed out that the informer-hearsay *was* corroborated by the subsequent observations of police officers. The most direct statement of the Court on the issue of corroboration appears in *Jones v. United States*:

> The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another. An affidavit is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented.
>
> In testing the sufficiency of probable cause for an officer's action even without a warrant, we have held that he may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge. . . .
>
> What we have ruled in the case of an officer who acts without a warrant governs our decision here. If an officer may act upon probable cause without a warrant when the only incriminating evidence in his possession is hearsay, it would be incongruous to hold that such evidence presented in an affidavit is insufficient basis for a warrant.[52]

In *Jones* the informant's hearsay was corroborated by his previous reliability, which was known to the affiant, the timeliness of the informer's personal observation (the day before the warrant issued), and the fact that the accused displayed needle marks on his arm and was a known narcotics user, facts also personally known to the affiant. This complex of corroborating factors was therefore more than sufficient to supply the substantial basis for crediting the informer's tips and for the Commissioner "to conclude that narcotics were probably present in the apartment."[53]

It appears that the crucial factor necessary to sustain probable cause predicated on informer-hearsay is not so much the corroboration of the tip by the officer's personal observations,[54] but rather

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[50] United States v. Ventresca, 380 U.S. 102 (1965); Jones v. United States, 362 U.S. 257 (1960); Draper v. United States, 358 U.S. 307 (1959).

[51] In McCray v. Illinois, 386 U.S. 300 (1967), the informer's tip was partially corroborated by Officer Jackson's spotting McCray, with whom he was familiar, in the vicinity where the informer said he would be, and by the officer's observation of McCray acting suspiciously immediately prior to his arrest.

[52] Jones v. United States, 362 U.S. 257, 269-70 (1960).

[53] *Id.* at 271.

[54] Where the informer's tip has stimulated investigation by the police which subsequently turns up evidence going beyond mere corroboration and showing probable cause entirely apart from the tip, it has been held that inquiry into the identity of the informer and the content and source of his tip is unwarranted and the informer privilege remains absolute. Scher v. United States, 305 U.S. 251 (1938); United States v. Elgisser, 334 F.2d 103 (2d Cir.), *cert. denied*, 379 U.S. 881 (1964); United States v. Santiago, 327 F.2d 573 (2d Cir. 1964); Miller v. United States, 273 F.2d 279 (5th Cir. 1959).

the existence of *any* substantial basis for crediting the informer's tip itself. This substantial basis may, but need not, be supplied by personal observations of the officer. Thus, when the informer's tip is supplemented by adequate proof of prior reliability, and there is an absence of corroboration by independent observation, probable cause is still established.[55] While prior reliability by itself is not ordinarily as corroborative of the validity of the tip as the officer's subsequent independent observations,[56] it nevertheless can justify the officer in believing that the tip is probably trustworthy. This is especially true in the case where the informer consistently gave correct information on numerous occasions in the past, the prior tips always resulting in successful searches. However, where there is no showing of independent observation, and prior reliability is the *only* corroborative factor, the court should carefully scrutinize the evidence concerning the nature, frequency, and correctness of the prior tips. Since in a warrantless search the burden of proving probable cause should fall on the prosecution by clear and convincing evidence,[57] a weak factual showing of prior reliability should result in

[55] In United States v. Freeman, 358 F.2d 459, 462 (2d Cir. 1966), the court stated:

> It is true that in the *Jones* case the informant's story was corroborated by other sources of information, and in United States v. Ramirez, 279 F.2d 712, 715 (2d Cir.), cert. denied, 364 U.S. 850, 81 S.Ct. 95, 5 L.Ed.2d 74 (1960) it was suggested that "*Jones* may require that the affidavit include some factual information independently corroborative of the hearsay report." We believe, however, that United States v. Ventresca, supra, Aguilar v. State of Texas, supra and Rugendorf v. United States, 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed.2d 887 (1964), establish that such corroboration is not required where the affiant attests to the previous reliability of the informant.

See People v. Pitts, 26 Ill. 2d 395, 186 N.E.2d 357 (1962).

[56] In United States v. Irby, 304 F.2d 280 (4th Cir.), *cert. denied,* 371 U.S. 830 (1962), the informer was shown to have a history of mental illness and was of unstable credibility — a pathological liar — and yet the court held probable cause to be established, since the information furnished was corroborated by police investigation prior to the arrest.

[57] "But when the constitutional validity of that arrest was challenged, it was incumbent upon the prosecution to show with considerably more specificity than was shown in this case what the informer actually said, and why the officer thought the information was credible." Beck v. Ohio, 379 U.S. 89, 97 (1964).

