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COMMENT

BEYOND UNRELIABLE:

HOW SNITCHES CONTRIBUTE TO
WRONGFUL CONVICTIONS

ALEXANDRA NATAPOFF*

INTRODUCTION

Thanks to new DNA technologies and the heroic efforts of innocence advocates, there is increasing public recognition that our criminal justice system often convicts the wrong people. Criminal informants, or “snitches,”¹ play a prominent role in this wrongful conviction phenomenon. According to Northwestern University Law School’s Center on Wrongful Convictions, 45.9 percent of documented wrongful capital convictions have been traced to false informant testimony, making “snitches the leading cause of wrongful convictions in U.S. capital cases.”² Horror stories abound of lying jailhouse

* Associate Professor, Loyola Law School, Los Angeles. This piece is based in part on my earlier article, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645 (2004), which offers a global analysis of the role of snitches in the criminal system and their impact on high crime communities.

¹ By “snitches” I mean criminals who provide information in exchange for lenience for their own crimes or other benefits. The term “informant” therefore does not include law-abiding citizens who provide information to the police with no benefit to themselves.

² Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, Center on Wrongful Convictions, Northwestern University School of Law, 2004, available at <http://www.law.northwestern.edu/wrongfulconvictions>.

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snitches and paid informants who frame innocent people in pursuit of cash or lenience for their own crimes.³ In recognition of the dangers of informants who lie, capital reform proposals often contain provisions designed to restrain the use of informant testimony.⁴

But informants do not generate wrongful convictions merely because they lie. After all, lying hardly distinguishes informants from other sorts of witnesses. Rather, it is how and why they lie, and how the government depends on lying informants, that makes snitching a troubling distortion of the truth-seeking process. Informants lie primarily in exchange for lenience for their own crimes, although sometimes they lie for money.⁵ In order to obtain the benefit of these lies, informants must persuade the government that their lies are true. Police and prosecutors, in turn, often do not and cannot check these lies because the snitch's information may be all the government has. Additionally, police and prosecutors are heavily invested in using informants to conduct investigations and to make their cases.⁶ As a result, they often lack the objectivity and the information that would permit them to discern when informants are lying.⁷ This gives rise to a disturbing marriage of convenience: both snitches and the government benefit from inculpatory information while neither has a strong incentive to challenge it.⁸ The usual protections against false evidence, particularly prosecutorial ethics and discovery, may thus be unavailing to protect the system from informant falsehoods precisely because prosecutors themselves have limited means and incentives to ferret out the truth.⁹

This Comment briefly surveys in Part I some of the data on

³ See *infra* notes 15-25 and accompanying text.

⁴ See, e.g. ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT, 120-22 (Apr. 15, 2002) [hereinafter ILLINOIS COMMISSION] (recommending enhanced documentation and discovery regarding the government's use of informants); see also ILL. COMP. STAT., ch. 725, § 5/115-21 (2003) (adopting Commission recommendation requiring reliability hearings for jailhouse informants).

⁵ Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 652 (2004).

⁶ *Id.* at 671.

⁷ Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 945 (1999).

⁸ This scenario presupposes some good faith on the part of the government; the purposeful use of false evidence is of course more problematic.

⁹ Yaroshefsky, *supra* note 7, at 947.

snitch-generated wrongful convictions.¹⁰ In Part II, it describes in more detail the institutional relationships among snitches, police, and prosecutors that make snitch falsehoods so pervasive and difficult to discern using the traditional tools of the adversarial process.¹¹ Part III concludes with a litigation suggestion for a judicial check on the use of informant witnesses, namely, a *Daubert*-style¹² pre-trial reliability hearing.¹³ The Appendix in Part IV contains a sample motion requesting and justifying such a hearing.¹⁴

I. WRONGFUL CONVICTION DATA

In 2000, the groundbreaking book *Actual Innocence* estimated that twenty-one percent of wrongful capital convictions are influenced by snitch testimony.¹⁵ Four years later, a study by the Center on Wrongful Convictions doubled that number.¹⁶ Another recent report estimates that twenty percent of all California wrongful convictions, capital or otherwise, result from false snitch testimony.¹⁷ The Illinois Commission on Capital Punishment, in reviewing that state's wrongfully convicted capital defendants, identified "a number of cases where it appeared that the prosecution relied unduly on the uncorroborated testimony of a witness with something to gain. In some cases, this was an accomplice, while in other cases it was an in-custody informant."¹⁸ Professor Samuel Gross's study on exonerations likewise reports that nearly fifty percent of wrongful murder convictions involved perjury by someone such as a "jailhouse snitch or another witness who stood to gain from the false testimony."¹⁹

¹⁰ See *infra* notes 15-25 and accompanying text.

¹¹ See *infra* notes 26-40 and accompanying text.

