

**--CORRECTED BRIEF--
NOS. SJC-13323, SJC-13341**

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

**COMMONWEALTH OF MASSACHUSETTS
APPELLANT**

V.

**SHAMIA WHITFIELD
APPELLEE**

**COMMONWEALTH OF MASSACHUSETTS
APPELLANT**

V.

**JONATHAN GANDIA
APPELLEE**

APPEALS FROM JUDGMENTS OF THE
DORCHESTER DIVISION OF THE BOSTON MUNICIPAL COURT AND THE
SPRINGFIELD DISTRICT COURT

CORRECTED BRIEF OF MASSACHUSETTS ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE
IN SUPPORT OF APPELLEES

Luke Ryan, BBO 664999, Molly Ryan Strehorn, BBO 675595
Sasson, Turnbull, Ryan & Hoose
100 Main Street, 3rd Floor
Northampton, MA 01060 / (413) 586-4800
lryan@strhlaw.com /mrstrehorn@strhlaw.com

Joshua M. Daniels, BBO 673034
Massachusetts Association of Criminal Defense Lawyers
P.O. Box 300765
Boston, MA 02130/(617) 942-2190
jdaniels@danielsappeals.com

February 23, 2023

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21 (b) (i), the amici curiae are non-profit corporations organized under the laws of the Commonwealth of Massachusetts. There are no parent corporations or publicly held corporations that own 10% or more of stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT.....2

TABLE OF AUTHORITIES4

PREPARATION OF THE AMICUS CURIAE BRIEF10

STATEMENT OF INTEREST.....10

SUMMARY OF THE ARGUMENT11

ARGUMENT13

I. Assumptions that protecting details about confidential informants leads to effective law enforcement are based on false propositions...13

A. Confidential informants are often untrustworthy and have contributed to wrongful convictions and other tragedies.....14

B. Reliance on criminal informants undermines the ostensible goals of the legal system: to enforce laws, ensure public safety, and deliver justice to those who have committed crimes.....23

C. Police reliance on informants reinforces systemic racism in policing...27

CONCLUSION.....31

CERTIFICATE OF COMPLIANCE.....33

CERTIFICATE OF SERVICE33

TABLE OF AUTHORITIES

Cases

Banks v. Dretke,
540 U.S. 668 (2004)14

Commonwealth v. Barry,
481 Mass. 388 (2019)11

Commonwealth v. Bonnett,
472 Mass. 827 (2015)11

Commonwealth v. Buckley,
478 Mass. 861 (2018)29

Commonwealth v. Desper,
419 Mass. 163 (1994)17

Commonwealth v. Lewin,
405 Mass. 566 (1989)12, 29

Commonwealth v. Long,
485 Mass. 711 (2020)28

Commonwealth v. Madigan,
449 Mass. 702 (2007)13

Commonwealth v. McCowen,
458 Mass. 461 (2010)29

Commonwealth v. Ramirez,
416 Mass. 41 (1993)18

Lafler v. Cooper,
566 U.S. 156 (2012)15

Matter of a Grand Jury Investigation,
485 Mass. 641 (2020).12

On Lee v. United States,
343 U.S. 747 (1952)14

Roviaro v. United States,
353 U.S. 53 (1957)11, 12, 31

United States v. Bernal-Obeso,
989 F.2d 331 (9th Cir. 1993)14

Rules

Mass. R. Evid. § 509.....12

Other Authorities

An Act relative to the reliability of testifying informants, Senate No. 832
(filed Jan. 14, 2019).15

Associated Press, “Man killed in raid on wrong house” DESERT NEWS (Oct. 7,
2000) *available at* <https://www.deseret.com/2000/10/7/19532683/man-killed-in-raid-on-wrong-house>.....21

Radley Balko & Joel Berger, “Wrong Door” (Sept. 2, 2006) *available at*
<https://www.cato.org/commentary/wrong-door#>.....21

Radly Balko, “No SWAT,” SLATE (Apr. 6, 2006), *available at* <https://slate.com/news-and-politics/2006/04/no-swat.html>.....20

St. John Barned-Smith, Keri Blakinger, James Pinkerton, “HPD Chief Acevedo
says narcotics cop committed likely crime by lying in affidavit for deadly raid,”
Houston Chronicle (Feb. 15, 2019)18

Laurence A. Benner, *Racial Disparity in Narcotics Search Warrants*,
6 J. GENDER, RACE & JUSTICE 183 (2002)27

Boston Police Dep’t, “Confidential Informant Procedures,” Rule 333 (Mar. 1, 2006), *available at* https://cdn.muckrock.com/foia_files/2015/08/03/Rule333.pdf.....22

Ronald E. Brooks, Prepared Statement (July 19, 2007) *available at* <https://www.govinfo.gov/content/pkg/CHRG-110hhr36784/html/CHRG110hhr36784.htm>18

Civil Rights Division of the Department of Justice, “Investigation of the Springfield, Massachusetts Police Department’s Narcotics Bureau” (July 8, 2020)26

Ellen A. Donnelly, “Opioids, Race, and Drug Enforcement: Exploring Local Relationships Between Neighborhood Context and Black–White Opioid-Related Possession Arrests,” *CRIM. J. POLICY REV.* I-26 (2020).....28

Erving Police Dep’t, Use of Confidential Informants,” Pol’y & Proc. No. 2.02 (Rev. July 1, 2014) *available at* https://www.erving-ma.gov/sites/g/files/vyhlf4401f/uploads/2.02_use_of_confidential_informants.pdf.....27

Massachusetts Sentencing Commission, Advisory Sentencing Guidelines (Nov. 2017).28

