SUBTLE INFLUENCES: THE CONSTITUTIONALITY OF JAILHOUSE INFORMANT TESTIMONY IN CAPITAL CASES

Wendy Freeman Miles

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlucdj
Part of the Criminal Procedure Commons, and the Law Enforcement and Corrections Commons

Recommended Citation
Available at: https://scholarlycommons.law.wlu.edu/wlucdj/vol5/iss1/24

This Article is brought to you for free and open access by the Law School Journals at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Capital Defense Journal by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.
monwealth claims of future dangerousness. Examples of each type of instruction follows.

A mitigation instruction might read as follows: "As you deliberate whether life in prison or death is appropriate punishment for the defendant's crime(s), you may consider as a possible mitigating factor that a sentence of life in prison means that the defendant will: [insert eligibility provision applicable to your case]

1. never be eligible for parole.
2. not be eligible for parole consideration for twenty-five years.
3. not be eligible for parole consideration for ___ years."

A future dangerousness instruction might be phrased: "When you assess the evidence presented by the Commonwealth in support of its contention that there is a probability that the defendant will commit future criminal acts of violence that would constitute a continuing threat to society, you may consider the fact that if you set defendant's punishment at life imprisonment, he will: [insert the eligibility provision applicable to your case]

1. never be eligible for parole.
2. not be eligible for parole consideration for twenty-five years.
3. not be eligible for parole consideration for ___ years."

Finally, defense counsel should prepare its response to the situation where the jury interrupts its deliberations to ask about parole or life imprisonment. This is particularly important if all defense efforts to introduce evidence or instructions on parole have been prohibited. Defense counsel must be prepared to convince the trial judge to give an explanation more than, "I can't tell you," or "it is of no concern." First, defense counsel must object to any such response by the trial judge to preserve error. Counsel should argue that a responsive answer is critical because, as indicated by the jury's action, they are already dubious about what a life sentence actually constitutes, and as such, are more likely to speculate in their sentencing decision.84 Second, counsel should press for one of two types of statements: (1) a flat statement that "life" means the defendant would be in jail for the rest of his life;85 or (2) an accurate statement that the defendant would serve twenty-five years in jail before ever being eligible for parole, or if appropriate would never be eligible for parole.86 Because a responsive answer to the jury during its deliberations may be critical to its sentencing determination, counsel must prepare, in advance, to respond to such a situation.

VIII. CONCLUSION: LIVING WITH THE CURRENT RULE

It is imperative that counsel challenge the Virginia Supreme Court's standing on parole in order to ensure that these constitutional claims are not defaulted. Several options have been presented in this article which counsel should pursue where it is appropriate for the individual case. If evidence or instruction on parole are not admitted, counsel should be alert to any signs that the jury has taken into account that the defendant might be released on parole despite being instructed to consider the choice as between life and death. In Harris v. Commonwealth,87 where one of the jurors explained to the jury how the parole system would come into play with regard to the various sentences that the jury was considering, the Virginia Court of Appeals found consideration of parole eligibility by the jury constituted grounds for impeachment of the jury's verdict. Consequently, counsel should consider having jurors questioned as to whether the possibility of parole was discussed by jurors while debating between life and death. Harris provides a limited window of opportunity to claim error given the current policy of the Supreme Court of Virginia.

84 Virginia's prohibition on parole evidence, questioning, and instructions is based on the possibility of juror speculation.
85 This may be appropriate since this is a fiction which Virginia maintains that jurors believe.

SUBTLE INFLUENCES: THE CONSTITUTIONALITY OF JAILHOUSE INFORMANT TESTIMONY IN CAPITAL CASES

BY: WENDY FREEMAN MILES

"[I]t is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

— Napue v. Illinois1

I. INTRODUCTION

In 1982, Roger Matney, a Virginia jailhouse informant, testified for the Commonwealth in the capital murder trial against Roger Keith Coleman. Matney told the court that while sharing a cell with Coleman, Coleman confessed to the rape and murder of Wanda Fay McCoy. Matney described a floor plan of the house and mentioned a paper towel that the police found beside the victim's body. It is arguable that Matney's testimony was the Commonwealth's strongest evidence against Coleman.2 After testifying, Matney was released from jail after serving only part of his four concurrent four-year prison sentences. Matney's mother-in-law signed an affidavit that stated that Matney said he falsified Coleman's confession.3

was executed on May 20, 1992.4

No one constitutional provision directly governs the use of jailhouse informant testimony in a capital murder trial. Capital defense counsel encountering evidence of this type must rely on a patchwork of rights and arguments to limit or exclude the testimony of informants. Consequently, counsel must be well-versed in the available legal challenges to informant testimony that apply to the different situations that may arise. This article is intended to act as a primer on the different types of challenges by presenting constitutional arguments against the use of such testimony at the pretrial, guilt and sentencing stages of capital murder trials and briefly (since there are few Virginia cases dealing with the issue of jailhouse informants) discuss Virginia case law on the issue. The article also provides practical suggestions of how to raise such arguments at the pretrial, trial and appellate levels.

II. SIXTH AMENDMENT RIGHT TO COUNSEL

A. The Triggering of the Right: “Deliberate Elicitation”

If formal judicial proceedings have begun,5 one of the most important protections against informant testimony is the Sixth Amendment right to counsel, which the Supreme Court has held applies to both the trial and capital sentencing phases.6 The Court first developed the protections in Massiah v. United States,7 where the Court held that a defendant is denied the right to counsel under the Sixth Amendment when government agents deliberately elicit incriminating statements from the defendant in the absence of counsel. In that case, the Court found that the Sixth Amendment had been violated when the defendant was surreptitiously tape recorded by federal agents with the aid of Massiah’s codefendant. Massiah made clear that the Sixth Amendment is violated even where the defendant is unaware that he is dealing with a government agent, with the Court even suggesting that “‘Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent.”8

The leading Supreme Court case dealing with the Sixth Amendment and jailhouse informants is United States v. Henry.9 In that case, the defendant, Henry, was held in a city jail pending his trial for armed robbery. Housed in the same cellblock with Henry was Nichols, an informant paid by the Federal Bureau of Investigation. An FBI agent, after being informed by Nichols that he shared the same cellblock as Henry, instructed Nichols to listen for any statements made by the other federal prisoners but not to initiate any conversations himself. A few weeks after Nichols had been released from jail, Nichols reported to the FBI agent that Henry had told him about the robbery. Nichols was paid for the information.

