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Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches

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I. Introduction

On April 9, 2003, Earl Bramblett was electrocuted in Virginia's electric chair.[1] Bramblett was convicted of the 1994 murder of a family of four.[2] Bramblett maintained his innocence until death, proclaiming in his final statement that he " 'didn't murder the Hodges family.' "[3] During Bramblett's trial, key testimony came from Tracy Turner, Bramblett's fellow inmate.[4] Turner testified that Bramblett confessed to killing the Hodges family to him and told him that he was " 'addicted to little girls.' "[5] After the trial, Turner recanted his testimony and admitted that he had lied.[6] The defense claims that most of the evidence external to Turner's testimony was circumstantial.[7] Unfortunately, due to the finality of an execution based largely on what may have been false testimony, the actual truth about the Hodges family murders may never be revealed.

Throughout history, the person who betrayed his friends and associates by informing is almost always "reviled."[8] However, the premise that the effective

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1. Bill Baskervill, *Va. Executes Man for Family's Slaying*, ASSOCIATED PRESS, Apr. 9, 2003, ¶ 1, *at* 2003 WL 18223466 (reporting on Bramblett's execution).

2. Maria Glod, *Condemned Va. Man Chooses the Chair*, WASH. POST, Apr. 8, 2003, at B3 (reporting on the controversy surrounding Bramblett's execution), *available at* 2003 WL 17426706.

3. Baskervill, *supra* note 1, ¶¶ 1, 3.

4. *Convicted Virginia Killer Dies in Electric Chair*, REUTERS, Apr. 9, 2003, ¶ 5, *at* http://www.clarkprosecutor.org/html/death/US/bramblett845.htm (last visited Oct. 28, 2003) (reporting on the circumstances surrounding Bramblett's execution).

5. *Id.*

6. *Id.*

7. *Id.*

8. Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 2 (2003) (referencing the terms "rat," "snitch," "tattletale," and "whistle-blower").

ness of our criminal justice system depends on jailhouse snitches and cooperating witnesses is long-standing.[9] Prosecutors regularly offer criminal defendants leniency in exchange for incriminating testimony about their cellmates, friends and acquaintances.[10] This testimony is inherently unreliable and unique in that it lies solely in the hands of the prosecutor. Only the prosecutor can screen against the false or misleading testimony provided by snitches.

"Cooperation has never been more prevalent than it is today."[11] The use of snitches has caused increased concern over the last fifteen years.[12] A variety of changes within the criminal justice system have caused this increase.[13]

This article will offer reforms in three areas. First, there must be a new wave of remedies tied to pre-trial, trial, and post-trial proceedings. Second, there needs to be a systematic collection of data regarding snitch and cooperating witness testimony. Finally, this article will propose a collection of structural reforms within the prosecutorial system itself.

II. Reasons Behind the Prevalence of Cooperative Testimony

Mandatory minimum sentences and the use of the Federal Sentencing Guidelines are two significant causes for the increase in cooperative testimony.[14] The cooperation system, as it currently exists, took shape with the adoption of the Federal Sentencing Guidelines ("Guidelines") in 1987.[15] Before the Guidelines, judges possessed wide discretion when determining sentences.[16] Now, a "defendant's sentencing range is determined by combining a mathematical score

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Simons also notes the media's portrayal of informants, or cooperators, as "disloyal, deceitful, greedy, selfish, and weak." *Id.*

9. *See id.* at 6 (noting that the cooperation system has been around for centuries).

10. *See id.* at 2 (noting that the cooperation system has flourished because it offers benefits to prosecutors in terms of information and to cooperators in the form of leniency).

11. *Id.* at 3.

12. Ellen Yaroshefsky, Introduction, *The Cooperating Witness Conundrum: Is Justice Obtainable?* 23 CARDOZO L. REV. 747, 749 (2002) [hereinafter Yaroshefsky, *Introduction*] (outlining the concerns surrounding the use of cooperating witnesses in the criminal justice system).

13. *Id.*

14. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002) (permitting a departure from sentencing guidelines for defendants who provide "substantial assistance" in the investigation and prosecution of another who has committed an offense); 18 U.S.C. § 3553 (2002) (permitting the court, "[u]pon motion of the Government," to impose a sentence below the mandatory minimum "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense").

15. Simons, *supra* note 8, at 7–8.

16. *Id.* at 8. Prior to the adoption of the Guidelines, "most federal crimes only provided a maximum sentence." *Id.* Judges were free to consider many factors other than the seriousness of the crime when determining the proper sentence. *Id.* These factors included: "[C]riminal history, age, education, employment, family background, family responsibilities, charitable works, health, history of substance abuse, behavior at trial, assistance to the authorities, remorse, or any other factor that the judge considered relevant." *Id.* at 9.

for the seriousness of the offense with a mathematical score for the defendant's criminal history."[17] Judges are no longer allowed to consider an individual offender's characteristics in sentencing.[18] Not only have the Guidelines limited sentencing discretion, but mandatory minimums have increased the severity of the sentences.[19] Mandatory minimum sentences and the Sentencing Guidelines have taken sentencing discretion away from the judiciary and put it in the hands of the prosecution.[20] These changes have raised the stakes for defendants and increased their motivation to cooperate.[21]

Prosecutors often use mandatory minimums and the Guidelines as a tool to compel cooperation from defendants who are potential witnesses.[22] The Guidelines allow a court to reduce a mandatory sentence in consideration of the following: (1) the significance and usefulness of the defendant's assistance, according to the Government's evaluation; (2) the accuracy, thoroughness, and reliability of the testimony; (3) the nature and extent of the assistance; (4) any risk of injury to the defendant or his family; and (5) the timeliness of the assistance.[23] The Guidelines provide a defendant with three basic choices: she may plead not guilty, guilty, or choose to plead guilty while cooperating, which will, in all likelihood, greatly reduce or eliminate her jailtime.[24] Defendants asked to cooperate almost always choose to do so.[25] The defendant is usually advised by everyone to cooperate— including prosecutors, law enforcement agents, defense counsel, co-defendants, fellow inmates, and jailors.[26] The Guidelines essentially make cooperation necessary to avoid extensive incarceration. "To many defendants, cooperation has become synonymous with hope."[27]

III. Singleton I *and* II

Jailhouse snitches and cooperating witnesses are inherently suspect witnesses. Jailhouse snitches have something very important at stake— their

17. *Id.* at 9.

