Informant Disclosure

"Once an informant is known, the drug traffickers are quick to retaliate. Dead men tell no tales."[1]

Hardly anyone has anything nice to say about informants. They are commonly known as "snitches," "rats," "weasels," and much worse. They are also called "targets" because, as the Court of Appeal observed in a drug case, "It does not take a lively imagination to realize that, in view of the violence found in the world of the narcotic pusher and user, disclosure might constitute a death warrant for the informer."[2]

While the use of informants has been called "dirty business,"[3] it is also a necessary and productive business because informants play "a vital part of society's defensive arsenal."[4] "Without informants," said the Ninth Circuit, "law enforcement authorities would be unable to penetrate and destroy organized crime syndicates, drug trafficking cartels, bank frauds, telephone solicitation scams, public corruption, terrorist gangs, money launderers, espionage rings, and the likes."[5]

Most informants would not, however, provide this information unless they could be certain that their identities would be kept secret. As the Supreme Court pointed out, an informant "will usually condition his cooperation on an assurance of anonymity—to protect himself and his family from harm."[6] For this reason, the law gives officers a right—a "privilege"—to refuse to disclose an informant's identity to anyone.[7] Officers may also refuse to disclose information that would even *tend* to reveal an informant's identity. Thus, in *People v. Seibel* the court explained that the privilege "protects not only the informant's name but also those portions of communication from and about the informant which would tend to reveal his or her identity. Events may be as revealing as the informant's name."[8]

Although the nondisclosure privilege is absolute, a defendant may file a motion known as a Motion to Disclose an Informant or MDI. The name of the motion is, however, misleading because virtually all defendants who file these motions are not actually interested in learning the informant's identity, as if the informant would make a great witness for the defense. Instead, their objective is to get the charges against them dropped. And this can happen if a court rules the informant is a "material witness" for the defense and if, as is usually the case, the investigating officer invokes the privilege and refuses to identity him.

Later in this article, we will discuss when an informant will be deemed a material witness and the unique procedure the courts utilize in making this determination. But first it is necessary to explain when, or under what circumstances, an informer will qualify as a protected "confidential informant."

Who Are "Confidential" Informants?

An informant will be protected by the nondisclosure privilege only if he is deemed a "confidential informant" or CI. And an informant will be deemed a CI if the following circumstances existed:

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[1] *Roviaro v. United States* (1957) 353 U.S. 53, 67 (dis. opn. of Clark, J.).
[2] *People v. Pacheco* (1972) 27 Cal.App.3d 70, 80. Also see *People v. Seibel* (1990) 219 Cal.App.3d 1279, 1289 ["And in the big-time drug business, to inform is to sign one's death warrant."].
[3] *On Lee v. United States* (1952) 343 U.S 747, 757.
[4] *McCray v. Illinois* (1967) 386 U.S. 300, 307.
[5] *U.S. v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331, 335.
[6] *McCray v. Illinois* (1967) 386 U.S. 300, 308-309. Also see *People v. Pacheco* (1972) 27 Cal.App.3d 70, 81 ["The vast majority of information concerning crime received by police authorities, comes from informants who would not give such information if they could not be promised concealment of their identity."].
[7] See Pen. Code § 964; Evid. Code § 1041(a)(2).
[8] (1990) 219 Cal.App.3d 1279, 1289. Also see *Roviaro v. United States* (1957) 353 U.S. 53, 60.

(1) **INFORMATION ABOUT CRIMINAL ACTIVITY**: The informant must have provided information that pertained to criminal activity.[9]

(2) **INFORMATION GIVEN TO LAW ENFORCEMENT**: The informant must have provided the information to a law enforcement officer or to someone who he knew would pass it along to an officer.[10]

(3) **INFORMATION GIVEN "IN CONFIDENCE"**: The informant must have provided the information "in confidence."

To say the information must have been given "in confidence" does not mean the informant must have intended that his information would be kept confidential; e.g., that it would not be used in a search warrant affidavit or communicated to other officers. Nor does it mean the informant must have requested anonymity. Instead, information is deemed given "in confidence" if, as is almost always the case, disclosure of the informant's identity would place him (and oftentimes his family) in danger.[11] Although confidential information includes tips from people via secret witness programs,[12] it does not apply to crime victims and witnesses who meet with officers and freely provide information about a crime. As the Court of Appeal explained, "The requirement of confidence eliminates from the ambit of the privilege most eyewitnesses who simply provide information to authorities upon being interviewed."[13]

Note that some CIs are called "confidential *reliable* informants" or CRIs. This simply means the informant has a history or track record for providing accurate information, which means that his information is presumptively reliable. In the context of informant disclosure, however, it doesn't matter whether the informant was a CI or CRI as they are both protected.

Who Are "Material" Witnesses?

