

CAUSE NO. 1423624

THE STATE OF TEXAS,

*

IN THE DISTRICT COURT OF

*

versus

*

HARRIS COUNTY, T E X A S,

*

GEORGE MARTINEZ.

*

177th JUDICIAL DISTRICT

*

**DEFENDANT GEORGE MARTINEZ'S
MOTION FOR ACCESS TO CONFIDENTIAL INFORMANT BY DEFENSE
INVESTIGATOR AND FOR PRODUCTION OF DISCOVERY
AS TO SAID INFORMANT**

TO THE HONORABLE ROBERT JOHNSON, DISTRICT JUDGE:

COMES NOW the Defendant, George Martinez, by and through his counsel of record, Paul Morgan, and respectfully moves this Court to instruct the prosecution to reveal the true name, present address or whereabouts and other identifying information of the confidential informant in advance of the trial in this matter, and to otherwise make said confidential informant available to the defense investigator. Further, the Defendant moves that the State be ordered to produce discovery as to the confidential informant employed in this matter. In support of said motion, the Defendant would show this Court as follows:

(1) Mr. Martinez is charged with the offense of possession of a controlled substance. The charged offense was the result of a joint Texas Department of Public Safety (DPS) and Houston Police Department (HPD) "buy/bust" operation in which a DPS confidential informant was used. The confidential informant in this case, _____, was outfitted with an audio/video recording device and actively participated in the buy/bust.

(2) While provided with a name of the DPS confidential informant, counsel has been unable to determine this informant's address or whereabouts, and has no other certain way of locating this person unless the State discloses the information.

(3) Generally, the State has a privilege to refuse to disclose the identity of a person who has furnished information relating to a possible violation of the law to a law enforcement officer. TEX. R. EVID. 508(a). The State's privilege is not absolute. *See id.* 508(c). The privilege does not apply (1) if the informer's identity has been voluntarily disclosed, (2) if the informer may be able to give testimony necessary to a fair determination of guilt or innocence, or (3) if the court is not satisfied that information was obtained from an informer reasonably believed to be reliable. *Id.*

(4) In this case, the State has voluntarily divulged the confidential informant's name, but has refused to provide additional identifiers concerning this person or his address or whereabouts so that a defense investigator can locate and interview the informant.

(5) If the confidential informant participated in the alleged offense, or was present at the time of the alleged offense or the arrest, he is a material witness to the transaction necessary to a fair determination of the issues of guilt or innocence as to whether or not whether Mr. Martinez knowingly committed the offense. *See Roviario v. United States*, 353 U.S. 53 (1957); *Anderson v. State*, 817 S.W.2d 69, 72 (Tex. Crim. App. 1991) ("Whenever it is shown that an informant was an eyewitness to an alleged offense then certainly that informant can in fact give testimony "necessary to a fair determination of the issues of guilt, innocence"); *Loving v. State*, 882 S.W.2d 42, 45 (Tex. App.-Houston [1st Dist.] 1994, *no pet.*) (trial court erred in refusing to determine under Rule 508(c)(2), whether confidential informant, who was at the scene moments before the arrest, would have supported defendant or police).

(6) Moreover, the State has an obligation to exercise reasonable diligence in maintaining knowledge of the whereabouts of its confidential informants. *See, United States v. Davila-Williams*, 496 F.2d 378, 382 (1st Cir., 1974).

(7) Mr. Martinez further requests disclosure of the following impeaching information pursuant to TEX. CODE CRIM. PROC., ART. 39.14; *Giglio v. United States*, 405 U.S. 150 (1972); and *Brady v. Maryland*, 373 U.S. 83 (1963):

(a) Any and all records and information revealing prior felony convictions, convictions for a crime involving false statements or dishonesty, or juvenile adjudications attributed to the confidential informant, including but not limited to relevant "rap sheets" and probation or parole records. *See United States v. Alvarez-Lopez*, 559 F.2d 1155 (9th Cir. 1977); *United States v. Strifler*, 851 F.2d 1197 (9th Cir. 1988)("defendant is entitled to material in a probation file that bears on the credibility of a significant witness in the case."); Tex. R. Evid. 609.