Nichols testified at trial that Henry had told him details about the robbery. The jury, which was not informed that Nichols was a paid FBI informant, convicted Henry of bank robbery. Henry did not learn until after trial that Nichols was a paid government informant and that he, Henry, argued, been housed in the same cell as Henry in order to elicit incriminating information.

The Henry Court viewed the question as whether Nichols had “deliberately elicited” the incriminating information from Henry.10 In determining that the statements were deliberately elicited, the Court relied on Massiah and considered three factors important: 1) Nichols was acting as a paid informant; 2) Nichols appeared to Henry to be just another inmate; and 3) Henry was in post-indictment custody when he talked to Nichols.11 Using these three factors, the Court found that “[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry’s Sixth Amendment right to counsel.”12

Importantly, in both Massiah and Henry, the Court found that the question of who initiated the incriminating conversations was irrelevant. Also of importance is the fact that the Court did not require that the government act purposefully; the language in Henry — “intentionally creating a situation likely to induce”13 — indicates that the intent lies not in the informant’s purposefully eliciting information, but in the government’s creation of circumstances that will probably lead a defendant incriminate himself.

Five years later, in Maine v. Moulton,14 the Supreme Court bolstered its holding in Massiah. In Moulton, the defendant, Moulton, and his co-defendant, Colson, were indicted for theft. Without Moulton’s knowledge, Colson began cooperating with police officers and agreed to testify against Moulton at trial. Colson informed the authorities that Moulton had suggested killing one of the State’s witnesses. Colson allowed the police to install a recording device on his telephone. Over the telephone the two men discussed the theft charges pending against them. Colson also agreed to wear a transmitter on his person at a meeting with Moulton during which the two men discussed the pending theft charges and, prompted by Colson’s questions, Moulton also talked about his earlier, but by then abandoned, plan to eliminate the State’s witness. The Court found that Colson had elicited the information by methods such as “frequently profess[ing] to be unable to recall the events . . . Apologizing for his poor memory, [Colson] repeatedly asked Moulton to remind him about details . . . [T]his technique caused Moulton to make numerous incriminating statements.”15

The State argued that both the telephone conversations and the conversation that took place during the meeting between the two men should have been admissible at trial because the police did not intentionally set up the conversations. The Supreme Court, however, held that it is irrelevant who “deliberately elicits” the incriminating information because the Sixth Amendment “guarantees the accused . . . the right to rely on counsel as a ‘medium’ between him and the State.”16 This guarantee includes the State’s affirmative obligation not to act in a manner that circumvents the protections accorded the accused by involving this right.16 Although the Court conceded that if the State obtains incriminating information “by luck or happenstance”17 the Sixth Amendment is not violated, it warned that “knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State’s obligation . . . as is the intentional creation

7 Miranda v. Arizona, 384 U.S. 436 (1966), does not apply in this situation because the jailhouse informant appears to be merely a fellow inmate; thus, the defendant does not know that he is really talking to an agent of the Commonwealth. See Illinois v. Perkins, 496 U.S. 292 (1990) (holding that an undercover law enforcement officer posing as a fellow inmate need not give Miranda warnings to an incarcerated suspect before asking questions that may elicit an incriminating response.”).
9 Id. (quoting United States v. Massiah, 307 F.2d 62, 72-73 (2nd Cir. 1962) (Hays, J., dissenting)).
11 Id. at 270.
12 Id.
13 Id. at 274.
15 Id. at 165-67.
16 Id. at 174-75.
17 Id. at 176.
of such an opportunity.”

In both Henry and Moulton, the informants played an “active” role in eliciting the statements. The informant in Henry “was a Government agent expressly commissioned to secure evidence” and did so by engaging the defendant in conversations. In Moulton, the Court found that the informant encouraged the defendant to make incriminating statements through surreptitious techniques. In both cases, the Court declined to “reach the situation where the ‘listening post’ [informant] cannot or does not participate in active conversation and prompt particular replies.”

The Court addressed that question in Kuhlmann v. Wilson. The defendant in that case, Wilson, was arrested for robbery and murder and placed in a cell with a police informant named Lee. Lee was instructed by a police detective not to ask any questions of Wilson but merely to “keep his ears open” for the names of Wilson’s confederates in the robbery and murder. Ultimately Wilson admitted that he and two other men had robbed and murdered the victim, and Lee subsequently reported these statements to the detective. The trial court denied Wilson’s suppression motion, finding that the informant had obeyed the detective’s instructions not to ask any questions and that Wilson’s statements were “spontaneous” and “unsolicited.”

The Kuhlmann Court held that unless the government utilizes “investigatory techniques that are the equivalent of direct police interrogation,” the Sixth Amendment is not violated by placing a covert informant in the same jail cell as a defendant. An informant’s mere reporting of the defendant’s incriminating statements to the police is not enough to make out a violation of the Sixth Amendment. Instead, the Court stated that “the defendant must show that the police and their informant took some action, beyond merely listening, that was designed to elicit incriminating remarks.”

After Kuhlmann a defendant, therefore, must be prepared to show that the informant “took some action, beyond merely listening” to establish a Sixth Amendment violation. Henry and Moulton, however, also make clear that “some action” need not amount to direct questioning of the defendant, but can be satisfied by actions and statements “likely to induce [the defendant] to make incriminating statements.”

**B. The “Offense-Specific” Requirement**

Another potential limitation is that the Sixth Amendment is “offense specific,” meaning that it applies only to the offense for which the formal judicial proceedings have begun. In Moulton, the Court noted that even though a defendant has been charged with one crime, the police still have an interest in investigating new or additional crimes and that those investigations frequently require surveillance of individuals. Although the Moulton Court recognized that the potential for abuse in the form of a “pretextual” investigation, the Court held that statements concerning unindicted offenses may be admitted in a trial of those offenses “whenever the police assert an alternative, legitimate reason for their surveillance.”

The potential for abuse that the Moulton Court acknowledged can be seen in King v. Commonwealth. In that case, the defendant, King, and his accomplice murdered and robbed a woman and then fled the state. Two weeks later, the two were arrested together. Although King’s accomplice was arrested for the capital murder, King was charged only with parole violations. In the intervening two months before King was formally charged with the murder for which his codefendant had already been indicted, the police visited him on two occasions during which King made incriminating statements about his involvement in the murder to the police. King sought to suppress the statements in a pretrial motion.