18. *Id.*

19. *Id.* at 10.

20. *Id.* at 8–9, 12.

21. Simons, *supra* note 8, at 13–14 (describing cooperation as the only major sentencing factor that the defendant has any control over and how cooperation is often a defendant's only chance at a significantly reduced sentence).

22. Steven M. Cohen, *What is True? Perspectives of a Former Prosecutor*, 23 CARDOZO L. REV. 818–19 (2002) (citing U.S. SENTENCING GUIDELINES MANUAL § 5K1.1(a) (2002)).

23. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1(a).

24. *See* Cohen, *supra* note 22, at 819 (explaining that, of these three choices, guilty with cooperation is the only rational choice for most defendants).

25. *Id.* at 819–20.

26. *Id.* at 820.

27. *Id.*

freedom. Prosecutors can offer reduced sentences, as well as many other rewards, in exchange for their testimony. Therefore, these witnesses have every reason to lie.

In 1998 a panel of the United States Court of Appeals for the Tenth Circuit decided in *Singleton v. United States*[28] ("*Singleton I*") that 18 U.S.C. § 201(c)(2), a federal bribery statute, prohibited prosecutors from offering leniency deals for testimony in criminal trials.[29] In the case, Singleton's accomplice, Napoleon Douglas ("Douglas"), testified against Singleton at her trial for cocaine distribution and money laundering.[30] Prosecutors offered Douglas a pre-trial agreement of leniency in exchange for testimony against Singleton.[31] Singleton was convicted, but the Tenth Circuit panel reversed the decision and ordered a new trial.[32] The court stated that its grounds for reversal were that Douglas's plea agreement constituted a violation of 18 U.S.C. § 201(c)(2), which reads that "whoever . . . promises anything of value . . . for . . . testimony" is guilty of a felony punishable by two years in prison.[33] The three-judge panel of the Tenth Circuit essentially declared that plea agreements for leniency constituted out and out bribery.[34]

The key issues that the *Singleton I* panel decided included the following: "1) whether the word 'whoever' included government officials and prosecutors, and 2) whether an offer of leniency was 'anything of value.' "[35] The panel decided that, according to plain language, the word "whoever" included federal prosecutors.[36] The panel did recognize two classes of statutes that do not apply to the government. First, statutes do not apply that "deprive the sovereign of a 'recognized or established prerogative title or interest.' "[37] The second class of statutes that are not applicable to the government are those whose application to the government would create an absurdity.[38] The panel decided that a statute that

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28. 144 F.3d 1343 (10th Cir. 1998).

29. United States v. Singleton, 144 F.3d 1343, 1348 (10th Cir. 1998) [hereinafter *Singleton I*], *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999) [hereinafter *Singleton II*], *cert. denied*, 527 U.S. 1024 (1999); *see* 18 U.S.C. § 201(c) (2002) (prohibiting bribery of public officials and witnesses).

30. *Singleton I*, 144 F.3d at 1344.

31. *Id.*

32. *Id.* at 1343.

33. *Id.* at 1345, 1360.

34. *See id.* at 1348 (holding that 18 U.S.C. § 201(c)(2), a federal bribery staute, prohibited prosecutors from offering leniency deals for testimony in criminal trials). The panel also stated that "[p]romising something of value to secure truthful testimony is as much prohibited as buying perjured testimony." *Id.* at 1358.

35. Bryan S. Gowdy, *Leniency Bribes: Justifying the Federal Practice of Offering Leniency for Testimony*, 60 LA. L. REV. 447, 451 (2000) (citing *Singleton I*, 144 F.3d at 1348).

36. *Singleton I*, 144 F.3d at 1348.

37. *Id.* at 1346 (quoting Nardone v. United States, 302 U.S. 379, 383 (1937)).

38. *Id.*

would restrict an agent of the government, but not the government itself, is enforceable against the agent.[39] The panel also decided that a statute designed to prevent "fraud, injury, or wrong" is enforceable against the government.[40] The panel in *Singleton I* decided that § 201(c)(2) satisfied this purpose because it "operates to prevent fraud upon the federal courts in the form of inherently unreliable testimony."[41] The panel also found that § 201(c)(2) did not create an absurdity.[42] Rather, the panel in *Singleton I* determined that § 201(c)(2)'s application to leniency deals by prosecutors was a central concept in the American legal tradition.[43]

Next, the court addressed whether an offer of leniency constituted "anything of value."[44] The test the panel employed was "whether the recipient subjectively attaches value to the thing received."[45] The panel found that other courts had held intangible things such as conjugal visits, information regarding the location of a witness, assistance in arranging a merger, and information in a DEA report to be "things of value."[46] In addition to its determination of the value of leniency, the panel also found that Congress's purpose in creating the bribery statute was "to keep testimony free of all influence so that its truthfulness is protected."[47]

The media hailed *Singleton I* as a legal " 'bombshell.' "[48] Criminal defense attorneys heralded the decision as long overdue and flooded federal courts with "*Singleton*" motions.[49] Several courts followed the Tenth Circuit panel and entertained these "*Singleton*" motions.[50] The Tenth Circuit, en banc, quickly reversed the panel's decision.[51] The United States Courts of Appeals for the

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39. *Id.*

40. *Id.*

41. *Id.*

42. *Singleton I*, 144 F.3d at 1348.

