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JUDICIAL DISCRETION TO WITHHOLD DISCLOSURE OF INFORMANT'S IDENTITY: *STATE v. ROBINSON*

> Law enforcement, however, in defeating the criminal, must maintain inviolate the historic liberties of the individual. To turn back the criminal, yet by doing so, destroy the dignity of the individual, would be a hollow victory.
>
> J. Edgar Hoover[1]

In *State v. Robinson*[2] the defendants were indicted for conspiracy to traffic in heroin, for possession of heroin, for possession of heroin with intent to distribute, and for trafficking in heroin. The defense moved for disclosure of a confidential informant who was a witness to and a participant in the two transactions which resulted in the charges. During an *in camera* hearing held pursuant to Rule 510(c)(2) of the New Mexico Rules of Evidence[3] the trial judge determined that, although the informant was a participant, his testimony would not be relevant or helpful to the defendants or necessary to a fair determination of their guilt or innocence, and therefore denied the defendant's pretrial motion for disclosure.[4]

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1. Hoover, *Civil Liberties and Law Enforcement: The Role of the F.B.I.*, 37 Iowa L. Rev. 175, 177 (1952).
2. 89 N.M. 199, 549 P.2d 277 (1976).
3. N.M. Stat. Ann. § 20-4-510(c)(2) (Supp. 1976):
   Testimony on Merits. If it appears from the evidence in the case or from other showing by a party that an informer will be able to give testimony that is relevant and helpful to the defense of an accused or is necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the state or a subdivision thereof is a party, and the state or subdivision thereof invokes the privilege, the judge shall give the state or subdivision thereof an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if he finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the state or subdivision thereof elects not to disclose his identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on his own motion. In civil cases, he may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without an order of the court. All counsel shall be permitted to be present at any stage at which counsel for any party is permitted to be present.
4. 89 N.M. 199, ____, 549 P.2d 277, 277 (1976).

The New Mexico Court of Appeals heard the case on interlocutory appeal and reversed the order of the trial court.[5] The New Mexico Supreme Court then heard the case on certiorari requested by the State and reinstated the trial court's order.[6]

This case raises the question of when Rule 510(c)(2) of the New Mexico Rules of Evidence[7] permits the trial court, after an *in camera* hearing, to deny the defendant's motion for disclosure of a confidential informant. Specifically, does Rule 510 give the trial court discretion to deny the motion for disclosure even though it has been determined that the informant was a participant in and therefore a material witness to the illegal activity which resulted in the arrest and his testimony is being sought for a trial on the merits?

The charges resulted from incidents occurring on two different days. According to the police reports the first incident took place on August 29, 1974 when a police agent and an confidential informant drove to a Dairy Queen store in Albuquerque. The informant introduced the officer to one of the defendants and the officer asked the defendant if he could obtain an ounce of heroin from him. They were soon joined by a second man, a co-defendant, who said he could arrange to obtain the heroin.

The officer and the informant then left, ostensibly to get the necessary money, but in fact to alert a surveillance team. They returned about twenty minutes later at which time the third, fourth and fifth co-defendants joined them. Using two cars, they all drove to a nearby Circle K store where the officer gave the money to one defendant who then made a telephone call out of the hearing of the officer and the informant. After the telephone call both cars drove to a house where the transaction took place. All the defendants injected the heroin in the presence of the officer and the informant. The informant was present during all the negotiations and saw the actual transfer of money for heroin.

The second incident took place on September 17, 1974 when the same officer and the same informant arrived at the Dairy Queen in the informant's car. They made arrangements with a group of people

5. State v. Robinson, 14 N.M. St. B. Bull. 1147, 1148 (Ct. App. February 19, 1976). The Court of Appeals decision has not been reported under the New Mexico Supreme Court's discretionary power to decide which cases will be published. Telephone interview with Ms. Rose Marie Alderette, Clerk of the New Mexico Supreme Court, October 8, 1976. The same case was originally heard by the New Mexico Court of Appeals on July 9, 1975. 14 N.M. St. B. Bull. 834. No transcript has been prepared of the *in camera* hearing. The case was remanded instructing that another *in camera* hearing be held and a record made for consideration by the Court of Appeals.

6. 89 N.M. 199, ____, 549 P.2d 277, 281 (1976). As of this writing the trial on the merits has not been scheduled.

7. N.M. Stat. Ann. § 20-4-510(c)(2) (Supp. 1976).

including some of the defendants from the first transaction.[8] Again, the informant saw the exchange of money for heroin and was a participant in the events leading to the arrest.