It could be argued that the police were intentionally creating an opportunity to violate King’s Sixth Amendment right to counsel by arresting him for something other than the capital murder and waiting two months, during which time he was interrogated about the murder, before charging him with that crime even though they immediately arrested and charged his accomplice with it.

The Virginia Supreme Court found, however, that King’s right to counsel had not been violated because “adversary judicial proceedings” had not yet been initiated on that charge and, therefore, the right had not yet attached. Thus, by delaying the filing of formal charges against King, the police were able to interrogate him about a murder, and then use those statements to convict him without violating his Sixth Amendment right to counsel.

In Eaton v. Commonwealth the defendant shot and killed four people (two of whom were a state trooper and Eaton’s girlfriend) in less than 24 hours. Afterwards, he shot himself in the head and was transported to a hospital. After being released from the hospital, he was transferred to jail for the murder of his girlfriend, but was questioned twice about the murder of the state trooper.

While Eaton was in the hospital, the police discovered that Eaton had been charged with a series of crimes in a different county and that an attorney had been appointed for him. Those charges were ordered nolle prosequi, even though no one told either Eaton or his attorney. The police then visited Eaton in the hospital and he made several incriminating statements. Eaton moved to suppress the statements as violations of the Sixth Amendment, but the Virginia Supreme Court held that “Eaton’s Sixth Amendment right to counsel had not attached with respect to the murder of Trooper Hines because ‘adversary judicial proceedings’ had not yet been initiated on that charge.”

Both King and Eaton illustrate the Virginia Supreme Court’s application of the bright-line rule set forth in Moulton. No matter how suspicious the government’s motive in delaying formal charges and then questioning an accused about the uncharged crime, the Sixth Amendment does not attach until formal judicial proceedings have been initiated against an accused.

---

18 Id.
19 Henry, 447 U.S. at 271. The Court wrote that “Nichols was not a passive listener...”
20 Id. at 273.
21 Id. at 270.
22 474 U.S. at 165-66.
25 Id. at 459.
26 Id.
27 Id. at 459. The California legislature codified Kuhlmann in §4001.1 of the California Penal Code: “No law enforcement agency and no in-custody informant acting as an agent for the agency, may take some action, beyond merely listening to statements of a defendant, that is deliberately designed to elicit incriminating remarks.”
28 Henry, 447 U.S. at 274.
30 Moulton, 474 U.S. at 179.
31 Id. at 180, n.16.
32 Id. at 180.
34 Id. at 360, 416 S.E.2d at 672 (quoting Eaton v. Commonwealth, 240 Va. 236, 252, 397 S.E.2d 385, 394 (1990) (quoting Michigan v. Jackson, 475 U.S. 625 (1986))). King argued, pursuant to Edwards v. Arizona, 451 U.S. 477 (1981), that his Fifth Amendment right to counsel had not attached with respect to the murder of Trooper Hines because ‘adversary judicial proceedings’ had not yet been initiated on that charge.
36 Id. at 252, 397 S.E.2d at 394.
C. The “Offense Specific” Requirement and Capital Sentencing

Although the classic case of Sixth Amendment violations involves an informant’s testimony at the guilt stage of trial, the problem also arises at the sentencing phase of a capital murder trial. The problem may be especially acute where the jailhouse informant’s testimony is used as evidence to prove the “future dangerousness” aggravating factor. 37

The Virginia Supreme Court has consistently held that evidence of unadjudicated acts is relevant to proving future dangerousness in the capital sentencing phase. 38 Because the court has held that evidence of future dangerousness is not limited to the defendant’s criminal record, 39 this particular stage of a capital murder trial is rife with opportunities for the Commonwealth’s use of informant testimony as to “admissions” and actions of the defendant while in jail. In several cases, Virginia courts upheld the juries’ findings of future dangerousness based in part upon the testimony of jailhouse informants. 40

In Frye v. Commonwealth, the Virginia Supreme Court held that a jailhouse informant’s testimony during the penalty phase regarding a capital defendant’s planned escape from a county jail was relevant and admissible to show his future dangerousness. 41 The statements were made by the defendant while incarcerated pending the trial. The trial court heard the informant’s testimony out of the presence of the jury and, over the defendant’s objections, admitted the testimony. The informant, Armentrout, testified that he frequently spoke to Frye about religion and that during one of these conversations, Frye asked Armentrout to help in an escape from the jail. Consequently, Armentrout told a jailor about Frye’s plan to escape and, over time, gave the jailor a note and a map written by Frye. Armentrout testified that the jailor told him “to suggest certain information concerning the location and condition of police cars” when the informant further discussed the plan to escape. The jailor testified that he never had a deal with Armentrout, but admitted that he told the informant “he would mention his cooperation to the Commonwealth’s attorney.” Frye argued that this evidence was inadmissible pursuant to Massiah, Henry and Moulton because it was obtained by knowingly circumventing the Sixth Amendment right to counsel. The Commonwealth argued that Armentrout was not an agent of the Commonwealth because he initiated the informant relationship, not the Commonwealth.

The court found that any evidence obtained through the initial conversation between the informant and the jailor was admissible because it was obtained through luck. 42 Any statements made after the jailor knew that Frye would talk to the informant, however, would not be admissible, provided the statements pertained to the pending charge of capital murder. 43 Because Frye’s statements concerned past and future criminal conduct unrelated to the charge of murder, the court reasoned, the statements were not obtained in violation of the Sixth Amendment and were admissible. 44

It may be argued, however, that the Sixth Amendment right cannot be interpreted as specifically as the Virginia Supreme Court did in Frye. In Moulton, the United States Supreme Court held that “incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused right to counsel.” 45 In a footnote, the Court added that “[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.” 46 Moulton thus only stated that the Sixth Amendment did not apply to a trial of the unindicted offenses and did not address where those offenses are being used to justify the death penalty for the offenses to which the Sixth Amendment has attached.

