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Government Discovery Obligations in Courts-Martial Involving Confidential Informants

BY MAJOR ROBERT W. MILLER

This article discusses the delicate balance between law enforcement's interests in protecting the identity of CIs and a military accused's Constitutional and Statutory rights where "Congress intended more generous discovery to be available for military accused."

"Once an informant is known the drug traffickers are quick to retaliate. Dead men tell no tales. The old penalty of tongue removal … has been found obsolete."[1]

INTRODUCTION

The Supreme Court of the United States has long recognized that confidential informants (CIs) play a "vital part of society's defensive arsenal" and "protecting [their] identity rests upon that belief."[2] The use of CIs in criminal investigations is an important and effective tactic that allows law enforcement to ferret out crimes in some of the darkest corners of society. After all, those who conspire to commit crimes generally do so in the presence of trusted confidants and not openly in public — let alone in the presence of law enforcement. Nevertheless, in *Roviaro v. United States*, the Supreme Court recognized that the public interest in protecting an informant's identity must be balanced against an accused's right to prepare his defense.[3] This article discusses the delicate balance between law enforcement's interests in protecting the identity of CIs and a military accused's Constitutional and Statutory rights where "Congress intended more generous discovery to be available for military accused."[4]

In the military context, CIs are especially useful in cases involving the use, possession, and distribution of controlled substances. Military law enforcement also uses CIs in cases involving fraud, espionage, terrorism, and other offenses involving multiple criminal actors.[5] It is important to briefly distinguish between undercover agents (UAs) and CIs in the military environment. UAs are trained law enforcement personnel who conduct covert operations.[6] For example, military law enforcement agencies often use UAs in cases involving internet crimes against children (ICAC) in which

UAs assume the identity of a minor while communicating online. On the other hand, CIs are non-law enforcement personnel, typically active duty service members, who do not receive formal training in conducting covert operations. Unlike UAs who work for a law enforcement agency, CIs sign a statement of agreement to act at the direction of law enforcement on its behalf.[7] This article focuses on the Government's discovery obligations in military courts-martial specifically involving CIs.

OSI CONFIDENTIAL INFORMANT PROGRAM

The Office of Special Investigations (OSI) is a federal law enforcement agency charged with investigating felony-level offenses committed by Air Force members. Much like other law enforcement agencies, OSI operates a CI program. In accordance with Air Force Instruction (AFI) 71-101, Volume 1, *Criminal Investigations Program*, dated 1 July 2019, paragraph 1.4.4., OSI field units must "operate a confidential informant program consisting of people who confidentially provide vital information for initiating or resolving criminal or counterintelligence investigations." As part of the CI program, OSI field units recruit active duty airmen and vet them for potential use as informants. Prior to 2012, OSI used the term "confidential source" rather than "confidential informant."[8] However, for all practical purposes, the two terms are synonymous and often times used interchangeably.

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The CI recruiting process generally includes an initial interview with OSI agents and an extensive vetting process. If selected to serve as an informant, the member signs a declaration of agreement prior to receiving assignments as an informant. Once entered into the program, OSI engages in a series of source meets, or follow-up meetings, with each CI throughout the informant's participation in the CI program. OSI uses source meets to collect information on active duty members suspected of engaging in criminal behavior. OSI creates a dossier file for each informant, which typically includes a running catalogue of each source meet, information received from the informant, assignments given by OSI agents to the informant, and training received by the informant.

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OSI's CI program is incredibly valuable to Air Force commanders at all levels because it facilitates readiness and national security. Like any law enforcement agency, OSI has an interest in protecting the identities and activities of CIs to ensure their safety and to maintain operational security. Unnecessary disclosure of a CI's identity could potentially result in physical harm to the informant or their family and have a significant chilling effect on OSI's ability to recruit informants. Additionally, disclosure of a CI's identity or activity could impact other pending OSI investigations involving the informant.

TRIAL COUNSEL DISCOVERY OBLIGATIONS

While Government discovery obligations are triggered by service of charges on the accused,[9] trial counsel are "strongly encouraged to provide discovery to Defense Counsel as soon as practicable."[10] Defense initial discovery requests often include language seeking the following: (1) the identity of any CIs involved in the investigation; (2) information or communications provided by the CI to law enforcement; and (3) any documentary evidence, such as agent notes and/or dossier file related to the CI. This article analyzes the Government's discovery obligations for cases in which the Government intends to call a CI to testify in its case-in-chief, as well as cases in which the Government does not intend to call a CI to testify as a Government witness. Additionally,

for reasons that will be discussed further below, even if not explicitly included in a Defense discovery request, the Government must also comply with its discovery obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). In particular, this includes disclosure of the fact that a witness called to testify in the Government's case-in-chief is either currently serving or previously served as a CI, even if done in a capacity unrelated to the case at hand.

