STATE OF SOUTH CAROLINA
COUNTY OF LAURENS

IN THE COURT OF GENERAL SESSIONS

STATE of SOUTH CAROLINA,

-*v*-

DAVID FULLER, JR., JAMES ANTHONY WILSON, SHIRLEY GREENE PACE, AND THOMAS CANNON
Defendants.

ORDER REGARDING DISCOVERY

Addy, J.

THIS MATTER CAME BEFORE THE COURT on March 6, 2015 on motion of David Fuller, Jr., James Anthony Wilson, Shirley Greene Pace, and Thomas Cannon, by and through their counsel, Chip Howe, Esq. The State was represented by Deputy Solicitor Dale Scott. Defendants are collectively charged with distribution of narcotics which involve a confidential informant [hereinafter "CI"] and videotapes of the transactions giving rise to the Defendants' charges. Defendants seek disclosure of the identity of the CI, the CI's criminal history, and the nature of any charges which the CI is resolving in return for the CI's cooperation and assistance in making buys from Defendants. Having reviewed the applicable law and considered argument of counsel, the court finds that the above information is subject to disclosure for the following reasons, and the Court memorializes it oral order from the March 6, 2015 hearing through this formal order:

1. There appears to be no dispute that the CI(s) involved in the above cases actively participated in the transactions. Therefore, the court is not asked to decide whether the informant in these cases was a "mere tipster."[1] Clearly, the Defendants are entitled to learn the identity of the CI; the sole question is the timing of the disclosure – through regular discovery, at some

[1] State v. Burney, 294 S.C. 61, 362 S.E.2d 635 (1987) (*disclosure of informant is not required where the informant was a tipster who supplied a lead to law enforcement or merely possessed peripheral knowledge of the crime*).

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point on the eve of trial, or at trial. The court notes that three of these cases arose in 2010, and Mr. Wilson's case arose in 2011. To date, the CI's identity on all cases remains undisclosed.

2. The court is fully aware of the difficulties inherent in narcotics cases such as these. By their very nature, illicit drug transactions are clandestine enterprises wherein dealers profit only by evading detection. Penetrating this world and making cases against such individuals often requires similar stealth and deception on the part of law enforcement; certainly, use of a CI in making cases remains a proven and effective law enforcement technique. The court also understands that CIs face certain retribution risks should their involvement be discovered by the dealers against whom the CI makes cases.

3. By electing to use CIs, however, the State invites and undertakes certain risks unique to the cases made by such informants. This court is aware that many individuals routinely agree to act as informants in order to "work off" charges which are pending against them. Such informal, but nonetheless existent, understandings are ripe areas for cross examination by the defense. Similarly, where the CI is an active participant in the narcotics transaction, their identity cannot be indefinitely concealed from the defendants against whom cases are made.[2]

4. The law is clear on several points. First, the identity of a CI who actively participates in a drug transaction resulting in criminal prosecution must be revealed to the Defendant.[3] By definition, one who acts at the behest or on the behalf of law enforcement becomes an agent for the State, and that agency relationship is subject to disclosure the same way as an investigating officer's identity is subject to disclosure. Second, Rule 5 explicitly requires disclosure by the State. Third, the Chief Justice has issued an administrative order requiring such Rule 5 disclosure to be made at the Initial Appearance date. The same order requires that law enforcement provide this information to the Solicitor within twenty-one (21) days of the arrest of the defendant. Accordingly, as explained in greater detail in the following paragraphs, the Court finds disclosure is required in the above cases:[4]

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[2] *See* fn.6.

[3] State v. Shupper, 263 S.C. 53, 207 S.E.2d 799 (1974).

[4] This order is limited to the four (4) cases captioned above and should not be interpreted as a blanket order or general finding with regard to any other pending or future case. All cases are different, and although this judge would likely rule in a similar manner if similar facts were presented, special circumstances may exist in other cases warranting a delay in disclosure or perhaps entry of a protective order. The court also notes that these finding are in accord with previous rulings made by Judges Griffith and King.

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(a) First, as explained in paragraph 4, *supra*, the law and the Chief Justice's Case Management Order clearly requires disclosure in cases such as this.

(b) Second, as conceded by the State, the Defendant is entitled to know the identity of the confidential informant prior to trial. Because the current case management order contemplates a plea offer being made to the Defendant early in the prosecution of the case, delaying disclosure until some period shortly before trial prevents the Defendant from evaluating the evidence against him and only encourages delay in resolving cases. Absent the ability to evaluate the evidence, there is no way a defendant can make a knowing or intelligent decision on whether to accept a plea offer or proceed to trial. Were a defendant to plead without such information, such a plea may constitute an unknowing, involuntary, uninformed decision and may be subject to reversal on direct appeal or potential collateral attack via post-conviction relief.

