UIC Law Review

Volume 9 | Issue 1 Article 16

Fall 1976

The Informant and Accomplice Witness: Problems for the Prosecution, 9 J. Marshall J. Prac. & Proc. 243 (1975)

Michael D. Marrs

THE INFORMANT AND ACCOMPLICE WITNESS: PROBLEMS FOR THE PROSECUTION

by MICHAEL D. MARRS

Prosecuting drug cases is not unlike prosecuting any other criminal case. There are, however, peculiar areas one encounters more frequently prosecuting drug cases than other types of crimes. The primary reasons one frequently confronts these same areas are the nature of the crime and the way in which the Federal Government has chosen to enforce the drug laws. Therefore, the typical narcotics case usually involves any one or, on occasion, all of the following areas: An informant or accomplice, undercover and surveillance agents, a search or seizure, expert witnesses, electronic surveillance of different kinds, and photographic evidence. Any one may create potential problems at various points during the prosecution. Of these, no one factor can be as devastating to the prosecution as the improper handling of the informant or accomplice witness.

Common experience teaches us from early childhood that the "tattletale" is one to be despised and discouraged. It is not surprising then, that unless carefully presented, the informant or accomplice witness will tend to be repugnant not only to the jury but to the judge as well. Careful thought must therefore be given to the presentation or even absence of the witness. This, however, is not intended to be a guide or a definitive analysis of the informant or accomplice witness from the prosecutor's perspective. Rather, this is a prosecutor's one-sided view of some of the potential problems that may arise as a result of the informant or accomplice witness.

> The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty' business may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions.[1]

---

* B.A., Michigan State University; J.D., Illinois Institute of Technology/Chicago-Kent College of Law; Chief of the Narcotics Prosecution Unit of the U.S. Attorney's Office of Chicago, 1973-1975; Assistant U.S. Attorney in the Special Prosecutions Division since January 1975.

The views expressed in this article do not reflect those of the United States Attorney's Office, but are solely those of the author.

Parts of the article, particularly that dealing with the area of the informant privilege, were written with the aid of Douglas P. Roller, Chief, Organized Crime and Racketeering, Strike Force, Cleveland, Ohio.

1. On Lee v. United States, 343 U.S. 747, 757 (1952).

With this pronouncement then, it is not surprising that it is uniformly held that the mere use of an informer witness by the prosecution is cause for suspicion.[2] Even more pointedly, some courts have observed that not only is there cause for suspicion, but also informants and accomplices have a "strong motivation to lie."[3] Further, if the witness happens to be an addict in addition to being an informer or accomplice, his testimony is received with extreme caution.[4] In almost all instances, the failure of the trial judge to give a requested cautionary instruction reflecting upon the testimony will constitute error.[5]

The straight forward approach is probably the most effective method with the informant or accomplice witness. With this approach, the witness' entire background and role in the case are divulged during direct examination.[6] To insure that nothing is

---

2. United States v. Penick, 496 F.2d 1105 (7th Cir. 1975), *cert. denied*, 95 S. Ct. 177 (1975); United States v. Kinnard, 465 F.2d 566, 570 (D.C. Cir. 1972); Fletcher v. United States, 158 F.2d 321, 322 (D.C. Cir. 1946).

3. United States v. Lee, 506 F.2d 111, 118 (D.C. Cir. 1974); United States v. Jones, 425 F.2d 1048 (9th Cir. 1970), *cert. denied*, 400 U.S. 823 (1970); Williamson v. United States, 332 F.2d 123 (5th Cir. 1964).

4. "[A] drug addict is inherently a *perjurer* where his own interests are concerned, it is manifest either that some corroboration of his testimony should be required, or at least that it should be received with suspicion and acted upon with caution." Fletcher v. United States, 158 F.2d 321, 322 (D.C. Cir. 1946) (emphasis added); United States v. Griffin, 382 F.2d 823, 828 (6th Cir. 1967). But, if the witness is a reformed addict, his testimony is not subject to the same degree of suspicion. United States v. Green, 327 F.2d 715 (7th Cir. 1964).

