Federal Judicial Treatment of Informers - Admissibility, Credibility and Constitutional Considerations

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The federal[1] government's use of informers, paid and unpaid, is undeniably widespread, valuable in criminal law enforcement, and constitutionally suspect.[2] However, as vital as their services may be to law enforcement officials, informers would be little used were it not for the judicially approved rule that "artifice and stratagem may be employed to catch those engaged in criminal enterprises."[3] This Note examines the judicial treatment of informers' testimony, its admissibility, and the basis for constitutional attack, noting that all of these aspects[4] are inseparably related.

An informer is one who voluntarily reports law violations or suspected violations to an agent of the government.[5] Although the informer is often a public-spirited citizen,[6] he may instead be one who has participated in a crime and subsequently turned against his partners; a "plant" employed by law enforcement agencies to participate in the commission of a crime;[7]

[1] Since there is no appreciable difference between state and federal treatment of informers, this Note primarily focuses on informers at the federal court level, with an incidental consideration of them at the state level. Similarly, focus is on trial considerations; the pre-trial use of informers to prompt confessions by suspects is not treated. Entrapment, a closely related but distinguishable field, is necessarily omitted.

[2] *See* Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951). Although the informers themselves have generally elicited the concurrent reactions of contempt and aversion, police forces the world over see wisdom in the extensive use of such persons, for the role they play in criminal law is of great magnitude.

[3] Sorrells v. United States, 287 U.S. 435, 441-42 (1932). *See also* Lewis v. United States, 385 U.S. 206 (1966); Price v. United States, 165 U.S. 311, 315 (1897); Andrews v. United States, 162 U.S. 420, 423 (1896); Rosen v. United States, 161 U.S. 29, 42 (1896); Goode v. United States, 159 U.S. 663, 669 (1895); Grimm v. United States, 156 U.S. 604, 610 (1895); United States v. Reisenweber, 288 F. 520, 526 (2d Cir. 1923); Bates v. United States, 10 F. 92, 94 (C.C.N.D. Ill. 1881).

[4] Another aspect is the "informer's privilege," not treated separately, but definitely to be kept in mind, since it is probable that few persons would be willing to impart information to the police without absolute promise of secrecy. The privilege, assertable by either the government or the court, provides that in the absence of statute, disclosure of the informer's identity ordinarily will not be compelled. Roviaro v. United States, 353 U.S. 53 (1957); Mitrovich v. United States, 15 F.2d 163 (9th Cir. 1926); People v. Lawrence, 149 Cal. App. 2d 435, 308 P.2d 821 (1957). The privilege forbids only nonessential disclosure; disclosure may always be compelled in cases where identity of the informer appears essential to the defense. Scher v. United States, 305 U.S. 251 (1938); Portomene v. United States, 221 F.2d 582 (5th Cir. 1955). An undecided related issue is whether to permit nondisclosure of the contents of the informer's report. *For nondisclosure*, Vogel v. Gruaz, 110 U.S. 311 (1884); Lewis v. Roux Trucking Corp., 222 App. Div. 204, 226 N.Y.S. 70 (1927); Dellastastious v. Boyce, 152 Va. 368, 147 S.E. 267 (1929). *Contra*, Scher v. United States, 305 U.S. 251 (1938); 8 J. WIGMORE, EVIDENCE § 2374 (8th ed. 1961).

[5] BLACK'S LAW DICTIONARY 919 (4th ed. 1951). Other definitions proliferate, *e.g.*, United States v. City of Mexico, 32 F. 105, 106 (S.D. Fla. 1887) (one whose information leads directly to a legal proceeding); Pollock v. The Laura, 5 F. 133, 141 (S.D.N.Y. 1880) (a person who lodges information with a government officer which leads to a suit brought by the government itself); Western Union Tel. Co. v. Nunnally, 86 Ga. 503, 12 S.E. 578 (1891) (a person who informs or procures an action against another, whom he suspects of the violation of some penal statute).

A variety of motives are ascribed as to what would prompt one to be an informer: promises of immunity or leniency, revenge, fear, money, jealousy, friendship with members of the police force, or even a desire to seek out criminals for society's sake. *See* Donnelly, *supra* note 2, at 1092.

