

Ripe for Resolution: A Critique of the Surveillance Post Privilege

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“ANY SOCIETY, HOWEVER committed to law, [must] be reminded again and again that it is deadly to reach conclusions on secret, untested evidence. From the French Revolution until today, the accuser has used the shield of anonymity to work off grudges and hatreds. In secrecy, there cannot be truth.”¹ Covert surveillance posts are often established in commercial or residential buildings located in high crime areas to allow law enforcement to better observe drug deals.² When an alleged buyer or seller is prosecuted based on observations made from a secret surveillance post, the government may withhold the surveillance location from the defense by invoking the official information privilege.³ Obtaining the exact location of the surveillance site is important for several reasons: it may show: (1) whether the officer’s view was obstructed; (2) whether the angle of the view made the observation difficult; and (3) whether the officer’s distance from the alleged criminal transaction supports an allegation that he indeed saw the transaction in detail.⁴

A defendant may request disclosure of the surveillance site, but despite the potential for exoneration if the location were revealed, there is only a remote possibility that such a request will be granted in California. If a defendant is charged with sales or possession, and if no evidence is found on the defendant, she is foreclosed from testing the

* Class of 2003. The author would like to dedicate this Comment to the memory of Lorna Shivey, for her wisdom and encouragement. The author would also like to thank Roy and Laura Spaulding for their love, and Rebecca Marcus for her zealous advocacy.

1. Max Rosenn, *Presumed Guilty*, 56 U. PITT. L. REV. 535, 547 (1995) (quoting Anthony Lewis, *Time of the Assassins*, N.Y. TIMES, June 15, 1989, at A31).

2. See Mark Hutchins, *Protecting Surveillance Sites*, POINT OF VIEW (Alameda County District Attorney’s Office), Winter 2001, at 19, available at http://www.co.alameda.ca.us/da/pov/protect_surveillance.htm (last visited Oct. 23, 2001).

3. The official information privilege also applies to disclosure of confidential informants and various documents and reports, such as accident reports and police records. See CAL. EVID. CODE § 1040 (Deering 2001). In this Comment the surveillance post privilege is also referred to as the surveillance privilege.

4. See *United States v. Green*, 670 F.2d 1148, 1156 (D.C. Cir. 1981).

only evidence against her—the officer’s veracity. This inability to test the veracity, or capability, of the accusing officer implicates the constitutional right to confront and cross-examine witnesses against the accused, as well as the right to due process and a fair trial. In California, trial courts wield their discretionary powers in inconsistent procedural practices. This has been exacerbated by the appellate courts, which have analyzed nearly indistinguishable fact patterns, but have produced opposite conclusions of law based on the application of disparate standards. The California Supreme Court has not yet reconciled these inconsistencies, which have been developing in the appellate courts since 1988. Some scholars think this issue is now “ripe for resolution.”⁵

California’s privilege is codified in Evidence Code section 1040, which prohibits disclosure of a surveillance site if such disclosure is against the public interest.⁶ The language of this section leaves the courts much discretion in determining whether to compel discovery of the secret surveillance post. The presiding judge must balance the public interest in maintaining secrecy against a defendant’s need for disclosure in an *in camera* hearing,⁷ without the presence of defense counsel. Even if the judge finds the privilege applicable, California’s Evidence Code section 1042 requires the judge to rule against the prosecution if the surveillance location is material to the defendant’s guilt or innocence.⁸ A finding against the government, pursuant to section 1042, would result in disclosure of the location or dismissal of the charges.

The focus of this Comment is whether the California official information privilege, as it relates to drug prosecutions, impedes the search for truth to the detriment of a defendant’s constitutional

5. L. DOUGLAS PIPES & WILLIAM E. GAGEN, JR., CALIFORNIA CRIMINAL DISCOVERY § 8:11 (2d ed. 1999).

6. This section provides:

Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

CAL. EVID. CODE § 1040(b)(2) (Deering 1986).

7. See CAL. EVID. CODE § 915 (Deering Supp. 2002).

8. See CAL. EVID. CODE § 1042(a) (Deering 1986) (“[I]f a claim of privilege . . . is sustained in a criminal proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material.”).

rights. This Comment considers four aspects of the official information privilege as it relates to covert surveillance locations in drug prosecutions. Part I discusses the problems emanating from the nondisclosure of the surveillance location. Part II presents a brief history of the privilege, an overview of the significant California cases, and a comparison of the closely analogous issue of the confidential informant privilege. Part III depicts in detail how the surveillance privilege unfolds in a pre-trial court proceeding. Part IV presents practical suggestions for defense counsel in dealing with the surveillance privilege. Finally, Part IV also proposes a solution for the future of the surveillance privilege that introduces additional procedural safeguards.

I. The Problem

The two major problems with nondisclosure of a surveillance location are the denial of a defendant's right to cross-examination and confrontation and the potential denial of the right to due process. These problems are best illustrated through an example of a typical surveillance case. *People v. Alfaro*⁹ is a quintessential example of an "empty bust"¹⁰ in which the defendant was held to answer to a charge of selling narcotics based on the testimony of the observing officer without the ability to cross-examine as to the precise surveillance location.¹¹

On November 3, 2000, Sergeant Yee of the San Francisco Police Department conducted a surveillance operation from a covert location in San Francisco.¹² The surveillance took place at 1:04 p.m., at which time there may have been precipitation or fog in the area.¹³ Sergeant Yee was eighty to ninety feet from Alfaro, using binoculars, and there were many people in the area at the time.¹⁴ There was also a bus stop, a sign, stairs, trees, and many buildings in the area that could have obstructed the officer's view.¹⁵ Alfaro was observed spitting some-

9. No. 180975 (Cal. Super. Ct. Dec. 8, 2000), *appeal denied sub nom.* Alfaro v. Superior Court, No. A094599 (Cal. Ct. App. Mar. 22, 2001) (denying writ of prohibition for failure to provide a record sufficient to enable informed appellate review).

10. *See* Rep. Tr. at 8:11-15 (Dec. 15, 2000). An empty bust is a narcotics sales arrest where no drugs are recovered from the defendant.

11. *See id.* at 13:1-11 (Dec. 15, 2000).

12. *See* Rep. Tr. 3:28, 4:1-8 (Dec. 8, 2000).

13. *See id.* at 3:28, 17:3-14.

14. *See* Rep. Tr. at 10:8-12, 35:3-28 (Dec. 8, 2000); 7:11-15 (Dec. 15, 2000).

15. *See* Rep. Tr. at 3:10-14, 4:22-25 (Dec. 15, 2000); 36:12-15, 40:13-27, 40:28, 41:1-5, 41:13-20 (Dec. 8, 2000).

thing from his mouth and handing the object to a woman.¹⁶ Sergeant Yee saw the woman take the object and give alleged paper currency to Alfaro in return.¹⁷ The incident lasted only twenty seconds from the time the woman approached Alfaro until they both walked away.¹⁸ One rock of suspected crack cocaine was recovered from the woman and Alfaro was arrested for the sale of narcotics.¹⁹ No indicia of sales, such as narcotics, a pager, or a cell phone, were found on Alfaro and the only money recovered was inaccessible as it was in his tennis shoe—between his foot and the bottom of his shoe.²⁰ At the preliminary hearing, the public defender was eventually allowed to question Sergeant Yee regarding the height and distance from the alleged transaction, but was denied the ability to establish whether any obstacles existed.²¹ Defense counsel also suggested alternatives to disclosure but was denied those as well.²² The judge sustained the surveillance privilege after an *in camera* hearing and found that non-disclosure did not deprive Alfaro of his constitutional rights to cross-examination and due process.²³ The ruling was appealed via a writ of prohibition, but it was denied because the record was insufficient to enable informed appellate review.²⁴

The court's denial of Alfaro's right to cross-examination forestalled his ability to establish the materiality of the surveillance location. Alfaro was able to determine that it was not a sunny day, that Sergeant Yee was eighty to ninety feet from the alleged transaction in an elevated position using binoculars, and that the transaction lasted twenty seconds.²⁵ However, there *may* have been fog or precipitation.²⁶ Furthermore, although Sergeant Yee was eighty to ninety feet away and in an elevated position, the defense was not allowed to estab-

16. *See id.* at 5:1–6, 20:3–22, 23:21–23.

17. *See id.* at 5:12–14, 28:6–13. It was contested whether the paper was currency.

18. *See id.* at 15:13–16.

19. *See id.* at 6:5–12, 31:12–14. Alfaro was charged by information with violating CAL. HEALTH & SAFETY CODE § 11352 with a CAL. PENAL CODE § 12022.1 allegation, which is a penalty enhancement for a felony committed while released from custody before final judgment on a prior felony.

20. *See Rep. Tr.* at 5:26–28, 6:1, 31:22–24, 32:12–21 (Dec. 8, 2000).

21. *See Rep. Tr.* at 9:17–27, 10:16–19, 11:2–6 (Dec. 15, 2000).

22. *See id.* at 9:5–9. Alternatives included using photographs, videotape or disclosing the location to a public defender investigator. *Rep. Tr.* at 38:17–23 (Dec. 8, 2000).

23. *See Rep. Tr.* at 37:25–28 (Dec. 8, 2000).

24. *See Alfaro v. Superior Court*, No. A094599 (Cal. Ct. App. Mar. 22, 2001).

25. *See Rep. Tr.* at 17:3–14, 10:8–12, 15:13–16 (Dec. 8, 2000); 7:14–17, 9:17–19 (Dec. 15, 2000).

26. *See Rep. Tr.* at 17:3–14 (Dec. 8, 2000).

lish how the officer calculated the distance nor how high he was.²⁷ The defense was also not allowed to inquire whether the officer was using a radio, a fact which has been relevant in other California cases.²⁸

As Alfaro's defense was a complete denial of the charges, the fact that there were no indicia of sales recovered is relevant.²⁹ In addition, Sergeant Yee neither actually saw Alfaro spit a rock into his hand, nor whether he actually handed it to the woman.³⁰ The rock recovered from the woman was the size of a Tic-Tac, which would be hard to see from any distance.³¹ Sergeant Yee did not see where the money came from, nor could he be certain that it was, in fact, money.³² While these factors are not conclusive proof that the officer did not adequately observe the transaction, they do suggest that his observation was not as reliable as he professed it to be. Given the number of possible obstructions in the area, the lack of direct evidence, and the defendant's complete denial of the charges, there was no way to test the officer's veracity absent disclosure of the location. The court's denial of Alfaro's right to cross-examination precluded him from testing the only direct evidence against him.

It has been argued that the inability to cross-examine a material witness is itself a violation of due process.³³ However, Alfaro's right to due process was also violated by the lack of sufficient procedures to ensure the adequate protection of his constitutional rights. The *in camera* hearing was recorded for the sole purpose of enabling informed appellate review, yet when the appellate court reviewed the record, the hearing was found to be insufficient.³⁴ Because the *in camera* hearing was an *ex parte* proceeding, defense counsel could not participate. As an alternative to disclosure, defense counsel suggested that the location be revealed to her investigator, without disclosing it to the defendant, in order to test the officer's veracity.³⁵ Even though

27. See Rep. Tr. at 9:20–28, 10:1–6 (Dec. 15, 2000).

28. See Rep. Tr. at 10:13–16 (Dec. 8, 2000); *People v. Garza*, 38 Cal. Rptr. 2d 11, 14 (Ct. App. 1995).

29. See Rep. Tr. at 8:25–28 (Dec. 15, 2000).

30. See Rep. Tr. at 20:10–22, 23:21–23 (Dec. 8, 2000).

31. See *id.* at 24:3. Due to the size of the rock, if Alfaro had another rock it easily could have been disposed of without observation.