Confidential Informant Testifies as Government Witness

For this analysis, as is often the case, OSI recruits a CI, tasks the CI to collect information on the accused's use of a controlled substance, and then obtains information about the accused's use of a controlled substance at an off-base party. Then, at trial, the Government calls the CI as a witness in its case-in-chief to prosecute the accused for use of a controlled substance. As a starting point, Military Rule of Evidence (Mil. R. Evid.) 507(a) provides that "the United States … has a privilege to refuse to disclose the identity of an informant."[11] However, in the above scenario in which the CI appears as a witness for the prosecution, Mil. R. Evid. 507(d)(1)(B) explicitly requires disclosure of the CI's identity.[12] Assuming Defense submits a discovery request seeking such information, the OSI dossier file related to the testifying CI and any agent notes related to information provided by the CI is almost always discoverable under Rule for Courts-Martial (R.C.M.) 701(a)(2). This *Rule* requires the Government to provide items relevant to Defense preparation. In order to properly prepare a defense, the accused must be permitted to inspect the documents used to build the Government's case. The dossier file and agent notes allow Defense to explore a potential entrapment defense, as well as properly equip Defense with ammunition on cross-examination to attack the CI's credibility.[13]

Confidential Informant Does Not Testify as Government Witness

While the *Rules* seem fairly straightforward when the CI is expected to testify, the analysis becomes more convoluted when OSI uses a CI during an investigation into the accused and the Government does not intend to call the CI to testify in its case-in-chief. For example, taking the above scenario, if the CI provides information to OSI about the accused's use of a controlled substance at an off-base party, then OSI interviews other attendees who also observed the accused's use, the Government may decide to call those other party attendees to testify rather than the CI. In such a scenario, OSI may wish to conceal the identity of the CI and any related dossier file in order to continue covert operations with the CI. Assuming Defense is unaware of the CI's identity referenced in the OSI report of investigation, Defense may request the identity of the CI and dossier files related to the CI to further investigate, prepare its defense, and to potentially call the CI as their own witness at trial.

> Trial counsel should coordinate the Defense request for release of any CI's identity and related dossier file with the local OSI detachment to determine what, if anything, will be provided.

Like any discovery request for documents within the government's possession, the analysis begins with R.C.M. 701. In accordance with R.C.M. 701(a)(2)(A)(i), Defense may inspect documents within the possession, custody, or control of military authorities that are relevant to Defense's preparation and are not otherwise protected from disclosure by a privilege. Trial counsel should coordinate the Defense request for release of any CI's identity and related dossier file with the local OSI detachment to determine what, if anything, will be provided. There are, in fact, limited situations in which the CI's identities and related dossier files are not subject to discovery. For instance, perhaps the CI was only peripherally involved as a "tipster" and the relevance of the related dossier file is tenuous.

In this situation, trial counsel should work closely with the local OSI detachment before refusing to provide the requested discovery. As a practical consideration, OSI detachments should understand that failure to comply with discovery obligations could potentially result in the dismissal of charges by the military judge. After coordina-

tion with OSI, trial counsel should respond to the Defense discovery request acknowledging the existence of the requested information (e.g., that confidential informant "John Doe" does exist and that OSI maintains a dossier file for the informant). In appropriate situations, trial counsel should inform Defense that it is invoking privilege for the CI's identity under Mil. R. Evid. 507 and that it does not believe the dossier file or any agent notes related to the CI are discoverable. This is perhaps the most important step for trial counsel. Trial counsel often times mistakenly believe that a decision not to release the CI's identity and related dossier file require a response along the lines of "none exist" or that the Government is "unaware of any such identity." Instead, the Government must expressly acknowledge what exists and indicate that it is denying Defense's request for that particular information.

