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1 FOR PUBLICATION

By Order of the Court, Judge PERRY B. INOS

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6 **IN THE SUPERIOR COURT**
7 **OF THE**
8 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

9 **COMMONWEALTH OF THE**)
10 **NORTHERN MARIANA ISLANDS,**)
11)
12 **Plaintiff,**)
13 **v.**)
14 **EDWARD MENDIOLA,**)
15 **Defendant.**)

CRIMINAL CASE NO. 12-0081D

**ORDER ON DEFENDANT'S MOTION
FOR DISCLOSURE OF CONFIDENTIAL
INFORMANTS AND EVIDENCE
OF DEFENDANT'S PARTICIPATION
AS A GOVERNMENT INFORMANT**

16 **I. INTRODUCTION**

17 THIS MATTER was heard on June 26, 2012 in Courtroom 217A on Defendant Edward
18 Mendiola's ("Defendant") motion for disclosure of the names and contact information of the
19 witnesses referred to in previously filed discovery and for evidence of Defendant's participation as
20 an informant for the Government. Assistant Attorney General James B. McAllister represented the
21 Commonwealth of the Northern Mariana Islands ("CNMI"). Assistant Public Defender Matthew H.
22 Meyer represented the Defendant.

23 **II. FACTUAL BACKGROUND**

24 Defendant was charged with the illegal possession and trafficking of crystal
methamphetamine, also known as "ice". Two cooperative sources ("CS1" and "CS2") informed

1 police detectives that Defendant actively sold ice in Fina Sisu village and that they had purchased
2 \$100 worth of ice from him on November 2, 2011. After obtaining an eavesdropping search
3 warrant, the CNMI Drug Enforcement Task Force and the Criminal Investigations Bureau
4 conducted a monitored and controlled operation, wherein CS1, while wearing a wire, contacted
5 Defendant, set up a time to meet, and purchased \$100 worth of ice from him. There is no indication
6 that CS2 was involved in any matter involving the defendant after initially reporting him to the
7 police.

8 Defendant has asked this court to order the government to provide him with (1) the names
9 and contact information for both CS1 and CS2; (2) an in-camera hearing where the court will take
10 testimony and evaluate the government's claim of privilege if it is unwilling to disclose the names
11 of these witnesses; (3) a written disclosure that would include any agreements Defendant made with
12 the government to act as an informant, along with information about money and/or favors provided
13 to the Defendant by the government, and the specific dates, times, and names of persons the
14 Defendant dealt with in relation to drug transactions on behalf of the government in relation to his
15 role as a government informant or agent; and (4) any promises, negotiations, money, and/or favors
16 provided to the confidential informants by either the police or Attorney General's Office, along
17 with all records of their criminal histories for felonies and crimes involving untruthfulness, be
18 disclosed in writing.

19
20 **III. DISCLOSURE OF THE CONFIDENTIAL WITNESSES' NAMES, CRIMINAL
HISTORIES, AND INFORMANT AGREEMENTS WITH THE GOVERNMENT**

21 **A. Legal Standard**

22 Under Rule 16(c) of the Commonwealth's Rules of Criminal Procedure, a defendant is
23 entitled to receive "photograph books, papers, documents, photographs, tangible objects, buildings
24 or places, or copies of portions thereof which are within the possession, custody, or control of the

1 government, and which are material to the preparation of his/her defense, or are intended for use by
2 the government as evidence in chief at the trial..." NMI R. Crim. P. 16(c). In addition, due process
3 requires that the prosecution turn over evidence that is "favorable to an accused...where the
4 evidence is material either to guilt or to punishment." *Commonwealth v. Campbell*, 4 NMI 12, 15
5 (1993), citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Information that "bears on the
6 credibility of a significant witness in the case", including impeachment evidence, is considered to
7 be *Brady* material. *Campbell* 4 NMI at 15, citing *United States v. Brumel-Alvarez*, 991 F.2d 1452,
8 1461 (9th Cir. 1992).

9 **B. Discussion**

10 A criminal defendant is generally entitled to receive exculpatory material in order to
11 properly prepare his defense. However, in the case of confidential informants, the government also
12 has an interest in protecting the identity of said witnesses in an effort to both ensure their safety and
13 keep information flowing to law enforcement agents. *Riley v. U.S.*, 411 F.2d 1146, 1151 (9th Cir.,
14 1969), citing *Roviaro v. U.S.*, 353 U.S. 53 (1957). In assessing whether the defendant is entitled to
15 receive the requested information, the court must first determine if the evidence is material under
16 *Brady* and then balance the interests of the defendant against those of the government.

17 **1. Are the disclosures requested material under *Brady*?**

18 In *Roviaro v. United States*, the defendant was charged with having sold heroin to a
19 confidential informant. Despite the fact that this informant and the defendant were the only
20 participants in the crime, the trial court denied the defendant's requests for disclosure of the
21 informant's name and contact information. While the prosecution did not call the witness to testify,
22 the defendant was convicted. The US Supreme Court, however, reversed the conviction, finding
23 that there is a limitation on the applicability of the government's right to withhold the identity
24 informants. "Where the disclosure of an informant's identity, or the contents of his communication,

1 is **relevant and helpful** to the defense of an accused, or is **essential to a fair determination of a**
2 **cause**, the [informer's] privilege must give way.” *Roviaro v. United States*, 353 U.S. 53, 60-61.
3 (emphasis added).

