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Brady and Jailhouse Snitches

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BRADY AND JAILHOUSE SNITCHES

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"The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him."[1]

INTRODUCTION

This essay is a byproduct of my work with the American Bar Association's Innocence Committee, which made a number of recommendations to prevent miscarriages of justice in the future.[2] I was asked to write portions of a report on jailhouse snitches and became intrigued by their extensive use in some jurisdictions.[3] More recently, I had the opportunity to read John Grisham's book, *The Innocent Man*, which tells the story of Ron Williamson.[4]

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1 Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1394 (1996).

2 *See* 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 REPORT]. The Committee was tasked with undertaking a review of the causes for wrongful convictions and recommending policies to better ensure that individuals will not be convicted of crimes they did not commit. Over a three-year period, the Committee drafted resolutions and accompanying reports that have now been adopted by the ABA House of Delegates. In addition to a resolution on jailhouse informants, the ABA adopted resolutions on false confessions, eyewitness identification procedures, forensic evidence, defense counsel practices, investigative policies and personnel, prosecution practices, systemic remedies, and compensation for the wrongfully convicted. These included recommendations for videotaping all interrogations, accrediting crime laboratories, conducting double-blind lineups, and requiring corroboration in all cases involving jailhouse snitches.

3 *See* Symposium, *The Cooperating Witness Conundrum: Is Justice Obtainable?*, 23 CARDOZO L. REV. 747 (2002).

4 JOHN GRISHAM, THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN (2006).

Williamson's capital murder conviction rested on the testimony of a jailhouse informant and hair evidence, often a lethal combination.[5]

This was Grisham's first nonfiction work, and he explains why he wrote the book: "Not in my most creative moment could I conjure up a story as rich and as layered as Ron's."[6] Indeed, Williamson's story is riveting but also tragic. Five days before his scheduled execution, a federal judge granted his petition for habeas relief.[7] A jailhouse snitch, Terri Holland, was the key prosecution witness. She was awaiting trial for her third felony conviction[8] when she purportedly heard Williamson's incriminatory remarks.[9] This was not Holland's first appearance as a jailhouse snitch; she also allegedly overheard incriminating statements in an unrelated murder case.[10] The *Williamson* case was also the focus of a chapter in *Actual Innocence*, a book by Jim Dwyer, Peter Neufeld, and Barry Scheck, which examined sixty-two of the first DNA exonerations secured through Cardozo Law School's Innocence Project. They wrote: "During her four-month bit in the county jail, . . . Terri Holland had solved the two most heinous murders in the modern history of Ada, Oklahoma, by taking confessions from two complete strangers."[11]

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[5] In Ron Williamson's habeas case, the federal district court correctly noted that the hair expert's testimony lacked scientific support; the court was "unsuccessful in its attempts to locate *any* indication that expert hair comparison testimony meets *any* of the requirements of *Daubert*." Williamson v. Reynolds, 904 F. Supp. 1529, 1558 (E.D. Okl. 1995), *aff'd sub nom.* Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997). The court further observed: "Although the hair expert may have followed procedures accepted in the community of hair experts, the human hair comparison results in this case were, nonetheless, scientifically unreliable." *Id.* Nevertheless, the Tenth Circuit reversed on this issue. Williamson v. Ward, 110 F.3d 1508, 1523 (10th Cir. 1997) (holding that the due process standard, not *Daubert*, applies in habeas proceedings). *See also* Paul C. Giannelli & Emmie West, *Hair Comparison Evidence*, 37 CRIM. L. BULL. 514 (2001) (discussing the DNA exoneration cases in which hair evidence was used to convict the innocent); Clive A. Smith & Patrick D. Goodman, *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil?*, 27 COLUM. HUM. RTS. L. REV. 227, 231 (1996) ("If the purveyors of this dubious science cannot do a better job of validating hair analysis than they have done so far, forensic hair comparison analysis should be excluded altogether from criminal trials.").

[6] GRISHAM, *supra* note 4, at 355.

[7] *Williamson*, 904 F. Supp. 1529.

[8] *Id.* at 1550 ("Another troubling aspect of this case concerns the motivation of one of the State's most important witnesses, Terri Holland. Holland's testimony provided the only evidence of straightforward admissions of guilt by Petitioner. . . . According to her testimony, she had three felony convictions, one being a federal conviction for conspiracy to defraud the federal government, another for forgery, and the last for passing bogus checks.").

[9] *Id.* at 1551 ("Holland claims that during that incarceration she heard not only Petitioner's confession for the murder of Ms. Carter, but also Karl Allen Fontenot's confession for the murder of Donna Haraway.") (citations omitted).

[10] GRISHAM, *supra* note 4, at 152 ("The prosecution's star was the amazing Terri Holland. From October 1984 to January 1985, Holland had been locked up in the Pontotoc County jail for writing bad checks. As far as unsolved murders went in Oklahoma, it was a productive and remarkable four-month stay.").

[11] JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER

Moreover, Holland failed to mention Williamson's "admission" for over a year.[12] Incredibly, "Holland denied she ever received any compensation or promises of leniency from the State in return for her testimony in either [murder case]."[13] Another prisoner, Glen Gore, who also testified against Williamson, would later be proved the actual killer through DNA evidence. At the end of his opinion granting Williamson habeas relief, which was rendered before the exculpatory DNA tests were performed, Chief Judge Seay wrote: "God help us, if ever in this great country we turn our heads while people who have not had fair trials are executed. That almost happened in this case."[14]

I. THE PROBLEM

Of the sixty-two cases examined by the Innocence Project, twenty-one percent involved snitches or informants.[15] According to the Center for Wrongful Convictions, snitch cases account for 45.9% of the 111 death row exonerations since the death penalty was restored in the 1970s.[16] Of the 117 death penalty appeals pending in the California State Public Defender's office, seventeen involved testimony by in-custody informants and six by informants in constructive custody.[17]

Jailhouse informant testimony also played a pivotal role in the wrongful conviction of Guy Paul Morin in Canada: "Such testimony related to a purported confession to the murder, made by Mr. Morin to a fellow inmate at the jail, Robert Dan May. The confession was allegedly heard by a second inmate in an adjoining cell who also

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DISPATCHES FROM THE WRONGLY CONVICTED 135 (2000).