RULE 510(c)(2)

Rule 510(c)(2) of the New Mexico Rules of Evidence states:

> If it appears from the evidence in the case or from other showing by a party that an informer will be able to give testimony that is relevant and helpful to the defense of an accused, or is necessary to a fair determination of the issue of guilt or innocence in a criminal case . . . and the state or subdivision thereof invokes the privilege, the judge shall give the state or subdivision thereof an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply the testimony. . . . If the judge finds that there is a reasonable probability that the informer can give the testimony, and the state or subdivision thereof elects not to disclose his identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on his own motion. . . .[9]

By denying disclosure in *Robinson,* the New Mexico Supreme Court has construed Rule 510(c)(2) to mean that even if a court determines that the confidential informant is a material witness, and that his testimony would be material in a trial on the merits, it nonetheless has the discretion to subsequently rule that he need not testify.

This construction ignores the important distinctions between a material witness and a nonmaterial witness and between a hearing and a trial on the merits. Under this construction of the Rule, it makes no difference whether the informant is a participant in the illegal activity or merely a "tipster"; it makes no difference whether the testimony is requested for a trial on the merits or for a pretrial motion hearing. These are not idle distinctions. First, informants frequently provide the police with "tips" concerning when and where to find illegal activity. However, the informant himself is nowhere near the scene of the activity, does not participate in the actual illegal transactions and cannot identify the defendants. He is not a material witness.[10] Secondly, the information supplied by the

8. State v. Robinson, 14 N.M. St. B. Bull. 1147-1148 (Ct. App. February 19, 1976). There was no testimony regarding the second incident during the *in camera* hearing although all the defendants were indicted for offenses stemming from it also. It is not clear, however, whether all the original defendants were present during the second incident.

9. N.M. Stat. Ann. § 20-4-510(c)(2) (Supp. 1976).

10. In McLawhorn v. North Carolina, 484 F.2d 1, 5 (4th Cir. 1973), the court analyzed this distinction:

informant may provide the probable cause for a search warrant and thus his testimony may be requested by the defense at a motion to suppress evidence. The leading case is *McCray v. Illinois.*[11] This case involved a pretrial hearing on a motion to suppress evidence found on the defendant after an informant told the police the defendant would have narcotics on him. In denying disclosure the Court said:

> We must remember also that we are not dealing with the trial of the criminal charge itself. There the need for a truthful verdict outweighs society's need for the informer privilege.[12]

The New Mexico Supreme Court decision blatantly ignores the Rule's statement of these distinctions between a tipster and a participant and between a pretrial hearing and a trial on the merits:

> If the judge finds that there is a reasonable probability that the informer can give the testimony, and the state or subdivision thereof elects not to disclose his identity, the judge on motion of the defendant in a criminal case shall dismiss the charges. . . .[13]

"The testimony" obviously refers to the previous sentence in the Rule, "testimony that is relevant and helpful to the defense of an accused or is necessary to a fair determination of the issue of guilt or innocence."[14] A tipster might or might not have testimony that is relevant and helpful to the defense and he might or might not have testimony that is necessary to a fair determination of guilt or innocence; a participant might or might not have testimony that is relevant and helpful to the defense but, as a material witness, he would quite obviously have testimony that is necessary to a *fair* determination of guilt or innocence. An informer's testimony during a pretrial motion hearing may or may not be relevant and helpful to the defense but a motion hearing does not determine issues of guilt or innocence; a trial does.

> In determining whether invocation of the privilege of nondisclosure is to be sustained a distinction has frequently been made based on the nature of the informant's activities, that is, whether the informant is an active participant in the offense or is a mere tipster who supplies a lead to law enforcement officers to be pursued in this investigation of crime. *Applying this distinction, disclosure of the informant's identity is required where the informant is an actual participant, particularly where he helps set up the crime occurrence* (emphasis added).

See also People v. Goggins, 34 N.Y.2d 163, 313 N.E.2d 41, 356 N.Y.S.2d 571 (1974), *cert. denied,* 419 U.S. 1012 (1974); Annot., 76 A.L.R.2d 262, 287-290 (1961) and Supp. at 434 (1975).

11. 386 U.S. 300 (1967).
12. *Id.* at 307.
13. N.M. Stat. Ann. § 20-4-510(c)(2) (Supp. 1976).
14. *Id.*

The New Mexico Supreme Court viewed the informant's testimony in light of the other testimony it anticipated would be introduced in the case and concluded that the informant would be a consistent witness for the state.

