

Confidential Informants: Protecting Their Identity

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

Utilizing confidential informants to obtain incriminating information has been described as “dirty business.”² And it certainly is. After all, the average CI is a “denizen of the underworld”³ who is assisting officers because he *wants* something, usually a break in a pending criminal case. As the court noted in *U.S. v. Bernal-Obseo*, “Criminals caught in our system understand they can mitigate their own problems with the law by becoming a witness against someone else.”⁴

It is also dirty business because CI’s—known in the trade as “snitches,” “stool pigeons,” “turncoats,” “snakes,” “rats,” and much worse—are “cut from untrustworthy cloth”⁵ and will lie and exaggerate when it suits their purposes. “Our judicial history,” said the Ninth Circuit, “is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison.”⁶

That being said, it is also true that CI’s play a vital role in the investigation of many types of crimes, especially drug trafficking and other varieties of criminal collusion.⁷ That’s because the people involved in illicit enterprises are naturally obsessed with secrecy. As a result, in many cases the only people who can obtain the inside information that will support arrests and search warrants are fellow felons and hoodlums.⁸ Furthermore, the information they furnish tends to be quite accurate, as demonstrated by the high percentage of productive search warrants based on their tips. As the United States Supreme Court summed it up, “[T]he informer is a vital part of society’s defensive arsenal.”⁹

¹ *Roviano v. United States* (1957) 353 U.S. 53, 67 (dis. opn. of Clark, J.).

² *On Lee v. United States* (1952) 343 U.S. 747, 757.

³ *On Lee v. United States* (1952) 343 U.S. 747, 756.

⁴ (9th Cir. 1993) 989 F.2d 331, 334. ALSO SEE *People v. Hambarian* (1973) 31 Cal.App.3d 643, 655 [“Many informers are themselves charged with or under investigation for criminal activity and give information to the police in the hope or expectation of receiving favorable treatment.”].

⁵ *U.S. v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331, 333. BUT ALSO SEE *U.S. v. Cook* (7th Cir. 1996) 102 F.3d 249, 252 [“Informants are tempted to manufacture or exaggerate evidence of crime, but law enforcement agents, aware of this, try to control them. An informant hired to buy drugs from a suspect will be searched before and after the transaction (to ensure that he has not brought his own drugs or kept the ‘buy’ money). An informant hired to negotiate a criminal transaction often will be wired for sound”].

⁶ *U.S. v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331, 334.

⁷ See *U.S. v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331, 335 [“Without informants, 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.”]; *People v. Pacheco* (1972) 27 Cal.App.3d 70, 81 [the “informer system” is “regarded as a necessity for law enforcement and which has existed from the very beginning of police work.”]; *On Lee v. United States* (1952) 343 U.S. 747, 756 [“Society can ill afford to throw away the evidence produced by the falling out, jealousies, and quarrels of those who live by outwitting the law.”].

⁸ See *U.S. v. Dennis* (2nd Cir. 1950) 183 F.2d 201, 224 [“[I]t is usually necessary to rely upon [CI’s] or upon accomplices because the criminals will almost certainly proceed covertly.”].

⁹ *McCray v. Illinois* (1967) 386 U.S. 300, 307.

For obvious reasons, however, CI's will flatly refuse to assist officers unless they are confident that their identity will be kept secret.¹⁰ In the words of the Court of Appeal, "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."¹¹

Because of this, the law gives officers a right—or "privilege"—to refuse to disclose a CI's identity to anyone.¹² They may even refuse to disclose information that would *tend to* reveal his identity.¹³ In other words, 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."¹⁴

Although this privilege is absolute—officers can *never* be required to identify a CI—a defendant may file a Motion to Disclose an Informant, commonly known as an "MDI." If this happens, and if the court determines that the CI would be a material witness for the defense, it must dismiss the charges against the defendant if, as is usually the case, officers invoke the privilege.

The reason the consequences are so severe is that an officer's refusal to identify a material defense witness would theoretically deny the defendant a fair trial.¹⁵ We say "theoretically" because in most cases the CI's testimony cannot possibly assist the defendant—and the defendant and his attorney know it. In fact, an inside informant is probably the last person in the world they would want to see on the witness stand.¹⁵ Furthermore, in many cases the defendant knows the CI's identity or is fairly certain of it.

¹⁰ 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."]; *People v. Pacheco* (1972) 27 Cal.App.3d 70, 80 ["It does not take a lively imagination to realize that [disclosure of an informant's identity] might constitute a death warrant for the informer"]; *McCray v. Illinois* (1967) 386 U.S. 300, 308 ["[A CI] will usually condition his cooperation on an assurance of anonymity"]; *Roviaro v. United States* (1957) 353 U.S. 53, 60 ["[T]he purpose of the privilege is to maintain the Government's channels of communication by shielding the identity of an informer from those who would have cause to resent his conduct."]; *People v. Lee* (1985) 164 Cal.App.3d 830, 835 ["Informants may be hesitant to cooperate if they believe they will be exposed to the danger of physical reprisals"]; *People v. Hobbs* (1994) 7 Cal.4th 948, 958 ["A citizen who knows [his identity could be revealed] may be loathe to cooperate . . . because he would justifiably believe himself to be in danger of physical violence from those upon whom he had informed"]; Evid. Code § 1041(a)(2) ["Disclosure of the identity of the informer is against the public interest"].

¹¹ *People v. Pacheco* (1972) 27 Cal.App.3d 70, 81.

¹² Evidence Code § 1041. ALSO SEE *People v. Hobbs* (1994) 7 Cal.4th 948, 960 ["The common law privilege to refuse disclosure of the identity of a confidential informant has been codified in Evidence Code section 1041"]; *People v. Goliday* (1973) 8 Cal.3d 771, 777 ["The common law informer's privilege . . . now lies embedded in Evidence Code section 1041."]. **NOTE:** The nondisclosure privilege is such a basic and sound principle that it was recognized by the common law. See *People v. McShann* (1958) 50 Cal.2d 802, 806 ["The common-law privilege of nondisclosure is based on public policy."]; 8 Wigmore, Evidence § 2374 (McNaughton rev. 1961) ["That the government has this privilege is well established, and its soundness cannot be questioned."].

¹³ See *Roviaro v. United States* (1957) 353 U.S. 53, 60 ["[W]here the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged."]; *People v. Hobbs* (1994) 7 Cal.4th 948, 962 ["[I]f disclosure of the contents of the informant's statement would *tend to disclose* the identity of the informer, the communication itself should come within the privilege."]; *U.S. v. Napier* (9th Cir. 2006) 436 F.3d 1133, 1136 ["[The privilege] protects more than just the name of the informant and extends to information that would tend to reveal the identity of the informant."].

¹⁴ *People v. Seibel* (1990) 219 Cal.App.3d 1279, 1289.

¹⁵ See *People v. Galante* (1983) 143 Cal.App.3d 709, 711 ["In truth, if this [CI] had been made available, his/her evidence would have but served to increase the charge against appellant from a single count of possession to multiple counts of sale."].