A CI will be deemed a material witness if the defendant proves there is a "reasonable possibility" that the CI "could give evidence on the issue of guilt which might result in defendant's exoneration."[14] In other words, a CI becomes a material witness if the informant's testimony would be "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause,"[15] or if the CI could "rebut a material element of the prosecution's case and thereby prove his innocence."[16]

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[9] See Evid. Code § 1041(a) [the information must have purported "to disclose a violation of the law"].

[10] See Evid. Code § 1041(b); *People v. Guereca* (1987) 189 Cal.App.3d 884, 889 [a person was not an informant when he didn't know that the person he was talking with was an officer].

[11] Also see Evid. Code § 1041(a)(2) and *People v. Otte* (1989) 214 Cal.App.4th 1522, 1532 ["the test of confidentiality in the instant case is not whether the particular informant demanded that his identity not be disclosed, or was in physical danger, but whether the investigation is of such a type that disclosure would cause the public interest [in effective law enforcement] to suffer."].

[12] See *People v. Callen* (1987) 194 Cal.App.3d 558, 563; *People v. Maury* (2003) 30 Cal.4th 342, 386 ["The promise of anonymity is offered [by anonymous witness programs] only for the purpose of inducing reluctant informers to provide information which assists in this primary purpose. The inducement derives from the protection from publicity or retaliation that the informer receives by remaining anonymous."].

[13] *People v. Lanfrey* (1988) 204 Cal.App.3d 491, 498.

[14] *Roviaro v. United States* (1957) 353 U.S. 53, 60-61. Also see *People v. Bradley* (2017) 7 Cal.App.5th 607, 624 ["If the trial court determines there is not a reasonable possibility the informant's evidence on the issue of guilt might exonerate the defendant, disclosure is denied."]; *People v. Lawley* (2002) 27 Cal.4th 102, 159-160 [an informant is a material witness if there is a "reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant."]; *People v. Long* (1974) 42 Cal.App.3d 751, 757 [an informant is material if his "testimony might, when taken together with other evidence, tend to raise a reasonable doubt . . . which would result in the defendant's exoneration."]; Evid. Code § 1042(d) [an informant is a material witness if there is a "reasonable possibility that nondisclosure might deprive the defendant of a fair trial."].

[15] *Roviaro v. United States* (1957) 353 U.S. 53, 60-61.

[16] *Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 419.

Accomplices and eyewitnesses

By their very nature, accomplices and eyewitnesses to a crime would likely have been in a position to provide information as to what the defendant said and did during or immediately before or after. Accordingly, a CI will usually be deemed a material witness if he participated in, or eyewitnessed, the crime with which the defendant was charged.[17] As the court observed in *Williams v. Superior Court*, "Where the evidence indicates that the informer was an actual participant in the crime alleged, or was a nonparticipating eyewitness to that offense, ipso facto it is held he would be a material witness."[18] There is, however, an exception to this rule: An accomplice or eyewitness cannot be a material witness if—as is often the case—the prosecution is able to prove that his testimony could have only harmed the defendant.[19]

CIs with "inside" information

A CI who was not an accomplice or eyewitness to a crime may nevertheless be deemed a material witness if he had been in a position—before or after the crime occurred—to have seen or heard something that might prove the defendant was not guilty.[20] This type of material witness is fairly common in drug-related crimes.

In many cases, however, even an informant with "inside" information will not be deemed a material witness if there was a lengthy time lapse between what he saw or heard and the commission of the crime. This is because the circumstances that existed when the CI made his observations may have little or no relevance in proving the existence of circumstances that existed much later or earlier.

For example, in ruling that a confidential informant was not a material witness in constructive possession drug cases, the courts have noted the following:

- "[T]he informant's observations occurred at least five days prior to [the search]. We think it clear, then, that the proximity of the informant to the charged offense is not close, not recent, and that the nexus of the informant's relationship to the charged crime is minimal."[21]
- "[D]efense counsel did not explain how this informant, whose last contact with the defendant was before November 3 . . . would possibly be able to give evidence on defendant's reason for possessing marijuana on November 19."[22]
- "The affidavit states the informer saw marijuana in the apartment 11 days before the search, not that he was a percipient witness to the particular possession of contraband disclosed by the search."[23]

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[17] See *Roviaro v. United States* (1957) 353 U.S. 53, 64; *In re Benny S.* (1991) 230 Cal.App.3d 102, 108-9 ["Had appellant been charged with the sales of marijuana witnessed by the informant, then disclosure would have been required."]; *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1043 ["Obviously, the participant-informant presents the clear-cut example of an informant who is a material witness on the issue of guilt or innocence."]; *People v. Cheatham* (1971) 21 Cal.App.3d 675, 677-78 ["Since [the informant] was not only a witness to, but a direct participant in, the sale herein involved, it was obvious that she was a witness whose identity must be revealed."].

