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The Informer Privilege in Criminal Prosecutions

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COMMENT

THE INFORMER PRIVILEGE IN CRIMINAL PROSECUTIONS

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Introduction

The defendant is on trial charged with the sale of narcotics. The prosecution's only eye witness, Officer Woodlow of the San Francisco Police Department, has just testified on direct examination that he had witnessed, from a secret vantage point, the sale of narcotics by the defendant to one John Doe, an unnamed informer. Counsel for the defense has resumed the questioning of the officer on cross-examination.

Q. "You observed defendant making a sale to another person?"

A. "Yes."

Q. "What is the name of that person?"

A. "I am not at liberty to reveal that information."

Q. "What is his name?"

The prosecuting attorney: "I object your honor to this line of questioning. The government has properly, through the witness, invoked its privilege of nondisclosure of an informer's identity. The public interest in efficient law enforcement dictates that this privilege be preserved regardless of the informer's relevancy to the evidence before the court."

Counsel for the defense: "Your honor, public policy dictates that the accused's right to a complete cross-examination of the evidence presented against him be preserved. The identity of the informer is highly relevant to the issue of the guilt or innocence of the defendant. The defendant denies that he made a sale of narcotics at the location and at the time specified by the witness. Defendant has no fair opportunity to substantiate his denial and impeach the testimony of the officer without disclosure of the informer's identity. If there is disclosure, the informer after being compelled to appear here might testify that no such sale was made, or that it was not the defendant who received narcotics, or that there was an entrapment."

The government has a privilege to keep the informer's identity a secret, but as in the hypothetical situation this secrecy may run counter to the rights of the defendant. Since the government prosecutes an accused it is unconscionable to allow it to undertake prosecution and then invoke its governmental privilege to deprive the accused of anything which might be material to his defense.

Two courses are available to the court by which to secure a fair hearing. The trial judge can require and compel the government's witness to disclose the informer's identity. Or the court can request the identity and, if such is refused, exclude all prior testimony of the witness. The very nature of the informer privilege dictates that the last alternative is the wisest.

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The Nature of the Privilege

Through the centuries the flow of communications from informers has proven vital to the detection of criminal activities. During the feudal period in England, before the organization of law enforcement agencies, information from informers was used to bring violators to the bar of justice.[1] Such information was later solicited by rewards, a practice which has survived to the present.[2]

The organization of law enforcement agencies did not in any way depreciate the usefulness of the informer. Today the police depend almost entirely on informers in the enforcement of sumptuary laws such as those directed against gambling, prostitution, or the illegal sale and use of liquors and narcotics.[3]

The best illustration of the effective use of informers is in narcotic offenses. The illegal sale or possession of narcotics is conducted with the greatest of secrecy. The contraband does not remain long in any one place. Knowledge of its presence at a particular place and time usually must stem from informers.

English and American courts often ascribed the public interest to the protection of the informer from reprisals in order to encourage him to do his duty or exercise his right as a citizen to report violations of the law to the proper government officials.

Courts declared that every citizen had the duty to communicate to his government any information which he had of the commission of an offense against the laws. Thus, in order to encourage him to perform his duty without fear of "evil consequences,"[4] it was declared that his identity was among the secrets of state.[5]

The United States Supreme Court declared on one occasion that it is a right as well as the duty of every citizen to report violations of the law to the proper authorities.[6] This right was said to arise from the very establishment of government. In order to secure the right the informer must be protected. Therefore public interest favored keeping the informer's identity a secret.

Today, the "duty" and "right" concepts are recognized as merely incidental to the true underlying purpose of the privilege. The privilege recognizes that a person may fear to cooperate in the administration of justice if he knows that his identity will be made public. But the informer is made secure only as an incident to the furtherance of the public interest in

[1] See 4 BLACKSTONE, COMMENTARIES § 330 for a discussion on the practice of approvement.

[2] Some federal statutes award informers a share of fines. See 38 STAT. 277 (1914), 21 U.S.C. 183 (1952). However, the majority of payments are made by officers out of the police department's budget.

[3] See VOLLMER, THE POLICE AND MODERN SOCIETY 81 (1936).

[4] United States v. Rogers, 53 F.2d 874, 876 (S.D. N.J. 1931).

[5] Worthington v. Scribner, 109 Mass. 487, 488 (1872).

