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Constitutional Law -- Right of a Criminal Defendant Under the Sixth Amendment to Confront Secret Informers Whose Statements Are Used to Establish Probable Cause

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*Constitutional Law*RIGHT OF A CRIMINAL DEFENDANT UNDER THE SIXTH AMENDMENT
TO CONFRONT SECRET INFORMERS WHOSE STATEMENTS ARE USED TO
ESTABLISH PROBABLE CAUSE*Introduction*

The task of apprehending and convicting criminals has become more and more difficult in recent years. The Supreme Court has given an increasing amount of protection to criminal defendants by putting teeth into the provisions of the Federal Constitution, especially the Fourteenth Amendment. The stand of the Court is not open to criticism merely because the law has become more difficult to enforce, but it must be recognized that the determination of the Court to protect a criminal defendant's rights has created problems in certain areas. One area of conflict which has not yet been brought specifically before the Court is within the comprehension of the Sixth Amendment to the Federal Constitution where it is stated that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." In their efforts to enforce the law, police officers have found cause to rely more and more on the statements of secret informers. The problem arises when the criminal defendant insists on his constitutional right to confront the person who has made the statement, for if the name of the informer is made public, his value as a secret informer is forever lost;¹ and the same or similar problems arise in cases involving secret government documents.²

The reasons for refusing to disclose secret information are as many and varied as the cases themselves.³ The two primary reasons, which genetically are one, for refusing confrontation of secret informers are public policy⁴ and the protection of the informer's value to the police.⁵ These reasons are in constant conflict

¹ See Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L. J. 1091 (1951), for a detailed discussion of paid informers, statutory provisions, etc.

² See Haydock, *Some Evidentiary Problems Posed by Atomic Energy Security Requirements*, 61 HARV. L. REV. 468 (1948).

³ 8 WIGMORE, EVIDENCE §§ 2367-79 (3d ed. 1940), discusses eight bases for the claimed privilege of nondisclosure of state secrets.

⁴ *Vogel v. Gruaz*, 110 U.S. 311 (1884). A statement made privately to the public prosecutor does not create liability in an action for defamation; it would contravene public policy.

⁵ *United States v. Blich*, 45 F.2d 627, 629 (D. Wyo. 1930). The court recognized the value of the informer.

with the ancient principle of law and justice that allows the accused the right to confront his accusers. This right was a part of the common law⁶ and was considered so valuable that it was included in the Federal Constitution and in the constitutions of almost every state.⁷

History

The right of confrontation is similar to the rule against hearsay in that it consists primarily in the right of the accused to cross-examine the witnesses against him, with the secondary and incidental advantage of having the jury observe the demeanor of the witnesses. To this right there are three notable exceptions: (1) dying declarations of a deceased are admitted on the trial of a party charged with his murder;⁸ (2) testimony given at former trials,⁹ and (3) depositions¹⁰ which were subject to cross-examination, may be admitted when for good reason the witness cannot be presented to testify at the present trial.

A question arises as to whether a fourth exception exists in cases where evidence sought to be introduced includes statements of a secret informer. The relation between the police force and its informers is one of extreme delicacy. The informers have no desire for public acknowledgment of their services, and if their names were subject to disclosure, this source of information would be cut off. In many classes of offenses the use of informers is almost essential to effective law enforcement,¹¹ and for this reason public policy requires that some privilege or rule of inadmissibility attach to the identity of informers. In England, the case of *Rex v. Hardy*¹² early promulgated such a rule to protect the sources of information of the police. In the later case of *Marks v. Beyfus*,¹³

⁶ 5 WIGMORE, *op. cit. supra* note 3, § 1395.

⁷ 5 *id.* § 1397 n.1 (listing the provisions of each state constitution including the right).

⁸ *Campbell v. Georgia*, 11 Ga. 353 (1852).

⁹ *Mattox v. United States*, 156 U.S. 237 (1895); *State v. Heffernan*, 24 S.D. 1, 123 N.W. 87 (1909).

¹⁰ 5 WIGMORE, *op. cit. supra* note 3, § 1398.

¹¹ As to the importance attached to secret informers by the federal government, see Supplement No. 2 to Dep't of Justice Order No. 3229, 11 FED. REG. 4920 (1946), set forth in 4 MOORE, FEDERAL PRACTICE § 26.25 [4] n.12 (2d ed. 1950). "Under no circumstances should the name of any confidential informant be divulged."

