TEXAS LAW ENFORCEMENT EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS

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TEXAS LAW ENFORCEMENT EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS

Following are summaries of information which my staff and I have received from members of Texas law enforcement departments regarding their experiences with electronic recording of custodial interrogations. Writings referred to are responses to survey forms distributed by police training firms. The balance of the information was received in telephone conversations; in each case, I mailed a written summary of the conversation to the officer with whom we spoke, for confirmation as to accuracy and completeness.

Our inquiries related solely to interviews of suspects in custody in a detention facility, beginning with the *Miranda* warnings and continuing until the interviews ended. Texas is a one party consent state, hence custodial interviews may be recorded without the suspects' knowledge or consent.

Texas has more than 600 police departments, over 200 sheriff offices, and a state Department of Public Safety. The following summaries represent a small fraction of this total.

Departments are listed alphabetically. The number of sworn officers, and the number of years the departments has been recording, relate to the year of our most recent contact. Many of these communications took place years ago, hence some of this information is no longer current.

• *Abilene Police Department, 2007, 2008:* 182 sworn officers. In 2007, a senior officer stated that for the past several months, the department has recorded the complete custodial questioning of felony suspects by audio and video. "We are very pleased to have the ability to record. We think it's going to enhance prosecutions. The detectives are very happy about it. We think it will provide great evidence in our favor. In 2008 a detective wrote that owing to recordings, investigators have improved their interrogation techniques and perform better knowing the interview is being recorded, and that the video may be watched by prosecutors, judges and juries. "It makes me step up my game," Recordings make it easier to document facts in reports and case jackets, result in greater number of pleas, and fewer allegations of misconduct.

• *Alamo Heights Police Department, 2010:* 23 sworn officers. A detective wrote that they have recorded most felony interviews for four

years, by both audio and video. "Prosecutors prefer video confessions. After review of video we can improve our questioning." Later review of recordings also assists in allowing detectives to observe suspects' responses and body language, to determine if important questions were not asked, to improve interview techniques, and for teaching other officers.

• *Andrews Police Department, 2009:* 16 sworn officers. An officer wrote that most custodial interviews are recorded by audio and video which is visible in the interview room. "Suspects once confessed are taking pleas rather than going to trial." Officers act "more professional," and "try to make suspect the focus." Later review assists in observing suspects' responses, to determine if important questions were omitted, and so officers can improve their techniques.

• *Arlington Police Department, 2004, 2007:* 550 sworn officers. In 2004, a lieutenant stated that in response to a recent request from the Tarrant County District Attorney, "We are going to tape the entire interview. This avoids someone later saying they were coerced or promised something." In 2007, a detective wrote that most custodial interviews of felony suspects are recorded in interview rooms in each of three police stations and at the Alliance for Children. Experience: "Positive – many false allegations by suspects have been disproved due to the interview being recorded."

• *Austin Police Department, 2003, 2004:* 1,431 sworn officers. An assistant district attorney, a legal advisor to the department, and a detective stated that for the past five to ten years, it has been the practice to record by audio and video in three interview rooms custodial interrogations of suspects in homicide, robbery, sexual assault, child abuse, and other serious crimes against persons. A detective stated that he favors recordings because they take away doubt about what occurred, and remove claims of coercion. The department's Homicide Unit Standard Operating Procedure, dated April 20, 2004, provides:

> "The detectives of the Homicide Unit will: ... Require electronic recording of interviews and interrogations of homicide suspects whenever possible. If unusual circumstances exist that make this impossible, then that reason will be thoroughly documented in supplemental form in the incident report, and the interview or interrogation will be thoroughly documented by other means."

• *Burleson Police Department, 2005:* 44 sworn officers. A supervisor wrote and a sergeant stated that custodial interviews of felony suspects conducted by detectives are "almost always" recorded by a camera hidden in the corner of a designated interview room. The supervisor wrote, "We do it from start to finish to keep the defense from bringing up any questions." Later review of recordings is helpful for a number of reasons.

• *Cedar Hill Police Department, 2009*: 65 sworn officers. A lieutenant stated that for the past ten years, electronic recordings are made of all custodial interviews of felony suspects, in two interview rooms. The police department does not have video capability, so interviewers customarily use digital audio recorders. Interviews are also made at the jail, which has several interview rooms with video capability. He stated that recording has been "a good experience. That way, detectives can go back and look at the recording when they're typing up their case notes. It's excellent when you get to court. The DA's office wants recordings." Later review of recordings are helpful for multiple reasons.

• *Cedar Park Police Department, 2005:* 50 sworn officers. A detective stated that custodial interviews of suspects are customarily recorded by both audio and video, and that "recently there has been a tremendous push from prosecutors to secure a recording in every investigation," because "an officer's word is not as credible as it used to be." The department has two interview rooms, and a special room for juveniles. He is very much in favor of recording, because it "saves a lot of work, and provides him with protection against defense attorneys." He also uses recordings to refresh his recollection in case he is called to testify long after an investigation has taken place.

• *Cleburne Police Department, 2004:* 50 sworn officers. Custodial interrogations of felony suspects have been videotaped on a regular basis since 1999. There is one sound-proofed interview room, with hidden cameras. A criminal investigator wrote, "Overall, I believe it is easier to get a suspect to verbally admit that he committed a crime than it is to sign a statement admitting that he did it. We are very glad to be able to record the interrogations…Getting the suspect to confess, and getting him to sign the confession are two different things. With the recording, it doesn't matter if he signs a written confession. In fact, we rarely ever ask for a written confession."

• *Collin County Sheriff, 2005:* 220 sworn officers. For at least the past twelve years, the department has electronically recorded all custodial interviews in rooms equipped for both audio and video. A sergeant stated that his overall experience with recording has been very good, especially helpful for court related purposes. The practice has improved officers' interrogation techniques, because they have a better opportunity to learn what questions to ask and when to ask. The tapes are reviewed to determine whether questions were missed, to improve techniques, and to ensure that documentation is accurate.

• *Corpus Christi Police Department, 2003-04:* 400-plus sworn officers. A senior officer, and an assistant district attorney who acts as legal advisor to the department, stated that in 2003, the department began to videotape custodial interviews on a regular basis all felony and class A and B misdemeanor suspects. The officer stated that recordings are an excellent tool for showing that suspects were warned of their rights. The legal advisor stated that at first detectives were apprehensive about recording because they thought their interviewing techniques would be exposed. However, after they became used to the practice, they uniformly accepted it, and do not want to change back to non-recorded interviews. He also wrote that "officers have found that they especially like the recording process because it is much faster and easier for them to simply record a suspect's interview, rather than the old method of interviewing the suspect, writing down his version of events, having the writing typed up and having the typing signed by the suspect. Simply recording everything means when the interview is over, the suspect's confession is recorded for posterity without all the other paperwork." The Legal Advisor prepared written guidelines for the detectives to follow when conducting videotaped interviews, and the suspect to acknowledge in writing, containing the *Miranda* warnings, and "Do you understand that you are being video recorded?".

• *Dallas County Sheriff, 2009:* Two veteran detectives wrote that the department has recently begun audio recording custodial interviews of certain felony suspects. One wrote that the department is "working on obtaining video in the future," and that "I believe [recording] has helped, especially when it comes to the defense attorney claim of misconduct. The recording is clear evidence that the interrogation was done appropriately." He reviews recording to determine if important questions were omitted, and to improve his interview techniques.

• *Dallas Police Department, 2005, 2006:* 3,000 sworn officers. In 2005, an assistant Dallas County district attorney wrote, "The Dallas Police Department has made a decision to begin making video recordings of their interrogations of murder suspects. We are working with police officials on a training program regarding the law in this area. DPD is in the process of developing their procedures for recording statements. The police hope to begin recording all statements by the end of the summer." In April 2006, a lieutenant stated that since September 2005, questioning of suspects in custody in all homicide investigations are electronically recorded by both audio and video, in four interview rooms equipped for both audio and video; and that the department is planning to expand its recording practice to cover robberies and assaults. He stated that he is "a big fan of recording," and that he has received only positive feedback from the department's detectives. He would support mandatory legislation provided it allowed for some exceptions. In August 2006, a sergeant stated that when the recording policy was adopted in 2005, there was at first resistance from some detectives, but now there is general agreement that recording works well for the police, and the department is considering expanding the kinds of investigations in which recordings will be made.

• *Duncanville Police Department, 2008-09:* 70 sworn officers. A detective wrote that for several years all custodial interviews in felony investigations are videotaped in an interview room. A veteran detective wrote that recording "allows you to review your performance on successful and unsuccessful interviews." Another detective wrote that the department has had "no bad experiences [I] know of" with recording custodial interviews.

• *Florence Police Department, 2006:* 14 sworn officers. A senior officer stated that for the past three years the department has recorded by audio and video the custodial questioning of criminal suspects, pursuant to a "Racial Profiling" protocol which requires "Officers who bring persons into the police department as suspects, witnesses, or victims, will activate the in-house recording system to serve as a document of evidence and to safeguard the officer from any accusations of wrong doing." The officer stated, "The recording of custodial interrogations is a great asset to the police and the suspect. It's a novel approach to keeping officers out of hot water." Recording of questioning of suspects are highly valued by the prosecution, whose first question to the officers are often, "Do you have a taped interview?"

• *Frisco Police Department, 2008:* 11 sworn officers. For the past seven years, audio and video recordings have been made of custodial interrogations of felony suspects. A captain wrote that the recordings are "Great. Makes prosecution much easier. Allows detectives to review (video) later for defensive behaviors." A sergeant wrote that recordings "are a wonderful tool when [they] work properly. It makes you act professional, and is a good training tool."

• *Georgetown Police Department, 2005, 2010:* 83 sworn officers. In 2005, a lieutenant stated that for more than 23 years, the department has videotaped custodial interviews of felony suspects. The equipment is in plain view of suspects. Recording entire custodial interrogations is beneficial, particularly with report writing. Tapes are reviewed to determine if important questions were not asked, and to observe suspects' responses and body language, and are used occasionally as teaching devices. In 2010, a detective wrote that his experience with video recording of custodial interrogations has been "positive."

• *Granger Police Department, 2006:* 6 sworn officers. As a general rule, officers record custodial interviews using video equipment mounted on the wall in plain view. A senior officers stated, "Electronic recording of custodial interviews has gotten us out of bad law suits. If a suspect makes a baseless complaint, he looks foolish because it's all on the tape for everyone to see." Recordings have also been beneficial in providing good training.

• *Harris County Sheriff, 2005:* 4,500 sworn officers. A sergeant stated that there is no department policy relating to recording custodial interviews. Detectives sometime record custodial questioning from *Miranda* to the end, but that is the exception, not the rule, and that the detective's preference and availability of an interview room, which are at each station, are usually the deciding factors. Recordings provide good protection to detectives.

• *Houston Police Department, 2003:* 5,300 sworn officers. A spokesperson said that there is no written or oral department policy on recording, but that detectives have discretion to record by audio and/or video, and frequently record custodial interrogations. Sometimes recordings are made of the entire interrogation, and sometimes only the final confession. He stated that detectives have had very positive experiences with recording; that video serves to protect officers from claims

of coercion or misconduct; that in court it fares well if the prosecution has a recording to show the jury; and that the benefits of video outweigh the costs involved. "Video is one more tool that is at the disposal of the investigator, so that his case can be well presented in a concise manner." A veteran sergeant stated that two rooms are equipped with video recorders. More interviews have been recorded within the past 12 to 15 years, and at present a majority of interviews at the station are recorded by audio/video from *Miranda* to the end. He prefers video because it allows the judge and jury to hear the suspect's own words, and view the process. "I love it – it's the way to go. We can't be accused of changing what the suspect said. It's a great law enforcement tool, the best evidence."

• *Hutto Police Department, 2006:* 19 sworn officers. For three years the department has recorded custodial interviews of felony suspects, by either audio or video. One room of the Criminal Investigation Division is equipped with a new audio/video recording system. A sergeant stated that he is an ardent supporter of electronically recording custodial interviews. "Our experience with recording interrogations has been absolutely great. I can't think of a single negative experience with the new recording equipment. Recording is "fantastic because it's more accurate and simply better than trying to take notes during the interview. Before we had this equipment, an officer had to rely on memory, which could be difficult when the prosecution of the case might occur several months after the interrogation." Recording has eliminated this problem by allowing officers to slow down, rewind, and replay the tape, which enables them to include word-for-word pertinent information in their reports. The technology has become "user friendly, less costly, and more reliable." The District Attorney purchased the equipment from his budget. "I view it as a win-win situation: law enforcement gains the benefit of having top of the line equipment on site, and the DA gets a video of the suspect, which often provides critical evidence in the case and makes the DA's job easier. With this system we can electronically record the entire interview without breaks. That makes it pretty hard to dispute what actually happened during the interrogation, and it provides evidence of the defendant's state of mind. When investigators are doing their job, the recording becomes law enforcement's best friend."

• *Irving Police Department, 2008:* 325 sworn officers. In 2004, a veteran investigator wrote, "We do not use electronic recordings at any stage of interviews or interrogations. I would like for our department to utilize recordings, but they do not allow it. In 2008, an investigator wrote

that for two to three years the department has recorded by both audio and video custodial interviews of felony suspects. "My experience is that I have a very high rate of admissions. I am more patient and time is less a factor."

• *Johnson County Sheriff, 2005:* 50 sworn officers. The department policy is to record by audio and video almost every custodial interrogations of felony suspects. A detective stated that he favors electronic recordings, because they save a lot of time and prevent misunderstandings.

• *Killeen Police Department, 2006:* 207 sworn officers. For the past several years, the department has pursued the practice of videotaping the custodial interviews of suspects in major felony investigations. A senior officer stated that he positively endorsed the practice. "There are many reasons why I support recording custodial interviews. First, they demonstrate that the interviews were conducted in a professional manner. Second, they prevent suspects from complaining of police misconduct. When there's a video of a suspect's interview with the officer, it's hard to deny what actually happened. Third, recordings also demonstrate suspects' refusal to give a statement. Electronic recording is a worthwhile tool."

• *Leander Police Department, 2005:* For several years, the department has recorded with both audio and video all custodial interviews. A lieutenant stated that recordings have proven beneficial for checking accuracy of reports, teaching and training.

• *Midland Police Department, 2008, 2009:* 180 sworn officers. For at least ten years, the department has used audio and recently video equipment to record custodial interviews of felony suspects. There are two rooms equipped with visible microphones for audio, and hidden video cameras. In 2008, a detective wrote that recording has proven "Very helpful in protecting the officers' interests. I have learned to sharpen my skills after listening to interviews." In 2009, a sergeant stated that the department's experience with recording has been "very positive, phenomenal. Juries obtain information that solidifies cases in court, so we're very pleased with it. Recordings are used for multiple purposes. In 2009, two detectives and an investigator wrote that recordings are "very helpful"; "Experience has been good. Prosecutors are able to use in court. The fact that it's going to be listened to makes me more aware of language"; "I have benefitted from reviewing my interviews."

• *Parker County Sheriff, 2007:* 75 sworn officers. The department has recorded custodial interviews by audio and video for 15 years. An investigator wrote. "Prosecutors love these recordings" and "Officers are more professional when recorded."

• *Plano Police Department, 2005:* 350 sworn officers. A public information officer wrote and stated that for at least five years the department has used both audio and video to record custodial interrogations of felony suspects. He stated that their experience with recording has been very good, especially in longer interviews, because it is valuable to be able to go back and review the tapes. It is also beneficial in court as well. Recording has improved officers' interview techniques, because they can watch the interview process in real time, and review what questions are being asked. Tapes are later reviewed for a variety of purposes.

• *Randall County Sheriff, 2004:* 78 sworn officers. For at least ten years, detectives have used two interview rooms to record by audio or audio/video custodial interviews of felony suspects. A sergeant wrote, "Our experiences have always been good except when the officer screws up. I often myself ask another officer to watch the interview separately to see what I am missing. A nice friendly interview that results in a confession is hard to beat in court."

• *Richardson Police Department, 2004:* 157 sworn officers. For at least 14 years, the department has recorded by video all in-custody interviews of felony suspects, in interview rooms equipped with hidden cameras. A sergeant wrote, "I believe recordings are beneficial to the department and the suspects that are being recorded. The recordings show the suspect's demeanor and actions and lessen the chance of miscommunication, coercion, etc. The recordings also corroborate the officer's testimony in court when necessary."

• *Round Rock Police Department, 2004, 2005:* 120 sworn officers. For at least six years, the department has strongly encouraged detectives to use both audio and video to record custodial interviews in most major felony investigations. A detective stated that recording is a positive tool for law enforcement. They are effective if the case goes to trial. They also help officers improve their techniques, knowing that they are under scrutiny and subject to review. Officers watch the tapes after interviews to pick up

on signals suspects give that they may not have otherwise noticed. "Recording is also an effective training mechanism."

• *San Antonio Fire Department, 2009:* 17 sworn officers. In arson investigations, the department records custodial interviews by both audio and video.

• *San Antonio Police Department, 2003:* 2,080 sworn officers. A senior officer stated that the department is about to receive a Local Law Enforcement Block Grant from the Department of Justice, which will be devoted to obtaining and installing recording equipment.

• *San Jacinto County Sheriff, 2006:* 18 sworn officers. For approximately ten years, the department has used both audio and video to record custodial interrogations of suspects in custody in major felony investigations, which includes most felonies. A senior officer stated that "Recording is a great tool. Once the interview is on video, a suspect can't go back and make false accusations against the officers. The suspect has to tell the truth because we can show the video of what was said and done during the interrogation. Recording always protects the officers against untrue accusations in this situation."

• *Southlake Division, TX Department of Public Safety, 2007:* 60 sworn officers. A lieutenant wrote that for at least three years, the department has recorded custodial interviews in "felony cases and crimes against persons, plus other cases of interest." Recordings are made by a covert camera, and are monitored in another room. This is "very helpful during prosecutions, because the recording shows *Miranda* being read, voluntary written statement being signed, etc. It also lets the detectives focus on the interview with no notepad in their hand." Recording "keeps the offices in line and encourages them to follow proper procedures."

• *Sugar Land Police Department, 2007, 2008:* 140 sworn officers. In 2007, a detective wrote that in almost all felony investigations, custodial interviews are recorded by both audio and video. Recordings are "good practice, assists in review for reports. In our department, one officer is in the room with the suspect, and another is in the recording room watching the suspect's actions." Recordings help officers "recap interviews for reports." Another detective wrote, "The experience has been very good. These recordings have helped with prosecution even when complete confessions were not obtained." In 2008, a sergeant wrote that recordings

have been made for at least twelve years. Recordings are "Very positive and useful. Local DA office encourages and loves the recorded interviews, it is the norm around here."

• *Tarrant County District Attorney, 2003, 2005:* A deputy chief stated in 2003 that the District Attorney sent a memorandum to the county's 34 police departments calling attention to the "wave of the future" that will require electronic recording of suspects' statements and confessions. The movement in this direction is "gaining momentum across the country," therefore the departments should "stay ahead of the curve" by budgeting for funding needed for recording equipment and facilities. In 2005, an assistant chief investigator stated that the District Attorney recently requested all law enforcement departments in Tarrant County to electronically record custodial interrogations in all high profile cases.

• *Taylor Police Department, 2005:* 30 sworn officers. A detective stated that for at least three years, the department has recorded custodial interrogations of all suspects by covert audio and video equipment. He stated that recording custodial interviews is very beneficial, because sometimes a suspect will talk but will be very wary or unwilling to put a statement in writing. With the recording, there are no questions or doubts about what was said in the interview room. Recordings are used for teaching, training for interviewing techniques, and observing suspects' responses.

• *Thrall Police Department, 2006:* A senior officer stated that the department does not currently record custodial interrogations. However, the District Attorney of Williamson County has coordinated a grant program that will enable the department to purchase and install digital recording equipment. Meanwhile, smaller departments in the county, including Thrall, have been granted access to the recording equipment located at Taylor PD.

• *Travis County Sheriff, 2007, 2010:* 300 sworn officers. In 2007, a detective stated that since at least 2003, the department has recorded custodial interviews of felony suspects with covert audio and video equipment. Recordings are a positive experience. Suspects can't accuse the police of putting words in their mouths. It's all there in black and white. Electronic recording is a time saving technique, which we're able to quickly download and send to the district attorney with the click of a button, much faster than handwritten confessions. In 2010, a detective wrote that

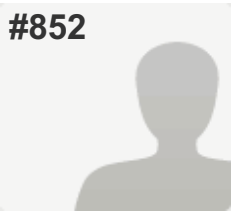
recordings "have afforded me the opportunity to review the interviews and observe signs missed during the interviews." Another detective wrote that his experience with recordings has been "Very positive. The DA's office wants the recordings."

• *Webster Police Department, 2007:* 50 sworn officers. A senior officer wrote that for 18 years the department has recorded custodial interrogations of felony suspects with covert audio/video equipment located in two interview rooms. "It has been well received in court. Recordings keep the officers on good behavior." A sergeant wrote, "in my experience (mostly for DUI cases) the video/audio is crucial for obtaining convictions as the video does not lie." He added that officers are "sure to use proper English structure and verbiage, and not talk down to suspects."

• *Williamson County Sheriff, 2005:* 150-200 sworn officers. A detective stated that for the past five years a majority of custodial interrogations of felony suspects have been recorded with audio and video equipment. The tapes are reviewed to observe suspects' responses and to see if important questions were not asked, and for training purposes.

• *Williamson County District Attorney, 2005:* The District Attorney stated that although recording custodial interviews is not required, police departments in Williamson County record more than half of their custodial interviews, depending upon the seriousness of the crime and threatened punishment. Thus, all interrogations in homicide and serious felony cases are recorded. He is currently overseeing the installation of digital recording devices in all police interrogation rooms in the county, to be funded from a fund of confiscated "drug money" earmarked for upgrading law enforcement capabilities.

Thomas P. Sullivan
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COMPLETE

Collector: Web Link 1 (Web Link)
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PAGE 2: Department Information

Q1: **Department name:**	Houston Police Department
Q2: **County:**	Harris
Q3: **Number of sworn officers:**	5100

PAGE 3: Recording Practices

Q4: **Does your department electronically record interrogations?**	Yes

PAGE 4: General

Q5: Why does your department not use audio or video to record interrogations? Please check all that apply.	*Respondent skipped this question*
Q6: Have you considered audio or video recording in the past?	*Respondent skipped this question*
Q7: Do you think using audio or video recording would be beneficial in any of the following types of felony cases?	*Respondent skipped this question*
Q8: Please indicate if you agree of disagree with the following statements:Recording of interrogations could:	*Respondent skipped this question*
Q9: Is there anything else you would like to share with the Commission regarding your opinion on electronic recording of interrogations?	*Respondent skipped this question*

PAGE 5: General

Q10: **How long has your department been recording interrogations?**

Years:	40

Q11: For what type of cases does your department electronically record?Please check all that apply.