Melanie B. Fessinger et al., *Informants v. Innocents: Informant Testimony and its Contribution to Wrongful Convictions*, 48 *Capital Univ. L. Rev.* 149 (2020).....15

Dennis G. Fitzgerald, *Informants, Cooperating Witnesses, and Undercover Investigations: A Practical Guide to Law, Policy, and Procedure* (2d ed. 2015).....18, 19

Innocence Project, “Informing injustice: The disturbing use of jailhouse informants” <https://innocenceproject.org/informing-injustice/>.....14

Inspector Gen., Audit of DEA’s Management & Oversight of its Confidential Source Program, (Sept. 2016), *available at* <https://oig.justice.gov/reports/2016/a1633.pdf>.....23

Bruce A. Jacobs, *Contingent Ties: Undercover Drug Officers’ Use of Informants*, 48 *BRIT. J. SOC.* 35 (1997).....18

Michael D. Kane, “Family in botched police raid sues Worcester, State Police, citing emotional distress” MASSLIVE (Mar. 17, 2016), *available at* https://www.masslive.com/news/worcester/2016/03/family_in_botched_police_raid.html.....21

Brian Lieberman, “Ethical Issues in the Use of Confidential Informants for Narcotic Operations,” 74 *The Police Chief* (June 2007).....16, 23

Ian Leson, Note, *Toward Efficiency and Equity in Law Enforcement: “Rachel’s Law” and the Protection of Drug Informants*, 32 *B.C. J.L. & SOC. JUST.* 391 (2012)13

Maggie Mulvihill, “Three Cops at Botched Raid Were Sued in Prior Gaffe,” *Boston Herald* (Apr. 1, 1994).20

Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 *HARV. L. REV.* 2049 (2016).....29

Medford Police Dep’t, “Use of Paid Confidential Informants,” Policy No. 2.02 (Rev. Aug. 29, 2022) *available at* <https://town.medfield.net/DocumentCenter/View/6362/202-Informants>.....27

Jerome G. Miller, *Search and Destroy: African-American Males in the Criminal Justice System* (1992).....28-29

Robert Mills et al., “City of Lowell to settle confidential informant lawsuit for \$750G,” *THE SUN* (Oct. 18, 2017).....27

Shelley Murphy & Michael Naughton, “Drug-Busting State Trooper Charged with Aiding Dealer,” *Boston Globe* (May 17, 2007).....25

Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 *Univ. of Cincinnati L. Rev.* 645 (2004).....*passim*

Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 *Golden Gate U.L. Rev.* 107 (2006).....*passim*

Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice* 7 (2d ed. 2022).....16

Northampton Police Dep’t, “Policy: Informants,” AOM: O-422 *available at* <https://www.northamptonpd.com/administration/policies-and-procedures/167-o422-informants/file.html>.....22

Mary Nicol Bowman, *Full Disclosure: Cognitive Science, Informants, and Search Warrant Scrutiny*, 47 AKRON L. REV. 431 (2015).....13,28

Office of the Inspector General, “The Federal Bureau of Investigation’s Compliance with the Attorney General’s Investigative Guidelines,” (Sept. 2005).....23

M.R. Pogreba & E.D. Poolle, *Vice Isn’t Nice: A Look at the Effects of Working Undercover*, 21 J. CRIM. JUST. 383 (1993).....24

Michael L. Rich, *Coerced Informants and Thirteenth Amendment Limitations on the Police-Informant Relationship*, 50 Santa Clara L. Rev. 682 (2010).....16

Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 Am. Crim. L. Rev. 737 (2016)14

Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 STAN L. REV. 603 (2022).....23

Rubee Sandoval, Louie Garcia, Rexina Linan-Juarez, John Cape, “Planted drugs, secret deals, lies: How one bad informant ruined the lives of at least 4 San Antonians,” KSAT 12 (Jan. 31, 2022), *available at* <https://www.ksat.com/news/defenders/2022/01/31/planted-drugs-secret-deals-lies-how-one-bad-informant-ruined-the-lives-of-at-least-4-san-antonians>.....16

Amanda J. Schreiber, Note, *Dealing with the Devil: An Examination of the FBI’s Troubled Relationship with Its Confidential Informants*, 34 COLUM. J.L. & SOC. PROBS. 301 (2001).....23

Ivy Scott, “Drones, stingrays, hidden microphones: Law enforcement in Massachusetts is increasingly using surveillance technology,” BOSTON GLOBE (Feb. 18, 2023).....28

Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VANDERBILT L. REV. 143 (2019).....15

Eli Sherman, “Heroin, cocaine and opioids among drugs found in cop’s desk in Fall River,” WPRI.COM (Aug. 3, 2021) *available at* <https://www.wpri.com/news/heroin-cocaine-and-opioids-among-drugs-found-in-cops-desk-in-fall-river/>25

Somerville Police Dep’t, “Use of Confidential Informants,” Policy No. 203 (Eff. Dec. 24, 2021) *available at* https://www.somervillepd.com/images/Policies/203_CI.pdf22

Cheryl Staats et al., “State of the Science: Implicit Bias Review 2013,” KIRWAN INSTITUTE FOR THE STUDY OF RACE & ETHNICITY.....29

Philip Stinson et al., “A Study of Drug-Related Police Corruption Arrests,” BOWLING GREEN ST. UNIV. CRIMINAL JUSTICE FACULTY PUBLICATIONS (2013)...25

Andrew Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent- The Informants Example*, 37 Southwestern Univ. L. Rev. 101 (2008).....17

Hon. Stephen S. Trott, *The Use of a Criminal as a Witness: A Special Problem* (Oct. 2007) *available at* https://www.aclu.org/sites/default/files/field_document/informant_trott_outline.pdf15