(b) Any and all records and information revealing prior misconduct or bad acts attributed to the confidential informant, including, but not limited to, any acts of misconduct conducted by him. Tex. R. Evid. 608(b)(3); Weinstein's Evidence 608[5] at 608-25 (1976).

(c) Any and all consideration or promises of consideration given to the confidential informant or expected or hoped for by him. By "consideration," Mr. Martinez refers to absolutely anything, whether bargained for or not, which arguably could be of value or use to him or to persons of concern to him. This request includes, but is not limited to formal or informal and direct or indirect leniency, favorable treatment or recommendations, or other assistance with respect to any pending or potential criminal, parole, probation, pardon, clemency, civil, tax court, Internal Revenue Service, Court of Claims, administrative, or other dispute with the United States. *See, e.g., Guam v. De la Rosa*, 644 F.2d 1257, 1259 (9th Cir. 1980) (testimony secured by promise not to prosecute in exchange for cooperation).

(d) "Consideration" also encompasses any favorable treatment or recommendations with respect to criminal, civil or tax immunity grants, relief from forfeiture, payments of money, permission to keep fruits of criminal activity including cash, vehicles, aircraft, rewards or fees, witness fees and special witness fees, provisions of food, clothing, shelter, transportation, legal services or other benefits, placement in a "witness protection program," and anything else that arguably could reveal an interest, motive, or bias in them in favor of the State or against the defense, or which could act as an inducement to testify or to color

testimony. *See Bagley v. Lumpkin*, 719 F.2d at 1462-64; *United States v. Mayer*, 556 F.2d 245, 248 (5th Cir. 1977); *United States v. Partin*, 493 F.2d 750, 757 (5th Cir. 1974); *United States v. Garza*, 574 F.2d 298, 301-02 (5th Cir. 1978).

(e) Any and all threats, express or implied, direct or indirect, or other coercion made or directed against the confidential informant, criminal prosecutions, investigations, or potential prosecutions pending, or which could be brought against them, any probationary, parole, deferred prosecution, or custodial status of the witness and any civil, tax court, court of claims, administrative, or other pending or potential legal disputes or transactions with the State or over which the State has a real, apparent, or perceived influence. *See Davis v. Alaska*, 415 U.S. 308 (1974); *United States v. Alvarez-Lopez, supra*; *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976).

(f) The existence and identification of each occasion on which the confidential informant has testified before the court, grand jury, or other tribunal or body in connection with this or other similar cases. *See United States v. Alvarez-Lopez, supra*; *Johnson v. Brewer*, 521 F.2d 556 (8th Cir. 1975).

(g) Any and all records and information which arguably could be helpful or useful to the defense in impeaching or otherwise detracting from the probative force of the State's evidence or which arguably could lead to such records or such information. This request includes any evidence tending to show the narcotic habits of the confidential informant at the time of relevant events, *see, e.g., United States v. Bernard*, 625 F.2d 854, 858-59 (9th Cir. 1980), and the confidential informant's personal dislike of the defendant. *See Guam v. De la Rosa*, 644 F.2d 1257 (9th Cir. 1980); *United States v. Haggett*, 438 F.2d 396 (2d Cir. 1969), *cert. denied*, 91 S. Ct. 1638 (1971).

(h) The captions and cause numbers of any and all other criminal cases, state or federal, in which the confidential informant has been involved either as confidential informant or as defendant. Any prior criminal conduct on the part of the confidential informant either as confidential informant or as a defendant is relevant in establishing a possible defense of entrapment.

(8) Mr. Martinez is making these multiple requests because, in order to properly prepare a defense in this matter, it is important that the defense be aware of all information related to the confidential informants' credibility and background. *Giglio v. United States*, 405 U.S. 150 (1972).