Moreover, in Estelle v. Smith 47 and Satterwhite v. Texas, 48 the Supreme Court found that the Sixth Amendment applied apply to the defendants’ statements to a psychiatrist, from which the psychiatrist then made his prediction of future dangerousness. 49 The Court reasoned in both cases that the Sixth Amendment had attached when the doctor interviewed the defendants because it was a “critical stage” of the prosecution; 50 therefore the defendants were denied the assistance of counsel in making the serious decision of whether to submit to the doctor’s questions. 51

In a similar fashion, where the state attempts to use statements concerning other offenses to impose the death penalty for a capital crime on which the defendant has already been charged, the other offenses can be seen in effect as part of the capital offense. To not extend Sixth Amendment protections in this situation would enable the state to deliberately elicit incriminating statements concerning the other offenses not with an eye towards prosecuting those crimes, but solely to

defendant joked about his crimes and that the defendant made a deadly weapon to use during an escape he was planning.

Id. at 231 Va. at 392, 345 S.E.2d at 283.

Id. at 231 Va. at 392, 345 S.E.2d at 283-83.

Id. at 231 Va. at 392, 345 S.E.2d at 282-83.

Moulton, 474 U.S. at 180.

Id. at 180, n. 16 (emphasis added).


The Court, in a later case, Pennsylvania v. Muniz, 496 U.S. 582 (1990) (plurality opinion), made clear that the Sixth Amendment was implicated even though the psychiatrist did not have any investigative interest in the statements themselves, but rather used the statements to make his prognosis of future dangerousness. Id. at 599, n.13.

49 Estelle v. Satterwhite, 451 U.S. at 469-70; Satterwhite, 486 U.S. at 254-55. The Estelle Court wrote that “the right to counsel granted by the Sixth Amendment means that a person is entitled to the help of a lawyer ‘at or after the time that adversary judicial proceedings have been inititated against him . . . whether by way of formal charge, preliminary hearing, indictment, information or arraignment.’” 451 U.S. at 469-70 (quoting Kirby v. Illinois, 406 U.S. 682, 688-89 (1972) (plurality opinion)).

Estelle, 451 U.S. at 469.
bolster its case for imposition of the death penalty on an already indicted capital crime.

The Illinois Supreme Court vacated a death sentence based in part on the foregoing argument. In People v. Kidd, the State introduced at the penalty stage the defendant's confession to police that he set a fire in which 10 children were killed approximately four years prior to the capital murder conviction at issue in the case. Although the police knew that the defendant was represented by counsel, the attorney was never notified that the defendant was being interrogated. The Illinois court found that the pretrial interrogation used to gather evidence for the penalty hearing was a critical stage of the prosecution and thus warranted protections under the Sixth Amendment; although the State was free to use the incriminating statements to prosecute the arson-murder unrelated to the capital murder, the court held that introduction of the statements to show that the defendant was death eligible violated the defendant's Sixth Amendment right to counsel.53

D. Making the Motion to Suppress Under the Sixth Amendment

Because of the damning nature of jailhouse informant testimony, Virginia defense counsel should make a motion to suppress the evidence from the guilt and penalty phases of the capital trial. A motion to suppress must be filed and notice given to the Commonwealth no later than seven days before trial. In this motion, the defendant will want to argue that the Commonwealth did more than merely place an informant in the same cell as the defendant and that the informant did more than merely listen to the defendant. To bolster its Sixth Amendment argument, the defense can attempt to show, for example, that the Commonwealth was paying the informant or promising the informant some type of benefit for the information and/or that the jailhouse informant had a continuing relationship as an informant with the state.

The most difficult factor to show will probably be that the informant went beyond merely listening and actually interrogated the defendant. Because the informant has a personal interest in testifying for the state, the question of whether he merely listened will more than likely be his word against the defendant's. Therefore, the defense should request an evidentiary hearing on the motion to suppress and, for this hearing, subpoena all jail inmates in an attempt to show that informant was not a mere "listening post."

Virginia defense counsel also should vigorously litigate any attempt to use jailhouse informant testimony to prove future dangerousness. The motion should note that the United States Supreme Court has held that defendant has a constitutional right to counsel at the penalty phase of a capital murder trial and argue that allowing informant testimony as to admissions of unadjudicated acts to the sentencing stage of a capital murder trial violates Estelle v. Smith and undermines Moulton v. Maine's holding that the Sixth Amendment "guarantees the accused . . . the right to rely on counsel as a "medium" between him and the State." The Commonwealth's ultimate purpose in a capital murder trial is to obtain a sentence of death which often includes a showing of future dangerousness. Thus any criminal activity relied upon to show future dangerousness should be seen as part and parcel of the Sixth Amendment right that has attached to the capital murder charge.59

III. CHALLENGES TO JAILHOUSE INFORMANT TESTIMONY BASED UPON RELIABILITY

Many do not realize the ease with which jailhouse informants can pick up the telephone and collect information on fellow inmates from prosecutors, bail bondsmen and the police, and then use the information inperjured testimony at trial. A jailhouse informant in California admitted to providing false information to the authorities in approximately 100 cases. His method for gathering information was to disguise himself as a bail bondsman and get an accused's case number and date of arrest from the sheriff's department. Then, masquerading alternately as a deputy district attorney and a police officer, he gathered "credible" information and informed the government of a fellow inmate's "confession." This same jailhouse informant admitted to lying under oath in three of the sixteen cases in which he testified for the state. In exchange for his testimony, the government gave him privileges such as early release from prison.

Because jailhouse informants are inmates themselves and thus are highly motivated by possible favors from the government in return for their information, the self-serving nature of this type of evidence raises questions bearing upon reliability, arbitrariness and the integrity of the criminal justice system.

A. Due Process

Due process claims regarding jailhouse informant testimony may involve challenges to the use of false testimony at trial, to the Commonwealth's withholding of information such as evidence of any favors the informant may have received from the Commonwealth, and to limitations concerning the cross-examination and impeachment of jailhouse informants.