43. *Id.* at 1347–48.

44. *Id.* at 1348.

45. *Id.* at 1349.

46. *Id.*

47. *Id.* at 1350.

48. Jeffrey M. Schumm, *Courts Rush to Extinguish* Singleton, *But Are the Embers of the Panel's Decision Still Glowing?*, 27 FLA. ST. U. L. REV. 325, 325 (1999) (quoting *Judicial Trouble*, WASH. POST, July 8, 1998, at A16).

49. *Id.* at 326.

50. *See id.* at 326–27 n.13 (citing United States v. Mays, No. 97-CR-127 (E.D. Tenn. 1998); United States v. Lowery, 15 F. Supp. 2d 1348, 1354 (S.D. Fla. 1998), *rev'd*, 166 F.3d 1119 (11th Cir. 1999); United States v. Fraguela, No. Crim. A. 96-0339, 1998 WL 560352, at *1 (E.D. La. Aug. 27, 1998), *order vacated on reconsideration*, No. Crim. A. 96-339, 1998 WL 910219, at *1 (E.D. La. Oct. 7, 1998); United States v. Revis, 22 F. Supp. 2d 1242 (N.D. Okla. 1998)).

51. *Singleton II*, 165 F.3d at 1297. The three judges from the original panel (Judges Kelly, Ebel, and Chief Judge Seymour) stayed fast to their decision in a dissent written by Judge Kelly. *Singleton II*, 165 F.3d at 1308 (Kelly, J., dissenting).

Fourth and the Fifth Circuits promptly rejected *Singleton I* on the basis of plain error.[52] The Fifth Circuit stated that it has "consistently... upheld government efforts to provide benefits to witnesses in exchange for testimony."[53] The United States Courts of Appeals for the Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits all followed suit and rejected *Singleton I*.[54] District courts responded en masse, following *Singleton II*'s lead in fashioning "hypertechnical and conflicting arguments to counter" the *Singleton I* decision.[55] In short, the federal judiciary struck down *Singleton I*'s holding that offering leniency to criminal defendants in exchange for testimony constitutes bribery and violates § 201(c)(2).

However, the one issue from *Singleton I* that all of these courts left unaddressed is that "[g]overnment leniency in exchange for testimony can create a powerful incentive to lie and derail the truth-seeking purpose of the criminal justice system."[56] There is little doubt that a system of rewards for testimony offers a real incentive to lie. Given the inherent unreliability of bought testimony, there is a reasonableness to the panel's opinion in *Singleton I* that signals a need for reform in our current system of handling cooperative testimony.

IV. Death is Different

Evidentiary scrutiny must be held to an even higher standard in capital cases due to the irrevocable nature of the punishment. The United States Supreme Court established the concept that death is different in *Woodson v North Carolina*.[57] The Court held that North Carolina's mandatory death sentence was unconstitutional based on "the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long."[58] Due to the fact that death is different, "there is a corresponding difference in the need for

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52. *See* Schumm, *supra* note 48, at 327 n.15 (listing cases from the Fourth and Fifth Circuits of the United States Courts of Appeals that rejected *Singleton I* on the basis of plain error).

53. United States v. Haese, 162 F.3d 359, 366 (5th Cir. 1998).

54. *See* United States v. Ware, 161 F.3d 414, 418–19 (6th Cir. 1998) (disagreeing with the *Singleton I* panel on whether "whoever" includes the government); United States v. Condon, 170 F.3d 687, 688–89 (7th Cir. 1999) (holding that statute does not require exclusion of Government proffered testimony obtained through promises of immunity); United States v. Johnson, 169 F.3d 1092, 1098 (8th Cir. 1999) (holding that 18 U.S.C. § 201(c)(2) cannot be read to bar plea agreements in exchange for testimony); United States v. Lowery, 166 F.3d 1119, 1124 (11th Cir. 1999) (holding that plea agreements in exchange for cooperation and testimony does not violate the federal bribery statute); United States v. Ramsey, 165 F.3d 980, 987 (D.C. Cir. 1999) (reasoning that the repeated rejection of *Singleton I* allowed plea agreements without violation of the bribery statute).

55. Schumm, *supra* note 48, at 327–28.

56. *Singleton II*, 165 F.3d at 1310 (Kelly, J., dissenting) (reiterating the policy behind the panel's original decision).

57. Woodson v. North Carolina, 428 U.S. 280, 305 (1975).

58. *Id.*

reliability in the determination that death is the appropriate punishment in a specific case."[59]

This need for reliability highlights the problems inherent in jailhouse snitch testimony. The testimony of informants who have received deals from prosecutorial agencies is suspicious from the outset. The use of such testimony in capital trials presents exactly the kind of danger addressed by the *Woodson* court. Death *is* different, and it requires a heightened evidentiary standard, particularly when jailhouse snitch testimony is involved. A man who has been convicted and executed for capital murder based on snitch testimony may be exonerated; however, exoneration will have arrived too late.

