THE JUSTICE PROJECT

Jailhouse Snitch Testimony

A Policy Review

Prosecutors relied heavily on the testimony of a jailhouse snitch to convict Wilton Dedge of rape. Dedge spent twenty-two years in prison before he was released and exonerated of the crime.

Proper safeguards on jailhouse snitch testimony could have prevented this injustice.

INTRODUCTION

Testimony from in-custody informants, often referred to as "jailhouse snitches," has been widely used in the American criminal justice system. Witnesses with special knowledge of criminal activity enable police and prosecutors to apprehend and prosecute criminal suspects. Thus, utilizing cooperating witnesses in order to obtain evidence of criminal activity is an important tool.

Nonetheless, the motive to fabricate testimony is inherent in a system in which snitches are often rewarded for their testimony. Jailhouse snitches, who often testify at pivotal moments in criminal prosecutions, have been shown to go to great lengths to deceive and misinform in the hopes of improving their current situations. With little or nothing to lose, and everything to gain, cunning and unscrupulous jailhouse snitches invent narratives and crime details that mislead law enforcement officers and contribute to appalling miscarriages of justice.

All wrongful convictions detract from the public's faith in the fair administration of justice, but the cost is especially high when wrongful convictions result from the testimony of questionable witnesses.

A 2005 report by the Center on Wrongful Convictions at Northwestern University School of Law found that snitch-dependent prosecutions are a leading cause of wrongful convictions in capital cases.[1] In fact, a survey of all cases involving individuals later exonerated by DNA testing showed that in over fifteen percent of cases, a jailhouse snitch testified against the defendant.[2]

The problems that arise when prosecutions rely on cooperating witnesses vary with the type of benefit conferred upon a witness in exchange for his or her testimony. Compensation of "jailhouse snitches" who provide incriminating testimony against a suspect, frequently one with whom they share a jail or prison cell, often takes the form of a favorable plea to a lesser charge or a reduction in sentence. Other types of criminal witnesses, such as accomplice witnesses and out-of-custody informants, can be compensated by the state either through immunity from prosecution or reduced charges. Because jailhouse snitches are so desperate to attain sentence reductions, snitch testimony is widely regarded as the least reliable testimony encountered in the criminal justice system.

In the face of serious concerns about the inherent unreliability of jailhouse snitches and the miscarriages of justice they cause, there are measures that states can implement to help ensure that the use of cooperating witness testimony does not undermine fairness and accuracy in criminal trials. Pragmatic changes requiring corroboration of the facts to which an informant testifies, pretrial disclosures, reliability hearings, and special jury instructions raise the evidentiary threshold and improve the quality of evidence presented at criminal trial. Courts raise standards for the admissibility of snitch testimony and ensure that judges and juries are able to make more informed decisions about the relative credibility of jailhouse snitch testimony by requiring greater scrutiny. By implementing these pragmatic changes within the context of courtroom procedures already in place, states can improve the quality of evidence presented at criminal trials.

This policy review has been designed to facilitate communication among local law enforcement officers, prosecutors, defense attorneys, judges, and others regarding the best practices and methods for enhancing the evidentiary value of a highly unreliable brand of cooperating witness testimony. By presenting the successful methods employed in individual jurisdictions, as well as the reasoning behind them, we hope to create a dialogue around recommendations that will enhance the quality of evidence relied upon in criminal trials, as well as confidence in our system of justice.

All wrongful convictions detract from the public's faith in the fair administration of justice, but the cost is especially high when wrongful convictions result from the testimony of questionable witnesses. While this review is limited to a discussion of the problems inherent in the use of jailhouse snitch testimony, many of the policy improvements recommended here could be considered in the context of other types of cooperating witnesses compensated by the state.

RECOMMENDATIONS & SOLUTIONS

Jailhouse snitch testimony poses special challenges to fairness and accuracy in criminal trials. When the state offers a benefit in exchange for testimony, whether that benefit is explicit or implied, the incentive for incarcerated individuals to fabricate evidence dramatically increases. Some informants may fabricate testimony in an effort to curry favor with prosecutors apart from any promise or implied benefit.

Though the legal system is designed to weed out perjured testimony through adversarial procedures such as cross-examination, the protections currently in place have proven starkly inadequate to safeguarding against unreliable testimony by witnesses with powerful incentives to lie. Remarkably, the use of jailhouse snitch testimony continues to be largely unregulated by state legislatures or courts despite frequent, documented miscarriages of justice and instances of wanton abuse.

The costs to the individual and to the state are high when snitch testimony leads to the wrongful conviction of an innocent person. Because perjured testimony has played a prominent role in documented cases of wrongful conviction in this country, jurisdictions must examine and implement safeguards designed to subject jailhouse snitch testimony, and the process by which such testimony is acquired, to higher levels of scrutiny and care.

WRITTEN PRETRIAL DISCLOSURES

States should adopt rules requiring mandatory, automatic pretrial disclosures of information related to jailhouse snitch testimony. Specifically, states should require the prosecution to make written disclosures regarding the circumstances of cooperation agreements and any other information about the credibility of a jailhouse snitch. Such disclosures should occur prior to any criminal trial or proceeding in which the prosecution intends to call the informant to testify. Disclosure of this information ensures that defendants can conduct meaningful cross-examination.

PRETRIAL RELIABILITY HEARINGS

States should adopt rules mandating pretrial determinations of reliability in cases where the prosecution intends to employ jailhouse snitch testimony. In a pretrial reliability hearing, the court is able to perform a "gatekeeper" function when admitting the testimony of the jailhouse snitch. The court must conclude that the jailhouse snitch's testimony is sufficiently reliable to submit to the jury by considering all factors that bear on the credibility of the jailhouse snitch, based on all information made available through written pretrial disclosures.

The testimony of a jailhouse snitch can often be powerful evidence at trial, overshadowing the obvious incentives for fabrication with compelling accounts of criminal conduct. Through improved standards, states can ensure that evidence presented in a courtroom and before a jury is of a sufficient quality to enable more reliable outcomes.

CORROBORATION

States should adopt corroboration requirements for jailhouse snitches to mitigate the inherent risks incentivised witness testimony carries.

Many law enforcement officers and prosecutors seek to corroborate at least a portion of the information provided by informants for the purpose of determining witness credibility, which has bearing on charging decisions as well as trial strategy. Nonetheless, the manner in which the prosecution may seek internal corroboration of jailhouse snitch testimony is largely a closed-door process. To inject a greater degree of transparency, oversight, and neutrality into the process, prosecutors should be required to disclose and present any information corroborating the witness' testimony. If the state is unable to corroborate the facts of snitch testimony, courts should limit the purposes for which such unsubstantiated testimony is used at trial.

CAUTIONARY JURY INSTRUCTIONS

States should adopt cautionary jury instructions in all cases where the testimony of a jailhouse snitch is used. The jury should be instructed to take into account several factors indicating the extent to which the testimony is credible, including: 1) explicit or implied inducements that the jailhouse snitch received, may receive, or will receive; 2) the prior criminal history of the informant; 3) evidence that he or she is a "career informant" who has testified in other criminal cases; and 4) any other factors that might tend to render the witness' testimony unreliable. Special jury instructions ensure that jailhouse snitch testimony is examined and weighed with proper caution.

GROUNDS FOR REFORM

An incarcerated individual has particular incentive to provide information in exchange for leniency, a reduced sentence, or other remuneration. Incarcerated individuals, in a system that relies on jailhouse snitches, risk little and can potentially gain much from lying to authorities.

Though fabricated snitch testimony continues to contribute to the mounting record of wrongful convictions in this country, state legislatures and courts have been slow to curb excesses or abuse. In large part, well-meaning police and prosecutors demonstrate due diligence in utilizing testimony by jailhouse snitches; however, few safeguards are currently in place to guide prosecutorial discretion or to ensure that juries weigh the testimony of these informants with proper care.

The recommendations in this policy review, explained in greater detail below, improve the informant process by ensuring greater access to critical information and giving the court a greater hand in determining reliability. Through more neutral and transparent use of snitch testimony, states ensure that proper safeguards are in place to protect against perjured testimony and increase the reliability of outcomes in criminal cases. By improving the quality of snitch testimony at trial through these reforms, states improve the use of snitch testimony at all phases of the criminal justice process.