5. United States v. Owens, 460 F.2d 268 (10th Cir. 1972); United States v. Davis, 439 F.2d 1105 (9th Cir. 1971); United States v. Egan, 287 F. 958 (D.C. Cir. 1923). Typical instructions provide:

Informants

The testimony of an informer who provides evidence against a defendant for pay or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against the defendant.

1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, 255, § 12.03 [hereinafter cited as DEVITT & BLACKMAR].

Accomplice

An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care.

You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.

1 DEVITT & BLACKMAR § 12.04.

6. *See* United States v. Del Purgatorio, 411 F.2d 84 (2d Cir. 1969); United States v. Graziane, 376 F.2d 258 (2d Cir. 1967); United States v. Freeman, 302 F.2d 347 (2d Cir. 1962), *cert. denied*, 375 U.S. 958 (1963). This, of course, does not mean that the witness' background is to be

overlooked in the witness' background, a checklist should be prepared perhaps based on the following areas: prior convictions; prior arrests; prior and present rumors; agencies which have employed the informant; whether the informant was paid for his services; how much he was paid and by whom; whether or not he is under indictment or is charged in any criminal proceedings; whether any charges have ever been dismissed as a result of government intervention; whether or not the witness is an addict; whether the witness has ever used drugs; and finally what deal, if any, has been made between the witness and the Government in return for his testimony. This tactic is totally proper and will only cause difficulty when an accomplice witness, in revealing his own criminal record, states that he has pled guilty to the charge on trial thereby creating the inference that the defendant is guilty as well. Usually, however, this problem can be cured by a cautionary instruction to the effect that the jury is not to draw any inference of guilt of the defendant from the accomplice's guilty plea.[7]

The clear advantage to this procedure is to take the "steam" out of the cross-examination. If the prosecution hinges on two or more "controlled buy"[8] transactions, the informant or accomplice becomes the focal point of the defense. In most instances, the well-trained surveillance agents will be solid witnesses. The only weak point, then, will be the informant or accomplice. The defense counsel's course, therefore, becomes a frontal attack on the informant's credibility by emphasizing his bad character. If the unsavory background is brought out in direct examination, the only matter left to the defense attorney then becomes the witness' powers of observation and ability to recall, factors which ultimately may prove to be of little concern if the surveillance witnesses are sound. If defense counsel attempts to rehash the background, he also risks engendering jury sympathy for the witness, unless of course the witness had a particularly odious background. In all events, however, nothing sounds as good the second time as it did the first, and a reiteration on cross-examination may even tend to bore the fact-finder. This tactic also creates certain other advantages particularly in final argument.

disclosed for the first time during direct examination. Giglio v. United States, 405 U.S. 150 (1972) and Brady v. Maryland, 373 U.S. 83 (1963) clearly imply that the defense receive such information reasonably in advance of trial.

7. United States v. Del Purgatorio, 411 F.2d 84 (2d Cir. 1969).

8. A controlled buy is a narcotics transaction which is "controlled" by the case agent. The informer and his vehicle are searched initially. Surveillance agents then place themselves in various frontage points where they can watch the informant travel to the defendant and purchase the narcotics. After the buy takes place, the informant is then watched as he returns to the case agent where he is again completely searched.

Again, because the informant or accomplice witness is the potential weak point in the prosecution, defense counsel will undoubtedly berate the prosecution for its use of the "dirty witness" and portray him as a criminal type unworthy of belief. The retort is obvious. First, the Government hid nothing from the jury and fully disclosed his background. Second, it would be lovely if the Government could recruit bank presidents with Ivy League credentials and young, smooth-cheeked clerics to make narcotics buys, but that is hardly reality. The defendant, therefore, controls for the most part who the Government will use as a witness. Third, if the witness is an accomplice, the argument can be made that the defendant in effect selected the witnesses against him and, therefore, the defense can hardly blame the Government for the witness' less than laudatory resume.

