ABOLISHING JAILHOUSE SNITCH TESTIMONY

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INTRODUCTION

Jailhouse snitch testimony is arguably the single most unreliable type of evidence currently used in criminal trials. Snitches are deeply unreliable witnesses. Many are con artists, congenital liars, and practiced fraudsters. As compensated witnesses, all snitches have deep conflicts of interest. What is worse, jailhouse snitch testimony as a class is not only the least credible type of evidence, but it is also among the most persuasive to jurors because jailhouse informants typically allege to have personally heard defendants confess their guilt to the crimes charged. Introduction of a defendant's confession, from any source, radically changes the complexion of a case, particularly one lacking other evidence that directly implicates the defendant in the crime. Research studies demonstrate that jurors are simply ill equipped to evaluate the credibility of jailhouse informant testimony and consistently give such testimony far more weight than is due even if they are aware of the incentives jailhouse snitches receive or expect in exchange for their testimony. The prejudicial effect of unreliable jailhouse snitch testimony is magnified by the context in which the evidence is presented to the jury. Jailhouse snitches are States' witnesses, and the credibility of their testimony is likely substantially bolstered as a result. Prosecutors bolster jailhouse snitch testimony simply by putting them on the witness stand as State's witnesses, signaling to the jury that the prosecutor believes their testimony is trustworthy. Even in cases in which bolstering crosses the line into the territory of the unethical or improper, and it often does, prosecutors are rarely called out for their misconduct, much less face sanctions. As a result of both implicit and explicit prosecutorial bolstering, jailhouse snitch testimony tends to have an even greater, and potentially more prejudicial, effect on reliable fact-finding.

Jailhouse snitch testimony, in fact, is so likely to make a material difference to the outcome of close cases, and so likely to be

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false, that permitting such witnesses to testify, absent direct corroboration through electronic recording or some other similarly reliable method, should be flatly banned. Numerous commentators have proposed modest fixes to the jailhouse snitch problem. Some have urged the conduct of pretrial reliability hearings. Others have argued for enhanced disclosure obligations regarding informant background and testimony. Still other fixes have been proposed. But given the depth to which jailhouse testimony is compromised, these modest proposals are simply inadequate. Anything less than total abolition of jailhouse snitch testimony is fundamentally insufficient to address what is perhaps the most outrageous and destructive prosecutorial practice currently tolerated by law.

This Article lays out that argument. Following this introduction, Part I demonstrates that jailhouse informant testimony is inherently biased and that the temptations faced by inmates to commit perjury are overwhelming. Part II explains why jailhouse snitch testimony is so persuasive to jurors, and why it is responsible for a disproportionate number of wrongful convictions. Part III examines the present devices relied upon to filter out unreliable informant testimony—cross-examination and post-conviction review—and finds them wanting. Neither device has a successful track record of providing relief to wrongfully convicted defendants nor offers any realistic mechanism to screen out unreliable snitch testimony. Part IV considers several remedies proposed by commentators and enacted in a few jurisdictions. These remedies, if adopted, might marginally improve the situation in some cases, but all of these remedies ultimately fail to address the fundamental problems of unreliability and unaccountability that are inherent to this class of evidence. Part V then advances the main thesis of the Article, urging adoption of a total ban on jailhouse informant testimony, subject only to a possible exception for testimony corroborated with electronic recording of any alleged confession or admission made by a criminal defendant. It assesses the grounds for such a ban by examining other categorical evidentiary exclusions enforced through judicial, legislative, or executive action.

I. JAILHOUSE SNITCH TESTIMONY IS FUNDAMENTALLY AND PERVASIVELY UNRELIABLE

Exoneration studies have identified a set of recurrent causes of wrongful convictions, including false confessions, mistaken eyewitness testimony, and faulty forensic evidence.[1] However, no

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1. *See, e.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 8–9 (2011); Samuel R. Gross et al., *Exonerations in the U.S., 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542–44 (2005).

evidence is more intrinsically untrustworthy than the allegations of a jailhouse snitch.[2] According to some wrongful conviction scholars, jailhouse snitch testimony is the single greatest cause of wrongful convictions.[3] This should not be surprising. It is hard to imagine more facially untrustworthy evidence. One federal court characterized the practice of using jailhouse snitches as "one of the most abused aspects of the criminal justice system,"[4] another as a "fertile field[] from which truth-bending or even perjury could grow,"[5] and a third called jailhouse snitch testimony "inherently unreliable."[6] In an address intended as advice for prosecutors, federal judge Stephen Trott warned prosecutors not to trust criminal informants:

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2. *See, e.g.*, THE JUSTICE PROJECT, JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW 1 (2007), *available at* http://www.pewtrusts.org /~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/ Jailhouse20snitch20testimony20policy20briefpdf.pdf (stating that "snitch testimony is widely regarded as the least reliable testimony encountered in the criminal justice system"); *see also* Brief of the NACDL as Amicus Curiae in Support of Respondent at 2, Kansas v. Ventris, 556 U.S. 586 (2009) (No. 07-1356), 2008 WL 5409458, at *2 [hereinafter Brief of the NACDL] ("[A] jailhouse snitch's uncorroborated claim that the defendant confessed to him . . . is notoriously unreliable."). Similarly, a state court has cautioned that "[c]ourts should be exceedingly leery of jailhouse informants, especially if there is a hint that the informant received some sort of a benefit for his or her testimony." Dodd v. State, 993 P.2d 778, 783 (Okla. Crim. App. 2000).

3. *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 57 (1987) (reporting that jailhouse informants testified falsely in 117 of the 350 wrongful convictions studied). Other exoneration studies have identified eyewitness "misidentifications" and false confessions as factors in a greater number of known wrongful convictions. GARRETT, *supra* note 1. Even if mistaken eyewitness testimony and false confessions have led to a greater absolute number of known wrongful convictions, there is little doubt that false jailhouse snitch testimony occurs with greater frequency than mistaken eyewitness identifications or false confessions. While eyewitness testimony and defendant confessions are two of the most common types of evidence used in criminal prosecutions, snitch testimony appears in a quantitatively smaller subset of cases. ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 6 (2009). Nonetheless, it still manages to account for a sizeable number of documented wrongful convictions. Bedau & Radelet, *supra*.

4. Zappulla v. New York, 391 F.3d 462, 470 n.3 (2d Cir. 2004) (quoting Jana Winograde, Comment, *Jailhouse Informants and the Need for Judicial Use Immunity in Habeas Corpus Proceedings,* 78 CALIF. L. REV. 755, 756 (1990)).

5. United States. v. Levenite, 277 F.3d 454, 461 (4th Cir. 2002).

6. Sivak v. Hardison, 658 F.3d 898, 916 (9th Cir. 2011).

> Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law. This willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they come into contact, including—and especially—the prosecutor. A drug addict can sell out his mother to get a deal, and burglars, robbers, murderers[,] and thieves are not far behind. Criminals are remarkably manipulative and skillfully devious. Many are outright conscienceless sociopaths to whom "truth" is a wholly meaningless concept. To some, "conning" people is a way of life. Others are just basically unstable people. A "reliable informer" one day may turn into a consummate prevaricator the next.[7]

Judge Trott warned that, among informants, jailhouse snitches are indisputably the worst of the bunch:

> The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him. The snitch now stands ready to testify in return for some consideration in his own case. Sometimes these snitches tell the truth, but more often they invent testimony and stray details out of the air.[8]

The practice of using jailhouse snitches in serious criminal cases is both pervasive and, as a direct result, a major cause of error in the criminal justice system.[9] Although it had long been apparent that jailhouse snitch testimony was sometimes extremely unreliable, the strong link between jailhouse snitches and wrongful convictions has only become clear recently thanks to the still-breaking wave of DNA exonerations.[10] Analysis of the causes of wrongful convictions in these cases reveals that jailhouse snitches have been involved in a surprisingly large percentage of known wrongful convictions—twenty-one percent—according to Innocence Project founders Barry Scheck, Peter Neufeld, and Jim Dwyer.[11] The Scheck, Neufeld, and Dwyer study looked at exonerations resulting from DNA testing, a sample that included a disproportionately large percentage of sexual assault cases.[12]

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7. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1383 (1996).

8. *Id.* at 1394.

9. NATAPOFF, *supra* note 3, at 6–7.

10. *Id.* at 7.

11. JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246 (2000).

12. *Id.* at 244–46.

Jailhouse informants play an even more pernicious role in capital cases.[13] One criminal defense attorney testified before a Los Angeles County grand jury that she had conducted a study of all cases in which a California defendant received the death penalty and concluded that jailhouse informant testimony was used in approximately one-third of those cases.[14] According to the Northwestern University Law School's Center on Wrongful Convictions, 45.9 percent of documented wrongful convictions in capital cases involved testimony by jailhouse informants or by "killers with incentives to cast suspicion away from themselves," making "snitches the leading cause of wrongful convictions in U.S. capital cases."[15] The Commission on Capital Punishment convened by former Illinois Governor George Ryan concluded that testimony from jailhouse informants appeared to be a major cause of wrongful convictions in the cases it looked at involving persons sentenced to death in Illinois.[16]

A. *Jailhouse Informants Face Overwhelming Temptations to Commit Perjury*

Jailhouse snitches testify not out of the goodness of their hearts but to obtain one or more of a variety of incentives typically offered to them. These incentives range from almost trivial benefits, like cigarettes, to improved jail conditions and cash payments,[17] up to the gold standard of "cooperation benefits"—release or reduction of

13. NATAPOFF, *supra* note 3, at 7.

14. REPORT OF THE 1989–90 LOS ANGELES COUNTY GRAND JURY: INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY 37, *available at* http://www.ccfaj.org/documents/reports/jailhouse/expert/1989-1990%20LA %20County%20Grand%20Jury%20Report.pdf [hereinafter GRAND JURY REPORT]. Following the release of the Grand Jury Report, the L.A. County District Attorney's Office adopted stringent controls over the use of jailhouse snitches and now rarely permits their use at trial. NATAPOFF, *supra* note 3, at 189–90.

15. NW. UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3 (2004–2005), *available at* http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf [hereinafter THE SNITCH SYSTEM].

16. GEORGE H. RYAN, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 7–8 (2002), *available at* http://illinoismurderindictments.law .northwestern.edu/docs/Illinois_Moratorium_Commission_complete-report.pdf.

17. Harris County, Texas, has recently begun a program offering jailhouse informants up to $5000 for helpful information. *See* Renee C. Lee, *Harris Co. Sheriff Offers Cash for Jailhouse Tipsters*, HOUS. CHRON. (Jan. 10, 2011), http://www.chron.com/news/houston-texas/article/Harris-Co-sheriff-offers-cash-for-jailhouse-1623204.php.

jail sentences.[18] Indeed, testifying against fellow inmates may often constitute a prisoner's only hope of escaping a substantial prison term.[19] The unscrupulous inmate thus faces powerful temptations to serve as a jailhouse snitch. As the Fifth Circuit has observed, "It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence."[20] Another court noted that it was "obvious" that cooperation premised on promises of leniency or immunity "provide[s] a strong inducement to falsify" testimony.[21] Even in cases where leniency or immunity is not at stake, the prospect of receiving some tangible reward for false testimony can be irresistible. As one attorney commented, "When you dangle extra rewards, furloughs, money, their own clothes, stereos, in front of people in overcrowded jails, then you have an unacceptable temptation to commit perjury."[22]

Not only are the temptations to manufacture false snitch testimony powerful, the difficulty of doing so is minimal. As a Canadian commission created to investigate the causes of one wrongful conviction observed, "In-custody confessions are often easy to allege and difficult, if not impossible, to disprove."[23] To generate a credible confession, a snitch need only learn some basic details about a fellow inmate's case.[24] A lying jailhouse snitch might gather information about a high profile case simply by reading newspaper stories or watching television broadcasts about the case.[25] Snitches can also obtain details about fellow prisoners' cases by speaking with complicit friends and relatives who can monitor preliminary hearings and other case proceedings and feed details to the aspiring snitch.[26] In some cases, informants share knowledge about case

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18. Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 935–36 (2009).

19. *See* Carl N. Hammarskjold, Comment, *Smokes, Candy, and the Bloody Sword: How Classifying Jailhouse Snitch Testimony as Direct, Rather than Circumstantial, Evidence Contributes to Wrongful Convictions*, 45 U.S.F. L. REV. 1103, 1106 (2011) (citing Maxwell v. Roe, 628 F.3d 486, 505 n.10 (9th Cir. 2010)) (describing one jailhouse snitch's boast to have lied in exchange for "$30.00 from petty cash" and "some smokes and candy"); Morrison, *supra* note 18 (noting that a "successful cooperator . . . might ultimately get years off his sentence or even avoid prison altogether").

20. United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987).

21. United States v. Meinster, 619 F.2d 1041, 1045 (4th Cir. 1980).

22. Robert Reinhold, *California Shaken over an Informer: He Shows How to Fabricate a Prisoner's Confession*, N.Y. TIMES, Feb. 17, 1989, at A17 (quoting Robert Berke, a lawyer for California Attorneys for Criminal Justice).

23. FRED KAUFMAN, THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN 599, *available at* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_ch3cd.pdf.

24. NATAPOFF, *supra* note 3, at 71.

25. GRAND JURY REPORT, *supra* note 14, at 72–73.

26. *Id.* at 70–71.

facts with each other, permitting multiple informants to corroborate each other's testimony.[27] Investigators have documented cases in which prison inmates purchased information from others outside of prison in an attempt to trade it for reduced sentences.[28] And now there is the Internet. As one commentator has observed, "The combination of the increasing availability of information over the internet and inmate internet access makes fabricating confessions even easier than ever before."[29]

The ease with which jailhouse informants can fabricate credible confessions was demonstrated by one particularly industrious snitch, Leslie Vernon White, a "convicted kidnapper, robber[,] and car thief."[30] In 1990, the CBS news program *60 Minutes* aired a segment featuring White, a self-proclaimed jailhouse snitch.[31] Two years earlier, White demonstrated for jailers how simple it was to concoct a confession and convince prosecutors it was genuine.[32] He repeated the performance while on camera for the CBS news program.[33] White's methods were shocking in their audacity. To get information, he simply picked up the telephone and asked for it.[34] To get government officials to talk, White posed as a law enforcement official or a government worker, and in that guise, contacted various government agencies, including the sheriff's information bureau, the county coroner, and the district attorney handling the case, from whom he obtained details about the facts and evidence of the case.[35] Then he arranged to be transported to or from the courthouse with the defendant who supposedly made the confession so that he could plausibly establish an opportunity for the defendant's alleged confession to have been made to him.[36]

Having gathered the basic case information and established a context in which the supposed confession occurred, it was easy for

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27. *Id.* at 68.

28. *See* Brad Heath, *Federal Prisoners Use Snitching for Personal Gain*, USA TODAY (Dec. 14, 2012, 3:06 PM), http://www.usatoday.com/story/news/nation/2012/12/14/jailhouse-informants-for-sale/1762013/.

29. Peter P. Handy, *Jailhouse Informants' Testimony Gets Scrutiny Commensurate with Its Reliability*, 43 MCGEORGE L. REV. 755, 759 (2012).

30. Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 629 n.192 (2009) (quoting Steve Mills & Ken Armstrong, *The Inside Informant*, CHI. TRIB., Nov. 16, 1999, at A1).