WRITTEN PRETRIAL DISCLOSURES

The adoption of mandatory, automatic pretrial disclosures related to jailhouse snitch testimony would allow for a complete airing of all relevant information bearing on a jailhouse snitch's credibility. Mandatory disclosures create a more transparent process, allowing for meaningful oversight and adversarial challenge. In fact, the effectiveness of the legal system's built-in safeguard of cross-examination is almost entirely dependent upon the level of pretrial disclosures. Because the processes by which jailhouse snitches are compensated and their testimony is developed are largely hidden from view (and from triers of fact), current procedural safeguards are unable to guard against untruthful testimony.[3]

Under the rule articulated by the U.S. Supreme Court in *Brady v. Maryland*, prosecutors are already required to disclose any "material" information that might exculpate the defendant in pretrial discovery;[4] however, this rule does not mean that prosecutors are required to disclose all of the circumstances under which informant witnesses come to cooperate with the state — information that is critical to proper determinations of reliability.[5] The additional burden of implementing greater pretrial disclosures would be minimal considering the existing systems in place for the exchange of information as a requirement of *Brady*.

States should adopt or extend rules to mandate written pretrial disclosure of the following: statements made by the accused to the jailhouse snitch; incentives that the witness received, will receive, or may receive in exchange for testimony (*e.g.*, promises for sentence reductions, offers to lesser pleas, improved incarceration conditions for in-custody witnesses, or anything else of value); whether the witness has agreed to testify at prior criminal trials and, if so, how many times he or she has done so (or agreed to do so) and whether the witness has received any previous benefits for testimony; the complete criminal history of the jailhouse snitch; whether at any time prior to trial the witness has recanted his or her testimony or made statements inconsistent with the testimony to be presented at trial; and anything else bearing on the witness' credibility.[6]

By specifying that the disclosures be in written form, this recommendation helps ensure the accumulation of detailed records of all interactions between the government and the informant witness prior to trial.

PRETRIAL RELIABILITY HEARINGS

American jurisprudence has long wrestled with the problems inherent in compensating witnesses — monetarily or otherwise — in exchange for truthful testimony. Payment of any sort in exchange for testimony creates a motive for a witness to lie. Though paying witnesses is largely considered unethical and even illegal as a general rule,[7] there are several commonly held exceptions.[8]

In the context of expert witnesses, for example, payment for testimony (or expertise) is an accepted practice. American courts allow witnesses who are leading professionals in their fields to receive compensation for their testimony because the subject

matter of expert testimony is beyond the common knowledge of a layman or of the court.[9] In civil trials, courts require that certain indicia of reliability be met before an expert is allowed to testify in exchange for money. For example, a pretrial "*Daubert* hearing" is a requirement established by the U.S. Supreme Court specifying that courts must determine the reliability of expert witnesses before their testimony is presented to a jury.[10] In terms of scientific expert testimony, for example, the court must not only determine whether the scientific expert is knowledgeable of the issues presented, but must also establish that the content of the expert's testimony is *reliable* under accepted standards within the field.[11]

Our criminal justice system does not afford the same pretrial procedural safeguards in criminal cases involving compensated jailhouse snitches — even in capital cases. Similar in theory to the function it serves with respect to expert witnesses, courts should perform this "gatekeeper" function in any criminal proceeding or trial in which the state presents a jailhouse snitch witness.[12] Because the stakes are so high in felony cases, and the propensity for inadvertent bias is so great in the criminal adversarial system, a reliability determination with respect to jailhouse snitches should be made by a neutral, objective party and not by the prosecutor alone. The best policy for ensuring the integrity of the criminal justice system is a requirement that the prosecution bear the burden of proof in showing that jailhouse snitch testimony is sufficiently reliable to be put before a jury in all criminal prosecutions. At the very least, this determination should be made in capital cases, as in Illinois.[13]

> By improving the quality of snitch testimony at trial through these reforms, states improve the use of snitch testimony at all phases of the criminal justice system.

CORROBORATION

Several states, including California, Illinois, and New York, have recognized the inherent unreliability of testimony offered by an accomplice, which has resulted in legislation requiring that accomplice testimony be corroborated.[14] While testimony provided by an accomplice is inherently suspect, and corroboration requirements should be implemented across the board, the testimony of a jailhouse snitch presents potentially greater risks. An accomplice, through his or her testimony, will generally incriminate himself or herself to some degree; jailhouse snitches, on the other hand, expect a potential gain while risking little or nothing in testifying against a defendant.

Illinois has recognized the fallibility of jailhouse snitch testimony and its potential harm. In April 2002, the Illinois Governor's Commission on Capital Punishment identified "a number of cases where it appeared that the prosecution relied unduly on the uncorroborated testimony of a witness with something to gain."[15] As a result, Illinois has passed a provision allowing a court to decertify a death penalty case when it finds that the evidence against the defendant, which led to the conviction, was limited to the uncorroborated testimony of an accomplice or a jailhouse snitch.[16] Similarly, the California Commission on the Fair Administration of Justice, established to examine the administration of criminal justice in California and recommend safeguards, has proposed three bills designed to address the leading causes of wrongful convictions, including a bill to curb false testimony by jailhouse informants by requiring corroborating evidence for all such testimony.[17] The American Bar Association, in a 2005 resolution, urged "federal, state, local, and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by ensuring that no prosecution should occur based solely upon uncorroborated jailhouse informant testimony."[18]

While at least seventeen states have taken steps toward expanding corroboration requirements to include testimony offered by jailhouse snitches, most states do not have legal safeguards against this risk.[19] The California Commission on the Fair Administration of Justice recommends that state legislatures enact statutory requirements for the corroboration of jailhouse snitch testimony. Courts, according to the California Commission recommendations, must only admit testimony corroborated by evidence that connects the defendant with the commission of the offense charged or the special circumstance(s) or aggravating factor(s) to which the jailhouse snitch testifies. Such evi-

dence must go beyond demonstrating merely that the offense took place or that special circumstances or aggravating factors occurred. Corroborative evidence must demonstrate not only that the events described by the snitch are correct, but must also demonstrate that the snitch's story factually links the offense to the accused. Further, the testimony of another snitch must not be considered adequate corroboration.[20]

It is important to note that corroboration requirements alone are not sufficient to prevent the risks inherent in jailhouse snitch testimony. While corroboration requirements for jailhouse snitch testimony are critical because "the existence of corroboration is usually a threshold question for the judge,"[21] in many cases it may prove to be an insufficient measure to counteract the inherent unreliability of this type of testimony. Consequently, without other measures such as written disclosures, reliability hearings, and jury instructions, a corroboration requirement for jailhouse snitch testimony is likely to fall short of its intended purpose.

CAUTIONARY JURY INSTRUCTIONS

If the court allows the state to present snitch testimony, it appropriately falls to a jury to decide whether the testimony is credible. Nonetheless, the record of wrongful convictions based on perjured testimony has reinforced the need for greater guidance in making this determination. Thus, states should adopt rules requiring the court to provide a more specific framework to juries who wrestle with the numerous reliability issues presented by snitch testimony. This is especially true because such testimony is presented by the state; so, absent a limiting instruction, jurors are often inclined to assume the existence of some threshold of witness credibility.[22] With little expense or burden on the courts, cautionary jury instructions tailored to the reliability issues specifically presented by jailhouse snitches provide a necessary added safeguard.

When the state presents the testimony of a jailhouse snitch, the presiding judge should advise the jury to take into account several factors that shed light on the extent to which the testimony is reliable. Specifically, the presiding jury should consider all factors required through pretrial disclosures and/or considered in pretrial determinations of reliability. The factors should include incentives that the witness received, will receive, or may receive in exchange for testimony (*e.g.*, promises for sentence reductions, offers to lesser pleas, improved incarceration conditions for in-custody witnesses, monetary rewards, or anything else of value). Judges should also consider whether the witness has agreed to testify at prior criminal trials and, if so, how many times he or she has done so (or agreed to do so) and whether the witness has received any previous benefits for testimony, as well as the complete criminal history of the informant witness. Finally, judges should also consider whether at any time prior to trial the witness has recanted testimony or made statements inconsistent with the testimony to be presented at trial; and anything else bearing on the witness' credibility.[23]

While cautionary jury instructions should not be considered a sufficient safeguard against informant perjury in and of themselves, they should be given by courts as follow-through measures to reinforce the dependability of the determinations made by judges at pretrial reliability hearings.