Credibility, however, is only one obvious problem when an informant or accomplice witness is to be used. With all the pitfalls of the testifying informant, one might be inclined to believe that the informant witness should be avoided where at all possible and full reliance placed upon the corroborating agent's testimony without requiring the informant to testify. In some instances, this might be the safe approach, but there are also problems that arise even when the informant does not testify, but merely participated in the investigation or acted as an intermediary between the defendant and an undercover agent. There are certain occasions when the decision concerning whether or not the informant is to testify is affected by other matters. For example, if the informant or his family faces a real possibility of harm, there may be little choice but to not require his testimony unless strict security procedures can be implemented. The prosecutor may also elect not to even disclose the name or identity of the informant under the claim of governmental privilege. There are, however, potential problems in this area.

The government's privilege to conceal the identity of the informant is a well recognized principle.[9] The privilege is firmly grounded on a policy articulated by Professor Wigmore as follows:

> A genuine privilege, on . . . fundamental principle . . . , must be recognized for the *identity of persons supplying the government with information concerning the commission of crimes.* Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity—to protect himself and his family from harm, to preclude

9. McCray v. Illinois, 386 U.S. 300 (1967); Scher v. United States, 305 U.S. 251 (1938).

adverse social reactions, and to avoid the risk of defamation or malicious prosecution actions against him.[10]

While it is apparent that the privilege is readily observed and supported by strong policy considerations, it is equally clear that it is not absolute. In *Roviaro v. United States*,[11] the Supreme Court articulated some of the restrictions placed on the privilege.

There, the defendant was charged with selling heroin to one "John Doe." Doe was an undisclosed government informant who had, while under surveillance, made a purchase of heroin from the defendant in a somewhat typically controlled buy situation. Well before trial, the defense in a bill of particulars requested the name, address, and occupation of John Doe. The Government refused, relying upon the privilege.[12] The defense request was denied and the defendant was subsequently convicted.

The defendant's contention in the Supreme Court was that the privilege could not be claimed since the informant was the only other active participant in the illegal activity charged. The Court agreed and reversed the conviction reasoning:

> The circumstances of this case demonstrate that John Doe's possible testimony was highly relevant and might have been helpful to the defense. So far as petitioner knew, he and John Doe were alone and unobserved during the crucial occurrence for which he was indicted. Unless petitioner waived his constitutional right not to take the stand in his own defense, John Doe was his one material witness. Petitioner's opportunity to cross-examine [the law enforcement officers] was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction. Doe had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or on the identity of the package . . . that he 'transported' from the tree to John Doe's car. The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide.
>
> . . .
>
> This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. Moreover, a government witness testified that Doe denied knowing petitioner or ever having seen him before. We conclude that,

10. 8 WIGMORE, EVIDENCE, § 2374 (McNaughton Rev. 1961) (emphasis added). *See also* United States *ex rel.* Abbott v. Twomey, 460 F.2d 400, 402-03 (7th Cir. 1972).

11. 353 U.S. 53 (1957).

12. At trial, government counsel explained the basis for refusal to disclose, citing the informant's participation in other pending cases.

> under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure.[13]

Thus, under these facts disclosure was required. The Court plainly stated, however, that it was not willing to establish fixed rules for disclosure but rather sought to strike a proper balance between protecting the flow of information and the individual defendant's right to prepare his defense.[14] In *McCray v. Illinois*,[15] the Court apparently utilized this balancing test in not requiring disclosure of the informant.

Thus, the courts must apply the balancing test on a case by case basis. One definitive criterion which has emerged from *Roviaro* and its progeny is that "[w]here 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."[16] Therefore, when presented with the proper factual context and a showing of need and relevance has been made, ordinarily disclosure will be ordered. The factual pattern in *Roviaro*, however, is the classic situation where courts would uniformly compel disclosure without more than an allegation of prejudice.