Why, then, do defendants file these motions? Because, like the lottery, it doesn't cost much to play, and the grand prize is liberating.

It is, therefore, important that officers and prosecutors understand how the informant-protection laws work, the danger areas, and the various options that are available to them.

WHO ARE CI's?

Not everyone who furnishes information to officers qualifies as a CI. Instead, the privilege applies only if the following circumstances existed.

(1) **INFORMATION ABOUT A CRIME:** The person must have furnished information about criminal activity.

(2) **INFORMATION TO POLICE:** The person must have known he was giving the information to an officer, or to a third person who would pass it along to an officer.

(3) **"IN CONFIDENCE":** The person must have furnished the information "in confidence," meaning there was reason to believe he wanted to remain anonymous.¹⁶ Such a desire will ordinarily be implied if, as is almost always the case, he would be in danger if his identity were revealed.¹⁷ A desire for anonymity will also be implied if he furnished the information to a secret witness hotline.¹⁸ On the other hand, crime victims and witnesses who meet with officers and freely provide them with information about a crime do not ordinarily qualify as CI's unless they requested anonymity.¹⁹

WHEN A CI IS "MATERIAL"

A CI will be deemed a material witness if there is a reasonable possibility he could provide evidence that would prove the defendant was not guilty.²⁰ In the words of the California Supreme Court:

¹⁶ See Evid. Code § 1041; *People v. Guereca* (1987) 189 Cal.App.3d 884, 889 [a person was not a CI when he didn't know that the person he was talking with was an officer].

¹⁷ See *People v. Otte* (1989) 214 Cal.App.3d 1522, 1531 ["The confidentiality of which [the privilege] speaks is the public interest in the confidentiality of the informant's identity for purposes of effective law enforcement."]. **NOTE:** The term "in confidence" has also been interpreted to mean that the public interest would be served if the CI's identity was kept confidential. See *People v. Otte* (1989) 214 Cal.App.3d 1522, 1532; *People v. Seibel* (1990) 219 Cal.App.3d 1279, 1286-8; *People v. Superior Court (Biggs)* (1971) 19 Cal.App.3d 522, 532 ["There is a recognized public interest in shielding the anonymity of narcotics informers."].

¹⁸ 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."].

¹⁹ See *People v. Lanfrey* (1988) 204 Cal.App.3d 491, 498 [an eyewitness provided information "in confidence" when he "requested that his identity remain confidential."]. **NOTE: Waiver of the privilege:** Even if the privilege applies, officers or prosecutors will be deemed to have waived it if they revealed the CI's identity in open court (see Evid. Code § 1041(a)(2)), or if they divulged his identity to the defendant or anyone else "who would have cause to resent the communication." See *Roviaro v. United States* (1957) 353 U.S. 53, 60. The privilege does not, however, terminate upon the death of the CI or because the defendant learned of his identity from someone other than officers or prosecutors. See *Roviaro v. United States* (1957) 353 U.S. 53, 67 (dis. opn. of Clark, J.) ["Experience teaches that once this policy [of nondisclosure] is relaxed—even though the informant be dead—its effectiveness is destroyed."]; *People v. Otte* (1989) 214 Cal.App.3d 1522, 1534, fn.7 ["The public policy [of nondisclosure] applies even if the informant is known to the defendant, and even if the informant is dead."].

²⁰ See *People v. Garcia* (1967) 67 Cal.2d 830, 840; *Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 419 [a CI is material if he could "rebut a material element of the prosecution's case and thereby prove his innocence."]; *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1043; *People v. Long* (1974) 42 Cal.App.3d 751, 757 [a CI is material if his "testimony might, when taken together with other evidence, tend to raise a

An informant is a material witness if there appears, from the evidence, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant.²¹

As we will discuss later, it is usually possible to prove a CI is not a material witness by having him testify at a closed hearing and explain to the judge exactly what he saw or heard. Otherwise, the court must make its determination based on circumstantial evidence.

The most important circumstance is usually whether the CI was in a position to see how the crime was committed or who committed it.²² If so, he will probably be deemed material. As the Court of Appeal observed, “If the evidence shows that the informer had a sufficiently proximate vantage point, Supreme Court decisions simply speculate concerning the informer’s potential testimony and hold that the defendant has demonstrated a reasonable possibility that the informant could [provide exonerating evidence].”²³

Consequently, it is often possible to determine whether a CI will qualify as a material witness by looking to see if he falls into one of the following categories: (1) accomplices and eyewitnesses; (2) vicinity witnesses; or (3) “mere informants,” also known as “fingerpointers.”

Accomplices and eyewitnesses

In the absence of direct evidence to the contrary, a CI will be adjudged a material witness if he participated in, or witnessed, the crime with which the defendant was charged. This is because such a person would have been in a unique position to see or hear things that might disprove an element of the charged crime.²⁴ As noted 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 . . .²⁵

For example, the courts have ruled that CI’s were material witnesses in the following situations:

reasonable doubt . . . which would result in the defendant’s exoneration.”]; Evid. Code § 1042(d) [a CI is a material witness if there is a “reasonable possibility that nondisclosure might deprive the defendant of a fair trial.”]. ALSO SEE *Roviaro v. United States* (1957) 353 U.S. 53, 60-1 [“Where the disclosure of an informant’s identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.”].

²¹ *People v. Lawley* (2002) 27 Cal.4th 102, 159.

²² 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.”].

²³ *Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 423-4.

²⁴ See *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.”]; *Price v. Superior Court* (1970) 1 Cal.3d 836, 842 [“The People do not dispute that, if Price had shown that the informer was a witness at the scene of the crime, disclosure of identity or dismissal would be required.”]; *People v. Ruiz* (1992) 9 Cal.App.4th 1485, 1487 [“[T]he CI’s *in camera* testimony is essential because he was an eyewitness to the alleged transaction.”].

²⁵ (1974) 38 Cal.App.3d 412, 420.

- The defendant was charged with selling drugs to the CI.²⁶
- The CI was present when the defendant sold drugs to an undercover officer.²⁷
- The CI was present when an undercover officer sold illegal firearms to the defendant.²⁸
- The defendant was charged with attempted murder, and there was a reasonable possibility that the CI was present when the crime occurred.²⁹

Vicinity witnesses

A CI who did not actually witness the crime may nevertheless be deemed a material witness if he was in the vicinity when it occurred and was in a position to see things that might prove the defendant was innocent.³⁰ For example, if the defendant claims he was misidentified, a CI who saw the perpetrator arriving at or leaving the scene would likely be a material witness because, as the court observed in *In re Tracy J.*, “Particularly in a case where there is a real question of identity, any witness who might be able to cast light on that issue would be material.”³¹

“Mere” informants (“Fingerpointers”)

The most common type of CI is the “mere informant” or “fingerpointer.” This is someone who tells officers that a certain person is engaged in criminal activity, typically drug trafficking. Fingerpointers may also provide some details, such as the modus operandi and the names of the other players. Based on the tip, officers will launch an investigation and, if all goes well, obtain incriminating evidence, often by means of a search warrant. As the California Supreme Court observed:

[A “mere informer”] 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.³²

²⁶ *Roviaro v. United States* (1957) 353 U.S. 53, 64 [“This is a case where the Government’s informer was the sole participant, other than the accused, in the transaction charged.”]. ALSO SEE *People v. McShann* (1958) 50 Cal.3d 802, 806 [“Since the alleged sale by the defendant was to the informer, defendant was clearly entitled to disclosure of his identity.”]; *People v. Cheatham* (1971) 21 Cal.App.3d 675, 677-8 [“Since [the CI] 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.”]; *Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851 [“[The CI] was both an eyewitness to, and participant in, the sale of seconal and without question was a material witness on the issue of guilt.”]; *Sorrentino v. U.S.* (9th Cir. 1947) 163 F.2d 627, 628-9 [“[The CI] was the person to whom appellant was said to have sold and dispensed the opium”].