[6] *In re* Quarles, 158 U.S. 532 (1894).

promoting the flow of such information to establish more efficient law enforcement.[7]

Some courts have declared that before the privilege can be invoked the trial court must determine whether the public interest would suffer by disclosure.[8] This question is not for the court to determine as the basis of the privilege *is* the public interest.

However, the court should, as in all evidentiary matters, determine whether the requisite elements of the privilege are fulfilled and the court should do so without forcing a disclosure of the very thing that the privilege is designed to protect. Unlike military secrets[9] there is no reason why the judge in his chambers should not be given the informer's identity. No matter how vital informers are to the enforcement of law it would be ludicrous to contend that a judge who sits as the keeper and preserver of the law is incompetent to be trusted with the identity of the informer.

The common law privilege only applies to the identity of persons who furnish information of violations of law to public officers charged with the enforcement of that law.[10] The privilege does not extend to the contents of the informer's statement.[11] In some instances the communications themselves will fall within the privilege but only because the identity of the informer is in jeopardy by disclosure of that information.[12]

[7] Roviaro v. United States, 353 U.S. 53, 59 (1956).

[8] People v. McShann, 50 Cal. 2d 802, 807, 330 P.2d 33, 35 (1958). This is an unnecessary literal interpretation of CAL. CODE CIV. PROC. § 1881(5) which declares, "a public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by disclosure." It is apparent that subdivision five does not specifically apply to the government's privilege of nondisclosure of an informer's identity. Subdivision five applies to any "confidential communication" received by a public officer. Whether the communications are from a disclosed or undisclosed source is immaterial. However, the courts in California have utilized this code section as the statutory safeguard of the common law informer privilege.

[9] See United States v. Reynolds, 345 U.S. 1 (1953). The United States Supreme Court had to determine whether the government had made a proper claim of privilege against disclosure of military secrets. The court said that some formula of compromise must be applied as judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet the court was unwilling to go so far as to say that there should be an automatic requirement of complete disclosure to the judge in his chambers before the claim of privilege could be accepted.

[10] People v. Keating, 286 App. Div. 150, 141 N.Y.S. 2d 562 (1955). The government's witness who acquired information from informers while engaged by a voluntary and private agency in aiding in the enforcement of criminal laws was not allowed to withhold the identities as he was not a public officer. The privilege applies to the identity of those who communicate only to such public officers as have a responsibility or duty to investigate or to prevent public wrongs, and not to officials in general. But Professor Wigmore says that the principle is a flexible one: "[I]t applies wherever the situation is one where without this encouragement the citizens who have special information of a violation of law might be deterred otherwise from voluntarily reporting it to the appropriate officials." 8 WIGMORE, EVIDENCE § 2374 (3d ed. 1940).

[11] 8 WIGMORE, EVIDENCE § 2374 (3d ed. 1940). Other government privileges shield the communication because the communication is directly vital to the national or public security. But in order to encourage communications of law violations it is the source of the communications which should be protected rather than the communications themselves. Contra: Michael v. Matson, 81 Kan. 360, 105 Pac. 537 (1909); People v. Roban, 45 N.Y.S. 2d 213 (1943). See 9 A.L.R. 1112; 59 A.L.R. 1559.

[12] Bowman Dairy Co. v. United States, 341 U.S. 214, 221 (1950).

The informer has no power to compel the government to invoke the privilege. The fate of his identity is solely in the hands of the government.[13] Like all privileges it may be waived by the holder.

This evidentiary privilege is available to the government in a criminal or civil suit and may be invoked in order to prevent any witness who appears for either party from disclosing an informer's identity.[14] The privilege cannot be invoked if the identity of the informer is known to those who have cause to resent the communications.[15] However, some courts have indicated that an accused who knows the identity of the informer will not ordinarily be prejudiced by the trial court's failure to require disclosure.[16]

In most jurisdictions the trial court need not determine the validity of the government's claim of privilege if the accused fails to make a proper demand at the trial for disclosure.[17]

The applicability of the privilege is independent of the informer's motivations. Whether he acts from motives of good citizenship, under a promise of immunity, for hire, or otherwise is immaterial.[18] So too, in civil suits the privilege is applicable regardless of the probative value of the informer's possible testimony.[19]

Participant-Informer Rule

Today many courts and writers persist in exhortation that there is no informer privilege if disclosure of the informer's identity is relevant and helpful to the defense of the accused or in criminal proceedings if it is

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[13] Worthington v. Scribner, 109 Mass. 487 (1872). But see Wells v. Toogood, 165 Mich. 677, 131 N.W. 124 (1911). The court failed to distinguish that the government is the sole holder of the privilege. Plaintiff brought action for slander against an alleged informer. When an officer was asked as to the complaint of theft made to him by the informer, defendant's counsel objected on the basis of the informer privilege. The trial court sustained the objection which was upheld on appeal. The government was not a party to this suit and had no representative present except the officer. It does not appear that the officer was aware of the privilege or had been advised by his superiors. Professor McCormick suggests that the trial judge may invoke the privilege for the absent holder. McCORMICK, EVIDENCE § 148 (1954).

