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IN CAMERA HEARINGS ON INFORMANT DISCLOSURE: A CRITICISM

Anita Susan Brenner*

INTRODUCTION

In California criminal trials, a police officer may testify as to information supplied by a confidential informant without disclosing the informant's identity. The police informant is considered an important law enforcement tool and a large number of arrests result from the information provided by informants. Thus, the identity of police informants traditionally has been protected by the privilege of nondisclosure on the theory that law enforcement would be less effective if disclosure were compelled. The United States Supreme Court has upheld this common law privilege and it has been codified in California Evidence Code section 1042(d).

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2. See Marks v. Beyfus, 25 Q.B.D. 494 (Ct. App. 1890). See also C. McCORMICK, EVIDENCE 309 (1954); 8 J. WIGMORE, EVIDENCE § 2374 (McNaughton rev. ed. 1961). It is important to distinguish between the disclosure of the identity of an informer and the disclosure of the information in his report. The contents of the communication are not privileged where they do not reveal the identity of the informer. See Roviaro v. United States, 353 U.S. 53, 60 (1957).


4. CAL. EVID. CODE § 1042(d) (West Supp. 1974), amending CAL. EVID. CODE § 1042 (West 1966), reads:

(d) When in any such criminal proceeding, a party demands disclosure of the identity of the informant on the ground the informant is a material witness in the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure. Such hearing shall be conducted outside the presence of the jury, if any. During the hearing, if the privilege provided for in Section 1041 [see note 16 infra] is claimed by a person authorized to do so or if a person who is authorized to claim such privilege refuses to answer any question on the ground that the answer would tend to disclose the identity of the informant, the prosecuting attorney may request that the court hold an in camera hearing. If such a request is made, the court shall hold such a hearing outside the presence of the defendant and his counsel. At the in camera hearing, the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the
mony as to information supplied by the unnamed informant is limited to information establishing probable cause to make an arrest or conduct a search.\textsuperscript{5}

There are two prerequisites to the privilege of nondisclosure: first, the court must be convinced of the informer's reliability;\textsuperscript{6} and second, the informer must not be a material witness to the issue of the defendant's guilt or innocence.\textsuperscript{7} The requirement of a "reliable informant" under section 1042(c) is interpreted broadly inasmuch as the informant need not be proved reliable; his information need only be corroborated.\textsuperscript{8} The United States Supreme Court has defined a "material witness" as a witness who is "relevant and helpful to the defense or essential to a fair determination of a cause."\textsuperscript{9} The California Supreme Court has held informers to be material witnesses in the following situations: (1) where the informer participates in the crime;\textsuperscript{10} (2) where the in-

court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. A reporter shall be present at the in camera hearing. Any transcriptions 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, and only a court may have access to its contents. The court shall not order disclosure, nor strike the testimony of the witness who invokes the privilege, nor dismiss the criminal proceeding, if the party offering the witness refuses to disclose the identity of the informer, unless, based upon the evidence presented at the hearing, held in presence of the defendant and his counsel and the evidence presented at the in camera hearing, the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial.

5. Thus, the prosecution need not disclose the identity of an informer who only provides information establishing probable cause. \textit{Id.} §§ 1042(b), (c) (West Supp. 1974).

6. \textit{Id.} § 1042(c).

7. \textit{Id.} § 1042(d).

8. \textit{See} People v. Johnson, 68 Cal. 2d 629, 634, 440 P.2d 921, 924, 68 Cal. Rptr. 441, 444 (1968). "Reliable informant" under section 1042(c) must not be confused with the requirement of reliability under the two-pronged test of Aguilar v. Texas, 378 U.S. 108, 114 (1964), for the reliability of an affiant whose affidavit leads to the issuance of a search warrant. Both the Johnson test and the Aguilar test are used in California, but whereas the former applies to disclosure of identity, the latter goes only to the sufficiency of the allegations in a search warrant affidavit.


10. The leading California case on the participant-informer situation is People v. McShann, 50 Cal. 2d 802, 330 P.2d 33 (1958), where the conviction was reversed for nondisclosure of the identity of a material witness on the theory that since the informer bought heroin from the defendant, he could have given evidence relevant to the defendant's guilt or innocence. Tape recordings of telephone conversations, allegedly between the defendant and the informer, concerning the sale of the heroin were played before the jury at trial. The McShann court noted:

\textit{Had there been disclosure, the informer might have testified that no such telephone call was made, that it was not defendant who received the call, that someone else called, or that there was an entrapment.}

\textit{Id.} at 810, 330 P.2d at 37. \textit{See also} People v. Lawrence, 149 Cal. App. 2d 435, 308 P.2d 821 (1957) (heroin purchased from defendant).
former makes a search warrant affidavit asserting that he has personal knowledge of the facts of the crime;[^11] (3) where the informer was an eyewitness to the crime.^[12]

When a criminal defendant demands disclosure of the informant’s identity[^18] under the material witness exceptions, California Evidence Code section 1042(d) provides for a two-step determination of the issue of materiality. The initial "open hearing" permits the defense to present evidence of materiality. At the close of this hearing, the prosecutor can compel the court to hold an in camera hearing from which the defendant and his counsel are excluded. The prosecutor may offer both testimonial and physical evidence at this hearing and such evidence and transcriptions will be sealed by the court.

The operation and impact of section 1042(d) in everyday criminal law practice can be better appreciated by considering a typical hypothetical situation:^[14]

[^11]: In Price v. Superior Court, 1 Cal. 3d 836, 463 P.2d 721, 83 Cal. Rptr. 369 (1970), a search warrant was issued on an affidavit by the informer stating that he had personal knowledge of the facts. Even though the search was ruled illegal, the possibility that the informer might have been a material witness required disclosure. Defendant Price was charged with firing a rifle at a police car. The informer had stated that on the date of the incident he had observed a conversation, incriminating Price, between persons who had been present at the shooting. The supreme court held:

> The ambiguous statement that the informer overheard a conversation by persons "known by him" to have been present at the commission of the crime is sufficient to establish a "possibility" that the informer himself was present at the scene of the crime.

*Id.* at 844, 463 P.2d at 725, 83 Cal. Rptr. at 73.


In Honore, the crucial issue was whether the defendant had dominion and control over marijuana found in her apartment. An informer had earlier been at Honore's home, while she was away, and had observed methedrine there. Since the informer had also seen four people in the apartment at the time, the supreme court ruled that he was a material witness, since he might be able to testify whether any of the four had brought any marijuana into the household themselves. 70 Cal. 2d at 169, 449 P.2d at 173, 74 Cal. Rptr. at 237.

[^18]: Such a demand can be made as part of a pretrial discovery motion or on cross-examination of a prosecution witness at the preliminary hearing or the trial. Cal. Evid. Code §§ 1042(c), (d) (West Supp. 1974). See Honore v. Superior Court, 70 Cal. 2d 162, 449 P.2d 169, 74 Cal. Rptr. 233 (1969) (pretrial discovery motion); People v. Archuleta, 16 Cal. App. 3d 295, 93 Cal. Rptr. 881 (1971) (pretrial discovery motion). If the motion to disclose is made at the time of trial, the hearing on the motion will be outside the presence of the jury. Cal. Evid. Code § 1042(d) (West Supp. 1974).

[^14]: References to this hypothetical will be made throughout the article.
Informant tells Officer that he bought marijuana from Pusher in a house located at 321 Main Street. Inside the house, Informer also saw a white clad woman packaging marijuana. As soon as a search warrant is issued, Officer enters the house on Main Street and finds, seated in the living room, Pusher and two women—Nurse A and Nurse B. Searching in the kitchen, Officer discovers 387 baggies of marijuana. Officer arrests Pusher, Nurse A and Nurse B for possession of marijuana.

At the preliminary hearing, Officer testifies for the prosecution. None of the defendants challenges the legality of the search warrant. However, on cross examination, counsel for Nurse A asks Officer to disclose the identity of his informer. Officer refuses and asserts the informer privilege. All defendants join in a motion for disclosure on the ground that the informant is a material witness. Nurse A asserts that the informer could identify the “white clad” woman as Nurse B, thereby proving her guilt. Nurse A states that while Nurse B lived with Pusher, she, Nurse A, was merely visiting. Surprisingly, Nurse B makes a similar offer of proof. The prosecutor is in a quandary because only Pusher's name appears on the mail box of the Main Street house. When the judge indicates that the nurses have met their burden of showing a possibility of Informer's materiality, the prosecutor requests an ex parte, in camera hearing. Accordingly, the prosecutor, the judge, the court reporter, and the Officer retire into chambers for a secret meeting. When they return, the judge denies the defense motions for disclosure.