¹² *Daubert v. Merrell Dow*, 509 U.S. 579 (1993) (requiring courts to independently evaluate the reliability of expert testimony).

¹³ See *infra* notes 41-58 and accompanying text.

¹⁴ See *infra* notes 59-69 and accompanying text.

¹⁵ JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE* 156 (Doubleday 2000).

¹⁶ Warden, *supra* note 2, at 3.

¹⁷ Nina Martin, *Innocence Lost*, *SAN FRANCISCO MAGAZINE* 87-88 (Nov. 2004) (estimating the number of California wrongful convictions as being in the hundreds or even thousands).

¹⁸ ILLINOIS COMMISSION, *supra* note 4, at 8.

¹⁹ Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*,

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Behind these general statistics lie numerous stories of informant crime, deceit, secret deals and government duplicity.²⁰ In Texas, in the so-called “sheetrock scandal,” a group of police officers and informants set up dozens of individuals with fake drugs, which were actually gypsum, the main, non-narcotic component of sheetrock.²¹ The suspects were typically Mexican workers, and many pleaded guilty or were deported before the scandal was uncovered.²² In Los Angeles, DEA informant Essam Magid not only avoided jail for his many crimes but earned hundreds of thousands of dollars by serving as an informant.²³ During this time, he framed dozens of innocent people before one person he targeted finally refused to plead guilty and revealed the arrangement.²⁴ The now-infamous Leslie White, the prototypical jailhouse snitch, sent dozens of suspects to prison by fabricating confessions and evidence, reducing his own sentences by years.²⁵

Although such horror stories provoke outcry, little has been done to cabin the law enforcement discretion that makes such informant operations possible, or to impose greater transparency and oversight onto the process in order to curtail such abuses.

II. INEXTRICABLY INTERTWINED: LAW ENFORCEMENT DEPENDENCE ON SNITCHES

Informants have become law enforcement’s investigative tool of choice, particularly in the ever-expanding world of drug enforcement.²⁶ Informants are part of a thriving market for information.²⁷ In this market, snitches trade information with

95 J. CRIM. L. & CRIMINOLOGY 523, 543-44 (2005).

²⁰ Natapoff, *supra* note 5, at 656-57.

²¹ *Fake Drugs, real lives: Evolution of a Scandal*, DALLASNEWS.COM, available at <http://www.dallasnews.com/s/dws/spe/2003/fakedrugs/fakedrug1103.html> (last visited Aug. 1, 2006).

²² *Id.*; see also Ross Milloy, *Fake Drugs Force an End to 24 Cases in Dallas*, N.Y. TIMES, Jan. 16, 2002, at A1.

²³ John Glionna and Lee Romney, *Snagging a Rogue Snitch*, L.A. TIMES, Dec. 5, 2005, at A1 (chronicling DEA’s reliance on Magid).

²⁴ *Id.*

²⁵ ROBERT BLOOM, *RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM* 64-66 (Praeger 2000).

²⁶ Natapoff, *supra* note 5, at 655.

²⁷ See Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563 (1999).

police and prosecutors in exchange for lenience, the dismissal of charges, reduced sentences, or even the avoidance of arrest.²⁸ It is a highly informal, robust market that is rarely scrutinized by courts or the public.²⁹ And it is growing.³⁰ While data is hard to come by, federal statistics indicate that sixty percent of drug defendants cooperate in some fashion.³¹ Informants permeate all aspects of law enforcement, from investigations to plea-bargaining to trial.³²

The growth in the sheer number of informants reflects the increasing dependence of police and prosecutors on informants.³³ Professor Ellen Yaroshefsky describes prosecutors' own complaints: "These [drug] cases are not very well investigated. . . . [O]ur cases are developed through cooperators and their recitation of the facts. Often, in DEA, you have agents who do little or no follow up so when a cooperator comes and begins to give you information outside of the particular incident, you have no clue if what he says is true."³⁴ Another prosecutor revealed that "the biggest surprise is the amount of time you spend with criminals. You spend most of your time with cooperators. It's bizarre."³⁵ Another prosecutor describes the phenomenon of "falling in love with your rat"³⁶:

You are not supposed to, of course. . . . But you spend time with this guy, you get to know him and his family. You like him. . . . [T]he reality is that the cooperator's information often becomes your mind set. . . . It's a phenomenon and the danger is that because you feel all warm and fuzzy about your cooperator, you come to believe that you do not have to

²⁸ *Id.*

²⁹ Natapoff, *supra* note 5 (describing the contours of the informant institution).

³⁰ Weinstein, *supra* note 27, at 563 ("These are boom times for sellers and buyers of cooperation in the federal criminal justice system.").

³¹ See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS Table 5.34 (2001) (stating that thirty percent of federal drug defendants received on-the-record cooperation credit under USSG § 5K1.1); *American College of Trial Lawyers Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1503, 1504 (2001) (citing sentencing commission report that "fewer than half of cooperating defendants receive a departure").

