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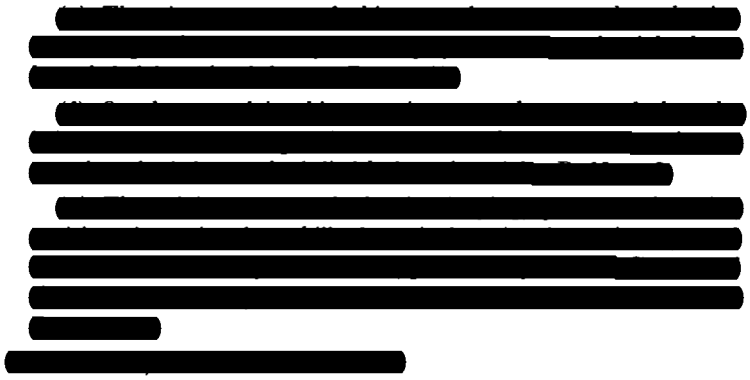
ROVIARO *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 58. Argued December 11, 1956.—Decided March 25, 1957.

[redacted]



Maurice J. Walsh argued the cause and filed a brief for petitioner.

James W. Knapp argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper.*

MR. JUSTICE BURTON delivered the opinion of the Court.

This case concerns a conviction for violation of the Narcotic Drugs Import and Export Act, as amended.[1]

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[1] "(c) Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. . . .

"Whenever on trial for a violation of this subdivision [§ 2 (c)] the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." 65 Stat. 767, 768, 21 U. S. C. § 174.

The principal issue is whether the United States District Court committed reversible error when it allowed the Government to refuse to disclose the identity of an undercover employee who had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged. For the reasons hereafter stated, we hold that, under the circumstances here present, this was reversible error.

In 1955, in the Northern District of Illinois, petitioner, Albert Roviaro, was indicted on two counts by a federal grand jury. The first count charged that on August 12, 1954, at Chicago, Illinois, he sold heroin to one "John Doe" in violation of 26 U. S. C. § 2554 (a). The second charged that on the same date and in the same city he "did then and there fraudulently and knowingly receive, conceal, buy and facilitate the transportation and concealment after importation of . . . heroin, knowing the same to be imported into the United States contrary to law; in violation of Section 174, Title 21, United States Code."

Before trial, petitioner moved for a bill of particulars requesting, among other things, the name, address and occupation of "John Doe." The Government objected on the ground that John Doe was an informer and that his identity was privileged. The motion was denied.

Petitioner, who was represented by counsel, waived a jury and was tried by the District Court. During the trial John Doe's part in the charged transaction was described by government witnesses, and counsel for petitioner, in cross-examining them, sought repeatedly to learn John Doe's identity. The court declined to permit this cross-examination and John Doe was not produced, identified, or otherwise made available. Petitioner was

found guilty on both counts and was sentenced to two years' imprisonment and a fine of $5 on each count, the sentences to run concurrently.[2] The Court of Appeals sustained the conviction, holding that the concurrent sentence was supported by the conviction on Count 2 and that the trial court had not abused its discretion in denying petitioner's requests for disclosure of Doe's identity. 229 F. 2d 812. We granted certiorari, 351 U. S. 936, in order to pass upon the propriety of the nondisclosure of the informer's identity and to consider an alleged conflict with *Portomene* v. *United States,* 221 F. 2d 582; *United States* v. *Conforti,* 200 F. 2d 365; and *Sorrentino* v. *United States,* 163 F. 2d 627.

At the trial, the Government relied on the testimony of two federal narcotics agents, Durham and Fields, and two Chicago police officers, Bryson and Sims, each of whom knew petitioner by sight. On the night of August 12, 1954, these four officers met at 75th Street and Prairie Avenue in Chicago with an informer described only as John Doe.[3] Doe and his Cadillac car were searched and no narcotics were found. Bryson secreted himself in the trunk of Doe's Cadillac, taking with him a device with which to raise the trunk lid from the inside. Doe then drove the Cadillac to 70th Place and St. Lawrence Avenue, followed by Durham in one government car and Field and Sims in another. After an hour's wait, at about 11 o'clock, petitioner arrived in a Pontiac, accompanied by an un-

[2] The judgment of conviction provided for a $5 fine on "each" count, to "run concurrently." The Government stated, during the argument before this Court, that this judgment has been construed administratively as imposing only one $5 fine. We therefore assume, without so deciding, that the judgment imposed a fully concurrent sentence.