ACCOMPLICE AND OUT-OF-CUSTODY INFORMANTS

This review deals specifically with jailhouse snitches, but there are other types of informants that can compromise the criminal justice system. Accomplice testimony, and even out-of-custody informant testimony, can be problematic. Although accomplice informants or out-of-custody informants generally have much to lose from a perjury conviction, they often have something to gain from testifying as well.[24] While it is illegal in the United States to give bribes or compensation in exchange for testimony, out-of-custody informants can wreak havoc on an otherwise fair trial by testifying because of a grudge, or other personal motive, and desiring to see the defendant behind bars. Additionally, even if an informant is not in state custody, there are circumstances in which witnesses can get immunity from prosecution for suspected crimes or possible charges.[25] Despite these potential problems with other types of testimony, jailhouse snitch testimony is still regarded as the least reliable type of testimony in the criminal justice system.

THE LEGAL LANDSCAPE

The issues presented by the use of informant witness testimony do not exist in a vacuum. Courts in many jurisdictions have recognized that special requirements are necessary to address the specific reliability concerns inherent in this type of testimony. The following is a brief overview of a number of ways in which states, and their courts, have enhanced procedural safeguards for defendants on the receiving end of informant-dependent prosecutions.

SINGLETON I AND SINGLETON II

Perhaps the most noteworthy decisions to come from any court regarding snitch testimony are the Tenth Circuit cases known as *Singleton I* and *Singleton II*, each of which dramatically changed the playing field for prosecutors and the defense bar. The implications of *Singleton I* were so far reaching as to cause some amount of internal crisis in District Attorneys' offices across the country. In turn, the defense bar lamented *Singleton II*, which was handed down shortly thereafter.

On July 1, 1998, a panel of the United States Court of Appeals for the Tenth Circuit decided *United States v. Singleton*, or *Singleton I*, ruling that the common practice of federal prosecutors conferring a benefit (be it money or a sentence reduction) on a witness in exchange for his or her testimony constitutes bribery of the witness. In coming to this decision, the panel relied on Section 201 of the Title XVIII of the U.S. Code, which reads in part:

> Whoever … directly or indirectly, corruptly gives, offers, or promises anything of value to any person, with intent to influence the testimony under oath or affirmation, such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court …shall be fined under this title or imprisoned for not more than two years, or both.[26]

The panel read this statute broadly, finding that it applied to prosecutors and government officials giving sentence reductions to cooperating witnesses.[27] According to the rules of statutory interpretation used by the court in *Singleton I*, the word "whoever" referred to federal prosecutors, and "anything of value" included intangibles, such as sentence reductions.

Less than two weeks later, however, on July 10, 1998, the court granted a rehearing *en banc*. On January 8, 1999, the Tenth Circuit *en banc* decided *Singleton II*, reversing its previous ruling by reading the statute much more narrowly. The reversing majority rationalized its reading by touting notions of sovereignty — that "whoever" cannot be deemed to include the sovereign government of the United States, and that a "thing of value" cannot be construed to include benefits received from the state.[28] Though prosecutors are persons, when they make plea bargains with defendants, they act in their official capacity as agents of the United States government. The United States government is not a person, and therefore not encompassed by the word "whoever."[29]

Following *Singleton I*, defense attorneys in all of the federal circuits filed motions to suppress the testimony of jailhouse snitches who had received leniency in exchange for testimony. When the Tenth Circuit reversed itself, the other circuits quickly followed suit, dismissing the motions.[30]

The holding in *Singleton I*, though reversed, shook the bedrock of the informant witness system and, in so doing, brought to light the complicity with which the criminal justice system accepts, without screening, the use of testimony that is inherently unreliable. The *Singleton I* holding is a reminder that the justice system's reliance on snitch testimony enjoys, at best, an uneasy relationship to foundational principles of American jurisprudence, and that reforms are necessary to avoid the pitfalls of bestowing benefits on witnesses in exchange for their testimony.

FEDERAL CIRCUITS

Singleton I is one of a long list of cases that have raised concerns about the reliability of snitch testimony. In addition to the **Tenth Circuit** ruling in the *Singleton* decisions, a number of other federal courts of appeal have addressed the issue of cooperating informants.

For example, in 1987, the **Fifth Circuit** Court of Appeals ruled that the trial court should give a special instruction cautioning the jury to question the credibility of witnesses who have been compensated for their testimony.[31]

In 1993, the **Ninth Circuit** discussed the unreliability of informants in *United States v. Bernal-*

Obeso: "The use of informants to investigate and prosecute persons engaged in clandestine criminal activity is fraught with peril. This hazard is a matter 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned' and thus of which we can take judicial notice."[32]

In 2002, the **Fourth Circuit** expressed its concern about snitch testimony, writing that compensated testimony "create(s) fertile fields from which truth-bending or even perjury could grow, threatening the core of a trial's legitimacy."[33]

In 2005, the **Ninth Circuit** Court of Appeals again called for heightened judicial scrutiny of deals between informants and prosecutors when it held: "where the prosecution fails to disclose evidence such as the existence of a leniency deal or promise that would be valuable in impeaching a witness whose testimony is central to the prosecution's case, it violates the due process rights of the accused and undermines confidence in the outcome of the trial."[34] Later in 2005, the same court called a lack of disclosure of deals between prosecutors and informants "unscrupulous."[35]

STATE COURTS

Likewise, some state courts have independently adopted general rules for different classes of informants, indicating a widely-held distrust of incentive-based testimony.[36]

For example, in 1999, the **Montana** Supreme Court ruled that when an informant testifies for personal gain rather than an independent law enforcement purpose, the court must give a special cautionary instruction to the jury. If the trial court fails to give the instruction, and the testimony is crucial to conviction, the conviction must be overturned as a matter of law.[37]

In 2000, the **Oklahoma** Criminal Court of Appeals ruled that courts must give a special instruction when jailhouse snitches testify, cautioning the jury that it must examine the testimony with special care. Courts ask jurors to take into account specific factors. The facts relevant to these factors must be disclosed by the prosecution prior to the trial.[38]

In 2004, the **Colorado** Court of Appeals reaffirmed its 1996 ruling that juries should be given a cautionary instruction when there is no corroborating evidence to support the testimony of an accomplice: "An instruction that directs the jury to use caution when considering accomplice testimony 'is to be given *only* when the prosecution's case is based on uncorroborated testimony of an accomplice.'"[39]

Ohio courts have similarly held that evidence corroborating an informant's testimony obviates the need for cautionary instructions.[40]

In 2001, the **Wisconsin** Appellate Court also ruled that "[i]t is an error to deny a request for an accomplice instruction only in a case where the accomplice's testimony is totally uncorroborated."[41]

In a 2005 decision, the **Connecticut** Supreme Court overruled a case in which the court had not allowed a credibility instruction, extending their special jury instruction law from including only accomplices to include jailhouse snitches. In the opinion the court stated that "an informant who has been promised a benefit by the State in return for his or her testimony has a powerful incentive, fueled by self-interest, to falsely implicate the accused. Consequently, the testimony of such an informant, like that of an accomplice, is inevitably suspect."[42]

BENEFITS & COSTS

BENEFITS OF REFORM

The practice of inmates exchanging testimony for more lenient sentences has its roots in British common law.[43] The main reason for its institution then, and its continued use today, is simple: it results in noticeably higher conviction rates.[44] Inmates may have information about suspects to which others would not have access — information that can be extremely helpful for incarcerating the guilty.

Nonetheless, in addition to its inherent interest in the economical administration of justice, the state must maintain credibility with its citizenry as it prosecutes crime. All wrongful convictions detract from the public's faith in the fair administration of justice, but the

cost is especially high when wrongful convictions result from the testimony of witnesses who have received a benefit in exchange for their testimony. False snitching — and the misguided prosecution that it enables — erodes the relationships between citizens and the state.[45] For each person wrongly convicted, a guilty party remains free to commit more crimes.

Higher scrutiny and transparency of jailhouse snitch testimony will allow law enforcement, courts, and the criminal justice system as a whole to focus their limited resources on convicting the guilty. By ensuring available resources will be used to capture the actual perpetrator, the criminal justice system simultaneously helps prevent wrongful convictions and further victimization of the community. With codified requirements for determining the reliability of jailhouse snitch testimony, the benefits to law enforcement, prosecutors, and the community will accrue through stronger prosecutions and more reliable outcomes in criminal cases.

COSTS OF REFORM

The policy improvements outlined in this review are generally accepted as high-yielding safeguards that do not overburden taxpayers or the courts. The main expenses in terms of implementation are procedural costs associated with a slightly higher workload for judges, more extensive pretrial investigation necessitated by corroboration requirements, and education or retraining programs associated with implementation. The expenses related to pretrial disclosures and jury instructions, on the other hand, are negligible. It is axiomatic that such procedural costs, incurred in the interests of justice, are a bare minimum expenditure for a criminal justice system in pursuit of more reliable outcomes in criminal cases. The values of fairness and accuracy are of far greater worth than the marginal procedural costs expended by the state.