²⁷ *People v. Lee* (1985) 164 Cal.App.3d 830, 840 [“[O]nly the informant could testify as to whether defendant personally had been selling PCP, whether she or another or others exercised dominion and control over the drugs and the nature and extent of the informant’s personal knowledge of these matters.”]. ALSO SEE *People v. Goliday* (1973) 8 Cal.3d 771, 775 [CI and an undercover officer were present when the sale occurred]; *People v. Ruiz* (1992) 9 Cal.App.4th 1485 [CI was present when defendant sold drugs to an undercover officer]; *People v. Guereca* (1987) 189 Cal.App.3d 884, 889 [“[The CI] was a material witness on guilt, at least as to the sales transaction which occurred in his presence.”].

²⁸ *People v. Rios* (1977) 74 Cal.App.3d 833, 837.

²⁹ *Price v. Superior Court* (1970) 1 Cal.3d 836, 842.

³⁰ See *Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 423 [the issue is whether the informant “viewed either the commission or the immediate antecedents of the alleged crime.”].

³¹ (1979) 94 Cal.App.3d 472, 477-8.

³² *People v. Garcia* (1967) 67 Cal.2d 830, 836 [quoting from *People v. Lawrence* (1957) 149 Cal.App.2d 436, 450]. ALSO SEE *People v. Blouin* (1978) 80 Cal.App.3d 269, 287 [“[The CI] 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. Hobbs*

In most cases, fingerpointers who testify at private or public hearings are deemed not material. This is because, as the court observed in *People v. Hardeman*, “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 of a charge or information which rises from the arrest.”³³

If, however, the fingerpointer does not testify, the court must base its decision on circumstantial evidence. What circumstances are important? As we will now discuss, the courts are particularly interested in the length of time between the CI’s observations and the discovery of the evidence, the strength of the prosecution’s case, whether the CI can disprove intent, and whether the defendant is seeking disclosure merely to attack probable cause.

STALE AND FRESH OBSERVATIONS: The more time that elapsed between the fingerpointer’s observations and the officers’ discovery of the evidence, the greater the chance he will be deemed *not* material.³⁴ This is because the circumstances that existed when the CI made his observations will frequently have little or no relevance in proving the existence of circumstances that existed much later when the evidence was discovered. For example, in ruling that a fingerpointer was not material, 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.”³⁵
- “[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 . . .”³⁶

(1994) 7 Cal.App.4th 948, 959; *People v. Seibel* (1990) 219 Cal.App.3d 1279, 1288-9; *People v. Martin* (1969) 2 Cal.App.3d 121, 128.

³³ (1982) 137 Cal.App.3d 823, 828-9. ALSO SEE *Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 420 [“[W]hen the informer is shown to have been neither a participant in nor a nonparticipant eyewitness to the charged offense, the possibility that he could give evidence which might exonerate the defendant is even more speculative and, hence, may become an unreasonable possibility.”]; *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.”]; *In re Benny S.* (1991) 230 Cal.App.3d 102, 108 [“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”].

³⁴ See *Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 423 [“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.”]; *People v. Hardeman* (1982) 137 Cal.App.3d 823, 829 [“The existence of a reasonable possibility that testimony given by an unnamed informant could be relevant to the issue of defendant’s guilt becomes less probable as the degree of attenuation which marked the informer’s nexus with the crime decreases.”].

³⁵ *People v. Fried* (1989) 214 Cal.App.3d 1309, 1316. ALSO SEE *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 [3 days]; *People v. Hambarian* (1973) 31 Cal.App.3d 643 [5 days]; *People v. Thompson* (1979) 89 Cal.App.3d 425 [more than a week].

³⁶ *People v. Otte* (1989) 214 Cal.App.3d 1522, 1536.

- “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 . . . ”³⁷

In contrast, in *Williams v. Superior Court*³⁸ a affiant reported that the CI had told him he saw Williams and a man named Anderson selling heroin inside Williams’ home, and that the sales occurred on either July 25th or July 26th. Based on this information, a warrant was issued and executed on the 26th. The search netted heroin possessed for sale. Although the heroin was found in Williams’ home, the CI was deemed material because he had been there shortly before the search and might have testified that only Anderson was selling.

STRENGTH OF EVIDENCE: The stronger the evidence of the defendant’s guilt, the less likely a fingerpointer will be able to help him. Some examples:

ID CASES: If the defendant’s guilt depends on ID, it is doubtful that a fingerpointer would be a material witness if the ID evidence was strong. For example, in *U.S. v. Henderson*³⁹ the defendant, who was charged with bank robbery, 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 the CI was not a material witness.

STRAIGHT POSSESSION: If the defendant was charged with straight possession of drugs that officers found on his person, there is simply no *reasonable* possibility that the CI could help him at trial.⁴⁰

POSSESSION FOR SALE: If the defendant was charged with possession with intent to sell, he may claim he possessed the drugs for personal use, and that the CI could help prove it. Whether this argument succeeds will depend mainly on how the defendant’s intent will be proven.

INTENT BASED ON CONTROLLED BUY: A CI will certainly be deemed a material if the defendant’s intent will be based on his selling drugs to the informant.⁴¹

³⁷ *People v. Sewell* (1970) 3 Cal.App.3d 1035, 1039.

³⁸ (1974) 38 Cal.App.3d 412, 422. ALSO SEE *People v. Goliday* (1973) 8 Cal.3d 711, 775 [officers entered five minutes after informant made a controlled buy]; *People v. Coleman* (1977) 72 Cal.App.3d 287, 296 [“only a few hours”]; *People v. Ingram* (1978) 87 Cal.App.3d 832, 837 [one day]; *Honore v. Superior Court* (1969) 70 Cal.2d 162, 169 [one day].

³⁹ (9th Cir. 2001) 241 F.3d 638, 646.