V. Methods of Handling Inherently Unreliable Testimony

Due to the Guidelines and minimum sentencing requirements, the use of jailhouse snitch and cooperating witness testimony has exploded.[60] Common sense suggests that a witness who is already incarcerated, has a trial pending, or may soon be indicted has more incentive to lie in favor of the prosecution, which is in a position to offer her some benefit, than to testify in a manner favorable to the defendant. Combine this basic intuitive step with evidence that informant "buying" or deal-making is a tool commonly used by prosecutors and there is an obvious problem—the criminal justice system is being fueled by "inherently unreliable testimony."[61] Add this problem of unreliable testimony to the immeasurable import of a capital murder trial, in which the penalty for a wrongful conviction based on false testimony may be irrevocable, and the urgent need for reforms within the criminal justice system regarding jailhouse snitch and cooperating witness testimony becomes apparent.

A. Remedies Before, After, and at Trial

The first step a criminal defense lawyer should take in any case, but especially those in which jailhouse snitch testimony may be used, is to file a Motion for Timely Disclosure of Exculpatory Evidence.[62] Attorneys should make this

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59. *Id.*

60. Simons, *supra* note 8, at 14.

61. *See* Schumm, *supra* note 48, at 328 n.17 (quoting Mark Curriden, *Court to Decide Legality of Rewarding Informants Experts Say Thousands of Cases Could Be Jeopardized*, DALLAS MORNING NEWS, Nov. 17, 1998, at 1A, *available at* 1998 WL 13118618). In his article, Curriden stated:

> More than 86 percent of a sampling of federal criminal cases in Dallas and Fort Worth between 1995 and 1997 involved the use of informants and co-conspirators who received deals from prosecutors in return for testimony.... Some of the informants were paid thousands of dollars for their cooperation. Most received a reduction in the amount of time they would serve in prison for their crimes.

Curriden, at 1A.

62. *See, e.g.*, MOTION FOR TIMELY DISCLOSURE OF EXCULPATORY EVIDENCE, *available at*

motion pursuant to the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, *Brady v. Maryland*[63] and its progeny.[64] In Virginia, the motion should also be made pursuant to sections Eight and Eleven of Article I of the Constitution of Virginia.[65] This motion requests exculpatory evidence be delivered to the defense as required by *Brady*.[66] *Brady* held that suppression of

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http://vc3.org/ (containing a motion requesting the disclosure of exculpatory evidence prepared by the Virginia Capital Case Clearinghouse at Washington & Lee University School of Law). The Virginia Capital Case Clearinghouse also has a copy of this motion on file. Please call (540) 458-8557 for a copy of this motion.

63. 373 U.S. 83 (1963).

64. *See* U.S. CONST. amend. VI (guaranteeing the defendant's right to confront witnesses); U.S. CONST. amend. VIII (protecting the defendant from cruel and unusual punishment); U.S. CONST. amend. XIV (guaranteeing that the defendant's rights are not to be abridged by the states); Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the prosecution's suppression of evidence favorable to the defendant, after the defendant requests that evidence, is a due process violation, regardless of the evidence's bearing on guilt or innocence); *see also* Strickler v. Greene, 527 U.S. 263, 289–90 (1999) (stating that the question of whether the suppressed evidence would have more than likely produced a different verdict is not material, and that whether the defendant received a fair trial, meaning a trial whose verdict is worthy of confidence, is the true test of materiality); Kyles v. Whitley, 514 U.S. 419, 434 (1995) (stating that the effect of suppressed *Brady* evidence needs to be considered, rather than the individual items of evidence, and that, in a capital murder trial, the suppressed evidence would have made a different result "reasonably probable"); United States v. Bagley, 473 U.S. 667, 676–78 (1985) (stating that impeachment evidence, as well as exculpatory evidence, needs to be disclosed, and that reversal of a conviction is required only if the suppression of the evidence undermines confidence in the outcome of the trial); Giglio v. United States, 405 U.S. 150, 154 (1972) (stating that a promise not to prosecute in exchange for cooperation made by a government attorney is attributable to the Government, even if the attorney had no authority to make such a promise and did not communicate the promise to the government attorney who tried the case; therefore, a violation of that promise constitutes a violation of due process and requires a new trial); Giles v. Maryland, 386 U.S. 66, 66–67 (1967) (remanding case to state court to hold further hearings regarding prosecutors' knowing use of perjured testimony and suppressing evidence favorable to the defendant).

65. VA. CONST. art. I, §§ 8, 11. Section 8 contains the defendant's right to notice, confrontation, and a speedy and public trial by jury. VA. CONST. art. I, § 8. It also ensures against self-incrimination and double jeopardy, among other enumerated rights. *Id.* Section 11 guarantees due process of law, among other enumerated rights. VA. CONST. art. I, §11.

66. *Brady*, 373 U.S. at 87. The snitch-related evidence requested in this motion should include the following: (1) any confessions or statements made by the defendant or any co-conspirator; (2) names and addresses of all witnesses the prosecution plans to offer; (3) any statements to, from, or between police officers in regard to any alleged participants in the crime; (4) any statement made by alleged co-conspirators which may be exculpatory to the defendant; (5) all records of felony convictions, guilty verdicts, or juvenile adjudications of each witness; (6) all records of bad acts by any witness; (7) all consideration given to, expected, or hoped for by a witness (consideration given a broad meaning of anything of subjective value to the witness; particularly leniency, clemency, favorable treatment, recommendations, or any assistance regarding pending or potential disputes with a sovereign agency); (8) all threats, direct or indirect, made to potential witnesses; (9) all other occasions when a witness has testified or spoken about the facts of the present case; (10) all other occasions in which a witness has testified as an informer, accomplice, or co-conspirator; (11) all documents of the police regarding a jailhouse informant; (12) all statements by third parties that would cast doubt on the jailhouse informant's testimony; (13) any statements by the jailhouse

evidence favorable to the accused by the prosecutor is a violation of due process "where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution."[67] Because jailhouse snitch and cooperating informant testimony is inherently unreliable, the *Brady* threshold for this kind of evidence should be substantially low.

