STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT I
Appeal Case No. 2017AP2272—CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ROBERT BILLINGS,

Defendant-Respondent.

ON NOTICE OF APPEAL FROM ORDERS REQUIRING THE STATE TO DISCLOSE THE IDENTITY OF A CONFIDENTIAL INFORMANT AND DISMISSING THE CASE, ENTERED ON OCTOBER 16, 2017 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE HANNAH DUGAN, PRESIDING

RESPONSE BRIEF OF DEFENDANT-RESPONDENT

JORGE R. FRAGOSO
Assistant State Public Defender
State Bar No. 1089114

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
fragosoj@opd.wi.gov
Attorney for Defendant-Respondent

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ISSUES PRESENTED

1. Is a defendant entitled to disclosure of the identity of a confidential informer based on the defendant's preliminary showing that the informer's testimony is necessary for his defense when the court orders the state to disclose the identity of the informer and the state forfeits its opportunity to rebut the defendant's showing in camera?

The trial court properly granted the defendant's motion to disclose the informer's identity and properly dismissed the case after the state refused to disclose the informer's identity.

2. After the court ordered the state to disclose the identity of its informer and granted the state a continuance to decide how to respond, did the trial court properly deny the state's second request for a continuance?

The trial court did not err by denying the state's second adjournment request.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Billings welcomes oral argument if it would be helpful to this court. This case does not meet the statutory criteria for publication. *See* Wis Stat. §§ 809.23(1)(b)4 and 752.31(2)(f).

STATEMENT OF CASE AND FACTS

On June 29, 2016, police entered the home of Robert Billings and recovered 0.49 grams of cocaine, $294 cash, and several mangled plastic bags. (1:1). The cocaine was found somewhere in Mr. Billings' apartment but not on his person. He was arrested and charged with one count of simple possession of cocaine, contrary to Wis. Stat. § 961.41(3g)(c).

The police entry into Mr. Billings' home was supported by a no-knock search warrant signed by Commissioner Barry Phillips.[1] (2). The search warrant relied on the affidavit of Milwaukee Police Officer Paul Martinez; the affidavit, in turn, rested heavily upon the statements of a confidential informer, who is alleged to have purchased cocaine from Mr. Billings in the days leading to his arrest. (2:11).

Mr. Billings appeared initially on July 3, 2016 and was released on a $500 signature bond. (22:4). On April 7, 2017, defense counsel moved the court to compel the disclosure of the identity of the confidential informer,[2] arguing that the informer was a transactional witness whose identification was required under Wis. Stat. § 905.10 and ***State v.***

---

[1] The search warrant was signed on June 28, 2016, executed on June 29, 2016, and returned on June 30, 2016 after collecting four items of evidentiary value. (2:2).

[2] Wisconsin Stat. § 905.10 refers to the person whose identity is protected as the "informer," but the affidavit refers to the person as the "informant." (2:4). In this brief, the terms are used interchangeably, but the word "informer" will be used whenever possible.

Outlaw, 108 Wis. 2d 112, 321 N.W.2d 145 (1982). (12:1).

A hearing was held on June 20, 2017, but no additional testimony or evidence was presented. (32). The court based its decision on the parties' arguments and the affidavit submitted with the search warrant application. (2).

The affidavit underlying the search warrant, which was reviewed and approved by Assistant District Attorney Patricia Daugherty, included the state's reasons for asserting the informer privilege. (2:7-8). It also included a statement vouching for the informer, who had "made more than ten successful controlled buys of controlled substances for law enforcement officers." (*Id.*). The affidavit claimed that the informer's usefulness would end if his/her identity were disclosed and that "disclosure of the informant's identity would result in physical harm to the informant." (*Id.*).

The affidavit concerned the purchase of cocaine from a subject named "Rob," a 45 year-old black male, approximately 6 feet tall with light complexion and short hair. (2:4). Rob is alleged to be Mr. Billings. According to Officer Martinez, the informer had been inside Rob's apartment within 72 hours of the controlled buy and claimed to have observed a firearm within the apartment. (2:5). The informer also claimed that Rob "continually keeps his firearm with him while inside the apartment." (2:10). No firearm was found during the thorough, no-knock search of Mr. Billings' apartment.