³² See Natapoff, *supra* note 5.

³³ See *id.*

³⁴ Yaroshefsky, *supra* note 7, at 937.

³⁵ *Id.* at 937-38.

³⁶ *Id.* at 944.

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spend much time or energy investigating the case and you don't. Once you become chummy with your cooperator, there is a real danger that you lose your objectivity. . . . ³⁷

Because investigations and cases rely so heavily on informants, protecting and rewarding informants has become an important part of law enforcement.³⁸ Police and prosecutors are well known for protecting their snitches: all too often, when defendants or courts seek the identity of informants, cases are dismissed or warrant applications are dropped.³⁹ More fundamentally, police and prosecutors become invested in their informants' stories, and therefore may lack the objectivity to know when their sources are lying.⁴⁰

Informants are thus punished for silence and rewarded for producing inculpatory information, even when that information is inaccurate. The system protects them from the consequences of their inaccuracies by guarding their identities and making their information the centerpiece of the government's cases. The front line officials who handle informants – police and prosecutors – are ill equipped to screen that information, and once they incorporate it into their cases, they acquire a stake in its validity. This phenomenon explains in part why snitch testimony generates so many wrongful convictions: it permeates the criminal system and there are few safeguards against it.

III. LITIGATING SNITCHES: A *DAUBERT*-INSPIRED APPROACH

While the impact of informants on the criminal system goes far beyond their role as witnesses, an important part of the wrongful conviction phenomenon turns on the role of snitches at trial. Many wrongful convictions represent instances where an innocent defendant refuses to plead guilty and goes to trial, but is nonetheless convicted because the jury accepts a snitch's testimony as credible and true. When this happens, the integrity of the system is at stake. This section

³⁷ *Id.*

³⁸ See Natapoff, *supra* note 5, at 654-57, 671-74 (documenting the nature and extent of law enforcement reliance on informants).

³⁹ See, e.g., L. Paul Sutton, *Getting Around the Fourth Amendment*, in THINKING ABOUT POLICE 441, 443 (Carl B. Klockars & Stephen D. Mastrofski eds., 2d ed. 1991).

⁴⁰ Yaroshefsky, *supra* note 7, at 943-44.

proposes a limited remedy for this problem in the form of pre-trial reliability hearings. Illinois has adopted this procedure for in-custody informants (so-called “jailhouse snitches”), and at least two U.S. jurisdictions as well as Canada have contemplated variations of it.⁴¹

The theory behind pre-trial reliability hearings mirrors the reasoning in *Daubert v. Merrell Dow*,⁴² in which the Supreme Court established the necessity for reliability hearings for expert witnesses. As Professor George Harris points out, there are many similarities between snitches and expert witnesses.⁴³ Like experts, informants are “paid” by one party.⁴⁴ This makes them more one-sided than typical witnesses.⁴⁵ Informants’ testimony is coached and prepared by government lawyers, making them challenging to cross-examine.⁴⁶ Moreover, informants’ stories are hard to corroborate or contradict in cases where their testimony is the central evidence against the defendant.⁴⁷ Finally, like experts, informants may have an air of “inside knowledge” about the crime that may sway the jury, an air that is not easily dispelled by cautionary instructions.⁴⁸ Indeed, the prevalence of wrongful convictions based on snitch testimony demonstrates that juries often believe informants.⁴⁹

For these types of reasons, the Supreme Court has recognized that discovery, cross-examination and jury instructions – the traditional adversarial protections against false testimony – do not guarantee a rigorous jury evaluation of expert testimony.⁵⁰ The court must act as a preliminary “gate-

⁴¹ See ILL. COMP. STAT., ch. 725, § 5/115-21 (2003); *Dodd v. State*, 993 P.2d 778, 785 (Okla. Crim. App. 2000) (Strubhar, J., specially concurring); *D’Agostino v. State*, 823 P.2d 283, 285 (Nev. 1992) (holding that before “jailhouse incrimination” testimony is admissible the “trial judge [must] first determine[] that the details of the admissions supply a sufficient indicia of reliability”); ILLINOIS COMMISSION, *supra* note 4, at 122 (documenting Canadian experience).

⁴² *Daubert v. Merrell Dow*, 509 U.S. 579 (1993) (requiring courts to independently evaluate reliability of expert testimony).

⁴³ George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 4 (2000).

⁴⁴ *Id.* at 3.

⁴⁵ *Id.* at 4.

⁴⁶ *Id.* at 31.

⁴⁷ *Id.* at 71.

⁴⁸ See Harris, *supra* note 43, at 49-58 (describing inadequate procedural controls over cooperating witnesses).

⁴⁹ *Id.* at 57-58.

⁵⁰ *Daubert*, 509 U.S. at 593-94.

