

MotionForDisclosureOfConfidentialInformant[2012]

INTRODUCTION

CLIENT NAME is accused of possessing with intent to distribute crack cocaine and ecstasy, and of using a firearm in furtherance of drug trafficking. The case arises from the search of Mr. NAME's home, where the police discovered suspected drugs and a lawfully registered firearm. The search warrant upon which the police relied was based entirely on information obtained from a confidential informant (CI). Portions of that search warrant are sealed, and the government has refused to disclose them, or the identity of the CI, to the defendant. Mr. NAME maintains that the identity of the CI must be disclosed pursuant to both *Brady v. Maryland*, 373 U.S. 83 (1963), and *Roviaro v. United States*, 353 U.S. 53 (1957). He submits this memorandum in support of his motion for disclosure of the identity of the confidential informant. Part of his motion will be submitted ex parte under seal. His motion is based on the authorities cited herein and the record in this case.

FACTS

1. Search Warrant

On March 18, 2010, San Francisco Police Officer Sean Griffin submitted an affidavit for a search warrant in this case, which is attached to this motion as Exhibit A. The affidavit indicates that a confidential informant contacted the police and "stated that he/she could purchase ecstasy from 'Dre' at any time." AN00079. The CI allegedly identified the address where "Dre" lives and the car that he drives. *Id.* Based upon this information, the police decided to have the CI "conduct a controlled buy of ecstasy (MDMA) from CLIENT NAME." AN00080. The CI allegedly bought ecstasy pills from Mr. NAME, which he or she then turned over to the police. *Id.* The alleged details of the controlled buy are unknown to the defense, as they are under seal. *Id.* ("See sealed portion of affidavit for full controlled buy details"). Based entirely on the information received from the CI and the controlled buy, a magistrate judge in San Francisco signed a search warrant for: (1) CLIENT NAME, (2) the residence at 1508 Jerrold Avenue, and (3) a Burgundy 4-door 2000 Buick with license plate 6JHT118. AN00077.

2. The Search and Arrest of Mr. NAME

According to the police report, on March 24, 2010, police officers entered the residence at 1508 Jerrold Avenue by picking the lock to the front door. Exhibit B, AN00075. They entered a bedroom in the back of the garage and came upon Mr. NAME and a woman in the room together. *Id.* Mr. NAME was wearing only his boxer shorts. *Id.* The police allege that Mr. NAME was "sitting on a chair in the rear of the bedroom. Doe had a 9mm Glock handgun sitting on the floor by his feet and he was packaging a

MotionForDisclosureOfConfidentialInformant[2012]

green vegetable like substance . . . into plastic baggies.” *Id.* The police placed Mr. NAME under arrest and searched the residence. *Id.* They allegedly recovered \$416.00 in currency, suspected crack cocaine, suspected marijuana, and suspected ecstasy. AN00076. They also seized the gun found in Mr. NAME’s room. The gun was registered to Mr. NAME. AN00076.

3. Charges and Court Proceedings

On July 15, 2010, an indictment was issued charging Mr. NAME with: (1) Possession with Intent to Distribute over 5 grams of cocaine base; (2) Possession with Intent to Distribute Ecstasy; (3) Possession of a Firearm During and in Relation to a Drug Trafficking Crime. Mr. Doe was released on bond and has complied with all his conditions of pretrial release. A trial date is set for December 13, 2010, with a motions hearing on November 30, 2010.

DISCUSSION

A. If the Government Intends to Call the Confidential Informant as a Witness, it Must Disclose the Identity of the CI to the Defense

It is well settled that if the government intends to call a confidential informant as a witness, it must disclose the identity of the confidential informant, as well as material impeachment information, to the defendant. *United States v. Bernard*, 2009 WL 4723329 (N.D. Cal. Dec. 4, 2009) at *3 (“Because the government intends to call the confidential informant as a witness at trial, it concedes that it must disclose his or her identity and material impeachment information to the Defendant.”); *see also United States v. Hollis*, 245 F.3d 671, 674 (8th Cir. 2001) (holding the government was not obligated to disclose informant’s identity where informant did not participate in the offense or testify at trial). In its October 29, 2010, response to Mr. NAME’s second discovery letter, the government stated that “The United States does not intend to call any confidential informant as a witness to testify at trial.” Unless he hears otherwise, Mr. NAME expects that the government will abide by this assertion.

B. Even if the Government does Not Call the CI as a Witness, The Defendant is Still Entitled To Disclosure of the Identity of the CI

Even if the government does not call an informant to testify at trial, the government’s privilege to refuse to disclose the identity of an informant is limited. *See Roviato v. United States*, 353 U.S. 53, 60 (1957). “Where the disclosure of an informer’s identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a case, the

MotionForDisclosureOfConfidentialInformant[2012]

privilege must give way.” *Id.* at 60-61. The decision depends on the particular circumstances of the case, including consideration of the offense charged, possible defenses, possible significance of the informant’s testimony and other relevant factors. *See id.* at 62; *United States v. Fixen*, 780 F.2d 1434, 1439 (9th Cir. 1986).

Furthermore, under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), “suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” It is well established that the existence of a witness favorable to the defense constitutes *Brady* material. *United States v. Wilkins*, 326 F.2d 135, 138 (2d Cir. 1964) (holding that government has a duty to disclose to the defense witnesses with favorable testimony). In addition, because disclosure pursuant to *Brady* rests on the due process guarantees of the Fifth and Fourteenth Amendments, the defendant’s right to exculpatory material cannot be conditioned on statutes or judicial rules, such as the informer’s privilege cited above that the government will likely attempt to assert. *See United States v. Quinn*, 356 F.Supp. 432, 441 (N.D. Ga. 1973) (holding that *Brady* material is of Constitutional nature and therefore must be disclosed independent of statute controlling disclosure of evidence); *United States v. Gleason*, 265 F. Supp. 880, 887 (S.D.N.Y. 1967) (holding that when determining when to disclose exculpatory evidence, “statutory restrictions must be accommodated to the demands of due process”).

Mr. NAME’s need to speak to the CI and investigate his testimony is crucial to his defense and essential to a fair determination of the case. The reasons supporting Mr. NAME’s need for disclosure of the CI are contained in the accompanying sealed *ex parte* submission.

CONCLUSION

In order to adequately prepare his defense, Mr. NAME now requests that the Court order the government to immediately reveal the identity of the CI.