All felonies	Yes
Assault	Yes
Burglary	Yes
Criminal Homicide/ Attempted Murder	Yes
Drug Offense (Felony)	Yes
Rape	Yes
Robbery	Yes
Theft (Felony/>$1500 taken)/ Motor Vehicle Theft	Yes

Q12: What individuals are electronically recorded during questioning? Please check all that apply.	Suspect (custodial), Witness, Suspect (non-custodial), Other (please explain) Complainant
Q13: Does your department electronically record line ups for eyewitness identification?	Yes
Q14: What type of settings are typically recorded (audio or visual) by your department?Please check all that apply.	Arrests, Phone conversations., Informal questioning outside the interrogation room., Informal questioning inside an interrogation room.

PAGE 6: Equipment Type

Q15: Does your department record audio and video or audio only?	Audio and video

PAGE 7: Equipment Information

Q16: What type of equipment does your department currently to record interrogations? Please check all that apply.	*Respondent skipped this question*
Q17: Is the recording equipment displayed in an area visible to the suspect?	*Respondent skipped this question*
Q18: What is your department's method of storing the recordings? Please check all that apply.	*Respondent skipped this question*
Q19: If your department uses video equipment, which of the following best describes what the camera records?	Other (please specify) Some interrogation rooms record both the suspect and the interviewing officer while others just record the suspect.

Q20: Does your department share recording and/or storage equipment with other agencies?	Yes

PAGE 8: Training

Q21: Are officers trained on the process and methods to operate the equipment? Please check all that apply.	Formal in-house training session

PAGE 9: Policies

Q22: Does your department have a written policy on recording interrogations?	Yes
Q23: Does your department obtain the suspect's consent before recording a custodial interrogation?	No
Q24: In your department, when does the officer begin and conclude the recording of an interrogation?	From the time the suspect is read his/her Miranda rights to the end of the questioning

Q25: How long is the recording retained? Please explain or enter "unknown."

Depends on the offense; Statute of Limitations or indefinitely.

PAGE 10: Funding Streams/ Costs

Q26: Please check all of the applicable funding streams that were used to purchase and maintain the recording equipment.	Federal grants, Department general funds, Donation/gift

Q27: If known, what was the estimated total cost for the products and services listed below:If unknown or not applicable, please leave blank.Please enter a whole number.

Purchasing	100000

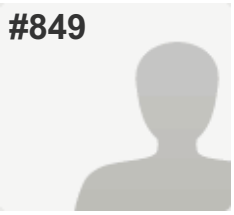
Q28: If known, what is the annual cost of maintaining the recording and storage equipment?Please enter a whole number.	10400

PAGE 11: Overall experience with recording of interrogations

Q29: Please indicate if you agree or disagree with the following statements:Recording of interrogations has:

Permitted the officers to concentrate on the suspect during the interrogation.	Neither agree nor disagree
Allowed officers who are not in the interrogation room to remotely observe or review the interrogations.	Strongly Agree
Reduced the risk of false confessions and convictions of innocent persons.	Strongly Agree
Reduced court time for officers.	Neither agree nor disagree
Resulted in less time spent reviewing and piecing notes together.	Neither agree nor disagree
Resulted in danger of losing cooperation/ confessions from the suspect due to their lack of willingness to be recorded.	Neither agree nor disagree
Reduced lawsuits from claims of officer misconduct during interrogations.	Strongly Agree
Assisted officers in solving the crime in question as well as others that may be connected.	Strongly Agree
Increased the public's trust in the justice system.	Strongly Agree
Enabled better practices and learning opportunities related to custodial interrogations.	Strongly Agree

Q30: Is there anything else you would like to share with the Commission regarding your experience with the recording interrogations?	*Respondent skipped this question*



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PAGE 2: Department Information

Q1: **Department name:**	Dallas Police Department
Q2: **County:**	Dallas
Q3: **Number of sworn officers:**	3400

PAGE 3: Recording Practices

Q4: **Does your department electronically record interrogations?**	Yes

PAGE 4: General

Q5: Why does your department not use audio or video to record interrogations? Please check all that apply.	*Respondent skipped this question*
Q6: Have you considered audio or video recording in the past?	*Respondent skipped this question*
Q7: Do you think using audio or video recording would be beneficial in any of the following types of felony cases?	*Respondent skipped this question*
Q8: Please indicate if you agree of disagree with the following statements:Recording of interrogations could:	*Respondent skipped this question*
Q9: Is there anything else you would like to share with the Commission regarding your opinion on electronic recording of interrogations?	*Respondent skipped this question*

PAGE 5: General

Q10: **How long has your department been recording interrogations?**

Years:	8

Q11: For what type of cases does your department electronically record?Please check all that apply.

All felonies	Yes
Assault	Yes
Burglary	Yes
Criminal Homicide/ Attempted Murder	Yes
Drug Offense (Felony)	Yes
Rape	Yes
Robbery	Yes
Theft (Felony/>$1500 taken)/ Motor Vehicle Theft	Yes
Other	Yes

Q12: What individuals are electronically recorded during questioning? Please check all that apply.	Witness, Suspect (custodial)
Q13: Does your department electronically record line ups for eyewitness identification?	Yes
Q14: What type of settings are typically recorded (audio or visual) by your department?Please check all that apply.	Informal questioning inside an interrogation room., Phone conversations., Arrests

PAGE 6: Equipment Type

Q15: Does your department record audio and video or audio only?	Audio and video

PAGE 7: Equipment Information

Q16: What type of equipment does your department currently to record interrogations? Please check all that apply.	*Respondent skipped this question*
Q17: Is the recording equipment displayed in an area visible to the suspect?	*Respondent skipped this question*
Q18: What is your department's method of storing the recordings? Please check all that apply.	*Respondent skipped this question*
Q19: If your department uses video equipment, which of the following best describes what the camera records?	The camera records both the interviewer and the suspect simultaneously
Q20: Does your department share recording and/or storage equipment with other agencies?	No

PAGE 8: Training

Q21: Are officers trained on the process and methods to operate the equipment? Please check all that apply.	Formal in-house training session, Trained by company (vendors)

PAGE 9: Policies

Q22: Does your department have a written policy on recording interrogations?	Yes, If yes, please provide your name and email address if your department would be interested in sharing this information with the Commission. Major Max Geron, stephen.geron@dpd.ci.dallas.tx.us
Q23: Does your department obtain the suspect's consent before recording a custodial interrogation?	Yes
Q24: In your department, when does the officer begin and conclude the recording of an interrogation?	Other (please explain) When the person enters the interrogation room and when they leave

Q25: How long is the recording retained? Please explain or enter "unknown."

unknown

PAGE 10: Funding Streams/ Costs

Q26: Please check all of the applicable funding streams that were used to purchase and maintain the recording equipment.	Donation/gift

Q27: If known, what was the estimated total cost for the products and services listed below:If unknown or not applicable, please leave blank.Please enter a whole number.

Purchasing	165000
Installation	0
Training on equipment	0
Storage	0

Q28: If known, what is the annual cost of maintaining the recording and storage equipment?Please enter a whole number.	0

PAGE 11: Overall experience with recording of interrogations

Q29: Please indicate if you agree or disagree with the following statements:Recording of interrogations has:

Permitted the officers to concentrate on the suspect during the interrogation.	Agree
Allowed officers who are not in the interrogation room to remotely observe or review the interrogations.	Agree
Reduced the risk of false confessions and convictions of innocent persons.	Agree
Reduced court time for officers.	Disagree
Resulted in less time spent reviewing and piecing notes together.	Disagree
Resulted in danger of losing cooperation/ confessions from the suspect due to their lack of willingness to be recorded.	Agree
Reduced lawsuits from claims of officer misconduct during interrogations.	Neither agree nor disagree
Assisted officers in solving the crime in question as well as others that may be connected.	Agree
Increased the public's trust in the justice system.	Neither agree nor disagree
Enabled better practices and learning opportunities related to custodial interrogations.	Agree

Q30: Is there anything else you would like to share with the Commission regarding your experience with the recording interrogations?	*Respondent skipped this question*

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Beyond Unreliable: How Snitches Contribute to Wrongful Convictions

Alexandra Natapoff

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COMMENT

BEYOND UNRELIABLE:

HOW SNITCHES CONTRIBUTE TO WRONGFUL CONVICTIONS

ALEXANDRA NATAPOFF*

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

[6] *Id.* at 671.

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

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

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

snitch-generated wrongful convictions.[10] In Part II, it describes in more detail the institutional relationships among snitches, police, and prosecutors that make snitch falsehoods so pervasive and difficult to discern using the traditional tools of the adversarial process.[11] Part III concludes with a litigation suggestion for a judicial check on the use of informant witnesses, namely, a *Daubert*-style[12] pre-trial reliability hearing.[13] The Appendix in Part IV contains a sample motion requesting and justifying such a hearing.[14]

I. WRONGFUL CONVICTION DATA

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

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

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

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

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

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

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

[16] Warden, *supra* note 2, at 3.

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

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

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

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

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

II. INEXTRICABLY INTERTWINED: LAW ENFORCEMENT DEPENDENCE ON SNITCHES

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

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

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

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

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

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

[24] *Id.*

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

[26] Natapoff, *supra* note 5, at 655.

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

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

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

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

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[28] *Id.*

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

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

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

[32] *See* Natapoff, *supra* note 5.

[33] *See id.*

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

[35] *Id.* at 937-38.

[36] *Id.* at 944.

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

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

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

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

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

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[37] *Id.*

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

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

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

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

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

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

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

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

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

[44] *Id.* at 3.

[45] *Id.* at 4.

[46] *Id.* at 31.

[47] *Id.* at 71.

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

[49] *Id.* at 57-58.

[50] *Daubert*, 509 U.S. at 593-94.

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

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

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

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[51] *Id.*

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

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

[54] *Id.*

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

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

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

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[55] *See id.*

[56] FED. R. EVID. 104(a).

[57] Harris, *supra* note 43, at 63.

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

IV. APPENDIX: MOTION AND MEMORANDUM IN SUPPORT OF PRE-TRIAL SNITCH RELIABILITY HEARING[59]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

*

UNITED STATES OF AMERICA

*

v.

*

JOHN DOE

* * * * * * * * *

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

*

UNITED STATES OF AMERICA

*

v.

*

JOHN DOE

* * * * * * * * *

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

SUMMARY

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

FACTUAL BACKGROUND

* * *

ARGUMENT

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

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

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

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

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

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

Similarly the Ninth Circuit has called for increased judicial scrutiny of deals between informants and the government, holding that "where the prosecution fails to disclose evidence such as the existence of a leniency deal or promise that would be valuable in impeaching a witness whose testimony is central to the prosecution's case, it violates the due process rights of the accused and undermines confidence in the outcome of the trial," *Horton v. Mayle*, 408 F.3d 570, 581 (9th Cir. 2005), and calling such lack of disclosure "unscrupulous." *Silva v. Brown*, 416 F.3d 980, 991 (9th Cir. 2005).

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

II. COMPENSATED WITNESSES ARE INHERENTLY UNRELIABLE

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

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

were placed there by false informant testimony.[61]

2. The Illinois Governor's Commission on Capital Punishment unanimously concluded that "[t]estimony from in-custody witnesses has often been shown to have been false, and several of the thirteen cases of men released from death row involved, at least in part, testimony from an in-custody informant."[62] The Commission recommended the holding of reliability hearings to mitigate the chances of perjury.

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

Courts likewise have recognized the inherent unreliability of compensated informants, going so far as to take judicial notice of their tendency to lie. "The use of informants to investigate and prosecute persons engaged in clandestine criminal activity is fraught with peril. This hazard is a matter 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned' and thus of which we can take judicial notice." *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993). "Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison." *Id.* Another court has noted that "[n]ever has it been more true that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is . . . to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration." *Commonwealth of Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1123 (9th Cir. 2001). Indeed, long before snitching became a pervasive aspect of the criminal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[66] *See* ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT, at 30, 122.

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

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

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

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

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

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

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

[69] *See id.* at 49-59.

jury.

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

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

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

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

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

Respectfully submitted,

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THE JUSTICE PROJECT

Jailhouse Snitch Testimony

A Policy Review

Prosecutors relied heavily on the testimony of a jailhouse snitch to convict Wilton Dedge of rape. Dedge spent twenty-two years in prison before he was released and exonerated of the crime.

Proper safeguards on jailhouse snitch testimony could have prevented this injustice.

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INTRODUCTION

Testimony from in-custody informants, often referred to as "jailhouse snitches," has been widely used in the American criminal justice system. Witnesses with special knowledge of criminal activity enable police and prosecutors to apprehend and prosecute criminal suspects. Thus, utilizing cooperating witnesses in order to obtain evidence of criminal activity is an important tool.

Nonetheless, the motive to fabricate testimony is inherent in a system in which snitches are often rewarded for their testimony. Jailhouse snitches, who often testify at pivotal moments in criminal prosecutions, have been shown to go to great lengths to deceive and misinform in the hopes of improving their current situations. With little or nothing to lose, and everything to gain, cunning and unscrupulous jailhouse snitches invent narratives and crime details that mislead law enforcement officers and contribute to appalling miscarriages of justice.

All wrongful convictions detract from the public's faith in the fair administration of justice, but the cost is especially high when wrongful convictions result from the testimony of questionable witnesses.

A 2005 report by the Center on Wrongful Convictions at Northwestern University School of Law found that snitch-dependent prosecutions are a leading cause of wrongful convictions in capital cases.[1] In fact, a survey of all cases involving individuals later exonerated by DNA testing showed that in over fifteen percent of cases, a jailhouse snitch testified against the defendant.[2]

The problems that arise when prosecutions rely on cooperating witnesses vary with the type of benefit conferred upon a witness in exchange for his or her testimony. Compensation of "jailhouse snitches" who provide incriminating testimony against a suspect, frequently one with whom they share a jail or prison cell, often takes the form of a favorable plea to a lesser charge or a reduction in sentence. Other types of criminal witnesses, such as accomplice witnesses and out-of-custody informants, can be compensated by the state either through immunity from prosecution or reduced charges. Because jailhouse snitches are so desperate to attain sentence reductions, snitch testimony is widely regarded as the least reliable testimony encountered in the criminal justice system.

In the face of serious concerns about the inherent unreliability of jailhouse snitches and the miscarriages of justice they cause, there are measures that states can implement to help ensure that the use of cooperating witness testimony does not undermine fairness and accuracy in criminal trials. Pragmatic changes requiring corroboration of the facts to which an informant testifies, pretrial disclosures, reliability hearings, and special jury instructions raise the evidentiary threshold and improve the quality of evidence presented at criminal trial. Courts raise standards for the admissibility of snitch testimony and ensure that judges and juries are able to make more informed decisions about the relative credibility of jailhouse snitch testimony by requiring greater scrutiny. By implementing these pragmatic changes within the context of courtroom procedures already in place, states can improve the quality of evidence presented at criminal trials.

This policy review has been designed to facilitate communication among local law enforcement officers, prosecutors, defense attorneys, judges, and others regarding the best practices and methods for enhancing the evidentiary value of a highly unreliable brand of cooperating witness testimony. By presenting the successful methods employed in individual jurisdictions, as well as the reasoning behind them, we hope to create a dialogue around recommendations that will enhance the quality of evidence relied upon in criminal trials, as well as confidence in our system of justice.

All wrongful convictions detract from the public's faith in the fair administration of justice, but the cost is especially high when wrongful convictions result from the testimony of questionable witnesses. While this review is limited to a discussion of the problems inherent in the use of jailhouse snitch testimony, many of the policy improvements recommended here could be considered in the context of other types of cooperating witnesses compensated by the state.

RECOMMENDATIONS & SOLUTIONS

Jailhouse snitch testimony poses special challenges to fairness and accuracy in criminal trials. When the state offers a benefit in exchange for testimony, whether that benefit is explicit or implied, the incentive for incarcerated individuals to fabricate evidence dramatically increases. Some informants may fabricate testimony in an effort to curry favor with prosecutors apart from any promise or implied benefit.

Though the legal system is designed to weed out perjured testimony through adversarial procedures such as cross-examination, the protections currently in place have proven starkly inadequate to safeguarding against unreliable testimony by witnesses with powerful incentives to lie. Remarkably, the use of jailhouse snitch testimony continues to be largely unregulated by state legislatures or courts despite frequent, documented miscarriages of justice and instances of wanton abuse.

The costs to the individual and to the state are high when snitch testimony leads to the wrongful conviction of an innocent person. Because perjured testimony has played a prominent role in documented cases of wrongful conviction in this country, jurisdictions must examine and implement safeguards designed to subject jailhouse snitch testimony, and the process by which such testimony is acquired, to higher levels of scrutiny and care.

WRITTEN PRETRIAL DISCLOSURES

States should adopt rules requiring mandatory, automatic pretrial disclosures of information related to jailhouse snitch testimony. Specifically, states should require the prosecution to make written disclosures regarding the circumstances of cooperation agreements and any other information about the credibility of a jailhouse snitch. Such disclosures should occur prior to any criminal trial or proceeding in which the prosecution intends to call the informant to testify. Disclosure of this information ensures that defendants can conduct meaningful cross-examination.

PRETRIAL RELIABILITY HEARINGS

States should adopt rules mandating pretrial determinations of reliability in cases where the prosecution intends to employ jailhouse snitch testimony. In a pretrial reliability hearing, the court is able to perform a "gatekeeper" function when admitting the testimony of the jailhouse snitch. The court must conclude that the jailhouse snitch's testimony is sufficiently reliable to submit to the jury by considering all factors that bear on the credibility of the jailhouse snitch, based on all information made available through written pretrial disclosures.

The testimony of a jailhouse snitch can often be powerful evidence at trial, overshadowing the obvious incentives for fabrication with compelling accounts of criminal conduct. Through improved standards, states can ensure that evidence presented in a courtroom and before a jury is of a sufficient quality to enable more reliable outcomes.

CORROBORATION

States should adopt corroboration requirements for jailhouse snitches to mitigate the inherent risks incentivised witness testimony carries.

Many law enforcement officers and prosecutors seek to corroborate at least a portion of the information provided by informants for the purpose of determining witness credibility, which has bearing on charging decisions as well as trial strategy. Nonetheless, the manner in which the prosecution may seek internal corroboration of jailhouse snitch testimony is largely a closed-door process. To inject a greater degree of transparency, oversight, and neutrality into the process, prosecutors should be required to disclose and present any information corroborating the witness' testimony. If the state is unable to corroborate the facts of snitch testimony, courts should limit the purposes for which such unsubstantiated testimony is used at trial.

CAUTIONARY JURY INSTRUCTIONS

States should adopt cautionary jury instructions in all cases where the testimony of a jailhouse snitch is used. The jury should be instructed to take into account several factors indicating the extent to which the testimony is credible, including: 1) explicit or implied inducements that the jailhouse snitch received, may receive, or will receive; 2) the prior criminal history of the informant; 3) evidence that he or she is a "career informant" who has testified in other criminal cases; and 4) any other factors that might tend to render the witness' testimony unreliable. Special jury instructions ensure that jailhouse snitch testimony is examined and weighed with proper caution.

GROUNDS FOR REFORM

An incarcerated individual has particular incentive to provide information in exchange for leniency, a reduced sentence, or other remuneration. Incarcerated individuals, in a system that relies on jailhouse snitches, risk little and can potentially gain much from lying to authorities.

Though fabricated snitch testimony continues to contribute to the mounting record of wrongful convictions in this country, state legislatures and courts have been slow to curb excesses or abuse. In large part, well-meaning police and prosecutors demonstrate due diligence in utilizing testimony by jailhouse snitches; however, few safeguards are currently in place to guide prosecutorial discretion or to ensure that juries weigh the testimony of these informants with proper care.

The recommendations in this policy review, explained in greater detail below, improve the informant process by ensuring greater access to critical information and giving the court a greater hand in determining reliability. Through more neutral and transparent use of snitch testimony, states ensure that proper safeguards are in place to protect against perjured testimony and increase the reliability of outcomes in criminal cases. By improving the quality of snitch testimony at trial through these reforms, states improve the use of snitch testimony at all phases of the criminal justice process.

WRITTEN PRETRIAL DISCLOSURES

The adoption of mandatory, automatic pretrial disclosures related to jailhouse snitch testimony would allow for a complete airing of all relevant information bearing on a jailhouse snitch's credibility. Mandatory disclosures create a more transparent process, allowing for meaningful oversight and adversarial challenge. In fact, the effectiveness of the legal system's built-in safeguard of cross-examination is almost entirely dependent upon the level of pretrial disclosures. Because the processes by which jailhouse snitches are compensated and their testimony is developed are largely hidden from view (and from triers of fact), current procedural safeguards are unable to guard against untruthful testimony.[3]

Under the rule articulated by the U.S. Supreme Court in *Brady v. Maryland*, prosecutors are already required to disclose any "material" information that might exculpate the defendant in pretrial discovery;[4] however, this rule does not mean that prosecutors are required to disclose all of the circumstances under which informant witnesses come to cooperate with the state — information that is critical to proper determinations of reliability.[5] The additional burden of implementing greater pretrial disclosures would be minimal considering the existing systems in place for the exchange of information as a requirement of *Brady*.

States should adopt or extend rules to mandate written pretrial disclosure of the following: statements made by the accused to the jailhouse snitch; incentives that the witness received, will receive, or may receive in exchange for testimony (*e.g.*, promises for sentence reductions, offers to lesser pleas, improved incarceration conditions for in-custody witnesses, or anything else of value); whether the witness has agreed to testify at prior criminal trials and, if so, how many times he or she has done so (or agreed to do so) and whether the witness has received any previous benefits for testimony; the complete criminal history of the jailhouse snitch; whether at any time prior to trial the witness has recanted his or her testimony or made statements inconsistent with the testimony to be presented at trial; and anything else bearing on the witness' credibility.[6]

By specifying that the disclosures be in written form, this recommendation helps ensure the accumulation of detailed records of all interactions between the government and the informant witness prior to trial.

PRETRIAL RELIABILITY HEARINGS

American jurisprudence has long wrestled with the problems inherent in compensating witnesses — monetarily or otherwise — in exchange for truthful testimony. Payment of any sort in exchange for testimony creates a motive for a witness to lie. Though paying witnesses is largely considered unethical and even illegal as a general rule,[7] there are several commonly held exceptions.[8]

In the context of expert witnesses, for example, payment for testimony (or expertise) is an accepted practice. American courts allow witnesses who are leading professionals in their fields to receive compensation for their testimony because the subject

matter of expert testimony is beyond the common knowledge of a layman or of the court.[9] In civil trials, courts require that certain indicia of reliability be met before an expert is allowed to testify in exchange for money. For example, a pretrial "*Daubert* hearing" is a requirement established by the U.S. Supreme Court specifying that courts must determine the reliability of expert witnesses before their testimony is presented to a jury.[10] In terms of scientific expert testimony, for example, the court must not only determine whether the scientific expert is knowledgeable of the issues presented, but must also establish that the content of the expert's testimony is *reliable* under accepted standards within the field.[11]

Our criminal justice system does not afford the same pretrial procedural safeguards in criminal cases involving compensated jailhouse snitches — even in capital cases. Similar in theory to the function it serves with respect to expert witnesses, courts should perform this "gatekeeper" function in any criminal proceeding or trial in which the state presents a jailhouse snitch witness.[12] Because the stakes are so high in felony cases, and the propensity for inadvertent bias is so great in the criminal adversarial system, a reliability determination with respect to jailhouse snitches should be made by a neutral, objective party and not by the prosecutor alone. The best policy for ensuring the integrity of the criminal justice system is a requirement that the prosecution bear the burden of proof in showing that jailhouse snitch testimony is sufficiently reliable to be put before a jury in all criminal prosecutions. At the very least, this determination should be made in capital cases, as in Illinois.[13]

> By improving the quality of snitch testimony at trial through these reforms, states improve the use of snitch testimony at all phases of the criminal justice system.