Variations on the factual scheme of *Roviaro,* however, produce different results. Where the informant is merely the party who introduces the undercover agent to the defendant and thereafter plays no significant role, disclosure may not be forthcoming.[17] Also, covert action by an informant, such as "tipster" information, will not require disclosure.[18] Finally, where the potential testimony from the informant will clearly be cumulative of other witnesses, disclosure may not be compelled.[19]

As could be expected, *Roviaro* produced a flood of requests

---

13. Roviaro v. United States, 353 U.S. 53, 63-65 (1957).
14. *Id.* at 62.
15. 386 U.S. 300 (1967).
16. Roviaro v. United States, 353 U.S. 53, 60-61 (1957). *See also* United States v. Alvarez, 472 F.2d 111 (9th Cir. 1973); United States v. Casiano, 440 F.2d 1203 (2d Cir. 1971), *cert. denied*, 404 U.S. 836 (1971); *accord*, Rugendorf v. United States, 376 U.S. 528 (1964); *accord*, United States v. Cansler, 419 F.2d 952 (7th Cir. 1969), *cert. denied*, 397 U.S. 1029 (1970).
17. United States v. Russ, 362 F.2d 843 (2d Cir. 1966), *cert. denied*, 385 U.S. 923 (1966); United States v. Coke, 339 F.2d 183 (2d Cir. 1964).
18. United States v. Barnes, 486 F.2d 776 (8th Cir. 1973); United States v. Willis, 473 F.2d 450 (6th Cir. 1973), *cert. denied*, 412 U.S. 908 (1973); United States v. Kelley, 449 F.2d 329 (9th Cir. 1971); United States *ex rel.* Abbott v. Twomey, 460 F.2d 400 (7th Cir. 1972); Miller v. United States, 273 F.2d 279 (5th Cir. 1959), *cert. denied*, 362 U.S. 928 (1960).
19. United States v. Fredia, 319 F.2d 853 (2d Cir. 1963); United States v. Holiday, 319 F.2d 775 (2d Cir. 1963).

for informant disclosures; but in *Rugendorf v. United States*,[20] and more recently in *Branzburg v. Hayes*,[21] the Supreme Court seemingly lessened the impact of *Roviaro*. In *Rugendorf*, the Court stated:

> Having failed to develop the criteria of *Roviaro* necessitating disclosure of the merits, we cannot say on this record that the name of the informant was necessary to his defense. . . . Never did petitioner's counsel indicate how the informants' testimony could *help establish petitioner's innocence*.[22]

In *Branzburg*, this narrowing application was reaffirmed when the court indicated that "their [the informants] identity cannot be concealed from the defendant *when it is critical to his case*."[23] The Seventh Circuit Court of Appeals, while not specifically adopting this view, has followed this narrowed interpretation.[24] Therefore, the defendant's burden in obtaining disclosure of an informant's identity would appear to be somewhat more difficult in that not only must a defendant show relevance and that the information may be helpful, but he must also demonstrate that disclosure is critical and might establish his innocence.

Of course, all discussions above presume that the informant is available to the Government. What of the situation, however, where the informant directly affects the prosecutor's decision whether or not he will be used as a witness by quietly disappearing some time before the trial of the case. This circumstance, while extremely disconcerting to the government lawyer, may not be critical to the prosecution.[25] Whether or not it becomes critical, however, depends to a great extent upon the Government's efforts to locate the informant and the circumstances surrounding his disappearance.