¹² 24 St. Tr. 199, 816 (1794). In an action for treason, a witness was asked on cross-examination to whom it was he had furnished information of the alleged treasonous acts. Objection to the question was sustained on the ground that public policy protects the channels by which information is conveyed to magistrates.

¹³ 25 Q.B.D. 494 (1890).

the English court reaffirmed the rule but noted a qualification when it stated that such evidence would be refused only when its admission was not essential to show the innocence of the accused. Until this time, the qualification had not been so clear because the courts in earlier cases had refused without reservation to allow a witness to be questioned as to channels of information, even when the question was asked on cross-examination for the avowed purpose of testing the credibility of the witness.¹⁴

Marks v. Beyfus was a civil suit for malicious prosecution. The plaintiff called the Director of Public Prosecutions as a witness and asked who it was that gave him the information he acted upon. Presumably, it was the defendant in the case, but the director refused to answer and the court upheld his refusal on the ground that the information asked for had been given to the director as a basis for a public prosecution for a public object, and on grounds of public policy the identity of the informer should not be disclosed. The court stated that even if the director agreed to disclose the informer's name, the court should refuse to allow it because except in a situation where the information is necessary to prove the innocence of the accused, the rule of inadmissibility is not one of discretion and must be applied.¹⁵ This statement is probably only dictum but should be criticized to the extent that it makes the rule almost absolute. If the rule is really one of public policy and not one of privilege for the witness, as has been stated,¹⁶ then it would seem that it should allow some discretion in the trial judge to decide whether it is really necessary in effectuating the public policy of the state to refuse the evidence. This is especially true in a civil suit subsequent to a criminal action in which the secret statements were obviously not those of a professional informer, and the criminal action was apparently no more than a malicious attempt to harass and vex the defendant.¹⁷

¹⁴ *Rex v. Hardy*, note 12 *supra*; *Attorney-General v. Briant*, 15 M. & W. 169, 153 Eng. Rep. 808 (Ex. 1846).

¹⁵ *Marks v. Beyfus*, 25 Q.B.D. 494, 498 (1890).

¹⁶ *Attorney-General v. Briant*, 15 M. & W. 169, 153 Eng. Rep. 808, 809 (Ex. 1846).

¹⁷ A contrary argument suggests that citizens would be less inclined to perform their public duty in reporting suspected criminal actions if they knew their names were going to be subject to disclosure. This argument is easily refuted. First, it must be noted from a practical viewpoint that most persons refuse to report suspected criminal actions either because of compassion for the suspected offender, or because of an "I don't care" attitude, as opposed to a fear of disclosure or possible future prosecution. In the case of the professional informer, it would seldom occur that a malicious prosecution suit would follow the criminal action; the type of

The rule has been similarly stated as unyielding to discretion in this country. In *Vogel v. Gruaz*,¹⁸ the leading federal case on the subject, the plaintiff brought a suit for defamation as a result of statements made to the state's attorney. In refusing to allow the state's attorney to reveal what the defendant had said to him, the Supreme Court stated:

Public policy will protect all such communications, absolutely, and without reference to the motive or intent of the informer or the question of probable cause; the ground being, that greater mischief will probably result from requiring or permitting them to be disclosed than from wholly rejecting them.¹⁹

To make the rule one of absolute prohibition of the disclosure of the informer's identity except in cases where the disclosure would be necessary to prove the innocence of the criminal defendant — and this necessity could never arise in an action for malicious prosecution — would be in many cases to change the machinery of law enforcement into an engine of vexation and harassment. The better rule in this situation would be to allow the court to inquire *in camera* as to the danger involved in disclosure and make the ultimate decision on admissibility according to the particular facts of the case.²⁰

¹⁷ *continued*

person about whom the professional informs shys away from such actions. Secondly, the informer has the protection of the court's discretion. The basis of its exercise would be the apparent good faith of the accusation — determined by examining the record at the criminal trial as to any basis for probable cause that the informer might have had — and the willingness of the police to disclose the informer's identity. The exercise of the court's discretion would necessarily include a consideration of the informer's future safety and possible aid to law enforcement.

¹⁸ 110 U.S. 311 (1884). The leading state case on this point is *Worthington v. Scribner*, 109 Mass. 487, 12 Am. Rep. 736 (1872).