31. NATAPOFF, *supra* note 3, at 71.

32. Steve Mills & Ken Armstrong, *Part 3: The Jailhouse Informant*, CHI. TRIB. (Nov. 16, 1999), http://articles.chicagotribune.com/1999-11-16/news/chi-991116deathillinois3_1_court-and-police-records-murder-confessions-jailhouse-informant.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

White to approach a homicide detective or a prosecutor with a deal.[37] "The key thing is they want to win," White explained.[38]

> So if I come forward with the information as detailed as that they're gonna use it. Because the jury not knowing the system or how it works, is going to believe when I get up there with all these details and facts, that this guy sat in the jail cell, or he sat on the bus, or he sat in the holding tank somewhere, or told me through a door or something, they're gonna believe me.[39]

Over the course of several years, White appeared as a government witness in numerous cases and offered to appear in even more.[40] In return, he received various rewards for doing so, including a letter recommending parole from a high-ranking official in a district attorney's office.[41] These benefits did not always work out well for the citizens of California. On White's last furlough, he used the opportunity to beat his wife, snatch a purse, and assault his landlady with a knife.[42]

As a result of the furor caused by White's confession and his startling demonstration of the ease with which he could manufacture false jailhouse confessions, Los Angeles County convened a grand jury investigation.[43] The Los Angeles County Grand Jury commenced a year-long examination of the jailhouse informant problem in the county.[44] What it found was even more shocking than White's demonstration. Based on extensive documentary and witness testimony, the Grand Jury learned of the existence of a complex and pervasive "informant system" at work in Los Angeles County, one that was driven by "the unwritten understanding between prosecutors and informants as to the benefits to be derived from their testimony."[45] In its report, the Grand Jury described a system set up to manufacture false jailhouse informant testimony.[46] At the county jail, known informants were segregated and housed in a special unit—known as the "K-9 unit."[47] Police officers and prosecutors in need of additional evidence could request that an inmate be housed in the K-9 unit, and those requests were routinely granted.[48] The delivery of fresh meat to the

37. *Id.*
38. *Id.*
39. GRAND JURY REPORT, *supra* note 14, at 72.
40. *See* Reinhold, *supra* note 22.
41. *Id.*
42. *Id.*
43. GRAND JURY REPORT, *supra* note 14, at 1–2.
44. *Id.* at 2.
45. *Id.* at 39.
46. *See id.* at 19.
47. *Id.* at 9.
48. *See id.* at 54–55.

K-9 unit typically set off a feeding frenzy among the seasoned snitches housed there, and it was not unusual for several K-9 inmates to contact officials with reports of alleged confessions only hours after the unsuspecting prisoner's arrival.[49] Attempts to obtain information from the unwitting inmate might begin in minutes.[50]

The Grand Jury found evidence that not only did clever informants like Leslie Vernon White find ways to gather facts needed to fool police and prosecutors into believing that they had heard a defendant confess to a crime, but in some cases police and prosecutors actively colluded with jailhouse informants to manufacture false evidence.[51] These officials, some informants testified, provided them with copies of arrest reports, trial transcripts, and case files; took the informants to crime scenes; and sometimes simply fed them the facts of the crime in order to help the informants develop convincing testimony.[52]

Snitches, moreover, risk little by fabricating false testimony. Perjury prosecutions of lying jailhouse informants are almost nonexistent.[53] As a case in point, following the Los Angeles County Grand Jury's investigation of the jailhouse informant problem, and despite discovery of large-scale and pervasive deception by jailhouse informants, the only two individuals prosecuted for providing perjured testimony in any court or case were the grand jury witnesses who had helped to expose the problems in the jailhouse snitch system.[54] In contrast, snitches who helped convict other innocent defendants were never prosecuted.[55] The message is

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49. *See id.* at 56 ("Within twenty-four hours of the inmate's arrival . . . an informant called the Los Angeles Police Department and left a message for the detective that he had information about the inmate. . . . [T]hree days after arranging for the inmate to be placed with informants, the detective interviewed three informants, each of whom claimed to have obtained incriminating information from the inmate.").

50. Ted Rohrlich, *Authorities Go Fishing for Jailhouse Confessions*, L.A. TIMES, Mar. 4, 1990, at A1.

51. *See* GRAND JURY REPORT, *supra* note 14, at 27–28.

52. *Id.*

53. For example, in an infamous case known as the "Marietta Seven," James Creamer and six others were wrongfully convicted between 1973 and 1975 of murdering two doctors in Marietta, Georgia, based largely on the perjured testimony of an informant testifying under immunity. THE JUSTICE PROJECT, *supra* note 2, at 8–9. After extensive findings undermining the snitch's credibility, the convictions were reversed and charges dropped against all seven defendants. *Id.* at 9–11. Despite calls to prosecute the snitch, the District Attorney declined to bring perjury charges. *Id.* at 11.

54. *See* Ted Rohrlich, *L.A. Jailhouse Informant Seized on Perjury Charge*, L.A. TIMES (Feb. 20, 1992), http://articles.latimes.com/1992-02-20/news/mn-3537_1_jailhouse-informant-scandal; Ted Rohrlich, *Perjurer Sentenced to 3 Years*, L.A. TIMES (May 20, 1992), http://articles.latimes.com/1992-05-20/local/me-312_1_law-enforcement-officer.

55. *See* Rohrlick, *Perjurer Sentenced to 3 Years*, *supra* note 54.

clear—lying snitches have little to lose and everything to gain by falsely reporting to police and testifying to juries that fellow inmates have confessed to crimes.

Witnesses suspected of lying to benefit criminal defendants, on the other hand, do not fare nearly so well. When a witness is thought to have lied on behalf of a criminal defendant, the witness is far more likely to be prosecuted for perjury. In one prominent Illinois case involving the killing of a Chicago police officer, six witnesses initially gave statements to police implicating Jonathan Tolliver as a suspect.[56] Those same witnesses later recanted their statements.[57] According to the witnesses, the original statements had been coerced from them by police.[58] The witnesses, however, paid dearly for the recantations. Five of the witnesses were charged with perjury and ultimately pled guilty to avoid even more serious sanctions.[59] Prosecutors then trumpeted the convictions as proof that the allegations that the witnesses' testimony had been coerced by police were false.[60]

Inmates thus find it easy to fabricate incriminating evidence against fellow defendants and costly to retract incriminating statements once made. Where the rewards for providing incriminating evidence are great, and where the costs of providing false testimony on behalf of the State are negligible, the "frequency of fabrication by witnesses who have made 'deals' with the government," as one commentator has observed, "while impossible to ascertain with accuracy, is potentially staggering."[61]

The easy availability of such powerful but unreliable evidence inevitably tempts both incautious and unethical prosecutors and law enforcement officials. The temptation to use snitch testimony is so great, and the costs so low, that prosecutors frequently put on such testimony despite multiple "red flags." Confirmation bias and tunnel vision are likely significant explanations for the frequency with which jailhouse snitch testimony that was later proved false is accepted and used by prosecutors.[62] Confirmation bias describes the tendency, well documented by cognitive researchers, for individuals to seek out evidence that confirms their preexisting beliefs and

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56. People v. Tolliver, 807 N.E.2d 524, 534–35 (Ill. App. Ct. 2004).

57. *Id.*

58. *Id.* at 531–34.

59. Stefano Esposito, *Last of Five Accused of Perjury in Ceriale Slaying Trial Sentenced*, CHI. SUN-TIMES, Aug. 3, 2004, news, at 12.

60. *Id.*

61. R. Michael Cassidy, *Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1130 (2004).

62. As Peter Joy has explained, "There are a number of psychological impediments the prosecutor faces, including tunnel vision, which may make the prosecutor a poor judge" of a witness's credibility. Peter A. Joy, *Constructing Systemic Safeguards Against Informant Perjury*, 7 OHIO ST. J. CRIM. L. 677, 680 (2010).

minimize or ignore evidence that contradicts those beliefs.[63] Tunnel vision, similarly, refers to the tendency of persons to ignore or downplay facts or evidence inconsistent with an individual's preexisting beliefs.[64] It is a product of the "'compendium of common heuristics and logical fallacies,' to which we are all susceptible, that lead[s] actors in the criminal justice system to 'focus on a suspect, select and filter the evidence that will "build a case" for conviction, while ignoring or suppressing evidence that points away from guilt.'"[65] Prosecutorial tunnel vision has been identified as a major cause of wrongful convictions.[66] Confirmation bias and tunnel vision help explain why prosecutors often continue to defend the credibility of jailhouse snitch testimony even after it has been confirmed in exoneration proceedings to have been false.[67]

The ease with which false jailhouse snitch testimony can be manufactured also plays into the hands of corrupt police officers and prosecutors who are seeking shortcuts to conviction or are engaged in corrupt conduct. Research on wrongful convictions, for example, demonstrates that police are likely to set up innocent people, when they do, by using evidence that is easy to manufacture and hard to disprove.[68] Jailhouse snitch testimony fits that description. As the

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63. *See generally* Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998); Barbara O'Brien, *Prime Suspect: An Examination of Factors That Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCHOL. PUB. POL'Y & L. 315 (2009).

64. *See* Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1044 (2009) ("An investigator exhibiting tunnel vision selects and filters evidence with an eye toward building a case against that suspect and consequently overlooks evidence that undermines it.").

65. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292 (quoting Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002)).

66. *Id.* at 293 (noting that "[m]ost official inquiries into specific wrongful convictions have noted the role that tunnel vision played in those individual cases of injustice").

67. *See* Charles I. Lugosi, *Punishing the Factually Innocent: DNA, Habeas Corpus and Justice*, 12 GEO. MASON U. C.R. L.J. 233, 235 (2002) (noting that "even after DNA testing has proven the innocence of a prisoner, prosecutors refuse to accept the results and rely upon other evidence that supports guilt, or they create a new theory of how the crime occurred (never before put to the judge and jury) to justify the continued punishment of an innocent person").

68. *See* Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1153 (2013) (observing that corrupt law enforcement officers who framed innocent individuals in the Rampart scandal typically charged defendants with crimes that are "easily manufactured" and difficult to defend against because they pitted the police officers' word against that of the defendant).

first-hand accounts provided by seasoned snitches prove, it is almost laughably simple to conjure up a plausible, albeit false, claim that a criminal defendant made a jailhouse confession. Once such allegations have been made by an informant, the informant has much to gain by sticking to his story, and even more to lose by retracting it.[69]

B. Compensated Witnesses Are Inherently Biased

A jailhouse informant is the quintessential self-interested witness. Anglo-American law has long recognized the potentially distorting effects of self-interest on the accuracy and reliability of legal proceedings.[70] Indeed, "[s]elf-interested witnesses were barred from testifying under early common law,"[71] and informers in particular were viewed as incompetent witnesses if they stood to directly gain some material benefit from their testimony.[72] Although the common law bar on self-interested witnesses has generally been abandoned, awareness of the effect of self-interest on decision making continues to grow.[73] Cognitive researchers have documented the powerful biasing effect of self-interest on objectivity.[74] Human judgment is almost inevitably influenced,

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69. In some cases, jailhouse snitch systems have operated, and may still be operating, that call into question the integrity and honesty of law enforcement officials at a system-wide level. *See* GRAND JURY REPORT, *supra* note 14, at 18–19.

70. *See* United States v. Murphy, 41 U.S. (16 Pet.) 203, 210 (1842).

71. Warren Moise, *I'm Booored! Bias and the Busy Trial Lawyer*, S.C. LAW, Jan. 2009, at 10, 11; *see also Murphy*, 41 U.S. (16 Pet.) at 210 (describing the general rule at common law as "undoubtedly" providing "in criminal cases as well as in civil cases, that a person interested in the event of the suit or prosecution, is not a competent witness"). Justice Story, however, acknowledged numerous exceptions to the general rule. For example, "a person who is to receive a reward for or upon the conviction of the offender" was "universally recognised as a competent witness, whether the reward be offered by the public or by private persons." *Id.* at 211; *see also* Carla Spivack, *Let's Get Serious: Spousal Abuse Should Bar Inheritance*, 90 OR. L. REV. 247, 299 (2011) (noting the historical "common-law bar to interested witnesses testifying in any proceeding").

72. As counsel argued to the United States Supreme Court in *United States v. Murphy*, "Informers are, generally, incompetent witnesses, where they are to receive any portion of the decree, sentence or judgment, without the necessity of a second suit." 41 U.S. (16 Pet.) at 205–06 (citing United States v. The Schooner Thomas and Henry, 1 Brock. Rep. 374; Tilly's Case, 1 Str. 316; Rex v. Stone, 2 Ld. Raym. 1545).

73. *See* Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899, 1947–48 (2003).

74. *Id.* (stating that the existence of self-serving bias has been established in numerous studies). According to Griffith, "Self-serving bias involves selective information processing, according to which a subject sees what it wants to see and conflates what is fair with what benefits oneself." *Id.* at 1948 (internal citations omitted).

consciously or unconsciously, by perceived self-interest.[75] Where persons must decide which of two positions to adopt or accept as true, those who stand to benefit from taking one position rather than another tend to favor the position that furthers their own self-interest.[76] Recognition of the biasing effect of self-interest provides a basis for a wide variety of legal rules. Self-interest bars some witnesses from testifying in probate proceedings,[77] for instance, and "self-serving bias" has been recognized in some contexts as grounds for regulating the types of compensation that a witness might be provided for testifying.

For example, normally "payments to witnesses in return for testimony are considered unethical and illegal."[78] Lawyers who provide such incentives to witnesses are subject to professional sanctions.[79] There are, however, exceptions to the rule. Expert witnesses, who are retained by parties and paid significant sums to testify on the party's behalf in court, are an obvious example.[80] Ethical rules attempt to constrain the degree to which compensated expert witnesses have a stake in the outcome of the cases in which they testify.[81] Almost every jurisdiction forbids expert witnesses from being paid on a contingent fee basis in recognition that such a fee arrangement would unduly bias the expert's testimony and be

75. *Id.* at 1947–48.

76. *See* Ward Farnsworth, *The Legal Regulation of Self-Serving Bias*, 37 U.C. DAVIS L. REV. 567, 569 (2003) ("It has long been understood that when people are better off if something is true, they become more likely to perceive it as true.").

77. Some states have enacted statutory bars on testimony by interested parties in probate proceedings. *See, e.g.*, Howle v. Edwards, 11 So. 748, 749 (Ala. 1892) (discussing an 1891 statute providing that "no person having a pecuniary interest in the result of the suit shall be allowed to testify against the party to whom his interest is opposed, as to any transaction with or statement by the deceased person whose estate is interested in the result of the suit or proceedings").

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

79. *See, e.g.*, Florida Bar v. Wohl, 842 So. 2d 811, 815–16 (Fla. 2003) (imposing a ninety-day suspension on a lawyer who provided financial inducement to a witness to provide factual testimony, because "payment of compensation other than costs to a witness could adversely affect credibility and fact-finding functions"). *See generally* Joseph Swanson, *Let's Be Honest: A Critical Analysis of* Florida Bar v. Wohl *and the Generally Inconsistent Approach Toward Witness Inducement Agreements in Civil and Criminal Cases*, 18 GEO. J. LEGAL ETHICS 1083 (2005).

80. Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 GEO. J. LEGAL ETHICS 465, 477 (1999) ("Unlike other witnesses who can be reimbursed for only expenses, an expert may be paid a fee for preparing and testifying in court.").

81. *See, e.g.*, Tagatz v. Marquette Univ., 861 F.2d 1040, 1042 (7th Cir. 1988) (discussing ethical problems with contingent fees); Swafford v. Harris, 967 S.W.2d 319, 322–23 (Tenn. 1998) (holding a contingency fee void as against public policy).

likely to induce the witness to tailor her testimony to favor the party on whose behalf she is testifying.[82] Ethics experts have continued to express concern about even non–contingent fee arrangements with expert witnesses.[83] The mere act of soliciting an initial opinion in a case provides expert witnesses with incentives to provide a favorable assessment because doing so greatly enhances the likelihood that they will be retained and paid for future testimony.[84]

In criminal law, aside from experts and the parties themselves, the most common type of compensated or incentivized witness is the informant.[85] Informants come in many shapes and sizes. There are informants on the street who are paid to feed information to police.[86] There are accomplices, codefendants, and coconspirators who seek cooperation deals with prosecutors in order to reduce or avoid their criminal exposure.[87] The use of informants pervades the criminal justice system. According to one account, approximately one in eight federal prisoners had his or her sentence reduced as a result of providing information to federal prosecutors.[88] All such witnesses are prone to self-serving bias, as are the police and prosecutors who benefit from their testimony.[89] One might argue, therefore, that all informant testimony, and perhaps all incentivized testimony more generally, is compromised as a result of self-serving bias.[90]

Jailhouse snitches, however, pose more of a problem than paid expert witnesses or even other types of snitches. The impact of a biased expert witness can be muted in many cases by the proffer of competing expert testimony. In a classic "battle of experts," each side can call out an opposing expert whose opinion strays too far from the facts or mainstream science, or at least make clear to the

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82. Lubet, *supra* note 80.

83. *Id.* at 477–78.

84. *Id.* at 478.

85. Harris, *supra* note 78.

86. *Id.* at 3.

87. *See* Morrison, *supra* note 18, at 931 (describing how cooperating defendants are recruited by prosecutors).

