No.

IN THE
Supreme Court of the United States

JAMES RODWELL,
Petitioner,

v.

MASSACHUSETTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

David Nagle was a long-time, paid government informant. In 1981, he claimed to have extracted a jailhouse confession from James Rodwell, who was subsequently indicted for the unsolved murder of a police captain's son. Nagle's testimony regarding this purported confession was critical to Rodwell's 1981 conviction for first-degree murder. James Rodwell has maintained his innocence through this case's lengthy history.

In the course of years of litigation, including an extensive evidentiary hearing decades after the conviction, this case has produced findings that Nagle was dishonest in his testimony, that he was a registered informant for the Drug Enforcement Administration (DEA) who engaged in multiple informant agreements in multiple cases from which he benefitted extensively, and that he had an entrepreneurial history of seeking favor with law enforcement in exchange for leniency. Nevertheless, in this particular case Mr. Rodwell was not able to establish evidence of an agency relationship between Nagle and the government sufficient to satisfy Massachusetts law. The questions presented are:

1. Whether an in-custody criminal informant who has repeatedly benefited monetarily and received lesser sentences from previous cooperation with the government and reasonably expected to receive additional benefits for further cooperation is a government agent for the purposes of *Massiah* and its progeny;

2. Whether the Massachusetts Supreme Judicial Court's rulings that defendants must affirmatively prove the existence of an articulated agreement containing a specific promise of a benefit to a jailhouse informant by the government is incorrect as a matter of law and inconsistent with established federal precedents because it precludes a finding of an implicit agreement whereby an experienced jailhouse informant who has cooperated regularly in the past can reasonably and accurately expect to be compensated for future cooperation thus establishing an agency relationship that implicates the Sixth Amendment rights of a defendant.

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James Rodwell respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court for Suffolk County in this case.

OPINIONS BELOW

The memorandum of decision from the Massachusetts Supreme Judicial Court for Suffolk County (App. 1a-4a) (docket no. SJ-2016-0237) is unreported. The findings of facts, conclusion of law, and order of the Middlesex Superior Court (App. 5a-129a) (docket no. 1981-CR-1712/14) is unreported. The order denying motion for reconsideration from the Massachusetts Supreme Judicial Court for Suffolk County (App. 130a-131a) (docket no. SJ-2016-0237) is unreported.

JURISDICTION

The final judgment of the Supreme Judicial Court for Suffolk County was entered on July 23, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).[1]

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defence.

STATEMENT

United States v. Henry, 447 U.S. 264, 266 (1980), is one of this Court's clearest articulations of the scope of *Massiah* protections. *See Massiah v. United States*, 377 U.S. 201, 207 (1964) (holding that once a criminal proceeding has been initiated and a defendant's right to counsel has attached, the government may not "deliberately elicit" statements from the defendant, in the absence of counsel and without a proper waiver).

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[1] As this Court has concluded, a denial of review by the Supreme Judicial Court justifies proceeding to the certiorari stage. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009).

In *Henry*, a jailhouse informant who had a prior relationship with the government was generally told to be "alert" to statements made by other prisoners, although he was explicitly instructed not to interrogate the defendant. 447 U.S. at 266. The informant was subsequently compensated for what he heard, an arrangement that the Court held violated the defendant's Sixth Amendment right to counsel. *Id.* at 274; *see Maine v. Moulton*, 474 U.S. 159, 176 (1985) ("knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity.").

Besides *Henry*, however, few of this Court's cases have risen or fell on the issue of agency. Agency was not a contested issue in *Kuhlmann v. Wilson*, 477 U.S. 436, 439 (1986) (police deliberately placed informant in cell with defendant); *Moulton*, 474 U.S. at 164-165 (codefendant wore wire transmitter); or *Massiah*, 377 U.S. at 202-203 (codefendant allowed federal customs agents to install transmitter in car and to listen to conversations with defendant). Consequently, the unsettled nature of this issue threatens uniformity in interpreting the Sixth Amendment across the country. As the First Circuit observed, circuits are divided concerning agency because "*Massiah* was never a precise formula and later Supreme Court rulings waver in their emphases." *United States v. LaBare*, 191 F.3d 60, 65 (1st Cir. 1999); *see id.* at 65 n. 2 (collecting and comparing standards across circuits); *Ayers v. Hudson*, 623 F.3d 301, 311–12 (6th Cir. 2010); *State v. Marshall*, 882 N.W.2d 68, 90 (Iowa 2016), *cert. denied*, 137 S. Ct. 829 (2017). But such uniformity is necessary to protect against the particularly pernicious threat posed by informants that arises from the covert nature of their relationship with the government and the way such a relationship allows the government to have an invisible presence in ostensibly innocent jailhouse conversations.