¹⁹ 110 U.S. at 315-16. But see *Steen v. First Nat. Bank*, 298 Fed. 36 (8th Cir. 1924), where, in an action for malicious prosecution, the plaintiff asked the prosecuting attorney the name of the person who gave him the information to start the criminal action against the plaintiff. Upon the defendant's objection, the court ruled that since the defendant had himself testified at the preliminary hearing to the conversation between himself and the prosecuting attorney the privilege of nondisclosure was waived. The court stated that the privilege was personal and likened it to that of the attorney-client privilege which could be waived by the client. The court added that mere silence during testimony disclosing the privileged confidential communication, or any substantial part of it, waives the privilege.

²⁰ In cases involving secret government documents, the courts have examined the documents to determine their necessity to a proper defense of the case. See *United States v. Schneiderman*, 106 F. Supp. 731 (S.D. Cal. 1952), *aff'd sub nom. Yates v. United States*, 225 F.2d 146 (9th Cir. 1955), *cert. granted*, 350 U.S. 858 (1955). In suits brought by the government, if the documents are essential items, the court will order their introduction;

The Informer and Probable Cause

The rule is well settled to the effect that where the privilege is invoked by the Government in a criminal prosecution and the identity of the informer becomes a material fact in the defense of the accused, the court will require the disclosure, and if the Government refuses, the witness will be held in contempt, or as an alternative, his favorable testimony will be barred.²¹ However, there are some areas in which the applicability of the rule has been questioned. In criminal proceedings where the action is based on evidence obtained during a search without a warrant, the prosecution must show reasonable or probable cause for conducting the search without a warrant,²² and in the federal courts and many states, the evidence will be excluded if no probable cause was present.²³ Thus, the defendant is constantly striving to convince the court that the state had no probable cause in order to get the evidence excluded, and the Government is trying urgently to show the existence of probable cause without having to reveal the name or names of its secret informants.

*United States v. Blich*²⁴ points up the conflict found in probable cause situations. In that case two federal prohibition agents had stopped and searched the defendant's car and found it to be carrying liquor in violation of the National Prohibition Act. The search was without a warrant. To establish probable cause, one of the agents testified that a "reliable informant" had advised him that the defendant at a certain time would be making delivery of intoxicating liquor at a certain designated place on the evening in question. The agent relied on this statement as his basis for probable cause,²⁵ but refused to reveal the name of his informant on the ground that it would be contrary to the policy of the Prohibition Department.²⁶ The court ruled that since the testimony of the in-

²⁰ *continued*

if the order is refused, the court will not admit any testimony based upon material in the documents. *United States v. Krulewitch*, 145 F.2d 76 (2d Cir. 1944); *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944).

²¹ *Wilson v. United States*, 59 F.2d 390 (3d Cir. 1932) (witness cited for contempt); *United States v. Keown*, F. Supp. 639 (W.D. Ky. 1937) (indictment dismissed).

²² *Carroll v. United States*, 267 U.S. 132 (1925).

²³ See *Wolf v. Colorado*, 338 U.S. 25, 29 (1948) for a listing of the states that refused illegally obtained evidence. For recent revisions in the state alignment, see 31 *NOTRE DAME LAW.* 85-88 (1955).

²⁴ 45 F.2d 627 (D. Wyo. 1930).

²⁵ The agent also testified that he had known the defendant previously as a violator of a municipal liquor ordinance, but the court refused to give weight to the statement because the previous violation had not involved transportation.

²⁶ The facts as stated by the court reveal that after a conference between

formant was the only basis of probable cause, the Government had failed to establish reasonable grounds for searching without a warrant, and the evidence obtained could not be considered.²⁷ The informer's identity was essential so that the court could "... determine whether, under all the circumstances, such information was reliable and the agent was justified in having such belief."²⁸

In *Scher v. United States*,²⁹ federal officers received confidential information that a certain automobile would be transporting illegal whiskey. The officers went to the place specified and there saw and heard a car being loaded with heavy packages. When a search was made, without a warrant, the officers found the car to be loaded with bootleg liquor. In upholding a conviction in which the name of the informant was not revealed, the Supreme Court distinguished the *Blich* case where justification was sought "because of honest belief based upon credible information."³⁰ The legality of the search here was based on what the officers saw and heard, not the information which caused the defendant to be observed. The Court recognized, however, that where the informer's identity is essential to the defense, it must be made known.³¹

In *Segurola v. United States*,³² the arresting officer testified that he had received confidential information that the defendant would

²⁶ *continued*

the district attorney and the Deputy Federal Prohibition Administrator, it was "elected" that the name of the informant would not be disclosed. There seems little doubt that the court would have accepted the name of the informant had it been offered in evidence, thus pointing out the weakness of the Supreme Court's reasoning when it called the privilege "absolute." *Vogel v. Gruaz*, 110 U.S. 311, 315 (1884).