Defense counsel argued that the informer was a transactional witness to the offense. (32:9). The informer claimed to have taken part in a drug transaction with Mr. Billings in Mr. Billings' apartment within 72 hours of the execution of the search warrant.

> [T]he informant told affiant that informant gave "Rob" a sum of money while within 4819 W. Hampton Ave., and then "Rob" gave the informant the substance … that the informant gave "Rob" the money which the informant had received from affiant in exchange for the substance; that "Rob" had an additional quantity of suspected cocaine in his possession that he retained after selling the informant the cocaine.

(2:5).

Because the informer claimed that "he saw Mr. Billings have control or possession of cocaine" in Mr. Billings' apartment, defense counsel argued that the informer could give testimony relevant to the guilt or innocence of Mr. Billings and necessary to his defense. (32:12). The affiant, Officer Martinez, witnessed the informer walk into the building but did not enter the building himself, nor did he surveil or record the inside of Mr. Billings' apartment during the alleged drug transaction. (2:5). Defense counsel also argued that part of Mr. Billings' defense was potentially to challenge the search warrant and that the informer's testimony would be necessary to the defendant's challenge. (32:7-8).

On July 10, 2017, the trial court issued an oral ruling in favor of Mr. Billings. The court found that Mr. Billings had met his initial burden by

demonstrating that the identity of the informer was necessary to his defense:

> The defense has already established that it would be hampered without being provided with that confidential informant because of the nature of the question of where the cocaine was found and why they even had a basis, whether or not the person was present for transactional purposes, whether the ID was the same.
>
> There's all sorts of information that would require that informant Because this was an entry into the house, based on information provided to the informant and the seizure, as the defense points out, nothing was found on Mr. Billings at the time. It was in the location and that does change. If something had been found on him, there would not necessarily need to be this relation.

(33:4-5).

The court continued, "Now the burden shifts to the state to determine what it wants to do." (33:5). The court ordered the state to "identify the confidential informant," but did not order that the identity of the informant be disclosed to the defense. (33:5). The state did not request an in camera review hearing or otherwise avail itself of its opportunity to show facts relevant to determining whether the informer can supply the necessary testimony. (33:5). In response to the judge's ruling, the state requested a status hearing to "sit down and to look at the case and decide where we want to go." (33:6). The court granted this request and gave the state eleven days to decide how to proceed.

At the status hearing on July 21, 2017, the state refused to disclose the informant; it did not request an in camera review hearing, nor did it offer additional evidence supporting its assertion of the informer privilege. (34). Defense counsel moved to dismiss the case, and the court granted the motion. (34:6). The court signed an order dismissing the case on October 16, 2017. (18:1).

ARGUMENT

I. The trial court properly granted the defendant's motion to disclose the identity of the confidential informer.

A. Standard of review and legal principles.

This court reviews the circuit court's factual findings concerning an in camera review under a clearly erroneous standard. ***State v. Nellessen***, 2014 WI 84, ¶ 14, 360 Wis. 2d 493, 849 N.W.2d 654 (citing ***State v. Green***, 2002 WI 68, ¶ 20, 253 Wis.2d 356, 646 N.W.2d 298). Whether the defendant submitted a preliminary evidentiary showing sufficient for an in camera review implicates a defendant's constitutional right to a fair trial and raises a question of law that this court reviews de novo. ***Id***.

The informer privilege allows the state to withhold the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law. Wis. Stat. § 905.10(1). The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. ***Roviaro v. United***

States, 353 U.S. 53, 59 (1957). The privilege is limited by the fundamental requirements of fairness, so "the public interest in protecting the flow of information [must be balanced] against the individual's right to prepare his case." ***Id***. at 62.

The limitation articulated in ***Roviaro*** is codified in Wis. Stat. § 905.10(3)(b) as an exception to the informer privilege. Although Wis. Stat. § 905.10(3)(b) "is a Wisconsin rule grounded on Wisconsin precedent," it is "consistent with ***Roviaro***." ***State v. Vanmanivong***, 2003 WI 41, ¶ 20, 261 Wis. 2d 202, 661 N.W.2d 76 (*citing* ***State v. Outlaw***, 108 Wis.2d 112, 121, 321 N.W.2d 145 (1982)). This exception allows the defendant to challenge the informer privilege and provides the state with an opportunity for an in camera review before disclosure of the informer's identity to the defendant:

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

Wis. Stat. § 905.10(3)(b).