[12] *Williamson*, 904 F. Supp. at 1551 ("Holland testified that she did not inform the district attorney's office of Petitioner's alleged confession until February 1986, because she assumed that other personnel in the jail were already aware of his statements. However, no such reporting delay occurred in Mr. Fontenot's case, since she testified against him as early as his preliminary hearing in January 1985.") (citations omitted).

[13] *Id.*

[14] *Id.* at 1577.

[15] DWYER ET AL., *supra* note 11, at 246. *See also* John M. Broder, *Starting Over, 24 Years After a Wrongful Conviction*, N.Y. TIMES, June 21, 2004, at A14 ("Mr. Goldstein was able to establish conclusively that Mr. Fink, a habitual criminal, heroin addict and serial liar, had fabricated his account of Mr. Goldstein's 'confession' to him when they were together briefly in a Long Beach police holding pen.").

[16] CENTER ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM 3 (Northwestern University School of Law 2004) (most were jailhouse informants).

[17] Vesna Jaksic, *Calif. May Crack Down on Use of Jailhouse Informants*, NAT'L L.J., Jan. 1, 2007, at 6 (reporting that the California Commission on the Fair Administration of Justice issued guidelines on the use of jailhouse informants).

testified at the trial."[18] Morin was later freed due to DNA testing; hair evidence also played a pivotal role in his case.[19]

Another Canadian case involved Thomas Sophonow. In addition to three jailhouse informants who testified for the prosecution, nine others volunteered. One was Terry Arnold, who is now a suspect in the killing. Of the testifying informants, Thomas Cheng had twenty-six counts of fraud dismissed in exchange for his testimony. Adrian McQuade, a career informant, was the second witness. Upon his arrest as a material witness, McQuade threatened to commit perjury if not released. Records never disclosed to the defense revealed that while he offered to be placed in jail with Sophonow, he did not hear a confession. The Commissioner who investigated Sophonow's wrongful conviction described the third informant, Douglas Martin, as "a prime example of the convincing mendacity of jailhouse informants. He seems to have heard more confessions than many dedicated priests."[20] With a record for perjury, he had testified as a jailhouse informant in at least nine cases.[21]

Problems with jailhouse informants, however, predate the recent DNA exonerations. One of the most notorious examples involved Leslie Vernon White, who, on *60 Minutes*, "admitted to consistently fabricating confessions of fellow inmates and offering perjured testimony to courts."[22] White testified against at least a dozen inmates; in "one thirty-six day period, he gave evidence for the Los Angeles district attorney's office in three murder cases and one residential burglary—all arising from what he claimed were fleeting jailhouse encounters during which inmates revealed critical details about the crimes to him."[23] A grand jury investigating the matter

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[18] Steven Skurka, *A Canadian Perspective on the Role of Cooperators and Informants*, 23 CARDOZO L. REV. 759, 761 (2002).

[19] *See* HON. FRED KAUFMAN, THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (Ontario Ministry of the Attorney General, 1998) [hereinafter KAUFMAN REPORT], *available at* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/ (Recommendation 2: "Trial judges should undertake a more critical analysis of the admissibility of hair comparison evidence as circumstantial evidence of guilt.").

[20] MANITOBA JUSTICE, THE INQUIRY REGARDING THOMAS SOPHONOW (2001), *available at* http://www.gov.mb.ca/justice/pubications/sophonow/jailhust/martin.html.

[21] Richard J. Wolson & Aaron M. London, *The Structure, Operation, and Impact of Wrongful Conviction Inquires: The Sophonow Inquiry as an Example of the Canadian Experience*, 52 DRAKE L. REV. 677, 682 (2004).

[22] ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM 65 (2002). "[White's] exploits were documented in a 1989 segment of *60 Minutes* and resulted in a Los Angeles County grand jury investigation on the use of jailhouse informants." *Id.* at 64. *See also* Robert Reinhold, *California Shaken Over an Informer*, N.Y. TIMES, Feb. 17, 1989, at A1 ("Defense lawyers have compiled a list of 225 people convicted of murder and other felonies, some sentenced to death, in cases in which Mr. White and other jailhouse informers testified over the last 10 years in Los Angeles County.").

[23] DWYER ET AL., *supra* note 11, at 128. In a different passage, they write: "Another

concluded that the 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."[24] Similarly, the District Attorney's Office "failed to fulfill the ethical responsibilities required of a public prosecutor by its deliberate and informed declination to take the action necessary to curtail the misuse of jail house informant testimony."[25]

Courts have also recognized this problem. A former prosecutor, Judge Trott of the Ninth Circuit, has commented:

> 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 not only to have the best lawyer money can buy or the court can appoint, but 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.[26]

The Supreme Court has made similar comments concerning accomplices, cautioning that "the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses."[27] Justice

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inmate, Sydney Stroch, was the 'Snitch Professor' who had supplied police with twenty 'confessions' he claimed to have heard while locked up. He was a witness in court at least a half-dozen times." *Id* at 129.

[24] REPORT OF THE 1989–90 LOS ANGELES COUNTY GRAND JURY: INVESTIGATION OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY 6 (June 26, 1990).

[25] *Id.*

[26] N. Mariana Islands v. Bowie, 243 F.3d 1109, 1123 (9th Cir. 2001). He elaborated:

> [B]ecause of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to "get" a target of sufficient interest to induce concessions from the government. 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, a circumstance we appear to confront in this case.

Id. at 1124. Judge Trott had previously written on this subject. *See* Trott, *supra* note 1.

[27] Crawford v. United States, 212 U.S. 183, 204 (1909). *See also* Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 847 (2002) ("The cooperating witness is probably the most dangerous prosecution witness of all. No other witness has such an extraordinary incentive to lie. Furthermore, no other witness has the capacity to manipulate, mislead, and deceive his investigative and prosecutorial handlers. For the prosecutor, the cooperating witness provides the most damaging evidence against a defendant, is capable of

Jackson put it this way a half-century ago: "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility."[28] Yet, unlike jailhouse informants, statements of accomplices can often be corroborated with other evidence.[29]

II. CREDIBILITY

A jurisdiction could prohibit informant/accomplice testimony entirely. The Sophonow Commission in Canada came close to this position, recommending that "[a]s a general rule, jailhouse informants should be prohibited from testifying."[30] Alternatively, a jurisdiction could subject such testimony to an exclusionary rule, as Illinois presently does in capital cases involving jailhouse informants.[31] If neither of these approaches is adopted, the decision regarding the reliability of this type of testimony is entrusted to the trier of fact, which cannot do its job unless it is fully informed of matters that affect the witness's credibility.

