In his book "Undercover," Carmine J. Motto, a retired Secret Service Agent, has this to say about the informant: "He is precisely described as one who gives information, he is a very necessary part of police work, and most agencies would be at a loss to operate without him."

Law enforcement officers use the information provided by informants to assist them in obtaining search and arrest warrants and from time to time as a basis for a search or an arrest without a warrant.

LEGAL ISSUES—

Police Informants

Over the years, the U.S. Supreme Court has had to decide many cases in which the defendants have alleged that the use of informants has violated their fourth, fifth, or sixth amendment rights. The court has sustained the use of informants by law enforcement agencies and has given them a confidential protected status.

Using Supreme Court and some lower appellate court decisions as a basis, following are some guidelines for the law enforcement officer on the protection of informant confidentiality and the use of informants to establish probable cause to search or arrest.

Conservation of Confidentiality

The confidential status of informants under the Federal law was well established in the 1895 case, in re *Quarles* and *Butler*, 158 U.S. 532 (1895):

> **It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offense against those laws; and as such information, given by a private citizen is a privileged and confidential communication, for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the Government.**

The principle of confidentiality was reaffirmed in *Wilson* v. *United States* in 1932 and again in *Sher* v. *United States* in 1938. The following is extracted from *Sher* v. *United States*, 305 U.S. 251 (1938):

> **A Federal officer who has made an arrest following a tip as to a violation of a Federal law may not in a prosecution for such violation be required to reveal the identity of his informant, where this is not essential to the defense, as, for example, where this turns upon an officer's good faith.**

The confidential status of informants was never absolute, however, for the court always maintained that when it was essential to the defense, Government witnesses could be compelled to disclose their sources of information. In *Jencks* v. *United States* 353 U.S. 657 (1957), the Supreme Court held that the defense was entitled to obtain, for impeachment purposes, statements that had been made to Government agents by Government witnesses during the investigatory stage.

The statements were to be turned over to the defense at the time of cross-examination if their contents related to the subject matter of the witness' direct testimony and if a demand had been made for specific statements that had been written by the witness or if orally made was recorded by Government agents. The trial judge was to review the statements for materiality and turn them over to the defense if they contained material related to direct examination.

Shortly after the *Jencks* decision, Congress passed the so-called Jencks Act of 1957. This act provided that only authenticated or substantially verbatim pretrial statements by prosecution witnesses who were to testify would be given to the defense.

Additionally, the act gave the trial judge latitude as to what papers of this type would be shown to the defense. The validity of the Jencks Act was upheld by the Supreme Court in 1959 in *Palermo* v. *United States*, 360 U.S. 343 (1959).

In those instances where an informant must testify, can he use a fictitious name and address? The Supreme Court said no in *Smith* v. *Illinois*, 390 U.S. 343 (1959). The Court reasoned that the credibility of a witness could not be established without knowing his name or where he lived. Credibility of the witness was a

by Lt. Col. Benjamin T. Valimont (Ret.)

particular issue in this case because there was a substantial conflict between the testimony of the witness and the defendant.

An exception to this disclosure requirement was established in *United States* v. *McKinley*, 493 F. 2d 547 (5th Civ., 1974). Special Agent Larry E. Rissler, Legal Counsel Division of the Federal Bureau of Investigation, summarized this exception thusly in "The Informer–Witness," FBI Law Enforcement Bulletin, May 1977:

> **Usually disclosure is justified by the need to impeach the witness. If the informer's testimony does not differ from that of the defendant, the need to impeach is diminished, and with it the reason to divulge the informer's true name and address.**
>
> **Often this is the case when the defense is based on entrapment. By asserting entrapment, the defendant admits performing the physical acts which constitute the crime but claims that the Government induced him to do it.**
>
> **Thus, in a recent Federal case an undercover agent testified to a narcotics sale made by the defendant but refused to furnish his home address, aliases used in previous narcotics investigations, or how long he remained in the area after the incident. The defendant claimed this denied him his sixth amendment right of cross-examination.**
>
> **The Court of Appeals disagreed and noted that because there was little conflict between the testimony of the witness and the defendant (defendant admitted making the sale) the undercover agent's credibility was only tangentially put in issued, and therefore, the defendant had no right to disclosure of the witness' background data.**