The showing a defendant must make to trigger an in camera review is light—it need only be one of "a possibility that the informer could supply testimony necessary to a fair determination" of guilt or innocence. ***Outlaw***, 108 Wis. 2d 112, 126. In ***State v. Nellessen***, 2014 WI 84, 360 Wis. 2d 493, 849 N.W.2d 654, the Supreme Court reaffirmed this "light" standard, holding that a defendant seeking to disclose the identity of a confidential informer "need only show that there is a reasonable possibility that a confidential informer *may* have information necessary to his or her theory of defense." ***Nellessen***, 360 Wis. 2d 493, ¶ 25 (emphasis added). The court used the word "may" to indicate a measure of likelihood or possibility in acknowledgment of the fact that "the nature of a confidential informer makes it impossible to know the specific information that the informer will have." ***Id***., ¶ 24.

Once there is a finding that the informer's testimony is "reasonably necessary on the question of guilt or innocence, the balance is irretrievably tipped to the side of disclosure." ***State v. Norfleet***, 2002 WI App 140, ¶ 13, 254 Wis. 2d 569, 647 N.W.2d 341. At that point, "it behooves the state to either disclose the identity of the informer or avail itself of the opportunity to offer proof of what in actuality the informer can testify about." ***Outlaw***, 108 Wis. 2d at 126. If the state foregoes this opportunity, "the judge, on the basis of the preliminary showing, can order disclosure and, in the absence of disclosure of the informer's identity, dismiss the case." ***Id***.

If the state avails itself of the "opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony," then the court must determine whether the informer's testimony is necessary to an asserted defense. If the in camera mechanism reveals that the informer's testimony *is* necessary, then "the privilege is at an end." ***Norfleet***, 254 Wis. 2d 569, ¶ 13. If not, then the informer's testimony and identity remain protected.

In this context, the word "necessary" means that "the evidence must support an asserted defense to the degree that the evidence could create reasonable doubt." ***State v. Vanmanivong***, 2003 WI 41, ¶ 23, 261 Wis. 2d 202, 661 N.W.2d 76. The "necessary … to an asserted defense" formulation implements an appropriate balance of the state's interests in protecting the identity of its informers on the one hand and the fundamental fairness of the defendant's trial on the other:

> ***Roviaro*** required a balancing test, looking at the defendant's right to present a defense and the government's right to protect its informants. ***Roviaro*** explicitly refused to give a specific rule, finding that the balance must be done on a case-by-case basis. The Court in ***Roviaro*** found that to determine whether a defendant's right to present a defense requires disclosure depends upon a balance of the circumstances of the case, including "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." We find that the ***Outlaw*** definition requiring the information to be "necessary" to the defense implements an appropriate balance.

State v. Vanmanivong, 261 Wis. 2d 202, ¶ 27 (*citing* ***Roviaro***, 353 U.S. at 60-62) (internal citations omitted).

B. Mr. Billings met his initial burden of showing that the informer was necessary for his defense.

Thus, in order to trigger an in camera review, a defendant "need only show that there is a reasonable possibility that a confidential informer may have information necessary to his or her theory of defense." ***Nellessen***, 360 Wis. 2d 493, ¶ 25. In claiming an exception to the informer privilege under Wis. Stat. § 905.10(3), defense counsel argued that because the cocaine was found in Mr. Billings' apartment rather than on his person, the informer's testimony regarding Mr. Billings' control over and awareness of the cocaine during the controlled buy would make his possession on the date of the offense more or less likely.[3] (32:16-17). Under this theory, the informer may know of other people who may have been present during the original transaction who may be alternate sources of the cocaine. The informer claims to have seen a quantity of cocaine in Mr. Billings' apartment, but the affidavit does not say where the cocaine was or how much cocaine he saw. All of this information could make Mr. Billings' defense of lack of knowledge or possession of the cocaine more likely.

[3] Counsel also argued that the identity of the informer would allow him to determine whether to challenge the search warrant. (32:18). This argument was not well developed by defense counsel, and the court did not rely on this argument in its decision.

