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Peter A. Joy

BRADY AND JAILHOUSE INFORMANTS: RESPONDING TO INJUSTICE

Peter A. Joy[†]

Two well-known mystery writers, Michael Connelly and John Grisham, recently wrote books in which uncorroborated jailhouse informant (snitch) testimony figures prominently. In Connelly's book, *The Lincoln Lawyer*,[1] an ambitious young prosecutor uses fabricated jailhouse snitch testimony to prosecute a man who is factually guilty. In Grisham's book, *The Innocent Man*,[2] an ambitious young prosecutor uses fabricated jailhouse snitch testimony to prosecute a man who is factually innocent. *The Lincoln Lawyer*, in which defense counsel exposes the false snitch testimony at trial and wins acquittal of a guilty man, is a work of fiction. *The Innocent Man*, in which the false snitch testimony helps to convict an innocent man, is a work of nonfiction. In both books, the prosecutors not only use false snitch testimony, they also conceal exculpatory evidence required to be disclosed to the accused by both *Brady v. Maryland*[3] and prevailing ethical rules.[4] Both books help to illustrate how jailhouse snitch

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† Professor of Law and Director of the Criminal Justice Clinic, Washington University School of Law in St. Louis.

1 MICHAEL CONNELLY, THE LINCOLN LAWYER (2005).

2 JOHN GRISHAM, THE INNOCENT MAN (2006).

3 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor."). Since *Brady*, the Supreme Court has decided a number of cases that have helped to define the disclosure obligation. Prosecutors must disclose materials that could impeach a witness' credibility, such as plea agreements with witnesses or other incentives to testify. Giglio v. United States, 405 U.S. 150 (1972); United States v. Bagley, 473 U.S. 667 (1985). In addition, a promise made by one prosecutor to a witness is imputed to the trial prosecutor, *Giglio* 405 U.S. at 154, and the trial prosecutor has an obligation to learn of *Brady* material known to other prosecutors in the office or to the police. Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

4 MODEL RULES OF PROFESSIONAL CONDUCT R. 3.8(d) (2006) [hereinafter MODEL

testimony and *Brady* violations sidetrack procedural justice, and Grisham's first book of nonfiction demonstrates how snitch testimony and *Brady* violations can combine to deny substantive justice by convicting the innocent. In this article, I analyze the pervasiveness of false snitch testimony and *Brady* violations as contributing causes of wrongful convictions and I recommend concrete steps that head prosecutors, defense lawyers, and trial and appellate judges can take to prevent and to respond effectively to these causes of wrongful convictions.

Throughout this article, I use the pejorative term "snitch" rather than "informant" due to the high rate of unreliability of uncorroborated jailhouse informant testimony. The untrustworthiness of such witnesses is well documented, and even some prosecutors who use jailhouse informants refer to them as "snitches." The pernicious effects of snitch testimony, especially when combined with a prosecutor's failure to disclose exculpatory information to the defense as required by *Brady,* are illustrated in Ron Williamson's case.

Ron Williamson, the subject of Grisham's book *The Innocent Man*, spent twelve years on Oklahoma's death row for a crime he did not commit before DNA evidence exonerated him. The prosecutor waited until after the death of Williamson's mother, a well respected member of the community and Williamson's alibi witness,[5] before bringing charges against Williamson.[6] The prosecutor then built his

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RULES]. The ethical rule states:

> The prosecutor in a criminal case shall . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defendant and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of a tribunal; . . . .

Id.

The American Bar Association (ABA) adopted the Model Rules in 1983 and has amended them frequently, most recently in 2002. The Model Rules replaced the ABA Model Code of Professional Responsibility (Model Code), which the ABA adopted in 1969. Nearly every state and the District of Columbia have adopted most of the language of the Model Rules for their ethics rules. *See* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (2006).

[5] Juanita Williamson was well known and respected in the community as a devout Christian, and "[s]he had hundreds of customers at her beauty shop and treated them all like close friends. If Juanita took the witness stand and said Ronnie was home on the night of the murder, the jury would believe her." GRISHAM, *supra* note 2, at 105. In addition, Juanita Williamson had an entry in her diary stating that Williamson was home with her and a receipt from a video store for the movies that she watched with Williamson the night of the murder "until early the next morning." *Id.* at 104–05.

[6] *See id.* at 121–23, 133.

case around the uncorroborated testimony of a jailhouse snitch with three prior felony convictions who, while facing more charges, claimed that two years earlier she overheard a jailhouse phone call in which Williamson admitted to committing murder.[7] Next, the prosecutor and police withheld exculpatory evidence, including the video of a polygraph of Williamson, administered shortly after the murder in which Williamson denied any involvement,[8] and a report of a video of an interview with Williamson's mother taken shortly before her death in which Williamson's mother provided evidence that she was with Williamson at her home the night of the murder.[9]

Stories like Williamson's are hard to align with the concept of justice in the United States. Yet, hardly a month goes by when there is not news about some other defendant who, after a lengthy incarceration, is exonerated based on DNA evidence. Since the first post-conviction DNA exoneration in 1989, there have been 194 post-conviction DNA exonerations in the United States, and those wrongfully convicted spent an average of twelve years in prison before being set free.[10] Combined, this represents more than two millennia—2,328 years—of confining the innocent in prison. Not only does this represent the loss of potentially productive lives for those convicted, but it also represents over $52 million in taxpayer money spent on state prison costs for the wrongfully convicted,[11] unknown expenditures for prosecuting, defending and providing trials that convict the wrong people,[12] and an indeterminate amount of tax dollars paid to the wrongfully convicted as reparations either

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[7] The witness, Terri Holland, claimed that she heard Williamson make a full confession over the phone in the front office of the jail, even though the jail personnel working the front desk never reported hearing anything inculpatory. *See* GRISHAM, *supra* note 2, at 152–53; *see also* Williamson v. Reynolds, 904 F.Supp. 1529, 1950–51 (E.D. Okl. 1995) *aff'd*, 110 F.3d 1508 (10th 1997) (commenting on the "troubling aspect" of Terri Holland's motivation to testify against Williamson).

[8] *See* GRISHAM, *supra* note 2, at 194–95, 277.

[9] *See id.* at 105–06. A detective asked Juanita Williamson if he could videotape a statement, and he asked her questions while she faced a video camera. Neither the tape nor a report of the interview was ever produced. *See id.*

[10] Innocence Project, Fact Sheet, http://www.innocenceproject.org/Content/351PRINT.php (last visited Feb. 17, 2007).

[11] "The average annual operating cost per State inmate in 2001 was $22,650, or $62.05 per day." James J. Stephen, U.S. Department of Justice, Bureau of Justice Statistics, State Prison Expenditures, 2001, at 1 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/spe01.pdf. Based on prison costs in 2001, the state prison costs for 2328 years of imprisonment are $52,729,200, using the average cost per year of imprisonment of $22,650. Grisham estimates that the cost to imprison Williamson, excluding extra cost of death row and treatment in state mental hospitals, "was at least $250,000." GRISHAM, *supra* note 2, at 357.

[12] There are no accurate estimates or data on the defense and prosecution costs for those wrongfully convicted, nor are there data on the proportionate costs for the judges, juries, court personnel, and jailers involved in wrongful convictions.

voluntarily, by statute, or as a result of litigation settlements and judgments.[13]

In addition to the loss of liberty and the costs of convicting the innocent, there are three additional dimensions to wrongful convictions that are sometimes neglected. First, more than half of those exonerated by DNA—112 of 194—are African American,[14] a rate higher than the racial disparities in arrests and convictions.[15] Commentators note that this racial disparity is likely the result of one of the causes of wrongful convictions, cross-racial misidentifications,[16] and "subtle problems of racism and stereotyping on the part of jurors, judges, prosecutors and defense lawyers."[17] Second, while the innocent are convicted and confined in prison, the guilty persons are often free to commit more crimes.[18] Third, the DNA exonerations represent a fraction of the wrongfully convicted because there is no DNA evidence in most cases. For example, one study identified 196 additional persons who had been exonerated by

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[13] There is no uniform method for compensating the wrongfully convicted. Approximately two thirds of the states do not have compensation or indemnification statutes. *See* Adele Bernhard, *Table: When Justice Fails: Indemnification for Unjust Conviction*, 7 U. CHI. L. SCH. ROUNDTABLE 345 (2000). In some instances, private bills are enacted to provide relief in particular cases. *See* Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 709 (2004). When successful, law suits can yield generous compensation. For example, the local government that convicted Williamson paid over $500,000 and the total settlement for wrongfully convicting Williamson was "believed to be in the $5 million range." GRISHAM, *supra* note 2, at 343. However, compensation is difficult to obtain through litigation, because prosecutors and law enforcement officers are usually protected from lawsuits by governmental immunity. *See* Imbler v. Pachtman, 424 U.S. 409, 410 (1976) (holding that a state prosecutor acting within the scope of prosecutorial duties may not be sued); Hunter v. Bryant, 502 U.S. 224, 229 (holding that law enforcement officers are entitled to immunity). In Williamson's case, he overcame claims of immunity by demonstrating that the prosecutor stepped out of his role as prosecutor to run the criminal investigation, and there was sufficient evidence demonstrating that a genuine question of fact existed as to whether prosecutor and police engaged in fabrication of evidence and withheld exculpatory evidence to convict Williamson. *See* GRISHAM, *supra* note 2, at 341–42.

[14] *See* Innocence Project, *supra* note 10.