As a general rule, the prosecutor is not required to call any particular witness in its case-in-chief.[26] However, when it ap-

---

20. 376 U.S. 528 (1964).
21. 408 U.S. 665 (1972).
22. Rugendorf v. United States, 376 U.S. 528, 535 (1964) (emphasis added).
23. 408 U.S. at 698 (emphasis added).
24. *E.g.*, United States v. DeStefano, 476 F.2d 324 (7th Cir. 1973).
25. Some courts have been quite understanding in these circumstances. "Informants in drug cases are not Brahmins, nor are they noted for long-term occupancy of well-tended premises. Their disappearance, voluntarily or otherwise, is not extraordinary." United States v. Super, 492 F.2d 319, 322 (2d Cir. 1974), *cert. denied*, U.S. ( ).
26. "Cases . . . have made it abundantly clear that the Government is not the guarantor of a special employee's appearance at trial." United States v. White, 324 F.2d 814, 815-16 (2d Cir. 1963); "The government is not required to call all witnesses who are competent to testify. . . . The principle applies even to a special agent or informer who participated in the transaction." Washington v. United States, 275 F.2d 687, 690 (5th Cir. 1960); *accord*, United States v. Mosby, 422 F.2d 72, 74 (8th Cir. 1970), *cert. denied*, 399 U.S. 914 (1970) where it was stated: "Absent unusual circumstances such as knowingly concealing evidence favorable to a defendant, the Government has a wide discretion with re-

pears that an informant witness may have played a somewhat questionable role in the case, the requirements will differ. In these cases, the defendants have usually asserted, with minor variations, that they are unable to locate the informant and that the Government elected not to require the informant's testimony in an effort to hide his questionable conduct. The defendants have then sought to compel the Government to produce the witness or at least demonstrate that a reasonable effort has been made to secure his appearance.[27]

In *Velarde-Villarreal v. United States*,[28] the defense claimed that the informant solicited the narcotics sale and in general had entrapped the defendant. The Government did not call the informant to the witness stand during its case-in-chief or in rebuttal, but instead relied wholly upon agent testimony. During the trial, the defendant moved for production of the witness and the court refused to order production stating that it did not believe the defendant's entrapment claim.

In reversing, the Court of Appeals stated that in view of the defendant's claim and his lack of prior involvement with the law or narcotics, the Government should have produced the informant for trial or have made every reasonable effort to do so. This conclusion has come to be almost universally shared where the informant is shown to be a material witness and the Government does not plan to use his testimony.[29]

What constitutes a reasonable effort to find the informant will naturally vary. In some cases, telephone calls and a general search may be sufficient, although this sort of effort is termed "minimal."[30] While in others, a mere statement by the prosecution to the effect that a reasonable effort is being made may be sufficient.[31] In some instances, the prosecution may even have to require one of its agents to "hang around" establishments (bars) frequented by the informant.[32] What would appear to be uniform, however, is that where the Government has knowingly

---

spect to the witnesses to be called to prove its case. The government is not ordinarily compelled to call all witnesses competent to testify including special agents or informers." *See also* United States v. Williams, 481 F.2d 735 (8th Cir. 1973), *cert. denied*, 414 U.S. 1026 (1973).

27. Some courts hold there is no duty to produce the informant at all, only to identify him, reciting that this fulfills *Roviaro*. *See* United States v. Super, 492 F.2d 319 (2d Cir. 1974); United States v. Cimino, 321 F.2d 509, 512 (2d Cir. 1963), *cert. denied*, 375 U.S. 974 (1964).

28. 354 F.2d 9 (9th Cir. 1965).

29. *See, e.g.*, United States v. Kitchen, 480 F.2d 1222 (8th Cir. 1973); United States v. Pollard, 479 F.2d 310 (8th Cir. 1973); *cert. denied*, 414 U.S. 1137 (1974); United States v. Hayes, 477 F.2d 868 (10th Cir. 1973); United States v. Cansler, 419 F.2d 952 (7th Cir. 1969). *Contra*, United States v. Super, 492 F.2d 319 (2d Cir. 1974).

