



cocaine, in violation of 21 U.S.C. § 841(a)(1) (Count Five); one count of possession with intent to distribute cocaine within 1,000 feet of a school, in violation of 21 U.S.C. § 860 (Count Six); and one count of possession of marijuana, in violation of 21 U.S.C. § 844(a) (Count Seven). The charge in Count One stems from Defendant's alleged sale of crack to a confidential informant ("the CI") on April 19, 2004. The charge in Count Two arises from Defendant's alleged sale of crack to the CI on April 20, 2004. The charges in Counts Three through Seven are based on the seizure of drugs and other items from Defendant's home after he was arrested on August 21, 2004 by members of the Philadelphia Police Department's 39th District Burglary Team. On February 3, 2005, Defendant filed a Notice of Alibi Defense with respect to Counts One and Two of the Indictment. Defendant now moves for disclosure of the identity of the CI who allegedly participated in the drug transactions that form the basis of the charges in Counts One and Two.

The Government alleges the following facts in support of the offenses charged in Counts One and Two of the Indictment. On April 19, 2004, the CI placed two phone calls to the person he knew as Danny "Nino" White, a/k/a Defendant Danny Harrison, and arranged to buy crack from him that evening. Before the CI met with Defendant, Philadelphia police officers searched the CI and gave him \$450 in prerecorded money. At some point between the hours of 8:00 PM and

12:00 AM, the CI purchased approximately 12 grams of crack from Defendant on the porch of the residence at 2818 North Marston Street in Philadelphia. Except for a brief period during the transaction in which Defendant and the CI entered the residence at 2818 North Marston Street, the officers maintained visual contact with the CI and Defendant at all times.

The following day, April 20, 2004, the CI arranged to buy more crack from Defendant that evening. Philadelphia police officers again searched the CI before he met with Defendant. At some point between the hours of 8:00 PM and 12:00 AM, the CI purchased approximately 13 grams of crack from Defendant. This transaction occurred next to Defendant's black Yukon Denali vehicle, which was parked in Fairmount Park near 33rd and Diamond Streets in Philadelphia. Two officers maintained visual contact with the CI and Defendant throughout the entire transaction.

The Government has advised the Court that, for safety reasons, it does not intend to call the CI to testify at the trial of this matter. Because the CI's testimony would be required to establish Defendant's actions when he and the CI briefly stepped out of the view of the undercover police officers during the April 19, 2004 transaction, the Government intends to move to dismiss Count One of the Indictment. The Government intends to proceed on Count Two, however, as two police officers observed the April 20, 2004 transaction in its entirety. The Government asserts that the

CI's identity is privileged from disclosure in connection with Count Two.

On March 31, 2005, the Court heard oral argument on the Motion and also allowed the Government to present *ex parte, in camera* evidence concerning potential security risks posed by disclosure of the CI's identity. The transcript of the *in camera* proceedings has been filed under seal.

## II. DISCUSSION

Courts have long recognized the Government's privilege to withhold the identity of a confidential informant from disclosure to criminal defendants. See, e.g., Scher v. United States, 305 U.S. 251, 254 (1938). In Roviaro v. United States, 353 U.S. 53 (1957), however, the United States Supreme Court recognized that the so-called "informer's privilege" is far from absolute. Id. at 60. In Roviaro, the defendant was convicted of selling heroin to a confidential informant. Id. at 54-55. At trial, the Government primarily relied on the testimony of a federal narcotics agent and a local police officer, both of whom had witnessed the drug transaction from separate undercover locations. Id. at 56-57. The Government did not call the confidential informant to testify at trial, and the trial court denied the defendant's repeated requests for disclosure of the confidential informant's identity. Id. at 55-56. On appeal, the Supreme Court concluded that "fundamental

requirements of fairness"<sup>1</sup> compelled the disclosure of the confidential informant's identity to the defendant:

This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. Moreover, a government witness testified that [the confidential informant] denied knowing [the defendant] or ever having seen him before. We conclude that, under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure.