(c) Third, under the South Carolina Supreme Court's decision in *Langford*[5], the court found Section 1-7-330 of the South Carolina Code of Laws unconstitutional and held that the Circuit Courts ultimately control the criminal docket. Although the Supreme Court has yet to provide any guidance on how *Langford* is to be implemented, the courts must now exercise greater control over the criminal docket and be more concerned with timely disposition of cases than courts were during the pre-*Langford* period. Indeed, in the above cases, the failure to disclose the CI's identity has resulted in these cases being delayed for approximately four (4) to five (5) years. Such delay works against the interests of all concerned. The State is harmed in that, assuming the allegations are true, a drug dealer has remained in the community for an extended period of time escaping punishment for serious crimes. The defendant is harmed in that he or she remains under the cloud cast by the accusation without the means to verify or even challenge the allegations against them. Accordingly, suggestions that such information be disclosed to a defendant on the eve of trial only creates unnecessary delay, requires the defendant to remain ignorant of the evidence against him, and engenders illogical structural inefficiencies in that a narcotics case has to be set for trial *before* discovery can be completed. Because the courts are now responsible for the dockets and any accompanying backlog, the courts must become more concerned with timely disposition of criminal matters. In fact, this judge has lamented that the Eighth Circuit's timeliness in case disposition ranks third from the bottom

[5] *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012).

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when compared with the other circuits in our state. For cases to get resolved - by plea, trial or dismissal - meaningful discovery must be timely provided.

(d) That a defendant is entitled to be informed of the nature of the charges against him, to have the assistance of counsel, and to be apprised of the evidence against him remain cornerstones of our system of criminal justice, but these truths take on an even greater importance for someone who is detained pending trial. Admittedly, Defendants are not currently in pre-trial detention, so their liberty interest in obtaining discovery is not as substantial as a defendant who remains in pretrial detention. However, regardless of a defendant's custody status, to permit the State to delay the production of evidence, which the law clearly states a defendant is entitled to, has the potential to invite abuse of those fundamental rights listed above. The Court of General Sessions is not a Star Chamber, and our procedural rules are not taken from Franz Kafka's *The Trial*. At the very least, a defendant may be aware of biases or grudges harbored by a CI which would be fertile areas for cross examination. Maybe the CI is the defendant's ex-spouse. Maybe the defendant owes the CI substantial money. Maybe the defendant wronged the CI in some other respect. Therefore, only disclosing the CI's identity to the attorney is insufficient for trial preparation purposes and for purposes of a defendant evaluating the risk/benefit of proceeding to trial.

(e) In arguing against disclosure, the State cites the decision in Hyman v. State, 397 S.C. 35, 723 S.E.2d 375 (2011). At first glance, *Hyman* would seem to support the State's position that our Supreme Court, in dicta, applied a balancing test which weighed the State's interest in keeping the CI's identity secret against Hyman's rights to be apprised of the evidence against him.[6] However, *Hyman* is clearly distinguishable. First, *Hyman* is a PCR case in which the applicant claimed his plea was involuntarily because he never watched the buy video. The trial court concluded, and the Supreme Court agreed, that counsel was not ineffective because

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[6] Interestingly, the SC Supreme Court cites State v. Humphries, 354 S.C. 87, 579 S.E.2d 613 (2003) for this proposition. However, a review of *Humphries* indicates that the court's decision was controlled by the fact that the CI was merely a tipster and was not an active participant in the transaction. Curiously, nowhere in *Humphries* is there any discussion of this balancing test which *Hyman* attributes to *Humphries*. Additionally, given centuries of established precedent, this Court finds it curious that a court could ever hold that disclosure of an admitted state agent's identity should be balanced against a citizen's exercise of fundamental constitutional rights. State v. Shupper, 263 S.C. 53, 207 S.E.2d 799 1974) (*disclosure of the confidential informant's identity is required when essential for a fair determination of the State's case against the accused*); *see also* State v. Batson, 261 S.C. 128, 198 S.E.2d 517 (1973); State v. Burney, 294 S.C. 61, 362 S.E.2d 635 (1987); State v. Diamond, 280 S.C. 296, 312 S.E.2d 550 (1984); State v. Wright, 322 S.C. 484, 472 S.E.2d 642 (Ct. App. 1986).

