2014 Virginia Bar Association Capital Defense Workshop

Litigating Snitches: from Reliability Hearings to Jury Instructions

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I. Introduction

The following is intended as a roadmap for litigating capital cases involving snitches. The outline and presentation contain a brief overview of the problem snitches present to a reliable determination of guilt and punishment (previously the subject of a presentation at the 2012 Capital Defense Workshop), basic legal principles guiding the admissibility of and limitations on snitch testimony, and most importantly, a discussion of motions to consider filing in challenging snitch testimony. These motions include:

- Motion for Reliability Hearing
- Motion to Bar Uncorroborated Snitch Testimony
- Motion to Exclude Testimony Pursuant to an Unconstitutional Cooperation Agreement (Consistency Provision)
- Equal Protection/Selective Prosecution Challenge
- Motion for Psychiatric Evaluation of Snitch
- Motion for protective measures to prevent government from developing snitch evidence
- Motion for Snitch Expert

In addition, I discuss methods for obtaining information about snitches (including a laundry list of items to request through discovery/as *Brady*, or to seek out through investigation), special cautionary jury instructions and some recent legislative reforms in other jurisdictions.

Understanding that the retention rate for late-day CLE presentations is exceedingly low, I made this outline as thorough as possible so that when you're ready to litigate a snitch case, you won't need to rely on your powers of recall. If it's at issue in your case, I probably at least touch on it in here. Moreover, most of what I've included has been litigated by someone, be it myself, a law partner or another colleague; if you'd like to brainstorm any of these issues or would like additional resources, feel free to contact me at the info listed above.

For our purposes, a snitch includes cooperating co-defendants/accomplices, confidential informants, "police plants", jailhouse informants or anyone else providing testimony in exchange for benefits.

II. The Problem with Snitches

a. Snitches are the Most Common Source of False Capital Convictions

- As of January 23, 2012, there were 140 death row exonerations in the United States since the death penalty moratorium ended in 1973.
- A 2004 analysis of 111 of those exonerations demonstrated that in 46% of them, the false conviction was based in whole or in part on the false testimony of a snitch. CENTER OF WRONGFUL CONVICTIONS, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row* 3 (2004), *at* www.law.northwestern.edu/wrongfulconvictions/documents/SnitchSystemBooklet.pdf. 14.
    - This is by far the leading cause of false convictions in capital cases. Erroneous eyewitness identification placed a distant second at 25.2%, followed by false confessions at 14.4%, and false or misleading scientific evidence at 9.9%. *Id*.
- The Innocence Project has further reported that in 15% of cases of all wrongful convictions overturned by DNA testing, an informant or snitch testified at trial. *See* http://www.themip.org/index.php/snitch-testimony.
- A comprehensive historical study of 350 erroneous convictions concluded that one-third of them were due to "perjury by prosecution witnesses", particularly co-conspirators—twice as many as the next leading source, erroneous eyewitness identification. H. Bedau & M. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 173 (1987).

b. Snitches are a Common Source of False Convictions in Virginia

E.g. The Case of Michael Hash:

> *The case of Michael Hash illustrates another way jailhouse snitch testimony can be used for impure ends: in Hash's case, law enforcement allegedly used a known jailhouse snitch as a de facto police agent in order to attain a conviction. Hash was just 15 when his 74-year-old mail carrier Thelma Scroggins was shot to death in 1996. A new sheriff reopened the cold case four years later and the then 19-year-old Hash found himself charged with murder, despite limited evidence.*
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> *While incarcerated pre-trial, Hash was moved from the local jail in Culpeper, Virginia to Albemarle Charlottesville Regional Jail specifically to be housed with noted jailhouse snitch Paul Carter. Carter, who was being housed on federal drug charges, has testified roughly 20 times – so it was little surprise that he would later testify against Hash. At trial, Carter said prosecutors had not promised him any lenience for his testimony – yet he was released shortly after the Hash trial.*
>
> *Last year, Michael Hash was released from prison after 12 years when his conviction was overturned due to "outrageous misconduct" by prosecutors and*

law enforcement. Hash has since filed a federal civil lawsuit against the Commonwealth Attorney, Sheriff and jailhouse snitch (among others) for violating Hash's constitutional right to due process and malicious prosecution.

The lawsuit maintains that Paul Carter "made himself available to anybody and everybody in the enforcement community when he felt he had some information that was helpful." While he was awaiting sentence himself, Carter allegedly told his lawyer "I'm not still involve[d] with this crime life. I just find things out to cut my time down." Hash's attorneys say law enforcement officials met with Carter beforehand to brief him on the case against Hash before setting the two up to meet in jail.

Hash seeks unspecified compensatory and punitive damages – as well as reimbursement of legal fees. No trial date is set at this time.

B. Lavietes, "Deal or no deal? The struggle with jailhouse snitches" (July 14, 2014) at http://www.crimelibrary.com/blog/article/deal-or-no-deal-the-struggle-with-jailhouse-snitches/index.html. See also, Allison B. Champion, Hash 'completely free', Culpeper Star Exponent (Aug. 20, 2012).

c. Purported Safeguards are Ineffective/Insufficient

CROSS-EXAMINATION

Cross as the traditional safeguard: *Hoffa v. United States*: Courts have traditionally permitted snitches to testify on the assumption that cross-examination will adequately test an informant's truthfulness. *See Hoffa v. United States*, 385 U.S. 293, 311 (1966).

- In *Hoffa*, the Supreme Court upheld the use of a compensated informant, holding that his testimony did not violate the defendant's right to due process, in large part because of the availability of cross-examination.
- "The established safeguards of the Anglo- American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." *Id.* at 311
    - *See also United States v. Cervantes-Pacheco*, 826 F.2d, 310 315 (5th Cir. 1987) (procedural protections of discovery, cross-examination, and jury instructions regarding informants satisfy due process).

Despite *Hoffa*, social science tells us our current safeguards are not serving their purpose. Cross is simply inadequate to expose the lies of snitches.

- Why is Cross Inadequate?
    1. Can't corroborate: Informants usually have information that cannot be corroborated or rebutted; moreover, with direct knowledge of the offense, they know if corroboration/rebuttal will exist, and can shape their story to accommodate circumstances.
        i. R. Michael Cassidy, *"Soft Words Of Hope:" Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 Nw. U. L.

REV. 1129, 1140 (2004) (noting that prosecutors report that "[a]ccomplice witnesses are very eager to please the government, precisely because they perceive that their future liberty and safety depend on it").
    1. "Accomplices can manipulate their versions of events without arousing much suspicion precisely because they are immersed in the details of the crime and know which aspects of the enterprise are verifiable and which are not."
2. No defense access: Defense has no pretrial access to the informant, and often lacks access to persons with whom that person is acquainted who may have info about his credibility
3. Routine/regular prosecutorial access:
    i. Commonwealth on the other hand can debrief them whenever they want;
    ii. Can work through informant's counsel;
    iii. Can tell them what version it is that they want to present; can even put that requirement in the cooperation agreement
    iv. As a result, Commonwealth is overprepared for snitch testimony, and the defense may not be prepared at all.
4. Incentive to protect snitch: Commonwealth has an incentive to ensure he's insulated from cross—has hinged the case on the word of someone who might lie
5. Imprimatur of Government: Snitch testimony bears the imprimatur of the government, and juries often trust the Commonwealth's judgment in evaluating and believing a cooperator, especially in serious cases, thereby "bolstering" the testimony
6. Informant's personal incentives: Informant himself has the greatest incentive to practice & get story straight

Cross is often less effective the more serious the lie:

- George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 54 (2000): "Paradoxically, the more a witness's fate depends on the success of the prosecution, the more resistant the witness will be to cross-examination. A witness whose future depends on currying the government's favor will formulate a consistent and credible story calculated to procure an agreement with the government and will adhere religiously at trial to her prior statements."

PROSECUTORIAL DISCRETION

Even under the best circumstances, with a well-meaning prosecutor, requiring prosecutors to employ their discretion to exclude questionable snitch testimony provides little if any protection to defendants. That said, it is true that every prosecutor has an obligation to propound only truthful testimony, and thus to be wary of false snitch testimony.

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

For a number of reasons, ***prosecutors have a very hard time distinguishing what's true from what's false***, which puts them in a weak position to assess/guarantee snitch reliability. Some of those reasons are as follows:

1) <u>The objective of a lying snitch is to evade detection</u>:
    a) Snitch is aware that any hopes of leniency rested on his ability to provide the Commonwealth with useful information.
    b) The Commonwealth is therefore the focus of his efforts to escape punishment
    c) If he IS lying, the Commonwealth will be last person to whom he will disclose his lie
    d) <u>Prosecutors are aware of this</u>
        i) A Fordham law review article included candid comments from a number of current and former prosecutors concerning their use of informants and awareness of the various factors influencing veracity. Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 (1999):
            (1) "'It is not that [the cooperator] thinks he's fabricating information[;] [h]e's just eager to please.'"
            (2) "Many [cooperators] come in believing This Is What They Want To Hear Time rather than This Is What Happened Time. Thus, the last thing you want to do is to feed them information because they will believe you want them to parrot back that information." *Id*. at 955.
            (3) <u>Do snitches embellish the truth?</u> One former chief US Attorney answered that question as follows:
                (a) "All I know is that truth is elusive. Everyone tells you things and people don't even know if they are embellishing. The greater the incentive structure, the greater the risk of incriminating others. How much do you really remember? Mistakes and concurrences vary and now, if you tell them to a partisan lawyer and it fits the theory, it becomes frozen in the story because it is useful. The client is alert. His ears pick up when he reveals certain facts that pique the prosecutor or agent." *Id*. at 953.

ii) Steven M. Cohen, *What Is True? Perspectives of a Former Prosecutor*, 23 CARDOZO L. REV. 817, 824 n.16 (2002). According to another former high ranking prosecutor, "most prosecutors candidly admit that they are aware of instances in which cooperators have lied and the lies have gone undetected long enough to have an impact on the investigation."
   (1) "For obvious reasons, when there is little information in the possession of (or available to) the prosecutor, the defendant's value as a cooperator increases. Unfortunately, that very lack of evidence tends to make it much more difficult to evaluate the veracity of the would-be cooperator". . . . In such situations, "the prosecutor is forced to rely to a greater extent on his 'gut reaction' than on tangible evidence. How successful are prosecutors in relying on their 'gut reactions' when assessing would-be cooperators? The answer is unclear." . . . . ([use of cooperating witnesses] "is laden with risk.". *Id*.