[3] Durham, Bryson and Sims, among them, testified that Doe was an "informer" and a "special employee" who had been known to the federal agents for several years.

identified man. Petitioner immediately entered Doe's Cadillac, taking a front seat beside Doe. They then proceeded by a circuitous route to 74th Street near Champlain Avenue. Both government cars trailed the Cadillac but only the one driven by Durham managed to follow it to 74th Street. When the Cadillac came to a stop on 74th Street, Durham stepped out of his car onto the sidewalk and saw petitioner alight from the Cadillac about 100 feet away. Durham saw petitioner walk a few feet to a nearby tree, pick up a small package, return to the open right front door of the Cadillac, make a motion as if depositing the package in the car, and then wave to Doe and walk away. Durham went immediately to the Cadillac and recovered a package from the floor. He signaled to Bryson to come out of the trunk and then walked down the street in time to see petitioner re-enter the Pontiac, parked nearby, and ride away.

Meanwhile, Bryson, concealed in the trunk of the Cadillac, had heard a conversation between John Doe and petitioner after the latter had entered the car. He heard petitioner greet John Doe and direct him where to drive. At one point, petitioner admonished him to pull over to the curb, cut the motor, and turn out the lights so as to lose a "tail." He then told him to continue "further down." Petitioner asked about money Doe owed him. He advised Doe that he had brought him "three pieces this time." When Bryson heard Doe being ordered to stop the car, he raised the lid of the trunk slightly. After the car stopped, he saw petitioner walk to a tree, pick up a package, and return toward the car. He heard petitioner say, "Here it is," and "I'll call you in a couple of days." Shortly thereafter he heard Durham's signal to come out and emerged from the trunk to find Durham holding a small package found to contain three glassine envelopes containing a white powder.

A field test of the powder having indicated that it contained an opium derivative, the officers, at about 12:30 a. m., arrested petitioner at his home and took him, along with Doe, to Chicago police headquarters. There petitioner was confronted with Doe, who denied that he knew or had ever seen petitioner.[4] Subsequent chemical analysis revealed that the powder contained heroin.

I.

Petitioner contends that the trial court erred in upholding the right of the Government to withhold the identity of John Doe. He argues that Doe was an active participant in the illegal activity charged and that, therefore, the Government could not withhold his identity, his whereabouts, and whether he was alive or dead at the time of trial.[5] The Government does not defend the nondisclosure of Doe's identity with respect to Count 1, which charged a sale of heroin to John Doe, but it attempts to sustain the judgment on the basis of the con-

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[4] Police Officer Bryson testified as follows:

"Q. Well, did he [John Doe] say anything with reference to an acquaintanceship or any prior association with this man [petitioner] or any transaction with this man?

. . . . . .

"A. Well, he said he didn't know the Defendant here. He said he had never seen him before."

[5] The following colloquy occurred between Chester E. Emanuelson, the government counsel, and Maurice J. Walsh, petitioner's counsel:

"Mr. Emanuelson: . . .

. . . . . .

"The reason we do not want to reveal his [Doe's] name is that there are other matters that are pending, I have been told—I know of one myself—and the cases hold that we do not have to reveal the informer's name. Now, if there is some reason—

"Mr. Walsh: Well, is there any activity of the informer which will

viction on Count 2, charging illegal transportation of narcotics.[6] It argues that the conviction on Count 2 may properly be upheld since the identity of the informer, in the circumstances of this case, has no real bearing on that charge and is therefore privileged.

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. *Scher* v. *United States,* 305 U. S. 251, 254; *In re Quarles and Butler,* 158 U. S. 532; *Vogel* v. *Gruaz,* 110 U. S. 311, 316. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. 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.

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be curtailed by reason of the disclosure of his name? Would you answer that?

"Mr. Emanuelson: Any activities?

"Mr. Walsh: Yes.

"Mr. Emanuelson: From this point forward, no.

"Mr. Walsh: Is there any occasion upon which he will be called to testify?

"Mr. Emanuelson: No."

In a later colloquy Mr. Emanuelson stated: "[A]s I understand it, the reason his [Doe's] name has not been disclosed is because he is acting as a Government employee in other cases and it would help other persons in other matters that are pending."

[6] Since the concurrent sentence did not exceed that which lawfully might be imposed under a single count, the judgment may be affirmed if the conviction on either count is valid. *Pinkerton* v. *United States,* 328 U. S. 640, 641–642, n. 1; *Hirabayashi* v. *United States,* 320 U. S. 81, 85; *Abrams* v. *United States,* 250 U. S. 616, 619; *Claassen* v. *United States,* 142 U. S. 140, 146–147.