CORROBORATION

Several states, including California, Illinois, and New York, have recognized the inherent unreliability of testimony offered by an accomplice, which has resulted in legislation requiring that accomplice testimony be corroborated.[14] While testimony provided by an accomplice is inherently suspect, and corroboration requirements should be implemented across the board, the testimony of a jailhouse snitch presents potentially greater risks. An accomplice, through his or her testimony, will generally incriminate himself or herself to some degree; jailhouse snitches, on the other hand, expect a potential gain while risking little or nothing in testifying against a defendant.

Illinois has recognized the fallibility of jailhouse snitch testimony and its potential harm. In April 2002, the Illinois Governor's Commission on Capital Punishment identified "a number of cases where it appeared that the prosecution relied unduly on the uncorroborated testimony of a witness with something to gain."[15] As a result, Illinois has passed a provision allowing a court to decertify a death penalty case when it finds that the evidence against the defendant, which led to the conviction, was limited to the uncorroborated testimony of an accomplice or a jailhouse snitch.[16] Similarly, the California Commission on the Fair Administration of Justice, established to examine the administration of criminal justice in California and recommend safeguards, has proposed three bills designed to address the leading causes of wrongful convictions, including a bill to curb false testimony by jailhouse informants by requiring corroborating evidence for all such testimony.[17] The American Bar Association, in a 2005 resolution, urged "federal, state, local, and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by ensuring that no prosecution should occur based solely upon uncorroborated jailhouse informant testimony."[18]

While at least seventeen states have taken steps toward expanding corroboration requirements to include testimony offered by jailhouse snitches, most states do not have legal safeguards against this risk.[19] The California Commission on the Fair Administration of Justice recommends that state legislatures enact statutory requirements for the corroboration of jailhouse snitch testimony. Courts, according to the California Commission recommendations, must only admit testimony corroborated by evidence that connects the defendant with the commission of the offense charged or the special circumstance(s) or aggravating factor(s) to which the jailhouse snitch testifies. Such evi-

dence must go beyond demonstrating merely that the offense took place or that special circumstances or aggravating factors occurred. Corroborative evidence must demonstrate not only that the events described by the snitch are correct, but must also demonstrate that the snitch's story factually links the offense to the accused. Further, the testimony of another snitch must not be considered adequate corroboration.[20]

It is important to note that corroboration requirements alone are not sufficient to prevent the risks inherent in jailhouse snitch testimony. While corroboration requirements for jailhouse snitch testimony are critical because "the existence of corroboration is usually a threshold question for the judge,"[21] in many cases it may prove to be an insufficient measure to counteract the inherent unreliability of this type of testimony. Consequently, without other measures such as written disclosures, reliability hearings, and jury instructions, a corroboration requirement for jailhouse snitch testimony is likely to fall short of its intended purpose.

CAUTIONARY JURY INSTRUCTIONS

If the court allows the state to present snitch testimony, it appropriately falls to a jury to decide whether the testimony is credible. Nonetheless, the record of wrongful convictions based on perjured testimony has reinforced the need for greater guidance in making this determination. Thus, states should adopt rules requiring the court to provide a more specific framework to juries who wrestle with the numerous reliability issues presented by snitch testimony. This is especially true because such testimony is presented by the state; so, absent a limiting instruction, jurors are often inclined to assume the existence of some threshold of witness credibility.[22] With little expense or burden on the courts, cautionary jury instructions tailored to the reliability issues specifically presented by jailhouse snitches provide a necessary added safeguard.

When the state presents the testimony of a jailhouse snitch, the presiding judge should advise the jury to take into account several factors that shed light on the extent to which the testimony is reliable. Specifically, the presiding jury should consider all factors required through pretrial disclosures and/or considered in pretrial determinations of reliability. The factors should include incentives that the witness received, will receive, or may receive in exchange for testimony (*e.g.*, promises for sentence reductions, offers to lesser pleas, improved incarceration conditions for in-custody witnesses, monetary rewards, or anything else of value). Judges should also consider whether the witness has agreed to testify at prior criminal trials and, if so, how many times he or she has done so (or agreed to do so) and whether the witness has received any previous benefits for testimony, as well as the complete criminal history of the informant witness. Finally, judges should also consider whether at any time prior to trial the witness has recanted testimony or made statements inconsistent with the testimony to be presented at trial; and anything else bearing on the witness' credibility.[23]

While cautionary jury instructions should not be considered a sufficient safeguard against informant perjury in and of themselves, they should be given by courts as follow-through measures to reinforce the dependability of the determinations made by judges at pretrial reliability hearings.

ACCOMPLICE AND OUT-OF-CUSTODY INFORMANTS

This review deals specifically with jailhouse snitches, but there are other types of informants that can compromise the criminal justice system. Accomplice testimony, and even out-of-custody informant testimony, can be problematic. Although accomplice informants or out-of-custody informants generally have much to lose from a perjury conviction, they often have something to gain from testifying as well.[24] While it is illegal in the United States to give bribes or compensation in exchange for testimony, out-of-custody informants can wreak havoc on an otherwise fair trial by testifying because of a grudge, or other personal motive, and desiring to see the defendant behind bars. Additionally, even if an informant is not in state custody, there are circumstances in which witnesses can get immunity from prosecution for suspected crimes or possible charges.[25] Despite these potential problems with other types of testimony, jailhouse snitch testimony is still regarded as the least reliable type of testimony in the criminal justice system.

THE LEGAL LANDSCAPE

The issues presented by the use of informant witness testimony do not exist in a vacuum. Courts in many jurisdictions have recognized that special requirements are necessary to address the specific reliability concerns inherent in this type of testimony. The following is a brief overview of a number of ways in which states, and their courts, have enhanced procedural safeguards for defendants on the receiving end of informant-dependent prosecutions.

SINGLETON I AND SINGLETON II

Perhaps the most noteworthy decisions to come from any court regarding snitch testimony are the Tenth Circuit cases known as *Singleton I* and *Singleton II*, each of which dramatically changed the playing field for prosecutors and the defense bar. The implications of *Singleton I* were so far reaching as to cause some amount of internal crisis in District Attorneys' offices across the country. In turn, the defense bar lamented *Singleton II*, which was handed down shortly thereafter.

On July 1, 1998, a panel of the United States Court of Appeals for the Tenth Circuit decided *United States v. Singleton*, or *Singleton I*, ruling that the common practice of federal prosecutors conferring a benefit (be it money or a sentence reduction) on a witness in exchange for his or her testimony constitutes bribery of the witness. In coming to this decision, the panel relied on Section 201 of the Title XVIII of the U.S. Code, which reads in part:

> Whoever … directly or indirectly, corruptly gives, offers, or promises anything of value to any person, with intent to influence the testimony under oath or affirmation, such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court …shall be fined under this title or imprisoned for not more than two years, or both.[26]

The panel read this statute broadly, finding that it applied to prosecutors and government officials giving sentence reductions to cooperating witnesses.[27] According to the rules of statutory interpretation used by the court in *Singleton I*, the word "whoever" referred to federal prosecutors, and "anything of value" included intangibles, such as sentence reductions.

Less than two weeks later, however, on July 10, 1998, the court granted a rehearing *en banc*. On January 8, 1999, the Tenth Circuit *en banc* decided *Singleton II*, reversing its previous ruling by reading the statute much more narrowly. The reversing majority rationalized its reading by touting notions of sovereignty — that "whoever" cannot be deemed to include the sovereign government of the United States, and that a "thing of value" cannot be construed to include benefits received from the state.[28] Though prosecutors are persons, when they make plea bargains with defendants, they act in their official capacity as agents of the United States government. The United States government is not a person, and therefore not encompassed by the word "whoever."[29]

Following *Singleton I*, defense attorneys in all of the federal circuits filed motions to suppress the testimony of jailhouse snitches who had received leniency in exchange for testimony. When the Tenth Circuit reversed itself, the other circuits quickly followed suit, dismissing the motions.[30]

The holding in *Singleton I*, though reversed, shook the bedrock of the informant witness system and, in so doing, brought to light the complicity with which the criminal justice system accepts, without screening, the use of testimony that is inherently unreliable. The *Singleton I* holding is a reminder that the justice system's reliance on snitch testimony enjoys, at best, an uneasy relationship to foundational principles of American jurisprudence, and that reforms are necessary to avoid the pitfalls of bestowing benefits on witnesses in exchange for their testimony.

FEDERAL CIRCUITS

Singleton I is one of a long list of cases that have raised concerns about the reliability of snitch testimony. In addition to the **Tenth Circuit** ruling in the *Singleton* decisions, a number of other federal courts of appeal have addressed the issue of cooperating informants.

For example, in 1987, the **Fifth Circuit** Court of Appeals ruled that the trial court should give a special instruction cautioning the jury to question the credibility of witnesses who have been compensated for their testimony.[31]

In 1993, the **Ninth Circuit** discussed the unreliability of informants in *United States v. Bernal-*

Obeso: "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."[32]

In 2002, the **Fourth Circuit** expressed its concern about snitch testimony, writing that compensated testimony "create(s) fertile fields from which truth-bending or even perjury could grow, threatening the core of a trial's legitimacy."[33]

In 2005, the **Ninth Circuit** Court of Appeals again called for heightened judicial scrutiny of deals between informants and prosecutors when it held: "where the prosecution fails to disclose evidence such as the existence of a leniency deal or promise that would be valuable in impeaching a witness whose testimony is central to the prosecution's case, it violates the due process rights of the accused and undermines confidence in the outcome of the trial."[34] Later in 2005, the same court called a lack of disclosure of deals between prosecutors and informants "unscrupulous."[35]

STATE COURTS

Likewise, some state courts have independently adopted general rules for different classes of informants, indicating a widely-held distrust of incentive-based testimony.[36]

For example, in 1999, the **Montana** Supreme Court ruled that when an informant testifies for personal gain rather than an independent law enforcement purpose, the court must give a special cautionary instruction to the jury. If the trial court fails to give the instruction, and the testimony is crucial to conviction, the conviction must be overturned as a matter of law.[37]

In 2000, the **Oklahoma** Criminal Court of Appeals ruled that courts must give a special instruction when jailhouse snitches testify, cautioning the jury that it must examine the testimony with special care. Courts ask jurors to take into account specific factors. The facts relevant to these factors must be disclosed by the prosecution prior to the trial.[38]

In 2004, the **Colorado** Court of Appeals reaffirmed its 1996 ruling that juries should be given a cautionary instruction when there is no corroborating evidence to support the testimony of an accomplice: "An instruction that directs the jury to use caution when considering accomplice testimony 'is to be given *only* when the prosecution's case is based on uncorroborated testimony of an accomplice.'"[39]

Ohio courts have similarly held that evidence corroborating an informant's testimony obviates the need for cautionary instructions.[40]

In 2001, the **Wisconsin** Appellate Court also ruled that "[i]t is an error to deny a request for an accomplice instruction only in a case where the accomplice's testimony is totally uncorroborated."[41]

In a 2005 decision, the **Connecticut** Supreme Court overruled a case in which the court had not allowed a credibility instruction, extending their special jury instruction law from including only accomplices to include jailhouse snitches. In the opinion the court stated 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."[42]

BENEFITS & COSTS

BENEFITS OF REFORM

The practice of inmates exchanging testimony for more lenient sentences has its roots in British common law.[43] The main reason for its institution then, and its continued use today, is simple: it results in noticeably higher conviction rates.[44] Inmates may have information about suspects to which others would not have access — information that can be extremely helpful for incarcerating the guilty.

Nonetheless, in addition to its inherent interest in the economical administration of justice, the state must maintain credibility with its citizenry as it prosecutes crime. All wrongful convictions detract from the public's faith in the fair administration of justice, but the

cost is especially high when wrongful convictions result from the testimony of witnesses who have received a benefit in exchange for their testimony. False snitching — and the misguided prosecution that it enables — erodes the relationships between citizens and the state.[45] For each person wrongly convicted, a guilty party remains free to commit more crimes.

Higher scrutiny and transparency of jailhouse snitch testimony will allow law enforcement, courts, and the criminal justice system as a whole to focus their limited resources on convicting the guilty. By ensuring available resources will be used to capture the actual perpetrator, the criminal justice system simultaneously helps prevent wrongful convictions and further victimization of the community. With codified requirements for determining the reliability of jailhouse snitch testimony, the benefits to law enforcement, prosecutors, and the community will accrue through stronger prosecutions and more reliable outcomes in criminal cases.

COSTS OF REFORM

The policy improvements outlined in this review are generally accepted as high-yielding safeguards that do not overburden taxpayers or the courts. The main expenses in terms of implementation are procedural costs associated with a slightly higher workload for judges, more extensive pretrial investigation necessitated by corroboration requirements, and education or retraining programs associated with implementation. The expenses related to pretrial disclosures and jury instructions, on the other hand, are negligible. It is axiomatic that such procedural costs, incurred in the interests of justice, are a bare minimum expenditure for a criminal justice system in pursuit of more reliable outcomes in criminal cases. The values of fairness and accuracy are of far greater worth than the marginal procedural costs expended by the state.

When perjured testimony leads to wrongful convictions, taxpayers shoulder the financial burden.

When perjured testimony leads to wrongful convictions, taxpayers shoulder the financial burden. From the state's initial investigation and prosecution through additional investigation, multiple, subsequent appeals, and exoneration (where sizeable compensation is possible), the public pays for perjured testimony. Compared to the costs of wrongful convictions, the expense to the state associated with implementing these reforms is extremely low. Given the pay-offs, and given that the proposed improvements fit easily within existing procedures, the reforms recommended here constitute pragmatic proposals for improved policies.

PROFILES OF INJUSTICE

The Marietta Seven

James Creamer and six co-defendants were wrongfully convicted of murdering two pathologists in Marietta, Georgia, almost entirely on the word of an informant named Deborah Ann Kidd. Transcripts of inconsistencies in Kidd's statements were withheld from the defense. In 1975, the convictions of the Marietta Seven were reversed, and the state dropped all charges. Despite the dropped charges, the District Attorney declined to prosecute Kidd for perjury.

On July 26, 1972, more than a year after the well publicized killings of two pathologists, Drs. Warren and Rozina Matthews, South Carolina State Police notified Cobb County authorities that they had a witness to the Matthews crime in custody on a shoplifting charge. Deborah Ann Kidd, a habitual drug abuser, prostitute, and shoplifter, claimed to have pertinent information and asked for immunity in exchange for her testimony.[46] Desperate for clues, then-Cobb County D.A. Ben Smith immediately sent a letter to Kidd promising blanket immunity in exchange for information about the crimes.

In discussions with authorities, Kidd implicated herself and nine other individuals in the murders: James Creamer, George Emmett, Hoyt Powell, Larry Hacker, Bill Jenkins, Wayne Ruff, Charles Roberts, Mary Ann Morphus, and Carolyn Sue Bowling Johnson. The handprint and fingerprints found at the scene did not match Kidd or any of the nine she implicated; however,

all nine individuals were indicted for murder based on Kidd's story, and seven were prosecuted.

THE SNITCH

Testifying under immunity, Kidd said she met Creamer on May 2, 1971 and became his girlfriend right away. They went to Georgia on May 4th with Powell and Ruff and checked into an Atlanta motel where she met the other men. After a party at the motel with drugs and alcohol, she said the group embarked on an armed robbery ending in the murder of the Matthews couple.

The neighbor who first reported hearing gunshots had a clear view of the house and rear yard, but when he looked out the window, he saw no people or automobiles. According to Kidd, however, the murderous party involved no fewer than ten people who traveled to the home in three cars.

Kidd said Ruff and Creamer killed Mr. Matthews. Before it was over, she claimed Mrs. Matthews shot Creamer, apparently with her own .38 pistol. Kidd tearfully claimed that she tried to flee the bloody scene, but Roberts caught her and made her shoot Mrs. Matthews in the head with her own gun. Kidd testified that she was able to recall the crime with greater clarity as a result of sessions with a psychologist who used hypnosis.

THE TRIALS

The Marietta Seven were convicted in five separate trials: Creamer and Emmett were tried separately in early 1973; Jenkins, Hacker, Powell, and Ruff were tried jointly in July 1973; and Roberts was tried in January 1975 after an earlier mistrial. All seven were convicted of murder. Despite Kidd's testimony, they all consistently maintained their innocence.

After the original trials, it became clear that Kidd had told several significantly different stories about the crime — stories that were at odds with known facts. Authorities had worked extensively with her, including retaining a psychologist, Dr. Edwin P. Hall, who guided Kidd's story over twelve visits totaling some thirty-five hours (some with police and prosecutors present). Dr. Hall conducted several "age regression" hypnosis sessions that were supposed to help Kidd "recover" memories and remove inconsistencies.

Defense attorneys were aware of the sessions, but were denied access to tapes and transcripts until much later. The records showed that Kidd's story was more manufactured than "recovered." Astonishingly, while the prosecution continued to work with Kidd in an attempt to shape her testimony into credible evidence, Kidd stayed for several weeks at the home of a detective with whom she developed a sexual relationship while continuing to abuse amphetamines supplied by the police.

During the appeals process, defense lawyers discovered numerous documents in police and prosecutors' files, hidden from the defense at trial, that shattered Kidd's credibility. The files revealed that during the summer of 1972, Kidd gave three substantially different accounts of the crime that contradicted the physical evidence. For example, she said Rozina Matthews had been severely beaten before being shot, although an autopsy showed no cuts or bruises, and no torn clothing. Additionally, Kidd initially stated that the crime occurred during cold weather, sometime around Christmas or New Year's Day, when it had, in fact, occurred in May.

She originally described Creamer's bleeding at the scene as profuse, but later testified that it was light — a more plausible claim, given that numerous samples of blood from the scene all matched the victims' blood type and could not have come from Creamer. No weapons were recovered from the scene, but ballistics tests indicated that three different .38 caliber guns were fired. Police knew that Creamer had a gunshot wound and that a bullet was lodged in his body. When it was surgically removed, the .38 slug was found to have been fired by a gun other than the Smith and Wesson owned and allegedly used by Rozina Matthews, and it matched none of the slugs found at the scene. During appeals, Creamer testified that he was shot during an attempted robbery near the Atlanta airport on the 19th or 20th of May, 1971.

In Kidd's first three versions of events given to police, she unequivocally claimed that Carolyn Sue Bowling Johnson participated in the murders. Investigators determined, however, that Johnson was in Hamilton, Ohio on the day of the crime, a fact confirmed by medical records and the testimony of a doctor that had treated her on that day. Further investigation did indicate that Johnson had been involved in a different crime — one in which Creamer was shot — but that this crime had occurred weeks later, around May 21, 1971. This was consistent with Creamer's explanation of his wound.

Defense lawyers also discovered suppressed documents showing that police had a witness who described seeing two teenagers driving a Mercedes sports car like the Matthews' near where their car was found. The description matched none of the defendants. A neighbor also told investigators he saw a car in front of the Matthews home near the time of the crime, and gave a description of its two occupants that matched none of the defendants. Other documents showed that on Aug 1, 1971, two witnesses told police that a different man, Willie Lloyd Gauldin, had confessed to them that he was the killer. Gauldin was arrested and taken to the police psychologist who performed a "hypnotic interrogation" and concluded that he was not involved.

Emmett's and Creamer's cases advanced first through the state appeals process. During the unsuccessful state court appeals, defense lawyer Bobby Cook dispatched an investigator to South Carolina to look into Kidd's past. The investigator found dated documents, including checks and divorce papers signed and dated by Kidd, showing that she was actually in Greenville, South Carolina on the very day she claimed to be in Marietta with the defendants committing the murders. After exhausting state appeals, their cases went to the U.S. District Court. When presented with the documentary evidence in a federal court hearing, Kidd denied the signatures were hers, but three document experts testified that they were Kidd's.

TOWARD JUSTICE

After seventeen days of hearings, United States District Judge Charles Moye overturned Emmett and Creamer's convictions on June 17, 1975. The court, finding numerous and pervasive instances of suppression and destruction of exculpatory evidence, described the undisclosed report of Kidd's three varying accounts of the crime as "utterly devastating to Kidd's credibility." Judge Moye wrote, "The prosecution, though it knew full well the exculpatory and devastating nature of the documents it possessed, did not divulge their existence or contents to either petitioner."[47]

In addition, the court found that "by the end of August, Kidd's scenario, riddled as it was with inconsistencies, implausibilities and gaps, was in dire need of shoring up if the prosecution were to obtain convictions."[48] Dr. Hall acted essentially as a specialized law enforcement investigator, the judge found, who was provided with detailed information about the crime by the police to help build a case out of Kidd's testimony.

The tapes and transcripts of their sessions revealed that Hall told Kidd to read media accounts of the case, including one taped comment in which Hall tells Kidd that she "ought to read that newspaper and get those names straight."[49] The judge found the sessions to be "a thinly veiled effort to prop up the prosecution's case."[50] Although the hypnotic sessions were taped, the prosecution claimed that some tapes and transcripts of the sessions were inadvertently destroyed. The court concluded that the evidence had been deliberately destroyed, constituting an unlawful obstruction of justice.

Cobb County District Attorney Darden acknowledged during the hearings that the Matthews investigation had been "bungled," and Judge Moye noted the tunnel vision of investigators in his ruling, writing, "The number and significance of the investigative gaps in this case is truly astounding." The court's conclusion was stinging:

> The prosecutorial suppression of nearly all evidence concerning Deborah Kidd resulted in a criminal proceeding that bordered on the Kafkaesque ... the extreme measures to which the state resorted in extracting information (or more accurately, in supplying information to) this witness and the use of her testimony at trial … the suppression of documents, the firing of police officers skeptical of Kidd's story, all raise grave questions regarding the single-minded zeal with which these convictions appear to have been sought and obtained. The predictable result is that this Court has before it a pair of criminal convictions obtained in a manner so manifestly and fundamentally unfair that they must be vacated.[51]

TWO CONFESSIONS

During appeals, Billy Sunday Birt came forward to confess to the Matthews killings and implicated two others he said participated in the crime: Billy Wayne Davis and Willie Hester. Birt had been convicted and sentenced to death for the murder of an elderly couple in Wrens, Georgia. Davis was in federal prison for

bank robbery, while Hester was never apprehended.

Birt's wife initially contacted lawyers representing the seven defendants and told of her husband's involvement in the Marietta murders. Birt himself contacted Cobb County authorities to tell his story. He was doing time in Illinois for bank robbery when he was extradited to Georgia to face charges in the Wrens killings. In a signed confession, Birt said he killed Warren Matthews and Davis killed Rozina Matthews. He was indicted for the Matthews murders in 1979. Birt was already on death row, however, and the case never went to trial.