2) <u>Despite their awareness, prosecutors are under pressure to use snitches to secure convictions, esp. in absence of other evidence</u>
   a) Barry Tarlow, a former prosecutor, explained in a Champion article that prosecutors are often drawn in by informants who have strong motivations to pin responsibility on others, and notes the heavy pressures on prosecutors to rely on unreliable compensated witnesses when others are unavailable. *See* Barry Tarlow, *Perjuring Informants Brought to the Bar*, RICO Report, CHAMPION 33-40 (July 2000)
   b) Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1596- 97 (2006) ("even 'virtuous,' 'conscientious,' and 'prudent' prosecutors fall prey to cognitive failures"—people naturally tend to view information that reinforces their existing beliefs favorably, and therefore seek out consonant evidence while scrutinizing dissonant evidence).

3) <u>Prosecutors are humans, and humans are terrible lie-detectors</u>: Even removing all of those practical dynamics influencing truth-telling, prosecutors and police—like everyone else—have great difficulty telling a truth-teller from a liar
   a) Paul Ekman & Maureen O'Sullivan, Who Can Catch a Liar?, 46 AM. PSYCHOLOGIST 913, 913-17 (Sept. 1991): Experimenters presented video clips of individual persons describing feelings about a movie each was allegedly watching; ***trial judges performed only slightly better than chance in determining who was lying*** about watching the movie, and confidence was not correlated to performance.
   b) Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident But Erroneous*, 23 CARDOZO L. REV. 809 (2002).
      i) Overview of empirical research including dozens of studies wherein a "compelling pattern emerges" that "people are poor human lie detectors"
      ii) ***Research consistently indicates that the average person attempting to make a truthfulness determination is only accurate about 55***

percent of the time, "barely better, statistically, than flipping a coin." *Id*. at 810.

c) Bella M. DePaulo et al., *The Accuracy-Confidence Correlation in the Detection of Deception*, 1 PERSONALITY & SOC. PSYCHOL. REV. 346 (1997): "[E]ven those cues that really are linked to deceit are linked only probabilistically. There is no behavior that always occurs when people are lying and never occurs when they are telling the truth.".

"Creating a 'market that is biased in the sense that payments are made for inculpatory but not exculpatory information'"; Professor Adina Schwartz, on the snitch system blurring the lines between prosecution and defense:

> *"[A]s cooperation becomes increasingly prevalent, defense attorneys are increasingly obligated to assist their clients to become "signed on" to assist the government in prosecuting others. Thus, an adversarial relationship between prosecution and defense is increasingly replaced by an exchange relationship in which defendants and their attorneys are enlisted on the prosecution's side.*
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> *...*
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> *[I]t becomes a matter of self-interest for the typical defendant to enter into a cooperation agreement as soon as possible. Unlike pleading guilty, cooperating does not only involve relinquishing one's own trial rights and presumption of innocence. Cooperating defendants switch from shielding themselves with the presumption of innocence to joining with the prosecution in depriving others of that shield. This shift in defendants' interests threatens the systemic defense role of challenging government power. Defense attorneys cannot fulfill their duty of loyalty to individual defendants by assisting them to become and remain part of the prosecution team without abandoning their traditional function of asserting the presumption of innocence and insisting that rights be protected during investigations and prosecutions."*
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> Adina Schwartz, "A Market in Liberty: Corruption, Cooperation, and the Federal Criminal Justice System," in W. Heffernan & J. Kleinig, Private and Public Corruption (Rowman & Littlefield 2004).

III. Courts, Scholars and Even Prosecutors Have Long Been Aware of the Reliability Concerns Surrounding Snitch Testimony

Where the government offers to spare a defendant his life in exchange for helpful testimony, the incentive to provide that testimony, regardless of its veracity, is immense. The incentives where the snitch is not facing capital murder charges are nearly as significant. Everyone knows this, even prosecutors, as discussed above. The following are some helpful quotations you can use in your snitch litigation to highlight this fact. This really is just a sampling—in virtually every jurisdiction there's at least one very good case commenting on how skeptically the law should view snitch testimony:

- Former U.S. Attorney General Edward H. Levi, in promulgating new guidelines for use of informants in federal cases: “Courts have long recognized that the government’s use of informants is lawful and may often be essential to the effectiveness of properly authorized law enforcement investigations. However, the technique of using informants . . . may involve an element of deception and intrusion into the privacy of individuals or may require government cooperation with persons whose reliability and motivation may be open to question, [and therefore] should be carefully limited. Thus . . . it is imperative that special care be taken not only to minimize their use but also to ensure that individual rights are not infringed and that the government itself does not become a violator of the law.” *Att’y. Gen’l. Guidelines for FBI Use of Informants in Domestic Security, Organized Crime and Other Crim. Investigations* (Dec. 15, 1976), in FBI Oversight: Hearings Before the Subcommittee on Civil and Const. Rights of the House Oversight Committee on the Judiciary, 95th Cong., 1st Sess. 50-53.

- U.S Department of Justice: "**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 doublecrossing 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. They 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 informant' one day may turn into a consummate prevaricator the next." Prosecution of Public Corruption Cases (Dept. of Justice Feb. 1988), pp. 117-118.

- “The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious questions of credibility.” *On Lee v. United States*, 343 U.S. 747, 755 (1952).

- “[A]n informant who has been promised a benefit by the State in return for his or her testimony has a powerful incentive, fueled by self-interest, to falsely implicate the accused. Consequently, the testimony of such an informant, like that of an accomplice, is inevitably suspect.” *State v. Patterson*, 886 A.2d 777 (Conn. 2005).

- **Compensated testimony “create(s) fertile fields from which truth-bending or even perjury could grow, threatening the core of a trial’s legitimacy**.” *United States v. Levenite*, 277 F.3d 454, 461 (4th Cir. 2002).

- “The use of informants to investigate and prosecute persons engaged in clandestine criminal activity is fraught with peril. This hazard is a matter ‘capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned’ and thus of which we can take judicial notice. . . . “Our

judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison."" *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993).

- "Never has it been more true that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is . . . to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration." *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1123 (9th Cir. 2001).

- "[W]e strongly question the reliability of testimony which was given in exchange for a reduced sentence. The testimony of jailhouse informants or 'snitches', is becoming an increasing problem in this state, as well as throughout the American criminal justice system. The present case is one of many across the nation where the truthfulness of the informant has been called into question. Informants…are offering evidence against their fellow inmates in exchange for reduced sentences. In the process of reaping their benefit, they are manipulating the system by helping to convict innocent citizens." *McNeal v. State*, 551 So.2d 151, 158 (Miss. 1989).

IV. Basic Constitutional Principles Guiding "The Factfinding Mission" in Capital Cases

The mere fact that the Commonwealth intends to use a snitch—an inherently unreliable source of information—in convicting and punishing your client should give rise to dramatically expanded rights in obtaining and challenging evidence. Combined with already-expanded due process rights in capital cases means you have legitimate grounds to ask for what might seem like extraordinary relief in a non-capital, non-snitch case. Some of the relevant constitutional authority supporting expanded protections in capital cases is discussed below, and should be cited in conjunction with authority on the unreliability of snitch testimony.

DEATH IS DIFFERENT

- "The penalty of death is qualitatively different from a sentence of imprisonment, however, long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *see Furman v. Georgia*, 408 U.S. 238, 306 (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability.").
- ***Because "death is different," the United States Constitution requires that "extraordinary measures [be taken] to [afford] process that will guarantee, as much as humanly possible, that" a sentence of death not be "imposed out of whim, passion, prejudice, or mistake."*** *Caldwell v. Mississippi*, 472 U.S.

320, 329 n.2 (1985) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1981) (O'Connor, J., concurring). Indeed, "[t]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Caspari v. Bolden*, 510 U.S. 383, 393 (1994).

- Expanded due process should apply at every stage of proceedings: This elevated concern for the rights of capital defendants applies not only during the penalty phase of a capital trial, but to any stage of the proceedings, including the guilt phase and its antecedent preparations. "To insure that the death penalty is indeed imposed on a basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." *Beck v. Alabama*, 447 U.S. 625, 638 (1980). *See also Kyles v. Whitley*, 514 U.S. 419 (1995) (noting that the Court's "duty to search for constitutional error with painstaking care is never more exacting than in a capital case").