[18] (1974) 38 Cal.App.3d 412, 420.

[19] See *People v. Bradley* (2017) 7 Cal.App.5th 607, 627 [the informant's testimony "would not have benefited defendant. It would have harmed him."]; *People v. Alderrou* (1987) 191 Cal.App.3d 1074.

[20] See *People v. Hardeman* (1982) 137 Cal.App.3d 823, 828 ["The courts have indicated that the measure of the 'reasonable possibility' standard . . . is predicated upon the relative proximity of the informant to the offense charged."]; *People v. Lee* (1985) 164 Cal.App.3d 830, 836 ["A nonparticipant informant can be a material witness . . . even when such informant was not an eyewitness to the alleged criminal act."

[21] *People v. Fried* (1989) 214 Cal.App.3d 1309, 1316. **NOTE**: Time lapse was also a factor in a ruling that the CI was not a material witness in the following cases: *People v. Hardeman* (1982) 137 Cal.App.3d 823, 829 [8 days]; *People v. Martin* (1969) 2 Cal.App.3d 121, 127 [3 days]; *People v. Duval* (1990) 221 Cal.App.3d 1105, 1114 ["several days"]; *People v. Alvarez* (1977) 73 Cal.App.3d 401, 408 [within past seven days]; *People v. Hambarian* (1973) 31 Cal.App.3d 643 [5 days].

[22] *People v. Otte* (1989) 214 Cal.App.3d 1522, 1536.

[23] *People v. Sewell* (1970) 3 Cal.App.3d 1035, 1039.

Not "Material" Witnesses

While it is important to know what types of CIs are likely to be material witnesses, it is just as important to know which types almost never qualify. As we will now discuss, there are three types: (1) CI's who only provided information to establish probable cause, (2) "mere informants," and (3) CIs with information not specific to the crime charged.

Informants who attack a search warrant

An informant is not a material witness if his only purpose was to attack the validity of a search warrant by, for example, testifying that he did not furnish information that was attributed to him.[24] As the California Supreme Court explained, "It has long been the rule in California that the identity of an informant who has supplied probable cause for the issuance of a search warrant need not be disclosed where such disclosure is sought merely to aid in attacking probable cause."[25]

The reason that disclosure is not required is that a judge who reviews an affidavit may, if he or she deems it necessary, require that the informant appear to answer questions as to what he saw or heard. As the court said in *People v. Navarro*, "Because the magistrate will issue a warrant only upon a showing of probable cause, and has the power to question the informant if he sees fit, there is adequate protection against police abuse."[26] More important, if the defendant has reason to believe the affiant lied about the existence of the CI or the nature of the information he provided, there are other kinds of motions he can file.[27]

"Mere informants"

A "mere informant" or "fingerpointer" is a CI who merely notified officers that a certain person was currently engaging in some criminal activity and, as the result, officers launched an investigation which eventually led to the seizure of incriminating evidence.[28] As the California Supreme Court explained, "'A mere informer has a limited role. When such a person is truly an informant he simply points the finger of suspicion toward a person who has violated the law. He puts the wheels in motion which cause the defendant to be suspected and perhaps arrested, but he plays no part in the criminal act with which the defendant is later charged."[29] Thus, if the CI is a mere informant "the possibility that he could give evidence which might exonerate the defendant is even more speculative and, hence, may become an unreasonable possibility."[30]

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[24] See *People v. Hardeman* (1982) 137 Cal.App.3d 823, 830; Evid. Code § 1042(b); *People v. Navarro* (2006) 138 Cal.App.4th 146, 176 ["If the informant was not a material witness on the issue of guilt and the defendant seeks to learn his identity in order to challenge a facially valid search warrant based on information provided by the informant, the informant's identity need not be disclosed."]; *People v. Martinez* (2005) 132 Cal.App.4th 233, 240 ["[C]ourts are not required to disclose the identity of an informant who has supplied probable cause for the issuance of a search warrant where such disclosure is sought merely to aid in attacking probable cause."].

[25] *People v. Hobbs* (1994) 7 Cal.App.4th 948, 959

[26] (2006) 138 Cal.App.4th 146, 176

[27] **NOTE**: These are known as Motions to Traverse or *Franks* Motions. They are essentially motions to suppress evidence obtained by means of a search warrant on grounds that the affiant or other officer intentionally or recklessly misrepresented or distorted the facts upon which probable cause was based. See *Franks v. Delaware* (1978) 438 U.S. 154; *People v. Luttenberger* (1990) 50 Cal.3d 1, 9.