30. United States v. Cansler, 419 F.2d 952 (7th Cir. 1969).

31. United States v. Hayes, 477 F.2d 868 (10th Cir. 1973).

32. United States v. Super, 492 F.2d 319 (2d Cir. 1974).

played some role in the informant's disappearance, it will be fatal to the prosecution.[33]

Reasonable efforts notwithstanding, however, in at least one instance it has been held that the prosecution is the *guarantor* of the informant's presence at trial. In *United States v. Hart*,[34] the Ninth Circuit in a two to one decision held that the reasonable effort standard established by *Velarde-Villarreal* was wholly insufficient in view of facts surrounding the informant's activities. There, the two government informants were Mexican nationals who periodically provided information to the Drug Enforcement Administration for a fee or reward on a case by case basis. Both men were employed in Mexico and ventured into the United States to pursue their informant roles. Neither man received any training or supervision and both selected their own targets. The agent who worked with the informants while they were in the United States did not know their addresses or telephone numbers in Mexico, but did know that following an arrest they would customarily disappear across the Mexican-American border.

Prior to trial, the defense motion for production of the two informants was granted and the Government then unsuccessfully attempted to secure their appearance at trial. Characterizing the Government's efforts as "too modest," the court stated that even if more vigor had been exercised, the defendant's conviction must be reversed.

> When [the Government] chooses to act through paid Mexican informants in investigations conducted entirely within the United States, the Government does become a 'guarantor' of the appearance of informants ordered produced. Upon failure of the Government to produce the informants, the indictment must be dismissed. . . . Only by requiring the Government to pay this cost for nonproduction can we adequately safeguard against

---

33. In this regard, the court in Velarde-Villarreal v. United States, 354 F.2d 9 (9th Cir. 1965) viewed the testimony of the Government with much alarm. The last time the agent had seen the informant was at the time of the defendant's arrest. The testimony went:

Q. Did you see him [the informant] leave?
A. Yes sir.
Q. And you saw him leave by the stairway?
A. Yes sir.
Q. And, I assume, going down? What did you see him do after he went down the stairway?
A. He walked across the parking lot patio and disappeared out of my view walking in the direction of the Mexican Border.
Q. Was this on instructions from you?
A. Yes.
Q. And at what time was it that you saw him walking down the stairs in relation to the happenings in the room?
A. Possibly three or four seconds after the knock on the door.

Id. at 12.

34. 17 CRIM. L.R. 2155 (9th Cir. 1975).

'rewarded' alien informants entrapping the unwary innocent and assure defendants . . . a fair trial.[35]

Finally, as can be seen from the preceding discussion, the major problem which may arise as a result of the nontestifying informant is the entrapment defense. Entrapment exists when a person, having no previous intent or purpose to violate the law, is induced or persuaded by law enforcement officers or their agents to commit a crime. Under this circumstance, as a matter of policy, the law forbids a conviction.[36] This defense was first recognized by the Supreme Court in *Sorrells v. United States*,[37] where a federal agent befriended the defendant and after being twice refused in his pleas was ultimately successful in making a single purchase of liquor from the reluctant defendant. The Court recognized the defense as a matter of policy upon the theory that the law prohibits law enforcement officers from luring innocent persons into the commission of crimes. In *Sherman v. United States*,[38] a narcotics case, this underlying policy was reaffirmed[39] in a similar factual context as that of *Sorrells*.

35. *Id.* at 2156. Judge Conti in dissent stated that the majority's ruling was directly in conflict with *Velarde-Villarreal* and that under the reasonable effort test the convictions should be affirmed. He further pointed out that the informants had no contact until the time of sale with one of the defendants and, therefore, outright reversal was an unduly harsh result at least as to the one defendant.

36. When the defense establishes a prima facie case of entrapment, the jury may be instructed as follows:

> The defendant asserts that he was a victim of entrapment as to the offense charged in the indictment.
>
> Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case. On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment. For example, when the government suspects that a person is engaged in the illicit sale of narcotics, it is not entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informer or decoy, to purchase narcotics from the suspected person.
>
> If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit crimes such as are charged in the indictment, whenever opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.
>
> On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find him not guilty.