²⁷ Since law officers are liable in all states to civil suit for an illegal search, an interesting problem would have arisen if the defendant in the *Blich* case had brought suit against the arresting officer. Since the search would be illegal unless based on probable cause, would the agents be allowed to reveal the name of their "reliable informant" to protect themselves from liability? Presumably the Government would be torn between its policy of preserving the secrecy of its informers and its interest in protecting its own agents from civil liability.

²⁸ 45 F.2d at 629.

²⁹ 305 U.S. 251 (1938).

³⁰ *United States v. Blich*, 45 F.2d 627 (D. Wyo. 1930).

³¹ The recognition was only dictum, since the Court relied on what the officers saw and heard to establish probable cause, but it is obvious that the Court considered it a correct statement of the law. The Court went out of its way to distinguish the *Blich* case, thus giving tacit approval to the rule that an informer's statements cannot be used unless the name of the informer is also disclosed. This is an affirmation of the common law rule stated in *Marks v. Beyfus*, note 13 *supra*.

³² 16 F.2d 563 (1st Cir. 1926), *aff'd*, 275 U.S. 106 (1927).

be illegally transporting liquor, but he refused to give the name of the informer. The court ruled that an attempt on the part of the defendant to run away from the officer was sufficient to establish probable cause for a search without a warrant, and the informer's name would not have to be revealed. A vigorous dissent, while recognizing that the name of the informant was privileged and need not be disclosed by the Government, was based on the ground that having once revealed the contents of the communication the Government waived its privilege and the defendant became entitled to a full disclosure, including the name of the informant. The argument of the dissenting judge does no harm to the theory of the majority. To make the disclosure of any benefit to the defendant the informer's testimony must prove unreliable and the government must be relying on it to establish probable cause, in which case the majority presumably would also have required the disclosure of the informer's name. In that regard, this case follows the implication of the *Scher* case³³ and can be construed in harmony with the *Blich* case.³⁴

In *United States v. Li Fat Tong*,³⁵ the defendant was arrested without a warrant, and federal agents relied on the information of secret informers to establish probable cause for the arrest. The defendant sought to suppress the evidence unless the identity of the informer was disclosed, but the motion was overruled. On appeal, the court made what seems to be a dubious distinction when it stated that the proof, though based on hearsay, was not from an "informer," because the arresting agent had gotten the information from another agent, although he in turn had received it from an unidentified informer. But the court took a bolder stand when it went even further to state:

³³ Note 29 *supra*.

³⁴ The waiver theory of the dissenting justice was used in *United States v. Schneiderman*, 106 F. Supp. 731 (S.D. Cal. 1952), *aff'd sub nom. Yates v. United States*, 225 F.2d 146 (9th Cir. 1955), *cert. granted*, 350 U.S. 858 (1955), a case involving an indictment under the Smith Act, to avoid a difficult problem. A government witness testified concerning written reports he had made to the FBI while posing as a Communist party member. The defendant sought the production of three reports pertaining to party meetings about which the witness testified. The United States Attorney opposed the motion to produce on the ground the documents contained the names of confidential informants, and that by virtue of regulations issued by the Attorney General he was obliged to keep the documents secret. The court avoided the constitutional issue as to the extent of the Attorney General's authority under the regulations by holding that the government waived its privilege of nondisclosure by adducing evidence touching the subject-matter communicated in the reports.

On the theory of waiver, see also *Steen v. First Nat. Bank*, 298 Fed. 36 (8th Cir. 1924).

³⁵ 152 F.2d 650 (2d Cir. 1945).

There is no reason to suppose that hearsay evidence derived from an informer is not as competent evidence on which to show probable cause for an arrest as any other proof. The weight to be given it is a matter for the sound discretion of the court which was exercised on the motion to suppress.³⁶

The court's theory was that public policy dictated that the names of secret informers were not to be disclosed unless necessary to show the innocence of the defendant. Since the defendant here was obviously guilty — he was carrying narcotics when arrested — the names of the secret informers would not prove the defendant's innocence.