[15] African Americans comprise 57.7 percent of those exonerated by DNA evidence. *See id.* In 1999, African Americans were approximately 12.9 percent of the population but were 49.4 percent of those in jails and prisons. Karen F. Parker et al., *Racial Bias and the Conviction of the Innocent*, *in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 114, 114–15 (Saundra D. Westervelt & John A. Humphrey eds., 2001); *see also id.* at 116–18 (discussing racial disparities in four major studies of wrongful convictions).

[16] *See* Parker et al., *supra* note 15, at 121–22.

[17] Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 375–76 (2006).

[18] *See, e.g.*, Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1267 n.133 (2005) (citing several examples of where the actual perpetrators were free to commit additional crimes while wrongfully convicted were imprisoned). "The true suspects and/or perpetrators have been identified in more than a third of the DNA exoneration cases." *See* Innocence Project, *supra* note 10.

means other than DNA evidence from 1989 through 2003.[19] The authors of this more comprehensive study acknowledge that their list of exonerations is not exhaustive because of the lack of a national registry of exonerations and fragmented record keeping at the local, state, and federal levels.[20] The researchers also exclude from their study mass exonerations, such as the 100 to 150 defendants convicted on the basis of police perjury in Los Angeles as part of the Rampart scandal.[21] After compiling the data on exonerations, the researchers of this more expansive study conclude "that many defendants who are not on this list, no doubt thousands, have been falsely convicted of serious crimes but have not been exonerated."[22]

Although it may not be possible to estimate accurately the number of wrongfully convicted, whatever the number, the most obvious question for anyone interested in justice is: What steps can be taken to address the underlying causes of wrongful convictions? Even those who may view the number of wrongful convictions as insignificant in light of the large number of persons convicted each year should be interested in taking steps to limit wrongful convictions if they care about procedural and substantive justice.[23] As a result of this interest in improving the criminal justice system, there have been a number of books, dozens of law review articles, a host of law school symposia, such as the one held by *Case Western Reserve Law Review*, and other efforts exploring the issue of wrongful convictions.

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[19] *See* Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523–24 (2005). In this study, the authors use "exoneration" whenever there "is an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted." *Id.* at 524. The methods of exoneration included pardons based on evidence of innocence, court dismissal of charges based on new evidence of innocence, acquittals at a retrial on the basis of evidence that the accused had no role in the crimes for which they had been originally convicted, and posthumous acknowledgements of innocence by state governments. *See id.* Given this broader definition of "exoneration," the authors state that "we are in no position to reach an independent judgment on the factual innocence of each defendant in our data." *Id.* at 526. Justice Antonin Scalia is critical of this study for "its inflation of the word 'exoneration' . . . mischaracterization of reversible error as actual innocence." Kansas v. Marsh, 126 S.Ct. 2516, 2537 (2006) (Scalia, J., concurring). In response to an op-ed critical of the study, one of the authors notes that a DNA review of rape convictions in Virginia demonstrated that one in fourteen rape convictions were wrongful. Samuel R. Gross, Letter to the Editor, *False Convictions Study*, N.Y. TIMES, Feb. 5, 2006, Sec. 4, at 11.

[20] Gross et. al., *supra* note 19, at 525.

[21] *Id.* at 533–34.

[22] *Id.* at 527.

[23] Joshua Marquis, while a district attorney in Oregon and Vice President of the National District Attorneys Association, wrote an op-ed critical of the attention given to cases of the wrongfully convicted. Joshua Marquis, Op-Ed, *The Innocent and the Shammed*, N.Y. TIMES, Jan. 26, 2006, at A23. He notes that given the large number of felony convictions each year, the error rate is very small, perhaps less than one percent. *See id.* Still, he notes, "American justice is a work in progress, and those of us charged with administering it are well aware that it needs constant improvement." *Id.*

Among the efforts considering how to address the causes of wrongful convictions is the work of the Ad Hoc Innocence Committee of the American Bar Association (ABA) Criminal Justice Section. The Ad Hoc Innocence Committee studied many of the causes of wrongful conviction and issued a report directed at systemic reforms—including reforms addressing snitch testimony and prosecutorial practices.[24] Professor Paul Giannelli wrote portions of the report dealing with jailhouse snitches,[25] and the committee recommended a resolution, which the ABA House of Delegates passed, urging federal, state, and local governments to adopt measures so "no prosecution should occur based solely upon the uncorroborated jailhouse informant testimony."[26] With regard to prosecutorial practices directed at *Brady* disclosures, the committee recommended, and the ABA House of Delegates passed, a resolution that advocates federal, state and local governments to implement procedures so that law enforcement agencies and others working with prosecutors have a better understanding of their obligation to disclose exculpatory and mitigating evidence to prosecutors.[27]

The reforms the Ad Hoc Innocence Committee and ABA House of Delegates recommend are laudable and should be pursued. If implemented, these systemic reforms will go a long way toward ensuring more procedural and substantive justice. But systemic reforms take time and may be less likely to occur than the pragmatic measures I urge local prosecutors, defense lawyers, and individual judges to start taking immediately to respond to the injustice of false snitch testimony and *Brady* violations that contribute to wrongful convictions.

I begin with a short discussion of the problem of wrongful convictions and the roles that false snitch testimony and prosecutorial misconduct play in convicting the innocent in Part I. In order to shape effective remedies to prevent wrongful convictions, it is necessary to understand the scope of the problem and the nature of causes of wrongful convictions. In Part II, I outline a number of realistic measures that head prosecutors, trial and appellate judges, and defense lawyer should take to prevent false snitch testimony and *Brady* violations. My goal in outlining these practical, low cost or no-

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[24] REPORT OF THE ABA CRIMINAL JUSTICE SECTION'S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY (Paul C. Giannelli & Myrna Raeder eds., 2006) [hereinafter INNOCENCE COMMITTEE REPORT].

[25] *See* Paul C. Giannelli, Brady *and Jailhouse Snitches*, 57 CASE W. RES. L. R. 593 (2007).

[26] INNOCENCE COMMITTEE REPORT, *supra* note 24, at 63 & n. 1.

[27] *Id.* at 99 & n. 1.

cost recommendations to counter the prejudicial effects of snitch testimony and *Brady* violations is to generate interest by the countless good prosecutors, defense lawyers, and judges who could prevent wrongful convictions through their daily work.

I. WRONGFUL CONVICTIONS AND THE RELATIONSHIP BETWEEN SNITCH TESTIMONY AND *BRADY* VIOLATIONS

Snitch testimony and prosecutorial misconduct, including failure to disclose exculpatory evidence as required by *Brady*, are major contributing causes to wrongful convictions. Fifty-one of the first 111 death row exonerations involved convictions based upon false snitch testimony.[28] Of the first sixty-two DNA exonerations, fifteen cases involved snitch testimony and twenty-six cases involved prosecutorial misconduct.[29] Of the cases involving prosecutorial misconduct, the suppression of exculpatory evidence—*Brady* violations—occurred forty-three percent of the time.[30]

Some of the other factors leading to wrongful convictions, such as mistaken identification, are more prevalent,[31] but false snitch testimony and suppression of exculpatory evidence are especially troubling because both serve to derail the truth seeking process of the criminal justice system. Rather than the adversarial process working as intended,[32] the use of false evidence (whether knowingly or unintentionally by prosecutors) and the suppression of exculpatory evidence either lead some innocent defendants to plead guilty or deny the fact finders the ability to reach just verdicts in cases that go to trial.

At the plea stage, efforts to eliminate false snitch testimony and to guarantee the defendant access to exculpatory evidence are necessary in order for there to be confidence in the accuracy of guilty pleas. This is especially true because some innocent defendants plead guilty in order to secure a certain shorter sentence or avoid the possibility of a death sentence. There is no question that this type of risk benefit

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[28] NORTHWESTERN UNIVERSITY SCHOOL OF LAW CENTER ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3 (2005), *available at* http://www.law.northwestern.edu/wrongfulconvictions/documents/SnitchSystemBooklet.pdf.

[29] JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE app. at 263 (2000).

[30] *Id.* app. at 265.

[31] Mistaken identity was found in fifty-two of the first sixty-two cases, serology inclusion was found in thirty-two cases, and police misconduct in thirty-one cases. *Id.* at 263.

[32] "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975).

analysis occurs, and our system of justice acknowledges the right of an individual to maintain innocence while entering a plea of guilty.[33]

The issue of false guilty pleas is accentuated by the extremely high number of criminal cases resolved by guilty pleas. Government studies show that ninety-five percent of state felony cases are resolved through guilty pleas.[34] In the federal system, over ninety percent of those facing felony charges were convicted and ninety-six percent of those convictions rested on guilty pleas.[35] These studies confirm, and in some situations exceed, commentators' estimates of guilty plea rates at approximately eighty to ninety percent.[36]

It is impossible to know how many defendants plead guilty to avoid more serious sentences, but there are examples. Recently, James Ochoa was exonerated by DNA evidence after serving ten months in prison for a crime he did not commit.[37] James Ochoa originally rejected a prosecutor's offer of two years in prison in exchange for pleading guilty because he knew he was innocent. But, after the trial judge threatened to impose a life sentence if convicted, James Ochoa entered a guilty plea during his trial over the advice of his defense lawyer rather than risk conviction.[38] In another case, Christopher Ochoa pled guilty to murder to avoid the possibility of the death penalty; DNA testing exonerated him after he spent twelve years in prison.[39] In the study of exonerations from 1989 to 2003, the researchers found that six percent of the exonerees had pled guilty.[40]

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[33] *See* North Carolina v. Alford, 400 U.S. 25 (1970) (holding that a defendant may enter a guilty plea while maintaining innocence in order to avoid a harsher punishment if found guilty at trial).