ARBITRARINESS/RELIABILITY

- According to the Supreme Court, enhancing the reliability of the system begins with addressing arbitrariness. In *Furman v. Georgia*, the Supreme Court found that statutes giving unbridled discretion to the jury in deciding whether to impose a death sentence violated the Eighth and Fourteenth Amendments to the U.S. Constitution. 408 U.S. 238 (1972). Lacking standards to channel the jury's discretion, the risk was too great that the death penalty would be "wantonly and freakishly imposed"; even if every person sentenced to death was guilty, the fact that there was no explanation for why others just as culpable were spared death would be enough to violate the constitution. *Id*. (Arbitrary imposition of the death penalty is "cruel and unusual in the same way that being struck by lightning is cruel and unusual.").
- Protections against arbitrariness also include a substantive component ensuring that ***only those most deserving*** will be executed. *See Zant v. Stephens*, 462 U.S. 862, 877 (U.S. 1983) (noting agreement among Furman justices that ***capital punishment be restricted to "the worst criminals", the most "reprehensible", and to "extreme cases"*** involving crimes "themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.").

V. Motions

a. Reliability Hearing

Defense counsel should move to exclude snitch testimony as unreliable. Procedurally you could request a reliability hearing in advance of an evidentiary hearing, or you could simply file a motion in limine to exclude the testimony of the snitch as unreliable (but expect that you'll have the argument about whether a hearing is proper prior to calling evidence). Grounds for excluding snitch testimony as unreliable are as follows:

1) A conviction based on testimony known by the government to be false, including false testimony left uncorrected at trial, violates Due Process.
   a) *See Napue v. Illinois*, 360 U.S. 264 (1959).
   b) *See United States v. Wallach*, 935 F.2d6 445 (2nd Cir. 1991) ("Indeed, if it is established that the government knowingly permitted the introduction of false testimony 'reversal is virtually automatic.'")

2) Informants pose an inherent risk of providing false testimony; court must implement measures to minimize that risk
   a) Because criminal informants pose such a high risk of false testimony, numerous courts and state legislatures have ordered special relief to defendants to safeguard against false testimony by informants, including expanded discovery, corroboration requirements and special jury instructions.
      i) *See, e.g., United States v. Levenite*, 277 F.3d 454, 459-62 (4th Cir. 2002). Compensated testimony "create[s] fertile fields from which truth-bending or even perjury could grow, threatening the core of a trial's legitimacy." *Id*. at 462. Such testimony "may be approved only rarely and under the highest scrutiny." *Id.*
   b) Combined with enhanced due process protections in all capital cases, the risk of an unreliable determination of guilt in a snitch case demands additional and unusual relief tailored to the problem at hand.

3) Pretrial reliability determination falls within the court's ordinary role as a gatekeeper:
   a) More prejudicial than probative: The Court has a duty to weed out unfairly prejudicial, confusing or misleading evidence before trial, even if there's an argument as to its relevancy
      i) VA. S. CT. RULE 2:403: Exclusion of Relevant Evidence on Grounds of Prejudice, etc: "Relevant evidence may be excluded if: (a) the probative value of the evidence is substantially outweighed by (i) the danger of unfair prejudice, or (ii) its likelihood of confusing or misleading the trier of fact…"
   b) Courts encouraged to evaluate competency/reliability in pretrial hearings: The court may resolve witness competency/reliability issues before trial if required by law "or in the interests of justice".

i) VA. S. CT. RULE 2:104: Preliminary determinations: The court determines qualifications of a person to be a witness" and "the admissibility of evidence". Moreover pretrial "hearings on preliminary matters" other than confessions shall be conducted "out of the hearing of the jury . . . . whenever a statute, rule, case law or the interests of justice require, or when an accused is a witness and so requests."
ii) Source note for 2:104(c): "The rule recognizes that it is desirable to have hearings on evidence issues outside the presence of the jury to assure that the jury is not influenced by evidence that is ruled inadmissible or by arguments and comments of counsel. It implements existing Virginia law. *Matthews v. Commonwealth*, 207 Va. 915, 918-20; *Enoch v. Commonwealth*, 141 Va. 411, 426-37 (1925).
iii) *O'Dell v. Commonwealth*, 234 Va. 672, 695-696 (Va. 1988): "First, O'Dell argues that he was entitled to a separate hearing out of the presence of the jury to enable the trial court to make a determination of the admissibility of the test results. A separate hearing is generally advisable to avoid a possible mistrial in the event a trial court concludes the tests are not sufficiently reliable to be introduced in evidence."

4) <u>Snitch testimony akin to expert testimony, for which pretrial admissibility hearings are virtually routine</u>
   a) Why do courts conduct pretrial hearings on the admissibility of expert witnesses?
      i) <u>Competency</u>: is this person knowledgeable and qualified to speak on the topic? Can he be trusted?
      ii) <u>Reliability</u>: is the testimony going to provide information that aids the jury in reliably determining guilt or innocence?
      iii) <u>Objectivity</u>: is he neutral or so biased (as a compensated witness) that his opinions should not be admitted?
   b) Why not just address those issues at trial?
      i) They are compensated witnesses and thus under the "control" of one party only
      ii) Their testimony is highly persuasive to juries
      iii) Cross-examination alone is often insufficient to highlight those deficiencies
   c) Parallels between experts and snitches
      i) Both compensated witnesses with significant incentive to help the propounding party
      ii) Are under the control of one party and unavailable to opposing counsel for pretrial preparation/investigation
      iii) In possession of information which is often impossible to corroborate and therefore very difficult to attack on cross-exam
      iv) Their testimony is often first-hand, direct evidence of the crime, implicitly sanctioned by the government, and therefore highly persuasive as a result

5) Other courts have conducted snitch reliability hearings, pursuant to statute or court order
   a) ILL. COMP. STAT., ch. 725, § 5/115-21(d) (requiring courts to hold reliability hearings whenever the government seeks to use a jailhouse informant in a capital case)
   b) *Dodd v. State*, 993 P.2d 778, 784 (Ok. Ct. of Crim. App. Jan. 6, 2000) (Strubhar, J., concurring) (approving lower court imposition of "reliability hearing" comparable to *Daubert* hearing)
   c) *D'Agostino v. State*, 823 P.2d 283 (Nev. 1992) (holding that before "jailhouse incrimination" testimony is admissible the "trial judge [must] first determine[] that the details of the admissions supply a sufficient indicia of reliability")
      i) A legally unsophisticated jury has little knowledge as to the types of pressures and inducements that jail inmates are under to 'cooperate' with the state and to say anything that is 'helpful' to the state's case. It is up to the trial judge to see that there are sufficient assurances of reliability prior to admitting the kind of amorphous testimony presented to keep this kind of unreliable evidence out of the hands of the jury." *Id*. at 284.

6) In sum, allowing snitch testimony to poison a just determination of guilt, under the usual restraint that only the jury will assess the credibility of the witness is, "to ignore as judges what we know as men". *Watson v. Indiana*, 338 U.S. 49, 52 (1949).

b. Motion to Bar Uncorroborated Snitch Evidence

As noted in a number of the jury instructions discussed below, several states have barred conviction for any crime based solely on the testimony of a snitch. Those states require corroboration of the testimony, and corroboration beyond simply that a crime occurred. The arguments to bar uncorroborated snitch testimony rely on general arguments about snitch reliability, and could be advanced along with a motion for a reliability hearing/to exclude snitch testimony as unreliable.

c. Motion to Bar Testimony Pursuant to Unconstitutional Cooperation Agreement (Consistency Provision)

Depending on how the Commonwealth developed your snitch and the agreement it reached with him, you may have an argument to preclude his testimony on the grounds that his cooperation was unconstitutional. This issue is more or less novel, having only been litigated in several states thusfar, with differing results. Much of the following research is borrowed from the writ petition and amicus briefs in *Bannister v. Illinois*, one of the cases where the issue was raised. *Bannister v. Illinois*, 131 S. Ct. 638 (2010) (petition for writ of certiorari denied).

The basic argument is that any cooperation agreement that includes "consistency" with prior statements (usually made during a debriefing) as a condition subverts the truth-seeking functions of trial, and is therefore unconstitutional. The specifics are discussed below.

1) Introduction: Introducing testimony offered pursuant to a provision binding the snitch to testify consistently with prior statements made to the police or prosecutors while not under oath contravenes due process, subverting the truth-seeking function of trial by interfering with the cooperator's oath to testify truthfully and disturbing the ability of the jury to determine the truth for itself. Contractually binding that individual to give particular testimony in support of a death sentence raises important questions about the integrity of the criminal process, and should be prohibited.

2) Ideal plea agreement: testimony conditioned on "truthfulness" only. *See State v. Fisher*, 859 P.2d 179, 184 (Ariz. 1993) ("The prosecution should have bargained . . . only for truthful and accurate testimony. Such an agreement maintains the integrity of the plea agreement process and promotes a fair trial without encouraging unreliable testimony.").

3) Consistency provisions: Rather than condition leniency on truthfulness alone, some agreements require "consistency" with prior unsworn statements, in particular those that the government has accepted and endorsed as true.
   a) Consistency provisions ordinarily arise in the most serious and "thorny" cases: Both in the Commonwealth and elsewhere, prosecutors seem to reserve consistency provisions for cases in which the cooperators have made prior inconsistent statements and there is no direct corroboration for the story that the prosecution wants the witness to recite.
   b) Example of a consistency provision: "I understand and agree that should I provide testimony in any hearing or trial that is different in any material respect from my prior testimony or the information that I provided during one or more debriefings with law-enforcement officers, that such materially different testimony shall constitute grounds for the immediate revocation of this agreement in addition to any other applicable criminal charges"

4) The Dilemma: A provision of this nature binds the cooperating witness to the story he told when debriefed with police or the prosecutors; the story the government has embraced as the truth. It *prohibits* any material deviation from the version sanctioned by the prosecutor, particularly any version that deviates to the benefit of the defendant.
   a) This interferes with the "truth-seeking" functions of trial: The "central function of the trial . . . is to discover the truth." *Portuondo v. Agard,* 529 U.S. 61, 73 (2000). Two general "truth-seeking requirements" preclude the prosecution from introducing witness testimony that is subject to a consistency provision:
      i) 1) the prosecution may not interfere with a witness' oath to tell "the whole truth";

ii) 2) the prosecution may not act as an arbiter of truth, impeding the jury's ability to determine the truth for itself based on the evidence.