The defense, of course, has no way of knowing what evidence was presented in the in camera hearing. Informer himself might have testified. Physical evidence such as letters addressed to one of the nurses at the Main Street address might have been introduced by the prosecution. Neighbors might have been subpoenaed to testify about Pusher's roommate. Nevertheless, all evidence, however exculpatory, has been ordered sealed by the trial court at the conclusion of the secret hearing.

This article will focus on the procedure for the determination of the materiality of an informant’s testimony as codified in California Evidence Code section 1042(d). First, section 1042(d) will be evaluated with particular reference to the interests served by in camera hearings for informant disclosure, as well as to the social costs of maintaining such a procedure. Next, the potential constitutional limitations on section 1042(d) dictated by the fifth and sixth amendments to the United States Constitution will be discussed. Finally, an alternative procedure to section 1042(d) will be suggested and analyzed.
THE IN CAMERA HEARING: POLICY AND PERSPECTIVE

Long before the enactment of section 1042(d), the identity of certain informers was protected under rules permitting nondisclosure. The California rule protected the identity of an informer when the public interest in nondisclosure outweighed the interest in disclosure to the individual defendant. Two theories supported the privilege. Under the “protection-inhibition” theory, nondisclosure was deemed necessary to guarantee the physical safety of the informer, so that fears of reprisal would not inhibit him from giving information concerning criminal activity. According to the “continual flow” theory, the privilege purportedly promoted confidentiality conducive to a continual flow of information from informers, thereby assuring effective law enforcement.

15. For a discussion of the informer privilege at common law, see C. McCormick, Evidence 309 (1954); 8 J. Wigmore, Evidence § 2374 (McNaughton rev. ed. 1961).
16. The informer privilege may be invoked under Cal. Evid. Code § 1041 (West 1966):
   (a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and:
      (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or
      (2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether the disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.
   (b) This section applies only if the information is furnished in confidence by the informer to:
      (1) A law enforcement officer;
      (2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated; or
      (3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2).
   (c) There is no privilege under this section to prevent the informer from disclosing his identity.
18. See United States v. Alvarez, 472 F.2d 111, 113 (9th Cir. 1973). Note that the state’s interest in protecting the informant may last only as long as the informant’s ability to obtain information. Sometimes, however, future protection must be guaranteed to an informant to acquire present cooperation. For example, in order to obtain necessary testimony against the Mafia in the Valachi case, the FBI bore the burden of protecting Joe Valachi from future reprisals, See P. Maas, The Valachi Papers 48 (1968).
Invocation of the privilege was once tactically expensive for the prosecution, for a directed verdict was required on every issue for which the privileged information was material, and nondisclosure of a material witness resulted in the dismissal of the entire case. Prior to 1969, the prosecution could not avoid the directed verdict or the dismissal merely by virtue of its superior knowledge of the facts concerning materiality. Recognizing that the prosecution can contact the informer, while the defendant must attempt factually to support the alleged materiality of an unknown informer, the California judiciary developed an equitable allocation of the burden of proof. Under this doctrine, the defense merely had to prove the "possibility" of materiality. If the prosecution, having access to information unavailable to the defense, could not refute this "possibility," it was required to disclose the identity of the informer or drop the charges.

The pre-1969 "disclose or dismiss" rule is memorialized in People v. Garcia. In that case, an affidavit for a search warrant from two informers stated that three people possessed marijuana, but neither the affidavit nor the search warrant mentioned the defendant's name. The defendant was present at the apartment when the police searched it. At the trial, the defendant testified

19. This form of the informer privilege is called "disclose or dismiss." The first three subsections of section 1042, which were part of the Evidence Code before the addition of section 1042(d), describe the consequences of invoking the informer privilege. If the privilege is asserted, section 1042(a) states that an order or finding of fact must be against the state on any issue to which the privileged information is material. CAL. EVID. CODE § 1042(a) (West Supp. 1974). The comment to section 1042(a) cautions that the government which prosecutes the accused also has the duty to see that justice is done. It is clearly unconscionable to allow the government to undertake prosecution and then invoke privileges which deprive the accused of anything which might prove material to his defense. See United States v. Reynolds, 345 U.S. 1, 12 (1953).

There are two exceptions to the general rule of section 1042(a). Section 1042(b) indicates that the identity of an informer is not necessary to prove the legality of a search made pursuant to a warrant. CAL. EVID. CODE § 1042(b) (West Supp. 1974). Moreover, when the informer is not a material witness on the issue of guilt, section 1042(c) declares that his identity is not necessary to establish reasonable cause to make a search or an arrest. Id. § 1042(c).

A 1969 amendment to the California Evidence Code added the in camera hearing provision in section 1042(d). Prior to 1969, the issue of materiality was determined in the open court hearing described in section 1042(c). Although section 1042(c) is currently part of the Evidence Code, it must be read in light of the section 1042(d) exception. Today, a directed verdict is still required on every issue to which the privileged information is material, but section 1042(d) makes the proof of materiality extremely difficult for the defendant.

20. See Honore v. Superior Court, 70 Cal. 2d 162, 449 P.2d 169, 74 Cal. Rptr. 233 (1969), where the defendant claimed she was in jail when marijuana was planted in her apartment. The California Supreme Court held that the defendant did not need to produce any facts to support her claim: the mere possibility was sufficient. The supreme court reiterated this doctrine in Price v. Superior Court, 1 Cal. 3d 836, 463 P.2d 721, 83 Cal. Rptr. 369 (1970).

that he had been in the apartment for the first time when arrested. One month before the trial, the defendant had filed a motion for pretrial discovery in order to compel disclosure by the People of the identities of the two informants relied on in the search warrant, claiming that they were either participating informants or material witnesses. The informer privilege was claimed by the People and disclosure was refused. When, during the trial, the defense asked for the identity of the two informants on cross-examination of a police officer, the privilege again was claimed and disclosure once again refused. On appeal, the California Supreme Court held that, "where it appears from the evidence that the informer was a material witness on the issue of guilt and the accused seeks disclosure on cross-examination, the People must either disclose or incur a dismissal."\textsuperscript{22} The court further held that it is sufficient for the defense to show that the informer might be a material witness.\textsuperscript{23}

The drafters of section 1042(d) felt that the informer privilege in the "disclose or dismiss" form failed to protect police informers in cases where the district attorney chose to disclose the identity of the informer rather than incur a dismissal.\textsuperscript{24} While California law traditionally resolved the issue of materiality on evidence presented by both the prosecution and the defense at an open hearing, section 1042(d) allows the prosecutor, on request, to obtain a second hearing \textit{in camera}, from which the accused and his counsel are excluded. Thus, section 1042(d) provides that a showing of the "mere possibility" that the informer may be material can be refuted by the district attorney \textit{in camera}; before the enactment of section 1042(d), this same showing would have forced the prosecution either to disclose the identity of the informer or to drop the charges.\textsuperscript{25}

Proponents of the \textit{in camera} hearing believe it provides the trial judge with a better understanding of the factual circum-

\textsuperscript{22} Id. at 836, 434 P.2d at 70, 65 Cal. Rptr. at 114, \textit{quoting} People v. McShann, 50 Cal. 2d 802, 808, 330 P.2d 33, 36 (1958).