⁴⁰ 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, 518-9 [“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. Garcia* (1970) 13 Cal.App.3d 486, 490 [defendant threw a heroin-filled balloon from his car during a pursuit instigated by information from informant]; *In re Benny S.* (1991) 230 Cal.App.3d 102, 108-9 [“[T]he charged offense was not sale of either cocaine or marijuana but possession for sale of the marijuana found in the pocket of the jacket appellant was wearing. In such circumstances the cases have consistently found the confidential informant not a material witness.” Citations omitted.]; *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.”]. **NOTE: Fingerpointers who can disprove sole possession:** A CI should not be deemed material on the issue of the defendant’s possession just because others also possessed the drugs. See *People v Hambarian* (1973) 31 Cal.App.3d 643, 659 [“Conviction need not be predicated upon exclusive possession, and a showing of nonexclusive possession would not exonerate defendant.”]; *People v. Green* (1981) 117 Cal.App.3d 199, 208; *People v. Galante* (1983) 143 Cal.App.3d 709, 712 [“[T]he fact that appellant’s past possessions of contraband may not always have been exclusive did not justify the requested [disclosure] order.”].

INTENT BASED ON QUANTITY AND PACKAGING: CI's are seldom adjudged material in cases where the defendant's intent to sell will be based on circumstances that existed when officers seized drugs, such as the quantity of the drugs, the manner in which they were packaged, or the presence of sales or manufacturing paraphernalia.⁴² For example, in *People v. Goliday* the court ruled that "the large quantity of narcotics found in the defendant's apartment raised an inference that defendant intended to sell them."⁴³ Similarly, in *People v. Alderrou* the court pointed out that the prosecution proved the defendant possessed the drugs for sale by relying on "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 personal use."⁴⁴

CONSTRUCTIVE POSSESSION CASES: If drugs were not found on the defendant's person but, instead, were discovered in his home, car, or other place over which he had control (i.e., "constructive possession"⁴⁵), he may claim that the drugs belonged to someone else, and that the fingerprinter could help him prove it. These claims are, however, seldom successful when the evidence that the defendant possessed the drugs was substantial, as in the following situations:

SUSPECT ADMITS: The defendant admitted to officers that the drugs were his.⁴⁶

DRUGS IN DEFENDANT'S HOME: The defendant was the sole occupant of the house in which the drugs were found, or his possession of the drugs was established through a controlled buy.⁴⁷

⁴¹ See *People v. Lee* (1985) 164 Cal.App.3d 830, 837-8 [controlled buy within 72 hours]. COMPARE *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1081 [defendant was not charged with any sale "which he may have made to the confidential informant or which the confidential informant may have witnessed."].

⁴² See *People v. Borunda* (1976) 58 Cal.App.3d 368, 376 ["[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."]; *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 31; *People v. Aguilera* (1976) 61 Cal.App.3d 863, 870, fn.7 ["In fact it is arguable that even if the informant could testify that someone other than defendant was engaged in sales at the residence, it would be irrelevant and could not help defendant, since the charge was based on a commercial quantity, commercially packaged, which she held in her own hand."]; *People v. Acuna* (1973) 35 Cal.App.3d 987, 992 [because intent to sell was based solely on the drugs that were carried by the defendant, it would have been irrelevant that "the defendant was not involved in the prior sale between [the CI] and codefendant Alford eight days before, or that defendant was a mere visitor to the apartment, or that he had purchased narcotics at the apartment several times before and had never seen defendant on any of those occasions, or that codefendant Alford was the only resident of the apartment during the time preceding the search"].

⁴³ (1973) 8 Cal.3d 771, 783-4.

⁴⁴ (1987) 191 Cal.App.3d 1074, 1081.

⁴⁵ See *Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 423 [constructive possession is possession "imputed to the defendant by reason of the location at which the contraband is discovered"].

⁴⁶ See *People v. Alvarez* (1977) 73 Cal.App.3d 401, 406 ["In fact, defendant admitted to the officers that everything they found was his."]; *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1077 ["Appellant told the officer his girl friend had nothing to do with the cocaine and everything in the bedroom related to narcotics belonged to him."]; *People v. Martin* (1969) 2 Cal.App.3d 121, ["[D]efendant admitted that he lived in the apartment [where the drugs were found] and owned a certain suit in the pocket of which contraband was found."]; *People v. Thomas* (1975) 45 Cal.App.3d 749, 755 [defendant admitted the heroin "was his."]. COMPARE *People v. Long* (1974) 42 Cal.App.3d 751, 755 [the evidence that defendant lived in the apartment was weak]; *People v. Viramontes* (1978) 85 Cal.App.3d 585, 592 [distinguishes *Alvarez* and *Martin*].

⁴⁷ See *People v. Thompson* (1979) 89 Cal.App.3d 425, 433 ["Defendant's connection with the house and the heroin on the date of the arrest was overwhelmingly established by the observations of the officers, unrelated to any information provided by the informant. The identity of the informant was totally irrelevant."].

DRUGS IN SAFE: The drugs were found in a safe to which the defendant possessed the combination or key.⁴⁸

DRUGS IN LOCKED ROOM: The drugs were found in a locked room; a key to the room was found in the defendant's possession.⁴⁹

SUSPECT ATTEMPTS TO DELAY SEARCH: When officers knocked and announced, the defendant attempted to prevent their entry.⁵⁰

DRUGS IN VARIOUS ROOMS: Officers found drugs "scattered throughout the apartment."⁵¹

INDICIA FOUND: Officers found indicia linking the defendant to the drugs; e.g. the drugs were found in a dresser which also contained the defendant's driver's license, social security card, and a letter addressed to her.⁵²

RECENT DRUG USE: The defendant's physical condition "evidenced recent drug use."⁵³

FINGERPOINTER NAMED THE DEFENDANT: When the fingerprinter provided officers with his tip, he positively identified the defendant as the person who possessed the drugs.⁵⁴

On the other hand, if the link between the defendant and the drugs was weak, a court might rule the CI was material, especially if there was reason to believe that the defendant did not control the place or thing in which the drugs were found, or if there were other people on the premises who might have possessed the drugs.⁵⁵

⁴⁸ 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."].

⁴⁹ See *People v. Green* (1981) 117 Cal.App.3d 199, 208 ["the key seized from defendant's belt opened the door to the storeroom."]. ALSO SEE *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"].

⁵⁰ See *People v. Thompson* (1979) 89 Cal.App.3d 425, 433.

⁵¹ *People v. Goliday* (1973) 8 Cal.3d 771, 783. ALSO SEE *People v. Martin* (1969) 2 Cal.App.3d 121, 128 [officer could smell burnt marijuana inside the defendant's apartment, and defendant admitted living there].

⁵² *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"].

⁵³ See *People v. Thomas* (1975) 45 Cal.App.3d 749, 755.

⁵⁴ See *People v. Hardeman* (1982) 137 Cal.App.3d 823, 829 [the CI 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. Thompson* (1979) 89 Cal.App.3d 425, 428 [CI identified the defendant].