[6] Crosby v. State, 90 Ga. App. 63, 82 S.E.2d 38, 39 (1954).

[7] This type is considered a "feigned accomplice" and thus is not subject to traditional accomplice rules if he merely feigns complicity in the commission of crimes for the purpose of securing evidence (and if his conduct falls short of entrapment), since he will be lacking in the requisite criminal intent. Smith v. United States, 17 F.2d 723 (8th Cir.), *cert. denied*, 274 U.S. 762 (1927); Lett v. United States, 15 F.2d 690 (8th Cir. 1926); Finley v. State, 84 Okla. Crim. 309, 181 P.2d 849 (1947). This same reasoning applies to paid informers. Smith v. United States, *supra*. The

and one urged by the government to uncover evidence of crime.[8] As will be seen, these latter sources of information are most subjected to court attack on constitutional grounds. And their proffered testimony often raises issues of credibility and admissibility.

I. INFORMERS' TESTIMONY AND CREDIBILITY

The evidentiary field presents recurring problems of admissibility and credibility. The general rule is that an informer's testimony is considered competent and is to be weighed like the testimony of any other witness.[9] When so weighed, it may be sufficient to sustain a conviction,[10] even though the testimony is not corroborated.[11] As to admissibility of the informer's testimony, the common law rule was that evidence which met the tests of relevancy and verity was admissible.[12] The fact that it was illegally obtained was immaterial because the courts would not inquire into the circumstances of the acquisition of material evidence.[13] Today admissibility is more restricted; evidence obtained by illegal means is no longer constitutionally admissible.[14] Otherwise, the standards for admissibility are still quite liberal. Eavesdropping, for example, is still condoned. Generally, the overheard conversation, if relevant, may be introduced into evidence both in federal and state courts.[15] Evidence obtained through informers, whether paid[16] or otherwise, also comes within this rule.[17]

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rule holds true notwithstanding the informers' actual participation in the criminal transactions themselves. They may continue to act with their guilty confederates until the matter can be so far advanced and matured as to insure the conviction of such confederates. Wilson v. United States, 260 F. 840 (8th Cir. 1919); People v. Finkelstein, 98 Cal. App. 2d 545, 220 P.2d 934 (1950). Decoy "accomplices" are used in a wide range of criminal situations, but are particularly abundant in the areas of narcotics laws violations, unlawful liquor traffic, and, to a lesser degree, postal service violations. For specific examples of each see Grimm v. United States, 156 U.S. 604 (1895) (postal service); Lett v. United States, 15 F.2d 690 (8th Cir. 1926) (narcotics); People v. Calvert, 93 Cal. App. 568, 269 P. 969 (1928) (liquor); Gonzales v. State, 108 Tex. Crim. 253, 299 S.W. 901 (1927) (narcotics); Bullock v. State, 99 Tex. Crim. 543, 270 S.W. 1018 (1925) (liquor).

[8] Comment, *An Informer's Tale: Its Use in Judicial and Administrative Proceedings*, 63 YALE L.J. 206 (1953). Paid informers' compensation may come from several sources: police contingency funds, resultant fines, or under express statutory authorization. *See, e.g.*, 21 U.S.C. § 199 (1946) authorizing the Commissioner of Narcotics to pay for information concerning a violation of any narcotic law of the United States.

[9] People v. McCarthy, 200 N.Y.S. 818 (Erie County Ct. 1923).

[10] *Id.*

[11] Lott v. United States, 230 F.2d 915 (5th Cir. 1956); State v. Batson, 107 S.C. 460, 93 S.E. 135 (1917). A point of importance is that an informer, or any person, is generally not rendered incompetent as a witness by the fact that he has been charged with a crime. State v. Link, 318 Mo. 1179, 3 S.W.2d 369 (1928). In Texas an indictment is not sufficient to disqualify a person as a witness. Robison v. State, 79 Tex. Crim. 369, 185 S.W. 565 (1916).

[12] Olmstead v. United States, 277 U.S. 438, 467 (1928); Adams v. New York, 192 U.S. 585 (1904); 8 J. WIGMORE, EVIDENCE § 2374 (8th ed. 1961).