[34] A 2002 study of felony cases in the seventy-five largest counties found that ninety-five percent of convictions occurring within a year of arrest were the result of guilty pleas. U.S. Dep't Justice, Bureau of Justice Statistics, Case Processing Statistics, available at http://www.ojp.usdoj.gov/bjs/cases.htm#felony. The study also found that approximately sixty-eight percent of all state felony defendants were convicted, with an eighty percent conviction rate for murder. Id.

[35] In 2004, approximately ninety-two percent of defendants facing federal felony charges were convicted, and ninety-six percent of those convicted pled guilty. U.S. Dep't Justice, Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2004, at 59, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0404.pdf.

[36] "A crudely calculated number that many commentators take as an honest estimate is 80% to 90% dispositions by guilty plea." H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1699 (2000).

[37] *See* H.G. Reza, *Innocent Man Grabs His Freedom and Leaves Town*, L.A. TIMES, Nov. 2, 2006, at B1.

[38] *See id.*

[39] Innocence Project, *Know the Cases: Christopher Ochoa*, http://www.innocenceproject.org/Content/230.php (last visited Feb. 11, 2007). A less clear example is Curtis McGhee, convicted of murder in 1978 on the basis of testimony from an alleged accomplice. McGee had his conviction reversed in 2003 because law enforcement authorities withheld exculpatory evidence. Rather than face a retrial, he pled guilty to second degree murder and was set free. *See* Gross et al., *supra* note 19, at 537–38.

[40] *See* Gross et al., *supra* note 19, at 536.

In a more recent study, researchers documented fourteen false guilty pleas out of 125 proven false confessions—eleven percent of their sample.[41]

In these and other instances of false guilty pleas, some innocent defendants plead guilty rather than face a harsher penalty, sometimes the death penalty. Because most felony cases result in guilty verdicts, and nearly all guilty verdicts are the result of defendants pleading guilty, the use of false snitch testimony or withholding exculpatory evidence become powerful levers to convince innocent persons that the trial process is stacked against them. As the James Ochoa case indicates, this can occur even over the advice of defense counsel.[42] These cases illustrate the importance of *Brady* disclosures to the proper functioning of the guilty plea process.

In addition to guilty pleas where the defendants are insincere and enter pleas to avoid the possibility of harsher punishment, Professor Kevin McMunigal notes that without disclosure of exculpatory information prior to a guilty plea there are problems of factually inaccurate guilty pleas due to faulty assumptions on the part of defendants.[43] McMunigal points out that some defendants enter guilty pleas because of their mistaken belief that they were guilty. A defendant can be mistaken and have imperfect knowledge of events when the prosecutor does not disclose exculpatory statements of witnesses who know critical information that the defendant does not,[44] or when the prosecutor does not disclose investigatory reports,

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[41] Steven Drizin, *Blum Blog: False Guilty Pleas: DNA Clears Man in Carjacking Case*, http://blog.law.northwestern.edu/bluhm/2006/11/false_guilty_pl.html (last visited Feb. 18, 2007).

[42] *See supra* notes 32 & 33 and accompanying text.

[43] *See generally* Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. R. 741 (2007).

[44] One of the examples Professor McMunigal uses is *State v. Gardner*, 885 P.2d 1144 (Idaho Ct. App. 1994). Danny Gardner was charged with vehicular manslaughter as the result of a collision when the automobile he was driving crossed the center line into the path of an oncoming pick-up truck, killing the driver of the truck and seriously injuring three passengers in the truck. Gardner tested positive for marijuana and his nephew, a passenger in Gardner's automobile at the time of the accident, gave a statement that Gardner had smoked marijuana right before the accident. *See id.* at 1147. Tests indicated that Gardner was under the influence of marijuana and was sleep deprived. Gardner pled guilty, stating at the hearing that "he could not remember anything about the accident and believed that he might have fallen asleep while driving because he had not slept the previous night." *Id.* Unknown to Gardner at the time he entered his plea was that a witness, traveling behind Gardner's vehicle at the time of the accident, gave a written statement to the Idaho State Police that "when the blue car [Gardner's vehicle] was about ten feet in front of the truck I believe the driver's front tire blew. The whole [*sic*] jumped into the oncoming lane like it was on rails." *Id.* In a deposition given in a subsequent civil case over the accident, "the witness further explained that he observed the left-front tire blowing out. He saw a puff of dust and rock chunks that appeared to have been caused by the tire blowing, and then the car immediately jerked to the left." *Id.* The trial court denied Gardner's motion to withdraw his guilty pleas, but the Idaho Court of Appeals vacated

such as accident reconstruction reports, that withdraw initial conclusions incorrectly blaming the defendant.[45]

False snitch testimony and *Brady* violations clash with the generally accepted notion that our criminal justice system protects the innocent and convicts the guilty. The presumption of innocence,[46] the right to remain silent,[47] the right to a public trial by an impartial jury,[48] and the requirement of proof of guilt beyond a reasonable doubt are all procedural safeguards meant to the protect the innocent. These safeguards reinforce the public's belief that our criminal justice system operates on the precautionary principle that "better that ten guilty persons escape than that one innocent suffer."[49] When false testimony is introduced into evidence, or exculpatory evidence is withheld from the defendant for possible use at trial, the justice system is derailed.

In many ways, the prosecutor is the key actor in the criminal justice system with both the overarching duty and the means to

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Gardner's guilty plea finding that the *Brady* disclosure duty applies to guilty pleas and that the prosecution's failure to disclose the written witness statement violated this duty. *Id.* at 1149–50, 52.

[45] In *Carroll v. State*, 474 S.E.2d 737 (Ga.App. 1996), Jessica Carroll entered a guilty plea based on the incorrect conclusions of an inexperienced investigating officer, who had not completed his first course in accident reconstruction. The investigating officer's conclusions, both about Carroll's speed and the role of road conditions in causing a accident that killed one person, turned out to be unsupported by the evidence collected at the scene of the accident. In preparing for trial, a more experienced accident reconstruction expert working for the state advised the prosecutor that the speed could not be calculated and that "the newly paved highway and the shoulder, which dropped-off, contributed to the accident." *Id.* at 738. The state did not disclose this new information and Carroll entered a guilty plea. *Id.* at 739. On appeal, the Georgia Court of Appeals granted Carroll's motion to withdraw her guilty plea, finding a *Brady* violation, and remanded the case for trial. *Id.* at 739–40.

[46] The U.S. Constitution does not expressly contain language about a presumption of innocence, but this principle has long been held as fundamental to our criminal justice system. *See, e.g.*, Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.").

[47] "No person shall be . . . compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

[48] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI. The right to a trial by a jury of one's peers has been described as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[49] WILLIAM BLACKSTONE, 4 COMMENTARIES *358. Professor Alexander Volokh traces the roots of the principle that some guilty should go free rather than risk punishing the innocent to ancient Greek philosophy, early Roman commentary, and the Book of Genesis. *See* Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 177–78 n.27 (1997). By the early 1800s, courts in the United States began quoting Blackstone's maxim. *See id.* at 183–84.

protect the innocent. As the Supreme Court explained, the prosecutor "is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."[50] Ethics rules reinforce this notion by requiring a prosecutor to be a "minister of justice" and to seek justice.[51] As a minister of justice, the prosecutor has the responsibility "not simply . . . of an advocate," but to adopt a somewhat neutral stance "to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[52]

The prosecutor's duty to seek justice may conflict with the prevailing norm of zealous representation by lawyers in the United States, however.[53] The norm of zealous representation is deeply rooted in the way that prosecutors approach their work, both historically and ethically. Victims initiated and prosecuted their own cases from colonial times until the mid-1800s in some states,[54] and public prosecutors would sometimes hire private lawyers to assist with prosecutions as late as the 1890s.[55] Even today, many prosecutors in the United States are part-time prosecutors who also engage in private practice, sometimes doing criminal defense.[56]

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[50] Berger v. United States, 295 U.S. 78, 88 (1935).

[51] MODEL RULES, *supra* note 4, at R. 3.8 cmt. 1.

[52] *Id.*; *see also* United States v. Kalfayan, 8 F.3d 1315, 1323 (9th Cir. 1993) (stating that prosecutors "serve truth and justice first" and their "job isn't just to win, but to win fairly, staying well within the rules").

[53] The concept of zealous representation is perhaps best captured by the words of Henry Brougham in his defense of Queen Caroline before England's House of Lords in 1820. Brougham threatened to take every step necessary to advance his client's interests, even if the defense of Queen Caroline would cause damage to King George IV. He explained:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

2 THE TRIAL AT LARGE OF HER MAJESTY CAROLINE AMELIA ELIZABETH 3 (London, T. Kelly 1821); *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.3.1, at 580 (1986). Zealous advocacy is typically discussed in many law schools courses, and it underlies our justice system, which is based on a competitive rather than cooperative model. *See* Robert J. Kutak, *The Adversary System and the Practice of Law*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 172, 173 (David Luban ed., 1984).

[54] *See* Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1322–26.

[55] *See* Mike McConville & Chester Mirsky, *The Rise of Guilty Pleas: New York, 1800–1865*, 22 J. L. & SOC'Y 443, 452–53 (1995).

