IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2010

NO. 24

WINSTON ELLIOTT,

PETITIONER/CROSS-RESPONDENT,

v.

STATE OF MARYLAND,

RESPONDENT/CROSS-PETITIONER.

ON APPEAL FROM THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY
(Dwight D. Jackson, Judge)

ON A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Amicus curiae National Association of Criminal Defense Lawyers ("NACDL") submits the following amicus brief in support of the brief of Petitioner/Cross-Respondent Winston Elliott.

INTERESTS OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers is a nonprofit corporation and the only national bar association working in the interest of public and private criminal defense attorneys and their clients. Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has a membership of more than 11,000 direct members and an additional 35,000 affiliate members in all fifty states and thirty nations. Its membership includes private criminal defense lawyers, public defenders, military defense lawyers, and law professors committed to preserving fairness within America's criminal justice system.

NACDL has a significant interest in guaranteeing criminal defendants their right to mount a defense to the charges against them. That right includes disclosure of the true identities of confidential informants when relevant and helpful to the defense of an accused, or essential to a fair determination of a charge. NACDL urges this Court to fortify that right.

STATEMENT OF THE CASE, QUESTIONS PRESENTED, STATEMENT OF FACTS, AND STANDARD OF REVIEW

NACDL joins and adopts by reference the Statement of the Case, Questions Presented, Statement of Facts, and Standard of Review set forth in the brief of Mr. Elliott.

ARGUMENT

Roviaro v. United States, 353 U.S. 53 (1957), requires courts to balance rigorously the competing interests of both the government and the accused when deciding whether to disclose the identity of the government's confidential informant. In this case, both the motions court and the trial court failed to balance those interests rigorously enough, resulting in a one-sided, pro-State consideration that effectively constituted no balancing at all. If this approach is affirmed by this Court, a vital, constitutionally required protection against misuse of criminal informants will greatly diminish, and the risk of erroneous convictions will rise. As governmental reliance upon confidential informants continues to grow, the risks inherent in that practice grow as well: the use of confidential informants undermines the truth-seeking function of criminal trials, increases the chances for wrongful conviction, and fosters an environment where corrupt practices can thrive. To protect against these dangers, the Roviaro balancing test must be rigorously applied by the courts, with an eye to this Court's rule that disclosure is *required* when the informant is not a mere "tipster" but rather a "participant, accessory or" "material witness, in the sense that his testimony is important to a fair determination of the cause." Brooks v. State, 320 Md. 516, 524-25 (1990) (internal quotation marks and emphasis

omitted). The lower courts failed to apply these principles, and their decisions should therefore be reversed.

I. The Lower Courts Failed to Apply *Roviaro*'s Requirement of Rigorous Balancing of the Competing Interests of the State and the Accused.

Roviaro v. United States, 353 U.S. 53 (1957), is the leading Supreme Court case on the disclosure of confidential informants. As this Court has recognized and applied in Maryland, Roviaro requires the motion or trial court to balance "the public interest in protecting the flow of information against the individual's right to prepare his defense" by considering "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Id. at 62; see Edwards v. State, 350 Md. 433, 440 (1998) (applying Roviaro).

Roviaro modified the State's common law privilege to withhold a confidential informant's identity, making it clear that that privilege is not absolute: it is constrained by (1) "fundamental requirements of fairness," and (2) its underlying purpose. Roviaro, 353 U.S. at 60-61; Edwards, 350 Md. at 440; cf. Vogel v. Gruaz, 110 U.S. 311, 314 (1884) (recognizing the old absolute privilege that applied before Roviaro). The Supreme Court further explained that fundamental fairness means that "the privilege *must* give way" if the disclosure of the informant's identity "is *relevant and helpful to the defense of an accused*, or is essential to a fair determination of a cause." Roviaro, 353 U.S. at 60-61 (emphasis added).

The privilege applies only so far as confidentiality is still needed. If, for some reason, the informer's identity already has become known, the privilege does not even

attach. As the Court explained, "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." Id. at 59. Because this purpose constrains the privilege, "once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable." Id. at 60.