Many of the Supreme Court's right of confrontation cases involved witnesses who have received or may receive benefits from the prosecution. For example, in *Davis v. Alaska*,[32] the defense attempted to show that a key prosecution witness was a juvenile probationer and therefore had a motive—retention of his probationary status—to testify in a way favorable to the prosecution. The trial judge, based on a statute, excluded this evidence. The Supreme Court reversed: "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."[33]

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lying convincingly, and typically is believed by the jury.").

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

[29] For a definition of jailhouse informant, see 725 ILL. COMP. STAT. ANN. § 5/115-21(a) (West 2004) ("For the purposes of this Section, 'informant' means someone who is purporting to testify about admissions made to him or her by the accused while incarcerated in a penal institution contemporaneously.").

[30] Wolson & London, *supra* note 21, at 689.

[31] 725 ILL. COMP. STAT. ANN. § 5/115-21(d) (West 2004) (based on REPORT OF THE GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, Recommendation 52 (April 2002)). *See also* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 61–62 (2000).

[32] 415 U.S. 308 (1974).

[33] *Id.* at 320. Similarly, in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the Court wrote: "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness [questions about the dismissal of a criminal charge], and thereby 'to expose to the jury the facts from which jurors could appropriately

III. *BRADY*

Disclosure of impeachment evidence is constitutionally required under *Brady v. Maryland*[34]—if it is material. In *Giglio v. United States*,[35] the Supreme Court held: "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this [*Brady*] rule."[36] Indeed, the Court's most recent *Brady* case, *Banks v. Dretke*,[37] involved the failure to disclose that a prosecution witness was a paid informant.

A. Materiality Requirement

The Supreme Court undercut the effectiveness of the *Brady* rule when it began to create a stringent materiality requirement. The word "materiality" is a term of art in this context. It is not used in the same sense as in evidence law, where it simply means an issue of consequence under the substantive law.[38] In the *Brady* context, it means "outcome determinative."[39]

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draw inferences relating to the reliability of the witness.'" *Id.* at 680 (quoting *Davis*, 415 U.S. at 318). *See also* Alford v. United States, 282 U.S. 687, 692 (1931) (defense counsel not permitted to question witness about present residence, which was under the control of federal authorities; "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.") (citations omitted).

[34] 373 U.S. 83 (1963). *See also* Barbara Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133 (1982) (arguing that limiting the application of *Brady* is a natural evolution of and best serves the adversary system); Elizabeth N. Dewar, Note, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450 (2006) (arguing that criminal defendants should be able to argue that failure to disclose exculpatory evidence raises reasonable doubt); Robert Hochman, Note, Brady v. Maryland *and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673 (1996) (arguing that *Brady* imposes duties not only on prosecutors but all state actors).

[35] 405 U.S. 150, 154–55 (1972) ("[T]he Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.").

[36] *Id.* at 154.

[37] 540 U.S. 668, 703 (2004) ("[A]s to the suppression of Farr's informant status and its bearing on 'the reliability of the jury's verdict regarding punishment,' all three elements of a *Brady* claim are satisfied.") (citations omitted).

[38] *See* FED. R. EVID. 401.

[39] The suppressed evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). *See* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 689–90 (2006) ("The most

The Court could have adopted a different approach. Instead of a demanding "materiality" standard, the Court could have used the traditional harmless error analysis.[40] Dissenting in *United States v. Bagley*, [41] Justice Marshall advocated this position: "By adhering to the view . . . that there is no constitutional duty to disclose evidence unless nondisclosure would have a certain impact on the trial [materiality]—the Court permits prosecutors to withhold with impunity large amounts of undeniably favorable evidence, and it imposes on prosecutors the burden to identify and disclose evidence pursuant to a pretrial standard that virtually defies definition."[42]

Under Justice Marshall's approach, the prosecution would be required to turn over all exculpatory evidence (whether or not material); if the prosecution failed in this obligation, the constitutional violation would be subject to harmless error analysis.[43] Under this approach, the prosecution would have the burden of establishing harmless error beyond a reasonable doubt,[44] rather than the defense attempting to demonstrate "materiality."[45] The Court has adopted a similar approach to ineffective assistance claims, with the same disastrous effect.[46]

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pernicious consequence of the judiciary's radical reconstruction of the concept of materiality has been to afford prosecutors an extraordinarily wide berth to conceal favorable evidence from the defense in the completely rational expectation that the suppression either will not be discovered or, if discovered, will be found by a reviewing court to not be material.").

[40] Once a reviewing court has found constitutional error, "there is no need for further harmless-error review." Kyles v. Whitley, 514 U.S. 419, 435 (1995).

[41] 473 U.S. at 682.

[42] *Id.* at 700 (Marshall, J., dissenting). He further commented:

> Once the prosecutor suspects that certain information might have favorable implications for the defense, either because it is potentially exculpatory or relevant to credibility, I see no reason why he should not be required to disclose it. After all, favorable evidence indisputably enhances the truth-seeking process at trial. And it is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence. In addition, to require disclosure of all evidence that might reasonably be considered favorable to the defendant would have the precautionary effect of assuring that no information of potential consequence is mistakenly overlooked. By requiring full disclosure of favorable evidence in this way, courts could begin to assure that a possibly dispositive piece of information is not withheld from the trier of fact by a prosecutor who is torn between the two roles he must play. A clear rule of this kind, coupled with a presumption in favor of disclosure, also would facilitate the prosecutor's admittedly difficult task by removing a substantial amount of unguided discretion.

Id. at 698.

[43] *See* United States v. Agurs, 427 U.S. 97, 117–18 (1976) (Marshall & Brennan, J. J., dissenting).