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keeper” and evaluate the reliability of experts before the jury hears them.⁵¹ For these same reasons, courts should act as gatekeepers and evaluate the reliability of informants before they can testify at trial. This would permit fuller disclosure of the deals that informants make with the government,⁵² allow more thorough testing of the truthfulness of informants, and reduce opportunities for abuse. It would also acknowledge that even well-meaning police and prosecutors may need help in ascertaining the reliability of their criminal sources.

Illinois has enacted a statute that provides a potential blueprint for the type of reliability inquiry that a trial court should conduct in evaluating informant testimony.⁵³ This statute places the burden on the government to prove reliability by a preponderance of the evidence, and requires the court to consider the following factors:

- (1) the complete criminal history of the informant;
- (2) any deal, promise, inducement, or benefit that the offering party has made or will make in the future to the informant;
- (3) the statements made by the accused;
- (4) the time and place of the statements, the time and place of their disclosure to law enforcement officials, and the names of all persons who were present when the statements were made;
- (5) whether at any time the informant recanted that testimony or statement and, if so, the time and place of the recantation, the nature of the recantation, and the names of the persons who were present at the recantation;
- (6) other cases in which the informant testified, provided that the existence of such testimony can be ascertained through reasonable inquiry and whether the informant received any promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; and
- (7) any other information relevant to the informant’s credibility.⁵⁴

⁵¹ *Id.*

⁵² See Justin Scheck, *Circuit Gets Tough on Secret Deals*, THE RECORDER, Feb. 16, 2006 (describing increasing attention to secret deals between prosecutors and informants that are not revealed to defense or the court).

⁵³ ILL. COMP. STAT., ch. 725, § 5/115-21(c) (2003).

⁵⁴ *Id.*

In effect, this model permits the court to examine the informant's incentives to lie, his history of escaping punishment through snitching, the existence, or lack, of corroboration, and the government's efforts to check the informant's story.⁵⁵ Such reliability determinations will be more efficient and effective in avoiding wrongful convictions because the court can evaluate the informant in the same way that it evaluates all preliminary questions of admissibility, without the constraints of the rules of evidence or the presence of the jury.⁵⁶

Although Illinois limits reliability hearings to in-custody informants, all informant testimony in which a criminal witness receives compensation for inculcating someone else is potentially infected by the same unreliability.⁵⁷ Accordingly, reliability hearings should be available in any case, pre-plea as well as pre-trial, in which a compensated informant is the source of inculpatory evidence.⁵⁸ Given the prevalence of informant falsehoods in wrongful capital convictions, such hearings should be mandatory in capital cases, even where the defense intends to concede guilt and move directly to the sentencing phase. If the government's information is based on informant testimony, the defense in turn will rely on such testimony in assessing the likelihood of success at trial. Given the stakes, such evaluations should not be left to the vagaries of informant truthfulness.

The Appendix to this Comment contains a motion and memorandum of law in support of the motion, requesting a reliability hearing in a capital case in which the main evidence against the defendant was supplied by three informant-accomplices. While the factual scenario is not universal, the legal analysis could form a basis for similar requests.

⁵⁵ *See id.*

⁵⁶ FED. R. EVID. 104(a).

⁵⁷ Harris, *supra* note 43, at 63.

⁵⁸ United States v. Ruiz, 536 U.S. 622, 629-633 (2002) (holding that the government is not constitutionally obligated to provide impeachment information to defendants pleading guilty).

IV. APPENDIX: MOTION AND MEMORANDUM IN SUPPORT OF PRE-TRIAL SNITCH RELIABILITY HEARING⁵⁹

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

*

*

v.

*

JOHN DOE

* * * * *

MOTION TO EXCLUDE COOPERATING WITNESS TESTIMONY AND REQUEST FOR A RELIABILITY HEARING

John Doe, by and through his attorneys, respectfully moves, pursuant to Federal Rules of Evidence 104, 403, and 701, to exclude the testimony of cooperating witnesses John Smith, John Jones and John Johnson, because their testimony is unreliable and its probative value is substantially outweighed by the danger of unfair prejudice. Mr. Doe further requests that the Court hold a pre-trial hearing to determine the reliability of these witnesses. In support of this motion Mr. Doe alleges as follows:

- 1. Mr. Doe has been charged by indictment with use of a handgun in the commission of a crime of violence that results in death, in violation of 18 U.S.C. § 924(j), carjacking in violation of 18 U.S.C. § 2119, conspiracy in violation of 18 U.S.C. § 371, and related counts.

⁵⁹ This motion is available for download at <http://www.lls.edu/academics/faculty/natapoff-snitching.html>. Although this motion was filed in federal district court and is thus a matter of public record, I have changed the names and other identifying information. The motion was never ruled on.