Rob Warden & Daniel Lennard, *Death in America under Color of Law: Our Long, Inglorious Experience with Capital Punishment*, 13 NW. J. L. & SOC. POL’Y 194 (2018)14

PREPARATION OF AMICI CURIAE BRIEF

Pursuant to Appellate Rule 17(c)(5), amici and their counsel declare that:

- (a) no party or party's counsel authored this brief in whole or in part;
- (b) no party or party's counsel contributed money to fund preparing or submitting the brief;
- (c) no person or entity other than the amici curiae contributed money that was intended to fund preparing or submitting a brief; and
- (d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

STATEMENT OF INTEREST

The **Massachusetts Association of Criminal Defense Lawyers**

(“MACDL”) is an incorporated association of more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

SUMMARY OF THE ARGUMENT

“The purpose of the [informer’s] privilege is the furtherance and protection of the *public interest* in *effective* law enforcement.” *Roviaro v. United States*, 353 U.S. 53, 59 (1957) (emphasis added). Courts generally assume that the use of confidential informants both protects the public and results in effective law enforcement. The question raised by those assumptions is, under what circumstances do countervailing considerations, including a defendant’s right to due process, outweigh society’s interest in protecting “the informant’s identity and concomitant information.” *Commonwealth v. Bonnett*, 472 Mass. 827, 847 (2015); *see also Commonwealth v. Barry*, 481 Mass. 388, 411 (2019) (characterizing the analysis as a “balancing test”). Substantial evidence now exists that challenges the assumptions that undergird the informer’s privilege. [Pg. 14-23]

The use of informants effectively lets those arrested for criminal activity “informally negotiate away liability in exchange for promised cooperation”—meaning that, as a practical matter, the law goes unenforced without any “judicial or public scrutiny as to the propriety, fairness, or utility of the deals being struck.”¹ And the information police officers receive in these clandestine exchanges often

¹ Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 UNIV. OF CINCINNATI L. REV. 645, 674 (2004).

proves unreliable anyway – just as often leading to a wrongful conviction or some other tragedy.

The caustic effects of the informant system are not limited to the legal system . . . Snitches increase crime and threaten social organization, inter-personal relationships, and socio-legal norms in their home communities [N]ot only do informants' past crimes go unpunished, but authorities routinely tolerate the commission of new crimes – both authorized and unauthorized – as part of the cost of maintaining an active informant.²

These downsides deserve equal consideration when a court conducts the balancing test first articulated in *Roviaro* and set forth in Mass. R. Evid. § 509. [Pg. 23-27]

In addition, when the scales tip in favor of withholding an informant's identity, that determination should not per se deprive a defendant of access to all information about the informant. The Commonwealth can protect the informant's identity (when appropriate) while still providing redacted versions of that material, consistent with this Court's recent jurisprudence recognizing the critical importance of pretrial discovery. *See, e.g., Matter of a Grand Jury Investigation*, 485 Mass. 641 (2020). Indeed, many if not most police departments now require detailed record-keeping about informants to ensure the integrity of investigations and avoid the sort of infamous police misconduct featured in cases like *Commonwealth v. Lewin*, 405 Mass. 566 (1989), such as inventing fictitious informants out of whole cloth. [Pg. 27-30]

² *Id.* at 645-47.

ARGUMENT

I. Assumptions that protecting details about confidential informants leads to effective law enforcement are based on false propositions.

The premise of the “informer’s privilege” is simple: personal safety concerns will prevent many people from furnishing information about criminal activity unless they can remain anonymous. *See Commonwealth v. Madigan*, 449 Mass. 702, 711 (2007). While cooperating with law enforcement can place some informants in grave danger,⁴ it is hardly the only risk that merits consideration. Courts should also consider the costs of secrecy, both for the individual defendant before them and for the public in general. In particular, courts should be mindful that reflexively shielding informants and the contents of their files from scrutiny too often paves the way for wrongful convictions, botched raids, unchecked crime, police corruption, and selective enforcement.

⁴ *See, e.g.*, Ian Leson, Note, *Toward Efficiency and Equity in Law Enforcement: “Rachel’s Law” and the Protection of Drug Informants*, 32 B.C. J.L. & SOC. JUST. 391 (2012) (discussing death of first-time informant during drug sting). It should be noted that the risk of retaliation differs from case to case. Consequently, courts should expect more from affiants than “the same boilerplate language about the reasons for keeping the informant’s identity confidential.” Mary Nicol Bowman, *Full Disclosure: Cognitive Science, Informants, and Search Warrant Scrutiny*, 47 AKRON L. REV. 431, 452 (2015).

A. Confidential informants are often untrustworthy and have contributed to wrongful convictions and other tragedies.

Criminal informants “must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom.” *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993). Indeed, by all accounts, informants are a major source of wrongful convictions. *See, e.g.*, Innocence Project, “Informing injustice: The disturbing use of jailhouse informants” (Mar. 6, 2019) (stating that false testimony from informants contributed to “nearly one in five of the 367 DNA-based exoneration cases.”), <https://innocenceproject.org/informing-injustice/> (last visited Feb. 18, 2023); Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 739 n.14 (2016) (collecting studies).⁵ Informants raise “serious questions of credibility”⁶ due to the “likelihood” that they “will provide

⁵ In fact, false testimony from an informant contributed to what is believed to be this country’s first documented wrongful conviction. *See* Rob Warden & Daniel Lennard, *Death in America under Color of Law: Our Long, Inglorious Experience with Capital Punishment*, 13 NW. J. L. & SOC. POL’Y 194, 208 (2018) (recounting how a forger named Silas Merrill was freed from a Vermont jail after telling the authorities that two brothers confessed to killing a man who later “turned up alive, having lived the previous seven years in New Jersey”).