88. See Heath, *supra* note 28.

89. Of course, many types of witnesses testify in contexts where it is clear that they have an interest in the outcome. Mothers testify about the good character of their children, and husbands and wives, girlfriends and boyfriends, and friends and coworkers testify about alibis of their friends and loved ones. Plaintiffs and defendants testify about facts surrounding civil disputes with thousands or even millions of dollars on the line. As explained below, jailhouse snitches are demonstrably different. They have no direct knowledge of the facts of a case, little if any reputation to protect, and direct and powerful incentives to manufacture testimony that is easy to conjure and difficult to rebut.

90. That a witness has received payments from the government in exchange for information or cooperation is a materially exculpatory fact that must be disclosed pursuant to *Brady v. Maryland*. *See, e.g.*, United States v. Sedaghaty, 728 F.3d 885, 892 (9th Cir. 2013) (holding that the government's failure to disclose that a witnesses had received payments from the FBI violated *Brady*).

jury that the opposing expert's interpretation is subject to debate. In addition, most credible expert witnesses face reputational constraints that limit the expert's willingness to proffer knowingly false or misleading testimony.[91] The same cannot be said for jailhouse snitches whose reputations are already marginal. Nor is it realistic to think that criminal defendants can combat jailhouse snitch testimony, or even the testimony of cooperating accomplice witnesses, street snitches, and the like, by calling comparable witnesses of their own. A criminal defendant lacks the ability to commandeer helpful testimony from such witnesses because, unlike the prosecutor, he lacks any power to reward such witnesses with leniency or immunity from prosecution.[92] And whereas prosecutors routinely reward street informants for information and testimony, a criminal defendant who paid a street informant to testify on his behalf would likely be charged with tampering or bribing witnesses.[93] Nonetheless, it is not implausible to assume that in many cases some types of cooperating accomplices and street snitches do have a credible basis for their testimony. Testimony provided by a codefendant who admits to being present at the crime scene, for example, can be tested against the known facts and evidence in the case, including the defendant's own account where the defendant chooses to testify.

In contrast, a criminal defendant is typically helpless to counter testimony provided by a lying jailhouse informant. Unlike with experts, defendants cannot usually put on their own "jailhouse snitch," so criminal defendants lack any opportunity to fight back on an even playing field. In criminal trials there is no "battle of snitches" that might balance competing versions of events. The criminal defendant can try, as many have, to call other inmates to testify that the defendant did not make any jailhouse confession.[94] But such testimony is, on its face, usually irrelevant, and courts will often bar it as such.[95] Even when allowed, however, it is not likely to be effective. After all, such witnesses cannot prove the negative—that an alleged confession did not actually occur—if the jailhouse informant testifies, as an untruthful jailhouse informant invariably will, that the confession was made out of earshot of other prisoners. Finally, whereas ethical rules bar contingent fee agreements with experts out of fear that such arrangements will bias witness

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91. Lubet, *supra* note 80, at 465.

92. *See* J. Richard Johnston, *Paying the Witness, Why Is It OK for the Prosecution, but Not the Defense?*, CRIM. JUST., Winter 1997, at 21 (arguing that compensating witnesses violates the federal bribery statute).

93. *Id.* at 22.

94. *See, e.g.*, Short v. Sirmons, 472 F.3d 1177, 1190 (10th Cir. 2006) (holding that the impeachment testimony of a fellow "cellmate" was not material).

95. *See, e.g.*, *id.*

testimony, jailhouse informants—and indeed all informants—testify almost exclusively under arrangements that create de facto contingent payment arrangements. Because "payment" in terms of leniency almost always is granted by the prosecutor after the informant testifies, the informant readily understands that the informant's chances of getting rewarded are contingent on his delivery of credible incriminating evidence against the defendant.

II. JAILHOUSE SNITCH TESTIMONY IS HIGHLY PERSUASIVE EVIDENCE

Jailhouse snitch testimony is problematic for another reason. There is, by and large, only one thing to which a jailhouse snitch can testify: that a fellow inmate confessed, and confession evidence is widely acknowledged to possess unique potency.[96] The Supreme has Court observed that confessions are "probably the most probative and damaging evidence that can be admitted."[97] One prominent evidence scholar asserted that "introduction of a confession makes the other aspects of a trial in court superfluous."[98] Research confirms that evidence that the defendant has confessed greatly increases the odds of conviction.[99] In a study conducted by Kassin and Neumann, researchers presented mock jurors with a variety of evidence of guilt and found that jurors were far more likely to convict suspects when the evidence included a confession than when other types of traditional evidence, such as eyewitness identifications or physical evidence, were presented.[100] They thus concluded that "confession evidence has a greater impact on jurors—and is seen as having a greater impact by jurors—than other potent types of evidence."[101]

Secondary confessions—that is, confessions made to witnesses (other than police officers)—are likely not as persuasive to jurors as direct confessions.[102] Jurors do, as a general matter, discount secondary confession evidence to some extent, and jurors may often be unwilling to convict based on secondary confession evidence alone.[103] However, secondary confession evidence remains extremely potent. "Since few species of evidence are as powerful as an acknowledgement of guilt from the mouth of the accused,

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96. Bruton v. United States, 391 U.S. 123, 139 (1968) (White, J., dissenting).

97. *Id.*

98. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 316 (2d ed. 1983).

99. Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 471 (1997).

100. *Id.* at 481.

101. *Id.*

102. Lisa Dufraimont, *Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?*, 33 QUEEN'S L.J. 261, 274 (2008).

103. *Id.*

jailhouse informant testimony can be highly persuasive."[104] Secondary confession evidence is likely to be particularly critical in "close cases."[105] That is, jailhouse snitch testimony is likely to be most influential where the State has some other evidence of guilt, but that other evidence is weak.[106] And these cases are precisely the ones in which jailhouse snitches are most likely to be used.[107] After all, the State must pay a price to induce the jailhouse snitch to testify, and it can be expected to avoid doing so unless prosecutors believe that the testimony is needed.[108] Accordingly, jailhouse snitch testimony will typically only be introduced when the prosecutor is concerned about the sufficiency of her case, and the testimony will tend to have the greatest impact in precisely those cases.[109]

The prevailing assumption by courts, and the justification for admitting jailhouse snitch testimony absent any significant reliability review or assessment, is that jurors are capable of discounting unreliable snitch testimony as the facts and circumstances warrant.[110] This assumption is almost certainly incorrect. Research on fundamental attribution error demonstrates that jurors cannot properly discount snitch testimony, even when they know that snitches have incentives to lie.[111]

In a recent study, a team of researchers set out to test the claim that jurors are able to effectively discount secondary confession evidence provided by a cooperating witness with incentives to fabricate evidence.[112] Their findings undercut the assertion that jurors are able to properly take into account the degree to which witness incentives undermine reliability.[113] In the study, the researchers recruited 345 college students and persons from the community to act as mock jurors.[114] All of the mock jurors were given an abbreviated trial transcript drawn from a real criminal case.[115] The transcript set forth the testimony of two State's witnesses, one who provided fiber evidence and another who

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104. *Id.*

105. Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decisionmaking*, 32 LAW & HUM. BEHAV. 137, 138 (2008).

106. *Cf.*, Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 LAW & HUM. BEHAV. 27, 27 (1997) (noting that evidence of coerced confessions was extremely influential in a test case where other evidence was weak).

107. Neuschatz et al., *supra* note 105.

108. *Id.*

109. *See id.*

110. Kassin & Neumann, *supra* note 99, at 470.

111. Neuschatz et al., *supra* note 105, at 142.

112. *Id.* at 137.

113. *Id.*

114. *Id.* at 139.

115. *Id.* at 140–41.

presented knife evidence, and included opening and closing statements.[116] The control group received this transcript only.[117] Other groups received the same transcript, plus the testimony of an additional witness who claimed to have heard the defendant confess to the crime.[118] In some cases, mock jurors were told that the witness had inadvertently learned of the crime and came forward as an act of civic duty.[119] In other cases, they were told that the witness was testifying pursuant to a cooperation deal in which the witness would directly benefit from his testimony.[120] The researchers then asked all of the mock jurors to assess the guilt of the defendant.[121] Consistent with prior research, researchers found that mock jurors who were given the confession evidence convicted the defendant at significantly higher rates than those who were not presented the confession evidence.[122]

More disturbing, however, the researchers found that the mock jurors who were presented with the confession evidence convicted at the *same* rate regardless of the source of the evidence.[123] Conviction rates, their data indicated, "were unaffected by the explicit provision of information indicating that the witness received an incentive to testify."[124] Although the mock jurors' questionnaire responses demonstrated that they understood that the "civic duty" witness was more interested in serving justice than the "incentivized" witness, the mock jurors failed to discount the reliability of the incentivized witness.[125]

The most plausible explanation for these results, as the researchers suggest, is that the mock jurors were committing "fundamental attribution error."[126] As they explain, "According to the fundamental attribution hypothesis, perceivers will ignore the contextual and situational factors in favor of a dispositional attribution. In application to a jury situation, jurors should perceive a witness' behavior as influenced by personal factors rather than situational demands."[127]

The vast majority of participants in the experiment seemed to make just this mistake, dismissing the possibility that important contextual factors like incentives for incriminating another suspect might influence the witness's motives to provide truthful

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116. *Id.* at 140.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 142.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*

testimony.[128] The mock jurors instead simply accepted the witness's testimony at face value.[129]

Prior studies similarly have concluded that "attributors attach insufficient weight to situational causes and accept behavior at 'face value.'"[130] To be sure, some of these studies have found evidence that subjects were able to engage in some critical assessment of certain types of confession evidence.[131] For instance, where subjects were told that a confession was coerced through threats or violence, they tended to more heavily discount the credibility of the confession.[132] After conducting one such study in which investigators provided subjects with trial transcripts from a mock case presenting a variety of evidence to the subjects, the investigators found that the subjects consistently gave some types of evidence more weight than others.[133] Although subjects continued to be more likely to convict in confession cases than nonconfession cases, subjects generally viewed confessions made in exchange for positive rewards as more credible than confessions made in response to threats.[134]

> When the coercive influence was operationally defined as a threat of harm or punishment, subjects clearly discounted the confession evidence—they viewed the confession as involuntary and manifested a relatively low rate of conviction. However, when coercion took the form of an offer or a promise of leniency, subjects were unable or unwilling to dismiss the prior confession.[135]

Although this research demonstrates that jurors have the capacity to overcome fundamental attribution bias and discount certain types of confession evidence, it does nothing to increase confidence in jurors' capacity to properly assess jailhouse snitch testimony induced through positive incentives. Rather, these findings cast further doubt on jurors' ability to adequately discount the reliability of jailhouse snitch testimony that has been induced through positive incentives.

Juror insensitivity to the increased unreliability of incentivized witness testimony is magnified by two additional factors. First, as discussed above, typical jurors almost certainly do not understand how easy it is for jailhouse snitches to manufacture detailed false

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128. *Id.*
129. *Id.* at 142, 146.
130. Saul M. Kassin & Lawrence S. Wrightsman, *Prior Confessions and Mock Juror Verdicts*, 10 J. APPLIED SOC. PSYCHOL. 133, 134 (1980) (citing studies).
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 143–44.

confessions. If jailhouse snitches testify about details that seem like they could only have been learned if the perpetrator had actually confessed to the snitch, but were actually gathered through the variety of approaches that snitches like Sidney Storch have admitted to using, then jailhouse snitch testimony will often be viewed as more credible than it should be.

Second, many jurors might perceive jailhouse snitch testimony as worthy of enhanced credence because of implicit or explicit prosecutorial bolstering of the witness's credibility. The mere fact that a prosecutor calls a jailhouse informant to serve as a State's witness suggests that the prosecutor has already determined the witness to be credible and truthful. Although the amount of presumptive credit the jury extends to State's witnesses will vary depending on both the local community's and the individual juror's views regarding prosecutorial honesty and integrity, in many jurisdictions the State begins with the benefit of the doubt.[136]

Moreover, even though it constitutes improper practice, it is not uncommon for prosecutors to affirmatively vouch for, or bolster, the credibility of the jailhouse snitches they put on the witness stand.[137] Take the controversial case of Troy Davis, who was executed in 2011.[138] Davis was tried for the 1989 murder of Savannah police officer Mark McPhail.[139] At Davis's trial in 1991, the State called a jailhouse snitch named Kevin McQueen to testify about an alleged confession made by Davis while the two men were on the prison basketball court.[140] The snitch's testimony was suspect. Not only had McQueen served as an informant for the State in other cases,[141] but his testimony was also seemingly implausible on its face. Numerous witnesses testified at Davis's trial that the persons who

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136. *See* Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CALIF. L. REV. 1423, 1465 (2001) ("The prosecutor enjoys presumptive credibility in the eyes of the jury and, unlike witnesses who take an oath and are subject to testing through cross-examination and impeachment, the prosecutor is rarely specifically so challenged."); *see also* United States v. Gonzalez-Vargas, 558 F.2d 631, 633 (1st Cir. 1977) (observing that "the representative of the government approaches the jury with the inevitable asset of tremendous credibility"); THE JUSTICE PROJECT, *supra* note 2, at 17 (stating that "jurors are somewhat predisposed to infer *some* degree of reliability because the witness is presented by the [S]tate").

137. *See, e.g.*, United States v. Young, 470 U.S. 1, 18–19 (1985) ("The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused . . . may induce the jury to trust the Government's judgment rather than its own view of the evidence.").

138. Davis v. State, 426 S.E.2d 844 (Ga. 1993) (affirming murder conviction and death sentence); Kim Severson, *Georgia Inmate Executed; Raised Racial Issues in Death Penalty*, N.Y. TIMES, Sept. 22, 2011, at A1.

139. Trial Transcript at 1228, State v. Davis, No. 089-2467 (Ga. Super. Ct. Oct. 25, 1991) [hereinafter Davis Trial Transcript].

140. *Id.* at 1229.

141. *Id.* at 1228.

were involved with the police officer shooting had been playing pool at a local pool hall, that a man named Sylvester "Red" Coles had gotten into an argument with a homeless man outside the pool hall, and that Troy Davis and a friend—who had both also been playing pool at the hall at the time—had followed Coles and his victim up the street to a Burger King parking lot where the police officer—who was responding to the fight between Coles and the homeless man—was shot.[142]

When the State called jailhouse snitch McQueen to testify at trial, however, McQueen claimed that Troy Davis had "confessed" to him a very different set of facts.[143] According to McQueen, Davis told him that he had gone to a party in Cloverdale,[144] a Savannah suburb, and that after the party, he had gone to his girlfriend's house, that they had decided to get breakfast at Burger King, and that he ran into someone who owed Davis money that was loaned to buy "dope."[145] According to McQueen, Davis told him that "they got into some beef there, and then a whole bunch of commotion started, and a dude came in what turned out to be Officer McPhail, and there were some shots fired."[146] On cross-examination, McQueen admitted that he had seen a story about the shooting on the news but denied "hoping to gain any advantage by testifying on behalf of the State, claiming that he had already been sentenced for his crimes."[147]

The supposed confession recounted by McQueen failed to match up in almost any way with the other evidence in the case. McQueen's version of the confession put Davis in the wrong place, at the wrong time, for the wrong reasons, in light of the evidence

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142. *Id.* at 1230.

143. *Id.*

144. *Id.* at 1230–31. McQueen also claimed that Davis had confessed to shooting someone at the party. According to McQueen, "when he was at the party, he got into a beef with some dudes, and a whole bunch of shooting and stuff going on. So after the party—" *Id.* at 1230. The D.A. interrupted. "Did he say he did any shooting?" *Id.* "Yeah," McQueen answered. *Id.* The D.A. began to ask if "he was the one that shot" an individual named Michael Cooper at the party, as Davis had been charged with that shooting in addition to the shooting of police officer Mark McPhail. *Id.* at 1231. However, before the prosecutor could get the name of the shooting victim out, defense counsel cut him off, asking the judge to counsel the prosecutor not to lead the witness. The judge obliged. *Id.* The prosecutor then rephrased his question: "What did he say about shooting somebody at the party?" *Id.* McQueen's answer was vague: "Well, exchange of gunfire. He didn't know who shot who, you know, I guess it was the wrong guy, you know, got hung up that night *Id.*

145. *Id.*

146. *Id.* at 1231.