[14] 8 WIGMORE, EVIDENCE § 2374 n. 1 (3d ed. 1940).

[15] Pihl v. Morris, 319 Mass. 57, 66 N.E.2d 804 (1946).

[16] Sorrentino v. United States, 163 F.2d 627 (9th Cir. 1947). See note 8 *supra.*

[17] United States v. Conforti, 200 F.2d 365 (7th Cir. 1952); McCoy v. State, 216 Md. 332, 140 A.2d 689 (1958).

[18] Usually the police do not depend on the ordinary citizen for information of law violations. The bulk of informers are actually cultivated by the police among the less desirable elements of society who have already acquired positions in the underworld. In many instances the informers are criminal violators themselves who trade information for rewards or for immunity from prosecution. See VOLLMER, THE POLICE AND MODERN SOCIETY 81 (1936). This introduces an interesting question: must the communications be made by such persons honestly and not maliciously in order to merit the government invoking the privilege? How would the government be able to prove whether the informer's intentions were honestly motivated without revealing the informer or dragging the trial out on a side issue? See *Ex Parte* Farrell, 189 F.2d 54 (1st Cir. 1951); Takahashi v. Hecht Co., 50 F.2d 326 (D.D.C. 1931).

[19] American Surety Co. v. Pryor, 217 Ala. 244, 115 So. 176 (1927).

essential to a fair determination of a cause.[20] This is the prevailing dictum in the United States but not the prevailing case law.

The confusion on this point can be traced to the days when the privilege was first developed. The courts upheld the privilege but at the same time allowed the prosecution to utilize the evidence of the witness, the whole of which was dependent on the informer.[21]

The effect here was that the government's evidence remained before the trial court while the defendant was denied his only means to refute or impeach it. If the evidence introduced by the witness was neither material nor prejudicial to the issue before the court no harm was done, but if this evidence was vital to the proof of the accused's guilt then the prosecution's nondisclosure served as a denial of the defendant's right to cross-examination.

As the courts in England and the United States became more aware of the accused's procedural and constitutional rights in criminal trials, the courts began to recognize the problem. But, instead of dealing with the evidence, the courts attacked the privilege. Lord Esher suggested that:[22]

> [I]f upon the trial of a prisoner the judge should be of the opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail.

In response to Lord Esher's suggestion several American courts adopted the "participant-informer" rule.[23] As Lord Esher contemplated, the rule would demand disclosure where the informer is a material witness on the issue of guilt or innocence. However, the rule has been applied only where the informer is a *participant* in a criminal act charged to the defendant. For example, the defendant is accused of making an unlawful sale of narcotics to an unnamed person. The person to whom the defendant supposedly made the sale is a "participant-informer."

The courts have held that a "participant-informer" is no longer simply an informer. He is said to be a police decoy who is a material witness to the unlawful transaction and thus vitally necessary for the defense of the accused.[24] At least one court has declared that the defendant cannot be denied the right to ascertain the "participant-informer's" identity without suppressing an element of the res gestae.[25]

In effect the "participant-informer" rule limits the applicability of the informer privilege to criminal cases where a *non*-participant informer is

[20] See notes 7 and 8 *supra*; 8 WIGMORE, EVIDENCE § 2374 (3d ed. 1940); MCCORMICK, EVIDENCE § 148 (1954).

[21] Rex v. Hardy, 24 Howell's State Trials 199 (1794).

[22] Marks v. Beyfus, 25 Q.B.D. 494, 498 (1890).

[23] Crosby v. State, 90 Ga. App. 63, 82 S.E.2d 38 (1954).

[24] *Ibid.*

[25] People v. Lawrence, 149 Cal. App. 2d 435, 308 P.2d 821 (1957).

involved. Such a restriction ignores the very nature of the privilege. The common law privilege made no distinction between an informer who is involved in the crime and an informer who merely points the finger of suspicion. The public interest will suffer by disclosure of *any* informer regardless of his participation in the unlawful transaction charged to the accused.