Next, judicial discretion as to defense witnesses could be invigorated. An imbalance of power exists in the current system of criminal prosecutions. The prosecution possesses meaningful resources with which it can entice and induce witnesses to come forward on its behalf. It may promise leniency, immunity, tied pleas in which a potential witness's husband or child may be granted leniency for the witness's testimony, conjugal visits, as well as other unspoken, often hinted-at, deals.[68] The defendant possesses no tools except an abstract concept of fairness with which he may cajole favorable witnesses, meanwhile competing with the Government's promised rewards. H. Richard Uviller proposed the exercise of a judicial power based on the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment.[69] Also, Uviller cites an inherent judicial power to offer immunity or sentence reductions for cooperating witnesses who choose to appear on behalf of the defense.[70] Immunity may be granted to a defense witness, accord-

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informant which are inconsistent with other statements; (14) all statements by the jailhouse informant which are internally inconsistent; all information which would undermine the jailhouse informant's testimony, including, to promises, inducements, or any other agreements; (15) records of the jailhouse informant as a witness for the United States or the Commonwealth in other cases; (16) any exculpatory information regarding jailhouse informants; (17) any competency hearing reports regarding the jailhouse informant; (18) all pre-sentence reports when jailhouse informant is the subject; all non-recorded oral statements made by the jailhouse informant to police; (19) any information from other sources, particularly other prisoners or guards, that contradicts the jailhouse informant's testimony; (20) any information from any party that jailhouse informants have a propensity to lie; any evidence that the jailhouse informant had personal animosity towards the defendant; (21) details regarding the statement the jailhouse informant allegedly heard (facts such as context, time, place, who started the conversation, etc.); (22) any information about the relationship between the defendant and the jailhouse informant; all information which indicates that the testimony of a prosecution witness is inconsistent with other information in the prosecution's actual or constructive possession; and (23) any information regarding promises, inducements, or animosity towards the defendant by any prosecution witness. MOTION FOR TIMELY DISCLOSURE OF EXCULPATORY EVIDENCE, *available at* http://vc3.org/.

67. *Brady*, 373 U.S. at 87.

68. Interview with Roger D. Groot, Co-Chair, Capital Defense Workshop, in Lexington, Va. (Aug. 23, 2003).

69. H. Richard Uviller, *No Sauce for the Gander: Valuable Consideration for Helpful Testimony from Tainted Witnesses in Criminal Cases*, 23 CARDOZO L. REV. 771, 782–83 (2002) (contending that defendants should be entitled to the benefit of witness compensation).

70. *Id.* (citing Virgin Islands v. Smith, 615 F.2d 964, 969–70 (3rd Cir. 1980)); *see also* Barry Scheck, *Closing Remarks*, 23 CARDOZO L. REV. 899, 907 (2002) [hereinafter Scheck, *Closing*] (elaborating on ways a judge could exercise inherent power regarding jailhouse snitch or cooperating witness testimony).

ing to *Smith*, "once it is established . . . that the conditions for such a remedy have been satisfied."[71] These conditions limit the court's power to immunize defense witnesses: "[T]he defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong government interests which countervail against a grant of immunity."[72] A defense witness whose freedom is at stake is often too scared of retribution to come forward and offer valuable exculpatory evidence. Uviller's suggestions allow defense attorneys the opportunity to offer proof of the exculpatory value of their cooperator's testimony and give the judge discretion to grant immunity or a sentence reduction.[73]

A workable remedy for the inherently unreliable testimony problem is being used in Canada in the form of jury instructions.[74] The *Vetrovec* warning comes from the Supreme Court of Canada's decision in *R. v Vetrovec*.[75] In *Vetrovec*, a number of people were convicted of conspiracy to traffic in heroin.[76] Because much of the evidence against Vetrovec was accomplice testimony, the trial judge warned the jury of the dangers of uncorroborated evidence given by an accomplice.[77] Hearing the case on appeal, the Supreme Court of Canada created a flexible rule that serves as a warning designed to prevent conviction based on unreliable testimony.[78] The instruction gives the judge a great deal of discretion to decide whether the accomplice or informant is genuinely motivated or self-interested.[79] If the judge finds that "the credit of the witness is such that the jury should be cautioned, then he may instruct accordingly. If, on the other hand, he believes the witness to be trustworth [sic], then regardless of whether the witness is technically an 'accomplice,' no warning is necessary."[80] However, the Supreme Court of Canada did go one step further, advising trial judges that "[w]hat may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness."[81] This warning became known as the *Vetrovec* warning.[82] Later, the courts gave the *Vetrovec* warning addressing prosecution

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71. *Smith*, 615 F.2d at 971.

72. *Id.* at 972.

73. Uviller, *supra* note 69, at 784.

74. *See* Steven Skurka, *A Canadian Perspective on the Role of Cooperators and Informants*, 23 CARDOZO L. REV. 759, 760 (2002) (discussing the Supreme Court of Canada's method of handling snitch testimony through jury instructions or warnings).

75. *Id.* at 759; R. v. Vetrovec, [1982] 1 S.C.R. 811.

76. Skurka, *supra* note 74, at 759.

77. R. v. Vetrovec, 1 S.C.R. at 813–14.

78. *Id.* at 830–32.