The *federal* courts have imposed the burden of proving probable cause on the government in the case of a warrantless search and seizure. United States v. Elgisser, 334 F.2d 103 (2d Cir. 1964); Rogers v. United States, 330 F.2d 535 (5th Cir. 1964); United States v. Rivera, 321 F.2d 704 (2d Cir. 1963); Plazola v. United States, 291 F.2d 56 (9th Cir. 1961); Cervantes v. United States, 263 F.2d 800 (9th Cir. 1959). Notwithstanding the wording quoted from *Beck v. Ohio,* "[t]he Supreme Court has never been *squarely* confronted with the question of which party has the burden of proof on a motion to suppress for lack of probable cause." Note, *Probable Cause: The Federal Standard,* in *Student Symposium: The Fourth Amendment,* 25 OHIO ST. L.J. 502, 527 (1964) (emphasis added). It thus appears that the federal approach is *not* constitutionally binding on the states. Indeed, ILL. REV. STAT. ch. 38, § 114-12(b)(1965) states that "the burden of proving that the search and seizure were unlawful shall be on the defendant." In People v. Rodriquez, 79 Ill. App. 2d 26, 223 N.E.2d 414 (1967), a case of a warrantless search, the defendant was held to have the burden of proving that the search and seizure were unlawful. *See* LaFave, *supra* note 5, at 346-49. It is suggested that the federal approach is more equitable, since the principal reason for imposing upon the prosecution in a warrantless search the burden of establishing probable cause is that the prosecution, rather than the defendant, is in a better position to know the existence of facts within the

suppression. In the case of a search pursuant to warrant, where the search is considered presumptively valid and the burden of establishing an unlawful search and seizure is on the accused,[58] prior reliability should be factually demonstrated in the affidavit, rule 41(e) expressly providing that "a warrant shall issue only on affidavit."[59]

In summary, if the informer's tip is timely, is based on personal knowledge, and contains sufficient factual content concerning a criminal offense, then either independent observation by the police *or* proof of prior reliability of the informer would elevate the tip to the dignity of probable cause. However, in the absence of such substantial basis for crediting the informer's tip, the tip alone is not sufficient to establish probable cause.[60]

III. THE INFORMER PRIVILEGE AND DISCLOSURE

A. *Disclosure and the Warrantless Search*

1. The Informer Privilege and the Sixth Amendment

As previously pointed out, if a reliable informer gives a tip grounded upon timely and personal knowledge to the police, then probable cause exists. McCray claimed, however, that even though the officers' sworn testimony fully supported a finding of probable cause for the arrest and search, nevertheless, the state court violated the sixth amendment right of confrontation and cross-examination, as applicable to the states under the fourteenth amendment, when it sustained the objection to the defendant's request for the informer's identity.[61] The Supreme Court viewed this claim as frivolous and characterized it as "absolutely devoid of merit."[62]

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officer's mind immediately prior to the arrest and search. Another reason is that such a search is an exception to the constitutional corollary that a search should rest upon a warrant. "Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes.... Only where incident to a valid arrest... or in 'exceptional circumstances' may an exemption lie, and then the burden is on those seeking the exemption to show the need for it...." United States v. Jeffers, 342 U.S. 48, 51 (1951). *See* Wong Sun v. United States, 371 U.S. 471, 482 (1963); McDonald v. United States, 335 U.S. 451, 455-56 (1948); Johnson v. United States, 333 U.S. 10, 15 (1948).

[58] *E.g.*, Irby v. United States, 314 F.2d 251 (D.C. Cir. 1963); Chin Kay v. United States, 311 F.2d 317 (9th Cir. 1962); Batten v. United States, 188 F.2d 75 (5th Cir. 1951).

[59] FED. R. CRIM. P. 41(c).

[60] McCray v. Illinois, 386 U.S. 300 (1967), illustrates the importance which the Court attaches to prior reliability. Although there was some corroboration of the tip by independent observation, it was not extensive enough to constitute a *substantial* basis for crediting the tip. The *substantial* basis of accreditation was furnished by the rather impressive evidence of prior reliability. Without this proof of prior reliability in *McCray*, it is submitted that probable cause would not have been established.

[61] McCray v. Illinois, 386 U.S. 300, 305 (1967).

[62] *Id.* at 314.

The right of cross-examination "is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."[63] Yet, that sixth amendment right has not, at this point of constitutional development, been extended to proceedings at all of the pre-trial stages. During the past several years, however, the Supreme Court has extended other constitutional safeguards into the pre-trial stages of the criminal process in order to prevent the right to a fair trial from becoming illusory by sanctioning the state's gathering of evidence in derogation of constitutional rights. Just recently, the Court imposed stringent requirements upon law enforcement officials at the interrogation[64] and lineup[65] phases of the criminal process. The Court recognized that without the right to counsel at the lineup, the defendant "is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him."[66]

A hearing on a motion to suppress evidence arising out of a warrantless search, particularly in the case of a possessory crime, is frequently the most critical stage of the proceedings for the accused. In many instances, the issue of guilt will depend entirely upon the resolution of the motion to suppress. If the exclusionary rule is not to degenerate into an insubstantial device for the protection of fourth amendment rights, then it would seem that the full panoply of rights incidental to cross-examination should be accorded the defendant at the suppression hearing arising out of a warrantless search. In such a case there has been no prior judicial determination of probable cause, and the hearing on the motion to suppress is really a post-factum judicial inquiry into the arresting officer's state of mind immediately prior to the arrest and search. It is not suggested here that the sixth amendment should require that the informer himself must confront the accused and testify to his tip to the police in order for the prosecution to establish a prima facie case of probable cause. Hearsay has long been recognized as competent evidence for the establishment of probable cause,[67] and a rule requiring the prosecution to establish informer-probable cause through the testimony of the informer himself would impose heavy

[63] Pointer v. Texas, 380 U.S. 400, 405 (1965).