The threat of physical harm is the basis for another exception to the disclosure requirement established by *Smith* v. *United States*. The Government bears the burden of demonstrating that there is a factual basis for concern. It will not suffice that the informant suspects that he is in some sort of danger. [1]

The court has also indicated in cases where the informant is not the principal witness against the defendant, disclosure need not be required. [2]

The Fourth Amendment of the U.S. Constitution provides that "no warrants shall be issued but upon probable cause...." When a law enforcement officer sees an offense committed and can provide eye witness testimony this will normally satisfy the probable cause requirement. Law enforcement officers have first hand knowledge of only a small portion of the offenses that they must react to. They normally receive their information from third parties, that is, informants. This information is labeled "heresay" and must be tested before being accepted as probable cause to search or arrest.

The U.S. Supreme Court in *Aguilar* v. *Texas*, 378 U.S. 108 (1964), held that a State search warrant was not valid because the magistrate was not provided with sufficient information to determine the credibility of the informant, nor was a basis for the informant's conclusion of criminal activity established. The court said:

> **For all that appears, the source here merely suspected, believed, or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not "judge for himself the persuasiveness of the facts relied on...to show probable cause." He necessarily accepted "without question" the informant's "suspicion," "belief," or "mere conclusion."**

The result of *Aguilar* is a two-pronged test for determining probable cause based upon hearsay information:

- Information must be provided that will enable a neutral and detached magistrate to determine that the informant is reliable.

• Information must be provided from which the magistrate can determine that the informant's information is reliable.

In each case, both prongs of the *Aguilar* test must be satisfied to establish probable cause. Each prong of the Aguilar test will be discussed separately.

The courts have placed informants into categories and use different standards for determining reliability of the various categories. The categories of informants are criminal informants, citizen informants, and other police officers.

In his book, "Arrest, Search, and Seizure," Lawrence Waddington, defines the criminal informant thusly:

Although the characterization of someone as a criminal informant is not entirely accurate, the term generally connotes a person who supplies information to law enforcement agencies in exchange for pay, immunity from arrest, or a promise of lenient treatment.

The criminal informant presents some problems when it comes to establishing his reliability and the reliability of his information. The most common method of establishing his reliability is for the law enforcement officer to show that the informant has provided accurate information in the past.[3] It is not sufficient, however, that the officer merely states that the informant has provided reliable information in the past, he must provide sufficient information about past performance to enable the magistrate to make an enlightened decision, stated in *Aguilar* v. *Texas* as:

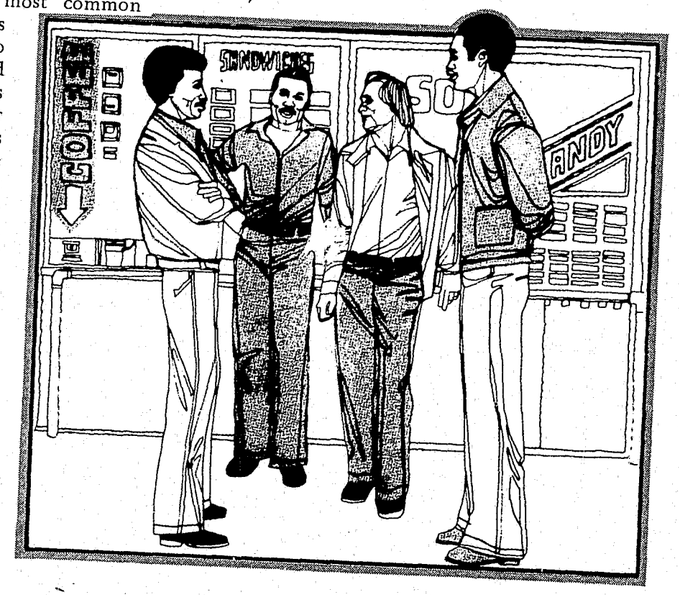
The Commissioner must judge for himself the persuasiveness of the facts relied upon by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion.