32. See *id.* at 27:12–28, 28:1–13.

33. See Rosenn, *supra* note 1, at 545.

34. See *Alfaro v. Superior Court*, No. A094599 (Cal. Ct. App. Mar. 22, 2001). Although the record of the *in camera* hearing accompanied the writ, it was not provided under seal to the judge who ruled on the § 995 motion.

35. See Rep. Tr. 9:5–9 (Dec. 15, 2000).

some courts allow the use of such alternatives, the *Alfaro* court denied all of the suggested alternatives to disclosure.³⁶ Ultimately, due to the lack of consistent procedures or standards, the denial of alternatives, and the inability to cross-examine a material witness, Alfaro's due process rights were violated when the court sustained the surveillance post privilege.

II. Background

"Almost all the rules of evidence other than rules of privilege are designed to enhance the accuracy and efficiency of the factfinding process. Privileges have a different purpose. . . . Their effect in any given trial may be to impede the search for truth."³⁷ The surveillance post privilege is derived from both statutory and case law. This section addresses the history of the privilege and how it was initially applied to drug prosecutions. This section also examines all California cases which have since applied the privilege in similar situations. Many procedures and justifications for the surveillance post privilege were adopted from the analogous privilege for confidential informants, so a brief comparison of the privileges is also provided as background information.

A. History of the Official Information Privilege

The official information privilege embodies two separate discovery privileges: an absolute privilege and a conditional, or qualified, privilege.³⁸ The absolute privilege is applied if disclosure is specifically forbidden by a federal or state statute.³⁹ In all other instances where governmental agencies refuse to disclose confidentially acquired information, the conditional privilege is invoked, requiring the court to determine whether disclosure is against the public interest.⁴⁰ Based on the conditional privilege of section 1040, the court does not have to require the prosecution to divulge a surveillance site if

36. *See id.* at 38:23 (Dec. 8, 2000).

37. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT CASES, AND PROBLEMS 871 (4th ed. 2000).

38. *See* CAL. EVID. CODE § 1040 (Deering 1986).

39. State law governs privileges in these circumstances. Substituting a single privilege for thirteen previous rules, Federal Rule of Evidence 501 prescribes that in federal courts government privileges shall "be governed by the principles of the common law . . . in the light of reason and experience." FED. R. EVID. 501. Under this rule of evidence "federal courts retain their power to develop the common law privileges of witnesses . . . on a case-by-case basis." *United States v. Green*, 670 F.2d 1148, 1155 n.10 (D.C. Cir. 1981).

40. *See County of San Diego v. Superior Court*, 222 Cal. Rptr. 484 (Ct. App. 1986).

“[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.”⁴¹ However, if the court finds that a surveillance location is privileged, section 1042 requires the court to nonetheless make a finding adverse to the prosecution if the location is material to the defense.⁴² Sections 1040 and 1042 were enacted in 1965 to replace California Civil Procedure Code section 1881, which had been in effect since 1872.⁴³

While the surveillance post privilege has roots dating back to 1872, it has been applied to drug prosecutions only since 1988. In 1988, courts broadened the privilege to allow a surveillance site to qualify as “information acquired in confidence.”⁴⁴

Historically, the official information privilege arose in cases involving state secrets or government documents,⁴⁵ but in 1988 the court in *Hines v. Superior Court*⁴⁶ held that section 1040 establishes a “surveillance location privilege.”⁴⁷ Official information is defined as “information acquired in confidence by a public employee in the course of his or her duty.”⁴⁸ In *Hines*, the defense argued that the investigating officer “did not ‘acquire’ knowledge of the location from which he was operating; he simply selected it, and chose to keep it secret.”⁴⁹ The defense argued that the effect of the nondisclosure ruling elevates *any* information that an officer obtains during an investigation to official information.⁵⁰ The court rejected this argument as too restrictive an interpretation of the statutory word “acquire.”⁵¹ Instead, the court relied on the Webster’s dictionary definition of “acquire”: “to come into possession of . . . often by some uncertain or

41. CAL. EVID. CODE § 1040(b)(2) (Deering 1986).

42. See CAL. EVID. CODE § 1042 (Deering 1986); *People v. Haider*, 40 Cal. Rptr. 2d 369, 374 (Ct. App. 1995). See also *Hines v. Superior Court*, 251 Cal. Rptr. 28, 30 (Ct. App. 1988) (“[T]he adverse finding is only required if the privileged information is *material*”).

43. See CAL. CIV. PROC. CODE § 1881 (Deering Supp. 2002).

44. CAL. EVID. CODE § 1040(a) (Deering 1986).

45. See *Samish v. Superior Court*, 83 P.2d 305 (Cal. Ct. App. 1938) (stating that the privilege protects public interests which may be injured by producing documents or revealing facts in the government’s possession).

46. 251 Cal. Rptr. 28, 30 (Ct. App. 1988). See also *People v. Montgomery*, 252 Cal. Rptr. 779, 783 (Ct. App. 1988) (citing *Commonwealth v. Lugo*, 503 N.E.2d 974, 976 (Mass. Ct. App. 1987)).

47. *Montgomery*, 252 Cal. Rptr. at 783.

48. CAL. EVID. CODE § 1040(a) (Deering 1986).

49. See *Hines*, 251 Cal. Rptr. at 30.

50. See *id.*

51. See *id.*

unspecified means.”⁵² The *Hines* court held that the official information privilege applied to surveillance locations by reason of the purpose and plain meaning of the statutory text.⁵³

Because application of the privilege to drug prosecutions is relatively new in California jurisprudence, understanding the few cases that have been reviewed on appeal is essential to understanding the privilege.

B. Significant Surveillance Post Cases

In California, there are six published cases which have applied the official information privilege to drug surveillances:⁵⁴ *People v. Haider*,⁵⁵ *People v. Garza*,⁵⁶ *In re Sergio M.*,⁵⁷ *People v. Walker*,⁵⁸ *Hines v. Superior Court*,⁵⁹ and *People v. Montgomery*.⁶⁰ In each of these cases the privilege was invoked, the surveillance location was not disclosed, and the defendant was convicted of selling narcotics.⁶¹ In only two cases, *Hines* and *Montgomery*, did an appellate court reverse the conviction based on nondisclosure of the surveillance site.⁶² *Montgomery* was reversed because of procedural insufficiencies with the *in camera* hear-

52. *Id.* (quoting Webster's Third New International Dictionary).

53. *See id.*

54. All recent cases involving the official information privilege as it is applied to covert surveillance locations have been depublished or unpublished. *See* *People v. Lockett*, No. C036813, 2002 WL 185948 (Cal. Ct. App. Feb. 5, 2002); *People v. Landa*, 69 Cal. Rptr. 2d 836 (Ct. App. Dec. 11, 1997); *In re Arthur H.*, 2002 Cal. App. LEXIS 3131 (Ct. App. Mar. 19, 2002); *People v. Yepez*, No. A093459, 2002 WL 236982 (Cal. Ct. App. Feb. 19, 2002); *People v. Birkley*, Nos. A089217 and A086947, 2001 WL 1663228 (Cal. Ct. App. Dec. 28, 2001); *People v. Medina*, No. A093212, 2002 WL 313200 (Cal. Ct. App. Feb. 28, 2002); *People v. Jackson*, No. F037364, 2002 WL 187389 (Cal. Ct. App. Feb. 6, 2002); *People v. Neves*, Nos. H020613 and H023188, 2002 WL 66155 (Cal. Ct. App. Jan. 17, 2002) (relying on surveillance cases to support disclosure of confidential informant); *In re Harrell*, Nos. D021040 and D021315, 1995 WL 748083 (Cal. Ct. App. Oct. 24, 1995) (relying on surveillance cases to support disclosure of confidential informant). In contrast, other cases applying the official information privilege to issues other than surveillance sites or confidential informants have not been depublished or unpublished. *See* *Michael P. v. Superior Court*, 113 Cal. Rptr. 2d 11 (Ct. App. 2001); *Marylender v. Superior Court*, 97 Cal. Rptr. 2d 439 (Ct. App. 2000).

55. 40 Cal. Rptr. 2d 369 (Ct. App. 1995), *habeas corpus denied sub nom.* *Haider v. Director of Corrections*, 992 F. Supp. 1192 (C.D. Cal. 1997).

56. 38 Cal. Rptr. 2d 11 (Ct. App. 1995).

57. 16 Cal. Rptr. 2d 701 (Ct. App. 1993), *review denied*, 1993 Cal. LEXIS 2245 (1995).

58. 282 Cal. Rptr. 12 (Ct. App. 1991).

59. 251 Cal. Rptr. 28 (Ct. App. 1988).

60. 252 Cal. Rptr. 779 (Ct. App. 1988).

61. *See* *People v. Haider*, 40 Cal. Rptr. 2d 369 (Ct. App. 1995); *Garza*, 38 Cal. Rptr. 2d 11; *In re Sergio M.*, 16 Cal. Rptr. 2d at 702; *Walker*, 282 Cal. Rptr. at 12; *Hines*, 251 Cal. Rptr. at 29; *Montgomery*, 252 Cal. Rptr. at 780.

62. *See Hines*, 251 Cal. Rptr. 31; *Montgomery*, 252 Cal. Rptr. at 780.

ing.⁶³ Therefore, not since 1988, when *Hines* was decided, has an appellate court reversed a drug sales conviction based exclusively on nondisclosure of the surveillance site.⁶⁴ A brief summary of each case is provided in this section to furnish distinguishing characteristics. The facts of each case are similar in that an officer was in a covert location when she observed the alleged drug transaction. Factual differences, such as distance and possible obstructions, are summarized in Table 1.

Hines v. Superior Court was the first, and remains the only, published California appellate case to reverse a conviction based on failure to disclose the surveillance location.⁶⁵ In *Hines*, the defendant was observed dealing drugs to passing motorists with the aid of a juvenile who guarded the stash.⁶⁶ The surveillance privilege was invoked at the preliminary hearing and the defendant moved to set aside the information pursuant to section 995 of the Penal Code.⁶⁷ A hypodermic needle was found on the defendant, but no drugs.⁶⁸ As there were no drugs or other indicia of sales found on the defendant, the court held the surveillance site was material to the defense and ordered the information to be set aside.⁶⁹

In *People v. Montgomery* the defendant repeatedly went into an intersection to flag down cars, barking, “‘Thai, I got Thai,’ and forming the letter ‘T’ with his hands.”⁷⁰ When officers attempted to arrest Montgomery after observing a sale, he fled into a building where officers heard him flushing a toilet.⁷¹ While nothing was observed swirling in the toilet bowl, a bag containing a small amount of marijuana was recovered from within the tank.⁷² The court found no violation of the defendant’s due process or confrontation rights.⁷³ As this was one of the first surveillance cases to invoke section 1040, the court responded by analogizing it to the confidential informant privilege.⁷⁴

63. See *Montgomery*, 252 Cal. Rptr. at 782.

64. See *Hines*, 251 Cal. Rptr. at 31.

65. See *id.*

66. See *id.* at 29.

67. See *id.* Penal Code section 995 allows the information to be set aside after a defendant has been arraigned if the defendant was committed without reasonable or probable cause. See CAL. PENAL CODE § 995 (Deering 2001).