[64] Miranda v. Arizona, 384 U.S. 436 (1966).

[65] United States v. Wade, 388 U.S. 218 (1967). The *Miranda* and *Wade* cases have, in effect, been overruled in the federal courts by the Omnibus Crime Control and Safe Streets Act of 1968, title II, § 701, 82 Stat. 197.

[66] 388 U.S. at 235.

[67] *E.g.*, United States v. Ventresca, 380 U.S. 102 (1965) (warrant); Jones v. United States, 362 U.S. 257 (1960) (warrant); Draper v. United States, 358 U.S. 307 (1959) (no warrant).

burdens on law enforcement. Rather, where probable cause is dependent on the informer's tip and the officer testifies to the tip and *establishes* a prima facie case of probable cause, it is suggested that the sixth amendment should, contrary to *McCray,* then come into play and permit the accused to cross-examine the officer concerning the informer's identity. For in the event that the officer is unable to name the informer, there would be serious, if not total, doubt cast on the officer's testimony concerning the informer's tip and reliability.[68] On the other hand, if the court, in order to protect the accused's sixth amendment rights, should order the officer to identify the informer, then the accused would be afforded an opportunity to subpoena the informer and perhaps contradict the prosecution's evidence of probable cause.

The Court's answer to McCray's claim of a sixth amendment deprivation of the right of cross-examination was that "it would follow from this argument that no witness on cross-examination could ever constitutionally assert a testimonial privilege, including the privilege against compulsory self-incrimination . . . ."[69] The Court's conclusion, however, falsely assumes that all privileges are of equal dignity. Most privileges, including the informer privilege, are generally creatures of statute or judicial rule, and have been strictly construed because they are in derogation of the common law policy of full disclosure of all relevant facts in the interest of truth.[70] The constitutional privilege against self-incrimination is of a totally different nature and is not strictly construed.[71] Thus, a witness should be able to successfully invoke the constitutional privilege against self-incrimination vis-a-vis the accused's constitutional right of cross-examination because the witness' constitutional privilege is of an origin and dignity equal to that of the accused's right of cross-examination.[72] However, it does not follow from this that a witness should be able to successfully invoke a statutory or evidential privilege vis-a-vis the accused's constitutional right of cross-examination. In dealing with the informer privilege, the Court failed to recognize

[68] Recently in Smith v. Illinois, 390 U.S. 129 (1968), the Supreme Court found a denial of the sixth amendment right of cross-examination when a witness to whom the accused allegedly sold heroin, refused to reveal his name and address on cross-examination during trial. The Court noted that "[p]rejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test . . . ."

[69] McCray v. Illinois, 386 U.S. 300, 314 (1967).

[70] 8 J. WIGMORE, EVIDENCE §§ 2285, 2380 (McNaughton rev. 1961).

[71] *See* Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964).

[72] *See,* United States v. Cardillo, 316 F.2d 606 (2nd Cir. 1963).

a hierarchy of interrelated privileges and rights within the witness-accused complex.[73]

Although the Supreme Court has voiced strong preference for police resort to arrest and search warrants,[74] the net effect of the Court's ruling in *McCray* on the sixth amendment issue might well be the encouragement of warrantless arrests and searches.[75] By insulating the informer's identity from the light of cross-examination, the accused in most instances will be precluded from raising any substantial questions of fact concerning the existence of probable cause. Whether the police will utilize the informer privilege to elevate mere suspicion to the level of probable cause on the basis of a productive search, and thereby take it upon themselves to become the arbiters of probable cause, as envisioned by Mr. Justice Douglas in his dissent,[76] remains to be seen.

2. The Informer Privilege and the Fourteenth Amendment

Having found no sixth amendment violation in *McCray,* the Court then considered whether the Illinois rule of informer privilege offended those fundamental principles of justice and fairness inherent in the due process clause of the fourteenth amendment.[77] The due process claim was viewed by the Court as a request by the accused for the creation of a judicial presumption of police perjury.[78] The Court concluded that to accept such a contention would constitute " 'a wholly unjustifiable encroachment . . . upon the constitutional power of states to promulgate their own rules of evidence . . . in their own state courts . . . .' "[79] This conclusion, however, follows only if it is assumed that there is a reasonable relationship between the conditions for the sustainment of the privilege and the constitutional prohibition against an unreasonable search and seizure. It has been stated that the "Court's treatment of . . . [the] fourteenth amendment claim as a request for the presumption of police perjury seems inconsistent with its past implicit recogni-

[73] Recently the Court demonstrated marked sensitivity in subordinating the confidentiality generally accorded to grand jury testimony to the paramount right of the accused to obtain all information helpful to his defense. In Dennis v. United States, 384 U.S. 855, 870 (1966), the Court held that the prosecution was duty bound to produce for defendant's examination the grand jury testimony of government witnesses, thereby abrogating the long established policy of secrecy surrounding grand jury proceedings in federal courts. The Court noted the "growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."

[74] Ventresca v. United States, 380 U.S. 102 (1965); Jones v. United States, 362 U.S. 257 (1960).

[75] *See The Supreme Court, 1966 Term,* 81 HARV. L. REV. 112, 196-200 (1967).

[76] McCray v. Illinois, 386 U.S. 300, 314 (1967) (dissenting opinion).

