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COMMENT

DISCLOSURE OF INFORMERS' IDENTITIES

By STEPHEN E. NEWTON*

THE use of confidential informers by the police is becoming an increasingly important law enforcement technique. The informer may be an undercover agent,¹ a criminal, who may or may not have been given immunity for his information,² or simply a citizen who has become aware of the commission of a crime and volunteers information to the police.³ His role may be hazardous, and if the police are required to reveal his identity in order to justify an arrest or search made on the basis of information received from him, the danger is greatly increased.⁴

The fourth amendment to the Constitution of the United States prohibits unreasonable search and seizure and provides that no warrant shall issue without probable cause.⁵ In order to discourage continuing abuses of this amendment, the Supreme Court, in 1914, adopted the "exclusionary rule."⁶ Initially it provided that evidence obtained by an illegal search and seizure by a federal officer was not admissible in a criminal proceeding in a federal court.⁷ The United States Supreme Court has since decided, in *Mapp v. Ohio*,⁸ that the exclusionary rule is binding upon the states in order to assure that the fourth amendment safeguards will not be violated by state officers.⁹

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¹ *People v. Wilburn*, 195 Cal. App. 2d 702, 16 Cal. Rptr. 97 (1961) *cert. denied*, 369 U.S. 856 (1962).

² *Wong Sun v. United States*, 371 U.S. 471 (1963).

³ *Trupiano v. United States*, 334 U.S. 699 (1948).

⁴ *People v. Durazo*, 52 Cal. 2d 354, 358-59, 340 P.2d 594, 597 (1959) (dissenting opinion).

⁵ The California constitution contains essentially the same provision. CAL. CONST. art. 1, § 19.

⁶ *Weeks v. United States*, 232 U.S. 383 (1914).

⁷ The exclusionary rule was adopted by the Supreme Court of California in 1955. *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905. At that time the rule was discretionary with the individual states. *Wolf v. Colorado*, 338 U.S. 25 (1949).

⁸ 367 U.S. 643 (1961). The scope of the rule had previously been expanded by *Rea v. United States*, 350 U.S. 214 (1956) (evidence illegally seized by federal officers not admissible in state courts), and by *Elkins v. United States*, 364 U.S. 206 (1960) (evidence seized illegally by state officers not admissible in federal courts).

⁹ *Ker v. California*, 374 U.S. 23 (1963), though holding a particular arrest constitutional, reiterated that each state must follow the exclusionary rule.

The legality of the search may depend upon whether probable cause for the issuance of a search warrant existed,¹⁰ or, in the absence of a warrant, whether the search was incident to a legal arrest.¹¹ The legality of the arrest, in turn, depends upon the existence of probable cause before the arrest, to believe that the arrestee is guilty of the crime for which he was arrested.¹²

The purpose of this note is to explore the right of the state to use the communications of an informer to establish this probable cause if it claims a privilege to refuse to disclose his identity. The law of California, including the extent to which it is subject to federal rules, will be emphasized.

PROBABLE CAUSE BASED ON HEARSAY

Before a discussion of the problem of disclosure of identity will be meaningful, the basic elements of probable cause must be understood.¹³ Probable cause exists if the facts and circumstances would warrant a reasonable man's belief that an offense had been committed by the accused.¹⁴ It has been firmly established that hearsay¹⁵ may constitute probable cause for the issuance of a warrant.¹⁶

*Draper v. United States*¹⁷ established that an arrest without a warrant may be legally based on a communication from an informer

¹⁰ FED. R. CRIM. P. 41(c).

¹¹ *Abel v. United States*, 362 U.S. 217 (1960); *Harris v. United States*, 331 U.S. 145 (1947); *Marron v. United States*, 275 U.S. 192 (1927).

¹² FED. R. CRIM. P. 3, 4, 26 U.S.C. § 7607 (1964) makes the same provisions for arrest by federal narcotics agents.

¹³ A general discussion of probable cause is beyond the scope of this note. See generally *Draper, The Cahan Case and Probable Cause*, 34 CAL. S.B.J. 251 (1959).

¹⁴ *Henry v. United States*, 361 U.S. 98 (1959). "Evidence which would 'warrant a man of reasonable caution in the belief that a felony has been committed' is sufficient to establish probable cause. *Wong Sun v. United States*, 371 U.S. 471, 479 (1963). Whether probable cause exists is a factual determination depending on the particular circumstances of the case. *United States v. Williams*, 336 F.2d 183 (2d Cir. 1964); *United States v. Wai Lau*, 329 F.2d 310 (2d Cir. 1964).