⁵⁵ See *People v. Viramontes* (1978) 85 Cal.App.3d 585, 591-2 ["[T]he People had little evidence, besides the fact that defendant was seen at the apartment and was later arrested there, that would tend to establish that he did in fact reside [there]."]; *People v. Garcia* (1967) 67 Cal.2d 830, 839 [people other than Garcia 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"]; *People v. Hardeman* (1982) 137 Cal.App.3d 823, 829 [CI said the only person he saw selling drugs was the defendant]; *Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 422 [CI was deemed material because he had been in the house shortly before the search and he might have testified that Anderson was the seller]; *Honore v. Superior Court* (1969) 70 Cal.2d 162, 168-9 [defendant was in jail shortly before the drugs were discovered; in addition, while she was in jail, the CI had seen other people in the apartment]; *People v. Ingram* (1978) 87 Cal.App.3d 832, 837 ["There is a direct conflict concerning whether defendant resided in apartment 107."]; *In re Tracy J.* (1979) 94 Cal.App.3d 472, 477-8 ["Particularly in a case where there is a real question of identity, any witness who might be able to cast light on that issue would be material."] *People v. Coleman* (1977) 72 Cal.App.3d 287; *People v. Lamb* (1972) 24 Cal.App.3d 378, 382 ["... it might have developed that the sales were made by someone other than defendant and that defendant was only a user and not a seller."]; *U.S. v Spires* (9th Cir. 1993) 3 F.3d 1234, 1238-9.

FINGERPOINTERS WHO CAN HELP IN CHALLENGING SEARCH WARRANTS: Even if the fingerpointer cannot help the defendant prove he is innocent, he may seek disclosure on grounds the CI could help him prove that probable cause for a search or arrest warrant did not exist. These motions are, however, summarily denied. As the California Supreme Court observed, “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.”⁵⁶

There are several reasons for this rule. For one thing, the judge who issued the warrant determined that probable cause did, in fact, exist. And if the judge thought there was some reason to question the CI, he could have done so.⁵⁷ Furthermore, the defendant is not seeking disclosure to protect his right to a fair trial. Instead, he is trying to “avoid the truth.”⁵⁸ The courts have also noted that there is no indication that officers are abusing the search warrant procedure by including information from non-existent informants or misrepresenting the nature of the informant’s tips.⁵⁹

Note: Other legal issues pertaining to fingerpointers are discussed at the end of this article.

DEFENDANT’S BURDEN

A defendant who files an MDI has the burden of presenting “some evidence” that the CI is a material witness.⁶⁰ In determining whether the defendant has met his burden, the courts consider the following.

SPECULATION IS NOT “EVIDENCE”: Because “some evidence” is required, a defendant cannot satisfy his burden by merely asserting that the CI might be of help.⁶¹ This occurred in *In re Robert B.*, prompting the following response from the court:

⁵⁶ *People v. Hobbs* (1994) 7 Cal.App.4th 948, 959. ALSO SEE *People v. Keener* (1961) 55 Cal.2d 714, 723 [“[W]here a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer in order to establish the legality of the search”]; *People v. Hardeman* (1982) 137 Cal.App.3d 823, 830 [“A request by respondent to disclose the informant’s identity based on an attack against the probable cause would necessarily fail.”]; *Cooper v. Superior Court* (1981) 118 Cal.App.3d 499, 509; *People v. Flemmings* (1973) 34 Cal.App.3d 63, 68; Evid. Code § 1042(c).

⁵⁷ See *People v. Keener* (1961) 55 Cal.2d 714, 723 [“[The magistrate] may, if he sees fit, require disclosure of the identity of the informant before issuing the warrant or require that the informant be brought to him.”]; *People v. Hobbs* (1994) 7 Cal.App.4th 948, 960.

⁵⁸ See *McCray v. Illinois* (1967) 386 U.S. 300, 307 [“Here, however, the accused seeks to avoid the truth.” Quoting *State v. Burnett* (1964) 201 A.2d 39, 44]; *People v. Hobbs* (1994) 7 Cal.App.4th 948, 968.

⁵⁹ See *People v. Keener* (1961) 55 Cal.2d 714, 723 [“[I]t does not appear that there has been frequent abuse of the search warrant procedure.”].

⁶⁰ See *People v. Lawley* (2002) 27 Cal.4th 102, 159.

⁶¹ See *People v. Lawley* (2002) 27 Cal.4th 102, 159 [“The defendant bears the burden of adducing some evidence on this score.”]; *People v. Hardeman* (1982) 137 Cal.App.3d 823, 828 [“This burden is met only where the defendant demonstrates through ‘some evidence’ that [the informant is material].”]; *People v. Fried* (1989) 214 Cal.App.3d 1309, 1314 [“[D]efendant’s offer of proof was inadequate to establish a prima facie case for disclosure. . . . there simply was no need for the magistrate to conduct an *in camera* hearing in the first instance.”]; *People v. Opper* (1990) 222 Cal.App.3d 1146, 1152 [“It is incumbent on the defendant to make a prima facie showing for disclosure before an *in camera* hearing is appropriate.”]; *People v. Alvarez* (1977) 73 Cal.App.3d 401, 406 [unsupported claim that police “planted” the evidence is insufficient]; *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.”]; *U.S. v. Henderson* (9th Cir. 2001) 241 F.3d 638, 645 [defendant must “show more than a mere suspicion that the informant has information which will prove ‘relevant and helpful’ to his defense, or that will be essential to a fair trial.”].

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.⁶²

Similarly, in *People v. Galante*⁶³ a CI’s tip enabled officers to obtain a warrant to search the defendant’s home. During the search, they found 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; e.g., the CI might have seen the defendant’s son hand it to him. In ruling the defense attorney’s musings did not constitute “some evidence,” the Court of Appeal pointed out:

Obviously all of these self-contradictory “may have beens” could not possibly be true, although they all could be, and apparently were, false. Furthermore, appellant himself necessarily knew to a certainty if any of them had any basis in fact and could so have apprised his counsel and the court at any time.

Still, because the courts must presume that the defendant does not know the CI’s identity (and therefore does not know what the informant saw or heard), not much “evidence” is required.⁶⁴

METHODS OF PROOF: If the CI furnished information that was used to obtain a search or arrest warrant, the defendant may meet his burden by introducing the officer’s affidavit into evidence, then making reasonable inferences as to the CI’s expected testimony.⁶⁵ A defendant cannot, however, meet his burden by filing a declaration by his attorney based on “information and belief.”⁶⁶

IF THE DEFENDANT MEETS HIS BURDEN: If the defendant meets his burden, the CI becomes a prima facie material witness, which means the burden shifts to the prosecution to prove the CI is not material.⁶⁷ It also means the court *must* conduct an open hearing⁶⁸ at which prosecutors will be given five options:

⁶² (1985) 172 Cal.App.3d 763, 770.

⁶³ (1983) 143 Cal.App.3d 709, 711.

⁶⁴ See *Price v. Superior Court* (1970) 1 Cal.3d 836, 843 [“[T]he defendant’s burden [requires] only some evidence of a possibility that the unnamed informer is a material witness.”]; *U.S. v. Spires* (9th Cir. 1993) 3 F.3d 1234, 1238; *People v. Blouin* (1978) 80 Cal.App.3d 269, 288 [“The showing is not as to what [the CI] would testify but as to what he might testify.”]; *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1044 [the defendant need not “demonstrate a reasonable possibility of the exact testimony the informant is expected to give.”].