[56] In the late 1970s, a majority of prosecutors in the United States were part-time prosecutors who also engaged in private practice that could include representing the accused. *See* WOLFRAM, *supra* note 53, § 8.9.4, at 454–55. Part-time prosecutors may ethically represent defendants provided the same office in which the part-time prosecutor works is not prosecuting the defendant and the charges do not involve the same jurisdiction's laws that the part-time

Prosecutors, whether part-time or full-time, receive the same legal education and are governed by the same ethics rules—with only one ethics rule directed solely to prosecutors—that apply to other lawyers.

In deciding whether to rely on jailhouse snitch testimony, the prosecutor likely feels the possibly conflicting pull of the duty to do justice against the norm of zealous representation. Jailhouse snitch testimony is notoriously unreliable, with inmates often manufacturing supposed confessions from others—such as the snitch in Williamson's case—in return for lenient treatment or other benefit.[57] Court decisions and former prosecutors warn about the danger of jailhouse snitches who "purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration."[58] Yet, as in the Williamson's case, sometimes snitch testimony is the key to prosecuting the person the prosecutor believes is culpable. When the suspect is in fact innocent, either the prosecutor is duped by the snitch or the prosecutor relies on what she may suspect is manufactured testimony because such testimony is the means to what the prosecutor believes is the desired ends of convicting a defendant the prosecutor presumes to be factually guilty.

Similarly, the prosecutor is conflicted when determining what material is exculpatory and must be given to the defendant pursuant to *Brady*. Under *Brady* and most state criminal discovery rules, the prosecutor has the discretion to determine *what* constitutes exculpatory evidence and *when* to disclose it. This has led to inconsistent decisions with some prosecutors turning over to defendants material other prosecutors fail to disclose, and some prosecutors waiting until the eve of trial or even during trial before turning over material.[59]

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prosecutor must enforce. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1285, at 160 (1974) (stating that prosecutors who only prosecute violations of municipal ordinances may represent criminal defendants facing violations of state law provided the municipality is not directly or indirectly involved or affected); Supreme Court of Ohio, Bd. of Comm'rs on Grievances & Discipline, Op. 88-008 (1988), *available at* http://www.sconet.state.oh.us/BOC/Advisory_Opinions/ (stating that a municipal prosecutor may "represent a criminal defendant in cases not involving the city or its ordinances").

[57] Professor Giannelli gives several examples, including Leslie Vernon White, who testified against more than a dozen inmates and helped spark a special grand jury investigation of jailhouse informants. *See* Giannelli, *supra* note 25.

[58] N. Mariana Islands v. Bowie, 243 F.3d 1109, 1123. The author of this decision, Judge Stephen Trott, was a former prosecutor who wrote a law review article warning prosecutors to be wary of using jailhouse snitches, co-conspirators, and other criminals as witnesses. *See* Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381 (1996).

[59] The prosecutor's duty to disclose evidence favorable to the defense is triggered when the evidence is material. "[E]vidence is material only if there is a reasonable probability that,

The prosecutor makes these decisions secretly, usually based on personal judgment, and those decisions are not subject to any established oversight mechanisms. The decision making process first requires the prosecutor to determine if the evidence is exculpatory and then if it is "material." Under existing law, the prosecutor knows that a *Brady* violation will not occur unless "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[60] Essentially, this means that the prosecutor who is convinced of the guilt of the accused is placed in the conflicting position of deciding if there is evidence strong enough to prevent a finding of guilt by the jury.

Even when *Brady* violations are found,[61] the prosecutor knows that there is little fear of professional discipline because, as one commentator researching professional discipline against prosecutors for *Brady* violations concluded, "punishment is virtually nonexistent."[62]

Until systemic reforms, such as those the ABA Ad Hoc Innocence Committee recommended, occur, the responsibility falls upon the prosecutors, defense lawyers, and judges at the trial and appellate levels to take measures that curtail the use of false snitch testimony and lead to better compliance with *Brady* disclosures. In the following part of this article, I will briefly outline what can be done.

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had the evidence been disclosed to the defense, the results of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985). There is no specific rule governing the timing of disclosures of exculpatory evidence, and a prosecutor need only disclose "exculpatory and impeachment information no later than the point at which a reasonable probability will exist that the outcome would have been different if an earlier disclosure had been made." United States v. Coppa, 267 F.3d 132, 142 (2d Cir. 2001); *see also* United States v. Ziperstein, 601 F.2d 281, 291 (7th Cir. 1979) ("As long as ultimate disclosure is made before it is too late for the defendant[] to make use of any benefits of the evidence, Due Process is satisfied."). "With neither a clear definition of favorable evidence nor a disclosure timetable, prosecutors have interpreted the constitutional discovery obligation inconsistently, and too often disclosed favorable information on the eve of, during, or after trial—or not at all." Am. Coll. of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 94 (2004).

[60] United States v. Bagley, 473 U.S. 667, 682 (1985).

[61] When *Brady* violations do surface, they are usually found because of a freedom of information act request, the information comes out in a related case, or the information comes out after DNA testing. *See* Giannelli, *supra* note 25, at 693.

[62] Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 742 (1987); *see also* BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT (2d ed. 2005) (discussing instances of prosecutorial misconduct and the lack of effective remedies); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833 (1997) (finding the disciplinary process ineffective against prosecutors).

II. ACTION PLAN FOR PROSECUTORS, DEFENSE ATTORNEYS, AND JUDGES TO COMBAT FALSE SNITCH TESTIMONY AND *BRADY* VIOLATIONS

Prosecutors, defense attorneys, and judges at the trial and appellate levels can and should do more to combat false snitch testimony and *Brady* violations. The growing number of exonerations demonstrates how snitch testimony and *Brady* violations can combine to convict the innocent, and anyone interested in avoiding future wrongful convictions should be interested in exploring what can be done immediately, without waiting for the possible reforms discussed above. Because prosecutors have the most control over snitch testimony and the disclosure of *Brady* material, I begin by discussing measures that head prosecutors should implement.

A. What Head Prosecutors Can Do

Commentators offer a number of reasons to explain why prosecutors commit errors in judgment, such as failing to make required *Brady* disclosures. Some commentators attribute fault to prosecutors and contend that prosecutors make these errors to gain advantage in the trial process or because they are overzealous.[63] More recently, other commentators have argued that faulty judgment is more likely due to various unintentional cognitive biases that prosecutors have rather than assessing blame against the prosecutors.[64] I have argued previously that prosecutorial misconduct is likely the result of three institutional conditions: "vague ethics rules that provide ambiguous guidance to prosecutors; vast discretionary

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[63] *See, e.g.*, Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 541 (1996) (arguing that a "win at all costs" mentality by some prosecutors cause them to cut "ethical corners"); Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 350 (2001) (discussing the lack of "moral courage" among prosecutors); Judith L. Maute, *"In Pursuit of Justice" in High Profile Criminal Matters*, 70 FORDHAM L. REV. 1745, 1747 (2002) (discussing problems of "overzealous prosecutors"); Tracy L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 882–90 (1995) (discussing the correlation of the "desire to 'win'" with prosecutorial misconduct).

[64] *See, e.g.*, Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006) (arguing that confirmation bias, selective information processing, belief perseverance, and avoidance of cognitive dissonance impede prosecutor decision making); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WISCONSIN L. REV. 291 (analyzing how tunnel vision—focusing on a particular suspect—affects all phases of criminal proceedings); Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847 (2002) (exploring how tunnel vision leads to constructing guilt based on unreliable informants).

authority with little or no transparency; and inadequate remedies for prosecutorial misconduct, which create perverse incentives for prosecutors to engage in, rather than refrain from, prosecutorial misconduct."[65] Whether the use of false snitch testimony and *Brady* violations are largely the result of conscious actions, unconscious psychological motivations, or institutional conditions, we are left with the results that such conduct always violates the rights of the accused and sometimes contributes to convicting the innocent.

No matter what causes prosecutorial errors, such as the use of false snitch testimony and *Brady* violations, the head prosecutor in a particular jurisdiction is in the best position to implement policies to prevent these problems. More than the state legislature, the federal government, or the United States Supreme Court, the head of a particular prosecutor's office has the ability to create and, if necessary, enforce polices that every prosecutor in that office must follow. The following policies, some of which already exist in some jurisdictions, are policies head prosecutors should implement to help prevent the use of false snitch testimony and *Brady* violations.

1. Adopt a Prosecutor's Handbook for the Office

Prosecutors have extensive power, and often exercise discretion in exercising this power, with few controls. Prosecutors decide whom to prosecute, what crimes to charge, how much leniency to give informants in exchange for information and testimony, sentence recommendations for the accused, and the nature of plea-bargains, if any, the accused may be offered. At each step, the individual prosecutors involved make these decisions in secret, subject only to the controls imposed by the head prosecutors in their offices. To provide concrete guidance to prosecutors and to introduce some transparency into how their offices work, head prosecutors should implement the recommendations of well established criminal justice standards and the National District Attorneys Association (NDAA) and follow the example of the U.S. Department of Justice by adopting prosecutor manuals for their offices.