This theory is out of harmony with the decision in *United States v. Blich*³⁷ and would seem to be a misapplication of the rules laid down in the *Scher* case³⁸ and *Carroll v. United States*.³⁹ The court states that that hearsay evidence is sufficient to establish probable cause for arrest, and that is unquestionably a correct statement of the law.⁴⁰ The court missed the point, however, on the question of what characteristics hearsay evidence should possess when it refused to require the Government to show the reliability of the hearsay. The court refused to admit the names of the informers because the admission could not prove the defendant's innocence, but if the defendant had not been carrying narcotics and the officers' reliance on the statements had not been borne out, would the court admit the names of the informers to discover whether the officers had reasonable grounds for relying on their statements? Basing the answer on reasonable implications from the court's opinion in the case, it would be "yes." But this would be allowing the end to justify the means, and does not square with a correct statement of the law.⁴¹

³⁶ 152 F.2d at 652.

³⁷ 45 F.2d 627 (D. Wyo. 1930).

³⁸ 305 U.S. 251 (1938).

³⁹ 267 U.S. 132 (1925).

⁴⁰ *Husty v. United States*, 282 U.S. 694 (1931) (where the information of a secret informer was used to establish probable cause). It should be noted that in the *Husty* case the Court refused to consider defendant's assignment of error as to nondisclosure of the informer's name because the question was not raised on the appeal to the court of appeals. The Court gave no indication as to what its decision would have been had it considered the question.

⁴¹ "An unlawful search cannot be justified by what is found." *United States v. Slusser*, 270 Fed. 818, 819 (S.D. Ohio 1921). It must be noted that most state courts still admit illegally obtained evidence, see 31 *NOTRE DAME LAW.* 85 (1955), leaving the defendant to seek his remedy in a civil suit against the officer making the illegal search. But the federal courts do not admit such evidence, and this would make the existence of a proper basis for probable cause an extremely important matter. If evidence is illegally

In *United States v. Nichols*,⁴² the defendant had protested against the admission of statements of an informer to establish probable cause without at the same time disclosing the name of the informer. The defendant put forth the argument that,

. . . since the backbone of the probable cause is the "tip", he is entitled to have the informer identified, in order that he may show, if possible, that the informer was unreliable or unworthy of belief, and if successful in this regard, he contends that the officers would not be justified in relying upon the "tip", and therefore would not have probable cause for the search.⁴³

The court, however, overruled the objection on the ground that,

. . . the defendant did not allege that it was his belief that the officer was testifying falsely as to having received the information, or that a disclosure of the informer's identity was essential to his defense on the merits of the case, as necessary or desirable to show his innocence of the charge against him.⁴⁴

Apparently, the court was giving but lip service to the principle that the informer's identity must be revealed to establish probable cause by requiring a direct allegation by defendant that disclosure was necessary to show his innocence before the Government would be forced to make disclosure. The case is capable of being squared with *United States v. Blich*.⁴⁵ However, the argument of the court seems almost as spurious as that of the Second Circuit in distinguishing between an informer's testimony received directly by the arresting officer and that received by another agent and passed on to the arresting officer.⁴⁶ The requirement stated by the court here is tantamount to saying that the prosecution need not bother to establish probable cause unless the defendant alleges such proof is essential to his defense, and a mere objection to the admission of evidence obtained in a search not based on probable cause is not a substitute for that allegation.⁴⁷

Conclusion

The courts are obviously not in harmony as to the competence

⁴¹ *continued*

obtained, defendants, while not innocent in fact, cannot be proven guilty with that evidence in the federal courts. The Second Circuit is attempting to evade this rule of inadmissibility in the *Li Fat Tong* case.

⁴² 78 F. Supp. 483 (W.D. Ark. 1948), *aff'd*, 176 F.2d 431 (8th Cir. 1949).

⁴³ *Id.* at 487.

⁴⁴ *Ibid.*

⁴⁵ 45 F.2d 627 (D. Wyo. 1930).

⁴⁶ *United States v. Li Fat Tong*, note 35 *supra*.

