IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,	)	**CRIMINAL CASE No. 99-0478T**
Plaintiff,	)	
v.	)	**ORDER GRANTING MOTION TO DISCLOSE CONFIDENTIAL INFORMANT**
NYOK S. TAN,	)	
Defendant.	)	

This matter came before the court on June 21, 2000 in courtroom 217A on Defendant Nyok S. Tan's motion for discovery, motion to suppress statements made by the Defendant concerning an alleged drug transaction, and motion for disclosure of confidential informant (the "Motion").[1] Douglas W. Hartig, Esq. appeared on behalf of the Defendant, and Marvin J. Williams, Esq. appeared on behalf of the Government. Following the hearing in this matter, the court took the matter under advisement and notified the parties that it would be issuing written findings and conclusions. After careful review and consideration of the arguments at the hearing and all papers submitted in support of and in opposition to the Motion, the court now issues its written decision.

[p. 2]

I. Background

1. On September 9, 1999 a confidential informant contacted Lt. Sylvestre Palacios of the Tinian Police, asserting that the Defendant had agreed to sell him two hundred dollars worth of crystal methamphetamine hydrochloride or "ice." *See* Affidavit of Sylvestre H. Palacios in Support of Search Warrant ("Palacios Aff") and Declaration of Probable Cause Complaint. The Informant claimed to have been associated with the Defendant as his

[1] The motion to suppress was ruled upon by the court from the bench and is treated in a separate order issued this even date .

delivery person. Palacios Aff. at ¶ 1. After obtaining funds from DPS, the Informant allegedly met with the Defendant, and on September 9, 1999 purchased a white crystal substance that later tested presumptively positive for D-Methamphetamine.

2. On September 11, 1999 the Informant again talked or met with the Defendant who told him that he still had a lot of "ice" to sell. Palacios Aff. At ¶ 6. When, on October 7, 1999, the Informant again contacted the Defendant in order to sell to him an additional quantity of "ice," the Informant agreed to meet him, obtained funds from the police to acquire the drugs, and completed the purchase.[2] The Information charges the Defendant with one count of Delivery of methamphetamine hydrochloride and one count of illegal possession of methamphetamine hydrochloride on September 9 and October 11.

3. In his Motion for disclosure of confidential informant, Defendant points out that the Informant was a percipient witness whose testimony might prove helpful in his defense. Specifically, Defendant contends that he is entitled to disclosure as the Informant contacted DPS, helped set up the deliveries, and was an "eye and ear witness" to the transaction and facts underlying the Government's case. Motion at 2.

4. The Government objects to the disclosure, asserting first, that because reports describing conversations between the Informant and the Defendant were furnished to the defense, disclosure is unnecessary since the Defendant obviously knows who the Informant is and the Defendant will not be surprised at trial. Opposition at 6. As additional grounds for withholding the Informant's **[p. 3]** identity, the Government asserts a compelling interest in protecting the identity of cooperative citizens until trial, as well as a strong interest in preserving the valuable resource of informants in investigations. *Id.*

II. QUESTION PRESENTED

1. Whether the Government must disclose, in advance of trial, the identity of a confidential informant who is both a percipient witness to and participant in the transactions forming the basis of the case against the Defendant?

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[2] The Probable Cause Complaint indicates that the telephone conversation was recorded after a search warrant was obtained. *See* Complaint at ¶ 5.

III. ANALYSIS

1. The so-called “informer's privilege”is, in reality, a privilege frequently granted to the government to withhold from disclosure the identity of confidential informants. The purpose of the privilege is to protect the government's sources of information and in this way facilitate law enforcement by preserving the anonymity of individuals willing to furnish information. *Rovario v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

2. The necessary use of informers and the consequent dependence on the privilege figures prominently in the enforcement of the narcotics laws. A mere informer, however, has a limited role. An informant simply points the finger of suspicion toward a person who has violated the law, putting the wheels in motion that cause the defendant to be suspected and perhaps arrested, but generally plays no part in the criminal act with which the defendant is later charged. Under ordinary circumstances, the identity of the informant is ordinarily not necessary to the defendant's case, and the privilege against disclosure properly applies.

3. When it appears from the evidence that the informer is also a material witness, is present with the accused at the occurrence of the alleged crime, and might also be a material witness as to whether the accused knowingly and intentionally delivered drugs as charged, his identity is relevant and may be helpful to the defendant. Under these circumstances, nondisclosure would deprive the defendant of a fair trial. Thus, when it appears from the evidence that the informer is a material witness on the issue of guilt and the accused seeks disclosure, the privilege must give way. *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957) (“Where the disclosure of an informer's **[p. 4]** 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.")