And because of the lack of a precise formulation, courts are deeply divided as to when an agency relationship arises between an individual and law enforcement authorities such as to render that individual a government agent for purposes of applying the protections of the Fourth, Fifth and Sixth Amendment. The constitutional standards for finding agency should be consistent given the narrowing of these federal constitutional protections in states that require an articulated agreement containing a specific benefit as a condition precedent for the application of Fifth and Sixth Amendment to jailhouse informants.

On one end of the spectrum lies Massachusetts. As the Supreme Judicial Court explained in *Commonwealth v. Caruso*, 476 Mass. 275, 282 (2017), "[n]o agency relationship exists in the absence of a prior arrangement between the Commonwealth and the informant. For example, no agency relationship forms when the Commonwealth does not promise a benefit to an informant, even where -- as in this case -- the informant has provided information to [law enforcement] on multiple prior occasions." This narrow and formalistic agency test requires defendants to produce evidence of specific agreements even though such evidence only exists in the minds of informants and law enforcement.

Similarly, in the context of the Fourth Amendment and consistent with *Henry*, the Tenth Circuit requires a defendant to show that the government "affirmatively encourage[d] or instigate[d] the private action." *United States v. Smythe*, 84 F.3d 1240, 1243 (10th Cir. 1996). And the Sixth Circuit requires a showing that the police instigated, encouraged, or participated in the investigation, and that the individual must have

engaged in the search with the intent of assisting the police in their investigative efforts. *United States v. Coleman,* 628 F.2d 961, 965 (6th Cir. 1980); *see State v. Collins*, 367 Md. 700, 716 n. 8, 790 A.2d 660, 669 n. 8 (2002) (approvingly citing Tenth Circuit standard).

On the other end of the spectrum, the Ninth Circuit, considering whether a search violated the Fourth Amendment, held that, even with no explicit instruction from law enforcement to perform the search in question or **advanced knowledge of the search**, the **searcher** in that case was a government agent because his prior relationship with the DEA effectively incentivized him to perform this kind of search. *United States v. Walther*, 652 F.2d 788, 792–93 (9th Cir. 1981). Other circuits have followed *Walther. See, e.g., United States v. Jarrett*, 338 F.3d 339, 344–45 (4th Cir. 2003) (approvingly citing *Walther* standard); *United States v. Pervaz*, 118 F.3d 1, 6 (1st Cir. 1997) (after reviewing *Walther, Coleman,* and *Smythe,* disagreeing with formulation of standard in *Smythe*). While such cases are based on the Fourth Amendment, there is no principled reason why the standard for government agency should differ among fundamental constitutional rights. *See United States v. Pace*, 833 F.2d 1307, 1313 n. 4 (9th Cir. 1987) (accepting *Walther* as applicable to Sixth Amendment inquiry); *Rodwell v Fair*, 834 F.2d 240, 241 (1st Cir. 1987) (same). Without clarification from this Court, a divide between jurisdictions threatens to deepen.

This split has profound implications for this case and for the use of professional criminal informants more generally. In the instant case, James Rodwell was convicted on the basis of testimony from David Nagle. Three decades later, Nagle was revealed to have a long-standing relationship with law enforcement beginning before, and concluding after, Rodwell's arrest and conviction. Relying on Supreme Judicial Court precedent applying its narrow and formalistic agency test, the single justice of the Supreme Judicial Court upheld a Superior Court ruling that because Rodwell could not show a specific prior arrangement between Rodwell and the Government, he could not show that Nagle was a government agent at the time that he allegedly extracted the Rodwell confession. Had the Supreme Judicial Court recognized Nagle's longstanding relationship with the government and his expectation of reward, as it would have under the *Walther* standard, they would have found that Nagle's repeated contacts and long remunerative relationship with law enforcement established him as a government agent. Nagle's testimony would therefore have been suppressed pursuant to *Massiah*, 377 U.S. at 207.