[13] Commonwealth v. Dana, 43 Mass. 329 (1841); Stevison v. Earnest, 80 Ill. 513 (1875).

[14] *See* notes 37-41, 53-58, 60 *infra* and accompanying text for the dominant constitutional factors involved.

[15] Sorrells v. United States, 287 U.S. 435 (1932); Cohn v. State, 120 Tenn. 61, 109 S.W. 1149 (1908).

[16] Grusin v. State, 10 Ga. App. 149, 75 S.E. 350 (1911).

[17] State v. Spano, 320 Mo. 280, 6 S.W.2d 849 (1928); Cohn v. State, 120 Tenn. 61, 109 S.W. 1149 (1908). As Rose v. United States, 274 F. 245 (6th Cir. 1921) notes, the courts not only have allowed the admission of material evidence which has been produced by an informer but also have allowed the informer to testify to what he saw and heard while within the defendant's residence or place of business.

The fact that an informer has a substantial interest in the criminal prosecution brought about through his efforts, while not making him incompetent as a witness, may affect his credibility.[18] The informer who ingratiates himself into the confidence of another for the purpose of obtaining an admission or confession does not by these acts alone render his evidence unworthy of belief.[19] Acute problems of credibility are presented by the informer whose compensation depends directly on convictions,[20] and by the temporary or casual informer. The former is frequently of doubtful character and often under great temptation to commit perjury and fabricate evidence.[21] The possibility of perjury and the fact that the jury decides the credibility of an informer's testimony have caused courts to develop cautionary instructions to the jury regarding the testimony of informers (particularly paid ones).[22] A dispute has arisen over giving such instructions, some courts holding that they *shall* be given[23] and others maintaining simply that they *may* be given.[24] The basic policy consideration, that the instruction is desirable, remains unaffected.

Preferably, courts should prevent convictions based upon testimony that is possibly or likely to be perjured, *i.e.*, "tainted testimony." Should such testimony be the basis for an award of a new trial? Two major cases have looked at this issue and have agreed the answer is "Yes." The United States Supreme Court in *Mesarosh v. United States*,[25] and *Communist Party v. Subversive Activities Control Board*,[26] reasoned that the dignity of the United States Government and the honor of the administration of justice would not permit the conviction of any person on tainted testimony. Thus, while the two cases seemingly place no restraint upon the use of informers

[18] United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951); United States v. One 1942 Studebaker, 59 F. Supp. 835 (D. Del. 1945).

[19] Sorrells v. United States, 287 U.S. 435 (1932); Heldt v. State, 20 Neb. 492, 30 N.W. 626 (1886). Although "shady" methods of securing evidence thus raise questions both of admissibility and credibility, the issue really becomes one of due process, with the courts denying the use of evidence obtained in excess of this standard. Sherman v. United States, 356 U.S. 369 (1958); Williamson v. United States, 311 F.2d 441 (5th Cir. 1962).

[20] State v. Carroll, 85 Iowa 1, 51 N.W. 1159 (1892); State v. Wakely, 43 Mont. 427, 117 P. 95 (1911); Clark v. State, 31 Okla. Crim. 383, 239 P. 275 (1925).

[21] For example, drug addicts are frequently used as stool pigeons in narcotics cases. For further discussion on this point, *see* Donnelly, *supra* note 2, at 1121.

[22] The form of the instruction is largely left up to the discretion of the trial court. Shettel v. United States, 113 F.2d 34 (D.C. Cir. 1940); State v. Boynton, 155 N.C. 456, 71 S.E. 341 (1911).

[23] United States v. Masino, 275 F.2d 129 (2d Cir. 1960) (error not to charge the jury that a paid government informer's testimony must be examined with greater scrutiny than the testimony of an ordinary citizen); Fletcher v. United States, 158 F.2d 321 (D.C. Cir. 1946) (jury should be instructed to scrutinize the informer's testimony closely for purposes of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of witness' own interest).

