INFORMANT DISCLOSURE AND PRODUCTION: A SECOND LOOK AT PAID INFORMANTS

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I. INTRODUCTION

Smith considers committing a burglary. Johnson, an acquaintance, tells Smith about a tavern that looks like an attractive target. Together they plan the burglary. Unfortunately for Smith, Johnson is a paid informant[1] who keeps the police informed of their progress. While committing the burglary, Smith is arrested. Johnson is paid for his efforts and disappears.

Smith's lawyer notifies the court that she intends to raise entrapment as a defense.[2] In order to interview the informant, she files a motion to compel disclosure of the informant's identity. The prosecution responds by disclosing Johnson's name and last known address. The defense fails to locate him. The prosecution then states that it no longer knows of its informant's whereabouts.

What happens next should be of great concern for all criminal defendants and their lawyers. While informants have always played an important role in law enforcement,[3] recent years show a dramatic rise in their use.[4] For example,

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1. Informants, or informers, are people who voluntarily furnish information of violations of the law to law enforcement officials. 76 A.L.R.2d 262, 267-268 (1961). For purposes of this article, "paid informants" are not only those who receive monetary compensation, but also those who receive lighter sentences, low bail, or any other special considerations from law enforcement officials.

2. For purposes of this article, "entrapment" is defined as "the act of officers or agents of the government in inducing a person to commit a crime not contemplated by him, for the purpose of instituting a criminal prosecution against him." BLACK'S LAW DICTIONARY 532 (6th ed. 1990).

3. *See generally* JACK MORRIS, POLICE INFORMANT MANAGEMENT I-1 (1st ed. 1983) (illustrating how the use of informants dates back to the earliest days of police service); Larry E. Rissler, *The Informer's Identity at Trial*, 44 FBI LAW ENFORCEMENT BULLETIN NO. 221 (1975) (stating that police have found it necessary to deal with informants since the earliest days of law enforcement history); Michael F. Brown, *Criminal Informants: Some Observations on Use, Abuse, and Control*, J. POLICE SCI. & ADMIN. 251 (1985) (statement by a speaker at the 1909 convention of the International Association of Chiefs of Police) ("Opinions differ regarding the relations that ought to exist between the police and the semi-criminal go-betweens, or stool pigeons, as they are commonly called. Intimate relations between those classes, while not desirable, are at times essential in police warfare against the lawless element."); Evan Haglund, Note, *Impeaching the Underworld Informant*, 63 S. CAL. L. REV. 1405, 1410 (1990) (arguing that informant use has historically depended on police techniques and certain crimes).

4. *See* Mark Curriden, *What's the Cost of Using Paid Informers?*, A.B.A. J., June 1991 at 43 (showing a rise in the use of confidential informants); *The Police Informant*, THE

a review of all 1989 search warrant affidavits filed in the U.S. District Court in Atlanta showed that the police used confidential informants in ninety percent of the cases, up from sixty percent in 1980.[5] In addition, a recent study demonstrates the number of federal search warrants relying exclusively on an unidentified informant nearly tripled, from 24 percent to 71 percent, between 1980 and 1993.[6]

Much of the recent increase in informant use is in the area of paid informants.[7] The amount of money federal agents paid to informants climbed from $25 million in 1985, to $97 million in 1993.[8] Many of today's paid informants operate on incentive plans.[9] Federal law allows governmental agencies to share with an informant up to twenty–five percent of what they seize, with a cap of $250,000 per case.[10]

While the credibility of informants is always questionable,[11] the recent incentive plans create environments which are especially favorable for entrapment.[12] Because the informant is paid contingent upon the seizure of things, the informant may try to facilitate such a seizure. Likewise, when the informant is paid contingent upon an arrest, the informant will likely facilitate such an arrest. With hopes of a big reward, such "facilitation" can easily become entrapment.

In many cases, including the above scenario, the informant is the only person who witnessed the events culminating in the arrest. Therefore, a potential defense of entrapment may necessarily depend on information only the informant can provide. However, the defense is often precluded from being able to adequately present an entrapment defense under today's practices. The informant is rarely called to testify before or at trial,[13] and, as this article

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ANGOLITE, Dec. 1980, at 25 (arguing that informants have become pervasive in the American culture and the trend is toward their increased use).

5. Curriden, *supra* note 4, at 43.

6. Mark Curriden, *The Informant Trap: Secret Threat to Justice*, NAT'L L. J., Feb. 20, 1995, at A1, A28 (examination of 1,212 warrants in four selected cities).

7. In 1987, the federal government paid $35 million to confidential informants. Curriden, *supra* note 4, at 43. In 1989, this number jumped to $63 million. *Id.* Between 1990–92, the DEA paid informers $30 million and the FBI paid informers $11 million, with some informants receiving $250,000 to $780,000 in one year. *Oversight Hearing on the Department of Justice Asset Forfeiture Program: Before Legislation and National Security Subcommittee, Committee on Government Operations*, 102nd Cong., 2nd Sess. 7 (1992) (statement of John Conyers Jr., Chairman). The increase in police use of paid informers is linked to greater sums of available money through the recently passed forfeiture statutes, from which funds must be spent on law enforcement. *Id.*

8. Curriden, *supra* note 6, at A28.

9. Curriden, *supra* note 4, at 44.

10. *Id.* In order to circumvent these monetary caps, "agents either treat a single drug bust as several cases, or else funnel payments through local law enforcement authorities who are not subject to the federal caps." *Id.*

11. *See, e.g.*, Curriden, *supra* note 4, at 46, (quoting Professor Dershowitz) ("[T]he word of a bought witness is simply worthless...[i]f a defense attorney were to pay a witness or informant for the defendant, he would be immediately jailed...[t]ell me that is a fair system."). *See also* Haglund, *supra* note 3, at 1412 (discussing the proclivity of informants to lie).