The prosecution has the duty to disclose exculpatory evidence to the defense pursuant to Brady v. Maryland. Brady held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Twenty-one years later, the Supreme Court

53 Id. at 712-14.
55 This type of evidence can be obtained through a motion for discovery and inspection. See infra notes 106-109 and accompanying text.
56 Kuhhnann, 477 U.S. at 459.
57 Mempa v. Rhay, 389 U.S. 128 (1967) (holding that sentencing is a "critical stage" of trial and therefore warrants protections under the right to counsel).
58 474 U.S. 175.
59 As part of this motion, defense counsel may wish to draw a parallel to Moulton by stating that the defendant is asking only that jailhouse informant testimony be suppressed from the penalty phase of the trial, and not that the Commonwealth be precluded from indicting, charging and trying the defendant for the unadjudicated acts to which the
extended the *Brady* holding to evidence that is "material . . . to the punishment to be imposed."68

As a corollary to *Brady*, the Commonwealth may not knowingly rely on false testimony to secure a conviction, whether such testimony is actively solicited or simply allowed to go uncorrected.69 In *Giglio v. United States*, after the defendant was convicted and sentenced, the defense alleged that the Government may have failed to disclose a deal it had with its key witness.70 Although the defense attorney attempted to reveal possible deals the witness may have had with the government through aggressive cross examination, the witness denied any such arrangement or agreement.71 In the government’s closing argument, the prosecutor also stated that the government had made no deals with the witness.72 However, the government later admitted that a prosecutor who had presented the case to the grand jury but did not try the case had made an agreement with the witness; the attorney who tried the case denied any knowledge of the agreement.

The *Giglio* Court held that "[w]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor’s office is an entity and as such it is the spokesman for the Government."73 More specifically, the Court stated that allowing false evidence to go uncorrected “is [as] incompatible with ‘rudimentary demands of justice’ as ‘deliberate deception of a court and jurors by the presentation of known false evidence.’”74 The Court concluded that “suppression of material evidence justifies a new trial ‘irrespective of the good faith or bad faith of the prosecution.’”75

The Virginia Court of Appeals addressed both *Brady* and *Giglio* claims in *Fitzgerald v. Bass*.76 The defendant in that case argued that, despite his specific request, the Commonwealth violated *Brady* when it failed to disclose certain information about one Cavaniss, a jailhouse informant, who testified against him. The defendant contended that the Commonwealth failed to provide information that would have shown, among other things, that the informant “was a paid informant for the State Police on cases not involving Fitzgerald . . . and that he was reimbursed for expenses connected with his testimony.”77

Pursuant to *Brady*, Fitzgerald made a request for:

[A]ny and all evidence of any kind whatsoever, known by the Commonwealth’s Attorney to be within the possession, custody or control of the Commonwealth, or by the exercise of due diligence should be known by the Commonwealth’s

---

70 The deal was that the witness would not be prosecuted if he testified for the prosecution identifying the defendant as the instigator of a forgery scheme. *Id.* at 150-51.
71 *Id.* at 151.
72 *Id.*
73 *Id.* at 154.
74 *Id.* at 153 (citing *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).
75 *Id.* at 150 (citing *Brady v. Maryland*, 373 U.S. at 87.)
76 6 Va. App. 38, 366 S.E.2d 615 (1988). Fitzgerald was appealing the denial of his state writ of habeas corpus. Fitzgerald was convicted of abducting, raping, robbing and murdering a woman. *Id.* at 47, 366 S.E.2d at 620.
77 *Id.* at 47, 366 S.E.2d at 620.
78 *Id.*
79 *Id.* at 48, 366 S.E.2d at 620-21.
80 *Id.* at 48, 366 S.E.2d at 620.
81 6 Va. App. at 48, 366 S.E. 2d at 620-21. The court wrote that "[t]his is not a situation where the Commonwealth responded falsely that it was not in possession of exculpatory evidence. Failure to object to such a response would not bar habeas review since ordinarily counsel would have no reason to believe that the Commonwealth was, in fact, withhold-

Attorney to be within the possession, custody or control of the Commonwealth . . . which affects the credibility of any of the Commonwealth’s anticipated witnesses.78

The Commonwealth responded to the motion by saying that it was "unable to ascertain what may affect the credibility of any of the Commonwealth’s witnesses," which the court of appeals interpreted as the Commonwealth essentially saying that impeachment evidence was not subject to discovery.79

Although the court found that the Commonwealth’s response "was clearly in error," it concluded that Fitzgerald’s failure to object to the Commonwealth’s response meant that he had defaulted on the *Brady* claim.80 Because of the way the Commonwealth responded—i.e., not falsely—the court found, in essence, that Fitzgerald had reason to believe that the Commonwealth was holding such evidence; since Fitzgerald should have pursued his claim further, the court found that he procedurally defaulted his claim.81

No *Brady* case, from *Napue v. Illinois*82 onward discusses procedural burdens on the defense when requesting evidence pursuant to *Brady*. The United States Supreme Court held in *United States v. Agurs* that the prosecution has a duty to disclose material evidence where there was a specific request, a general request, or no request at all from the defense.83 The court conceded in *Fitzgerald* that the evidence asked for by the defense was material as defined in *United States v. Bagley*.84 If the prosecution has a duty to turn over material *Brady* evidence whether the defense requests it or not, it logically follows that failure to do so warrants review; in other words, the defense cannot default on a *Brady* claim.85 Consequently, the *Fitzgerald* court’s holding that the defendant defaulted his *Brady* claim is highly questionable as a legal holding.

In *Fitzgerald*, the defendant also claimed that he was denied due process when the same jailhouse informant, Cavaniss, testified falsely that he had no pending charges and no prior felony convictions.86 The court found that the Commonwealth’s attorney had no actual knowledge of the false testimony, but that it did have constructive knowledge even though the informant’s prior criminal convictions and charges occurred and were recorded in a different county from the one in which he was testifying.87 Therefore under *Giglio*, the court held, a new trial was required if the informant’s testimony was material and if it could have affected the judgment of the jury.88 The court noted the United States Supreme Court had stated that this test is the equivalent to the "harmless
Beyond a reasonable doubt standard set forth in *Chapman v. California*.99