⁶⁵ See *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1044 [“[T]he affidavit to support the search warrant that recites the informant’s communication to the police officer is considered admissible evidence for this purpose.”]; *People v. Hardeman* (1982) 137 Cal.App.3d 823, 829 [court considers affidavit]; *People v. Otte* (1989) 214 Cal.App.3d 1522, 1536 [“[Defendant] may rely upon reasonable inferences from the People’s evidence”]; *People v. Alvarez* (1977) 73 Cal.App.3d 401, 406 [defendant “may instead rely upon reasonable inferences from the People’s evidence.”].

⁶⁶ See *People v. Oppel* (1990) 222 Cal.App.3d 11461153 [“We hold that the affidavit of an attorney for a party, made on information and belief, cannot, as a matter of law, be construed to be evidence”]; *People v. Fried* (1989) 214 Cal.App.3d 1309, 1315. **NOTES:** A declaration from the defendant is not mandatory. See *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1044. [defendant’s testimony “is not a necessary ingredient to obtain disclosure.”]. Defendants are not required to disclose a defense theory or trial strategy. See *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1048 [“a specific articulation of a defense is not required”].

⁶⁷ **“Prima facie case” defined:** “Such as will suffice until contradicted and overcome by other evidence.” Black’s Law Dict. (4th ed. 1951) p. 1353. ALSO SEE Merriam-Webster’s Collegiate Dictionary (11th ed. 2003) p. 985-6 [Prima facie defined: “[S]ufficient at first impression; apparent.”].

- (1) DISCLOSE: They may disclose the CI's identity.
- (2) REFUSE TO DISCLOSE: They may refuse to disclose, in which case the charges against the defendant will be dismissed.⁶⁹
- (3) APPEAL: Although prosecutors may appeal the court's ruling, an appeal without requesting an *in camera* hearing is not recommended because, if they lose, the court may be required to impose sanctions; e.g., dismissal of charges.⁷⁰
- (4) PROVE IN OPEN COURT: Prosecutors can try to prove the CI is not material by presenting testimony in open court from officers or civilians (other than the CI). This option is utilized primarily when the CI was merely a fingerpointer, and he refuses to testify at an *in camera* hearing or cannot be located.
- (5) IN CAMERA HEARING: Prosecutors may attempt to prove the CI is not material by taking the direct approach and having him meet with the judge in a closed hearing—known as an “in camera hearing”—and explain exactly what he saw and heard. In most cases, this is the best option. In fact, the Court of Appeal has advised the trial courts that, when a defendant meets his burden, the “preferable procedure” is to notify the prosecution before making a final ruling so that prosecutors will have “the opportunity to request such an *in camera* hearing.”⁷¹

IN CAMERA HEARINGS

The easiest and 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 tell the judge what he knows. The term “*in camera*” means “[i]n the judge’s private chambers, not in open court.”⁷² Thus, in the context of MDI hearings, the term is used to describe a hearing that is closed to the public, and closed to the defendant and his attorney.⁷³ In fact, the only people who may be present are the CI, judge, prosecutor, investigating officer, and court reporter.⁷⁴

⁶⁸ See Evid. Code § 1042(d) [“. . . the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure.”]; *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1079 [“[T]he trial judge complied with the procedures outlined in the Evidence Code. It first held an open, adversary hearing.”]; *People v. Rios* (1977) 74 Cal.App.3d 833, 839 [“[T]he court shall conduct a hearing at which the parties may present evidence”].

⁶⁹ See *Roviaro v. United States* (1957) 353 U.S. 53, 61 [“In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.”]; *People v. Hobbs* (1994) 7 Cal.4th 948, 959 [“. . . the People must either disclose his identity or incur a dismissal.”]; *People v. Lawley* (2002) 27 Cal.4th 102, 159 [“[T]he prosecution must disclose the name of an informant who is a material witness in a criminal case or suffer dismissal of the charges against the defendant.”].

⁷⁰ See *People v. Viramontes* (1978) 85 Cal.App.3d 585, 593 [“Having failed to [request an *in camera* hearing] the People cannot now complain that the record in this respect is uncertain.”]. COMPARE *In re Tracy J.* (1979) 94 Cal.App.3d 472, 478 [failure of prosecution to request an *in camera* hearing did not bar remand for an *in camera* hearing where the prosecution, having succeeded in blocking the motion in the trial court, had no reason to seek an *in camera*]; *People v. Ingram* (1978) 87 Cal.App.3d 832, 840-2 [remand for *in camera*].

⁷¹ *People v. Allen* (1980) 101 Cal.App.3d 285, 289.

⁷² *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.”].

⁷³ See *People v. Hobbs* (1994) 7 Cal.4th 948, 973 [“[D]efendant and his counsel are to be excluded unless the prosecutor elects to waive any objection to their presence.”].

⁷⁴ See *People v. Hobbs* (1994) 7 Cal.4th 948, 973 [“The prosecutor may be present at the *in camera* hearing”]; *Cooper v. Superior Court* (1981) 118 Cal.App.3d 499, 504; *People v. Gooch* (1983) 139 Cal.App.3d 342, 344.

Because *in camera* hearings are private, the CI can freely tell the judge exactly what he saw or heard.⁷⁵ For this reason, the *in camera* hearing is the “favored procedure”⁷⁶ as it eliminates the “guessing game” that necessarily results when a court must rely on circumstantial evidence to determine what a CI saw or heard.⁷⁷ Moreover, it accomplishes this without risking inadvertent disclosure. As the Ninth Circuit pointed out, an *in camera* hearing “bears little risk of disclosing the identity of the informant and does not jeopardize the government’s future use of that individual.”⁷⁸

Procedure

The following is the procedure the courts follow when prosecutors request an *in camera* hearing:

REQUEST MUST BE GRANTED: The court must grant the prosecution’s request.⁷⁹

SECURITY PRECAUTIONS: The defense is never told when or where the *in camera* hearing will take place. While most hearings are held in the judge’s chambers, they may be held elsewhere (such as a police station or a prosecutor’s office) if the court determines that such a precaution is necessary to protect the informant. 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.”⁸⁰

⁷⁵ See *People v. Aguilera* (1976) 61 Cal.App.3d 863, 868 [the procedure “allows the prosecutor to produce the informant *in camera* so that the court can determine just what the informant knows”]; *People v. Reel* (1979) 100 Cal.App.3d 415, 420 [“The *in camera* hearing is a highly advantageous procedure providing an expanded evidentiary base for the trial court’s determination.”]; Evidence Code § 915(b) [“If the judge determines that the information is privileged, neither the judge nor an other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.”].

⁷⁶ *U.S. v. Spires* (9th Cir. 1993) 3 F.3d 1234, 1238.

⁷⁷ See *People v. Aguilera* (1976) 61 Cal.App.3d 863, 868 [the *in camera* procedure “is highly advantageous and provides a method of eliminating the ‘guessing game’ qualities which often attend these determinations.”]; *People v. Blouin* (1978) 80 Cal.App.3d 269, 288 [“[T]he speculative possibility that the informant might possess exculpatory information could well have been investigated by an *in camera* hearing”]. ALSO SEE *People v. Viramontes* (1978) 85 Cal.App.3d 585, 591 [“[The problem] is in determining what constitutes a ‘reasonable possibility,’ and in trying to ascertain, prior to an informant’s testimony, what he ‘might’ testify to if he were forced to come forth with his story.”].