The courts which use the "participant-informer" rule allow both the privilege *and* the evidence in a *non*-participant situation.[26] Thus in application of the rule the court not only ignores the very nature of the privilege but also does nothing to protect the defendant's rights where the non-participant informer is a material witness. For example, the defendant is charged with the unlawful possession of narcotics. The informer was the only eye-witness to the search other than the defendant and the arresting officer. The testimony of the arresting officer is more likely to be believed by the jury than the testimony of the defendant. Only the informer's testimony can reveal whether the officer's evidence is fabricated. Under these circumstances the "participant-informer" rule which requires disclosure of the informer has no application as the informer is not a participant in the felonious transaction. Thus the court allows the prosecution to invoke the informer privilege, and the court will not exclude the officer's allegation. Hence the government is allowed to utilize its evidence while holding back the only substantial means available to the defendant for rebuttal.

The Modern Rule

A modern rule has been adopted by the Supreme Court of the United States[27] and by the Supreme Court of California.[28] The modern rule remedies the weaknesses of the "informer-participant" rule but, in turn, is open to other criticism. The Supreme Court announced in *Roviaro v. United States*[29] that an absolute rule cannot be applied in determining the informer's relevancy to the issue before the court.

In determining the informer's relevancy the trial court must take into consideration all of the circumstances, such as: the crime charged, the significance of the testimony of the prosecution's witnesses, whether the informer was known to the accused, the possible defenses, and the possible significance of the informer's testimony. The fact that the informer has participated in the crime for which the defendant is charged is merely an additional factor for consideration.[30]

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[26] This is stated affirmatively. Even though the courts applying the informer-participant rule also declared that disclosure would be required where a non-participant was a "material" witness the courts were always able to ignore such situations. See People v. Gonzales, 136 Cal. App. 2d 437, 288 P.2d 588 (1955); Prown v. State, 135 Tex. Cr. R. 394, 120 S.W.2d 1057 (1938); State v. Hull, 189 Wash. 174, 64 P.2d 83 (1937).

[27] See note 7 *supra.*

[28] See note 8 *supra.*

[29] 353 U.S. 53 (1956).

[30] *Ibid.*

Unfortunately, the courts, in applying this totality-of-the-circumstances test, designate as error the trial court's failure to require disclosure.[31] This has lent itself to the popular legal belief that the privilege gives way where, under the circumstances, the informer is material to the defense of the accused. But the word "require" as analyzed within the context of the cases means only to "request." Actually, the error under this view is the failure of the trial court to dismiss the prosecution's case when the prosecution ignores the trial court's *request* for disclosure.[32]

In *People v. McShann*[33] the California court adopted the modern rule promulgated by the United States Supreme Court. The defendant was convicted on a second count of unlawful possession of narcotics. The prosecution introduced the testimony of the arresting officers on the issues of the defendant's possession of heroin and his admissions of guilt. This evidence of itself was enough to convict the defendant. However, the prosecution also chose to introduce as evidence telephone conversations between the informer and the defendant in order to buttress the government's proof of the guilty knowledge necessary for the crime. The defendant asked for disclosure of the informer's identity. The trial court, relying on the "participant-informer" rule, allowed the government's privilege and the evidence.

The California Supreme Court properly discerned that the informer, as originator of the telephone call, was a material witness on the issue of possession. The court ordered reversal and assigned as error the failure of the trial court to require disclosure. However, specific instructions were given to the trial court on how to deal with such a situation.

The instructions given truly characterize the modern rule. The trial court is admonished *not to require disclosure* of the identity of the informer if the government elects to invoke its evidentiary privilege. Instead the trial court should dismiss the prosecution's case.[34] Therefore if the prosecution elects to invoke the privilege it does so at the expense of incurring a dismissal.[34a]

The burden is placed on the prosecution and not upon the trial court to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of the informer's identity. The public interest dictates that the prosecution of law violators and the informer privilege are the responsibilities of the government. The

[31] See notes 7 and 8 *supra*.

[32] *Ibid.*

[33] 50 Cal. 2d 802, 330 P.2d 33 (1958).

[34] The United States Supreme Court has indicated that the same policy will apply in criminal cases where the government invokes its other evidentiary privileges so depriving the defendant of an opportunity to defend himself. See United States v. Jencks, 353 U.S. 657 (1956); United States v. Reynolds, 345 U.S. 1 (1952).