[24] Caminetti v. United States, 242 U.S. 470 (1917); United States v. Wilson, 154 F.2d 802, 805 (2d Cir. 1946) (while it is better practice for the court to do so, it is not necessary that it give any qualifying charge); United States v. Gallo, 123 F.2d 229 (2d Cir. 1941). State v. Goff, 174 Neb. 548, 118 N.W.2d 625 (1962) and State v. Boner, 42 Wyo. 36, 288 P. 13 (1930) go further: such instructions should *not* be given where there is no, or not sufficient, evidence to justify it.

[25] 352 U.S. 1 (1956) (wherein false testimony given concurrently before a Senate committee by a paid informer, who had testified for the government concerning activities of a Communist conspiracy, so tainted his testimony in the prosecution of the conspirators for violating the Smith Act as to require a reversal of their convictions).

[26] 351 U.S. 115, 124 (1956) (wherein newly-available evidence established that certain witnesses on whose testimony the Board had relied had perjured themselves in other cases of a similar nature).

per se, the government is forced to make a careful evaluation of the informer's expected testimony.[27] Although a different line of reasoning among the circuits holds that a new trial will not be ordered on the basis of new evidence which is merely impeaching,[28] *Mesarosh* indicates that a new trial will be granted when it can be clearly shown by new evidence that the testimony of the informer was unreliable. The courts tend to give the defendant every opportunity to bring out such evidence, and thus are nearly unanimous in allowing a searching and liberal cross-examination of an informer[29] (especially a paid one). And, a refusal to permit such cross-examination may constitute error.[30] The amount of compensation and method of payment to a paid informer is also within the scope of proper cross-examination, as is an inquiry into whether the informer's compensation depends on conviction.[31]

II. CONSTITUTIONAL CONSIDERATIONS

The field of constitutional law has spawned vociferous attacks on government informers. Past attention in federal cases has focused almost entirely on provisions of the fourth, fifth, and sixth amendments to the United States Constitution.

Many informer activities, for example, can and do fall within the unreasonable search and seizure prohibition of the fourth amendment,[32] although obtaining information by trick or deceit has never of itself been regarded as an illegal search and seizure.[33] In *Gouled v. United States*[34] the Court liberally construed the fourth amendment and held that an unreasonable[35] search and seizure does not necessarily involve the use of physical force or coercion. The crucial element may be the lack of knowl-

[27] Note, *"Tainted Testimony" as Basis for Award of New Trial*, 1957 WASH. U.L.Q. 170, 176.

[28] United States v. Rutkin, 208 F.2d 647 (3d Cir. 1953); United States v. Parker, 103 F.2d 857 (3d Cir.), *cert. denied*, 307 U.S. 642 (1939).

[29] District of Columbia v. Clawans, 300 U.S. 617, 630 (1937) (such cross-examination "should not be curtailed summarily . . . ."); Gossett v. State, 48 Okla. Crim. 224, 291 P. 575 (1930).

[30] Gossett v. State, 48 Okla. Crim. 224, 291 P. 575 (1930); Grim v. State, 32 Okla. Crim. 297, 240 P. 1093 (1925).

[31] Harwell v. State, 11 Ala. App. 188, 65 So. 702 (1914); State v. Carroll, 85 Iowa 1, 51 N.W. 1159 (1892). *Contra*, State v. Panchuk, 53 N.D. 669, 207 N.W. 991 (1926).

[32] The fourth amendment provides: "The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." State constitutions generally contain a similar clause, often in the precise words.

The fourth amendment does not forbid all searches and seizures, but only those that are not based upon probable cause or upon a warrant where a warrant is required. Cannon v. United States, 158 F.2d 952, 954 (5th Cir. 1946), *cert. denied*, 330 U.S. 839 (1947). To enforce the provisions of the fourth amendment, federal courts have adopted an exclusionary rule; evidence illegally obtained is excluded from the prosecution's case. Weeks v. United States, 232 U.S. 383 (1914); *cf.* Mapp v. Ohio, 367 U.S. 643 (1961).

[33] Goldman v. United States, 316 U.S. 129 (1942); United States v. Mandel, 17 F.2d 270 (D. Mass. 1927).