Id. at 64-65.

The Roviaro Court emphasized that "no fixed rule with respect to disclosure is justifiable." Id. at 62. Instead, the trial court should balance "the public interest in protecting the flow of information against the individual's right to prepare his defense." Id. The result of the balancing "must depend on the particular circumstances of each case, taking into consideration the crime

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<sup>1</sup> Although Roviaro involved an exercise of the Supreme Court's supervisory power to define the scope of evidentiary privileges, see McCray v. Illinois, 386 U.S. 300, 309 (1967), courts have subsequently concluded that "disclosure of an informant's identity in situations analogous to Roviaro is mandated by the Constitution." Gaines v. Hess, 662 F.2d 1364, 1368 (10th Cir. 1981) (collecting cases); see also United States v. Valenzuela-Bernal, 458 U.S. 858, 870 (1982) ("While Roviaro was not decided on the basis of constitutional claims, its subsequent affirmation in McCray v. Illinois, 386 U.S. 300 (1967), where both due process and confrontation claims were considered by the Court, suggests that Roviaro would have not been decided differently if those claims had actually been called to the Court's attention.").

charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Id. "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Id. at 60-61.

Based on the nature and extent of the informant's involvement in the criminal occurrence, the United States Court of Appeals for the Third Circuit has suggested that "one of three types of cases may emerge" under Roviaro. United States v. Jiles, 658 F.2d 194, 196 (3d Cir. 1981). "First, the court may be presented with an extreme situation, such as that in Roviaro itself, in which the informant played an active and crucial role in the events underlying the defendant's potential criminal liability." Id. at 196-97. In such cases, disclosure of the confidential informant's identity "will in all likelihood be required to ensure a fair trial." Id. at 197. "At the other end of the spectrum, are the cases in which the informant was not an active participant or an eyewitness, but merely a tipster." Id. In such cases, courts have generally held that the identity of the confidential informant need not be disclosed. Id. at 197. Finally, "[a] third group of cases falls between these two extremes and it is in this group that the balancing becomes most difficult." See id. (informant was eyewitness to, but did not actually participate in, criminal

activity). As "the Court in Roviaro left substantial leeway to the trial courts to determine on a case-by-case basis whether disclosure is warranted," the resolution of a motion to compel disclosure is committed to the sound discretion of the trial court. United States v. Brown, 3 F.3d 673, 679 (3d Cir. 1993).

The Government does not dispute that the CI played an active and crucial role in the events underlying Defendant's potential criminal liability on Count Two of the Indictment. Although this case involves "an extreme situation, such as that in Roviaro itself," Jiles, 658 F.2d at 196, the Government contends that the mere fact that the CI was the sole participant with the accused in the drug transaction at issue is insufficient to establish that disclosure of the CI's identity would be "relevant and helpful to the defense" or "essential to a fair determination of a cause." Roviaro, 353 U.S. at 60-61. The Government insists that Defendant must make a particularized showing that the CI's testimony would significantly aid Defendant in establishing his asserted defense. The Government concedes, however, that none of the cases it cites in support of this proposition involved, as in this case, a confidential informant who was the sole participant, other than the accused, in the criminal transaction charged in the indictment. (3/31/05 Tr. at 11.)

As Defendant points out, courts generally have not required a criminal defendant to make an affirmative showing of materiality

where the confidential informant was the only other participant in the crime charged. In such cases, "participation, per se, qualifies the informant as a material witness." McLawhorn v. North Carolina, 484 F.2d 1, 7 (4th Cir. 1973).<sup>2</sup> As the United States Court of Appeals for the Fifth Circuit has observed, the testimony of a confidential informant who played a critical role in the crime charged is essential to accomplishing the very purpose of a criminal trial - finding the truth:

As [the confidential informant] was a principal actor before and during this performance, who he was and what he knew was certainly material and relevant. In this testimony there might have been the seeds of innocence, of substantial doubt, or overwhelming corroboration. As [such,] the inferences from it covered the full spectrum from innocence to guilt . . . .