Because the informant's testimony established an element of the crime Fitzgerald was charged with,90 the court found the testimony to be material to the rape conviction in that Cavaniss' credibility in the eyes of the jury could have determined their verdict.91 The court proceeded to find the error harmless, however, after considering the informant's testimony in light of the entire trial, including the nature and strength of the Commonwealth's evidence compared to the defense's evidence, the extent of the defense's impeachment of the informant, how "vulnerable" his testimony would have been had the "truth" been revealed, and whether any such considerations "could in any reasonable likelihood have caused the jury to bring in a verdict of not guilty."92 Because the informant had admitted to a conviction for breaking and entering — a felony — and to "‘something like' a misdemeanor conviction of moral turpitude"93 and had spent time in jail, the court found that the jury was aware that Cavaniss had "a substantial criminal background."94 In addition, since the defense in its closing argument had emphasized the criminal record to which Cavaniss had admitted, the court found that there was no reasonable likelihood that the jury's judgment would have been different had the informant testified truthfully.95 The court noted that even if the defense had known of Cavaniss' further criminal history and his status as a police informant, and had argued to the jury that these gave him a motive to provide false testimony for the Commonwealth, it was doubtful whether this would have affected the jury's determination of the informant's testimony.96

In *O'Dell v. Commonwealth*,97 the defendant argued that he was denied his rights to discovery under *Napue and Brady* when the Commonwealth did not disclose a plea agreement between it and one of its witnesses, a jailhouse informant. In an oblique one-paragraph statement, the Virginia Supreme Court held that neither *Napue nor Brady* indicates a defendant has a right to discover the existence or contents of a plea agreement prior to trial. Instead, these cases turn upon undisclosed plea agreements with witnesses who had already testified.98 The court, citing *Weatherford v. Bursey*,99 held that "there is no general constitutional right to such pre-trial discovery in a criminal case."100

While it is true that *Weatherford* stands for the proposition that "[t]here is no general constitutional right to discovery in a criminal case,"101 the United States Supreme Court unequivocally distinguished *Weatherford* from *Brady*.102 The *Weatherford* Court wrote:

It does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably.... *Brady is not implicated here* where the only claim is that the State should have revealed that it would present the eyewitness testimony of a particular agent against the defendant at trial.103

Thus, the Virginia Supreme Court in *O'Dell* was comparing "apples to oranges" when it applied the holding in *Weatherford* to the facts in *O'Dell*.

Capital defense counsel should note that, contrary to *O'Dell*, impeachment evidence as well as exculpatory evidence falls under the purview of *Brady*104 since "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."105

1. Pre-Trial Motions

Virginia defense counsel should file, pursuant to the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Rule 3A:11 of the Rules of the Supreme Court of Virginia a motion for discovery and inspection. A motion for discovery and inspection pursuant to Rule 3A:11 must be filed 10 days prior to the date fixed for trial.106 In this motion, the defendant should request that the trial court order the Commonwealth to disclose:107

1. Pre-trial motions shall be limited to matters within the purview of *Brady*. Virginia defense counsel should note that defendants have an absolute right under the confrontation clause to cross-examine a Commonwealth's witness to show the witness' bias or motivation. *Deavers v. Commonwealth*, 220 Va. 14, 16, 255 S.E.2d 458, 459 (1979), *Whittaker v. Commonwealth*, 217 Va. 966, 968, 234 S.E.2d 79, 81 (1977), *Moore v. Commonwealth*, 202 Va. 667, 669, 119 S.E.2d 324, 327 (1961). The right to confrontation is extended in Virginia to capital sentencing via statute, Va. Code Ann. §19.2-264.4 (1990). A defendant is also "entitled to prove facts that would support an inference that such testimony was motivated by a bargain for leniency granted in a previous trial." *Whittaker*, 217 Va. at 968, 234 S.E.2d at 81. Further, a defendant has the right to attack the credibility of a jailhouse informant by showing that the witness has received or been promised favorable treatment from the Commonwealth for his or her testimony and, thereby, to show the informant's true motive for giving such testimony. *Deavers*, 220 Va. at 16, 255 S.E.2d at 459, *Whittaker*, 217 Va. at 968, 234 S.E.2d at 81.

103 *Napue*, 360 U.S. at 269.

105 Counsel should be aware that filing a motion for discovery pursuant to Rule 3A:11 entitles the Commonwealth to limited reciprocal discovery if the defense motion is granted. In *Hackman v. Commonwealth*, the Supreme Court of Virginia cautioned "members of the trial bar that generally it is advisable to have a court order or written stipulation specify precisely what is to be discoverable [under Rule 3A:11], thereby avoiding misunderstandings that may lead to fatal consequences on appeal." 220 Va. 710, 261 S.E.2d 555, 558 (1980).

107 Clearly, the content of the motion for discovery and inspection should not be limited to the suggestions in this article. It should include requests for all *Brady* material.
Any and all consideration of promises of consideration given to or on behalf of any potential witness or expected or hoped for by any witness. By “consideration” defendant refers to absolutely anything, whether bargained for or not, which arguably could be of value or use to such a potential witness or to persons of concern to such witness, including but not limited to formal or informal, direct or indirect: leniency, favorable treatment, recommendation or other assistance with respect to any pending or potential criminal, parole, probation, pardon, clemency, civil, tax court, court of claims, administrative or other dispute with the Commonwealth, with any other authority or with any other parties; criminal, civil or tax immunity grants[,] witness fees or special witness fees; provision of food, clothing, shelter, transportation, legal services or other benefits; placement in a “witness protection program or equivalent benefits; informer status of any potential witness; and anything else which arguably could reveal an interest, motive or bias in any witness in favor of the Commonwealth or against defendant or act as an inducement to testify or to color testimony.\(^{108}\)

The motion should further ask the court to order the Commonwealth to disclose the “existence and identification of each occasion on which each potential witness who was or is an informer . . . has testified before any court, grand jury, or other tribunal or body.”\(^{109}\) Also, the motion should request all personnel files that might arguably help the defense impeach any Commonwealth witness since, at times, informers are paid for their services by the state.

2. Post-Trial Motions

The defense may not discover until after trial that a jailhouse informant perjured herself, that the perjury was uncorrected by the Commonwealth, or that evidence affecting the credibility of a witness (e.g. that the witness was promised something for her testimony) was not disclosed. The usual remedy for such claims is a motion for a new trial.\(^ {110}\) Defense counsel, under Virginia Supreme Court Rule 1:1, have until twenty-one days after sentencing to file a motion for a new trial. The motion should set forth both state and federal grounds for the motion and show how the defendant was prejudiced by the informant’s testimony or by the Commonwealth’s nondisclosure.