1 DEVITT & BLACKMAR § 13.13; Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932).

37. 287 U.S. 435 (1932).

38. 356 U.S. 369 (1958).

39. "To determine whether entrapment has been established, a line

What both *Sorrells* and *Sherman* also shared were the views stated by Mr. Justice Roberts in *Sorrells* and Mr. Justice Frankfurter in *Sherman*, the so-called "government conduct" theory of entrapment. Under this theory, predisposition is not controlling when the Government, directly or through its informant, is the source of the contraband. In this circumstance, the law as a matter of policy would forbid a conviction as well.

In *United States v. Russell*,[40] the Supreme Court had occasion to once more comment on the theory of the entrapment defense. There, the defendant's illicit existing, but idle, drug manufacturing ring was infiltrated by a government agent. The government agent ultimately supplied an essential precursor chemical to enable the defendant to once more manufacture methamphetamine. The defendant was then convicted of illegally manufacturing methamphetamine. In the Ninth Circuit, the conviction was reversed based upon "an intolerable degree of government participation in the criminal enterprise."[41] The Supreme Court, however, in an opinion by Mr. Justice Rehnquist stated that this conduct by the Government was not sufficient to constitute entrapment. "[The defendant] was an active participant in the illegal drug manufacturing enterprise which began before the Government agent appeared on the scene, and continued after the agent had left the scene. He was, in the words of *Sherman*, not an 'unwary innocent' but an 'unwary criminal.'[42]

In so ruling, the Court declined to adopt the view of Justice Roberts and Justice Frankfurter, but reaffirmed the majority opinions of *Sorrells* and *Sherman* making predisposition of the defendant the principal element in the entrapment defense.

Under the "government conduct" theory, the entrapment defense had become most effective, particularly when the informant had not testified and the defendant introduced evidence of entrapment by the informant in that the informant had furnished the contraband. Under many circumstances it was held that the Government must then disprove the entrapment defense.

---

must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *Id.* at 372.

40. 411 U.S. 423 (1973).

41. 459 F.2d 671 (9th Cir. 1972).

42. 411 U.S. 423 at 436; *accord*, United States v. McGrath, 468 F.2d 1027 (7th Cir. 1972), *vacated and remanded*, 412 U.S. 936, *aff'd*, 494 F.2d 562 (7th Cir. 1974). In *McGrath*, the government agents supplied the printing materials, including the ink and paper, to an ongoing counterfeiting ring. The Seventh Circuit Court of Appeals reversed McGrath's conviction and the Government then appealed. The Supreme Court then vacated the decision and remanded the case to the Seventh Circuit for reconsideration in light of *Russell*. Upon reconsideration, the Seventh Circuit affirmed the conviction.

A typical ruling was in *United States v. Bueno*.[43] In *Bueno* the court held that where the defendant had testified to facts which would constitute an entrapment defense as a matter of law, the Government had a duty to produce the informant to testify, or in some manner rebut the defendant's testimony.[44] In reversing Bueno's conviction, the court observed: "it was activity of the informer, who was not called to testify that is fatal to the conviction."[45] The court rejected the government argument that there was no need to call the informant since the jury was entitled to reject Bueno's testimony and that the evidence of Bueno's willingness to sell the narcotics was sufficient to permit the jury to disbelieve the defendant's lack of predisposition and his alleged entrapment by the informant.[46]

With the *Russell* decision it appeared that the government conduct theory of entrapment was at best limited to those instances where the conduct was "shocking to the universal sense of justice" and that the death knell had sounded for *Bueno* and its progeny. Despite *Russell*, however, the Fifth Circuit has reaffirmed *Bueno*.

In *United States v. Oquendo*, the court stated, "We recognize that in *Russell*, the Supreme Court emphasized that entrapment is a limited defense as well as affirming the continuing vitality of the predisposition inducement test of *Sherman* and *Sorrells*. But, despite the fact that the defendant's predisposition to commit the crime is not a significant factor under *Bueno*, we do not feel that *Bueno* is inconsistent with *Russell*."[47]

---

43. 447 F.2d 903 (5th Cir. 1971).