2. In addition to Mr. Doe, three other men were arrested in connection with this case. Those men are John Smith, John Jones, and John Johnson. Information provided by the government indicates that, shortly after their arrests, these three men gave statements to the police. Eventually each man exonerated himself and implicated Mr. Doe in the victim's murder. The men also portrayed Mr. Doe as the leader in the carjacking. All three are now cooperating with the government against Mr. Doe.

3. In exchange for having incriminated Mr. Doe, the cooperators have all received compensation from the government in the form of charging and sentencing consideration. In particular, as a result of their statements implicating Mr. Doe, they have been permitted to plead guilty in state court to paroleable sentences of forty-five years for Smith and Jones, and thirty-five years for Johnson. Family members of the men have advised counsel that if Mr. Doe is convicted, their sentences may be further reduced. In light of the compensation that the cooperating witnesses have received (and may expect to receive) in exchange for implicating Mr. Doe, their testimony is biased and inherently unreliable.

4. Their testimony also will be extremely difficult to disprove because they are the only witnesses to the crime, and the police have recovered very little physical evidence. Cross-examination may be an insufficient tool to establish the veracity of these unverifiable statements.

5. For these reasons, Mr. Doe moves to exclude the testimony of the three cooperating witnesses based on its unreliability, its lack of probative value, its prejudicial nature, and its imperviousness to cross-examination at trial.

6. Several courts have held that pre-trial reliability hearings are appropriate where unreliable cooperating witnesses are propounded as witnesses. The Illinois Governor's Commission on Capital Punishment recently has recommended that reliability hearings be held whenever an in-custody informant is a potential witness in a capital case. In this case, a hearing is especially important, because the government's entire case for guilt and for the death penalty rests on cooperating informant testimony.

WHEREFORE, Mr. Doe requests that the Court hold a pre-trial reliability hearing at which the cooperators shall be made available for examination by counsel, to permit the Court

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to decide whether their testimony is sufficiently reliable, and therefore sufficiently probative, to be admissible under Federal Rule of Evidence 403. A separate memorandum of law is submitted in support of this motion.

Respectfully submitted,

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

*

**UNITED STATES OF
AMERICA**

*

v.

*

JOHN DOE

* * * * *

**MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION TO EXCLUDE COOPERATING WITNESS
TESTIMONY AND REQUEST FOR A
RELIABILITY HEARING**

SUMMARY

“It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence” *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987). In this case, the government’s case for Mr. Doe’s guilt, and potentially for the death penalty, will be based primarily on the testimony of three compensated, interested, biased witnesses whose eventual freedom depends on their ability to obtain Mr. Doe’s conviction. Under the circumstances, their reliability is so compromised that their testimony lacks probative value, thereby failing the test of Federal Rule of Evidence 403. The Fourth and Ninth Circuits have called for increased judicial scrutiny of compensated informant witnesses, and several courts have mandated pre-trial reliability hearings to permit courts to evaluate the reliability of compensated witnesses such as the cooperators in this case. Mr. Doe thus requests that the Court hold a reliability hearing to require the government to establish the reliability of its cooperating witnesses, to exclude some or all of those witnesses if the Court deems it appropriate, and to preserve Mr. Doe’s right to a fair trial.

FACTUAL BACKGROUND

* * *

ARGUMENT

I. COURTS HAVE DEEMED COMPENSATED WITNESSES UNRELIABLE AND SUBJECT TO ADDITIONAL JUDICIAL SCRUTINY

The Fourth Circuit has recently expressed its deep concern over the use of compensated informant testimony and its reluctance to admit such testimony absent stringent judicial controls. *United States v. Levenite*, 277 F.3d 454, 459-62 (4th Cir. 2002). Compensated testimony “create[s] fertile fields from which truth-bending or even perjury could grow, threatening the core of a trial’s legitimacy.” *Id.* at 462. Such testimony “may be approved only rarely and under the highest scrutiny.” *Id.*⁶⁰

The Fourth Circuit has prescribed additional procedural guarantees that the government must adhere to where the use of compensated informant witnesses is contemplated. Before such testimony will be permitted: (1) the compensation arrangement must be disclosed to the defendant, (2) the defendant must have the opportunity to cross-examine the witness, and (3) the jury must be instructed to engage in heightened scrutiny of the witness. Finally, where the compensation is:

contingent on the content or nature of the testimony given, the court must ascertain (1) that the government has independent means, such as corroborating evidence, by which to measure the truthfulness of the witness’s testimony and (2) that the contingency is expressly linked to the witness testifying truthfully. Moreover, when a witness is testifying under such a contingent payment arrangement, the government has a duty to inform the court and opposing counsel when the witness’ testimony is inconsistent with the government’s expectation.

Levenite, 277 F.3d at 462-63.