Further review is therefore imperative. The question presented arises frequently and is critically important in each case in which it arises. And this case presents a clean and fully-developed vehicle for addressing the question. The petition accordingly should be granted.

PROCEEDINGS BELOW

In 1978, Louis Rose, the son of a police captain, was murdered. The case remained unsolved until May 1981, when the police investigation focused on James Rodwell. Rodwell was indicted for the murder and the case went to trial later that year. In its case in chief, the Commonwealth relied on two witnesses: David Nagle and Francis Holmes. Holmes testified as an immunized co-conspirator and claimed that he had witnessed Rodwell commit the murder. Nagle testified that Rodwell confessed to the

murder while they were incarcerated together at the end of June 1981. Under Massachusetts law, an immunized co-conspirator's uncorroborated testimony is not sufficient for a conviction. *See* Mass. Gen. Laws ch. 233, § 20I. Before trial, Rodwell moved to suppress Nagle's testimony and sought to cross-examine him about his government contacts. The trial court denied Rodwell's motion without a hearing, ruling that his motion did not contain sufficient evidence to show Nagle was an informant.

Rodwell was convicted later that year and sentenced to life in prison. Almost three decades later, Rodwell secured transcripts of a New York federal case of *U.S. v. Mourad,* S.D.N.Y. 82-CR-00769, revealing David Nagle's status as a registered DEA informant prior to Rodwell's supposed statement. This new revelation lead to the discovery of Nagle's DEA file and vital information about his relationship with law enforcement in the previously-privileged attorney files disclosed to Rodwell upon Nagle's death. This new evidence revealed Nagle was a longtime, registered DEA informant from at least 1978 until the Spring of 1981 and that Nagle had in fact met and had been promised a reward with the lead detective in the Rose murder in June -- not July as Nagle had testified to. After decades, the trial court finally granted Rodwell an evidentiary hearing. The evidence further revealed that Nagle had a working relationship with the detective who led the investigation into Rodwell, the District Attorney's office knew of this connection, and that Nagle had been substantially rewarded several times in the past by both state and federal authorities for his cooperation. As the Superior Court addressing his motion for a new trial would later note in 2016:

> Throughout the 1970's and 1980's Nagle was a regular and prolific police informant. He met frequently with narcotics detectives from police departments, providing them with information. Some of the information he acquired from contacts came from the narcotics trade. He was also willing to give up his friends, accomplices and at least one relative, and others who had told them of their own and other's criminal activities. He was not above getting his information from newspapers and dressing it up for presentation to the police. (App. 41a) * * *
> * * * "Without a doubt * * * he traded his information for favorable treatment, both from the police and on their recommendation, in his many encounters with the criminal justice system." (App. 47a) * * *
> [Nagle] was supplementing his legitimate income from time to time with thefts and robberies; that he received, over over and over again, extraordinary light sentences on the crimes for which he was apprehended and to which he plead guilty; and this was because he was generously supplying information to law enforcement authorities, who reciprocated with lenient sentencing recommendations which judges were willing to follow." (App. 47a) * * *

> [Nagle] 'knew the score' - i.e., if you are arrested and want to help yourself out, you can give the police/prosecution information about other people" (App. 95a).

And Nagle continued to follow this self-serving path up to and through the trial in the present case. The Superior Court's 2016 findings not only found Nagle "dishonest and unreliable" (App. 43a) but identified at least one instance of perjury in the very testimony at issue. (App. 15a)

Nonetheless, Mr. Rodwell's conviction was affirmed by the Supreme Judicial Court of Massachusetts. *Commonwealth v. Rodwell*, 394 Mass. 694 (1985). His case has been subject to numerous post-conviction actions. At the last of which, on May 20, 2016, after an extensive evidentiary hearing (featuring 29 witnesses including three current or former judges), a judge of the Superior Court denied the petitioner's motion for a new trial.