If the defendant is denied the right to cross-examine and impeach the credibility of a jailhouse informant, defense should make a timely objection on the record. If overruled, defense can use this claim, based on state and federal law, as a basis for a motion for new trial and as an objection on the record. If overruled, defense can use this claim, based on state and federal law, as a basis for a motion for new trial and as an objection on the record. If overruled, defense can use this claim, based on state and federal law, as a basis for a new trial. The defense may not discover until after trial that a jailhouse informant perjured herself, that the perjury was uncorrected by the Commonwealth, or that evidence affecting the credibility of a witness (e.g. that the witness was promised something for her testimony) was not disclosed. The usual remedy for such claims is a motion for a new trial.\(^ {110}\) Defense counsel, under Virginia Supreme Court Rule 1:1, have until twenty-one days after sentencing to file a motion for a new trial. The motion should set forth both state and federal grounds for the motion and show how the defendant was prejudiced by the informant’s testimony or by the Commonwealth’s nondisclosure.

If the defendant is denied the right to cross-examine and impeach the credibility of a jailhouse informant, defense should make a timely objection on the record. If overruled, defense can use this claim, based on state and federal law, as a basis for a motion for new trial and as an objection on the record. If overruled, defense can use this claim, based on state and federal law, as a basis for a new trial. The defense may not discover until after trial that a jailhouse informant perjured herself, that the perjury was uncorrected by the Commonwealth, or that evidence affecting the credibility of a witness (e.g. that the witness was promised something for her testimony) was not disclosed. The usual remedy for such claims is a motion for a new trial.\(^ {110}\) Defense counsel, under Virginia Supreme Court Rule 1:1, have until twenty-one days after sentencing to file a motion for a new trial. The motion should set forth both state and federal grounds for the motion and show how the defendant was prejudiced by the informant’s testimony or by the Commonwealth’s nondisclosure.

The defendant may also use claims that the informant perjured himself and/or that the Commonwealth knew of the perjury as a basis for a state petition for habeas corpus relief.\(^ {111}\) However, the inmate who seeks to collaterally attack his conviction may find it hard to obtain the necessary evidence to do so because he will have to elicit the informant’s admission that the informant perjured himself at trial. Such testimony would subject the informant to prosecution for perjury and thus the informant would probably be unwilling to so testify. One commentator argues that courts should grant use immunity to a jailhouse informant who, when asked in a habeas proceeding whether he perjured himself at trial, invokes his Fifth Amendment privilege.\(^ {112}\)

B. Eighth Amendment

A jailhouse informant’s testimony that results in a death sentence is also questionable under Eighth Amendment protections against the arbitrary imposition of the death penalty. The motive for false testimony is so great in some instances — early release from prison or jail, promises of lenient sentences or the dropping of charges altogether — that serious doubt is cast on the reliability of such testimony,\(^ {113}\) particularly when the result of this testimony is the punishment of death.

Since the death penalty is unlike a prison term in that, once imposed, it cannot be modified or vacated, it is cruel and unusual punishment if imposed arbitrarily.\(^ {114}\) Based on that proposition, the Supreme Court wrote in Woodson v. North Carolina,\(^ {115}\) that “there is a . . . difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” Likewise, in Lockett v. Ohio\(^ {116}\) the Court wrote that the “qualitative difference between death and other penalties calls for a greater need for reliability when the death sentence is imposed.” Thus, the procedures a state employs to impose the death penalty must be more reliable than those used in the determination of other criminal punishments.\(^ {117}\)

Virginia defense counsel should argue in their motions to suppress that jailhouse informant testimony is so self-serving in nature as to be inherently unreliable and thus in violation of the Eighth Amendment. Barring this type of testimony from the penalty stage of a capital trial would ensure the high standard of reliability that is constitutionally required.\(^ {119}\)

To ensure the heightened standard of reliability required pursuant to Woodson\(^ {120}\) and its progeny, Virginia defense counsel should file a motion for discovery and inspection pursuant to state and federal law.\(^ {121}\) Since Brady requires discovery of exculpatory or material evidence relevant to the punishment to be imposed as well as to guilt, the Commonwealth has a duty to disclose any information relevant to rebutting the informant’s testimony as to future dangerousness at the penalty stage (i.e. mitigating evidence). Such evidence may include the Commonwealth’s providing leniency, favorable treatment, recommendations for parole, early release or payment for his testimony in the capital case. Counsel should argue that Virginia courts have the authority to order a broad range of discovery, going beyond that required pursuant to Rule 3A:11. Should the trial court deny the motion or the Common-wealth fail to disclose the requested information, defense counsel should

So.2d 788 (Fla. 1976) (where the court found that the informant’s testimony appeared to be “the product of purely selfish considerations.”).

\(^{114}\) Furman v. Georgia, 408 U.S. 238 (1972) (plurality opinion).

\(^{115}\) 428 U.S. 280, 305 (1976) (footnote omitted).


\(^{117}\) Woodson, 428 U.S. at 305.

\(^{118}\) See supra notes 54-59 and accompanying text.

\(^{119}\) Lockett, 438 U.S. at 640; Woodson, 428 U.S. at 305. Defense counsel should also argue that testimony by informants as to the defendant’s future dangerousness was obtained in violation of the Sixth Amendment.

\(^{120}\) 428 U.S. at 305.

\(^{121}\) See supra notes 106-109 and accompanying text.
make a specific and timely objection on the record, citing both state and federal grounds for their objection.

D. Judicial Rulings Requiring Corroboration

The integrity of the judicial system is undermined when a defendant is sentenced to death solely or partly on the basis of uncorroborated jailhouse informant testimony. When an informant testifies that the defendant "confessed" to the capital crime or to unadjudicated acts, the prejudicial effect is "harmful in the extreme and cannot be overlooked by the reviewing court." 122 Some state courts have recognized and designed rules of law to combat the unreliability of jailhouse informant testimony. Defense counsel, therefore, should not hesitate to argue against informant testimony not only on constitutional grounds, but also on the basis of general evidentiary and fairness principles.

In D'Agostino v. State, 123 the defendant was convicted of murder and sentenced to death by a jury. During the penalty phase of the trial, the state called D'Agostino's cellmate to testify that the defendant had admitted to several other unadjudicated killings. According to the informant, D'Agostino admitted to killing a man and slitting a woman's throat, but the jailhouse informant could not give specifics as to the time or place of the murders.