147. *In re* Davis, No. CV 409-130, 2010 WL 3385081, at *30 (S.D. Ga. Aug. 24, 2010); *see* Davis Trial Transcript, *supra* note 139, at 1239, 1243 (informing the defense attorney that he "was already sentenced" and that "the Judge was not going to go back and review [his] case").

presented at trial and the State's own theory of the case.[148] In fact, McQueen's account of this supposed confession was deemed, by the federal district court judge who years later conducted a three-day habeas hearing on Troy Davis's contention of actual innocence, to be patently false because it "totally contradict[ed] the events of the night as described by numerous other State witnesses."[149] Indeed, the judge found that McQueen's trial testimony "was so clearly fabricated" that the Court could not understand "why the State persist[ed] in trying to support its veracity."[150]

But the State's position at trial and beyond was that McQueen's testimony was solid and credible.[151] In his closing argument to the jury, Savannah District Attorney Spencer Lawton beseeched the jury to credit McQueen's testimony.[152] As he told the jury:

> You heard from Kevin McQueen. Kevin McQueen was, in Mr. Barker's terms, the jailbird. Well, if you're going to talk to Troy Anthony Davis about what he did, you've got to be where Troy Anthony Davis is, and Kevin McQueen told you that he was told by Troy Anthony Davis that . . . Davis had shot Officer McPhail. *There's not a reason on earth to doubt his word.* There was nothing, no reason why he had to be here, except that we subpoenaed him when we learned what he had to say.[153]

Notwithstanding that the jailhouse snitch's testimony was later dismissed as "clearly fabricated," jurors were assured by the District Attorney that "there's not a reason on earth to doubt his word."[154] It is difficult, in retrospect, to ascertain the weight that the jury ultimately gave to McQueen's testimony, but the attempt by prosecutors to bolster McQueen's testimony and convince the jury that the jailhouse snitch was a reliable witness certainly could have contributed to the jury's decision to convict.

III. STATUS QUO SAFEGUARDS ARE INEFFECTIVE

Despite the virtual avalanche of evidence that jailhouse snitch testimony is inherently biased, unreliable, and frequently the cause of wrongful convictions, few jurisdictions have taken any meaningful steps to limit its use, and none bar it completely.[155] Defenders of the status quo contend that the traditional tools of litigation—vigorous

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148. *In re Davis*, 2010 WL 3385081, at *49.
149. *Id.*
150. *Id.*
151. Davis Trial Transcript, *supra* note 139.
152. *Id.*
153. *Id.* at 1501 (emphasis added).
154. *Id.*
155. *See* GARRETT, *supra* note 1, at 143 (explaining several states' limitations on jailhouse snitch testimony).

cross-examination and post-conviction review—adequately enable criminal defendants to discredit lying jailhouse snitches or, where jailhouse testimony was only later revealed to have been perjured, to obtain post-conviction relief.[156] For reasons discussed below, neither of these supposedly reliable litigation tools provides innocent defendants with meaningful protections from being wrongfully convicted because of false jailhouse snitch testimony.

A. *Cross-Examination Constitutes an Inadequate Means to Check False or Unreliable Jailhouse Snitch Testimony*

In *Kansas v. Ventris*,[157] the U.S. Supreme Court had an opportunity to adopt sweeping limitations on the use of jailhouse informant testimony.[158] Defendant Ray Ventris had been convicted of aggravated burglary and aggravated robbery after he and an accomplice named Rhonda Theel shot and killed a man in his home and drove away with approximately $300 and the victim's cell phone.[159] Theel pleaded guilty to aggravated robbery and agreed to testify against Ventris.[160] In exchange, prosecutors agreed not to prosecute Theel for murder.[161] At trial, Theel testified that Ventris was the main instigator, while Ventris testified that Theel was primarily responsible for the robbery and shooting.[162]

The State then called a jailhouse informant who had been planted in Ventris's holding cell for the specific purpose of gathering "incriminating statements" from Ventris.[163] Although the State conceded that use of the jailhouse informant to elicit incriminating statements from Ventris likely violated the Sixth Amendment, the trial court permitted the informant's testimony regarding Ventris's statements to come in for impeachment purposes.[164] The informant then testified that Ventris confessed to him that "'[h]e'd shot this man in his head and in his chest' and taken 'his keys, his wallet, about $350.00, and . . . a vehicle.'"[165]

The jury acquitted Ventris on the murder count, but convicted him of aggravated burglary and aggravated robbery.[166] The Kansas

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156. *Id.* at 142 (stating that the Supreme Court relies on traditional litigation tools, like cross-examination, to combat the potential for error in snitch testimony).

157. 556 U.S. 586 (2008).

158. *Id.* at 594 n.* (rejecting the suggestion that the Court craft a broader rule to exclude uncorroborated jailhouse snitch testimony).

159. *Id.* at 588–89.

160. *Id.*

161. *Id.*

162. *Id.* at 589.

163. *Id.*

164. *Id.*

165. *Id.* (quoting State v. Ventris, No. 94,002, 2006 WL 2661161, at *3 (Kan. Ct. App. Sept. 15, 2006)).

166. *Id.*

Supreme Court reversed the convictions, holding that the admission of Ventris's purported confession obtained in violation of the Sixth Amendment for impeachment purposes was erroneous.[167] When the case reached the U.S. Supreme Court, Ventris and amici on his behalf argued, inter alia, that "jailhouse snitches are so inherently unreliable" that the Court should "craft a broader exclusionary rule for uncorroborated statements obtained by that means."[168] The Court rejected that argument.[169]

As the Court explained, "Our legal system . . . is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses, and we have long purported to avoid 'establish[ing] this Court as a rule-making organ for the promulgation of state rules of criminal procedure."[170] The Court concluded that statements obtained in violation of the Sixth Amendment may be used for impeachment purposes, and that the credibility of the jailhouse informant's testimony regarding Ventris' alleged jailhouse confession was a matter for the jury to determine.[171] The Court thus declined to impose more stringent regulation of jailhouse informant testimony. Reasoning similarly, numerous state courts have also rejected calls for greater regulation of jailhouse informant testimony.[172]

The Court's holding in *Ventris* followed the conventional notion that credibility and reliability determinations should normally be left to the fact finder.[173] As the Court noted in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[174] "Vigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[175]

The assumption, however, that vigorous cross-examination provides an effective means of exposing or defeating unreliable

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167. *Id.* (citing State v. Ventris, 176 P.3d 920, 928 (Kan. 2008)).

168. *Id.* at 594 n.*.

169. *Id.*

170. *Id.* (quoting Spencer v. Texas, 385 U.S. 554, 564 (1967)); *see also* United States v. Scheffer, 523 U.S. 303, 313 (1998) ("A fundamental premise of our criminal trial system is that 'the jury is the lie detector.'" (quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973))).

171. *Ventris*, 556 U.S. at 594.

172. *See, e.g.*, Parrish v. Commonwealth, 121 S.W.3d 198, 203 (Ky. 2003) (rejecting a claim that testimony of a jailhouse informant should have been excluded because it was inherently suspect, and its reliability should have been the subject of a cautionary admonition because the rule is that "the credibility of witnesses and the weight to be given sworn testimony are matters for the jury to decide").

173. *See* Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1049 (9th Cir. 2014) (stating that "it is the job of the fact finder, not the trial court, to determine which source is more credible and reliable").

174. 509 U.S. 579 (1993).

175. *Id.* at 596.

evidence is increasingly being questioned with respect to certain types of evidence. The Oregon State Supreme Court recently decided that in cases involving eyewitness identifications obtained through suggestive police procedures, "'traditional' methods of testing reliability—like cross-examination—can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence."[176] As the Oregon court noted, research studies have demonstrated that mock jurors are surprisingly bad at distinguishing accurate and inaccurate eyewitness identifications.[177] Prominent academic commentators have also concluded that judges and jurors often fail to properly discount all sorts of direct and factual evidence, including eyewitness testimony, because they are "often not aware of the factors that decrease the reliability of eyewitness perception and memory," and not nearly as competent at evaluating the veracity of witnesses testifying in court as commonly thought.[178]

For these same reasons, the Court's assumption in *Ventris* that impeachment of unreliable or untruthful witnesses is sufficient to protect criminal defendants from wrongful convictions is wrong in the case of jailhouse snitches. As noted above, confession evidence is a uniquely potent form of evidence in criminal trials. Jurors are almost certain to give extraordinary weight to evidence that a defendant has confessed. Where confession evidence has been obtained through the use of coercion, the courts have long recognized that such evidence is inadmissible, and that the conventional means of impeaching unreliable evidence—cross-examination—provides insufficient protection against undue prejudice.[179] As Justice White observed in *Arizona v. Fulminante*:[180]

> A defendant's confession is "probably the most probative and damaging evidence that can be admitted against him," so damaging that a jury should not be expected to ignore it even if told to do so. Moreover, it is impossible to know what credit and weight a juror gave to a confession.[181]

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176. State v. Lawson, 291 P.3d 673, 695 (Or. 2012).

177. *Id.* at 695 n.9 (citing R.C.L. Lindsey et al., *Can People Detect Eyewitness-Identification Inaccuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOL. 79 (1981)).

178. Frederick Schauer & Barbara A. Spellman, *Is Expert Evidence Really Different?*, 89 NOTRE DAME L. REV. 1, 18–19 (2013) (arguing that the relevancy standard for factual evidence may be too lax).

179. *See* United States v. Karake, 443 F. Supp. 2d 8, 50 (D.D.C. 2006) ("A long line of Supreme Court precedent makes clear, 'confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological,' are inadmissible . . . ." (quoting Rogers v. Richmond, 365 U.S. 534, 540–41 (1961))).

180. 499 U.S. 279 (1991).

181. *Id.* at 292 (quoting Cruz v. New York, 481 U.S. 186, 195 (1987) (White, J., dissenting)).

Strict exclusion is sometimes the only appropriate remedy where extremely damaging but unreliable evidence threatens to "distort the truth-seeking function of the trial."[182]

Second, because jurors are likely to proceed under the biasing influence of fundamental attribution error, the traditional stuff of impeachment—the demonstration that a jailhouse snitch has a poor character for honesty and self-interested motives to testify—will often have little or no impact on jury decision making. Once the jury has heard the evidence that the defendant has confessed to the crime, the damage has already been done.

Third, unlike most other types of evidence frequently used in criminal cases, jailhouse snitch testimony is often uniquely insulated from effective impeachment. This insulation exists in part because the incentives that jailhouse informants receive in exchange for cooperation are typically hidden.[183] Prosecutors rarely negotiate explicit deals with jailhouse snitches prior to their testimony.[184] Rather, prosecutors and snitches operate with a shared understanding that a snitch's positive performance will eventually be rewarded with tangible benefits.[185] The lack of any record of benefits promised to the informant impedes effective impeachment by defense counsel, just as it was designed to do.[186] The usual practice of refusing to enter into any formal deal before the snitch testifies in court was documented in one Florida case, where the prosecutor's notes memorializing his conversation with the snitch were later discovered and became the subject of a *Brady* dispute.[187] Here is how the prosecutor summarized his conversation: "Spoke with Fred Landt [Freeman's defense counsel] regarding Dennis Freeman. Told him I would make no firm offer prior to [Ponticelli's] trial but assured him his cooperation would be remembered with favor before mitigating judge/Sturgis. Will make no formal deal on the record prior to trial."[188]

At an evidentiary hearing on the *Brady* claim, the prosecutor denied that the note indicated that she had made any undisclosed

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182. *Id.* at 293.

183. *See* Cassidy, *supra* note 61, at 1167 n.215 (noting that "[e]xamples abound of significant inducements to accomplice witnesses that were hidden from the defense at trial"); Harvey A. Silverglate, *The Decline and Fall of Mens Rea*, CHAMPION, Sept.–Oct. 2009, at 14, 18 (noting that "in practice, many types of inducements and threats often are implied, the subject of a knowing wink of the eye by the prosecutor to the prospective witness's lawyer"), *available at* http://www.threefeloniesaday.com/LinkClick.aspx?fileticket =rdMd9mcf5ZA%3D&tabid=38.

184. Cassidy, *supra* note 61, at 1144 n.80.

185. *Id.* at 1129.

186. *Id.* at 1142.

187. Ponticelli v. State, 941 So. 2d 1073, 1085 (Fla. 2006).

188. *Id.*

deal with the informant.[189] Regardless of whether that claim was technically correct, the note evidences what is already acknowledged to be standard practice: prosecutors avoid making any formal deals prior to trial, but provide sufficient post-trial rewards to snitches to ensure a steady future supply.[190] That practice was also apparent in the notorious case of Cameron Todd Willingham.[191] Willingham was accused in Texas of murdering his three young daughters by arson.[192] At his capital trial, Texas prosecutors called jailhouse snitch Johnny Webb, who was serving a fifteen-year sentence for aggravated robbery, to testify about a confession Willingham supposedly made.[193] After testifying improbably that Willingham, who hardly knew Webb, confessed to him through a hole in a steel door in Willingham's cell, Webb denied that prosecutors had offered him any inducement to testify.[194] Nonetheless, "[f]ive years later the prosecutor asked the Texas Board of Pardons and Paroles to grant Webb parole."[195] Webb later recanted his trial testimony, but then recanted his recantation.[196] Willingham, who is widely believed to be innocent, was executed by Texas in 2004.[197]

Jailhouse snitch testimony is also difficult to impeach effectively because it is invariably of the "he said-she said" variety. As long as the snitch can plausibly testify that he had an opportunity—no matter how fleeting—to speak with the defendant, the snitch's claim that the defendant confessed to him is practically unverifiable. Defense counsel can impugn the credibility of the snitch, but many criminal defendants—especially defendants with a criminal

189. *Id.*

190. Cassidy, *supra* note 61, at 1148.

191. Willingham v. Cockrell, No. 02-10133, 2003 WL 1107011 (5th Cir. Feb. 17, 2001).

192. *Id.* at *1.

193. Paul Gianelli, *Junk Science and the Execution of an Innocent Man*, 7 N.Y.U. J.L. & LIBERTY 221, 234 (2013) (explaining that lawyers seeking a posthumous exoneration of Willingham have uncovered records indicating that, in fact, prosecutors reduced charges against Webb from aggravated robbery to simple robbery and also advocated on his behalf at a clemency hearing, citing his participation in the *Willingham* case as a basis).

194. *Id.* at 233–34; *see* Brandi Grissom, *Citing New Evidence, Urging a Posthumous Pardon in 1992 Case*, TEX. TRIB., Sept. 26, 2013, at A19A, *available at* http://www.nytimes.com/2013/09/27/us/citing-new-evidence-urging-a-posthumous-pardon-in-1992-case.html?_r=0.

195. Gianelli, *supra* note 193, at 233–34.

196. *Id.* at 234–35 (noting also that Webb later admitted to a reporter from the *New Yorker* magazine that he might have "misunderstood" Willingham, adding "[t]he statute of limitations has run out on perjury, hasn't it?").

197. *See Cameron Todd Willingham: Wrongfully Convicted and Executed in Texas*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Cameron_Todd_Willingham_Wrongfully_Convicted_and_Executed_in_Texas.php (last visited Sept. 1, 2014); David Grann, *Trial By Fire: Did Texas Execute an Innocent Man?*, NEW YORKER (Sept. 7, 2009), http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann.

history—go into a jury trial with their own credibility highly suspect and will often be unlikely to come out on top in any swearing contest. Whether or not the jailhouse snitch is perceived to be believable may ultimately turn simply on the comparative rhetorical skills of the prosecutor and defense counsel.[198] Defense attorneys equipped with superior cross-examination skills may successfully blunt the force of a jailhouse snitch's testimony, but the vast majority of criminal defendants saddled with average or inferior counsel will have no such luck. It is not unusual, moreover, for trial courts to affirmatively prevent the defense from even questioning the snitch about the snitch's criminal history or the charges pending against him.[199]

Apart from simply impeaching the character of the snitch or the circumstances or plausibility of the snitch's claim, there is very little that defense counsel can do to counter snitch testimony. For a variety of reasons, defense lawyers can rarely call witnesses of their own to prove that the defendant did not confess to the snitch.[200] In most cases, a lying snitch will simply testify that the defendant confessed in private, when there were no other witnesses to overhear the alleged confession.[201] And in some cases, inmates work together to corroborate each other's false testimony.[202] The Los Angeles County Grand Jury investigation on the County's use of jailhouse informants discovered several instances in which multiple inmates coordinated their trial testimony to make their false claims more credible.[203] Not only is it difficult to find jailhouse witnesses who can effectively counter snitch testimony, in some cases it is positively hazardous to even try.[204] One attorney told the Los Angeles Grand Jury that jailhouse informants were so uniformly untrustworthy that he was afraid to even interview them because he feared they might fabricate some criminal activity that the attorney

198. Stephen Bright made this point more generally in the context of death penalty litigation. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994).