⁷⁸ *U.S. v. Spires* (9th Cir. 1993) 3 F.3d 1234, 1238.

⁷⁹ See Evid. Code § 1042(d) [“. . . the prosecuting attorney may request that the court hold an *in camera* hearing. If such a request is made, the court shall hold a hearing”]; *People v. Reel* (1979) 100 Cal.App.3d 415, 420 [“If such a request is made, the court must entertain the same and hold a hearing”]; *People v. Aguilera* (1976) 61 Cal.App.3d 863, 870 [“[T]he language of Evidence Code section 1042(d) is mandatory.”]; *People v. Blouin* (1978) 80 Cal.App.3d 269, 288 [mandatory language]; *In re Benny S.* (1991) 230 Cal.App.3d 102, 106. **NOTE:** In *Aguilera*, the court indicated that an *in camera* hearing would not be required if it was apparent that the CI was material; e.g., the CI was a percipient witness. At p. 870, fn. 6. This is inaccurate. Many CI’s who were percipient witnesses are determined not to be material witnesses when, as the result of an *in camera* hearing, the court determines they could only furnish incriminating evidence. See *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1080-1 [“[A]n informant is not a ‘material witness’ . . . where the informant’s testimony although ‘material’ on the issue of guilt could only further implicate rather than exonerate the defendant.”]; *People v. Ruiz* (1992) 9 Cal.App.4th 1485, 1488-9 [even though the CI witnessed the transaction, evidence presented at the *in camera* hearing can establish that he was not material].

⁸⁰ *People v. Hobbs* (1994) 7 Cal.4th 948, 973. ALSO SEE *State v. Richardson* (1987) 529 A.2d 1236, 1241 [“The defendant or his criminal associates may through a variety of means learn when the [*in camera* hearing] is taking place, and observe those who enter the courthouse at that time.”]. **NOTE:** In extreme cases, the hearing can be conducted over the telephone. The usual procedure is as follows: The CI will go a secure location, such as a police station in another jurisdiction. Telephone contact will then be made with the court, where the judge, prosecutor, investigating officer, and court reporter will listen on a speakerphone, usually in the judge’s chambers. An officer with the CI will videotape his testimony. After the judge swears

INFORMANT MUST BE SWORN: The judge must administer the oath to the CI and any other witnesses who will testify.⁸¹

PROCEEDINGS TRANSCRIBED: Although the proceedings must be documented by a court reporter, the transcript will be sealed.⁸²

DEFENSE MAY SUBMIT QUESTIONS: The defendant's attorney may be permitted to submit written questions for the CI.⁸³ The attorney must not be permitted to ask questions by telephone.⁸⁴

REVIEWING DOCUMENTS: The court may review any documents that are reasonably necessary to make its ruling.⁸⁵

Must the informant testify?

Although the CI will usually testify, it is not a requirement. As the Court of Appeal observed, "Neither expressly nor by implication does [the Evidence Code] *require* the confidential informant to be present or to testify at the *in camera* hearing."⁸⁶

As a practical matter, however, the CI's testimony is almost always essential. After all, as noted earlier, the whole purpose of *in camera* hearings is to eliminate the "guessing game" that results when prosecutors rely on circumstantial evidence to prove what the CI saw or heard. But if the CI does not testify, the court may still have nothing but circumstantial evidence. Thus, Judge Jefferson warned prosecutors:

[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.⁸⁷

the CI, the hearing will begin, with the prosecutor eliciting from the CI exactly what he saw or heard. In some cases, the court may want to delay making a decision until he is better able to judge the CI's credibility by viewing the videotape. See *People v. Flannery* (1985) 164 Cal.App.3d 1112, 1115, 1121; *People v. Hobbs* (1994) 7 Cal.4th 948, 973, fn8 ["We agree with the *Flannery* court's observations concerning the videotaping procedure utilized therein"]. ALSO SEE *Skelton v. Superior Court* (1969) 1 Cal.3d 144, 153.

⁸¹ See *People v. Gooch* (1983) 139 Cal.App.3d 342, 345.

⁸² See Evid. Code § 1042(d) ["A reporter shall be present at the *in camera* hearing. Any transcription of the proceedings at the *in camera* hearing, as well as any physical evidence presented at the hearing, shall be ordered sealed by the court"]; *Torres v. Superior Court* (2000) 80 Cal.App.4th 867, 874 ["In order to protect petitioner's right to appellate review, the trial court can and should exercise its inherent power to order that the proceedings be recorded and transcribed and that the transcript be sealed."]; *Cooper v. Superior Court* (1981) 118 Cal.App.3d 499, 505, fn.3 ["Transcripts of the *in camera* hearings were ordered sealed, became part of the record and have been reviewed by this court."].

⁸³ See *People v. Hobbs* (1994) 7 Cal.4th 948, 973 ["Defense counsel should be afforded the opportunity to subject written questions, reasonable in length, which shall be asked by the trial judge of any witness called to testify at the proceeding."]; *Torres v. Superior Court* (2000) 80 Cal.App.4th 867, 874 ["[P]etitioner should be given an opportunity to propose questions to be asked at the *in camera* hearing."].

⁸⁴ See *People v. Galante* (1983) 143 Cal.App.3d 709, 712 ["The most startling aspect of this *in camera* hearing was the decision by the magistrate to allow defense counsel to participate therein telephonically. Such a procedure was, of course, extraordinarily dangerous and one that we trust will never again be repeated."].

⁸⁵ See *People v. Estrada* (2003) 105 Cal.App.4th 783, 796 ["[T]he trial court retains considerable discretion in terms of what it will review *in camera*."].

⁸⁶ *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1079. ALSO SEE *People v. Lee* (1985) 164 Cal.App.3d 830, 840 [not error to conduct *in camera* hearing without the CI]; *People v. Fried* (1989) 214 Cal.App.3d 1309, 1314

⁸⁷ 2 Jefferson, *Evidence Benchbook* (2d ed. 1982) p. 1576. ALSO SEE *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1079, fn.1.

Those “rare cases” when a CI’s testimony might not be needed seem to be limited to situations in which the testifying officers could prove both of the following: (1) the CI was merely a fingerpointer, and (2) the defendant’s guilt was based solely on circumstances that existed when he was arrested or when the evidence was discovered.

For example, if the defendant was charged with straight possession, the arresting officer could probably prove that the CI was not material if the officer found the evidence in the defendant’s pocket, and the CI was not present when this happened. Even 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 the quantity of the drugs in the defendant’s pocket or the manner in which they were packaged. (See “Strength of evidence” at pages 7-9.)

On the other hand, the CI’s testimony will likely be needed if there is a legitimate factual dispute that he could help resolve. For example, in *People v. Coleman*⁸⁸ the CI told officers that he had seen Coleman and Dukes selling heroin inside Coleman’s apartment. A few hours later, officers went to the apartment without the CI and, when Dukes answered the door, they saw heroin and sales paraphernalia in plain view. Dukes and Coleman were arrested.