When perjured testimony leads to wrongful convictions, taxpayers shoulder the financial burden.

When perjured testimony leads to wrongful convictions, taxpayers shoulder the financial burden. From the state's initial investigation and prosecution through additional investigation, multiple, subsequent appeals, and exoneration (where sizeable compensation is possible), the public pays for perjured testimony. Compared to the costs of wrongful convictions, the expense to the state associated with implementing these reforms is extremely low. Given the pay-offs, and given that the proposed improvements fit easily within existing procedures, the reforms recommended here constitute pragmatic proposals for improved policies.

PROFILES OF INJUSTICE

The Marietta Seven

James Creamer and six co-defendants were wrongfully convicted of murdering two pathologists in Marietta, Georgia, almost entirely on the word of an informant named Deborah Ann Kidd. Transcripts of inconsistencies in Kidd's statements were withheld from the defense. In 1975, the convictions of the Marietta Seven were reversed, and the state dropped all charges. Despite the dropped charges, the District Attorney declined to prosecute Kidd for perjury.

On July 26, 1972, more than a year after the well publicized killings of two pathologists, Drs. Warren and Rozina Matthews, South Carolina State Police notified Cobb County authorities that they had a witness to the Matthews crime in custody on a shoplifting charge. Deborah Ann Kidd, a habitual drug abuser, prostitute, and shoplifter, claimed to have pertinent information and asked for immunity in exchange for her testimony.[46] Desperate for clues, then-Cobb County D.A. Ben Smith immediately sent a letter to Kidd promising blanket immunity in exchange for information about the crimes.

In discussions with authorities, Kidd implicated herself and nine other individuals in the murders: James Creamer, George Emmett, Hoyt Powell, Larry Hacker, Bill Jenkins, Wayne Ruff, Charles Roberts, Mary Ann Morphus, and Carolyn Sue Bowling Johnson. The handprint and fingerprints found at the scene did not match Kidd or any of the nine she implicated; however,

all nine individuals were indicted for murder based on Kidd's story, and seven were prosecuted.

THE SNITCH

Testifying under immunity, Kidd said she met Creamer on May 2, 1971 and became his girlfriend right away. They went to Georgia on May 4th with Powell and Ruff and checked into an Atlanta motel where she met the other men. After a party at the motel with drugs and alcohol, she said the group embarked on an armed robbery ending in the murder of the Matthews couple.

The neighbor who first reported hearing gunshots had a clear view of the house and rear yard, but when he looked out the window, he saw no people or automobiles. According to Kidd, however, the murderous party involved no fewer than ten people who traveled to the home in three cars.

Kidd said Ruff and Creamer killed Mr. Matthews. Before it was over, she claimed Mrs. Matthews shot Creamer, apparently with her own .38 pistol. Kidd tearfully claimed that she tried to flee the bloody scene, but Roberts caught her and made her shoot Mrs. Matthews in the head with her own gun. Kidd testified that she was able to recall the crime with greater clarity as a result of sessions with a psychologist who used hypnosis.

THE TRIALS

The Marietta Seven were convicted in five separate trials: Creamer and Emmett were tried separately in early 1973; Jenkins, Hacker, Powell, and Ruff were tried jointly in July 1973; and Roberts was tried in January 1975 after an earlier mistrial. All seven were convicted of murder. Despite Kidd's testimony, they all consistently maintained their innocence.

After the original trials, it became clear that Kidd had told several significantly different stories about the crime — stories that were at odds with known facts. Authorities had worked extensively with her, including retaining a psychologist, Dr. Edwin P. Hall, who guided Kidd's story over twelve visits totaling some thirty-five hours (some with police and prosecutors present). Dr. Hall conducted several "age regression" hypnosis sessions that were supposed to help Kidd "recover" memories and remove inconsistencies.

Defense attorneys were aware of the sessions, but were denied access to tapes and transcripts until much later. The records showed that Kidd's story was more manufactured than "recovered." Astonishingly, while the prosecution continued to work with Kidd in an attempt to shape her testimony into credible evidence, Kidd stayed for several weeks at the home of a detective with whom she developed a sexual relationship while continuing to abuse amphetamines supplied by the police.

During the appeals process, defense lawyers discovered numerous documents in police and prosecutors' files, hidden from the defense at trial, that shattered Kidd's credibility. The files revealed that during the summer of 1972, Kidd gave three substantially different accounts of the crime that contradicted the physical evidence. For example, she said Rozina Matthews had been severely beaten before being shot, although an autopsy showed no cuts or bruises, and no torn clothing. Additionally, Kidd initially stated that the crime occurred during cold weather, sometime around Christmas or New Year's Day, when it had, in fact, occurred in May.

She originally described Creamer's bleeding at the scene as profuse, but later testified that it was light — a more plausible claim, given that numerous samples of blood from the scene all matched the victims' blood type and could not have come from Creamer. No weapons were recovered from the scene, but ballistics tests indicated that three different .38 caliber guns were fired. Police knew that Creamer had a gunshot wound and that a bullet was lodged in his body. When it was surgically removed, the .38 slug was found to have been fired by a gun other than the Smith and Wesson owned and allegedly used by Rozina Matthews, and it matched none of the slugs found at the scene. During appeals, Creamer testified that he was shot during an attempted robbery near the Atlanta airport on the 19th or 20th of May, 1971.

In Kidd's first three versions of events given to police, she unequivocally claimed that Carolyn Sue Bowling Johnson participated in the murders. Investigators determined, however, that Johnson was in Hamilton, Ohio on the day of the crime, a fact confirmed by medical records and the testimony of a doctor that had treated her on that day. Further investigation did indicate that Johnson had been involved in a different crime — one in which Creamer was shot — but that this crime had occurred weeks later, around May 21, 1971. This was consistent with Creamer's explanation of his wound.

Defense lawyers also discovered suppressed documents showing that police had a witness who described seeing two teenagers driving a Mercedes sports car like the Matthews' near where their car was found. The description matched none of the defendants. A neighbor also told investigators he saw a car in front of the Matthews home near the time of the crime, and gave a description of its two occupants that matched none of the defendants. Other documents showed that on Aug 1, 1971, two witnesses told police that a different man, Willie Lloyd Gauldin, had confessed to them that he was the killer. Gauldin was arrested and taken to the police psychologist who performed a "hypnotic interrogation" and concluded that he was not involved.

Emmett's and Creamer's cases advanced first through the state appeals process. During the unsuccessful state court appeals, defense lawyer Bobby Cook dispatched an investigator to South Carolina to look into Kidd's past. The investigator found dated documents, including checks and divorce papers signed and dated by Kidd, showing that she was actually in Greenville, South Carolina on the very day she claimed to be in Marietta with the defendants committing the murders. After exhausting state appeals, their cases went to the U.S. District Court. When presented with the documentary evidence in a federal court hearing, Kidd denied the signatures were hers, but three document experts testified that they were Kidd's.

TOWARD JUSTICE

After seventeen days of hearings, United States District Judge Charles Moye overturned Emmett and Creamer's convictions on June 17, 1975. The court, finding numerous and pervasive instances of suppression and destruction of exculpatory evidence, described the undisclosed report of Kidd's three varying accounts of the crime as "utterly devastating to Kidd's credibility." Judge Moye wrote, "The prosecution, though it knew full well the exculpatory and devastating nature of the documents it possessed, did not divulge their existence or contents to either petitioner."[47]

In addition, the court found that "by the end of August, Kidd's scenario, riddled as it was with inconsistencies, implausibilities and gaps, was in dire need of shoring up if the prosecution were to obtain convictions."[48] Dr. Hall acted essentially as a specialized law enforcement investigator, the judge found, who was provided with detailed information about the crime by the police to help build a case out of Kidd's testimony.

The tapes and transcripts of their sessions revealed that Hall told Kidd to read media accounts of the case, including one taped comment in which Hall tells Kidd that she "ought to read that newspaper and get those names straight."[49] The judge found the sessions to be "a thinly veiled effort to prop up the prosecution's case."[50] Although the hypnotic sessions were taped, the prosecution claimed that some tapes and transcripts of the sessions were inadvertently destroyed. The court concluded that the evidence had been deliberately destroyed, constituting an unlawful obstruction of justice.