⁶ *Banks v. Dretke*, 540 U.S. 668, 700 (2004) (quoting *On Lee v. United States*, 343 U.S. 747, 757 (1952)).

unreliable information in exchange for a personal incentive.”⁷ As one jurist put it, informants “are likely to say and do anything to get what they want, especially when what they want is to get out of trouble with the law.”⁸

Falsely accusing the innocent: Protecting the innocent from an informant’s misinformation requires a commitment to granting defendants access to information⁹ about their inherently unreliable accusers at the pretrial investigative phase¹⁰. “[C]riminal justice today is for the most part a system of pleas, not a system of trials.” *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). “When a criminal informant fingers an innocent person, the pressures of the criminal system may drive that person to plead guilty rather than face worse consequences.” NATAPOFF, SNITCHING, *supra* at 98. This is especially true for innocent defendants stuck in pretrial detention who perceive offers for time served, suspended, or probation sentences as the only path “to get out of jail so they can go home and care for their

⁷ Melanie B. Fessinger et al., *Informants v. Innocents: Informant Testimony and its Contribution to Wrongful Convictions*, 48 CAPITAL UNIV. L. REV. 149, 158 (2020) (citations omitted) [hereinafter “*Informants v. Innocents*”]

⁸ Hon. Stephen S. Trott, *The Use of a Criminal as a Witness: A Special Problem* 5 (Oct. 2007) [hereinafter “*A Special Problem*”], https://www.aclu.org/sites/default/files/field_document/informant_trott_outline.pdf (last visited Feb. 19, 2023).

⁹ *See, e.g.*, “An Act relative to the reliability of testifying informants,” Senate No. 832 (filed Jan. 14, 2019).

¹⁰ Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VANDERBILT L. REV. 143, 202 (2019).

children, keep their jobs, or avoid eviction.” *Id.* at 97. These tragic cases of falsely accusing the innocent almost always remain “invisible because the informant’s misinformation is never contested or revealed.” *Id.* at 98.

Motivation to manufacture evidence: While some informants are motivated by greed or personal vendettas, “[m]ore times than not,” informants cooperate “in an attempt to ‘work off’ their own criminal actions.” Brian Lieberman, “Ethical Issues in the Use of Confidential Informants for Narcotic Operations,” 74 *The Police Chief* (June 2007). Knowing that, investigators often recruit informants immediately after an arrest—when a “civilian’s uncertainty about her future is highest” and “the fear of criminal charges and a long prison sentence” supplies a “most powerful motivational tool.” Michael L. Rich, *Coerced Informants and Thirteenth Amendment Limitations on the Police-Informant Relationship*, 50 *Santa Clara L. Rev.* 682, 694 (2010). Because of their predicament, these informants frequently go to extraordinary lengths to uphold their end of these “off the books” plea bargains. Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice* 7 (2d ed. 2022) [hereinafter “Snitching”]. Those lengths may include planting or manufacturing evidence,¹⁵ an ever-present danger at the heart

¹⁵ See, e.g., Rubee Sandoval, Louie Garcia, Rexina Linan-Juarez, John Cape, “Planted drugs, secret deals, lies: How one bad informant ruined the lives of at least 4 San Antonians,” *KSAT 12* (Jan. 31, 2022), <https://www.ksat.com/>

of this Court’s “controlled buy” case law. *See Commonwealth v. Desper*, 419 Mass. 163, 168 (1994) (“The principal difficulty with this ‘controlled buy’ is that the affiant did not state that the informant was searched for drugs before the informant entered the building.”).¹⁶

Lying under oath in the courtroom: False information, first provided on the street, ends up in the courtroom. “Police and prosecutors . . . often do not and cannot check these lies because the snitch’s information may be all the government has.” Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U.L. Rev. 107, 108 (2006).¹⁷ As a result, the evidence presented at trial relies on a foundation of fabricated information. Due to a dependence on informants,¹⁸ many detectives overlook missteps on an

[news/defenders/2022/01/31/planted-drugs-secret-deals-lies-how-one-bad-informant-ruined-the-lives-of-at-least-4-san-antonians/](https://www.defenders.org/news/defenders/2022/01/31/planted-drugs-secret-deals-lies-how-one-bad-informant-ruined-the-lives-of-at-least-4-san-antonians/) (last visited Feb. 19, 2023).

¹⁶ *See also* Trott, *A Special Problem*, *supra* note 8 at 7 (citing instance where a search of the informants would have made it clear they “were bringing drugs to the deal”).

¹⁷ Unfortunately, “otherwise suspect informants’ tales are most likely to be believed by the police when the tales are consistent with culturally-reinforced racial biases.” Andrew Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent - The Informants Example*, 37 SOUTHWESTERN UNIV. L. REV. 101, 106 (2008).

¹⁸ As the President of the National Narcotic Officers’ Association Coalition once told Congress: “There has long been a saying in law enforcement. Good informant, good case. Bad informant, bad case. No informant, no case.” Prepared Statement of

informant’s track record and instead report – at least in search warrant affidavits – only instances when the informant’s information led to successful seizures of contraband or prosecutions.¹⁹ Similarly troubling are examples of fabricated or “phantom” informants.²⁰ Dennis G. Fitzgerald, *Informants, Cooperating Witnesses, and Undercover Investigations: A Practical Guide to Law, Policy, and Procedure* 163-65 (2d ed. 2015) [hereinafter “INFORMANTS”]. According to a former DEA special agent, “[t]he unfortunate truth is that some police officers . . . ‘invent’ their informants. Agents are able to obtain search warrants by attributing fictitious accounts of criminal activity in affidavits to a nonexistent reliable informant.” *Id.*

Ronald E. Brooks (July 19, 2007), *available at* <https://www.govinfo.gov/content/pkg/CHRG-110hrg36784/html/CHRG-110hrg36784.htm> (last visited Feb. 18, 2023); *see also* Bruce A. Jacobs, *Contingent Ties: Undercover Drug Officers’ Use of Informants*, 48 BRIT. J. SOC. 35, 35 (1997) (stating that “narcotics police cannot operate without [informants]”).