[77] *E.g.,* Palko v. Connecticut, 302 U.S. 319 (1937).

[78] McCray v. Illinois, 386 U.S. 300, 312-13 (1967).

[79] *Id.* at 313.

tion of danger inherent in requiring a defendant to accept the uncorroborated word of an arresting officer."[80]

In the course of its disposition of the due process claim, the Court went to some length to relegate to an evidentiary, as opposed to a constitutional, rule the often cited language in *Roviaro v. United States*[81] that the invocation of the privilege is limited by fundamental principles of fairness. The *McCray* opinion disinherits *Roviaro* of constitutional heritage by characterizing as dictum its discussion of the limitations on the informer privilege in the context of search or seizure.[82] Of course, once the right to disclosure was stripped of its constitutional underpinnings implied in *Roviaro,* then indeed the Court was compelled to hold that there was no constitutional basis for imposing an *absolute* rule of disclosure in cases of a warrantless search predicated upon an informer's tip.

The net effect of the Court's rejection of McCray's constitutional claims and the relegation of *Roviaro* to an evidentiary status is to leave the states a freer hand in formulating their own rules of informer privilege. In fact, the Court in *McCray* hinged its decision on Illinois' evidentiary rule as outlined in judicial decisions, which precluded disclosure of the informer's identity where "the trial judge is convinced, by evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible information supplied by a reliable informant."[83]

The difficult problem, unanswered by *McCray,* remains: to what minimal extent must procedural safeguards be afforded the

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[80] *The Supreme Court, 1966 Term,* 81 HARV. L. REV. 112, 198 (1967). For a practical criticism of the Court's reasoning at this point in the *McCray* decision, pointing out that police "perjury" is fact and not fiction, see Younger, *The Perjury Routine,* 204 THE NATION 596-97 (1967).

[81] 353 U.S. 53 (1957). *See* text accompanying note 27, *supra.*

[82] Prior to *McCray, Roviaro* was generally viewed as a constitutional decision applicable to the states under the fourteenth amendment. For Mapp v. Ohio, 367 U.S. 643 (1961), made the fourth amendment applicable to the states, and Ker v. California, 374 U.S. 23 (1963), held that the constitutional standards of reasonableness under the fourth amendment are applicable to the states under the fourteenth amendment. *Roviaro* involved the actions of federal officers in a federal prosecution. The statement in *Roviaro* that the informer privilege is limited by fundamental principles of fairness and must give way when essential to a fair determination of the cause would be applicable to the states so long as *Roviaro* was a constitutional decision. Several courts, prior to *McCray,* seemed to impute to *Roviaro* a constitutional basis. *See, e.g.,* Costello v. United States, 298 F.2d 996 (9th Cir. 1962); United States *ex rel.* Coffey v. Fay, 234 F. Supp. 543 (S.D.N.Y. 1964); Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958). Justice Douglas in his dissenting opinion in *McCray* viewed *Roviaro* as a constitutional decision:

> In *Roviaro v. United States,* 353 U.S. 53, 61, we held that where a search *without a warrant* is made on the basis of communications of an informer and the Government claims the police had "probable cause," disclosure of the identity of the informant is normally required. In no other way can the defense show an absence of "probable cause." By reason of *Mapp v. Ohio* . . . that rule is now applicable to the States.

386 U.S. at 315.
See 46 CALIF. L. REV. 467, 468 (1958); 28 U. PITT. L. REV. 477, 479 (1967).

[83] McCray v. Illinois, 386 U.S. 300, 305 (1967).

aggrieved before the privilege can be sustained? For instance, if a statute or judicial rule of evidence sanctioned an absolute or unconditional privilege, that is, the sustainment of the privilege without the necessity of an evidentiary showing by the prosecution of any such factor as conditioned the Illinois rule of privilege (such as the officer's credibility), then the police would indeed become the absolute arbiters of probable cause and the person aggrieved by the search would be virtually deprived of his day in court on his fourth amendment rights.[84] For these reasons fundamental principles of fairness and due process should come into play in such a situation and abrogate the privilege. *McCray* seems to imply that an unconditional privilege would run afoul of minimal constitutional protections; for in sustaining the invocation of the privilege the Court emphasized the substantial factual showing, in open court, of those factors necessary to the proper invocation of the privilege in Illinois:

> The arresting officers in this case testified, in open court, fully and in precise detail as to what the informer told them and as to why they had reason to believe his information was trustworthy. Each officer was under oath. Each was subjected to searching cross-examination. The judge was obviously satisfied that each was telling the truth, and for this reason he exercised the discretion conferred upon him by the established law of Illinois to respect the informer's privilege.[85]

Yet, in regard to the minimal procedural safeguards necessary for the invocation of the informer privilege, the line of demarcation between the state's right to promulgate its own rules of evidence and the accused's rights inherent in due process and fundamental

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[84] In *McCray,* the Court did allude to a California statute, CAL. EVID. CODE § 1042(c) (West 1966), vesting discretion in the trial judge to uphold the privilege upon an evidentiary showing "in open court . . . that such information was received from a reliable informant . . . ." The Court cited the California act as an example of a statute consistent with the evidentiary rule of Illinois. But, since the California statute makes no provision for an evidentiary showing of "good faith reliance" by the police officer or credibility of the informant, as to the tip *at issue,* as required in Illinois, it arguably falls short of the procedural safeguards present in *McCray.* One can conceive of situations where the prosecution might be able to establish the informer's *prior* reliability, but the officer's testimony as to the particular tip in question may be a complete fabrication; or, the informer, though shown to have been previously reliable, may have lied to the police officer, who accepted the information as true, made a warrantless search, and actually discovered contraband. In both of these situations, it would seem that disclosure of the informer's identity would be required in Illinois but *not* in California. The only safeguard in both rules is the broad discretion of the trial judge. If *McCray,* therefore, postulates as a condition of constitutional immunity the procedural and evidential framework present in the Illinois rule of informer privilege, then a California-type rule would be constitutionally infirm.