¹⁵ The term "hearsay" as used in this note refers to information relied upon in part as probable cause, which would be hearsay evidence if offered at the trial by the one relying on it.

¹⁶ *Jones v. United States*, 362 U.S. 257 (1960). The affidavit stated that an unnamed informer had told the affiant that the defendant was engaged in illicit narcotics traffic, and had sold narcotics to the informer. The affiant further swore that the informer had previously given correct information. The Court distinguishes *Jones* from *Nathanson v. United States*, 290 U.S. 41 (1933), which held that an affidavit did not establish probable cause where it merely set out the belief of someone other than the affiant. In *Jones* the facts set forth in the affidavit were the personal observations of the informer, not merely his belief.

In discussing warrants, the cases make no substantial distinction between search warrants and warrants for arrest.

¹⁷ 358 U.S. 307 (1959).

to an arresting officer,¹⁸ but that alone is not sufficient to establish probable cause (for the issuance of a warrant or an arrest without one) in the absence of a substantial basis for crediting the hearsay.¹⁹ There must be facts within the officer's knowledge which corroborate the informer's story,²⁰ or the informer must have proven himself reliable in the past.²¹ In both *Draper* and *Jones v. United States*²² the informer was considered reliable because he had given correct information in the past, but the requirements of reliability were not thoroughly discussed by the Court because there were also corroborating facts in both cases. The corroborating circumstances need not, in themselves, be indicative of guilt, provided that when taken together with the information given to the officer, a reasonable man would be led to believe that the accused was guilty.²³ The more reliable the informer, the less is needed to corroborate his story.²⁴ Conversely, if the informer is anonymous,²⁵ or of unknown reliability, more corroborating evidence is required.²⁶

The cases in which the exclusionary rule may be most devastating to the prosecution are crimes of possession. Narcotics violations are the primary examples,²⁷ but some of the others are possession

¹⁸ *Grau v. United States*, 287 U.S. 124 (1932), has been cited as authority for the position that the evidence necessary to show probable cause must be admissible at the trial. But, in *Grau*, although the evidence was in fact competent, it was insufficient to establish probable cause. The Supreme Court has not repeated the statement that the evidence must be competent before a jury, *Brinegar v. United States*, 338 U.S. 160, 174 n.13 (1949), although such a rule has been applied by some of the circuit courts of appeals. *E.g.*, *Simmons v. United States*, 18 F.2d 85 (8th Cir. 1927); *Worthington v. United States*, 166 F.2d 557 (6th Cir. 1948).

¹⁹ *Jones v. United States*, 362 U.S. 257, 269, 271 (1960).

²⁰ *Beck v. Ohio*, 379 U.S. 89 (1964); *Wong Sun v. United States*, 371 U.S. 471 (1963); *United States v. Elgisser*, 334 F.2d 103 (2d Cir. 1964).

²¹ *Wrightson v. United States*, 236 F.2d 672 (D.C. Cir. 1956); *Hurst v. California*, 211 F. Supp. 387 (N.D. Cal. 1962); *United States v. Jackson*, 159 F. Supp. 845 (D.D.C. 1958).

²² 362 U.S. 257 (1960).

²³ *Draper v. United States*, 358 U.S. 307 (1959). *Draper* arrived on a certain train, as predicted by the informer, was dressed according to the description, and walked quickly, carrying a tan zipper bag. *Accord*, *United States v. Luster*, 342 F.2d 763 (6th Cir. 1965); *Thompson v. United States*, 342 F.2d 137 (5th Cir. 1965); *Newcomb v. United States*, 327 F.2d 649 (9th Cir. 1964); *United States v. Robinson*, 325 F.2d 391 (2d Cir. 1963).

²⁴ See cases cited note 23 *supra*.

²⁵ As in *Hurst v. California*, 211 F. Supp. 387 (N.D. Cal. 1962).

²⁶ *Newcomb v. United States*, 327 F.2d 649 (9th Cir. 1964); *United States v. Irby*, 304 F.2d 280 (4th Cir. 1962); *Overton v. United States*, 275 F.2d 897 (D.C. Cir. 1960); *United States v. Valentine*, 202 F. Supp. 677 (E.D. Tenn. 1962).

²⁷ *Jones v. United States*, 362 U.S. 257 (1960).