[34] 255 U.S. 298 (1921). Gouled and two others were charged with conspiracy to defraud the United States. Papers surreptitiously taken from Gouled's office by a government agent (who was a business acquaintance of Gouled's and pretended to make a friendly call on him) were objected to by Gouled as inadmissible in light of the fourth amendment.

[35] By "unreasonable" is meant an unlawful examination or inspection of one's premises or person with a view to the discovery of stolen contraband or illicit property or for some evidence of guilt to be used in prosecution for crime. United States v. Snyder, 278 F. 650, 658 (N.D.W. Va. 1922).

edge or consent on the part of the suspect. Thus, an unreasonable search and seizure occurs when an informer enters a suspect's house by means of fraud, stealth, social acquaintance, or under the guise of a business call and makes a search and seizure.

Attention shifted to the fifth amendment's due process clause[36] and the right to counsel under the sixth amendment[37] in the 1953 informer case of *Caldwell v. United States*.[38] *Caldwell* held, under circumstances of flagrant governmental intrusion into the confidential relationship between defendant and his counsel, that such informer activity violated the constitutional guarantees of due process of law and effective representation by counsel and thus invalidated the defendant's conviction. The court cautioned that neither high motives nor zeal for law enforcement could justify spying upon and intrusion into the relationship between a person accused of a crime and his counsel.[39] The essence of the court's opinion seems to be that the sixth amendment would not be violated by the mere surreptitious effort of an informer to get evidence from the accused, but rather by an effort which involved "intrusion upon conferences . . . between accused *and his counsel.*"[40] As to the violation of the fifth amendment's due process clause, the court intimated that perhaps the totality of circumstances indicated a lack of fundamental fairness.[41]

Massiah v. United States[42] examined another constitutional question frequently arising in informer cases: the fifth amendment's prohibition in criminal cases of compulsory self-incrimination.[43] Although only the sixth amendment's right to counsel was specifically dealt with by the Court, the decision appeared to rest upon an unarticulated assumption that, through the fifth amendment's prohibition of compulsory self-incrimination, the accused had a right to silence. If so, the Court certainly extended the right against self-incrimination. The Court intimated that if it was improper for the government to compel the accused to help convict himself, it might also be considered improper for the accused to be tricked

[36] The fifth amendment provides, in pertinent part, that "no person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

[37] The sixth amendment provides, in part, that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

[38] 205 F.2d 879 (D.C. Cir. 1953). The defendant was prosecuted for violation of a federal "obstruction of justice" statute and a District of Columbia bribery statute. The principal damaging evidence was supplied by one Bradley, who in his dual capacity as defense assistant and government agent gained free access to the confidential plans of the defense.

[39] *Id.* at 881.

[40] *Id.* (emphasis in original).

[41] For the court observed that the Constitutional guarantees of the fourth, fifth, and sixth amendments lose most of their substance "if the Government can with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisers, to listen to their conversations, and to participate in their counsels of defense." *Id.*

[42] 377 U.S. 201 (1956). Petitioner was indicted for violating the federal narcotics laws, was free on bail and had retained a lawyer. Government agents, without petitioner's knowledge, secured an alleged confederate's consent to install a radio transmitter in the latter's automobile. An agent was thereby enabled to overhear petitioner's damaging statements, which resulted in his conviction.

[43] The pertinent part of the fifth amendment here involved reads "no person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The sixth amendment's right to counsel was also involved in *Massiah* and, in fact, was the principal reason the Court used for justifying a reversal of defendant's conviction.

into convicting himself.[44] Thus, it could be inferred that the Court was saying that an individual's right of privacy meant that he could speak freely, without fear that someday his words might be used against him—an interpretation which, if correct, would virtually outlaw the government's use of secret informers.[45] Perhaps the real meaning of the decision is not so pervasive; at any rate, the subsequent cases of *Lopez v. United States*[46] and *Hoffa v. United States*[47] specifically stated countervailing ideas which nullify any such far-reaching impact of *Massiah*.