68. See *Hines*, 251 Cal. Rptr. at 29.

69. See *id.* at 31.

70. *People v. Montgomery*, 252 Cal. Rptr. 779, 780 (Ct. App. 1988).

71. See *id.* at 781.

72. See *id.*

73. See *id.* at 783.

74. See *id.* at 783–87.

The *Montgomery* appellate court concluded that due to the distance of twenty-five to thirty-five yards, the officer may have “been unable to distinguish defendant’s activities from the other suspects’ activities.”⁷⁵ Due to the small amount of marijuana recovered and because the only direct evidence was the testimony of the officer, the court refused to sustain the conviction.⁷⁶ The surveillance privilege was not challenged until mid-trial, so the appellate court reversed the conviction due to procedural insufficiencies without the resolution of the surveillance privilege.⁷⁷

In *People v. Walker*, a buyer drove up to a courtyard, exited his car, and conversed with the defendant.⁷⁸ The defendant then went inside a building and returned with a small object, which the buyer put in his shirt pocket.⁷⁹ The privilege was challenged at trial and there was detailed testimony from the officer that was corroborated in almost every respect.⁸⁰ Walker admitted at trial that he had a conversation with the “buyer” regarding purchasing drugs, but alleged that he referred the buyer to someone else.⁸¹ Although the defendant denied making a sale and disputed the officer’s testimony regarding the officer’s distance from the defendant, the court concluded the location was not material because the officer had an unobstructed view from only fifteen feet away, under good lighting conditions.⁸²

In *In re Sergio M.*, a juvenile defendant approached a car, spoke to a passenger, and then retrieved a paper bag from behind a fence.⁸³ He then removed a small plastic baggie from the paper bag and returned the paper bag to its hiding place before appearing to sell the baggie to the passenger.⁸⁴ Nearly every aspect of the officer’s highly detailed testimony was corroborated—a small baggie of marijuana was found on the passenger and the marijuana stashed behind the fence was found exactly where the officer claimed it was.⁸⁵ The surveillance privilege was challenged at a pre-trial, jurisdictional hearing.⁸⁶ The

75. *People v. Walker*, 282 Cal. Rptr. 12, 18 (Ct. App. 1991) (citing *People v. Montgomery*, 252 Cal. Rptr. 779, 784–86 (Ct. App. 1991)).

76. *See Montgomery*, 252 Cal. Rptr. at 786.

77. *See id.*

78. *See Walker*, 282 Cal. Rptr. at 14.

79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.* at 17.

83. *See In re Sergio M.*, 16 Cal. Rptr. 2d 701, 702 (Ct. App. 1993).

84. *See id.* at 702–03.

85. *See id.*

86. *See id.* at 702.

magistrate allowed the defense to pose questions for the *in camera* hearing and accepted testimony from a defense investigator, which allowed the magistrate to make an independent determination as to whether the surveillance was obstructed.⁸⁷ *Sergio* is almost identical to *Hines*, yet the court did not require disclosure. This illustrates the disparities between the courts of appeal. The magistrate concluded that disclosure of the location was "absolutely essential," yet found the public interest in protecting the location outweighed the defendant's interests.⁸⁸

In *People v. Garza*, the defendant stood on a street corner attempting to flag down cars by yelling the word "coke."⁸⁹ The officer did not observe an actual drug sale, but four bindles of cocaine were found on the defendant.⁹⁰ The court found it significant that the officer broadcast detailed descriptions of the defendant over a two-way radio while observing him.⁹¹ It concluded that this would have been impossible if the officer's view was obstructed in any meaningful way.⁹² As in *Walker*, the privilege was challenged at trial and there was detailed testimony from the officer that was corroborated in almost every respect.⁹³ The surveillance privilege challenge did not arise until the appeal, during which the defendant claimed ineffectiveness of counsel.⁹⁴ The court found there was no prejudice because the remaining evidence was sufficient to sustain the conviction.⁹⁵

The most recent surveillance case to be published in California, *People v. Haider*,⁹⁶ is significant because it is the only California case heard on habeas corpus appeal to a federal court.⁹⁷ The federal district court held that there was no constitutional violation of the defendant's Sixth Amendment confrontation right because the defense did not demonstrate how disclosure might result in the defendant's exoneration.⁹⁸ The defense was unable to show that there was any area of the roof from which the view was obstructed.⁹⁹ *Haider* is similar to

87. *See id.* at 702-03.

88. *Id.*

89. *People v. Garza*, 38 Cal. Rptr. 2d 11, 12 (Ct. App. 1995).

90. *See id.*

91. *See id.* at 14.

92. *See id.*

93. *See id.*

94. *See id.* at 14-15.

95. *See id.*

96. 40 Cal. Rptr. 2d 369 (Ct. App. 1995).

97. *See Haider v. Dir. of Corr.*, 992 F. Supp. 1192 (C.D. Cal. 1998).

98. *See id.* at 1193.

99. *See id.* at 1198.

Montgomery in that the defense did not challenge the surveillance privilege until trial.¹⁰⁰ Whereas *Montgomery* was reversed for procedural inadequacies at the *in camera* hearing, the *Haider* conviction was upheld on appeal.¹⁰¹ The surveillance operation facts in *Haider* and *Hines* are almost identical—the distance was comparable, binoculars were used, and money was found on a co-defendant.¹⁰² The only apparent distinction between *Haider* and *Hines* is a sunny day.¹⁰³

Haider can be distinguished from most other surveillance cases in that the court had the benefit of the defendant's testimony at trial, where he admitted to being in the observed location, conducting a drug transaction.¹⁰⁴ There was no factual dispute regarding obstructions—the only disagreement was over who made the sale.¹⁰⁵

C. The Confidential Informant Privilege

California and federal courts alike have compared the policy justifications for the surveillance privilege to those used for upholding the confidential informant privilege and have found them to be analogous.¹⁰⁶ Although these privileges share similar statutory language and purportedly share the same test for materiality, there are notable distinctions, such as the various ways in which material witness testimony is used in relation to both privileges. Furthermore, while the disclosure of covert surveillance posts and the disclosure of confidential informants share many of the same policy considerations, such as the interest in individual safety and the interest in preserving the future utility of an informant or surveillance site, these policy considerations do not apply equally to both privileges.

Before discussing the distinctions between the two privileges it is important to examine their similarities. Analogizing the confidential informant privilege to the surveillance post privilege is appropriate in part because sections 1040 through 1042 of the Evidence Code apply to both issues. Similar to section 1040 in surveillance cases, California

100. See *id.* at 1194–95; *People v. Montgomery*, 252 Cal. Rptr. at 781–82 (Ct. App. 1988).

101. See *Haider* at 1194–95.

102. See *infra* Table 1, p. 1079.

103. See *id.*

104. See 992 F. Supp. at 1197–98.

105. See *id.* at 1198.

106. See *People v. Walker*, 282 Cal. Rptr. 17 (Ct. App. 1991); 16 Cal. Rptr. 2d 701 (Ct. App. 1993); *People v. Montgomery*, 252 Cal. Rptr. 783–85 (Ct. App. 1988); *People v. Garza*, 38 Cal. Rptr. 2d 14 (Ct. App. 1995); *Haider v. Dir. of Corr.*, 992 F. Supp. 1192, 1196 (C.D. Cal. 1997); PIPES & GAGEN, JR., *supra* note 5, § 8:3. See generally Zana E. Holley, Annotation, *Police Surveillance Privilege*, 67 A.L.R. 5TH 149 (2001).

Table 1

Material Factors	<i>People v. Haider</i>	<i>People v. Garza</i>	<i>In re Sergio M.</i>	<i>People v. Walker</i>	<i>People v. Montgomery</i>	<i>Hines v. Superior Court</i>
District/Year	2d District, Division 2 1995	6th District 1995	6th District 1993	2d District, Division 5 1991	1st District, Division 3 1998	1st District, Division 4 1988
Charge	Cal. Health & Safety § 11352	Cal. Health & Safety § 11351	Cal. Health & Safety §§ 11359, 11360(a)	Cal. Health & Safety § 11352	Cal. Health & Safety §§ 11359, 11360	Cal. Health & Safety §§ 11351, 11351.5
Distance	100-120 feet	40-50 feet	<100 yards	15 feet	25-35 yards	50 yards
Height	2 stories up	Ground level, on foot	Unknown	Ground level	Ground level to higher	Unknown
Binoculars	Yes: 10X	No	Yes: 35X	No	Yes	Yes
Radio	No	Yes	Yes	Yes	Unknown	Yes
Time	Day	9:20 p.m. Feb.	Day	5:45 p.m. Oct.	Unknown	Day
Weather/Lighting	Sunny	Amber street lights	Sunny	"Good" lighting	Unknown	Overcast
Possible Obstructions	Fence	Unexplored	Fence, shrubs, trees, buildings	Unexplored	Unobstructed per officer's testimony	Unobstructed per officer's testimony
Buyer Stopped	Yes	No, sale not observed	Yes, drugs found	Yes, partial rock found	No	No
Others Similarly Dressed	No	Unexplored	Yes (disputed)	Unexplored	Unexplored	Unexplored
Other Evidence	\$2 found on defendant, buyer dropped rock and pipe on ground	\$20 found on co-defendant, 4 bindles of cocaine found on defendant, 12 bindles discarded	Recovered money consistent with amount sold	Gang area, defendant arrested 6 days after buyer	Drug area, <1 ounce marijuana recovered, \$35, toilet flushed before detained	Co-dealer juvenile stopped with drugs
Outcome	Disclosure not material, conviction upheld	Disclosure not material as remaining evidence was sufficient to sustain conviction	Disclosure not material, conviction upheld	Disclosure not material, conviction upheld	Conviction reversed, procedurally insufficient as privilege was not challenged until trial	Disclosure was material
In Camera Hearing Held	Yes, mid-trial	No, privilege not challenged	Yes, defense allowed questions	Unknown	Yes, mid-trial	No

Evidence Code section 1041 allows for nondisclosure of an informant if the public interest in preserving confidentiality outweighs the interest in justice.¹⁰⁷ As with surveillance cases, pursuant to Evidence Code section 1042, the court must make a finding adverse to the prosecution if disclosure of the confidential witness' identity is material to the

107. See CAL. EVID. CODE § 1041 (Deering 1986).

defense.¹⁰⁸ Consonant with the surveillance post privilege, the judge determines the materiality of the informant's identity in an *in camera* hearing.¹⁰⁹ However, section 1042 establishes two exceptions to the general rule that the court must make an adverse finding against the prosecution if the information is material: 1) disclosure is not necessary to prove the legality of a search made pursuant to a warrant *and* 2) identity is not necessary to establish probable cause to make an arrest or search.¹¹⁰ This divergent language for the confidential informant privilege does not apply to the surveillance post privilege and instead stems from the nature of the use of informants. A tip from an informant may lead to a search warrant or an arrest without a warrant, but if there is other direct evidence to support the search warrant or probable cause for an arrest, disclosure of a confidential informant is not always necessary. In surveillance cases, a search warrant is not involved and sometimes the only direct evidence is the police officer's testimony.