⁶⁰ Although *Levenite* concerned a witness who was testifying in exchange for money, the same concerns arise when the compensation consists of reduced criminal sanctions. Indeed, the promise of a reduced sentence or the elimination of the capital sentencing option may be far more valuable to a defendant than cash. See *Cervantes-Pacheco*, 826 F.2d at 315 (the same analysis is applied by analogy when lenience is provided as compensation for information).

Similarly the Ninth Circuit has called for increased judicial scrutiny of deals between informants and the government, holding that “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,” *Horton v. Mayle*, 408 F.3d 570, 581 (9th Cir. 2005), and calling such lack of disclosure “unscrupulous.” *Silva v. Brown*, 416 F.3d 980, 991 (9th Cir. 2005).

In this case, the three cooperators are being compensated specifically for testimony adverse to Mr. Doe. They have already received the benefit of reduced charges and have been promised low, agreed-upon sentences, and may have their sentences further reduced if Mr. Doe is convicted. Their testimony is thus compensated, contingent testimony precisely of the sort that so troubled the Fourth Circuit in *Levenite*. The Court therefore has an obligation to ascertain whether the government can corroborate the cooperators’ truthfulness, the nature of the contingency arrangement, and the means the government intends to use to assure that the cooperators testify truthfully. Because of the difficulty ascertaining these matters in the heat of trial in the presence of the jury, a pre-trial reliability hearing is warranted.

II. COMPENSATED WITNESSES ARE INHERENTLY UNRELIABLE

A growing body of literature documents the inherent unreliability of compensated witnesses, cooperating co-conspirators, “jailhouse snitches,” and other types of informants. Numerous horror stories of wrongful convictions based on perjurious informant testimony have emerged, and they have prompted official review of the practice of permitting compensated informant testimony. The following list contains just a few of the efforts to document and control informant unreliability:

1. The founders of the Innocence Project discovered that twenty-one percent of the innocent defendants on death row

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were placed there by false informant testimony.⁶¹

2. The Illinois Governor's Commission on Capital Punishment unanimously 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."⁶² The Commission recommended the holding of reliability hearings to mitigate the chances of perjury.

3. In their comprehensive historical study, Bedau and Radelet discovered that one-third of the 350 erroneous convictions they studied were due to "perjury by prosecution witnesses." This was twice as many as the next leading source – erroneous eyewitness identification – and stemmed in large part from the prevalence of co-conspirator testimony.⁶³

Courts likewise have recognized the inherent unreliability of compensated informants, going so far as to take judicial notice of their tendency to lie. "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." *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993). "Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison." *Id.* Another court has noted that "[n]ever has it been more true that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is . . . to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration." *Commonwealth of Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1123 (9th Cir. 2001). Indeed, long before snitching became a pervasive aspect of the criminal

⁶¹ BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE* 126-57 (Doubleday 2000).

⁶² ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT, Chapter 8 (April 2002).

⁶³ Hugo Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 173 (1987).

justice system, the Supreme Court recognized that “[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious questions of credibility.” *On Lee v. United States*, 343 U.S. 747, 755 (1952).

Where the unreliability of a particular type of witness is so well-established, it is appropriate for the court to take protective steps to guarantee the integrity of the process. *Cf. Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 595 (1993) (court to act as “gatekeeper” to ensure reliability of scientific evidence).

III. CROSS EXAMINATION IS AN INSUFFICIENT GUARANTEE OF RELIABILITY IN THIS CASE

Despite the recognized unreliability of compensated informant witnesses, courts have traditionally permitted them to testify on the assumption that cross-examination will adequately test an informant’s truthfulness. *See, e.g., Hoffa v. United States*, 385 U.S. 293, 311 (1966). In *Hoffa*, the Supreme Court upheld the use of a compensated informant, holding that his testimony did not violate the defendant’s right to due process, in large part because of the availability of cross-examination, reasoning that “[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury.” *Id.* at 311; *see also Cervantes-Pacheco*, 826 F.2d at 315 (procedural protections of discovery, cross-examination, and jury instructions regarding informants satisfy due process).

The cooperators’ testimony in this case, however, will be nearly impossible for defense counsel to penetrate on cross-examination. The cooperators are the only witnesses to the crime, and their stories can be neither independently confirmed nor disproved. The assertion that Mr. Doe was the shooter—the most important single disputed fact in the entire case—rests entirely upon the self-serving, unverifiable statements of the cooperating witnesses. Their mere *ipse dixit*, if maintained, could suffice to persuade a jury to impose the death penalty on Mr. Doe.

Cross-examination will be further hampered because the defense lacks pre-trial access to the cooperators. At this stage

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in the proceedings, the defense has not yet seen the cooperators' plea agreements. The cooperators, on the other hand, have had multiple opportunities to hone their version of events in preparation for court, both in the state proceedings and in connection with this federal case. This combination of one-sided access and government preparation will render these witnesses overly prepared and difficult to examine at trial.