44. *Accord*, United States v. Dillet, 265 F. Supp. 980 (S.D.N.Y. 1966); United States v. Silva, 180 F. Supp. 557 (S.D.N.Y. 1959); *cf.* United States v. Cansler, 419 F.2d 952 (7th Cir. 1969), *cert. denied*, 397 U.S. 1029 (1972). *But see* United States v. Jett, 491 F.2d 1078 (1st Cir. 1974).

45. United States v. Bueno, 447 F.2d 903, 904 (5th Cir. 1971).

46. But, what of Masciale v. United States, 356 U.S. 386 (1958), decided on the very same day as *Sherman* where the Supreme Court in a factual context analogous to that of *Bueno* observed:

> As for [the informant], petitioner testified that the informer engaged in a campaign to persuade him to sell narcotics by using the lure of easy income. Petitioner argues that this undisputed testimony explained why he was willing to deal with [the government agent] and so established entrapment as a matter of law. *However, his testimony alone could not have this effect.* While petitioner presented enough evidence for the jury to consider, they were entitled to disbelieve him in regard to [the informant] and so find for the Government on the issue of guilt.

Masciale at 388 (emphasis added). In United States v. Jett, 491 F.2d 1078 (1st Cir. 1974), the First Circuit Court of Appeals stated that the *Bueno* court was simply unaware of *Masciale*. Apparently, the *Bueno* court was still unaware of it when it reaffirmed *Bueno* in United States v. Oquendo, 490 F.2d 161 (5th Cir. 1974). *Contra*, United States v. Cansler, 419 F.2d 952 (7th Cir. 1969), *cert. denied*, 397 U.S. 1029 (1970); United States v. Draper, 411 F.2d 1106 (7th Cir. 1969), *cert. denied*, 397 U.S. 906 (1970); United States v. Caro, 350 F.2d 862 (7th Cir. 1965).

47. 490 F.2d 161, 164 (5th Cir. 1974).

With a decision by the Eighth Circuit in *United States v. Hampton*,[48] perhaps the matter will finally be resolved. In *Hampton*, the defense clearly established entrapment as a matter of law in the *Bueno* sense with testimony that the informant was the source of the contraband. In view of this testimony, it was urged by the defense that a special instruction be tendered to the jury to the effect that if they found that the Government provided the contraband, the defendant could not be convicted. The instruction was refused and the defendant was convicted. On appeal, the conviction was affirmed.

After an extended discussion of *Russell*, the court stated: "We believe that the Supreme Court's opinion in *Russell* forecloses us from considering any theory other than predisposition with respect to Hampton's entrapment defense."[49] The court then turned to *Bueno* and plainly rejected it, finding that even if the Government's conduct was as the defendant claimed it to be, he was entitled to no more than an entrapment instruction based upon predisposition. The Supreme Court has granted certiorari and will probably resolve this conflict during the fall term. With any decision, the conflict among the circuits will be resolved and some of the problems stemming from the use of the informant witness will be more easily solved.

As can be seen from the preceding discussions and authorities, informants and accomplices present some of the most difficult trial issues for the prosecutor, at almost all phases of the lawsuit. A mistake in presenting the witness can alienate the jury, while failure to present the witness can void a potential conviction. With the growing sophistication of the average juror these traditional problems created by the informant or accomplice witness will only increase. Rightfully, in the post-Watergate era, members of the public and, therefore, potential jurors will likely demand more integrity from the system. In this vein, the use of the informant will undoubtedly be the subject of an increased natural suspicion by both the public and the courts.

48. 507 F.2d 832 (8th Cir. 1975), *cert. granted*, 95 S. Ct. 1445 (1975).
49. *Id.* at 835.