John Ferdico, in his book *Criminal Procedure for the Law Enforcement Officer,'* cites an Illinois case which provides some idea of what the courts consider when deciding reliability issues. In this case, defendant's appeal was based on the fact that "informant's" reliability had not been established because there was no proof that his earlier tips had resulted in convictions. The Appellate Court for the State of Illinois said:

Convictions, while corroborative of an informant's reliability, are not essential in establishing his reliability. Arrests, standing alone, do not establish reliability, but information that has been proved accurate does. Arrestees may not be prosecuted; if prosecuted they may not be indicted; if indicted they may not be tried; if tried, they may not be convicted.

If a case is tried, the informer may never testify; his credibility may never be passed upon in court. The true test of his reliability is the accuracy of his information.

People v. *Laurence*, 133 Ill. App. 2d 542, 544, 273 N.E. 2d 637, 639 (Appellate Court of Illinois 1971).



Reliability of the criminal informant can also be established when he makes statements or turns over evidence against his own penal interest. In *United States* v. *Harris*, 403 U.S. 573 (1971) the Court approved of a warrant issued on an informant's tip that he had purchased illegal whiskey from defendant at his residence over a 2-year period, the last purchase being within 2 weeks of the tip.

Additionally, detailed information was provided concerning the concealment of the whiskey. The affidavit described the informant as a "prudent person." The defendant was said to have a reputation as a bootlegger and other persons had supplied similar information about him. The defendant also had been found in control of illegal whiskey within the previous 4 years.

The court concluded that the detailed account of the tip, the personal observation this revealed, and the fact that the informant had admitted to criminal behavior by his purchase of whiskey were sufficient to enable the magistrate to find him reliable and that the supporting evidence, including defendant's reputation, could supplement this determination. The court said in *United States* v. *Harris* :

People do not lightly admit a crime and place critical information in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search.

When law enforcement officers receive information from an untested informant the information must be corroborated. The corroboration can be such things as the defendant's prior criminal record, information from other official records, the results of police surveillance, information from other untested informants.

The decisive factor here is not the quantity of information but the quality. It must be sufficient to pursuade a neutral and detached magistrate to issue a warrant.

Lawrence Waddington in "Arrest, Search, and Seizure," describes the citizen informant in this manner:

Most often a citizen informant is a victim or witness of a crime involving injury to person or damage to property. His report often easily verifiable from circumstances, may properly constitute sole source of probable cause to arrest.

A Wisconsin Supreme Court case which Ferdico cites in "Criminal Procedures for the Law Enforcement Officer," provides some insight into the rationale for placing so much faith in the citizen informants' statements.

An ordinary citizen who reports a crime that has been committed in his presence, or that a crime is being or will be committed, stands on much different ground than a police informer. He is a witness to criminal activity who acts with an intent to aid the police in law enforcement because of his concern for society or for his own safety. He does not expect any gain or concession for his information. An informer of this type usually would not have more than one opportunity to supply information to the police, thereby precluding proof of his reliability by pointing to previous accurate information which he has supplied. *State* **v.** *Paszek*, **50 Wis. 2d 619, 184 N.W. 2d 836, 843 (1971).**

In those instances when the citizen informant does not wish his identity disclosed, it is necessary for the law enforcement officer seeking a warrant to supply the magistrate with sufficient backup data on the informant to enable a decision on reliability. The issue on how much backup data is necessary is unclear.

Ferdico cites two Virginia cases that seem to indicate that the citizen informant who wishes to remain anonymous will not have as strict a reliability criteria applied as would be the case for a criminal informant.

Generally, fellow law enforcement officers are considered reliable informants and their reliability does not have to be tested.

In the *United States* v. *Ventresca*, 380 U.S. 102 (1965), the court upheld a search warrant that had been issued based upon the personal observations of the affiant and hearsay from other Federal agents. The hearsay in this case was that alcohol and tobacco tax

agents had smelled the odor of fermenting mash. The court said:

> ...moreover, upon reading the affidavit as a whole, it becomes clear that the detailed observations recounted in the affidavit cannot fairly be regarded as having been made in any significant part by persons other than full-time investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service. Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number.

An exception to this policy might be in a case where the information has passed through a number of other police officers before getting to affiant.