\textsuperscript{24} In a press release dated August 11, 1969, State Senator Lewis F. Sherman of Alameda County, a proponent of \textit{in camera} hearings for informant disclosure, stated:

\begin{quote}
Under present law, based upon a tip, the police officer makes an independent investigation, obtains a search warrant, finds the contraband, and testifies in court. At this point the defense counsel may demand the identity of the informer and the district attorney must decide between a dismissed case and a "liquidated" informer. Most district attorneys will not jeopardize their informer. . . .
\end{quote}

Copy of release on file with the author.

stances surrounding the question of materiality. These facts are deemed necessary to enable the judge to balance the defendant's interest in a fair trial against law enforcement's interest in nondisclosure. These advocates argue that without the closed hearings, the determination of materiality becomes merely a "judicial guessing game." The ex parte procedure described in section 1042(d) was selected without due consideration of two other alternatives. The Legislature could have provided for a bilateral in camera hearing to be attended by defense counsel but not the defendant. The legislators also could have chosen to leave the existing law unchanged, for despite its shortcomings, the former rule of "disclose or dismiss" preserved the defendant's right to a fair trial. Too little attention was given to the fact that under the Anglo-American legal system, the substantive rights necessary to insure a fair trial include the presumption of innocence, the right to confront one's accusers, and the right of access to whatever information may be helpful to one's defense. It is the author's contention that the in camera hearing in any form significantly erodes the foundations of a fair trial; a fortiori, the exclusion of defense counsel from such a hearing is irreconcilable with existing constitutional authority. Even though the state has a legitimate interest in the protection of informers, this interest can be satisfied by an


27. In a concurring opinion to United States v. Day, 384 F.2d 464, 470 (3d Cir. 1967), Justice McLaughlin approved of the trial judge's use of the in camera procedure and observed that the judge really cannot perform his function without being told the identity of and other facts about the informer. The same observation was made in United States v. Jackson, 384 F.2d 825, 827 (3d Cir. 1967).

28. See United States v. Lloyd, 400 F.2d 414 (6th Cir. 1968), where the court of appeals remanded the case to the district court with the instruction that the district judge hold an in camera hearing for the purpose of determining whether disclosure of the informer's identity would have been relevant and helpful to the defendant in conducting her defense, and whether the informer was available as a witness.

29. See United States v. Day, 384 F.2d 464, 468 (3rd Cir. 1967), where the court stated:

No simple answer has yet been found to the informer dilemma which still continues to vex our courts. Surely the right of the accused to a fundamentally fair trial is diminished when he is refused access to an informer, where there is no assurance given to the court that the information possessed by the informer can in no way assist the defense. Set over against the accused's interest is the necessary reliance placed by law enforcement agencies, especially in narcotics cases, on the use of informers in securing inroads into areas of illegal activity that would be otherwise foreclosed without the use of special employees.


30. U.S. Const. amend. VI: "In a criminal prosecution, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

open determination of materiality without resorting to the *in camera* hearing.

**THE RIGHT TO AN ADVOCATE: A LIMIT ON THE EX PARTE HEARING**

Attractive as the *ex parte* hearing may seem to law enforcement, it places heavy burdens upon the defendant and the trial judge. In addition, the *ex parte* nature of the *in camera* hearing represents a direct conflict with the notions underlying the adversary system of criminal justice.

**The Defendant**

The fact that section 1042(d) requires a defendant to argue a theory of materiality with respect to an unknown informant represents a nearly insurmountable task. Since the district attorney can have the informer testify at a closed hearing, the defendant is often faced with the need to impeach an unidentified witness. Nor can the defendant be assured that the judge will pose the kinds of questions the defense feels would impeach the informer, such as whether the informer received compensation for his services. Indeed, *ex parte* or judicial investigation cannot elicit the

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32. See text accompanying notes 34-49 infra.
33. See text accompanying notes 50-57 infra.
34. For example, a defendant will "need to impeach" the witness who is lying. If Pusher and the Nurses from the hypothetical (see text accompanying note 14 *supra*) had been allowed inside the *in camera* hearing, they could have impeached untruthful witnesses by: (1) discrediting the witness personally; (2) destroying all or a portion of the witness' testimony; (3) obtaining some admissions from the witness and thus weakening the testimony; (4) attacking the credibility of the witness; (5) developing new facts favorable to the defense; or (6) bringing out the whole truth—for example, that Nurse A did not live with Pusher. See generally N. Stevenson, *Successful Cross Examination Strategy* (1971).

The defense will also "need to impeach" witnesses who are mistaken, biased or forgetful. For example, if Informer himself is called to testify, his testimony regarding his own materiality may be incomplete or inaccurate because of his desire to remain anonymous. Such advocacy is impossible when the witness is unidentified, for the defense cannot even draft effective written questions to be asked at the *in camera* hearing.


The unreliability of political informers is illustrated by the cases of Louis Tackwood, Eustacio Martinez and Boyd Douglas. Mr. Tackwood is a 32-year-old black man who allegedly was employed by the Los Angeles Police Department for ten years. He worked in the Special Identification and Investigation Section (SII) and the Criminal Conspiracy Section (CCS). In September, 1971, Tackwood confessed his role as an *agent provocateur* to the *Los Angeles Free Press*. See *Los Angeles Times*, Nov. 17, 1971, section B, at 4.

A 23-year-old Mexican-American named Eustacio Martinez claims to have infiltrated Casa de Carnalismo, the United Farmworkers Organizing Committee, the Brown Berets and the Chicano Moratorium Committee, while in the employ of the Alcohol, Tobacco and Firearms (AFT) Division of the Internal Revenue
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in-depth examination of credibility accomplished by the adversary proceeding.\textsuperscript{36}

The secrecy of the \textit{in camera} hearing extends to its transcripts and records. Both testimonial and physical evidence presented at the hearing are sealed.\textsuperscript{37} In some cases, the physical evidence concealed might include tape recordings of conversations between the informant and the defendant. Prior to the enactment of section 1042(d), however, California case law clearly gave the defendant an unqualified right to the discovery and inspection of such recordings or transcripts.\textsuperscript{38} Thus, section 1042 (d) has the effect of reducing the scope of criminal discovery available to the defense.

No appellate court has thoroughly examined the burdens placed upon the defendant by the \textit{ex parte, in camera} hearing, and only one court has adequately discussed the bilateral \textit{in camera} hearing. The recent federal district court decision of \textit{United States v. Lopez}\textsuperscript{39} has been recognized as a seminal case in an area where no appellate court had ventured.\textsuperscript{40} \textit{Lopez} is noteworthy for its careful analysis of the bilateral \textit{in camera} hearing and its solicitous attitude towards the rights of the criminal defendant.


\textsuperscript{37} CAL. EVID. CODE § 1042(d) (West Supp. 1974) states in part:

Any transcription of the proceeding at the \textit{in camera} hearing, as well as any physical evidence presented at the hearing, shall be ordered sealed by the court, and only a court may have access to its contents.

\textsuperscript{38} Cash v. Superior Court, 53 Cal. 2d 72, 346 P.2d 407 (1959); People v. Cartier, 51 Cal. 2d 590, 335 P.2d 114 (1959); see also People v. Estrada, 54 Cal. 2d 713, 355 P.2d 641, 7 Cal. Rptr. 897 (1960); Funk v. Superior Court, 52 Cal. 2d 423, 340 P.2d 593 (1959). The transcript of the informant’s testimony may be highly useful to the defense, both for investigation and impeachment purposes. Furthermore, the testimony of the informant may include information which would tend to prove the defendant innocent. To withhold such exculpatory evidence from the defense would be a denial of due process under \textit{Brady v. Maryland}, 373 U.S. 83 (1963). In \textit{Brady}, the United States Supreme Court held that the suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material either to guilt or the degree of punishment warranted. \textit{Brady} involved the suppression of a murder confession by the defendant’s accomplice. \textit{Id.} at 86-88.

\textsuperscript{39} 328 F. Supp. 1077 (E.D.N.Y. 1971).

Defendant Lopez was apprehended at the John F. Kennedy Airport just as he was about to board a plane for Puerto Rico. Pursuant to the anti-hijacking profile, an employee of Pan American Airlines had pointed out the defendant and another man as “selectees” or persons whose physical characteristics and demeanor suggested they were potential hijackers. A search of the defendant produced heroin. The defendant was then charged with concealing and facilitating the transportation of heroin and with conspiring to commit that crime.41

At the trial, the defense moved to suppress the heroin taken from the defendant on the ground that the use of the profile violated the equal protection clause of the fourteenth amendment. Since it was thought that the effectiveness of the anti-hijacking profile might be undermined if it were examined in an open court hearing, an in camera investigation was conducted.

The court in Lopez did not employ the ex parte hearing, however, but permitted defense counsel to hear all testimony about the profile and to cross-examine witnesses. The public and the defendant were excluded from the courtroom. Despite the presence of defense counsel, the district court was extremely concerned with the effect of this adversary, in camera hearing on the defendant’s right to a public trial and his right to confront adverse witnesses. The district court stated that the exclusion of the defendant could not be justified as harmless error simply because his attorney was present.42 Noting that the burden of justifying the anti-hijacking procedure was substantial, the court nevertheless approved the adversary hearing which included defense counsel but not the defendant, on the rationale that disclosure would hamper law enforcement.43 A hearing with only defense counsel and the prosecution present was considered the best way to investigate the profile and, at the same time, protect the rights of the individual defendant.