12. *See, e.g.*, McLawhorn v. North Carolina, 484 F.2d 1, 7 n.18 (4th Cir. 1973) (recognizing that informants often have a pecuniary interest in the arrest of the defendant, which increases the risk of entrapment).

13. The government may avoid putting the informant to the stand for at least two reasons. First, the government may wish to keep the informant's identity as secret as possible.

explains, getting such information from an informant is often impossible because after law enforcement has utilized the informant, he or she often disappears.

This article explains just how the government is constitutionally allowed to let an informant slip through its fingers after an arrest is made but before the defendant can interview him or her regarding any good faith defenses. Part II provides the backdrop to the judicial treatment of informants by briefly examining the constitutional due process right to "access evidence."[14] Part III shows how these due process concerns have been applied to a defendant's right to access informants, focusing specifically on the government's incentives to lose track of its paid informants.[15] Part IV proposes the use of a "missing witness" instruction as a way to persuade the government to keep track of its informants long enough to allow for a defense interview.[16] This article concludes by inviting further comment and solutions on ways to handle the growing use of paid informants.[17]

II. THE DUE PROCESS RIGHT TO ACCESS EVIDENCE

"Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness."[18] The Supreme Court has "long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense."[19] To safeguard this right, the courts have developed "what might loosely be called the area of constitutionally guaranteed access to evidence."[20] The purpose of such a doctrine is to deliver "exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system."[21]

Within this framework lies a defendant's constitutionally protected right to request and obtain from the prosecution evidence that is either material to his or her guilt or relevant to his or her punishment.[22] Even absent a request, the

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Second, the government may wish to avoid the "interested witness" instruction which generally provides:

> The testimony of an informant, someone who provides evidence against someone else for money, or to escape punishment for [his] [her] own misdeeds or crimes, or for other personal reason or advantage, must be examined and weighed by the jury with greater care than the testimony of a witness who is not so motivated.
> _____ may be considered an informant in this case.
> The jury must determine whether the informer's testimony has been affected by self-interest, or by the agreement [he] [she] has with the government, or [his own] [her own] interest in the outcome of the case, or by prejudice against the defendant.

EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS – CIVIL AND CRIMINAL § 15.02 (4th ed. 1987). Such an instruction is appropriate when the informant is paid for his testimony. U.S. v. Brooks, 928 F.2d 1403, 1409 (4th Cir), *cert. denied* 112 S. Ct. 140 (1991).

14. *See infra* text accompanying notes 18–44.
15. *See infra* text accompanying notes 45–79.
16. *See infra* text accompanying notes 81–93.
17. *See infra* text accompanying note 93.
18. California v. Trombetta, 467 U.S. 479, 485 (1984).
19. *Id.* at 485.
20. *Id.*
21. *Id.*
22. Brady v. Maryland, 373 U.S. 83, 87-88 (1963).

prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt.[23] This so-called *Brady* right generally requires disclosure of evidence requested by the defendant when such evidence is: (1) material;[24] (2) exculpatory;[25] (3) relevant;[26] (4) unavailable to the defense from other sources;[27] and (5) under

23. United States v. Agurs, 427 U.S. 97, 107–13 (1976). "Although disclosure [of exculpatory material] must be made when it is still of substantial value to the accused, the prosecution does not need to produce *Brady* material before trial." United States v. Woodley, 9 F.3d 774, 777 (9th Cir. 1993); *see also* United States v. Farley, 2 F.3d 645, 654 (6th Cir. 1993). *But see* United States v. Williams, 10 F.3d 1070 (4th Cir. 1993) (assuming *arguendo* that *Brady* material must be turned over to the defense prior to trial).

24. Evidence withheld by the government is "material only if there is reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). *See also* United States v. Kozinski, 16 F.3d 795, 818 (7th Cir. 1994) (construing "reasonable probability" as probability that is sufficient to undermine confidence in the outcome).

Cumulative evidence is not "material." *See, e.g.*, Kozinski, 16 F.3d at 819 (finding no *Brady* violation when undisclosed testimony simply added two more transactions to transactions already in evidence and supported by co-conspirator's testimony); United States v. Farley, 2 F.3d 645, 654 (6th Cir. 1993) (finding no *Brady* violation in failing to disclose grand jury testimony when defendants already had consistent testimony); United States v. Rodriguez Alvarado, 985 F.2d 15, 19 (1st Cir. 1993) (finding no *Brady* violation when government failed to disclose that its informant failed a polygraph test as such evidence was cumulative to inconsistent statements previously introduced).

For cases applying the *Brady* materiality standard, *see, e.g.*, United States v. Aggarwal, 17 F.3d 737, 743 (5th Cir. 1994) (finding no *Brady* violation when government waited to turn over documents as they pertained to peripheral issue at trial and therefore not material); United States v. Ailport, 17 F.3d 235, 237 (8th Cir. 1994) (finding no *Brady* violation when, while undisclosed tapes were somewhat favorable to defendant as to narcotics source, they were not material to defendant's guilt for aiding and abetting narcotics distribution); Jones v. Washington, 15 F.3d 671, 676 (7th Cir. 1994) (finding no *Brady* violation in failing to disclose firearms worksheet which indicated that gun allegedly used by defendant may have been inoperable due to mud in its barrel when defendant was identified, worksheet stated that gun "apparently will fire," and defendant could have dropped the gun in mud after discharge).