The Supreme Court of Nevada noted the frequency of jailhouse informants coming forward to testify for the state and decided that it was time to examine the practice carefully. 124 The court found that in D'Agostino there was no way that the defendant could have defended himself against such unverifiable accusations. 125 The court held that testimony as to "admissions" of past unadjudicated homicides by the defendant is inadmissible unless "the trial judge first determines that the details of the admissions supply a sufficient indicia of reliability or there is some credible evidence other than the admission itself to justify the conclusion that the convict committed the crimes which are the subject of the admission." 126

In Eaton, the Supreme Court of Virginia alluded to the necessity of corroborating jailhouse informant testimony. 127 Eaton argued that the evidence in the guilt phase of his trial was insufficient to establish that he was the "triggerman" as required by Virginia law for capital murder. 128 Although the court upheld the use of the informant testimony, it did so only after noting that "[d]espite Eaton's attack on the credibility of Holley as a 'jailhouse snitch,' Holley's testimony was corroborated in several respects: first, the circumstantial evidence . . . second, Eaton's murderous career . . . and third, Eaton's statements to the police . . ." 129

Requiring corroborating evidence for an informant's testimony as to "admissions" enhances the integrity of the judical system. 130 Corroborated jailhouse informant testimony, as opposed to self-serving uncorroborated testimony, enhances the overall reliability of a capital conviction. This type of requirement does not undermine the state's interest in investigating crimes that was recognized in Moulton 131 because it does not ban the state's use of informants. The state may still take advantage of fortuitous evidence offered by jailhouse informants, and the requirement for evidence that tends to prove that what the informant is offering is true only serves to make the ultimate investigation of the "confessed" crime more trustworthy. Virginia defense counsel should object to uncorroborated informant testimony in that the prejudice of such unreliable testimony severely outweighs its probative value. In their motion to suppress the informant's testimony, counsel should request an evidentiary hearing to determine what corroborative evidence exists for the testimony.

E. Techniques for Combatting the Impact of Informant Testimony: Voir Dire and Jury Instructions

Voir dire is an essential tool defense counsel can employ to guard against the inherent unreliability of a jailhouse informant's testimony at the trial and penalty phases. Defense counsel should ask potential jurors: 132

1. Do you believe that it is fair for an individual who is accused of a crime to testify against another, and as a result of his testimony receive from the Commonwealth [a reduced or lenient sentence / charge(s) against him dropped / early release from prison or jail]?

2. Do you understand that an individual's testimony may be motivated by his desire to avoid criminal charges?

3. Do you feel you are capable of scrutinizing and analyzing each witness' testimony for their reason or motivation for testifying?

Defense counsel should argue that because the jury determines whether to impose a life sentence or the death penalty, the capital defendant's Sixth Amendment right to an impartial jury and the Eighth Amendment heightened reliability standard set forth in Woodson requires that such questioning be allowed. 133 Likewise, one of the basic principles of due process is that the defendant has the right to a fair and impartial jury. Defense counsel should argue that they are constitutionally mandated, via the Sixth Amendment right to effective assistance of counsel, to make informed decisions about potential jurors and to ensure the jurors' impartiality once they are empaneled. Thus the defendant has the right to meaningful voir dire.

Once the jury has heard the informant's testimony, counsel should attempt to highlight for the jury the informant's lack of credibility. Although an effective and necessary arena for pointing out the unreliability of the testimony is the closing argument, defense counsel should also submit to the court jury instructions regarding the credibility of jailhouse informant testimony. One example of such an instruction is as follows:

The testimony of [a jailhouse] informant should be viewed with caution and close scrutiny. In evaluating such testimony, can be analogized to the requirement for corroborating evidence and/or witnesses for the crime of solicitation that states recognize. See, e.g., Cal. Penal Code §653(e) (West 1988).

123 Id.
124 Id.
125 Id. at 284.
126 Id. at 285.
127 240 Va. at 254, 397 S.E.2d at 396.
128 The jailhouse informant testified that Eaton talked about each of four killings at length, admitted to shooting a state trooper and told the informant details about a high speed chase and automobile accident following the murder of the state trooper. Id. at 244, 397 S.E.2d at 389.
129 Id. at 254, 397 S.E.2d at 396.
130 The need for corroboration of jailhouse informant testimony
you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.\footnote{134}

Defense counsel should always proffer cautionary instructions when the Commonwealth’s case depends in part on untrustworthy evidence. Defense attorneys should argue that, under the Eighth Amendment heightened reliability standard,\footnote{135} the trial court is mandated to allow such instructions to resist the inherent unreliability of jailhouse informant testimony.

IV. CONCLUSION: THE NEED FOR A DATABASE ON JAILHOUSE INFORMANTS

Common sense would dictate that defense counsel advise their clients not to talk to anyone in jail and warn them of the consequences of talking to cellmates. However practical this advice, it is frequently not realistic because “confinement may bring into play subtle influences that will make [an individual] particularly susceptible to the ploys of under-

\footnote{134} Cal. Penal Code \S 1127a (West 1988). The State of California mandates that this jury instruction be read upon request of either party “in any criminal trial or proceeding in which an in-custody informant testifies as a witness.” Id.

\footnote{135} In \textit{Ford v. Wainwright}, 477 U.S. 399 (1986), the Court held that cover Government agents."\footnote{136} Advising the capital defendant not to talk is also not sufficient because, clearly, jailhouse informants are exceptionally motivated to fabricate confessions of their fellow inmates.

The problems Virginia defense counsel encounter when faced with the use of jailhouse informant testimony at a capital trial are numerous. This article has outlined a variety of constitutional and evidentiary challenges that might be raised. As a practical matter, one of the hardest problems to overcome is gathering evidence on the informant that supports motions to suppress and that may be used to impeach the informant’s credibility. One practical remedy for these hurdles would be the creation of a jailhouse informant database among defense attorneys containing information such as how many times an informant has testified for the Commonwealth, what the informant’s status is with the state (e.g. paid informant), what benefits the informant has received in the past for testimony, and the informant’s past convictions. An existing database would also serve as a source of documentation for future legislation. Until such a database exists, an attorney faced with a jailhouse informant may want to circulate a letter to other defense attorneys in the area requesting any information that they might have concerning the informant.

\footnote{136} \textit{Henry}, 447 U.S. at 274.

“(i)n capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability” (emphasis added).