Such a bilateral hearing is easier to justify than an ex parte hearing, from which defense counsel is excluded, but even the presence of defense counsel does not guarantee protection of the defendant’s rights in informant disclosure proceedings. In comparing the nature of the hijacking profile to the informer privilege, the Lopez court noted that informers may give information furnishing a basis for an arrest without a warrant, whereas the anti-hijacking profile merely supplies the probable cause to frisk.44

43. Id. at 1091-92.
44. Viewing the anti-hijacking profile itself as an “objective” system which acts as an informer, the Lopez court compared the system to the traditional “sub-
other words, the anti-hijacking profile is relevant only to the issue of probable cause, while the informer privilege affects the more fundamental issue of guilt or innocence. Furthermore, the disclosure of the anti-hijacking profile would adversely affect the prevention of hijackings on a nationwide scale, while the publication of an informant's name would, at the very worst, facilitate a limited number of crimes. In view of the critical nature of the informer privilege, the exclusion of defense counsel from the section 1042(d) hearing is clearly inconsistent with the rejection of the ex parte procedure in Lopez.

The proposed Federal Rules of Evidence avoid unfairness to the accused by authorizing a bilateral in camera hearing on informant disclosure. Rule 510(c)(3) would require attendance by both counsel if the judge does not believe the informer is reasonably reliable, or if his information is used to establish the legality of a means of obtaining evidence. This procedure is designed to avoid "any significant impairment of secrecy, while affording the accused a substantial measure of protection against arbitrary police action." In light of the modern preference for adversary in camera hearings, California's ex parte hearing on informant disclosure is clearly antiquated.

The Judge

The ex parte hearing burdens trial judges as well as defendants. Without the aid of a defense advocate, the trial judge must assess the credibility of the informer, critically examine the prosecutor's theory of immateriality, object to leading questions, and move to strike irrelevant or inadmissible answers. At the same time, the judge must try to keep an open mind and attempt impartially to determine the factual issues. Indeed, dicta in one recent United States Supreme Court case suggests that a bilateral hearing is necessary to avoid burdening the trial judge with the additional duties of an adversary. In Dennis v. United States, the instant case actually presents a stronger case for non-disclosure to the defendant because the informant is an objective system, not an individual who might be known to the defendant. He could not, by his presence, hope to impugn its credibility. Furthermore, since the level of probability required to justify a frisk is lower than "probable cause" there is a corresponding lower necessity for disclosure. In fact, the instant case actually presents a stronger case for non-disclosure to the defendant because the informant is an objective system, not an individual who might be known to the defendant. He could not, by his presence, hope to impugn its credibility. Furthermore, since the level of probability required to justify a frisk is lower than "probable cause" there is a corresponding lower necessity for disclosure.

Id. at 1092.

45. PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES rule 510(c)(3) (Mar. 1971) (this section not adopted). The Proposed Rules have since been approved by Congress as the FEDERAL RULES OF EVIDENCE. Public Law 93-595 (Jan. 2, 1975).
46. Id., Commentary at p. 61.
47. 384 U.S. 855 (1966). The defendants in Dennis had been convicted of conspiring fraudulently to obtain the services of the N.L.R.B. for their labor union, by filing false affidavits forswearing their communist affiliations.
the Supreme Court unanimously held that the failure of the trial
court to permit the defendants to examine witnesses' grand jury
testimony constituted reversible error. Regarding the discovery
of grand jury transcripts, the Supreme Court stated that "trial
judges ought not to be burdened with the task or the responsibility
of examining sometimes voluminous grand jury testimony in order
to ascertain inconsistencies with trial testimony." The Court
further stated that "[i]n our adversary system, it is enough for
judges to judge. The determination of what may be useful to the
defense can properly and effectively be made only by an advoc-
ate."

Adversary Hearings and the "Complex Task" Doctrine

The necessity of the adversary hearing was again suggested
by the Supreme Court in Alderman v. United States, which was
a consolidation of cases involving electronic surveillance by the
government. One case involved defendants Alderman and Al-
derisio, who were convicted of conspiring to transmit to the Soviet
Union information relating to the national defense of the United
States. In Alderman, the government was required to disclose
all of the information obtained from its surveillance that would
be "arguably relevant" to the convictions. The Supreme Court
rejected the suggestion that records of the conversation first be
submitted to the trial judge for an in camera examination. In re-
fusing the government's request for an in camera hearing, the
Court stated that the task of winnowing out prohibited evidence
belonged to an advocate. The in camera decision of the trial
judge alone was deemed insufficient to effect properly so complex
a determination.

While it can be argued that the Alderman rationale requires
an adversary proceeding for the resolution of all issues raised by
a criminal proceeding, the United States Supreme Court has ex-

48. Id. at 874.
49. Id. at 875.
51. Id. at 184.
52. Id. at 182. As the court explained:
An apparently innocent phrase, a chance remark, a reference to what
appears to be a neutral person or event, the identity of a caller of the
individual on the other end of a telephone, or even the manner of speak-
ing or using words may have special significance to one who knows the
more intimate facts of an accused's life. And yet that information may
be wholly colorless and devoid of meaning to one less well acquainted
with all relevant circumstances. Unavoidably, this is a matter of judg-
ment, but in our view the task is too complex, and the margin for error
too great, to rely wholly on the in camera judgment of the trial court
to identify these records which might have contributed to the Govern-
ment's case.

Id.
expressly rejected this view in *Taglianetti v. United States*, a case involving a prosecution for the willful attempt to evade income taxes. The district court in *Taglianetti* had conducted an *ex parte in camera* examination of government records of electronic surveillance to determine whether the government had correctly identified the defendant's voice. The Supreme Court approved the *in camera* procedure, noting that the contested voice identification in surveillance tapes failed the "complex task" or the "high margin for error" requirement of *Alderman*.

In *in camera* hearings on informant disclosure the necessity of assessing witness credibility, evaluating the prosecution's case, and observing the rules of evidence combine to make the determination of the materiality of an informer's identity a task which is sufficiently complex to involve the high margin for error discussed in *Alderman* and *Taglianetti*. Clearly, questions regarding the materiality of such testimony are far more complex than the mere identification of an accused's voice on surveillance tapes. Furthermore, just as the grand jury transcripts considered in *Dennis* were voluminous and full of inconsistencies, the informer, as a live witness, possesses a wealth of information, which a skilled defense attorney could probe for inconsistencies. Reasonable men and women may differ as to the credibility of a witness. Therefore, a judge should not be burdened with the subjective assessment of credibility absent the aid of a defense advocate.

The use of hearings in which advocates represent partisan interests before impartial judges is a basic aspect of our system of criminal justice, because such hearings provide for accurate resolutions of factual issues while guarding against error caused by the judges' relative unfamiliarity with the cases before them.

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54. Id. at 317-18. The court stated:
   Nothing in *Alderman v. United States*, *Ivanov v. United States*, or *Butenko v. United States* [citations omitted], requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance. On the contrary, an adversary proceeding and disclosure were required in those cases, not for lack of confidence in the integrity of government counsel or the trial judge, but only because the in camera procedures at issue there would have been an inadequate means to safeguard a defendant's Fourth Amendment rights. Here the defendant was entitled to see a transcript of his own conversations and nothing else. He had no right to rummage in government files. The trial court was asked to identify those instances of surveillance which petitioner had standing to challenge under the Fourth Amendment exclusionary rule and to double-check the accuracy of the Government's voice identifications. Under the circumstances presented here, we cannot hold that "the task is too complex, and the margin for error too great to rely wholly on the in camera judgment of the trial court." *Alderman v. United States* [citation omitted].

55. J. FRANK, COURTS ON TRIAL 80 (1950).
Thus, the Canons of Judicial Ethics, adopted by the Conference of California Judges recognize that *ex parte* hearings are an extreme measure and therefore caution against them.\(^{57}\) Essentially, then, the major defect in the section 1042(d) procedure lies in its exclusion of defense counsel from the crucial determination of the materiality of the informant. Whether this exclusion also violates the defendant's constitutional rights will be explored in the following section.