Along with sections 1041 and 1042, courts use the balancing test articulated in *Roviaro v. United States*¹¹¹ when considering the materiality of an informant's identity. In *Roviaro*, the United States Supreme Court recognized a trade-off between encouraging free flow of information to law enforcement officials and the right of the defendant to make a full and fair defense.¹¹² The Court concluded that where disclosure "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."¹¹³ The Court declined to articulate a bright line rule and instead balanced the defendant's right to prepare a defense against the public interest.¹¹⁴ "[W]hether 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."¹¹⁵ While courts consistently import policy considerations

108. *See id.*

109. *See id.* § 1042(d). The *in camera* hearing was added to the Evidence Code in 1969. Prior to 1969 materiality was determined in an open hearing and the prosecutor was required to "disclose or dismiss" if the informant's identity was material. *See* Anita Susan Brenner, *In Camera Hearings on Informant Disclosure: A Criticism*, 15 SANTA CLARA L. REV. 326, 333-34 (1975).

110. *See* § 1042(b)-(c).

111. 353 U.S. 53 (1957).

112. *See id.* at 62.

113. *Id.* at 60-61.

114. *See id.* at 62.

115. *Id.*

from the confidential informant privilege to the surveillance post privilege, they have not relied as heavily on the *Roviaro* test.¹¹⁶

The confidential informant privilege and the surveillance post privilege also deviate in the use of witness testimony. An investigating officer who is testifying in a proceeding where the surveillance post privilege has been sustained can maintain secrecy of the surveillance post but still be questioned on other factors, such as distance, obstacles, and weather.¹¹⁷ If the identify of an informant is withheld, however, the accused cannot cross-examine the witness at all. Disclosure of an informant's name, by itself, may not be sufficient to test the reliability of the informant without the production of the witness.¹¹⁸ However, disclosure of a covert location provides everything necessary to test the reliability of an officer. Due to the nondisclosure of the identity of an informant, the defendant is in danger of losing either a witness who might testify to an entrapment defense or potential testimony that might impeach the officer's statement or both.¹¹⁹ Similarly, nondisclosure in a surveillance case also precludes the possibility of witness impeachment or the use of mistaken identity as a defense.

The interest in preserving the future utility of a building has been recognized as similar to the interest in ensuring the continued viability of a confidential informant. In *United States v. Green*,¹²⁰ the court stated that, just as disclosure of a confidential informer's identity destroys the informer's future use, so does the disclosure of a surveillance location destroy the future use of the site.¹²¹ However, it can be argued that in a high narcotics area, there may be multiple vantage points from which drug deals could be viewed. It does not necessarily follow that this proposition holds true for informants. The future value of an informant should not be weighted the same as the future

116. See discussion *infra* Part III.E. In California, only the *Walker* court has referred to the *Roviaro* test. See *People v. Walker*, 282 Cal. Rptr. 12, 16 (Ct. App. 1991). Similar to California's restrained use of *Roviaro*, federal courts have cited *Roviaro* in only two surveillance cases. See *United States v. Harley*, 682 F.2d 1018, 1020 (D.C. Cir. 1982); *United States v. Green*, 670 F.2d 1148, 1154 (D.C. Cir. 1981).

117. See *Anderson v. United States*, 607 A.2d 490, 495 n.4 (D.C. Cir. 1992) (affirming the trial court decision but criticizing a ruling requiring the defendant to show that there was no building from which the officer could have observed the transactions, in order to make a preliminary showing of need).

118. See Carol S. Johnson, *Limitations on the Use of Informers—Are the California Safeguards Adequate?*, 3 U.S.F. L. Rev. 187, 199 (1968).

119. See *id.* at 188.

120. 670 F.2d 1148 (D.C. Cir. 1981).

121. See *id.* at 1155.

value of a surveillance post. However, most California courts do not agree.

Along with the future utility of an informant or surveillance post, California courts have recognized the safety of informants and building owners as a sufficient public policy justification to warrant nondisclosure. The societal interest in preserving the flow of information to law enforcement necessitates ensuring the safety of individuals who facilitate that flow. Remarkably, the *Haider* court found an even greater reason to protect a surveillance site than a confidential informer because "an informer may be able to hide."¹²² The *Haider* court mirrored sentiments expressed in the earlier *Montgomery* opinion that "[a]n informer . . . probably has a fairly good chance of hiding because of the anonymity of our predominantly urban environment. But a person whose address is revealed has no place to hide."¹²³ Notwithstanding the ability to conceal the exact address while revealing it to the defense counsel, is it reasonable to expect an informer to move about, on the run, for an indefinite period? An informer has allegedly witnessed illegal activity and snitched on an accused, while building owners are one step removed from law enforcement activity. Unlike informants, building owners are only tangentially associated with the surveillance activity and are not witnesses against the accused. The protection afforded to buildings vis-à-vis informants is disproportional to the associated risk and potential ill-will directed toward a building owner.

In spite of this, procedures in applying the surveillance privilege and the confidential informant privilege have been almost identical, as evidenced by courts' reliance on confidential informant analogies. While both privileges share similar policy concerns, the significant distinctions addressed in this section compel adoption of separate procedural considerations.

III. Procedural Application of the Privilege

The official information privilege is triggered by a defendant's request for discovery of the surveillance post. The court then begins a burden-shifting process in which the prosecution must invoke the privilege.¹²⁴ If the privilege is sustained, the burden then shifts to the defense to demonstrate that the surveillance post is material to the

122. *People v. Haider*, 40 Cal. Rptr. 2d 369, 371 (Ct. App. 1995).

123. *People v. Montgomery*, 252 Cal. Rptr. 779, 784 (Ct. App. 1988).

124. Other state and federal courts do not assign burdens of proof, but instead look at the totality of the evidence. *See United States v. Foster*, 986 F.2d 541, 543-44 (D.C. Cir.

defendant's guilt or innocence.¹²⁵ The judge (or magistrate) performs a balancing test to determine if the need for disclosure is outweighed by the need to preserve the confidentiality of the location.¹²⁶ The judge will sustain the privilege if she determines that "the public interest in nondisclosure outweighs the interest of justice served by disclosure."¹²⁷ If the court requires knowledge of the exact address of the surveillance post in order to rule, the judge may require disclosure in an *ex parte in camera* hearing.¹²⁸ Even if the court finds that a privilege exists, Evidence Code section 1042 provides that "the court must nonetheless make a finding adverse to the prosecution if the location is *material* to the defense."¹²⁹ In addition to the *in camera* hearing, the court also conducts an adversary hearing at which all parties may present evidence on the issue of the claim of privilege.¹³⁰ To illustrate how the privilege works in the courtroom, excerpts of the preliminary hearing transcript from *People v. Alfaro*¹³¹ are presented in this section.

A. Invoking the Official Information Privilege

The official information privilege can be invoked in any evidentiary court proceeding when the defense specifically requests the testifying officer to reveal the location of the surveillance post.¹³² The privilege can be invoked or challenged at trial or at a variety of pre-trial proceedings such as a section 995 hearing to dismiss charges,¹³³ a preliminary hearing,¹³⁴ a jurisdictional hearing,¹³⁵ a suppression hear-

1993); *Hollins v. Commonwealth*, 450 S.E.2d 397, 399 (Va. Ct. App. 1994); *Commonwealth v. Lugo*, 548 N.E.2d 1263, 1267-68 (Mass. App. Ct. 1990).

125. See *Hines v. Superior Court*, 251 Cal. Rptr. 28, 30 (Ct. App. 1988); *People v. Montgomery*, 252 Cal. Rptr. 779, 784 (Ct. App. 1988).

126. See *id.*

127. 1 JEFFERSON'S CALIFORNIA EVIDENCE BENCHBOOK, CEB § 42.11 (3d ed. 2001).

128. See *id.* § 35.30.

129. *People v. Haider*, 40 Cal. Rptr. 2d 369, 371 (Ct. App. 1995) (emphasis added).

130. See *id.*

131. No. 180975 (Cal. Super. Ct. Dec. 8, 2000), *appeal denied sub nom.* *Alfaro v. Superior Court*, No. A094599 (Cal. Ct. App. Mar. 22, 2001) (denying writ of prohibition for failure to provide a record sufficient to enable informed appellate review).

132. See Interview with Rebecca Marcus, Deputy Public Defender, San Francisco Office of the Public Defender, in San Francisco, Cal. (Dec. 18, 2001).

133. See *Hines v. Superior Court*, 251 Cal. Rptr. 28, 29 (Ct. App. 1988). Penal Code section 995 allows an information to be set aside after a defendant has been arraigned if the defendant was committed without reasonable or probable cause. See CAL. PENAL CODE § 995 (Deering 2001).

134. See *Hines*, 251 Cal. Rptr. 28. See also *People v. Montgomery*, 252 Cal. Rptr. 779, 781 (1988).

135. See *In re Sergio M.*, 16 Cal. Rptr. 2d 701, 702 (Ct. App. 1993).

ing,¹³⁶ or an *in limine* motion.¹³⁷ To initiate a ruling against disclosure, the prosecution must explain why it cannot disclose the location or declare that an explanation would betray the privilege.¹³⁸ A bona fide justification for nondisclosure is not required as the government has the option to assert that disclosure would betray the privilege. During cross-examination of the testifying officer at the preliminary hearing in *Alfaro*, the invocation of the privilege occurred in the following manner:

Q: . . . where were you located at during your period of surveillance at 1:04 on this date?

MS. LOPEZ: Objection, Your Honor. It is privileged.

THE COURT: Are you claiming a privilege, sir?

THE WITNESS: Yes.

MS. MARCUS: At this time, Your Honor, I would like to say several things for the record. First of all, if the officer is invoking the privilege, first of all, obviously I would like an *in camera* hearing. I have a few questions. I would like an *in camera* hearing only to the issue of whether he can claim privilege. Once Your Honor makes that determination, I have several more questions as to the materiality of this location.¹³⁹

As illustrated by this exchange, the form of the request can be quite general. After the officer or district attorney invokes the privilege, the defense may demand an *in camera* hearing to determine if the privilege applies. If the defense does not request an *in camera* hearing, it may be waived, as the *in camera* provisions of Evidence Code section 915 are "permissive, not mandatory."¹⁴⁰ To be granted a hearing, the defense should also offer proof of the need for disclosure.

136. See *United States v. Green*, 670 F.2d 1148, 1150 (D.C. Cir. 1981); *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971); *Hicks v. United States*, 431 A.2d 18, 19 (D.C. 1981).

137. See *Montgomery*, 252 Cal. Rptr. at 781. An *in limine* motion may be a motion to suppress evidence, pursuant to Penal Code section 1538.5 which allows the suppression of evidence obtained as a result of an unreasonable and illegal warrantless search and/or seizure in violation of the defendant's rights under the Fourth Amendment of the United States Constitution. See CAL. PENAL CODE § 1538.5 (Deering 2001).