OATH TO TELL "THE WHOLE TRUTH"

1) Common law tradition required oath to tell the whole truth
   a) Judiciary Act of 1789: witnesses "shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth." An Act to Establish the Judicial Courts of the United States § 30, 1 Stat. 73, 89 (1789).
   b) U.S. Supreme Court: The oath "impress[es the witness] with the seriousness of the matter," *Maryland v. Craig*, 497 U.S. 836, 845-46 (1990) (*quoting California v. Green*, 399 U.S. 149, 159 (1970)), and it "guard[s] against the lie by the possibility of a penalty for perjury." *Green*, 399 U.S. at 158.
2) Oath and Due Process: This has carried forward to modern procedure, and given rise to a number of specific Due Process protections:
   a) Prosecution may not present testimony from a witness who is unwilling, or compromised in his ability, to testify to the whole truth.
   b) May not knowingly present false testimony at trial. *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935) (per curiam).
   c) May not allow testimony from a government witness that it knows to be false or incomplete to stand uncorrected. *See Napue v. Illinois*, 360 U.S. 264, 269-70 (1959); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (per curiam).
3) Consistency provision interferes with the oath (and Due Process)
   a) Instead of the oath alone, witness is bound by his "contract" to tell the same story he told before.
   b) If he doesn't he will be punished according to the terms of the contract.
   c) The consistency provision therefore binds the snitch to prior, unsworn statements (often with a threat of loss of liberty or death), rather than binding him to the truth alone, under penalty of perjury.
      i) Presenting accomplice testimony subject to consistency provisions, therefore, "taint[s] the truth-seeking function of the courts by placing undue pressure on witnesses to stick with one version of the facts regardless of its truthfulness." *State v. Fisher*, 859 P.2d 179, 184 (Ariz. 1993).

JURY MUST DETERMINE TRUTH FOR ITSELF

1) Jury alone decides who is telling the truth:
   a) In our adversarial system of justice, during a criminal trial the Commonwealth and the defendant present competing versions of the truth, and the jury (or the court sitting without a jury) decides whether the prosecution has proven its case beyond a reasonable doubt. This determination rests in large part on the jury's view of the credibility of witnesses and the stories they tell.
   b) In that regard, as Virginia courts routinely instruct in criminal cases, the jurors alone "are the judges of the facts, the credibility of the witnesses, and the weight of the evidence." Virginia Model Jury Instructions, No. 2.500. The

prosecution may play no role in that process, nor may it interfere with the jury's ability to fill that role.

2) Cooperation agreement with consistency provision substitutes prosecutor's judgment for that of the jury:
   a) The Due Process Clause "preserve[s] the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles v. Whitley,* 514 U.S. 419, 440 (1995).
      i) For this reason the Commonwealth may not withhold material exculpatory evidence from the jury's purview. *Id.* at 432; *see also Brady v. Maryland,* 373 U.S. 83 (1963). In addition it may not "vouch" for a witness, suggesting personal knowledge of the truth beyond what the jury heard, or implying "that the prosecutor knows what the truth is and is assuring its revelation." *United States v. Brown*, 720 F.2d 1059, 1073 (9th Cir. 1983) (quoting *United States v. Roberts*, 618 F.2d 530, 536 (9th Cir. 1980). *See also Young v.United States,* 470 U.S. 1, 18-19 (1985).
      ii) Moreover, the Commonwealth may not introduce witness identification testimony that it has unduly influenced before putting the witness on the stand. *Foster v. California,* 394 U.S. 440, 443 (1969); *see also Manson v. Brathwaite,* 432 U.S. 98, 116 (1977). If the state "[i]n effect . . . repeatedly [says] to the witness, 'This is the man,'" the witness's testimony becomes tainted beyond repair. *Foster,* 394 U.S. at 443.
      iii) Lastly, the government may not use statements it coerced from a suspect—in the classic scenario, present in the case of Earl Washington Jr. case and others, *see Earl Washington*, Innocence Project at http://www.innocenceproject.org/Content/ Earl_Washington.php, the suspect provides a statement, the police tell him that's not what happened, they suggest what did happen, and questioning does not end, nor does pressure subside, until the suspect repeats the "truth" as described by the police. *Id*.
   b) Commonwealth decides what "the truth" is then tells witness to tell "the truth":
      i) Cannot require a snitch to tell the truth and then tell him what the truth is.
      ii) To do so places the prosecutor's "private deliberations" over the jury's role as finder of fact.
         (1) It permits the Commonwealth to define the truth in its own terms and ensures that its witnesses put forth that version of the truth.
      iii) When consistency provisions influence the testimony of witnesses in this manner, it can no longer be said that the jurors alone "are the judges of the facts, the credibility of the witnesses, and the weight of the evidence." Rather, the prosecution invades the province of the factfinder, interferes with its ability to determine the truth for itself, and as a result violates due process.

OTHER POLICY CONSIDERATIONS

1) Threat of perjury diminished: Consistency provisions diminish the threat of perjury: cooperators know that it is highly unlikely that the Commonwealth will later claim that a version of events that it sanctioned was in fact false.

2) Interferes with how people usually recall and recount facts: Halts the normal process of modifying, clarifying and supplementing testimony both during direct and cross examination; a process that essential in the face of thorough questioning in order to arrive at the "whole truth"
   a) Instead, pursuant to consistency provision, one need only review prior statements and repeat them.
   b) If he does, he will gain benefit of the bargain, which is the entire point of his testimony to begin with—his incentive is to satisfy the Commonwealth by repeating the prior narrative, not tell the story as he actually remembers it.
   c) Accordingly, a cooperator who testifies falsely but consistently with prior statements knows he will retain the benefit of his bargain, while a cooperator whose truthful testimony diverges from prior statements knows he will not.

3) Cross-examination is insufficient (and may do more harm than good)
   a) Prosecutors violate due process when they introduce into evidence plea agreements with even an ordinary truthfulness provision and suggest to the jury—by argument, implication, or other language in the agreement itself,—that they have independently verified the truthfulness of the cooperator testimony. *See United States v. Harlow*, 444 F.3d 1255, 1263 (10th Cir. 2006); *see also United States v. Binker*, 795 F.2d 1218, 1222 n.2, 1227 (5th Cir. 1986).
   b) It's vouching—implies "that the prosecutor knows what the truth is and is assuring its revelation." *United States v. Brown*, 720 F.2d 1059, 1073 (9th Cir. 1983) (*quoting United States v. Roberts*, 618 F.2d 530, 536 (9th Cir. 1980)).
   c) A consistency provision sends essentially the same message; a prosecutor evaluated the testimony and believed it, and if after testifying prosecutor seems satisfied with it, the jury should be satisfied, as well.

CASE LAW

Almost all courts confronted with challenges to consistency provisions have disapproved of them. They have disagreed, however, as to whether those provisions violate due process and render testimony inadmissible or the agreements void.

1) Admissible (denied challenge based on consistency provision): Tennessee, Wisconsin, Michigan and Illinois have ruled in favor of admissibility. *See State v. Bolden*, 979 S.W.2d 587 (Tenn. 1998) (no due process violation because truthfulness provision "alongside a consistency provision" means the agreement "hinges upon truthful testimony); *State v. Nerison*, 401 N.W.2d 1, 8 (Wis. 1987) (sanctioning cooperator agreements generally); *People v. Jones*, 600 N.W.2d

652, 656-57 (Mich. Ct. App. 1999) (a consistency provision provides "some incentive" for a witness "to conform [his] trial testimony to [his] prior accounts," but it does not render "the witnesses' testimony so tainted as to be inadmissible."); *People v. Bannister*, 923 N.E.2d 244 (Ill. 2009).

2) Inadmissible (consistency provisions violate due process): U.S. Court of Appeals for the Armed forces and the highest state courts of California, Kansas, Arizona, and Nevada. *See United States v. Stoltz*, 14 C.M.A. 461, 464 (1964) (consistency provisions "obviously detract from the quest for truth"; court "utterly condemned" testimony "as a pollution of the stream of justice."); *United States v. Gilliam*, 23 C.M.A. 4, 8 (1974) (testimony subject to agreement that "required [a witness] to testify in a particular manner" improperly bound the witness "without regard for the sanctity of his oath").
   a) *People v. Allen,* 729 P.2d 115, 130-31 (Cal. 1986) (providing a co-defendant a benefit "subject to the condition that his testimony substantially conform to an earlier statement given to police," renders his testimony "'tainted beyond redemption' and its admission denies the defendant a fair trial.") (citing *People v. Medina,* 116 Cal. Rptr. 133, 141 (Ct. App. 1974). *See also*, *People v. Garrison,* 765 P.2d 419, 428 (Cal. 1989).
   b) *State v. Dixon,* 112 P.3d 883 (Kan. 2005) (The prosecution may not require anything more of cooperators than that they "testify[] completely and truthfully," even when the prior statements at issue were given under oath.).
   c) *State v. Fisher*, 859 P.2d 179 (Ariz. 1993) (declaring unenforceable" the provision in a cooperating witness's "plea agreement requiring that she testify consistently with prior statements to authorities" in that it undermined the reliability and fairness of the trial and plea bargaining process and tainted the truth-seeking function of the trial court by placing undue pressure the witness to adhere to a previous version of the facts regardless of its truthfulness).
   d) In Nevada the prosecution may not present testimony subject to consistency provisions unless there is credible evidence to corroborate the testimony. *Franklin v. State*, 577 P.2d 860 (Nev. 1978).