⁴⁷ See *Cannon v. United States*, 158 F.2d 952 (5th Cir. 1946), *rehearing on motion for cert. denied*, 331 U.S. 863 (1949), which holds to the same effect.

of the statements of an informer when they are relied upon to establish probable cause and the name of the informer is not disclosed. The Supreme Court has twice avoided the issue,⁴⁸ and, in addition to the cases discussed above, many other cases can be found as apparent authority on both sides of the issue.⁴⁹ There is agreement among all the courts, however, with the basic rule that the criminal defendant is entitled to know the informer and even call him to the stand when it is necessary to prove the defendant's innocence; and when the rule collides with the policy of keeping the informer's name secret, the individual's right to show his innocence must prevail, either by requiring disclosure or by refusing to admit the evidence obtained through use of the informer's statement. The conflict exists only as to the application of the rule in probable cause situations. The courts which would not require disclosure are apparently motivated by the argument that if the defendant is obviously guilty, why should the government be forced to choose between revealing the names of its trusted informers, and letting the guilty go free. To support their refusal to require disclosure, some of these courts cite *United States v. Scher*⁵⁰ as declaratory of the rule that the policy is unbending and disclosure is absolutely prohibited.⁵¹

Since the courts apparently would not give credence to the informer's statement if the person protesting its admission is not obviously guilty, the courts who adopt the theory are in effect using two different rules of law, one for the guilty and another for the innocent. In addition, such a rule plays havoc with a liberal construction of the Fourth Amendment to the Federal Constitution, which requires probable cause for a search and the evidence to prove it.

⁴⁸ *Husty v. United States*, 282 U.S. 694 (1931); *Seguro v. United States*, 275 U.S. 106 (1927).

⁴⁹ Courts which would apparently not require disclosure: *McInes v. United States*, 62 F.2d 180 (9th Cir. 1932), *cert. denied*, 288 U.S. 616 (1933); *Shore v. United States*, 49 F.2d 519, 522 (D.C. Cir. 1931), *cert. denied*, 285 U.S. 552 (1932); *Goetz v. United States*, 39 F.2d 903 (5th Cir. 1930); *United States v. Rogers*, 53 F.2d 874, 876 (D.N.J. 1931), *aff'd sub nom. Burkis v. United States*, 60 F.2d 452 (3d Cir.), *cert. denied*, 287 U.S. 655 (1932).

Courts which would apparently require disclosure to admit the evidence: *Wilson v. United States*, 59 F.2d 390 (3d Cir. 1932); *United States v. Keown*, 19 F. Supp. 639, 645-46 (W.D. Ky. 1937); *People v. Ramistella*, 306 N.Y. 379, 118 N.E.2d 566 (1954).

⁵⁰ 305 U.S. 251 (1938).

⁵¹ Notably the *Nichols* case on appeal to the Eighth Circuit. 176 F.2d 431, (8th Cir. 1949). This is not only a compromise of the basic rule but also a misinterpretation of the *Scher* case, note 50 *supra*, and a misapplication of the common law rule. See *Marks v. Beyfus*, note 13 *supra*.

The argument of these courts is well answered in *United States v. Blich*:

It is scarcely an answer to the proposition that an agent testifies that his informant was a reliable person, and that he believed the information so given, unless the court sitting in judgment may have the right to determine whether, under all the circumstances, such information was reliable and the agent was justified in having such belief. A belief must or should rest upon a substantial basis. It is not a question of impugning the motives or doubting the honest belief of the agent in regard to the information which he may have received. It is simply requiring the witness to sustain his motives and his beliefs by all the evidence at his command. It is conceivable that a prohibition agent in the earnestness and eagerness of performing his duty might adopt very shadowy leads. But what is of greater consequence is that an ill-intentioned person might give an officer information which would in many instances lead to humiliation and vexation of the innocent automobile driver upon the public highway, and yet, with the failure to disclose the name of his informant, the prohibition agent would be safely ensconced behind his blanket testimony that he was informed by a reliable person.⁵²

The better rule is to require universal disclosure of the names of informants when their statements are made the basis for establishing probable cause. This would give law enforcement officers a concrete rule on which to act and would coincide with the protections of the Constitution against unreasonable search. Where the defendant is found to be breaking the law, but the Government needs the statements of an informer to establish probable cause, it must weigh the future value of the informer's secret identity against the desirability of obtaining a conviction. If the informer's identity weighs heavier, and the Government refuses to disclose his identity, the case should be dismissed.

But under practical considerations, it would be a most unusual situation when the statement of an informer is an absolute essential. The Government should take its cue from the Supreme Court in *United States v. Scher*,⁵³ and where such secret information is received, the Government officers need only delay an arrest or search long enough to detect with their own eyes sufficient evidence to establish probable cause. The statements will then be unnecessary to the prosecution, and the informer will have served his valuable purpose of helping to detect and convict criminals.

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⁵² 45 F.2d at 629.

⁵³ 305 U.S. 251 (1938).