[44] *See* Chapman v. California, 386 U.S. 18 (1967).

[45] *See* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3 (2d ed. 1999).

[46] The "materiality" requirement in *Brady* functions much like the "prejudice" requirement in the ineffective assistance of counsel cases. *See* 5 LAFAVE ET AL., *supra* note 45, § 27.6(d), at 947 ("An additional group of violations were destined not be analyzed under the

B. Prosecutor's Decision

Another underappreciated aspect is the psychological posture in which the prosecutor finds herself when confronting *Brady* issues. Here, I believe the lack of trial experience by the members of the Supreme Court has had an impact. After law school, I tried cases in the Army—first as a prosecutor, then as defense counsel, and then once again as a prosecutor. I came to understand how legal rules worked in practice as well as the pressures generated by those rules. As a prosecutor, I could easily be righteous, seeing myself as the instrument of justice seeking redress for rape and homicide victims, and protecting the public from predators. Once a defense attorney, I changed my psychological mindset overnight. I could be equally righteous when I believed my client was innocent, but more typically, I would be disturbed because the prosecution had overcharged my client, or violated his rights in securing a confession, or made a deal with an accomplice who was far more culpable. In short, the abstract notion of the "adversary system" that I had studied in law school became a living, driving force in my professional life. With that understanding, lets look at the context in which *Brady* decisions are made.

First, a prosecutor knows that she has a very high burden of persuasion—proof beyond a reasonable doubt—and, in most jurisdictions, must obtain a unanimous verdict from twelve jurors.[47] One juror holdout can "hang" a jury, and most defense counsel consider a hung jury, even though it will result in a mistrial and possible retrial, a victory.[48]

Second, the prosecutor knows she gets only one shot at a conviction. An acquittal will foreclose an appeal, due to the Supreme Court's double jeopardy jurisprudence.[49] In contrast, a conviction and reversal on appeal does not preclude a retrial.[50]

Third, if the prosecutor believed the accused was innocent, virtually all prosecutors would dismiss the case. Thus, *Brady* issues arise in cases where the prosecutor believes the defendant is guilty. The *Williamson* case illustrates the power of this prosecutorial belief.

Chapman's harmless error test because they were harmful by definition . . . . Examples include a finding that counsel's representation was ineffective . . . or that nondisclosed exculpatory evidence was material . . . .").

[47] *See* 5 LAFAVE ET AL., *supra* note 45, § 22.1(e) (discussing unanimity requirement).

[48] There are, of course, cases in which the evidence is overwhelming, but they tend to result in a plea bargain.

[49] *See* 5 LAFAVE ET AL., *supra* note 45, § 25.3(b) (discussing effects of acquittal).

[50] *See id.*, § 25.4(a).

After Williamson succeeded in securing habeas relief, he sought DNA testing. Grisham writes: "Bill Peterson [the prosecutor] liked the idea of DNA testing. He had never wavered in his belief that Williamson was the killer, and now it could be proven with real science."[51] Even after the DNA tests exonerated Williamson, the prosecutor's mind did not change. Grisham observes: "Peterson was still convinced Ron Williamson had raped and murdered Debbie Carter, and his evidence had not changed. Forget the DNA."[52] With this mind set, the prosecutor must determine whether evidence is "favorable" and "material."[53] In these circumstances, it is not difficult for the prosecutor to convince herself that evidence is "neutral" rather than "favorable" or not outcome determinative ("material").[54]

Fourth, apparently prosecutors are not particularly good at assessing the credibility of their informants. The little empirical data on the subject indicate that there is often difficulty in screening out unreliable informant testimony. One prominent researcher commented:

> Surprisingly, however, professionals who regularly make these kinds of [truth-determination] judgments for a living, like the rest of us, are highly prone to error. In one study, researchers Paul Ekman and Maureen O'Sullivan were curious to know whether groups of so-called experts—such as police investigators; CIA, FBI, and military polygraph examiners; trial judges; psychiatrists; and U.S. Secret Service Agents—are truly better than the average person. Using stimulus materials from past studies—consisting of true and false stories—they found that college students had a 52.8 percent accuracy rate, which is pretty typical. Police detectives were only slightly higher, at 55.8 percent; CIA, FBI, and military polygraph examiners were at 55.7 percent, trial judges were at 56.7 percent, and psychiatrists were at

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[51] GRISHAM, *supra* note 4, at 288.

[52] *Id.* at 302.

[53] For a discussion of *Brady* issues involving scientific evidence, see Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 VAND. L. REV. 791 (1991).

[54] *Agurs*, 427 U.S. at 117 (Marshall, J., dissenting) ("[T]he rule reinforces the natural tendency of the prosecutor to overlook evidence favorable to the defense, and creates an incentive for the prosecutor to resolve close questions of disclosure in favor of concealment."); Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 394–95 (1984) (arguing that since a prosecutor is "an understandably biased party," it is a "nearly impossible task" for a prosecutor to determine objectively what evidence is favorable to a defendant); Gershman, *supra* note 39, at 708 ("Moreover, for prosecutors, whose natural instincts are to discount any rule that would require them to assist a defendant in defeating the prosecutor's case, the *Brady* rule became an obstacle to be avoided or subverted.").

> 57.6 percent. U.S. Secret Service Agents won the prize, exhibiting a 64 percent accuracy rate, the highest of all groups.[55]

Fifth, the prosecutor knows that there is little chance that her decision will be revealed; neither the judge nor defense counsel will automatically review the prosecutor's decision. Every time I read a case involving a *Brady* issue, I want to know how the exculpatory information surfaced. How did the defense counsel learn of the evidence? Sometimes, a convict files a freedom of information act request.[56] Sometimes the information comes out after a request for DNA testing is made.[57] At other times, the information is revealed in a related case.[58] I suspect it is rarely revealed by the original prosecutor, who has already found it non-material or non-exculpatory. In sum, *Brady* depends on the self-regulation of prosecutors.