**Undoing Legislative Excess: The Role of the Judiciary**

The interests of law enforcement often are invoked to justify the heavy burden upon the accused, the limits on discovery, and the exclusion of defense counsel from the *in camera* hearing on informant disclosure. Unless prodded by judicial and public opinion, the California Legislature is not likely to revise section 1042(d). Hopefully, an enlightened judiciary will attempt to limit the excesses of section 1042(d) by utilizing such explicit constitutional guarantees as the right of confrontation, the right to compulsory process, the right to a public trial, the right to a jury trial, and the right to counsel.\(^{58}\) Since section 1042(d) ar-

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\(^{57}\) The disfavor in which the *ex parte* hearing is placed by the Canons is worth noting:

**14—EX PARTE APPLICATIONS**
A judge should act upon *ex parte* applications for injunctions and other extraordinary remedies only after careful consideration and where the necessity for quick action is clearly shown. He should grant relief only when fully satisfied that the law permits the relief sought and that the urgency of the particular situation demands it.

**15—EX PARTE COMMUNICATIONS**
A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.


\(^{58}\) Both the federal and state constitutions declare that the accused shall have the basic rights of confrontation, compulsory process, public trial, jury trial and counsel. U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**Cal. Const., art. 1, § 13** provides, in part:
ARGUABLY violates each one of these constitutionally guaranteed rights, it deserves serious judicial assessment.

**Right of Confrontation**

The California Supreme Court has never considered the constitutionality of section 1042(d) with regard to the sixth amendment right of confrontation. The applicability of the right to confront witnesses at a section 1042(d) hearing depends on whether the informer falls within the class of "witnesses against" who are subject to the confrontation guarantee. Two interpretations of the "witnesses against" requirement are possible. The phrase can refer either to one who gives testimonial evidence against the accused, or one who is a material witness. If the

In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. The right to confront witnesses at a section 1042(d) hearing depends on whether the informer falls within the class of "witnesses against" who are subject to the confrontation guarantee. Two interpretations of the "witnesses against" requirement are possible. The phrase can refer either to one who gives testimonial evidence against the accused, or one who is a material witness. If the

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Under both the state and federal versions of these rights, the first level of inquiry should be whether the section 1042(d) hearing is the type of proceeding to which the enumerated rights of the accused ought to apply. Since both the sixth amendment and the state constitution are limited to "criminal prosecutions," there are no special rights in non-criminal proceedings.

The case of United States v. Dali, 424 F.2d 45, 48 (2d Cir. 1970), cert. denied, 400 U.S. 821 (1971), suggests that the sixth amendment should apply to suppression hearings. Clearly, the section 1042(d) hearing should merit the same constitutional protection as a hearing for the suppression of evidence, since the question of an informer's identity affects the more fundamental issue of guilt or innocence, while physical evidence goes to the less important issue of probable cause to search.

This is not surprising in view of the courts' lack of concern for the confrontation clause generally. See Graham, *The Right of Confrontation and Rules of Evidence: Sir Walter Raleigh Rides Again*, 9 ALAS. L.J. 3 (1971), which notes that the right of confrontation has received scant attention from courts and commentators.

The United States Supreme Court held confrontation to be a fundamental right, and therefore applicable to state criminal trials through the fourteenth amendment, in *Pointer v. Texas*, 380 U.S. 400 (1965). Even if the sixth amendment right of confrontation does not apply to section 1042(d) in camera hearings, the due process clause of the fifth amendment may require a right of confrontation. *See In re Gault*, 287 U.S. 1 (1967). However, while the due process right of confrontation may be of broader applicability than the sixth amendment grant, it may require less rigorous standards for its satisfaction, since it is an implied rather than express right.


"[T]he accused shall enjoy the right . . . to be confronted with the Witnesses against him . . . ." U.S. CONST. amend. VI.

If the "material witness" test is adopted, the informer is a "witness
prosecutor brings the informer into the *in camera* hearing, it is clear that the informer is a "witness against" the defendant under both definitions. If, however, the informer fails to give testimonial evidence, he may be a "witness against" under the second definition, but clearly not under the first.

Bolstering the argument that the non-testifying informer is a "witness against" under the material witness definition is the rule excepting material witnesses from the informer privilege.63 Like any other exception to a privilege, the material witness exception is an implied recognition of the dictates of the confrontation clause.64

In addition to the uncertain "witnesses against" doctrine, there are other approaches to the scope of confrontation. Read literally the confrontation clause would require testimonial evidence to be presented solely through witnesses present in court.65 Because such an interpretation would exclude all hearsay evidence,66 a much narrower interpretation traditionally has been applied: the right to confrontation was equated with the right to cross-examine witnesses.67 In 1895, the United States Supreme Court stated that the primary object of the confrontation clause was to prevent depositions or *ex parte* affidavits from being used against a defendant on the issue of his own materiality regardless of whether he actually testifies *in camera*. At issue in the section 1042(d) hearing is the materiality of the unidentified informer, who in turn is a material witness on this issue.

Even if the narrower test of "testimonial evidence" is adopted, such testimony need not be limited to in-court statements. A sworn affidavit may be testimony as well. The confrontation clause, however, does not apply to statements which are signed but not sworn, since these do not constitute "testimony."


64. It is well settled that the privilege, as applied to non-material witnesses, does not violate the right of confrontation. McCray v. Illinois, 386 U.S. 300 (1967). A study of the informer's privilege with particular attention to the intent of the Constitutional Convention is very useful in applying the confrontation clause to the section 1042(d) proceeding. There are documents written before the Constitution which provide the right to confront "accusers." See VA. CONST. § 8 (1776), which provides: "In all capital and criminal cases a man hath a right to . . . be confronted with the accusers and witnesses." Two interpretations are thus possible. Either the common law right of confrontation was applied against witnesses and informers, or the omission of the word "accusers" in the United States Constitution signifies an intent to limit the right to confront witnesses. At any rate, the contention that the informer privilege does not violate the right of confrontation needs to be reexamined in view of these pre-constitutional documents.

65. *Webster's New International Dictionary* 561 (1936) defines "confront" as "to put or bring face to face, to cause to face or meet."


against the defendant in lieu of a personal cross-examination of the witness. Thereafter, a line of cases equated the confrontation clause with the right of cross-examination until the Supreme Court's holding in *Dutton v. Evans* distinguished the two rights. If the right of confrontation is no longer synonymous with the right to cross-examine, confrontation may merely mean the right to prepare a defense.

It is also unclear whether the right to confrontation attaches to the defendant personally or can be satisfied by *in camera* cross-examination by defense counsel. Those courts which follow the former view are concerned with the heavy burden of justifying the *in camera* procedure, even where it is bilateral in nature. Thus, *United States v. Lopez*, contains dicta to the effect that the mere presence of a defense attorney does not guarantee compliance

68. Mattox v. United States, 156 U.S. 237, 242-43 (1895). The Court went on to uphold the hearsay exception for prior recorded testimony, the confrontation clause notwithstanding.


70. 400 U.S. 74, 86 (1970). The Supreme Court affirmed a Georgia murder conviction where a prosecution witness was allowed to relate admissions made by the defendant's co-conspirator. Four of the justices (Stewart, White, Blackmun and Burger) joined in an opinion which apparently distinguished the right of confrontation from the right of cross-examination. The dissenters (Marshall, Black, Douglas, and Brennan) asserted that cross-examination and the opportunity for the jury to weigh the demeanor of the witness are two elements of the confrontation clause. *Id.* at 101. For a cursory history of the confrontation clause from *Mattox* to *Dutton* as well as a discussion of the proposition that *Dutton* divorced cross-examination from confrontation, see Griswold, *The Due Process Revolution and Confrontation*, 119 U. Pa. L. Rev. 711 (1971).

However, the Griswold thesis may have been shattered by the high Court's holding that a defendant was denied his right to confrontation when the trial court refused to allow cross-examination of a key government witness. *See* Davis v. Alaska, 415 U.S. 308 (1974). Note, however, the concurring opinion of Mr. Justice Stewart, in which he stated that cross-examination was constitutionally required only under the peculiar facts of the *Davis* case:

> In joining the Court's opinion, I would emphasize that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions.

*Id.* at 321.