138. See *Anderson v. United States*, 607 A.2d 490, 496 (D.C. 1992). See also *Torres v. Superior Court*, 95 Cal. Rptr. 2d 686, 690 (Ct. App. 2000) (ruling against disclosure of a confidential informant requires the prosecution to show why the matter is privileged, or declare that the explanation would compromise the privilege).

139. Rep. Tr. at 37:9-20, *People v. Alfaro*, No. 18097S (Cal. Super. Ct. Dec. 8, 2000). The People were represented by Merri Lopez from the San Francisco District Attorney's Office and Alfaro was represented by Rebecca Marcus from the San Francisco Public Defender's Office. See *id.* at 1:1.

140. PIPES & GAGEN, JR., *supra* note 5, § 8:7.

B. Defendant's Initial Showing of Need

Before granting an *in camera* hearing, some courts may require the defendant to make a prima facie showing that the surveillance location is material to the defense.¹⁴¹ The *Montgomery* court referred to this pre-requisite, but did not identify the standard which should be applied.¹⁴² It relied on *People v. Ingram*¹⁴³ for the requirement of a prima facie showing of materiality.¹⁴⁴ *Ingram*, however, involved the disclosure of a confidential informant.¹⁴⁵ While the two privileges are similar, the *Ingram* court required the defense to show that the identity of the informant would be material at trial by demonstrating that there was a reasonable possibility that the informant could provide evidence that would exonerate the defendant.¹⁴⁶ It can be argued that a comparable test for the surveillance privilege would be to require the defense to show the possibility that an obstacle existed which could have obstructed the officer's view. However, there is no published opinion requiring such a test at this stage.

In reality, the initial showing of need may be less structured than the *Montgomery* test and may not occur precisely between the invocation of the privilege and the *in camera* hearing. In the *Alfaro* preliminary hearing, the defense demonstrated this requirement:

MS. MARCUS: Your Honor, at this time I am prepared to go through a litany of obstructions as to the officer's view, which I think is highly relevant as to surveillance cases.

THE COURT: Miss Marcus, unless you have an offer of proof as to something specific at that time and place, it is speculation.

MS. MARCUS: I respectfully disagree. I just would like my position clear for the record here. We have a surveillance case.¹⁴⁷

Once the defendant has made an initial showing of need, the judge or magistrate must balance the public interest in nondisclosure against the defendant's constitutional rights in determining whether to sustain the privilege.

141. See *Montgomery*, 252 Cal. Rptr. at 785. See also *Anderson v. United States*, 607 A.2d 490, 496 (D.C. 1992).

142. See *Montgomery*, 252 Cal. Rptr. at 785.

143. 151 Cal. Rptr. 239 (Ct. App. 1978).

144. See *Montgomery*, 252 Cal. Rptr. at 785.

145. See *Ingram*, 151 Cal. Rptr. at 240.

146. See *id.* at 245.

147. Rep. Tr. at 36:27-28, 37:1-7, *People v. Alfaro*, No. 180975 (Cal. Super. Ct. Dec. 8, 2000).

C. Balancing of Public Interests Against the Defendant's Rights

1. Public Interest Weighing Against Disclosure

A disquieting aspect of the public policy rationale asserted by the government is the utter absence of any particularized finding of need on the part of law enforcement. Although some judges, during an *in camera* hearing, require particularized reasons for sustaining the privilege,¹⁴⁸ the government is not required to specify to whom, by what means, or on what basis there is a credible threat to safety. The government merely asserts broad public policy concerns, citing prior cases that have relied on those justifications, and the burden shifts to the defense, who then must overcome an unrealistic burden of proof.

Despite the qualified right to confront and cross-examine witnesses, the court must weigh such countervailing concerns as: the safety of the arresting officers, the safety of property owners or managers who allow their premises to be used for surveillance, the likelihood that criminals would be able to avoid surveillance if the location were known, the potential for future surveillance activities being frustrated, and the possibility that the information would educate third parties as to how to conduct illegal surveillance.¹⁴⁹

Safety of police officers and building owners is a ubiquitous but established justification for the official information privilege. Courts often cite *Green*, *Hines*, *Sergio*, and *Montgomery* when identifying public interests. The often-quoted safety concern from *Green* is that "[t]he revelation of a surveillance location might also threaten the safety of police officers using the observation post, or lead to adversity for cooperative owners or occupants of the building."¹⁵⁰

Although possible, potential harm to individuals due to the disclosure of a property address is often speculative. In *In re. Darryl G.*,¹⁵¹ the testifying officer conceded that he was unaware of any previous retaliation in response to disclosure: "[T]he Captain testified that the precinct has lost surveillance posts in the past, sometimes by way of disclosure, and to his knowledge, there has never been any violent retaliation against police officers or civilians in the neighborhood where the post was located."¹⁵² Similarly, in *Montgomery* the investigat-

148. See Interview with Judge Wallace P. Douglass, San Francisco County Superior Court, Criminal Division, in San Francisco, Cal. (Mar. 22, 2002).

149. See Holley, *supra* note 106, § 2 at 156. (2001).

150. United States v. Green, 670 F.2d 1148, 1155 (D.C. Cir. 1981).

151. No. QDS:28700138 (N.Y. Fam. Ct. 1998), *aff'd*, 264 A.D.2d 690 (N.Y. App. Div. 1999).

152. *Id.*

ing officer “conceded that he knew of no instances where a surveillance location had been disclosed, and therefore he did not know [an] incident in which a person had been killed as a result.”¹⁵³ A potential reason for the absence of data on retaliation may be that the privilege is seldom overcome. Retaliation is only possible if the location is revealed—as the location is seldom disclosed, retaliation as a general justification becomes more speculative. Safety of police officers and private citizens is a legitimate concern but, in most cases, can be protected even if the covert surveillance location is disclosed. If defense counsel is admitted to the *in camera* hearing and required to maintain secrecy, access to the information would afford the defendant an opportunity to ascertain if any obstacles existed and whether the officer’s testimony is credible, without jeopardizing anyone’s safety.

If the surveillance site nevertheless became known, it is improbable that criminals, armed with such knowledge, could avoid surveillance on account of the disclosure. By virtue of public arrests in a particular area, criminals are already apprised of surveillance activities whether or not a specific site is identified. Moreover, when surveillance is performed in even moderately populated areas, there are often multiple sites which could be utilized.

Another accepted justification for nondisclosure is the endangerment of future police investigations. The *Hines* opinion is often cited for this proposition as it sustained the privilege because “the location was ‘currently used as an ongoing operation for investigations’ and thus ongoing investigations would be jeopardized by disclosure.”¹⁵⁴ *Sergio* echoed this sentiment when it determined that disclosure “would decrease the effectiveness of law enforcement in the future.”¹⁵⁵ The *Montgomery* court also acknowledged the aforementioned policy concerns such as the safety of police officers and building owners, as well as the future value of cooperative building owners that disclosure would “likely destroy the future value of that location for police surveillance.”¹⁵⁶ Prosecutors have agreed that “[w]ithout this privilege, a lot of investigations would have to be curtailed and prosecutions would have to be terminated.”¹⁵⁷ In an urban

153. *People v. Montgomery*, 252 Cal. Rptr. 779, 782 (Ct. App. 1988).

154. *Hines v. Superior Court*, 251 Cal. Rptr. 28, 29 (Ct. App. 1988).

155. *In re Sergio M.*, 16 Cal. Rptr. 2d 701, 703 (Ct. App. 1993) (quoting the minor defendant’s investigator).

156. *Montgomery*, 252 Cal. Rptr. at 783.

157. Richard Pliskin, *In Surveillance Cases, Location Is Everything*, N.J.L.J. (Jan. 25, 1993), at 3.

environment, where drug trafficking is a pervasive problem, there are often many buildings that police could utilize. Although it may take time to develop relationships with building owners, the inconvenience of moving a surveillance site to a new location should not warrant such an intrusion on a defendant's constitutional rights.

Although no California case has articulated this justification, the possibility that disclosing a surveillance post would educate third parties on how to conduct illegal surveillance is *de minimus*, if not altogether nonexistent. It is dubious whether drug dealers would desire knowledge regarding the mechanics of setting up a surveillance operation. Even if they did, however, knowledge of a surveillance location itself reveals no procedural or technical aspects of a police surveillance operation. At most, the location information could only hint at police strategy. However, even if the location were strategic, its discovery would not convey the overall plan or reasoning behind the site selection.

2. Defendant's Constitutional Right to Cross-Examination

There is no bright line rule granting a defendant the constitutional right to disclosure in all circumstances. "When confronted with an allegation that a criminal defendant has the right to disclosure of every informant in every case, the United States Supreme Court found no support for the position in the due process clause of the Fourteenth Amendment or in the Sixth Amendment right of confrontation."¹⁵⁸ Despite the constitutional floor of the Sixth Amendment, the trial court has broad discretion to control the scope of cross-examination.¹⁵⁹ "A basic function of cross-examination is to explore credibility."¹⁶⁰ In surveillance cases, however, credibility cannot always be explored without disclosure of the location. The officer's credibility is presumed up-front and the conclusion that the location is immaterial is bootstrapped by concluding that the view could not have been obstructed, otherwise the officer could not have observed what he said he saw.

When a defendant is unable to cross-examine a witness regarding certain aspects of the alleged crime, the question becomes whether a trial or pre-trial proceeding is inherently flawed and, therefore, unfair. Although the Sixth Amendment right to cross-examine and con-

158. *Montgomery*, 252 Cal. Rptr. at 783 (citing *McCray v. Illinois*, 386 U.S. 300, 312-13 (1967); *Cooper v. California*, 386 U.S. 58, 62 n.2 (1967)).

159. *See Hicks v. United States*, 431 A.2d 18, 21 (D.C. 1981).

160. *Id.*

front witnesses is not an absolute right,¹⁶¹ in the case of hand-to-hand narcotics transactions often the only evidence against a defendant is the officer's testimony. Because of this, the defendant is denied any opportunity to fully explore the only evidence inculcating him—the officer's credibility. Without disclosure of the surveillance location and in the absence of other inculpatory evidence such as large sums of money or drugs, the defendant's only available defense is a denial of the charges.¹⁶² If the defense counsel cannot question the arresting officer about possible obstacles and whether the officer actually saw what he said he saw, then the jury has no recourse but to weigh the officer's credibility against the defendant's. The nondisclosure of the surveillance site impedes the jury's ability to fairly assess the police officer's credibility.¹⁶³

While courts have been imprecise about the origin of a defendant's rights, it has been commonly accepted that there is a general right of cross-examination which applies in pre-trial proceedings and affects the substantial rights of the accused.¹⁶⁴ "Thus, whether [the courts] describe the right of cross-examination as deriving from the fundamental concepts embedded in the Due Process Clause or as implicit in the rules governing federal criminal proceedings . . . [there is] no doubt of the applicability of the right . . . or of its importance."¹⁶⁵ The *Hines* court found that the magistrate had "severely limited the petitioner's right to cross-examine on [a] material issue" and reversed the lower court ruling.¹⁶⁶ "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth-determining process."¹⁶⁷ Therefore, the right should not be encroached upon by generalized justifications and bootstrapped findings of immateriality.