3) Dicta disapproving of the practice: Courts in three other states have not directly confronted the issue but nonetheless have strongly suggested that the admission of testimony pursuant to a consistency provision violates due process.
   a) *See State v. DeWitt,* 286 N.W.2d 379, 384 (Iowa 1979) (agreeing that plea agreement requiring conformity with specific statements violates due process, but concluding that the plea agreement at issue did not so require), *cert. denied,* 449 U.S. 844 (1980); *State v. Burchett,* 399 N.W.2d 258, 266 (Neb. 1986) (same, reasoning that "it is only where the prosecution has bargained for false or s*pecific testimony),..,* that an accomplice's testimony is so tainted as to require its preclusion" (emphasis added) (citing De*Witt,* 286 N.W.2d at 384)); *State v. Clark,* 743 P.2d 822, 828 (Wash. Ct. App. 1987) (citing the California Court of Appeal's decision in *Medina* for the rule that consistency provisions violate due process but finding no such provision in the case before it).

d. Equal Protection/Selective Prosecution Challenge

In most capital cases involving co-defendants, the Commonwealth will offer to spare one defendant his life in exchange for testimony against the other defendant or defendants. The Commonwealth typically bases its decision concerning which party to offer leniency on ordinary policy concerns such as the efficient administration of justice, the quantum of evidence against each party, and the degree to which each defendant can aid the prosecution. Those aren't constitutional standards for determining who should live or die, however—if a jury used those standards, its verdict would be overturned. Why is it that a prosecutor can decide questions of life or death based on simple policy concerns, rather than on mitigating and aggravating factors like a jury must? The Equal Protection Clause suggests it shouldn't, and below I propose a framework for challenging that offer of leniency to a snitch simply for snitching as an abuse of discretion.

To my knowledge this motion has not been litigated elsewhere. It is a bit complex (maybe even convoluted) so if you are thinking about filing it, or if you are simply interested in the issue, please contact me and I'll send you the motion and memorandum. I'd love to discuss it with you and further develop the argument.

1) The Commonwealth has "broad discretion" to enforce the criminal law. *See Wayte v. United States*, 470 U.S. 598, 607 (1985).
   a) This includes discretion to make charging decisions.
   b) A "'presumption of regularity' supports" the Commonwealth's charging decisions "and 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties'." *United States v. Armstrong*, 517 U.S. 456, 464 (1996), *quoting United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

2) Charging discretion is not unfettered.
   a) Rather, it is "subject to constitutional constraints" including those dictated by the Equal Protection Clauses of the Fifth and Fourteenth Amendments. *United States v. Batchelder*, 442 U.S. 114, 125 (1979).
   b) According to the Equal Protection Clause, a prosecutor's exercise of discretion may not be based on an "unjustifiable standard". *See Armstrong* at 464, *quoting Oyler v. Boles*, 368 U.S. 448, 456 (1962).

3) Capital charging discretion must rely on same standards required for reliable determination of guilt and punishment in capital cases
   a) The standards for ensuring that similar capital defendants are treated similarly are compelled by *Furman v. Georgia*, 408 U.S. 238 (1972), and its progeny and codified in the Virginia Code as elements of a capital offense and aggravating factors justifying a death sentence.
   b) These are the standards "by which the jury [] decide[s] the questions of guilt and sentence". *Gregg v. Georgia*, 428 U.S. 153, 204 (1976) (White, J., concurring).

c) Arbitrariness in the death penalty context occurs where decisions, including charging decisions, are based on any standard other than these.
d) Because they are arbitrary, they are impermissible according to equal protection.

4) Unreliable and arbitrary results
   a) Disproportionality is unavoidable: Inherently results in comparative disproportionality if parties share roughly equal culpability.
   b) Builds unreliability into close cases: If snitch is used, snitch is probably necessary for the Commonwealth to make its case, both for guilt and for death
      i) In other words, it would be a close case but for the snitch
      ii) The snitch—the most unreliable witness imaginable—then becomes the difference between life and death, solely based on the Commonwealth's judgment

5) What relief does the Equal Protection Clause demand?
   a) Per the requirements of *McCleskey* and *Armstrong*, there is a prima facie case of abuse of discretion if there is "some evidence" that defendants are similarly situated but being treated differently.
   b) A proffer of the same charges and the existence of a cooperation agreement arguably satisfies the "some evidence" test
   c) A prima facie case entitles the Defendant to discovery and a justification from the Commonwealth
      i) The Commonwealth must respond to the allegation and state with specificity its grounds for seeking death against your client but not against the snitch
      ii) It may have to produce internal memoranda establishing how it reached its decision
      iii) After production of discovery, the Court may then conduct an evidentiary hearing to determine whether to dismiss the indictments, bar the death penalty, or deny the claim and allow the case to go forward.

e. Motion for Psychiatric Evaluation of Snitch

If the snitch is a professional informant with a prior criminal history, there's a good chance he has some psychiatric history that you can discover through discovery/*Brady* requests or investigation (see below), even if that diagnosis is something like anti-social personality disorder. If you learn of a prior diagnosis (or of attributes that fit a diagnosis) that includes symptoms affecting reliability, you may be able to request a psychiatric evaluation of the snitch. For example, if you learned of sociopathic traits like manipulative behaviors, or of any history of psychosis/delusions, or of any difficulty with forming/retaining memories, you would be right to be concerned about how the snitch's mental health might impact his testimony.

f. Motion for protective measures to prevent government from developing snitch evidence

Massiah v. United States, 377 U.S. 201 (1965), prohibits the government from eliciting statement from a Defendant who is represented by counsel. *See also Texas v. Cobb*, 532 U.S. 162 (2001) (Sixth Amendment invocations covers the offense charged and any same offense under the same elements test; it does not cover other offenses that are merely "close related" or "inextricably intertwined" with the charged offense).

More than in any other type of case, in a capital case the Commonwealth will be constantly trying to develop more evidence against your client. Some of that will be difficult to avoid, like the recording of your client's jail calls and visits. But if you are worried that it might extend beyond surveillance to the use of jailhouse informants, you may wish to ask for protective measures to prevent the government from developing snitch evidence.

POSSIBLE PROTECTIVE MEASURES

1) File a "Notice of Invocation of Right to Counsel and Right to Remain Silent on Behalf of Client" pursuant to *McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204 (1991). For example:
   a) "My client has no intention of talking with anyone other than his attorneys about the facts of this case. He hereby invokes his rights to remain silent and for a lawyer to be present if he is approached by anyone acting in the interest of the Commonwealth, either openly or otherwise. Should someone nonetheless approach my client to speak about the case, he does so in violation of his right to counsel. Moreover, should this court hear of evidence procured by these means at a future hearing, it should view them skeptically, in light of this invocation of rights."
2) Ask the court to preclude the Commonwealth from using or contacting known informants in the jail, or from interviewing cell mates or unit mates without probable cause to believe your client has made incriminating statements.

CASE LAW

- *Massiah v. United States* (1964), 377 U.S. 201 -- Surreptitious interrogation of defendant during continuing investigation following indictment, at a time when defendant was represented by counsel, was a denial of right to counsel under the Sixth Amendment.
- *Illinois v. Perkins* (1990), 496 U.S. 292 -- Massiah does not apply where no charges have been filed and undercover officer is placed in cellblock to seek incriminating information. Also see Hoffa v. United States (1966), 385 U.S. 293.
- *United States v. Henry* (1980), 447 U.S. 264 -- Statements made to inmate in same cell block inadmissible when paid informant had been contacted by government agents and asked to be alert to incriminating statements made by federal prisoners.

- *Maine v. Moulton*, 474 U.S. 159 (1985); *Kuhlman v. Wilson*, 477 U.S. 436, 459 (1986) (must show the "police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks)."
- *Dodd v. Oklahoma*, 993 P.2d 778 2000 (Ok. Ct. Crim. App. 2000): The U.S. Constitution prohibits a jailhouse informant from testifying to a defendant's statements when the informant works for the government and "deliberately elicits" or coerces statements related to a crime for which an accused has been indicted. *See Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (defendant's confession to jailhouse informant was motivated by fear of physical violence and informant's promise of protection found to be coerced - error to admit confession but admission of coerced confession could be harmless error); *Illinois v. Perkins*, 496 U.S. 292 (1990) (government informer permitted to question a prisoner regarding an uncharged crime).

g. Motion for Snitch Expert

This is will be steep hill to climb in a state as expert-averse as the Commonwealth, but attorneys have requested experts on snitches in other states. In doing so, one might highlight that the average juror is unaware of the problem of false testimony by snitches, exactly how the incentive structures affect a snitch psychologically, or the difficulties in distinguishing true and false testimony absent corroboration.

One might also compare snitch experts with some of the more bogus prosecution experts, like gang "experts", who are have been permitted to testify as to habits, tendencies and mannerisms of gang members. Snitches are a distinct group facing cognizable pressures that tend to affect all of them similarly. If one can testify about how those pressures affect the behavior of gang members, why not allow the same with respect to snitches?