¹⁹ For example, in *Commonwealth v. Ramirez*, 416 Mass. 41 (1993), the affidavit stated that the confidential informant had “proven to be reliable in the past by furnishing information . . . which led to the arrest and conviction” of two named defendants. *Id.* at 43 n.3. Following the defendant’s conviction, his attorney was able to demonstrate that only “60% of the search warrants . . . obtained pursuant to information supplied by [the informant] had led to the seizure of contraband.” *Id.* at 46 n.11; *see also id.* at 46 (adopting the defendant’s characterization of this as a “suspiciously low number of contraband seizures”).

²⁰ *See*, St. John Barned-Smith, Keri Blakinger, James Pinkerton, “HPD Chief Acevedo says narcotics cop committed likely crime by lying in affidavit for deadly raid,” *Houston Chronicle* (Feb. 15, 2019) (internal investigation revealed officer “lied about using a confidential informant”) <https://www.chron.com/news/houston-texas/article/Houston-police-shooting-affidavit-confidential-13620120.php> (last visited Feb. 18, 2023).

at 163.²¹ As this Court has noted, “[l]ies about the existence of an undisclosed informant . . . are easy to tell yet most difficult to uncover.” *Lewin*, 402 Mass. at 589.

Contributing to wrong door raids: Unfortunately, the damage caused by false allegations from informants is not confined to the miscarriages of justice in the courtrooms. When an informant leads law enforcement to the wrong door, the consequences can be deadly for innocent people. This is what happened on the night of March 25, 1994, when “a team of police officers wearing helmets, fatigues and boots sledgehammered” through the front door of a Dorchester apartment while “brandishing shotguns and 9-millimeter Glock pistols.”²⁴ Upon doing so, the officers found not the target of the raid – a “drug gang armed with machine guns” – but “the Rev. Accelyne Williams, 75, who died of a heart attack shortly after he was handcuffed.”²⁶ An internal investigation revealed that the police relied on an

²¹ In addition to being easier to control than actual informants, “phantom informants” can enrich dishonest detectives. “To further the ruse, the detective can withdraw funds to pay his [non-existent] source for the controlled buys. The reward money is pocketed by the detective. The money withdrawn for the purchase of evidence is also pocketed.” FITZGERALD, INFORMANTS, *supra* at 164.

²⁴ “Police Mistakes Cited in Death of Boston Man,” N.Y. TIMES (May 16, 1994), *available at* <https://www.nytimes.com/1994/05/16/us/police-mistakes-cited-in-death-of-boston-man.html> (last visited Feb. 18, 2023).

²⁶ *Id.*

informant who “might have been ‘tipsy’ after drinking beer that night in March when he visited what he said was a den of drugs and weapons.”²⁷ “You’d be surprised at how easily this can happen,” an unnamed officer told the *Boston Herald*.²⁸

Unfortunately, wrong-door raids remain common,²⁹ and false information furnished by informants continue to be a leading cause. *See, e.g.*, Joey Oliver, “MSP sued by Flint family after they say troopers raided the wrong house” (May 17, 2022) (“[W]hat prompted the search warrant was, in part, false information provided by a confidential informant.”), <https://www.mlive.com/news/flint/2022/05/msp-sued-by-flint-family-after-it-says-troopers-raided-the-wrong-house.html> (last visited Feb. 18, 2023); Billy Binion, “Texas Cops Realized They Raided the Wrong House. They Kept Searching Anyway.” REASON (July 30, 2021) (citing “incorrect information from a confidential informant”), <https://reason.com/2021/07/30/qualified-immunity-police-drug-raid-texas-lucil-basco/> (last visited Feb. 18,

²⁷ *Id.*

²⁸ Maggie Mulvihill, “Three Cops at Botched Raid Were Sued in Prior Gaffe,” *Boston Herald* (Apr. 1, 1994).

²⁹ “It’s impossible to estimate just how many wrong-door raids occur. Police and prosecutors are notoriously inept at keeping track of their own mistakes, and victims of botched raids are often too terrified or fearful of retribution to come forward.” Radly Balko, “No SWAT,” SLATE (Apr. 6, 2006), <https://slate.com/news-and-politics/2006/04/no-swat.html> (last visited Feb. 18, 2023).

2023).³⁰ In 2016, for example, a confidential informant told investigators that he had recently been inside the Worcester apartment of an armed man wanted for weapons offenses. *See* Michael D. Kane, “Family in botched police raid sues Worcester, State Police, citing emotional distress” MASSLIVE (Mar. 17, 2016), https://www.masslive.com/news/worcester/2016/03/family_in_botched_police_raid.html (last visited Feb. 18, 2023). After leveraging that tip into a no-knock warrant, SWAT team members descended on the residence for a pre-dawn, military-style raid. *Id.* As it turned out, their target had relocated months ago; the