²⁸ *Carroll v. United States*, 267 U.S. 132 (1925).

of "boot-leg" alcohol,²⁸ stolen property,²⁹ and counterfeit money.³⁰ Generally the evidence obtained by the search is conclusive proof of guilt,³¹ if admissible, and the only defense presented is that there was no probable cause for the search, or for the arrest to which the search was incident. Often the evidence which the defendant contends is inadmissible is the only evidence which the prosecution has.

In seeking to show lack of probable cause for an arrest or search, the defendant often demands that the identity of the informer be revealed. It was decided in *Roviaro v. United States*³² that the informer's identity must be disclosed when he is a participant and material witness.³³ There is support for this position in California.³⁴ These cases are to be distinguished from those in which the informer plays no part in the crime, but merely directs the attention of the police toward the defendant. The latter are the primary concern of this note.

Arguments Against Disclosure

There are ample reasons for the prosecution's desire to keep the identity of its informer a secret. In his dissenting opinion in *People v. Durazo*,³⁵ a narcotics case, Justice Shenk stated:

By the very nature of the crime the use of informers plays a major role in the apprehension of narcotic violators Obviously it becomes impossible to solicit the assistance of informers where their identity is required to be revealed and they are thus exposed to retaliation on the part of narcotic violators. The hazardous position of the informer is dramatically called to our attention in [citing case], . . . where it was held that inadequate protection had been furnished to an informer who was set upon and murdered. . . . It is apparent that the need to protect the informer's name, and his life as well, is a factor to be given considerable weight in the balance

²⁸ *Rugendorf v. United States*, 376 U.S. 528 (1964).

²⁹ *Newcomb v. United States*, 327 F.2d 649 (9th Cir. 1964).

³¹ *E.g.*, "[E]very person who possesses any narcotic [except by prescription] . . . shall be punished by imprisonment in the state prison . . ." CAL. HEALTH & SAFETY CODE § 11500.

³² 353 U.S. 53 (1957).

³³ The informer had purchased narcotics from the defendant. The Court ruled that the informer was the only material witness to the charge of selling narcotics and to the charge of illegally transporting them. The Court did not discuss how it might have ruled had there been more than one material witness, although it did emphasize that the informer was the "sole participant other than the accused [t]he only witness in a position to amplify or contradict the testimony of the government witnesses." *Id.* at 64.

³⁴ *People v. Kiihoa*, 53 Cal. 2d 748, 3 Cal. Rptr. 1, 349 P.2d 673 (1960); *People v. Williams*, 51 Cal. 2d 355, 333 P.2d 19 (1958); *People v. McShann*, 50 Cal. 2d 802, 330 P.2d 33 (1958).

³⁵ 52 Cal. 2d 354, 340 P.2d 594 (1959).

in determining whether the state must reveal the source of its information.³⁶

Another reason for official reluctance to reveal the names of informers is that disclosure would destroy their future efficacy, just when they had proven themselves reliable.

Arguments for Disclosure

Although the reasons for nondisclosure are strong, they are not absolute. The public interest in nondisclosure must be balanced against the right of the defendant adequately to prepare his defense.³⁷ The United States Supreme Court has said that fixed rules for determining when disclosure must be made are not appropriate, but that the determination depends upon the particular circumstances of the case at bar.³⁸

One argument advanced for requiring disclosure is that the issue of probable cause should be determined by an impartial judge or magistrate, but unless the judge or magistrate hears the testimony and cross-examination of the informer, he cannot make the determination. Instead, the reliability of the informer, and the existence of probable cause, will be determined by the arresting officer.³⁹ Another closely related argument is that, by cross-examining the informer, the defendant may be able to cast doubt on the informer's reliability, or show that the officer lied about the information that he had at the time of the arrest.⁴⁰

PRESENT LAW OF DISCLOSURE

Warrant Cases

The leading federal case on the issue of disclosure when a valid warrant has been issued on the basis of information from informers

³⁶ *Id.* at 358-59, 340 P.2d at 597. "It is common knowledge that without the aid of confidential informants the discovery and prevention of crime would present such a formidable task as practically to render hopeless the efforts of those charged with law enforcement. And the alarming fact that the underworld often wreaks vengeance upon informers would unquestionably deter the giving of such information if the identity of the informer should be required to be disclosed in all instances." *Harrington v. State*, 110 So. 2d 495, 497 (Fla. App. 1959).