25. Courts have defined "exculpatory evidence" as that which is "favorable to the defense." *See, e.g., Ailport*, 17 F.3d at 236; United States v. DeLuna, 10 F.3d 1529, 1534 (10th Cir. 1993) (finding no *Brady* violation in government's failure to disclose amount paid to confidential informant when such evidence would not have been favorable to the defendant); United States v. Enriquez-Estrada, 999 F.2d 1355, 1361 n.3 (9th Cir. 1993) (finding no *Brady* violation when government failed to reveal statement made by defendant to DEA agent that he was staying at residence at which 1,000 pounds of marijuana were found as statement was not exculpatory).

When the evidence would be helpful to the defense, it must be disclosed. *See, e.g.*, United States v. Innamorati, 996 F.2d 456, 480 (1st Cir.) (finding *Brady* violation when government failed to disclose agent's notes indicating that driver was someone other than defendant, as defendant had alleged), *cert. denied* 114 S. Ct. 1993); United States v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1993) (finding potential *Brady* violation when government fails to disclose a material lie by its informant regarding prior homicide convictions).

26. *See, e.g., Ailport*, 17 F.3d at 238 (finding no *Brady* violation when the identity of an original narcotics source was not relevant to the defendant's conviction for its sale); United States v. Coleman, 997 F.2d 1101, 1106 (5th Cir.) (finding no *Brady* violation when government failed to disclose an offer made by a witness to federal prosecutors where there was no indication that subject matter of the offer had any relation to transactions involved in the case at bar), *cert. denied* 114 S. Ct. 333 (1993).

27. *See, e.g.*, United States v. Garcia, 13 F.3d 1464, 1472 (11th Cir. 1994) (finding no *Brady* violation when another witness could have replaced the undisclosed agent with no substantive change in the testimony); United States v. Huebner, 16 F.3d 348, 354 (9th Cir. 1994) (finding no *Brady* violation in the government's failure to disclose IRS documents when the defense had access to documents containing same relevant information); United States v. Zackson, 6 F.3d 911, 919 (2nd Cir. 1993) (finding no *Brady* violation when the government

the actual or imputed knowledge or control of the prosecution.[28] Failing to disclose such evidence is a constitutional violation whether done in good or bad faith.[29] Whereas *Brady* and its progeny address exculpatory evidence still in the government's possession, *California v. Trombetta*[30] and *Arizona v. Youngblood*[31] address situations in which the disputed evidence was once in the government's possession, but is no longer under government control. Together, these cases establish that when law enforcement fails to preserve evidence, a defendant's due process rights are infringed only when the following circumstances exist: 1) the missing evidence possessed apparent exculpatory value;[32] 2) the defendant is unable to obtain comparable evidence through reasonably available means;[33] and 3) the government acted in bad faith[34] in effecting its disappearance.

The existence of bad faith turns on "the police's knowledge of the exculpatory value of the evidence at the time it was destroyed."[35] Bad faith is almost impossible to prove.[36] To show bad faith, the defendant must show

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understated a codefendant's role as an informant when defendant had sufficient access to essential facts thus enabling him to take advantage of any exculpatory material).

28. "*Brady* does not require the government to conduct discovery on behalf of the defendant." United States v. Baker, 1 F.3d 596, 598 (7th Cir. 1993). *See also Garcia*, 13 F.3d at 1472 (finding no *Brady* violation when the prosecution was unaware that a government witness was a suspect in an unrelated murder case in another state); United States v. Jadusingh, 12 F.3d 1162, 1166 (1st Cir. 1994) (holding no *Brady* violation when the government failed to disclose witness' prior drug conviction until first day of trial when the government did not learn of conviction before the defendant); United States v. Kern, 12 F.3d 122, 124 (8th Cir. 1993) (finding no *Brady* violation when the state's knowledge of a police report which potentially exonerated the defendants could not be imputed to a federal prosecutor).

29. United States v. Agurs, 427 U.S. 97, 110 (1976). As the court explained, the due process violation occurs from the fact that the defendant was unable to introduce material evidence in his defense which could have created a reasonable doubt as to his guilt and not because of the character of the prosecutor in withholding evidence. *Id.*

30. 467 U.S. 479 (1984).

31. 488 U.S. 51 (1988).

32. California v. Trombetta, 467 U.S. 479, 488–489 (1984). *See, e.g.*, United States v. Caicedo–Llanos, 960 F.2d 158, 161-162 (D.C. Cir. 1992) (finding no due process violation when the government destroyed a facsimile photograph because it did not determine the validity of defendant's arrest); James v. Singletary, 957 F.2d 1562, 1568 (11th Cir. 1992) (finding the police were under no obligation to preserve evidence of the victim describing the assailants when such a recording was only potentially exculpatory), *cert. denied* 114 S. Ct. 262 (1993); United States v. Olson, 978 F.2d 1472, 1482 (7th Cir. 1992) (finding no due process violation when the government failed to record a conversation between the defendant and an informant when the defendant had already indicated predisposition to commit the crime).

33. *See, e.g.*, United States v. Innamorati, 996 F.2d 456, 483 (1st Cir. 1993) (finding no due process violation where the government failed to preserve the defendant's handwritten form when the corrected form was essentially preserved by defendant's grand jury testimony which was read to the jury line by line); United States v. Bakhtiar, 994 F.2d 970, 979 (2nd Cir. 1993) (finding no due process violation where the government failed to produce original counterfeit checks when copies were authenticated at trial); United States v. Scoggins, 992 F.2d 164, 167 (8th Cir. 1993) (finding no due process violation where the government destroyed marijuana plants when government agencies instead sampled and videotaped the plants).

34. *Youngblood*, 488 U.S. at 58.