The petitioner appealed and sought review by the full bench of the Supreme Judicial Court. This procedure applies to appellate review of murder cases in which the defendant has already had a direct appeal. *See* Mass. Gen. Laws ch. 278, § 33E. On August 17, 2017, after almost a year under advisement, the Supreme Judicial Court for Suffolk County (which is a single justice of the Supreme Judicial Court), denied further review on the ground that no new and substantial question was presented. The single justice did note that "the defendant presented some new evidence" but, in a footnote, declined the defendant's request to adopt the Ninth Circuit's more favorable interpretation of who constitutes a government agent. (App. 2a, 3a n. 3.) The defendant moved for reconsideration as allowed under Massachusetts law. *See Commonwealth v. Gunter*, 459 Mass. 480, 481 (2011). On July 23, 2018, after being under advisement for nine additional months before a successor justice, that single justice denied the motion for reconsideration, thus precluding review by the full state court of last resort.

REASONS FOR GRANTING THIS PETITION

Criminal informants, or "jailhouse snitches", play a vital role in investigations and convictions. Legal precedent, scholarship, and empirical evidence all confirm that these jailhouse informants are strongly incentivized to provide false evidence to help the government in achieving their end goal. This risk is long-established and well-known to all of the players in the criminal justice system. For example, the Center on Wrongful Convictions at Northwestern University School of Law found that 45.9 percent of all wrongful capital convictions are the result of false testimony by compensated criminal informants, "mak[ing] snitches the leading cause of wrongful convictions in U.S. capital cases." *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row* (Northwestern University School of Law, Center on Wrongful Convictions, 2005); *see* Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice* 69-78 (2009). In this vein, the Supreme Court of Connecticut has acknowledged the "growing recognition of the inherent unreliability of jailhouse informant testimony". *State v. Arroyo*, 292 Conn. 558, 570 (2009); *see Zappulla v. New York*, 391 F.3d 462, 470 n. 3 (2d Cir. 2004) (noting "numerous scholars and criminal justice experts have found the testimony by 'jail house snitches' to be highly

unreliable"); *United States v. Lewis*, 850 F. Supp. 2d 709, 738 (N.D. Ohio 2012), *aff'd*, 521 F. App'x 530 (6th Cir. 2013) ("jailhouse informants present special credibility problems; courts, scholars and some state legislatures have recognized that they are often unreliable witnesses who stand to benefit from providing testimony, and often present testimony that can readily be fabricated" and collecting supporting authorities); Hon. Alex Kozinski, *Preface, Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xxii n. 107 (2015) (noting strong incentives for jailhouse informants to extract false confessions).[2]

The established practices and mutual understandings that surround the use and reward of jailhouse informants and repeat informants creates the expectation that the informant will benefit from alleging a prison confession in a case pending prosecution. This widespread understanding that benefits will be forthcoming as a reward for information functionally establishes agreements whether or not each specific instance is deliberately arranged by law enforcement with the promise of a benefit. Prosecutors do in fact reward informants who provide information, and they do not need to expressly tell in-custody, long-time informants that they will be rewarded for cooperation; the practice is pervasive and well-understood. When experienced informants who have been consistently rewarded in the past entrepreneurially produce information for the government, they are operating based on a proven, tacit agreement that they will be rewarded again. *See, generally*, Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice* 69-78.

Occasionally this problem boils to the surface. One federal court noted the law enforcement practice of placing seasoned informants next to defendants in the jail in order to elicit information: "the Los Angeles County District Attorney found 150 cases where an informant was placed next to an inmate and the informant testified against that inmate. The defense bar found more than 200 such cases." *Williams v. Davis*, No. CV 00-10637 DOC, 2016 WL 1254149, at *20 (C.D. Cal. Mar. 29, 2016) (internal citation omitted). The Florida Supreme Court noted "informant witnesses * * * constitute the basis for many wrongful convictions" and particularly "jailhouse informants". *In re Amend. To Rule of Crim. Proc. 3.220*, 140 So. 3d 538, 539, 540 (Fla. 2014). There are many more examples in the federal courts. *See Lewis*, 850 F. Supp. 2d at 762; *Maxwell v. Roe*, 628 F.3d 486, 498-508 (9th Cir. 2010). Jailhouse informants themselves are under significant coercive pressure by virtue of their incarceration and pending cases, pressures which strongly incentivize fabrication in order to obtain leniency and other benefits. *See Burns v. Martuscello*, 890 F.3d 77, 88, 89 (2d Cir. 2018); *see also United States v. Morales*, 902 F.2d 604, 606, 608-09 (7th Cir.), *amended,* 910 F.2d 467 (7th Cir. 1990) (new trial granted because "key witness" for prosecution determined to be too unreliable).