The California statute was enacted to nullify the effect of the holding of the California Supreme Court in Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958). *See* text accompanying note 30 *supra.* The constitutionality of the statute has recently been upheld in Martin v. Superior Court, 57 Cal. Rptr. 351, 353, 424 P.2d 935, 937 (1967), the court stating that the Supreme Court's ruling in *McCray* was "controlling on the facts before us." The extent of the evidentiary finding in *Martin* of the police officer's credibility, if indeed there was any such finding, is not apparent from the opinion. The Court in *Martin* appears to assume that the Illinois rule is no different from the California statute.

[85] McCray v. Illinois, 386 U.S. 300, 313 (1967).

fairness remains distinctly clouded. It is submitted that, even though the Supreme Court in *McCray* chose not to abrogate the informer privilege on sixth amendment grounds, nevertheless the Court should at least have delineated explicitly the minimal constitutional standards necessary for the invocation of the privilege, rather than merely implying that an unconditional privilege would be constitutionally infirm. Without such delineation, it can be anticipated that state and federal opinions in this area will continue to fall into the morass of confusion.

3. The Conditions for Disclosure of the Informer's Identity in the Warrantless Search

Under *McCray,* the disclosure of an informer's identity is not a matter of constitutional right. On the other hand, the judicial determination of whether or not to compel disclosure is not a matter resting exclusively within the unfettered discretion of the trial court. The real problem of the *McCray* case concerns the circumstances under which disclosure should be ordered. In sustaining the trial judge's exercise of discretion in upholding the claim of informer privilege by the state, the Supreme Court predicated its ruling on Illinois' evidentiary rule that the identity of the informer need not be disclosed "if the trial judge is convinced, by evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible information supplied by a reliable informant."[86] At first glance, the Court would appear to be stating that the factors of good faith reliance by police officers, credibility of informer-information, and informer reliability are pertinent to a resolution of the issue of disclosure. However, as indicated previously, credibility of the tip and informer reliability are factors essential to the issue of probable cause. Absent a proper showing of such factors, probable cause is lacking and the evidence should be suppressed. The problem of whether the prosecution should be ordered to disclose the informer's identity or suffer the suppression of evidence if it elects to disobey the order should never arise in such a case, since the problem of disclosure presupposes a prima facie showing of probable cause and a demand for disclosure by the accused *after* a prima facie case has been established. What seems to be crucial to the problem of disclosure, therefore, is the good faith or credibility of the police officer in testifying to the facts underlying the search. For instance, if the officer's testimony is vague, inconsistent, or otherwise questionable on the facts and circumstances relating to the arrest and search, the informer's tip, or informer re-

[86] *Id.* at 305.

liability, or if the officer obviously testifies falsely to a particular fact in issue, disclosure of the informer's identity might be ordered. The Court in *McCray* intimated the propriety of disclosure in such circumstances when it stated:

> If the magistrate doubts the credibility of the affiant, he may require that the informant be identified or even produced. It seems to us that the same approach is equally sufficient where the search was without a warrant, that is to say, that it should rest entirely with the judge who hears the motion to suppress to decide whether he needs such disclosure as to the informant in order to decide whether the officer is a believable witness.[87]

Where the officer's credibility is thus put in issue, it is reasonable to order disclosure in order to afford the accused the opportunity of testing, among other things, whether in fact the informer exists, what precisely he told the officers, and under what circumstances the tip was given. If the officer is unable to name the informer, or if the prosecution discloses the identity of the informer and the informer contradicts the officer's testimony concerning the tip, there would be serious, if not total, doubt cast on the officer's testimony concerning probable cause. In short, with disclosure in the case where the officer's credibility is suspect, the aggrieved is afforded an opportunity for a full evidentiary hearing consistent with the exclusionary rule.[88]

The prosecution, upon an order of disclosure, can of course elect to withhold the identity of the informer[89] but not at the expense of the accused's fourth amendment rights. Upon an order of disclosure and the prosecution's election to withhold the informer's identity, the court should suppress the evidence obtained as a result of the search and seizure in issue.[90] When the prosecution elects to obey the order and disclose the informer's identity, it must provide the accused with sufficient information — such as name, last known address, and physical description of the informant — to enable the accused to locate him.[91] If, after a diligent search, the accused is unable to locate and compel the presence of the informer in court,

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[87] McCray v. Illinois, 386 U.S. 300, 307-08 (1967), quoting Chief Justice Weintraub's discussion of the disclosure issue in State v. Burnett, 42 N.J. 377, 388, 201 A.2d 39, 45 (1964).