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Hyman stated he was fine with only his counsel seeing the videos. *Id.* 387 S.C at 40, 723 S.E.2d at 377. Secondly, the trial court expressed the same concerns regarding withholding of evidence in *Hyman* that are being expressed in this order.[7] Third, the Supreme Court found that there was no Rule 5 violation in *Hyman* because "the identity of the informant had been disclosed to the defense by the time [Hyman] pled guilty, removing any impediment to [Hyman's] access to the videotape in time for trial." *Id.* 387 S.C. at 47, 723 S.E.2d at 381. Fourth, the central complaint in *Hyman* was not so much that his counsel was ineffective; Hyman's complaint was that he had rejected earlier offers which, in hindsight, he later wished he had accepted. That a criminal defendant is not entitled to any offer is axiomatic; that is, the State is under no obligation to make any kind of plea offer to any defendant.[8] Therefore, that Hyman rejected earlier offers and elected to proceed to trial and received a more substantial sentence is central to the issues addressed in *Hyman*. For these reasons, *Hyman* does not apply.

(f) Finally, the court is aware that lawyers will frequently get charges against their clients dismissed in return for that same client acting as a CI. In the present case, Mr. Howe is the public defender for Laurens County. Having been appointed to represent the above Defendants, Mr. Howe, or another lawyer with the Public Defender's office, may have represented the CI involved in some or all of these Defendants' cases. In short, Mr. Howe may have a conflict in representing these Defendants, a conflict about which he has no way of knowing. The court is aware of numerous other cases where disclosure of the CI's identity immediately prior to trial resulted in a conflict becoming apparent, thereby necessitating appointment of new counsel and further delay of trial. As explained in paragraph (c), the court is responsible for the efficient use of limited judicial resources. An eleventh-hour continuance for an easily avoidable reason only squanders valuable court time. Additionally, it causes defense counsel to commit time and effort preparing a case which counsel ultimately has to abandon because of ethical requirements.

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[7] "The PCR judge stated he was concerned over the seemingly widespread policy of withholding evidence from criminal defendants to allegedly protect the identity of confidential informants, which [PCR Judge Nettles] described as effectively 'impairing a defendant's ability to make an intelligent choice regarding his jury trial rights.'" *Id.* 387 S.C. at 41, 723 S.E.2d at 387.

[8] Although this is a correct statement of the law, this Court is not naïve. Failure to negotiate cases, make offers or recommendations, or attempt to achieve some common ground would result in the entire criminal justice system grinding to an abrupt and catastrophic halt. The vast majority of cases are resolved by pleas or dismissals, and our State simply lacks the time and resources necessary to try every case which is brought.

5. Although the Court shares the State's legitimate concern that disclosure could pose physical risk to the CI or affect ongoing operations involving the same CI, these concerns do not change the requirements of the law. There are ways in which the State or law enforcement could minimize the risk of disclosure to ongoing operations. The most obvious way would be to avoid serving any warrant until the informant has made a number of cases against several defendants. Additionally, law enforcement could use undercover police or other individuals from outside the area, thereby minimizing post-arrest contact with the informant and the defendants against whom cases are made. Although these methods would have obvious disadvantages, they are ways to maintain ongoing operations. In other instances, the court has been informed that law enforcement purportedly represented to CI's who made buys that the CIs would merely have to make the buy and would not need to be concerned with their identity becoming known. At best, these representations are incorrect and should be discouraged, and law enforcement should be brutally candid with CIs about the risks and obligations they undertake by becoming informants.[9]

6. The court also notes that Mr. Howe is merely seeking information concerning identity, criminal history, and any agreements or deals relating to any underlying charges which the CI may be working off. Mr. Howe is not seeking the CI's address, personal identifying information, or any contact information. Therefore, the court finds that Defendants' request is narrowly tailored to address the legal requirements and practical concerns as outlined in the preceding paragraphs.

7. Finally, by this order, the court does not necessarily intend to discourage or otherwise condemn the practice of making offers conditioned upon the CI's identity remaining undisclosed. The court can envision situations where the offer extended is extremely beneficial, the defendant is convinced of his guilt, and counsel is comfortable proceeding even though counsel and the defendant may remain ignorant of the CI's identity. In such situations, the parties remain free to agree to a resolution which meets their common objectives subject to judicial approval via plea colloquy. However, in instances such as the present cases where negotiations have proven futile, the Court must enforce the law and require disclosure.

[9] This judge began his legal career as a narcotics prosecutor for the Solicitor's office, and I recall law enforcement taking the position that they would rather dismiss a case than burn a CI to whom they had promised confidentiality.

WHEREFORE, it is ordered that the identity of the CI in the above cases shall be disclosed as soon as practicable. The CI's criminal history and any understandings, agreements, or arrangements concerning any benefit conferred on the CI in return for the CI's participation in the buys must also be disclosed.

IT IS SO ORDERED.

Frank R. Addy, Jr.
Resident Judge
Eighth Judicial Circuit

March 17, 2015
Greenwood, South Carolina