Gilmore v. United States, 256 F.2d 565, 567 (5th Cir. 1958); see

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<sup>2</sup> As noted by the Court at oral argument, the United States Court of Appeals for the Second Circuit has held that "disclosure of the identity or address of a confidential informant is not required unless the informant's testimony is shown to be material to the defense . . . . [I]t is not sufficient to show that the informant was a participant in and witness to the crime charged." United States v. Saa, 859 F.2d 1067, 1073 (2d Cir. 1988) (emphasis added) (citing United States v. Jimenez, 789 F.2d 167 (2d Cir. 1986)). In contrast to the instant case, neither Jimenez nor Saa involved circumstances "where the Government's informer was the sole participant, other than the accused, in the transaction charged" and "[t]he informer was the only witness in a position to amplify or contradict the testimony of government witnesses." Roviaro, 353 U.S. at 64 (emphasis added); see United States v. Rodas, Crim. A. No. 91-1036, 1992 WL 30936, at \*1 (S.D.N.Y. Feb. 13, 1992) (distinguishing Jimenez and Saa from "sole participant" cases). Accordingly, the Second Circuit's decisions in Jimenez and Saa are inapposite.

also United States v. Steele, 83 F. Supp. 2d 340, 343 (N.D.N.Y. 2000) (holding that informants who witnessed and directly participated in all significant events surrounding crimes charged were "'obviously . . . crucial witness[es] to the alleged narcotics transactions'") (quoting United States v. Roberts, 388 F.2d 646, 649 (2d Cir. 1968)); Rodas, 1992 WL 30936, at \*1 (holding that materiality "may be presumed" where informant is crucial participant in crime charged); United States v. Palacios, 763 F. Supp. 380, 381 (N.D. Ill. 1991) ("Considering the government informant's direct involvement in the transaction in question, there is no doubt that the confidential informant could provide valuable testimony."); United States v. King, 121 F.R.D. 277, 283 (E.D.N.C. 1988) ("If the informant is *not* an integral participant in the criminal transaction, a defendant must come forward with something more than speculation as to the usefulness of the disclosure.") (emphasis added); cf. United States v. United States Gypsum Co., 550 F.2d 115, 120 n.5 (3d Cir. 1977) ("An informant in a drug case is a potential witness who may be presumed to possess unique knowledge about the transaction.").

The distribution offense with which Defendant is charged in Count Two of the Indictment requires the Government to prove beyond a reasonable doubt that Defendant: (1) distributed a controlled substance and; (2) that he did so knowingly. United States v. Hargrove, Crim. A. No. 99-231-01, Civ. A. No. 03-387, 2003 WL

22232853, at \*8 (E.D. Pa. Aug. 1, 2003); see also 21 U.S.C. § 841(a)(1). In this case, the CI alone arranged the drug purchase at issue in Count Two. The CI alone stood face to face with the alleged seller, paid the purchase price for the drugs, and took delivery of the drugs. As the CI "set up the criminal occurrence and . . . played a prominent part in it," Roviaro, 353 U.S. at 64, he could extensively testify from personal knowledge concerning both of the essential elements of the crime charged. Furthermore, as Defendant allegedly has no knowledge of the events underlying the charge in Count Two,<sup>3</sup> the CI is the only eyewitness who might "throw doubt upon [Defendant's] identity," Roviaro, 353 U.S. at 64, and refute the anticipated testimony of the two police officers who witnessed the April 20, 2004 transaction.<sup>4</sup> In sum, where, as here,

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<sup>3</sup> During oral argument, defense counsel advised the Court that, "depending upon what information we get about when the transaction actually took place [within the window of time between 8:00 AM and 12:00 PM], we may not have a seamless alibi." (3/31/05 Tr. at 30.) Defense counsel did make clear, however, that his client still generally denies participating in the April 20, 2004 transaction. (Id. at 31.)