³⁷ *Roviaro v. United States*, 353 U.S. 53 (1957); *United States v. Robinson*, 325 F.2d 391 (2d Cir. 1963); *People v. Williams*, 51 Cal. 2d 355, 333 P.2d 19 (1958); *Priestly v. Superior Court*, 50 Cal. 2d 812, 330 P.2d 391 (1958).

³⁸ *Roviaro v. United States*, 353 U.S. 53, 62 (1957).

³⁹ *United States v. Robinson*, 325 F.2d 391 (2d Cir. 1963); *United States ex rel. Coffey v. Fay*, 234 F. Supp. 543 (S.D.N.Y. 1964); *Priestly v. Superior Court*, 50 Cal. 2d 812, 818, 330 P.2d 39, 43 (1958).

⁴⁰ *Roviaro v. United States*, 353 U.S. 53 (1957). See also cases cited note 39 *supra*.

is *Rugendorf v. United States*.⁴¹ Three informers, not material witnesses, told stories to agents of the Federal Bureau of Investigation which together constituted probable cause for the issuance of a search warrant. The information was that a considerable number of furs, which matched the description of furs stolen earlier in another state, had been seen in the defendant's basement. Two men who, according to one of the informers, had stolen the furs had been seen at the market owned by the defendant's brother, who allegedly was a fence for stolen furs. An F.B.I. agent obtained a warrant on an affidavit which contained the above information, but did not disclose the names of the informers. In spite of the trial court's refusal of the defendant's demand for disclosure of the informers' identities, the conviction was affirmed. The Court ruled that it was not necessary to disclose the identities of the informers since the United States commissioner who issued the warrant had a substantial basis for crediting the facts recited in the affidavit.⁴² The only challenge to the sufficiency of the affidavit was that two small facts were inaccurate. These facts, however, were held to be irrelevant and immaterial to the issue.⁴³ *Rugendorf* governs the situation in federal cases, where a warrant has been issued.⁴⁴

⁴¹ 376 U.S. 528 (1964).

⁴² *Id.* at 533.

⁴³ The two inaccuracies were: the defendant and his brother were associated in business; and the defendant was the manager of his brother's market. The Court said that since they were the allegations of one of the informers, and not of the F.B.I. agent, they did not cast doubt on the good faith and veracity of the agent. The court did not meet the issue of whether the inaccuracies could be used to cast doubt on the credibility of the other allegations of the informer. The defendant attempted to bring the case within the *Roviano* rule by saying that only the informer could provide information as to whether he had been a participant in receiving the goods, and therefore was a material witness. Although that claim had not been raised at the trial, and thus could not be raised on appeal, the Court said that even if it had been properly raised, it would have been denied. There was no intimation that the informer was a participant, and the defendant had completely failed to show how the informer's identity would be helpful to a defense on the merits.

⁴⁴ *Aguilar v. Texas*, 378 U.S. 108 (1964) should not be construed as requiring disclosure. The affidavit in that case stated that, "Affiants have received reliable information from a credible person and do believe that heroin . . . and narcotic paraphernalia are being kept at the above described premises for the purposes of sale and use contrary to the provisions of the law." *Id.* at 109. In holding that the affidavit did not show probable cause, the Court said that the affidavit not only failed to show any personal knowledge on the part of the affiant, but it also failed to show whether the informer had any personal knowledge. In merely stating that the affiants believed that the defendant had narcotics, the affidavit stated no facts supporting that belief, nor any information actually received from the informer. Thus the magistrate could not possibly judge for himself the persuasiveness of the facts relied upon to establish probable cause. *Id.* at 114. Citing *Jones* and *Rugendorf*, the Court explicitly states that the informer's identity "need not be disclosed." *Ibid.*

The California rule is similar to that of *Rugendorf*. *People v. Keener*⁴⁵ held that the prosecution need not disclose the identity of its informer where the search was made pursuant to a warrant, valid on its face, as long as the magistrate was satisfied from the evidence that probable cause existed.⁴⁶

No-Warrant Cases

The issue of disclosure when the arrest is made without a warrant has not been decided by the Supreme Court of the United States. The decisions of the lower federal courts are in conflict.⁴⁷