³⁰ *See also* “Chicago Police Raid Another Wrong Home; Suspect They Were Seeking Was 200 Miles Away,” CBS Chicago (July 18, 2019) (attributing a “a disturbing pattern” of wrong door raids to the failure of police “to verify information provided to them by confidential informants”), <https://www.cbsnews.com/chicago/news/chicago-police-raid-wrong-homes/> (last visited Feb. 18, 2023); “Family Says Police Raid Was Wrong and Vile,” COURTHOUSE NEWS SERVICE (July 18, 2012) (bad tip from confidential informant resulted in drug task force officers handcuffing children “[a]fter breaking down doors and shooting the family dog”), <https://www.courthousenews.com/family-says-police-raid-was-wrong-and-vile/> (last visited Feb. 18, 2023); Radley Balko & Joel Berger, “Wrong Door” (Sept. 2, 2006) (“In 2003, acting on a bad tip from an informant, police mistakenly raided the Harlem home of Alberta Spruill, a 57-year-old city worker. The violence of the incursion literally scared Spruill to death [I]n 2004, police mistakenly raided the home of Martin and Leona Goldberg, a Brooklyn couple in their 80s, when an informant provided bad information.”), <https://www.cato.org/commentary/wrong-door#> (last visited Feb. 18, 2023); Associated Press, “Man killed in raid on wrong house” DESERT NEWS (Oct. 7, 2000) (“Police admitted their mistake, saying faulty information from a drug informant contributed to the death of John Adams Wednesday night.”), <https://www.deseret.com/2000/10/7/19532683/man-killed-in-raid-on-wrong-house> (last visited Feb. 18, 2023)

current tenant was a petrified woman “sleeping in her bed with her two daughters.”

Id.

Given that confidential informants are often untrustworthy, due to the perverse incentives of the paradigm, and have contributed to numerous injustices in courtrooms and tragedies in communities, judicial orders in criminal cases compelling the production of materials about an informant’s performance would have consequential results. First, it would safeguard all defendants’ rights, especially in the investigative, pretrial phase, when incentives to accept a plea often outweigh the stamina to fight, even for those who are innocent. Second, it would have the potential to encourage more officers to follow department protocols requiring them to memorialize when an informant “[k]nowingly provides false information” or inspires a “reason to believe that an informant may no longer be suitable for use.” Boston Police Dep’t, “Confidential Informant Procedures,” Rule 333 (Mar. 1, 2006), *available at* https://cdn.muckrock.com/foia_files/2015/08/03/Rule333.pdf (last visited Feb. 18, 2023); *see also* Somerville Police Dep’t, “Use of Confidential Informants,” Policy No. 203 (Eff. Dec. 24, 2021) (requiring officers to complete form summarizing information received by informants and “any corroboration” of it), https://www.somervillepd.com/images/Policies/203_CI.pdf (last visited Feb. 18, 2023); Northampton Police Dep’t, “Policy: Informants,” AOM: O-422, <https://www.northamptonpd.com>

/administration/policies-and-procedures/167-o422-informants/file.html (mandating periodic “evaluation” of each “confidential informant’s work performance, usefulness, and reliability”).³⁶ Court orders meant to increase compliance with investigative guidelines would also result in a corresponding decrease in groundless, court-authorized home invasions – “activity that, if done by anyone else, would be a serious felony.” Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 STAN L. REV. 603, 610 (2022).

B. Reliance on criminal informants undermines the ostensible goals of the legal system: to enforce laws, ensure public safety, and deliver justice to those who have committed crimes.

Few informants are merely witnesses of crime. Indeed, law enforcement officials expect that many will “persist in . . . criminal activity,” Amanda J.

³⁶ While every law enforcement agency that utilizes informants should have written protocols pertaining to their use, *see* Brian Lieberman, “Ethical Issues in the Use of Confidential Informants for Narcotic Operations,” 74 *The Police Chief* (June 2007), a department’s policies are not always an accurate reflection of its practices. For example, a 2005 Inspector General report found the FBI failed to adhere to its own informant guidelines in 87 percent of the cases it examined. *See* Office of the Inspector General, “The Federal Bureau of Investigation’s Compliance with the Attorney General’s Investigative Guidelines,” ch. 3 (Sept. 2005) (redacted), <https://oig.justice.gov/sites/default/files/legacy/special/0509/final.pdf> (last visited Feb. 19, 2023). A more recent DEA audit revealed improper payments of millions of dollars to informants who had previously been deactivated due to serious misconduct. *See* Inspector Gen., *Audit of DEA’s Management & Oversight of its Confidential Source Program*, i (Sept. 2016), <https://oig.justice.gov/reports/2016/a1633.pdf> (last visited Feb. 19, 2023).

Schreiber, Note, *Dealing with the Devil: An Examination of the FBI's Troubled Relationship with Its Confidential Informants*, 34 COLUM. J.L. & SOC. PROBS. 301, 321 (2001). Once they realize their “protected status,” many “take advantage” of it “by pursuing more criminal opportunities.” M.R. Pogreba & E.D. Poolle, *Vice Isn't Nice: A Look at the Effects of Working Undercover*, 21 J. CRIM. JUST. 383, 387 (1993).

“[L]etting known criminal actors walk away in exchange for information, and even facilitating their criminality to enhance their informational value, flips the law enforcement endeavor on its head.” Natapoff, *Snitching*, *supra* at 33. Putting aside the toll this takes on the legitimacy of our legal system, “unchecked criminality” by informants “poses a special threat to the communities in which this conduct takes place.” *Id.* at 127. And the victims of these informants’ crimes pay the price.³⁷ If the police turn a blind eye to these offenses in exchange for information about drug activity, it tells “those victims that their personal suffering

³⁷ See, e.g., “Profile of a Snitch: A Tragic Choice,” CHICAGO LAWYER (Oct. 1987) (detailing the violence perpetrated by a notorious government informant), <https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/documents/profile-of-a-snitch.pdf> (last visited Feb. 18, 2013).

or need for vindication is less significant than drug enforcement goals.” Natapoff, Snitching, *supra* at 41.³⁸

Sometimes, detectives do not simply give their informants a free pass to commit crimes but become active participants in their criminal activity themselves. *See, e.g.*, Shelley Murphy & Michael Naughton, “Drug-Busting State Trooper Charged with Aiding Dealer,” *Boston Globe* (May 17, 2007).⁴¹ As the author states, “drug markets tend to instigate many different forms of police misconduct and crime” by furnishing “opportunities for personal gain through payoffs, shakedowns, robberies, and opportunistic thefts.”⁴² Officers who partner with informants in these criminal enterprises have an obvious interest in concealing their own wrongdoing. As a result, the affidavits they file in court and the reports they provide to prosecutors seldom, if ever, admit their misdeeds. For example, the

³⁸ Compromises like this also call into question the commitment to “public safety principles that have been used for decades to justify intrusive policing and harsh punishment.” NATAPOFF, SNITCHING, *supra* at 137.