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[2] Judge Kozinski's words on this concern are worth quoting fully: "Serial informants are exceedingly dangerous because they have strong incentives to lie or embellish, they have learned to be persuasive to juries and there is no way to verify whether what they say is true. A man jailed on suspicion of a crime should not be subjected to the risk that someone with whom he is forced to share space will try for a get-out-of-jail-free card by manufacturing a confession."

A. There is jurisdictional split as to whether a defendant must show a specific prior arrangement to obtain a conclusion an informant is a government agent

It is because of this risk of false conviction, the importance of Fifth and Sixth Amendment rights to help prevent such an outcome and the uncertainty of when an agency relationship between an informant and law enforcement is triggered that the granting of this petition is so important. The Fifth and Sixth Amendments must serve as a levee against the potential dangers posed by the frequent reliance on untrustworthy criminal informants. Yet, without a clear and readily applicable standard dictating when an informant transforms into a government agent, the levee risks breaking. This Court "has not formally defined the term 'government agent' for Sixth Amendment purposes." *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 893 (3d Cir. 1999)."[T]he United States Supreme Court has not clearly defined the point at which agency arises." *Caruso*, 476 Mass. at 282. This is likely because, in the Court's past cases, "the agency per se of the informant has been too clear for discussion." *State v. Hernandez*, 842 S.W.2d 306, 314 (Tex. Ct. App. 1992). For instance, as noted above, agency was not a contested issue in this Court's cases of *Kuhlmann, Moulton*, or *Massiah*. However, in *Henry*, 447 U.S. at 270-271, this Court held that a jailhouse informant paid on a contingent fee basis was acting as an agent for the government. *See, e.g., LaBare*, 191 F.3d at 65 (circuits of United States Court of Appeals divided concerning agency because "*Massiah* was never a precise formula and later Supreme Court rulings waver in their emphases"). More specific to Mr. Rodwell's case, there is a split as to whether a defendant must produce evidence of an **articulated agreement containing a specific benefit** between the government and the informant in order to establish agency and be afforded protection by the Fifth and Sixth Amendments.

1. Some jurisdictions require a defendant show an in-advance, articulated agreement

In Massachusetts, the SJC requires that a defendant establish that there is an "articulated agreement" containing a "specific benefit" in order to establish an agency relationship. That Court has held that "[n]o agency relationship exists in the absence of a prior arrangement between the Commonwealth and the informant. For example, no agency relationship forms when the Commonwealth does not promise a benefit to an informant, even where -- as in this case -- the informant has provided information to [law enforcement] on multiple prior occasions." *Caruso*, 476 Mass. at 282.

Four federal circuits follow a bright-line rule. The First, Second, Eighth, and D.C. Circuits have adopted the bright-line rule that "an informant becomes a government agent for purposes of [the Sixth Amendment] only when the informant has been instructed by the police to get information about the particular defendant." *United States v. Birbal*, 113 F.3d 342, 346 (2d Cir. 1997); *see LaBare*, 191 F.3d at 65 (informant not an agent when the government asked him to report incriminating statements, but "in no way focused [his] attention on an individual defendant"); *Moore v. United States*, 178 F.3d 994, 999 (8th Cir. 1999) (informant not an agent when he had a general proffer agreement but was not directed to procure information from any particular defendant); *United States v. Watson*, 894 F.2d 1345, 1348 (D.C. Cir. 1990) (informant with history of cooperating

with DEA not an agent when "there is no evidence that the DEA in any way encouraged [him] to talk to [the particular defendant]").

