

What, and Lose the Name?

There are strategic reasons James Payne's firm isn't looking to merge, but we'd bet preserving a name as cool as Payne & Fears is part of it.

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Punishment

Justice Bedsworth tackles to kick a senior citizen off forest, for seeming drunk. S

THE RECORD

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Feds trying to avoid the stand

FBI won't say whether Marin defendant was really an informant

By Millie Lapidario
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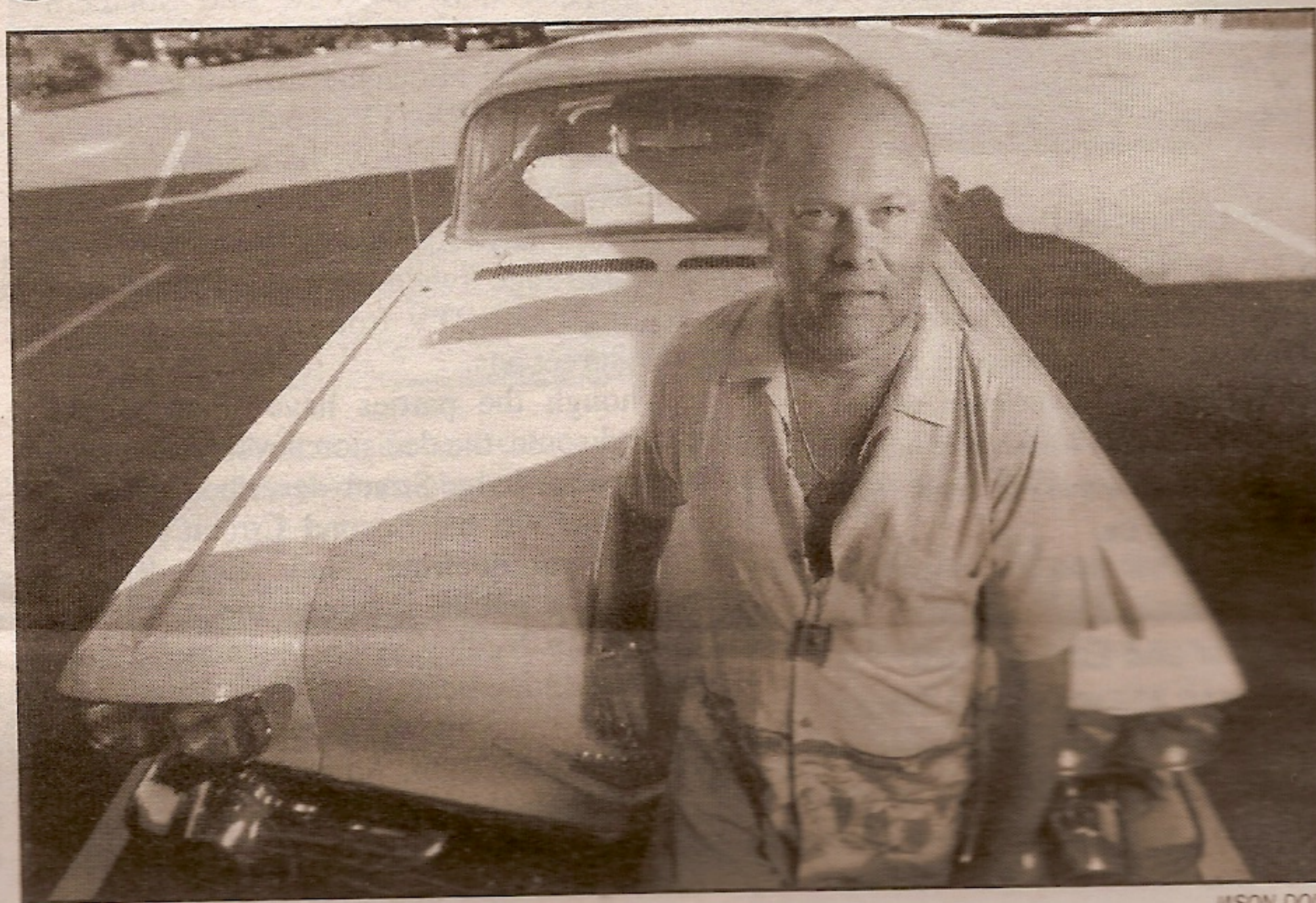
It's not every day that a defense attorney sides with the person prosecuting his client, in order to force the hand of the federal government. But that's exactly what's happened in a Marin County case.

Defendant Mario Hammonds faces criminal charges for allegedly trying to purchase a few thousand dollars' worth of merchandise at Nordstrom in 2005 with fraudulent checks and a false ID. But Hammonds claims he is a confidential informant for the FBI and was only following FBI orders when he was caught by local authorities.

Now, both the prosecutor and defense attorney need the feds to shed some light on Hammonds' story: Although it's Hammonds who needs the testimony to potentially clear him, the local prosecutor also is concerned about providing it to the defense attorney.