After balancing the state's interest in "withhold[ing] the identity of an informant … against the public interest in protecting the flow of information," the trial court found that the defendant "would be hampered without being provided with that confidential informant." (33:4). Although the trial court did not articulate the specific legal standard, it clearly weighed the competing interests and determined that the informer's testimony would be necessary to the defendant's asserted defense. *See* ***State v. Echols***, 175 Wis. 2d 653, 673, 499 N.W.2d 631 (1993) ("When a trial court does not expressly make a finding necessary to support its legal conclusion, an appellate court can assume that the trial court made the finding in the way that supports its decision.").

Mr. Billings' theory of defense was that he lacked knowledge of the cocaine and did not exercise control over it, and the informer's testimony is probative of both his knowledge of and control over the cocaine:

> The confidential informant would be able to testify that there was this cocaine also present within the residence. Because that cocaine was not found on his person, the totality of the circumstances surrounding the cocaine makes it, I guess, either more likely or less likely that Mr. Billings exercised possession of it on three days later or two days later.
>
> The material nature or the transactional nature is that the confidential informant states he saw him in possession or control of it. And then three days later there's some found in the apartment, again, not on Mr. Billings. So the confidential

> informant has testimony potentially that he saw him in possession.

(32:17-18).

The trial court found the informer's testimony was particularly relevant because of "the nature of the question of where the cocaine was found," i.e., not on Mr. Billings' person. (33:4). The court highlighted the fact that "nothing was found on Mr. Billings at the time" the search warrant was executed and implied that "[i]f something had been found on [Mr. Billings]," the court may have reached a different decision. (*Id.*). The trial court also found the informer's testimony would be relevant to the underlying search warrant and to Mr. Billings' identification. (33:4-5). Thus, the court found that "the defense had established distinguishing features" that made this informer a transactional witness and that rendered disclosure necessary. (33:5).

The trial court's reasoning bears a resemblance to the Supreme Court's rationale in ordering the disclosure of the informer in ***Roviaro***. In the following excerpt, the Court referenced several potential defenses, including the defense of lack of knowledge—the same defense Mr. Billings asserted here:

> Unless petitioner waived his constitutional right not to take the stand in his own defense, John Doe was his one material witness. Petitioner's opportunity to cross-examine Police Officer Bryson and Federal Narcotics Agent Durham was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction. Doe had helped

> to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or on the identity of the package. *He was the only witness who might have testified to petitioner's possible lack of knowledge of the contents of the package that he 'transported' from the tree to John Doe's car*. The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide.

Roviaro, 353 U.S. at 64 (emphasis added).

As in ***Roviaro***, here the trial court weighed the competing interests and determined that the testimony of the informer was necessary to Mr. Billings' asserted defense—although admittedly, the court used the phrase "hampered without" rather than the phrase "necessary to." Based upon the asserted defense and the informer's relationship to that defense, this court should find that the defense met its initial burden.

C. The state forfeited its opportunity for an in camera review under Wis. Stat. § 905.10.

Once the defendant has met his initial burden, the state can avail itself of the opportunity to offer proof that the informer's testimony is not necessary to the defense. ***Outlaw***, 108 Wis. 2d at 126. If the state refuses this opportunity, the trial court can order disclosure of the informer on the basis of the defendant's preliminary showing. ***Id***. If the state refuses to disclose, the court can dismiss the case. ***Id***.

After finding that Mr. Billings met his initial burden, the trial court shifted the burden to the state "to determine what it wants to do." (33:5). The court told the state it could "identify the confidential informant," but did not order that the identity of the informant be disclosed to the defense. (33:5). The state did not request an in camera review hearing or otherwise avail itself of its opportunity to show facts relevant to determining whether the informer can supply the necessary testimony. (33:5). In response to the judge's ruling, the state requested a status hearing to "sit down and to look at the case and decide where we want to go." (33:6).