<sup>4</sup> Given the CI's critical involvement in all material aspects of the April 20, 2004 transaction, the Government's representation that the CI would merely corroborate the testimony of the law enforcement officers does not undermine Defendant's need for disclosure in this case. As one court has recognized:

That [the prospect of exculpatory testimony from an informant] expects unbelievably much in unlikely circumstances is hardly relevant. During a trial the armor of the presumption of innocence and the location of the burden of proof rule out even the most sensible skepticism about what a witness . . . shown to be present [during the criminal occurrence]

the confidential informant is the "sole participant, other than the accused, in the transaction charged" and is "the only witness in a position to amplify or contradict the testimony of government witnesses," Roviaro, 353 U.S. at 64, his or her testimony is inherently material to a fair determination of guilt or innocence and highly relevant to the defense of the accused. For this reason, the Court concludes that Defendant need not make an independent showing that the CI's testimony would be material to his defense in this case.

As Defendant has established sufficient need for disclosure of the CI's identity, the Court must next consider whether Defendant's

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might say under oath.

Melendez v. Superintendent, Clinton Corr. Facility, 399 F. Supp. 430, 440 (E.D.N.Y. 1975); cf. United States v. Freund, 525 F.2d 873, 878 (5th Cir. 1976) ("Certainly there will be cases in which an *in camera* hearing [with the informant] is either unnecessary or insufficient to protect the defendant's rights."). Moreover, Roviaro makes clear that "the desirability of calling [an informant] as a witness . . . [is] a matter for the accused[,] rather than the Government[,] to decide." Roviaro, 353 U.S. at 64. Indeed, even if the CI's account of the April 20, 2004 transaction tends to incriminate Defendant, his testimony may be still be relevant and helpful to the defense. "It is no secret . . . that often these informants are not pillars of the community . . . ." United States v. Jones, 492 F.2d 239, 243 (3d Cir. 1974); see also United States v. Cortese, 614 F.2d 914, 921 (3d Cir. 1980) (recognizing that informants "have historically been known to hold grudges against those who are the subject matter of the information" and that "informants traditionally act in their own interest"). Thus, Defendant may seek to call the CI as a hostile witness and impeach his credibility. See, e.g., Devose v. Norris, 53 F.3d 201, 207 n.12 (8th Cir. 1995). In view of the prominent role that the CI played in the April 20, 2004 transaction, evidence impeaching the credibility of the CI could bear directly on Defendant's innocence.

need outweighs "the public interest in protecting the flow of information." Roviaro, 353 U.S. at 62; see also Jiles, 658 F.2d at 198 ("The second part of the 'Roviaro test' requires a balancing of the [defendant's] interest in disclosure against the Government's interest in maintaining the confidentiality of its informant."). In considering the Government's interest in non-disclosure, trial courts must distinguish between cases where the Government merely "argues, on general policy bases, that releasing the identity of the informant will deter future witnesses from stepping forward," and cases in which the Government offers specific evidence demonstrating that disclosure would result in "a very high risk of harm to the particular informant involved." Jiles, 658 F.2d at 198.<sup>5</sup> The Government's assertion of danger to the informant should "not be disregarded lightly," United States v. Almodovar, Crim. A.

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<sup>5</sup> Several courts in other Circuits have suggested that the purpose of the informer's privilege is not to protect the particular informer from retaliation, but to generally encourage informers to come forward in the future. See, e.g., Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d 762, 768 (D.C. Cir. 1965). This policy argument does not weigh in favor of non-disclosure in cases involving, as here, "an extreme situation, such as that in Roviaro itself," Jiles, 658 F.2d at 196, since the facts and circumstances of Roviaro put law enforcement officials and potential informants on notice of the limited scope of the informer's privilege. Indeed, "[t]o the extent that the Roviaro balancing test becomes known to potential informers, it will adversely affect the policy for which the privilege exists," Westinghouse, 351 F.2d at 768-69, and "[i]f potential informers really relied on the assurance of anonymity in the past, Roviaro should be expected to decrease the flow of information to the Government while exposing those who do inform to a greater risk of public identification." Id. at 769.