79. *See id.* at 821–23 (stating that no arguments about the potential unreliability of accomplice testimony can justify a hard and fast rule regarding its use).

80. *Id.* at 823.

81. *Id.* at 831.

82. Skurka, *supra* note 74, at 761.

witnesses it deemed to be untrustworthy.[83] The Supreme Court of Canada further broadened the rule by noting circumstances under which the warning should be given.[84] In 1996 the Ontario government created a commission to investigate the wrongful murder conviction of Guy Paul Morin.[85] The commission suggested that jailhouse snitches are almost always doubtful in their credibility and that the *Vetrovec* warning should emphasize that snitches are "almost invariably motivated by self-interest and that historically such evidence has been shown to be untruthful and to produce miscarriages of justice."[86]

B. Data Collection

1. Defining the Need for Data

As it now stands, there is no systematic collection of data regarding snitch testimony.[87] Most of what is now known stems from anecdotal evidence.[88] Implementing a thorough system of data collection would help satisfy an acute need for information in regard to the dangers of snitch testimony.

Solid evidence exists that shows the dangers of cooperative witnesses and jailhouse snitches. Some of this evidence comes from the DNA exonerations studied by the Benjamin J. Cardozo School of Law's Innocence Project.[89] Of the first seventy exonerations studied, sixteen featured damaging snitch testimony as a leading cause of the conviction.[90] This study is one of the first in the United States to examine wrongful convictions in a meaningful way.[91] The drastic nature of the results regarding snitch testimony surprised even the authors.[92] As

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83. *Id.*

84. R. v. Bevan, [1993] 2 S.C.R. 599.

85. Skurka, *supra* note 74, at 761. Morin was exonerated of the murder of his nine-year-old neighbor by DNA testing. *Id.* Morin's conviction was heavily influenced by jailhouse snitch testimony regarding an alleged confession made to another inmate and heard by a second. *Id.* Both inmates testified at trial. *Id.* (citing HON. FRED KAUFMAN, THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (ONTARIO MINISTRY OF THE ATTORNEY GENERAL 1998) [hereinafter MORIN COMMISSION], at 1-4, http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_esumm.pdf (last visited Nov. 17, 2003)).

86. *Id.* at 762-63 (citing MORIN COMMISSION, at 634-35, http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_ch3cd.pdf (last visited Nov. 17, 2003)).

87. Scheck, *Closing*, *supra* note 70, at 900.

88. *Id.*

89. THE INNOCENCE PROJECT, CAUSES AND REMEDIES OF WRONGFUL CONVICTIONS, *at* http://www.innocenceproject.com/causes/index.php (last visited Nov. 17, 2003).

90. *Id.*

91. *See generally* BARRY SCHECK ET AL., ACTUAL INNOCENCE, (2000) [hereinafter SCHECK ET AL., ACTUAL INNOCENCE] (chronicling the multiple instances of wrongful convictions in the United States).

92. Scheck, *Closing*, *supra* note 70, at 900.

only a minority of serious felonies involve DNA testing, there are likely to be many more wrongful convictions, many based in part on snitch testimony.[93]

In Canada, Guy Morin's exoneration led to the impaneling of the Morin Commission which, after looking at jailhouse snitch evidence from Canada, Great Britain, Australia, and the United States, concluded that cooperating informants are notorious for their untruthfulness and are motivated largely by self-interest.[94] The Commission's report warned against the dangers of jailhouse snitch testimony and recommended that trial judges be suspicious of such evidence, but they were not to reject it outright.[95] The United States government, as well as the state governments, must organize a study of the dangers of snitch testimony. Privately funded organizations such as The Innocence Project cannot single-handedly collect data sufficient to study properly the problem. A nationwide and statewide effort, comparable to the Morin Commission, should be implemented.

2. Data Collection

There is currently no organization with sufficient means to collect and analyze national data regarding cooperating informants and jailhouse snitches.[96] Both The Innocence Project and the Morin Commission demonstrate effective methods of data collection.[97] The Morin Commission supplies a model for state and federal governments designing systems of investigation and research into the problems inherent in prosecutors' reliance on snitch testimony.[98] The Innocence Project also provides a model on a smaller scale.[99] Professor Scheck suggested the creation of "Innocence Commissions."[100] These Innocence Commissions

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93. *Id.* at 901.

94. Skurka, *supra* note 74, at 762–63 (citing MORIN COMMISSION, at 555–60, http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_ch3ab.pdf; MORIN COMMISSION, at 634–35, http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_ch3cd.pdf (last visited Nov. 17, 2003)).

95. *Id.*

96. Scheck, *Closing*, *supra* note 70, at 900.

97. *See generally* MORIN COMMISSION, http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin (last visited Nov. 17, 2003) (gathering international data regarding jailhouse snitch testimony); THE INNOCENCE PROJECT, *at* http://www.innocenceproject.com (last visited Nov. 17, 2003) (studying causes of wrongful convictions in DNA exonerations).

98. *See generally* MORIN COMMISSION, http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin (last visited Nov. 17, 2003) (gathering international data regarding jailhouse snitch testimony). *See also* Skurka, *supra* note 74, at 762 (describing the Morin Commission's gathering of international data involving the use of jailhouse snitch testimony); Scheck, *Closing*, *supra* note 70, at 902 n.1 (alluding to Canada's success in creating models for wrongful conviction inquiries).

99. *See generally* THE INNOCENCE PROJECT, *supra* note 97 (studying causes of wrongful convictions in DNA exonerations).