Kidd, too, finally confessed to her lies. On Monday, August 25, 1975, she admitted on tape to police and prosecutors that she lied in testimony that convicted the seven men. Two days later, after intense negotiations among prosecutors, defense lawyers, and federal and state judges, three of the men (Roberts, Powell, and Emmett) were released on personal recognizance bonds and eventually saw all charges dropped. The other four remained incarcerated for charges unrelated to the Marietta murders.

On September 2, 1975, Cobb District Attorney Buddy Darden announced he was dropping all charges against the seven. He conceded that Kidd, his star witness in the five trials, had admitted to lying, but he refused to prosecute her for perjury. Darden cited several reasons, including possible involvement of others in manufacturing her testimony, legal complications associated with the initial promise of blanket immunity, and "a waste of taxpayer money." Critics charged that authorities wanted to avoid the embarrassment that would follow shining a spotlight on their gross mishandling of this unreliable witness.

By the time of his release, Emmett had served thirty-five months, Powell two years, and Roberts twenty-three months. Roberts pled guilty to drug and gun charges upon release, with credit for time spent on the charges for which he was exonerated. While these innocent men served time in jail, Kidd suffered no repercussions for committing perjury. Proper safeguards monitoring snitch testimony may have prevented this tragic injustice altogether.

Wilton Dedge's Story

Arrested at age twenty, Wilton Dedge spent twenty-two years in prison for the rape of a seventeen-year-old Florida woman before DNA testing finally proved his innocence. The prosecution relied heavily on identification testimony from the victim and testimony from a jailhouse snitch who testified that Dedge had confessed to committing the crimes. After years of fighting for a DNA test, Dedge won his freedom in August 2004. The state of Florida awarded Dedge $2 million in compensation for his wrongful imprisonment.

On January 23, 1984, Clarence Zacke and Wilton Dedge were placed in a prison transport van together. They were the only two inmates in the van. Dedge was awaiting a bond proceeding and a retrial for the 1981 rape of a seventeen-year-old Florida woman. Zacke, in prison for murder and conspiracy to commit murder, was a jailhouse snitch. A little over a week after their time together in the transport van, Zacke testified at Dedge's bond proceedings. He claimed that Dedge had confessed the crime to him, calling the victim "an old hog", and saying that he would kill her if he ever got out of prison.[52] Dedge was denied bond. While his sentence from the first trial was thirty years, at his retrial he was sentenced to two consecutive life sentences plus two consecutive fifteen year sentences. The conviction and increased sentence were due in large part to Zacke's testimony.

THE TRIALS

On December 8, 1981, around 4:30 p.m., a seventeen-year-old woman was repeatedly raped and assaulted in her home in Canaveral Groves, Florida. A month later, on January 8, 1982, Wilton Dedge was arrested based on the victim's identification, which had wavered substantially in the month since the crime.

Dedge was first tried for burglary, sexual battery, and aggravated battery in 1982. The prosecution relied heavily on the victim's identification, scent identification from a police dog, and analysis of a hair found at the crime scene. The Florida jury took four hours and twenty-five minutes to convict Dedge of burglary with assault, sexual battery with a weapon, and aggravated battery. On December 22, 1983, however, the Fifth District Court of Appeals reversed Dedge's conviction, finding that while the scent identification was persuasive, the trial judge had erred in

disallowing the defense to present the testimony of an expert on human scent discrimination and in allowing hearsay during the examination of the prosecution's expert witness. Because the eyewitness testimony was equivocal and the forensic evidence inconclusive, the Court of Appeals found these errors to be harmful.

Dedge was convicted a second time in August of 1984 based on questionable eyewitness identification, snitch testimony, limited forensic hair comparison, and dog sniffing evidence from a since-discredited handler.

THE JAILHOUSE SNITCH

Prosecutors relied heavily on testimony of prison inmate Zacke at Dedge's second trial in 1984. Based on Zacke's testimony, the open-ended forensic hair analysis, and the victim's identification, Dedge was convicted a second time of burglary with assault, sexual battery with a weapon, and aggravated battery. This conviction was affirmed on appeal. Assistant State Attorney Chris White, who prosecuted the case, noted that Zacke wasn't promised anything *specifically* in exchange for his testimony. Still, Zacke received a reduction in his sentence after testifying against Dedge.[53]

Notably, the testimony against Dedge was not the first time Zacke had come forward with information to help an investigation. He had previously testified against convicted serial killer Gerald Stano, claiming that Stano had confessed to murdering Cathy Lee Schraf. Following conviction for the Schraf murder, Stano was sentenced to death. Zacke later recanted this testimony during a phone interview with a freelance writer.[54] Zacke had over a century shaved off of his original 180 year sentence. He later admitted that he had been hoping to receive parole by testifying against Dedge.[55] On November 11, 1989, a hearing examiner requested a twenty-six year reduction of Zacke's sentence in return for Zacke's alleged cooperation in providing authorities with information about a potential prison escape. Assistant State Attorney Chris White and Assistant State Attorney Michael Hunt both spoke at the hearing, calling Zacke a liar and a con artist (incidentally, their statements at the hearing were never shared with Dedge's defense attorney).

The culmination of Zacke's snitch testimonies allowed him to negotiate his sentence to sixty years or less with good behavior.[56] But Zacke was ultimately unsuccessful in parlaying his snitch testimony into an early release. On December 21, 2005, jurors convicted Zacke of raping his adopted daughter over a multi-year period in the 1970s after deliberating for only two-and-a-half hours. He was sentenced to five consecutive life sentences. The victim came forward to publicly accuse him of rape upon learning of his impending release.[57] In 2006, attorneys for Wilton Dedge called for an investigation after discovering that Florida authorities had prior knowledge of these allegations against Zacke, and that they may have hidden the allegations in order to secure Dedge's conviction.[58]

THE LONG ROAD TO EXONERATION

Throughout the course of his trials and appeals, Dedge continually proclaimed his innocence. At the time of his original and second trials, however, DNA testing was not available. In fact, DNA testing was not used in commercial laboratories until 1987.[59] Florida courts first used DNA analysis in October of 1988,[60] and it wasn't until 1990 that federal courts authorized its use.[61]

On March 30, 1988, Dedge's attorney first wrote the State Attorney seeking DNA testing. Though the State Attorney had the authority to grant the request for DNA testing, he advised Dedge's attorney to file a motion with the court. Dedge's attorney subsequently verified that the state attorney's office was maintaining the forensic evidence from the crime scene so that testing could be performed. During this same time, Dedge himself was inquiring into different possibilities of exoneration. He tried to show that Zacke had lied, the eyewitness identification had been contradictory, and that the prosecution had misused the hair analysis. He also contacted DNA testing services, including advocacy groups, to seek help in getting tested.

On October 17, 1994, Dedge contacted attorneys at the Innocence Project after seeing a television report about their work in post-conviction DNA testing. Less than two months later, the Innocence Project decided to take Dedge's case. When the Innocence Project contacted the State Attorney's office seeking release of certain evidence, the Assistant State Attorney requested that they obtain a court order. Though they could hardly know this at the time, following this initial opposition by the state, Dedge and his attorneys would face ten more years of appeals before finally winning release.

On April 24, 1997, the Innocence Project filed the first motion for DNA testing. The State Attorney's office opposed this motion, claiming that the statute of limitations had passed despite the fact that the state had received the first request for DNA from Dedge's attorney in 1988. The trial court agreed with the state, and denied the motion for DNA testing. After multiple appeals, the court ordered the release of certain evidence for DNA testing and, in March of 2001, Dedge motioned to vacate his conviction based on determinative proof of his innocence.

Later that spring, the legislature passed a new statute that allowed for post-conviction DNA testing. In November of that year, Dedge returned to court, filing yet another motion to vacate the judgment against him. The state argued that his conviction rested upon more than forensic evidence, relying on the snitch testimony and the dog scent lineup. According to the prosecutors, any of this evidence would have been sufficient to convict Dedge; thus, the exculpatory DNA evidence should not be determinative in the case. After an initial hearing in which Dedge's motion to vacate his sentence was denied, the Florida Fifth District Court of Appeal affirmed without prejudice, allowing Dedge to file under the newly passed post-conviction DNA statute. Dedge's attorneys filed a new motion under this statute, and on April 27, 2004, a new trial was ordered. After twenty-two years behind bars for a crime he did not commit, and after years of arduous appeals and disappointments, Dedge at last won his freedom. He was released on August 12, 2004.[62]

On June 23, 2003, Governor Jeb Bush signed legislation, inspired in part by Dedge's case, which extended prisoners' rights to DNA testing that could exonerate them by removing any deadline for seeking evidence to prove innocence.[63] The law also mandates that evidence collected at the time of the crime must be preserved until an inmate's sentence is completed.[64]

On December 14, 2005, the state of Florida awarded Dedge a $2 million settlement for his twenty-two year ordeal.[65] Dedge was the first Florida inmate exonerated by DNA testing to receive compensation from the state. In 2006, attorneys for Wilton Dedge called for an investigation after discovering that the Florida authorities had prior knowledge of the allegations against Zacke, and may have hidden the information in order to secure Dedge's conviction.[66]

A SNITCH'S STORY

Leslie Vernon White, a self-confessed career criminal, has provided prosecutors with testimony in as many as forty cases. In an appearance on *60 Minutes*, White described the process by which inmate informers fabricate evidence and claimed that he often lied when giving testimony as a jailhouse snitch.[67] In a 1988 interview with *Time Magazine*, White had this to say about his prison stints: "Every time I come in here, I inform and get back out."[68]

After perjuring himself in a 1981 trial, and falsely claiming that the Hillside Strangler had confessed to him in 1982, White lost any remaining shards of credibility. Nevertheless, prosecutors continued to use his testimony, and in November of 1988, the *Los Angeles Times* reported that White had been called as a witness in three murder cases.[69]

In a 1990 interview with *60 Minutes*, White gave a first hand account of how he was able to render perjured testimony believable. First, White would determine the last name of a person recently charged with a murder in Los Angeles County (available in the public record). Using the prison chaplain's phone, White then called the Document Control Center of the Los Angeles County Sheriff's Office to obtain a case number and arrest date. White would then call the District Attorney's Record's Bureau and pose as a Deputy District Attorney to get the names of prosecutors assigned to the case and names of key witnesses. White would then identify himself as a Los Angeles police officer to the County Coroner's Office, where he learned how the victim was killed. Finally, White would call families of the victim and accused to learn characteristics personal to each. Armed with this information, White would fabricate a seemingly credible "confession" on the part of the accused.[70]

Although White was crafty in his pursuit of details, he claimed to *Los Angeles Times* reporters that his methods were both known to and employed by many looking for early release from California's prisons.[71]

SNAPSHOTS OF SUCCESS

A number of states and jurisdictions have taken measures to ensure that perjured snitch testimony does not result in egregious miscarriages of justice such as wrongful convictions. States like Illinois, California, and Oklahoma represent case studies in snitch reform — and in successful methods for enhancing the evidentiary value of jailhouse snitch testimony.

ILLINOIS

Illinois has recognized the need for proper disclosures of information relevant to incentive agreements with jailhouse snitches, and that courts should perform a "gatekeeper" function when criminal prosecutors present jailhouse snitch testimony. The Illinois House Special Committee on Prosecutorial Misconduct, after holding extensive hearings, proposed that the Illinois Supreme Court adopt jury instructions cautioning about the reliability of such testimony.[72] In April 2002, the Illinois Governor's Commission on Capital Punishment, expanding on the prior work of the House Special Committee, concluded that "[t]estimony from in-custody witnesses has often been shown to have been false, and several of the thirteen cases of men released from death row involved, at least in part, testimony from an in-custody informant." The Commission recommended that the state require pretrial reliability screenings of jailhouse snitch testimony.[73]

Illinois courts are now required by statute to hold pretrial reliability hearings in capital cases that employ jailhouse snitches. In reaching a decision, Illinois courts consider information provided by prosecutors, including the criminal history of the informant, any benefit conferred or to be conferred to the informant in exchange for his or her testimony, other cases in which the informant has testified, and other information relevant to the informant's credibility.[74] These practices match this report's best practices for disclosure.

CALIFORNIA

California established the California Commission on the Fair Administration of Justice to examine California's administration of criminal justice and to recommend safeguards to ensure its fairness. On September 20, 2006, the Commission conducted a public hearing, which included the testimony of Dennis Fritz, a man wrongly convicted of rape and murder. The principal testimony against Fritz came from jailhouse snitches, with little corroboration. Five days before Fritz's codefendant, Ron Williamson, was scheduled to be executed, DNA testing was finally performed. The DNA results matched one of the informants who had testified against Fritz and Williamson, and both men were exonerated. The Commission has proposed three bills designed to address the leading causes of wrongful convictions, including a bill to curb false testimony by jailhouse informants by requiring corroborating evidence for all such testimony.[75] In its April 17, 2007 press release, the Commission argued: "Jailhouse informants have strong reasons to lie because they are offered lenience in return for information. The leading cause of wrongful convictions in death penalty cases in the United States is false testimony by informants."[76]

The Commission made a number of recommendations, most of them similar to the best practices outlined in this review. These include the disclosure of any benefit a government informant receives or may receive, required independent corroboration of snitch testimony, and recording of all contact with in-custody informants.

The Commission's recommendation that prosecutors seek independent corroboration of snitch information largely reflects the internal policies of District Attorneys in a number of California jurisdictions. For example, in response to the exploits of Leslie Vernon White, a Los Angeles jail inmate who made national news after detailing methods for fabricating testimony to gain lenience, the Los Angeles County Grand Jury convened a comprehensive investigation regarding the use of jailhouse snitches.[77] In response to the report and recommendations that resulted from the investigation, the Los Angeles County District Attorney's office adopted policy guidelines to strictly control the use of jailhouse snitches as witnesses.

The California legislature has addressed the need for jury instructions. California currently requires an instruction to juries to make an independent reliability determination when the state presents jailhouse snitch testimony. In every California criminal proceeding in which the jury hears snitch testimony, upon request of either party, the judge instructs the jury, "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."[78]

OKLAHOMA

In *Dodd v. State* (2000), the Oklahoma Court of Criminal Appeals adopted two rules that limit improper reliance on snitch testimony. First, the Oklahoma Court now requires that prosecutors share any information with defense counsel that might discredit the reliability of snitch testimony. In practice, this rule operates as a supplement to the U.S. Supreme Court's 1963 holding in *Brady v. Maryland*, which requires prosecutors to turn over to defense counsel any "material" evidence that might impeach government witness testimony. The *Dodd* rule expands what the court considers "material" to include any information that might lead a fact finder to deem snitch testimony unreliable. The second rule adopted in *Dodd* requires trial courts to issue a special cautionary instruction to juries who hear snitch testimony. The instruction requires juries to take into account several factors similar to those set forth in the Illinois statute. The Court wrote, "Courts should be exceedingly leery of jailhouse informants, especially if there is a hint that the informant received some sort of a benefit for his or her testimony."[79]

VOICES OF SUPPORT

"The need for disclosure is particularly acute where the government presents witnesses who have been granted immunity from prosecution in exchange for their testimony … We said that informants granted immunity are by definition ... cut from untrustworthy cloth, and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom. ... Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery."[80]

United States Court of Appeals for the Ninth Circuit
Carriger v. Stewart, December 17, 1997

"If I worked with a cooperator and came to trust him and I corroborated six of the eight major facts he told me, I would tend to believe the other two uncorroborated ones and use those at trial. I would not always try to corroborate those additional two facts. I've gotten burned by such an approach."[81]

Anonymous
Assistant United States District Attorney
Fordham Law Review, December, 1999

"The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility."[82]

United States Supreme Court
On Lee v. U.S., June 2, 1952

"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 this kind of amorphous testimony to keep this kind of unreliable evidence out of the hands of the jury ..."[83]

Supreme Court of Nevada
D'Agostino v. State, December 30, 1991

"Jailhouse informant testimony has come under increasing criticism and has contributed to a great number of wrongful convictions in [Illinois] and the country … In Illinois, of the 13 wrongful convictions from death row, five were convicted based on jailhouse informant testimony. Clearly, there is need for a legislative response."[84]

James B. Durkin
Illinois State Representative
Chicago Daily Law Bulletin, April 26, 2003

"The jailhouse informant is often a seasoned witness who can appear convincing even during tough cross-examination. And it's been shown that juries tend to give weight to the evidence of a defendant's confession, even after warnings as to the credibility of jailhouse informants in general. I believe the only effective way to deal with this problem is to provide a pretrial exclusion process to ensure the reliability of an informant's testimony."[85]

Robert M. Bloom
Professor, Boston College Law School
ABA Criminal Justice Magazine, Spring 2003

"When used properly, informants can be a powerful and appropriate investigative tool. But they can also be destructive, crime-producing, and corrupting. The widespread use of informants means that much of the real adjudicative process takes place underground, without rules, records, or lawyers, and without public or judicial scrutiny of the fairness and accuracy of the process."[87]

Alexandra Natapoff
Associate Professor
Loyola School of Law, Los Angeles
San Francisco Chronicle, November 19, 2006

"I'm not the first guy who went to prison because someone lied, and I won't be the last. But it's wrong, and something should be done to try to prevent this because no one can give me back all the years I lost."[86]

Timothy Atkins
Exoneree
Sacramento Bee, May 18, 2007

"How can we prevent informants from testifying falsely? We can't. But we can reduce the number of wrongful convictions based on false testimony with steps designed to level the playing field and open the process to daylight."[88]

George C. Harris
Director of the Center for Advocacy and
Dispute Resolution, University of the Pacific
McGeorge School of Law
San Jose Mercury News, November 14, 2006

QUESTIONS & ANSWERS

Are unreliable jailhouse snitches so pervasive in criminal cases, and in the record of wrongful convictions, as to warrant substantive policy change?

Yes. The "informant institution" is an ever-expanding one.[89] The incentives to cooperate are often irresistible given the benefits offered in exchange for testimony. Unfortunately, the number of wrongful convictions incurred as a result of perjured informant witness testimony is correspondingly high. Of 111 wrongful convictions in capital cases recently examined by the Center on Wrongful Convictions at Northwestern University School of Law, fifty-one involved "incentivised" witness testimony. Perjured snitch testimony was determined to be the most common cause of wrongful convictions in capital cases.[90] The total number of cases in which perjured informant witness testimony has led to wrongful convictions is impossible to determine, but scholars generally agree that the number is very high.

Our system of criminal justice already has a safeguard in using cross-examination to discredit unreliable witness testimony. Why isn't this safeguard a sufficient tool to weed out false jailhouse snitch testimony?

Cross-examination is an insufficient safeguard against the perils of unreliable snitch testimony because of the special problems that arise from limited disclosure requirements related to informant witnesses. Oftentimes, defense counsel will not have access to all of the information to discredit the testimony of an unreliable state informant, because discovery requirements do not, as a general rule, extend to evidence that is not "material" to guilt or innocence. Materiality as defined by courts is a very high threshold, describing evidence that, if disclosed, would have

resulted in a "reasonable probability" that the defendant would be found not guilty.[91] The materiality standard certainly does not apply to all evidence that could be used to show the implausibility of a jailhouse snitch's testimony. Without pretrial disclosures of all information relevant to credibility determinations, meaningful cross-examination is impossible.

Furthermore, it is difficult to "un-toll the bell." Though effective cross-examination might convince a jury to give less weight to informant testimony, jurors are somewhat predisposed to infer *some* degree of reliability because the witness is presented by the state. Therefore, a pretrial, independent determination by the court that the witness is credible is necessary to prevent improper reliance by juries on informant testimony. Similarly, use of the common tool of implied inducements allows for prosecution witnesses to state to a jury, unequivocally, that they have not received any benefit in exchange for their testimony. The fact that such informers *will* or *may* receive such benefits, even if not explicitly promised, is often overwhelmed by the informer's second-hand account of criminal activity. Proper instruction to the jury is necessary to balance this precarious practice.

Our lengthy and unfortunate history of wrongful convictions has shown that the procedural safeguards currently in place do not effectively remedy the problems presented by the unreliable testimony of jailhouse snitches. In order to offer adequate protection to innocent individuals, and to ensure reliable outcomes in criminal cases, states must implement meaningful procedural safeguards that supplement the tools currently available to defendants.

Shouldn't it be left to a jury to decide whatever testimony is credible or not?

As is the case when a party to a civil action wishes to present expert testimony, there are times when it is necessary for a court to make an independent *legal determination* as to the admissibility of witness testimony. Such legal determinations fall squarely within the jurisdiction of the judge in criminal trials. Once the judge has ruled on the legal implications of allowing a jury to hear snitch testimony, the jury, as fact-finder, should give the testimony whatever weight they feel is appropriate.

Evidence that is unduly prejudicial is always excluded from the total body of evidence presented to a jury. Perjured snitch testimony is so highly prejudicial to a defendant as to warrant both corroboration and a pretrial determination by the court that the testimony can be presented to the jury at all. Once such a determination has been made, it is indeed the role of the jury to make a determination as to whether to believe the informant witness' testimony based on the guidelines of a limiting instruction.

Aren't the policy recommendations implicitly displaying a general mistrust of prosecutors and law enforcement officers who are simply trying to keep criminals of the streets?

Most police and prosecutors subscribe to high standards of corroboration and witness scrutiny before utilizing snitch testimony. When a state informant witness is not credible, the credibility of those who employ that testimony is also undermined, as is their ability to successfully prosecute and enhance public safety.

Often, the problems discussed here arise as a result of unscrupulous informers deceiving law enforcement, whose resources are often over-extended. Informants are often so desperate to escape incarceration that they will go to great lengths to weave elaborate narratives in exchange for sentence reductions. Though prosecutors have an ethical duty to ascertain the truthfulness of information from cooperating witnesses, it shouldn't fall *entirely* to prosecutors, or to police, to weed out the bad apples.

Most of the policy improvements discussed here are not designed to place any additional burden on state attorneys or law enforcement officers who already employ basic corroboration techniques. Furthermore, expanding the role of the courts in determining informant witness reliability will ensure that public confidence in our law enforcement officers remains intact.

Are reforms related to snitch testimony difficult to implement?

The policy recommendations are designed to fit readily within the context of processes already in place, including discovery, jury instructions, and consideration of adversarial motions (with argument and presentation of evidence). Courts are already employing these procedures in their daily practice and in the context of criminal trials. What's more, courts are already conducting hearings to determine the reliability of expert witnesses. The reforms would be an extension of this rule to a class of witnesses that demands equal, if not higher, scrutiny.

A MODEL POLICY

MODEL BILL FOR INCREASING THE EVIDENTIARY VALUE OF JAILHOUSE INFORMANT TESTIMONY

An Act:

Section I. Purpose.
The purpose of this Act is to ensure that only reliable jailhouse informants are permitted to testify at trial, and to ensure that when such an informant testifies, the jury is fully informed. Because in-custody informants have very strong incentives to fabricate or elaborate testimony in order to receive lenient treatment, courts should view such testimony with skepticism. This act should be interpreted consistent with the goal of keeping unreliable informant testimony out of court.

Section II. Definitions.

A. As used in this section, "in-custody informant" means a person, other than a co-defendant, percipient witness, accomplice, or co-conspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution.

B. As used in this section, "consideration" means any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, benefit, immunity, financial assistance, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, the informant's testimony in the criminal proceeding in which the prosecutor intends to call him or her as a witness.