199. *See, e.g.*, Dansby v. Hobbs, 766 F.3d 809, 821–822 (8th Cir. 2014) (discussing the trial court's enforcement of the motion in limine precluding "the defense from mentioning or attempting to elicit testimony from any witness regarding the reason for [the jailhouse snitch's] incarceration" (internal quotation marks omitted)).

200. *See, e.g.*, C. Blaine Elliott, *Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches*, 16 CAP. DEF. J. 1, 10 (2003) ("A defense witness whose freedom is at stake is often too scared of retribution to come forward and offer valuable exculpatory evidence.").

201. *See, e.g.*, *id.* at 1 (describing the story of one man wrongfully convicted of murder because a snitch lied about a confession).

202. *See* GRAND JURY REPORT, *supra* note 14, at 18, 30.

203. *See id.*

204. *See id.* at 39.

was engaged in, such as suborning perjury.[205] Whereas under current law prosecutors are permitted to reward informants and cooperating witnesses with substantial benefits in exchange for their helpful testimony, defense lawyers have no comparable authority.[206] Indeed, defense lawyers who offer rewards to defense witnesses might be prosecuted for witness tampering.[207]

In sum, the dynamics of jailhouse snitch testimony make cross-examination uniquely ill suited to produce reliable results. While suffering many similar defects, other forms of incentivized testimony, such as that provided by cooperating accomplices, co-defendants, and street snitches, at least provide defense counsel with some objective factual context that might be used to assess the credibility of the witness. As the National Association of Criminal Defense Lawyers ("NACDL") argued to the Supreme Court in *Ventris*, accomplice testimony retains at least some indicia of reliability because "the accomplice inculpates herself in the process."[208] In contrast, "snitch testimony lacks even this form of corroboration."[209]

For all these reasons, cross-examination cannot be relied upon to ensure that false snitch testimony is not believed or that unreliable evidence is not given undue weight by jurors.

B. Post-Conviction Review of False Jailhouse Snitch Testimony Is Also Insufficient

If cross-examination often proves wholly ineffective in countering false jailhouse snitch testimony, the other traditional remedy—post-conviction review—is even more dysfunctional. First, the same structural difficulties that plague efforts to impeach snitches through cross-examination are present in a post-conviction challenge of snitch testimony. Rarely will evidence be available, post-conviction, to prove that a jailhouse snitch lied at trial.[210] Credibility determinations are largely in the province of the fact finder and are almost never disturbed on review.[211] Second, even when reviewing courts do determine that a jailhouse informant's testimony was unreliable, or even plainly false, courts rarely grant relief.[212]

In one puzzling case, for example, a defendant had been convicted and sentenced to life in prison for allegedly participating

205. *Id.*
206. NATAPOFF, *supra* note 3, at 186.
207. *Id.*
208. Brief of the NACDL, *supra* note 2, at 3.
209. *Id.*
210. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 86–87 (2008).
211. 5 AM. JUR. 2D *Appellate Review* § 641 (2014).
212. *See supra* Subpart III.A.

in the rape and murder of a young woman.[213] The State's evidence against the defendant was weak. DNA evidence implicated another man but not the defendant.[214] The only physical evidence against the defendant was a single pubic hair that had been recovered among sixteen others from the crime scene.[215] The hair was described as a nonexclusive match to the defendant's hair type.[216] The State conceded by stipulation that the defendant was excluded as a contributor of any of the other fifteen hairs.[217] One of these possibly matched another suspect in the case.[218] The State's case against the defendant was built on this one hair and the testimony of three witnesses.[219] The first witness was a fourteen-year-old boy, described in a psychological evaluation as having a penchant for lying, who gave inconsistent statements to police, only one of which implicated the defendant, and who testified at trial that the defendant was not involved in the attack.[220] The other two witnesses were jailhouse informants.[221] The first jailhouse informant, a man named Hopkins, testified that the defendant had confessed to participating in the attack.[222] Hopkins's credibility was dubious; according to the appellate court:

> Hopkins admitted to hearing jail guards talking about the case, but claimed he heard their conversations after he first talked to the police. He said that everyone in jail was talking about what happened in defendant's case. Hopkins also revealed that he had provided testimony in two other special circumstance murder cases. In exchange for his testimony, Hopkins had three felony counts dismissed. His sentence of four years ten months on the remaining counts he pled guilty to was stayed and he was released from jail. Furthermore, Hopkins's statement that he talked with defendant while they worked mornings together at the same job in the jail yard was shown to be untrue, as defendant never had a morning job.[223]

A second jailhouse informant named Cooper also testified that defendant had admitted to participating in the rape and murder.[224]

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213. People v. Lopes, No. C041516, 2004 WL 418350, at *1 (Cal. Ct. App. Mar. 8, 2004).
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at *1–2.
221. A fourth witness who knew nothing of the case at bar testified about an incident occurring after the attack in which the defendant and others allegedly fondled a teenage girl. *Id.* at *3.
222. *Id.* at *2.
223. *Id.* at *3.
224. *Id.*

But as the appellate court pointed out, this informant also had both a record of prior cooperation and apparently strong incentives to testify.[225]

Cooper was in the San Joaquin County Jail on warrants for charges of possession of precursors with intent to manufacture drugs and receiving stolen property, plus prior conviction enhancements.[226] Cooper stated he was afraid that if he went to prison he would be killed.[227] Cooper also had a lengthy record of felony and misdemeanor convictions dating to the 1970s and was on probation at the time of his testimony.[228] In exchange for his testimony, Cooper was allowed to serve his time in Humboldt County, where he was placed in an alternative work program.[229] After two days in that program, Cooper left.[230] He remained at large until just before the trial, when he was arrested on a probation violation and sentenced to thirty days in jail.[231] When arrested, Cooper gave several fake names and birth dates, apparently to avoid arrest on three outstanding felony warrants.[232] Cooper also admitted he had provided information to the police to benefit himself a couple of times in the past.[233]

Notwithstanding the obvious flimsiness of the State's case—consisting entirely of one nonexclusively matching hair, an inconsistent statement from an untrustworthy child, and the testimony of two jailhouse snitches, one of whom was caught in a flat lie and the other who had obvious incentives to help the State—the jury convicted and the appellate court affirmed.[234] The appellate court reasoned that although there were serious problems with each of the witnesses who testified, the witnesses corroborated each other.[235] The police statement given by the fourteen-year-old with a propensity to lie was corroborated by the self-serving and clearly perjurious testimony of the jailhouse snitch, and vice versa.[236] The appellate court seems to have thought that while a small amount of untrustworthy evidence might provide an insufficient basis for conviction, problems with the reliability of the State's evidence could be overcome by piling on more untrustworthy evidence.

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225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.* at *1.
235. *Id.* at *5.
236. *Id.* at *3 (noting that a jailhouse snitch's "statement that he talked with defendant while they worked mornings together at the same job in the jail yard was shown to be untrue, as defendant never had a morning job").

Sometimes appellate judges simply do not know what to think but affirm anyway. In one Georgia case, a habeas court denied relief to a defendant who had been convicted of murder and armed robbery almost entirely on the testimony of a jailhouse informant named Donald Bates.[237] At trial, Bates testified that the defendant Johnny Ashley had made a jailhouse confession to him.[238] Defense counsel for Ashley adduced substantial impeachment evidence on cross-examination, but the jury convicted Ashley nonetheless.[239] After conducting extensive post-conviction hearings, Ashley's lawyers put on extensive evidence that Bates was mentally ill and had fabricated his trial testimony.[240]

At the conclusion of the hearing on the matter, the judge summed up his thoughts on the matter:

> At the trial I thought Donald Bates was lying. Now I think Donald Bates is lying on the trial, but I do not think that affects the verdict in the case . . . I just don't believe prisoners who testify against prisoners to get out of jail. And I don't think juries do either. I didn't believe it then; I don't believe it now. I don't think that you've proved anything about what the truth is, either. I don't think it was what Mr. Bates swore it was and I don't think we know.[241]

Despite conceding that one of the main witnesses at Ashley's trial was an untrustworthy witness and a blatant liar, the trial court denied Ashley's motion for a new trial, based entirely, it appears, on the judge's conviction that the snitch's testimony was so obviously perjured that members of the jury must have realized it.[242] In so ruling, the judge failed to take into account several factors that might have led a jury to give such testimony credence at trial, including that Mr. Bates was the State's witness whose credibility

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237. Ashley v. State, 439 S.E.2d 914, 915–16 (Ga. 1994).

238. *Id.* at 916.

239. As the court noted on appeal:

> During defense counsel's cross-examination of Bates, the witness admitted that he had previously given police officers false information about the case; that he had been convicted six times for forgery; that he had just been released from the mental health unit of a state correctional institution; and that he had mental health problems and was being treated with Prozac. Defense counsel sought to present testimony from an assistant district attorney that, in another murder case, Bates had given authorities false information concerning the identity of the perpetrator in exchange for favorable treatment from the authorities. The trial court refused to allow the evidence after sustaining the State's objection that it was irrelevant and collateral.

Id.

240. *See* Brief of Appellant, Ashley v. State, 439 S.E.2d 914 (Ga. 1994) (No. S93A1989), 1993 WL 13035276, at *24–25.

241. *Id.*

242. *Id.*

was defended by the prosecutor, that the judge himself had permitted the witness to testify in the first place, and that the jury's verdict itself belied his conclusion. In any event, the court's ruling was affirmed on appeal.[243] Ashley served twenty years in a Georgia prison, and was released on parole on January 31, 2012.[244]

What is worse, even in cases where jailhouse snitches come forward and admit that they lied at trial, courts rarely grant defendants post-conviction relief.[245] This happened, for instance, in the Troy Davis case.[246] Five years after jailhouse snitch Kevin McQueen testified that Davis confessed to shooting police officer Mark McPhail, McQueen executed an affidavit recanting his trial testimony.[247] In the affidavit, McQueen explained that he had heard details of the Davis case on television and from other inmates, and he had then contacted the detective in charge of the investigation.[248] He falsely told the detective that Davis had confessed to him and repeated the story at trial.[249] He also admitted that the charges against him had been dropped or reduced as a reward for his testimony, a fact that he also lied about at trial.[250]

McQueen's recantation was presented to numerous courts during the approximately twenty years that Davis sought to prove that he was actually innocent of the murder of the Savannah police officer.[251] Because Davis was deemed to have procedurally defaulted most of his legal claims, few courts even addressed the significance of McQueen's recantation.[252] When a judge finally did consider the significance of the recantation in a habeas hearing conducted to evaluate Davis's actual innocence claim, the judge rejected it as insignificant.[253] According to the judge, McQueen's trial testimony was so patently false that the jury must have been aware of the fact

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243. *Ashley*, 439 S.E.2d at 917.

244. *Parolee Database*, ST. BOARD. PARDONS & PAROLES (Oct. 18, 2011), http://www.pap.state.ga.us/ParoleeDatabase/ (search "Inmate Number" for "219088").

245. *See generally* Anne Bowen Poulin, *Convictions Based on Lies: Defining Due Process Protection*, 116 PENN ST. L. REV. 331 (2011).

246. Davis v. State, 660 S.E.2d 354, 358–59 (Ga. 2008) (affirming a denial of a motion for a new trial despite recantations by several prosecution witnesses).

247. *In re* Davis, No. CV409–130, 2010 WL 3385081, at *48 (S.D. Ga. Aug. 24, 2010).

248. Evidentiary Hearing Transcript at 36–37, *In re Davis*, (No. 09CV00130), 2010 WL 8032222.

249. *Id.* at 27–30.

250. *In re Davis*, 2010 WL 3385081, at *48.

251. *See, e.g.*, Petition for a Writ of Certiorari at 25, *Davis*, 660 S.E.2d 354 (No. 08-66), 2008 WL 4366181 (presenting McQueen's recantations as a reason for the Supreme Court of Georgia to reconsider Davis's conviction).

252. *See, e.g.*, Davis v. Turpin, 539 S.E.2d 129, 134 (Ga. 2001) (holding that Davis had procedurally defaulted on his constitutional claims by failing to raise them on direct appeal).

253. *In re Davis*, 2010 WL 3385081, at *54.

at trial.[254] Therefore, the judge concluded, McQueen's recantation was both plainly true and inconsequential.[255] Davis's habeas petition was denied, and Davis was subsequently executed.[256]

Although it took twenty years, a better result was obtained by Bobby Joe Maxwell. Maxwell had been convicted in 1992—largely on the testimony of infamous jailhouse snitch Sidney Storch—of committing several murders attributed to the "Skid Row Stabber."[257] Based on extensive evidence, including the testimony given by Storch to the Los Angeles County Grand Jury, that Storch was a serial perjurer who had made a living concocting false jailhouse confessions, the Ninth Circuit granted Maxwell's habeas petition in 2012.[258] Even then, however, the Ninth Circuit was forced to expressly overrule factual findings made by the California Superior Court, which had concluded, notwithstanding overwhelming evidence of Storch's "pattern of perjury," that there was no basis in the Maxwell case itself to find that Storch's testimony was false.[259]

California sought certiorari in the United States Supreme Court, which was denied over the dissents of Justices Scalia and Alito.[260] Justice Scalia complained that, at best, "the evidence relied on by the Ninth Circuit might permit, but by no means compels, the conclusion that Storch fabricated Maxwell's admission."[261] This, Scalia argued, was an insufficient basis upon which to grant habeas relief.[262] Writing in support of the Court's denial of certiorari, Justice Sotomayor responded:

> The dissent labels all of this evidence "circumstantial." It insists that it is possible that Storch repeatedly falsely implicated other defendants, and fabricated other material facts at Maxwell's trial, but uncharacteristically told the truth about Maxwell's supposed confession. Of course, that is possible. But it is not reasonable, given the voluminous evidence that Storch was a habitual liar who even the State concedes told other material lies at Maxwell's trial.[263]

Maxwell's case does demonstrate that post-conviction relief for some victims of false jailhouse testimony is possible, but it is the exception that proves the rule. The evidence of Storch's misconduct was overwhelming, and Maxwell's victory seemingly grudging.

254. *Id.*
255. *Id.* at *60.
256. *Id.* at *61; Kim Severson, *Georgia Inmate Executed; Raised Racial Issues in Death Penalty*, N.Y. TIMES, Sept. 22, 2011, at A1.
257. Maxwell v. Roe, 628 F.3d 486, 491 (9th Cir. 2010).
258. *Id.* at 513.
259. *Id.* at 504–05.
260. Cash v. Maxwell, 132 S. Ct. 611, 613 (2012).
261. *Id.* at 614 (Scalia, J., dissenting).
262. *Id.* at 615.
263. *Id.* at 612 (Sotomayor, J., concurring) (internal citations omitted).

Plainly, post-conviction relief for defendants convicted on the basis of unreliable or false snitch testimony is technically available but practically attainable only in extreme cases, and even then only over spirited opposition. As the state court rulings in Maxwell's case illustrate, busy and jaded state appellate courts typically look the other way in the presence of even blatant evidence that jailhouse snitches lied at a criminal defendant's trial, and sentiment in favor of upholding those determinations exists in some quarters all the way up the judicial chain of command.[264]

This anecdotal evidence is supported by more systematic research. Professor Brandon Garrett conducted a study of the first two hundred DNA exonerations.[265] In those cases, Garrett found that jailhouse informant testimony had been a factor in 11.5 percent of the cases.[266] Jailhouse informants provided testimony in forty-three percent of the capital cases that ultimately ended in exoneration.[267] Strikingly, not one of those wrongly convicted defendants attempted to challenge their convictions based on a claim that the jailhouse informant had fabricated testimony, likely, as Garrett surmises, "because they could not locate any evidence to prove that the informants testified falsely."[268] Reviewing the record of relief granted in cases involving false jailhouse snitch testimony, it is abundantly clear that wrongly convicted defendants cannot rely on post-conviction processes for relief. As Anne Bowen Poulin has argued, "When false testimony is given at trial the truth finding process is fundamentally corrupted."[269] The courts' routine failure to grant relief to defendants who establish that jailhouse snitches presented false testimony at trial deserves prompt and effective relief, but such relief, sadly, for most has simply not been forthcoming.