In balancing those interests, Roviaro specified that "no fixed rule with respect to disclosure is justifiable" and mandated that courts analyze "the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Id. at 62. The Court analyzed "the materiality of [the informant's] *possible* testimony [with] reference to the offense charged ... and the evidence relating to [it]." Id. (emphasis added). Emphasizing the defendant's "vital need for access to any material witness," the Court explained that this analysis included looking at the language of the charging document to determine whether it, like the charging document here, burdened the defendant with justifying his possession of contraband, as well as looking to the other circumstances of the case. Id. at 62-64.

This Court has taken Roviaro one step further, holding repeatedly that *disclosure is required* when the informant is not a mere "tipster" but rather a "participant, accessory or" "material witness, in the sense that his testimony is important to a fair determination of the cause." Brooks v. State, 320 Md. 516, 524-25 (1990) (quoting Gulick v. State, 252

Md. 348, 354 (1969); Nutter v. State, 8 Md. App. 635, 639 (1970)) (internal quotation marks and emphasis omitted).

In the proceedings below, the motions court did not rigorously balance the competing interests. Rather, it erroneously accepted the State's minimal showing, which fell far below the requirements of Roviaro and Brooks. In so doing, the court failed to take appropriate account of the rights of the defendant to a fair trial – rights that must be paramount in any criminal proceeding.

First, the motions court accepted the State's general allegations, not supported by record evidence, of the general necessity to promote the flow of information and to protect its confidential informants. See E. 168-69. This assertion was rendered in general, non-specific terms: the State admitted that the actual confidential informant's safety was not at issue. (E. 169). In other words, even though the law is clear that, without a particularized showing, the privilege cannot stand, see Hardiman v. State, 50 Md. App. 98, 105-06 (1981) ("There was nothing for the judge to balance on the suppression side of the scale as far as this record reveals."), the motions court simply accepted the general societal need for confidential informants as meeting the State's burden of demonstrating a specific need of confidentiality for this particular informant.

The motions court also apparently agreed with the State's second argument, that disclosure was not mandated if Petitioner already knew the identity of the informant, see E. 167, 170-72, even though both Roviaro and Hardiman squarely hold that the exact opposite rule applies. See Roviaro, 353 U.S. at 60 ("Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication,

the privilege is no longer applicable.") (emphasis added); Hardiman, 50 Md. App. at 111 ("The 'rule' is quite *the contrary*. ... [A]n accused's knowledge of an informant [does] not support the government's right to withhold the identity - it *destroy[s] the government's privilege to withhold it.*") (emphasis added). And although the State made some references to the materiality of the testimony vis-à-vis the charges, see E. 169-70, the motions court did not balance the various factors beyond mentioning them in passing; rather, it settled on a conclusion. See E. 170-72.

Moreover, the motions court did not just fail to take the circumstances of the case into account or to recognize the materiality of the informant's possible testimony. Worse, the court abandoned the required balancing test in favor of a one-sided test that considered only the *State's* interests: "So, the [c]ourt does have an obligation, the State does have an obligation to make sure that these confidential sources are protected, and I'm going see – I'm going to do everything that I can to make sure that they are protected." (E. 171). Indeed, the motions court apparently suggested that a defendant charged with possession of drugs with intent to distribute – the very charge in Roviaro – can *never* obtain the identity of a confidential informant. (E. 170-71). This flies in the face of Roviaro, which dealt with the same situation as here: "[s]o far as [P]etitioner knew, he and [the informant] were alone and unobserved during the crucial occurrence for which he was indicted" – that is, the placing of the bags into the trunk of the Nissan and the conversation that preceded it. Roviaro, 353 U.S. at 63-64. "Unless [P]etitioner waived his constitutional right not to take the stand in his own defense," as Mr. Elliott

had to do here, see E. 344, "[the informant] was his one material witness." Roviaro, 353 U.S. at 64.