IN CAMERA REVIEW AND PROTECTIVE ORDERS

Once trial counsel responds to Defense's discovery request, Defense must then decide whether to file a motion to compel the CI's identity and related dossier file. In accordance with R.C.M. 701(g)(2), "upon motion by a party, the military judge may review any materials in camera." Therefore, if Defense files a motion to compel, trial counsel should specifically request that the military judge conduct an in camera review of the disputed discovery materials. Trial counsel should coordinate with OSI to provide the military judge unredacted copies of the materials. Additionally, the OSI case agent should be prepared to testify in support of the Government's opposition to the release of the information and articulate to the military judge the rationale in opposing production of the requested materials.

R.C.M. 701(g)(2) further provides that "upon a sufficient showing, the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate." Accordingly, trial counsel should request that the military judge issue a protective order to the Defense over any materials ordered released by the military judge. The protective order should specify that Defense counsel is not to release the information to anyone outside the Defense team[14] and to return all copies of documents provided to trial counsel at the conclusion of trial.

> Although protecting sensitive information is important for effective law enforcement, there is no such "tradecraft privilege" permitted by the Military Rules of Evidence or case law.

DISPELLING MYTHS ABOUT OSI TRADECRAFT

In deciding to withhold certain information, OSI agents often invoke the term "tradecraft." Although protecting sensitive information is important for effective law enforcement, there is no such "tradecraft privilege" permitted by the Military Rules of Evidence or case law. Mil. R. Evid. 505 provides a privilege for classified information if disclosure would be detrimental to national security. Mil. R. Evid. 506 provides a privilege for non-classified Government information if disclosure would be detrimental to the public interest. Mil. R. Evid. 506(b) defines the scope of "Government information" as official communication and documents and other information within the custody or control of the Federal Government. Additionally, Mil. R. Evid. 506(b) expressly states that "this rule does not apply to the identity of an informant (Mil. R. Evid. 507)." While certain OSI practices might theoretically require trial counsel to invoke privilege under Mil. R. Evid. 506, it is unlikely that anything related to OSI's CI program would qualify under this privilege.

COMPARISON TO CIVILIAN JURISDICTIONS

In *Roviaro v. United States*, the Supreme Court held that although the Government has a privilege to withhold an informant's identity in certain instances, application of the privilege is limited by fundamental requirements of fairness.[15] The Court noted, "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is

essential to a fair determination of a cause, the privilege must give way."[16] Acknowledging the importance in preserving anonymity, the Court established a balancing test between "the public interest in protecting flow of information to law enforcement against the individual's right to prepare [a] defense."[17] In evaluating each case, the Court must consider the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.[18] In determining whether to disclose the identity of an informant, virtually every federal circuit employs a similar balancing test, which essentially boils down to whether the informant is merely a "tipster" versus an actual participant or spectator to the crime.[19]

The Government must also disclose whether a particular witness has ever served as a CI, either in the past or in the present, even if the witness served as a CI in a capacity unrelated to the case against the accused.

GOVERNMENT WITNESS SERVED AS CONFIDENTIAL INFORMANT IN UNRELATED MATTER

The above analysis assumes that the investigation into the accused involves the use of a CI. However, the Government must also disclose whether a particular witness has ever served as a CI, either in the past or in the present, even if the witness served as a CI in a capacity unrelated to the case against the accused. The rationale for disclosure of this information is that an individual who serves as a CI may want — or expect — something in return, or may have a bias in favor of the Government. Take, for example, a scenario in which a CI is tasked by OSI to collect information on a particular member's use of a controlled substance, but then, in a completely unrelated manner, becomes a witness to an assault at an off-base party. If the Government calls the witness to testify in its case-in-chief to the assault consummated by a battery, the fact that the witness served as a CI is nevertheless discoverable under R.C.M. 701(a)(6), which partially incorporates the holding in *Brady v. Maryland*, 373 U.S. 83 (1963).[20] To some extent, as indicated below, R.C.M. 701(a)(6) is different from *Brady v. Maryland* in that R.C.M. 701(a)(6) does not include evidence "*material* to the accused's guilt or punishment," but *Brady* does. (Emphasis added).

R.C.M. 701(a)(6) provides

> trial counsel shall, as soon as practicable, disclose to the Defense the existence of evidence known to trial counsel which reasonably tends to (A) negate the guilt of the accused of an offense charged; (B) reduce the degree of guilt of the accused of an offense charged; (C) reduce the punishment; or (D) adversely affect the credibility of any prosecution witness or evidence.