4. In *Rovario*, the Supreme Court did not establish a "fixed rule" for determining when the Government must disclose the identity of a confidential informant, but rather one that "calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." *Id.* at 62. To effectuate this balancing test, the court examines

three factors: (1) the degree of the informant's involvement in the crime; (2) the relationship between the defendant's asserted defense and the informant's likely testimony; and (3) the governmental interests in nondisclosure. *United States v. Gonzalo Beltran*, 915 F.2d 487, 489 (9th Cir.1990).

5. In this case, the Informant appears to have had a high degree of involvement in the criminal activity that led to the Defendant's arrest. The first factor of *Gonzalo Beltran* has, therefore, been satisfied. With regard to the third factor, governmental interest in nondisclosure, the Government points to the importance of protecting the identity of informants involved in ongoing investigations, particularly those involved in drug cases (Opp at 6). The Government does not contend, however, that disclosure would be harmful to the Informant's safety, or that disclosure could jeopardize ongoing and future investigations. *Id.*. *See Smith v. Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968) (precluding defendant accused of dealing drugs from inquiring about informant's true name case violated defendant's sixth amendment right to confront witnesses against him where there was no showing that the inquiry would have in any way endangered the witness). The court therefore concludes that the Defendant has satisfied the third prong of *Gonzalo Beltran*.[3]

6. With regard to the second *Gonzalo Beltran* factor, the defendant bears the burden of showing the need for disclosure. *Roviaro*, 353 U.S. at 60-61, 77 S.Ct. at 629. "Mere suspicion" that the information will prove helpful is insufficient. *United States v. Johnson*, 886 F.2d 1120, 1122 (9th **[p. 5]** Cir.1989). In his moving papers, the Defendant has suggested a specific relationship between his defense and the informant's likely testimony, as required by the second prong of *Gonzalo Beltran*. Although the Defendant has not come forward with the specifics of his possible defense, he did state that the Informant was a percipient witness who played an integral role in the narcotics transaction, and in this way,

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[3] Furthermore, any harm to the witness is *de minimus* where, as here, the Government asserts that the Defendant already knows the Informant's identity.

certainly implied that the testimony would be helpful or favorable, or could provide evidence on the issue of guilt which might result in the Defendant's exoneration.

7. Although, as the Government points out, Defendant's memorandum in support of the Motion was somewhat vague, at this juncture it is not possible for him to know specifically what testimony the Informant might provide, as the Defendant has not had the opportunity to interview him. The fact that the Informant is a percipient witness who, by virtue of his prior association with the Defendant, could be biased or prejudiced against him, and is not merely a tipster who provided the basis for probable cause, weighs heavily in the Defendant's favor. The Ninth Circuit has noted the distinction "between those situations wherein an informant's role was merely peripheral, and, in contrast, those situations wherein the informant actually witnessed the crime, or, as here, even helped instigate the criminal transaction." *United States v. Hernandez*, 608 F.2d 741, 744 (9th Cir.1979). [4]

8. The court therefore determines that the Defendant has made the threshold showing under *Gonzalo Beltran* to require disclosure in this case. Notwithstanding the contentions of the Government, the **[p. 6]** court is not aware of a single case holding that confrontation may be denied where the witnesses are key to the prosecution, there is reason to suspect that factual bases may exist for attacking the credibility of these witnesses, and the denial of confrontation may deprive a defendant of the opportunity to develop such facts. In other words, a case such as this where a defendant's ability to present his case would be"significantly impaired" presents sufficiently compelling reasons to warrant disclosure.

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[4] *See United States v. Cervantes*, 542 F.2d 773, 775 (9th Cir. 1976) (; *United States v. Miramon*, 443 F.2d 361, 362 (9th Cir. 1971) (error not to require disclosure of informant who was present at narcotics sale, and took part in arranging it); *Lopez-Hernandez v. United States*, 394 F.2d 820, 821 (9th Cir. 1968) ("In light of the extent of the informant's participation in the events culminating in appellant's arrest and his presence as a witness, it cannot be said that disclosure of his identity would not have been 'relevant and helpful' to appellant's defense").

So ORDERED this 28 day of June, 2000.

/s/ Timothy H. Bellas
TIMOTHY H. BELLAS, Associate Judge