Mr. Elliott suspected that the man he knew as Christopher Lodge was the confidential informant – the same man who, Mr. Elliott testified, had arranged to put his bags in Mr. Elliott's car. (E. 352-56). And the testimony of the officers at the hearing corroborated this suspicion, at a minimum. See E. 58-59, 141-42. This would permit the possibilities that (a) the informant entrapped Mr. Elliott or (b) Mr. Elliott had no knowledge of the contents of the bags in the car. Thus, the *possible* testimony of the informant was material and helpful to Mr. Elliott's defense, cf. Roviaro, 353 U.S. at 63-64, which is enough to satisfy the balancing test. As in Roviaro, "[t]his is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged": his testimony "might have borne upon [P]etitioner's knowledge of the contents of the package or might have tended to show an entrapment." Id. at 64. Unlike a "tipster" who does not get involved in the crime, the informant here may have been an active participant in the crime. Disclosure of the informant's identity therefore should have been required.

The motions court's rote acceptance of the State's position thus falls far short of the rigorous analysis required in Roviaro and its progeny. This Court should ensure that the lower courts understand that the accused's constitutional rights are at stake; that the State's privilege is not constitutionally mandated and not to be preferred; and that allowing the State to withhold disclosure without rigorously balancing the various Roviaro factors works a great deal of societal harm.

II. When Courts Fail to Balance Rigorously, Erroneous Convictions and Corruption of the Criminal Justice System May Result.

The use of confidential informants works against the truth-seeking function of the criminal justice system. It generates false convictions and testimonial inaccuracies because of informants' incentives to lie for leniency and money, thereby undermining the public's faith in the workings of our justice system.[1] Heightened judicial scrutiny is needed to check the State's largely unregulated use of confidential informants and to ensure the fair trial guaranteed by the Constitution. Rigorous application of the Roviaro balancing test is one of the best ways to curb the problems associated with confidential informants because such increased judicial scrutiny will promote accuracy in the determination of innocence or guilt – a "fundamental requirement of fairness." Roviaro, 353 U.S. at 60-61. Abandoning that test, as the lower courts did in this case, will invite misconduct and erroneous convictions.

The exchange of information for (a) leniency in sentencing, (b) dropping of investigations or reduction of charges, (c) money, or even (d) drugs, is a common

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[1] See generally Alexandra Natapoff, Snitching: Criminal Informants and the Erosion of American Justice (2009) ("Snitching") (collecting authorities); Alexandra Natapoff, Deregulating Guilt: The Information Culture of the Criminal System, 30 Cardozo L. Rev. 965 (2008); Alexandra Natapoff, Beyond Unreliable: How Snitches Contribute to Wrongful Convictions, 37 Golden Gate U. L. Rev. 107 (2006) ("Beyond Unreliable"); Northwestern Univ. Sch. of Law, Center on Wrongful Convictions, The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row (Winter 2004-2005), available at http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf (accessed June 2, 2010); Alexandra Natapoff, Snitching: The Institutional and Communal Consequences, 73 Univ. Cin. L. Rev. 645 (2004); Dennis G. Fitzgerald, Inside the Informant File, The Champion (May 1998) (NACDL publication); Hon. Stephen S. Trott, Words of Warning for Prosecutors Using Criminals as Witnesses, 47 Hastings L.J. 1381 (1996).

practice in the confidential-informant system. See Matthew Dolan, Officers in Corruption Case Guilty of Gun, Drug Charges, Baltimore Sun, Apr. 8, 2006, at 1B (describing how two Baltimore detectives stole drugs from suspects to compensate the informants they handled); Alexander v. DeAngelo, 329 F.3d 912, 914-15 (7th Cir. 2003) (describing how Fort Wayne, Indiana officers offered to drop Amy Gepfert's cocaine charges if she engaged in sexual acts with another suspect so police could charge the suspect with solicitation of a prostitute). Yet another is that many (if not most) informants are criminals themselves. Police often will make informant deals with quid pro quos: for example, the informant might face charges unless he provides information that leads to the convictions of several other individuals. See, e.g., Nathan Levy, Bringing Justice to Hearn, Texas Observer, Apr. 29, 2005; All Things Considered: Controversy over Federally Funded Regional Drug Task Forces in Texas (National Public Radio broadcast Nov. 4, 2002); see also Natapoff, Snitching, supra, at 3-4 (detailing how informant Derrick Megress' lies caused the improper arrests of twenty-eight innocent people). These deals provide a tremendous incentive for informants to lie and to frame others. The police in this case knew that the confidential informant was involved in both the buying and selling of marijuana but did not arrest or charge him because he accepted the police's offer to trade information for leniency. (E. 53-54).