3. Defendant's Constitutional Right to Due Process

Due process may not absolutely require disclosure in order to test an officer's reliability. However, "[a]n improper denial of the right of

161. See *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

162. See *State v. Zenquis*, 618 A.2d 335, 337 (N.J. 1993).

163. See *id.*

164. See *United States v. Green*, 670 F.2d 1148, 1154 (D.C. Cir. 1981) (ruling on a federal suppression hearing attempting to disclose location).

165. *Id.* (citations omitted).

166. *Hines v. Superior Court*, 251 Cal. Rptr. 28, 31 (Ct. App. 1988).

167. *Id.* (paraphrasing *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)).

cross-examination constitutes a denial of due processes.”¹⁶⁸ In *Montgomery*, the court applied sections 1040 and 1042 to a defendant’s right to due process when it concluded that “[t]he statute speaks in terms of ‘necessity for disclosure in the interest of justice’ . . . which appears to be a due process concept.”¹⁶⁹ The court also acknowledged that section 1042 “codifies the due process demand . . . that the prosecution cannot commence criminal proceedings ‘and then invoke its governmental privileges to deprive the accused of anything which might be material to his [or her] defense.’”¹⁷⁰ Essentially, the government is charging a defendant with illegal activity and then refusing to allow the defendant to test the accuracy of its accusation. While this denial of cross-examination may be a denial of due process, due process is also denied in surveillance cases by virtue of the secrecy and procedural inconsistencies associated with *in camera* hearings.¹⁷¹

D. *In Camera* Hearing

“American distrust for secret proceedings was roused by persecutions of the Inquisition and the Star Chamber ‘The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.’”¹⁷² However, this public forum is absent in an *in camera* hearing.

If the defendant succeeds in the prima facie showing of need, the judge or magistrate has the discretion to grant an *in camera* hearing, attended by the party claiming the privilege (the officer and/or district attorney).¹⁷³ In California, Evidence Code section 915 prescribes that a judge *may* conduct an *in camera* hearing to determine the materiality of the information.¹⁷⁴ During the hearing, the judge balances the public interest against the interests of the defendant and concludes “with the trial court making findings sufficient to enable the appellate court to review its decision.”¹⁷⁵ A record is made of the hear-

168. *Priestly v. Superior Court*, 330 P.2d 39, 45 (1958).

169. *People v. Montgomery*, 252 Cal. Rptr. 779, 783 (Ct. App. 1988) (citations omitted).

170. *Id.* (quoting *United States v. Reynolds*, 345 U.S. 1, 12 (1953)).

171. See discussion *infra* Part III.D.

172. *United States v. Lopez*, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971) (granting a motion to suppress evidence) (quoting *In re Oliver*, 333 U.S. 257, 268–72 (1948)).

173. See CAL. EVID. CODE § 1042(d) (Deering 2001).

174. See CAL. EVID. CODE § 915 (Deering 2001).

175. *People v. Montgomery*, 252 Cal. Rptr. at 785 (citing *Parnes v. Superior Court*, 146 Cal. Rptr. 818, 821 (Ct. App. 1978)).

ing but is not transcribed until requested by the defendant to assist review if the ruling is challenged.¹⁷⁶ When so requested, the transcribed record is sealed to preserve the secrecy of the location and only the reviewing judge is allowed to read it. Although it is not an ex parte proceeding per se, the person invoking the privilege, here the prosecution, can determine whether to exclude opposing counsel.¹⁷⁷ As the party invoking the privilege is the prosecution, it is a constructive ex parte proceeding. While the authority is clear regarding when and under what circumstances an *in camera* hearing may be held, there is broad discretion with respect to how the hearing is conducted.

Even in the federal arena, procedural variances exist in the way district courts direct *in camera* hearings. In *Hicks v. United States*,¹⁷⁸ the district court judge upheld the privilege and denied questioning as to the exact surveillance location.¹⁷⁹ Within the same federal circuit and in the same year, the district court in *United States v. Jenkins*¹⁸⁰ ordered disclosure to defense counsel subject to the condition that the surveillance location would not be disclosed to the defendant, and gave leave to reopen the evidentiary hearing if the defense thought the officers' view was obstructed.¹⁸¹ By contrast, in California, no published case has allowed this conditional disclosure to the defense counsel.¹⁸²

An *in camera* hearing is discretionary and is waived if not requested.¹⁸³ In both *Hicks* and *Jenkins*, the defense did not request an *in camera* hearing and the judge was not required *sua sponte* to order a hearing absent a request on the record.¹⁸⁴ This is true in California as well. An *in camera* hearing was held in *Haider, Sergio, and Montgomery*, but not in *Garza, Hines* or *Walker*.¹⁸⁵

176. See CAL. EVID. CODE §§ 915, 1042(d). The standard of review for appellate courts is the abuse of discretion standard. See *People v. Haider*, 40 Cal. Rptr. 2d 369, 374 (Ct. App. 1995).

177. See CAL. EVID. CODE § 1042(d).

178. 431 A.2d 18 (D.C. 1981).

179. See *id.*

180. 530 F. Supp. 8 (D.C. Cir. 1981).

181. See *id.* at 9.

182. See generally, *People v. Haider*, 40 Cal. Rptr. 2d 369 (Ct. App. 1995); *In re Sergio M.*, 16 Cal. Rptr. 2d 701 (Ct. App. 1993); *People v. Montgomery*, 252 Cal. Rptr. 779 (Ct. App. 1988); *People v. Garza*, 38 Cal. Rptr. 2d 11 (Ct. App. 1995); *Hines v. Superior Court*, 251 Cal. Rptr. 28 (Ct. App. 1988); *People v. Walker*, 282 Cal. Rptr. 12 (Ct. App. 1991).

183. See *Holley*, *supra* note 106, at § 1(2)(b).

184. See *Hicks*, 431 A.2d at 22; *Jenkins*, 530 F. Supp. at 10.

185. See generally, *Haider*, 40 Cal. Rptr. 2d 369; *Sergio*, 16 Cal. Rptr. 2d 701; *Montgomery*, 252 Cal. Rptr. 779; *Garza*, 38 Cal. Rptr. 2d 11; *Hines*, 251 Cal. Rptr. 28; *Walker*, 282 Cal.

During the *in camera* hearing the magistrate or judge attempts to explore the accuracy of the officer's observations.¹⁸⁶ An officer can support the existence of a threat drawing on his experience and knowledge of the people involved, as well as intelligence information.¹⁸⁷ Because the location has not been disclosed, a specific threat is not always available, so an officer may testify to the defendant's propensity for violence or past retaliations in other circumstances.¹⁸⁸ Building owners can also testify in the *in camera* hearing based on their personal knowledge of the individuals involved.¹⁸⁹

The judge begins the process by asking broad questions, such as why the prosecution is asserting privilege for that location, and usually receives only generalized answers in response—such as building owner safety and the future value of the site.¹⁹⁰ The judge then follows up with specific questions, such as whether anyone in particular has been threatened or if there are other locations in the neighborhood that could be used.¹⁹¹ At the court's discretion, the defendant may propose questions to be asked at the hearing.¹⁹² If the prosecution responds with only generalized answers, the judge determines whether the government's "concerns are legitimate enough to encroach on the confrontation privilege" by considering the totality of the circumstances.¹⁹³

Perhaps the most obvious danger of the *in camera* hearing is that the officer may give plausible, even compelling testimony during the *in camera* hearing that "could conceivably be true, but unless [the judge] goes to the site, you don't know. The irony is when the defendant is seeking the means to test whether the officer saw what he said he saw and you have to rely on the officer."¹⁹⁴ Only disclosure of the surveillance site can remedy the risk of untruthful officers.

An *ex parte* hearing not only burdens the defense, but also the judge or magistrate who must be an advocate for the defendant as well as an impartial fact finder. "The *ex parte* process places too much

Rptr. 12 (clarifying procedures for an *in camera* hearing but not specifying whether one had been used in the proceeding below).

186. See Douglass, *supra* note 148.

187. See Interview with Judith T. Brown, Deputy District Attorney, Marin County District Attorney's Office, San Rafael, Cal. (July 11, 2002).

188. See *id.*

189. See *id.*

190. See Douglass, *supra* note 148.

191. See *id.*

192. See *People v. Montgomery*, 252 Cal. Rptr. 779, 785 (Ct. App. 1988).

193. See Douglass, *supra* note 148.

194. *Id.*

confidence in judicial prescience and invites error, even unfairness.”¹⁹⁵ “In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.”¹⁹⁶ One risk associated with an *ex parte* hearing is that the defendant cannot be assured a judge will pose the kinds of questions the defense feels might impeach the officer. Even if the defense is allowed to pose questions for the hearing, without being involved, the defense cannot follow up on the information presented.

A bilateral hearing is superior to an *ex parte* hearing, because it introduces advocacy for the defendant, but even the presence of defense counsel does not guarantee complete protection of the defendant’s rights.¹⁹⁷ One risk of allowing the defense to participate in the *in camera* hearing on the condition that the information not be revealed to the client is that it puts the defense attorney in an awkward position as she may learn things that would be worthwhile to discuss with her client but which she cannot reveal.¹⁹⁸ An apparently innocent remark or reference may have special significance to a defendant, but may be devoid of meaning to one not acquainted with the relevant circumstances.¹⁹⁹ Therefore, although a bilateral hearing is not a panacea, it is needed to avoid burdening the trial judge with the additional duty of being an adversary or advocate.²⁰⁰

E. Defendant’s Showing of Materiality

The location of the secret surveillance post may not be material if the defendant confessed or if he was charged with simple possession and drugs were recovered from his person.²⁰¹ However, absent other evidence, if the People succeed *in camera*, “the adversary process should be utilized, probing the information’s relevance to the defense, exploring with counsel the availability of other alternatives, and, if necessary, hearing testimony *voir dire*.”²⁰² If a court sustains the government’s privilege, the information is not disclosed to the defen-

195. *People v. Superior Court (Biggs)*, 97 Cal. Rptr. 118, 124 (Ct. App. 1971).

196. *Dennis v. United States*, 384 U.S. 855, 875 (1966).

197. *See Brenner*, *supra* note 109 at 336.

198. *See Douglass*, *supra* note 148.

199. *See Alderman v. United States*, 394 U.S. 165, 182 (1969).

200. *See Dennis v. United States*, 384 U.S. 855, 874–75 (1966).

201. *See Thomas J. Orloff & Mark Hutchins, California Criminal Investigation* 298 (2001 ed.).

202. *People v. Montgomery*, 252 Cal. Rptr. 779, 785 (Ct. App. 1988) (quoting *People v. Superior Court (Biggs)*, 97 Cal. Rptr. 118, 124 (Ct. App. 1971)).

dant, but the defense counsel may still question the officer's ability to have in fact made the observations, as long as the questions do not reveal the exact location of the post.²⁰³ Typical questions involve weather conditions, distance, height, other bystanders dressed like the defendant, lighting, presence of obstructions, and whether binoculars were used.²⁰⁴ For example, in *Hines*, the defense was able to ascertain that the officer was fifty yards away and the day was somewhat overcast.²⁰⁵ In *Sergio* the defense determined that the officer observed the transaction using binoculars at a distance of one hundred yards, on a clear and sunny day.²⁰⁶ While these details provide some basic notion of locality, they do not give the defense counsel enough information to properly explore the veracity of the testifying officer.