35. *Id.* at 56. In *Youngblood*, the Court offered two reasons for this good faith requirement. First the Court recognized the problematic amount of speculation inherent in the evaluation of lost evidence. *Id.* at 58. Second, the Court identified a potentially onerous burden on law enforcement in requiring them to retain and preserve all material found in the course of an investigation simply because such material could conceivably have some evidentiary value in the future. *Id.*

36. Jones v. McCaughtry, 965 F.2d 473, 477 (7th Cir. 1992).

official animus or a conscious effort to suppress exculpatory evidence.[37] The government does not act in bad faith if it follows its own law enforcement procedures.[38] In addition, the government does not act in bad faith when it does not follow its own law enforcement procedures.[39] It is only in the case of gross negligence or willful disregard of exculpatory value that bad faith can be found to exist at all.

In *U.S. v. Cooper*,[40] one of the few cases where bad faith has been established,[41] at issue was whether chemical laboratory equipment seized by Drug Enforcement Agency agents possessed the physical capacity to manufacture methamphetamine.[42] The defendants maintained that their equipment was used instead to manufacture other products, and that the equipment would not withstand the high temperatures required to manufacture methamphetamine.[43] Despite confirmation from one defendant's parole office and from the landlord of the building in which the laboratory was situated that the equipment was devoted to lawful chemical processes and lacked the capability to produce methamphetamine, the government destroyed the laboratory equipment.[44] As the defendants had no comparable alternative means of supporting their assertion of innocence, the destruction of the equipment thereby deprived them the opportunity to present a defense. Such destruction, in the face of corroborative evidence of the potentially exculpatory nature of the evidence from sources other than the defendants themselves, constituted bad faith.

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37. *Id.* at 477.

38. *See, e.g.*, Holdren v. Legursky, 16 F.3d 57, 60 (4th Cir. 1994) (finding no bad faith where physicians failed to preserve semen samples as they were following standard procedures in collecting, analyzing, and disposing of semen and, because such evidence had not been tested, did not know it had any exculpatory value); *Scoggins*, 992 F.2d at 167 (finding no bad faith when government agents destroyed marijuana plants pursuant to department policy); United States v. Gibson, 963 F.2d 708, 711 (5th Cir. 1992) (finding no bad faith where the government destroyed marijuana pursuant to agency procedure and sent a letter to the U.S. Attorney asking whether such evidence should be preserved and received no response).

39. *See, e.g.*, United States v. Femia, 9 F.3d 990, 995 (1st Cir. 1993) (finding no bad faith when the government destroyed tape recordings of conversations between the defendant and his co–conspirators even though tapes copied for defendant prior to trial may have been altered, damaged, or inexpertly copied from the originals); United States v. Barton, 995 F.2d 931, 936 (9th Cir.) (finding no bad faith where the government negligently destroyed marijuana plants by placing them in unventilated plastic bags) *cert. denied* 114 S. Ct. 413 (1993); United States v. Sanders, 954 F.2d 227, 231 (4th Cir. 1992) (finding no bad faith where a videotape was inadvertently erased).

40. United States v. Cooper, 983 F.2d 928, 931–33 (9th Cir. 1993).

41. *See also, e.g*, United States v. Bohl, 25 F.3d 904, 906–908 (10th Cir. 1994) (finding bad faith when government disposed of legs of radar and radio transmission towers before prosecution of defendants for fraud in connection with government contract to build towers, despite defendants' repeated requests for preservation of such evidence so that they could conduct their own tests and evidence suggesting that government's tests might have been flawed); People v. Newberry, 638 N.E.2d 1196, 1197 (Ill.App. 1994) (finding bad faith when government destroyed white powdery substance giving rise to drug charges, despite defendant's general motion for discovery of evidence state intended to use at trial, state's case hinged on proof that defendant possessed and delivered controlled substance, destroyed evidence was essential to state's case in chief, and defense was deprived of primary strategy raising reasonable doubt concerning accuracy of tests performed).

42. Cooper, 983 F.2d at 931.

43. *Id.*

44. *Id.*

III. THE DUE PROCESS RIGHT TO ACCESS GOVERNMENT INFORMANTS

While a defendant has a right to access evidence that is material, exculpatory, relevant, otherwise unavailable, and in the prosecution's control, that defendant is not necessarily entitled to discovery of an informant's identity. Under *U.S. v. Roviaro*[45] and its progeny[46], the government has a limited privilege to withhold the identity of a confidential informant from disclosure.The purpose of this privilege is the "furtherance and protection of the public interest in effective law enforcement."[47] The privilege recognizes "the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation."[48]

A. The Prosecution Must Disclose What It Knows

The *Roviaro* court put forth no fixed rule with respect to disclosure. Instead, it established a balancing test under which the defendant's need for disclosure to ensure a fair trial is weighed against the public's interest in preserving the informant's anonymity and encouraging citizens to report crimes.[49]

In order to tip this balance in his or her favor and earn the right to disclosure of the informant's name, the defendant has the burden of demonstrating[50] at least some of the following circumstances: (1) the informant holds significant relevant, material and exculpatory information;[51] (2) the

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45. *See* Roviaro v. United States, 353 U.S. 53 (1957).

46. Many states have codified the privilege established in *Rovario*. The Arizona Rules of Criminal Procedure read in pertinent part:

> b. Materials Not Subject to Disclosure.
> (2) *Informants.* Disclosure of the existence of an informant or of the identity of an informant who will not be called to testify shall not be required where disclosure would result in substantial risk to the informant or to the informant's operational effectiveness, provided the failure to disclose will not infringe the constitutional rights of the accused.