Some state high courts and the D.C. Court of Appeals also adopt a version of the bright-line rule, though they sometimes use slightly different language. *See, e.g., Watson v. United States*, 66 A.3d 542, 546 (D.C. 2013) ("Ordinarily, an informant becomes a government agent for purposes of [the Sixth Amendment] only when the informant has been instructed by the police to get information about the particular defendant." (internal quotation marks and citation omitted)); *In re Benn*, 952 P.2d 116, 138 (Wash. 1998) ("For there to be an agency relationship, there must be at least an implicit agreement between the parties with respect to the current undertaking."); *In re Neely*, 864 P.2d 474, 481 (Cal. 1993) ("[T]he evidence must establish that the informant . . . was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage. . . .").[3]

2. *Other jurisdictions do not require showing an in-advance, articulated agreement*

The Third, Fourth, Sixth, and Eleventh Circuits explicitly reject the bright-line rule and instead apply fluid, multi-factored tests for agency. *See Depree v. Thomas*, 946 F.2d 784, 793-94 (11th Cir. 1991) ("There is, by necessity, no bright-line rule for determining whether an individual is a government agent [. . .]. The answer depends on the 'facts and circumstances' of each case."); *accord United States v. Brink*, 39 F.3d 419, 421-23 (3d Cir. 1994); *Thomas v. Cox*, 708 F.2d 132, 136 (4th Cir. 1983); *Ayers*, 623 F.3d at 310-12. Some state courts also take this view. *See, e.g., State v. Stahlnecker*, 690

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[3] There exists a similar split as to who constitutes a government agent in a Fourth Amendment context. Some circuits do not require that the defendant show an explicit agreement between the government and informant in order to invoke the protections of the Fifth and Sixth Amendments. For instance, the Ninth Circuit, in *United States v. Walther*, held that an informant with a prior history of cooperation with the government, and an understanding of the incentives associated with procuring and trading information, is an agent. 652 F.2d 788, 792–93 (1981). Under this reasoning, an experienced informant with no new agreement (whether express or newly-implied) is just as much a threat to *Massiah* protections as an identical inmate with a formal agreement. The Fourth, Fifth and Seventh Circuit follow a similar approach to the Ninth. *See United States v. Jarrett,* 338 F.3d 339, 344-45 (4th Cir. 2003) (approvingly citing test from *Walther* and Fifth and Seventh Circuit precedent). In contrast, the Tenth Circuit requires the defendant show that the Government "affirmatively encourage[d] or instigate[d] the private action." *United States v. Smythe,* 84 F.3d 1240, 1243 (10th Cir. 1996). The Sixth Circuit, similarly in the Fourth Amendment context, requires that the defendant show, "[f]irst, the police must have instigated, encouraged or participated in the search [and] [s]econd, the individual must have engaged in the search with the intent of assisting the police in their investigative efforts. *United States v. Coleman,* 628 F.2d 961 at 965 (6th Cir.1980) (internal citations omitted). *See United States v. Pervaz*, 118 F.3d 1, 6 (1st Cir. 1997) (after reviewing *Walther, Coleman,* and *Smythe,* disagreeing with formulation of standard in *Smythe*).

S.E.2d 565, 572 (S.C. 2010); *Commonwealth v. Murphy*, 448 Mass. 452, 461 (2007)[4]; *State v. Willis*, No. E201201313-CCA-R3-DD, 2015 WL 1207859, at *64 (Tenn. Crim. App. Mar. 13, 2015); *Commonwealth v. Moose*, 602 A.2d 1265, 1270 (Pa. 1992) (finding informant was an agent based on length of time he cooperated, frequency of cooperation, and hope of a recommendation for leniency at sentencing).

C. The Sixth Amendment's protection against incentivized informants is a bulwark against wrongful convictions

It is well-established that the Sixth Amendment right to counsel is a bulwark against wrongful convictions. *See, e.g., Perry v. New Hampshire*, 565 U.S. 228, 244–45 (2012); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963), *quoting extensively Powell v. Alabama*, 287 U.S. 45, 68–69 (1932). That protection is effectuated in part through *Massiah's* prohibition against the surreptitious governmental deployment of informants. This Court has also "made clear that, at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Moulton*, 474 U.S. at 171.