The trial court ordered an *in camera* hearing to determine, among other things, whether the CI could testify that Dukes, not Coleman, was running the heroin operation. But because the CI refused to testify, the prosecutor’s only witness at the hearing was the investigating officer who simply stated that the CI did not see or hear 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.”

DISCLOSURE COMPLIANCE

If the court rules a CI was a material witness and orders officers to reveal his identity, they will usually refuse because, as the Court of Appeal observed, disclosure “might constitute a death warrant for the informer.”⁸⁹ And, as noted, the price for a refusal is usually the dismissal of charges. In those rare cases in which officers decide to comply, the question arises: What must they disclose?

As a general rule, they must disclose his name, his address, and any other “pertinent information which might assist the defense to locate him.” And if officers do not have such information, they must make “reasonable efforts” to obtain it. As 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 transient, or conceals his address, the law enforcement agency probably should make some arrangements for maintaining close communication with him.⁹⁰

⁸⁸ (1977) 72 Cal.App.3d 287. ALSO SEE *People v. Ruiz* (1992) 9 Cal.App.4th 1485, 1489 [“The materiality of the CI’s possible testimony cannot be determined by a peace officer’s characterization of the eyewitness CI’s knowledge of the incident and the CI’s reliability and credibility.”]; *People v. Lee* (1985) 164 Cal.App.3d 830, 840 [“[O]nly the informant could testify as to whether defendant personally had been selling PCP, whether she or another or others exercised dominion and control over the drugs and the nature and extent of the informant’s personal knowledge of these matters.”].

⁸⁹ *People v. Pacheco* (1972) 27 Cal.App.3d 70, 80.

⁹⁰ *Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851. ALSO SEE *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 365-6; *People v. Cheatham* (1971) 21 Cal.App.3d 675, 678, fn.3 [police efforts to keep track of the CI

OPTION: ATTORNEY MEETS WITH INFORMANT: Officers may avoid disclosing the informant's address by arranging a meeting between the CI and the defendant's lawyer. This occurred in *People v. Rios* where the court ruled the prosecutor had complied with a disclosure order because he "was willing and ready to produce the informant in his office at any time mutually convenient to the defense and the informant."⁹¹

OPTION: REDUCE CHARGES: If the CI is a material witness on the issue of intent to sell (e.g., he was the buyer or he witnessed the sale), he may not be a material witness on a lesser included offense of straight possession. In that case, the court may refuse to order the disclosure of the CI's identity if the prosecution agrees to reduce the charge against the defendant to straight possession.⁹²

HOTLINE INFORMANTS: Most people who phone police-operated hotlines want to remain anonymous and, in fact, would not call if they believed their identity might be revealed. Consequently, in most cases these calls are not traced, and hotline operators do not press the callers to identify themselves.

When it turns out that a hotline caller might have been a material witness, the defense may attempt to obtain a dismissal on grounds the agency did not make reasonable efforts to learn the caller's identity. But the Court of Appeal has ruled that, for various reasons, no such duty exists.⁹³

OTHER FINGERPOINTER ISSUES

When a search warrant is based on information from a fingerpointer, officers and prosecutors should be aware of the following. (Much of the information about these procedures is technical in nature. For details, see *California Criminal Investigation*.)

SEALING SEARCH WARRANTS: All search warrants, affidavits, and supporting documents become a public record when the warrants are returned or, if not executed, 10 days after they were issued.⁹⁴ This can create problems if the affidavit contains information that discloses or tends to disclose a CI's identity. Consequently, the judge who issues the warrant may order that all or part of the affidavit be kept confidential until further court order.⁹⁵ Although a court may later lift the sealing order, officers and prosecutors retain control over the sealed information because they have the option of incurring sanctions rather than releasing it.⁹⁶

were sufficient, especially because "they were rendered fruitless by [the CI'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."].

⁹¹ (1977) 74 Cal.App.3d 833, 837.

⁹² 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. Long* (1974) 42 Cal.App.3d 751, 758 ["Defendant is on extremely shaky ground with respect to his contention that the informant's identity is relevant to the included offense of possession."]; *People v. Borunda* (1976) 58 Cal.App.3d 368, 375 ["When the informant would be a material witness who might give testimony exonerating the defendant of sale or possession for sale, but there is no evidence he could give testimony exonerating the defendant of simple possession, the trial court should reduce the charges to simple possession rather than to dismiss them in their entirety."].

⁹³ *People v. Callen* (1987) 194 Cal.App.3d 558, 563.

⁹⁴ See Pen. Code § 1534; *Oziel v. Superior Court* (1990) 223 Cal.App.3d 1284, 1295.

⁹⁵ See *People v. Hobbs* (1994) 7 Cal.4th 948, 971 ["[A]ll or any part of a search warrant affidavit may be sealed if necessary to implement the privilege and protect the identity of a confidential informant."].

⁹⁶ See *People v. Hobbs* (1994) 7 Cal.4th 948, 959.

HOBBS MOTIONS: When a search warrant affidavit is sealed, the defense will not know exactly what information it contains. This makes it impossible for the defense to challenge the existence of probable cause or the accuracy of the information in the affidavit. To remedy this, the California Supreme Court has ruled that, in sealed affidavit cases, the defense may file a so-called *Hobbs* Motion which is essentially a request that the judge examine the affidavit and look for “possible inconsistencies or insufficiencies regarding the showing of probable cause.”⁹⁷ Before conducting the examination, the court may require that officers furnish it with police reports and any other documents regarding the CI and his reliability.

FRANKS AND LUTTENBERGER MOTIONS: Defendants will sometimes seek the suppression of evidence on grounds the affiant lied about the existence of a CI, the CI’s reliability, or the nature of the information he furnished. To do so, the defendant must file a Motion to Traverse, commonly known as a *Franks* motion.⁹⁸

The problem is that the motion must include a “substantial preliminary showing” by way of affidavits or other reliable statements (or their absence must be “satisfactorily explained”) that the affidavit contained false information or that material information was omitted. This can, of course, be difficult or impossible if the affidavit was sealed.

So, to correct the situation, the California Supreme Court ruled that when all or a “major part” of a search warrant affidavit has been sealed, the “substantial preliminary showing” requirement is waived.⁹⁹ Instead, the court will conduct an *in camera* review of all pertinent police records, especially any documents relating to the informant’s background and reliability. If it determines that some or all of these documents are discoverable, it will provide copies to the defense after deleting any information that may tend to reveal the CI’s identity. POV

⁹⁷ *People v. Hobbs* (1994) 7 Cal.4th 948, 973. ALSO SEE *People v. Navarro* (2006) 138 Cal.App.4th 146, 177 [“Problems arise when the prosecution tried to extend the [informant privilege] procedures to all or most of a search warrant affidavit, leaving a defendant unable to determine whether a probable cause challenge should be made.”].

⁹⁸ See *Franks v. Delaware* (1978) 438 U.S. 154.

⁹⁹ *People v. Hobbs* (1994) 7 Cal.4th 948, 972, fn.6.