While the defendant is required to make a prima facie showing that the privileged information is material to the defense, there is a three-way split among California appellate courts regarding the appropriate standard to use. The *Hines-Montgomery* standard requires that disclosure is material to guilt or innocence.²⁰⁷ The *Walker* test requires the defense to show a reasonable possibility that disclosure *would* be material to guilt or innocence, which would result in the defendant's exoneration.²⁰⁸ Finally, the *Haider-Garza-Sergio* standard requires the defense to show that the officer was making his observations from an obstructed location *and* that there is a reasonable possibility that disclosure would be material to guilt or innocence, which *might* result in the defendant's exoneration.²⁰⁹

Under *Hines* and *Montgomery*, both decided in 1988, the First Appellate District required the defense to show that disclosure is material to guilt or innocence.²¹⁰ Under this standard, the claim of privilege pertains to the material issue of whether the officer actually had a "clear and unobstructed view."²¹¹ The defense must offer proof that there were obstructed locations around the arrest site. It cannot be

203. See *id.* at 782.

204. See Orloff, *supra* note 201.

205. See *Hines v. Superior Court*, 251 Cal. Rptr. 28, 29 (Ct. App. 1988).

206. See *In re Sergio M.*, 16 Cal. Rptr. 2d 701, 704 (Ct. App. 1993).

207. See *Hines*, 251 Cal. Rptr. at 31.

208. See *People v. Walker*, 282 Cal. Rptr. 12, 17 (Ct. App. 1991).

209. See *People v. Haider*, 40 Cal. Rptr. 2d 369, 371 (Ct. App. 1995); *People v. Garza*, 38 Cal. Rptr. 2d 11, 14 (Ct. App. 1995); *In re Sergio M.*, 16 Cal. Rptr. 2d 701, 704 (Ct. App. 1993).

210. See *Hines*, 251 Cal. Rptr. at 31; *People v. Montgomery*, 252 Cal. Rptr. 779, 784 (Ct. App. 1988).

211. *Hines*, 251 Cal. Rptr. at 31.

merely a fishing expedition.²¹² The *Hines* and *Montgomery* courts found that the surveillance site was material in order to permit the defense to test whether the officer could see what he claimed to have seen from the point where he claimed to have been.²¹³ In addressing whether to sustain the privilege in *Montgomery*, the trial court held that the official information privilege is “given and upheld as a matter of law *regardless of materiality* when the location is being presently used for current observation by police agency.”²¹⁴ While the reviewing court reversed the lower court ruling for procedural reasons, the rationale for sustaining the privilege was not found unreasonable even though there was no direct evidence other than the officer’s testimony.²¹⁵

In *Walker*, the Second Appellate District, in 1991, considered using the *Hines–Montgomery* standard, but chose instead to adopt a standard from *Price v. Superior Court*,²¹⁶ a case involving disclosure of a confidential informant’s identity.²¹⁷ Under the *Price* standard, the defense must show that there is a “reasonable possibility” that disclosure of the surveillance site “could constitute material evidence on the issue of guilt *which would result in his exoneration.*”²¹⁸ This standard is similar to the more stringent test used by the Sixth Appellate District and may have been the precursor to the standard used in *Haider*, which was decided in 1995.

Most courts follow the test for materiality articulated in the *Haider*, *Garza*, and *Sergio* line of cases, originating from the Second and Sixth Appellate Districts.²¹⁹ This standard requires the defense to show that there were locations in the area from which the view was impaired, *and* that there is reason to believe the officer was making his observations from such a location.²²⁰ The second prong of this standard is nearly impossible to meet.²²¹

The *Garza* court also incorporated the *Walker* standard, but changed “would” to “might,” thereby requiring that disclosure *might*

212. See *Montgomery*, 252 Cal. Rptr. at 784.

213. See *Hines*, 251 Cal. Rptr. at 31; *Montgomery*, 252 Cal. Rptr. at 786.

214. *Montgomery*, 252 Cal. Rptr. at 782 (emphasis added).

215. See *id.* at 785.

216. 463 P.2d 721 (Cal. 1970).

217. See *id.*

218. *People v. Walker*, 282 Cal. Rptr. 12, 17 (Ct. App. 1991) (emphasis added).

219. See generally *People v. Haider*, 40 Cal. Rptr. 2d 369 (Ct. App. 1995); *People v. Garza*, 38 Cal. Rptr. 2d 11 (Ct. App. 1995); *In re Sergio M.*, 16 Cal. Rptr. 2d 701 (Ct. App. 1993).

220. See generally *Haider*, 40 Cal. Rptr. 2d 369.

221. See *People v. Haider*, 40 Cal. Rptr. 2d 369, 373 (1995); *People v. Garza*, 38 Cal. Rptr. 2d 11, 14 (1995); *In re Sergio M.*, 16 Cal. Rptr. 2d 701, 704 (1993).

result in a reasonable possibility of exoneration.²²² The *Garza* court found this modified approach to signify the "crucial standard."²²³ Courts following this standard view the existence of obstructed locations as "logically irrelevant" absent evidence that the officer observed the transaction from an obstructed view.²²⁴ It could be argued that the absence of a reason to believe an officer was observing the transaction from an obstructed position does not make the matter irrelevant, but merely goes to the weight that it should be accorded in balancing the government's interests against the defendant's interests. As illustrated by *Sergio*, this standard introduces a hurdle that is almost insurmountable. There, despite the existence of at least two locations with obstructions and a factual dispute regarding whether the defendant was dressed like other people in the area, the location of the surveillance post was found not material.²²⁵ The *Sergio* court determined that knowing the location was "absolutely essential" yet refused to make an adverse finding.²²⁶ Does this mean if the trial court finds materiality, it can nevertheless ignore the mandate of section 1042?

The disparity in standards exercised in California can be viewed either as an evolution of reasoning, a bona fide split of opinion, or perhaps simply a difference with no distinction, as the standard for disclosure is so difficult that it is almost never met. The discrepancy between *Walker* and *Haider*, which were both decided in the Second Appellate District, is explained by the fact that Division Five of the Second Appellate District decided *Walker* in 1991 and Division Two decided *Haider* in 1995.²²⁷ While *Walker* has not been overruled, the Second Appellate District may have used *Haider* to extend the *Walker* standard. The *Haider* court recognized Division Five's holding in *Walker* and criticized the Sixth Appellate District for its interpretation of *Walker*.²²⁸ Notwithstanding its support of *Walker*, Division Two adopted the more stringent *Garza* and *Sergio* standard, requiring a rea-

222. See *Garza*, 38 Cal. Rptr. 2d at 14.

223. *Id.* (quoting *People v. Alderrou*, 236 Cal. Rptr. 740, 744 (1986)).

224. *Haider*, 40 Cal. Rptr. 2d at 373 (quoting *Anderson v. United States*, 607 A.2d 490, 497 (D.C. 1992)).

225. See *Sergio*, 16 Cal. Rptr. 2d at 704.

226. See *id.* at 703.

227. See *People v. Walker*, 282 Cal. Rptr. 12 (Ct. App. 1991); *Haider*, 40 Cal. Rptr. 2d at 369.

228. See *Haider*, 40 Cal. Rptr. 2d at 373 (interpreting *Garza* to have read *Walker* as holding that a reasonable possibility of exoneration can be shown by evidence that suggests at least one point within the surveillance area was obstructed).

sonable possibility that the officer was actually in an obstructed location.²²⁹

The California Supreme Court has provided no guidance to help resolve these apparent discrepancies, although Justice Mosk was of the opinion that the *Haider* petition for review should have been granted.²³⁰ Neither has the United States Supreme Court articulated a materiality standard for the disclosure of surveillance sites. However, in *Roviaro v. United States*, the Court addressed materiality in the closely analogous issue of the disclosure of confidential informants.²³¹ While only one California court²³² has explicitly cited *Roviaro*, federal courts often rely on *Roviaro* to analogize to surveillance cases.²³³ In *Haider v. Director of Corrections*,²³⁴ a federal district court found that section 1040(b)(2) is “conceptually similar, if not identical” to the *Roviaro* balancing test used for the informant and surveillance privileges under the Federal Rule of Evidence 501.²³⁵ While federal courts have not disregarded the *Roviaro* standard, they have interpreted it to include the more restrictive test discussed under the *Haider*, *Garza*, and *Sergio* cases: The defendant must demonstrate both that there are locations from which the view is impaired and “some reason to believe that the officer made his observations from such a location.”²³⁶

The division of burdens, where the government merely asserts the privilege on generalized justifications and where the defense must show that the officer saw the alleged transaction from an obstructed view, is inherently flawed. While the defense can question the observing officer regarding whether he saw the alleged transaction from one of the possible obstructed vantage points, the officer can quash the defendant’s initial showing by testifying unambiguously that he was in an unimpaired location.²³⁷ If the defense cannot show that there was some reason to believe the officer saw the transaction from an obstructed location, a court will sustain the defense’s initial showing of

229. *See id.*

230. *See Haider v. Dir. of Corr.*, 992 F. Supp. 1192, 1195 (C.D. Cal. 1997).

231. *See Roviaro v. United States*, 353 U.S. 53 (1957) (requiring the public interest to be balanced against the defendant’s right to prepare a defense).

232. *See People v. Walker*, 282 Cal. Rptr. 12, 16 n.6 (Ct. App. 1991).

233. *See Haider*, 992 F. Supp. at 1196–97; *Hicks v. United States*, 431 A.2d 18, 21–22 (D.C. Cir. 1981); *People v. Superior Court (Biggs)*, 97 Cal. Rptr. 118, 124 (Ct. App. 1971); *Anderson v. United States*, 607 A.2d 490, 495 (D.C. Cir. 1992); *United States v. Harley*, 682 F.2d 1018, 1020 (D.C. Cir. 1982).

234. 992 F. Supp. 1192 (C.D. Cal. 1997).

235. *Id.* at 1197.

236. *Anderson*, 607 A.2d at 497.

237. *See Haider*, 992 F. Supp. at 1197.

need only if the observing officer's testimony is unreliable.²³⁸ This is an incredibly high bar in that it is a Herculean task to show the unreliability of the officer's testimony when the defense cannot test the veracity of the testimony with cross-examination.

This division also creates a circular argument, as the defendant needs the disclosure to adequately justify the need for the disclosure—he must demonstrate his need to obtain the location, the value of which is unknown, and establish that this need outweighs any harm to the government from disclosure. On an analogous matter pertaining to the official information privilege, the California Supreme Court acknowledged that “[o]rdinarily a defendant cannot show that a statement contains contradictory matters until he has seen it, and, if such a showing were a condition precedent to production, his rights would be dependent upon the highly fortuitous circumstance of his detailed knowledge as to the contents of the statement.”²³⁹ Therefore, these standards of materiality are too heavy for most defendants to bear.