[34a] An interesting question arises where the government does reveal the identity of the informer but the informer has disappeared. Is the trial court still obligated to dismiss the prosecution's case? And, how much is necessary for a complete identification? See People v. Valencia, 156 Cal. App. 2d 337, 341, 342, 319 P.2d 377, 379 (1958).

government exercises a power of waiver over both. The final election of whether one or the other should prevail is properly left to the state.

This "election" doctrine can actually result in placing an unnecessary burden on the prosecution. For instance, in the *McShann* case there was evidence, aside from the telephone conversation, sufficient of itself to sustain a conviction. In such a case the defendant's rights are adequately protected merely by exclusion of the telephone conversations. The court should dismiss the prosecution's case only where the remaining evidence is insufficient to sustain a conviction.

Reasonable Cause for Arrest and Search

In many jurisdictions evidence obtained by an illegal search and seizure cannot be used to obtain a conviction in a criminal trial. The federal courts have adopted this procedure to safeguard an individual's right to privacy under the fourth amendment.[35] Although not required by the fourteenth amendment,[36] an increasing minority of the states are adopting this rule.[37]

A law enforcement officer can make a lawful search for and seizure of evidence in two general situations: (1) when he is possessed of a valid search warrant previously issued authorizing the search and seizure, or (2) without a search warrant as an incident to a lawful arrest.

A lawful arrest may be made either under the authority of a warrant of arrest in possession of the officer, or without such a warrant upon a showing of probable or reasonable cause.[38]

Here again, then, is the situation where the informer privilege may come into conflict with the defendant's rights. If the officer has acted entirely or substantially on information provided by an informer, the informer is certainly material to any proof of reasonable cause.[39]

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[35] Weeks v. United States, 232 U.S. 383 (1914).

[36] Wolf v. Colorado, 338 U.S. 25 (1949).

[37] McCORMICK, EVIDENCE § 139 n. 7 (1954). California has adopted this rule in People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

[38] People v. Dupee, 151 Cal. App. 2d 364, 311 P.2d 568 (1957). But see RESTATEMENT, TORTS § 119 (G) (1934). (At common law the officer did not have to justify his grounds for arrest if the person arrested had in fact committed a felony. The officer's arrest was deemed lawful, therefore the incidental search would be reasonable. If the officer arrested the wrong person then he was allowed to show reasonable cause for the arrest as a defense to a civil suit.)

[39] Reasonable cause may be established solely on the officer's own investigation after acting on a tip from the informer. The informer is not material when the officer has acted on what he himself saw. Scher v. United States, 305 U.S. 251 (1938). The reasoning is that the informer acts merely as a "tipster" who arouses a suspicion in the officer. However, the officer acting on this suspicion needs far less observation to satisfy his own belief that defendant is committing a felony or has committed a felony than would be true if he had acted on impulse. The officer need only show for the purpose of satisfying reasonable cause that he acted as the reasonable person would under the circumstances at the time. See Willson v. Superior Court, 46 Cal. 2d 291, 294 P.2d 36 (1957). There, officers received information from an anonymous source that defendant was bookmaking. The officers then went to the cafe-bar where the defendant was working as a waitress. Defendant was previously unknown to the officers and had no prior record as a suspect. Defendant was observed writing on a pad while conducting a telephone conversation. Defendant matched the description given by the informer. The officers watched the defendant for awhile and then arrested her. The subsequent search revealed that she was taking bets. Prior to the arrest they did not overhear the telephone conversations or see what the defendant was writing down. Certainly, of itself, defendant's conduct was not enough to arouse a reasonable suspicion. The court held that the officers had satisfied reasonable cause to act on their "own observations" for the arrest and search.

On January second, X, who is regarded by the police as a reliable informer, communicates to the police that D was in possession of narcotics on January first. With directions from X, the officers drive out to D's residence. The officers conduct no prior investigation but arrest D and search his person. The arrest and search are without warrants. The search results in a finding and seizure of narcotics. As a result D is indicted for the illegal possession of narcotics. The informer is in no way relevant to the guilt or innocence of the defendant. X was not a participant or witness to the unlawful possession. He merely pointed the finger of suspicion at D.

In the example given, to show the legality of the officer's arrest either the informer must be brought forward or the court must accept the hearsay declarations of the officers.