Northwestern Law School's Center on Wrongful Convictions has documented a particularly egregious example of the inaccuracy that informants may inject into criminal cases. As of late 2004, fifty-one individuals had been exonerated of crimes for which they were sentenced to death based in whole or part on the testimony of witnesses with

incentives to lie, such as promises of leniency in pending cases. Center for Wrongful Convictions, supra, at 3. Of the then-111 death-row exonerations since 1970, informant cases accounted for 45.9%, making informants the leading cause of wrongful convictions in capital cases. Id. And, according to a study by Professor Samuel Gross of the University of Michigan Law School, nearly 50% of wrongful murder convictions involve perjury by witnesses who stand to gain from false testimony. Samuel R. Gross et al., Exonerations in the United States: 1989 Through 2003, 95 J. Crim. L. & Criminology 523, 543-44 (2005).

Informant use also has racial dimensions. According to a study by Laurence A. Benner, innocent black and Hispanic households in San Diego suffered from a disproportionate number of bad search warrants, 80% of which relied on confidential informants. Laurence A. Benner, Racial Disparity in Narcotics Search Warrants, 6 J. Gender, Race & Just. 183, 190-91, 196, 200-01 (2002).

These are not aberrant occurrences. The criminal justice system is rife with these problems. For example, on May 20, 2010, just a few days before the filing of this brief, an egregious instance of a lying confidential informant was uncovered in Florida. See Convicted Felon: Lying Confidential Informant Sent Me to Prison, CBS-Wink News Now, May 20, 2010, http://www.winknews.com/Local-Florida/2010-05-20/Convicted-felon-Lying-confidential-informant-sent-me-to-prison (accessed June 2, 2010) (describing how Romill Blandin spent twenty months in prison after confidential informant 0828 had framed him after lying to police and then hid behind her confidential informant status). Informant 0828, whose real name is Shakira Redding, reportedly

admitted to framing others by hiding drugs and money on her person and then planting them on others in exchange for leniency on her own cocaine charges. Id. Her actions allegedly resulted in at least one, but probably several, false convictions. Id. According to Assistant State Attorney Guy Flowers, Ms. Redding "didn't lie in every case"; still, the State Attorney's office reportedly felt it necessary to dismiss the twenty cases she was involved in. Id.

For criminals, the possibility of avoiding jail time while benefitting financially is a strong motivator. The monetary rewards can be substantial: Los Angeles DEA informant Essam Magid earned hundreds of thousands of dollars as an informant, over and above receiving leniency for his many crimes. Natapoff, Beyond Unreliable, supra, 37 Golden Gate U. L. Rev. at 110 (citing John Glionna and Lee Romney, Snagging a Rogue Snitch, L.A. Times, Dec. 5, 2005, at A1). He framed dozens of innocent individuals to get that money, going undetected until one person whom he had framed refused to plead guilty and uncovered his scheme. Id. Leslie White was another criminal who sent dozens of suspects to prison by fabricating confessions and evidence in order to reduce his own jail time. Id. (citing Robert Bloom, Ratting: The Use and Abuse of Informants in the American Justice System 64-66 (2000)).