F. Alternatives to Disclosure

In order to overcome the official information privilege, some federal district courts have required the defendant to show that the evidence is needed to conduct the defense and that there are no adequate alternative means of getting at the same point.²⁴⁰ Some California trial courts have also employed alternative means of disclosure. When the surveillance post privilege is sustained, alternatives to disclosure should always be suggested by the defense as was done in *Alfaro*:

MS. MARCUS: I would also propose, Your Honor, because you have upheld the privilege, that the location be revealed to me, that I can reveal it to my investigator, not to my client, so it can be viewed, photographed or videotaped so some evidence can be brought into court, so that the vantage point can be seen from the location to where Mr. Alfaro was standing.

THE COURT: Denied.²⁴¹

...

MS. MARCUS: I will be happy to have the location revealed to a defense investigator for me to come there and present evidence to

238. See *Hicks v. United States*, 431 A.2d 18, 19–20 (D.C. Cir. 1981).

239. *People v. Chapman*, 338 P.2d 428, 430 (Cal. 1959).

240. See *United States v. Harley*, 682 F.2d 1018, 1020 (D.C. Cir. 1982).

241. Rep. Tr. at 38:17–23 (Dec. 8, 2000), *People v. Alfaro*, No. 180975 (Cal. Super. Ct. Dec. 8, 2000).

the Court on whether this can really be seen from where the officer says it can be seen.²⁴²

In addition to the alternatives discussed in *Alfaro*, the defense can also request that a videotape or photograph, taken from the surveillance site, be provided to the judge for his *in camera* review.²⁴³ The defense can also request that the judge visit the surveillance site in person, under similar conditions. One judge in San Francisco, Judge Douglass, traveled to a surveillance site to test the veracity of an officer's testimony and viewed videotape taken by the defense of a surveillance location.²⁴⁴ Despite the appeal of acquiring first-hand knowledge of the site, the judge risks becoming a witness when testing the reliability of an officer's testimony via a site visit.²⁴⁵ While the site visit was useful to Judge Douglass, the defense counsel began asking him questions about the location which put him in a precarious position.²⁴⁶ The canons in the Code of Judicial Ethics prohibit judges from voluntarily appearing as witnesses and suggest that judges should discourage people from requiring them to serve as witnesses.²⁴⁷ The Code of Judicial Conduct also prohibits judges from independently investigating the facts in a case and allows judges to consider only the evidence presented.²⁴⁸ For these reasons the judge must receive the consent of both parties before employing alternative means of disclosure.²⁴⁹ Alternatives to disclosure are a modest attempt to equalize a situation that is heavily weighted toward the prosecution. However, because of the judge's risk of misconduct and the bilateral consent requirement, alternatives are not always available or feasible.

G. Findings Adverse to the Prosecution

If a court sustains the surveillance privilege and the defense meets the materiality standard, the court must make a finding adverse

242. *Id.* at 9:6–10 (Dec. 15, 2000).

243. Prosecutors contend that photographs may reveal the location based on the angle and perspective of the shot. Interview with Judith T. Brown, Deputy District Attorney, Marin County District Attorney's Office, San Rafael, Cal. (July 11, 2002).

244. *See* Douglass, *supra* note 148. Note that if the location is not disclosed, a judge can refuse to answer any questions under the color of privilege.

245. *See id.*

246. *See id.*

247. *See* CAL. CODE OF JUDICIAL ETHICS, CANON 2(B)(2) (2001) ("A judge must not testify as a character witness without being subpoenaed because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies.").

248. *See id.*, Canon 3(B)(7) (2001) (embracing independent investigation of facts within general prohibition against ex parte communications).

249. *See* Douglass, *supra* note 148.

to the prosecution pursuant to California Evidence Code section 1042.²⁵⁰ Section 1042 does not mandate what the result of an adverse finding is,²⁵¹ but the result may include striking the officer's testimony or dismissing the charges.²⁵² The usual sanction is the suppression of the officer's testimony regarding any observations made from the surveillance location.²⁵³ In a rare ruling for the defendant, the *Hines* court reversed a lower court ruling and found section 1042 applicable because the defendant needed the information to test the observing officer's knowledge.²⁵⁴ In justifying the holding, the court explained that "[t]he purpose of the defense in learning the location was to test that very observation—did [the officer] actually have a clear and unobstructed view of the scene? This was the very issue to which the privileged information was material."²⁵⁵

If the prosecution refuses to disclose the location after an adverse finding, the court can sanction the prosecution with contempt or dismiss the charges.²⁵⁶ The contempt sanction, however, does not provide the defendant any relief unless the prosecution is moved to disclose the location.²⁵⁷ If the charge is for drug sales, the court could also reduce the charge to possession.²⁵⁸

In such rare cases where a court does not sustain the privilege, the prosecution has the choice of not presenting the evidence (the officer's testimony) or disclosing the surveillance site. When, as in *Hines*, there is no other direct evidence besides the officer's observations, the only alternative is dismissal.²⁵⁹

250. See CAL. EVID. CODE § 1042 (Deering 2001).

251. See PIPES & GAGEN, JR., *supra* note 5, at § 8:7.

252. See *Hines v. Superior Court*, 251 Cal. Rptr. 28, 31 (Ct. App. 1988) (citing *People v. McShann*, 330 P.2d 33, 36 (Cal. 1958); *Priestly v. Superior Court*, 330 P.2d 39, 43 (Cal. 1958)).

253. See Orloff, *supra* note 201, at 297.

254. *Hines*, 251 Cal. Rptr. at 31.

255. *Id.*

256. Pipes & Gagen, Jr., *supra* note 5, at 433.

257. See *id.*

258. See *id.*

259. The prosecution may have an agreement with the building owner to not disclose the identity of the location, so there may be a moral obligation beyond the constitutional restraints that would prompt the prosecution to dismiss rather than disclose. "People trying to improve their neighborhoods should not be put in fear of retaliation." Brown, *supra* note 187.

IV. The Solution

A. Defense Practitioner's Guidelines

The following guidelines can be used to safeguard a defendant's interests, as well as to ensure that the *Montgomery* procedural requirements²⁶⁰ are met.

At the earliest opportunity in any evidentiary hearing, the defense counsel should request the testifying officer to reveal the exact location of the surveillance post. When the official information privilege is invoked, counsel should then request an *in camera* hearing to determine if the privilege is justified.

Counsel should propose questions to be asked at the *in camera* hearing. Some helpful questions may include:²⁶¹ Is the location being used in on-going investigations? Would the safety of officers and/or private citizens be compromised by disclosure of the location? Did the officer videotape the transaction or photograph the view from the surveillance point to the defendant's location (or vice versa)? If not, is there anything that would prevent that from being done now?

If or when the privilege is upheld after the *in camera* hearing, counsel should cross-examine the officer to elicit as much information as possible regarding the location. Some helpful questions may include:²⁶² What was the distance between the officer and the alleged drug transaction? Was the officer at ground level or elevated? What direction was the officer facing vis-à-vis the defendant? Was the officer using a vision-enhancing device, such as binoculars? What time of day was it? What kind of lighting was available? Was the officer looking through anything, such as a window or fence, when she made the observations? What was the defendant wearing? How many people were in the area? Exactly where were they in relation to the defendant? How many and how frequently did people pass through the area? Where exactly was the defendant? Did the defendant move? If so, to where and for how long? Did the officer ever lose sight of the defendant? What exactly was the defendant doing throughout the surveillance? How long did the surveillance last? What exactly did the other person(s) engaged in the transaction do? If applicable, what color, size and shape was the object exchanged? Were there any trees, telephone poles, mailboxes, parked cars, fences, etc., between the of-

260. See *People v. Montgomery*, 252 Cal. Rptr. 779, 784-86 (1988).

261. Questions furnished by Rebecca Marcus, Deputy Public Defender for the San Francisco Public Defender's Office.

262. See *id.*

ficer's line of sight and the defendant, or anywhere near the defendant? When and who arrested the defendant? Was a two-way radio used to transmit details? Was a pager, cell phone, or cash recovered from the defendant?

In addition, counsel should move to strike the officer's testimony on grounds that the exercise of the official information privilege violated the defendant's confrontation rights under the Sixth Amendment by preventing cross-examination of an adverse witness on a material issue. In preparation for a section 995 motion to dismiss charges, counsel should request that the record of the *in camera* hearing be transcribed and sent under seal to the judge ruling on the motion in order to preserve the issue for appellate review.

Defense counsel can also request alternatives to nondisclosure. Alternatives may include: Providing photographs or videotapes of the location area for the judge to use in her materiality determination. Requesting the judge visit the area under similar conditions. Requesting participation (by the attorney or an investigator) in the *in camera* hearing subject to the condition of nondisclosure to the client.

B. Proposal

Despite the existence of nearly identical facts, one court may require disclosure in a surveillance case while another court might sustain the privilege, as evidenced by *Hines* and *Sergio*. To resolve the inherent inequities in the materiality standard and the inconsistencies in the application of the surveillance privilege, the California Supreme Court must decide which standard is appropriate and articulate the proper procedures. As *Hines* has been the only case to require disclosure on the merits since the courts extended the official information privilege to surveillance cases in 1988, one could argue that the current de facto standard requires nondisclosure unless all possible locations were obstructed. A standard requiring disclosure in all cases where there was at least one obstructed location would be as equally unjust as the current standard, which results in nondisclosure in almost all cases when the officer testifies that he had an unobstructed view. The right to confrontation and cross-examination demands a less severe standard. Public interest must be weighed but not to the point of abrogating the defendant's Constitutional rights.

The *Hines-Montgomery* standard, requiring disclosure if it is material to guilt or innocence, is most equitable to defendants. This standard retains the court's discretion, yet allows disclosure when the location is material to a fair defense. The *Haider-Garza-Sergio* standard

requires the defense to show the officer was making his observation from an obstructed location and that there is a reasonable possibility that disclosure would be material to guilt or innocence, which might result in exoneration. This standard delivers the most discretion to the court, but compelling the defendant to show that the officer was making his observations from an obstructed location calls for a level of prescience that does not exist. A more practical standard would require the defense to show that that officer *may* have observed the transaction from an obstructed location and that disclosure would be material to a fair trial. In addition, or as an alternative, elimination of the requirement that the disclosure would result in the defendant's exoneration would also improve the prospects of a defendant receiving a fair trial. This modified standard would put more pressure on the government to justify their rationale for nondisclosure.

Procedures used in applying the surveillance privilege could be improved with minimal effort from the court. The *in camera* hearing should be bilateral so that the defense counsel can participate, and may be conducted with a requirement that information not be disclosed. The defense counsel is the party in the best position to determine if the surveillance site is material to the defendant's case and may make inquiries not conceived of by the court. At a minimum, the *in camera* hearing should be conducted in such a way that the burden could shift to the defense to rebut the public interest arguments. The court could also preserve meaningful appellate review by exercising the discretion it already possesses in the form of requiring alternatives to disclosure. Even if not shared with the defense, the court could require the prosecution to produce videotape or photographs, taken from the surveillance in order to make a more informed decision.

Conclusion

"[S]ince the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."²⁶³ In a surveillance case, it is the government who selects the site, the government who prosecutes the case, and the government who deprives the defendant of the information needed to undertake a fair defense. The time has come for the California Supreme Court to resolve the inconsistencies which have manifested in the surveillance post privilege.

263. United States v. Reynolds, 345 U.S. 1, 12 (1953).