III. Recent Informer Cases

The decisions in *Gouled*, *Caldwell*, and *Massiah* serve to delineate the constitutional bases for attacking the use of informers and the evidence they obtain. Three recent informer cases have looked at these bases of attack. All three affirm that the constitutional provisions considered by the older cases are the pertinent ones; all indicate that the trends evidenced by the older decisions are for the most part valid. The main opposition is to *Massiah*, as indicated above.

In the area of the fourth amendment, *On Lee v. United States*[48] indicates that the adoption of trickery and stealth by federal officers will not, by itself, render evidence inadmissible in the absence of a trespass sufficient to make the search and seizure illegal. An entry secured by the mere concealment of true identity is not such a "trespass."[49] The impact on treatment of informers, all of whom necessarily conceal their true identity, is obvious.

Lopez v. United States[50] adds support to *On Lee*'s handling of the fourth amendment restrictions. Lopez was convicted on charges of having attempted to bribe an internal revenue agent. The evidence showed that the defendant first made an unsolicited offer of money to the agent for the purpose of obtaining his assistance in concealing cabaret tax liability, and that, at a later meeting in defendant's office, the latter's improper overtures began almost at the outset of the discussion, which was recorded by a device carried by the agent.

The emphatic lesson to be learned from the Court's affirmation of the conviction is that a person runs the risk that his private conversations with another may be revealed by the latter,[51] and the fourth amendment will

[44] *See* 78 Harv. L. Rev. 217 (1964).

[45] The dissent was quite disturbed by the idea that admissions elicited by informers might be considered violative of the right against self-incrimination, noting that "until today" confessions were not deemed to be involuntary just because made "outside the presence of counsel." 377 U.S. at 210.

[46] 373 U.S. 427 (1963).

[47] 385 U.S. 293 (1966).

[48] 343 U.S. 727 (1952).

[49] In *On Lee*, an undercover agent, whom defendant trusted, engaged defendant in conversation. By microphone hidden on the agent, On Lee's incriminating statements were transmitted to another agent. *Held*: Although an issue of credibility was raised, the evidence was admissible since no unlawful search and seizure. *Id.*

[50] 373 U.S. 427 (1963).

[51] As the Court said, "the only evidence obtained consisted of statements made by Lopez to Davis (the internal revenue agent), statements which Lopez knew full well could be used against him by Davis if he wished." This statement, of course, confines the meaning of Massiah v. United States, 377 U.S. 201 (1956) within smaller limits than those conjectured.

not be violated by such a revelation.[52] Implicit also in the decision is judicial approval of informers preying upon friendships—if the informer directly testifies and thus can be subjected to the scrutiny of intensive cross-examination.

In no case before 1966 were all pertinent constitutional considerations systematically presented and analyzed in a single opinion. In *Hoffa v. United States*[53] the United States Supreme Court did just that. Defendant Hoffa alleged violations of the fourth, fifth, and sixth amendments because of the government's use of one James Partin, a paid secret informer and former union colleague of Hoffa. Hoffa was convicted on charges of endeavoring to bribe members of the jury in an earlier trial. A substantial element in the government's proof in the jury tampering case was contributed by Partin, who testified to several incriminating statements made at the time of the earlier trial by Hoffa and another defendant in the informer's presence. The informer, under state and federal indictments,[54] was released from jail on bail, made repeated visits to the courtroom, frequented the Hoffa hotel suite (also used as a conference room by Hoffa's counsel) and made reports to a federal agent concerning the conversations in which the incriminating statements were made. After completion of the first trial, the informer's wife received payments from government funds, and the state and federal charges against the informer were either dropped or not actively prosecuted. In spite of these facts the lower courts refused to suppress the informer's evidence.[55]

The Supreme Court held that none of Hoffa's constitutional rights had been violated. The fourth amendment's prohibition of unreasonable searches and seizures was not violated since Partin was in Hoffa's suite by invitation, and Hoffa was not relying on the security of the hotel suite but on the misplaced confidence that Partin would not reveal the conversations. The fifth amendment's prohibition of compulsory self-incrimination was not invaded since the conversations were voluntary; therefore, there was no coercion.[56] Nor was the due process clause of the fifth amendment violated since the use of secret informers is not unconstitutional per se. Nor did Partin necessarily lie even though he had great motive to do so.[57] The sixth amendment's right to counsel was not impaired since none of Hoffa's incriminating statements which Partin heard were made in the presence or hearing of counsel, or in connection with the legitimate defense in the

[52] Lopez advanced the contention that the agent gained access to his office by misrepresentation and because of this conduct all evidence obtained there (*i.e.*, the agent's conversation with him) was illegally "seized."