⁴¹ *See also* Eli Sherman, “Heroin, cocaine and opioids among drugs found in cop’s desk in Fall River,” WPRI.COM (Aug. 3, 2021) (noting how investigation began with report officer was “giving drugs to an informant”), <https://www.wpri.com/news/heroin-cocaine-and-opioids-among-drugs-found-in-cops-desk-in-fall-river/> (last visited Feb. 19, 2023).

⁴² Philip Stinson et al., “A Study of Drug-Related Police Corruption Arrests,” BOWLING GREEN ST. UNIV. CRIMINAL JUSTICE FACULTY PUBLICATIONS (2013), https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1009&context=crim_just_pub (last visited Feb. 19, 2023).

Civil Rights Division of the Department of Justice’s (DOJ) 2018 investigation of the Springfield Police Department’s (SPD) Narcotics Bureau found, among other things, that SPD narcotics detectives had a practice of submitting reports “with inaccurate or falsified information.” DOJ, “Investigation of the Springfield, Massachusetts Police Department’s Narcotics Bureau” 17 (July 8, 2020).⁴³ “In many instances,” investigators were “only able to identify untruthful reporting” because the officer made statements “inconsistent with other available evidence.” *Id.* at 17, 16.

While the law entrusts the government with virtually “unfettered discretion over the benefits that it can offer, including money, leniency for past crimes, and the freedom to commit new ones,” *id.* at 3, rarely is there any justification for shrouding these arrangements in secrecy. When the veracity of an informant is at issue and an affiant elects (as most do) not to disclose details about the informant’s criminal history, defendants deserve the opportunity to discover that history for themselves so that have a fair chance to challenge the informant’s veracity. Most police departments with informant protocols in fact require police officers to “[m]aintain detailed records” of (though not necessarily interfere with) “[u]nauthorized criminal activity.” Medford Police Dep’t, “Use of Paid

⁴³ A copy of this report is available at: <https://www.justice.gov/media/1079436/dl?inline> (last visited Feb. 20, 2023).

Confidential Informants,” Policy No. 2.02 (Rev. Aug. 29, 2022).⁴⁴ If a department has no written directives regulating its use of informants, or its officers chose to ignore them,⁴⁵ that alone may raise questions about the professionalism or integrity of the investigation. Either way, disclosure of an informant’s criminal history sheds important light on law enforcement choices, which are often made with “few external controls and little judicial oversight or legislative or public scrutiny.” NATAPOFF, SNITCHING, *supra* at 71.

C. Police reliance on informants reinforces systemic racism in policing.

When it comes to the investigation of drug and firearm offenses, there is a “vast pool of potential targets.” Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 UNIV. OF CINCINNATI L. REV. 645, 674 (2004). “[E]very racial group has drug users and sellers among them.” Laurence A. Benner, *Racial Disparity in Narcotics Search Warrants*, 6 J. GENDER, RACE &

⁴⁴ A copy of this policy is available at: <https://town.medfield.net/DocumentCenter/View/6362/202-Informants> (last visited Feb. 18, 2023); *see also* Erving Police Dep’t, Use of Confidential Informants,” Pol’y & Proc. No. 2.02 (Rev. July 1, 2014) (same), https://www.erving-ma.gov/sites/g/files/vyhlf4401/f/uploads/2.02_use_of_confidential_informants.pdf (last visited Feb. 18, 2023).

⁴⁵ Robert Mills et al., “City of Lowell to settle confidential informant lawsuit for \$750G,” THE SUN (Oct. 18, 2017) (noting how an experienced detective claimed to be unaware of a department policy requiring him to vet an informant repeatedly deemed “unreliable”), <https://www.lowellsun.com/2017/10/18/city-of-lowell-to-settle-confidential-informant-lawsuit-for-750g/> (last visited Feb. 19, 2023).

JUSTICE 183, 201 (2002). Yet, as is well documented, investigators do not target all groups equally. “Discrimination and prejudice fuel the surveillance, arrest, and sanctioning of people of color beyond any potential underlying differences in criminal involvement.” Ellen A. Donnelly, “Opioids, Race, and Drug Enforcement: Exploring Local Relationships Between Neighborhood Context and Black–White Opioid-Related Possession Arrests,” CRIM. J. POLICY REV. I-26 (2020). This “deep police penetration into minority and/or poor neighborhoods”⁴⁸ takes many forms⁴⁹ and “leads to a ‘ratchet effect,’ where police devote even more resources to the group that seems to be offending at higher rates, and thereby discover even more crime, creating a self-fulfilling prophecy with racial effects even without racial animus.” Mary Nicol Bowman, *Full Disclosure: Cognitive Science, Informants, and Search Warrant Scrutiny*, 47 AKRON L. REV. 431, 452 (2015).⁵⁰

⁴⁸ Massachusetts Sentencing Commission, Advisory Sentencing Guidelines, pg. 39 (Nov. 2017).