The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged.[7] Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.[8]

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful

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[7] *Foltz* v. *Moore McCormack Lines,* 189 F. 2d 537, 539–540; VIII Wigmore, Evidence (3d ed. 1940), § 2374 (1); A. L. I., Model Code of Evidence (1942), Rule 230. But cf. *In re Quarles and Butler,* 158 U. S. 532; *Vogel* v. *Gruaz,* 110 U. S. 311, 316.

[8] *Sorrentino* v. *United States,* 163 F. 2d 627, 629; *Pihl* v. *Morris,* 319 Mass. 577, 578–580, 66 N. E. 2d 804, 805–806; *Commonwealth* v. *Congdon,* 265 Mass. 166, 174–175, 165 N. E. 467, 470; *Regina* v. *Candy,* cited 15 M. & W. 175; VIII Wigmore, Evidence (3d ed. 1940), § 2374 (2).

The record contains several intimations that the identity of John Doe was known to petitioner and that John Doe died prior to the trial. In either situation, whatever privilege the Government might have had would have ceased to exist, since the purpose of the privilege is to maintain the Government's channels of communication by shielding the identity of an informer from those who would have cause to resent his conduct. The Government suggests that if petitioner knew John Doe's identity, the court's failure to require disclosure would not be prejudicial even if erroneous. See *Sorrentino* v. *United States,* 163 F. 2d 627. However, any indications that petitioner, at the time of the trial, was aware of John Doe's identity are contradicted by the testimony of Officer Bryson that John Doe at police headquarters denied knowing, or ever having seen, petitioner. The trial court made no factual finding that petitioner knew Doe's identity. On this record we cannot assume that John Doe was known to petitioner, and, if alive, available to him as a witness. Nor can we conclude that John Doe died before the trial.

to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.[9] In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.[10] Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication.[11]

Three recent cases in the Courts of Appeals have involved the identical problem raised here—the Government's right to withhold the identity of an informer who helped to set up the commission of the crime and who was present at its occurrence. *Portomene* v. *United States,* 221 F. 2d 582; *United States* v. *Conforti,* 200 F. 2d 365; *Sorrentino* v. *United States,* 163 F. 2d 627. In each case it was stated that the identity of such an informer must be disclosed whenever the informer's testi-

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[9] See, *e. g., Scher* v. *United States,* 305 U. S. 251; *Wilson* v. *United States,* 59 F. 2d 390; *Centoamore* v. *Nebraska,* 105 Neb. 452, 181 N. W. 182. Early decisions established that the scope of the privilege was in the discretion of the trial judge. Disclosure was compelled when he found it "material to the ends of justice . . . ." *Regina* v. *Richardson,* 3 F. & F. 693, 694 (1863). See also, *Marks* v. *Beyfus,* L. R. 25 Q. B. D. 494, 498 (1890). In the *Scher* case, *supra,* at 254, this Court said that "public policy forbids disclosure of an informer's identity unless essential to the defense, as, for example, where this turns upon an officer's good faith."

[10] See *United States* v. *Coplon,* 185 F. 2d 629, 638; *United States* v. *Andolschek,* 142 F. 2d 503, 506.

[11] *E. g., Scher* v. *United States, supra; United States* v. *Li Fat Tong,* 152 F. 2d 650; *Wilson* v. *United States, supra; United States* v. *Keown,* 19 F. Supp. 639.

mony may be relevant and helpful to the accused's defense.[12]

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

II.

The materiality of John Doe's possible testimony must be determined by reference to the offense charged in Count 2 and the evidence relating to that count. The

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[12] In the *Portomene* case, *supra,* the accused was charged with two sales of narcotics to an informer. The accused took the stand, denied selling narcotics, and testified that the person he believed to be the informer had a grudge against him. The Fifth Circuit held that disclosure was essential to the defense.

In the *Conforti* case, *supra,* the accused was charged with possession of counterfeit notes. Agents overheard the informer make arrangements with the accused, saw the informer meet the accused and a package transferred, and then received from the informer a package containing counterfeit money. The Seventh Circuit stated that the accused would have been entitled to disclosure of the informer's identity if a proper demand had been made at the trial.