While purporting to apply this principle from *Moulton, see Caruso*, 476 Mass. at 281 n. 3, the SJC reiterated that an "inmate's unencouraged hope to curry favor by informing does not establish an agency relationship[.]" *Id.* at 282. Such a holding is in serious tension with the language quoted above in *Moulton.* As numerous courts and commentators have recognized, jailhouse informants are among the least-reliable witnesses in the justice system. *See United States v. Lewis*, 850 F. Supp. 2d 709, 738 (N.D. Ohio 2012), *aff'd,* 521 F. App'x 530 (6th Cir. 2013), and cases cited. Informant testimony results in a plethora of wrongful convictions. *See id.* ("noting false snitch testimony is a major contributing cause to wrongful convictions") (internal quotations and alteration omitted); Kozinski, *Preface, Criminal Law 2.0,* 44 Geo. L.J. Ann. Rev. Crim. Proc. at xxii n. 107 (noting strong incentives for jailhouse informants to extract false confessions). Mr. Rodwell's case may be just the latest example but it is also one of the most egregious given that Nagle's dishonesty is itself undisputed.

Where, as here, there is pervasive evidence that an informant has had a long-term beneficial relationship with the government, such an informant will reasonably and accurately believe that a reward will be forthcoming for future cooperation. Such a system strongly incentivizes jailhouse informants to lie to obtain a reward. *See* Kozinski, *Preface, Criminal Law 2.0,* 44 Geo. L.J. Ann. Rev. Crim. Proc., at xxii, n. 107. Therefore, the Sixth Amendment protection set forth in *Massiah* and *Henry* is undermined when tacit understandings between longtime informants and the government are not recognized as generating an agency relationship. Though based on a provision of a different constitutional amendment, the reasoning in *Walther* operates with identical force. The essential nature of the constitutional protection is the same; a person is acting as a government agent whether they accepted a package or elicited an underlying confession.

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[4] That Massachusetts law can arguably support each side of this divide highlights the importance of this Court resolving this split.

Too often a defendant will have no recourse when this right is violated because the arrangement is achieved with a "wink and a nod" and no documentary record. *See Ayers*, 623 F.3d at 312. The result the defendant urges thus recognizes the reality of modern-day relationships (elaborated upon above) that would otherwise preclude establishing a circumvention of the Sixth Amendment. And the requirement for a defendant to prove this agreement invites the government to continually act in a covert manner with informants so that this relationship will always be invisible on paper but very real to both the government and the informant.

The Sixth Amendment right to counsel is too important a right to be subject to varying interpretations. "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland v. Washington*, 466 U.S. 668, 691–92 (1984); *accord United States v. Cronic*, 466 U.S. 648, 656 (1984). As this Court has emphatically asked, "what use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?" *Moulton*, 474 U.S. at 171. That right demands more protection than some courts are granting, and that lesser degree of protection is inconsistent with this Court's case law. *See Henry*, 447 U.S. at 274; *Ayers*, 623 F.3d at 311–12 (relying on *Henry* and "agree[ing] with those courts that do not limit agency in the *Massiah* context to cases where the State gave the informant instructions to obtain evidence from a defendant.).

D. As applied to the facts of this case, the constitutional violation is dispositive

At the very least, it is easy to see how these different approaches could lead to different results in Mr. Rodwell's case and countless others. Under the more formalist approach, followed by Massachusetts courts, the Sixth Circuit, and the Tenth Circuit, absent showing an explicit agreement, a defendant like Rodwell is unable to invoke the protections contemplated in *Massiah,* no matter how frequent the informant's dealings are with the government.

But under the approach taken by the Ninth, or Fourth, Circuit, David Nagle's several-year-history of repeatedly cooperating with the government and being subsequently rewarded would be enough, as a matter of law, to establish him as a government agent and entitle him to suppression of the purported confession under *Massiah*, 377 U.S. at 207.

The late Justice Scalia observed shortly before he passed away that, while death penalty defendants get "endless legal assistance from the abolition lobby ... the lifer languishes unnoticed behind bars." *Glossip v. Gross*, 135 S. Ct. 2726, 2747, *reh'g denied,* 136 S. Ct. 20 (2015) (Scalia, J., concurring). Mr. Rodwell should not suffer that fate. When this case was most recently in federal court 15 years ago, the First Circuit proclaimed that a court with "the benefit of a more elaborate presentation of the facts concerning the Faustian bargain between Nagle and the prosecutor, would have ruled differently in the habeas case and set aside the underlying conviction" *Rodwell v. Pepe*, 324 F.3d 66, 72 (1st Cir. 2003). The evidentiary hearing that the defense obtained for Mr. Rodwell brought more of these facts into the light.