The ABA Criminal Justice Standards on the Prosecution Function (ABA Prosecution Function Standards) recommend that each prosecutor's office adopt a "prosecutor's handbook" containing "a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures for the office. The objectives of these policies as to discretion and procedures should be to achieve a fair,

[65]Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System,* 2006 WISCONSIN L. REV. 399, 400.

efficient, and effective enforcement of the criminal law."[66] The ABA Prosecution Function Standards recommend that the public have access to the handbook "except for subject matters declared 'confidential,' when it is reasonably believed that public access to their contents would adversely affect the prosecution function."[67]

The NDAA, the leading national organization for state prosecutors, similarly recommends the creation of a written policy manual for each office explaining: "The policies and procedures should give guidance in the exercise of prosecutorial discretion and should provide information necessary for the performance of the duties of the staff."[68] Similar to the ABA Criminal Justice Standards' rationale, the NDAA states: "The objectives of these policies and procedures are to establish the office as a place for the fair, efficient, and effective enforcement of the criminal law."[69] The NDAA also recommends that each prosecutor's manual "should be subject to access by the general public and/or law enforcement agencies or the defense bar."[70]

In addition to the recommendations of the ABA Criminal Justice Standards and the NDAA, the U.S. Department of Justice has set a national example by publishing the U.S. Attorney's Manual (USAM),[71] which is available to the public. The USAM sets out the general principles for commencing or recommending federal prosecution,[72] and the USAM lists factors prosecutors should consider in exercising discretion whether to prosecute.[73] The USAM also

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[66] AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993), *available at* http://www.abanet.org/crimjust/standards/pfunc_toc.html. The ABA issued the initial set of criminal justice standards in 1969, and the ABA House of Delegates approved the third edition of the Standards in February, 1992. *Id.* at xii.

[67] *Id.* at Standard 3-2.5(b).

[68] NAT'L DISTRICT ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS, Standard 10.1 (2d ed. 1991), *available at* http;//www.ndaa.org/pdf/ndaa_natl_prosecution_standards.pdf.

[69] *Id.*

[70] *Id.* at Standard 10.3.

[71] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL (2003), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/index.html.

[72] The USAM states that a prosecutor "should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction" unless the prosecutor believes: "1. No substantial Federal purpose would be served by prosecution; 2. The person is subject to effective prosecution in another jurisdiction; or 3. There exists an adequate non-criminal alternative to prosecution." *Id.* at § 9-27.220(A).

[73] The USAM lists the following seven factors for federal prosecutors to consider in exercising discretion to pursue a prosecution:

(1) Federal law enforcement priorities;
(2) The nature and seriousness of the offense;
(3) The deterrent effect of prosecution;
(4) The person's culpability in connection with the offense;

identifies impermissible considerations, which are: "1. The person's race, religion, sex, national origin, or political association, activities, or beliefs; 2. The attorney's own personal feelings concerning the person, the person's associates, or the victim; or 3. The possible affect of the decision on the attorney's own professional or personal circumstances."[74]

Despite the recommendations of the ABA Criminal Justice Standards and the NDAA and the example of the U.S. Department of Justice, relatively few of the more than 2300 prosecutors' offices that pursue felony cases in state courts have manuals or written guidelines for exercising discretion, and whatever manuals or guidelines that may exist do not appear to be available to the public.[75] The lack of written policies for exercising discretion and the lack of transparency in the process are breeding grounds for inconsistency and potential arbitrariness in the way prosecutors in an office approach their work.

The head prosecutor of an office without a written manual or guidelines for exercising discretion could help prevent the use of false snitch testimony and *Brady* violations by creating written guidelines covering these two areas and making those guidelines available to the public. Such action would establish procedures in the office that are clear and definite, and each prosecutor's actions pursuant to these

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(5) The person's history with respect to criminal activity;
(6) The person's willingness to cooperate in the investigation or prosecution of others; and,
(7) The probable sentence or other consequences if the person is convicted.

Id. at § 9-27.230(A). The USAM states that the list is "not intended to be all-inclusive," explains each factor, and lists an additional eighth factor, which is "the person's personal circumstances." *Id.* § 9-27.230(B).

[74] *Id.* at § 9-27.260(A).

[75] CAROL J. DEFRANCES, BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2001, at 1 (2002), *available at* http://www.ojp.gov/bjs/abstract/psc01.pdf. Available data from the Bureau of Justice Statistics demonstrate that only nineteen percent of prosecutors' offices have written guidelines for handling juvenile cases. *Id.* at 7. The survey did not provide any other information on manuals or written guidelines. *See generally id.*

In my own experience practicing criminal law in several different cities and counties in two states, I have never found a state or local prosecutor's office with a manual or written guidelines addressing the exercise of discretion made available to the public. Prosecutors in state courts routinely tell me that no such manual or written guidelines exist in their offices. It appears that Minnesota is the only state with a law addressing this issue, and the law requires every prosecutor's office to adopt "written guidelines governing the county attorney's charging and plea negotiation policies and practices." MINN. STAT. § 338.051(3)(a) (1997). Minnesota requires the guidelines to set out "the circumstances under which plea negotiation agreements are permissible," "the factors that are considered in making charging decisions and formulating plea agreements," and "the extent to which input from other persons concerned with a prosecution, such as victims and law enforcement officers, is considered in formulating plea agreements." *Id.* I have been unable to locate any other information concerning the number of state and local prosecutors' offices that have manuals or written polices outlining the exercise of discretion. More research and data in this area are needed.

written procedures could be subject to internal review and, if necessary, enforcement.

Although no one has done an in depth study into prosecutor integrity, a Department of Justice's National Institute of Justice study of police integrity found that a "culture of integrity, as defined by clearly understood and implemented policies and rules, may be more important in shaping the ethics . . . than hiring the 'right' people."[76] In addition, the study recommended that to enhance integrity two other measures should be taken: "consistently address relatively minor offenses with the appropriate discipline" so that one "may infer that major offenses, too, are likely to be disciplined," and "disclose the disciplinary process and resulting discipline to public scrutiny."[77]

The findings concerning steps to enhance police integrity are consistent with studies of lawyer ethics that demonstrate that the ethical culture in a law office is critical to the ethical behavior of the lawyers in that office.[78] This all points to the need for head prosecutors to implement written policies that describe proper conduct in dealing with informants, especially jailhouse snitches, and *Brady* material, and to utilize internal discipline procedures when those policies are violated. Without written policies, the prosecutors making these decisions are left to determine, on their own, the proper way of handling a situation, or must rely on the advice of others in their offices who may have widely varying views of what is proper. In the following sections, I will discuss specific policies head prosecutors should consider implementing for dealing with informant, especially snitch, testimony and *Brady* disclosures.

2. Impose Controls on the Use of Informant (Snitch) Testimony

A head prosecutor could prohibit the use of informant testimony, especially jailhouse snitch testimony, altogether, but many prosecutors might view that approach as too drastic a cure for the problem of potential unreliability of informants. In some instances,

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[76] NAT'L INST. OF JUSTICE, ENHANCING POLICE INTEGRITY, at ii (2005), *available at* http://www.ncjrs.gov/pdffiles1/nij/209269.pdf. The study involved a survey of 3235 police officers from thirty different law enforcement agencies who responded to hypothetical questions related to misconduct. *Id.* at 1.

[77] *Id.* at 6.

[78] *See, e.g.*, JEROME E. CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR 167 (1966) ("The longer a lawyer has been a member of the office, and the more socially cohesive the office, the more likely it is that his behavior will be in line with the attitudes of his colleagues."); FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 173 (1981) ("[A]fter general upbringing, the source given the greatest credit for learning professional responsibility is the 'observation of or advice from other attorneys in your own law office.'").

the testimony of a jailhouse snitch may appear to be reliable and may be important to prosecuting a defendant successfully. Instead of banning the use of jailhouse informant testimony altogether, a more balanced approach to the problem would consider reasonable measures that could effectively address the reliability issue.

The reliability issue should be approached with clear guidelines because the unreliability of informant testimony has been recognized by courts and prosecutors—anyone remotely associated with the criminal justice system recognizes that there are problems using witnesses who trade testimony for leniency.[79] Nearly one hundred years ago, the United States Supreme Court warned that the testimony of accomplice informants should be viewed "with suspicion, and with the very greatest care and caution,"[80] and more than fifty years ago the Court stated that "informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may

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[79] Judge Stephen Trott, a former prosecutor, used to train federal prosecutors about the problems of using informant testimony, especially jailhouse snitch testimony. He later used his training materials in writing a law review article in which he stated: "The most dangerous informer of all is the jailhouse snitch who claims another prisoner confessed to him." Trott, *supra* note 58, at 1394. Judge Trott currently sits on the Ninth Circuit, and in a decision he authored he explained:

> Never has it been more true than it is now 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 N. Mariana Islands v. Bowie, 243 F.3d 1109, 1123 (9th Cir. 2001).