ARIZ. REV. STAT. ANN., Rule 15.4(b)(2). *See, e.g.*, WIS. STAT. ANN. § 905.10; FLA. R. CRIM. P., Rule 3.220 (1988); MONT. CODE ANN. Rule 502 and MONT. CODE ANN. 46–15–324; N.C. GEN. STAT. § 15A–903; CAL. PENAL CODE § 1041(a).

47. *Id.* at 59.

48. *Id.*

49. *Id.* at 62. The Court stated that courts should consider the crime charged, possible defenses, the potential significance of the informant's testimony, and any other relevant factors. *Id.* Further, the government must at least disclose communications that do not tend to reveal his identity. *Id.* at 60.

50. The defendant bears the burden of demonstrating the need for the disclosure of a confidential informant's identity. United States v. Amador–Galvan, 9 F.3d 1414, 1417 (9th Cir. 1993); United States v. Blevins, 960 F.2d 1252, 1258 (4th Cir. 1992). Showing "mere suspicion" is not enough. *Amador–Galvan*, 9 F.3d at 1417.

51. *See, e.g.*, United States v. Sanchez, 988 F.2d 1384, 1392 (5th Cir.) (finding disclosure not required when the informant would only further implicate the defendant in the crime) *cert. denied* 114 S. Ct. 217 (1993); United States v. Jenkins, 4 F.3d 1338, 1341 (6th Cir. 1993) (finding disclosure not required when the informer's testimony would not have been helpful to the defendant); United States v. Bender, 5 F.3d 267, 269–270 (7th Cir. 1993) (finding disclosure not required when the informant's testimony would have had little significance for the defendant's defense).

informant is otherwise unavailable to the defense;[52] (3) the informant was an active participant in the crime;[53] and (4) a small government interest in maintaining confidentiality.[54] After making this threshold showing of need, the trial court will likely conduct an *in camera* inspection to determine whether disclosure of an informant's identity is warranted under *Roviaro*.[55]

The reason the defendant gets to learn the informant's identity under the *Roviaro* framework is to allow the defendant an opportunity to call the informant as a witness, or at least interview him or her in preparation for trial.[56] But disclosure is often not enough to allow the defense such an opportunity because the information disclosed is often outdated or wrong.[57] Because this happens so often, the courts have imposed a duty[58] to help the defense locate and produce the informant.

B. The Prosecution Need Only Produce What It Can

The duty to produce an informant, however, is separate and distinct from the duty to merely identify him or her.[59] The extent of the duty to produce will vary with the circumstances of the case, including the extent of government control over the informant, the importance of the informant's testimony, and the difficulty of locating the informant.[60]

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52. *See, e.g.*, United States v. McDonald, 935 F.2d 1212, 1218 (11th Cir. 1991) (finding disclosure not required when defense counsel attempted to interview informant but informant refused and informant was also able to be called as witness by defense).

53. *See, e.g., Sanchez*, 988 F.2d at 1391–1392 (finding disclosure not required when the informant simply rode along with officer and observed the crime); *Bender*, 5 F.3d at 270 (finding disclosure not required when informant was mere "tipster").

54. *See, e.g.*, Sanchez, *supra* note 51, at 1392 (finding disclosure not required when, because the defendant was member of Mexican mafia, informant's and informant's family would be in "grave danger" if discovered); *Bender*, 5 F.3d at 51, at 270 (recognizing a strong public interest in keeping an informer's identity secret when disclosure would compromise ongoing criminal investigations).

55. Most courts find *in camera* hearings to be beneficial for determining the relevant and exculpatory value of an informant. *See, e.g.*, United States v. Saa, 859 F.2d 1067, 1072–75 (2d Cir. 1988), *cert. denied* 489 U.S. 1089 (1989); United States v. Sharp, 778 F.2d 1182, 1187 (6th Cir. 1985), *cert. denied* 475 U.S. 1030 (1986). The Ninth Circuit, however, has recently held that where a defendant makes a "minimal threshold showing" that disclosure would be relevant to at least one defense, a hearing is required. United States v. Spires, 3 F.3d 1234, 1238 (9th Cir. 1993).

56. Roviaro v. United States, 353 U.S. 53, 64 (1957).

57. *See* Twiggs v. Superior Court of San Francisco, 667 P.2d 1165, 1167 (Cal. 1983) (specifically rejecting decisions which find prosecution automatically fulfills its obligation of disclosure when it reveals all that it knows, regardless of inadequacy of such data to locate informer).

58. The court in *Twiggs* listed the following justifications for imposing a duty to disclose, regardless of defendant's inability to locate informant: the prosecution knows from the outset whether the informant is a material witness; the prosecution has greater investigatory resources; and the prosecution has superior knowledge of and contacts with informant. *Id.* at 1168.

59. U.S. v. Formanczyk, 949 F.2d 526, 529 (1st. Cir. 1991).

60. *Id.* at 530. *See also* United States v. Giry, 818 F.2d 120, 130–31 (1st Cir 1987) (finding government not required to locate and produce an informant for trial because his testimony was relatively unimportant and government neither controlled his whereabouts nor had other dealings with him), *cert. denied*, 484 U.S. 855 (1987); U.S. v. Padilla, 869 F.2d 372, 377 (8th Cir. 1989) (finding government not required to locate and produce informant for trial because second witness testified concerning same events and the defendant was allowed to tell his own account of informant's actions), *cert. denied*, 492 U.S. 909 (1989).