VI. Acquiring Information

Just as important as bringing the issue of snitch reliability to the court's attention through pretrial litigation is obtaining information to attack the snitch's credibility at trial, both through discovery/Brady and your own investigation.

a. Brady/Discovery Requests

PROSECUTOR'S DUTIES

Brady includes more than just what exists in prosecutor's file: The Commonwealth's obligation extends beyond what is contained in its file, to all information, in any form, known by all law enforcement or other government agencies involved in this case, whether or not personally known to the individual prosecutor. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (The individual prosecutor has a duty to learn of any *Brady* material known to others acting on the government's behalf, including the police); *see*

also Strickler v. Greene, 527 U.S. 263, 275, n. 12 (1999) (Prosecutor is responsible for all favorable evidence known to those acting on the government's behalf); *Workman v. Commonwealth*, 272 Va. 633, 646, 636 S.E.2d 368, 375 (2006) (same).

Duty to actively investigate: Commonwealth must not only turn over what it has, it must collect what it doesn't. It must seek to corroborate and verify testimony, procure evidence that establishes (or diminishes) its claims, and inquire of all law enforcement agencies involved to ensure that both the prosecution and defense have access to the information required to ensure a fair proceeding and an adequate defense [This principle has been applied to impeachment of government informants, even those whose information merely supported a warrant, and who were not prospective trial witnesses. The prosecution is responsible for any failure to disclose information, and it makes no difference if it was withheld deliberately, or inadvertently because of a simple failure to obtain it. *Id*.; *see also Lowe v. Commonwealth*, 218 Va. 670, 239 S.E.2d 112 (1977), *cert. denied*, 435 U.S. 930 (1977).

ASKING FOR THE INFORMATION

File Early to Frame Issues: Per my law partner, Joe Flood, file a very broad discovery/*Brady* motion for snitch information as early as possible in the case:

> *File this in every case and do so early on to frame the issue for the court in the hopes that as additional issues arise, the snitch evidence will be viewed in a bad light. The timing is critical.*

Preserve Information: In addition, move to preserve information such as investigator notes, recordings, snitch incarceration history, etc. While this information may not always be discoverable, as recent cases have demonstrated, if it is not properly preserved it might be the difference between life and death. This motion should be filed in tandem with the early, broad discovery/*Brady* request, or follow it immediately.

If information is only available upon demonstrating materiality, a proffer as to how the information is favorable may be required:

- VA. S. CT. RULE 2:607: Impeachment of Witnesses: an informant may be impeached "with ANY proof that is relevant to the witness's credibility" and "may be undertaken, *among other means*", by reputation, prior convictions, bias, inconsistent statements, contradiction by other evidence and "any other evidence which is probative on the issue of credibility because of a logical tendency to convince the trier of fact that the witness's perception, memory, or narration is defective or impaired, or that the sincerity or veracity of the witness is questionable."
- VA. S. CT. RULE 2:1101(c) (Applicability of Evidentiary Rules: Permissive application): "Except as otherwise provided by statute or rule, adherence to the Rules of Evidence (other than with respect to privileges) is permissive, not mandatory, in the following situations . . . capital murder sentencing hearings."

SPECIFIC INFORMATION TO REQUEST

Information about the Snitch, his Background and his Character

1) Prior history as an informant: Information that witnesses in the case have previously worked as government informants:
   a) Either as cooperating codefendants OR
   b) As third-parties, paid or otherwise rewarded for assisting in the investigation or prosecution of a crime.
   c) With respect to third-party informants, the Commonwealth should disclose records of monetary payments and the specifics of the deals offered or promises made in prior cases

2) Prior criminal conduct of the snitch
   a) Must be viewed very broadly: Not just felony convictions and crimes of moral turpitude. Why? Because a professional snitch—someone who's snitched before—may have earned leniency on prior occasions (dismissals, reduced charges, recommendations of leniency at sentencing, unopposed reconsideration requests, etc).
      i) Felony convictions, guilty verdicts and withheld findings of guilt;
      ii) Juvenile adjudications (esp relating to credibility or relevant to specific issues in the case or elements of the indictments)
         (1) VA. S. CT. RULE 2:609: "Juvenile adjudications may not be used for impeachment of a witness on the subject of general credibility, but may be used to show bias of the witness *if constitutionally required*."
      iii) Crimes of moral turpitude: convictions, guilty verdicts or withheld findings of guilt for crimes of moral turpitude;
      iv) Uncharged bad acts: Any unadjudicated bad acts that would constitute a felony, crime of moral turpitude or delinquent conduct
      v) Otherwise relevant bad acts: Any conduct, adjudicated or unadjudicated, that is relevant to the indicted offenses, including but not limited to criminal conspiracy, gang involvement, crimes committed for pecuniary benefit, obstruction of justice, perjury, threats, and violent behavior.
      vi) Any offense, charged or uncharged, where informant offered, sought or received any type of benefit, including dismissed offenses, reduced charges and leniency at sentencing
   b) Any evidence that the snitch has engaged in criminal activity. Including
      i) Any instance where any witness was arrested, questioned, or accused of a crime, regardless of whether they were prosecuted;
      ii) Any instance where law enforcement officers prepared, filed and served an affidavit or search warrant seeking an arrest or search of the informant's person, property, or communications
      iii) Or where any witness was named in a warrant even he/she was not the actual target.
   c) Demand that Commonwealth search not only databases, inquire with any police department or prosecutor with whom snitch may have had contact--

d) *See, e.g.*, *Crivens v. Roth*, 172 F.3d 991, 996-99 (7th Cir. 1999) (failure to disclose crimes committed by government witness even if using aliases violated *Brady*); *Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997) (failure to disclose Department of Corrections file, which would have revealed lengthy criminal history, and history of lying to police and blaming others for his own crimes undermined confidence in the verdict, and new trial ordered).

3) Violent character: Prior reputation or disposition for and/or incidents of violent conduct of the potential witnesses for the Commonwealth. Including specific threats, specific acts of violence, all unadjudicated violent conduct, or a general reputation for violence.

4) Reputation and character for untruthfulness: Information revealing a prior reputation or disposition for untruthfulness of the informant. This includes:
   a) General reputation for deception or untruthfulness, whether that opinion is held by employers, neighbors, probation or parole officers, police officers, jailers, family members, friends or acquaintances.
   b) Specific acts of lying, cheating, stealing, dishonesty, deceit or fraud. Examples of such specific acts are as follows:
      i) False statements (about anything oral or written)
      ii) Use of False Names or Identity
      iii) False information on indigency affidavits or in other matters before this or other courts
      iv) False information in applications, leases, contracts, or other business dealings
      v) False or misleading information provided to prison or jail officials
      vi) False testimony in any matter
      vii) Acts of adultery or deceit in personal affairs
      viii) False information to employers

5) False or broken promises by the informant to the courts or other gov't officials.
   a) Violations of a plea or cooperation agreement (in any respect)
   b) Violations of bond conditions, violations of pretrial services
   c) Probation revocations, in any fashion, including through drug use or incurring new charges.
   d) Failures to Appear based upon written "promise to appear"
   e) VA. S. CT. RULE 2:608: "Unadjudicated perjury. If the trial judge makes a threshold determination that a reasonable probability of falsity exists, any witness may be questioned about prior specific instances of unadjudicated perjury."

Information Concerning the Instant Case

1) Consideration and promises of consideration given by the Commonwealth

a) You are entitled to ALL benefits. *United States v. Butler*, 885 F.2d 885, 889 (9th Cir. 1978) (prosecutor held to have erroneously revealed some but not all of the benefits a witness was to receive for his testimony.).
b) The actual cooperation agreement.
    i) In *United States v. Sanfilippo*, 564 F.2d 176 (5th Cir. 1977), a conviction was reversed when the prosecutor failed to disclose the complete plea bargain for a witness' cooperation: "the government argues that [the witness'] prior convictions sufficiently impeached his credibility so that the plea agreement would add nothing. The fact that the history of a witness shows that he might be dishonest does not render cumulative evidence that the prosecution promised immunity for testimony. A jury may very well .... have reached a different decision as to whether [the witness] had fabricated testimony in order to protect himself against another criminal prosecution." (*Id*. at 178.)
c) Preferential treatment or privileges the informant has received as a result of debriefing/agreeing to cooperate, no matter how minimal (e.g. outside food, additional free time/rec time, particular unit/cell assignments, enhanced visitation privileges (longer/unmonitored visits, contact visits, increased frequency, etc.).
d) *Reutter v. Solem*, 888 F.2d 578, 581 (8th Cir. 1989) (failure to inform defense that key witness had applied for commutation and was scheduled to appear before parole board in a few days).

2) <u>Motive to lie</u>
a) Desire for leniency
b) Awareness or apprehension of the potential punishment
c) Negative feelings/personal bias toward defendant or any defense witness
    i) History of hostility/negative interactions
    ii) *See, e.g., Schledwitz v. United States*, 169 F.3d 1003, 1015-16 (6th Cir. 1999) (witness portrayed as neutral and disinterested expert actually had been investigating defendant for years amounted to *Brady* violation); *United States v. O'Connor*, 64 F.3d 355, 359 (8th Cir. 1995) (failure to disclose threats by one government witness against another and attempts by that same government witness to influence testimony of another government witness)
d) Any lies/distortions made while attempting to cooperate/debriefing with police
e) Threats, express or implied, toward the defendant or anyone associated with defense
f) Attempts to obstruct justice or influence/intimidate witnesses (shows witness will scheme/do what it takes to ensure his narrative is accepted)
g) Financial motive: If a case where informant was, is or will be compensated, or if his or his family's financial well-being depend on his liberty, his poor finances are material and must be disclosed:
    i) Bank and credit account records
    ii) Credit history
    iii) Liens, debt, bankruptcies
h) Immigration status
i) The nature/extent of relationships with other state's witnesses or police officers.