Finally, sanctions for *Brady* violations appear to be illusory. As one scholar, who has researched disciplinary actions against

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[55] Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident But Erroneous*, 23 CARDOZO L. REV. 809, 811 (2002). *See also* Christian A. Meissner & Saul M. Kassin, *"He's guilty!": Investigator Bias in Judgments of Truth and Deception*, 26 LAW & HUM. BEHAV. 469, 470 (2002) ("Unfortunately, psychological research has generally failed to support the claim that individuals can attain high levels of performance in making judgments of truth and deception. Over the years, numerous studies have demonstrated that individuals perform at no better than chance level in detecting deception."); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 953 (1999) (reporting a study based on interviews with former Assistant U.S. Attorneys: "Four AUSAs expressed the belief that, due to a host of factors, most prosecutors are 'horrible' at the cooperation process and many, unwittingly, obtain false information."). *See also* Gershman, *supra* note 27, at 848–49 ("Some prosecutors trust their cooperators too much—one former prosecutor described the relationship as 'falling in love with your rat'—and this mindset skews the prosecutor's ability to evaluate the cooperator's credibility objectively.").

[56] United States v. Stifel, 594 F. Supp. 1525, 1543 (N.D. Ohio 1984) ("[H]ad the defense known of the November 1968 tests performed by [the expert] on tape obtained from Plymouth Rubber Company, it could have used this evidence to further impeach the credibility of [the expert's] scientific methods.").

[57] *See* DWYER ET AL., *supra* note 11, at 125 ("Fish's misleading testimony in the Willis case, which led to the conviction of an innocent man and allowed a predator to continue roaming the streets, shows why the state should have turned over all of Fish's laboratory notes and data, rather than merely presenting her final report."); Barry Scheck & Peter Neufeld, Editorial, *Junk Science, Junk Evidence*, N.Y. TIMES, May 11, 2001, at A31 ("In Chicago, a police lab analyst, Pamela Fish, left out exculpatory serological results in testimony at a 1992 rape trial, contributing to a wrongful conviction. In 1999, the defendant was exonerated by DNA tests. Questions have now been raised about Ms. Fish's conduct in a 1986 murder case.").

[58] *See* Troedel v. Wainwright, 667 F. Supp. 1456, 1459–60 (S.D. Fla. 1986) ("In light of this admission, the above testimony received at the evidentiary hearing and the inconsistent positions taken by the prosecution at Hawkins' and Troedel's trials, respectively, the Court concludes that the opinion Troedel had fired the weapon was known by the prosecution not to be based on the results of the neutron activation analysis tests, or on any scientific certainty or even probability. Thus, the subject testimony was not only misleading, but also was used by the State knowing it to be misleading."), *aff'd sub nom.* Troedel v. Dugger, 828 F.2d 670 (11th Cir. 1987).

prosecutors, noted: "When it comes to disciplining a prosecutor who commits *Brady*-type misconduct, . . . punishment is virtually nonexistent."[59]

Given these realities, some stemming from the prosecution's difficult burdens in obtaining convictions, and some peculiar to the *Brady* doctrine, we should not be surprised with the present state of affairs.[60]

IV. DISCOVERY PROVISIONS

Although many scrupulous prosecutors adhere to the *Brady* requirements, others have failed, and failed far too often. A better approach is expanded discovery rules. Here, again, my experience trying courts-martial cases has influenced my thinking. The military system went beyond an "open file" system. The same case file was given to both the prosecutor and defense attorney—and usually at the same time. Moreover, defense attorneys had the right to interview all prosecution witnesses who served in the Armed Forces.[61] As far as I could tell, there were few *Brady* issues.

The Model Code places an ethical duty on prosecutors to disclose favorable defense evidence.[62] Current ABA Criminal Justice Standards require the prosecution to disclose cooperation

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[59] Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 742 (1987). *See also* Greshman, *supra* note 39, at 687 ("*Brady* is insufficiently enforced when violations are discovered, and virtually unenforceable when violations are hidden."); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 400 ("[P]rosecutorial misconduct is largely the result of three institutional conditions: vague ethics rules that provide ambiguous guidance to prosecutors; vast discretionary 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."); 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, 934 (1997) ("We should not continue to permit the almost total lack of meaningful sanctions to enforce the command of *Brady* to constitute our own sanction for the misconduct of our prosecutors."); Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 281–82 (2004).

[60] Gershman, *supra* note 39, at 686 ("Reflecting on this landmark decision forty-three years later, one is struck by the dissonance between *Brady's* grand expectations to civilize U.S. criminal justice and the grim reality of its largely unfulfilled promise.").

[61] There were typically no barriers to interviewing witnesses. I would simply telephone the witness's commanding officer and set up a time for an interview. Of course, witnesses had the right not to incriminate themselves, and if a witness was charged with a crime, the right to counsel.

[62] MODEL RULE OF PROF'L CONDUCT R. 3.8(d) (governing the special responsibilities of a prosecutor and requiring a prosecutor to "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 . . . .").

agreements,[63] as well as exculpatory evidence,[64] before trial. Some states have comparable provisions.[65] These rules are not enough.

One court devised special rules for jailhouse informants. In *Dodd v. State*,[66] the Oklahoma Court of Criminal Appeals, after noting that "[c]ourts should be exceedingly leery of jailhouse informants, especially if there is a hint that the informant received some sort of a benefit for his or her testimony,"[67] went on to adopt special discovery rules in this context:

> 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; (3) the specific statements made by the defendant and the time, place, and manner of their disclosure; (4) all other cases in which the informant testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; (5) whether at any time the informant recanted that testimony or statement, and if so, a transcript or copy of such recantation; and (6) any other information relevant to the informant's credibility.[68]

This is a remarkable decision. It came from the same state where Williamson was convicted. The Canadian ("Kaufman") Commission in the Guy Paul Morin case also recommended extensive disclosure in the informant context,[69] and Illinois subsequently codified this

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[63] ABA STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND TRIAL BY JURY 11-2.1(a)(iii) (3d ed. 1996) ("The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness.").

[64] *Id.*, Standard 11-2.1(a)(viii).

[65] 4 LAFAVE ET AL., *supra* note 45, § 20.3(m), at 884.

[66] 993 P.2d 778 (Okla. Crim. App. 2000).

[67] *Id.* at 783.

[68] *Id.* at 784.