Even when a defendant properly triggers this duty to produce, the government need only produce the informant if it can find him or her. More specifically, the government will not have to produce an informant if it can show that (1) it did not cause the informant's disappearance; and (2) it has made reasonable efforts to locate the informant.[61] This burden[62], however, is not difficult for the prosecution to meet. For example, in *United States v. Cimino*,[63] the prosecution was ordered to produce the informant for the defense. The prosecution sent an agent to the informant's last known address, where he knocked and received no response. The *Cimino* court found that even though there was evidence that the informant still lived at the known address, paid his bill for the week, and made phone calls the day after the agent's visit, reasonable efforts to produce the informant had been shown.[64]

While good police administrative procedures preserve information on an informant,[65] the present disclosure doctrine does not require anything more. To the contrary, the present approach creates an incentive for the prosecution to remain ignorant about the informant's real name, address, place of employment or phone number. As noted, the government need only disclose what it knows and produce only what it can. If it knows very little, disclosure is meaningless but constitutional. If it cannot find the informant after "reasonable efforts," then fruitless attempts at production will be constitutionally legitimate. Accordingly, if the prosecution fails to keep track of its paid informants, defendants will not get to interview those increasingly numerous informants who hold material and sometimes exculpatory information.

This result directly contradicts the policies behind *Roviaro*, which attempted to implement defendants' due process rights to access the informants who were used by the government to gain their arrests. Although such access was meant to provide the defense with the opportunity to at least interview the informant, subsequent case law has consistently allowed the prosecution to separate the defendant from an exculpatory informant. Without the affirmative

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61. *See, e.g.*, United States v. Suarez, 939 F.2d 929, 932 (11th Cir. 1991). If the court finds that the government made a "reasonable effort" to produce the informant, the trial proceeds even though the informant may have been essential to the preparation of the accused's defense. Note, *Informers in Federal Narcotics Prosecutions*, 1–2 COLUM. J. L. & SOC. PROBS. 47, 69 (1965–66). *See also* United States V. Muse, 708 F.2d 513, 515 (10th Cir. 1983) (finding that because government used reasonable efforts to produce informant, defendant not entitled to continuance on grounds that informant could not be located).

62. *See* Velarde–Villarreal v. United States, 354 F.2d 9, 12 (9th Cir. 1965) (where defendant charged with importing heroin claimed entrapment by government informant, burden of proving government was genuinely unable through reasonable effort to produce informant as witness and that government did or did not take steps to ensure availability should be on government, and failure to meet burden would call for new trial).

63. 321 F.2d 509 (2d Cir. 1963).

64. *Id.* at 516. *See also Suarez*, 939 F.2d at 932 (finding reasonable efforts when police tried to locate the informant for over two weeks, including visiting two residences, calling two telephone numbers, consulting friends and frequented places); United States v. Mora, 994 F.2d 1129, 1139–40 (5th Cir. 1993) (finding reasonable efforts when police visited home and business with no indication of whereabouts); Fitzpatrick v. Procunier, 750 F.2d 473, 476 (5th Cir. 1985) (finding reasonable efforts when state issued a subpoena and warrant for informant's presence).

65. JOSEPH GRANO, THE CRIMINAL & CIVIL INVESTIGATION HANDBOOK (1981). Such procedures often consist of working up a biography, which includes listing known associates, frequented addresses, friends and relatives, property, cars, etc., so that the informant can be located when necessary. *Id.*

duty to keep track of its paid informants, the government has an opportunity to extract all substance from this recognized constitutional right.

C. Potential Responses

Such concerns have been echoed in a few recent decisions.[66] In *United States v. Montgomery*,[67] the Ninth Circuit held that the government failed to use reasonable efforts to produce a confidential informant when it "completely avoided knowledge" of the informant's whereabouts.[68] In *Montgomery*, Hardcastle, an accused drug dealer, became an informant for the Drug Enforcement Agency in San Diego, California. According to this informant, the DEA agent for whom he worked promised him probation if he were successful in producing an arrest.[69] The agent further told him to "lie or do whatever it took to get a deal."[70] Soon thereafter, Montgomery, the defendant, was arrested for dealing drugs.[71] While prior to the arrest the DEA agent and Hardcastle shared "almost daily contact," communication ceased almost immediately after the arrest.[72] In raising an entrapment defense, Montgomery filed a successful motion to compel the production of the informant for a pretrial interview. The government then had 23 days in which to exercise reasonable efforts to locate Hardcastle.[73]

For the first 21 days, however, the government did nothing to (1) locate the informant, (2) ensure that it would be able to locate the informant when necessary, or (3) notify the informant to be available for the interview.[74] On the 22nd day, when the government began to search for Hardcastle, it found that he had disappeared. As a result, the Ninth Circuit held that the government should have known that Hardcastle would flee and thus its inaction constituted unreasonable efforts. Accordingly, Montgomery received a new trial.

Montgomery shows that not only will the courts find unreasonable efforts if the government *causes* the informant to disappear, it may also find unreasonable efforts when the government *allows* the informant to disappear. Thus, under the facts of *Montgomery*, the prosecution may have a small incentive to keep track of its informants.

Another case which addresses the government's seemingly strong incentive to "lose" an informant is *People v. Holmes*.[75] In *Holmes*, the prosecution lost track of one of its paid informants and was unable to produce the informant for the defense. The question before the court was whether the *Youngblood* bad–faith standard relating to lost evidence should be applied to the world of "lost" paid informants.