[28] See *People v. Blouin* (1978) 80 Cal.App.3d 269, 287 ["[The informant] simply triggered an investigation by reporting a suspicious situation . . . Defendant's participation in the crime itself was revealed by subsequent police investigation without resort to further information from the informant."]; *People v. McCoy* (1970) 13 Cal.App.3d 6, 12 ["The informant's function, in informing the police of his observations, was limited to pointing the finger of suspicion at those persons residing at the ranch and furnishing the requisite information for the issuance of the search warrant."]; *People v. Hobbs* (1994) 7 Cal.App.4th 948, 959; *People v. Seibel* (1990) 219 Cal.App.3d 1279, 1288-89.

[29] *People v. Garcia* (1967) 67 Cal.2d 830, 836.

[30] *Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 420. Also see *People v. Hardeman* (1982) 137 Cal.App.3d 823, 828-29 ["If the informer is not a percipient witness to the events which are the basis of the arrest, it is highly unlikely that he can provide information relevant to the guilt or innocence"].

Information not specific to charged crime

Even if an informant possessed information pertaining to a crime, he will not be deemed a material witness if his information did not pertain to the crime with which the defendant was charged.[31] This typically becomes an issue in drug cases.

STRAIGHT POSSESSION: If the defendant was charged with straight possession of drugs found in his possession as the result of a tip from the CI, the informant will seldom be deemed a material witness because the crime of straight possession is completed at the moment an officer discovers the drugs; and it is unlikely that information given to an officer by an informant would be exculpatory as to a crime that had not yet been committed.[32] For example, in ruling that a CI was not a material witness to a charge of straight possession, the courts have noted the following:

- The drugs were "found in the pocket of the jacket appellant was wearing."[33]
- The defendant threw a heroin-filled balloon from his car during a pursuit instigated by information from informant.[34]
- "The defendant was carrying in his hand a blue plastic bag containing heroin, which he dropped when confronted by the police."[35]

POSSESSION WITH INTENT: In cases where the defendant was charged with possession with intent to distribute, the likelihood that the informant will be deemed material to prove a lack of intent will often depend on how prosecutors will attempt to prove his intent. For example, a CI's testmony would likely be irrelevant if proof of intent will be based on an admission or, as frequently happens, on circumstances that existed when officers seized the drugs, such as the quantity of drugs, the manner in which they were packaged, and the presence of sales paraphernalia.[36]

Thus, in rejecting defense arguments that a confidential informant was a material witness as to the defendant's intent to sell, the courts have said the following:

- "[T]he large quantity of narcotics found in the defendant's apartment raised an inference that defendant intended to sell them."[37]
- Possession for sale was established by "the quantity of cocaine found in appellant's possession combined with the scales, cutting compound, and other apparatus and supplies he also possessed which are typically associated with cocaine intended for sale rather than for person use."[38]

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[31] See *People v. Alderrou* (1987)191 Cal.App.3d 1074, 1081 ["it is important to bear in mind what offense appellant was found to have committed"].

[32] See *People v. Borunda* (1976) 58 Cal.App.3d 368, 375 ["Furthermore, heroin was found not only at [defendant's home] but also in defendant's shirt pocket. There is no possibility the informant could give testimony exonerating defendant of possession of that heroin."]; *People v. Acuna* (1973) 35 Cal.App.3d 987, 991 ["on [defendant's] person in his pants pocket were three balloons of heroin"]; *People v. Rogers* (1976) 54 Cal.App.3d 508, 518-19 ["Defendant was charged with possession for sale based on his personal possession of heroin when arrested; neither the informant nor Linda could have furnished relevant information."]; *People v. Flemmings* (1973) 34 Cal.App.3d 63, 68 ["[T]he evidence showed that defendant was carrying in his hand a blue plastic bag containing heroin, which he dropped when confronted by the police."].

[33] *In re Benny S.* (1991) 230 Cal.App.3d 102, 108-9. Also see *People v. Borunda* (1976) 58 Cal.App.3d 368, 375 ["There is no possibility the informant could give testimony exonerating defendant of possession of that heroin."]; *People v. Acuna* (1973) 35 Cal.App.3d 987, 991 ["defendant was in the apartment and on his person in his pants pocket were three balloons of heroin which he had for the purpose of sale. Such evidence establishes every element of the offense of possession for sale of a narcotic"].

[34] *People v. Garcia* (1970) 13 Cal.App.3d 486, 490.

[35] *People v. Flemmings* (1973) 34 Cal.App.3d 63, 68.

[36] See *People v. Aguilera* (1976) 61 Cal.App.3d 863, 870, fn.7 ["the charge was based on a commercial quantity, commercially packaged, which she held in her own hand"]; *In re Benny S.* (1991) 230 Cal.App.3d 102, 108-9 [officers "found several baggies, each containing a green leafy substance resembling marijuana"].

[37] *People v. Goliday* (1973) 8 Cal.3d 771, 783-84.

[38] *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1081.