[69] KAUFMAN REPORT, *supra* note 19, Recommendation No. 47 [Prosecutors ought to disclose]:

> (1) The criminal record of the in-custody informer including, where accessible to the police or Crown, the synopses relating to any convictions.
>
> (2) Any information in the prosecutors' possession or control respecting the circumstances in which the informer may have previously testified for the Crown as an informer, including, at a minimum, the date, location and court where the previous testimony was given. (The police, in taking the informer's statement,

approach in death penalty cases involving jailhouse informants.[70] Of course, a savvy defense attorney could make a specific *Brady* request for all the information mentioned in *Dodd*, but why should the defendant with an inexperienced or incompetent attorney receive less information?[71]

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should inquire into any prior experiences testifying for either the provincial or federal Crown as an informer or as a witness generally.).
(3) Any offers or promises made by police, corrections authorities, Crown counsel, or a witness protection program to the informer or person associated with the informer in consideration for the information in the present case.
(4) Any benefit given to the informer, members of the informer's family or any other person associated with the informer, or any benefits sought by such persons, as consideration for their co-operation with authorities, including but not limited to those kinds of benefits already listed in the Crown Policy Manual.
(5) As noted earlier, any arrangements providing for a benefit (as set out above) should, absent exceptional circumstances, be reduced to writing and signed and/or be recorded on videotape. Such arrangements should be approved by a Director of Crown Operations or the In-Custody Informer Committee and disclosed to the defence prior to receiving the testimony of the witness (or earlier . . .).
(6) Copies of the notes of all police officers, corrections authorities or Crown counsel who made, or were present during, any promises of benefits to, any negotiations respecting benefits with, or any benefits sought by, an in custody informer. There may be additional notes of officers or corrections authorities which may also be relevant to the incustody informer's testimony at trial.
(7) The circumstances under which the in-custody informer and his or her information came to the attention of the authorities.
(8) If the informer will not be called as a Crown witness, a disclosure obligation still exists, subject to the informer's privilege.

[70] That statute makes the following information discoverable:
(1) the complete criminal history of the informant;
(2) any deal, promise, inducement, or benefit that the offering party has made or will make in the future to the informant;
(3) the statements made by the accused;
(4) the time and place of the statements, the time and place of their disclosure to law enforcement officials, and the names of all persons who were present when the statements were made;
(5) whether at any time the informant recanted that testimony or statement and, if so, the time and place of the recantation, the nature of the recantation, and the names of the persons who were present at the recantation;
(6) other cases in which the informant testified, provided that the existence of such testimony can be ascertained through reasonable inquiry and whether the informant received any promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; and,
(7) any other information relevant to the informant's credibility.
725 ILL. COMP. STAT. ANN. § 5/115-21(c) (West 2004).

[71] In *Agurs*, the Court wrote that failure to respond to a specific and relevant request "is seldom, if ever, excusable." 427 U.S. at 106. It added: "[I]f the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge." *Id.*

V. WRITTEN AGREEMENTS

One of the most difficult areas to regulate involves unstated expectations and *sub rosa* understandings.[72] Recall Terri Holland's claim that she had received no benefit by testifying against Ron Williamson. One commentator has observed:

> To enhance the credibility of his testimony, an informant often testified that there have been no promises of benefits made to them in return for their testimony. Even though nothing may be explicitly stated, both the prosecutor and the informant knew that there will be some compensation for the testimony. "The practice (of promising rewards) was done by a wink and a nod and it was never necessary to have any kind of formal understanding."[73]

As one court wrote: "We are not unaware of the reality that the Government has ways of indicating to witness's counsel the likely benefits from cooperation without making bald promises . . . ."[74] Another court has highlighted the problem with this practice:

> By allowing Thornton to testify without making any express advance promises, the Commonwealth could presumably craft a reward post hoc that conformed to the quality of the service. This approach has the added advantage of permitting a prosecutor to tout the fact to the jury that no specific promises have been made to the witness. Needless to say, this tactic provides a witness who faces pending charges with an even stronger motive to lie than a witness with whom a bargain is made before trial.[75]

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[72] *See* R. Michael Cassidy, *"Soft Words of Hope:"* Giglio, *Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1132 (2004) ("The Court's decision in *Giglio* has created an incentive for prosecutors to make representations to an accomplice witness that are vague and open-ended, so that they will not be considered a firm 'promise' mandating disclosure. . . . Such indefinite agreements have the added advantage of allowing prosecutors to argue to the jury that no specific promise has been made to the witness; this is viewed as tactically more advantageous to the government because it prevents the factfinder from second-guessing the appropriateness of concessions ultimately conferred.").

[73] BLOOM, *supra* note 22, at 66 (citing L.A. Grand Jury Report, at 39, and Ted Rohrlich, *Perjurer Sentenced to 3 Years; Crime: Informant Blew the Whistle on Use of Jailhouse Liar-for-Hire, but No Law Officers Were Charged for Conspiring with Him*, L.A. TIMES, May 20, 1992, at B1 (quoting Douglas Dalton, special counsel to the Los Angeles County Grand Jury)).

[74] United States v. Ramirez, 608 F.2d 1261, 1266 n.9 (9th Cir. 1979) (citing United States v. Butler, 567 F.2d 885, 888 (9th Cir. 1978), and adding "conceivably Zamora's and his counsel's protestations that the Government made no 'promises' while perhaps literally true might have been misleading").

[75] Commonwealth v. Davis, 751 N.E.2d 420, 423 n.7 (Mass. App. Ct. 2001).

Requiring written agreements of all deals is critical. The Kaufman Report recommended that, in the absence of exceptional circumstances, all agreements with in-custody informants be written and signed by the prosecutor, the informant, and defense counsel.[76] Oral agreements, if fully reproduced on videotape, may substitute for a written agreement. Written agreements are also the rule in federal practice.[77]

Of course, if the prosecutor claims there is no agreement, the problem remains. The federal courts have taken different approaches on how to deal with the problem of tacit agreements and *Brady*.[78] The Sixth Circuit recently addressed the problem but the panel decision was withdrawn for *en banc* review.[79] The panel wrote:

> While it is theoretically possible for the prosecution to grant a witness benefits after trial that have no connection to the witness' testimony, it is more than a fair assumption that the prosecution generally grants a witness such benefits in exchange for his testimony. The prosecution is also not in the business of altruism; it grants leniency to an informant because it wants that informant's testimony, and it wants to

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[76] KAUFMAN REPORT, *supra* note 19, Recommendation 43.