Section III. Disclosure Obligations of the Prosecution.
In any criminal trial or proceeding in which the prosecution intends to call an in-custody informant to testify, pursuant to relevant state rules governing discovery, the prosecution must obtain and disclose the following information to the defense:

A. A written statement setting out any and all consideration promised to, received by, or to be received by the in-custody informant. This requirement applies even if the prosecution is not the source of the consideration.

B. The complete criminal history of the in-custody informant.

C. The names and addresses of any and all persons with information concerning the defendant's alleged statements, including but not limited to: law enforcement and/or prison officers to whom the informant related the alleged statements; other persons named or included in the alleged statement; and other persons who were witness and who can be reasonably expected to have been witness to the alleged statements.

D. Any prior cases in which the in-custody informant testified and any consideration promised to or received by the in-custody informant, provided such information may be obtained by reasonable inquiry.

E. Any and all statements by the in-custody informant concerning the offense charged.
F. Any other information that tends to undermine the in-custody informant's credibility.
G. This section does not alter other disclosure or discovery obligations imposed by state or federal law.
H. Any materials that the prosecution must disclose under this section are admissible to impeach the credibility of the in-custody informant if such informant testifies at trial.

Section IV. Requirement for a Pre-Trial Admissibility Hearing.

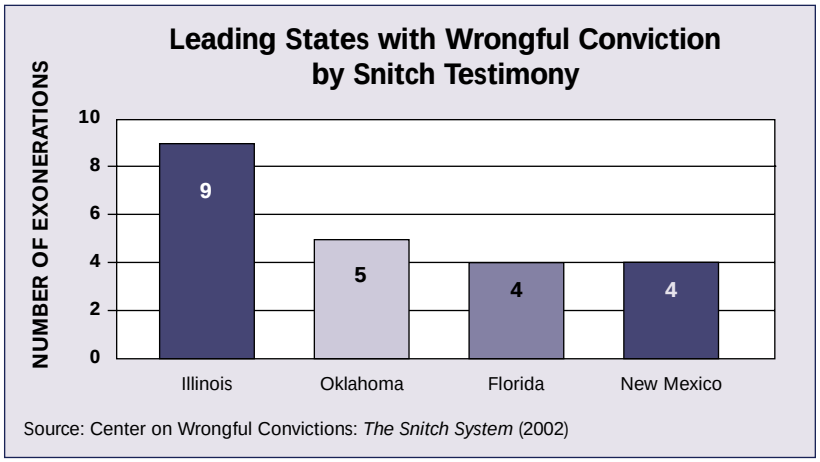
A. Prior to trial, the prosecution must apply to the trial court and request that the trial court admit the testimony of the in-custody informant. In such hearing, the court must only admit the testimony of the in-custody informant if it concludes that the informant is reliable, considering such factors as the consideration offered to the in-custody informant, the complete criminal record of the in-custody informant, the alleged statements made by the accused, the time, place, and circumstances of the alleged statements, the time, place, and circumstances of the alleged disclosure to law enforcement officials, any inconsistent statements by the in-custody informant, other cases in which the in-custody informant testified, and any consideration promised or received in those cases, the quality of corroborating evidence, and any other evidence relevant to the in-custody informant's credibility. The prosecution shall bear the burden of proof.
B. The judge should only admit the in-custody informant's testimony if corroborated by other such evidence as independently tends to connect the defendant with the commission of the offense charged or the special circumstance(s) or aggravating factor(s) to which the in-custody informant testifies. Such corroboration is not sufficient if it merely shows the commission of the offense or the special circumstance(s) or aggravating factor(s).

Section V. Jury Instructions.

Prior to sending the charges to the jury, the court should instruct the jury that in-custody informant testimony can be especially unreliable and must be given special scrutiny. The court should also instruct the jury that they may consider all of the factors listed in Section IV in evaluating the credibility of the in-custody informant. The jury shall not be instructed that the court has already found that the in-custody informant is reliable.

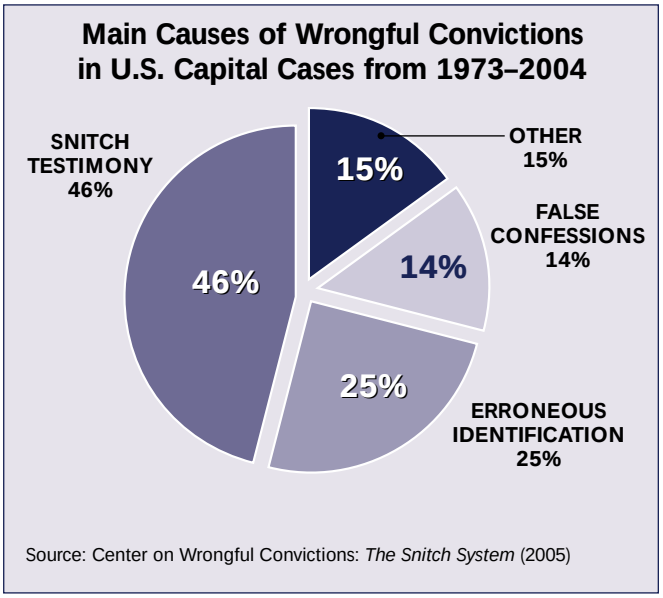
STATISTICS

As of May 11, 2007, over 120 people have been exonerated from death row since capital punishment was reinstated in 1973. A 2005 study by the Center for Wrongful Convictions at the Northwestern School of Law examined 111 of those exonerations and found that fifty-one of those 111 people were wrongfully sentenced to death based at least in part on the testimony of "witnesses with incentives to lie."[92] In fact, testimony from snitches and other informants is the leading cause of wrongful convictions in capital cases.[93]



Source: Center on Wrongful Convictions: *The Snitch System* (2002)

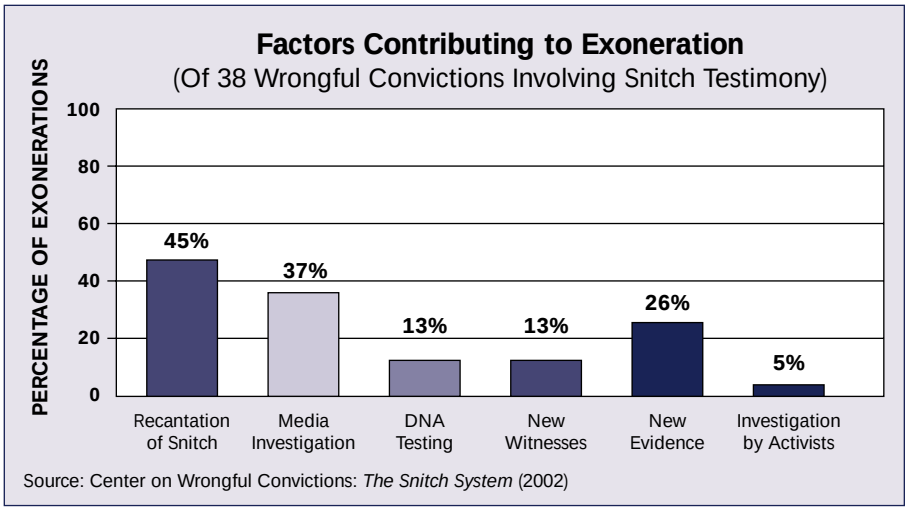
In a related study published in 2002, the Center for Wrongful Convictions examined ninety-seven cases in which evidence presented subsequent to sentencing conclusively exonerated the defendants. In thirty-eight of those ninety-seven cases, informant witness testimony was shown to be a primary factor in the jury's decision to convict.[94] And in sixteen of those ninety-seven cases, jailhouse snitches simply fabricated confessions that were never actually made by the defendant. In each instance, the testifying government witness received some benefit in exchange for the testimony.[95]



Source: Center on Wrongful Convictions: *The Snitch System* (2005)

As of November 1999, two months prior to the Illinois moratorium on the death penalty, four of twelve Illinois cases that resulted in wrongful death sentences for individuals who were later exonerated, relied on jailhouse snitch testimony. In another two of those twelve cases, Illinois prosecutors had jailhouse snitch testimony at the ready, but opted not to present it to the jury.[96]

Finally, according to the California Commission on the Fair Administration of Justice, in the state of California, twenty percent of *all* wrongful convictions are the result of perjured snitch testimony.[97]



Source: Center on Wrongful Convictions: *The Snitch System* (2002)

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[28] *United States v. Singleton*, 165 F.3d 1297.
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(725 ILCS 5/115-21)
Sec. 115-21. Informant testimony.
(a) For the purposes of this Section, "informant" means someone who is purporting to testify about admissions made to him or her by the accused while incarcerated in a penal institution contemporaneously.
(b) This Section applies to any capital case in which the prosecution attempts to introduce evidence of incriminating statements made by the accused to or overheard by an informant.
(c) In any case under this Section, the prosecution shall timely 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 will make in the future to the informant;
(3) the statements made by the accused;
(4) the time and place of the statements, the time and place of their disclosure to law enforcement officials, and the names of all persons who were present when the statements were made;
(5) whether at any time the informant recanted that testimony or statement and, if so, the time and place of the recantation, the nature of the recantation, and the names of the persons who were present at the recantation;
(6) other cases in which the informant testified, provided that the existence of such testimony can be ascertained through reasonable inquiry and whether the informant received any promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; and
(7) any other information relevant to the informant's credibility.
(d) In any case under this Section, the prosecution must timely disclose its intent to introduce the testimony of an informant. The court shall conduct a hearing to determine whether the testimony of the informant is reliable, unless the defendant waives such a hearing. If the prosecution fails to

show by a preponderance of the evidence that the informant's testimony is reliable, the court shall not allow the testimony to be heard at trial. At this hearing, the court shall consider the factors enumerated in subsection (c) as well as any other factors relating to reliability.

(e) A hearing required under subsection (d) does not apply to statements covered under subsection (b) that are lawfully recorded.

(f) This Section applies to all death penalty prosecutions initiated on or after the effective date of this amendatory Act of the 93rd General Assembly.

(Source: P.A. 93-605, eff. 11-19-03.)

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Supreme Court of Florida

No. SC13-1541

IN RE: AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.220.

[May 29, 2014]

PER CURIAM.

This matter is before the Court, on the Court's own motion, for consideration of amendments to Florida Rule of Criminal Procedure 3.220 (Discovery). See Fla. R. Jud. Admin. 2.140(d). We have jurisdiction. See art. V, § 2(a), Fla. Const.

The Florida Innocence Commission (Commission),[1] in its final report issued on June 25, 2012, recommended that rule 3.220 be amended to include "informant witnesses" in the category of witnesses that the prosecution must disclose to the

1. Following the filing of a "Petition for a Rule Establishing an Actual Innocence Commission," then-Chief Justice Canady established the Florida Innocence Commission by Administrative Order AOSC10-39 on July 2, 2010. The Commission was "established to conduct a comprehensive study of the causes of wrongful conviction and of measures to prevent such convictions." The Commission is no longer active.

defense, as well as to require the State to disclose certain material or information obtained from such witnesses. Florida Innocence Commission, Final Report to the Supreme Court of Florida, at 90-92, 166-67, and Appendix G (June 25, 2012) (Final Report).[2] The Court referred the matter to the Florida Supreme Court's Criminal Court Steering Committee (Steering Committee) for consideration. After the Steering Committee recommended that amendments to rule 3.220 were not needed, the Court, on its own motion, decided to consider amendments to rule 3.220 consistent with the Commission's proposals. The Court published the Commission's proposed amendments for comment. One comment was received from the Criminal Procedure Rules Committee (Rules Committee), which agreed with the Steering Committee that the amendments were unnecessary.

We disagree with the Steering Committee and the Rules Committee. We agree with the Commission that rule 3.220 should be amended to include more detailed disclosure requirements with respect to informant witnesses, because informant witnesses are not currently specifically treated under the rule and they constitute the basis for many wrongful convictions. See Final Report, at 66.

First, we amend rule 3.220(b)(1)(A)(i) to include a new type of witness that must be disclosed by the prosecution—i.e., informant witnesses, whether in

2. The Commission's Final Report may be accessed online at http://www.flcourts.org/core/fileparse.php/248/urlt/finalreport2012.rtf.

custody or not, who offer testimony concerning the statements of a defendant about the issues for which the defendant is being tried. We also add court commentary to rule 3.220 to clarify that new subdivision (b)(1)(A)(i)(8) is not intended to limit in any manner the discovery obligations otherwise provided for under the rule.

In addition, under new subdivision (b)(1)(M), the State must disclose whether it has "any material or information that has been provided by an informant witness" which includes the following five types of material or information:

> (i) the substance of any statement allegedly made by the defendant about which the informant witness may testify;
>
> (ii) a summary of the criminal history record of the informant witness;
>
> (iii) the time and place under which the defendant's alleged statement was made;
>
> (iv) whether the informant witness has received, or expects to receive, anything in exchange for his or her testimony;
>
> (v) the informant witness' prior history of cooperation, in return for any benefit, as known to the prosecutor.

Finally, we add the following court commentary pertaining to new subdivision (b)(1)(M):

> [T]he Florida Innocence Commission recognized the impossibility of listing in the body of the rule every possible permutation expressing a benefit by the state to the informant witness. Although the term "anything" is not defined in the rule, the following are examples of benefits that may be considered by the trial court in determining whether the state has complied with its discovery obligations. The term "anything" includes, but is not limited to, any deal, promise,

> inducement, pay, leniency, immunity, 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.

Given the incidence of wrongful convictions involving "jailhouse informants" as stated by the Innocence Commission in its Final Report,[3] the amendments to rule 3.220 will provide for the disclosure of information specifically relating to informant witnesses. This information is readily available to the prosecution and will not be overly burdensome to disclose.

Accordingly, we amend rule 3.220 as reflected in the appendix to this opinion. New language is indicated by underscoring; deletions are indicated by struck-through type. The amendments shall take effect at 12:01 a.m. on July 1, 2014.

It is so ordered.

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3. In its Final Report, the Innocence Commission states in pertinent part as follows:

> According to the Innocence Project, an in-custody informant ("jailhouse informant") testified in over 15% of wrongful conviction cases later overturned through DNA testing. Of the exonerees released from death row, 45.9% were convicted, in part, due to false informant testimony. This makes fabricated testimony a leading cause of wrongful convictions in capital cases. Further studies have shown that informant perjury was a factor in nearly 50% of wrongful murder convictions.

Final Report, at 49.

POLSTON, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

Original Proceeding – Florida Rules of Criminal Procedure

Melanie L. Casper, Chair, Criminal Procedure Rules Committee, West Palm Beach, Florida; John F. Harkness, Jr., Executive Director, and Heather S. Telfer, Staff Liaison, The Florida Bar, Tallahassee, Florida,

Responding with comments

APPENDIX

RULE 3.220. DISCOVERY

(a) [No changes]

(b) Prosecutor's Discovery Obligation.

(1) Within 15 days after service of the Notice of Discovery, the prosecutor shall serve a written Discovery Exhibit which shall disclose to the defendant and permit the defendant to inspect, copy, test, and photograph the following information and material within the state's possession or control, except that any property or material that portrays sexual performance by a child or constitutes child pornography may not be copied, photographed, duplicated, or otherwise reproduced so long as the state attorney makes the property or material reasonably available to the defendant or the defendant's attorney:

(A) a list of the names and addresses of all persons known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto, or to any similar fact evidence to be presented at trial under section 90.404(2), Florida Statutes. The names and addresses of persons listed shall be clearly designated in the following categories:

(i) Category A. These witnesses shall include (1) eye witnesses, (2) alibi witnesses and rebuttal to alibi witnesses, (3) witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or codefendant, which shall be separately identified within this category, (4) investigating officers, (5) witnesses known by the prosecutor to have any material information that tends to negate the guilt of the defendant as to any offense charged, (6) child hearsay witnesses, ~~and~~ (7) expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify~~.~~, and (8) informant witnesses, whether in custody, who offer testimony concerning the statements of a defendant about the issues for which the defendant is being tried.

(ii)-(iii) [No changes]

(B)-(L) [No changes]

(M) whether the state has any material or information that has been provided by an informant witness, including:

(i) the substance of any statement allegedly made by the defendant about which the informant witness may testify;

(ii) a summary of the criminal history record of the informant witness;

(iii) the time and place under which the defendant's alleged statement was made;

(iv) whether the informant witness has received, or expects to receive, anything in exchange for his or her testimony;

(v) the informant witness' prior history of cooperation, in return for any benefit, as known to the prosecutor.

(c)-(o) [No changes]

Committee Notes

1968 Adoption – 1998 Amendment. [No changes]

Court Commentary

2014 Amendment. The amendment to subdivision (b)(1)(A)(i)(8) is not intended to limit in any manner whatsoever the discovery obligations under the other provisions of the rule. With respect to subdivision (b)(l)(M)(iv), the Florida Innocence Commission recognized the impossibility of listing in the body of the rule every possible permutation expressing a benefit by the state to the informant witness. Although the term "anything" is not defined in the rule, the following are examples of benefits that may be considered by the trial court in determining whether the state has complied with its discovery obligations. The term "anything" includes, but is not limited to, any deal, promise, inducement, pay, leniency, immunity, 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.

1996 Amendment – 1999/2000 Amendment. [No changes]

Revised 7/19/12
Effective 9/4/12

IDENTIFICATION: IN-COURT IDENTIFICATION ONLY

(Defendant), as part of [his/her] general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that [he/she] is the person who committed the alleged offense. The burden of proving the identity of the person who committed the crime is upon the State. For you to find defendant guilty, the State must prove beyond a reasonable doubt that this person is the person who committed the crime. (Defendant) has neither the burden nor the duty to show that the crime, if committed, was committed by someone else, or to prove the identity of that other person. You must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proved beyond a reasonable doubt that (this defendant) is the person who committed it.

The State has presented testimony of [insert name of witness who identified defendant]. You will recall that this witness identified the defendant as the person who committed [insert the offense(s) charged]. According to the witness, [his/her] identification of the defendant was based upon the observations and perceptions that [he/she] made of the perpetrator at the time the offense was being committed. It is your function to determine whether the witness's identification of (defendant) is reliable and believable, or whether it is based on a mistake or for any reason is not worthy of belief.[1] You must decide whether it is sufficiently reliable evidence upon which to conclude that (this defendant) is the person who committed the offense[s] charged.

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[1] United States v. Wade, 388 U.S. 218, 228, 87 S. Ct. 1926, 1933, 18 L. Ed. 2d 1149, 1158 (1967); State v. Green, 86 N.J. 281, 291-93 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-19 (App. Div. 1996).

Eyewitness identification evidence must be scrutinized carefully**.** Human beings have the ability to recognize other people from past experiences and to identify them at a later time, but research has shown that there are risks of making mistaken identifications. That research has focused on the nature of memory and the factors that affect the reliability of eyewitness identifications.

Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex.[2] The process of remembering consists of three stages: acquisition -- the perception of the original event; retention -- the period of time that passes between the event and the eventual recollection of a piece of information; and retrieval -- the stage during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors.[3]

Relying on some of the research that has been done, I will instruct you on specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable. In evaluating this identification, you should consider the observations and perceptions on which the identification was based, the witness's ability to make those observations and perceive events, and the circumstances under which the identification was made. Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore,

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2 State v. Henderson, 208 N.J. 208, 245 (2011).

3 Id. at 245-46.

when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.[4]

In deciding what weight, if any, to give to the identification testimony, you should consider the following factors that are related to the witness, the alleged perpetrator, and the criminal incident itself.[5] **[choose appropriate factors]**:

(1) The Witness's Opportunity to View and Degree of Attention: In evaluating the reliability of the identification, you should assess the witness's opportunity to view the person who committed the offense at the time of the offense and the witness's degree of attention to the perpetrator at the time of the offense. In making this assessment you should consider the following **[choose appropriate factors from (a) through (g) below]**:

(a) Stress: Even under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification. Therefore, you should consider a witness's level of stress and whether that stress, if any**,** distracted the witness or made it harder for him or her to identify the perpetrator.[6]

(b) Duration: The amount of time an eyewitness has to observe an event may affect the reliability of an identification. Although there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure to the perpetrator. In addition, time estimates given by witnesses may not always be accurate because witnesses tend to think events lasted longer than they actually did.[7]

(c) Weapon Focus: You should consider whether the witness saw a weapon during the incident and the duration of the crime. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of a subsequent identification if the crime is of short duration. In considering this factor, you should take into account the duration of the crime because the longer the event, the more time the witness may have to adapt to the presence of the weapon and focus on other details.[8]

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4 State v. Romero, 191 N.J. 59, 76 (2007).
5 Henderson, supra, 208 N.J. at 247.
6 Id. at 261-62.
7 Id. at 264.
8 Id. at 262-63.

(d) Distance: A person is easier to identify when close by. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a mistaken identification. In addition, a witness's estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.[9]

(e) Lighting: Inadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions present at the time of the alleged crime in this case.[10]

(f) Intoxication: The influence of alcohol can affect the reliability of an identification.[11] An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who drank a small amount of alcohol. [12]

(g) Disguises/Changed Appearance: The perpetrator's use of a disguise can affect a witness's ability both to remember and identify the perpetrator. Disguises like hats, sunglasses, or masks can reduce the accuracy of an identification.[13] Similarly, if facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.[14]

(2) Prior Description of Perpetrator: Another factor for your consideration is the accuracy of any description the witness gave after observing the incident and before identifying the perpetrator. Facts that may be relevant to this factor include whether the prior description matched the person picked out later, whether the prior description provided details or was just general in nature, and whether the witness's testimony at trial was consistent with, or different from, his/her prior description of the perpetrator. [**Charge if appropriate**: You may also consider whether the witness did not identify the defendant at a prior identification procedure or chose a different suspect or filler.]

(3) Confidence and Accuracy: You heard testimony that (insert name of witness) expressed his/her level of certainty that the person he/she selected is in fact the person who committed the crime. As I explained earlier, a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.[15] Although some research has found that highly confident

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9 Id.at 264.

10 Ibid.

11 If there is evidence of impairment by drugs or other substances, the charge can be modified accordingly.

12 Henderson, supra, 208 N.J. at 265.

13 Id. at 266.

14 Ibid.

15 Id. at 254 (quoting Romero, supra, 191 N.J. at 76).

witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.[16]

(4) Time Elapsed: Memories fade with time. As a result, delays between the commission of a crime and the time an identification is made can affect the reliability of the identification. In other words, the more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken.[17]

(5) Cross-Racial Effects: Research has shown that people may have greater difficulty in accurately identifying members of a different race.[18] You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness's identification.

[The jury should also be charged on any other relevant factors in the case.**]**

You may consider whether the witness was exposed to opinions, descriptions, or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence, that may have affected the independence of his/her identification.[19] Such information can affect the independent nature and reliability of a witness's identification and inflate the witness's confidence in the identification.

You are also free to consider any other factor based on the evidence or lack of evidence in the case that you consider relevant to your determination whether the identification was reliable. Keep in mind that the presence of any single factor or combination of factor(s), however, is not an indication that a particular witness is incorrect. Instead, you may consider the factors that I have discussed as you assess all of the circumstances of the case, including all of the testimony and documentary evidence, in determining whether a particular identification made by a witness is accurate and thus

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16 Id. at 253-55.