The court granted the state's request and gave the state eleven days to decide how to proceed. At the status hearing on July 21, 2017, the state again did not request an in camera review hearing, nor did it offer additional evidence supporting its assertion of the informer privilege. (34). Instead, the state requested a second adjournment in order to review the transcript of the previous hearing. (34:4). The state did not offer facts rebutting the initial showing that the informer would be necessary to the assertion of a defense. Instead, the prosecutor stated, "I can tell you I'm not revealing the confidential informant's information at this point." (34:5). Defense counsel moved to dismiss the case, and the court properly granted the motion. (34:6).

By not asserting its right under Wis. Stat. § 905.10(3)(b), the state forfeited its "opportunity to show in camera facts relevant to determining whether the informer" can supply the relevant testimony. *See* ***Outlaw***, 108 Wis. 2d at 126 (If the

state foregoes this opportunity, "the judge, on the basis of the preliminary showing, can order disclosure and, in the absence of disclosure of the informer's identity, dismiss the case."). Forfeiture is a rule of judicial administration that may be applied when a party fails to assert a right. ***State v. Ndina***, 2009 WI 21, ¶¶ 28-30, 315 Wis. 2d 653, 761 N.W.2d 612. It is primarily asserted when a party fails to object to an error because its purpose "is to give the opposing party and the circuit court an opportunity to correct any error." ***State v. McKellips***, 2016 WI 51, ¶ 47, 369 Wis. 2d 437, 881 N.W.2d 258.

Having forfeited its opportunity for in camera review, the state should not be allowed to assert that opportunity on appeal. The forfeiture rule rests on sound public policy:

> The purpose of the "forfeiture" rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal. The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from "sandbagging" opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.

State v. Ndina, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612.

The trial court gave the state eleven days to decide "where [it] want[ed] to go." (33:6). At the ensuing hearing, the state chose neither to request

an in camera review nor to disclose the identity of the informer. It forfeited its opportunity to rebut the defendant's initial showing, and the trial court's decision dismissing the case should be upheld.

D. The trial court did not err by dismissing the case after the state refused to disclose the identity of the informer.

Even if this court finds that the state did not forfeit its right to an in camera review, it should still uphold the trial court's decision granting the defendant's motion. This court has upheld a trial court's decision to forego the in camera review altogether because "the trial court had enough information at [that] point to reasonably determine that Norfleet should have an opportunity to cross-examine this informer." ***State v. Norfleet***, 254 Wis. 2d 569, ¶ 14 (internal quotation to the court record omitted). Based on the evidence available to the trial court at that point, this court found that "any testimony the informant would give in camera was relevant and material to the accused's defense and reasonably necessary on the question of guilt or innocence." ***Id***., ¶ 15. This court upheld the trial court's decision to deny an in camera review as a reasonable exercise of discretion. ***Id***., ¶ 16.

Here, although there was no testimony on the record, the court had access to the search warrant affidavit, in which the state set forth the informer's role in the offense, the informer's participation in additional and ongoing investigations, the informer's "usefulness to the Milwaukee Police Department," and the informer's reliability in previous

investigations. (2:4-6). Therefore, the court was able to discern "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *See* ***Vanmanivong***, 261 Wis. 2d 202, ¶ 27 (*quoting* ***Roviaro***, 353 U.S. at 60-62). In addition, the state argued in the affidavit that that disclosure of the informer's identity would "discourage citizens from telling the Milwaukee Police Department about drug trafficking" and would "result in physical harm to the informant." (2:4-7). The court was also aware of the informer's statement that the target of the controlled buy "keeps his firearm with him while inside the apartment," as well as the absence of any allegation that a firearm was actually found in Mr. Billings' apartment. (2:10).

Even if the trial court is understood to have denied the state an opportunity for an in camera review, its decision should be upheld. Given the level of detail included in the affidavit, the trial court here was in a similar position to the court in ***Norfleet***. Any testimony the informant would give in camera that was not in the affidavit is necessary on the question of guilt or innocence. Therefore, even if this court finds that the state did not forfeit its opportunity to rebut the defendant's showing, it should uphold the trial court's decision to order disclosure of the informant and its subsequent decision to dismiss the case.

II. The trial court did not err by denying the state's second adjournment request.

A. Standard of review.

A motion for a continuance is a matter addressed to the trial court's discretion. ***State v. Wollman***, 86 Wis.2d 459, 468, 273 N.W.2d 225 (1979). The trial court's ruling will not be disturbed on appeal unless there has been a misuse of discretion. ***State v. Anastas***, 107 Wis.2d 270, 272, 320 N.W.2d 15 (Ct. App. 1982).