IV. REGULATION OF JAILHOUSE SNITCH TESTIMONY SHORT OF ABOLITION IS CERTAIN TO BE INEFFECTIVE

A wide variety of commentators have condemned jailhouse snitch testimony for many of the reasons noted here.[270] They have

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264. *But see, e.g., Ex parte* Weinstein, 421 S.W.3d 656, 659 (Tex. Crim. App. 2014) (denying habeas relief despite false witness testimony on the grounds that said testimony was immaterial to the verdict).

265. Garrett, *supra* note 210, at 64.

266. *Id.* at 86.

267. *Id.* at 93.

268. *Id.* at 86–87.

269. Poulin, *supra* note 245, at 334.

270. *See, e.g.*, THE SNITCH SYSTEM, *supra* note 15; Alexandra Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 107–29 (2006); David Protess, *A Tale of Two Snitches*, HUFFINGTON POST (Aug. 10, 2013, 5:12 AM), http://www.huffingtonpost.com/david-protess/reynaldo-guevara_b_3397012.html.

proposed a variety of reforms, including enhanced disclosure requirements to ensure vigorous cross-examination of jailhouse informants, pretrial reliability hearings, special jury instructions, using experts to educate the jury about the effect of incentives on the reliability of testimony, and heightened corroboration requirements.[271] Few, however, have vigorously called for an outright ban on use of electronically uncorroborated jailhouse snitch testimony.[272] As I argue here, however, nothing less than a total ban on such testimony will be effective.

A. *Pretrial Reliability Hearings Are Unlikely to Adequately Screen Out Lying Jailhouse Snitches*

Some commentators have proposed conducting pretrial reliability hearings to screen out unreliable jailhouse snitch testimony.[273] Leading snitch expert Alexandra Natapoff, for example, urges courts to conduct pretrial reliability hearings for all informant witnesses, including jailhouse snitches that the government intends to present at trial.[274] In such hearings, the government would have the burden to demonstrate "the reliability of any informant witness, or statements made by that informant."[275] Moreover, as she points out, at least three states have already established pretrial reliability hearings for jailhouse snitches.[276] Proponents argue that such hearings fall well within the comfort zone of trial courts, which regularly are asked to screen other types

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271. *See, e.g.*, NATAPOFF, *supra* note 3, at 192–99; Harris, *supra* note 78, at 49–58.

272. The authors of a 2007 PEW Charitable Trust study on jailhouse snitches, for instance, condemned their use but advocated a set of reforms, including corroboration, "pretrial disclosures, reliability hearings, and special jury instructions" instead of a categorical ban. THE JUSTICE PROJECT, *supra* note 2. Rory Little has urged a categorical exclusion of six types of unreliable evidence most frequently linked to wrongful convictions, including jailhouse informant testimony, in capital cases. *See* Rory K. Little, *Addressing the Evidentiary Sources of Wrongful Convictions: Categorical Exclusion of Evidence in Capital Statutes*, 37 SW. U. L. REV. 965, 968–69 (2008). Other occasional calls for a total ban have been made. *See, e.g.*, Robert M. Bloom, *Jailhouse Informants*, 18 A.B.A. SEC. CRIM. JUST. 20, 78 (2003) ("The best way to deal with perjured testimony is to exclude it, and in light of the evidence that testimony from a jailhouse informant is so often false, it, too, should be subject to exclusion.").

273. *See, e.g.*, DWYER ET AL., *supra* note 11, at 157; Harris, *supra* note 78, at 61–62.

274. NATAPOFF, *supra* note 3, at 194.

275. *Id.*

276. *Id.* at 194–95 (identifying Illinois, Oklahoma, and Nevada as mandating pretrial reliability hearings for jailhouse-informant testimony); *see* D'Agostino v. State, 823 P.2d 283, 285 (Nev. 1991); Dodd v. State, 993 P.2d 778, 784 (Okla. Crim. App. 2000).

of evidence, such as scientific evidence and expert witness testimony, for reliability.[277]

Professor George Harris has also proposed that courts undertake extensive pretrial reliability hearings of any compensated witness, including jailhouse snitches.[278] Harris suggests that evidence at such hearings would include anything relevant to the witness's credibility, including the "nature of compensation that the witness has received or may receive," the witness's history of cooperation in other cases, and physical or other evidence "unknown to the witness at the time of her initial proffer of testimony, that is consistent with or contradicts the cooperator's testimony" in specific and unanticipated ways.[279] "Changed testimony, a history of repeated cooperation for compensation, compensation out of proportion to the government's legitimate interest in the prosecution of the defendant, or overtly contingent compensation should create a presumption of insufficient reliability that the moving party would have to overcome."[280]

Although adoption of a pretrial reliability screening requirement would not be a bad thing, and might even be moderately helpful, the proposed pretrial reliability screenings would certainly not be a panacea. Indeed, there is little reason to believe that trial courts have the ability or inclination to screen out false jailhouse snitch testimony in the mine run of cases.

For starters, judges are unlikely to be any better than jurors at distinguishing lying witnesses from honest ones.[281] Numerous studies have examined the extent to which training and expertise improves one's ability to assess whether others are telling the truth.[282] Police officers in particular have been the focus of many of these studies because they regularly interview suspects and evaluate the credibility of the stories they are told.[283] Without exception, those studies have found that "people are poor intuitive judges of truth and deception, and that police investigators and

277. NATAPOFF, *supra* note 3, at 195; *see* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587–90 (1993).

278. Harris, *supra* note 78, at 63–64.

279. *Id.* at 63.

280. *Id.* at 64–65.

281. *See, e.g.*, Schauer & Spellman, *supra* note 178, at 19 (noting the "mistaken belief that judges and juries are competent evaluators of the veracity of those who are offering [direct evidence] testimony").

282. Saul M. Kassin & Christina T. Fong, *"I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 LAW & HUM. BEHAV. 499, 501 (1999) (internal citations omitted); *see also* Gary D. Bond, *Deception Detection Expertise*, 32 LAW & HUM. BEHAV. 339, 339 (2008) (citing research studies finding that subjects were generally unable to identify lies at a rate greater than chance).

283. *See* Christian A. Meissner & Saul M. Kassin, *"He's Guilty!": Investigator Bias in Judgments of Truth and Deception*, 26 LAW & HUM. BEHAV. 469, 471 (2002).

other so-called experts who routinely make such judgments are also highly prone to error."[284] Indeed, some studies indicate that specialized training might make interviewers more likely to misinterpret the truthfulness of the interviewee and to increase the interviewer's confidence in those misjudgments.[285] If police investigators—who often receive special training in interrogation skills and lie detection—have not demonstrated any measurable advantage in detecting deception, there is little reason to believe judges—who deal with individuals at far greater remove—have developed any better abilities.

Like police officers, judges actually might be more poorly equipped than jurors to fairly evaluate the credibility of a jailhouse snitch's incriminating testimony, and confirmation bias again may be the culprit. Research on judge and juror perceptions of guilt indicates that judges are more likely to view criminal defendants as guilty than jurors.[286] In Kalven and Zeisel's classic study of jury behavior, for example, the researchers found that judges were consistently more likely than juries to vote to convict.[287] Other researchers have found "similar patterns of trial judges unduly leaning in the prosecution's favor when appraising the evidence."[288] Due to the volume of apparently guilty criminal defendants that judges see regularly in their courtrooms, judges may similarly be more strongly disinclined to question the accuracy of the jailhouse snitch's testimony, which confirms what the judge likely assumes anyway: that the defendant is guilty.

Pro-prosecution bias by judges has been frequently noted in other contexts as well. For instance, judicial tolerance of police perjury is widely acknowledged.[289] Courts know that police frequently lie but tend to look the other way.[290] A variety of scholars have concluded that trial judges "habitually accept[] the policeman's word" and may even ignore police lies "to prevent the suppression of evidence and assure conviction."[291] At least one research study

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284. Kassin & Fong, *supra* note 282, at 500–01; *see also* Bella M. DePaulo et al., *The Accuracy-Confidence Correlation in the Detection of Deception*, 1 PERSONALITY & SOC. PSYCHOL. REV. 346, 346 (1997).

285. DePaulo et al., *supra* note 284.

286. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 55–59 (Phoenix ed., 1971); Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 562–63 (1998).

287. KALVEN & ZEISEL, *supra* note 286; *see also* Guggenheim & Hertz, *supra* note 286 (discussing research).

288. Guggenheim & Hertz, *supra* note 286, at 568.

289. Melanie D. Wilson, *Improbable Cause: A Case for Judging Police by a More Majestic Standard*, 15 BERKELEY J. CRIM. L. 259, 267–68 (2010).

290. *Id.* at 267 (citing studies that conclude judges "knowingly acquiesce in police perjury so that they too avoid letting a guilty defendant escape prosecution").

291. *Id.* at 265.

lends empirical credence to that hypothesis.[292] One commentator summarized the most frequently advanced explanations for why judges so frequently fail to crack down on police perjury:

> 1) it is impossible to determine if a witness is lying; 2) judges dislike the possibility of suppressing evidence due to police perjury; 3) many judges believe that most defendants in the system are guilty; 4) judges are more likely to believe an officer's testimony rather than the defendant's; and 5) judges do not enjoy accusing other government officials of lying.[293]

The reasons judges are reluctant to make credibility determinations against police are also applicable to jailhouse snitches in that adverse credibility findings might also impugn the motives or integrity of the prosecutors who put the snitches on the witness stand. In many cases there will be little external basis on which to assess the credibility of a jailhouse snitch's testimony. Because of pro-prosecution bias, judges may be more inclined to permit prosecutors to put on potentially unreliable evidence, particularly because such evidence confirms the possible judicial assumption that most defendants are, in fact, guilty. While judges are unlikely to be inclined to specially credit an inmate's testimony under most circumstances, they may be more willing to credit such testimony where it has been previously vetted—or at least apparently vetted—by law enforcement officials. Finally, just as judges are often reluctant to accuse police officers of lying, they probably are also reluctant to make an adverse credibility determination against a witness for whom the prosecutor has—expressly or implicitly—personally vouched. After all, a judicial determination that such a witness is lying at minimum suggests that the prosecutor who put that witness on the stand was negligent in proffering the evidence, and could even imply that the prosecutor knowingly attempted to use false testimony.

That judges tend, for whatever reason, to be biased when assessing the admissibility of evidence is further supported by the judicial track record in screening scientific evidence. As Professor Suzanne Rozelle has argued, a study of evidentiary challenges in criminal cases reveals a clear pattern of pro-prosecution admissibility rulings.[294] Courts readily admit all sorts of questionable forensic "match" evidence proffered by prosecutors,

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292. *Id.* at 264–65 (studying judicial resolution of claims of police perjury brought by criminal defendants).

293. *See* Jennifer E. Koepke, Note, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211, 222 (2000) (summarizing reasons that judges are reluctant to find police perjury).

294. *See* Susan D. Rozelle, Daubert, *Schmaubert: Criminal Defendants and the Short End of the Science Stick*, 43 TULSA L. REV. 597, 606 (2007).

including tool mark, bite mark, footprint, and handwriting comparisons, that lack any scientific foundation regarding the reliability of the method or the proficiency of the analyst.[295] At the same time, those same courts routinely deny defendants' requests to put on expert witnesses to testify about the known unreliability of that evidence, even where such testimony is grounded in empirical research.[296] This pro-prosecution bias strongly suggests that judges will conduct pretrial reliability screenings of jailhouse snitch testimony in the same one-sided manner.

In sum, most judges' laissez-faire attitudes about State's witnesses provides little reason to expect that if given the opportunity to conduct pretrial hearings, judges will suddenly crack down on unreliable jailhouse snitches.

B. Disclosure of Impeachment Material

A small number of states require prosecutors to comply with enhanced disclosure obligations in certain types of cases involving jailhouse informants.[297] As a result of recent reforms, for example, Illinois prosecutors must now disclose a substantial amount of information about informants, including any benefit promised to the informant in exchange for testimony, the circumstances in which the defendant's alleged confession supposedly occurred, names of witnesses present at the time, and the informant's prior history of cooperation with the State.[298] Oklahoma and Nebraska also require enhanced pretrial disclosure.[299] Oklahoma's Court of Criminal Appeals recently established disclosure rules applicable to jailhouse snitch testimony in all cases.[300] According to the Oklahoma Court, at least ten days prior to trial the State must disclose the informant's criminal history, any deal or promise extended to the informant, the circumstances in which the admission or confession was obtained, other cases in which the informant has testified and any benefits received as a result, any statements recanting his statement or testimony, and any other information relevant to the informant's credibility.[301] This impeachment evidence is undoubtedly necessary to permit defense counsel to better cross-examine informants. For these reasons, numerous commentators

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295. *Id.* at 599–600.
296. *Id.*
297. GARRETT, *supra* note 1, at 256.
298. 725 ILL. COMP. STAT. 5 / 115-21(c) (1993).
299. NATAPOFF, *supra* note 3.
300. *See* Dodd v. State, 993 P.2d 778, 784 (Okla. Crim. App. 2000).
301. *Id.*

have called for increased disclosure obligations along similar lines.[302]

There may, however, be inherent limits on the extent to which disclosure rules can mitigate the likely prejudice resulting from admission of unreliable jailhouse snitch testimony. First, no matter how scathing the impeachment, jurors all begin with the knowledge that jailhouse snitches are convicted criminals. Notwithstanding that knowledge, jurors routinely believe snitch testimony anyway. Second, as George Harris has noted, most of the critical details surrounding a jailhouse informant's testimony, including how the government "selects, prepares, and evaluates" such witnesses, are "undiscoverable," and "[e]ven that which is discoverable often remains resistant to realistic portrayal at trial."[303] More likely, however, the critical information will simply never be uncovered. "Given the secrecy surrounding the prosecutor's preparation of her witnesses and the inability to review the process meaningfully, it is virtually impossible to ascertain whether and to what extent witnesses have been coached by prosecutors and police to give false or misleading testimony."[304] In addition, many types of benefits that prosecutors can bestow on jailhouse informants—such as a promise not to bring future charges or to bring lesser charges rather than greater charges—are protected under the guise of prosecutorial discretion and insulated from discovery.[305]

There are additional reasons why enhanced discovery will not resolve the jailhouse snitch problem. Perhaps most importantly, in many cases there simply will be little to disclose. When an inmate comes forward purporting to possess incriminating information, the State can truthfully claim that it had nothing to do with initiating contact with the witness. It simply received the evidence that the witness reported, found it credible, and proffered it at trial. The fundamental question—whether the informant is truthful or lying—will remain for the jury to determine. Because no formal deal will actually have been made in most cases prior to the witness's in-court testimony, there also will be nothing to disclose regarding any benefit or inducement offered by the State in exchange for the testimony. When questioned about whether the witness has received a benefit, the witness can honestly state that he has not. He might add, as witnesses frequently and honestly do, that he hopes the prosecutor or judge will look favorably upon him in the future as a result of his testimony, because the prosecutor has never

302. *See* NATAPOFF, *supra* note 3, at 192; Harris, *supra* note 78, at 62 (calling for enhanced discovery requirements in cases of all cooperating witnesses, including electronic recording of all ex parte discussions with the cooperator).

303. Harris, *supra* note 78, at 53.

304. Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 833 (2002).

305. Harris, *supra* note 78, at 53.

made any explicit promise to reward him, and because the prosecutor has only asked him to testify "truthfully" about what he knows.

Enhanced disclosure is an inadequate remedy for another, and perhaps even more basic, reason. Precisely in those cases in which jailhouse snitch testimony is likely to be most sought out, prosecutors cannot be trusted to fairly and honestly disclose the critical facts that would undermine the snitch's testimony.[306] If police or prosecutors have affirmatively provided essential details about a case to a jailhouse snitch they know to be untrustworthy, have made secret promises to reward witnesses for their testimony in the future, or have recruited the snitch—in violation of the Sixth Amendment—to affirmatively elicit incriminating information against a fellow inmate, then no formal disclosure requirement will induce the prosecutor to disclose such damning information.