The federal government has stayed mum on whether or not Hammonds is an informant. The U.S. attorney's office has refused to obey subpoenas from Hammonds' attorney, Jon Rankin, and Marin County prosecutor Jack Ryder. And when Superior Court Judge Michael Dufficy issued an order in March directing the feds to hand over evidence, federal prosecutors responded by removing the matter to federal court and filing a motion to quash the subpoenas and vacate the order.

Today federal prosecutors will attempt to persuade U.S. Magistrate Judge Joseph Spero to rid them of those requests, not only based on sovereign immunity, but also fed-



JASON DOY

NEED BACKUP: Tiburon solo Jon Rankin says his client was an informant acting under orders from the FBI when he was arrested on a state crime. He's hoping the feds will confirm it in court.

eral rules known as the *Touhy* regulations. The government contends that under the 1951 case *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, the appropriate federal agency must authorize its employees before they can testify or provide documents ordered by state courts.

According to filings from the U.S. attorney's office, the U.S. Department of Justice has not authorized FBI agent Joan Linehan and Assistant U.S. Attorney Letitia Kim to testify. That alone should grant the U.S. attorney's office its motion, Kim argues in her latest filing.

But federal prosecutors will have to go up against Deputy DA Ryder, who shares the same opinion as Rankin — that the federal government must comply based on the 1963 case *Brady v. Maryland*, 373 U.S. 83. Ryder's court filing stresses that federal prose-

cutors have a constitutional duty to disclose exculpatory evidence, just as state prosecutors do.

"It's very unusual," said Rankin, a Tiburon-based solo. "The defendant doesn't view the obligation of the government to provide exculpatory information separately by agency."

Kim and Natalya LaBauve, a spokeswoman for the Northern District of California U.S. attorney's office, declined to comment on the case. In court filings, Kim neither confirms nor denies whether Hammonds is a confidential informant.

But a look at a November letter from Kim responding to Rankin's initial subpoena ordering FBI agent Linehan to appear at Hammonds' preliminary hearing offers a clue: "Disclosure will not be authorized if it

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would violate a statute, rule or regulation; reveal a confidential source; reveal investigatory records compiled for law enforcement purposes; or disclose investigative techniques and procedures."

The letter continues: "The subjects of testimony identified in your letter implicate many of those concerns."

NO GAME PLAYING

Federal and state investigations cross paths frequently, according to Steven Gruel, the former chief of the major crimes section of the U.S. attorney's office; someone acting as an informant for one law enforcement agency may end up a target of another agency.

Gruel, who is not involved in this case but has previously prosecuted many multi-district and organized crime cases requiring coordination with state prosecutors, explained that the *Touhy* regulations are meant to prevent federal employees from being subpoenaed at the whim of any disgruntled person. But regardless of the legal hurdles of getting a federal employee to testify in state court, said Gruel, who now does defense work, "there shouldn't be game playing over something like innocence."

In similar situations in the past, Marin County DA Edward Berberian Jr. said, local prosecutors have been able to negotiate with the federal government and eventually get a federal officer's testimony. This case has gone further than most by ending up in federal court, said Berberian.

Of course, the state prosecutor and defense attorney in this case have different motives for trying to get the FBI agent to testify.

If the FBI agent confirms Hammonds' claim that he was ordered by the FBI to use fraudulent checks, Berberian said it's "more than likely" that he would drop the charges.

Hammonds faces three felony counts related to the 2005 incident, but because he already has one strike on his record for a 1984 conviction of a lewd or lascivious act on a child — and multiple prior convictions dating back to the late 1970s — Rankin says he could be facing a total of 14 years and eight months in prison.

Ryder, however, needs the federal government's cooperation for a clean prosecution in state court. If Judge Spero rules in favor of the U.S. attorney's office, the superior court judge could dismiss the charges if

it finds a "reasonable possibility that nondisclosure might deprive the defendant of a fair trial," according to Ryder's filing.

"I'm not saying that it exists," said Berberian, referring to the exculpatory evidence cited by the defense. "We don't know. But we have an obligation to provide that if it does exist."

'I'm not saying that [the exculpatory evidence] exists. We don't know. But we have an obligation to provide that if it does exist.'

- EDWARD BERBERIAN JR.
Marin County DA

ACTING UNDER ORDERS?

Even if Hammonds is an informant, Berberian said, the check fraud may have had nothing to do with his duties.

"All the People have requested is the testimony of a FBI agent who can tell the jury that Mr. Hammonds was never ordered by the Federal Government to pass fraudulent checks at Nordstrom's," Ryder writes.

Ryder is asking Judge Spero to hold an *in camera* hearing, where the U.S. attorney's office would present evidence to the judge in private to show that the danger to the informant or the disruption of the federal investigation outweighs Hammonds' right to discovery.

But the U.S. attorney's office won't budge on that proposed idea, either.

According to Gruel, the case presents two conflicting principles for the U.S. attorney's office: If the federal government gives in this time, it could set a precedent of having to testify in state cases. But if the FBI agent doesn't testify and Hammonds is being truthful, he said, it wouldn't be accomplishing justice.

Hammonds was held after his preliminary hearing late last year, but because this discovery issue remains unresolved, Rankin said a trial date has not been set.

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