3) Information about police officers:
   a) If you suspect the officer's personal biases or modus operandi played a key role in developing the informant, selecting which defendant to whom to offer leniency, etc, you may want to look into the officer's history with snitches, as well.
   b) Personnel files, especially of testifying officers: *See, e.g., United States v. Brooks*, 966 F.2d 1500, 1504 (D.C. Cir. 1992) (prosecutor must search personnel records of police officer/witnesses to fulfill Brady obligations).
   c) Prior instances of police perjury or suborning perjury: *See, e.g., United States v. Cuffie*, 80 F.3d 514, 517 (D.C. Cir. 1996) (failure to disclose perjury by police officer during motion to seal proceeding material attributed to government where prosecutor knew about the perjury).
   d) Knowledge of police intimidation of witnesses: *See, e.g.*, *Guerra v. Johnson*, 90 F.3d 1075, 1079 (5th Cir. 1996) (failure to disclose police intimidation of key witnesses and information regarding suspect seen carrying murder weapon minutes after shooting).

4) Inconsistent/unreliable statements:
   a) Information that the expected and/or actual testimony of any prosecution witness is inconsistent, or is refuted by or fails to corroborate other information known to the Commonwealth
   b) Circumstances of witness statements that indicates a lessened degree of reliability
      i) Medical or mental health condition of the informant
         (1) Keep an eye out for sociopathic traits
         (2) Also low-intelligence/ self-esteem insofar as it affects "compliance"
      ii) Substance abuse history of the informant
      iii) Any evidence the informant was under the influence of substances or any medical or mental health condition at the time of the incident, during any interview/debriefing with the government, or at hearings or trial
   c) Must disclose the inconsistencies whether or not the Commonwealth intends to call them to testify. *United States v. Frost*, 125 F.3d 346, 381-84 (6th Cir. 1997) (*Brady* violation when government does not disclose statement of exculpatory witness, but instead tells defense that witness would provide inculpatory information if called to testify).
   d) Request ALL inconsistencies, express or implied, whenever they occurred, in ANY format:
      i) Taken during informal interviews conducted of the witnesses;
      ii) Formal memoranda or police reports;
      iii) Any grand jury testimony, whether provided by the witnesses themselves, by law enforcement proffer or by other means;
      iv) Proffers by counsel for informant
      v) Courts have ruled that prosecutor and law enforcement notes from interviews with government witness are discoverable and are subject to Brady disclosures:
         (1) *United States v. Service Deli, Inc.*, 151 F.3d 938, 943-44 (9th Cir. 1998) (notes from witness interview that contained three keys pieces of

impeachment information since they showed that story had changed, change may have been brought about by threats of imprisonment, and witness had claimed to have suffered a stroke)

(2) *United States v. Pelullo*, 105 F.3d 117, 122-23 (3d Cir. 1997) (failure to disclose notes of FBI and IRS agents corroborating defendant's version of events and impeaching testimony of government agents).

LEGAL AUTHORITY—BROADER OBLIGATIONS IN SNITCH CASES

Dodd v. Oklahoma, 993 P.2d 778, 784 (Ok. Ct. Crim. App. 2000): At least ten days before trial, the state is required to disclose in discovery:

> *(1) the complete criminal history of the informant;*
> *(2) any deal, promise, inducement, or benefit that the offering party has made or may make in the future to the informant (emphasis added);*
> *(3) the specific statements made by the defendant and the time, place, and manner of their disclosure;*
> *(4) all other cases in which the informant testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for or subsequent to that testimony or statement;*
> *(5) whether at any time the informant recanted that testimony or statement, and if so, a transcript or copy of such recantation; and*
> *(6) any other information relevant to the informant's credibility.*

United States v. Levenite, 277 F.3d 454, 459-62 (4th Cir. 2002): "he Fourth Circuit has prescribed additional procedural guarantees that the government must adhere to where compensated informant witnesses are contemplated. Before such testimony will be permitted:

> *(1) the compensation arrangement must be disclosed to the defendant,*
> *(2) the defendant must have the opportunity to cross-examine the witness, and*
> *(3) the jury must be instructed to engage in heightened scrutiny of the witness.*
>
> *Finally, where the compensation is: contingent on the content or nature of the testimony given, the court must ascertain*
>
> *(1) that the government has independent means, such as corroborating evidence, by which to measure the truthfulness of the witness's testimony and*
> *(2) that the contingency is expressly linked to the witness testifying truthfully.*
>
> *Moreover, when a witness is testifying under such a contingent payment arrangement, the government has a duty to inform the court and opposing counsel when the witness' testimony is inconsistent with the government's expectation.*

Supreme Court of Florida, No. SC13-1541, IN RE: AMENDMENTS TO FLORIDA RULE OF CRIM. PROCEDURE 3.220

Responding to Florida Innocence Comm'n. Report, the Supreme Court of Florida now requires prosecutors "to disclose both a summary of the jailhouse informant's criminal history and just what kind of deal a snitch will be getting in return for testimony. And now, jurors will hear about prior cases that relied on testimony from that particular informant. The justices ordered new restrictions on the much abused informant testimony, because snitches, the court noted, 'constitute the basis for many wrongful convictions.' It was an unanimous decision. It was about time.The new rules require greater disclosure of an informant's criminal background, prior history of providing information to the government, and all their deals. Of particular importance, the Florida court included all informants who allege that they have evidence about defendant statements, not merely "jailhouse snitches," i.e., those who happen to be in jail at the time. The new rule also requires disclosure of benefits that the informant "expects to receive" for his testimony, and it defines benefits broadly as "anything...[including any] personal advantage, vindication, or other benefit that the prosecution, or any person acting on behalf of the prosecution, has knowingly made or may make in the future."

F. Grimm, "Florida's high court puts brakes on snitches' testimony", MIAMI HERALD (July 23, 2014).

b. Investigation

1) Jail calls (see 2012 CDW presentation by Prof. Garrett and D. Ramseur)
2) Informant file
3) Interview arresting law enforcement officers, jail and prison guards
4) School records
5) Employment records
6) Financial records: bank records, liens, bankruptcy, debt, credit info
7) Medical and mental health records
8) Family history/background (through subpoenas/interviews)
9) Previous court testimony
10) Cellmates?
11) Court Files
    a) Plea agreements
    b) Reconsideration requests
    c) Stay of Transfer Orders
    d) Letters from prosecutor recommending leniency

VII. Jury Instructions (and legislative reforms)

Eighteen (or more) states authorize some type of instruction advising the jury to be skeptical of snitch testimony. You want to try to do better than that: use stronger language, require corroboration, etc.

An example I drafted, adapted from instructions that have been granted in California and Oklahoma:

The testimony of informants [cooperating co-defendants] can be especially unreliable and should be given special scrutiny [viewed with distrust], in particular if it is:

1) *In other parts false*
2) *Given under terms of immunity*
3) *Given for leniency or hoped for benefit (including pay, immunity from prosecution, leniency in prosecution, personal advantage,or vindication)*
4) *Given for financial or other reward*
5) *Given influence of drugs or alcohol*

In scrutinizing this testimony, you may consider whether the witness has previously testified as an informant or sought a benefit for his cooperation through any court process, even if that benefit did not materialize; his prior criminal record; prior false testimony or false promises; any other evidence relevant to his credibility as an informant [cooperating co-defendant]

LEGAL AUTHORITY

Dodd v. Oklahoma, 993 P.2d 778, 784 (Ok. Ct. Crim. App. 2000) (cited above):

> *"In all cases, where a court admits jailhouse informant testimony, OUJI-CR 2d. 9-43 (amended as follows) shall be given: The testimony of an informer who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider: (1) whether the witness has received anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony; (2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (3) whether the informant has ever changed his or her testimony; (4) the criminal history of the informant; and (5) any other evidence"*

Legislative Reforms

Several states, including California, Florida and Texas, have in recent years passed legislation mandating corroboration and authorizing jury instructions in snitch cases. The legislation may be used in crafting jury instructions:

California

> *Penal Code section 1111. A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.*

An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

Penal code section 1111.5.

(a) A jury or judge may not convict a defendant, find a special circumstance true, or use a fact in aggravation based on the uncorroborated testimony of an in-custody informant. 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. Corroboration is not sufficient if it merely shows the commission of the offense or the special circumstance or the circumstance in aggravation. Corroboration of an in-custody informant shall not be provided by the testimony of another in-custody informant unless the party calling the in-custody informant as a witness establishes by a preponderance of the evidence that the in-custody informant has not communicated with another in-custody informant on the subject of the testimony.

(b) As used in this section, "in-custody informant" means a person, other than a codefendant, percipient witness, accomplice, or coconspirator, whose testimony is based on statements allegedly made by the defendant while both the defendant and the informant were held within a city or county jail, state penal institution, or correctional institution. Nothing in this section limits or changes the requirements for corroboration of accomplice testimony pursuant to Section 1111.

Penal Code Section 1127a(b): "The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case."

Texas Code of Criminal Procedure Article 38.075 (enacted in 2009)

CORROBORATION OF CERTAIN TESTIMONY REQUIRED.
(a) A defendant may not be convicted of an offense on the testimony of a person to whom the defendant made a statement against the defendant's interest during a time when the person was imprisoned or confined in the same correctional facility as the defendant unless the testimony is corroborated by other evidence tending to connect the defendant to the offense committed. In this subsection, "correctional facility" has the meaning assigned by Section 1.07, Penal Code.
(b) Corroboration is not sufficient for the purposes of this article if the corroboration only shows that the offense was committed.