- "[D]efendant's guilt of possession for sale of that marijuana was established based on the quantity involved and independent of anything the informant might testify."[39]

On the other hand, the CI will almost certainly be deemed a material if intent is based on a sale that the CI witnessed or participated in.[40] Also see "Accomplices and eyewitnesses," above.

CONSTRUCTIVE POSSESSION CASES: If the defendant was charged with constructive possession of drugs (i.e., officers did not find the drugs in his physical possession[41]), he may claim that he lacked dominion and control over the drugs or the place or thing in which they were found, and that the CI could help him prove it. In such cases, the deciding factor is often whether the evidence of constructive possession was strong or weak.

For example, any of the following circumstances might make it difficult for the defendant to convince a judge that the CI was material: the defendant admitted that he possessed the drugs,[42] the drugs were found in the defendant's home,[43] the drugs were in a safe or locked place or room that was accessible solely by the defendant,[44] the defendant attempted to delay the search,[45] defendant's ID was found with the drugs,[46] the defendant was under the influence of drugs of the type that officers found,[47] the informant said the only person he saw in possession of the drugs was the defendant, or the defendant was captured on video in possession of the drugs.[48]

A CI might, however, be deemed a material witness if there was a reasonable likelihood that someone else on the premises recently had sole possession of the contraband. As the Court of Appeal explained:

> Where possession of contraband is among the elements of the crime charged and it is imputed to the defendant by reason of the location at which the contraband is discovered by the police, and where such discovery stems in whole or part from an informer's very recent observation of contraband on those same premises, the Supreme Court has compelled disclosure of the informer's identity if the evidence shows that persons other than the defendant were on the premises when the informer observed the contraband and that the defendant was not then present or may not have been present.[49]

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[39] *People v. Borunda* (1976) 58 Cal.App.3d 368, 376

[40] See *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 30-31; *People v. Lee* (1985) 164 Cal.App.3d 830, 836.

[41] See CALCRIM 2304. **NOTE**: Constructive possession is possession "imputed to the defendant by reason of the location at which the contraband is discovered." *Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 423.

[42] See *People v. Alvarez* (1977) 73 Cal.App.3d 401, 406; *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1077.

[43] See *People v. Thompson* (1979) 89 Cal.App.3d 425, 433.

[44] See *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1081 ["Defendant's possession, dominion and control of these narcotics was proved rather conclusively by the fact they were found in a safe opened with a key taken from a case containing his papers and only his papers."]; *People v. Green* (1981) 117 Cal.App.3d 199, 208 ["the key seized from defendant's belt opened the door to the storeroom."]; *People v. Galante* (1983) 143 Cal.App.3d 709, 711 ["[A]ppellant had the key to the locked cabinet [in which cocaine was found] in his possession when arrested"].

[45] See *People v. Thompson* (1979) 89 Cal.App.3d 425, 433.

[46] See *People v. Lizarraga* (1990) 219 Cal.App.3d 476, 479. Also see *People v. Green* (1981) 117 Cal.App.3d 199, 208 [the drugs were "accompanied by a business card bearing defendant's name and occupation"].

[47] See *People v. Thomas* (1975) 45 Cal.App.3d 749, 755.

[48] See *People v. Hardeman* (1982) 137 Cal.App.3d 823, 829 [the informant said the sales "which he observed were conducted by a single individual, the respondent, and not in a joint manner."]; *People v. Thomas* (1975) 45 Cal.App.3d 749, 754 ["[T]he informant told the police that he was present at the residence of defendant and saw high grade heroin in defendant's possession there."]; *People v. Hardeman* (1982) 137 Cal.App.3d 823, 829 [the only person informant saw selling drugs was the defendant]; *US v. Henderson* (9th Cir. 2001) 241 F.3d 638, 646 [defendant was positively identified by witnesses, plus he was captured in mid-holdup by a bank surveillance camera].

[49] *Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 423.

For example, in *Williams v. Superior Court*[50] the CI said he had seen Williams and Anderson selling and packaging heroin in Anderson's home shortly before officers entered to execute a search warrant. In arguing that the informant was a material witness, Williams argued "it is reasonably possible that the informer might testify that [Williams] was merely present when the informer was at the residence; the informer's testimony might show that the heroin was sold, packaged, and controlled solely by Anderson during this period; and, from such testimony, the trier of fact might infer that petitioner had no control or right to control the heroin later found in her dresser, and that she herself had no intent to sell contraband." The court agreed.