100. Scheck, *Closing*, *supra* note 70, at 902–03 (citing SCHECK ET AL., ACTUAL INNOCENCE, *supra* note 91, at 246, 260).

would be state and federal institutions charged with investigating wrongful convictions.[101] These commissions would also be modeled after the Criminal Case Review Commission in the United Kingdom ("CCRC").[102] The CCRC investigates claims of innocence.[103]

Professor Scheck would "[r]equire the official collection and reporting of data on cases where newly discovered evidence of innocence is the basis for overturning a conviction."[104] He also promotes the "[c]reat[ion] and fund[ing] [of] Innocence Projects at law schools that will represent clients in DNA and non-DNA cases," as well as the "[f]und[ing] [of] teaching and research on wrongful convictions, causes, and remedies."[105] The goal of these Commissions would be the collection of data to help both state and federal criminal justice systems avoid wrongful convictions by making possible an understanding of how the wrongful conviction occurred in the first place.[106] In the present system, judges generally vacate convictions through one-line orders, so the only way to gather information on these exonerations is through a thorough study of newspaper clippings.[107]

The collection of post-trial data following acquittals could also assist in a study of snitch testimony and its dangers. Prosecutors have the ability to collect data on cooperating witnesses or snitches who they believe lied at trial.[108] Alternatively, there could be a system that enables defense attorneys to submit a standing objection regarding the truthfulness of snitch testimony, either to the prosecutors, the judiciary, or perhaps some neutral body designed for such cases.[109] Prosecutors could also keep records on cases that do not proceed due to their disbelief in the available snitch testimony.[110] Prosecutors are in a much better position to keep such records due to their relative wealth of resources and information about the cases.[111] Each of these data collection methods would help to uncover the prevalence and unreliability of cooperative witnesses and snitch testimony, even in acquittals and trials that never went forward. This data could supplement the data collected by the federal and state Innocence Commissions.

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101. SCHECK ET AL., ACTUAL INNOCENCE, *supra* note 91, at 260.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 246.
107. SCHECK ET AL., ACTUAL INNOCENCE, *supra* note 91, at 246.
108. Scheck, *Closing*, *supra* note 70, at 901.
109. *Id.*
110. *Id.*
111. *Id.*

C. *Structural Prosecutorial Reform*

A third method of solving the unreliability problem of jailhouse snitch and cooperative witness testimony is structural reform within the prosecutorial agencies themselves. These reforms would enable prosecutors to deal more effectively with the unreliable nature of cooperating witnesses and jailhouse snitches. The prosecutor makes the decision to accept and use such testimony, unwittingly spreading possibly false information into the criminal justice system.[112] While not always blameworthy, prosecutors do have a special burden to check this testimony, especially when the possibility of falsehood is high.[113]

Due to mandatory minimums and the Guidelines, prosecutors have more leverage than ever to induce cooperation.[114] The Innocence Project studies have shown that the adversary system alone is not enough to correct the mistaken judgments of prosecutors concerning the testimony of cooperators and jailhouse snitches.[115] No one, from defense attorneys to judges, law enforcement agents to prosecutors, questions the proposition that the use of cooperative informant testimony is risky.[116] However, prosecutors, as well as the courts, firmly believe that the use of informants is necessary to obtain convictions.[117] Prosecutors are in the best position to judge pre-trial the truth or falsity of a particular witness's testimony.[118] Therefore, prosecutors do have a special duty to ensure that the information and testimony that they rely on is true.[119]

Prosecutors have an immense responsibility to ensure accurate testimony from snitches.[120] It is important for the courts to require rigorous investigation of snitches before their testimony is used and to exercise close supervision of the prosecutors' decisions to use such testimony. Heightened prosecutorial standards may involve a series of rules addressing how to handle snitch testimony from a prosecutorial point of view. These rules should include the following: (1) the testimony should be slightly discredited without corroborating evidence, as long as the corroboration is not by another snitch; (2) the snitch's character must be investigated for credibility issues, like an extensive criminal record, or other disreputable behavior known to either the prosecutor or law enforcement

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112. *See* Cohen, *supra* note 22, at 825–26 (describing the prosecutor's role in the decision to accept and utilize cooperative testimony).

113. *Id.*

114. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1, *supra* note 14.

115. *See generally* THE INNOCENCE PROJECT, *supra* note 97 (demonstrating the number of wrongful convictions, often aided by cooperative testimony, under the current adversarial system).

116. Cohen, *supra* note 22, at 827.

117. *Id.*

118. Scheck, *Closing*, *supra* note 70, at 903.

119. *Id.*

120. *See* Cohen, *supra* note 22, at 827 (stressing that those with responsibility, especially prosecutors, take steps to "understand and guard against cooperating witnesses infecting criminal investigations with lies and half-truths").

agents; (3) the prosecutor must be reasonably certain of the veracity of the snitch's statement; (4) a supervisory group must have final approval over the use of snitch testimony; (5) if an accomplice, the snitch's relative culpability must be established; (6) the court should closely scrutinize any deals with more culpable defendants to the detriment of less culpable ones; (7) any deals with the informant must be disclosed to the defense as exculpatory *Brady* evidence; (8) if the witness engages in criminal behavior then all deals should be revoked; and (9) post-trial, jailhouse snitches and accomplice witnesses should be closely monitored and any dishonest behavior should be disclosed to the defense team.[121]

Often, despite the best efforts of the prosecution and defense, there is no way to tell when an informant is lying. At that point, his testimony is heard and his deceit is undetected.[122] However, there are many cases in which prosecutors uncover a snitch's lie.[123] These situations should be catalogued so prosecutors in the future may use the catalog as a reference when faced with a questionable witness.[124] Prosecutors' offices, especially United States Attorneys' Offices, could also maintain a list detailing the following: "(1) the nature of the lie; (2) the circumstances that led to the discovery of the deception; (3) the action, if any, taken by the prosecutor after the discovery of the lie; and (4) the affect [sic] of the false information on the investigation and prosecution."[125] This investigation and record-keeping on the part of prosecutors will assist all parties in the criminal justice system to better understand the scope of the problem of jailhouse snitch testimony.