Finally, even if a disclosure requirement did result in discovery of important impeachment evidence that defense counsel could use at trial to impeach the witness, it is not clear that witness impeachment alone is sufficient to blunt the prejudice caused by testimony that the defendant has confessed to the crime. As discussed above, research suggests that while jurors have the capacity to recognize that some witnesses are more self-interested than others, such information does not necessarily get processed in a way that helps defendants. Due to the stickiness of fundamental attribution error, jurors are still more likely to vote to convict, particularly in close cases, after hearing even tainted and objectively unreliable confession evidence.

C. *Corroboration*

Another suggestion made by commentators is to apply heightened corroboration requirements to jailhouse snitch testimony.[307] Indeed, the American Bar Association passed a resolution "calling on federal, state, and local governments to adopt measures so 'no prosecution should occur based solely upon uncorroborated jailhouse informant testimony.'"[308] These

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306. As one commentator noted, "The likelihood of fabrication resulting from bargained-for testimony is simply too great to rely on a prosecutor's honor and good faith in meeting his discovery obligations" with respect to incentivized witnesses. Cassidy, *supra* note 61, at 1176.

307. *Cf.* Christine J. Saverda, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 798 (1990) (arguing that corroboration requirements should apply for all compensated informants).

308. *See* Peter A. Joy, *Constructing Systematic Safeguards Against Informant Perjury*, 7 OHIO ST. J. CRIM. L. 677, 680–81 (2010) (quoting ABA Res. 108(b), adopted by the House of Delegates (Feb. 15, 2005)). Defendants have argued for adoption of corroboration requirements unsuccessfully in some states. *See, e.g.*, State v. Walker, 82 A.3d 630, 635 (Conn. App. Ct. 2013); *see also* ABA CRIMINAL JUSTICE SECTION, ACHIEVING JUSTICE: FREEING THE

recommendations recently have been implemented in a few states, including Texas[309] and California,[310] which have enacted legislation to require corroboration of jailhouse informants' testimony.[311]

Jailhouse snitch corroboration requirements are often modeled on similar corroboration requirements for accomplice testimony.[312] While these reforms are laudable for what they are worth, they simply are not worth that much. The main problem with a corroboration requirement is that, as typically formulated, it is too lax. Under Texas law, for example, "all that is required is that there be some evidence—other than the jailhouse informant's testimony—which tends to connect the accused to the commission of the offense."[313] California's requirement is somewhat more stringent. In California, it is not enough if the corroborating evidence merely "tends to connect" the defendant to the crime.[314] Rather, the corroborating evidence must, in fact, "connect[] the defendant with the commission of the offense."[315] Accomplice testimony, however, can be corroborated by jailhouse snitch testimony, and vice versa, substantially weakening the protective value of the corroboration requirement.[316] Jailhouse snitches can also presumably be corroborated by other jailhouse snitches.[317]

Other states rely on the "corpus delicti rule" to enforce a more modest corroboration requirement. In Tennessee, for instance, "the corpus delicti of a crime may not be established by a confession

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INNOCENT, CONVICTING THE GUILTY 63 (Paul C. Giannelli & Myrna Raeder eds., 2006) (urging reforms of state rules regarding jailhouse informants).

309. TEX. CODE CRIM. PROC. ANN. art. 38.075 (West 2014).

310. CAL. PENAL CODE § 1111.5 (Deering 2008).

311. *Id.* ("The testimony of an in-custody informant shall be corroborated by other evidence that connects the defendant with the commission of the offense, the special circumstance, or the evidence offered in aggravation to which the in-custody informant testifies."); TEX. CODE CRIM. PROC. ANN. art. 38.075 ("A defendant may not be convicted of an offense on the testimony of a person . . . imprisoned or confined in the same correctional facility as the defendant unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed.").

312. *Compare* CAL. PENAL CODE § 1111.5, *with* CAL. PENAL CODE § 1111 (Deering 2008).

313. Hernandez v. State, No. 03-10-00863-CR, 2013 WL 3723203, at *4 (Tex. App. July 11, 2013); *see also* Gill v. State, 873 S.W.2d 45, 48 (Tex. Crim. App. 1994).

314. CAL. PENAL CODE § 1111.

315. *Id.*; *see* People v. Davis, 217 Cal. App. 4th 1484, 1490 (2013).

316. *See, e.g.*, People v. Washington, Nos. A118349, A123088, 2009 WL 714512, at *9 (Cal. Ct. App. Mar. 19, 2009) (citing People v. Williams, 940 P.2d 710, 772 (Cal. 1997)); Ramirez v. State, 754 S.E.2d 325, 327 (Ga. 2014).

317. *See, e.g.*, Whitley v. Ercole, 725 F. Supp. 2d 398, 404 (S.D.N.Y. 2010) (affirming conviction based on testimony of jailhouse informant where informant's testimony was corroborated by other jailhouse informants).

alone."[318] Accordingly, a conviction may not be sustained if the only evidence in the case is testimony by a jailhouse informant. The corpus delicti rule, however, provides even weaker protection against lying jailhouse snitches. In Tennessee, for example, as long as the prosecutor can prove that a crime in fact occurred, the corpus delicti rule will not bar the State from relying solely on jailhouse informant testimony to establish that a particular individual was the crime's perpetrator.[319]

Even where the corroboration requirement has some teeth, it will rarely make much of a difference. In the vast majority of cases in which jailhouse snitch testimony is sought, there will be at least *some* other evidence implicating the defendant.[320] In those cases, however, prosecutors want to use the jailhouse snitches for precisely the reason that they should not be allowed to do so: the other evidence in the case is weak or equivocal, making the jailhouse snitch testimony unduly influential in determining the outcome of the case.[321] After all, there is no reason to use jailhouse snitch testimony—and to reward convicted criminals for providing it—if the State has sufficient other evidence to prove guilt beyond a reasonable doubt. It is only in cases where the prosecutor believes there to be a real risk of acquittal that the prosecutor will be willing to "pay" the price for such testimony.[322]

These corroboration rules do little to prevent wrongful convictions from occurring in the types of cases in which jailhouse snitches are typically used. Prosecutors will rarely move forward in

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318. State v. Churchwell, No. M2011-00950-CCA-R3-CD, 2013 WL 430118, at *7 (Tenn. Crim. App. Feb. 4, 2013) (citing Ashby v. State, 139 S.W. 872 (Tenn. 1911)).

319. *See id.* (holding that the bodies of shooting victims established that a criminal offense had occurred, and therefore the corpus delicti rule was not violated by admission of a jailhouse informant's testimony that the defendant confessed to the crime). Connecticut makes corroboration of a jailhouse snitch's testimony a factor in determining whether a failure to instruct the jury about the potential unreliability of a jailhouse informant was harmless error. *See* State v. Ebron, 975 A.2d 17, 29 (Conn. 2009); State v. Arroyo, 973 A.2d 1254, 1262–63 (Conn. 2009).

320. Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing "First Drafts," Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519, 551–52 (2009).

321. *Id.*

322. At the same time, cases in which the only evidence against a defendant is jailhouse snitch testimony—though they certainly exist—are likely to be highly disfavored by prosecutors. After all, even jurors prone to be misled by fundamental attribution error will be hard-pressed to convict a defendant where there is absolutely no other evidence of guilt than the uncorroborated say-so of a single jailhouse snitch. I say a single snitch here advisedly, because in California, at least, jailhouse snitch testimony provided by two different snitches will satisfy the corroboration requirement, as long as the snitches did not have an opportunity to conspire among themselves. *See* CAL. PENAL CODE § 1111.5 (Deering 2008).

cases where there is no evidence at all connecting a defendant to a charged crime, and as long as there is some other evidence, even if it is quite weak, then the corroboration requirement will not prevent the snitch's testimony from coming in.

Perhaps a truly robust corroboration rule would make a difference. For instance, reliability would not be a significant problem under a rule that permitted jailhouse snitch testimony to come in only if the alleged confession made to the snitch had been electronically recorded. In that case, the snitch's testimony would be corroborated by the taped recording of the conversation. Of course, such a rule would raise other problems—most significantly, Sixth Amendment concerns—that would preclude snitches from being used to secretly record confessions by other inmates in most cases.[323]

Given the substantial concerns, however, that police officers and prosecutors might provide jailhouse informants with crucial details about the investigation—inadvertently or otherwise—even a strong corroboration requirement that did not actually require electronic recording would fail to provide sufficient protection. First, there is documented evidence that law enforcement agents have provided informants with incriminating details in some cases.[324] More generally, research on false confessions demonstrates that even police officers and prosecutors acting entirely in good faith can, and have, inadvertently revealed supposedly secret details to interrogated suspects during the course of interrogation.[325] Judges and juries then concluded that those confessions were reliable precisely because they included details about which only the perpetrator of the crime supposedly could know.[326] Corroboration of the "details" of the suspect's confession, in these cases, actually served to bolster the false confessions.[327] Courts uniformly emphasized that these confessions contained admissions that only the true murderer or rapist could have known.[328]

While recording the entirety of the interrogation might have revealed the source of contamination, anything less only further

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323. The Sixth Amendment bars the State from "deliberately eliciting"—either directly or through its agents—incriminating statements from criminal defendants. *See* Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986); United States v. Henry, 447 U.S. 264, 270 (1980). However, the prohibition only applies with respect to crimes as to which the defendant has been charged. *See* Texas v. Cobb, 532 U.S. 162, 163 (2001).

324. *See* GRAND JURY REPORT, *supra* note 14, at 27–28.

325. Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1053 (2010).

326. *Id.* at 1113 (examining dozens of exonerations involving false confessions and finding that "[i]n many cases . . . police likely disclosed [critical] details during interrogations by telling exonerees how the crime happened").

327. *Id.* at 1118.

328. *Id.*

cemented its persuasiveness.[329] The same dynamic almost certainly would be at work in cases involving jailhouse snitches. A mandatory requirement that all conversations between a snitch and state agents be recorded, as some commentators have urged,[330] would address some aspects of the problem, but given the variety of possible sources of information from which a jailhouse snitch can potentially draw, only a tape recording of the defendant's actual confession to the snitch would adequately ensure that the snitch's testimony was reliable.

D. *Jury Instructions*

Commentators have also called for juries to be instructed about the special reliability concerns present when jailhouse informants testify.[331] A few states have adopted such requirements.[332] While requiring special jury instructions is harmless, it is, like the other measures discussed above, almost certainly an insufficient remedy. The problems with jury instructions are well documented. A wealth of data suggests that jury instructions are generally ineffective tools for channeling a juror's assessment of evidence presented at trial.[333] First, jurors generally are poor at understanding traditional jury instructions or applying those instructions in deliberations.[334]

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329. *Id.*

330. *See, e.g.*, GARRETT, *supra* note 1, at 247. Some jurisdictions already require such procedures. In Los Angeles County, for example, "the District Attorney's office . . . requires tape-recording of all interviews with jailhouse informants and preservation of these recordings, as well as any other records of interaction and use of jailhouse informants." Handy, *supra* note 29, at 760; *see also* Gershman, *supra* note 304, at 861–62; Mosteller, *supra* note 320, at 560–61, 560 n.193.

331. *See, e.g.*, NATAPOFF, *supra* note 3, at 197.

332. California is one such state. *See* CAL. PENAL CODE § 1127a(b) (Deering 2008) (requiring courts to instruct the jury on in-custody informant testimony). Other states include Montana and Oklahoma, which require special jury instructions on informant credibility when a jailhouse informant testifies. *See* State v. Grimes, 982 P.2d 1037, 1043 (Mont. 1999); Dodd v. State, 993 P.2d 778, 784 (Okla. Crim. App. 2000). Some states require cautionary jury instructions only where a jailhouse informant's testimony lacks corroboration. *See* People v. Petschow, 119 P.3d 495, 504 (Colo. App. 2004); State v. James, No. 96-CA-17, 1998 WL 518135, at *5 (Ohio Ct. App. Mar. 25, 1998); State v. Spiller, No. 00-2897-CR, 2001 WL 1035213, at *5 (Wis. Ct. App. Sept. 11, 2001).

333. *See, e.g.*, Anthony N. Doob & Hershi M. Kirshenbaum, *Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act upon an Accused*, 15 CRIM. L.Q. 88, 91–95 (1972) (finding that mock jurors who learned of a defendant's prior convictions were more likely to convict regardless of whether they received instructions to disregard the prior convictions). *But see* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 423–39 (2013) (reviewing empirical studies and concluding that "evidentiary instructions work, albeit imperfectly").

334. Sara Gordon, *Through the Eyes of Jurors: The Use of Schemas in the Application of "Plain-Language" Jury Instructions*, 64 HASTINGS L.J. 643, 645

Second, studies using mock jurors have consistently shown that instructions to disregard relevant evidence do not prevent jurors from incorporating that evidence into deliberations.[335] Studies of the efficacy of cautionary instructions are also at best mixed.[336] There is thus substantial reason to doubt that such instructions will prove effective in inoculating jurors after exposure to false jailhouse snitch testimony. Indeed, like with unreliable confession evidence generally, it is far more likely that such instructions "occur too late in the process to undo the damage" once the testimony "has entered the stream of evidence at trial."[337] Where evidence as potentially prejudicial as a reported post-crime confession is at issue, cautionary jury instructions—while undoubtedly better than nothing—are simply inadequate to ensure that innocent criminal defendants receive a fair trial.

There is, in short, no reason to believe that jury instructions are an effective tool to neutralize the impact of highly prejudicial false snitch testimony. Relying on jury instructions to redress the harm inflicted from false jailhouse snitch testimony is like applying a Band-Aid to a gunshot wound. It merely obscures the problem.

Indeed, even if all of the above requirements were in place, there would still be no reason for confidence that false jailhouse snitch testimony might not be admitted and relied upon by jurors to convict innocent defendants. Observations made by scholars writing about a similar problem—the admissibility of unreliable expert forensic witness testimony—apply equally to jailhouse snitch testimony: "Experimental research . . . reinforces the need for incriminating [] evidence to be reliable because the various trial

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(2013) (reporting that "studies have almost universally returned results finding that, by and large, jurors are confused by jury instructions and often disregard them").

335. *See, e.g.*, Thomas R. Carretta & Richard L. Moreland, *The Direct and Indirect Effects of Inadmissible Evidence*, 13 J. APP. SOC. PSYCHOL. 280, 291 (1983) (reporting that mock jurors presented with inadmissible evidence were more likely to convict than jurors not presented with the evidence notwithstanding judicial instructions to disregard it); Saul Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046 (1997) (finding that mock jurors exposed to incriminating evidence were more likely to view the defendant as guilty than jurors not exposed to that evidence notwithstanding instructions to ignore it); Lisa Eichorn, Note, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 LAW & CONTEMP. PROBS. 341, 347 (1989).

336. Cindy E. Laub et al., *Can the Courts Tell an Ear from an Eye? Legal Approaches to Voice Identification Evidence*, 37 LAW & PSYCHOL. REV. 119, 156 (2013) (evaluating research on cautionary instructions regarding the reliability of eyewitness testimony); *see also* Sklansky, *supra* note 333, at 429.

337. Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 823 (2013).

safeguards, along with lay jurors, trial, and appellate judges, have not performed well in response to prosecutions and convictions incorporating unreliable [] evidence."[338]

Jailhouse snitch testimony is fundamentally and pervasively unreliable. Its use poses an irremediable threat of taint in criminal cases.

V. ABOLITION IS THE ONLY APPROPRIATE REMEDY

Abolition of jailhouse snitch testimony is perhaps a radical suggestion. After all, courts are extremely reluctant to bar use of relevant evidence in general, and even more so to exclude an entire class of potentially material evidence altogether. Nonetheless, there is precedent for such a ban. Indeed, several types of evidence are now considered so lacking in reliability that they are flatly banned as admissible in-court evidence. Moreover, it is increasingly clear that nothing less than a total ban can protect innocent criminal defendants from the substantial risk of wrongful conviction as a result of the use, and abuse, of jailhouse snitch testimony.

A. *Constitutional Precedents: Coerced Confessions*

Coerced confessions are the paradigmatic example of a type of evidence that has been barred as a matter of law from use in criminal trials.[339] Although there are constitutional considerations at play in the taking as well as the use of coerced confessions, the ban on the use of coerced confessions can be traced in substantial measure to the inherent unreliability of such evidence.[340]

The voluntary confession requirement is a longstanding common-law evidence rule that ultimately took on constitutional significance in the United States.[341] The rule is premised on the presumption that freely made confessions are strongly reliable, but that confessions induced through promises or threats lack such indicia of reliability.[342] The *Arizona v. Fulminante* case reflects the

338. Gary Edmond & Kent Roach, *A Contextual Approach to the Admissibility of the State's Forensic Science and Medical Evidence*, 61 U. TORONTO L.J. 343, 366–67 (2011).