17 Id. at 267.

18 This instruction must be given whenever there is a cross-racial identification. Id. at 299 (modifying State v. Cromedy, 158 N.J. 112, 132 (1999)).

19 State v. Chen, 208 N.J. 307 (2011).

worthy of your consideration as you decide whether the State has met its burden to prove identification beyond a reasonable doubt. If you determine that the in-court identification resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, you may consider that evidence and decide how much weight to give it. If you instead decide that the identification is the product of an impression gained at the in-court identification procedure, the identification should be afforded no weight. The ultimate issue of the trustworthiness of the identification is for you to decide.

If, after considering all of the evidence, you determine that the State has not proven beyond a reasonable doubt that (defendant) was the person who committed this offense [these offenses], then you must find him/her not guilty. If, on the other hand, after considering all of the evidence, you are convinced beyond a reasonable doubt that (defendant) was correctly identified, you will then consider whether the State has proven each and every element of the offense[s] charged beyond a reasonable doubt.

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Effective 9/4/12

IDENTIFICATION: IN-COURT AND OUT-OF-COURT IDENTIFICATIONS

(Defendant), as part of [his/her] general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that [he/she] is the person who committed the alleged offense. The burden of proving the identity of the person who committed the crime is upon the State. For you to find this defendant guilty, the State must prove beyond a reasonable doubt that this defendant is the person who committed the crime. The defendant has neither the burden nor the duty to show that the crime, if committed, was committed by someone else, or to prove the identity of that other person. You must determine, therefore, not only whether the State has proven each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proven beyond a reasonable doubt that this defendant is the person who committed it.

The State has presented the testimony of [insert name of witness who identified defendant]. You will recall that this witness identified the defendant in court as the person who committed [insert the offense(s) charged]. The State also presented testimony that on a prior occasion before this trial, this witness identified the defendant as the person who committed this offense [these offenses]. According to the witness, [his/her] identification of the defendant was based upon the observations and perceptions that [he/she] made of the perpetrator at the time the offense was being committed. It is your function to determine whether the witness's identification of the defendant is reliable and believable, or whether it is based on a mistake or for any reason is not worthy

of belief.[1] You must decide whether it is sufficiently reliable evidence that this defendant is the person who committed the offense[s] charged.

Eyewitness identification evidence must be scrutinized carefully. Human beings have the ability to recognize other people from past experiences and to identify them at a later time, but research has shown that there are risks of making mistaken identifications. That research has focused on the nature of memory and the factors that affect the reliability of eyewitness identifications.

Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex.[2] The process of remembering consists of three stages: acquisition -- the perception of the original event; retention -- the period of time that passes between the event and the eventual recollection of a piece of information; and retrieval -- the stage during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors.[3]

Relying on some of the research that has been done, I will instruct you on specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable. In evaluating this identification, you should consider the observations and perceptions on which the identification was based, the witness's ability to make those observations and perceive events, and the circumstances under which the identification was made. Although nothing may appear more convincing than

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1 United States v. Wade, 388 U.S. 218, 228, 87 S. Ct. 1926, 1933, 18 L. Ed. 2d 1149, 1158 (1967); State v. Green, 86 N.J. 281, 291-93 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-19 (App. Div. 1996).

2 State v. Henderson, 208 N.J. 208, 245 (2011).

3 Id. at 245-46.

a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.[4]

If you determine that the out-of-court identification is not reliable, you may still consider the witness's in-court identification of the defendant if you find that it resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, and that the identification is reliable. If you find that the in-court identification is the product of an impression gained at the out-of-court identification procedure, it should be afforded no weight. The ultimate question of the reliability of both the in-court and out-of-court identifications is for you to decide.[5]

To decide whether the identification testimony is sufficiently reliable evidence to conclude that this defendant is the person who committed the offense[s] charged, you should evaluate the testimony of the witness in light of the factors for considering credibility that I have already explained to you. In addition, you should consider the following factors that are related to the witness, the alleged perpetrator, and the criminal incident itself.[6] In particular, you should consider **[choose appropriate factors from one through five below]**:

(1) The Witness's Opportunity to View and Degree of Attention: In evaluating the reliability of the identification, you should assess the witness's opportunity

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4 State v. Romero, 191 N.J. 59, 76 (2007).

5 Wade, supra, 388 U.S. at 229-32, 241, 87 S. Ct. at 1933-35, 1940, 18 L. Ed. 2d at 1158-60, 1165 (manner in which lineup or other identification procedure conducted relevant to reliability of out-of-court identification and in-court identification following out-of-court identification, and jury's credibility determinations).

6 Henderson, supra, 208 N.J. at 247.

to view the person who committed the offense at the time of the offense and the witness's degree of attention to the perpetrator at the time of the offense. In making this assessment you should consider the following **[choose appropriate factors from (a) through (g) below]**:

(a) Stress: Even under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification. Therefore, you should consider a witness's level of stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.[7]

(b) Duration: The amount of time an eyewitness has to observe an event may affect the reliability of an identification. Although there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure to the perpetrator. In addition, time estimates given by witnesses may not always be accurate because witnesses tend to think events lasted longer than they actually did.[8]

(c) Weapon Focus: You should consider whether the witness saw a weapon during the incident and the duration of the crime. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of a subsequent identification if the crime is of short duration. In considering this factor, you should take into account the duration of the crime because the longer the event, the more time the witness may have to adapt to the presence of the weapon and focus on other details.[9]

(d) Distance: A person is easier to identify when close by. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a mistaken identification. In addition, a witness's estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.[10]

(e) Lighting: Inadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions present at the time of the alleged crime in this case.[11]

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7 Id. at 261-62.
8 Id. at 264.
9 Id. at 262-63.
10 Id. at 264.
11 Ibid.

(f) Intoxication: The influence of alcohol can affect the reliability of an identification.[12] An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who drank a small amount of alcohol. [13]

(g) Disguises/Changed Appearance: The perpetrator's use of a disguise can affect a witness's ability both to remember and identify the perpetrator. Disguises like hats, sunglasses, or masks can reduce the accuracy of an identification.[14] Similarly, if facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.[15]

(2) Prior Description of Perpetrator: Another factor for your consideration is the accuracy of any description the witness gave after observing the incident and before identifying the perpetrator. Facts that may be relevant to this factor include whether the prior description matched the photo or person picked out later, whether the prior description provided details or was just general in nature, and whether the witness's testimony at trial was consistent with, or different from, his/her prior description of the perpetrator. [**Charge if appropriate**: You may also consider whether the witness did not identify the defendant at a prior identification procedure or chose a different suspect or filler.]

(3) Confidence and Accuracy: You heard testimony that (insert name of witness) made a statement at the time he/she identified the defendant from a photo array/line-up concerning his/her level of certainty that the person/photograph he/she selected is in fact the person who committed the crime. As I explained earlier, a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.[16] Although some research has found that highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.[17]

(4) Time Elapsed: Memories fade with time. As a result, delays between the commission of a crime and the time an identification is made can affect the reliability of the identification. In other words, the more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken.[18]

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12 If there is evidence of impairment by drugs or other substances, the charge can be modified accordingly.

13 Henderson, supra, 208 N.J. at 265.

14 Id. at 266.

15 Ibid.

16 Id. at 254 (quoting Romero, supra, 191 N.J. at 76).

17 Id. at 253-55.

18 Id. at 267.

(5) Cross-Racial Effects: Research has shown that people may have greater difficulty in accurately identifying members of a different race.[19] You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness's identification.

[The jury should also be charged on any other relevant factors in the case.]

In evaluating the reliability of a witness's identification, you should also consider the circumstances under which any out-of-court identification was made, and whether it was the result of a suggestive procedure. In that regard, you may consider everything that was done or said by law enforcement to the witness during the identification process. You should consider the following factors**: [Charge if appropriate]**:[20]

(1) Lineup Composition: A suspect should not stand out from other members of the lineup. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness's confidence in the identification because the selection process seemed so easy to the witness.[21] It is, of course, for you to determine whether the composition of the lineup had any effect on the reliability of the identification.

(2) Fillers: Lineups should include a number of possible choices for the witness, commonly referred to as "fillers." The greater the number of choices, the more likely the procedure will serve as a reliable test of the witness's memory. A minimum of six persons or photos should be included in the lineup.[22]

(3) Multiple Viewings: When a witness views the same person in more than one identification procedure, it can be difficult to know whether a later identification comes from the witness's memory of the actual, original event or of an earlier identification procedure. As a result, if a witness views an innocent suspect in multiple identification procedures, the risk of mistaken identification is increased. You may consider whether the witness viewed the suspect multiple times during

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19 This instruction must be given whenever there is a cross-racial identification. Id. at 299 (modifying State v. Cromedy, 158 N.J. 112, 132 (1999)).

20 The following factors consist of "the system … variables … for which [the Court] found scientific support that is generally accepted by experts." Henderson, supra, 208 N.J. at 298-99.

21 Id. at 251.

22 Ibid.

the identification process and, if so, whether that affected the reliability of the identification. [23]

[CHARGE IN EVERY CASE IN WHICH THERE IS A SHOWUP PROCEDURE]

(4) Showups: In this case, the witness identified the defendant during a "showup," that is, the defendant was the only person shown to the witness at that time. Even though such a procedure is suggestive in nature, it is sometimes necessary for the police to conduct a "showup" or one-on-one identification procedure. Although the benefits of a fresh memory may balance the risk of undue suggestion, showups conducted more than two hours after an event present a heightened risk of misidentification. Also, police officers must instruct witnesses that the person they are about to view may or may not be the person who committed the crime and that they should not feel compelled to make an identification. In determining whether the identification is reliable or the result of an unduly suggestive procedure, you should consider how much time elapsed after the witness last saw the perpetrator, whether the appropriate instructions were given to the witness, and all other circumstances surrounding the showup.[24]

[CHARGE (a) and (b) IN EVERY CASE IN WHICH THE POLICE CONDUCT AN IDENTIFICATION LINEUP PROCEDURE][25]

In determining the reliability of the identification, you should also consider whether the identification procedure was properly conducted.

(a) Double-blind: A lineup administrator who knows which person or photo in the lineup is the suspect may intentionally or unintentionally convey that knowledge to the witness. That increases the chance that the witness will

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[23] Id. at 255-56. If either "mugshot exposure" (no identification in first lineup/photo array, but later identification of someone from the first array in second lineup/photo array) or "mugshot commitment" (selection of person in lineup who was identified in previous photo array) are part of the evidence, the jury should be instructed on the concepts implicated by those terms without using the word "mugshot." See Model Jury Charge (Criminal) on "Identity-Police Photos."

[24] Henderson, supra, 208 N.J. at 259-61.

[25] "To help jurors weigh that evidence, they must be told about relevant factors and their effect on reliability." Id. at 219 (asking the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to this charge "and address various system and estimator variables").

identify the suspect, even if the suspect is innocent. For that reason, whenever feasible, live lineups and photo arrays should be conducted by an officer who does not know the identity of the suspect.[26]

[CHARGE IF BLIND ADMINISTRATOR IS NOT USED]

If a police officer who does not know the suspect's identity is not available, then the officer should not see the photos as the witness looks at them. In this case, it is alleged that the person who presented the lineup knew the identity of the suspect. It is also alleged that the police did/did not compensate for that by conducting a procedure in which the officer did not see the photos as the witness looked at them.

[RESUME MAIN CHARGE]

You may consider this factor when you consider the circumstances under which the identification was made, and when you evaluate the overall reliability of the identification.[27]

(b) Instructions: You should consider what was or what was not said to the witness prior to viewing a photo array.[28] Identification procedures should begin with instructions to the witness that the perpetrator may or may not be in the array and that the witness should not feel compelled to make an identification. The failure to give this instruction can increase the risk of misidentification. If you find that the police [did/did not] give this instruction to the witness, you may take this factor into account when evaluating the identification evidence.[29]

[CHARGE IF FEEDBACK IS AN ISSUE IN THE CASE]

(c) Feedback: Feedback occurs when police officers, or witnesses to an event who are not law enforcement officials, signal to eyewitnesses that they correctly identified the suspect. That confirmation may reduce doubt and engender or produce a false sense of confidence in a witness. Feedback may also falsely enhance a witness's recollection of the quality of his or her view of an event. It is for you to determine whether or not a witness's

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26 Id. at 248-50.

27 Ibid.

28 See State v. Cherry, 289 N.J. Super. 503 (App. Div. 1995).

29 Henderson, supra, 208 N.J. at 250.

> recollection in this case was affected by feedback or whether the recollection instead reflects the witness's accurate perception of the event.[30]

[RESUME MAIN CHARGE]

You may consider whether the witness was exposed to opinions, descriptions, or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence, that may have affected the independence of his/her identification.[31] Such information can affect the independent nature and reliability of a witness's identification and inflate the witness's confidence in the identification.

You are also free to consider any other factor based on the evidence or lack of evidence in the case that you consider relevant to your determination whether the identifications were reliable. Keep in mind that the presence of any single factor or combination of factor(s), however, is not an indication that a particular witness is incorrect. Instead, you may consider the factors that I have discussed as you assess all of the circumstances of the case, including all of the testimony and documentary evidence, in determining whether a particular identification made by a witness is accurate and thus worthy of your consideration as you decide whether the State has met its burden to prove identification beyond a reasonable doubt. If you determine that the in-court or out-of-court identifications resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, you may consider that evidence and decide how much weight to give it. If you instead decide that the identification(s) is/are the product of an impression gained at the in-court and/or out-of-court identification

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30 Id. at 253-55; see also State v. Herrera, 187 N.J. 493, 509 (2006) (quoting State v. Ramirez, 817 P.2d 774, 781 (Utah 1991) (citing State v. Long, 721 P.2d 483, 493 (Utah 1986)).

31 State v. Chen, 208 N.J. 307 (2011).

procedures, the identifications should be afforded no weight. The ultimate issue of the trustworthiness of an identification is for you to decide.

If, after consideration of all of the evidence, you determine that the State has not proven beyond a reasonable doubt that (defendant) was the person who committed this offense [these offenses], then you must find him/her not guilty. If, on the other hand, after consideration of all of the evidence, you are convinced beyond a reasonable doubt that (defendant) was correctly identified, you will then consider whether the State has proven each and every element of the offense[s] charged beyond a reasonable doubt.

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Effective 9/4/12

IDENTIFICATION: OUT-OF-COURT IDENTIFICATION ONLY

(Defendant), as part of [his/her] general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that [he/she] is the person who committed the alleged offense. The burden of proving the identity of the person who committed the crime is upon the State. For you to find (defendant) guilty, the State must prove beyond a reasonable doubt that this person is the person who committed the crime. (Defendant) has neither the burden nor the duty to show that the crime, if committed, was committed by someone else, or to prove the identity of that other person. You must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proved beyond a reasonable doubt that (this defendant) is the person who committed it.

The State has presented testimony that on a prior occasion before this trial, [insert name of witness who identified defendant] identified (defendant) as the person who committed [insert the offenses charged]. According to the witness, [his/her] identification of the defendant was based upon the observations and perceptions that [he/she] made of the perpetrator at the time the offense was being committed. It is your function to determine whether the witness's identification of (defendant) is reliable and believable or whether it is based on a mistake or for any reason is not worthy of belief.[1] You must decide whether it is sufficiently reliable evidence that (this defendant) is the person who committed the offense[s] charged.

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[1] United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L. Ed. 2d 1149, 1158 (1967); State v. Green, 86 N.J. 281, 291-93 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-19 (App. Div. 1996).

Eyewitness identification evidence must be scrutinized carefully**.** Human beings have the ability to recognize other people from past experiences and to identify them at a later time, but research has shown that there are risks of making mistaken identifications. That research has focused on the nature of memory and the factors that affect the reliability of eyewitness identifications.

Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex.[2] The process of remembering consists of three stages: acquisition -- the perception of the original event; retention -- the period of time that passes between the event and the eventual recollection of a piece of information; and retrieval -- the stage during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors.[3]

Relying on some of the research that has been done, I will instruct you on specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable. In evaluating this identification, you should consider the observations and perceptions on which the identification was based, the witness's ability to make those observations and perceive events, and the circumstances under which the identification was made. Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing

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2 State v. Henderson, 208 N.J. 208, 245 (2011).

3 Id. at 245-46.

alone, may not be an indication of the reliability of the identification.[4] In deciding what weight, if any, to give to the identification testimony, you should consider the following factors that are related to the witness, the alleged perpetrator, and the criminal incident itself.[5] **[choose appropriate factors from one through five below]**:

(1) The Witness's Opportunity to View and Degree of Attention: In evaluating the reliability of the identification, you should assess the witness's opportunity to view the person who committed the offense at the time of the offense and the witness's degree of attention to the perpetrator at the time of the offense. In making this assessment you should consider the following **[choose appropriate factors from (a) through (g) below]**:

(a) Stress: Even under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification. Therefore, you should consider a witness's level of stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.[6]

(b) Duration: The amount of time an eyewitness has to observe an event may affect the reliability of an identification. Although there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure to the perpetrator. In addition, time estimates given by witnesses may not always be accurate because witnesses tend to think events lasted longer than they actually did.[7]

(c) Weapon Focus: You should consider whether the witness saw a weapon during the incident and the duration of the crime. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of a subsequent identification if the crime is of short duration. In considering this factor, you should take into account the duration of the crime because the longer the event, the more time the witness may have to adapt to the presence of the weapon and focus on other details.[8]

(d) Distance: A person is easier to identify when close by. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a

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4 State v. Romero, 191 N.J. 59, 76 (2007).
5 Henderson, supra, 208 N.J. at 247.
6 Id. at 261-62.
7 Id. at 264.
8 Id. at 262-63.

mistaken identification. In addition, a witness's estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.[9]

(e) Lighting: Inadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions present at the time of the alleged crime in this case.[10]

(f) Intoxication: The influence of alcohol can affect the reliability of an identification.[11] An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who drank a small amount of alcohol. [12]

(g) Disguises/Changed Appearance: The perpetrator's use of a disguise can affect a witness's ability both to remember and identify the perpetrator. Disguises like hats, sunglasses, or masks can reduce the accuracy of an identification.[13] Similarly, if facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.[14]

(2) Prior Description of Perpetrator: Another factor for your consideration is the accuracy of any description the witness gave after observing the incident and before identifying the perpetrator. Facts that may be relevant to this factor include whether the prior description matched the photo or person picked out later, whether the prior description provided details or was just general in nature, and whether the witness's testimony at trial was consistent with, or different from, his/her prior description of the perpetrator. [**Charge if appropriate**: You may also consider whether the witness did not identify the defendant at a prior identification procedure or chose a different suspect or filler.]

(3) Confidence and Accuracy: You heard testimony that (insert name of witness) made a statement at the time he/she identified the defendant from a photo array/line-up concerning his/her level of certainty that the person/photograph he/she selected is in fact the person who committed the crime. As I explained earlier, a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.[15] Although some research has found that

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9 Id. at 264.

10 Ibid.

11 If there is evidence of impairment by drugs or other substances, the charge can be modified accordingly.

12 Henderson, supra, 208 N.J. at 265.

13 Id. at 266.

14 Ibid.

15 Id. at 254 (quoting Romero, supra, 191 N.J. at 76).

highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.[16]

(4) Time Elapsed: Memories fade with time. As a result, delays between the commission of a crime and the time an identification is made can affect the reliability of the identification. In other words, the more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken.[17]

(5) Cross-Racial Effects: Research has shown that people may have greater difficulty in accurately identifying members of a different race.[18] You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness's identification.

[The jury should also be charged on any other relevant factors in the case.**]**

In evaluating the reliability of a witness's identification, you should also consider the circumstances under which the out-of-court identification was made, and whether it was the result of a suggestive procedure. In that regard, you may consider everything that was done or said by law enforcement to the witness during the identification process. You should consider the following factors**: [Charge if appropriate]**:[19]

(1) Lineup Composition: A suspect should not stand out from other members of the lineup. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness's confidence in the identification because the selection process seemed so easy to the witness.[20] It is, of course, for you to determine whether the composition of the lineup had any effect on the reliability of the identification.

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16 Id. at 253-55.

17 Id. at 267.

18 This instruction must be given whenever there is a cross-racial identification. Id. at 299 (modifying State v. Cromedy, 158 N.J. 112, 132 (1999)).

19 The following factors consist of "the system … variables … for which [the Court] found scientific support that is generally accepted by experts." Henderson, supra, 208 N.J. at 298-99.

20 Id. at 251.

(2) Fillers: Lineups should include a number of possible choices for the witness, commonly referred to as "fillers." The greater the number of choices, the more likely the procedure will serve as a reliable test of the witness's memory. A minimum of six persons or photos should be included in the lineup.[21]

(**3) Multiple Viewings**: When a witness views the same person in more than one identification procedure, it can be difficult to know whether a later identification comes from the witness's memory of the actual, original event or of an earlier identification procedure. As a result, if a witness views an innocent suspect in multiple identification procedures, the risk of mistaken identification is increased. You may consider whether the witness viewed the suspect multiple times during the identification process and, if so, whether that affected the reliability of the identification. [22]

[CHARGE IN EVERY CASE IN WHICH THERE IS A SHOWUP PROCEDURE]

(4) Showups: In this case, the witness identified the defendant during a "showup," that is, the defendant was the only person shown to the witness at that time. Even though such a procedure is suggestive in nature, it is sometimes necessary for the police to conduct a "showup" or one-on-one identification procedure. Although the benefits of a fresh memory may balance the risks of undue suggestion, showups conducted more than two hours after an event present a heightened risk of misidentification. Also, police officers must instruct witnesses that the person they are about to view may or may not be the person who committed the crime and that they should not feel compelled to make an identification. In determining whether the identification is reliable or the result of an unduly suggestive procedure, you should consider how much time elapsed after the witness last saw the perpetrator, whether the appropriate instructions were given to the witness, and all other circumstances surrounding the showup.[23]

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21 Ibid.

22 Id. at 255-56. If either "mugshot exposure" (no identification in first lineup/photo array, but later identification of someone from the first array in second lineup/photo array) or "mugshot commitment" (selection of person in lineup who was identified in previous photo array) are part of the evidence, the jury should be instructed on the concepts implicated by those terms without using the word "mugshot." See Model Jury Charge (Criminal) on "Identity-Police Photos."

23 Henderson, supra, 208 N.J. at 259-61.

[CHARGE (a) AND (b) IN EVERY CASE IN WHICH THE POLICE CONDUCT AN IDENTIFICATION LINEUP PROCEDURE][24]

In determining the reliability of the identification, you should also consider whether the identification procedure was properly conducted.

(a) Double-blind: A lineup administrator who knows which person or photo in the lineup is the suspect may intentionally or unintentionally convey that knowledge to the witness. That increases the chance that the witness will identify the suspect, even if the suspect is innocent. For that reason, whenever feasible, live lineups and photo arrays should be conducted by an officer who does not know the identity of the suspect.[25]

[CHARGE IF BLIND ADMINISTRATOR IS NOT USED]

If a police officer who does not know the suspect's identity is not available, then the officer should not see the photos as the witness looks at them. In this case, it is alleged that the person who presented the lineup knew the identity of the suspect. It is also alleged that the police did/did not compensate for that by conducting a procedure in which the officer did not see the photos as the witness looked at them.