Cobb County District Attorney Darden acknowledged during the hearings that the Matthews investigation had been "bungled," and Judge Moye noted the tunnel vision of investigators in his ruling, writing, "The number and significance of the investigative gaps in this case is truly astounding." The court's conclusion was stinging:

> The prosecutorial suppression of nearly all evidence concerning Deborah Kidd resulted in a criminal proceeding that bordered on the Kafkaesque ... the extreme measures to which the state resorted in extracting information (or more accurately, in supplying information to) this witness and the use of her testimony at trial … the suppression of documents, the firing of police officers skeptical of Kidd's story, all raise grave questions regarding the single-minded zeal with which these convictions appear to have been sought and obtained. The predictable result is that this Court has before it a pair of criminal convictions obtained in a manner so manifestly and fundamentally unfair that they must be vacated.[51]

TWO CONFESSIONS

During appeals, Billy Sunday Birt came forward to confess to the Matthews killings and implicated two others he said participated in the crime: Billy Wayne Davis and Willie Hester. Birt had been convicted and sentenced to death for the murder of an elderly couple in Wrens, Georgia. Davis was in federal prison for

bank robbery, while Hester was never apprehended.

Birt's wife initially contacted lawyers representing the seven defendants and told of her husband's involvement in the Marietta murders. Birt himself contacted Cobb County authorities to tell his story. He was doing time in Illinois for bank robbery when he was extradited to Georgia to face charges in the Wrens killings. In a signed confession, Birt said he killed Warren Matthews and Davis killed Rozina Matthews. He was indicted for the Matthews murders in 1979. Birt was already on death row, however, and the case never went to trial.

Kidd, too, finally confessed to her lies. On Monday, August 25, 1975, she admitted on tape to police and prosecutors that she lied in testimony that convicted the seven men. Two days later, after intense negotiations among prosecutors, defense lawyers, and federal and state judges, three of the men (Roberts, Powell, and Emmett) were released on personal recognizance bonds and eventually saw all charges dropped. The other four remained incarcerated for charges unrelated to the Marietta murders.

On September 2, 1975, Cobb District Attorney Buddy Darden announced he was dropping all charges against the seven. He conceded that Kidd, his star witness in the five trials, had admitted to lying, but he refused to prosecute her for perjury. Darden cited several reasons, including possible involvement of others in manufacturing her testimony, legal complications associated with the initial promise of blanket immunity, and "a waste of taxpayer money." Critics charged that authorities wanted to avoid the embarrassment that would follow shining a spotlight on their gross mishandling of this unreliable witness.

By the time of his release, Emmett had served thirty-five months, Powell two years, and Roberts twenty-three months. Roberts pled guilty to drug and gun charges upon release, with credit for time spent on the charges for which he was exonerated. While these innocent men served time in jail, Kidd suffered no repercussions for committing perjury. Proper safeguards monitoring snitch testimony may have prevented this tragic injustice altogether.

Wilton Dedge's Story

Arrested at age twenty, Wilton Dedge spent twenty-two years in prison for the rape of a seventeen-year-old Florida woman before DNA testing finally proved his innocence. The prosecution relied heavily on identification testimony from the victim and testimony from a jailhouse snitch who testified that Dedge had confessed to committing the crimes. After years of fighting for a DNA test, Dedge won his freedom in August 2004. The state of Florida awarded Dedge $2 million in compensation for his wrongful imprisonment.

On January 23, 1984, Clarence Zacke and Wilton Dedge were placed in a prison transport van together. They were the only two inmates in the van. Dedge was awaiting a bond proceeding and a retrial for the 1981 rape of a seventeen-year-old Florida woman. Zacke, in prison for murder and conspiracy to commit murder, was a jailhouse snitch. A little over a week after their time together in the transport van, Zacke testified at Dedge's bond proceedings. He claimed that Dedge had confessed the crime to him, calling the victim "an old hog", and saying that he would kill her if he ever got out of prison.[52] Dedge was denied bond. While his sentence from the first trial was thirty years, at his retrial he was sentenced to two consecutive life sentences plus two consecutive fifteen year sentences. The conviction and increased sentence were due in large part to Zacke's testimony.

THE TRIALS

On December 8, 1981, around 4:30 p.m., a seventeen-year-old woman was repeatedly raped and assaulted in her home in Canaveral Groves, Florida. A month later, on January 8, 1982, Wilton Dedge was arrested based on the victim's identification, which had wavered substantially in the month since the crime.

Dedge was first tried for burglary, sexual battery, and aggravated battery in 1982. The prosecution relied heavily on the victim's identification, scent identification from a police dog, and analysis of a hair found at the crime scene. The Florida jury took four hours and twenty-five minutes to convict Dedge of burglary with assault, sexual battery with a weapon, and aggravated battery. On December 22, 1983, however, the Fifth District Court of Appeals reversed Dedge's conviction, finding that while the scent identification was persuasive, the trial judge had erred in

disallowing the defense to present the testimony of an expert on human scent discrimination and in allowing hearsay during the examination of the prosecution's expert witness. Because the eyewitness testimony was equivocal and the forensic evidence inconclusive, the Court of Appeals found these errors to be harmful.

Dedge was convicted a second time in August of 1984 based on questionable eyewitness identification, snitch testimony, limited forensic hair comparison, and dog sniffing evidence from a since-discredited handler.

THE JAILHOUSE SNITCH

Prosecutors relied heavily on testimony of prison inmate Zacke at Dedge's second trial in 1984. Based on Zacke's testimony, the open-ended forensic hair analysis, and the victim's identification, Dedge was convicted a second time of burglary with assault, sexual battery with a weapon, and aggravated battery. This conviction was affirmed on appeal. Assistant State Attorney Chris White, who prosecuted the case, noted that Zacke wasn't promised anything *specifically* in exchange for his testimony. Still, Zacke received a reduction in his sentence after testifying against Dedge.[53]

Notably, the testimony against Dedge was not the first time Zacke had come forward with information to help an investigation. He had previously testified against convicted serial killer Gerald Stano, claiming that Stano had confessed to murdering Cathy Lee Schraf. Following conviction for the Schraf murder, Stano was sentenced to death. Zacke later recanted this testimony during a phone interview with a freelance writer.[54] Zacke had over a century shaved off of his original 180 year sentence. He later admitted that he had been hoping to receive parole by testifying against Dedge.[55] On November 11, 1989, a hearing examiner requested a twenty-six year reduction of Zacke's sentence in return for Zacke's alleged cooperation in providing authorities with information about a potential prison escape. Assistant State Attorney Chris White and Assistant State Attorney Michael Hunt both spoke at the hearing, calling Zacke a liar and a con artist (incidentally, their statements at the hearing were never shared with Dedge's defense attorney).

The culmination of Zacke's snitch testimonies allowed him to negotiate his sentence to sixty years or less with good behavior.[56] But Zacke was ultimately unsuccessful in parlaying his snitch testimony into an early release. On December 21, 2005, jurors convicted Zacke of raping his adopted daughter over a multi-year period in the 1970s after deliberating for only two-and-a-half hours. He was sentenced to five consecutive life sentences. The victim came forward to publicly accuse him of rape upon learning of his impending release.[57] In 2006, attorneys for Wilton Dedge called for an investigation after discovering that Florida authorities had prior knowledge of these allegations against Zacke, and that they may have hidden the allegations in order to secure Dedge's conviction.[58]

THE LONG ROAD TO EXONERATION

Throughout the course of his trials and appeals, Dedge continually proclaimed his innocence. At the time of his original and second trials, however, DNA testing was not available. In fact, DNA testing was not used in commercial laboratories until 1987.[59] Florida courts first used DNA analysis in October of 1988,[60] and it wasn't until 1990 that federal courts authorized its use.[61]

On March 30, 1988, Dedge's attorney first wrote the State Attorney seeking DNA testing. Though the State Attorney had the authority to grant the request for DNA testing, he advised Dedge's attorney to file a motion with the court. Dedge's attorney subsequently verified that the state attorney's office was maintaining the forensic evidence from the crime scene so that testing could be performed. During this same time, Dedge himself was inquiring into different possibilities of exoneration. He tried to show that Zacke had lied, the eyewitness identification had been contradictory, and that the prosecution had misused the hair analysis. He also contacted DNA testing services, including advocacy groups, to seek help in getting tested.

On October 17, 1994, Dedge contacted attorneys at the Innocence Project after seeing a television report about their work in post-conviction DNA testing. Less than two months later, the Innocence Project decided to take Dedge's case. When the Innocence Project contacted the State Attorney's office seeking release of certain evidence, the Assistant State Attorney requested that they obtain a court order. Though they could hardly know this at the time, following this initial opposition by the state, Dedge and his attorneys would face ten more years of appeals before finally winning release.