In the *Sorrentino* case, *supra,* the accused was charged with both sale and possession of narcotics. Government agents saw the accused go into a house with the informer after arrangements for a sale had been overheard, and the informer later turned over narcotics to the agents. The Ninth Circuit stated that the accused was entitled to disclosure under these circumstances, but the conviction was affirmed on the ground that the record demonstrated that the accused knew the identity of the informer.

See also, *Crosby* v. *Georgia,* 90 Ga. App. 63, 82 S. E. 2d 38.

charge is in the language of the statute. It does not charge mere possession; it charges that petitioner did "fraudulently and knowingly receive, conceal, buy and facilitate the transportation and concealment after importation of . . . heroin, knowing the same to be imported into the United States contrary to law . . . ." While John Doe is not expressly mentioned, this charge, when viewed in connection with the evidence introduced at the trial, is so closely related to John Doe as to make his identity and testimony highly material.

It is true that the last sentence of subdivision (c) of § 2 authorizes a conviction when the Government has proved that the accused possessed narcotics, unless the accused explains or justifies such possession.[13] But this statutory presumption does not reduce the offense to one of mere possession or shift the burden of proof; it merely places on the accused, at a certain point, the burden of going forward with his defense.[14] The fact that petitioner here was faced with the burden of explaining or justifying his alleged possession of the heroin emphasizes his vital need for access to any material witness. Otherwise, the burden of going forward might become unduly heavy.

The circumstances of this case demonstrate that John Doe's possible testimony was highly relevant and might

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[13] See n. 1, *supra*, where the material part of the statutory provision is quoted in full.

[14] *Casey* v. *United States*, 276 U. S. 413, 418; *United States* v. *Chiarelli*, 192 F. 2d 528, 531; *Stoppelli* v. *United States*, 183 F. 2d 391; *Landsborough* v. *United States*, 168 F. 2d 486.

Petitioner contends that the Government in all cases must make a further affirmative showing that the accused knew that he possessed narcotics. He argues that its failure to do so here entitles him to an acquittal. That contention, however, has been decided against petitioner in the cases cited above.

have been helpful to the defense. So far as petitioner knew, he and John Doe were alone and unobserved during the crucial occurrence for which he was indicted. Unless petitioner waived his constitutional right not to take the stand in his own defense, John Doe was his one material witness. Petitioner's opportunity to cross-examine Police Officer Bryson and Federal Narcotics Agent Durham was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction. Doe had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or on the identity of the package. He was the only witness who might have testified to petitioner's possible lack of knowledge of the contents of the package that he "transported" from the tree to John Doe's car. The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide.

Finally, the Government's use against petitioner of his conversation with John Doe while riding in Doe's car particularly emphasizes the unfairness of the nondisclosure in this case. The only person, other than petitioner himself, who could controvert, explain or amplify Bryson's report of this important conversation was John Doe. Contradiction or amplification might have borne upon petitioner's knowledge of the contents of the package or might have tended to show an entrapment.

This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. Moreover, a government witness testified that Doe denied knowing petitioner or ever hav-

ing seen him before. We conclude that, under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure.[15]

Petitioner also presents a claim of error arising out of a controversy over the correctness of an entry, made on the envelope containing the heroin, to the effect that the heroin had been found by Bryson. The undisputed testimony of the officers was that the heroin had been found by Durham and handed by him to Bryson who, in turn, handed it to Fields who made the erroneous entry. On the basis of this discrepancy, petitioner sought to obtain Durham's written report to the Federal Narcotics Bureau concerning the case. Although this discrepancy dealt with the relatively minor matter of who had first found the package, it also reflected upon the credibility of Durham and Fields, two of the Government's principal witnesses. However, in view of the decision we have reached on other grounds, we deem it unnecessary to determine whether the denial of this request, even if erroneous, was prejudicial to petitioner.

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[15] Thus far we have dealt largely with the trial court's refusal, at the trial, to require disclosure of the informer's identity. In view of the Government's exclusive reliance here upon Count 2, we have considered this question only with respect to that count. However, we think that the court erred also in denying, prior to the trial, petitioner's motion for a bill of particulars, insofar as it requested John Doe's identity and address. Since Count 1 was then before the court and expressly charged petitioner with a sale of heroin to John Doe, it was evident from the face of the indictment that Doe was a participant in and a material witness to that sale. Accordingly, when his name and address were thus requested, the Government should have been required to supply that information or suffer dismissal of that count.

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The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for proceedings not inconsistent with this opinion.

Reversed and remanded.

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