Finally, unlike uncharged lay witnesses, the cooperators have compelling incentives to pin responsibility on Mr. Doe. Their future literally hangs in the balance, based on their ability to maintain a consistent story. For all these reasons, in-trial cross-examination may be insufficient to determine whether the cooperators are being truthful.

Professor George Harris has analyzed the difficulty of cross-examining informants whose compensation depends on their usefulness to the prosecutor. As Professor Harris explains:

Paradoxically, the more a witness's fate depends on the success of the prosecution, the more resistant the witness will be to cross-examination. A witness whose future depends on currying the government's favor will formulate a consistent and credible story calculated to procure an agreement with the government and will adhere religiously at trial to her prior statements.⁶⁴

In this case, the motivations of the cooperators are precisely those described by Professor Harris. Years of their lives literally depend on the success of this prosecution, and therefore they will be more resistant to cross-examination than the typical witness.

For these reasons, the Court should not rely on defense counsel's eventual cross-examination of these witnesses to establish their truthfulness, but rather should have the opportunity, unfettered by the rules of evidence and the presence of the jury, to determine for itself whether the testimony of these witnesses bears sufficient indicia of reliability to permit its presentation at trial.

⁶⁴ George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 54 (2000) (attached as Ex. D).

IV. THE GOVERNMENT HAS AN OBLIGATION TO ESTABLISH THE RELIABILITY OF ITS COOPERATING WITNESSES

The government has special obligations when it comes to their cooperating informants. Courts have established that a “prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system [and courts] expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery.” *Commonwealth of the Northern Mariana Islands v. Bowie*, 236 F.3d 1083, 1089 (9th Cir. 2001); see also *Levenite*, 277 F.3d at 459-62. This obligation stems from two sources: first, the government enlists and controls and rewards its informants and is therefore in a unique position to evaluate their reliability. The second is that the prosecutor, as the representative of the sovereign, has an ethical obligation to ensure that the defendant is given a fair trial. See *Bowie*, 236 F.3d at 1089 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

Unfortunately, because of the dynamics of this case, the government is in a weak position to guarantee the reliability of the cooperators’ testimony. From the inception of this case, the cooperators have been well aware that any hope of lenience rested on their ability to provide the government with useful information. The government is thus the primary target of the cooperators’ efforts to escape punishment, and if the cooperators are lying, they will presumably be particularly careful not to reveal it to the government.

The Ninth Circuit addressed these issues of reliability and government obligations in a case with facts startlingly similar to the instant case. In *Bowie*, three co-conspirators were charged with murder and kidnapping. There was some evidence that two of the three conspired to pin the murder on the third. The government’s failure to fully investigate the possibility of collaborative perjury caused the Court to reverse the conviction. In its decision, the Court noted that when the government makes a deal with an informant, “each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to

'get' a target of sufficient interest to induce concessions from the government." *Bowie*, 236 F.3d at 1095. The Court concluded that "rewarded criminals represent a great threat to the mission of the criminal justice system." *Id.*

Barry Tarlow has likewise documented the significant difficulties that prosecutors experience in holding their criminal informants accountable.⁶⁵ Tarlow, a former prosecutor, explains how prosecutors may be drawn in by informants who have strong motivations to pin responsibility on others, and notes the heavy pressures on prosecutors to rely on unreliable compensated witnesses when others are unavailable.

Given the inherent "peril" of rewarded testimony and the government's heavy reliance on it in this case, the government should not be permitted merely to proffer its good faith belief in the reliability of its witnesses. Rather, it is appropriate to hold a hearing to establish the reliability of the witnesses through adversarial questioning and a neutral evaluation by the Court.

V. A PRETRIAL RELIABILITY HEARING IS REQUIRED TO TEST THE INFORMANT'S RELIABILITY OUTSIDE THE PRESENCE OF THE JURY

A. The Court has the Authority and Obligation to Conduct a Reliability Hearing Under the Federal Rules of Evidence

In this case, the interests of justice and a fair trial require a pretrial reliability hearing to permit the Court to ascertain the reliability and probative value of the cooperators' testimony. The Court has clear authority to hold such a hearing pursuant to Federal Rule of Evidence 104(c), which provides: "Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require"

The rules of evidence likewise obligate the Court to screen out unfairly prejudicial, harmful, confusing or otherwise unhelpful evidence. Federal Rule of Evidence 403 provides

⁶⁵ See Barry Tarlow, *Perjuring Informants Brought to the Bar*, RICO Report, CHAMPION, at 33-40 (July 2000).

that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Likewise, Federal Rule of Evidence 701, limits lay witness testimony to testimony that is “helpful” to the trier of fact.