On April 24, 1997, the Innocence Project filed the first motion for DNA testing. The State Attorney's office opposed this motion, claiming that the statute of limitations had passed despite the fact that the state had received the first request for DNA from Dedge's attorney in 1988. The trial court agreed with the state, and denied the motion for DNA testing. After multiple appeals, the court ordered the release of certain evidence for DNA testing and, in March of 2001, Dedge motioned to vacate his conviction based on determinative proof of his innocence.

Later that spring, the legislature passed a new statute that allowed for post-conviction DNA testing. In November of that year, Dedge returned to court, filing yet another motion to vacate the judgment against him. The state argued that his conviction rested upon more than forensic evidence, relying on the snitch testimony and the dog scent lineup. According to the prosecutors, any of this evidence would have been sufficient to convict Dedge; thus, the exculpatory DNA evidence should not be determinative in the case. After an initial hearing in which Dedge's motion to vacate his sentence was denied, the Florida Fifth District Court of Appeal affirmed without prejudice, allowing Dedge to file under the newly passed post-conviction DNA statute. Dedge's attorneys filed a new motion under this statute, and on April 27, 2004, a new trial was ordered. After twenty-two years behind bars for a crime he did not commit, and after years of arduous appeals and disappointments, Dedge at last won his freedom. He was released on August 12, 2004.[62]

On June 23, 2003, Governor Jeb Bush signed legislation, inspired in part by Dedge's case, which extended prisoners' rights to DNA testing that could exonerate them by removing any deadline for seeking evidence to prove innocence.[63] The law also mandates that evidence collected at the time of the crime must be preserved until an inmate's sentence is completed.[64]

On December 14, 2005, the state of Florida awarded Dedge a $2 million settlement for his twenty-two year ordeal.[65] Dedge was the first Florida inmate exonerated by DNA testing to receive compensation from the state. In 2006, attorneys for Wilton Dedge called for an investigation after discovering that the Florida authorities had prior knowledge of the allegations against Zacke, and may have hidden the information in order to secure Dedge's conviction.[66]

A SNITCH'S STORY

Leslie Vernon White, a self-confessed career criminal, has provided prosecutors with testimony in as many as forty cases. In an appearance on *60 Minutes*, White described the process by which inmate informers fabricate evidence and claimed that he often lied when giving testimony as a jailhouse snitch.[67] In a 1988 interview with *Time Magazine*, White had this to say about his prison stints: "Every time I come in here, I inform and get back out."[68]

After perjuring himself in a 1981 trial, and falsely claiming that the Hillside Strangler had confessed to him in 1982, White lost any remaining shards of credibility. Nevertheless, prosecutors continued to use his testimony, and in November of 1988, the *Los Angeles Times* reported that White had been called as a witness in three murder cases.[69]

In a 1990 interview with *60 Minutes*, White gave a first hand account of how he was able to render perjured testimony believable. First, White would determine the last name of a person recently charged with a murder in Los Angeles County (available in the public record). Using the prison chaplain's phone, White then called the Document Control Center of the Los Angeles County Sheriff's Office to obtain a case number and arrest date. White would then call the District Attorney's Record's Bureau and pose as a Deputy District Attorney to get the names of prosecutors assigned to the case and names of key witnesses. White would then identify himself as a Los Angeles police officer to the County Coroner's Office, where he learned how the victim was killed. Finally, White would call families of the victim and accused to learn characteristics personal to each. Armed with this information, White would fabricate a seemingly credible "confession" on the part of the accused.[70]

Although White was crafty in his pursuit of details, he claimed to *Los Angeles Times* reporters that his methods were both known to and employed by many looking for early release from California's prisons.[71]

SNAPSHOTS OF SUCCESS

A number of states and jurisdictions have taken measures to ensure that perjured snitch testimony does not result in egregious miscarriages of justice such as wrongful convictions. States like Illinois, California, and Oklahoma represent case studies in snitch reform — and in successful methods for enhancing the evidentiary value of jailhouse snitch testimony.

ILLINOIS

Illinois has recognized the need for proper disclosures of information relevant to incentive agreements with jailhouse snitches, and that courts should perform a "gatekeeper" function when criminal prosecutors present jailhouse snitch testimony. The Illinois House Special Committee on Prosecutorial Misconduct, after holding extensive hearings, proposed that the Illinois Supreme Court adopt jury instructions cautioning about the reliability of such testimony.[72] In April 2002, the Illinois Governor's Commission on Capital Punishment, expanding on the prior work of the House Special Committee, concluded that "[t]estimony from in-custody witnesses has often been shown to have been false, and several of the thirteen cases of men released from death row involved, at least in part, testimony from an in-custody informant." The Commission recommended that the state require pretrial reliability screenings of jailhouse snitch testimony.[73]

Illinois courts are now required by statute to hold pretrial reliability hearings in capital cases that employ jailhouse snitches. In reaching a decision, Illinois courts consider information provided by prosecutors, including the criminal history of the informant, any benefit conferred or to be conferred to the informant in exchange for his or her testimony, other cases in which the informant has testified, and other information relevant to the informant's credibility.[74] These practices match this report's best practices for disclosure.

CALIFORNIA

California established the California Commission on the Fair Administration of Justice to examine California's administration of criminal justice and to recommend safeguards to ensure its fairness. On September 20, 2006, the Commission conducted a public hearing, which included the testimony of Dennis Fritz, a man wrongly convicted of rape and murder. The principal testimony against Fritz came from jailhouse snitches, with little corroboration. Five days before Fritz's codefendant, Ron Williamson, was scheduled to be executed, DNA testing was finally performed. The DNA results matched one of the informants who had testified against Fritz and Williamson, and both men were exonerated. The Commission has proposed three bills designed to address the leading causes of wrongful convictions, including a bill to curb false testimony by jailhouse informants by requiring corroborating evidence for all such testimony.[75] In its April 17, 2007 press release, the Commission argued: "Jailhouse informants have strong reasons to lie because they are offered lenience in return for information. The leading cause of wrongful convictions in death penalty cases in the United States is false testimony by informants."[76]

The Commission made a number of recommendations, most of them similar to the best practices outlined in this review. These include the disclosure of any benefit a government informant receives or may receive, required independent corroboration of snitch testimony, and recording of all contact with in-custody informants.

The Commission's recommendation that prosecutors seek independent corroboration of snitch information largely reflects the internal policies of District Attorneys in a number of California jurisdictions. For example, in response to the exploits of Leslie Vernon White, a Los Angeles jail inmate who made national news after detailing methods for fabricating testimony to gain lenience, the Los Angeles County Grand Jury convened a comprehensive investigation regarding the use of jailhouse snitches.[77] In response to the report and recommendations that resulted from the investigation, the Los Angeles County District Attorney's office adopted policy guidelines to strictly control the use of jailhouse snitches as witnesses.

The California legislature has addressed the need for jury instructions. California currently requires an instruction to juries to make an independent reliability determination when the state presents jailhouse snitch testimony. In every California criminal proceeding in which the jury hears snitch testimony, upon request of either party, the judge instructs the jury, "The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the

extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case."[78]

OKLAHOMA

In *Dodd v. State* (2000), the Oklahoma Court of Criminal Appeals adopted two rules that limit improper reliance on snitch testimony. First, the Oklahoma Court now requires that prosecutors share any information with defense counsel that might discredit the reliability of snitch testimony. In practice, this rule operates as a supplement to the U.S. Supreme Court's 1963 holding in *Brady v. Maryland*, which requires prosecutors to turn over to defense counsel any "material" evidence that might impeach government witness testimony. The *Dodd* rule expands what the court considers "material" to include any information that might lead a fact finder to deem snitch testimony unreliable. The second rule adopted in *Dodd* requires trial courts to issue a special cautionary instruction to juries who hear snitch testimony. The instruction requires juries to take into account several factors similar to those set forth in the Illinois statute. The Court wrote, "Courts should be exceedingly leery of jailhouse informants, especially if there is a hint that the informant received some sort of a benefit for his or her testimony."[79]

VOICES OF SUPPORT

"The need for disclosure is particularly acute where the government presents witnesses who have been granted immunity from prosecution in exchange for their testimony … We said that informants granted immunity are by definition ... cut from untrustworthy cloth, and 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. ... Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery."[80]

United States Court of Appeals for the Ninth Circuit
Carriger v. Stewart, December 17, 1997

"If I worked with a cooperator and came to trust him and I corroborated six of the eight major facts he told me, I would tend to believe the other two uncorroborated ones and use those at trial. I would not always try to corroborate those additional two facts. I've gotten burned by such an approach."[81]