In other cases, the courts have cited the following circumstances as establishing a reasonable possibility that the CI was a material witness:

- People other than the defendant were named in the affidavit as the sellers which was "consistent with the claim of defendant at trial that he was a visitor at the apartment."[51]
- The drugs were found in the defendant's purse at her apartment, but there was another suspect in the apartment and defendant claimed the other suspect put the drugs in her purse.[52]
- Defendant was in jail shortly before the drugs were discovered and, while she was in jail, the informant had seen other people in the apartment.[53]

Proof of guilt may also be deemed weak if there was reason to believe the defendant was merely a visitor at the location, or that another resident possessed it.[54] However, a CI does not become a material witness merely because the defendant claimed the CI could help prove he did not have *sole* possession of drugs or other contraband,[55] or because he contends (with no proof) that the drugs had been planted.[56]

Court Procedure

The first step in the MDI procedure is the filing by the defense of a written motion to disclose an informant.[57] The court will then schedule a hearing in open court in which the defendant has the burden of presenting "some evidence"[58] (speculation is not "evidence"[59]) that demonstrates a "reasonable possibility" that the CI's testimony could help exonerate the defendant.[60] Such evidence usually consists of information contained in police reports and search warrant affidavits from which the existence of the CI and the nature of his testimony may be inferred.[61]

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[50] (1974) 38 Cal.App.3d 412, 422.
[51] *People v. Garcia* (1967) 67 Cal.2d 830, 839. Compare *People v. Alvarez* (1977) 73 Cal.App.3d 401, 407.
[52] *People v. Coleman* (1977) 72 Cal.App.3d 287.
[53] *Honore v. Superior Court* (1969) 70 Cal.2d 162, 168-69.
[54] See *People v. Long* (1974) 42 Cal.App.3d 751, 755; *Honore v. Superior Court* (1969) 70 Cal.2d 162, 168-69; *People v. Ingram* (1978) 87 Cal.App.3d 832, 837; *In re Tracy J.* (1979) 94 Cal.App.3d 472, 477-78.
[55] See *People v. Hambarian* (1973) 31 Cal.App.3d 643, 659; *People v. Green* (1981) 117 Cal.App.3d 199, 208.
[56] See *People v. Alvarez* (1977) 73 Cal.App.3d 401, 406.
[57] See Evid. Code § 1042(d); *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1079; *People v. Rios* (1977) 74 Cal.App.3d 833.
[58] See *People v. Lawley* (2002) 27 Cal.4th 102, 159; *Davis v. Superior Court* (2010) 186 Cal.App.4th 1272, 1277.
[59] See *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1044; *People v. Galante* (1983) 143 Cal.App.3d 709, 711 ["[The defendant's attorney], not feeling constrained by any consideration for reality, posited various mutually inconsistent hypotheses that might, theoretically, explain how a person could conceivably find himself in appellant's position without necessarily being guilty of the offense charged. It was never once suggested, however, that there was a basis in fact for any of these musings nor that appellant himself claimed that any of them were true."]; *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1083 ["Indeed one would have to engage in wild speculation about convoluted improbable plots to come up with a scenario which would produce testimony from his confidential informant tending to exonerate this appellant of this offense."]; *In re Robert B.* (1985) 172 Cal.App.3d 763, 770 ["bare, unsupported speculation"].
[60] *In re Tracy J.* (1979) 94 Cal.App.3d 472, 477 ["defendant must demonstrate a "reasonable possibility"].
[61] See *People v. Alvarez* (1977) 73 Cal.App.3d 401, 406; *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1044; *People v. Otte* (1989) 214 Cal.App.3d 1522, 1536 ["[Defendant] may rely upon reasonable inferences from the People's evidence"].

While the term "reasonable possibility" has "vague and almost limitless perimeters,"[62] it must reach "at least a low plateau of reasonable possibility."[63] In the following cases, the courts explained why the defense failed to meet this burden of proof.

In *In re Robert B.* the court pointed out that "Robert presented only the bare, unsupported speculation that the informer may have been able to offer exonerating testimony, but failed to provide any evidentiary basis for raising this mere speculation to the 'reasonable possibility' which would entitle him to disclosure."[64] In *People v. Otte* the defendant claimed that the CI could help prove that the he did not possess the marijuana for sale. The court responded, "[Y]et defense counsel did not explain how this informant, whose last contact with the defendant was before November 3, and who did not even know the defendant's full name or address, would possibly be able to give evidence on defendant's reason for possessing marijuana on November 19, 1987."[65]

In *People v. Galante* officers obtained a warrant to search the defendant's home based on information from a CI, and the search netted a large quantity of cocaine in a locked file cabinet in the defendant's bedroom. They also found a key to the cabinet in the defendant's pocket. The defendant's attorney filed an MDI in which he floated "various mutually inconsistent hypotheses" by which the CI might be able to explain how the key happened to find its way into his client's pocket. In denying the motion, the court said that the defendant's attorney, "not feeling constrained by any consideration for reality, posited various mutually inconsistent hypotheses that might, theoretically, explain how a person could conceivably find himself in appellant's position without necessarily being guilty of the offense charged. It was never once suggested, however, that there was a basis in fact for any of these musings nor that appellant himself claimed that any of them were true."[66] Finally, in *U.S. v. Henderson* a bank robbery suspect claimed he had been framed, and that the CI could help him prove it. But because he was unable to explain how the bank's surveillance cameras happened to show him in the process of robbing the bank, the court ruled that an *in camera* hearing was unnecessary.[66]