The rule in California is set out in *Priestly v. Superior Court*.⁴⁸ In an opinion by Justice Traynor, the court ruled that if the information given to the police by the informer is necessary to establish probable cause for the arrest without a warrant, the identity of the informer must be revealed in order to allow the defendant a fair opportunity to rebut the officer's testimony on the issue of probable cause.⁴⁹ The defendant made a prima facie case of lack of probable cause by showing that his arrest was without a warrant.⁵⁰ The burden of proof was then on the prosecution to show that probable cause existed. The procedural effect of the rule is to require the testimony of the officer with respect to information received from the informer to be stricken upon proper motion by the defense, if the prosecution refuses to disclose the identity of the informer.⁵¹ (The court seems to assume that the prosecution knows the identity of the informer and makes the actual decision on disclosure.) The court explicitly disapproved any previous holdings not requiring disclosure.⁵²

Priestly does not conflict with the provision in California Code of Civil Procedure section 1881(5) that "a public officer cannot be examined as to communications made to him in official confidence when the public interest would suffer by the disclosure." The prosecution retains the choice of disclosing the informer's identity, or claiming the privilege and having the testimony stricken.⁵³ In *Coy v.*

⁴⁵ 55 Cal. 2d 714, 12 Cal. Rptr. 859, 361 P.2d 587 (1961).

⁴⁶ The affidavit set out the information received from the confidential informer, and also stated, as evidence of the informer's reliability, that as a result of information received from him in the past, four persons were arrested and held to answer at preliminary hearings.

⁴⁷ *Newcomb v. United States*, 327 F.2d 649 (9th Cir.), cert. denied, 377 U.S. 944 (1964) (disclosure not required); *United States v. Robinson*, 325 F.2d 391 (2d Cir. 1963) (disclosure required).

⁴⁸ 50 Cal. 2d 812, 330 P.2d 39 (1958).

⁴⁹ *Id.* at 818, 330 P.2d at 43.

⁵⁰ *Id.* at 816, 330 P.2d at 41.

⁵¹ *Id.* at 819, 330 P.2d at 43.

⁵² *Ibid.*

⁵³ *Id.* at 818-19, 330 P.2d at 43. In *Priestly*, disclosure was demanded at the preliminary hearing. The result of striking the officer's testimony would be a failure to

Superior Court,⁵⁴ the defendant asked for disclosure, the prosecution objected, and the objection was sustained on the ground that the informer's identity was privileged. On appeal, the defendant contended that it was error to sustain the objection. The court held that there was no error. Disclosure is not mandatory. The defendant's remedy is to move to have the testimony regarding the informer's information stricken. But the defendant must make the motion, because the prosecution may be willing to disclose if its case would otherwise fail, or it may have other evidence to introduce if the testimony regarding the informer is stricken.⁵⁵

A number of cases subsequent to *Priestly* have limited the effect of the disclosure requirement, resulting in the anomalous situation that, although disclosure is required so that the defendant can cross-examine the informer,⁵⁶ he may never have the opportunity to do so. In *People v. Prewitt*,⁵⁷ a non-warrant case, the officer received an anonymous phone call from an informer, but he recognized his voice as one who had, on two previous occasions, given information leading to arrests. The order of the superior court setting aside the indictment was reversed, the Supreme Court holding that probable cause had been established, even though the informer could not be identified. Proven accuracy in the past justified reliance on the informer in this case.⁵⁸ Thus the court held that the identity of the informer was not essential to a fair trial, although the indictment would have been set aside had the informer's identity been withheld from the defendant but known to the police.

Even if disclosure is made as required by *Priestly*, the informer's whereabouts may not be known or he may have purposely disappeared, and thus still not be available as a witness. However, his failure to appear does not require that the testimony of the officer regarding communications from the informer be stricken.⁵⁹ The

show probable cause for the arrest and search. Under the exclusionary rule, the evidence obtained by the search—narcotics—would be repressed, and there would be no evidence to warrant holding the defendant for trial.

⁵⁴ 51 Cal. 2d 471, 334 P.2d 569 (1959).

⁵⁵ *Accord*, *People v. Zapata*, 220 Cal. App. 2d 903, 34 Cal. Rptr. 171 (1963).

⁵⁶ *Priestly v. Superior Court*, 50 Cal. 2d 812, 818, 330 P.2d 39, 43 (1958).

⁵⁷ 52 Cal. 2d 330, 341 P.2d 1 (1959).

⁵⁸ *Id.* at 337, 341 P.2d at 5. The case was distinguished from *Priestly* on the theory that if the officer did not know who the informer was, it was impossible for him to disclose. It was not a case of claiming the privilege of nondisclosure which, under *Priestly*, would have required that the officer's testimony be stricken. *Id.* at 336, 341 P.2d at 4.