No. 96-71, 1996 WL 700267, at \*7 (D. Del. Nov. 26, 1996), for "[o]nce an informant is known the drug traffickers are quick to retaliate." Roviaro, 353 U.S. at 67 (Clark, J., dissenting); but see 26A Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5702 (1992) (contending that "[t]here is very little empirical evidence to justify a fear of retaliation on the part of informers"). While a specific risk of harm to the informant "cannot justify a deprivation of [the defendant's] right to a fair trial, it does require close scrutiny of [the defendant's] need to have his counsel meet with the informant." Jiles, 658 F.2d at 198.

Although there is some evidence in the sealed record regarding a potential risk of physical harm to the CI if his identity is disclosed, the Court cannot conclude that the Government's interest in maintaining the confidentiality of the CI's identity outweighs Defendant's interest in disclosure. Crediting the Government's own version of the facts of this case, Defendant is already aware of the specific locations, drug quantities, and type of drug involved in his two face to face transactions with the CI, which took place over the course of two consecutive evenings. The Government's interest in the continued safety and anonymity of the CI loses some force when the Court considers that Defendant may very well determine the CI's identity upon acquiring more specific information regarding the timing of the April 20, 2004

transaction.<sup>6</sup> See Roviario, 353 U.S. at 60 (noting that scope of informer's privilege is limited by its underlying purpose). By contrast, regardless of which parties' version of the facts is credited, disclosure of the CI's identity remains essential to a fair determination of guilt or innocence and relevant to the defense of the accused in this case. Under these circumstances, to allow the Government to prosecute Count Two without first disclosing the identity of the CI would be "clearly incompatible with our standards for the administration of criminal justice in the federal courts[,] . . . . [f]or the interest of the United States in a criminal prosecution 'is not that it shall win a case, but that justice shall be done.'" Jencks v. United States, 353 U.S. 657, 668 (1957) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

### III. CONCLUSION

Having considered the crime charged, the possible defenses, the possible significance of the CI's testimony, and other relevant factors, including the Government's interest in non-disclosure of the CI's identity, the Court concludes that fundamental fairness requires the informer's privilege to give way in this case.

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<sup>6</sup> Based on the police reports provided by the Government, Defendant knows only that the April 20, 2004 transaction occurred at some point between 8:00 PM and 12:00 AM. At trial, defense counsel's cross-examination of the law enforcement witnesses will likely elicit details concerning the timing and surrounding circumstances of the April 20, 2004 transaction.

Accordingly, Defendant's Motion to Disclose the Identity of the Confidential Informant is granted.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA                   :  
  :  
          v.                                    :  
  :  
DANNY HARRISON                            :  
  :

CRIMINAL No. 04-CR-768

**O R D E R**

**AND NOW**, this 12th day of April, 2005, upon consideration of Defendant's Motion to Compel Disclosure of the Confidential Informant's Identity (Doc. No. 23), the Government's Response thereto, the Argument held in open court on March 31, 2005, and the *ex parte, in camera* proceedings held on March 31, 2005, **IT IS HEREBY ORDERED** said Motion is **GRANTED**. The Government shall either disclose the confidential informant's identity to Defendant or move to dismiss Count Two of the Indictment within ten (10) days of the date of this Order.<sup>7</sup>

BY THE COURT:

s/ John R. Padova  
John R. Padova, J.

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<sup>7</sup> As noted in the accompanying Memorandum, the Government advised the Court at argument that it intended to move to dismiss Count One of the Indictment.