[53] 385 U.S. 293 (1966).

[54] State, for kidnapping; federal, for embezzlement and conversion of union funds and falsification of union's books and records.

[55] 349 F.2d 20 (6th Cir. 1966).

[56] The immunity guaranteed by the fifth amendment is only against compulsory self-incrimination. Blackford v. United States, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958); United States v. Mary Helen Coal Corp., 24 F. Supp. 50 (D. Ky. 1938).

[57] Notice how once again an informer's testimony is not constitutionally inadmissible even though its credibility may be seriously questioned. *See* notes 18, 19 *supra* and accompanying text.

prior trial.[58] It appears that the Court did not want to extend *Mesarosh*'s "tainted testimony" concept[59] to a situation in which it was far from clear that the key government witness might have committed perjury, although he had great motivation to do so.

IV. CONCLUSION

Hoffa raises two questions, one corollary and one primary. The corollary question is whether the decision is indicative of the extent to which the government may go in the future to solicit informers. Since the government apparently almost "sprang"[60] Partin from jail to gain his services, is such a tactic implicitly condoned by the Court, and is there any limitation at all on how far the government may go in soliciting the activities of informers?[61] Had the facts conclusively shown that Partin was actually released from jail or that all criminal prosecutions against him were dropped solely because of his agreement to turn government agent, the Court possibly would have invalidated Hoffa's conviction. Thus, *Hoffa* should not be construed to mean that the present Court is willing to grant the government an unrestricted license in its procurement of secret agents. Rather, confronted with a situation in which the government's solicitation of informers is only slightly more questionable, it seems likely that the Court will find that such procurement by law enforcement agencies cannot be judicially sanctioned. It seems very possible that the courts will impose solicitation standards upon the government in the near future.

The primary and more important question is whether *Hoffa* is indicative of a trend toward leniency in applying constitutional restrictions to informers. The case may only be prominent because of its well-known defendant, and such prominence, of course, has no enduring legal significance or implications. However, the wide latitude allowed the informer Partin and the ease with which the Court dismissed each of the defendant's contentions may suggest that today's Court is not yet contemplating saddling

[58] The Court did note that in line with Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953), and assuming (but not deciding) that Partin did intrude into the conferences of Hoffa's counsel in the Taft-Hartley trial, this fact would at most have invalidated only the Taft-Hartley trial (if Hoffa had lost instead of getting a hung jury), not the present jury tampering one.

[59] *See* notes 25, 26 *supra* and accompanying text.

[60] There is no doubt in the dissent's mind that Partin was "sprung."

[61] This leads to the opinionated area where law and philosophy commingle. One main line of thinking (but not the majority) is the "dirty business" or "fair play" philosophy, represented by the minority's argument in On Lee v. United States, 343 U.S. 727, 747 (1952) that the Court should discourage government officials and agents from being sneaks and peeping-toms and restrict the government's employment of "dirty business" in its efforts to obtain evidence of crime. "Fair play" should be required in federal law enforcement.

This argument stems from Mr. Justice Frankfurter's views in McNabb v. United States, 318 U.S. 332 (1943). Mr. Justice Holmes and Mr. Justice Brandeis expressed similar concepts in Olmstead v. United States, 277 U.S. 438, 469-70, 471-85 (1928). Mr. Chief Justice Warren, in his dissent in *Hoffa*, reiterated the fair play approach, maintaining that the conviction of Hoffa should be reversed because there was a gross affront to the equality and fairness of federal law enforcement by allowing the government to reach into jail and spring such an unsavory and unreliable (to him) informer-witness. 385 U.S. at 313. Apparently, though, something more than "dirty business" (if this be such) on the part of federal law enforcement officers and informers will be necessary to invoke the theory of *McNabb*.