(9) Cross-examination of the confidential informant will be a critical part of Mr. Martinez's defense. This cross-examination must be complete and thorough in order to protect Mr. Martinez's rights. *Washington v. Texas*, 388 U.S. 14 (1967). In order to properly cross-examine the confidential informant, the defense must be aware of all information relating to the confidential informant's credibility, including any biases, prejudices or motives, as well as the substantive evidence in the confidential informant's possession regarding entrapment. The inherent unreliability of the testimony of confidential informants¹ underscores the need for complete disclosure of information relating to their credibility. *See United States v. Caldwell*, 466 F.2d 611 (9th Cir. 1972).

(10) In the absence of any valid state justification, the failure to make the confidential informant available to the defense or to produce the requested discovery deprives a defendant of the basic right to have the prosecutor's case encountered and to "survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U. S. 648, 656 (1984). *See also Washington v. Texas*, 388 U.S. 14, 22-23 (1967).

(11) Mr. Martinez cannot safely go to trial without access to the confidential informant or the requested discovery, nor can he adequately prepare the defense to the charges against him.

(12) Absent such access to the confidential informant and the requested discovery, Mr. Martinez's rights under Article I, Sections 10 and 19, of the Texas Constitution, as well as under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution will be violated, to his irreparable injury and thus deprive Mr. Martinez of a fair trial herein.

¹ "A recent study conducted by the Actual Innocence Project revealed that out of sixty-two cases in which DNA has exonerated an innocent defendant, thirteen cases, or twenty-one percent, relied to some extent on the testimony of informers." *Commonwealth of Northern Marian Islands v. Bowie*, 243 F.3d 1109, 1124 n. 6 (9th Cir. 2001).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Honorable Court will, in all things, **GRANT** this motion and that the Court order the prosecution to disclose the true name and present address and whereabouts of its confidential informant in advance of trial in this case, and further moves that the State be ordered to produce all requested discovery concerning its confidential informant, and that the Court further **GRANT** any additional relief to which the Defendant may be justly entitled.

DATED this _____ day of August, 2017.

Respectfully Submitted,

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**COUNSEL OF RECORD FOR THE DEFENDANT
GEORGE MARTINEZ**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **Defendant Martinez’s Motion for Access to Confidential Informant by Defense Investigator and for Production of Discovery as to Said Informant** has been duly served upon counsel representing the State of Texas in this matter by either Hand Delivery, Prepaid United States Mail, E-mail, or FAX on this _____ day of August, 2017.

Paul Morgan
SBT No. 24077192

**COUNSEL OF RECORD FOR THE DEFENDANT
GEORGE MARTINEZ**

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177th JUDICIAL DISTRICT

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**COURT’S ORDER GRANTING DEFENDANT’S
MOTION FOR ACCESS TO CONFIDENTIAL INFORMANT BY DEFENSE
INVESTIGATOR AND FOR PRODUCTION OF DISCOVERY
AS TO SAID INFORMANT**

CAME ON THIS DAY TO BE CONSIDERED **Defendant Martinez’s Motion for Access to Confidential Informant by Defense Investigator and for Production of Discovery as to Said Informant**, and the Court, after duly considering the pleadings and the evidence of the parties herein, finds that this motion should be and is hereby **GRANTED / DENIED**.

It is hereby **ORDERED, ADJUDGED and DECREED**, that, for the reasons set forth by the Court in its oral ruling from the bench or its separate memorandum of even date, that the State is to locate and disclose the true name and present address and whereabouts of its confidential informant in advance of trial in this case.

It is **FURTHER ORDERED, ADJUDGED and DECREED**, that the State produce all requested discovery concerning its confidential informant in this matter.

SIGNED at Houston, Texas, this _____ day of _____, 2017.

**HONORABLE ROBERT JOHNSON, DISTRICT JUDGE
177TH DISTRICT COURT, HARRIS COUNTY, TEXAS**