B. The trial court did not err by denying the state's second adjournment request and dismissing the case.

The state argues that the trial court improperly dismissed the case when it refused to disclose the identity of the informer. (Petitioner's Br. 16, *citing* ***State v. Wollman***, 86 Wis. 2d 459, 273 N.W.2d 225 (1979)). The court did not err in dismissing the case, nor did it err in denying the state's adjournment request. In ***Wollman***, the Supreme Court held that a defendant was not denied due process and effective assistance of counsel when the court denied his request for a continuance. ***Wollman***, 86 Wis. 2d at 472. "The decision to grant or deny a continuance is a matter within the discretion of the trial court." ***Id***., at 468. The inquiry into whether a court has abused in discretion by denying a continuance involves balancing a defendant's right to adequate representation against the efficient administration of justice:

> In determining whether a court has abused its discretion by the denial of a continuance, a single inquiry is to be made. This inquiry requires the balancing of the defendant's constitutional right to adequate representation by counsel against the public interest and the prompt and efficient administration of justice. As in all reviews of alleged abuse of trial court discretion, this balancing must be done in light of all the circumstances that appear of record.

Wollman, 86 Wis. 2d at 468.

In the present case, the interests of the defendant are aligned with the interests of the public. The state does not assert a constitutional violation resulting from the denial of the continuance, arguing only that its request for an adjournment was "reasonable." (Petitioner's Br. at 16).

Moreover, it's not clear that the court's denial of the state's request for a continuance prejudiced the state in any way. The state had already been granted one continuance to decide how to respond to the court's decision. A second continuance would not have affected the outcome of the case. The court had already ruled in favor of the defendant, and the state had "elect[ed] not to disclose the informer's identity." Wis. Stat. § 905.10(3)(b). Based on the state's decision, "the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate." *Id*. At that point, the state's request for a continuance was dilatory. *See* ***Wollman***, 86 Wis. 2d at 470 (*quoting* ***Giacalone v. Lucas***, 445 F.2d 1238, 1240 (6th Cir. 1971)). In fact, the state failed to articulate a clear reason for the adjournment request, offering only that it had

requested the transcript of the previous hearing and it "would like to first review the transcripts to see if we appropriately preserve all the issues raised." (34:4). The state also said it might "decide to reveal [the identity of the informant]," it might appeal, or it might dismiss. (34:4). The state made two definitive statements: that it "wouldn't be [filing] an interlocutory appeal," and that it was "not revealing the confidential informant's information at this point." (34:4-5).

Finally, the state does not seek any specific remedy with regard to this issue, and it is not clear what this court would do if it decided this issue in the state's favor. If this court were to uphold the trial court's ruling as to the first issue, the case would remain dismissed under Wis. Stat. § 905.10(3)(b). If this court overturns the trial court's decision and remands the case with specific orders, then the case would no longer be dismissed. This is clearly a case in which "'probing appellate scrutiny' of a decision to deny a continuance is not warranted." ***State v. Fink***, 195 Wis. 2d 330, 338–39, 536 N.W.2d 401 (Ct. App. 1995). This court should uphold the trial court's order dismissing the case.

CONCLUSION

After balancing the state's interest in protecting the identity of its informers and the defendant's interest in a fair trial as articulated by ***Roviaro***, ***Outlaw***, and their progeny, this court should conclude that the defendant met his initial burden of showing the identity and testimony of the informer were necessary to his defense and should uphold the trial court's ruling.

Further, finding that the state forfeited its opportunity for in camera review and refused to disclose its informer's identity, this court should uphold the trial court's ruling dismissing the case.

Mr. Billings asks this court to affirm the trial court's decisions.

Dated this 5th day of October 2018.

Respectfully submitted,

JORGE R. FRAGOSO
Assistant State Public Defender
State Bar No. 1089114

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
fragosoj@opd.wi.gov

Attorney for Defendant-Respondent

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,032 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 5th day of October 2018.

Signed:

_____

JORGE R. FRAGOSO
Assistant State Public Defender