[RESUME MAIN CHARGE]

You may consider this factor when you consider the circumstances under which the identification was made, and when you evaluate the overall reliability of the identification.[26]

(b) Instructions: You should consider what was or what was not said to the witness prior to viewing a photo array.[27] Identification procedures should begin with instructions to the witness that the perpetrator may or may not be in the array and that the witness should not feel compelled to make an identification. The failure to give this instruction can increase the risk of misidentification. If you find that the police [did/did not] give this

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[24] "To help jurors weigh that evidence, they must be told about relevant factors and their effect on reliability." Id. at 219 (asking the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to this charge "and address various system and estimator variables").

[25] Id. at 248-50.

[26] Ibid.

[27] See State v. Cherry, 289 N.J. Super. 503 (App. Div. 1995).

instruction to the witness, you may take this factor into account when evaluating the identification evidence.[28]

[CHARGE IF FEEDBACK IS AN ISSUE IN THE CASE]

(c) Feedback: Feedback occurs when police officers, or witnesses to an event who are not law enforcement officials, signal to eyewitnesses that they correctly identified the suspect. That confirmation may reduce doubt and engender or produce a false sense of confidence in a witness. Feedback may also falsely enhance a witness's recollection of the quality of his or her view of an event. It is for you to determine whether or not a witness's recollection in this case was affected by feedback or whether the recollection instead reflects the witness's accurate perception of the event.[29]

[RESUME MAIN CHARGE]

You may consider whether the witness was exposed to opinions, descriptions, or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence, that may have affected the independence of his/her identification.[30] Such information can affect the independent nature and reliability of a witness's identification and inflate the witness's confidence in the identification.

You are also free to consider any other factor based on the evidence or lack of evidence in the case that you consider relevant to your determination whether the identification was reliable. Keep in mind that the presence of any single factor or combination of factor(s), however, is not an indication that a particular witness is incorrect. Instead, you may consider the factors that I have discussed as you assess all of the circumstances of the case, including all of the testimony and documentary evidence,

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[28] Henderson, supra, 208 N.J. at 250.

[29] Id. at 253-55; see also State v. Herrera, 187 N.J. 493, 509 (2006) (quoting State v. Ramirez, 817 P.2d 774, 781 (Utah 1991) (citing State v. Long, 721 P.2d 483, 493 (Utah 1986)).

[30] State v. Chen, 208 N.J. 307 (2011).

in determining whether a particular identification made by a witness is accurate and thus worthy of your consideration as you decide whether the State has met its burden to prove identification beyond a reasonable doubt. If you determine that the out-of-court identification resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, you may consider that evidence and decide how much weight to give it. If you instead decide that the identification is the product of an impression gained at the out-of-court identification procedure, the identification should be afforded no weight. The ultimate issue of the trustworthiness of the identification is for you to decide.

If, after considering all of the evidence, you determine that the State has not proven beyond a reasonable doubt that (defendant) was the person who committed this offense [these offenses], then you must find him/her not guilty. If, on the other hand, after consideration of all of the evidence, you are convinced beyond a reasonable doubt that (defendant) was correctly identified, you will then consider whether the State has proven each and every element of the offense[s] charged beyond a reasonable doubt.

MODEL EYEWITNESS IDENTIFICATION INSTRUCTION

This instruction should be given in any case in which the jury heard eyewitness evidence that positively identified the defendant and in which the identification of the defendant as the person who committed or participated in the alleged crime(s) is contested. Where there is no positive identification but a partial identification of the defendant, as discussed in *Commonwealth v. Franklin*, 465 Mass. 895, 910-12 (2013), this instruction or "some variation" of it should be given upon request. The instruction is set forth at 473 Mass. 1051 (2015).

The Commonwealth has the burden of proving beyond a reasonable doubt that the defendant is the person who committed (or participated in) the alleged crime(s). If you are not convinced beyond a reasonable doubt that the defendant is the person who committed (or participated in) the alleged crime(s), you must find the defendant not guilty.

Where a witness has identified the defendant as the person who committed (or participated in) the alleged crime(s), you should examine the identification with care. As with any witness, you must determine the witness's credibility, that is, do you believe the witness is being honest? Even if you are convinced that the witness believes his or her identification is correct, you still must consider the possibility that the witness made a mistake in the identification. A witness may honestly believe he or she saw a person, but perceive or remember the event inaccurately. You must

decide whether the witness's identification is not only truthful, but accurate.

People have the ability to recognize others they have seen and to accurately identify them at a later time, but research and experience have shown that people sometimes make mistakes in identification.

The mind does not work like a video recorder. A person cannot just replay a mental recording to remember what happened. Memory and perception are much more complicated.[i] Remembering something requires three steps. First, a person sees an event. Second, the person's mind stores information about the event. Third, the person recalls stored information. At each of these stages, a variety of factors may affect — or even alter — someone's memory of what happened and thereby affect the accuracy of identification testimony.[ii] This can happen without the witness being aware of it.

I am going to list some factors that you should consider in determining whether identification testimony is accurate.

1. <u>Opportunity to view the event</u>. **You should consider the opportunity the witness had to observe the alleged offender at the time of the event. For example, how good a look did the witness get of the person and for how long? How much attention was the witness paying to the person at**

that time? How far apart were the witness and the person? How good were the lighting conditions? You should evaluate a witness's testimony about his or her opportunity to observe the event with care.[iii]

a. *If there was evidence that a disguise was involved or the alleged offender's face was obscured.*

You should consider whether the person was disguised or had his or her facial features obscured. For example, if the person wore a hat, mask, or sunglasses, it may affect the witness's ability to accurately identify the person.[iv]

b. *If there was evidence that the alleged offender had a distinctive face or feature.*

You should consider whether the person had a distinctive face or feature.[v]

c. *If there was evidence that a weapon was involved.* **You should consider whether the witness saw a weapon during the event. If the event is of short duration, the visible presence of a weapon may distract the witness's attention away from the person's face. But the longer the event, the more time the witness may have to get used to the presence of a weapon and focus on the person's face.[vi]**

2. Characteristics of the witness. You should consider the physical and mental characteristics of the witness when the observation was made. For example, how good was the witness's eyesight? Was the witness experiencing illness, injury, or fatigue? Was the witness under a high level of stress? High levels of stress may reduce a person's ability to make an accurate identification.[vii]

a. *If there was evidence that the witness and the person identified are family members, friends, or longtime acquaintances.*

If the person identified is a witness's family member, friend, or longtime acquaintance, you should consider the witness's prior familiarity with the person.[viii]

b. *If there was evidence that drugs or alcohol were involved.* **You should consider whether, at the time of the observation, the witness was under the influence of alcohol or drugs and, if so, to what degree.**

Omit the following instruction only if all parties agree that there was no cross-racial identification. The trial judge has the discretion to add the references to ethnicity to the instruction. *See Commonwealth v. Bastaldo*, 472 Mass. 16, 29-30 (2015).

3. Cross-racial identification. **If the witness and the person identified appear to be of different races (or ethnicities), you should consider that people may have greater difficulty in accurately identifying someone of a different race (or ethnicity) than someone of their own race (or ethnicity).**[ix]

4. Passage of time. **You should consider how much time passed between the event observed and the identification. Generally, memory is most accurate immediately after the event and begins to fade soon thereafter.**[x]

5. Expressed certainty. **You may consider a witness's identification even where the witness is not free from doubt regarding its accuracy. But you also should consider that a witness's expressed certainty in an identification, standing alone, may not be a reliable indicator of the accuracy of the identification,**[xi] **especially where the witness did not**

describe that level of certainty when the witness first made the identification.[xii]

6. Exposure to outside information. You should consider that the accuracy of identification testimony may be affected by information that the witness received between the event and the identification,[xiii] or received after the identification.[xiv] Such information may include identifications made by other witnesses, physical descriptions given by other witnesses, photographs or media accounts, or any other information that may affect the independence or accuracy of a witness's identification.[xv] Exposure to such information not only may affect the accuracy of an identification, but also may affect the witness's certainty in the identification and the witness's memory about the quality of his or her opportunity to view the event.[xvi] The witness may not realize that his or her memory has been affected by this information.[xvii]

An identification made after suggestive conduct by the police or others should be scrutinized with great care. Suggestive conduct may include anything that a person says or does that might influence the witness to identify a particular individual.[xviii] Suggestive conduct need not

be intentional, and the person doing the "suggesting" may not realize that he or she is doing anything suggestive.[xix]

7. Identification procedures.

a. *If there was evidence of a photographic array or a lineup.* **An identification may occur through an identification procedure conducted by police, which involves showing the witness a (set of photographs) (lineup of individuals). Where a witness identified the defendant from a (set of photographs) (lineup), you should consider all of the factors I have already described about a witness's perception and memory. You also should consider the number of (photographs shown) (individuals in the lineup), whether anything about the defendant's (photograph) (physical appearance in the lineup) made the defendant stand out from the others,[xx] whether the person (showing the photographs) (presenting the lineup) knew who was the suspect and could have, even inadvertently, influenced the identification,[xxi] and whether anything was said to the witness that may have influenced the identification.[xxii] You should consider that an**

identification made by picking a defendant out of a group of similar individuals is generally less suggestive than one that results from the presentation of a defendant alone to a witness.

b. *Upon request, the judge should also give an instruction about the source of the defendant's photograph within the array.*

You have heard that the police showed the witness a number of photographs. The police have photographs of people from a variety of sources, including the Registry of Motor Vehicles. You should not make any negative inference from the fact that the police had a photograph of the defendant.

c. *If there was evidence of a showup.* **An identification may occur through an identification procedure conducted by police known as a showup, in which only one person is shown to a witness. A showup is more suggestive than asking a witness to select a person from a group of similar individuals, because in a showup only one individual is shown and the witness may believe that the police consider that individual to be a potential suspect.[xxiii] You should consider how much time has passed between the event and the showup because the risk of an inaccurate**

identification arising from the inherently suggestive nature of a showup generally increases as time passes.[xxiv]

d. *If there was evidence of a photographic array, lineup, or showup.* **You should consider whether the police, in showing the witness (a set of photographs) (a lineup) (a showup), followed protocols established or recommended by the Supreme Judicial Court or the law enforcement agency conducting the identification procedure that are designed to diminish the risk of suggestion. If any of those protocols were not followed, you should evaluate the identification with particular care.**

The trial judge may take judicial notice of police protocols regarding eyewitness identification that have been established or recommended by the Supreme Judicial Court, and include in the instruction those established or recommended protocols that are relevant to the evidence in the case. *See Commonwealth v. Walker*, 460 Mass. 590, 604 (2011) ("Unless there are exigent or extraordinary circumstances, the police should not show an eyewitness a photographic array . . . that contains fewer than five fillers for every suspect photograph. . . . We expect police to follow our guidance to avoid this needless risk"); *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 797-98 (2009) ("What is practicable in nearly all circumstances is a protocol to be employed before a photographic array is provided to an eyewitness, making clear to the eyewitness, at a minimum that: he will be asked to view a set of photographs; the alleged wrongdoer may or may not be in the photographs depicted in the array; it is just as important to clear a person from suspicion as to identify a person as the wrongdoer; individuals depicted in the photographs may not appear exactly as they did on the date of the incident because features such as weight and head and facial hair are subject to change; regardless of whether an identification is made, the investigation will continue; and the procedure requires the administrator to ask the witness to state, in his or her own words, how certain he or she is of any identification"); *id.* at 798 ("We decline at this time to hold that the absence of any protocol or comparable warnings to the eyewitnesses requires that the identifications be found inadmissible, but we expect such protocols to be used in the future"); *id.* at 797 ("We have yet to conclude that an identification procedure is unnecessarily suggestive unless it is administered by a law enforcement officer who does not know the identity of the suspect [double-blind procedure], recognizing that it may not be practicable in all situations. At the same time, we acknowledge that it is the better practice [compared to a non-blind procedure] because it eliminates the risk of conscious or unconscious suggestion"). If the Legislature were to establish police protocols by statute, the judge should instruct the jury that they may consider

protocols established by the Legislature. The judge also may take judicial notice of those protocols and include them in the instruction.

The trial judge also may include established or recommended procedures where the evidence shows that they were established or recommended by the law enforcement agency conducting the investigation at the time of the identification procedure.

e. *If there was evidence of a multiple viewings of the defendant by the same witness.*

You should consider whether the witness viewed the defendant in multiple identification procedures or events. When a witness views the same person in more than one identification procedure or event, it may be difficult to know whether a later identification comes from the witness's memory of the original event, or from the witness's observation of the person at an earlier identification procedure or event.[xxv]

8. Failure to identify or inconsistent identification. You should consider whether a witness ever failed to identify the defendant, or made an identification that was inconsistent with the identification that the witness made at the trial.

9. Totality of the evidence. In evaluating the accuracy of a witness's identification, you should consider all of the relevant factors that I have

discussed, in the context of the totality of the evidence in this case. Specifically, you should consider whether there was other evidence in the case that tends to support or to cast doubt upon the accuracy of an identification. If you are not convinced beyond a reasonable doubt that the defendant is the person who committed (or participated in) the alleged crime(s), you must find the defendant not guilty.

NOTES:

1. **Expert testimony**. Whether to permit expert testimony on the general reliability of eyewitness identifications generally rests in the judge's discretion. The weight of authority is against the general admissibility of such expert testimony, but some jurisdictions favor its admission if special factors are present (typically, lack of corroboration, or discrepancies, concerning the identification). At least where there is other evidence corroborating the identification, the admissibility of such evidence is consigned to the judge's discretion. Before admitting such evidence the judge must, at minimum, find that it meets the general requirements for expert testimony: that it is relevant to the circumstances of the identification; that it will help, rather than confuse or mislead, the jury; that the underlying basis of the opinion, and any tests or assumptions, are reliable; and that the opinion is sufficiently tied to the facts of the case so that it will aid the jury in resolving the matter. General acceptance by other experts is a factor, but is not controlling. *Commonwealth v. Santoli*, 424 Mass. 837, 841-45 (1997); *Commonwealth v. Hyatt*, 419 Mass. 815, 818 (1995); *Commonwealth v. Francis*, 390 Mass. 89, 95-102 (1983); *Commonwealth v. Weichell*, 390 Mass. 62, 77-78 (1983), *cert. denied*, 465 U.S. 1032 (1984); *Commonwealth v. Jones*, 362 Mass. 497, 501-02 (1972) (psychological characteristics and dangers of recall are probably "well within the experience of" ordinary jurors). Expert testimony on a particular witness's visual acuity is proper. *Commonwealth v. Sowers*, 388 Mass. 207, 215-16 (1983).

2. **Other potential perpetrators**. A defendant is entitled to introduce evidence tending to show that someone else committed the crime or had motive, opportunity, and intent to do so, provided such evidence is not too remote in time, probatively weak, or irrelevant. Doubtful cases should be resolved in favor of admissibility. *Commonwealth v. Lawrence*, 404 Mass. 378, 387-88 (1989); *Commonwealth v. Murphy*, 282 Mass. 593, 597-98 (1933); *Commonwealth v. Walker*, 14 Mass. App. Ct. 544, 552 (1982); *Commonwealth v. Magnasco*, 4 Mass. App. Ct. 144, 147-48 (1976). This may include evidence of other recent, similar crimes by similar methods. *Commonwealth v. Rosario*, 21 Mass. App. Ct. 286, 291 (1985). A judge, however, should exclude evidence of other, allegedly similar crimes by another perpetrator where they are insufficiently proximate in time and location, or where they do not share similar features. *Commonwealth v. Brown*, 27 Mass. App. Ct. 72, 75-76 (1989).

3. **Evidence of prior identifications**. A witness's testimony as to his own prior identification is admissible to corroborate his in-court identification, and is not hearsay. *Commonwealth v. Nassar*, 351 Mass. 37, 42 (1966) (photograph); *Commonwealth v. Locke*, 335 Mass. 106, 112 (1956) (lineup). A third party may testify as to another witness's prior identification even in the absence of any in-court identification and even when the witness denies having made an identification. *Commonwealth v. Le,* 444 Mass. 431, 438 (2005). A third party's testimony is also admissible to impeach an identification witness who now denies having made the prior identification. *Commonwealth* v. *Daye*, 393 Mass. 55, 60 (1984); *Commonwealth v. Swenson*, 368 Mass. 268, 274 (1975). Where a witness is unavailable after a good faith, unsuccessful effort to obtain his or her testimony, evidence of his prior in-court identification is admissible if it was made under oath and subject to

cross-examination; it may be admitted by means of a transcript or by the testimony of someone who was present. *Commonwealth v. Furtick*, 386 Mass. 477, 480 (1982); *Commonwealth v. Bohannon*, 385 Mass. 733, 740-49 (1982). The Supreme Judicial Court has held that this doctrine is consistent with *Crawford v. Washington,* 541 U.S. 36 (2004), where "a reasonable person in the [witness's] position would not have anticipated this his statement would be used against the defendant in prosecuting the crime." *Commonwealth v. Robinson*, 451 Mass. 672, 680 (2008).

4. **Reliability**. If the defendant proves by a preponderance of evidence that a prior identification was unnecessarily suggestive in all the circumstances, the identification may not be admitted at trial. Article 12 of the Massachusetts Declaration of Rights requires this rule of per se exclusion of out-of-court identification evidence, without regard to reliability, whenever the identification has been obtained through unnecessarily suggestive confrontation procedures. *Commonwealth* v. *Johnson*, 420 Mass. 458, 461-64 (1995). Massachusetts thus follows the former *Wade-Gilbert-Stovall* Federal rule instead of the current reliable-in-the-totality-of-circumstances rule adopted in *Manson v. Brathwaite,* 432 U.S. 98, 114 (1977). Any subsequent identifications may be admitted only if the prosecution proves by clear and convincing evidence that they have an independent source, considering (1) the extent of the witness's opportunity to observe the perpetrator at the time of the crime (the "most important [factor] because the firmer the contemporaneous impression, the less the witness is subject to the influence of subsequent events," *Commonwealth v. Bodden*, 391 Mass. 356, 361 (1984)); (2) any prior errors in description; (3) any prior errors in identifying another person; (4) any prior failures to identify the defendant; (5) any other suggestions; and (6) the lapse of time between the crime and the identification. *Commonwealth v. Johnson*, 420 Mass. 458, 464 (1995); *Commonwealth v. Botelho*, 369 Mass. 860, 869 (1976).

As to other reliability issues, see *Commonwealth v. Collins*, 470 Mass. 255, 261-67 (2014) (in-court identification against an equivocal out-of-court identification); *Commonwealth v. Crayton*, 470 Mass. 228, 233-45 (2014) (in-court identification in the absence of an out-of-court identification); *Commonwealth v. Harris*, 395 Mass. 296, 299-300 (1985) (one-on-one confrontations); *Commonwealth v. Weichell,* 390 Mass. 62, 68-73 (1983) (composite drawings); *Commonwealth v. Porter*, 384 Mass. 647, 657-58 (1981) (showing single photo); *Commonwealth v. Simmons*, 383 Mass. 46, 49-53 (1981) (identification of inanimate object); *Commonwealth v. Venios*, 378 Mass. 24, 29 (1979) (showing single photo); *Commonwealth v. Moynihan*, 376 Mass. 468, 476 (1978) (identification in presence of other witnesses); *Commonwealth v. Marini*, 375 Mass. 510, 516-17 (1978) (voice identification); *Commonwealth v. Dickerson*, 372 Mass. 783, 787-88 (1977) (initial failure to identify does not bar later positive identification), *overruled on other grounds*, *Commonwealth v. Paulding*, 438 Mass. 1, 6-11 (2002); *Commonwealth v. Chase,* 372 Mass. 736, 741-45 (1977) (one-on-one confrontations); *Commonwealth v. Lacy*, 371 Mass. 363, 368-69 (1976) (same); *Commonwealth v. Wilson*, 360 Mass. 557, 562 (1971) (weight of identification testimony is for jury); *Commonwealth v. Cunningham*, 104 Mass. 545, 547 (1870) (several non-positive identifications can provide proof beyond reasonable doubt); *Commonwealth v. Amorin*, 14 Mass. App. Ct. 553, 555 (1982) (one-on-one confrontations); *Commonwealth v. Walker,* 14 Mass. App. Ct. 544, 550-51 (1982) (same); *Commonwealth v. Marks*, 12 Mass. App. Ct. 511, 515-16 (1981) (same); *Commonwealth v. Bishop*, 9 Mass. App. Ct. 468, 471-73 (1980) (weight of uncertain identification is for jury); *Commonwealth v. Jones*, 9 Mass. App. Ct. 83, 92-93 (1980) (same); *Commonwealth v. Cincotta*, 6 Mass. App. Ct. 812, 817 (doubts as to reliability not of constitutional dimension are matters of weight for jury), *aff'd*, 379 Mass. 391 (1979).

ENDNOTES TO MODEL INSTRUCTION:

[i] *See Commonwealth v. Gomes*, 470 Mass. 352, 369 (2015); Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices 15 (July 25, 2013), available at http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf [http://perma.cc/WY4M-YNZN] (Study Group Report), quoting Report of the Special Master, *State v. Henderson*, N.J. Supreme Ct., No. A-8-08, at 9 (June 10, 2010) (Special Master's Report) ("The central precept is that memory does not function like a videotape, accurately and thoroughly capturing and reproducing a person, scene or event. . . . Memory is, rather[,] a constructive, dynamic and selective process"); *State v. Henderson*, 208 N.J. 208, 245 (2011); *State v. Lawson*, 352 Or. 724, 771 (2012) (Appendix); *see also* E.F. Loftus, J.M. Doyle, & J.E. Dysart, Eyewitness Testimony: Civil and Criminal § 2-2, at 14 (5th ed. 2013) (Loftus et al.).

[ii] *See* Study Group Report, *supra* note i, at 16, quoting *Henderson*, 208 N.J. at 245 (three stages involved in forming memory: acquisition — "the perception of the original event"; retention — "the period of time that passes between the event and the eventual recollection of a particular piece of information"; and retrieval — "the stage during which a person recalls stored information").

For a detailed discussion of the three stages of memory and how those stages may be affected, see Study Group Report, *supra* note i, at 15-17; National Research Council of the National Academies, Identifying the Culprit: Assessing Eyewitness Identification 59-69 (2014) (National Academies) ("Encoding, storage, and remembering are not passive, static processes that record, retain, and divulge their contents in an informational vacuum, unaffected by outside influences"); *see also State v. Guilbert*, 306 Conn. 218, 235-36 (2012); *Henderson*, 208 N.J. at 247; Loftus et al., *supra* note i, at § 2-2, at 15 ("Numerous factors at each stage affect the accuracy and completeness of an eyewitness account").

[iii] *See* D. Reisberg, The Science of Perception and Memory: A Pragmatic Guide for the Justice System 51-52 (2014) (witnesses may not accurately remember details, such as length of time and distance, when describing conditions of initial observation); *see also Lawson*, 352 Or. at 744 (information that witness receives after viewing event may falsely inflate witness's "recollections concerning the quality of [his or her] opportunity to view a perpetrator and an event").