4 In this case, CS1 was debriefed by two police detectives, informed those detectives of the
5 Defendant's drug-related activities, contacted Defendant under police supervision to arrange for the
6 purchase of a controlled substance, and then participated in a monitored and controlled operation to
7 purchase that controlled substance while wearing a wire and being provided with the money to
8 make the purchase. It is clear that CS1 was not the typical uninvolved informant but rather played
9 an active role in the drug transaction and is likely to be a significant witness for the prosecution
10 during trial. Therefore, his or her name is relevant and material under *Brady*.¹

11 CS2, on the other hand, played a much more passive role in that he or she merely reported
12 having purchased ice from Defendant. There is no evidence to indicate that this particular witness
13 participated in the police operation involving CS1 or was involved in any other transaction
14 involving both Defendant and law enforcement agents, and the prosecution denies that CS2
15 participated in the operation leading to Defendant's arrest.

16 **2. Balancing the interests of the defendant and the government**

17 The government is often given the privilege of withholding the identity of informants for
18 public interest concerns relating to the facilitation of effective law enforcement. *Roviaro* 353 U.S.
19 at 59. However, “[w]here the disclosure of an informer's identity, or of the contents of his
20

21 ¹ See also *Commonwealth v. Tan*, Crim. No. 99-0478T (NMI Super. Ct. June 28, 2000) (Order Granting Motion to
22 Disclose Confidential Informant), wherein the CNMI Superior Court distinguishes between the typical informant, who
23 simply “points the finger of suspicion toward a person” and an “informer [who] is also a material witness” in making its
24 decision as to whether to reveal the identity of a confidential informant. In that case, similar to the situation in this case
in relation to CS1, the confidential informant was more than a mere informer. He was “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”. The *Tan* Court found that “when it appears from the evidence that the
informer is a material witness on the issue of guilt and [the] accused seeks disclosure, the [informer's] privilege must
give way.”

1 communication, is relevant and helpful to the defense of an accused, or is essential to a fair
2 determination of a cause, the privilege must give way.” *Id.* at 60-61. The *Roviaro* Court did not set
3 a “fixed rule” to establish when the government is required to disclose the identities of confidential
4 sources but rather provided one that “calls for balancing the public interest in protecting the flow of
5 information against the individual’s right to prepare his defense.” *Id.* at 62. Disclosure is required
6 where a cooperating source is the “sole participant, other than the accused, in the transaction
7 charged...[and] the only witness in a position to amplify or contradict the testimony of government
8 witnesses.” *Roviaro*, 353, U.S. at 64.

9 In this case, CS1 was highly involved in the criminal activity. He informed the detectives
10 that he had previously purchased ice from Defendant, contacted the Defendant to purchase more of
11 the drug, and proceeded to purchase the drug under police supervision. Given his high level of
12 involvement, this witness’ name and contact information should be disclosed. Moreover, the
13 government has agreed to disclose CS1’s name and any promises it made to CS1 in exchange for
14 his or her cooperation and testimony. This court also finds that CS1’s criminal history should be
15 disclosed to the defendant, as the Supreme Court has previously determined that information
16 bearing “on the credibility of a significant witness” is *Brady* material. *Campbell* 4 NMI at 15.

17 However, there is absolutely no evidence of CS2’s participation in relation to Defendant
18 after the initial report of having purchased ice from him. While Defendant claimed in court that he
19 suspects CS2 may have worked in collusion with CS1 based on a personal vendetta, he did not
20 provide the court with any precedent requiring the disclosure of a witness who was seemingly
21 uninvolved in anything more than a probable cause determination. Defendant can only speculate
22 why CS2 might reported him to the police. Disclosure of a cooperating source is not required
23 where his involvement in a case is limited to establishing probable cause. *Riley* 411 F2d. at 1153;
24 *McCay v. Illinois*, 300 U.S. 386, 312-13. The CNMI Superior Court has previously ruled similarly,

1 finding that where an informant “simply points the finger of suspicion toward a person...the
2 privilege against disclosure properly applies.” *Commonwealth v. Tan*, Crim. No. 99-0478T (NMI
3 Super. Ct. June 28, 2000) (Order Granting Motion to Disclose Confidential Informant at 3).
4 Therefore, the court does not believe that the government has an obligation to disclose CS2’s
5 identity, criminal records, or informant agreements with the government.

6 IV. DISCLOSURE OF AGREEMENTS BETWEEN DEFENDANT AND CNMI

7 Information that “is material either to [the] guilt or punishment” of a defendant must be
8 disclosed under *Brady*. *Brady v. Maryland*, 373 U.S. at 87. However, where any agreement was
9 made with law enforcement agents **after** an arrest, said agreement is unlikely to produce any
10 information material to a defendant’s guilt in the matter at hand. Such agreements could, though,
11 be a factor in the sentence imposed. Therefore, the court concludes that this information must be
12 considered *Brady* and be disclosed.

13 IV. IN-CAMERA HEARING

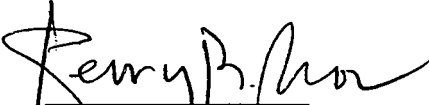
14 The preferred means of resolving disputes as to whether evidence falls under the *Brady*
15 disclosure rules is to conduct an in-camera determination. *Campbell* 4 NMI at 17. Here, the
16 prosecution has already agreed to provide Defendant with CS1’s identity and any agreement he or
17 she may have made with the government in exchange for cooperation and testimony. The court has
18 determined that revealing the identity of CS2 is improper. Lastly, the prosecution has indicated that
19 the only agreements that may exist between it and Defendant relate to information provided after
20 his arrest and for completely unrelated incidents. The Court has, however, decided that the
21 prosecution should provide this information. Therefore, the Court sees no reason for an in-camera
22 review of evidence.

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VI. CONCLUSION

For the foregoing reasons, the Court hereby grants in part and denies in part Defendant's motion as outlined above.

SO ORDERED this 9th day of July, 2012.


PERRY B. INOS
Associate Judge