Ferdico cites an Indiana case where the court failed to find probable cause because information passed through three other officers before getting to affiant. (*Ferry* v. *State*, 255 Ind. 27, 262, N.E. 2d 523, Supreme Court of Indiana, (1970.)

There are basically two types of information to be concerned with—first-hand information and hearsay information.

First-hand information is that which the informant has personally perceived and hearsay information is information that the informant has received from a third party.

First-hand information is considered the most reliable and usually does not present the law enforcement officer with any significant problems. He merely has to relate to the magistrate what his informant perceived, when he perceived it, and how he came to perceive it.

Waddington in "Arrest, Search, and Seizure," cities a California case that is a good example of first-hand knowledge:

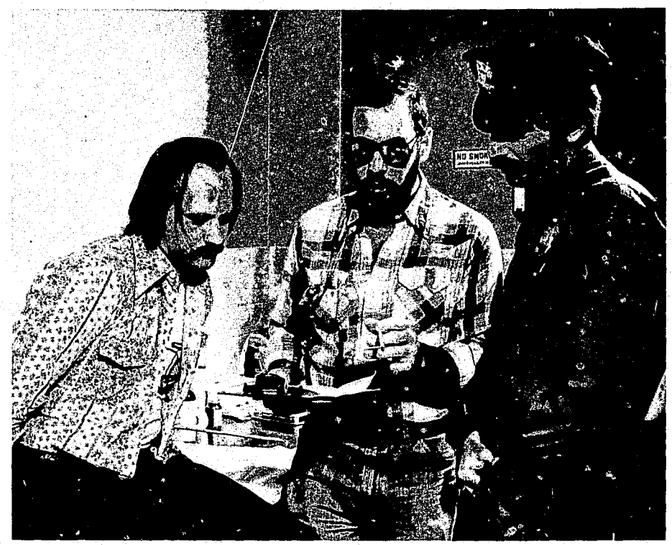
> A detective engaged in the investigation of illicit narcotics traffic testified that he had been informed by a certain named juvenile that one 'Dewey' had furnished marihuana and restricted dangerous drugs to said juvenile within the immediately preceding three weeks;
> that "Dewey" was presently dealing in narcotics at a certain address;
> that "Dewey" had previously dealt in narcotics at other premises described by the juvenile;
> that lists of telephone numbers and names contained in the juvenile's wallet contain the name of 'Dewey' among others, and contained a telephone number (which was verified to be a number listed at the premises alleged to be 'Dewey's' present address);
> and that he removed notes from the juvenile's wallet which the juvenile identified as being a price list for 'stuff,' which was identified by the juvenile as marihuana and a price list for 'spoons' for methamphetamine.
> The juvenile stated the price list was furnished to him by 'Dewey.'
> Finally, the landlady at the premises alleged by the juvenile to be 'Dewey's' present address had told the officer that the premises were occupied by a man matching the physical description of 'Dewey.' *People* v. *Scoma*, 71 Calif. 2d. 332, 455 p. 2d 419. In this case, the hearsay statements reporting illegal activity are factual in nature and clearly indicate that the informant had personal knowledge of such illegal activity.

When an informant is providing information that he has not personally perceived it is still possible, though more complicated to satisfy the second prong of the *Aguilar* test. When dealing with information that is hearsay to the law enforcement informant, it is necessary to establish the reliability of the original informant. This is done in basically the same way as establishing reliability for the law enforcement informant, that is, statement against penal interest, previous reliable information.

The magistrate must be provided with sufficient background information so that he can make an enlightened decision. He must be able to ascertain that the law enforcement informant is not just repeating rumors but rather is providing information with a factual basis.

There will be times when all requirements of the test cannot be satisfied. This does not mean however, that an informant's information cannot be used. What is needed in this case is supporting information that will corroborate the information provided by the informant.

The law enforcement officer may be able to obtain supporting information through surveillance or other



Photograph curtesy Copp Organization, Inc.

investigative activity or he may be able to get supporting information from other informants.

In *Draper* v. *United States*, 358 U.S. 307 (1959), the Supreme Court ruled that an officer's independent verification of an informant's tip was sufficient for probable cause.