Professor Bennett Gershman, a former prosecutor, has warned that a cooperating witness not only has "extraordinary incentives to lie" but also has the "capacity to manipulate, mislead, and deceive his investigative and prosecutorial handlers." Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARODOZO L. REV. 829, 847 (2002). Despite these risks, Gershman explains: "For the prosecutor, the cooperating witness provides the most damaging evidence against a defendant, is capable of lying convincingly, and typically is believed by the jury." *Id.*

The ABA's Ad Hoc Innocence Committee's report also notes that among the official studies documenting "problems associated with the use of jailhouse informants" are "a grand jury report," "two Canadian public inquiries," "numerous books, articles, and news reports." ABA INNOCENCE COMMITTEE REPORT, *supra* note 24, at 63. A Los Angeles County Grand Jury Report found that "prosecutors' and investigators' systematic misuse of jailhouse informants leading to wrongful convictions in as many as 250 major felony prosecutions between 1979 and 1988." Barry Tarlow, *Some Prosecutors Just Don't Get It: Improper Cross and Vouching*, CHAMPION, Dec. 28, 2004, at 55, 61 (citing to the report by the Los Angeles County Grand Jury). The two major findings of the Los Angeles County Grand Jury were that the "Los Angeles County District Attorney's Office failed to fulfill the ethics responsibilities required of a public prosecutor by its deliberate and informed declination to take the action necessary to curtail the misuse of jailhouse informant testimony," and the "Los Angeles Sheriff's Department failed to establish adequate procedures to control improper placement of inmates with the foreseeable result that false claims of confessions or admissions would be made." REPORT OF THE 1989–90 LOS ANGELES COUNTY GRAND JURY: INVESTIGATION OF JAILHOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY 6 (1990).

[80] Crawford v. United States, 212 U.S. 183, 204 (1909).

raise serious questions of credibility."[81] More recently, Judge Stephen Trott, a former prosecutor sitting on the Ninth Circuit, explained:

> [E]ach contract for testimony is fraught with 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. Defendants or suspects with nothing to sell sometimes embark on a methodical journey to manufacture evidence and to create something of value, setting up and betraying friends, relatives, and cellmates alike. Frequently, and because they are aware of the low value of their credibility, criminals will even go so far as to create corroboration for their lies by recruiting others into the plot . . . .[82]

Given the problems with credibility, head prosecutors should ensure that their offices have clear guidelines controlling the use of cooperating witnesses, especially jailhouse snitches. Perhaps the single most important policy would be to require the corroboration of jailhouse informant testimony, so that, as the ABA recommends, "no person should lose liberty or life based solely on the testimony of such a [jailhouse informant] witness."[83] Some states currently require corroboration for accomplice testimony,[84] and the same motivation of a lighter sentence or other benefit that motivates an accomplice to testify against the accused motivates jailhouse snitches.

If a head prosecutor is not willing to require corroboration of jailhouse snitch testimony before using it against the accused, at the very least the head prosecutor should put written guidelines in place for how and when to use jailhouse informants. Psychology experiments consistently demonstrate that "as a general rule people are poor lie detectors."[85] For example, one study showed that college

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[81] On Lee v. United States, 343 U.S. 747, 757 (1952).

[82] Commonwealth of N. Mariana Islands, 243 F.3d at 1124.

[83] ABA INNOCENCE COMMITTEE REPORT, *supra* note 24, at 70. The ABA Resolution, passed by the ABA House of Delegates, states: "RESOLVED, That the American Bar Association urges 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." *Id.* at 63.

[84] The ABA Innocence Committee cites to several state statutes and notes that "[e]ighteen states require corroboration of an accomplice's testimony." *Id.* at 70, n.22.

[85] Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 809 (2002). "Dozens of studies of the communication of deception provide compelling evidence that people are not very skilled at distinguishing when others are lying from when they are telling the truth. In experimental studies of detecting deception, accuracy is typically only slightly better than chance." Bella M. DePaulo et al., *The*

students had only a 52.8 percent accuracy rate in detecting true and false stories, federal polygraph examiners were slightly better at 55.7 percent, robbery investigators had a 55.8 percent accuracy rate, trial judges had a 56.7 percent accuracy rate, psychiatrists were at a 57.6 percent accuracy rate, and U.S. Secret Service agents did the best with a 64 percent accuracy rate in detecting true and false stories.[86] With the general human tendency to be only slightly better than chance in sorting out truth from lies, and even trained law enforcement personnel not doing much better, reasonable measures to determine the reliability of jailhouse informants are needed.

A head prosecutor who wants to establish procedures to counterbalance the human inability to be good lie detectors should use the ABA Ad Hoc Innocence Committee's Report list of factors, developed by a Canadian commission report investigating the wrongful conviction of Guy Paul Morin.[87] Among these factors are recommendations that the informant's statements be corroborated by evidence other than the testimony of other informants, that the statement contain "details or leads to the discovery of evidence known only to the perpetrator," that the prosecutor consider the past record of the informant in giving reliable testimony, whether the informant's report of alleged statements made by the accused was given immediately after the statement was made and given to more than one officer, and the techniques used in obtaining the report of the statement such as "use of non-leading questions, thorough report of words spoken by the accused, thorough investigation of the circumstances which might suggest opportunity or lack of opportunity to fabricate a statement."[88]

In addition, police and prosecutors should videotape or audio record all conversations with the jailhouse informant so that there is the ability, after the fact, to determine if the witness has been coached into inculpating the accused, or if the witness has manipulated the police or prosecutor into disclosing details of the crime known only to the victim, the real perpetrator, and involved law enforcement

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Accuracy-Confidence Correlation in the Detection of Deception, 1 PERSONALITY & SOC. PSYCHOL. REV. 346, 346 (1997).

[86] Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOLOGIST 913, 916 (1991). This study involved 509 people who were showed a videotape of ten people who were either lying or telling the truth in describing their feelings. *Id.* at 913.

[87] *See* ABA INNOCENCE COMMITTEE REPORT, *supra* note 24, at 67–69 (citing HON. FRED KAUFMAN, THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (Ontario Ministry of the Attorney General 1998)).

[88] *Id.*

officials.[89] A prosecutor not involved in the case should review these recordings so that there is an internal check on reliability. If the jailhouse informant is going to be used as a prosecution witness at trial, the recordings should be turned over to the defense as part of *Brady* disclosure for possible impeachment of the witness.[90]

Finally, if an agreement is reached with a jailhouse snitch, all promises and benefits to the witness should be in writing and subject to full disclosure under *Brady*.[91] The next section will discuss other policies a head prosecutor should create with regard to *Brady* disclosure obligations.

3. Create Clear Discovery Rules for the Prosecutor's Office

A head prosecutor can help avoid *Brady* violations by adopting clearer disclosure rules than those required by the courts or state law. As discussed previously, a prosecutor evaluating evidence for disclosure to the defendant may be conflicted when determining what is exculpatory pursuant to *Brady*.[92] The standard for disclosure under *Brady* has focused on the "materiality" of the evidence and requires that the "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceeding would have been different."[93] In exploring this standard, the Supreme Court has ruled that even when the withheld evidence creates a reasonable *possibility* of a different outcome if the prosecution had turned over the evidence there is not a *Brady* violation because the defendant fails to meet the burden of establishing a reasonable *probability* of a different outcome.[94] One commentator explains "what 'material' means; under what circumstances exculpatory evidence must be disclosed—by whom—and when it must be disclosed; have been the subject of much

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[89] Professor Bennett Gershman discusses the various ways prosecutors engage in witness coaching, and how cooperating witnesses can deceive and manipulate police and prosecutors. See Gershman, *supra* note 79, at 829–44, 847–50. Gershman notes however, that even with documentation of the encounters with a cooperating witness there are some psychological components such as "a witness's own 'suggestibility,' 'confabulation,' and 'memory hardening,'" that may escape detection and still lead to false or misleading testimony. Id. at 852.

[90] Contemporaneous records of interactions between the government and the jailhouse are necessary "to ascertain the extent to which prosecutors or police may have improperly influenced witnesses overtly, covertly, or even unwittingly to give false or misleading testimony." *Id.* at 833.

[91] The Supreme Court has held: "When the 'reliability of a given witness may well be determinative of the guilt or innocence,' nondisclosure of evidence affecting credibility falls within this [Brady] rule." Giglio v. United States, 405 U.S. 150, 155 (1963).

[92] *See supra* notes 59–62 and accompanying text.

[93] United States v. Bagley, 473 U.S. 667, 682 (1985).

[94] Strickler v. Greene, 527 U.S. 263, 291 (1999).

confusion, revision, and debate among courts, lawyers, and academics."[95] Rather than letting prosecutors in an office attempt to assess disclosure under a confusing set of rules, a head prosecutor should provide clearer guidance that ensures complete compliance with *Brady*.

The surest way to meet and exceed *Brady* disclosure obligations is to adopt an "open file" discovery policy—essentially making available to the defense all of the information in the prosecutor's possession. Many individual prosecutors have open file discovery policies,[96] though this is generally left to the discretion of individual prosecutors and is not an office-wide policy.[97] This means that without a policy requiring open file discovery in a particular office, whether a defendant receives the benefit "of an open file policy may depend on the particular prosecutor, the relationship between defense counsel and the prosecutor, the identity of the defendant, and the nature of the case."[98] Without guidelines on the exercise of discretion in discovery, there is the potential for some prosecutors to use factors such as the race or social standing of the defendant or the defendant's lawyer in determining who receives open file discovery.

An open file discovery policy not only removes the guessing and doubt on whether prosecutors in the office are following *Brady*, but a head prosecutor who implements an open file discovery policy will eliminate potential grounds for appeal and second guessing of the judgment of prosecutors.[99] An open file discovery policy also removes the problem of a prosecutor trying to evaluate evidence under the vague and indefinite standards of *Brady*.

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[95] Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WISCONSIN L. REV. 542, 564–65.

[96] *See, e.g.*, David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1738 (1993) (noting that some prosecutors have an "open file" discovery policy by choice); Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Courts Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1107 (1991) (stating that many prosecutors "choose to open their files to opposing counsel"). In my own experience doing criminal defense, some prosecutors in local and state courts would open their files to me by permitting me to review their files in their presence, while other prosecutors in the same office would not.