71. Dictum in United States v. Wade, 388 U.S. 218, 224-25 (1967), suggests that confrontation is an aspect of the right to prepare a defense:

> In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. The guarantee reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." (Emphasis supplied.) The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful "defense."
with the confrontation clause.\textsuperscript{72} Indeed, effective advocacy may depend on the assistance of the defendant, who often is more familiar with the facts than his counsel.

By the same token, the jurisdictions which allow confrontation to be satisfied vicariously emphasize the interchangeability of the defendant and his attorney. A typical case is \emph{Ellis v. Oklahoma}, where the right of confrontation was held inapplicable to a bilateral \textit{in camera} hearing on a juror's qualifications, on the theory that the criminal defendant lacks an absolute right under the confrontation clause to be a participant.\textsuperscript{73} Yet, despite the position in \emph{Ellis} and other similar cases,\textsuperscript{74} vicarious confrontation may be inapplicable to a section 1042(d) situation. Unlike the examination of veniremen, a matter for which the defendant can be of little value to his attorney, an attorney's examination of an informer might require quick, continuous access to his client for effective cross-examination.

On the other hand, even if the section 1042(d) hearing is technically violative of the confrontation clause, the government's interest in effective law enforcement may be so important as to require an involuntary waiver of the right to confrontation.\textsuperscript{75} A defendant may involuntarily waive confrontation if he is a member of a class of individuals to whom confrontation has been denied, because there are circumstances where the national security interest justifies infringing the otherwise fully assured right of a person to be confronted by his accusers.\textsuperscript{76} Thus, the existence of an in-

\textsuperscript{72} 328 F. Supp. 1077, 1088 (E.D.N.Y. 1971). The court declared:
But any defendant, if he is found guilty, should, as a matter of fundamental fairness and as part of the rehabilitative process, have the assurance, by reason of his direct observation, that justice was done.

\textit{Id.}

\textsuperscript{73} 430 F.2d 1352, 1355 (10th Cir. 1970).

\textsuperscript{74} \textit{See, e.g., United States v. Jorgenson}, 451 F.2d 516 (10th Cir. 1971); \textit{Near v. Cunningham}, 313 F.2d 929 (4th Cir. 1963).

\textsuperscript{75} The right of confrontation is not absolute. It may be waived by the defendant's statements or his acts. The United States Supreme Court recently held, in Illinois \textit{v. Allen}, 397 U.S. 337 (1970), that the trial judge may exclude the defendant when necessary to preserve order and decorum in the courtroom. That proposition has been subject to considerable criticism. \textit{See Helwig, Coping with the Unruly Defendant}, 7 \textit{Gonzaga L. Rev.} 17 (1971); \textit{Comment, Courtroom Restraint of the Criminal Defendant}, 25 \textit{Baylor L. Rev.} 141 (1973); \textit{Note, The Disruptive Criminal Defendant}, 22 \textit{Baylor L. Rev.} 307 (1970). The American Bar Association recommends that the defendant be allowed to observe the court proceedings through methods of modern technology. \textit{ABA Standards Relating to the Judge's Role in Dealing with Trial Disruptions}, part C.1 (Approved Draft 1972).

While the case of the disruptive defendant may be deemed a voluntary waiver of the right to confrontation, the protective policy considerations underlying the informer privilege may necessarily imply an involuntary waiver of the right of confrontation in the section 1042(d) hearing.

\textsuperscript{76} \textit{See McKay, The Right of Confrontation}, 1959 \textit{Wash. U.L.Q.} 122. Mc-
voluntary waiver in the section 1042(d) situation depends on whether society's interest in the informer privilege is sufficiently important to outweigh the defendant's interest in having the informer's identity disclosed.

Whatever the nuances of the confrontation clause, its purpose is to guarantee the accused direct access to his accusers. The section 1042(d) proceeding serves to shield a potentially invaluable witness from the defense on the ground that the informer would not be useful to the defendant. By doing so, section 1042 (d) limits the defendant's access to a person who was instrumental to his indictment.

Right to Compulsory Process

The criminal defendant's right to compulsory process to obtain witnesses is of recent origin; at common law, the right was possessed by the prosecution alone. The Bill of Rights corrected this defect by giving the subpoena power to the accused. Thus, the sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor. . . ."

The applicability of this right to the defendant's section 1042 (d) hearing depends on whether the testimony given at the hearing is by a "witness in his favor." The defense counsel and defendant must determine which witnesses are to be subpoenaed for the defense, since selection of defense witnesses is not left to the prosecutor. Even though most informers would advocate their own immateriality at the in camera hearing, the defendant should be the one to decide if the informer is a "witness in his favor" on the issue of identity disclosure. The defendant could argue that the informer must either be a witness against him or a witness in his favor, thereby invoking either the right of confrontation or the right to compulsory process.

That all individuals are subject to compulsory process was decided in United States v. Cooper. There, defendant Cooper was charged with libel on the President of the United States.

Kay classifies the principal groups of people to whom confrontation has been held dispensable, because of the asserted requirements of national security, as the following: government employees, employees of contractors of the government, maritime workers, international agencies, military personnel, aliens, conscientious objectors and applicants for passports. . .

77. The common law right to compulsory process was possessed by both parties in civil cases. 8 J. WIGMORE, EVIDENCE § 2191 (McNaughton rev. ed. 1961).
78. See State v. Dehler, 257 Minn. 549, 102 N.W.2d 696 (1960).
79. U.S. CONST. amend. VI.
80. CAL. PEN. CODE § 1326 (West 1970).
81. 4 U.S. (4 Dall.) 341 (1800).
Cooper's application to the Supreme Court "requesting" the attendance of several members of Congress was refused by Justice Chase, since it was deemed unnecessary to request the attendance of witnesses when the Constitution gave the defendant the right to order their appearance.\textsuperscript{82}

Despite the deference usually accorded the right to compulsory process, the defense will have to overcome the California case of People v. Pacheco,\textsuperscript{83} which summarily upheld the section 1042(d) in camera hearing against the contention that it violated the right to compulsory process. The court in Pacheco noted that the record of the in camera hearing showed that knowledge of the informer's identity could not have benefited the defendant.\textsuperscript{84} Perhaps Pacheco's inadequate treatment of the right to compulsory process can also be explained by the fact that the ex parte determination of the informer's non-materiality keeps the informer's name from the defendant. Because there is no right to subpoena an unknown bystander, the defendant may not use the subpoena as a fishing expedition to discover the identity of the informer. Nevertheless, the prosecutor has a duty to disclose all evidence favorable and material to the defense.\textsuperscript{85} An informer who can give material evidence on the issue of materiality, therefore, should be "disclosed" by the prosecution and subpoenaed by the court.\textsuperscript{86}

At the root of Pacheco's questionable ruling is the court's failure to distinguish the informer privilege from the procedure used to determine the materiality of an informer.\textsuperscript{87} The court of appeal contended that it was the

\begin{itemize}
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} 27 Cal. App. 3d 70, 103 Cal. Rptr. 583 (1972).
\item \textsuperscript{84} 27 Cal. App. 3d at 80, 103 Cal. Rptr. at 589. This summary decision by the court of appeal may have denied the defendant the right to an appellate advocate. The policy underlying the right to an appeal requires that the appellate counsel be given the opportunity to obtain the full transcript and advocate reversal based on that record. See ABA Project on Standards for Criminal Justice, Standards Relating to Criminal Appeals § 3.3 (1970). In Pacheco, the appellate court read the transcript and ruled the evidence immaterial, thereby denying the defendant the same rights violated initially by the trial court in the in camera hearing. The reviewing court additionally infringed upon the right to appeal.
\item \textsuperscript{86} Again, in the hypothetical (see text accompanying note 14 \textit{supra}), Informer is not a material witness to the guilt or innocence of Pusher; nevertheless he is material to the issue of his own materiality. Pusher can argue that his right to compulsory process requires that he be allowed to subpoena Informer on the issue of disclosure. Query whether Pusher should have the right to subpoena everyone he knows and ask if they informed on him.
\item \textsuperscript{87} Again, the reader must not confuse the two issues: the informer privilege
invocation of the basic privilege that denies informer's name to the defendant, not the *in camera* hearing, which is only the method by which the court determines the applicability of the privilege. If the sixth amendment were to apply, it would deny the privilege, the right to which has been determined to be valid.\(^8\)

In fact, the privilege theoretically only denies to the defendant the names of non-material informants of no value to him. The *ex parte, in camera* hearing, on the other hand, is the procedure by which the court can erroneously determine that a *material* informer is non-material. The absence of defense counsel, of course, increases the likelihood of this unfortunate result.