[88] *See* Comment, *Informer's Word as the Basis for Probable Cause in the Federal Courts,* 53 CALIF. L. REV. 840, 851 (1965).

[89] United States v. Tucker, 380 F.2d 206 (2d Cir. 1967).

[90] *E.g.,* Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958); People v. Gutierrez, 171 Cal. App. 2d 728, 341 P.2d 54 (1959); Drouin v. State, 222 Md. 271, 160 A.2d 85 (1960).

[91] 8 J. WIGMORE, EVIDENCE § 2374 (McNaughton rev. 1961); People v. Diaz, 174 Cal. App. 2d 799, 345 P.2d 370 (1959); People v. Mays, 174 Cal. App. 2d 465, 344 P.2d 840 (1959); People v. Taylor, 159 Cal. App. 2d 752, 324 P.2d 715 (1958).

then the court should grant the motion to suppress, since by virtue of the order of disclosure, the court obviously has not been clearly convinced by the prosecution's evidence of the constitutional propriety of the search and seizure.[92] There is the further consideration, rooted in fundamental fairness, that the unavailability of the informer under these circumstances has precluded the accused from a full evidentiary hearing on his fourth amendment claim.

Disclosure of the informer's identity not being a matter of constitutional right under *McCray,* a court *could* adopt an alternative procedure to an order of disclosure in open court: when a demand for disclosure is made by the accused and the court is not convinced of the officer's credibility, and sufficient corroborative or independent evidence is lacking, the court could order that the informer be produced in the privacy of the court's chambers, and in the absence of counsel, accused, and witnesses, the court could conduct an *in camera* hearing into the facts and circumstances surrounding the alleged tip, the informer's prior reliability, and the contents of the alleged tip. A record of the *in camera* proceedings could be kept and sealed with the court for purposes of appellate review of its final determination of the disclosure and suppression issues. Although such procedure has been utilized by at least one court,[93] it would appear that the alleged advantage in not jeopardizing the future use of the informer by revealing his identity to the accused might be overbalanced by the deprivation to the accused of a detailed cross-examination of the officer with reference to the informer's identity, and the further deprivation of an examination of the informer with reference to probable cause and the officer's credibility. Although such deprivations would not amount to sixth amendment violations under *McCray,* the shortcomings of such procedure should not be minimized, particularly since an *in camera* hearing would be a procedure resulting from some initial reservations by the court of the officer's credibility.

In summary, when the issue of disclosure is raised, unless the court is convinced of the officer's credibility, disclosure of the informer's identity should be ordered. What must not be forgotten is that in the absence of disclosure the accused is severely hampered

[92] *See* cases cited note 57 *supra.*

[93] United States v. Day, 384 F.2d 464 (3d Cir. 1967). In LaFave, *supra* note 5, at 368, it is noted that this practice is being encouraged by some trial judges in Illinois. Yet, in People v. Freeman, 34 Ill. 2d 362, 215 N.E.2d 206 (1966), after defendant was denied the name of the informer, his request for such an *in camera* hearing was also denied, and the Supreme Court of Illinois affirmed the judge's decision, apparently on the basis that the police officers' testimony was sufficiently credible to establish probable cause.

in, if not precluded from, effectively litigating his fourth amendment right. Unless the law of informer privilege is cautiously applied, there is danger that the exclusionary rule will be reduced to a nullity.

B. *Disclosure and the Search Pursuant to Warrant*

The fundamental problem in the search pursuant to warrant is whether the aggrieved is *ever* entitled to the disclosure of the identity of the informer referred to in the affidavit. The question was at least implicitly before the Supreme Court in *Rugendorf v. United States*,[94] and the Court was able to sidestep a direct confrontation of the problem. Before trial, the defendant filed a motion for the names of the informers referred to in the affidavit, on the basis of which a search warrant was issued, and he challenged not only the legal sufficiency of the affidavit but also its veracity. The motion was denied. The Supreme Court held that the search was valid because the alleged factual inaccuracies of the affidavit were "of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit."[95] The Court then concluded that since there was substantial basis for crediting the informer-hearsay declarations in the affidavit, the informer's identity was properly withheld, challenge to the veracity of the affidavit having failed to show that "the affiant was in bad faith or that he made any misrepresentations to the Commissioner in securing the warrant."[96] Nevertheless, the Court seems to have implied that if an affidavit *does* set forth allegations of an informer's communication which include matters within the personal knowledge of the affiant and essential to probable cause, disclosure might be compelled upon a preliminary showing by the aggrieved that the affiant acted in bad faith or made misrepresentations in obtaining the warrant. But, the defendant should support his motion to disclose with something more than mere suspicion that the facts of the affidavit are untrue.[97]

The Court's approach in *Rugendorf* is strikingly similar to the approach in *McCray* with reference to good faith and credibility. From the standpoint of the aggrieved, however, the *Rugendorf* ruling is of little comfort, since in most cases it will be virtually impossible to show that the affiant acted in bad faith or misrepresented the informer's allegations to the judge or commissioner, unless testimony

[94] 376 U.S. 528 (1964).

[95] *Id.* at 532.

[96] *Id.* at 533.