339. Jackson v. Denno, 378 U.S. 368, 376 (1964).

340. *Id.* at 386 (1964).

341. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 296 (1991); Hopt v. Utah, 110 U.S. 574, 585 (1884).

342. As the Supreme Court long ago observed:

> But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that

Supreme Court's most recent recognition of both the inherent unreliability of coerced confessions and the difficulty of repairing the prejudice done to defendants when such evidence is erroneously admitted.[343] It is perhaps noteworthy that *Fulminante*, though widely invoked as a coerced confessions case, is also a jailhouse snitch case.[344] In *Fulminante*, the defendant was suspected of killing his eleven-year-old stepdaughter.[345] While in jail for an unrelated offense, Fulminante allegedly made statements to a fellow inmate implicating him in the killing.[346] After the inmate reported the statements to the FBI, the inmate was instructed to "find out more."[347] As a suspected child murderer, Fulminante was being threatened by other prisoners and was deeply concerned for his safety.[348] The inmate "offered to protect Fulminante from his fellow inmates, but told him, 'You have to tell me about it,' you know. I mean, in other words, 'For me to give you any help.'"[349] Fulminante then allegedly admitted to the inmate that he had driven his stepdaughter "to the desert on his motorcycle, where he choked her, sexually assaulted her, and made her beg for her life, before shooting her twice in the head."[350]

Fulminante moved to suppress the confession on grounds that it was the product of coercion.[351] The trial court denied the motion, and Fulminante was convicted and sentenced to death.[352] The Arizona Supreme Court reversed, concluding that the trial court erred in finding that the confession was voluntary and that the error was not harmless.[353] The U.S. Supreme Court granted certiorari

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> freedom of will or self-control essential to make his confession voluntary within the meaning of the law.

Hopt, 110 U.S. at 585.

343. 499 U.S. at 296.

344. There was, moreover, some reason to doubt the credibility of Sarivola, the jailhouse informant. Sarivola was associated with the Columbo crime family and convicted for loan sharking, extortion, and illegal debt-collection practices. Brief of Respondent at 11, Arizona v. Fulminante, 499 U.S. 279 (1990) (No. 89-839), 2009 WL 507414. He was also a paid informant for the FBI who received payment for relaying "incriminating statements from targeted suspects." *Id.* On one occasion, Sarivola produced a fake audio tape containing purportedly incriminating statements made by another inmate. *Id.* at 12. He ultimately admitted that the tape was a "phony," but the FBI continued to use his services even after learning of the fraud. *Id.* at 6–7.

345. *Fulminante*, 499 U.S. at 282.

346. *Id.* at 283.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.* at 283–84.

352. *Id.* at 284.

353. *Id.*

and affirmed.[354] All nine justices agreed that use of coerced confession evidence at trial is per se error.[355]

> "Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision.[356]

The Court was divided, however, as to whether admission of a coerced confession could ever be harmless.[357] A five justice majority held that harmless error analysis was appropriate even in cases where a coerced confession had improperly been admitted at trial, but that the error in Fulminante's case was not harmless.[358] Four justices dissented from the application of harmless error analysis, contending that such evidence was so inherently prejudicial that no trial in which such evidence had been presented to a jury could be fair.[359]

The Court thus emphasized not only that use of coerced confessions was always constitutionally improper, but that any harmless error analysis conducted by a court in a case where a coerced confession had erroneously been admitted required "extreme caution," since "the risk that the confession is unreliable" is magnified by the "profound impact" that confession evidence tends to exert upon juries.[360]

Of course, the constitutional ban on involuntary confessions necessitated by due process considerations is accompanied by the Fifth Amendment's ban on compelled self-incriminating testimony.[361] That ban is further expanded under *Miranda v. Arizona*[362] to preclude government use of virtually all statements obtained by police during custodial interrogation in a manner inconsistent with the procedural safeguards established by the Court.[363]

354. *Id.* at 284–85.
355. *Id.* at 288 (White, J., dissenting).
356. *Id.* at 296 (quoting Bruton v. United States, 391 U.S. 123, 139–40 (1968) (White, J., dissenting)).
357. *Id.* at 288, 295.
358. *Id.* at 295, 297.
359. *Id.* at 288–90.
360. *Id.* at 296.
361. U.S. CONST. amend. V.
362. 384 U.S. 436 (1966).
363. *Id.* at 460–61.

B. *Procedurally Unreliable Hearsay Evidence*

A coerced confession is not the only kind of evidence categorically prohibited from use in criminal trials. The Sixth Amendment's Confrontation Clause similarly precludes the use, at trial, of a particular class of evidence, namely, testimonial out-of-court statements that were either made without prior opportunity for cross-examination or by a currently available declarant.[364] The Court's pre-*Crawford* Confrontation Clause jurisprudence was an express reflection of the constitutional importance of evidentiary reliability.[365] In *Ohio v. Roberts*,[366] the Court construed the Confrontation Clause as directed toward the exclusion of out-of-court statements made by unavailable witnesses that lack "adequate 'indicia of reliability.'"[367] Of course, with *Crawford*, the Court reconceptualized its Confrontation Clause jurisprudence, downplaying mere evidentiary reliability as the touchstone of constitutional admissibility of hearsay evidence.[368] Instead, the Court substituted a procedural standard: hearsay evidence was admissible under the Confrontation Clause only if it was either nontestimonial, or if testimonial, only if it had previously been subject to cross-examination.[369] Nonetheless, the Court was explicit that the reliability of evidence was the primary purpose of the Confrontation Clause:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.[370]

The Sixth Amendment Confrontation Clause thus represents a longstanding, and well-recognized, constitutional exclusionary principle for a class of presumptively unreliable evidence.

Judges also have the ability, although it is one that is infrequently used, to enforce wholesale exclusions on classes of

364. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 68 (2004) (holding that testimonial evidence is only admissible where cross-examination is unavailable).
365. *See, e.g.*, Ohio v. Roberts, 448 U.S. 56, 66 (1980).
366. *Id.*
367. *Id.*
368. Crawford v. Washington, 541 U.S. 36, 61 (2006).
369. *Id.* at 53–56.
370. *Id.* at 61.

evidence deemed insufficiently reliable.[371] A court might exclude jailhouse informant testimony on grounds that admission of such unreliable evidence violates basic due process norms.[372]

Alternatively, courts might follow the lead established in *Jackson v. Denno*[373] and impose stricter constitutional regulation on the use of jailhouse snitch testimony. The defendant in *Jackson*, Nathan Jackson, alleged that his murder confession was the product of coercion.[374] Pursuant to New York state procedure, the voluntariness of Jackson's confession was submitted, along with all of the other evidence, to the jury, which was accordingly instructed that if it found that Jackson's confession had been coerced, it should ignore it.[375] Jackson complained that submission of a coerced confession to the jury irreparably tainted the case.[376] The U.S. Supreme Court agreed, ruling that questions regarding the voluntariness of confessions must be adjudicated prior to trial in order, among other things, to ensure that jurors do not rely on unreliable involuntary confessions to "serve as makeweights in a compromise verdict," or to prevent jurors from "accepting the confessions to overcome lingering doubt of guilt prejudice."[377]

The logic underlying an expansion of the *Jackson* rule to jailhouse snitch cases is simple. Like involuntary confessions, jailhouse snitch testimony is patently unreliable. Permitting a snitch to testify regarding the substance of an alleged confession is little different from permitting a police officer to testify about an allegedly coerced confession. The only difference is the identity of the witness—and few would argue that the credibility of inherently self-interested felons is greater than that of police officers. Certainly, the logic undergirding the *Jackson* rule, at minimum, counsels for mandatory pretrial reliability hearings for contested jailhouse snitch testimony, as many commentators have argued and as a few states now require. But because—unlike presumably uncoerced confessions made to trained and disinterested law enforcement officers—all jailhouse confessions are inherently unreliable, it makes far more sense to treat those alleged confessions like coerced confessions, requiring not merely that they

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371. *See* Welsh S. White, *Regulating Prison Informers Under the Due Process Clause*, 1991 SUP. CT. REV. 103, 105 (1991).

372. *Cf. id.*; *see also* Rory K. Little, *Addressing the Evidentiary Sources of Wrongful Convictions: Categorical Exclusion of Evidence in Capital Statutes*, 37 SW. U. L. REV. 965, 977 (2009) (citing polygraph evidence as one long-standing example, and pointing out several categories of evidence proven unreliable in wrongful conviction cases, such as junk science).

373. 378 U.S. 368 (1964).

374. *Id.* at 369–70.

375. *Id.* at 374–75.

376. *Id.* at 376.

377. *Id.* at 380 (quoting Stein v. New York, 346 U.S. 156, 177–78 (1956)).

be screened through pretrial reliability hearings, but that they be absolutely precluded.[378]

C. *Statutory and Administrative Exclusions*

While the federal Constitution bars the use of certain classes of presumptively unreliable evidence, such as compelled confessions and statements obtained in violation to the Confrontation Clause, still other classes of evidence are barred by statute, evidentiary rule, and administrative practice.[379]

One familiar example is polygraph evidence. Because of deep-seated concerns about its reliability, polygraph evidence has been banned by statute in many states.[380] In virtually every state where it has not been banned by statute, it has been ruled per se inadmissible by courts.[381] Such bans are appropriate, the Supreme Court has held, because of the State's "unquestionably . . . legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial."[382] Indeed, the evidence at issue in the famous *Frye v. United States*[383] case—setting minimum standards for the admissibility of scientific evidence—was a polygraph test.[384] Although the test for admissibility established in *Frye* has been replaced by the *Daubert* criteria, the ban on polygraph evidence in criminal cases remains largely—albeit not entirely—intact.[385]

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378. Of course, judges might also presumptively exclude such evidence under Rule 403 on the theory that the probative value of jailhouse snitch testimony is outweighed by its prejudicial impact. *See* FED. R. EVID. 403.

379. Indeed, the common exclusion of hearsay and character evidence is based on "the fear that certain kinds of admittedly relevant evidence will be overvalued by the trier of fact." Schauer & Spellman, *supra* note 178, at 3.

380. *See* ARK. CODE ANN. §§ 12-21-701 to 12-21-704 (2009) (holding inadmissible all "stress evaluation instrument[s] [administered by law enforcement] to test or question individuals for purpose of determining and verifying the truth of statements"); CAL. EVID. CODE § 351.1 (Deering 2004) ("[T]he results of a polygraph examination . . . shall not be admitted into evidence in any criminal proceeding."). Such evidence is also precluded in military court martials pursuant to Military Rule of Evidence 707, which provides, in relevant part: "(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." MILITARY COMM'N R. EVID. 707.

381. *See* United States v. Scheffer, 523 U.S. 303, 311 (1998) (affirming the military's per se ban on admissibility of polygraph evidence in court martial proceedings).

382. *Id.* at 303.

383. 293 F. 1013 (D.C. Cir. 1923).

384. *Id.* at 1013–14.

385. *See generally* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); James R. McCall, *Misconceptions and Reevaluation—Polygraph Admissibility After* Rock *and* Daubert, 1996 U. ILL. L. REV. 363 (1996).

Other types of evidence have also been deemed sufficiently unreliable in some jurisdictions and therefore categorically inadmissible. Visual hair analysis, for example, is "a kind of evidence so inexact that it is restricted or barred in some jurisdictions."[386] Other examples include hypnotically refreshed testimony[387] and uncorroborated accomplice testimony.[388] (Of course, all of the flaws of uncorroborated accomplice testimony, and then some, exist with respect to uncorroborated jailhouse snitch testimony as well.) Some law enforcement agencies have taken it upon themselves to refrain from using or sanctioning the use of certain types of unreliable evidence. The FBI, for instance, stopped performing bullet lead analysis after the "National Research Council concluded that available data did not support expert testimony linking crime bullets to a particular source."[389]

Because of the highly unreliable nature of jailhouse snitch testimony, state and federal lawmakers and law enforcement agencies can and should, consistent with the treatment of other forms of grossly unreliable evidence, ban the use of jailhouse snitch testimony through legislative or administrative fiat.[390]

CONCLUSION

Jailhouse snitch testimony is an inherently unreliable type of evidence. Snitches have powerful incentives to invent incriminating

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386. James Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2050 n.84 (2000) (citing Ken Armstrong & Steve Mills, *Death Row Justice Derailed*, CHI. TRIB., Nov. 14, 1999, at N1).

387. Michael Martin, *Admission of Hypnotically Refreshed Statements*, 214 N.Y. L.J. 3 (1995); Gregory G. Sarno, Annotation, *Admissibility of Hypnotic Evidence at Criminal Trial*, 92 A.L.R.3D 442 (1979).

388. W.J. Dunn, Annotation, *Question as to Who Are Accomplices, Within Rule Requiring Corroboration of Their Testimony, as One of Law or Fact*, 19 A.L.R.2D 1352 (1951); *see also* M.C.D., Annotation, *Contingency That One May Be Subjected to an Independent Claim or Suit Depending on Outcome of Action in Which He Is Called as a Witness as a Disqualifying Interest Within Statutes Disqualifying One Person as Witness Because of Death of Another*, 88 A.L.R. 248 (1934); A.M. Swartout, Annotation, *Statute Disqualifying One Person as Witness Because of Death of Another as Applicable to Executor or Administrator of Decedent*, 117 A.L.R. 606 (1938).

389. Laurel Gilbert, Comment, *Sharpening the Tools of an Adequate Defense: Providing for the Appointment of Experts for Indigent Defendants in Child Death Cases Under* Ake v. Oklahoma, 50 SAN DIEGO L. REV. 469, 482 (2013); *see* *FBI Press Release, FBI Laboratory Announces Discontinuation of Bullet Lead Examinations*, FBI (Sept. 1, 2005), http://www.fbi.gov/news/pressrel/press-releases/fbi-laboratory-announces-discontinuation-of-bullet-lead-examinations.

390. A bill to bar the use of informant testimony in all death penalty cases was proposed by a Texas legislator, but was not enacted. *See* Brandi Grissom, *Bill Would Restrict Informant Testimony in Death Cases*, TEX. TRIB. (Nov. 28, 2012), http://www.texastribune.org/2012/11/28/bill-would-restrict-informant-testimony-death-case/.

lies about other inmates in often well-founded hopes that such testimony will provide them with material benefits, including in many cases substantial reduction of criminal charges or sentences. At the same time, false snitch testimony is difficult if not altogether impossible to impeach. Because such testimony usually pits the word of two individuals against one another, both of whose credibility is suspect, jurors have little ability to accurately or effectively assess or weigh the evidence. Moreover, research suggests that jurors frequently succumb to fundamental attribution error and unwittingly fail to properly discount the reliability of evidence supplied by biased and self-interested witnesses. Unreliability concerns are further magnified because jailhouse snitch testimony is almost exclusively a species of confession evidence, and ample research demonstrates that confession evidence is more persuasive to jurors than any other type of evidence.

Although some jurisdictions have placed a few modest limits on jailhouse snitch testimony, no jurisdiction has banned such testimony outright. It continues to be assumed that the traditional tools of trial procedure—cross-examination and post-conviction review—are adequate to screen out unreliable evidence and safeguard defendants' rights. These methods, however, are plainly insufficient, as mounting evidence of wrongful convictions brought about through the use of false snitch testimony attests. Commentators have urged adoption of a variety of additional measures intended to bolster the ability of courts to screen such testimony for reliability, but on closer examination, none of these suggestions—while on their own terms marginally helpful—sufficiently mitigates the high risk that false jailhouse snitch testimony will be admitted and have a material impact on jury deliberations.

The only effective solution is to flatly preclude the use of such testimony. The constitutional infrastructure already exists to permit courts to move in this direction. The Supreme Court's longstanding preclusion of coerced confession evidence provides a precedent readily applicable to confession evidence from jailhouse snitches. But in all likelihood, if change in this area comes, it will be as a result of legislative resolve to take meaningful steps to reduce wrongful convictions. There is a mature body of research data that identifies the primary causes of wrongful convictions. Jailhouse snitch testimony is at the top of the list. It is low fruit, waiting to be picked.

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