Anonymous
Assistant United States District Attorney
Fordham Law Review, December, 1999

"The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility."[82]

United States Supreme Court
On Lee v. U.S., June 2, 1952

"A legally unsophisticated jury has little knowledge as to the types of pressures and inducements that jail inmates are under to 'cooperate' with the state and to say anything that is 'helpful' to the state's case. It is up to the trial judge to see that there are sufficient assurances of reliability prior to admitting this kind of amorphous testimony to keep this kind of unreliable evidence out of the hands of the jury ..."[83]

Supreme Court of Nevada
D'Agostino v. State, December 30, 1991

"Jailhouse informant testimony has come under increasing criticism and has contributed to a great number of wrongful convictions in [Illinois] and the country … In Illinois, of the 13 wrongful convictions from death row, five were convicted based on jailhouse informant testimony. Clearly, there is need for a legislative response."[84]

James B. Durkin
Illinois State Representative
Chicago Daily Law Bulletin, April 26, 2003

"The jailhouse informant is often a seasoned witness who can appear convincing even during tough cross-examination. And it's been shown that juries tend to give weight to the evidence of a defendant's confession, even after warnings as to the credibility of jailhouse informants in general. I believe the only effective way to deal with this problem is to provide a pretrial exclusion process to ensure the reliability of an informant's testimony."[85]

Robert M. Bloom
Professor, Boston College Law School
ABA Criminal Justice Magazine, Spring 2003

"When used properly, informants can be a powerful and appropriate investigative tool. But they can also be destructive, crime-producing, and corrupting. The widespread use of informants means that much of the real adjudicative process takes place underground, without rules, records, or lawyers, and without public or judicial scrutiny of the fairness and accuracy of the process."[87]

Alexandra Natapoff
Associate Professor
Loyola School of Law, Los Angeles
San Francisco Chronicle, November 19, 2006

"I'm not the first guy who went to prison because someone lied, and I won't be the last. But it's wrong, and something should be done to try to prevent this because no one can give me back all the years I lost."[86]

Timothy Atkins
Exoneree
Sacramento Bee, May 18, 2007

"How can we prevent informants from testifying falsely? We can't. But we can reduce the number of wrongful convictions based on false testimony with steps designed to level the playing field and open the process to daylight."[88]

George C. Harris
Director of the Center for Advocacy and
Dispute Resolution, University of the Pacific
McGeorge School of Law
San Jose Mercury News, November 14, 2006

QUESTIONS & ANSWERS

Are unreliable jailhouse snitches so pervasive in criminal cases, and in the record of wrongful convictions, as to warrant substantive policy change?

Yes. The "informant institution" is an ever-expanding one.[89] The incentives to cooperate are often irresistible given the benefits offered in exchange for testimony. Unfortunately, the number of wrongful convictions incurred as a result of perjured informant witness testimony is correspondingly high. Of 111 wrongful convictions in capital cases recently examined by the Center on Wrongful Convictions at Northwestern University School of Law, fifty-one involved "incentivised" witness testimony. Perjured snitch testimony was determined to be the most common cause of wrongful convictions in capital cases.[90] The total number of cases in which perjured informant witness testimony has led to wrongful convictions is impossible to determine, but scholars generally agree that the number is very high.

Our system of criminal justice already has a safeguard in using cross-examination to discredit unreliable witness testimony. Why isn't this safeguard a sufficient tool to weed out false jailhouse snitch testimony?

Cross-examination is an insufficient safeguard against the perils of unreliable snitch testimony because of the special problems that arise from limited disclosure requirements related to informant witnesses. Oftentimes, defense counsel will not have access to all of the information to discredit the testimony of an unreliable state informant, because discovery requirements do not, as a general rule, extend to evidence that is not "material" to guilt or innocence. Materiality as defined by courts is a very high threshold, describing evidence that, if disclosed, would have

resulted in a "reasonable probability" that the defendant would be found not guilty.[91] The materiality standard certainly does not apply to all evidence that could be used to show the implausibility of a jailhouse snitch's testimony. Without pretrial disclosures of all information relevant to credibility determinations, meaningful cross-examination is impossible.

Furthermore, it is difficult to "un-toll the bell." Though effective cross-examination might convince a jury to give less weight to informant testimony, jurors are somewhat predisposed to infer *some* degree of reliability because the witness is presented by the state. Therefore, a pretrial, independent determination by the court that the witness is credible is necessary to prevent improper reliance by juries on informant testimony. Similarly, use of the common tool of implied inducements allows for prosecution witnesses to state to a jury, unequivocally, that they have not received any benefit in exchange for their testimony. The fact that such informers *will* or *may* receive such benefits, even if not explicitly promised, is often overwhelmed by the informer's second-hand account of criminal activity. Proper instruction to the jury is necessary to balance this precarious practice.

Our lengthy and unfortunate history of wrongful convictions has shown that the procedural safeguards currently in place do not effectively remedy the problems presented by the unreliable testimony of jailhouse snitches. In order to offer adequate protection to innocent individuals, and to ensure reliable outcomes in criminal cases, states must implement meaningful procedural safeguards that supplement the tools currently available to defendants.

Shouldn't it be left to a jury to decide whatever testimony is credible or not?

As is the case when a party to a civil action wishes to present expert testimony, there are times when it is necessary for a court to make an independent *legal determination* as to the admissibility of witness testimony. Such legal determinations fall squarely within the jurisdiction of the judge in criminal trials. Once the judge has ruled on the legal implications of allowing a jury to hear snitch testimony, the jury, as fact-finder, should give the testimony whatever weight they feel is appropriate.

Evidence that is unduly prejudicial is always excluded from the total body of evidence presented to a jury. Perjured snitch testimony is so highly prejudicial to a defendant as to warrant both corroboration and a pretrial determination by the court that the testimony can be presented to the jury at all. Once such a determination has been made, it is indeed the role of the jury to make a determination as to whether to believe the informant witness' testimony based on the guidelines of a limiting instruction.

Aren't the policy recommendations implicitly displaying a general mistrust of prosecutors and law enforcement officers who are simply trying to keep criminals of the streets?

Most police and prosecutors subscribe to high standards of corroboration and witness scrutiny before utilizing snitch testimony. When a state informant witness is not credible, the credibility of those who employ that testimony is also undermined, as is their ability to successfully prosecute and enhance public safety.

Often, the problems discussed here arise as a result of unscrupulous informers deceiving law enforcement, whose resources are often over-extended. Informants are often so desperate to escape incarceration that they will go to great lengths to weave elaborate narratives in exchange for sentence reductions. Though prosecutors have an ethical duty to ascertain the truthfulness of information from cooperating witnesses, it shouldn't fall *entirely* to prosecutors, or to police, to weed out the bad apples.

Most of the policy improvements discussed here are not designed to place any additional burden on state attorneys or law enforcement officers who already employ basic corroboration techniques. Furthermore, expanding the role of the courts in determining informant witness reliability will ensure that public confidence in our law enforcement officers remains intact.

Are reforms related to snitch testimony difficult to implement?

The policy recommendations are designed to fit readily within the context of processes already in place, including discovery, jury instructions, and consideration of adversarial motions (with argument and presentation of evidence). Courts are already employing these procedures in their daily practice and in the context of criminal trials. What's more, courts are already conducting hearings to determine the reliability of expert witnesses. The reforms would be an extension of this rule to a class of witnesses that demands equal, if not higher, scrutiny.

A MODEL POLICY

MODEL BILL FOR INCREASING THE EVIDENTIARY VALUE OF JAILHOUSE INFORMANT TESTIMONY

An Act:

Section I. Purpose.
The purpose of this Act is to ensure that only reliable jailhouse informants are permitted to testify at trial, and to ensure that when such an informant testifies, the jury is fully informed. Because in-custody informants have very strong incentives to fabricate or elaborate testimony in order to receive lenient treatment, courts should view such testimony with skepticism. This act should be interpreted consistent with the goal of keeping unreliable informant testimony out of court.

Section II. Definitions.

A. As used in this section, "in-custody informant" means a person, other than a co-defendant, percipient witness, accomplice, or co-conspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution.

B. As used in this section, "consideration" means any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, benefit, immunity, financial assistance, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, the informant's testimony in the criminal proceeding in which the prosecutor intends to call him or her as a witness.

Section III. Disclosure Obligations of the Prosecution.
In any criminal trial or proceeding in which the prosecution intends to call an in-custody informant to testify, pursuant to relevant state rules governing discovery, the prosecution must obtain and disclose the following information to the defense:

A. A written statement setting out any and all consideration promised to, received by, or to be received by the in-custody informant. This requirement applies even if the prosecution is not the source of the consideration.