E. This case is a perfect vehicle for addressing the question presented

Review is especially appropriate here because this case is a pristine vehicle for addressing the question presented. The trial court made detailed findings of fact and issued thorough conclusions of law concerning the relationship between Nagle and law enforcement and the effect of Nagle's testimony on the petitioner's trial. The Supreme Judicial Court for Suffolk County accepted the trial court's findings and disposed of the case on strictly legal grounds. Moreover, Mr. Rodwell has maintained his innocence throughout this case's lengthy history.[5]

The Superior Court findings following an evidentiary hearing make this case a clean vehicle for resolving the jurisdictional split. That David Nagle "knew the score", (App. 95a), due to his long-time activity as a paid government informant would be dispositive. His testimony that Mr. Rodwell purportedly confessed to him would be excluded if Nagle constitutes a government agent. *See Moulton,* 474 U.S. at 172–176 (evidence obtained through government agent must be suppressed). Mr. Nagle's testimony, in the words of the Superior Court, "materially" increased Mr. Rodwell's chances of conviction. (App. 111a). Actually, his testimony's significance was even stronger. Such testimony was decisive because the other witness against Mr. Rodwell testified pursuant to an immunity order and therefore, as a matter of law, could not be the sole basis for a murder conviction.

Furthermore, it is consistent with the Supreme Court's decision in *Henry* that a clear understanding by a jailhouse informant that he would be rewarded for bringing forth confessions incentivizes the informant to circumvent the protection of *Miranda*. *See Henry*, 447 U.S. at 274, *citing Miranda v. Arizona*, 384 U.S. 436, 467 (1966). Although in *Henry*, the government had instructed an inmate and paid FBI informant to "pay attention" to statements by other inmates, 447 U.S. at 268, Nagle's longtime relationship with the government meant he did not need such an explicit instruction to, in effect, be working as a government agent just as much as the inmate in *Henry*. (App. 95a.) Indeed, in responding to Mr. Rodwell's first habeas petition the First Circuit cited *Walther* but stated Rodwell "did not properly seek to present [government agent] evidence in state court." *Fair*, 834 F.2d at 241-42. But a long-time, paid informant has the same natural understanding and pernicious motivation as the inmate whose actions were found unconstitutional in *Henry*.

Lastly, the SJC's ruling to the contrary (declining to adopt *Walther*) is not the end of the issue. While states may interpret their own constitutional provisions to be more protective than federal law, *see Danforth v. Minnesota*, 552 U.S. 264, 288 (2008), only the Supreme Court can establish protections binding on the entire country. In recent years, the Supreme Court has not been shy about rejecting Supreme Judicial Court precedent when it was insufficiently protective, and the Federal Constitution required something more. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009) (Confrontation Clause); *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (per

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[5] The trial court determined a wrongful conviction challenge was "on the table." Tr. 10/22/15, p. 27, and accepted exhibits in support of that claim, *id.* at p. 15. Nagle's own half-brother, who had a "distinguished career" in law enforcement and served as a police chief, said "[y]ou couldn't believe anything that he told you" (App. 43a).

curiam) (Second Amendment); *see also Weaver v. Massachusetts*, 137 S. Ct. 1899, 1913–14 (2017) (reconsidering, though ultimately affirming, SJC decision based on the Sixth Amendment); *Powell v. Tompkins*, 783 F.3d 332, 361 (1st Cir. 2015) (Torruella, J., dissenting), *cert. denied,* 136 S. Ct. 1448 (2016) ("I am unable to perceive a reading of the SJC's disposition of Powell's due process claim that does not contradict clearly established federal law as determined by the Supreme Court"). The Sixth Amendment right to counsel means nothing if it can be circumvented so easily. For all the above reasons, further review of Mr. Rodwell's claim is manifestly warranted.

CONCLUSION

The petition should be granted.

Respectfully Submitted,
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