⁵⁹ *People v. Galvan*, 208 Cal. App. 2d 443, 25 Cal. Rptr. 128 (1962); *People v. Saucedo*, 199 Cal. App. 2d 47, 18 Cal. Rptr. 452 (1962); *People v. Castedy*, 194 Cal. App. 2d 763, 15 Cal. Rptr. 413 (1961); *People v. McKoy*, 193 Cal. App. 2d 104, 13 Cal. Rptr. 809 (1961); *People v. Givens*, 191 Cal. App. 2d 834, 13 Cal. Rptr. 261 (1961). Although the police are not required to keep track of the informer so as to

rule, then, while requiring disclosure, contains no assurance that its *raison d'être* will be fulfilled.

EFFECT OF THE EVIDENCE CODE ON DISCLOSURE

The recently enacted California Evidence Code contains provisions dealing directly with the disclosure of official information and the identity of an informer. The code, which becomes effective January 1, 1967, repeals California Code of Civil Procedure section 1881,⁶⁰ which is replaced in part by sections 1040 and 1041 of the Evidence Code. Particularly relevant to this discussion is Evidence Code section 1042. Subdivision (a) thereof provides that if the privilege of nondisclosure is claimed by the state or a public entity in a criminal proceeding where the privileged information (not limited to, but including, informers) is material to the issue, the court will make such order or finding of fact adverse to the prosecution, on that issue, as is required by law. However, section 1042(b) provides that regardless of subdivision (a), disclosure is not required when a warrant, valid on its face, has been issued. So far as the question of the informer's identity is concerned, section 1042(b) is a codification of the present California law concerning warrants, as set out by the *Keener* rule.⁶¹

The provision of the Evidence Code which may have the greatest impact on existing law is section 1042(c):

Notwithstanding subdivision (a), in any preliminary hearing, criminal trial, or other criminal proceeding, for violation of any provision of Division 10 (commencing with section 11000) of the Health and Safety Code [narcotics violations], the evidence of information communicated to a peace officer by a confidential informant, who is not a material witness to the guilt or innocence of the accused of the offense charged, shall be admissible on the issue of reasonable cause to make an arrest or search without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied, based upon evidence produced in open court, out of the presence of the jury, that such information

be able to produce him as a witness, they may not encourage him to disappear, or otherwise prevent his appearance. *People v. Wilburn*, 195 Cal. App. 2d 702, 16 Cal. Rptr. 97 (1961), *cert. denied*, 369 U.S. 856 (1962).

⁶⁰ Cal. Stat. 1965, ch. 299, § 64. CAL. CODE CIV. PROC. § 1881, the section to be repealed, enumerates and defines privileged communications.

⁶¹ 55 Cal. 2d 714, 12 Cal. Rptr. 859, 361 P.2d 587 (1961). "Subdivision (b) does not affect the rule that a defendant is entitled to know the identity of an informer in a case where the informer is a material witness with respect to facts directly relating to the defendant's guilt." Comment—Assembly Committee on Judiciary, WEST'S CALIFORNIA EVIDENCE CODE 220 (1965).

was received from a reliable informant and in his discretion does not require such disclosure.⁶²

The effect of the above provision is the abolishment by the legislature, in narcotics cases, of the rule laid down in *Priestly* that the identity of an informer must be disclosed in all cases of arrest without a warrant⁶³ where the prosecution relies on the facts supplied by the informer to establish probable cause.⁶⁴ Section 1042(c) of the Evidence Code allows communications from an undisclosed informer to be used to establish probable cause, provided that: (1) the informer is not a material witness to the guilt or innocence of the defendant;⁶⁵ (2) the judge or magistrate is satisfied that the informer was reliable; and (3) the judge or magistrate is satisfied that the officer received the information.

The requirement that the informer be reliable in cases where the arrest is made without a warrant is no different from that obtaining in those cases in which a warrant has been issued. In *People v. Keener*,⁶⁶ a case involving a warrant, the magistrate was satisfied as to the informer's reliability because the informer had previously given correct information leading to four arrests. Similarly, in the *Prewitt* case, where there was no warrant, the prosecution was able to establish the informer's reliability even though his identity was unknown. Thus the California Supreme Court has already established that the requirement of reliability may be met without disclosure. The arresting officer would be cross-examined on the issue of re-

⁶² Cal. Stat. 1965, ch. 937, adds § 1881.1 to the Code of Civil Procedure. This section will be in effect until the Evidence Code becomes effective (Jan. 1, 1967) and will then be repealed. It is identical to CAL. EVIDENCE CODE § 1042(c), quoted in the text.