The Government violates an accused's right to due process under *Brady* if it withholds evidence that is favorable to the Defense and material to the accused's guilt or punishment.[21] Additionally, evidence that could be used at trial to impeach witnesses is subject to discovery.[22] Finally, the *Discussion* to R.C.M. 701(a)(6) states,

> In accordance with R.C.M. 701(d) … trial counsel should exercise due diligence and good faith in learning about any evidence favorable to the defense known to others acting on the Government's behalf in the case, including military, other governmental, and civilian law enforcement authorities.[23]

Therefore, it is incumbent upon trial counsel to coordinate with OSI to determine whether any Government witness ever served as a CI.

UNITED STATES V. CLAXTON

In *United States v. Claxton*, the Air Force Court of Criminal Appeals (AFCCA) addressed the issue of whether the Government's failure to disclose the fact that one of its witnesses was a confidential informant for OSI pursuant to *Brady* was harmless beyond a reasonable doubt.[24] Appellant, a cadet at the United States Air Force Academy, was convicted of sexual offenses involving two different

women on two separate occasions.[25] Appellant was convicted of engaging in wrongful sexual contact with Cadet MI stemming from a March 2011 incident that occurred in his dormitory room.[26] Cadet Eric Thomas was present in the Appellant's dormitory room when the wrongful sexual contact occurred.[27] Appellant was also convicted of assault consummated by a battery and attempted abusive sexual contact on Ms. SW stemming from a November 2011 incident that occurred in Cadet Thomas' dormitory room.[28] Finally, Appellant was convicted of assault consummated by a battery for a physical altercation that occurred the same night as the November 2011 incident between the Appellant, Cadet Thomas, and another cadet in the hallway outside Cadet Thomas' dormitory room.[29]

In late 2011 and throughout the first half of 2012, including during the time period of Appellant's trial, Cadet Thomas actively worked as a CI for OSI in several unrelated investigations.[30] In its discovery request, Defense requested, amongst other things, "any information received from an informant."[31] The Government did not disclose to Defense any information about Cadet Thomas' status or activities as a CI prior to Appellant's trial in June 2012.[32] At trial, the Government called Cadet Thomas to testify about the charged sexual offenses and assault consummated by a battery. On appeal, AFCCA found that the Government should have disclosed to Defense the fact that Cadet Thomas was an informant and should have provided the dossier file, which included statements about Cadet Thomas' motivation to serve as a confidential informant for OSI.[33] AFCCA held that by failing to provide Defense information about the CI status of Cadet Thomas and another cadet, the Government precluded Defense from impeaching their credibility and motive.[34] However, AFCCA found that the failure to disclose the cadets' CI status and related dossier file was harmless beyond a reasonable doubt, since testimony by the two cadets was relatively unimportant in relation to Appellant's own admissions and was cumulative of other testimony and evidence in the case.[35]

In reviewing AFCCA's decision, the Court of Appeals for the Armed Forces (CAAF) agreed that the Government committed a *Brady* violation in failing to disclose the two cadets' status as CIs with OSI, but affirmed the lower Court's decision that the error was harmless beyond a reasonable doubt.[36] Nevertheless, CAAF characterized the Government's failure to disclose this information as "gross governmental misconduct."[37] In his opinion, Judge Stucky noted that it is unclear from the record whether trial counsel were aware of Cadet Thomas' status as a CI, but it was their duty to learn of any favorable evidence known to others acting on the Government's behalf and to disclose it to Defense.[38] Judge Stucky further noted that there is no evidence in the record that trial counsel made any attempt to inquire as to the status of Government witnesses as required by the Defense discovery request.[39]

As a matter of practice, trial counsel should coordinate with OSI in every case to confirm whether any CIs participated in the investigation.

CONCLUSION

As a matter of practice, trial counsel should coordinate with OSI in every case to confirm whether any CIs participated in the investigation. Trial counsel should also coordinate their witness list with OSI to confirm none of the Government's witnesses are currently serving or previously served as CIs. As mentioned above, even if not expressly requested by Defense, failure to disclose this information could potentially result in a *Brady* violation causing reversible error. The *Discussion* to R.C.M. 701 provides that "[d]iscovery in the military justice system is intended to eliminate pretrial gamesmanship, minimize pretrial litigation, and reduce the potential for surprise and delay at trial." After coordination with OSI, trial counsel should provide timely disclosures to Defense to eliminate the need for unnecessary litigation and to protect the accused's Constitutional right to due process. While the old penalty of tongue removal may be obsolete, state bar removal is not.

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ENDNOTES

[1] Roviaro v. United States, 353 U.S. 53, 67 (1957) (Clark, J., dissenting).