D. Helping Prosecutors Understand the Problems of Snitch Testimony

Due to the overwhelming proliferation of cooperative testimony and the duty of the prosecutor to help curb its inherent risks, prosecutors must be encouraged to consider the dangers of false testimony and to be trained in methods to detect it. Prosecutors have the most exposure to these witnesses and they make the offers in exchange for testimony. A heavy responsibility comes with that power and it follows that the prosecution must try to lessen the impact of potentially false or misleading testimony.

For example, an independent board of senior prosecutors should be employed to supervise and review all debriefing sessions with potential cooperating witnesses.[126] The prosecutor's office has an ethical responsibility to ade-

121. Yaroshefsky, *Introduction*, *supra* note 12, at 756 (citing Rory K. Little, Remarks at the Cardozo School of Law Symposium, *The Cooperating Witness Conundrum: Is Justice Obtainable?* (Nov. 30, 2000) (on file with Yaroshefsky)).

122. *Id.*

123. *Id.*

124. *Id.*

125. Cohen, *supra* note 22, at 826–27.

126. Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 CARDOZO L. REV. 875, 891 (2002).

quately supervise the work of its lawyers.[127] Assuming that prosecutors feel enormous pressure to obtain convictions, coupled with their power to offer incentives to jailhouse snitches, accomplices, and other cooperating witnesses, it is imperative that there be some form of supervisory check on a prosecutor's individual discretion.

Many prosecutors want to find the truth in a case and believe that finding that truth is " '[a] matter of common sense.' "[128] Many prosecutors believe snitches because the information they provided was consistent with other information already gathered.[129] In an interview of the Assistant United States Attorneys ("AUSAs"), most of the participants believed they could tell which witnesses were truthful.[130] Research shows that the average person can tell whether they are being told the truth about 55% of the time, slightly higher than a coin toss.[131] Additionally, studies show that the more confident one is that he can tell the truth from a lie, the more likely he is incorrect.[132] Police officers had, on average, a 55.8% rate of accuracy, only barely higher than the 52.8% registered by college students.[133] This lack of accuracy in determining the truth does not serve the prosecutorial goal of determining truth from lies very well. However, schools exist that train law enforcement officers to tell when an individual is telling the truth or lying.[134] Likewise, psychologists should train prosecutors in lie detection for their debriefings with cooperating witnesses.[135] "People are not good intuitive lie detectors, but it may well be possible to make them better."[136]

Professor Scheck offers the idea of simulations within the prosecutors' offices.[137] During these simulations, prosecutors would attempt to tell whether a subject is telling the truth or lying.[138] Nothing could be more informative or

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127. *Id.* at 890 n.64 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 11(1) (2000); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 1-104(c) (1980) (stating that a law firm shall adequately supervise the work of its partners, lawyers, and non-lawyer employees); MODEL RULES OF PROF'L CONDUCT R. 5.3(a) (1983) (stating that a partner in a law firm should ensure that all lawyers in that firm adhere to the Model Rules).

128. Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth-Telling and Embellishment*, 68 FORDHAM L. REV. 917, 943 (1999) (quoting one of twenty-five anonymous interviews author had taken with AUSAs).

129. *Id.* at 934 (stating that most of the twenty-five AUSAs believed that they obtained "most of the truth").

130. *Id.* at 943–45.

131. Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 810 (2002).

132. *Id.*

133. *Id.* at 811.

134. *Id.* at 812.

135. *Id.* at 815.

136. *Id.* at 816.

137. Scheck, *Closing*, *supra* note 70, at 905.

138. *Id.*

humbling to these professionals than feeling confident in their answers, often based on years of experience, and getting it wrong.[139] At the very least, these simulations could provide prosecutors additional training in truth detection.

Finally, there needs to be stricter enforcement of ethical sanctions by the appropriate disciplinary panels for abuses of prosecutorial discretion in the use of cooperation testimony. Prosecutors feel an intense pressure to obtain a conviction and, given their bargaining power under the Guidelines, the *Brady* obligation is not a sufficient check on their discretion.[140] A strong supervisory hand and a real threat of discipline would check prosecutors' drive to convict and their power to offer leniency in exchange for testimony.

VI. Conclusion

The United States and Virginia continue to allow jailhouse snitch and cooperating witness testimony in criminal trials. Yet, this testimony is inherently unreliable due to the tremendous incentives for these witnesses to lie. This practice cuts right to the heart of the truth-finding function of the criminal justice system. The Guidelines and mandatory minimum sentences have caused an age-old technique in trying criminal cases, the use of snitch testimony, to increase beyond the natural check of the adversarial system. The dangers of jailhouse snitch testimony are particularly notable in capital murder trials where exoneration is impossible. Situations like that of Earl Bramblett should never occur. Death is different, both practically and legally, and requires a higher evidentiary standard of reliability.[141] There needs to be more defense oriented methods to deal with this problem. Data must be collected to gauge the extent of the problem before it can be corrected. Finally, the prosecutorial systems must reform themselves in order to contain a situation which often creates injustice in criminal proceedings.

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139. *Id.*

140. Ross, *supra* note 126, at 891.

141. *Woodson*, 428 U.S. at 305.