Although there is no evidence of this issue in this particular case, another unfortunate reality of the use of confidential informants is that police officers occasionally lie about their informants. At times, this takes the form of the wholesale invention of an informant and the accompanying deception of the court. One recent example occurred three years ago in Atlanta, where two police officers lied to a

magistrate about the existence of an informant to obtain a search warrant supported by probable cause. These lies, left unchecked by judicial scrutiny, resulted in the officers' wrongful shooting of a ninety-two-year-old woman in her home, which the officers erroneously suspected to contain a kilogram of cocaine. See Rhonda Cook, Chain of Lies Led to Botched Raid, Atlanta Journal-Constitution, Apr. 27, 2007, at D1; Bill Torpy, Report Says Pot Bust Led to Raid, Atlanta Journal-Constitution, Dec. 8, 2006, at A1; Natapoff, Snitching, supra, at 1.

These problems are not unavoidable. By subjecting the State's use of confidential informants to the judicial scrutiny required by Roviaro, the courts can take a step toward improving the accuracy of our criminal truth-seeking process. This is especially true where the accused defends on grounds of entrapment or lack of knowledge of the contents of a package, the case before the Court.

Given these dangers, the need for rigorous scrutiny and balancing is greater than ever. Indeed, in most of today's confidential informant cases, the policy behind the original common law privilege no longer applies. As Roviaro described the policy behind the privilege, it "recognizes the *obligation of citizens* to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." Roviaro, 353 U.S. at 59 (emphasis added). This may be true in cases where a "good Samaritan" citizen comes forward with information about a crime: confidentiality can protect an innocent witness from revenge. See id. at 67 (Clark, J., dissenting). But in most cases, like this one, the informant is a criminal who is attempting to curry favor with police and prosecutors by

providing information about others. See E. 53-54. He or she would not do so unless forced by the threat of criminal charges or harsher sentences. In these cases, the promise of confidentiality for these criminal informants is no boon for the "public interest in protecting the flow of information," Roviaro, 353 U.S. at 62, because it is leniency, not confidentiality, that motivates them to inform. The distinction between the citizen case and the criminal case parallels that between tipsters and criminal participants. Because Roviaro limited the scope of the privilege to its underlying purposes, id. at 60, the privilege should not apply in cases where the informant has received some other benefit in exchange for the information – particularly the benefit of leniency. This Court should require the lower courts to scrutinize this point: the Government ought to disclose the quantity and quality of all the informant's inducements to provide information as a condition of the Government's invocation of the privilege from the first.

If the lower courts' decisions are affirmed, and if their pro-privilege analyses are not reversed, Roviaro's pro-fairness balance of interests will no longer be the law in Maryland. As one court explained this aspect of Roviaro:

> Roviaro states that in a wide range of cases, the privilege will not preclude disclosure, if indeed the Government chooses to invoke it at all. If requirements of "fairness" to the defendant demand it, the informer's identity will be revealed. The Roviaro case stops far short of guaranteeing the anonymity of informers.

Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d 762, 769 (D.C. Cir. 1965).

Thus, Roviaro marked a clear step *away* from the absolute privilege the government had enjoyed in the past, toward a more rational and constitutionally founded scheme in which the defendant's constitutionally protected civil rights appropriately may

trump the judicially-created lesser privilege of the government. The decisions below mark a sharp movement in the opposite direction, contrary to Roviaro and contrary to this Court's decisions applying Roviaro. The State's use of confidential informants must not be afforded virtual carte blanche, as occurred in this case.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Special Appeals.

Respectfully submitted,

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Rule 8-504(a)(8) Statement: This brief was prepared in 13-point Times New Roman font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 4th day of June 2010, copies of the foregoing Brief of Amicus Curiae were sent by first class mail, postage prepaid, to the following counsel: Christopher Davies, Esq., Andrew Goetz, Esq., Assigned Public Defenders, Wilmer Cutler Pickering Hale and Dorr LLP, 1875 Pennsylvania Avenue, NW, Washington, DC 20006, Counsel for Petitioner/Cross-Respondent); and James E. Williams, Assistant Attorney General, Office of the Attorney General – Criminal Appeals Division, 200 Saint Paul Place, Baltimore, Maryland 21202, Counsel for Respondent/Cross-Petitioner.

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