In addressing this issue, the *Holmes* court first examined *Youngblood*'s two primary concerns in requiring bad faith: (1) when potentially exculpatory

66. *See, e.g.*, United States v. Montgomery, 998 F.2d 1468 (9th Cir. 1993); People v. Holmes, 552 N.E.2d 763 (Ill.1990).
67. 998 F.2d 1468 (9th Cir. 1993).
68. *Id.* 1470.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 1474.
74. *Id.*
75. 552 N.E.2d 763 (Ill. 1990).

evidence is permanently lost, courts can only speculate as to the materiality of that lost evidence, and (2) it is impracticable to impose a duty on police to preserve all material that might be of conceivable evidentiary significance.[76] The *Holmes* court then rejected these arguments relating to paid informants by finding: (1) a defendant will frequently be able to demonstrate what the informant will testify to and how it would be important to his defense,[77] and (2) there is no unfair burden in requiring the state to ensure that the material and exculpatory evidence is available for trial when the police did not find the material but instead *caused* it to have significance by employing an informant to participate in the criminal activity for which a defendant is being prosecuted.[78]

The unfairness of letting the government employ an informant up to an arrest and then lose track of him or her when that informant could be material and exculpatory to the defense seems to have guided the *Holmes* court in its rejection of *Youngblood*'s application to this area. It is this unfairness,[79] reinforced by the increased use and compensation of informants, that mandates a stronger duty to keep track of and locate paid government informants.[80]

IV. AN INCENTIVE FOR THE GOVERNMENT

As an incentive for the government to keep track of its paid informants, this article proposes the following framework: When the defense requests disclosure of a paid informant, the court orders an *in camera* hearing. At this hearing, the court determines whether the defense has made an adequate showing that the informant's likely testimony is material and exculpatory enough to compel disclosure of the informant's identity. If the court determines

76. *Youngblood*, 488 U.S. 51 (1988).
77. *Holmes*, 552 N.E.2d at 770.
78. *Id.*
79. In Velarde-Villarreal v. United States, 354 F.2d 9, 15 (9th Cir. 1965) (Ely, concurring and dissenting) the court addressed this element of unfairness when the government chooses to involve itself in the direct participation of a crime. That in doing so, the government must assume obligations which vary with the extent of its involvement. Where asserting a defense of entrapment is likely, an informant's testimony is essential to a "full and fair determination of the issue," and thereby requires not only identification but "also possible accessibility of the needed witness when his presence is necessary to fulfill the fundamental requirements of fairness." *Id.*
80. Keeping track of informants is not an undue burden for the government. The basic data ordinarily required for a background report on persons being considered for positions of trust is listed in *Fundamentals of Criminal Investigation* as: date and time of the interview; name, vocation and address of the interviewee; subject's full name; length of acquaintance in years; type of contact, whether business or social; degree of association; when last seen; names – parents, brothers, and sisters; marital status and children; residence, past and present; educational background; personal and financial habits; personality traits; membership in organizations; relatives in foreign lands; honesty, loyalty and discretion; recommendation for a position of trust; evaluation; and references. CHARLES E. O'HARA & GREGORY L. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 92 (5th ed. 1980). This background checklist would obviously need to be adapted to the informant setting.

Moreover, some sources specifically suggest the use of an informant identification record. *See* HOWARD A. KATZ, DEVELOPING AND USING UNDERWORLD POLICE INFORMANTS 6 (suggesting departmental policy should require the unit commander to maintain files with exclusive access on all informants, including a list of all active and former informants, their names, addresses, fingerprints, photographs, descriptions and criminal records); JACK MORRIS, POLICE INFORMANT MANAGEMENT IV–10 – IV–12 (1983) (provides a sample informant identification record requiring: personal identifiers; criminal status; associates and other relevant information; file criteria and photograph; prior informant activity and reliability; and submissions and approval).

that disclosure is appropriate, and the defendant cannot locate the informant, the prosecution then has the obligation of making a reasonable good–faith effort to locate and produce the informant for trial. If the prosecution is then unable to locate and produce the disclosed informant, the court at the election of and upon request of the defense then gives a "missing witness" instruction when the jury is instructed.

The missing witness instruction is a well–established concept in American jurisprudence. Over 100 years ago, the United States Supreme Court recognized the rule when it stated:

> [t]he rule, even in criminal cases, is that, if a party has it peculiarly within his power to produce the witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.[81]

In interpreting this language, courts have set forth two criteria which must be established before comment or instruction[82] on the inference is possible.[83] First, the requesting party must establish that the potential witness is unavailable in either a physical or practical sense.[84] Second, the potential testimony must be relevant and noncumulative.[85] In the informant setting, this second prong will always be satisfied because a defendant cannot compel disclosure of an informant's identity unless he first shows that testimony will be material and noncumulative, and under this framework the instruction is given after identity has been disclosed and production has failed. Therefore, if a

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81. Graves v. United States, 150 U.S. 118, 121 (1893).

82. In the criminal context, the missing witness jury instruction generally reads as follows:

> If it is peculiarly within the power of either the government or the defense to produce a witness who could give relevant testimony on an issue in the case, failure to call that witness may give rise to an inference that this testimony would have been unfavorable to that party. No such conclusion should be drawn by you, however, with regard to a witness who is equally available to both parties or where the testimony of that witness would be merely cumulative.
> The jury must always bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

EDWARD J. DEVITT ET. AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS – CIVIL AND CRIMINAL § 14.15 (4th ed. 1987). In the civil context, the instruction reads generally as follows:

> If a party fails to call a person who possesses knowledge about facts in issue, and who is reasonably available to him, and who is not equally available to the other party, then you may infer that the testimony of that witness is unfavorable to the party who could have called him and did not.

EDWARD J. DEVITT ET. AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS – CIVIL AND CRIMINAL § 72.15 (4th ed. 1987).