[77] Cassidy, *supra* note 72, at 1147 ("Although not required by statute or rule of criminal procedure, almost all plea agreements with cooperating witnesses in federal court are put in writing.") (citing U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION § 9-27-450 (1993)).

[78] *Compare* Wisehart v. Davis, 408 F.3d 321, 324 (7th Cir. 2005) ("Express or tacit, either way there would be an agreement, it would be usable for impeachment, and it would have to be disclosed to the defense."), *and* Reutter v. Solem, 888 F.2d 578, 582 (8th Cir. 1989) ("Our conclusion does not depend on a finding of either an express or an implied agreement between Trygstad and the prosecution regarding the prosecution's favorable recommendation to the parole board. . . . We hold that, viewed in the context of petitioner's trial, the fact of Trygstad's impending commutation hearing was material in the *Bagley* sense and that petitioner therefore is entitled to relief."), *with* Shabazz v. Artuz, 336 F.3d 154, 165 (2d Cir. 2003) ("[P]etitioner is correct that Landers and Pullum received a benefit because they testified against him. However, this fact, standing alone, does not establish that, prior to petitioner's trial, the District Attorney's Office promised Landers and Pullum leniency. The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony.").

[79] *See* Bell v. Bell, 460 F.3d 739, 753–54 (6th Cir. 2006) ("[A] tacit agreement in this context is based on the transparent incentives for both the witness and the prosecution. The fact is that a jailhouse informant is one of the least likely candidates for altruistic behavior; his offer to testify is almost always coupled with an expectation of some benefit in return. The prosecution is not naive as to this expectation, and the prosecution also knows that when the value of the informant's testimony reaches a sufficient level, it is in the prosecution's interest to fulfill this expectation. At the most fundamental level, the arrangement is a *quid pro quo*; the informant knows he is giving something of value and expects something in return; the prosecution knows it is receiving something of value, and gives something in return. No written or spoken word is required to understand the nature of this tacit agreement."), *vacated, reh'g granted en banc*.

encourage other informants to come forward and testify. A rule requiring disclosure of a tacit agreement regardless of when the prosecution grants leniency recognizes this fact and is necessary to prevent the prosecution from shirking its *Brady* responsibilities by simply waiting until after the petitioner's trial to act on the tacit agreement.[80]

VI. OTHER APPROACHES

Several other approaches to the jailhouse snitch problem have been advocated.

A. Prosecution Screening

The first (and perhaps the most important) check on unreliable testimony by informants is the prosecutor.[81] The Canadian ("Kaufman") Commission in the Guy Paul Morin case provided a list of factors that prosecutors should review.[82]

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[80] *Id.* at 755.

[81] *See* Steven M. Cohen, *What is True? Perspectives of a Former Prosecutor*, 23 CARDOZO L. REV. 817, 827–28 (2002).

[82] Recommendation 41. [In assessing the reliability of in-custody informers, prosecutors should consider:

(1) The extent to which the statement is confirmed . . .;

(2) The specificity of the alleged statement. For example, a claim that the accused said "I killed A.B." is easy to make but extremely difficult for any accused to disprove;

(3) The extent to which the statement contains details or leads to the discovery of evidence known only to the perpetrator;

(4) The extent to which the statement contains details or leads which could reasonably be accessed by the in-custody informer, other than through inculpatory statements by the accused. . . . Crown counsel should be mindful that, historically, some informers have shown great ingenuity in securing information thought to be unaccessible to them. Furthermore, some informers have converted details communicated by the accused in the context of an exculpatory statement into details which purport to prove the making of an inculpatory statement;

(5) The informer's general character, which may be evidenced by his or her criminal record or other disreputable or dishonest conduct known to the authorities;

(6) Any request the informer has made for benefits or special treatment (whether or not agreed to) and any promises which may have been made (or discussed with the informer) by a person in authority in connection with the provision of the statement or an agreement to testify;

(7) Whether the informer has, in the past, given reliable information to the authorities;

(8) Whether the informer has previously claimed to have received statements while in custody. This may be relevant not only to the informer's reliability or unreliability but, more generally, to the issue of whether the public interest would be served by utilizing a recidivist informer who previously traded information for benefits;

(9) Whether the informer has previously testified in any court proceeding, whether as a witness for the prosecution or the defence or on his or her behalf, and any findings in relation to the accuracy and reliability of that evidence, if known;

Judge Trott has also provided step-by-step guidance for prosecutors. His fundamental message, however, is don't use jailhouse informants and, if you do, "Corroborate *everything* you can." [83]

B. Corroboration Requirement

Skepticism about the reliability of accomplice testimony has led many jurisdictions to require corroboration as a condition for a conviction.[84] A significant number mandate this requirement by statute.[85] The ABA recently adopted a resolution recommending that the corroboration rule be extended to jailhouse snitch testimony.[86]

C. Jury Instructions

Cautionary jury instructions are another possibility. Such instructions are often used with accomplice testimony.[87] There is,

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(10) Whether the informer made some written or other record of the words allegedly spoken by the accused and, if so, whether the record was made contemporaneous to the alleged statement of the accused;
(11) The circumstances under which the informer's report of the alleged statement was taken (*e.g.* report made immediately after the statement was made, report made to more than one officer, etc);
(12) The manner in which the report of the statement was taken by the police (*e.g.* through use of non-leading questions, through report of words spoken by the accused, through investigation of circumstances which might suggest opportunity or lack of opportunity to fabricate a statement) . . .;
(13) Any other known evidence that may attest to or diminish the credibility of the informer, including the presence or absence of any relationship between the accused and the informer;
(14) Any relevant information contained in any available registry of informers.

KAUFMAN REPORT, *supra* note 19, Recommendation No. 39 ("Confirmation should be defined as *credible* evidence or information, available to the Crown, *independent of the in-custody informer*, which *significantly supports* the position that the inculpatory aspects of the proposed evidence were not fabricated. One in-custody informer does not provide confirmation for another.").