[2] McCray v. Illinois, 386 U.S. 300, 307 (1967).

[3] *See* Roviaro, 353 U.S. at 62.

[4] United States v. Eshalomi, 23 M.J. 12, 24 (C.M.A. 1986); *see also* United States v. Enloe, 35 C.M.R. 228, 230 (C.M.A. 1965) (congressional intent to provide military accused with broader right of discovery than civilian defendants); United States v. Santos, 59 M.J. 317, 321 (C.A.A.F. 2004) ("The military justice system provides for broader discovery than required by practice in federal civilian criminal trials.").

[5] *See* Office of Special Investigations, manual 71-118, Vol. 1, Criminal Investigative Source Management (14 March 2019) [hereinafter OSI].

[6] *See* OSI *supra* note 5, Vol. 3, Undercover Operations (10 June 2019).

[7] *See* OSI *supra* note 5.

[8] *See* OSI *supra* note 5, Vol. 1, Confidential Source Management (3 October 2002).

[9] *See* Manual for Courts-Martial, United States, R.C.M. 701(a) (2019).

[10] *See* U.S. Dep't. of Air Force, Instr. 51-201, Administration of Military Justice, para. 5.12 (5 January 2021).

[11] Significantly, Mil. R. Evid. 507(a) only extends a privilege to the actual communications of an informant where "necessary to prevent the disclosure of the informant's identity."

[12] *See also* MCM, *supra* note 9, R.C.M. 701(a)(3)(A).

[13] *See* Giglio v. United States, 405 U.S. 150 (1972); *See also United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F. 1999) (impeachment evidence is subject to discovery); *United States v. Watson*, 31 M.J. 49, 54-55 (C.M.A. 1990) (impeachment evidence "can obviously be material evidence at a criminal trial"); *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004) (information need not be admissible at trial to be discoverable).

[14] Trial counsel should request a tailored protective order specifying each member of the defense team by-name to avoid any confusion (e.g., Capt Jane Doe, detailed military defense counsel, Mr. John Doe, civilian defense counsel; TSgt John Doe, defense paralegal; and Ms. Jane Doe, expert consultant in the field of forensic psychology).

[15] *See* Roviaro v. United States, 353 U.S. 53, 60 (1957).

[16] *Id.* at 60-61.

[17] *Id.* at 62

[18] *Id.*

[19] *See Carpenter v. Lock*, 257 F.3d 775 (8th Cir. 2001); *United States v. Freeman*, 816 F.2d 558 (10th Cir. 1987); *United States v. Gray*, 47 F.3d 1359 (4th Cir. 1995); *United States v. Jefferson*, 252 F.3d 937 (7th Cir. 2001); *United States v. Sierra-Villegas*, 774 F.3d 1093 (6th Cir. 2014).

[20] *See infra* p. 8 (discussion of *United States v. Claxton*).

[21] *See* United States v. Behenna, 71 M.J. 228, 237-38 (C.A.A.F. 2012) (citing Smith v. Cain 565 U.S. 73, 75 (2012)).

[22] *See* United States v. Santos, 59 M.J. 317, 321 (C.A.A.F. 2004) (citing United States v. Watson, 31 M.J. 49, 54 (C.M.A. 1990).

[23] *See also* Kyles v. Whitley, 514 U.S. 419, 437 (1995).

[24] *See* United States v. Claxton, 2016 CCA LEXIS 649 (A.F.C.C.A. 2016).

[25] *Id.* at *1.

[26] *Id.* at *4-5.

[27] *Id.*

[28] *Id.* at *5-6.

[29] *Id.*

[30] *Id.* at *9.

[31] *Id.* at *18.

[32] *Id.* at *9.

[33] *Id.* at *20-21 ("Cadet Thomas told OSI in December 2011 that he feared being disenrolled and 'will do anything he can to remain at [the Academy] and keep his career in the Air Force.' The Defense would also have learned that Cadet Thomas' disenrollment process had been delayed at the request of OSI so he could continue to work as a CI and testify at several courts-martial, including that of Appellant.")

[34] *Id.* at *22.

[35] *Id.* at *29, *33, *35.

[36] *See* United States v. Claxton, 76 M.J. 356 (C.A.A.F. 2017).

[37] *Id.* at 361.

[38] *Id.* (citing Kyles v. Whitley, 514 U.S. 419, 437 (1995).

[39] *Id.*