The *Pacheco* court's confusion over privilege and procedure explains why it failed to consider the right to have depositions as a solution to the compulsory process dilemma.\(^9\) Both the right to compulsory process and the informer's need for anonymity could be satisfied by allowing defense counsel to attend the *in camera* hearing, or by a system of written interrogatories, or by having the defense file voir dire questions with the judge to be asked of the informer. The court of appeal never considered these alternatives. Due to these unresolved issues in *Pacheco*, its terse approval of section 1042(d) is less than persuasive.

**Right to Public Trial**

The right to a public trial is another constitutional guarantee which arguably overrides the governmental interest in nondisclosure of informers' identities. Traditionally viewed as a guarantee against the use of courts as instruments of persecution,\(^9^0\) public trial has been highly regarded by the United States Supreme Court:

> The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet. All of these institutions obviously symbolized a menace to liberty.\(^9^1\)

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\(^8\) See generally F. HELLER, THE SIXTH AMENDMENT (1951).  
\(^9\) In re Oliver, 333 U.S. 257, 270 (1948); United States v. Kobil, 172 F.2d 919, 921 (3d Cir. 1949).  
\(^9^0\) J. WIGMORE, EVIDENCE § 2191 (McNaughton rev. ed. 1961).  
\(^9^1\) In re Oliver, 333 U.S. 257, 268-69 (1948).
The right to a public trial is expressly granted by the sixth amendment, which provides that "the accused shall enjoy the right to a speedy and public trial . . . ."\(^{92}\)

Among the reasons that have been advanced in favor of public trials are the following: (1) some member of the public may come forward to aid the defendant;\(^93\) (2) a public hearing avoids the suspicion which always accompanies secrecy;\(^94\) (3) knowledge that the hearing is subject to contemporaneous review by the public is an effective restraint on the prosecutor and the judge;\(^95\) (4) a public hearing enables spectators to observe the procedures followed by their government and to acquire confidence in judicial remedies;\(^96\) and (5) the defendant should, at minimum, be entitled to the presence of family and friends regardless of the charges.\(^97\) Many of these rationales also apply to *in camera* proceedings.

Despite the right to a public trial, it is within the discretion of the trial court to exclude some or all of the spectators from the courtroom. The Supreme Court has reversed convictions arising from trials that were too public\(^{98}\) as well as from trials that were completely secret.\(^99\) An order that certain spectators be excluded from the courtroom has been viewed as a proper exercise of discretion when the subject matter of a case was sexually explicit,\(^100\) when the order benefited the accused\(^101\) or a witness,\(^102\)

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92. U.S. CONST. amend. VI. This right was made applicable to state court proceedings through the fourteenth amendment in *In re Oliver*, 333 U.S. 257 (1948). In addition, denial of a public trial may deprive the accused in a criminal trial of the fairness required by the federal Constitution’s guarantee of due process. The right is also guaranteed in the California Constitution. CAL. CONST. art. 1, § 13.

93. *In re Oliver*, 333 U.S. 257, 270 & n.24 (1948). See also United States v. Kobil, 172 F.2d 919 (3d Cir. 1949); Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944).


95. *In re Oliver*, 333 U.S. 257, 270 (1948). See also United States v. Kobil, 172 F.2d 919, 921 (3d Cir. 1949); Davis v. United States, 247 F.2d 394, 395 (8th Cir. 1917).


102. Geise v. United States, 265 F.2d 659 (9th Cir.), *cert. denied*, 361 U.S.
or when it was designed to prevent courtroom disturbances or overcrowding. The exclusion of the public from the section 1042(d) hearing, however, is another matter. The section 1042 (d) in camera proceeding does not involve the exercise of judicial discretion, as it is held on the demand of the prosecutor. The power to exclude members of the public is properly within the discretion of an independent magistrate; but it should not be within the discretion of the prosecutor, who is an advocate for nondisclosure of the informant’s identity and who is unconcerned with impartially balancing the defendant’s right to a public trial against the interest in secrecy.

842 (1959); United States v. Kobil, 172 F.2d 919, 923 (3d Cir. 1949); Reagan v. United States, 202 F. 488, 490 (9th Cir. 1913).


104. Even here it can only be granted to deal with an embarrassing subject, courtroom disturbance, overcrowding, or to protect the defendant or a witness. See text accompanying notes 100-03 supra.

105. If there is a right to a public section 1042(d) hearing, it is unclear whether that right would require that the hearing be open solely to the accused or to the public as well. The large number of cases which hold that the defendant’s right to a public trial may be waived by his failure to assert it seem to support the view that the right belongs exclusively to the defendant. See Geise v. United States, 265 F.2d 659 (9th Cir. 1959); United States v. Sorsentino, 175 F.2d 721 (3d Cir. 1949); United States v. Kobil, 172 F.2d 919 (3d Cir. 1949). ABA, STANDARDS RELATING TO FAIR TRIAL & FREE PRESS rule 3.5(d) (Approved Draft 1968) allows exclusion of the general public and the news media from portions of a trial occurring outside the presence of the jury, on motion by the defendant.

U.S. CONSt. amend. IX states:
The enumeration in the constitution of certain rights shall not be con-
strued to deny or disparage others retained by the people.

Although no court has discussed the ninth amendment as a basis for granting the public an independent right to be present at trials, some cases have held that such a right exists on other grounds. Kostowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956) (defendant’s waiver of a public trial due to embarrassing testimony does not justify exclusion of the general public); E.W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896, appeal dismissed per curiam, 164 Ohio St. 261, 130 N.E.2d 701 (1955) (defendant’s waiver of public trial had no effect because of public’s independent right to attend). See generally Comment, Exclusion of the General Public From a Criminal Trial—Some Problem Areas, 1966 WASH. U.L.Q. 458.

The problem of the public’s independent right to be present generally arises in the context of excessive or prejudicial pretrial publicity. See ABA, STANDARDS RELATING TO FAIR TRIAL & FREE PRESS (Approved Draft 1968). But the interests of a fair trial and a free press are not necessarily opposed in the section 1042 (d) hearing. In this proceeding the issue is merely the scope of the right to a public trial. In the interests of informer protection, "public trial" might narrowly be defined to require the exclusion of the general public and the media. On the other hand, the fundamental philosophy of a democratic society might require an open hearing so that all citizens will be able intelligently to participate in the processes of their government.
Right to Jury Trial

Trial by jury has been traced to the Magna Carta.\(^{106}\) The First Continental Congress declared trial by jury as "the inherent and invaluable right of every British subject in these colonies."\(^{107}\) This high regard for the jury trial in criminal cases resulted in a double guarantee by the Federal Constitution.\(^{108}\) The right does not extend, however, to "petty offenses."\(^{109}\) Thus, those in camera hearings which arise in conjunction with a criminal proceeding involving a petty offense encompass no right to a jury trial, while those which arise from felony or serious misdemeanor offenses arguably do.

Even if the underlying trial warrants a jury, not all the issues presented at the in camera hearing merit jury resolution. It is clearly the law in California that where the trial is by jury, the jury alone is to decide all questions of fact.\(^{110}\) Since section 1042 (d) provides that the judge shall hold an in camera hearing at the request of the prosecutor, the trial judge might be forced to decide factual issues normally tried to the jury.

Entrapment furnishes a good example. If a defendant moves for the disclosure of the identity of an informer on the theory that the informer planted narcotics in the defendant's home, the prosecutor can require the judge to hold an in camera hearing, where the informer can testify that he did not entrap the defendant. Entrapment is an issue which is traditionally tried by the jury,\(^{111}\) and whenever there is sufficient evidence of entrapment, the defendant is entitled to an instruction on it.\(^{112}\) Despite the clear authority for entrapment to be tried by the jury, section

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\(^{106}\) W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 349 (T. Cooley ed. 1893). Some historians, however, reject this claim. See Frankfurter, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 HARV. L. REV. 917, 922 (1926).


\(^{108}\) U.S. CONST. art. III, § 2 provides in pertinent part that "[t]he trial of all Crimes, except in Cases of Impeachment, shall be by jury. . . . ." The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the Crime shall have been committed." U.S. CONST. amend. VI.