> In the case before us the informant in his testimony in the *in camera* hearing did not contradict nor vary the police offense reports which were made part of the record in the case before the Court of Appeals.[15]

This statement by the New Mexico Court appears to ignore the language in the Rule which very clearly sets the criteria for disclosure. If the testimony is relevant and helpful to the defense, disclosure must follow. If the testimony is not, then if it is necessary to a *fair* determination of guilt or innocence disclosure also must follow. A witness who does not contradict police offense reports may have testimony only relevant to the guilt of the defendants but, according to Rule 510, such testimony by a participant must be disclosed if requested by the defense. It must be disclosed because the testimony of material witnesses is necessary to a fair determination of guilt or innocence. Since the Rule applies to both guilt and innocence the emphasis must properly be on the word "fair." To deny disclosure of a material witness who participated in the allegedly illegal transactions seriously impedes the adversary process the purpose of which is the fair determination of guilt or innocence.

ROVIARO v. UNITED STATES

In order to construe Rule 510 as it has done, the New Mexico Court was forced to justify its argument in the face of the holding in *Roviaro v. United States,*[16] the last definitive word on this issue from the United States Supreme Court. *Roviaro* was also a drug case involving an informant who bought narcotics from the defendant while a police agent hid in the trunk of the car, watching and listening to the whole transaction.[17] The Court in *Roviaro* required disclosure and laid the ground rules for the limits of privilege in the Proposed Federal Rules of Evidence. New Mexico's Rule 510 was taken almost verbatim from the Proposed Federal Rule.[18]

15. 89 N.M. 199, ____, 549 P.2d 277, 279 (1976).
16. 353 U.S. 53 (1957).
17. *Id.* at 57.
18. The advisory Committee Note to that Rule says:
... (2) The informer privilege, it was held by the leading case, [Roviaro] may not be used in a criminal prosecution to suppress the identity of a witness when the public interest in protecting the flow of information is outweighed by the individual's right to prepare his defense.

> 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 case, *the privilege must give way* (emphasis added).[19]

The New Mexico Supreme Court chose to ignore this language in *Roviaro,* as it ignored the same language in Rule 510. Instead it isolated one paragraph of dicta in the *Roviaro* decision which "calls for balancing the public interest in protecting the flow of information against the indvidual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case. . . ."[20]

The New Mexico Supreme Court then proceeded to distinguish *Roviaro* on the basis of the facts: The Court said that in *Roviaro* the informant was the sole nondefendant involved, ignoring the fact that a police officer was secreted in the trunk of the car where he saw and heard the whole transaction.[21] In *Robinson* the police officer and the informant both actively engaged in the transaction with the defendants.[22] On the basis of this extremely tenuous distinction the Court concluded that the facts were different in the two cases and therefore the disclosure in *Roviaro* was not applicable to the present case. If disclosure or nondisclosure is to be determined by this distinction there is a serious possibility of police perjury to fit the facts to *Robinson.* It is all too easy for the police officer to testify that the drugs were sold to him rather than to the informer and, with the informer silent, there may be no way to impeach his testimony. It should also be noted, as it was in *Roviaro,* that the informer would be the only nonpolice witness should the defendants invoke their rights not to testify[23] and the one witness who could amplify or

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Congress did not adopt any of the proposed evidentiary privilege rules including Rule 510. Instead, Congress substituted Rule 501 in the Federal Rules of Evidence:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. . . .

19. 353 U.S. at 60-61. *See also* Annot., 76 A.L.R.2d 262, 282 (1961) and Supp. at 429 (1975).

20. 353 U.S. at 62.

21. *Id.* at 57.

22. 89 N.M. at , 549 P.2d at 279.

23. "Unless petitioner waived his constitutional right not to take the stand in his own defense, John Doe [the informant] was his one material witness." 353 U.S. at 64.

See also Commonwealth v. Carter, 427 Pa. 53, 233 A.2d 284 (1967), where the court in requiring disclosure notes that the informer is the only material witness to the transaction besides the police and the defendant.

contradict the testimony of the police.[24] This is precisely the case in *Robinson.*

Since *Roviaro,* other courts in considering the issue of disclosure, have concluded that an informant who was a participant must be disclosed as a material witness. In *Gilmore v. United States*[25] the informant pointed out the defendant to the police agent and watched as a narcotics transaction took place. In holding that disclosure was required, the court stated:

> Anonymous 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 seeds of innocence, of substantial doubt, or overwhelming corroboration. As the inferences from it covered the full spectrum from innocence to guilt, the process of truth-finding, which should be the aim of every trial, compelled its disclosure.[26]

RULE 510 AND THE SIXTH AMENDMENT

The New Mexico Court has put the trial judge in a rather peculiar position. While deciding whether or not the informant's testimony will be helpful to the defense, he is simultaneously deciding whether or not the informant's testimony is necessary for a fair determination of the guilt or innocence of the defendant, whether or not the state's interest in protecting the informant is being served, and whether or not the informant is a credible witness.[27] The judge plays all the

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24. 353 U.S. at 64.