Other states: Many other states take a half-hearted approach to instructing the jury, stating in more neutral language a closer look at the testimony may be warranted but not stating that it is probably unreliable, and not barring convictions based on uncorroborated accomplice/informant testimony:

- *See, e.g.*, *People v. Atkins*, 243 N.W.2d 292, 294 (Mich. 1976); *Fresneda v. State*, 483 P.2d 1011, 1013 (Alaska 1971); *People v. Bazemore*, 182 N.E.2d 649 (Ill. 1962); *State v. Bruns*, 146 N.W.2d 786 (Neb. 1966); *Crowe v. State*, 441 P.2d 90 (Nev. 1968); *State v. Logner*, 256 S.E.2d 166 (N.C. 1979); *Commonwealth v. Donnelly*, 336 A.2d 632 (Pa. 1975); *State v. Marshall*, 264 N.W.2d 911 (S.D. 1978).
- Connecticut's is a good example of the half-hearted approach. Connecticut Criminal Jury Instruction 2.5-3: Informant Testimony:

> *A witness testified in this case as an informant. An informant is someone who is currently incarcerated or is awaiting trial for some crime other than the crime involved in this case and who obtains information from the defendant regarding the crime in this case and agrees to testify for the state. You must look with particular care at the testimony of an informant and scrutinize it very carefully before you accept it. You should determine the credibility of that witness in the light of any motive for testifying falsely and inculpating the accused.*
>
> *In considering the testimony of this witness, you may consider such things as:*
>
> > *the extent to which the informant's testimony is confirmed by other evidence;*
> >
> > *the specificity of the testimony;*
> >
> > *the extent to which the testimony contains details known only by the perpetrator;*
> >
> > *the extent to which the details of the testimony could be obtained from a source other than the defendant;*
> >
> > *the informant's criminal record;*
> >
> > *any benefits received in exchange for the testimony;*
> >
> > *whether the informant previously has provided reliable or unreliable information; and*
> >
> > *the circumstances under which the informant initially provided the information to the police or the prosecutor, including whether the informant was responding to leading questions.*
>
> *Like all other questions of credibility, this is a question you must decide based on all the evidence presented to you.*

Federal instructions:

- *United States v. Swiderski*, 539 F.2d 854, 859-860 (2d Cir. 1976) (general instruction to jury that it "might also think about whether [the informer] had an interest in testifying" was inadequate to cure omission of informer instruction); *United States v. Garcia*, 528 F.2d 580, 588 (5th Cir. 1976) (drug conviction reversed when failure to give informer instruction sua sponte held to be plain error); *United States v. Lee*, 506 F.2d 111 (D.C. Cir. 1974) (cautionary instruction required when little or no corroboration exists.)

VIII. Additional Legislative Reforms: Illinois

Illinois' history with assessing and ultimately eliminating its system of capital punishment provides excellent examples of why the court should be concerned about using snitches in death penalty trials. In 1999, the Chicago Tribune published a five-part series entitled, *The Failure of the Death Penalty in Illinois* The third part of the series, entitled *The Inside Informant,* documented abuses and perils of the "snitch" system in Illinois. Steve Mills & Ken Armstrong, *The Inside Informant,* Chi. Trib., at 1 (Nov. 16, 1999), at http://articles.chicagotribune.com/1999-11-16/news/9911180109_1_murder-confessions-court-and-police-records-hours-of-tape-recordings. Included was the story of Tommy Dye, a man who "lie[d] about almost everything, even his own name," and who had been documented as lying under oath. *Id.* Despite these obvious shortcomings, Dye's testimony was the centerpiece of the trial that put Steven Manning, a former Chicago police officer, on death row. *Id.* The paper went on to report that in Illinois, at least 46 inmates had been sent to death row in cases where the prosecution used an informant, and that in about half of those cases, the informant played a significant role in the conviction. *Id.*

Following publication of the series, then Governor Ryan created a Commission on Capital Punishment to conduct a comprehensive review of the administration of the death penalty in Illinois, culminating in an exhaustive report confirming the Tribune's findings. *See* Ryan Report. "[I]t takes only a cursory reading of the [Ryan Report] to recognize that it describes men released who were demonstrably innocent or convicted on grossly unreliable evidence." *Kansas v. Marsh*, 126 S. Ct. 2516, 2545 n.2 (Souter, J., dissenting).

The Commission further sought to reduce or eliminate wrongful convictions, making 85 recommendations for reform, many of which focused on "snitch" testimony. *Id.* With respect to prosecutorial discretion, the Report emphasized the unique position of police and prosecutors in evaluating evidence and making charging decisions, recommending periodic training on the risk of false testimony by cooperating witnesses. Ryan Report at 21, 27, 28 (likewise recommending training of attorneys and judges). It also made a variety of specific recommendations regarding the handling of snitch testimony in pretrial proceedings, suggesting government disclosure of detailed information about cooperators (including background, leniency agreements, and any statements material to the case), and pretrial evidentiary hearings to determine the reliability and admissibility of informant testimony, where the court would exclude any testimony not deemed reliable by a preponderance of the evidence. Ryan Report at 120-22. The Report also addressed the problems entailed when cooperator testimony cannot objectively verified, recommending limitations on the death penalty unless that testimony is corroborated. *Id*. In one form or another, the Illinois legislature incorporated all of these recommendations[1], including statutory provisions requiring pretrial admissibility hearings, 725 ILL. COMP. STAT. 5/115-21(c), and "allowing a court to

[1] Illinois has since abolished the death penalty, *see* R. Long, *Death Penalty Dies in Illinois as of Today*, Chi. Trib. (July 01, 2011), *at* http://articles.chicagotribune.com /2011-07-01/ news/chi-death-penalty-dies-in-illinois-as-of-today-20110701_1_death-penalty-maximum-security-prisons-death-row.

decertify a death penalty case when it [found] that the evidence against the defendant, which led to the conviction, was limited to the uncorroborated testimony of an accomplice or a jailhouse snitch." The Justice Project, *Jailhouse Snitch Testimony: A Policy Review*, at 4 (2007), *available at* http://www.pewtrusts.org/.

As has been documented in this outline, many states and federal jurisdictions heed the recommendations of the Ryan Report, at least in part[2]. In addition, a number of governmental and legal organizations have commissioned their own studies assessing and recommending the types of changes needed in capital and non-capital cases alike. For example, the California Commission on the Fair Administration of Justice proposed legislation designed to safeguard against the leading causes of false convictions, including bills that would mandate disclosure of information about "snitches", require special jury instructions concerning reliability, and bar conviction in any case, capital or otherwise, based on the uncorroborated testimony of a cooperating witness. CA. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *Report and Recommendations Regarding Informant Testimony*, at http://www.ccfaj.org/documents/reports/jailhouse/official/official%20report.pdf. The California legislature has enacted some of those recommendations, as discussed above. *See* Cal. Penal Code 1127(a) (requiring jury instructions on reliability). Similarly, the American Bar Association passed a resolution urging governments to identify and attempt to eliminate the causes of erroneous convictions in all capital and non-capital cases, including by specifying the types of information important in assessing "snitch" credibility, mandating prompt disclosure of that information, requiring cautionary jury instructions on reliability, and foregoing prosecution in all cases based solely upon the uncorroborated "snitch" testimony. 18 A.B.A. Resol.108B, House of Delegates (Feb.14, 2005), at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am05115a.authcheckdam.pdf.

[2] *See, e.g.*, CAL. PENAL CODE 1127(a) (requiring the court to instruct the jury that cooperator testimony should be "viewed with caution and close scrutiny"); *Dodd v. State of Oklahoma*, 993 P.2d 778 (2000) (mandating prompt disclosure of information concerning the cooperating witness, similar to Illinois statute, requiring jury instruction on "snitch" reliability, and approving lower court imposition of "reliability hearing" comparable to *Daubert* hearing); *D'Agostino v. State*, 107 Nev. 1001, 823 P.2d 283 (Nev. 1992) (holding that before "jailhouse incrimination" testimony is admissible the "trial judge [must] first determine[] that the details of the admissions supply a sufficient indicia of reliability"); *United States v. Levenite*, 277 F.3d 454, 461 (4th Cir. 2002) (noting that federal law requires disclosure of cooperation agreements as well as cautionary jury instructions); *State v. Grimes*, 982 P.2d 1037 (Mont. 1999) (reliability instruction); *People v. Petschow*, 119 P.3d 495, 504 (Colo. Ct. App. 2004) (reliability instruction where testimony is uncorroborated); *State v. Spiller*, No. 00-2897-CR, 2001 WL 1035213 (Wis. App. Sept. 11, 2001) (reliability instruction); *State v. Patterson*, 886 A.2d 777 (Conn. 2005) (finding it error to exclude reliability instruction and remarking that "an informant who has been promised a benefit by the State in return for his or her testimony has a powerful incentive, fueled by self-interest, to falsely implicate the accused. Consequently, the testimony of such an informant, like that of an accomplice, is inevitably suspect."). *But see* Virginians for Alternatives to the Death Penalty, *Equal Justice and Fair Play: An Assessment of the Capital Justice System in Virginia* (2006), at http://www.acluva.org /publications/EqualJusticeandFairPlay.pdf (noting that, apart from requiring production of *Brady* material, Virginia's death penalty scheme falls well short of the Ryan Report's recommendations pertaining to "snitch" testimony).