[83] Trott, *supra* note 1, at 1427.

[84] *See, e.g.*, Humber v. State, 466 So. 2d 165 (Ala. Crim. App. 1985) (citing statute); State v. Shaw, 37 S.W.3d 900, 903 (Tenn. 2001) ("In Tennessee, a conviction may not be based solely upon the uncorroborated testimony of an accomplice.").

[85] *See, e.g.*, ALASKA STAT. § 12.45.020 (Michie 2004); ARK. CODE ANN. § 16-89-111E (Michie 2003); CAL. PENAL CODE § 111 (Deering 2003); GA. CODE ANN. § 24-4-8 (2003); NEV. REV. STAT. § 175.291 (2004); N. Y. CRIM. PROC. § 60.22 (Consol. 2004); OKLA. STAT. tit. 22 § 742 (2004); OR. REV. STAT. § 136.440 (2003). Eighteen states require corroboration of an accomplice's testimony.

[86] INNOCENCE REPORT, *supra* note 2, at 63.

[87] In *Banks v. Dretke*, Justice Ginsburg, speaking for seven Justices, observed:
The jury, moreover, did not benefit from customary, truth-promoting precautions that generally accompany the testimony of informants. This Court has long recognized the "serious questions of credibility" informers pose. *On Lee v. United States*, 343 U.S. 747, 757 (1952). *See also* Trott, Words of Warning for Prosecutors Using

however, great variability regarding special jury instructions.[88] In some jurisdictions, a cautionary instruction is not required where there is corroboration of accomplice testimony. For example, in Virginia, in the absence of corroboration, it is the duty of the court to give a cautionary instruction.[89] In Mississippi, cautionary instructions are discretionary, but that discretion can be abused where the state's evidence rests solely on accomplice testimony and there is some question as to the reasonableness and consistency of that testimony.[90] In Utah, giving a cautionary instruction generally falls within the discretion of the court, but it must be given if the judge finds the testimony "self-contradictory, uncertain or improbable."[91] Federal cases set forth various versions of such instructions, some using the language "particular caution" and others employing phrases such as "great caution" or "great caution and care."[92]

Special cautionary instructions should be given whenever there is accomplice or informant testimony, whether corroborated or not and regardless of other factors.[93] Here, again, *Dodd v. State* is the

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Criminals as Witnesses, 47 Hastings L. J. 1381, 1385 (1996) ("Jurors suspect [informants'] motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable . . . ."). We have therefore allowed defendants "broad latitude to probe [informants'] credibility by cross-examination" and have counseled submission of the credibility issue to the jury "with careful instructions." *On Lee,* 343 U.S. at 757; accord, *Hoffa v. United States,* 385 U.S. 293, 311–312 (1966). *See also* 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 15.02 (5th ed. 2000) (jury instructions from the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits on special caution appropriate in assessing informant testimony).

540 U.S. 668, 701–02 (2004).

[88] *See* State v. May, 339 So. 2d 764, 775 (La. 1976) ("As a general principle of Louisiana law, a conviction can be sustained on the uncorroborated testimony of a purported accomplice, although the jury should be instructed to treat such testimony with great caution.").

[89] *See* Smith v. Commonwealth, 237 S.E.2d 776, 777 (Va. 1977) ("[T]he accomplice's testimony was not sufficiently corroborated, and it was error to refuse a cautionary instruction.").

[90] *See* Slaughter v. State, 815 So. 2d 1122, 1134 (Miss. 2002).

[91] UTAH CODE ANN. § 77-17-7 (2004).

[92] *See, e.g.*, United States v. Gardner, 244 F.3d 784, 789 (10th Cir. 2001) ("weighed with great care, and received with caution"); United States v. Prawl, 168 F.3d 622, 629 (2d Cir. 1999) ("weighed by you with great care"); United States v. Garcia Abrego, 141 F.3d 142, 153 (5th Cir. 1998) ("greater caution than other testimony"); United States v. Yarbrough, 852 F.2d 1522, 1538 (9th Cir. 1988) ("great caution and care").

[93] Research indicates that the timing of the instruction is important—*i.e.*, instructions close in time to the admission of the evidence are more effective. *See* SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 145 (1988) ("These data demonstrate that adherence to judges' instructions might hinge on their placement within the trial. 'Better late than never' may apply to some areas of life, but not to the practice of instructing juries."). *See also* Amiram Elwork & Bruce D. Sales, *Jury Instructions*, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 280, 291 (Saul M. Kassin & Lawrence

landmark case. The court required a jury instruction specific to jailhouse informants.[94]

D. Expert Testimony

Sometimes courts have allowed expert testimony to enlighten jurors about police procedures that may generate suspect evidence. Eyewitness identifications[95] and false confessions are examples.[96] In *State v. DuBray*,[97] the Montana Supreme Court ruled that the trial court had not abused its discretion in excluding expert testimony regarding the credibility of incarcerated informants. The trial court had precluded the testimony because (1) it would have invaded the province of the jury, (2) it was unnecessary because the notion of prisoners bartering testimony in exchange for favorable treatment is generally understood by lay persons, and (3) the accused had the opportunity to cross-examine witnesses regarding their possible motivations.[98] As noted above, however, cross-examination will only be effective if counsel has all the pertinent information concerning any cooperation agreement, which is often not the case.

CONCLUSION

Brady often fails because the Supreme Court undercut the prosecutor's obligation by adding a stringent materiality requirement, which an accused must satisfy to establish a due process violation.

S. Wrightsman eds., 1985) ("Although there is no empirical data on this, it is logical to assume that such instructions [limited purpose] are properly timed. That is, these instructions are probably most effective when they are presented in the immediate context of the evidence or procedures to which they apply.").

[94] 993 P.2d 778, 784 (Okla. Crim. App. 2000):

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

[95] *See* 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELREID, SCIENTIFIC EVIDENCE § 9-2 (4th ed. 2007) (discussing cases).

[96] *Id.*, § 9-9 (discussing cases).

[97] 77 P.3d 247 (Mont. 2003).

[98] *Id.* at 256.

Given this doctrinal barrier, a better approach focuses on an expanded discovery rule along the lines set forth by the court in *Dodd.*