25. 256 F.2d 565 (5th Cir. 1958).

26. *Id.* at 567. *See also* United States v. Martinez, 487 F.2d 973 (10th Cir. 1973); Lopez-Hernandez v. United States, 394 F.2d 820 (9th Cir. 1968); Annot., 76 A.L.R.2d 262, 287-290 (1961) and Supp. at 434 (1975).

27.

> Our evidentiary Rule 510 provides a systematic method for balancing the state's interest in protecting the flow of information against the individual's right to prepare his defense. It gives the trial court the opportunity to determine through an *in camera* hearing whether the identify of the informer must be disclosed or not. Where it appears that the informer's testimony will be relevant and helpful to the defense of an accused, or necessary to a fair determination of the issue of guilt or innocence, then the trial judge can order the state to either reveal the identity of the informer or suffer a dismissal of the charges to which the testimony would relate. On the other hand, where it appears to the trial judge from the evidence that the informer's testimony will not be relevant and helpful to an accused's defense, or necessary to a fair determination of the issue of guilt or innocence, then the identity of the informer can remain undisclosed, and that person is not exposed unnecessarily to the highly dangerous position of being a known informant. Our only concern upon appellate review of the trial court's determination is to insure that it did not abuse its discretion in this matter.

89 N.M. at ____, 549 P.2d at 279-80.

parts in the scenario. He is judge; he is counsel for the defense; he is prosecutor; he is jury. The judge also directs the action by asking all the questions and as a final triumph he does not even allow an audience!

If *Roviaro* and Rule 510 are to be interpreted this way, our adversary system of justice in situations of this type is virtually destroyed. If relevancy is to be determined by whether or not one witness will contradict another, why have a trial in the first place? Why have a right to cross examination if witnesses who might be impeached need never be produced? Why have a right to counsel if the defense cannot choose which witnesses will be helpful to its case? Why have a jury trial if the jury is denied the opportunity to weigh the credibility of witnesses?

The Sixth Amendment guarantees of the right to confront one's accusers, the right to obtain witnesses in one's favor and the right to assistance of counsel are basic elements of due process required in all criminal trials.[28] "In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it."[29] In order to "make a defense" the defendant and his attorney—not the judge or the state—must decide which witnesses will be helpful.[30] The defense must be afforded the opportunity to test the credibility of witnesses in front of the jury. Otherwise, notwithstanding the clear and definitive requirements of the Sixth Amendment, the possibilities for police abuse are enormous. What is the relationship between the informer and the police? Why is he an informer?[31] What, if anything, was he promised in exchange for his testimony?[32] "It is not unknown for the arresting officer to mis-

28. U.S. Const. amend. VI; *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confrontation); *Washington v. Texas*, 388 U.S. 14 (1967) (right to witnesses); *Gideon v. Wainright*, 372 U.S. 335 (1963) (right to counsel).

29. *Faretta v. California*, 422 U.S. 806, 818 (1975).

30.

> The desirability of calling John Doe [the informant] as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the government to decide.

353 U.S. at 64.

> Under an adversary system of justice, each side is uniquely suited to determine whether the testimony of a particular witness will advance its cause.

Commonwealth v. Carter, 427 Pa. 53, , 233 A.2d 284, 290 (1967).

> [I]t is unfair to refuse to afford a defendant the opportunity of deciding for himself whether or not the informer could provide testimony helpful to the defense. To deny access to the informer in such circumstances is to deny a defendant his sixth amendment rights as established by Roviaro.

People v. Lewis, 57 Ill.2d 232, , 311 N.E.2d 685, 688 (1974).

31. "The informer's reasons for being an informer are unclear from the record." State v. Robinson, 14 N.M. St. B. Bull. 1147-1148 (Ct. App. February 19, 1976).

32. The possible bias of a witness is always relevant to his credibility. *See* Davis v. Alaska, 415 U.S. 308 (1974); Giglio v. United States, 405 U.S. 150 (1972).

represent his connection with the informer, [or] his knowledge of the informer's reliability. . . ."[33] An informer who did not contradict police offense reports while testifying during an *in camera* hearing has not weathered the intense scrutiny of cross examination.[34]

The safeguards of a full adversary trial cannot be reduced merely because the law is a difficult one to enforce. The New Mexico Court's concern in *Robinson* that forcing the state to reveal the informer's identity in narcotics cases would "unreasonably cripple the state's efforts at drug law enforcement"[35] was misplaced. It is true that drug cases involve peculiar problems because there are often no "victims," at least none with an interest in prosecuting. The requirements of due process cannot be made to depend on the difficulty of enforcing certain laws. This was well stated by the Supreme Court of Pennsylvania in *Commonwealth v. Carter:*