At least two courts and one state legislature have mandated reliability hearings whenever incarcerated informants (“jailhouse snitches”) are proposed witnesses. See *Dodd v. State*, 993 P.2d 778, 784 (Ok. Ct. of Crim. App. Jan. 6, 2000) (Strubhar, J., concurring) (approving lower court imposition of “reliability hearing” comparable to *Daubert* hearing); *D’Agostino v. State*, 107 Nev. 1001, 823 P.2d 283 (Nev. 1992) (holding that before “jailhouse incrimination” testimony is admissible the “trial judge [must] first determine[] that the details of the admissions supply a sufficient indicia of reliability”). Illinois mandates such hearings by law. See ILL. COMP. STAT., ch. 725, § 5/115-21(c) (2003). Illinois’s statutory requirement is based on the recommendations of the Governor’s Commission on Capital Punishment, which concluded that reliability hearings are necessary whenever incarcerated informants are offered as witnesses.⁶⁶ Such conclusions apply here with equal force. Jailhouse snitches are incarcerated defendants who provide information to law enforcement in exchange for charging and sentencing benefits. The ability of such snitches to fabricate confessions and other evidence has become infamous.⁶⁷ Precisely the same concerns are present where, as here, the informant is in custody, subject to criminal penalties, and is offering unique, unverifiable information in exchange for lenience.

B. The Principles of *Daubert* Support the Holding of a Reliability Hearing

The law’s treatment of expert witnesses further supports the holding of a reliability hearing in this instance. In *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), the

⁶⁶ See ILLINOIS GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT, at 30, 122.

⁶⁷ See *id.* at 122-123 (detailing the Los Angeles Grand Jury investigation of jailhouse snitch testimony).

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Supreme Court determined the need for a special mechanism to evaluate the reliability of expert witnesses because experts pose thorny problems of cross-examination and persuasion. Experts, for example, rely on specialized information that is not directly available to the jury. *Daubert*, 509 U.S. at 592. The court held that the concerns underlying Rule 403 are preeminent because expert witnesses can have such a potent effect on juries:

Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 [] exercises more control over experts than over lay witnesses.

Daubert, 509 U.S. at 595. Moreover, as Professor Harris has noted, expert witnesses are compensated, violating the usual presumption against the use of paid testimony.⁶⁸ The suitability of compensated expert testimony is thus determined in part by pre-trial judicial examinations of reliability.

Informants pose many of the same special concerns that expert witnesses do. Unlike typical lay witnesses, they are compensated, they have personal interests in the outcome of the case, their testimony is difficult to test on cross-examination, and they are selected and controlled by the propounding party.⁶⁹ Like experts, moreover, informant testimony can be “powerful and quite misleading.” *Daubert*, 509 U.S. at 595. At least one court has expressly extended the principles of *Daubert* to cover informants, imposing a “reliability hearing” requirement whenever the testimony of a so-called “jailhouse snitch” is involved. *Dodd v. State*, 993 P.2d 778, 784 (Ok. Ct. of Crim. App. Jan. 6, 2000) (Strubhar, J., concurring) (approving lower court imposition of “reliability hearing” comparable to *Daubert* hearing).

In this case, the cooperators are the sole witnesses to the crime and their version of the story will carry heavy weight with the jury. In the same way that courts act as “gatekeepers” with respect to experts, it is appropriate for this Court to ensure that unreliable informant testimony does not taint the

⁶⁸ See Harris, *supra* note 64, at 1-5.

⁶⁹ See *id.* at 49-59.

jury.

C. A Reliability Hearing is Warranted on the Facts of this Case

In this case, the cooperators' testimony presents a substantial danger of "unfair prejudice" because it is the government's primary evidence against Mr. Doe, because it is highly unreliable, because the cooperators have overwhelming motivations to lie, and because their testimony cannot be disproved. Their testimony may not be helpful to the trier of fact if it is so biased and unverifiable that no trier of fact can conclusively determine it is truthful or not.

It is particularly important that the cooperators' reliability be tested prior to trial outside the presence of the jury. The cooperators' reliability, their incentives to fabricate, the details of the crime, and their relationship to the defendant are matters which may only be susceptible to penetration through the more informal inquiries permitted under Rule 104, where the rules of evidence do not apply. Moreover, the Court is better suited to recognize reliability and credibility concerns that may elude the jury. The inquiry into such matters also could be highly prejudicial if heard by a jury and incurable by subsequent jury instruction.

Finally, as noted above, the procedural requirements set forth in *Levenite* can best be met at a preliminary hearing. At such a hearing, the informant will be subject to cross-examination, and the government can provide to the Court and counsel any corroboration it might have and provide assurances that the arrangement with the witnesses indeed protects against perjurious testimony.

For all these reasons, Mr. Doe moves to exclude the testimony of the cooperators, and for a pretrial reliability hearing to evaluate the reliability and probative value of the cooperators' testimony.

Respectfully submitted,