⁴⁹ For example, it appears that the Boston police currently monitor civilian activity with “nearly “1,000 pole-mounted cameras.” Ivy Scott, “Drones, stingrays, hidden microphones: Law enforcement in Massachusetts is increasingly using surveillance technology,” BOSTON GLOBE (Feb. 18, 2023). These cameras “are not distributed evenly around town.” *Id.* “Roxbury, Dorchester, and the South End — neighborhoods largely made up of residents of color — each have more than 100 cameras,” while “West Roxbury . . . has just one.” *Id.*

⁵⁰ One of the hallmarks of “systemic racism” is the production of “racially disparate outcomes, regardless of the intentions of the people who work within [the system].” *Commonwealth v. Long*, 485 Mass. 711, 740 (2020) (citation omitted)

The use of informants tends to reinforce these disparities. Because “snitches can only snitch on people they know,” investigators end up devoting their “resources in the snitch’s community whether or not the situation there independently warrants it.” Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 UNIV. OF CINCINNATI L. REV. 645, 673 (2004). This ultimately results in what Professor Andrew Crespo found in the District of Columbia where the execution of search warrants “almost perfectly track the city’s sharply segregated racial demographics, with almost no search warrant executions in [its] predominantly white areas.” Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2082 (2016).

Three decades ago, a prominent criminologist explained how inundating socially disadvantaged neighborhoods with informants actually breeds violence. “Relying on informers threatens and eventually cripples much more than criminal enterprise. It erodes whatever social bonds exist in families, in the community, or on the streets – loyalties which, in past years, kept violence within bounds.”

(Budd, J., concurring) (recognizing that “our criminal justice system is rife with it”). “Unconscious or implicit bias is a discriminatory belief or association likely unknown to its holder.” *Commonwealth v. Buckley*, 478 Mass. 861, 878 n.4 (2018) (citation omitted) (Budd, J., concurring); *Commonwealth v. McCowen*, 458 Mass. 461, 499 (2010) (Ireland, J., concurring) (noting “people possess [implicit racial biases] over which they have little or no conscious, intentional control” (citation omitted)). “Like all other populations, police officers are not immune to implicit bias.” Cheryl Staats et al., “State of the Science: Implicit Bias Review 2013,” pg. 36, KIRWAN INSTITUTE FOR THE STUDY OF RACE & ETHNICITY.

Jerome G. Miller, *Search and Destroy: African-American Males in the Criminal Justice System* 102 (1992). As Professor Natapoff more recently pointed out:

For most U.S. communities and institutions, snitching is not a quality-of-life issue. There are not enough informants to impact the everyday experiences of residents, and those informants who exist remain largely invisible. Not so for our poorest neighbors of color already grappling with high rates of criminal system involvement and victimization. In these concentrated areas, there are likely to be many informants, enough so that residents live with the knowledge of their presence and threats of informant-related crime and violence. Although these communities may be limited in number they constitute the most troubling aspects of the penal system, both because they are home to so many people enmeshed in the criminal process and because they pay the highest price when our justice policies go awry. An official practice that threatens them with special harms thus deserves our closest scrutiny.

NATAPOFF, SNITCHING, *supra* at 138-39.

When officers consistently use their discretion to target racial and ethnic minorities, those they arrest deserve access to information about the police department's informant program so that they can vindicate their rights to equal protection. The disclosure of such information also serves the interests of communities shaped by the policy of "seeding the streets with informers" whose presence "poses dangers for street criminals and law-abiding residents alike."

NATAPOFF, SNITCHING, *supra* at 129, 130 (citations omitted).

CONCLUSION

More than six decades have now passed since the Supreme Court equated the “public interest” with “protecting the flow of information” furnished by confidential informants. *Roviaro*, 353 U.S. at 62. By broadly shielding informants from scrutiny, courts have unwittingly paved the way for wrongful convictions, botched raids, unchecked crime, and police corruption while limiting defendants’ rights to due process. The use of informants in racially-segregated neighborhoods has skyrocketed, and the costs have become apparent. In accordance with enhanced access to discovery in criminal cases, this Court should allow opportunities to meaningfully challenge informant’s reliability, which would safeguard the integrity of the investigative process through transparency and accountability.

Respectfully submitted,

/s/ Luke Ryan

Luke Ryan

BBO 664999

Sasson, Turnbull, Ryan & Hoose

100 Main Street, 3rd Floor

Northampton, MA 01060

(413) 586-4800

lryan@strhlaw.com

/s/ Molly Ryan Strehorn

Molly Ryan Strehorn,
BBO 675595
Sasson, Turnbull, Ryan & Hoose
100 Main Street, 3rd Floor
Northampton, MA 01060
(413) 586-4800
mrstrehorn@strhlaw.com

/s/ Joshua M. Daniels

Joshua M. Daniels
BBO 673034
Massachusetts Association of Criminal Defense Lawyers
P.O. Box 300765
Boston, MA 02130
(617) 942-2190
jdaniels@danielsappeals.com

February 23, 2023

CERTIFICATION OF COMPLIANCE

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure Rules 16(a)(13) (addendum), 16(e) (references to the record), Rule 20, and Rule 21, that pertain to the filing of briefs. Exclusive of the exempted portions of the brief, as provided in Mass. R. App. P. 20(a)(2)(D), the brief contains 4878 words. The brief has been prepared in proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman font. The undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

February 23, 2023

/s/ Molly Ryan Strehorn

CERTIFICATE OF SERVICE

Pursuant to Massachusetts Appellate Rule of Procedure 13(2), I certify that on February 23, 2023, I made service of this brief upon the attorneys of record for each party via the Electronic Filing System and first-class mail.

February 23, 2023

/s/ Molly Ryan Strehorn