> [W]e find it impossible to accept the contention that the peculiar problems surrounding enforcement of the narcotics laws should play a part in our determination of the scope of the prosecution's duty to disclose to the defense the identify of material eyewitnesses having knowledge of facts crucial to guilt or innocence.[36]

California has also adopted an *in camera* hearing provision with respect to disclosure of informants.[37] However, the California cases consistently hold that the *in camera* hearing allows the judge to determine only whether or not the informant is a material witness. The *in camera* court can probe no further; if the informer is a material witness, disclosure must follow.

> Where the evidence indicates that the informer was an actual participant in the crime alleged, or was a non-participating eyewitness to that offense, *ipso facto* it is held he would be a material witness on

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33. McCray v. Illinois, 386 U.S. 300, 316 n. 2 (1967) (Douglas, J., dissenting).

34.

> Petitioner's opportunity to cross-examine Police Officer Bryson and Federal Narcotics Agent Durham was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction. Doe had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment.

353 U.S. at 64.

Although not raised in *Robinson,* entrapment is frequently a defense in drug cases where the informants have arranged the meetings or introduced the police agents to the defendants. With the informant silent, obviously this defense cannot be pursued. *See also* Lopez-Hernandez v. United States, 394 F.2d 820 (9th Cir. 1968); Jones v. United States, 266 F.2d 924 (D.C. Cir. 1959).

35. 89 N.M. at ____, 549 P.2d at 279.

36. 427 Pa. 53, ____, 233 A.2d 284, 289 (1967).

37. Cal. Ann. Evid. Code § 1042(d) (West Supp. 1976).

> the issue of guilt and nondisclosure would deprive the defendant of a fair trial.[38]

New Jersey, Kansas and Wisconsin also have *in camera* provisions regarding the informant privilege.[39] Cases in those states support the contention that *Roviaro* and the Sixth Amendment require disclosure whenever the informer is a material witness.[40]

CONCLUSION

The New Mexico Supreme Court has construed Rule 510 of the New Mexico Rules of Evidence in *Robinson* to permit the trial judge, *in camera,* to determine the State's interest, the defense's interest and the relevance of an informer's testimony even after the facts have revealed that the informer was a participant in the illegal activity and, therefore, a material witness. This construction cannot be squared with the constitutional requirements of the Sixth Amendment or with *Roviaro,* the leading United States Supreme Court case on the issue of the informant privilege.

It must be emphatically stated that there is *no* mention of an *in camera* hearing in *Roviaro.* Instead the Court unequivocally says: "the privilege must give way."[41] The *in camera* hearing, then, must be limited to a determination of whether the informant was a participant, or, if not, whether his testimony would be helpful to the defense. If the court determines that the informant was a participant, his identity must be disclosed. Nothing less will satisfy the rigors of American criminal justice.

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38. Williams v. Superior Court for the County of San Joaquin, 38 Cal. App.3d 412, 420, 112 Cal. Rptr. 485, 485 (1975). *See also* People v. Goliday, 8 Cal.3d 771, 505 P.2d 537, 106 Cal. Rptr. 113 (1973).

39. Kan. Civ. Pro. Stat. Ann. § 60-436 (Vernon 1965); N.J. Stat. § 2A:84A-28 (Supp. 1974); Wis. Stat. Ann. § 905.10(1) (Spec. Pamphlet 1974).

40. State v. Deffenbaugh, 216 Kan. 593, 533 P.2d 1328 (1975); State v. Oliver, 50 N.J. 39, 231 A.2d 805 (1967); State v. Midell, 40 Wis.2d 516, 162 N.W.2d 54 (1968).

41. 353 U.S. at 61. Some courts have interpreted *Roviaro* to require full disclosure *without* an *in camera* hearing anytime there is a trial on the merits and the informant can provide relevant testimony on the issue of guilt or innocence:

> When, however, as in the case at bar the defendant's guilt or innocence is at issue, the decision as to whether the informant's identity should be disclosed must *not* be resolved in an *ex parte* proceeding (emphasis added).

People v. Goggins, 34 N.Y.2d 163, 169, 313 N.E.2d 41, 44, 356 N.Y.S.2d 571, 575 (1974), *cert. denied,* 419 U.S. 1012 (1974).

See also, Note, *Disclosure of an Informant's Identity–The Substantive and Procedural Balance Tests,* 39 Albany L. Rev. 561, 570 (1975).