83. V. Jones v. Otis Elevator Co., 861 F.2d 655, 659 (11th Cir. 1988).

84. *See, e.g.*, United States v. St. Miochol's Credit Union, 880 F.2d 579, 597 (1st. Cir. 1989); United States v. Sutton, 732 F.2d 1483, 1492 (10th. Cir. 1984), *cert. denied*, 469 U.S. 1157 (1985); Labii v. Santa Fe Marine, Inc., 526 F.2d 961, 963 (5th Cir.), *cert. denied* 429 U.S. 827 (1976); United States v. Burgs, 579 F.2d 747, 750 (2d Cir. 1978); United States v. Kenney, 500 F.2d 39, 40 (4th Cir. 1974).

85. *See, e.g.*, United States v. Mahoney, 537 F.2d 922, 926–27 (7th Cir. 1976), *cert. denied*, 429 U.S. 1025 (1976); United States v. Nahoom, 791 F.2d 841, 846 (11th Cir. 1986); Georgia Southern & Florida Railway Company v. Perry, 326 F.2d 921, 925 (5th Cir. 1964).

defendant can satisfy the first prong by showing that the informant is "unavailable," the court should permit comment and give the instruction.[86]

A witness can be unavailable in either the physical or practical sense. Physical availability turns on whether the witness is physically present at the trial or is accessible by subpoena.[87] Practical availability turns on the witness' relationship to the nonproducing party.[88] A witness is unavailable in a *practical sense* when this relationship creates bias or hostility against the opposing party.[89]

An example of such a biased relationship is in the employer–employee context. Because of an employee's economic interest in his or her job, the courts recognize the employer–employee relationship as one that creates practical unavailability for the other side.[90] Thus, when an unproduced witness is an employee of the nonproducing party, and that witness would give material, noncumulative testimony at trial, the missing witness instruction is properly given.

When the government loses a witness, however, courts have been reluctant to give a missing witness instruction. This is so despite the strong similarity to the employer–employee relationship[91] that exists between the informant and law enforcement until the time of the defendant's arrest.[92] In refusing the instructions, the courts usually reason that when the government loses track of its informants before trial, those informants are no longer in its control and, thus, unavailable to both sides.[93]

Under the current framework, if the government has retained information or "control" over its informant, the missing witness instruction should be given. If it loses control over the informant, it escapes the instruction. So rather than using the missing witness instruction to cure the government's failure to keep track of informants, courts today use the instruction as punishment for knowing their whereabouts. In its current use,

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86. The decision of whether to give a missing witness instruction lies within the discretion of the trial court. United States v. Sutton, 732 F.2d 1483, 1492 (10th Cir. 1984), *cert. denied*, 469 U.S. 1157 (1985); Burgess v. United States, 440 F.2d 226, 233 (D.C. Cir. 1970); Labii v. Santa Phe Marine, Inc., 526 F.2d 961, 963 (5th Cir. 1976).

87. *Jones*, 861 F.2d at 659.

88. *Id.*

89. *Id. See also* McClanahan v. United States, 230 F.2d 919, 926 (5th Cir. 1956).

90. *See* Chicago College of Osteopathic Medicine v. George A. Fuller Co., 719 F.2d 1335, 1353 (7th Cir. 1983); Miller v. Rykoff–Sexton, Inc., 845 F.2d 209, 212 (9th Cir. 1988); United States v. Beekman, 155 F.2d 580, 584 (2nd Cir. 1946).

91. *See* United States v. Pizarro, 717 F.2d 336, 343 (7th Cir. 1983); United States v. Clarke, 220 F.Supp. 905, 909 (1963) (referring to paid informant as a "special employee").

92. United States v. Spinosa, 982 F.2d 620, 633 (1st. Cir. 1992).

93. There is no automatic inference of exclusive government control of its informants. *See, e.g.*, United States v. Kirk, 534 F.2d 1262, 1280 (8th Cir. 1976) (finding defendant was not entitled to missing witness instruction when there was no showing that the government possessed all power to produce the witness); United States v. Tarantino, 846 F.2d 1384, 1404 (D.C. Cir. 1988); United States v. Easley, 977 F.2d 283, 286 (7th Cir. 1992) (finding that defendant was not entitled to a missing witness instruction when the informant had disappeared before trial); United States v. Burton, 898 F.2d 595, 597 (8th Cir. 1990) (finding instruction not appropriate when the informant was no longer available to the government, even though he had worked with the government after the events leading up to the defendant's arrest); United States v. Johnson, 562 F.2d 515, 517 (8th Cir. 1977) (finding instruction not warranted when informant was no longer associated with the government and his whereabouts were unknown).

then, the missing witness instruction provides yet another incentive to lose the informant.

CONCLUSION

While the missing witness instruction remains controversial,[94] its use in the paid informant context would accomplish three important goals. First, a missing witness instruction given at the request of the defense would create an appropriate incentive for *Roviaro*'s preference for disclosure. Second, it would reprimand the prosecution for failing to provide the defendant his or her due process right to access material and exculpatory evidence. Third, it would discourage law enforcement agencies from "neglecting" to inform themselves of the current whereabouts of their paid confidential informants.

Given the government's expansive reliance on informants, the amounts of money that informants can make and, consequently, the greater risks of entrapment and other improper conduct, the justice system should not rely on its antiquated rules of informant production and disclosure. It needs to take another look at paid informants.

94. In 1990, a panel of the Fifth Circuit asserted that the "uncalled-witness" rule has "no place in federal trials conducted under the Federal Rules of Evidence and the Federal Rules of Civil Procedure." Herbert v. Wal-Mart Stores, 911 F.2d 1044, 1047 (5th Cir. 1990). The panel reasoned that because witnesses are not "controlled" by either party under modern evidentiary rules, any competent witness whose testimony is not privileged may be called, interrogated, and impeached by any party to the litigation. *Id.* at 1048.