[97] *See* Tamara L. Graham, *Death by Ambush: A Plea for Discovery of Evidence in Aggravation*, 17 CAP. DEF. J. 321, 342. n.170 (2005).

[98] Prosser, *supra* note 95, at 593–94.

[99] Provided the material in the prosecutor's file is complete and contains information compiled by all of the law enforcement personnel related to the case, there cannot be any *Brady* material not disclosed if the prosecutor has an open file discovery policy. And, a prosecutor with open file discovery has an obligation to ensure that the materials in the file are complete and accurate. *See* Robinson v. State, 879 S.W.2d 419, 421–22 (Ark. 994). When a prosecutor employs open file discovery, there cannot be a *Brady* violation. *See* Martin v. State, 971 So.2d 736, 744 (Ala. Crim. App. 2003).

An open file discovery policy could also provide that if there is anything in the file that the prosecutor believes is privileged or would be embarrassing or intrusive into the privacy rights of a witness, the prosecutor would provide notice to the defense attorney that certain material, such as medical records of a potential witness, are being withheld for privacy reasons. Such a claim by the prosecution would shift the burden to the defense to seek a court order to obtain the evidence. In some instances, a trial judge may engage in an *ex ante, in camera* review to determine if the evidence in question is *Brady* material rather than in an appellate *post hoc* evaluation of withheld evidence on appeal.

If a head prosecutor is reluctant to implement an open file discovery for an office, at the very least the head prosecutor could create a policy that all exculpatory evidence be disclosed to the defendant. As a result of a study of wrongful convictions in Illinois, the Illinois Supreme Court adopted a rule that "the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment thereof."[100] By adopting such a policy, a head prosecutor would remove the confusion over the "materiality" component currently present under *Brady*, and, like implementing an open file discovery policy, should prevent *Brady* violations in the prosecutor's office.

In addition to whatever policy a head prosecutor implements concerning disclosure obligations, the policy should require timely disclosure of material when it will be most useful to the defense. This means that disclosure of favorable material should take place prior to plea bargains, as Professor McMunigal has argued.[101] For cases going to trial, disclosure should take place weeks or at least days prior to trial, instead of the first day of trial or during trial, as sometimes occurs.

B. What Defense Attorneys Can Do

Defense attorneys also should do more to combat possible false snitch testimony. For example, two former public defenders have created "The Rat Manual," in which they outline steps to take when dealing with informants, including jailhouse snitches.[102] The manual provides an excellent step-by-step approach to all aspects of dealing

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[100] Ill. Sup. Ct. R. 412(c).

[101] *See* McMunigal, *supra* note 43, at 745–47.

[102] *See* Charles M. Sevilla & Verna Wefald, Finding Evidence to Search for and Undermine the Snitch (The Rat Manual) (1994) (on file with author).

with informants and it provides case and statutory support for every subject. The issues covered include early discovery of the informant's identity and background, collecting impeachment information from public records and investigation techniques, investigating the prosecutor's conduct with the informant and other informants, filing pretrial motions to exclude the informant as unreliable, implementing a strategy to impeach the informant on cross-examination, using expert witnesses for impeachment, drafting cautionary jury instructions addressing the issue of credibility for snitch testimony, and post conviction motions.[103]

In a similar vein, some public defender offices have offered training on dealing with informants and have made materials available via the internet. The District of Columbia's Public Defender Service (PDS) has posted materials from a program entitled "The ABCs of Cross-Examining 'Cooperating' Witnesses."[104] The PDS training materials contain internet links to materials that include a sample motion to preclude the creation of snitch testimony, a sample motion to exclude cooperating witness testimony and a request for a reliability hearing, and three sample cross-examinations.[105] The Florida Public Defender Conference presented a program entitled "Snitches, Rats and Songbirds,"[106] and the material for the conference, available over the internet, includes suggestions for introducing the issue of informant credibility during jury *voir dire*, language for describing the snitch during closing, and a sample cautionary letter to send to clients advising them not to speak to anyone about their cases.[107] The materials demonstrate the variety of approaches defense counsel should employ to prevent the creation of and to combat false jailhouse snitch testimony.

If there is jailhouse snitch testimony, defense lawyers who seek to exclude the informant's testimony will face obstacles. The criminal justice system relies primarily on the availability of cross-examination and jury instructions to address issues of reliability when the government uses informants.[108] Yet, jailhouse snitches trading

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[103] *See id.*

[104] District of Columbia Public Defender Service, *The ABCs of Cross-Examining the "Cooperating" Witness*, http://www.pdsdc.org/calendar/summerseries/ss06202006/CrossExaminingCooperatingWitnesses-TableofContents.pdf (last visited March 1, 2007).

[105] *See id.* The sample motion to preclude the creation of snitch testimony was created by the Louisiana State Indigent Defense Assistance Board. *See id.*

[106] *See id.*

[107] *See id.*

[108] In addressing the use of compensated informants, the Supreme Court reasoned that the government does not violate a defendant's due process rights stating: "The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed

testimony for leniency have significant incentives to fabricate testimony because their own fate depends upon them presenting credible and consistent testimony against the accused.[109] Once a jailhouse snitch formulates a story, the prosecutor handling the case will very likely coach the informant to be consistent and convincing.[110] This type of practiced testimony is especially resistant to cross-examination, so defense lawyers must press the issue of jailhouse informant unreliability through the types of investigations, pretrial motions and hearings, and trial strategies, discussed in a growing number of resources, to combat false snitch testimony.

Defense attorneys should also push trial courts to require prosecutors to provide early and complete disclosure of exculpatory evidence concerning the informant. In every case in which the prosecutor designates a jailhouse informant as a witness, the defense attorney should file a discovery motion that specifically asks for the following: a complete criminal history of the informant; a list of all cases in which the informant has testified or offered to testify against another; whether the informant has ever recanted testimony or a statement in the past and a copy of such recantation; the specific statements of the defendant that the informant will testify about and the time, place, and manner in which the statements were allegedly made; all written or oral deals, promises, inducements, or benefits made by the government to the informant or planned to be made by the government, and any other information concerning the informant's credibility.[111] If the trial judge requires this type of

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jury." Hoffa v. United States, 385 U.S. 293, 311 (1966).

[109] As one commentator 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.

George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 54 (2000).

[110] *See* Gershman, *supra* note 79, at 834–38.

[111] This recommendation is based on the following specific discovery required by the Oklahoma Court of Criminal Appeals whenever the government uses an informant:

> At least ten days before trial, the state is required to disclose in discovery: (1) the complete criminal history of the informant; (2) any deal, promise, inducement, or benefit that the offering party has made or may make *in the future* to the informant (emphasis added); (3) the specific statements made by the defendant and the time, place, and manner of their disclosure; (4) all other cases in which the informant testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; (5) whether at any time the informant recanted that testimony or

discovery, and if the prosecutor fully complies with such a discovery order, the requirements of *Brady* will be met.

More detailed discovery motions, practice aids such as "The Rat Manual," and the public defender training materials provide defense attorneys with steps that they can take to preclude the creation of snitch testimony, possibly exclude such testimony when it exists, and creatively attack the testimony if it is introduced at trial. The overarching message of these strategies is that defense lawyers should be more proactive to attempt to combat the use of false snitch testimony and to obtain compliance with *Brady*.

C. What Trial and Appellate Judges Can Do

Judges at the trial and appellate levels should also do more to guard against the use of false snitch testimony and *Brady* violations. The adversary system depends on trial judges monitoring the conduct of prosecutors and defense lawyers in discovery, pretrial, and trial proceedings. In reviewing cases, appellate judges should fashion clearer legal rules to govern the disclosure obligations of prosecutors and the conduct of trials.

A trial judge presented with a motion to exclude jailhouse informant testimony should grant a reliability hearing on the matter and appellate judges should approve of such hearings as within the sound discretion of the trial judge. There are grounds for a trial judge exercising such authority to ascertain the reliability and probative value of jailhouse snitch's testimony in both federal and state courts. The Federal Rules of Evidence provide: "Preliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence shall be determined by the court . . . ."[112] In addition, the Federal Rules of Evidence provide: "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 [out of the hearing of the jury] when the interests of justice require."[113] Most states, including Ohio, have adopted this same or similar language.[114] These evidentiary rules recognize a trial judge's

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statement, and if so, a transcript or copy of such recantation; and (6) any other information relevant to the informant's credibility.

Dodd v. State, 993 P.3d 778, 784 (Okla. Crim. App. 2000).

[112] FED. R. EVID. R. 104(a) (2006).

[113] FED. R. EVID. R. 104(c) (2006).