[iv] *See* Study Group Report, *supra* note i ,at 30, quoting *Lawson*, 352 Or. at 775 (Appendix) ("[S]tudies confirm that the use of a disguise negatively affects later identification accuracy. In addition to accoutrements like masks and sunglasses, studies show that hats, hoods, and other items that conceal a perpetrator's hair or hairline also impair a witness's ability to make an accurate identification"); *Henderson*, 208 N.J. at 266 ("Disguises and changes in facial features can affect a witness'[s] ability to remember and identify a perpetrator"); *State v. Clopten*, 223 P.3d 1103, 1108 (Utah 2009) ("[A]ccuracy is significantly affected by factors such as the amount of time the culprit was in view, lighting conditions, use of a disguise, distinctiveness of the culprit's appearance, and the presence of a weapon or other distractions"); Wells & Olson, Eyewitness Testimony, 54 Ann. Rev. Psychol. 277, 281 (2003) (Wells & Olson) ("Simple disguises, even those as minor as covering the hair, result in significant impairment of eyewitness identification"); *see also* Cutler, A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy, 4 Cardozo Pub. L. Pol'y & Ethics J. 327, 332 (2006) ("In data from over 1300 eyewitnesses, the percentage of correct judgments on identification tests was lower among eyewitnesses who viewed perpetrators wearing hats [44%] than among eyewitnesses who viewed perpetrators whose hair and hairlines were visible [57%]").

[v] *See* Study Group Report, *supra* note i, at 30-31, quoting *Lawson*, 352 Or. at 774 (Appendix) ("Witnesses are better at remembering and identifying individuals with distinctive features than they are those possessing average features"); *Clopten*, 223 P.3d at 1108; Wells & Olson, *supra* note iv, at 281 ("Distinctive faces are much more likely to be accurately recognized than nondistinctive faces" but "what makes a face distinctive is not entirely clear"); *see also* Shapiro & Penrod, Meta-Analysis of Facial Identification Studies, 100 Psychol. Bull. 139, 140, 145 (1986) (meta-analysis finding that distinctive targets were "easier to recognize than ordinary looking targets").

[vi] *See* Study Group Report, *supra* at 130 ("A weapon can distract the witness and take the witness's attention away from the perpetrator's face, particularly if the weapon is directed at the witness. As a result, if the crime is of short duration, the presence of a visible weapon may reduce the accuracy of an identification. In longer events, this distraction may decrease as the witness adapts to the presence of the weapon and focuses on other details"); *Guilbert*, 306 Conn. at 253; *Lawson*, 352 Or. at 771-72 (Appendix); *see also* Kassin, Hosch, & Memon, On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts, 56 Am. Psychol. 405, 407-12 (2001) (Kassin et al.) (in 2001 survey, eighty-seven per cent of experts agree that principle that "[t]he presence of a weapon impairs an eyewitness's ability to accurately identify the perpetrator's face" is reliable enough to be presented in court); Maass & Köhnken, Eyewitness Identification: Simulating the "Weapon Effect," 13 Law & Hum. Behav. 397, 405-06 (1989); Steblay, A Meta-Analytic Review of the Weapon Focus Effect, 16 Law & Hum. Behav. 413, 415-17 (1992) (meta-analysis finding "weapon-

absent condition[s] generated significantly more accurate descriptions of the perpetrator than did the weapon-present condition"); *id.* at 421 ("To not consider a weapon's effect on eyewitness performance is to ignore relevant information. The weapon effect does reliably occur, particularly in crimes of short duration in which a threatening weapon is visible"); Wells & Quinlivan, Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later, 33 Law & Hum. Behav. 1, 11 (2009) (Wells & Quinlivan). *But see* National Academies, *supra* note ii, at 93-94 (recent meta-analysis "indicated that the effect of a weapon on accuracy is slight in actual crimes, slightly larger in laboratory studies, and largest for simulations").

[vii] *See Gomes*, 470 Mass. at 372-73; Study Group Report, *supra* note i, at 29, quoting Special Master's Report, *supra* note i, at 43 (while moderate levels of stress might improve accuracy, "eyewitness under high stress is less likely to make a reliable identification of the perpetrator"); *Lawson*, 352 Or. at 769 (Appendix); *see also* Deffenbacher, Bornstein, Penrod, & McGorty, A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory, 28 Law & Hum. Behav. 687, 699 (2004) (finding "considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details"); Morgan, Hazlett, Doran, Garrett, Hoyt, Thomas, Baranoski, & Southwick, Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress, 27 Int'l J.L. & Psychiatry 265, 272-74 (2004). *But see* Study Group Report, *supra* note i, quoting *Henderson*, 208 N.J. at 262 ("There is no precise measure for what constitutes 'high' stress, which must be assessed based on the facts presented in individual cases").

[viii] *See* Study Group Report, *supra* note i, at 135 (recommending instruction stating, "If the witness had seen the defendant before the incident, you should consider how many times the witness had seen the defendant and under what circumstances"); *see also* Pezdek & Stolzenberg, Are Individuals' Familiarity Judgments Diagnostic of Prior Contact?, 20 Psychol. Crime & L. 302, 306 (2014) (twenty-three per cent of study participants misidentified subjects with unfamiliar faces as familiar, and only forty-two per cent correctly identified familiar face as familiar); Read, The Availability Heuristic in Person Identification: The Sometimes Misleading Consequences of Enhanced Contextual Information, 9 Applied Cognitive Psychol. 91, 94-100 (1995). *See generally* Coleman, Newman, Vidmar, & Zoeller, Don't I Know You?: The Effect of Prior Acquaintance/Familiarity on Witness Identification, Champion, Apr. 2012, at 52, 53 ("To a degree," increased interaction time may produce "marginally more accurate identifications," but increased interaction time may also generate more incorrect identifications); Schwartz, Memory for People: Integration of Face, Voice, Name, and Biographical Information, in SAGE Handbook of Applied Memory 9 (2014) ("familiarity exists on a continuum from very familiar [your spouse's face] to moderately familiar [the face of the person who works downstairs] to completely unfamiliar [a person you have never met]. Unfortunately, little research directly addresses the continuum from [familiar] to unfamiliar").

[ix] *See* Study Group Report, *supra* note i, at 31 ("A witness may have more difficulty identifying a person of a different race or ethnicity"); Kassin et al., *supra* note vi, at 407-12 (in 2001 survey, ninety per cent of experts agree that principle that "[e]yewitnesses are more accurate when identifying members of their own race than members of other races" is reliable enough to be presented in court); Meissner & Brigham, Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review, 7 Psychol., Pub. Pol'y, & L. 3, 15 (2001) (meta-analysis of thirty-nine research articles concluding that participants were "1.4 times more likely to correctly identify a previously viewed own-race face when compared with performance on other-race faces" and "1.56 times more likely to falsely identify a novel other-race face when compared with performance on own-race faces"); Wells & Olson, *supra* note iv, at 280-81; *see also Commonwealth v. Zimmerman*, 441 Mass. 146, 154-55 (2004) (Cordy, J., concurring); *State v. Cabagbag*, 127 Haw. 302, 310-11 (2012); *Lawson*, 352 Or. at 775 (Appendix); National Academies, *supra* note ii, at 96, citing Grimsley, Innocence Project, What Wrongful Convictions Teach Us About Racial Inequality, Innocence Blog (Sept. 26, 2012, 2:30 P.M.), at http://www.innocenceproject.org/Content/What_Wrongful_Convictions_Teach_Us_About_Racial_Inequality.php [http://perma.cc/KX2J-XECN] ("Recent analyses revealed that cross-racial [mis]identification was present in 42 percent of the cases in which an erroneous eyewitness identification was made").

In *Bastaldo*, 472 Mass. at 28-29, the court concluded that there is "not yet a near consensus in the

relevant scientific community that people are generally less accurate at recognizing the face of someone of a different *ethnicity* than the face of someone of their own ethnicity" (emphasis added). However, there are studies that "support the conclusion that people are better at recognizing the faces of persons of the same ethnicity than a different ethnicity." *Id.*; *see* Gross, Own-Ethnicity Bias in the Recognition of Black, East Asian, Hispanic and White Faces, 31 Basic & Applied Social Psychol. 128, 132 (2009) (study revealed that white participants recognized white faces better than they recognized Hispanic, Asian, and black faces, but found no significant difference between Hispanic participants' recognition of white faces and Hispanic faces); Platz & Hosch, Cross-Racial/Ethnic Eyewitness Identification: A Field Study, J. Applied Social Psychol. 972, 979, 981 (1988) (Mexican-American and white convenience store clerks better recognized customers of their own group than customers of other group); *see also* Chiroro, Tredoux, Radaelli, & Meissner, Recognizing Faces Across Continents: The Effect of Within-Race Variations on the Own-Race Bias in Face Recognition, 15 Psychonomic Bull. & Rev. 1089, 1091 (2008) (white South African participants better recognized white South African faces than white North American faces, and black South African participants better recognized black South African faces than black North American faces).

[x] *See* Study Group Report, *supra* note i, at 31-32, quoting *Lawson*, 352 Or. at 778 (Appendix) ("The more time that elapses between an initial observation and a later identification procedure [a period referred to in eyewitness identification research as a 'retention interval'] . . . the less reliable the later recollection will be. . . . [D]ecay rates are exponential rather than linear, with the greatest proportion of memory loss occurring shortly after an initial observation, then leveling off over time"); National Academies, *supra* note ii, at 15 ("For eyewitness identification to take place, perceived information must be encoded in memory, stored, and subsequently retrieved. As time passes, memories become less stable").

[xi] *See Gomes*, 470 Mass. at 370-71; Study Group Report, *supra* note i, at 19 ("Social science research demonstrates that little correlation exists between witness confidence and the accuracy of the identification"); *Lawson*, 352 Or. at 777 (Appendix) ("Despite widespread reliance by judges and juries on the certainty of an eyewitness's identification, studies show that, under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy"); *Clopten*, 223 P.3d at 1108; *see also Commonwealth v. Cruz*, 445 Mass. 589, 597-600 (2005); *Commonwealth v. Santoli*, 424 Mass. 837, 845-46 (1997); *Commonwealth v. Jones*, 423 Mass. 99, 110 n.9 (1996).

[xii] *See Henderson*, 208 N.J. at 254 ("to the extent confidence may be relevant in certain circumstances, it must be recorded in the witness'[s] own words" before any possible influence from any extraneous information, known as feedback, that confirms witness's identification); *Lawson*, 352 Or. at 745 ("Retrospective self-reports of certainty are highly susceptible to suggestive procedures and confirming feedback, a factor that further limits the utility of the certainty variable"); Wells & Bradfield, Distortions in Eyewitnesses' Recollections: Can the Postidentification-Feedback Effect Be Moderated?, 10 Psychol. Sci. 138, 138 (1999) (Distortions) ("The idea that confirming feedback would lead to confidence inflation is not surprising. What is surprising, however, is that confirming feedback that is given after the identification leads eyewitnesses to misremember how confident they were at the time of the identification"); *see also Commonwealth v. Crayton*, 470 Mass. 228, 239 (2014) ("Social science research has shown that a witness's level of confidence in an identification is not a reliable predictor of the accuracy of the identification, especially where the level of confidence is inflated by [an identification procedure's] suggestiveness").

[xiii] *See Gomes*, 470 Mass. at 373-74; Study Group Report, *supra* note i, at 21-22; Special Master's Report, *supra* note i, at 30-31 ("An extensive body of studies demonstrates that the memories of witnesses for events and faces, and witnesses' confidence in their memories, are highly malleable and can readily be altered by information received by witnesses both before and after an identification procedure"); *Lawson*, 352 Or. at 786 (Appendix) ("The way in which eyewitnesses are questioned or converse about an event can alter their memory of the event").

[xiv] *See* Study Group Report, *supra* note i, at 22, quoting *Henderson*, 208 N.J. at 255 (postidentification feedback "affects the reliability of an identification in that it can distort memory, create a false sense of confidence, and alter a witness'[s] report of how he or she viewed an event"); Special Master's Report, *supra*

note i, at 33 ("A number of studies have demonstrated that witnesses' confidence in their identifications, and their memories of events and faces, are readily tainted by information that they receive after the identification procedure"); Steblay, Wells, & Douglass, The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications, 20 Psychol., Pub. Pol'y, & L. 1, 11 (2014) ("Confirming feedback significantly inflates eyewitness reports on an array of testimony-relevant measures, including attention to and view of the crime event, ease and speed of identification, and certainty of the identification decision"); *see also Commonwealth v. Collins*, 470 Mass. 255, 263 (2014) ("Where confirmatory feedback artificially inflates an eyewitness's level of confidence in his or her identification, there is also a substantial risk that the eyewitness's memory of the crime at trial will 'improve' ").

[xv] *See* Study Group Report, *supra* note i, at 22, quoting *Lawson*, 352 Or. at 788 (Appendix) ("[T]he danger of confirming feedback [whether from law enforcement, other witnesses, or the media] lies in its tendency to increase the *appearance* of reliability without increasing reliability itself"); *Henderson*, 208 N.J. at 253 ("Confirmatory or post-identification feedback presents the same risks. It occurs when police signal to eyewitnesses that they correctly identified the suspect"); *Lawson*, 352 Or. at 777-78 (Appendix); Hope, Ost, Gabbert, Healey, & Lenton, "With a Little Help from My Friends . . .": The Role of Co-Witness Relationship in Susceptibility to Misinformation, 127 Acta Psychologica 476, 481 (2008); Skagerberg, Co-Witness Feedback in Line-ups, 21 Applied Cognitive Psychol. 489, 494 (2007) ("post-identification feedback does not have to be presented by the experimenter or an authoritative figure [e.g., police officer] in order to affect a witness'[s] subsequent crime-related judgments").

[xvi] *See* Study Group Report, *supra* note i, at 21-22; *Henderson*, 208 N.J. at 255; *Lawson*, 352 Or. at 744; *see also* Douglass & Steblay, Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect, 20 Applied Cognitive Psychol. 859, 863-65 (2006) (participants who received confirming feedback "expressed significantly more retrospective confidence in their decision compared with participants who received no feedback"); Wells & Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. Applied Psychol. 360, 366-367 (1998) (witnesses receiving confirming feedback reported "a better view of the culprit, a greater ability to make out details of the face, greater attention to the event, [and] a stronger basis for making an identification" compared to witnesses receiving no feedback); Distortions, *supra* note xii, at 140-43; National Academies, *supra* note ii, at 92-93 ("Research has . . . shown that . . . if an eyewitness hears information or misinformation from another person before law enforcement involvement, his or her recollection of the event and confidence in the identification can be altered . . .").

[xvii] *See* Study Group Report, *supra* note i, at 117, 136 n.4, citing Principles of Neural Science, Box 62-1, at 1239 (Kandel, Schwartz, & Jessell eds., 2000); *see also* Clark, Marshall, & Rosenthal, Lineup Administrator Influences on Eyewitness Identification Decisions, 15 J. Experimental Psychol.: Applied 63, 72 (2009) (Clark, Marshall, & Rosenthal) ("Most witnesses appeared to be unaware of the influence" of lineup administrator in staged experiment).

[xviii] *See* Study Group Report, *supra* note i, at 140, quoting Wells & Quinlivan, *supra* note vi, at 6 ("From the perspective of psychological science, a procedure is suggestive if it induces pressure on the eyewitness to make a lineup identification [a suggestion by commission], fails to relieve pressures on the witness to make a lineup selection [a suggestion by omission], cues the witness as to which person is the suspect, or cues the witness that the identification response was correct or incorrect").

[xix] *See* Study Group Report, *supra* note i, at 22-23, quoting *Lawson*, 352 Or. at 779 (Appendix) ("research shows that lineup administrators who know the identity of the suspect often consciously or unconsciously suggest that information to the witness"); National Academies, *supra* note ii, at 91-92 ("Law enforcement's maintenance of neutral pre-identification communications — relative to the identification of a suspect — is seen as vital to ensuring that the eyewitness is not subjected to conscious or unconscious verbal or behavioral cues that could influence the eyewitness' identification").

[xx] *See Silva-Santiago*, 453 Mass. at 795, quoting *Commonwealth v. Melvin*, 399 Mass. 201, 207 n.10 (1987) ("we 'disapprove of an array of photographs which distinguishes one suspect from all the others on the basis of some physical characteristic' "); Wells & Olson, *supra* note iv, at 287 ("Ideally, lineup fillers would be chosen so that an innocent suspect is not mistakenly identified merely from 'standing out,' and so that a culprit does not escape identification merely from blending in"); *see also Henderson*, 208 N.J. at 251; *Lawson*, 352 Or. at 781 (Appendix); Malpass, Tredoux, & McQuiston-Surrett, Lineup Construction and Lineup Fairness, in 2 Handbook of Eyewitness Psychology 156 (2007) ("Decades of empirical research suggest that mistaken eyewitness identifications are more likely to occur when the suspect stands out in a lineup").

[xxi] *See Silva-Santiago*, 453 Mass. at 797 ("we acknowledge that [a double-blind procedure] is the better practice [compared to a non-blind procedure] because it eliminates the risk of conscious or unconscious suggestion"); Study Group Report, *supra* note i, at 88 ("When showing a photo array or conducting a lineup, the police must use a technique that will ensure that no investigator present will know when the witness is viewing the suspect. The preference is that the police have an officer who does not know who the suspect is administer the array or lineup"); *Guilbert*, 306 Conn. at 237-38 (courts across country accept that "identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure"); *Henderson*, 208 N.J. at 249 ("The consequences are clear: a non-blind lineup procedure can affect the reliability of a lineup because even the best-intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect"); *see also* National Academies, *supra* note ii, at 27 ("As an alternative to a double-blind array, some departments use 'blinded' procedures. A blinded procedure prevents an officer from knowing when the witness is viewing a photo of the suspect, but can be conducted by the investigating officer"); *id.* at 107 ("The committee [appointed by the National Academy of Sciences] recommends blind [double-blind or blinded] administration of both photo arrays and live lineups and the adoption of clear, written policies and training on photo array and live lineup administration. Police should use blind procedures to avoid the unintentional or intentional exchange of information that might bias an eyewitness").

[xxii] *See* Clark, Marshall, & Rosenthal, *supra* note xvii, at 74 (subtle, nondirective statements by lineup administrator "can lead a witness to make an identification, particularly when the perpetrator was not present"); Malpass & Devine, Eyewitness Identification: Lineup Instructions and the Absence of the Offender, 66 J. Applied Psychol. 482, 486-87 (1981) (where subject witnesses were asked to identify assailant in staged experiment, "[c]hanging the instruction from biased [suspect is present in lineup] to unbiased [suspect may or may not be present] resulted in fewer choices and fewer false identifications without a decrease in correct identifications").

[xxiii] *See* Study Group Report, *supra* note i, at 26, citing Special Master's Report, *supra* note i, at 29 (showups carry their own risks of misidentification "due to the fact that only one person is presented to the witness"); *Lawson*, 352 Or. at 742-43 ("A 'showup' is a procedure in which police officers present an eyewitness with a single suspect for identification, often [but not necessarily] conducted in the field shortly after a crime has taken place. Police showups are generally regarded as inherently suggestive — and therefore less reliable than properly administered lineup identifications — because the witness is always aware of whom police officers have targeted as a suspect"); Dysart & Lindsay, Show-up Identifications: Suggestive Technique or Reliable Method?, in 2 Handbook of Eyewitness Psychology 141 (2007) ("Overall, show-ups [fare] poorly when compared with line-ups. Correct identification rates are equal and false identification rates are about two to three times as high with show-ups compared with line-ups"); *see also Silva-Santiago*, 453 Mass. at 797; *Commonwealth v. Martin*, 447 Mass. 274, 279 (2006) ("One-on-one identifications are generally disfavored because they are viewed as inherently suggestive").

[xxiv] *See Lawson*, 352 Or. at 783 (Appendix) ("Showups are most likely to be reliable when they occur immediately after viewing a criminal perpetrator in action, ostensibly because the benefits of a fresh memory outweigh the inherent suggestiveness of the procedure. In as little as two hours after an event occurs, however, the likelihood of misidentification in a showup procedure increases dramatically"); Yarmey, Yarmey, & Yarmey, Accuracy of Eyewitness Identifications in Showups and Lineups, 20 Law & Hum. Behav. 459, 473 (1996) ("Although showups conducted within [five minutes] of an encounter were significantly better than

chance, identifications performed [thirty minutes] or longer after a low-impact incident are likely to be unreliable"); Dysart & Lindsay, The Effects of Delay on Eyewitness Identification Accuracy: Should We Be Concerned?, in 2 Handbook of Eyewitness Psychology 370 (2007) (results of studies support conclusion that showups, "if they are to be used, should be used within a short period after the crime, perhaps a maximum of [twenty-four] hours," but acknowledging that "such a conclusion is highly speculative, given the minimal amount of data available").

[xxv] *See Gomes*, 470 Mass. at 375-76; Study Group Report, *supra* note i, at 25, quoting Special Master's Report, *supra* note i, at 27-28 ("The problem is that successive views of the same person create uncertainty as to whether an ultimate identification is based on memory of the original observation or memory from an earlier identification procedure"); *Henderson*, 208 N.J. at 255; Deffenbacher, Bornstein, & Penrod, Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 Law & Hum. Behav. 287, 306 (2006) (Deffenbacher, Bornstein, & Penrod) ("prior mugshot exposure decreases accuracy at a subsequent lineup, both in terms of reductions in rates for hits and correct rejections as well as in terms of increases in the rate for false alarms").

In *Gomes*, 470 Mass. at 376 n.37, quoting Study Group Report, *supra* note i, at 31, the Supreme Judicial Court noted that support for the phenomenon of "unconscious transference," which occurs "when a witness confuses a person seen at or near the crime scene with the actual perpetrator," was not as conclusive as the support for mugshot exposure. Unconscious transference nevertheless has substantial support and is relevant to the issue of multiple viewings of a person identified. *See* Study Group Report, *supra* note i, at 31, quoting Special Master's Report, *supra* note i, at 46 ("The familiar person is at greater risk of being identified as the perpetrator simply because of his or her presence at the scene. . . . This 'bystander error' most commonly occurs when the observed event is complex, i.e., involving multiple persons and actions, but can also occur when the familiarity arises from an entirely unrelated exposure"); *Lawson*, 352 Or. at 785-86 ("Yet another facet of the multiple viewing problem is the phenomenon of unconscious transference. Studies have found that witnesses who, prior to an identification procedure, have incidentally but innocently encountered a suspect may unconsciously transfer the familiar suspect to the role of criminal perpetrator in their memory"); *Guilbert*, 306 Conn. at 253-54 ("the accuracy of an eyewitness identification may be undermined by an unconscious transference, which occurs when a person seen in one context is confused with a person seen in another"); *see also* Deffenbacher, Bornstein, & Penrod, *supra* note xxv, at 301, 304-05 (although negative impact of unconscious transference was less pronounced than that of mugshot exposure, both types of errors considered "products of the same basic transference design"); Ross, Ceci, Dunning, & Toglia, Unconscious Transference and Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person, 79 J. Applied Psychol. 918, 923 (1994) (witnesses in experiment who viewed bystander in staged robbery "were nearly three times more likely to misidentify the bystander than were control subjects" who did not view bystander).