⁶³ Cf. *People v. Keener*, 55 Cal. 2d 714, 12 Cal. Rptr. 859, 361 P.2d 587 (1961).

⁶⁴ Cases in which there is sufficient evidence, apart from the informer's testimony, to establish probable cause do not require disclosure even though it may have been the informer who originally caused the police to suspect the defendant. *People v. Fuqua*, 222 Cal. App. 2d 306, 35 Cal. Rptr. 163 (1963); *People v. Ortiz*, 208 Cal. App. 2d 572, 25 Cal. Rptr. 327 (1962); *People v. Rodriguez*, 204 Cal. App. 2d 427, 22 Cal. Rptr. 324 (1962); *People v. Womack*, 200 Cal. App. 2d 634, 19 Cal. Rptr. 451 (1962). Note that such a result is contemplated in *Priestly*. "Such a requirement [disclosure] does not unreasonably discourage the free flow of information to law enforcement officers or otherwise impede law enforcement. Actually its effect is to compel independent investigations to verify information given by an informer or to uncover other facts that establish reasonable cause to make an arrest or search. Such a practice would ordinarily make it unnecessary to rely on the communications from the informer to establish probable cause." 50 Cal. 2d 812, 818, 330 P.2d 39, 43 (1958).

⁶⁵ This requirement has already been treated with respect to both federal and California cases. Cases cited notes 32 and 34 *supra*.

⁶⁶ 55 Cal. 2d 714, 12 Cal. Rptr. 859, 361 P.2d 587 (1961).

liability, to the extent that his testimony would not result in disclosure.⁶⁷

The additional requirement that the judge or magistrate be satisfied that the officer actually received the information, and that the informer was not invented in order to justify a completed arrest or search, is also within the scope of the decided cases. In answer to the contention that fictitious informers might be relied upon, the court in *Prewitt* said: "It cannot be presumed, however, that officers will commit perjury . . . and it must be presumed that trial courts will be alert to detect perjury if it does occur."⁶⁸

In analyzing the effect of the Evidence Code on the law of disclosure, it is appropriate to give attention to the arguments advanced in favor of disclosure which were more fully set out above. One argument is that if the prosecution is not required to disclose the informer's identity, the issue of probable cause will be determined by the arresting officer instead of a judge or magistrate.⁶⁹ The fallacy here is apparent. It is true that if the officer merely stated that the informer was reliable and that his communication gave rise to probable cause, then he alone would determine the issue. But if the officer testifies, as required by Evidence Code section 1042(c), to the facts communicated to him by the informer and the circumstances which establish the informer's reliability, all of the evidence related to the issue of probable cause will be in the hands of the judge or magistrate. The judge will make the determination of probable cause based on those facts, not on the officer's conclusions. The only question that would be left in doubt is the veracity of the officer in stating the facts. But the officer's veracity may be explored in his testimony and cross-examination, as in the case with any other witness.⁷⁰

⁶⁷ The question of reliability has not been thoroughly treated in the federal cases, and apparently the requirement is met by a conclusional statement that the informer is believed to be reliable on the basis of accurate information given in the past. See *Jones v. United States*, 362 U.S. 257 (1960); *Rugendorf v. United States*, 376 U.S. 528 (1964).

⁶⁸ 52 Cal. 2d 330, 338, 341 P.2d 1, 5. *Accord*, *People v. Farrara*, 46 Cal. 2d 265, 294 P.2d 21 (1956).

⁶⁹ See note 39 *supra* and accompanying text.

⁷⁰ CAL. CODE CIV. PROC. § 1963(15) establishes a disputable statutory presumption that the official duty has been regularly performed. This section is superseded by CAL. EVIDENCE CODE § 664, which contains the same provision, but with this exception: "This presumption does not apply on an issue as to the lawfulness of an arrest . . . made without a warrant." There is already a presumption on this point in California. *People v. Agnew*, 16 Cal. 2d 655, 107 P.2d 601 (1940). The presumption is that an arrest without a warrant is illegal, and the burden is on the person making the arrest to show that it was legal. This presumption was recognized in *Priestly*. However, there is no presumption that the officer is lying when he attempts to justify the arrest. Subsequent to *Agnew* and *Priestly*, the California Supreme Court specifically emphasized in