Courts have allowed hearsay evidence. Some courts base the test of probable or reasonable cause on whether the officer has relied on information from a "reliable" informer.[40] A reliable informer is one who has supplied the authorities with accurate information on prior occasions. The officer may establish reliability by evidence other than by production of the informer. Thus there is no way to prove whether or not the communication was actually made. And therefore, reasonable cause is made to rest on the assumption that an officer is honest. But this is only an assumption and without the informer the defendant has no way to rebutt it.

Properly, within many jurisdictions the defendant's right to cross-examination applies to this collateral cause as much as it does to the issue of guilt or innocence.[41] But some unnecessarily attack the informer privilege in order to guarantee the defendant's rights.[42] The privilege is forced to give way and the witness is compelled over the objection of the government to disclose the identity of the informer.[43]

Other courts have discerned that the privilege is to be preserved. These

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[40] United States v. Li Fat Tong, 152 F.2d 650 (2d Cir. 1945).

[41] United States v. Keown, 19 F. Supp. 639 (S.D. Ky. 1937).

[42] Hill v. State, 151 Miss. 518, 118 So. 539 (1928).

[43] Wilson v. United States, 59 F.2d 390 (3d Cir. 1932). (This was a rare case where the peculiar question of contempt was involved. Prohibition officer refused to reveal the identity of the person on whose information he acted for search and seizure. The trial court held the officer in contempt and the circuit court of appeal affirmed). This case raises a very important question: Does the court have the jurisdiction to compel a witness who is an employee or executive officer of the government to reveal information which the government has classified as secret?

Congressional legislation casts a shadow on whether the federal courts can require a witness who is a government agent to disclose the identity of an informer. REV. STAT. § 161 (1872), 5 U.S.C. § 22 (1952). *Cf.* U.S. *ex rel.* Touchy v. Ragen, 340 U.S. 462 (1957). (Pursuant to Department of Justice Order No. 3229, issued by the Attorney General under 5 U.S.C. § 22, a subordinate official of the Department of Justice refused, in a habeas corpus proceeding by a state prisoner, to obey a subpoena *duces tecum* requiring him to produce papers of the Department in his possession. *Held*: Order No. 3229 is valid and the subordinate official properly refused to produce the papers.) But *Cf.*: State *ex rel.* State v. Church 35 Wash. 170, 211 P.2d 701 (1949). (In face of a state statute prohibiting disclosure of certain information from social security and county welfare department records, the court held that the county welfare department administrator was not immune from obeying a court order to produce secret departmental documents). See also Mitchell v. Roma, 22 F.R.D. 217 (S.D. Pa. 1958).

courts do not require disclosure but strike the testimony relating to the communications from the informer.[44] Of course, this may operate to defeat the prosecution's proof of reasonable cause, but the election properly rests on the government to determine whether prosecution of its case against the defendant is less important than waiver of its evidentiary privilege.

A Rule of Exclusion

The hypothetical situation which appears in the introduction left the trial court with two alternatives by which to secure a fair hearing. The trial court *could require* the government's witness to disclose the informer's identity. Or the court *could request* the identity and, if such was refused, *exclude* all prior testimony of the witness.

The trial court may determine whether the requisite elements of the privilege are present for its invocation, but adopting a strict disclosure rule as suggested by Lord Esher the trial court will exceed the limits of its judicial authority. The privilege is embedded in the public interest and operates to keep the informer's identity outside the purview of judicial interrogation. If the privilege is to give way it should only do so because of the government's waiver.

But the informer privilege was not designed to allow the prosecution to withhold the informer's identity and still utilize the favorable evidence of the witness. It is generally held that where one is deprived of the opportunity of a complete cross-examination he is entitled to have the testimony on direct examination stricken from the record.[45]

If the witness' testimony plus any other evidence contingent thereon is excluded the defendant's rights are no longer in jeopardy. His right to cross-examination runs to this evidence. And if the evidence is ruled inadmissible there is no reason for a required disclosure of the informer's identity. So too, the prosecution need fail only if the evidence remaining is insufficient to merit a conviction of the defendant.

An exclusionary rule keeps the court within its judicial limits by placing the initial burden of choice between the privilege and the evidence on the government. This is the preferable result as only the government is in the position to discern whether immediate prosecution is more desirable than the informer's continued aid to subsequent law enforcement.

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[44] United States v. Keown, 19 F. Supp. 639, 646 (S.D. Ky. 1937); Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958). Unfortunately in both cases the courts used language which could lead the unsuspecting and not too careful reader to believe that they were applying a disclosure rule.

[45] 58 AM. JUR. *Witnesses* § 612 (1948).