Three other things should be noted. First, a defendant does not meet his burden by filing a declaration by his attorney based on "information and belief."[68] Second, the defendant is not required to file a personal declaration in support of his motion.[69] Third, the defense is not required to disclose defense theories or trial strategies.[70]

If the defendant meets his burden

If the court rules the defense met its burden, the prosecution will will have six options:

(1) **REQUEST AN IN CAMERA HEARING**: If the CI is available and willing to testify at an *in camera* hearing, the best option is to ask the judge to convene an *in camera* hearing. If prosecutors make such a request, it must be granted.[71] See "In Camera Hearings," below.

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[62] *People v. Hardeman* (1982) 137 Cal.App.3d 823, 828.

[63] *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1044. Also see *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1083 ["Indeed one would have to engage in wild speculation about convoluted improbable plots to come up with a scenario which would produce testimony from his confidential informant tending to exonerate this appellant of this offense."]; *People v. Green* (1981) 117 Cal.App.3d 199, 208 ["[D]efendant's showing must encompass more than speculation."]; *People v. Fried* (1989) 214 Cal.App.3d 1309, 1315 ["The assertion that the informant may have been on the premises shortly before the search and planted the contraband . . . was supported by nothing more than counsels' 'information and belief.'"].

[64] (1985) 172 Cal.App.3d 763, 770.

[65] (1989) 214 Cal.App.3d 1522, 1536.

[66] (1983) 143 Cal.App.3d 709, 711.

[67] (9th Cir. 2001) 241 F.3d 638.

[68] See *People v. Oppel* (1990) 222 Cal.App.3d 1146, 1153; *People v. Fried* (1989) 214 Cal.App.3d 1309, 1315.

[69] See *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1044.

[70] See *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1048 ["a specific articulation of a defense is not required"].

[71] See Evid. Code § 1042(d); *People v. Reel* (1979) 100 Cal.App.3d 415, 420.

(2) **DISMISS CHARGES**: Dismiss the charges against the defendant.
(3) **REFUSE TO DISCLOSE**: Refuse to disclose the CI's identity, in which case the charges against the defendant will ordinarily be dismissed.[72]
(4) **REDUCE CHARGE**: If the CI is deemed a material witness only as to one element of the crime (e.g., intent to sell) disclosure will not be required if prosecutors charge the defendant with a crime that does not include that element; e.g., straight possession.[73] Also see "Complying With Disclosure Orders," below.
(5) **DISCLOSE**: Disclose the CI's identity.
(6) **APPEAL**: Appeal the judge's ruling that the CI is a material witness. However, an immediate appeal may not be a good option because, if prosecutors do so without first requesting an *in camera* hearing, and if they lose the appeal, the court must impose sanctions; e.g., dismissal.[74]

In Camera Hearings

The most effective way of proving that a CI is not a material witness is to have him appear before a judge at an *in camera* hearing and, after being sworn,[75] tell the judge what he knows. The term *"in camera"* means "[i]n the judge's private chambers, not in open court."[76] Consequently, the only people who are usually present are the judge, CI, prosecutor, investigating officer, and a court reporter. Although most *in camera* hearings are conducted in the judge's chambers, they may be conducted at a secret location if necessary to make sure no one will see the CI at the courthouse. As the California Supreme Court explained, "[P]recautions must be taken to protect [the informant's] identity, including the holding of the *in camera* hearing at a place other than the courthouse if deemed necessary to guarantee the informant's anonymity."[77]

A good discussion of the *in camera* procedure was provided by the court in *People v. Aguilera*:

> Since the crucial question as to disclosure is whether the informant could give testimony on the issue of guilt which would exonerate the defendant, the [*in camera* procedure] is highly advantageous and provides a method of eliminating the "guessing game" qualities which have often attended these determinations. It allows the prosecutor to produce the informant *in camera* so that the court can determine just what the informant knows, and whether his testimony would be material on the issue of guilt. If his testimony at the *in camera* hearing shows that there is no reasonable possibility the informant could aid the defense, the public interest in nondisclosure of his identity can be preserved without any infringement on the defendant's right to a fair trial.[78]

While the CI will usually testify at the hearing, it is not a requirement; i.e., prosecutors may present testimony from any person who can help prove that the CI is not a material witness.[79] As a practical matter, however, the CI's testimony is almost always necessary because the whole purpose of an *in camera* hearing is to eliminate the "guessing game" that necessarily results when prosecutors rely on circumstantial evidence to prove what the CI saw and heard. As Judge Jefferson warned prosecutors:

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[72] See *Roviaro v. United States* (1957) 353 U.S. 53, 61; *People v. Lawley* (2002) 27 Cal.4th 102, 159.
[73] See *People v. Lamb* (1972) 24 Cal.App.3d 378, 382 ["[T]here was ample and admissible evidence of possession. The most that the informer could have done for defendant would have been to cast doubt on the defendant's status as a seller. Under those circumstances, the interests of justice are best served by reducing the judgment [to straight possession]."]; *People v. Borunda* (1976) 58 Cal.App.3d 368, 375.
[74] See *People v. Viramontes* (1978) 85 Cal.App.3d 585, 593. Compare *In re Tracy J.* (1979) 94 Cal.App.3d 472, 478.
[75] See *People v. Gooch* (1983) 139 Cal.App.3d 342, 345; *People v. Lee* (1985) 164 Cal.App.3d 830, 834.
[76] See *The New Shorter Oxford English Dictionary* (4th ed. 1993) p. 1333. ALSO SEE: *Blacks Law Dict.* (4th ed. 1951) p. 892 ["*In camera*": "In chambers, private. A cause is said to be heard *in camera* either when the hearing is had before the judge in his private room or when all spectators are excluded from the courtroom."].
[77] *People v. Hobbs* (1994) 7 Cal.4th 948, 973.
[78] 61 Cal.App.3d 863, 868-69.
[79] See *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 29-30.

> [I]f an *in camera* hearing is held and the prosecutor does not produce the informer to testify, the prosecutor gambles on whether the evidence presented will satisfy the trial judge that the informer could *not* possibly give exonerating evidence. ¶ Experience indicates that only in the rare case are police officers or others able to offer competent evidence to obviate the necessity of the informer appearing and testifying.[80]

Those "rare cases" seem to be limited to situations in which the testifying officers could prove (1) that the CI was a "mere informant" or "fingerpointer," and (2) the defendant's guilt was based solely on circumstances that existed after the CI provided his information. For example, if the CI provided a tip that the defendant was selling drugs and, based on that tip, officers detained the defendant and discovered evidence during a pat search, it is likely that the CI would not be needed; i.e., that officer who discovered the drugs could prove he was not a material witness. Similarly, as noted earlier, if the defendant was charged with possession for sale, the CI's testimony would probably not be needed if the defendant's intent to sell was based on circumstances that existed at the time he was detained; e.g., intent based on the quantity of the drugs in his possession or the manner in which they were packaged.

On the other hand, the CI's testimony will likely be needed if there was a legitimate factual dispute that he could help resolve. For example, in *People v. Coleman*[81] the CI said he had seen Coleman and Dukes selling heroin inside Coleman's apartment. A few hours later, officers went there without the CI and, when Dukes opened the door, they seized heroin and sales paraphernalia in plain view.

The trial court ordered an *in camera* hearing to determine, among other things, whether the CI could testify that it was Dukes, not Coleman, who was running the heroin operation. But because the CI refused to testify, the prosecutor's only witness was the investigating officer who simply offered his opinion that the CI did not see or hearing anything that would help the defendant. Such testimony, said the court, was insufficient because it "does not begin to eliminate the guesswork involved in speculating what the informer's testimony would be if he were called to testify."

Complying With Disclosure Orders

In those rare cases in which officers elect to comply with the court's disclosure order, they will be required to disclose the CI's name, his address, and any other "pertinent information which might assist the defense to locate him."[82] And if officers do not have such information they must undertake "reasonable efforts" to obtain it.[83] In discussing this "reasonable effort" standard, the California Supreme Court explained:

> The "reasonable effort" required will, of course, depend on the facts of each case. If the informer has a regular abode and place of employment, simply obtaining his address and phone number may suffice; if he is a transient, or conceals his address, the law enforcement agency probably should make some arrangements for maintaining close communication with him.[84]

Officers may, however, avoid having to disclose the CI's address if they make him available to meet privately with defense counsel.[85] But this option should be used very selectively, if at all. POV

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[80] 2 Jefferson, *Evid. Benchbook* (2d ed. 1982) p. 1576. Also see *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1079, fn.1.
[81] (1977) 72 Cal.App.3d 287.
[82] *Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851. Also see *People v. Goliday* (1973) 8 Cal.3d 771.
[83] *Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851.
[84] *Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851. Also see *People v. Cheatham* (1971) 21 Cal.App.3d 675, 678, fn.3 [police efforts to keep track of the informant were sufficient, especially because "they were rendered fruitless by [the informant's] deceptive statements to the police and to the refusal of her friends to cooperate in locating her."]; *People v. Goliday* (1973) 8 Cal.3d 771, 782 ["The police must undertake reasonable efforts to obtain information by which the defense may locate such an informer."].
[85] See *People v. Rios* (1977) 74 Cal.App.3d 833.