[97] United States v. Warrington, 17 F.R.D. 25 (N.D. Cal. 1955).

from the informer himself is obtained.[98] However, assuming that the aggrieved *can* establish a prima facie case of bad faith or misrepresentation by the affiant, disclosure seems to be in order, since otherwise there is great danger not only that the constitutional requirement of an oath or affirmation for a warrant is being abused,[99] but also that the judicial procedure for the issuance of a warrant, as well as the search and seizure process itself, is being utilized by the affiant to perpetrate a sham upon the aggrieved and the court;[100] disclosure therefore will preserve the constitutional mandate from invidious abuse, and protect the court and the aggrieved from fraud.

In order to preserve strict constitutional adherence to the fourth amendment by law enforcement officials, a vigorous argument can be proffered that a person aggrieved by a search and seizure pursuant to warrant should be entitled to disclosure of the informer's identity under the same circumstances as in a warrantless search, even in the absence of a showing of bad faith or misrepresentation on the part of the affiant, in order to contest via an evidentiary hearing the underlying allegations of the affidavit. Otherwise, by simply reciting the magical phraseology of informer-probable cause in the affidavit, law enforcement officials might be able to effectively foreclose the aggrieved from his day in court on probable cause. Under federal rule 41(c), no testimony is taken upon the issuance of a search warrant, the rule providing that the warrant shall issue only on affidavit.[101] At first glance, it does not seem unreasonable to urge that one aggrieved by a search pursuant to warrant should be afforded the same procedural remedy as one aggrieved by a warrantless search. In the latter case, the party aggrieved is afforded the opportunity of contesting the sworn testimony of law enforce-

[98] If, however, the informer initially contacts an officer and the officer in turn communicates the informer's message to the affiant, the aggrieved might conceivably be able to show through the testimony of the initial contact that the statement in the affidavit, allegedly recounting the informer's message to the initial contact and its relay by the initial contact to the affiant, is false, and thereby establish a prima facie case of bad faith or misrepresentation by the affiant. On the other hand, if the affidavit sets forth probable cause independently of the informer's tip to the initial contact, and the independent probable cause is not shown by the aggrieved to be the product of misrepresentation or bad faith, then the informer's tip, even though misrepresented in bad faith by the affiant, is not really essential to probable cause at all. The difficult case on disclosure, within the context of "bad faith-misrepresentation," appears to be the case involving a communication from the informer to the police with little or no other evidence of probable cause existing. In such a situation if the aggrieved can establish a prima facie case of bad faith or misrepresentation by the affiant, disclosure seems to be in order under *Rugendorf*. *See* United States v. Pearce, 275 F.2d 318 (7th Cir. 1960).

[99] U. S. CONST. amend. IV.

[100] *See* King v. United States, 282 F.2d 398 (4th Cir. 1960).

[101] FED. R. CRIM. P. 41(c).

ment officials by an evidentiary hearing on a motion to suppress, and might under some circumstances demand disclosure. Why should not a party aggrieved by a search pursuant to warrant be accorded the same opportunities?

Several cases have held that in the case of a search pursuant to warrant the aggrieved on a motion to suppress may attack the factual accuracy or contents of an affidavit by an evidentiary hearing;[102] but these cases did not concern themselves with the right of disclosure of the informer's identity as antecedent to the evidentiary hearing. A few cases, however, have held that the aggrieved is entitled to disclosure of the identity of the informer referred to in an affidavit and that, in the absence of such disclosure, the evidence should be suppressed.[103] Notwithstanding a vigorous argument and a few cases to the contrary, it would appear that a rule permitting the aggrieved to demand the disclosure of an informer's identity in order to contest the allegations of the affidavit relating to the informer's credibility and reliability is of doubtful judicial persuasion. In the absence of a showing of bad faith or misrepresentation by the affiant, to allow such disclosure is, in effect, to repudiate the rule that in a search pursuant to warrant probable cause must be determined by the affidavit itself, nothing more and nothing less.[104] The reasons for confining the inquiry to the four corners of the affidavit are manifold. In the first place, to afford the accused the right to contest the veracity of the affidavit would undoubtedly discourage resort to search warrants by law enforcement officials. If the allegations of an affidavit are subject to contradiction and impeachment to the same extent as the testimony of a law enforcement official on a motion to suppress involving a warrantless search, the factors presently motivating the procurement of warrants (rendering the officer's belief immune from evidentiary contradiction and legally validating the officer's subsequent search and seizure through prior independent judicial judgment) might be destroyed. In the second place, if the aggrieved is granted the right to testimonially impeach the veracity of an otherwise sufficient affidavit,

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[102] *E.g.*, United States v. Freeman, 358 F.2d 459 (2d Cir. 1966); King v. United States, 282 F.2d 398 (4th Cir. 1960); United States v. Poppitt, 227 F. Supp. 73 (D. Del. 1964); Lerner v. United States, 151 A.2d 184 (D.C. Mun. Ct. 1959); People v. Alfinito, 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965).

[103] United States v. Pearce, 275 F.2d 318 (7th Cir. 1960); Baker v. State, 150 So. 2d 729 (Fla. App. 1963).