\(^{109}\) Frankfurter, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 HARV. L. REV. 917, 925-28 (1926). See also Baldwin v. New York, 399 U.S. 66 (1970) (if a prosecution involves an offense punishable by more than six months imprisonment, the defendant has a right to a jury trial); Duncan v. Louisiana, 391 U.S. 145 (1968).

\(^{110}\) CAL. EVID. CODE § 312(a) (West 1966); CAL. PEN. CODE § 1126 (West 1970).


1042(d) allows the judge to believe the informer rather than the defendant on the entrapment issue.¹¹³

Right To Counsel

The sixth amendment right to counsel is of modern origin.¹¹⁴ It provides that the “accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”¹¹⁵ This right has been interpreted by the Supreme Court to require “effective” and “substantial assistance,”¹¹⁶ not only at the criminal trial, but at all “critical stages” in which “substantial rights” of an accused may be affected.¹¹⁷ Thus, counsel is required at a police lineup,¹¹⁸ a preliminary hearing,¹¹⁹ arraignment,²²⁰ sentencing,²²¹ and on

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¹¹³ Section 1042(d) of the Evidence Code provides that the judge will make his determination based upon the evidence presented at both the open and the in camera hearings.

For example, drawing again from the hypothetical (see text accompanying note 14 supra), Pusher might argue that he was hired by Informer to package the marijuana. The prosecutor could subpoena Informer to the in camera hearing to rebut this theory. Under section 1042(d) the judge could assess the credibility of Informer, even though this is normally a function of the jury.

Pusher could argue that nondisclosure would deprive him of a fair trial because entrapment must be tried to a jury. Nevertheless, no court has so limited the scope of the in camera hearing. Thus, section 1042(d) allows the trial judge in this instance to take the issue of entrapment away from the jury.

By the same token, the in camera hearing invades the province of the jury in criminal libel trials (CAL. PEN. CODE §§ 248-57 (West 1970)), where the jury has the right to determine both law and fact. CAL. PEN. CODE § 1125 (West 1970). Whenever informant communications are used as a basis for searches which result in evidence of libel, the section 1042(d) hearing infringes on the right to trial by jury, since juries in libel cases must decide every issue including, arguably, the materiality of an informer.

¹¹⁴ F. HELLER, THE SIXTH AMENDMENT 109 (1951). At common law, the participation of counsel was prohibited in ordinary felony cases, but was allowed in misdemeanor and treason cases. The denial of counsel in criminal prosecutions probably was a result of the absence of a criminal prosecutor: in England the defendant was confronted only by the victim or an interested party. See 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 355 (T. Cooley ed. 1873). For a thorough study of the right to counsel, see W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955).


¹¹⁶ The right to “effective” assistance of counsel was established in Powell v. Alabama, 287 U.S. 45, 71 (1932), the celebrated “Scottsboro Boys” case.


appeal granted as a matter of right.\textsuperscript{122} Since critical stages of the criminal proceedings include all proceedings collateral to trial, a closed section 1042(d) hearing would appear to deny "effective and substantial" assistance of counsel to the defendant. Indeed, the American Bar Association proposes that counsel be provided in all proceedings arising from the initiation of a criminal action against the accused.\textsuperscript{123}

The presence of defense counsel at every stage of a criminal proceeding is an essential part of effective assistance of counsel. In recognition of the important role of the defense advocate, the Proposed Federal Rules of Evidence suggest a bilateral \textit{in camera} hearing.\textsuperscript{124} The inclusion of defense counsel at disclosure hearings would appear to be a minimum constitutional standard, balancing the defendant's right to representation with the prosecution's need to avoid public disclosure of the informer's identity. As an officer of the court, the defense attorney would be under a duty to refrain from disclosing the informer's identity.

The bilateral hearing, however, does not insure effective assistance of counsel. The defense attorney may be reluctant to ask his client questions about the informer for fear of disclosing the informer's identity. As previously noted,\textsuperscript{125} the attorney may also need quick, continuous access to his client in order to cross-examine the informer effectively. Furthermore, the client may be able to provide factual information and defenses unknown to his attorney in advance of the proceeding. In other words, effective assistance of counsel will require the attendance of the defendant in many cases.

\textbf{Conclusion}

Sound judgment requires departure from section 1042(d). The section 1042(d) \textit{ex parte}, \textit{in camera} hearing places a heavy burden on the defense and the courts, limits discovery, and leaves the accused effectively without an advocate. In addition, section 1042(d) arguably abridges several constitutional rights, including the rights to confrontation, compulsory process, public trial, jury trial, and counsel. Abridgement of these fundamental rights may further result in the violation of due process of law.\textsuperscript{126} This ar-

\begin{itemize}
  \item \textsuperscript{122} Douglas v. California, 372 U.S. 353 (1963).
  \item \textsuperscript{123} ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services rule 4.2 (Approved Draft 1968).
  \item \textsuperscript{125} See text accompanying notes 72-74 supra.
  \item \textsuperscript{126} The fifth and fourteenth amendments to the Constitution provide that no person shall be deprived of life, liberty or property without due process of law.
\end{itemize}
INFORMANT DISCLOSURE

The article has suggested that judicial abrogation of section 1042(d) can and should be based on one of the grounds discussed.

Proponents of the in camera hearing want a middle ground between disclosure and dismissal. The in camera hearing allegedly provides the trial judge with a better understanding of the facts which may rebut the defense theory of materiality. A study of the several alternatives to the in camera hearing, however, indicates that there can be no middle ground.

In the bilateral in camera hearing, the defense counsel would be allowed to attend, but the defendant would be excluded. While this procedure has the advantage of providing the defendant with an advocate, it places the defense counsel in the difficult position of being privy to information which he or she cannot share with the client. As an officer of the court, the lawyer can be ordered not to disclose the information, but it is unrealistic to assume that every attorney will obey. Furthermore, defense counsel might be reluctant to ask the client questions about the informer for fear of disclosing the informer's identity.

A second solution would be to create a special staff of public defenders to act as defense advocates at the in camera hearing. This proposal, however, would be unwieldy and would foist unwanted attorneys upon defendants who prefer private counsel.

A third alternative would be to exclude the prosecution as well as the defense from the in camera hearing. The prosecutor can be ordered to give the name of the informer to the judge, who will then investigate the case. Judicial investigation will place an additional burden on the trial judge, but it is arguably fairer because it treats defense and prosecution equally. Mutual exclusion was approved in People v. Woolman, where the defense and the district attorney were excluded from a hearing on the materiality of an arresting officer's misconduct files. Nevertheless, the city attorney and the police officer witness attended the hearing. One critical problem with judicial investigation is

The California Constitution contains a similar provision. Cal. Const. art. 1, § 13. Denial of the constitutional rights discussed above would automatically deprive the accused of the right to due process, for due process of law requires a trial "which meets the minimum test of fairness required by the Constitution." J. Frank, Courts on Trial 88 (1950).

129. The court noted that "to require an adversary hearing with counsel would destroy, at the outset, the very privilege which the hearing is designed to protect." 40 Cal. App. 3d at 655, 115 Cal. Rptr. at 326. However, the city attorney is also a prosecutor and the police have good communication with the prosecutorial sector of city government. Query whether the Woolman court applied a fair principle in an unfair manner.
that it bypasses a fundamental feature of our system of justice—the adversary hearing.\textsuperscript{180}

Until the Legislature assumes its burden of statutory reform, the only viable judicial alternative is a return to the old rule of "disclose or dismiss" as set forth by the California Supreme Court in \textit{People v. Garcia}.\textsuperscript{181} Under the rule of \textit{Garcia}, once a defendant makes a prima facie showing on the informer's materiality, the burden is then on the prosecution either to disclose the informer's identity or to incur a dismissal. Indeed, this is the best alternative to section 1042(d) unless the state can show a compelling interest in the \textit{in camera} procedure. "Disclose or dismiss" is truly consonant with the great principle of American jurisprudence which, in a conflict between the rights of the accused and the efficiency of the state, strikes the balance in favor of the accused.

\textsuperscript{130} See text accompanying notes 32-57 \textit{supra}.

\textsuperscript{131} 67 Cal. 2d 830, 833, 434 P.2d 366, 370, 65 Cal. Rptr. 110, 114 (1967). \textit{See} text accompanying notes 21-23 \textit{supra}. 