In *Draper* a Federal narcotics agent received information from an informant, who had provided reliable information in the past, that on September 8 or 9, Draper would arrive in Denver on a train from Chicago with 3 ounces of heroin.

The informant gave the agent a detailed physical description of Draper and of the clothing he was wearing and said that he would be carrying a tan zipper bag and that he habitually walked real fast.

On the morning of September 8, the agent went to the Denver train station and kept watch over all incoming trains from Chicago, but no one fitting Draper's description was observed. The agent returned to the train station on September 9 and saw a person carrying a tan zipper bag, meeting the exact physical description and wearing the precise clothing described by the informant, alight from an inbound chicago train and start walking fast toward the exit.

In the *Draper* case the court said:

- Nor can we agree with petitioner's second contention that Marsh's information was insufficient to show probable cause and reasonable grounds to believe that petitioner had violated or was violating the narcotic laws and to justify his arrest without a warrant.
- The information was given to narcotic agent Marsh by 'special employee' Hereford may have been hearsay to Marsh, but coming from one employed for that purpose and whose information had always been found accurate and relaible, it is clear that Marsh would have been derelict in his duties had he not pursued it.
- And when in pursuing that information, he saw a man, having the exact physical attributes and wearing the precise clothing and carrying the tan zipper bag that Hereford had described start to walk at a 'fast' pace toward the station exit, Marsh had personnally verified every facet of the information given him by Hereford except whether petitioner had accomplished his mission and had the 3 ounces of heroin on his person or in his bag.
- And surely, with every other bit of Hereford's information being thus personally verified, Marsh had "reasonable grounds" to believe that the remaining unverified bit of Hereford's information—that Draper would have the heroin with him—was likewise true.

Although *Draper* is a warrantless arrest it provides insight into what the court expects in the way of corroboration. The law in this area is still somewhat unsettled and hard and fast rules as to what will suffice as corroboration cannot be made.

Spinelli v. *U.S.*, 393 U.S. 410 (1969), is a negative example in that the court points out what is insufficient corroboration. In *Spinelli* a search warrant for gambling paraphernalia was based upon an affidavit which indicated:

The defendant was observed several times going to a certain apartment.

A FBI check with the telephone company revealed two telephones in the apartment listed under the name of Grace Hagen.

Defendant was known to the affiant and to Federal law enforcement agents and local law enforcement agents as "bookmaker."

Affiant had been informed by a reliable confidential informant that defendant was operating a handbook and accepting wagers and disseminating wagering by means of the telephone located in the apartment.

The court first noted that the last item failed to satisfy the first prong of the *Aguilar* test because no underlying circumstances were shown to establish reliability. The court then inquired as to whether the corroborating evidence was adequate and concluded that the FBI only established that the informant was correct in placing the defendant and two telephones in the apartment, which did not warrant the inference that the informant had come by his information in a reliable way.

The court disregarded the third item in the affidavit calling in a "bald and unilluminating assertion of police suspicion."

Ferdico has this to say about *Spinelli*:

> **The Spinelli case is valuable to the law enforcement officer in that it traces through all the Aguilar requirements for establishing probable cause using an informant's information and gives reasons why each test was not met by the affidavit in that case. It then considers other information in the affidavit as corroboration of the informant's information and gives specific reasons why the corroborative information is adequate.**

It also needs to be pointed out here that since *Spinelli* the U.S. Supreme Court had decided that alleged criminal reputation may be considered by a magistrate in deciding whether or not to issue a warrant, *United States* v. *Harris*.

The various courts of this nation, including the U.S. Supreme Court, recognize the fact that the informant plays a vital role in the law enforcement effort. To the maximum extent possible, they have endeavored to protect the confidentiality of the informant. It is not inconceivable that the court could have ruled that due process requires the identity of all informants be disclosed.

In *Aguilar* and *Spinelli* the court has provided law enforcement officers with substantive guidance as to what is required to obtain a warrant based upon an informant's information. The court could have ruled in these cases without issuing the guidance and leaving the law enforcement community to hit and miss with information provided by informants. ■

*** It is important to note that Federal law, as cited in the article, does not agree in all respects with the law applied in courts-martial. It is, however, necessary to use the cited law as a foundation for understanding the practice in military courts.**

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END