[104] *E.g.*, Giordenello v. United States, 357 U.S. 480 (1958); Paldo v. United States, 55 F.2d 866 (9th Cir. 1932); United States v. Freeman, 165 F. Supp. 121 (S.D. Ind. 1958); United States v. Casino, 286 F. 976 (S.D.N.Y. 1923).

should not the prosecuting attorney be given the right to rebut the aggrieved's evidence? The net effect of such procedure might well be to render nugatory the recognized implications in rule 41 of the Federal Rules of Criminal Procedure, both as to the legality of the searching officer's actions and the prima facie validity of the judicial officer's determination of probable cause. Finally, it should be remembered that the warrant is issued by an independent judicial officer and, contrary to the case of a warrantless search, his decision on the issue of probable cause presumably entails a weighing of the aggrieved's right of privacy. Moreover, if the magistrate doubts the veracity of the allegations in the affidavit concerning the informer, he can require the identification and production of the informer prior to the issuance of a warrant.[105] Since a warrant is issued only on the basis of an affidavit filed with the court,[106] a supplemental affidavit setting forth the additional facts and circumstances as provided by the produced informer which confirm the veracity of the tip could then be filed as a matter of record prior to the issuance of the warrant. The aggrieved under such a procedure is not without remedy; the basis of the judicial officer's action in issuing the warrant is a matter of record and subject to contest by the aggrieved on a hearing concerning the sufficiency, as opposed to the veracity, of the affidavit.

So long as the procedure for issuance of warrants is not proven to be frequently abused,[107] it would seem that for the above reasons a motion for disclosure in order to contest the credibility and reliability of the informer should have no place in the case of a search pursuant to warrant. The only purpose of disclosure would be to afford the aggrieved the opportunity to contest the veracity, as opposed to the sufficiency, of the affidavit, and fundamental principles of policy seem to militate against opening up the affidavit to the onslaught of factual contradiction and impeachment common to the

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[105] *E.g.*, State v. Burnett, 42 N.J. 377, 201 A.2d 39, 45 (1964), quoted with approval in McCray v. Illinois, 386 U.S. 300, 307-08 (1967); People v. Keener, 55 Cal. 2d 714, 361 P.2d 587, 12 Cal. Rptr. 859 (1961).

[106] FED. R. CRIM. P. 41(c), (f).

[107] For an analysis of the warrant procurement procedure in practice, pointing out that magistrates perfunctorily issue warrants requested by prosecutors, *see* Miller & Tiffany, *Prosecutor Dominance of the Warrant Decision: A Study of Current Practices,* 1964 WASH. U.L.Q. 1. *See also* LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions,* 63 MICH. L. REV. 987, 991-95 (1965), pointing out that in many instances, judicial control of the warrant process is only a "fiction."

motion to suppress arising out of the warrantless search.[108] In the case of bad faith or misrepresentation by the affiant, however, there is present an essential abuse of the search and seizure process *ab initio,* as well as a possible fraud upon the court, and the policy of "affidavit-conclusiveness" should take second place to the only effective remedy calculated to preserve the integrity of the fourth amendment and the judicial process.

CONCLUSION

The essence of the fourth amendment prohibition against unreasonable searches and seizures is the indefeasible right of personal privacy in the individual. To protect this right the exclusionary rule was adopted; to implement this rule the motion to suppress was provided. True, the effect of the exclusionary rule might well be that the criminal goes free, but "it is the law that sets him free," and "[n]othing can destroy a government more quickly than . . . its disregard of the charter of its own existence."[109]

The net effect of *McCray,* however, is the subordination of individual privacy to society's interest in effective law enforcement. For by relegating to an evidentiary, as opposed to a constitutional, status the demand of an accused for disclosure of the informer's identity during cross-examination on the motion to suppress, the Court has helped to insulate from cross-examination the very source of ostensible probable cause; accordingly, the accused's day in court on his fourth amendment rights has been drastically curtailed. Far from discouraging abusive police practices, *McCray* can only encourage warrantless searches allegedly predicated on a tip from the so-called previously reliable informer. Thus, the policeman becomes

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[108] In People v. Keener, 55 Cal. 2d 714, 722, 361 P.2d 587, 591, 12 Cal. Rptr. 859, 863 (1961), the court stated as follows:

> If a search is made pursuant to a warrant valid on its face and the only objection is that it was based on information given to a police officer by an unnamed informant, there is substantial protection against unlawful search and the necessity of applying the exclusionary rule in order to remove the incentive to engage in unlawful searches is not present. The warrant, of course, is issued by a magistrate, not by a police officer, and will be issued only when the magistrate is satisfied by the supporting affidavit that there is probable cause. He may, if he sees fit, require disclosure of the identity of the informant before issuing the warrant or require that the informant be brought to him. The requirement that an affidavit be presented to the magistrate and his control over the issuance of the warrant diminish the danger of illegal action, and it does not appear that there has been frequent abuse of the search warrant procedure. One of the purposes of the adoption of the exclusionary rule was to further the use of warrants, and it obviously is not desirable to place unnecessary burdens upon their use. . . . It follows from what we have said that where a search is made pursuant to warrant valid on its face, the prosecution is not required to reveal the identity of the informer in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it.

[109] Mapp v. Ohio, 367 U.S. 643, 659 (1961).

the arbiter of probable cause and the right of privacy is truly a right without a remedy. Implicit in *McCray* is the threat that the constitutional right of privacy might be relegated to a status inferior to that of a common law rule of institutional efficiency. A free society can endure without an informer privilege, but hardly without a meaningful constitutional right of privacy.