As to the argument that disclosure is necessary to give the defendant an opportunity to rebut the testimony of the officer on probable cause by examining the informer, it has already been pointed out that the fact that the informer is not available to testify does not require striking the testimony on probable cause.⁷¹

CONCLUSION

The rule in *Priestly* requiring the prosecution to disclose the identity of an informer, in the case of an arrest made without a warrant, is in direct conflict with section 1042(c) of the California Evidence Code. However, from the preceding arguments, it can be seen that to a large extent, the purpose of the disclosure rule has been lost so that the defendant may never be able to examine the informer.⁷² Since probable cause may be established even if the informer cannot be found to appear as a witness,⁷³ it must be presumed that the courts are not convinced that a fair trial requires the testimony and cross-examination of the informer. Thus, the *Priestly* rule, in effect, has become a mere procedural stumbling block, of which the defendant may take advantage in order to defeat an otherwise successful prosecution.

Section 1042(c) removes the stumbling block of disclosure in narcotics cases, thus preserving the public interest in protecting informers. Disclosure should not be required when the informer is not a material witness, provided that the testimony of the officer is sufficient, in the discretion of the trial court, to satisfy the requirements of probable cause.

The United States Supreme Court, in repeating the holding that the exclusionary rule will be enforced against the states, has expressly stated that the states are free to establish their own rules of police conduct, so long as they are not violative of the Constitution.⁷⁴

The Supreme Court of California has, itself, noted with favor those same rules of judicial construction in *People v. Mickelson*:⁷⁵

The United States Supreme Court has not interpreted the Fourth Amendment as requiring that Court to lay down as a matter of constitutional law precise rules of police conduct. . . . If a state adopts

Prewitt that it could not be presumed that the officer was lying. See note 68, *supra* and accompanying text.

⁷¹ Cases cited note 59 *supra*.

⁷² *People v. Prewitt*, 52 Cal. 2d 330, 341 P.2d 1 (1959); *Coy v. Superior Court*, 51 Cal. 2d 471, 334 P.2d 569 (1959); *People v. Wilburn*, 195 Cal. App. 2d 702, 16 Cal. Rptr. 97 (1961).

⁷³ Cases cited notes 59 and 72 *supra*.

⁷⁴ *Ker v. California*, 374 U.S. 23, 31-34 (1963). This point is emphasized in *People v. Cahan*, 44 Cal. 2d 434, 440, 282 P.2d 905, 908 (1955).

⁷⁵ 59 Cal. 2d 448, 30 Cal. Rptr. 18, 380 P.2d 658 (1963).

a rule of police conduct consistent with the requirements of the Fourth Amendment, and if its officers follow those rules, they do not act unreasonably within the meaning of the amendment⁷⁶

In *Priestly* the court did not say that disclosure was constitutionally required.⁷⁷ Therefore, it may be assumed that the legislative abolishment of that rule is not necessarily unconstitutional. The United States Supreme Court has not ruled on the issue of disclosure in non-warrant cases. Although the exclusionary rule is constitutionally required,⁷⁸ the methods of establishing probable cause have not been dictated by the Court. Section 1042(c) of the Evidence Code does not leave to the prosecution the ultimate decision as to disclosure. Rather, the judge or magistrate decides whether, under the particular circumstances of the case, disclosure is required for a fair determination of the issue of probable cause. Such a procedure would adequately safeguard the defendant's rights and would not be unconstitutional. The result is that a uniform procedure will be followed in both warrant cases⁷⁹ and non-warrant cases.

The rules of disclosure for prosecutions for narcotics violations established by the California Evidence Code provide a workable solution to the problem of protecting the identity of police informers, and thereby preserving their future effectiveness, and perhaps their lives, while at the same time assuring that a fair determination of probable cause for an arrest or search will be made by a judge or magistrate. The new rules in no way relax the requirements of legal searches and seizures.⁸⁰ The law of probable cause remains unchanged. The effect of the rules will be to avoid, in the future, the impediments to law enforcement caused by the procedural pitfalls resulting from the *Priestly* rule.

⁷⁶ *Id.* at 451-52, 30 Cal. Rptr. at 20, 380 P.2d at 660.

⁷⁷ 50 Cal. 2d 812, 818, 330 P.2d 39, 43 (1958).

⁷⁸ *Mapp. v. Ohio*, 367 U.S. 643 (1961).

⁷⁹ *Aguilar v. Texas*, 378 U.S. 108 (1964). See note 44 *supra*.

⁸⁰ See notes 41 and 45 *supra* and accompanying text.