B. The complete criminal history of the in-custody informant.

C. The names and addresses of any and all persons with information concerning the defendant's alleged statements, including but not limited to: law enforcement and/or prison officers to whom the informant related the alleged statements; other persons named or included in the alleged statement; and other persons who were witness and who can be reasonably expected to have been witness to the alleged statements.

D. Any prior cases in which the in-custody informant testified and any consideration promised to or received by the in-custody informant, provided such information may be obtained by reasonable inquiry.

E. Any and all statements by the in-custody informant concerning the offense charged.
F. Any other information that tends to undermine the in-custody informant's credibility.
G. This section does not alter other disclosure or discovery obligations imposed by state or federal law.
H. Any materials that the prosecution must disclose under this section are admissible to impeach the credibility of the in-custody informant if such informant testifies at trial.

Section IV. Requirement for a Pre-Trial Admissibility Hearing.

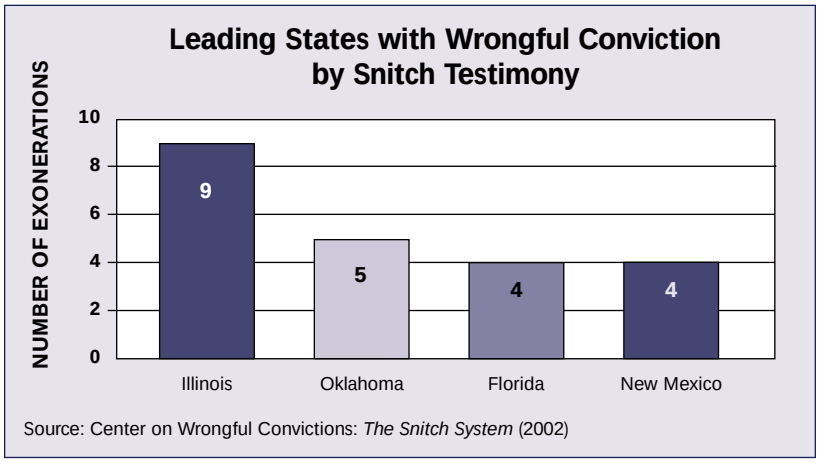
A. Prior to trial, the prosecution must apply to the trial court and request that the trial court admit the testimony of the in-custody informant. In such hearing, the court must only admit the testimony of the in-custody informant if it concludes that the informant is reliable, considering such factors as the consideration offered to the in-custody informant, the complete criminal record of the in-custody informant, the alleged statements made by the accused, the time, place, and circumstances of the alleged statements, the time, place, and circumstances of the alleged disclosure to law enforcement officials, any inconsistent statements by the in-custody informant, other cases in which the in-custody informant testified, and any consideration promised or received in those cases, the quality of corroborating evidence, and any other evidence relevant to the in-custody informant's credibility. The prosecution shall bear the burden of proof.
B. The judge should only admit the in-custody informant's testimony if corroborated by other such evidence as independently tends to connect the defendant with the commission of the offense charged or the special circumstance(s) or aggravating factor(s) to which the in-custody informant testifies. Such corroboration is not sufficient if it merely shows the commission of the offense or the special circumstance(s) or aggravating factor(s).

Section V. Jury Instructions.

Prior to sending the charges to the jury, the court should instruct the jury that in-custody informant testimony can be especially unreliable and must be given special scrutiny. The court should also instruct the jury that they may consider all of the factors listed in Section IV in evaluating the credibility of the in-custody informant. The jury shall not be instructed that the court has already found that the in-custody informant is reliable.

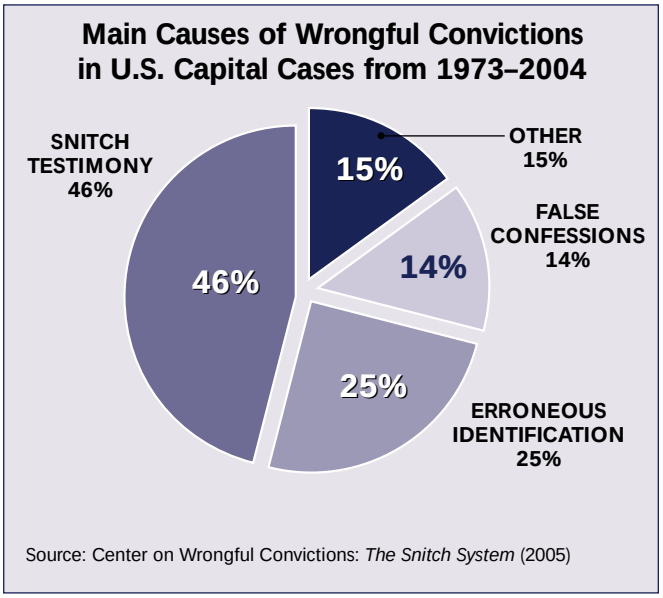
STATISTICS

As of May 11, 2007, over 120 people have been exonerated from death row since capital punishment was reinstated in 1973. A 2005 study by the Center for Wrongful Convictions at the Northwestern School of Law examined 111 of those exonerations and found that fifty-one of those 111 people were wrongfully sentenced to death based at least in part on the testimony of "witnesses with incentives to lie."[92] In fact, testimony from snitches and other informants is the leading cause of wrongful convictions in capital cases.[93]



Source: Center on Wrongful Convictions: *The Snitch System* (2002)

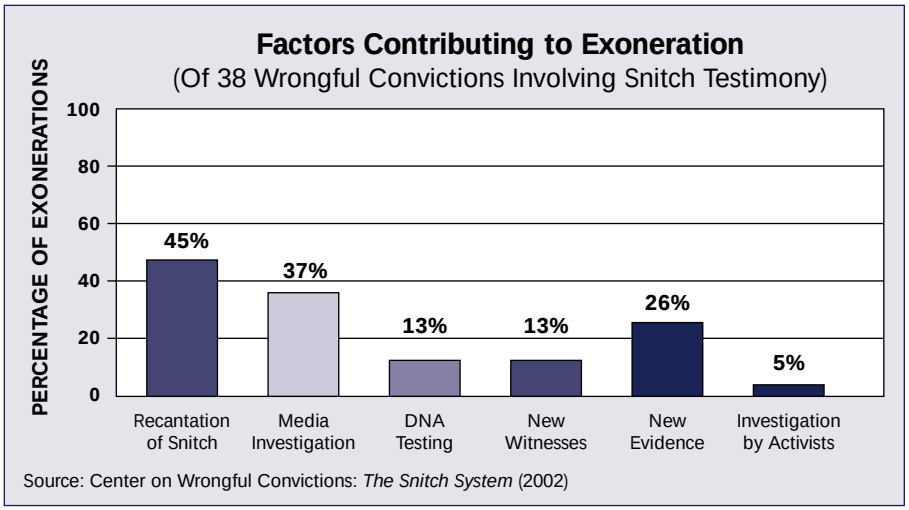
In a related study published in 2002, the Center for Wrongful Convictions examined ninety-seven cases in which evidence presented subsequent to sentencing conclusively exonerated the defendants. In thirty-eight of those ninety-seven cases, informant witness testimony was shown to be a primary factor in the jury's decision to convict.[94] And in sixteen of those ninety-seven cases, jailhouse snitches simply fabricated confessions that were never actually made by the defendant. In each instance, the testifying government witness received some benefit in exchange for the testimony.[95]



Source: Center on Wrongful Convictions: *The Snitch System* (2005)

As of November 1999, two months prior to the Illinois moratorium on the death penalty, four of twelve Illinois cases that resulted in wrongful death sentences for individuals who were later exonerated, relied on jailhouse snitch testimony. In another two of those twelve cases, Illinois prosecutors had jailhouse snitch testimony at the ready, but opted not to present it to the jury.[96]

Finally, according to the California Commission on the Fair Administration of Justice, in the state of California, twenty percent of *all* wrongful convictions are the result of perjured snitch testimony.[97]



Source: Center on Wrongful Convictions: *The Snitch System* (2002)

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The following materials are essential reading for individuals interested in enhancing the evidentiary value of jailhouse snitch testimony.

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The following listing includes some of the key source material used in developing the content of this policy review. While by no means an exhaustive list of the sources consulted, it is intended as a convenience for those wishing to engage in further study of the topic of jailhouse snitch testimony. Many of the entries contain hyperlinks for ease in locating an article, report, or document on the web.

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