[114] The Ohio Rules of Evidence provide: "Preliminary questions concerning the qualification of a person to be a witness . . . shall be determined by the court . . . ." OHIO R. EVIDENCE R. 104(A) (2006). The rules further state: "Hearings on the admissibility of

authority and obligation to conduct an admissibility hearing to determine whether jailhouse snitch testimony of an alleged confession by the accused did occur and is sufficiently reliable to be permitted at trial against the accused. Federal Rule of Evidence 403 also provides 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."[115]

As discussed previously, courts have long recognized the unreliability of informants,[116] and at least one court has stated that the use of informant testimony is "creating the risk of sending innocent persons to prison."[117] In *Dodd v. State*,[118] the Oklahoma Court of Criminal Appeals warned: "Courts should be exceedingly leery of jailhouse informants, especially if there is a hint that the informant received some sort of benefit for his or her testimony."[119]

Given the historical unreliability of jailhouse informants, some judges have recommended or required reliability hearings when a prosecutor plans to use the testimony of a jailhouse informant against the accused. In a concurrence in *Dodd v. State*, one of the appellate judges stated that "to ensure the utmost reliability in the admission of jailhouse informant testimony, I would also mandate the reliability hearing."[120] In *D'Agostino v. State*,[121] the Nevada Supreme Court held that in the penalty phase of a capital case the "supposed admissions"

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confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall also be conducted out of the hearing of the jury when the interests of justice require." *Id.* at R. 104(C). Some of the other states with the same or essentially same rule of evidence include Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Idaho, Indiana, Iowa, Kentucky, Maine, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *See* ALA. R. EVID. R. 104 (2007); ALASKA R. EVID. R. 104 (2006); ARIZ. R. EVID. R. 104 (2007); ARK. R. EVID. R. 104 (2006); COLO. R. EVID. R. 104 (2007); DEL. R. EVID. R. 104 (2006); IDAHO R. EVID. R. 104 (2006); IND. R. EVID. 104 (2006); IOWA R. EVID. R. 104 (2007); KY. R. EVID. R. 104 (2006); ME. R. EVID. R. 104 (2006); MICH. R. EVID. R. 104 (2007); MINN. R. EVID. R. 104 (2005); MISS. R. EVID. R. 104 (2007); MONT. R. EVID. R. 104 (2005); N.H. R. EVID. R. 104 (2007); N.J. R. EVID. R. 104 (2007); N.M. R. EVID. R. 11-104 (2007); N.D. R. EVID. R. 104 (2007); 12 OKL. ST. § 2105 (2006); OR. REV. STAT. § 40.030, R. 104 (2006); R.I. R. EVID. ART I, R. 104 (2006); S.C. R. EVID. R. 104 (2006); S.D. CODIFIED LAWS § 19-9-9 (2006); TENN. R. EVID. R. 104 (2006); TEX. R. EVID. R. 104 (2007); UTAH R. EVID. R. 104 (2006); VT. R. EVID. R. 104 (2007); WASH. R. EVID. R. 104 (2006); W. VA. R. EVID. R. 104 (2006); WIS. STAT. § 901.04 (2006); WYO. R. EVID. R. 104 (2006).

[115] FED. R. EVID. R. 403 (2006).

[116] *See supra* notes 80–84 and accompanying text.

[117] United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th 1993).

[118] Dodd v. State, 993 P.2d 778, 783 (Okla. Crim. App. 2000).

[119] *Id.* at 783.

[120] *Id.* at 784.

[121] 823 P.2d 283 (Nev. 1992).

by a defendant "may not be heard by the jury unless the trial judge first determines that the details of the admissions supply a sufficient indicia of reliability or there is some credible evidence other than the admission itself to justify the conclusion that the convict committed the crimes which are the subject of the admission."[122]

As the foregoing discussion indicates, both the rules of evidence and case authority provide support for the trial judge to exercise a gate keeping function before admitting jailhouse informant testimony.[123] When the record of a reliability hearing supports a finding of unreliability, the trial judge should exclude the testimony reasoning that the probative value of the testimony is outweighed by the danger of unfair prejudice to the accused and that the testimony may mislead the jury. A trial judge's decision on this preliminary matter should be found to be within the judge's sound discretion, and should not be disturbed on appeal unless the record demonstrates an abuse of discretion.[124]

In addition to requiring reliability hearings before permitting jailhouse informants to testify, trial and appellate judges can do more to require more detailed discovery concerning jailhouse informants and timely disclosure. Two models for more extensive discovery when there are jailhouse informants are found in Oklahoma case law[125] and in an Illinois statute.[126] Trial judges should impose such

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[122] *Id.* at 285.

[123] Professor George Harris has argued that the law's treatment of expert witnesses also supports holding reliability hearings when a jailhouse informant is used. *See* Harris, *supra* note 109, at 1–5. Harris notes that jailhouse informants are compensated by one party, as are expert witnesses, and this makes them more one-sided and violates the usual prohibition on paid testimony. *See id.* Harris also contends that like experts, informants may appear to have special knowledge of the crime that can sway the jury. *See id.* 54–56, 59–61. *See also* Daubert v. Merrell Dow, 509 U.S. 579 (1993) (requiring courts to hold reliability hearings before admitting expert testimony).

[124] *See, e.g.*, Pina v. State, 38 S.W.3d 730, 736 (Tex. App. 2001) (holding that preliminary questions concerning the admissibility of evidence are within the trial court's discretion).

[125] *See supra* note 111.

[126] Whenever the prosecution intends to use an informant to testify against the accused in a death penalty cases, Illinois law requires the prosecutor to provide the following to the defense:

(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

requirements by instituting standing discovery orders in criminal cases that require more detailed discovery concerning the background of informants and possible impeachment material. If a trial judge is reluctant to impose a standing order for more extensive and timely discovery concerning informants, the trial judge should grant a defense motion for more extensive discovery.[127] By enforcing a standing discovery order or by granting a defense motion for more extensive discovery concerning informants, the trial judge would help to ensure complete and timely disclosure of all *Brady* material to the defense.

Appellate judges can also take a more practical approach by establishing more workable standards for *Brady* disclosures. Some courts have held that the prosecutor has an obligation to disclose to the defendant all favorable evidence "without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial."[128] By separating the duty to disclose all favorable evidence from the issues of materiality and the probability of reversal if the material is withheld, these courts are sending a clearer message to prosecutors that *Brady* disclosures must be complete. Some courts also caution prosecutors that "[w]here doubt exists as to the usefulness of the evidence to the defendant, the government must

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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.

§ 725 ILL. COMP. STAT. ANN. 5/115-21(c) (2007). The statute defines an informant as "someone who is purporting to testify about admissions made to him or her by the accused while incarcerated in a penal institution contemporaneously." *Id.* at 5/115-21(a).

In addition, the prosecutor in a death penalty case must disclose to the defense the following for every witness whose testimony the government plans to introduce:

(1) whether the witness has received or been promised anything,including pay, immunity from prosecution, leniency in prosecution, or personal advantage, in exchange for testimony;

(2) any other case in which the witness testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the witness received any deal, promise, inducement, or benefit in exchange for that testimony or statement; provided that the existence of such testimony can be ascertained through reasonable inquiry;

(3) whether the witness has ever changed his or her testimony;

(4) the criminal history of the witness; and,

(5) any other evidence relevant to the credibility of the witness.

Id. at 5/115-22.

[127] See *supra* note 111 and accompanying text for an example of the type information about the informant that defense lawyers should seek in discovery.

[128] United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005); *see also* United States v. Acosta, 357 F. Supp.2d 1228, 1233 (D. Nev. 2005).

resolve all such doubts in favor of full disclosure."[129] As the District of Columbia Court of Appeals recently held:

> In arguable cases, the prosecutor should provide the potentially exculpatory information to the defense or, at the very least, make it available to the trial court for *in camera* inspection. Further, when the issue appears to be a close one, the trial court should insist upon reviewing such material, and should direct disclosure to the defense . . . ."[130]

When a defendant demonstrates on appeal that a prosecutor did not turn over *Brady* material, state appellate courts should also consider shifting the burden to the prosecution to show lack of prejudice to the defendant. This approach was recently adopted by the Minnesota Supreme Court for prosecutorial trial misconduct,[131] and at least two other states require the government to demonstrate that prosecutorial trial misconduct has not affected a defendant's rights.[132] Although these cases apply to trial misconduct, the reasoning is equally applicable to pretrial disclosure obligations calculated to provide the defendant access to favorable evidence for use at trial. As the Minnesota Supreme Court reasoned, "placing the burden on the prosecution to show lack of prejudice will allow for more effective regulation of impermissible practices" and courts "retain the authority in the appropriate case to reverse under our supervisory powers, without regard to whether the defendant was prejudiced."[133] By shifting the burden to the prosecution to prove lack of prejudice when the prosecution does not turn over favorable evidence to the defendant, state appellate courts would encourage greater disclosure and better safeguard the due process rights of the accused.

CONCLUSION

Reducing the incidence of false snitch testimony and *Brady* violations is a shared responsibility of prosecutors, defense counsel, and the judiciary. Rather than hoping and waiting for systemic change to occur from above in the form of legislation or the possible development of better case law by the United States Supreme Court to

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[129] United States v. Safavian, 233 F.R.D. at 17.

[130] Boyd v. United States, 908 A.2d 39, 61 (D.C. Ct. App. 2007).

[131] Minnesota v. Ramey, 721 N.W.2d 294, 302 (Minn. 2006).

[132] *See* Wilson v. State, 874 So.2d 1155, 1159 (Ala. Crim. App. 2003) (holding that state must prove that prosecutorial misconduct did not affect defendant's substantial rights); State v. King, 555 N.W.2d 189, 194 (Wis. Ct. App. 1996) (holding that burden is on prosecution to prove that plain error is harmless).

[133] Ramey, 721 N.W.2d at 303.

protect against wrongful convictions, it is time for all who care about wrongful convictions to do what is within their power to address the causes of wrongful convictions. If even a handful of head prosecutors, judges, and defense lawyers utilize some of the legal "self-help" remedies outlined in this article, they will help prevent additional wrongful convictions based on false snitch testimony and *Brady* violations.